IN THE SUPREME COURT OF FLORIDA

DONALD ROBERT LLOYD,

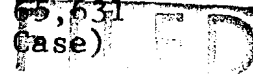
Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. 65,631
(Capital Case)



APPEAL FROM THE CIRCUIT COURT
OF THE THIRTEENTH JUDICIAL CIRCUIT
IN AND FOR HILLSBOROUGH COUNTY

BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

At approximately 12:00 noon on June 2, 1983, James Thornton rode his bicycle up to the corner to get a newspaper. He went out of his driveway, up Azalea Avenue to Dixon, crossed over Dixon to a vacant lot and then traveled southwest diagonally across the lot to the church parking lot, across the church parking lot, across Bougenvilla , down the south side of Bougenvilla , across Florida Avenue and continued on Bougenvilla to Florida Avenue. (R.1385) On his way to get the paper, there were no vehicles parked in the vacant lot. On his return trip a few minutes later, James Thornton passed a red Volkswagen van parked in his path. He came within about three feet of the van. (R.1392)

Just before crossing over the vacant lot onto Dixon, he heard a woman's scream coming from the home of Leon and Cheryl Osborne. He dismissed it as kids playing and continued to ride down Azalea. When he approached his neighbor's house, he heard a crack-like explosive sound. He thought it was a gunshot, so he turned around to look, but didn't see anything suspicious. (R.1395) As he turned into his driveway, he heard a second sound, but it was a more muffled sound. (R.1396)

Thornton then dropped the newspaper into the back of his truck, jumped over the bicycle, allowed it to just fall up against the side of the screened in porch, walked to the front of his truck, and looked towards the Osborne house. He saw a man running from the Osborne house diagonally across the field.

(R.1397) The man was approximately 5 ft. 8 to 10 in., weighing about 180 to 200 lbs. with black bushy hair. He was carrying a medium sized bag in his right hand and was trotting away from the house. Thornton saw him running between the two buildings about four feet from the Osborne's fence. (R.1399)

Thornton then grabbed his bicycle and rode as fast as he could in that direction so he could follow the man and see where he went. He did not see any other people at that time. He was almost at the end of Azalea approaching Dixon when he looked up and saw the man approaching the van along the driver's side. Thornton was about 20 to 30 feet away. (R.1401) Thornton drove past the van, turned around and came back in the same path. (R.1413) Upon his return trip he made eye contact with the man having full faced eye contact, face to face. (R.1416) Thornton also got an identification of the van as well as the auto tag number. (R.2053)

After the van drove away, Thornton went to the Osborne's house and knocked on the front door. When no one answered, he knocked a little louder and when he knocked hard the second time, the door came open just a little bit to reveal five-year-old Ryan Osborne. Thornton described Ryan Osborne as shocked, limp, standing there in a daze. (R.1423) Thornton asked Ryan if his mother was there. Ryan said that someone had shot her. Ryan took Thornton by the hand, led him down the hall. As he approached the bathroom, he could see Cheryl Osborne's leg in

the bathroom with her feet out in the hall. He then went to telephone the police. (R.1424)

The victim Cheryl Lynn Osborne's son, Ryan Osborne, testified that on the day in question, he was in the garage with his dog, Lucy. He heard a knock on the door and then came in the house. (R.1905) Ryan did not know the person at the door. He had a beard and a mustache. He was also wearing glasses. (R.1906) The man and his mother were talking, he said he was a guitar player, he had a suitcase and a short dark colored gun. (R.1907) The man told Ryan and his mother to go into the bathroom. There, the man said to give him some money. Cheryl Osborne tried to give him some money, but she didn't have any. She also tried to give him her ring. The man then shot her two times. (R.1908) After the shots, the man went out into the front yard. Ryan followed him and saw him get into a red and white van. (R.1910)

Robert Howell, a neighbor of the deceased, testified that on the day of the murder, he was working at his father's house which is nine houses down from the victim's. (R.1728) He noticed a van proceeding down the street rather slowly. (R.1730) The van was driving approximately 5 to 6 MPH towards the victim's house. (R.1731) This was at approximately 11:40 a.m. The van was an early model VW microbus, red with a white top in very good condition. (R.1732) Howell described the driver of the van as having a beard, a neatly cropped hairstyle, dark sultry grey on top. (R.1733) Approximately 20 minutes later, he

saw the van returning from the direction it had come from. The van was driving at approximately 30 to 35 MPH. It was the same person driving the van. (R.1734)

Detective R. J. Reynolds of the Tampa Police Department, testified that he ran the tag number given to him by James Thornton through the computer and it identified Donald Lloyd as the owner of the van. (R.2053) He then contacted the Vero Beach Police Department and asked them to pick up Lloyd for questioning.

Lieutenant Sidney James DuBoise with the Detective Bureau of the Indian River County Sheriff's Office went to the Lloyd household. He told Mrs. Lloyd they were looking for Mr. Lloyd in reference to a hit and run in Tampa. Mrs. Lloyd said that Donald Lloyd was in Tampa looking for a job and that he had the van with him, and that she would have him contact them when he returned. (R.581, 1815)

At approximately 7:00 p.m., Mrs. Lloyd went to the Indian River County Jail where she was met by Donald Lloyd driving the red and white van. (R.1816) Lloyd was asked to wait until the Tampa police officers arrived. He agreed. (R.583)

Detective Michael McAllister of the Tampa Police Department testified that he and Detective Reynolds went to Vero Beach at approximately 9:00 or 9:30 p.m. on June 2, 1983. There, he interviewed Lloyd at the Sheriff's department. Lloyd told him he had come to Tampa on the 1st, spent the night 30 miles east of Tampa, drove in on the 2nd. Lloyd said he had not picked up

any hitchhikers and had control of the car all day. He said he had made a few phone calls to trucking companies trying to get work. He could not remember the names of any particular company. (R.1974) Donald Lloyd had fresh scratches on the bottom of his arm and on his hand. (R.1975-77)

When Lloyd was informed that they were there investigating a homicide and that a man matching his description driving a red and white van bearing his tag number had been seen leaving the area, Lloyd exclaimed, "You got me, why don't you go ahead and shoot me now and get it over with". (R.1980)

Lloyd's photograph and fingerprints were taken. The photograph was put in a photopack ID and returned to Tampa to be shown to the witnesses. James Thornton and Ryan Osborne both selected Donald Lloyd's photograph as the assailant. Witness, Robert Howell selected both Lloyd and another person. (R.1745)

Agent Michael P. Malone of the FBI testified that he was submitted clothing and hair samples from the victim and Donald Lloyd. He found a single hair on Donald Lloyd's clothing that matched the victim's. (R.1603)

Donald Coleman and Perry Pisal of the Indian River County Sheriff's Department testified that while Lloyd was waiting for McAllister and Reynolds to fly back to Tampa with the photopack for identification, he made several statements to the both of them. In particular, Lloyd said that if he had known this was about a contract killing, that he would have been on his way to Mexico by now and that there was a witness who got his tag

number. (R.637,1831, 1835, 1846) They also overheard the defendant tell his wife in a phone conversation to sell everything and forget about him, that he was no good. (R.1853)

Peter Lardizabal, the chief medical examiner in Hillsborough County, testified that he conducted the autopsy of Cheryl Osborne. (R.1753) There were two gunshot wounds, one was a through and through gunshot wound on the right side of the neck, the other was a contact gunshot wound, point of entry on the right top of the head. The gunshot wound on the top of the head was the cause of death. (R.1753-54) Based on his examination, he could not form an opinion as to which of the two shots was fired first. The gunshot to the top of the head was made with the gun actually in contact with the head. (R.1765) Cheryl Lynn Osborne was approximately 5 ft. 5 in. tall. The two bullets found at the scene were both .38 caliber bullets, both fired from a .38 caliber weapon. One of the bullets was a lead bullet, the other was a wad cutter style bullet. (R.1785-89)

James Scharfschwerdt, of the Indian River County Sheriff's department testified that he gave the defendant .38 caliber ammunition. They were wad cutters. He had given them to him within the last two years. (R.1811-12) Jack Williamson testified that two months prior to the murder he saw Lloyd with a .32 or .38 revolver. (R.2039-43)

After trial by jury, Appellant was convicted of first degree murder and upon recommendation of the jury, was sentenced to die in the electric chair.

SUMMARY OF THE ARGUMENT

Issue I: The decision as to whether to permit a psychiatric examination of a witnes at all is within the trial court's discretion. A defendant does not have a right to order a psychiatric examination of a witness. At most, a defendant would be allowed to attack the credibility of a witness with evidence of psychiatric problems. Ryan did not have a psychiatric condition. All of the examiners found Ryan to be a perfectly average six year old. Under Appellant's reasoning, all victims and witnesses to traumatic events would be subject to such an exam.

Second, not only did the court permit the examination by Dr. Blau, but also Dr. Blau and the defense were given all of the records of Ryan's other mental health exams. These exams included the results of tests that Dr. Blau felt were essential. Further, the defense and Dr. Blau had Ryan's 48 page deposition plus the opportunity to cross-examine Ryan on the witness stand. The Appellant was not denied his right to confront the witness and has not shown any prejudice that resulted from the small limitation.

Issue II: When a witness' competency is at issue, it is the duty of the court to make such examination as will satisfy it of the competency or incompetency of the proposed witness. It is for the judge to decide whether a child has sufficient mental capacity and sense of moral obligation to be competent as a witness, and his ruling should not be disturbed unless a manifest abuse of discretion is shown. Williams v. State,

supra; Rutledge v. State, 374 So.2d 975 (Fla. 1979); cert. denied, Rutledge v. Florida, 446 U.S. 913, 64 L.Ed.2d 267, 100 S.Ct. 844 (1980). Likewise, the form of the examination rests in the sound discretion of the court.

The trial judge in the instant case personally examined Ryan as well as hearing extensive testimony from Dr. Blau regarding Ryan's ability to testify. After careful consideration, the court held that Ryan was qualified to testify. (R.499) The court found that Ryan was intelligent and capable of expressing himself concerning the matter in such a manner as to be understood. The court also found that Ryan understood the duty to tell the truth (R.499). This is a matter that is within the court's discretion and this discretion was not abused.

Further, for the most part Appellant's claim that Ryan's testimony was inconsistent is not supported by the record when Ryan's testimony is viewed in context and when one remembers this is a six-year-old responding to undeniably frightening and confusing questions.

Appellant also contends that Ryan's ability to appreciate the importance to tell the truth could not be based solely on Ryan's knowing the "magic words". Case law is clear that even young witnesses who do not know the meaning of a lie can have it explained to them by the court and thereby become a competent witness. Harrold v. Schluep, 264 So.2d 431 (Fla. 4th DCA 1972). Ryan clearly understood the importance of telling of the truth

and what it meant to tell a lie. He was a remarkably competent witness and the trial court did not err in so holding.

Further, as to the effect on the cross-examination of Ryan, the defense knew of the alleged inconsistencies at the time of trial and made their attacks on Ryan's credibility at that time. Despite this, it is obvious the jury found Ryan to be sufficiently credible as to the important issues.

Issue III: The photographic display shown to Ryan Osborne was not impermissibly suggestive. Testimony showed that the photos were incredibly similar, the different backgrounds were unnoticed by anyone during the investigation and the layout did not suggest a suspect. Further, Ryan had a substantial opportunity for independent identification and made an immediate, unhesitating identification.

Under these circumstances, the trial court correctly denied the motion to suppress.

Issue IV: On appeal, Appellant claims it was error for the trial court to allow Detective Reynolds to testify that the photograph Ryan chose the day after the murder was Donald Lloyd's.

The Florida Evidence Code provides that this testimony is admissible as non-hearsay if the declarant testifies at trial and is subject to cross-examination concerning the identification. §90.801(2)(c), Fla. Stat. (1985).

Ryan testified at trial concerning his identification and was cross-examined by defense counsel. (R.1922-1940, 1942-44)

The court did not limit the cross-examination. Further, the jury was clearly informed that Ryan had misidentified the defendant that day. (R.2081)

The court followed proper procedure in allowing Reynolds to testify regarding the initial identification. No error was committed.

Issue V: The police did not commit a constitutional violation by not warning Lloyd at the outset that he was being sought as a suspect in a murder. He was not under arrest at the time but, merely being sought for questioning.

Further, Appellant's statements were properly admitted. When a party invokes the right to remain silent, he controls the timing of his statements. He is not precluded from making later voluntary statements. Lloyd was not coerced into making the admitted statements.

Issue VI: Evidence that Lloyd had possession of a loaded weapon similar to the murder weapon a few months prior to the murder is unquestionably relevant and not unduly prejudicial, especially in light of James Scharfschwerdt's earlier testimony that he had given Lloyd .38 ammunition.

Similarly, the fact that Williamson was recalled and able to complete his testimony does not warrant reversal. If anything, the court's animosity toward the prosecutor reduced Williamson's credibility.

Issue VII: The trial court, after a very thorough analysis which is set forth at R.362-369, found three

aggravating circumstances; 1) The capital felony was committed while the defendant was engaged in an attempt to commit a robbery, (R.364); merged with this was the additional factor that the capital felony was committed for pecuniary gain, (R.364); 2) the capital felony was especially heinous, atrocious or cruel,and 3) The capital felony was a homicide and was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification (R.367).

As mitigating circumstances, the court found; 1) No significant history of prior criminal activity.

Appellant contends that the evidence did not support a finding of any aggravating circumstances.

Cheryl Lynn Osborne was an innocent victim to Donald Lloyd's cold-blooded attack. The aggravating factors were supported by the record and outweighed the mitigating circumstance. The death sentence was properly imposed.

ISSUE I

WHETHER THE TRIAL COURT ERRED IN LIMITING DR. BLAU'S EXAMINATION OF RYAN OSBORNE TO ONE HOUR.

Appellant, Donald Robert Lloyd, was charged and convicted of the first-degree murder of Cheryl Lynn Osborne. The testimony presented at trial showed that Mr. Lloyd drove from his home in Vero Beach to the Osborne home in Tampa. When he entered the Osborne home he ordered the young Mrs. Osborne and her five-year old son, Ryan Osborne, into the bathroom (R.1908). After demanding money from Mrs. Osborne, Donald Lloyd shot her two times. One of the shots was to the top of her head and killed her instantly (R.1754). Ryan Osborne witnessed the murder of his mother. When he was seen shortly thereafter by a neighbor, Ryan was covered with his mother's splattered blood (R.1881). Ryan identified Appellant as the murderer (R.2081).

As the sole eye witness to the event, Ryan's ability to testify was, of course, both important to the prosecution and highly detrimental to the defense.

Prior to trial, the defense sought to challenge Ryan's competency to testify even though Ryan had been examined by a child psychiatrist, Dr. Lockey.

The defense requested the court pay for a psychologist for the defense and allow him to conduct his own examination of Ryan (R.2370). The court agreed to pay for the additional expert but limited his examination of Ryan to one hour (R.1343, 2401).

The ruling was one within the sound judicial discretion of the court and Appellant has failed to show an abuse of that discretion. Wilks v. State, 217 So.2d 610 (Fla. 3d DCA 1969). The trial court reasoned that as the records of Ryan's previous examinations would be available to the defense expert (Dr. Blau), as Ryan's family, neighbors and teachers, were available to Dr. Blau, as Dr. Blau could be (and was) present during Ryan's appearance in court, and as Dr. Blau had access to Ryan's 48 page deposition, one hour would be sufficient for Dr. Blau to meet with the child (R.1343, 2367-2401). In light of the foregoing, this limitation was warranted. Further, the court noted that if Dr. Blau found anything to indicate there were problems with Ryan, he would reconsider (R.2399). Dr. Blau was apparently not able to present such extraordinary problems.

Appellant's bald assertion that the court's refusal to allow Dr. Blau the right to examine the child created a fundamental denial of Appellant's rights resulting in a deprivation of his due process rights under the Sixth and Fourteenth Amendments and of his right to confront the witness against him is not supported by the facts nor the law.

First, the decision as to whether to permit a psychiatric examination of a witnes at all is within the trial court's discretion. A defendant does not have a right to order a psychiatric examination of a witness. At most, a defendant would be allowed to attack the credibility of a witness with evidence of psychiatric problems. Ryan did not have a psychiatric condition. All of the examiners found Ryan to be a

perfectly average six year old. Under Appellant's reasoning, all victims and witnesses to traumatic events would be subject to such an exam. Wilks, supra.

Second, not only did the court permit the examination by Dr. Blau, but also Dr. Blau and the defense were given all of the records of Ryan's other mental health exams. These exams included the results of tests that Dr. Blau felt were essential. Further, the defense and Dr. Blau had Ryan's 48 page deposition plus the opportunity to cross-examine Ryan on the witness stand. The Appellant was not denied his right to confront the witness and has not shown any prejudice that resulted from the small limitation.

ISSUE II

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN RULING RYAN OSBORNE A COMPETENT WITNESS.

Appellant contends that the trial court erred in holding that Ryan was competent to testify. This claim is based in part on Dr. Blau's expert testimony that the average six year old was not a competent witness and on alleged inconsistencies in Ryan's testimony at trial.

It has long been the law of this state that if an infant witness has sufficient intelligence to receive just impressions of the facts respecting which he or she is to testify and sufficient capacity to relate them correctly, and has received sufficient instruction to appreciate the nature and obligation of an oath, the infant should be permitted to testify. Williams v. State, 400 So.2d 471 (Fla. 5th DCA 1981); Cross v. State, 89 Fla. 212, 103 So. 636 (1925).

When a witness' competency is at issue, it is the duty of the court to make such examination as will satisfy it of the competency or incompetency of the proposed witness. It is for the judge to decide whether a child has sufficient mental capacity and sense of moral obligation to be competent as a witness, and his ruling should not be disturbed unless a manifest abuse of discretion is shown. Williams v. State, supra; Rutledge v. State, 374 So.2d 975 (Fla. 1979); cert. denied, Rutledge v. Florida, 446 U.S. 913, 64 L.Ed.2d 267, 100

S.Ct. 844 (1980). Likewise, the form of the examination rests in the sound discretion of the court.

> While the form of the examination rests in the sound discretion of the Court, it is the better practice for the trial judge either to question the witness himself or to be present when the examination is conducted by counsel, and to rule on the basis of the evidence heard. Of course, the trial judge is not limited to an examination of the witness alone, but, in its discretion, may hear evidence from doctors, acquaintances, or other sources calculated to lead to a correct appraisal of the competency of the witness. The findings of the trial court may not be rejected on review except for an abuse of discretion, **Henderson v. United States,** 218 F.2d 14 (6th Cir. 1955); **Florida Power and Light Company v. Robinson,** 68 So.2d 406 (Fla. 1953).
>
> Shuler v. Wainwright, 491 F.2d 1213 (5th Cir. 1974)

The trial judge in the instant case personally examined Ryan as well as hearing extensive testimony from Dr. Blau regarding Ryan's ability to testify. After careful consideration, the court held that Ryan was qualified to testify. (R.499) The court found that Ryan was intelligent and capable of expressing himself concerning the matter in such a manner as to be understood. The court also found that Ryan understood the duty to tell the truth (R.499). This is a matter that is within the court's discretion and this discretion was not abused. See Romero v. State, 341 So.2d 263 (Fla. 3d DCA 1977) (Not an abuse of discretion to find six-year-old child competent to testify as to facts of murders.) See also Harrold

v. Schluep, 264 So.2d 431 (Fla. 4th DCA 1972).

The numerous "facts" that Ryan allegedly was inconsistent on do not bear on competency but rather on credibility. Credibility is an issue for the jury to decide, whereas competency is to be determined by the judge. United States v. Lindstrom, 698 F.2d 1154 (11th Cir. 1983); United States v. Martino, 648 F.2d 367 (5th Cir. 1981).

> Although there were inconsistencies in his testimony (a problem not confined to youthful witnesses) his testimony did not give the impression that he had been coerced or that he was confused. The jury and the trial judge had an opportunity to observe his demeanor and to listen to his testimony and it was the province of the jury to find the truth. It is within the sound discretion of the trial judge to decide whether an infant of tender years has sufficient mental capacity and sense of moral obligation to be competent as a witness, and his ruling will not be disturbed unless a manifest abuse of discretion is shown. **Rutledge v. State**, 374 So.2d 975 (Fla. 1979), cert.denied, **Rutledge v. Florida**, 446 U.S. 913, 64 L.Ed.2d 267, 100 S.Ct. 1844 (1980). We find no such abuse of discretion here.

Williams, supra, at 472.

Undoubtedly, had the State had a choice it would not have chosen to have its sole eye-witness be a six year old child. Appellant is the one who chose to put Ryan and the State in that position. Nevertheless, a comparison of Ryan's testimony with that of the other witnesses supports a finding that Ryan's testimony was remarkably accurate.

Ryan accurately testified that the man ordered them into the bathroom, that he demanded money, that his mother took out her wallet to show the man, that she took off her ring to give it to him, that she was shot twice and that he saw the man get into a red and white van. These are the important facts and they were all supported by the testimony of other witnesses. That Ryan may have been inconsistent on other collateral facts does not make him an incompetent witness. As previously noted, conflicts in testimony does not render a witness incompetent. In Williams v. State, supra, the court held that it was not error for a trial court to find a nine year old witness competent even though there were inconsistencies in his testimony.

Further, for the most part Appellant's claim that Ryan's testimony was inconsistent is not supported by the record when Ryan's testimony is viewed in context and when one remembers this is a six-year-old responding to undeniably frightening and confusing questions.

In Harrold v. Schluep, 264 So.2d 431 (Fla. 4th DCA 1972), the court noted that:

> We would suppose and fairly, we believe, that any six year old child, being brought into the unfamiliar environment of a courtroom and faced with a crowd of strangers and adult terminology, would be necessarily afraid, shy, and ill at east (as indeed are some adults).

Id. at 435

At pages 48-51, Appellant's Initial Brief, he raises 17 points on which he claims Ryan gave conflicting or false answers. For purposes of clarity, each will be addressed in the order presented.

(1) Ryan did not testify that his mother told the man to come in. Rather, he said he heard a knock at the door, then he (Ryan) came in (R.1905).

(2) Ryan testified at trial that <u>when</u> the man came to the door, there was no fighting. He did not say his mother did not fight with the man (R.1924).

This is clearly consistent with his later statement that his mommy fought with the man by the door (R.1938-39).

(3) Ryan testified at trial that he was in the garage when the man came (R.1922).

Detective McAllister, when asked by defense counsel if Ryan had told him he was in the backyard when the man came, responded, "That is what he said". Detective McAllister however, was not sure of exactly what Ryan had told him (R.2030-31). This does not demonstrate an untruth but, rather, a conflict in evidence.

(4) Appellant contends that Ryan was wrong when he said he saw the man at the front door because such a view would have been impossible from either the garage or backyard.

This ignores both Ryan's testimony that when he heard the man knock, he (Ryan) came in the house and also the unshakeable conclusion that for Ryan to have been ordered into the bathroom

with his mother (unless Appellant is for the first time contending Ryan was not a witness), he had to have seen the man at the door (R.1905, 1908).

(5) Appellant's contentions to the contrary, Ryan never waivered from his contention that the man demanded money. To conclude that Ryan's negative response to defense counsel's very general question, "What did the man say in the house?", renders his testimony on this fact untrue is ludicrous. Such a vague question would have confused even an adult witness, let alone a six-year-old child.

(6) That Ryan stated for the first time at trial that the man was a guitar player, likewise, does not render his testimony incompetent.

(7) Ryan's recollection of what happened to the ring is not even inconsistent based on the facts alleged in Appellant's brief at pg. 49, #7. The fact is, Ryan testified at trial he did not, at that time, remember what happened to the ring. This is consistent with the prior statement.

(8) Ryan's disagreement with Detective Goethe concerning whether he had told her the man had "hair" on his face is not an inconsistency in his testimony. Rather, it is a conflict with the statement of Dr. Goethe and, thus, a credibility question for the jury.

(9) Any witness, regardless of age, could have difficulty remembering whether someone had a beard the year before. Further, this is not an inconsistency as Ryan never said his

father had a beard at the time. (Note. Appellant fails to show where in the record facts are presented to support the claim that Leon Osborne had a beard at the time of the crime.)

(10) Again, Ryan's denial of Detective Goethe's statement that Ryan had pointed to his own clothing to describe the colors of the assailant's clothes is a conflict in the evidence, not an inconsistency in Ryan's own testimony.

(11) A review of Detective McAllister's testimony shows that even he was not sure what Ryan told him but, he thought Ryan had said Lloyd had gone out by the garage door and over the fence (R.2030-31). Ryan disagreed, and claimed he said the man went out the front door and that he followed him and saw him get into the red and white van (R.19-10-11, 1928-29). Again, this is a conflict in the testimony between two witnesses and not an inconsistency in Ryan's testimony.

(12) Ryan's statement that he saw the man carrying a suitcase when he left the house versus his statement that when the man left he had a gun in his hand (with no mention of a suitcase) is also consistent when viewed in the context of the explicit question asked by Detective Goethe (R.2113). Ryan never said Lloyd <u>only</u> had a gun in his hand and nothing else. Rather, Detective Goethe asked if the man had anything in his hand when he left. Ryan said, "yes, a gun."

It is only reasonable that having just viewed Lloyd shoot his mother twice, that immediately after the incident, Ryan would most emphatically remember that the man had the gun in his hand when he left.

That Ryan later remembered the suitcase only adds to his testimony, it does not make it inconsistent as Ryan at no time said the man only had a gun.

(13) The portion of Ryan's deposition referred to in Appellant's point 13, page 50, does not appear to be in the record as your Appellee cannot find it and Appellant has chosen not to refer to the appropriate page in the record in violation of 9.210(b)(3) Fla. R. App. P.

Therefore, it is impossible for your Appellee to determine the context in which Ryan may or may not have made this statement.

In either case, Ryan testified clearly that he followed the man out the front door until he saw him get into the van (R.1911).

(14) That a six year old may be confused about dates does not render him incompetent to testify. Even the adult officers who testified had difficulty remembering dates and sequences. Surely, Appellant would not suggest that Detective McAllister was an incompetent witness because he could not remember when he first interviewed Ryan (R.2030).

(15) It is clear that Ryan was confused when he denied speaking to anyone about the case. When he was asked the question in a less confusing context, he readily admitted speaking to others.

(16) Again, this is a conflict in the testimony between two witnesses - not an inconsistency in Ryan's own testimony.

(17) Ryan's testimony that he did not see the man run past the stump appears to be the result of lack of communication between defense counsel and the witness. What Ryan meant by the statement is unclear, but not necessarily inconsistent. Ryan may have meant that he looked away and did not see the man run past the stump. It is obvious, however, that Ryan did not mean to imply the man stopped at the stump or went in a different direction as Ryan never deviated from his position that he saw Lloyd enter the van.

Appellant's contentions to the contrary State Exhibit 3, does not show that Ryan could not see the van if he did not see him pass the tree stump (R.2417)

Thus, having reviewed the alleged inconsistencies, it is apparent that Ryan's testimony was remarkably consistent and precise on even the most minute, irrelevant facts. Any conflicts in the evidence between Ryan's testimony and the testimony of others were for the jury to resolve and did not mandate a finding that Ryan was an incompetent witness.

Appellant also contends that Ryan's ability to appreciate the importance to tell the truth could not be based solely on Ryan's knowing the "magic words". Case law is clear that even young witnesses who do not know the meaning of a lie can have it explained to them by the court and thereby become a competent witness. Harrold v. Schluep, 264 So.2d 431 (Fla. 4th DCA 1972). Ryan clearly understood the importance of telling of the truth

and what it meant to tell a lie. He was a remarkably competent witness and the trial court did not err in so holding.

Appellant once again addresses the court's limitation of Dr. Blau's examination of Ryan and asserts that this denied him effective cross-examination. Once again, however, Appellant presents no facts to support this contention. As stated in Issue I, Dr. Blau was allowed a limited examination of Ryan as well as unlimited access to Ryan's records, deposition and family, friends and teachers. Despite this, Dr. Blau produced no evidence of anything outside the norm of an average six year old. Had he done so, a more extensive examination may even have been permitted but this is cleary beyond what the law requires.

The determination of competency was for the judge. It is within the judge's discretion to accept or reject expert opinions. Under Dr. Blau's theory, no six-year-old would be a competent witness. As this is clearly not the law in this state, the trial court did not err in refusing to adhere to Dr. Blau's opinion.

Further, as to the effect on the cross-examination of Ryan, the defense knew of the alleged inconsistencies at the time of trial and made their attacks on Ryan's credibility at that time[1/]. Despite this, it is obvious the jury found Ryan to be sufficiently credible as to the important issues.

1/ Throughout defense counsel's cross-examination of Ryan, he was presented with prior statements made to the officers and in his 48 page deposition.

Appellant relies on several cases that make a witness's prior psychiatric history admissible to support his claim that a longer exam should have been allowed. These cases do not permit a defense demanded exam. They only permit evidence of prior psychiatric history to be used to attack credibility. No error was committed here as the court did allow an exam and the court did not deny defense the right to present evidence of Ryan's mental condition after the event.

Further, it should be noted that Ryan, unlike those witnesses in the cases relied upon by Appellant, did not have a prior psychiatric condition. He was simply suffering the expected aftereffects of a child who witnessed the brutal slaying of his mother. For Appellant to suggest that a witness would have to suffer a psychiatric examination by a defense doctor every time they were victim to a traumatic event that caused them to seek mental health counseling is incomprehensible and unsupported by the law.

ISSUE III

WHETHER THE TRIAL COURT CORRECTLY DENIED APPELLANT'S MOTION TO SUPPRESS RYAN OSBORNE'S PRE-TRIAL IDENTIFICATION OF DONALD LLOYD AS THE MURDERER.

Appellant contends that the totality of the circumstances surrounding the display of the photographic line-up mandates a conclusion that the Appellant's photograph was shown in an impermissibly suggestive manner thereby unacceptably creating a substantial risk of misidentification. Appellant claims this is true because the display of photographic line-up was without reference to the description supplied by the identifying witness and because the sole photograph of the only blue-eyed suspect taken against a noticeably different background, was placed in a single column set apart from the other photographs,

The state of the law is that a court must set aside defendant's conviction only "if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." Simmons v. United States, 390 U.S. 377, 384, 88 S.Ct. 967, 971, 19 L.Ed.2d 1247 (1968). In Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972), the Supreme Court stated that the "central question" in determining the scope of the due process protections against the admission of evidence obtained through suggestive identification procedures is "whether under 'the totality of the circumstances' the identification was

reliable even though the confrontation procedure was suggestive." Id. at 192, 93 S.Ct. at 378. Reliability is the key factor in determining the admissibility of identification evidence. Summitt v. Bordenkircher, 608 F.2d 247 (6th Cir. 1979). The Supreme Court in Neil v. Biggers, 409 U.S. at 199, 93 S.Ct. at 382, articulated five indicia that we must consider in assessing reliability or the "likelihood of misidentification": 1) the opportunity to view the criminal at the time of the crime, 2) the witness' degree of attention, 3) the accuracy of the witness' prior description of the criminal, 4) the level of certainty demonstrated by the witness at the confrontation, and, 5) the length of time between the crime and the confrontation. These factors must be weighed against the effect of the suggestive procedure to determine whether the identification is so unreliable as to create a substantial likelihood of misidentification. Summitt v. Bordenkircher, 608 F.2d 247 (6th Cir. 1979), citing Manson v. Brathwaite, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977). Ryan observed Lloyd for several minutes at close range in broad daylight and within 24 hours he unhesitatingly identified Lloyd as the assailant.

Further, the question is not whether this photo array was suggestive, but rather, whether it was impermissibly suggestive. Each case must be considered on its own facts. Simmons v. United States, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968).

The identification process used in the instant case does

not support Appellant's contention that it was impermissibly suggestive.

In United States v. Ayendes, 451 F.2d 601, 605 (6th Cir. 1976), the court held that although the photographic identification procedure which commingled three black and white photos with color pictures of each of the defendants may have been "suggestive", it was not "so impermissibly suggestive as to render it highly likely that [it] led to irreparable misidentifications." In United States v. Snow, 552 F.2d 165 (6th Cir. 1977), the court further held that an array in which the photos of the defendant and another individual were slightly different in size and pose from the other photos was not "so impermissibly suggestive as to violate any constitutional rights of the defendant." 552 F.2d at 167.

In the instant case, five photographs were laid out before Ryan Osborne within 24 hours of his mother's shooting and he immediately chose Appellant. Upon review of these photographs, the trial judge noted:

> "I think it was a very fair photo line-up. There can be no question about that. I think, as a matter of fact, one guy in there looked like his twin brother. It's amazing he made the right identification so there is nothing unfair by any stretch of the imagination regarding the photo line-up or the way they were set out. There is nothing suggestive about that."

(R.1919)

> "Its amazing to get five people so similar."

(R.577)

Detective McAllister testified that no one noticed the

difference in the background until it was pointed out by defense counsel months later (R.507). Witness James Thornton also stated that he did not remember any difference in the background of the photographs, they all looked pretty much the same (R.575). Witness Robert Howell testified that he, although he had a good look at Lloyd, nevertheless chose two photographs, one of Lloyd and one of another man. He wasn't sure of Lloyd's picture because Lloyd had red eyes in the photograph (R.1733, 1741, 1745, 1747).

Also, there was nothing impermissibly suggestive about the layout. Detective R. J. Reynolds testified that the photographs were laid out side by side, in the same order for each witness. Captain Martinez testified that the photographs were laid out with two placed on the top row and three placed in the second row underneath. Lloyd's photograph was on the bottom right. It was not separated out to the side. (R.784, 2096-97) Even if this court accepted Captain Martinez's version of the layout, it is not evidence of an impermissibly suggestive layout.

This was not a case such as those presented by Appellant where the witness was shown one photograph containing a picture of the suspect and when no identification could be made, a second photograph was shown containing a different picture of the same suspect. See Sepulvado v. State, 362 So.2d 324 (Fla. 2d DCA 1978). Nor is it a case where only one picture resembled the suspect. See, M.J.S. v. State, 386 So.2d 323 (Fla. 2d DCA 1980). A review of the record shows the great similarity between these photographs. It is obvious the police made every

attempt to make the photographic line-up as fair as possible.

Appellant also places considerable reliance on the contention that Ryan's description of the assailant did not match Appellant's. To support the contention that it was reversible error to show the photographs to Ryan based on a description given by James Thornton, Appellant relies on Rolle v. State, 416 So.2d 51 (Fla. 4th DCA 1982). Rolle, however, is not relevant to the instant case and instead provides that it is improper hearsay testimony for a police officer to testify that he placed a defendant's picture in a photographic display based on confidential information.

Is Appellant seriously suggesting after James Thornton saw only one person leaving the scene of the crime, got that person's tag number and identified the owner of the car (once it was traced to Donald Lloyd across the state) as the person he saw leaving the scene, that Lloyd's photograph should not have been shown to Ryan because it did not exactly fit the description given by Ryan? A description that was elicited from him while he sat in shock covered with his mother's blood and was based on responses to questions such as "did he have hair on his face", "were his clothes dark like your shorts - light like your shirt?", "was he skinnier than your neighbor?". Appellant must surely concede these were not the most optimum circumstances for obtaining a description. Under the given circumstances, the officers would have been derelict in their duties if they had not given Ryan an opportunity to confirm or deny Lloyd's participation in the crime.

ISSUE IV

WHETHER THE TRIAL COURT PROPERLY ALLOWED DETECTIVE McALLISTER TO TESTIFY AS TO RYAN'S PRIOR IDENTIFICATION OF DONALD LLOYD AS THE MAN WHO SHOT AND KILLED HIS MOTHER.

During Appellant's trial, Ryan was shown the same photographic display shown to him the morning after the homicide. Although the day after the murder he had identified Lloyd's photograph as being the man who hurt his mommy, at trial a year later, he chose a different, albeit very similar, photograph. Based on this misidentification, the trial court refused to let the prosecutor attempt to elicit an in-court identification from Ryan.

Both Ryan and Detective Reynolds testified regarding the previous identification of Lloyd by Ryan and then a stipulation was read to the jury concerning the subsequent misidentification.

On appeal, Appellant claims it was error for the trial court to allow Detective Reynolds to testify that the photograph Ryan chose the day after the murder was Donald Lloyd's.

This court, however, has held that if the original identifying witness testifies at trial concerning a prior identification, testimony of a witness who observed the identification is admissible as substantive evidence of identity State v. Freber, 366 So.2d 426 (Fla. 1978).

The Florida Evidence Code also provides that this testimony is admissible as non-hearsay if the declarant testifies at trial

and is subject to cross-examination concerning the identification. §90.801(2)(c), Fla. Stat. (1985).

Ryan testified at trial concerning his identification and was cross-examined by defense counsel. (R.1922-1940, 1942-44) The court did not limit the cross-examination. Further, the jury was clearly informed that Ryan had misidentified the defendant that day. (R.2081)

The court followed proper procedure in allowing Reynolds to testify regarding the initial identification. No error was committed.

ISSUE V

WHETHER THE TRIAL COURT ERRED IN FAILING TO SUPPRESS APPELLANT'S STATEMENTS.

Appellant's argument here appears to be two-fold; (1) the statements should be inadmissible because Appellant was not informed of the reason he was sought for questioning immediately upon his arrival at the Indian River Sheriff's Office and (2) the statements should have been suppressed because they were made after he invoked his right to remain silent.

As to the first contention, Appellant produces no support in the law for the contention that he should have been informed of the real reason for his being asked to the station prior to the arrival of the interrogating officers. This case cannot be likened to those where a warrant for arrest is being executed without explanation. Lloyd was not under arrest at that time, he was merely being sought for questioning based on the information they had. Under the circumstances Lloyd may have been a material witness and not detained after assisting in the investigation.

In the instant case, the investigating officers received information that a man left the scene in a red and white van bearing a given tag number. This tag number was traced to Donald Lloyd in Vero Beach. The Indian River Sheriff's Office was dispatched to Lloyd's residence where Mrs. Lloyd was questioned regarding the van's whereabouts. (R.580-582) She

informed the officers that her husband had the van and was in Tampa looking for work. (R.582) The officer asked Mrs. Lloyd to have Lloyd come to the station for questioning in regard to an accident in Tampa. (R.582) Lloyd came to the station of his own volition. The Indian River officers testified that they did not speak to Lloyd because it was a Tampa investigation and they were not involved in it. He was simply requested to wait. Lloyd did not object. (R.583) Captain Tippins further testified that while he did not advise Lloyd of his rights in full, Lloyd was informed that he could call an attorney if he would like. (R.612)

Detective McAllister and Detective Reynolds arrived from Tampa to question Appellant within two hours, beginning the interrogation at approximately 9:45 p.m. (R.581,688) Detective McAllister testified they got some preliminary information, such as his name, height, weight, address, prior record and occupation. He was then read his rights. (R.688) He was asked about his whereabouts that day. After telling them he was in Tampa looking for work, Lloyd tried to find out what they knew. They told him it was involving a homicide of a 28-year-old female who was shot and killed. His vehicle was positively identified at the scene and a person fitting his description had been seen running from the scene. At that point, Lloyd got nervous and said, "Ok, you got me, I got nothing else to say. Why don't you go ahead and shoot me and get it over with now." (R.691, 1979-80) Appellant concedes that the interrogation

ceased at that point. The interview lasted approximately a half hour. (R.2056)

Detective Reynolds left the room for 3 to 4 minutes and returned with Mrs. Lloyd. (R.2056) They explained to her what was happening and that they wanted to take Lloyd's photograph. Lloyd's photograph and prints were taken by 10:30 p.m. and then Reynolds and McAllister flew back to Tampa to show the photos to the witnesses. Lloyd waited in the lobby for their return. While there, he made several inculpatory statements to the Indian River officers on duty - despite their admonishments to him to not talk about the case because it was Tampa's investigation and they didn't want to interfere. (R.659)

As to Appellant's first claim, the record shows that Lloyd was informed of the purpose for the investigation as soon as it was apparent that Lloyd could be involved and was facing possible arrest. Appellant has failed to show that this was unlawful or that it resulted in any prejudice to him other than precluding him from "being on the way to Mexico."

Appellant also claims that the statements should have been suppressed because they were made after Lloyd invoked his right to remain silent.

The Supreme Court held in Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 2694 (1966) that police must follow certain guidelines when conducting custodial interrogations, in order to protect the constitutional rights of the suspect. Under Miranda, the police not only must give the suspect the

now-familiar set of warnings, but also must scrupulously honor the suspect's right to cut off questioning. As the Miranda court emphasized: "If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease." Id. at 473-74, 86 S.Ct. at 1627.

In Michigan v. Mosley, 423 U.S. 96, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975), the Supreme Court explored in greater detail the scope of a suspect's right to cut off questioning. There, the Court explained that a reasonable and faithful interpretation of the Miranda opinion must rest on the intention of the Court in that case to adopt "fully effective means. . . to notify the person of his right to silence and to assure that the exercise of the right will be scrupulously honored. . ." 384 U.S. at 479, 86 S.Ct. at 1630. The critical safeguard identified in the passage at issue is a person's right to cut off questioning. Id. at 474, 86 S.Ct. at 1627. Through the exercise of his option to terminate questioning he can control the time at which questioning occurs, the subjects discussed, and the duration of the interrogation. The requirement that law enforcement authorities must respect a person's exercise of that option counteracts the coercive pressures of the custodial setting. The admissibility of statements obtained after the person in custody has decided to remain silent depends under Miranda on whether his "right to cut off questioning" was "scrupulously honored." Id at 103-04, 96 S.Ct. at 326.

The Supreme Court has likewise indicated that the police do not in all circumstances have to cease all questioning once a suspect in any way exercises his Miranda rights. Nothing in the Miranda opinion can sensibly be read to create a per se proscription of indefinite duration upon any further questioning by any police officer on any subject, once the person in custody has indicated a desire to remain silent. Michigan v. Mosley, 423 U.S. 96, 102-03, 96 S.Ct. 321, 325-26, 46 L.ED.2d 313 (1975).

Appellant's reliance on Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981) and its progeny are misplaced. Appellant did not request counsel but, rather, simply stated that he had nothing else to say. (R.1779-80)

The Court in Edwards, supra, at 485, noted that it had adopted different standards to be applied when the right to counsel is invoked versus the right to remain silent.

> In **Michigan v. Mosley,** 423 U.S. 96, 46 L.Ed.2d 313, 96 S.Ct. 321 (1975), the Court noted that Miranda had distinguished between the procedural safeguards triggered by a request to remain silent and a request for an attorney and had required that interrogation cease until an attorney was present only if the individual stated that he wanted counsel. 432 U.S., at 104, n. 10, 46 L.Ed.2d 313, 96 S.Ct. 321; see also id., at 109-111, 46 L.Ed.2d 313, 96 S.Ct. 321 (White, J., concurring).

Edwards v. Arizona, at 485

Where the right to remain silent is invoked, officers may

reinitiate questioning at a later time.

The facts in the instant case do not even rise to this level. While it is true that Detective McAllister told Lloyd about a similar case after Lloyd said he didn't have anything to say - Lloyd was not being interrogated and he did not make any statements to McAllister.

Several hours had elapsed before Lloyd made the gratuitous inculpatory statements to the Indian River Officers. He was not being questioned by the officers and, in fact, they asked him not to talk about it.

The statements were voluntary and the trial court properly denied the motion to suppress.

ISSUE VI

WHETHER JACK WILLIAMSON'S TESTIMONY WAS IMPROPERLY ADMITTED.

At trial, Lloyd's former supervisor, Jack Williamson, testified that he saw a .32 or .38 Smith and Wesson revolver in Lloyd's shaving kit and that Lloyd said he kept it loaded when he went on trips. (R.2039-40) The murder weapon was a .38 caliber revolver. (R.1785)

On appeal, Lloyd urges that the admission of this testimony was error because its probative value was outweighed by its prejudicial value.

Section 90.403, Florida Statutes provides, in part:

> Relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence.

As the court noted in Smith v. State, 404 So.2d 167 (Fla. 1st DCA 1981), the approach expressed in Section 90.403 is in agreement with the Federal Rules of Evidence and federal case law. Committee notes to Federal Rule 403 explain: "'Unfair prejudice' within its context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one."

The statement was not worded as to evoke a particularly emotional response from the listener, or to suggest to the jury any other improper basis for its decision. There is no

contention that the witness' recitation of the event was inaccurately or misleadingly presented. See, generally, Clark v. State, 363 So.2d 331 (Fla. 1978).

Evidence that Lloyd had possession of a loaded weapon similar to the murder weapon a few months prior to the murder is unquestionably relevant and not unduly prejudicial, especially in light of James Scharfschwerdt's earlier testimony that he had given Lloyd .38 ammunition. (R.1811) In Johnson v. State, 393 So.2d 1069 (Fla. 1980), this Court held that testimony relating to defendant's possession of a gun, other than the murder weapon, almost two months after the crime was not reversible error.

Similarly, the fact that Williamson was recalled and able to complete his testimony does not warrant reversal. If anything, the court's animosity toward the prosecutor reduced Williamson's credibility.

ISSUE VII

WHETHER THE TRIAL COURT PROPERLY IMPOSED THE DEATH SENTENCE.

The trial court, after a very thorough analysis which is set forth at R.362-369, found three aggravating circumstances; 1) the capital felony was committed while the defendant was engaged in an attempt to commit a robbery, (R.364); merged with this was the additional factor that the capital felony was committed for pecuniary gain, (R.364); 2) the capital felony was especially heinous, atrocious or cruel, and 3) The capital felony was a homicide and was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification (R.367).

As mitigating circumstances, the court found; 1) No significant history of prior criminal activity.

The jury recommended the death penalty with the vote being 7 to 5. (R.2814)

Appellant contends that the evidence did not support a finding of any aggravating circumstances.

As to the first factor - committed during a robbery and for pecuniary gain - Appellant argues that the trial court explicitly agreed with the defense that there was no evidence of pecuniary gain and, therefore, neither the robbery factor nor the committed for pecuniary gain factor could stand. A review of the record, however, does not support this contention.

During the sentencing charge conference, the giving of the sixth factor - committed for pecuniary gain - was discussed and the judge said he wouldn't give it, that it merged with commission or attempted commission of a robbery. (R.2753) The court did not explicitly find that the crime was not committed for pecuniary gain. It only found that the instruction wasn't necessary because it was merged with the robbery.

Further, the evidence did show beyond a reasonable doubt that Lloyd sought pecuniary gain during the commission of the homicide. As the trial court noted in its order imposing the death sentence, Ryan Osborne testified that Lloyd demanded money and that the victim's wallet was found open on the counter next to her body. (R.363) These facts support both the finding that Lloyd sought pecuniary gain and that the homicide was committed while the defendant was engaged in an attempt to commit a robbery.

Assuming, arguendo, that the trial court had found no evidence of pecuniary gain, this Court can, as it has in other cases, reweigh the evidence in the case sub judice and find that the aggravating circumstance was supported by the record. Goode v. State, 365 So.2d 381 (Fla. 1978).

The second aggravating circumstance was that the felony was especially heinous, atrocious or cruel. Appellant argues that there was no evidence to support a finding that the act was a consciousless, pitiless crime which is unnecessarily tortuous to

the victim. Cf. State v. Dixon, 238 So.2d 1 (Fla. 1973). A review of the record and the trial court's sentencing order belie this contention. Lloyd entered the Osborne home, argued with Cheryl Osborne then ordered her and her 5-year-old son into the bathroom at gunpoint. At that point, Cheryl Osborne would reasonably have been in fear for her life and that of her young son. This is further evidenced by the sequence of events described by James Thornton, who said he heard a woman's scream as he passed the Osborne home. The scream sounded like it was moving from one end of the Osborne house to the other. (R.1394) Thornton had reached his neigbor's driveway before he heard the first shot. (R.1395) He did not hear the second shot until he had turned into his own driveway. These were not two instantaneous shots. Thornton also noted that the second shot was muffled. When this fact is considered in the context of Doctor Lardizbal's autopsy and testimony, it is apparent that it was the second shot that killed Cheryl Osborne.

Dr. Lardizbal testified he found two gunshots. A through and through gunshot on the right side of the neck and a contact gunshot wound to the top of the head. (R.1754) The doctor defined "contact wound" as meaning the gun was actually in contact with the head. (R.1765) This would naturally muffle the sound of the shot as opposed to the through and through shot which left a bullet in the wall. The position of the body also supports this finding as it indicates that Cheryl dropped to her knees and then, upon receiving the final shot, collapsed. Unlike the

victim in Clark v. State, 443 So.2d 973 (Fla. 1983), Cheryl Osborne knew for more than an instant what was about to happen to her.

Appellant also contends that the trial court incorrectly considered Ryan's presence at the scene. To support this contention, Appellant relies on Clark, supra. The court in Clark, however, was not considering the impact of the pitiable pleas made by the victim's husband on the victim. Here, we have a young mother who was not only in fear for her life, but that of her young son. Surely, there can be no worse torture than for a parent to fear for the life of their young child.

The third aggravating circumstance found by the trial court was that the homicide was committed in a cold, calculated and premeditated manner. This was suported by Lloyd's gaining entrance to the Osborne home, requesting money at gunpoint, ordering the victims into the bathroom, shooting Cheryl in front of five-year-old Ryan and shooting Cheryl twice at close range several seconds apart. (R.366-67)

Where a person strikes another with a deadly weapon and inflicts a mortal wound, the very act of striking such a person with such weapon in such manner is sufficient to warrant a jury in finding that the person striking the blow intended the result which followed. See Rhodes v. State, 104 Fla. 420, 140 So. 309. 310 (1932); Buford v. State, 403 So.2d 943, 949 (1981). Premeditation may be inferred from the circumstances surrounding the homicide. Hill v. State, 133 So.2d 68 (Fla. 1961). Ample evidence in the record supports the finding that the murder was

committed in a cold, calculated and premeditated fashion. Cf. Rose v. State, 472 So.2d 1155 (Fla. 1985); Squires v. State, 450 So.2d 208 (Fla. 1984); Combs v.State, 403 So.2d 418 (Fla. 1981), cert. denied, 456 U.S. 984, 102 S.Ct. 2258, 72 L.Ed.2d 862 (1982); Mason v. State, 438 Soi.2d 374 (Fla. 1983), cert. denied, ___ U.S. ___, 104 S.Ct. 1330, 79 L.Ed.2d 725 (1984).

Appellant contends that the evidence did not support the trial court's finding that premeditation was evidenced by Lloyd's gaining entrance to the victim's home because the trial court directed a verdict to this charge. The burglary charge was denied because the State failed to allege enter "or remain" in the information. Nevertheless, the facts show that Lloyd entered the Osborne home and remained without consent. Further, the Court's finding was not that the entry was "forced", only that it was done.

Appellant argues Ryan's presence was improperly considered based on Mason v. State, 438 So.2d 374 (Fla. 1983). This Court in Mason, however, merely found that the presence of the children could not support the aggravating circumstance of "danger to many persons". This Court in Mason found that the murder was cold, calculated and premeditated. This was true despite the fact that the finding was based on the same facts as the "heinous, atrocious and cruel" finding. This Court also noted that the finding was further supported by the fact that nothing indicated the victim provoked the attack in any way or that Appellant had any reason for committing the murder.

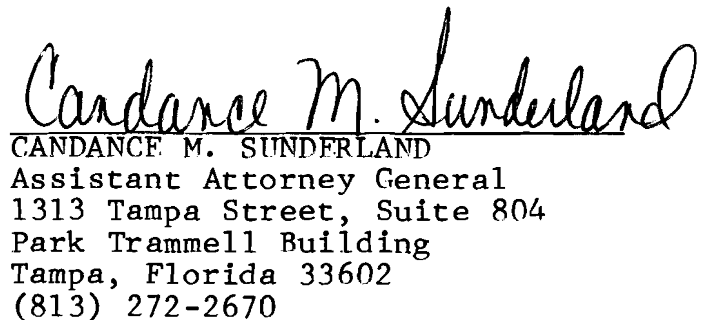
Cheryl Lynn Osborne was an innocent victim to Donald Lloyd's cold-blooded attack. The aggravating factors were supported by the record and outweighed the mitigating circumstance. The death sentence was properly imposed.

CONCLUSION

Based on the foregoing arguments and citations of authority, the judgment and sentence of death should be affirmed.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL



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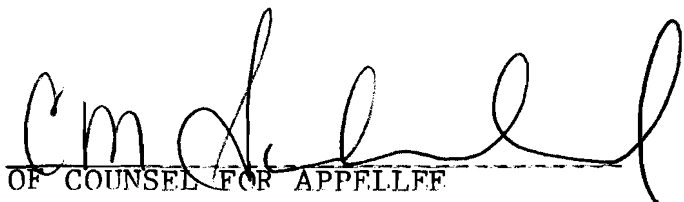
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Laura R. Morrison, Counsel for Appellant, 633 South Andrews Avenue, Third Floor, Fort Lauderdale, Florida 33301, this 18th day of September, 1986.



OF COUNSEL FOR APPELLEE