IN THE SUPRRME COURT OF FLORIDA

JOHN MAREK,
Appellant,
vs.
STATE OF FLORIDA,
Appellee.

CASE NO. 65,821

ANSWER BRIEF OF APPELLEE

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OTHER AUTHORITY

PRELIMINARY STATEMENT

Appellee was the prosecution and Appellant the defendant in the Criminal Division of the Cricuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida.

In the brief, the parties will be referred to as they appear before this Honorable Court of Appeal except that Appellee may also be referred to as the State.

The following symbols will be used:

"R"	Record on Appeal
"AB"	Appellant's Initial Brief
"SR"	Supplemental Record

All emphasis has been added by Appellee unless otherwise indicated.

STATEMENT OF THE CASE

Appellee accepts Appellant's Statement of the Case as found on page one (1) of Appellant's initial brief with the following additions and clarifications:

On June 1, 1984, Appellant, John Marek, was found guilty by a jury of his peers for the crime of murder in the first degree as to Count I of the indictment, guilty of kidnapping with intent to commit a sexual battery as to Count II, guilty of attempted burglary with an assault as to Count III and guilty of two (2) counts of battery as to Counts IV and V (R 1438-1442).

On June 5, 1984, a separate sentencing proceeding was conducted by the trial jury for the purpose of advising the trial court whether the Appellant should be sentenced to death or life imprisonment for his conviction of murder in the first degree. The trial court instructed the jury on the following aggravating circumstances:

> 1. The defendant has been previously convicted of a felony involving the use or threat of violence to some person.
>
> The crime of kidnapping is a felony involving the use or threat of violence to another person;
>
> 2. The crime for which the defendant is to be sentenced was committed while he was engaged in the commission of the crime of attempted burglary with an assault;
>
> 3. The crime for which the defendant is to be sentenced was committed for financial gain;
>
> 4. The crime for which the defendant is to be sentenced was especially wicked, evil, atrocious or cruel. (R 1449)

The trial court then instructed the jury on the mitigating

circumstances that they could consider (R 1450). Thereafter, the jury by a vote of ten (10) to two (2) advised and recommended to the court that it impose the death penalty (R 1453).

Subsequently, in its sentencing order, the trial court determined the above-cited, four aggravating circumstances to be applicable (R 1472). The trial court found no mitigating circumstances to be applicable to the Appellant (R 1473-1474).

The trial court accepted the jury's recommendation of death and sentenced Appellant to death as to Count I (R 1462). Appellant was sentenced by the trial court to thirty (30) years as to Count II and nine (9) years as to Count III (R 1463-1464). The trial court suspended sentencing as to Counts IV and V (R 1465-1466).

STATEMENT OF THE FACTS

Appellee accepts Appellant's statement of the facts as found on pages two (2) through six (6) of Appellant's initial brief with the following additions and clarifications:

Jerome Kasper, the lifeguard who discovered Adella Simmons' body in the observation deck of the lifeguard stand, testified that the only way to enter the observation deck was through a door or through a window (R 464). Kasper testified that he locked the door to the observation deck when he left work the evening of June 16, 1983 (R 461). The ladder which was used to reach the observation deck was also locked away in the shed underneath the lifeguard stand (R 457). Kasper testified that when he arrived at work at approximately 7:15 A.M., the morning of June 17, 1983, he noticed that a overturned trash can had been placed at the entrance to the lifeguard stand (R 465). Kasper also noticed "drag marks" in the sand which were made by the trash can when it was dragged from its usual position thirty (30) yards down the beach, to the lifeguard stand (R 466). Kasper testified that there were some Budweiser beer cans laying near the trash can and that he found a blue and white tee shirt nearby (R 469-470). Kasper testified that he placed the tee shirt and beer cans in the trash can and dragged it back to its proper place (R 470). Kasper then went to the bottom area of the lifeguard stand to get the ladder and proceeded to climb up to the observation deck (R 471). Kasper testified that the door to the observation deck was unlocked (R 472). Upon entering the deck, Kasper found the victim's nude body sprawled

on the floor (R 472). Kasper testified that it was possible to enter the observation deck through a window by just "jiggling" the window's shutters (R 463). Kasper also testified that there was an electric light inside of the observation deck and that when the shutters were closed, it was impossible to see into or out of the deck (R 477-480). Kasper immediately notified police of his find (R 473).

Robert Haarer of the Broward sheriff's office, forensic unit, testified that he arrived at the scene at approximately 8:10 A.M., June 17, 1983 (R 484). Haarer testified that the interior of the observation deck was in disarray (R 494). Haarer testified that he found white cotton socks near the body, with the toes burned out (R 495). Haarer testified that the victim's pubic hairs had also been burned, the burns being consistent with those inflicted by matches or a lighter (R 500). Haarer testified that he found the victim's shorts and underpants inside of the deck and that a red bandana had been tied around the victim's neck (R 500-501, 543). Haarer testified that he and Detective Gary Ayers processed the crime scene for fingerprints; Ayers processed the inside of the observation deck and Haarer the outside (R 508). Haarer specifically concentrated on processing the deck's windows and shutters (R 508). Haarer testified that he lifted nine (9) latent fingerprints from the exterior of the observation deck (R 511).

Patrol Sergeant George Hambleton of the Daytona Beach Shores Police Department testified that he first came into contact with Raymond Wigley at approximately 11:00 P.M., June 17, 1983 (R 549). Hambleton testified that Wigley was driving a

Ford pickup truck down Daytona beach when he stopped him (R 549-550). Hambleton testified that he found a ".25 auto, small, little chrome gun" in the passenger side glove compartment of the truck (R 550). Hambleton testified that he seized Wigley's truck and "sealed" it (R 555). Appellant was not in the truck at the time it was stopped (R 559).

Michael Rafferty of the Florida Department of Law Enforcement processed the truck (R 563). Rafferty testified that in addition to finding a gold watch, gold pendant and gold earring in the truck, he also found a duffle bag and empty beer cans in the cargo bed of the truck (R 564).

Robert Schafer of the Daytona Shores Police Departmet testified that he came into contact with Appellant at approximately 11:00 P.M. on June 17, 1983 on Daytona Shores beach (R 607-608). Schafer testified that after placing handcuffs on Appellant he read Appellant his rights (R 609). Schafer testified that Appellant asked him why he was being arrested and what was it all about (R 609). Schafer told Appellant that he was being "picked up" pursuant to a BOLO from another police agency in south Florida regarding a murder (R 610). Appellant denied any knowledge of a murder (R 610). Schaffer then told Appellant that Wigley and the truck had already been taken into custody and Appellant responded that he did not know Wigley and had only been a hitchhiker who had been picked up (R 610).

Detective Gary Ayers of the Broward sheriff's office testified that he processed the inside of the observation deck for fingerprints at approximatwly 8:30 A.M., on June 17, 1983

(R 620-621). Ayers testified that he lifted eighteen (18) latent fingerprints from the inside of the deck (R 623).

Sondra Yonkman testified as the latent print examiner for the Broward sheriff's office (R 632). Yonkman testified that prints matching both Appellant's and Wigley's fingerprints were lifted from the exterior point of entry to the observation deck (R 636-642). Yonkman further testified that only Appellant's fingerprints were found inside of the observation deck (R 642-645). Yonkman testified that there was no doubt that the print identifications she made were from the individuals identified to her as being Wigley and Appellant (R 659). Yonkman testified that all of her print identifications were verified by Detective Richtarick of the Broward sheriff's office (R 659).

Officer Dennis Satnick of the City of Dania Police Department, testified that he first came into contact with Appellant and Wigley on Dania beach at approximately 3:35 A.M,, on June 17, 1983 (R 660-661). Satnick testified that he was patrolling the beach, which was closed to the public at that time of morning, when he came across a Ford pickup truck parked on the beach (R 661-663). Satnick noticed there was a large amount of beer in the cargo bed of the truck (R 663). Satnick proceeded to walk up and down the beach looking for the truck's occupants (R 664-665). The pickup truck was parked approximately one-hundred (100) yards from the lifeguard shack (R 676). Satnick testified that while walking on the beach he saw a large sea turtle laying eggs in the sand approximately fifty (50) yards from the pickup truck (R 666). Satnick returned to his police

car after being unable to spot anyone on the beach (R 665). Satnick testified that after he returned to his car he noticed two people coming from the area of the lifeguard shack walking towards the pickup truck (R 667). Neither of the individuals were wearing shirts (R 667). Satnick asked both men for identification, and the men identified themselves as John Marek, Appellant, and Raymond Wigley (R 669). Satnick testified that he filled out a field contact card regarding his encounter with Appellant and Wigley (R 667), and was in contact with the men for approximately forty (40) minutes (R 670). Satnick testified that Dania police officers Darby and D'Andrea were also present and were speaking with Appellant and Wigley (R 679-680). Satnick testified that Appellant was the more dominant of the two (R 671). He further testified that every time Wigley would attempt to speak, Appellant would interrupt and prevent him from speaking (R 670). Satnick testified that Appellant told some jokes to the officers and that Wigley laughed in response to these jokes (R 671). Satnick testified that Appellant was very friendly and that Wigley "didn't say much" (R 681). Satnick testified that he was suspicious of Wigley because he wouldn't make eye contact (R 681). Satnick testified that he detected the odor of alcohol on both men and that Wigley was staggering and his speech slurred (R 672-673, 677). Satnick testified that in his opinion, Wigley was intoxicated (R 672). Satnick testified that Appellant did not appear to be intoxicated and in fact dominated the conversation (R 671, 675). Appellant never gave Wigley a chance to speak (R 682). Satnick testified that after this encounter was over,

Appellant, not Wigley, drove the pickup truck away from the beach (R 676).

Jean Trach testified that she had been travelling with the victim, Adella Simmons, prior to her death (R 695). Trach testified that she and Simmons had been close friends for approximately nine (9) years and that Simmons was forty-seven (47) years old at the time of her death and a widow (R 694, 696, 722). Trach testified that Simmons had worked at Barry College in Miami as a Director of Business Affairs (R 696). Trach testified that she and Simmons drove up to Largo the afternoon of Sunday, June 12th in Trach's 1982 Chevy Monza (R 397, 737). The women began their trip back to Miami on Thursday, June 16, 1983, at approximately 2:00 P.M. (R 699, 737). Trach testified that Simmons was driving and that the car began having problems about one (1) hour after the women left Largo (R 699). Trach and Simmons were travelling south on the Florida turnpike when their car broke down at mile marker 83, just north of Jupiter (R 695). Trach testified that Simmons put the car's flashers on and pulled over to the side of the road at approximately 10:45 P.M. (R 701-702). Trach testified that when they pulled to the side of the road, a truck pulled off behind them (R 702). Trach identified Appellant as being one of the persons in the truck (R 704). Trach testified that Appellant got out of the truck and came up to the car and asked if he could help (R 707). Wigley remained in the truck. Trach told Appellant he could help by going to the nearest service station and getting either a tow truck or a state trooper (R 707-708). Appellant wasn't willing to do that because he had had a couple of beers, but offered to fix the car (R 708). Trach testified

that Appellant and Wigley stayed with the women's car for approximately forty-five (45) minutes (R 708). Trach testified that after Appellant tried to fix the car, he offered to take the women to Miami (R 709). The women declined (R 709). Wigley finally got out of the truck approximately one-half hour after the truck followed the women's car off of the turnpike (R 709). Trach testified that Appellant then offered to take one of the women to the nearest telephone on the turnpike to call for help (R 709). Appellant specifically stated that he would take only one of the women, not both (R 709). Trach testified that Appellant had been doing all of the talking and that Wigley had not said a word (R 709). Simmons suggested that Trach ride with Appellant to the nearest telephone because she thought that would be safer than being left alone in the car (R 710). Trach testified that Simmons was concerned for Trach's safety and didn't want to leave her alone in the car (R 710). Trach refused to go with the men (R 710). Simmons then decided to go for help with Appellant and Wigley since she and Trach "couldn't sit there all night" (R 711). Trach testified that she told Simmons not to go (R 711). At approximately 11:30 P.M., Simmons got in the truck and sat between Appellant and Wigley (R 723). This was the last time that Trach saw Adella Simmons (R 723).

Trach testified that at the time Simmons left with Appellant she was wearing white shorts and a long-sleeve tee shirt (R 711). Trach identified at trial the shorts and tee shirt found on Dania beach at the scene of the murder as those that Simmons had been wearing (R 711-712). Trach also identified the jewelry found in the truck as belonging to Simmons (R 718).

Trach testified that Wigley was silent and did not attempt to make any conversation with the women during the forty-five (45) minutes the four were together (R 739). Appellant, however, was very friendly and talkative (R 740). Trach testified that at no time did she ever detect an odor of alcohol on Appellant and that Appellant did not appear to be in any way intoxicated (R 710). Trach also testified that during the five days she and Simmons were vacationing in Largo, Simmons had not been with any men and could not have had the opportunity for sexual intercourse (R 720). Trach testified that she and Simmons slept in her sister's condominium every night on the trip and that Simmons could not have had any sexual encounter with a man (R 720-722).

Dr. Ronald Wright, the Chief Medical Examiner for Broward County, Florida, testified as to the victim's injuries and cause of death. Dr. Wright performed the autopsy on the victim at 11:00 A.M., June 17, 1983 (R 809). Dr. Wright testified that the victim died from asphyziation by ligature strangulation (R 781). Dr. Wright testified that the death occurred at approximately 3:00 to 3:30 A.M., June 17, 1983 (R 739, 753). Dr. Wright testified that a bandana had been tied tightly around the victim's neck and that the deep bruising on the neck itself was consistent with the victim being strangled (R 758-759). He further testified that "reddish" hemorrhages on the victim's face were consistent with her air passages being blocked off (R 749). Dr. Wright testified that he found five (5) fingerprint marks on the victim's neck which in his opinion either resulted from the strangulation itself or from the victim's trying to get the bandana off her neck (R 757). Dr. Wright testified that in such a murder the victim's heart would stop beating within 10

to 15 minutes after the ligature was applied to the neck (R 823). Dr. Wright testified that the victim was probably conscious for one (1) minute after the ligature was applied (R 823).

Dr. Wright testified that the victim suffered numerous facial as well as external and internal scalp injuries which were consistent with her being struck with a fist, hand or blunt instrument (R 759-762). The victim's arms and chest area also had many bruises and contusions, and her right breast had an abrasion consistent with a heel mark (R 767, 778). Dr. Wright also testified that the victim had deep scrape marks and bruises on the center of her back (R 769). The victim also had an abrasion over her left hip (R 762, 769). Dr. Wright testified that the victim suffered an extensive amount of internal bruising in the area of her back (R 770). Also, the tissue surrounding the victim's kidneys was bruised and bleeding (R 771). Dr. Wright testified that this type of injury was consistent with the victim being kicked with a great deal of force (R 771).

Dr. Wright also testified that a large amount of sand was impacted on the victim's upper back, lower back and buttocks (R 783). It was Dr. Wright's opinion that the victim was unclothed on the beach prior to being taken up to the observation deck, due to the amount of sand found on her body which was not present in any kind of quantity in the shack itself (R 754, 783). Dr. Wright testified that the injuries to the victim's breast and back occurred when she was unclothed due to the nature and extent of the injuries. (R 782-783). It was Dr. Wright's opinion that the injuries to the victim's hip and back were "exceptionally consistent" with her being dragged from

the lower level of the lifeguard shack over the wooden siding to the upper level of the shack (R 782, 815, 822). Dr. Wright testified that it was his opinion that the contusions, abrasions and scrapes to the victim's hip and back were caused by the wooden siding of the lifeguard stand (R 822). Dr. Wright further testified that the injuries to the victim's back, hip, chest, breast, arms, face and scalp all occurred while the victim was alive and had a beating heart since there was bleeding and bruising into the depths of those wounds (R 815). It was therefore Dr. Wright's opinion that the victim was alive at the time she was taken up to the observation deck of the lifeguard stand (R 815).

Dr. Wright also testified that he was certain that at least one person had had sexual intercourse with the victim within twenty-four (24) hours preceding his autopsy which was performed at 11:00 A.M., June 17, 1983 (R 808-809). Dr. Wright's examination of the victim revealed three spermatozoa present in the victim's cervix (R 775). Dr. Wright testified that these spermatozoa were intact, complete with tails (R 776). Dr. Wright testified that because the sperm had tails they were less than twenty-four (24) hours old since the tails ordinarily fall off after a twenty-four (24) hour period (R 776). Dr. Wright testified that it was highly unlikely that the sperm could be up to three (3) days old (R 809). Dr. Wright also testified that there is a wide variation in the number of sperm present in a normal ejaculation but many factors could affect that number rendering it significantly lower (R 798, 813). Dr. Wright testified that these factors inluded frequency of ejaculation, alcohol consumption before ejaculation and oral or external ejaculation preceding a vaginal ejaculation (R 798, 813).

Dr. Wright also testified that the victim's pubic hair had been singed (R 772). He further testified that there was "blistering" present on the tip of her right thumb (R 779). Dr. Wright testified that this blistering was consistent with a match or lighter being applied to the tip of the victim's finger and that this injury occurred after the victim was dead since the flame involved did not produce a "vital" reaction (R 780-781). Dr. Wright testified that blistering of this type was characteristically a post-morten injury (R 781).

The defense opened its case with Vincent Thompson, a City of Dania firefighter, who had been present when the police spoke with Appellant and Wigley on Dania beach (R 875). Thompson testified that during Appellant's conversation with police, Appellant was very friendly and told several jokes (R 877). Wigley, however did not speak at all and seemed very withdrawn (R 879). Thompson testified that Appellant controlled the tempo of the conversation with police and appeared to be the more "predominant" of the two (R 882). Thompson testified that Wigley appeared to be nervous and that Appellant did not (R 888). Thompson testified that shortly after Appellant and Wigley left the beach, they returned (R 883-884). Thompson testified that he spoke with Appellant and Wigley and one of them indicated that they had returned to the beach to pick up some clothes (R 884-885). After the conversation, Appellant and Wigley walked down the beach and picked up what appeared to be a pile of clothes (R 885). After they picked the clothes up, Appellant and Wigley got back in their truck and drove away (R 886). Thompson testified that Appellant and Wigley appeared to be in a "fog" rather than grossly intoxicated (R 878).

Officer Henry Rickmeyer of the Dania Police Department testified that he had taken a statement from Jean Trach on June 20, 1983 (R 892). Rickmeyer testified that Trach told him that although Wigley did get out of the truck on the turnpike, Wigley just stood by silently and didn't say anything (R 895).

Officer Robert Darby of the Dania Police Department testified that he had been present during the conversation Appellant and Wigley had with police (R 893). Darby testified that while Appellant was telling the police jokes, Wigley was looking at Appellant with disbelief (R 904-905). Darby testified that Wigley seemed nervous and didn't say anything during the conversation but instead stood with his head down (R 902-903).

Appellant testified on his own behalf. Appellant testified that he was twenty-two (22) years old and worked on an oil rig in Fort Worth, Texas, his home town, before travelling to Florida (R 935-936). Appellant testified that on Monday, June 13, 1983, he and Raymond Wigley left Texas to come to Florida for a "fun-loving" two weeks (R 940). Appellant testified that he had known Wigley for a couple of months prior to the trip and that he and Wigley were drinking two to four cases of beer a day during the trip to Florida (R 936, 940). Appellant testified that he was driving the truck when it followed the victim's car off of the turnpike (R 942). Appellant testified that he offered to take both women to a filling station and that after the women talked between themselves, the victim agreed to go with Appellant and Wigley for help (R 940, 946). Appellant testified that he was the one who invited the victim to ride with him and that he, not Wigley, did all of the talking (R 972). Appellant testified that Wigley drove the truck and that he fell asleep

in the passenger seat approximately two minutes after he, Wigley and the victim got in the truck (R 947). Appellant testified he woke up "sometime later" and asked Wigley if he dropped the victim off since he didn't see the victim in the cab of the truck (R 948). Wigley told Appellant that he dropped the victim off at a gas station (R 948). Appellant testified that he then fell asleep and that when he woke up he was on the beach (R 949). Appellant proceeded to look for Wigley on the beach and found him up on the observation deck of the lifeguard stand (R 950). Appellant got up on top of a trash can, grabbed one of the railings and swung himself up to meet Wigley (R 951). Appellant testified that he knew he was "trespassing" when he entered the observation deck (R 954). Appellant testified that he never saw the victim's body inside of the observation deck because it was dark inside and a chair was obstructing his view (R 856). Appellant testified that he "felt" his way along the walls of the deck and opened a shutter in order to exit the deck (R 954-956). Appellant testified that he was in the shack for a total of 15 to 18 minutes (R 957). Appellant testified that he and Wigley left their shirts on the beach to make it look like they were "messing around with the water or something" (R 957).

Appellant testified that he and Wigley were confronted by police after they left the observation deck and that the police treated them with hospitality (R 960). Wigley was standing with his head hung down while Appellant joked with police (R 960-961). Appellant testified that he drove the truck away from the beach (R 960). After remembering that he had left his clothes on the beach, Appellant drove back to the beach to pick them up (R 962-963). Appellant testified that he never knew there was a body in the observation deck

and that he had never asked Wigley what had happened to the victim, Adella Simmons (R 978). Appellant also testified that he never knew Wigley's last name even though he had known him for a couple of months before the trip and that he himself drank sixty (60) beers on Thursday, June 16, 1983 (R 969). Appellant testified that he didn't know where he was when he was at the beach but had told the police on the beach that he was looking for a couple of college friends (R 976-977). Appellant explained "Well, I knew they was in Florida. I don't know whereabouts they was" (R 977). Appellant testified that he told police that he went to college (R 977). Appellant admitted to having been previously convicted of a felony (R 977).

Appellant never heard any yelling or struggling while he was asleep in the cab of the truck on the way to the beach (R 973). Appellant denied strangling the victim or burning her pubic hair (R 976). Appellant also denied burning the victim's finger to see if she was dead (R 976).

Appellant explained that he denied knowing Wigley when he was picked up on Daytona beach because he didn't know Wigley's last name (R 978-980). Appellant admitted hearing Detective Rickmeyer tell him while he was in a holding cell in Daytona Beach, "Congratulations, you made it to the big times" (R 1013). Appellant testified that he then told Detective Rickmeyer, "SOB must have told all" (R 1014). Appellant denied knowing that the Ford truck he was driving was stolen (R 1015).

In rebuttal, Detective Rickmeyer testified that he in fact told Appellant while he was in the holding cell, "Congratulations, you made it to the big time. You're now charged with murder, kid-

napping, rape and robbery" (R 1019). Rickmeyer testified that Appellant responded, "Oh, shit, the SOB told all" (R 1019).

Officer Satnick testified on rebuttal that when he met Appellant and Wigley on Dania beach, he addressed both by their last names after taking down the information for his contact report from Appellant's and Wigley's driver's licenses (R 1023-1024). Appellant told Satnick that he was at the beach to meet with some college kids whom he went to college with (R 1026-1027). When Satnick asked Appellant what college he went to, Appellant did not answer (R 1027).

POINTS INVOLVED ON APPEAL

POINT I

WHETHER THE TRIAL COURT CORRECTLY SENTENCED APPELLANT TO DEATH FOR MURDER IN THE FIRST DEGREE WHERE IT WAS CLEARLY ESTABLISHED BY THE EVIDENCE ADDUCED AT TRIAL THAT APPELLANT WAS THE DOMINANT ACTOR IN THE CRIMINAL EPISODE?

POINT II

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION FOR MISTRIAL?

POINT III

WHETHER THE TRIAL COURT CORRECTLY DENIED APPELLANT'S MOTION TO DISQUALIFY THE JURY PANEL?

POINT IV

WHETHER THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTIONS FOR JUDGMENT OF ACQUITTAL WHERE THERE WAS SUBSTANTIAL, COMPETENT EVIDENCE TO SUPPORT HIS CONVICTIONS?

POINT V

WHETHER THE TRIAL COURT ERRED IN ACCEPTING THE JURY'S RECOMMENDATION AND IMPOSING A SENTENCE OF DEATH? (Restated)

POINT VI

WHETHER DEATH BY ELECTROCUTION CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT?

SUMMARY OF THE ARGUMENT

POINT I. The evidence adduced at trial clearly supports Appellant's sentence of death. The evidence clearly established that the Appellant was the dominant actor in the criminal episode where witness testimony showed Appellant to be the leader and as being dominant over co-defendant Raymond Wigley.

POINT II. The trial court correctly denied Appellant's motion for mistrial since the curative instruction given to the jury, to which defense counsel agreed, was entirely appropriate and was clearly sufficient to dissipate any prejudicial effects of the witness' testimony.

POINT III. The trial court correctly denied Appellant's motion to disqualify the jury panel since there was nothing contained in the audio/visual presentation which could have even remotely affected the jury and their ability to return a fair verdict.

POINT IV. Appellee maintains that the evidence adduced at trial clearly supports the jury's verdicts. The evidence against Appellant was substantial and competent and support his convictions as to all counts of the indictment.

SUMMARY OF THE ARGUMENT
(Continued)

POINT V. The trial court correctly sentenced Appellant to death where there were no mitigating factors and four aggravating factors and where the jury recommended death.

POINT VI. Death by electrocution does not constitute cruel and unusual punishment.

ARGUMENT

POINT I

THE TRIAL COURT CORRECTLY SENTENCED APPELLANT TO DEATH FOR MURDER IN THE FIRST DEGREE WHERE IT WAS CLEARLY ESTABLISHED BY THE EVIDENCE ADDUCED AT TRIAL THAT APPELLANT WAS THE DOMINANT ACTOR IN THE CRIMINAL EPISODE.

Appellant argues that the trial court erred in sentencing him to death for first degree murder, where his co-defendant, Raymond Wigley, was sentenced to life in prison for the same crime. Appellant contends that the disparity in the sentences imposed is unconstitutional. Appellee maintains however, that the sentence imposed upon Appellant by the trial court was clearly supported by the evidence adduced at trial.

The evidence presented at trial clearly established that the Appellant, John Marek, was the dominant actor in the criminal episode. Appellant, not Wigley, was driving the pickup truck when he and Wigley followed the victim's car off of the turnpike (R 942). Appellant, not Wigley, immediately got out of the truck and offered the women assistance (R 707). Raymond Wigley did not even get out of the truck until approximately one-half hour after Appellant followed the women's car off of the road (R 709). Jean Trach, the victim's travelling companion, testified that Appellant specifically told the women that he would take only <u>one</u> of them to a telephone to call for help (R 709). Trach testified that Appellant did all of the talking and that Wigley didn't say a word (R 709). Trach testified that Appellant, after spending forty-five (45) minutes with the women, finally persuaded the victim to ride with him for help (R 708-711). Trach testified that she saw the victim, Adella Simmons, for the last time at approximately 11:30 P.M., June 16, 1983, when the victim got in the truck and sat between Appellant and

Wigley (R 723).

Officer Dennis Satnick testified that he came into contact with Appellant and Wigley on Dania beach at approximately 3:30 A.M., on June 17, 1983 (R 660-661). Satnick testified that he was patrolling the beach, which was closed to the public at that time of morning, when he came across a pickup truck parked on the beach approximately one-hundred (100) yards from the lifeguard stand (R 661-663, 676). Satnick testified that after unsuccessfully trying to locate the truck's occupants on the beach he finally noticed two people coming from the area of the lifeguard stand walking towards the pickup truck (R 665, 667). The men identified themselves as John Marek, Appellant and Raymond Wigley (R 669). Satnick conversed with Appellant and Wigley for approximately forty (40) minutes and testified that Appellant was the more dominant of the two (R 671). He further testified that every time Wigley would attempt to speak, Appellant would interrupt and prevent him from speaking (R 670). Appellant told Satnick that he was at the beach to meet with some college kids whom he went to college with (R 1026-1027). When Satnick asked Appellant what college he went to, Appellant did not answer (R 1027). Satnick testified that Appellant told some jokes and was very friendly and that Wigley "didn't say much" (R 681). Satnick testified that during the conversation, Wigley wouldn't make eye contact (R 681). Satnick testified that in his opinion, Wigley was intoxicated (R 672). Satnick testified that Appellant did not appear to be intoxicated and in fact dominated the conversation (R 671, 675). Appellant never gave Wigley a chance to speak (R 682). Satnick testified

that after this encounter was over, Appellant, not Wigley, drove the pickup truck away from the beach (R 676).

Officer Robert Darby testified that he had been present during the conversation Appellant and Wigley had with police on Dania beach (R 893). Darby testified that while Appellant was telling jokes, Wigley was looking at Appellant with disbelief (R 904-905). Darby testified that Wigley seemed nervous and didn't say anything during the conversation but instead stood with his head down (R 902-903).

Vincent Thompson, a City of Dania firefighter, who had been present during the conversation on Dania beach testified that during Appellant's conversation with police, Appellant was very friendly and told several jokes (R 877). Wigley, however did not speak at all and seemed very withdrawn (R 879). Thompson testified that Appellant controlled the tempo of the conversation with police and appeared to be the more "predominant" of the two (R 882). Thompson testified that Wigley appeared to be nervous and that Appellant did not (R 888).

Appellant, himself, even testified that he, not Wigley did all of the talking after he followed the women's car off of the turnpike (R 942, 972).

Detective Rickmeyer testified that when he told Appellant, "congratulations, you made it to the big time . . ." Appellant responded, "Oh, shit, the SOB told all" (R 1019).

Further testimony established that although both Appellant's and Wigley's fingerprints were found on the exterior point of entry to the observation deck (R 636-642), only Appellant's

fingerprints were found inside of the observation deck (R 645).

Appellee maintains that the evidence adduced at trial revealed that the Appellant was the dominant actor in the criminal episode. Numerous witnesses at trial described Appellant as being dominant over Wigley. Appellant, not Wigley, drove the pickup truck when they followed the women off of the road and it was Appellant, not Wigley who initiated the conversation with the women and offered to take only one of them to telephone for help. Additionally, it was Appellant who set the tone and tempo of the conversation he and Wigley had with the police on Dania beach. Further, Appellant's statement to Detective Rickmeyer "oh, shit, the SOB told all" also reveals Appellant as being the stronger of the two. By every single witnesses'account, Appellant was friendly, talkative and a leader, and Wigley withdrawn, nervous and a follower. Clearly, Appellant was the instigator of the criminal episode and its dominant actor. Appellant's role in the crime was vastly different from that of Wigley's as the jury so found.

The fact that another jury sitting before the same trial judge, sentenced Appellant's co-defendant, Raymond Wigley, to life in prison for his role in Adella Simmons' murder, is proof positive that the roles each defendant played in the relevant events were certainly different. Contrary to Appellant's assertion that the trial court was "trying very hard" to support its sentence of death, the evidence adduced at trial clearly supports Appellant's death sentence and shows that not only did Appellant and Wigley act in concert from beginning to end, but that Appellant was the dominant actor in the criminal episode. See Salvatore v. State, 366 So.2d

745 (Fla. 1978); Tafero v. State, 403 So.2d 355 (Fla. 1981).

Appellee would further point out that the cases of Slater v. State, 316 So.2d 539 (Fla. 1975) and Malloy v. State, 382 So.2d 1190 (Fla. 1979), which Appellant cites in support of his position that his sentence of death was unfairly imposed, are readily distinguishable from the case at bar. This Court reduced the defendant's sentence of death in Slater v. State, supra, because the trial court overrode the jury's recommendation of life and imposed a sentence of death on a defendant who clearly was not the triggerman in a robbery-murder. Likewise, in Malloy v. State, supra, this court reversed a sentence of death where the trial court overrode a jury's recommendation of life where there was conflicting evidence as to whom the triggerman was in the murder. Appellee therefore maintains that neither Slater v. State, supra, nor Malloy v. State, supra, are applicable to the instant case.

Appellee maintains that the trial court properly sentenced Appellant to death for the first degree murder of Adella Simmons. This Court on numerous occasions has affirmed a sentence of death for one defendant even when another has gotten a life sentence for his participation in the same criminal episode, where as here, it has been shown that the defendant was the dominating force behind the criminal acts. Tafero v. State, supra; Jackson v. State, 366 So.2d 752 (Fla. 1978); Witt v. State, 342 So.2d 497 (Fla. 1977). Thus, Appellant's domination having been clearly established at trial, his sentence of death was appropriately imposed by the trial court.

POINT II

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING APPELLANT'S MOTION FOR MISTRIAL.

Florida case law clearly states that a motion for declaration of mistrial is addressed to the sound discretion of the trial judge. Ferguson v. State, 417 So.2d 639 (Fla. 1982); Salvatore v. State, 366 So.2d 746 (Fla. 1978). Further, it is a long-established rule that the power to declare a mistrial and discharge a jury should be exercised with great care and caution and should be done only in cases of absolute necessity. Salvatore v. State, supra, Smith v. State, 365 So.2d 405 (Fla. 3d DCA 1979).

The standard of prejudice which must be met by the defendant in order to obtain a new trial varies adversely with the degree to which the conduct of the trial has violated fundamental notions of fairness. Salvatore v. State, supra. See also Kyle v. United States, 297 F.2d 507 (2d Cir. 1961), cert. denied 377 U.S. 909, 84 S.Ct. 1170. It should not be presumed that if error did occur it injuriously affected the substantial rights of the defendant. Salvatore v. State, supra.

In the instant case, the following transpired during the direct examination of state's witness, Officer George Hambleton:

> Q Did you notice anything unusual inside the truck? Particularly, I want to direct your attention to the passenger side glove compartment?
>
> A A .25 auto, small, little chrome gun.
>
> Q What did you do with the weapon?
>
> A I left it there.
>
> Q What did you do with the remaining contents of the truck:
>
> MR. MOLDOF: I object to that testimony. Move to have it stricken. I think it has no

> relevance to this case whatsoever. I move to have that testimony stricken.
>
> (R 550).

Thereafter, the trial court after hearing the arguments of counsel outside of the presence of the jury, sustained defense counsel's objection (R 550-552). Defense counsel then moved for a mistrial (R 553). The trial court denied the motion for mistrial but asked defense counsel, "do you wish me to make any type of comment to the jury to tell them that they are to disregard that?" (R 553). Defense counsel responded, "exactly" and the following curative instruction was given to the jury:

> Ladies and gentlemen, before I sent you out there was indication by the witness that he found some type of a gun or firearm in this car and after discussion with counsel there is no evidence that I can see that would make that item relevant to this case, so at this point I would like you to do the best you can to forget it. In fact, I'll instruct you to forget that there was a firearm in that particular vehicle. It has no bearing on this case at this point and just disregard it.
>
> (R 554).

Appellee maintains the witness' testimony was not of such a prejudicial nature that the trial court's instruction to the jury to "forget" the testimony would not have cured any prejudice. Appellant argues, now for the first time on appeal, that the trial court's curative instruction "did not go far enough" (AB 13). Appellee maintains however, and defense counsel apparently agreed, that the curative instruction given by the trial court was entirely appropriate and was clearly sufficient to dissipate any prejudicial effects of the witness' testimony. Jennings v. State, 453 So.2d

1109 (Fla. 1984); Rivers v. State, 226 So.2d 337 (Fla. 1969); Harvey v. State, 176 So. 439 (Fla. 1937); Morales v. State, 431 So.2d 648 (Fla. 3d DCA 1983); Stewart v. State, 221 So.2d 155 (Fla. 3d DCA 1969). The trial court's instruction was full and prompt, and sufficiently firm that the jury "forget that there was a firearm" (R 550). Williams v. State, 327 So.2d 798 (Fla. 3d DCA 1976). Clearly, this curative instruction eradicated from the minds of the jury not only the offending testimony itself, but the imputations and inferences which might be drawn therefrom. Stewart v. State, supra. It is assumed that juries will follow the trial court's instructions. McGee v. State, 304 So.2d 142 (Fla. 2d DCA 1974). This Court must give great weight to the fact that the trial court after a lengthy discussion with counsel, believed that he had succeeded in erasing any prejudice from the minds of the jury. Grant v. State, 171 So.2d 361 (Fla. 1965); James v. State, 334 So.2d 83 (Fla. 3d DCA 1976).

Appellee would further submit that even if the trial court's instruction did not go as "far" as Appellant would have liked it to go, any error in giving this instruction was harmless in light of the overwhelming evidence of Appellant's guilt as adduced at trial. Therefore, pursuant to §924.33 Fla.Stat.(1983), no error was committed by the trial court, and the court did not abuse it's discretion herein. State v. Woodson, 330 So.2d 152 (Fla. 4th DCA 1976). The trial court's ruling, in denying appellant's motion for mistrial, comes to this reviewing Court with a presumption of correctness. See DeConingh v. State, 433 So.2d 501 (Fla. 1983).

POINT III

THE TRIAL COURT CORRECTLY DENIED APPELLANT'S MOTION TO DISQUALIFY THE JURY PANEL.

Appellant complains that the trial court erred in denying his motion to disqualify the jury panel. Appellant essentially argues that he was denied a fair and impartial jury because the members of his jury viewed an audio/visual presentation which allegedly contained misstatements of the law. Appellee maintains however, that the trial court correctly denied Appellant's motion since there was nothing contained in the presentation which could have even remotely affected the jury and their ability to return a fair verdict.

In the instant case, the members of the jury were shown as part of their orientation process, an audio/visual presentation entitled "You, The Juror" (See Supplemental Record). This presentation is shown to all prospective jurors who may serve on a jury in Broward County, Florida. This presentation is designed to explain to the prospective jurors, their role in a courtroom.

The presentation opens with the narrator explaining the concept of trial by jury. The prospective jurors are then told by the narrator that jurors perform a vital, civic duty. The narrator then explains such things as voir dire, pre-emptory challenges and challenges for cause, opening statements, evidence, closing arugments, jury deliberations and rendering a verdict. The presentation ends with the Battle Hymm of the Republic being played.

Appellant first complains that the narrator's comment, ". . . persons who may have some knowledge of the facts pertaining

to either a civil or criminal case may be called upon by either of the attorneys to testify under oath as witnesses," constitutes a comment on silence. This argument is without merit for two reasons. First, in order for a comment to be considered a comment on silence, a defendant must first invoke the right to remain silent. Donovan v. State, 417 So.2d 674 (Fla. 1982). In the instant case Appellant himself took the witness stand and testified on his own behalf (R 934-978). Clearly, Appellant did not invoke his right to remain silent. True, the narrator's comment can in no way be considered a comment on silence. Second, the narrator's comment is a correct statement of the law; witnesses may be called to testify by either side contrary to Appellant's argument otherwise.

Appellant next complains that the criminal defendant portrayed in the presentation is a "seedy looking individual" with a "thin little mustache" and placed the Appellant in a negative light to prospective jurors. Appellant generously concedes that this argument is "probably subjective". He is right. The criminal defendant portrayed in the videotape has a neat haircut and well-trimmed mustache, and is wearing a coat and tie. Appellee maintains that this person cannot, under any stretch of the imagination, be considered "seedy". Appellee would also submit that it is highly improbable that the jury in Appellant's case would confuse the generic defendant portrayed in the presentation with the real-life defendant, John Marek.

Regarding Appellant's argument that the jury was "instructed" on the law by virtue of viewing the audio/visual presentation. Appellee would submit that a review of the audio/visusl presentation by this Court will reveal that Appellant's argument is

without merit. Any discussion during the presentation regarding what the law authorizes, pre-emptory challenges and challenges for cause, evidence and witness testimony was solely for the purpose of familiarizing prospective jurors with what they could expect to see in the courtroom. The narrator's discussion regarding these topics was both generalized and clearly benign.

Appellee would also point out that in view of the trial court's instruction to the jury that this case be decided only upon the testimony and evidence presented at trial (R 1255), anything contained in the audio/visual presentation would not and could not be considered by the jury when rendering their verdict. It is assumed that the jury followed the trial court's instructions. McGee v. State, supra. Thus, the trial court correctly denied Appellant's motion to disqualify the jury.

POINT IV

THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTIONS FOR JUDGMENT OF ACQUITTAL WHERE THERE WAS SUBSTANTIAL, COMPETENT EVIDENCE TO SUPPORT HIS CONVICTIONS.

Appellant alleges that the trial court erred in denying his motions for judgment of acquittal because the evidence presented at trial was insufficient to support the jury's verdicts. However, Appellee maintains that the record will disclose that this case was fully and fairly tried and that the verdicts arrived at by the jury were supported by the evidence.

Under Florida law, a motion for a directed verdict of acquittal should be denied unless there is no legally sufficient evidence on which to base a verdict of guilt. McGahee v. Massey, 667 F.2d 1357

(11th Cir. 1982). The accepted standard to be applied on review of denial of the motion is not whether the evidence fails to exclude every reasonable hypothesis but that of guilt, but rather when the jury might so reasonably conclude. Tsavaris v. State, 414 So.2d 1087 (Fla. 2d DCA 1982); Amato v. State, 246 So.2d 609 (Fla. 3d DCA 1974). The jury having so concluded, this Court will not reverse a judgment based upon a verdict returned by the jury where there is substantial, competent evidence to support the conviction. Heiney v. State, 447 So.2d 210 (Fla. 1984); Rose v. State, 425 So.2d 521 (Fla. 1982), cert. denied, ___U.S. ___, 103 S.Ct. 1883, 76 L.Ed.2d 812 (1983).

There existed in this case clear, substantial and competent evidence to support the jury's verdicts and Appellant's conviction for first degree murder, kidnapping, attempted burglary with an assault and two counts of battery. In the case sub judice, the facts given to the jury to consider were as follows:

Jean Trach testified that she and the victim, Adella Simmons were travelling south on the Floria turnpike when their car broke down at mile marker 83, just north of Jupiter (R 695). Trach testified that Simmons put the car's flashers on and pulled over to the side of the road at approximately 10:45 P.M. (R 701-702). Trach testified that when they pulled to the side of the road, a truck pulled off behind them (R 702). Trach testified that Appellant got out of the truck and came up to the car and asked if he could help (R 707). Trach told Appellant he could help by going to the nearest service station and getting either a tow truck or a state trooper (R 707-708). Appellant wasn't willing to do that because he had had a couple of beers, but offered to fix the car (R 708). Trach testified that Appellant and Wigley stayed with the women's car for for approxi-

mately forty-five (45) minutes (R 708). Trach testified that after Appellant tried to fix the car, he offered to take the women to Miami (R 709). The women declined (R 709). Trach testified that Appellant then offered to take one of the women to the nearest telephone on the turnpike to call for help (R 709). Appellant specifically stated that he would take only one of the women, not both (R 709). Trach testified that Appellant had been doing all of the talking and that Wigley had not said a word (R 709). Simmons suggested that Trach ride with Appellant to the nearest telephone because she thought that would be safer than being left alone in the car (R 710). Trach testified that Simmons was concerned for Trach's safety and didn't want to leave her alone in the car (R 710). Trach refused to go with the men (R 710). Simmons then decided to go for help with Appellant and Wigley since she and Trach "couldn't sit there all night" (R 711). Trach testified that she told Simmons not to go (R 711). At approximately 11:30 P.M., Simmons got in the truck and sat between Appellant and Wigley (R 723). This was the last time that Trach saw Adella Simmons (R 723).

Officer Dennis Satnick testified that he came into contact with Appellant on Dania beach at 3:30 A.M., June 17, 1983, as Appellant was walking away from the area of the lifeguard stand (R 660-663,676). The pickup truck which Appellant was driving was parked approximately one-hundred (100) yards from the lifeguard shack (R 676). Satnick testified that Appellant told him he was at the beach to meet with some college kids whom he went to college with (R 1026-1027). When Satnick asked Appellant what college he went to, Appellant did not answer (R 1027). Vincent Thompson, a City of Dania firefighter, who had been present when police spoke with Appellant and Wigley on Dania beach testified that shortly after Appellant and Wigley left the

beach, they returned to pick up some clothes (R 884-885).

Jerome Kasper discovered the victim's body in the observation deck of the lifeguard stand at approximately 7:15 A.M., June 17, 1983 (R 465, 472). He testified that the only way to enter the stand was through a door which he locked the night before, or through a window (R 461, 464). Kasper testified that when he arrived at work the morning of the 17th he noticed an overturned trash can had been placed at the entrance to the lifeguard stand (R 465). Kasper also noticed "drag marks" in the sand which were made by the trash can when it was dragged from its usual position thirty (30) yards down the beach, to the lifeguard stand (R 466). Kasper testified that it was possible to enter the observation deck through a window by just "jiggling" the window's shutters (R 463). Kasper also testified that there was an electric light inside of the observation deck and that when the shutters were closed, it was impossible to see into or out of the deck (R 477-480).

Appellant was picked up by police at approximately 11:00 P.M., June 17, 1983, on Daytona Shores beach (R 607-608). When Appellant was told by police that Wigley and the truck had already been taken into custody, Appellant responded that he did not know Wigley and had only been a hitchhiker who had been picked up (R 610). Inside the pickup truck, police found several pieces of jewelry which were identified at trial as belonging to the victim (R 564). Further testimony established that although both Appellant's and Wigley's fingerprints were found on the exterior point of entry to the observation deck (R 636-642), only Appellant's prints were found inside the observation deck (R 645).

Appellant's testimony was patently unbelievable. He testified that he was asleep in the truck during the ride to Dania beach

(R 947). He testified that he never saw the victim's body in the lifeguard stand and that he "felt" his way along the walls of the stand in order to find an exit (R 856, 954-956). Appellant testified that he knew he was "trespassing" when he entered the stand and that he and Wigley left their shirts on the beach to make it look like they were "messing around with the water or something" (R 957).

Appellant never heard any yelling or struggling while he was asleep in the cab of the truck on the way to the beach (R 973). Appellant denied strangling the victim or burning her pubic hair (R 976). Appellant also denied burning the victim's finger to see if she was dead (R 976). When Appellant was told "Congratulations, you made it to the big time. You're now charged with murder, kidnapping, rape and robbery", Appellant responded, "Oh, shit, the SOB told all" (R 1019).

Dr. Wright testified that the victim died from asphyxiation by ligature strangulation at approximately 3:00 to 3:30 A.M., June 17, 1983 (R 739, 753, 780). A red bandana had been tightly knotted around the victim's neck and her pubic hair and thumb had been burned (R 772, 779). The victim had also been severely beaten about the face and body and the tissue surrounding her kidneys was bruised and bleeding (R 771). These bruises were consistent with the victim being kicked with a great deal of force (R 771). Further, the victim's right breast had an abrasion consistent with a heel mark (R 767, 778).

Dr. Wright testified that it was his opinion that the victim was unclothed on the beach prior to being taken up to the observation deck due to the amount of sand impacted on her body (R 783). Injuries to the victim's back and breast occurred when she was unclothed due to the nature of the injuries. Injuries to the victim's hip and back were "exceptionally consistent" with her being dragged from the lower level of the lifeguard shack over the wooden siding to the upper level

of the shack (R 782, 815, 822). These injuries occurred while the victim was alive and it was therefore Dr. Wright's opinion that the victim was alive at the time she was taken up to the observation deck (R 815). Dr. Wright's examination of the victim revealed three spermatozoa present in the victim's cervix (R 775). Dr. Wright testified that these spermatozoa were intact, complete with tails (R 776). Dr. Wright testified that because the sperm had tails they were less than twenty-four (24) hours old since the tails ordinarily fall off after a twenty-four (24) hour period (R 776). Dr. Wright testified that it was highly unlikely that the sperm could be up to three (3) days old (R 809). Dr. Wright also testified that there is a wide variation in the number of sperm present in a normal ejaculation but many factors could affect that number rendering it significantly lower (R 798, 813). Dr. Wright testified that the lack of trauma to the victim's vagina was due to the fact that the victim was forty-seven (47) years old and that due to her age her viginal walls had thickened (R 774). He testified that because of this, it would be unusual to find any injury to the vagina even if there was forcible intercourse (R 774).

Appellee submits that the above evidence more than sufficiently supports Appellant's conviction for first degree murder, not only on a premeditation theory but also under the felony-murder theory. The evidence overwhelmingly establishes premeditation on the part of Appellant. The victim was last seen getting into the pick-up truck with Appellant and was found nude and strangled on a beach over an hours drive away. Appellant was confronted on the beach shortly after the murder and the victims jewelry was found inside the truck in which Appellant was traveling. These facts although circumstantial, clearly support premeditation on the part of Appellant. Heiney v. State, supra;

Adams v. State, infra; McKennon v. State, 403 So.2d 389 (Fla. 1981); Welty v. State, 402 So. 2d 1159 (Fla. 1981). Premeditation, is the fully formed conscious purpose to kill formed upon reflection and deliberation. Sireci v. State, 399 So.2d 964 (Fla. 1981). Appellee submits that the victim's strangulation death was the subject of reflection and deliberation and clearly establishes premeditation. Appellee would also submit that the evidence at trial clearly establishes Appellant's guilt on a felony-murder theory. The victim was last seen getting into the pick-up truck with Appellant after Appellant offered to take her to the nearest telephone to call for help. The testimony of Jean Trach shows that the victim was concerned for her and Trach's safety and only agreed to go along with Appellant after it became obvious that help in the from of a state trooper would not be forthcoming. Although it is true that the victim voluntarily got in the truck, it is absurd to think that she voluntarily submitted to being driven to Dania beach, over an hours drive away, where she was beaten tortured and strangled to death. It is clear that at some point the victim was not voluntarily in the truck with Appellant. These facts show unquestionably that the victim was kidnapped. Rose v. State, supra; Harkins v. State, 380 So.2d 524 (Fla. 5th DCA 1980); Miller v. 233 So.2d 448. Further, contrary to Appellant's assertions otherwise, the case of Jenkins v. State, 433 So.2d 603 (Fla. 1st DCA 1983) is not applicable to the instant case since the evidence adduced at trial established that the victim died hours after she got in the truck with Appellant; her death was certainly not immediate nor the kidnapping incidental to the murder. These facts without a doubt support Appellant's conviction for kidnapping and thus establishes clearly his guilt under the felony-murder theory. Appellants

conviction for first degree murder under the theory of felony-murder is also sustainable based on his conviction under Count III of the indictment, attempted burglary. §782.04 Fla.Stat. Evidence in support of this conviction is firmly established in the record. The victim's body was dragged up to the lifeguard shack and sustained numerous bruises, abrasions and contusions during the course thereof. Appellant himself testified that he knew he was "tresspassing" when he entered the shack and his fingerprints were found in numerous places inside. Clearly Appellant's purpose for entering the shack was to assault the victim, since her shorts and underwear were found inside next to her naked body. Likewise there can be no doubt that Appellant is guilty of battery. Medical testimony established that the victim was severely beaten, tortured and physically degraded prior to her death.

Appellee maintains that the trial court did not err in denying Appellant's motions for judgment of acquittal and that there was more than sufficient evidence to support the jury's verdicts. Appellee would further point out that in reviewing the claim of insufficiency of the evidence, an appellate court must be mindful of the principle that a judgment of conviction comes to the court with a presumption of correctness and that a defendant's claim of insufficiey of the evidence cannot prevail where there is substantial competent evidence to support the verdict and judgment. Spinkellink v. State, 313 So.2d 666, 671 (Fla. 1975). As a general rule, an appellate court should not retry a case or reweigh conflicting evidence submitted to a jury. Chaudoin v. State, 362 So.2d 398 (Fla. 2d DCA 1978); The concern on appeal must be whether, after all conflicts in the evidence and all reasonable inferences therefrom have been resolved in favor of the verdict on appeal, there is substantial, competent evidence to support the verdict and judgment. Rose v. State, supra. Legal sufficiency

alone, as opposed to evidentiary weight, is the appropriate concern of an appellate tribunal. Tibbs v. State, 397 So.2d 1120, 1123 (Fla. 1981).

Appellee maintains that in light of the foregoing facts and authority, the evidence adduced below was substantial competent evidence and, therefore, an affirmance of the judgment based upon the wholly proper guilty verdict ruturned by the jury is required. Welty v. State, supra; Rose v. State, supra. Appellant's conviction and sentence must be affirmed.

POINT V

THE TRIAL COURT DID NOT ERR IN ACCEPTING THE JURY'S RECOMMENDATION AND IMPOSING A SENTENCE OF DEATH. (Restated)

The primary standard for this Court's review of death sentences is that the recommended sentence of a jury should not be disturbed if all relevant data was considered, unless there appears strong reasons to believe that reasonable persons could not agree with the recommendation. Tedder v. State, 322 So.2d 908 (Fla. 1975). The standard is the same regardless of whether the jury recommends life or death. LeDuc v. State, 365 So.2d 149 (Fla. 1978).

In the instant case, the jury recommended by a vote of ten (10) to two (2) that Appellant be sentenced to death (R 1453). The trial court, after finding four (4) aggravating circumstances to be applicable, accepted the jury's recommendation and sentenced Appellant to death (R 1462). Appellant argues that the trial court erroneously imposed a sentence of death for several reasons. Appellee will address each of Appellant's contentions separately and show that each is without merit.

A. THE TRIAL COURT WAS CORRECT IN FINDING FOUR (4) AGGRAVATING CIRCUMSTANCES TO BE APPLICABLE IN SENTENCING APPELLANT.

Appellant claims that the trial court erred in finding four (4) aggravating circumstances to be applicable in sentencing Appellant to death. Appellant first complains that the trial court erred in finding as an aggravated circumstance that the Appellant had previously been convicted of a felony involving the use or threat of violence, that felony being the kidnapping of the victim, Adella Simmons. Appellant argues that the use of the kidnapping

conviction was improperly considered by the trial court under Meeks v. State, 339 So.2d 186 (Fla. 1976). Appellee maintains however, that Appellant's contemporaneous conviction for the kidnapping of the victim was properly considered by the trial court in sentencing Appellant. This Court has expressly held that a contemporaneous conviction arising from a separate act of violence committed against one victim may be considered during the penalty phase of a trial. Griffin v. State, No. 62,819 (Fla. May 2, 1985); Hardwick v. State, 461 So.2d 78 (Fla. 1984). Thus, the trial court properly considered Appellant's conviction for kidnapping as an aggravating circumstance in sentencing Appellant to death.

Appellant next argues that the trial court erred in finding that the murder was committed while Appellant "was engaged in the commission of attempted burglary with intent to commit a sexual battery" (R 1472). Appellee maintains however that because Appellant was convicted under Count III of the indictment which reads:

> RAYMOND DEWAYNE WIGLEY and JOHN RICHARD MAREK between 11 p.m. on June 16, 1983 and 4 a.m. on June 17, in the year of our Lord One Thousand Nine Hundred and Eighty-three, in the County of Broward, State of Florida, did unlawfully enter or remain in a structure located at 100 North Beach Road, property of the City of Dania, with intent to commit sexual battery, and in the course thereof did make an assault upon one ADELLA MARIE SIMMONS, against the form of the statute in such case pursuant to Section 810.02 and 777.011. (R 1358)

the trial court properly considered this aggravating circumstance in sentencing Appellant. Appellee maintains that there was overwhelming evidence to support this conviction, as is set forth in Appellee's Statement of the Facts at pages four (4) through

seven (7) and twelve (12) through fourteen (14) and in Appellee's argument contained in Point IV. Clearly, the trial court did not err in applying this aggravating circumstance in sentencing Appellant.

Appellant also argues that the trial court erred in finding that the murder of Adella Simmons was committed for pecuniary gain. Appellant essentially contends that there was insufficient evidence to support this finding. Appellee disagrees. The evidence adduced at trial clearly support the trial court's finding. Michael Rafferty of the Florida Department of Law Enforcement testified that while processing the pickup truck which Appellant and Wigley drove, he found a gold earring in the ashtray (R 565). Rafferty also found a gold watch, a gold necklace and another gold earring in the truck's storage console (R 566). Jean Trach positively identified these items of jewelry as belonging to the victim and worn the night of June 16, 1983 (R 718). Further, numerous witnesses at trial testified that Appellant was at various times either a driver or passenger in the pickup truck where the jewelry was found. Appellant by his own admission drove the pickup truck away from Dania beach the morning of June 17, 1983, after being confronted by police (R 960). Clearly, there can be no question that the jewelry found in the truck after the murder was identified as belonging to the victim and worn by the victim when she got into the truck with Appellant.

Appellant further argues that the trial court erred in finding that the murder of Adella Simmons was heinous, atrocious and cruel and that such a description is vague and ambigious and provided no guidance in the advisory phase as to precisely what

it meant (AB 22). Appellee maintains however, that the meaning of such a term is a matter of common knowledge and defined by this Court in State v. Dixon, 283 So.2d 1 (Fla. 1973), as follows:

> It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and, that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies - the conscienceless or pitiless crime which is unnecessarily torturous to the victim.
>
> At p. 9.

Appellee therefore maintains that this term was easily understood by the court and jury and was clearly applicable to the facts of the instant case.

In finding the murder of Adella Simmons to be heinous, atrocious and cruel, the trial court stated:

> The Court finds that the murder was especially heinous, atrocious or cruel. The victim was terrorized for at least three (3) hours prior to her death. The victim was abducted late at night by Marek and Wigley. During the ordeal, she was beaten severely, stripped naked and dragged into a deserted lifeguard tower during the early morning darkness. Her pubic hair was burned and she was choked and strangled to death. The physical and mental torture would have had to make her realize the great propensity that she was going to be killed. Watching her killer choke the life from her for at least thirty (30) seconds before she lost consciousness would only add to her terror. The victim's finger was burned in the tower. If it was done before her death it was to make sure that the death contemplated had been finalized or to further degrade her body. This aggravating circumstance was also proved beyond any reasonable doubt.
>
> (R 1472)

Appellee submits that beyond a shadow of doubt this aggravating factor is supported by the record.

Jean Trach testified that the last time she saw the victim was at approximately 11:30 P.M., June 16, 1983, when the victim got into the pickup truck with the Appellant (R 723). Officer Dennis Satnick testified that he came into contact with Appellant on Dania beach at 3:30 A.M., June 17, 1983, as Appellant was walking away from the area of the lifeguard stand (R 660-663, 676). The victim's body was found in the observation deck of the lifeguard stand at 7:15 A.M., June 17, 1983 (R 465, 472). The victim was nude and a red bandana was tightly knotted around her neck (R 472, 573, 758-759). The victim's pubic hair had been burned, the burns being consistent with those inflicted by matches or a lighter (R 500). The victim's right thumb had also been burned (R 779).

The victim suffered numerous facial as well as external and internal scalp injuries which were consistent with her being struck with a fist, hand or blunt instrument (R 759-762). The victim's arms and chest area also had many bruises and contusions, and her right breast had an abrasion consistent with a heel mark (R 767, 778). The victim had deep scrape marks and bruises on the center of her back (R 769). Also, the tissue surrounding the victim's kidneys was bruised and bleeding (R 771). This type of injury was consistent with the victim being kicked with a great deal of force (R 771).

A large amount of sand was impacted on the victim's upper back, lower back and buttocks (R 783). It was Dr. Wright's opinion that the victim was unclothed on the beach prior to being taken up to the observation deck, due to the amount of sand found on her body which was not present in any kind of quantity in the sack itself

(R 754, 783). He testified that the injuries to the victim's breast and back occurred when she was unclothed due to the nature and extent of the injuries (R 782-783). It was his opinion that the injuries to the victim's hip and back were "exceptionally consistent" with her being dragged from the lower level of the lifeguard shack over the wooden siding to the upper level of the shack (R 782, 815, 822). Dr. Wright further testified that the injuries to the victim's back, hip, chest, breast, arms, face and scalp all occurred while the victim was alive and had a beating heart since there was bleeding and bruising into the depths of those wounds (R 815). It was therefore Dr. Wright's opinion that the victim was alive at the time she was taken up to the observation deck of the lifeguard stand (R 815).

Dr. Wright also testified that the victim was sexually assaulted within twenty-four (24) hours preceding his autopsy which was performed at 11:00 A.M. June 17, 1983 (R 808-809). Dr. Wright's examination of the victim revealed spermatozoa present in the victim's cervix (R 775). Dr. Wright testified that because the sperm had tails they were less than twenty-four (24) hours old (R 776).

Dr. Wright testified that the victim died from asphyxiation by ligature strangulation (R 781). Dr. Wright testified that the death occurred at approximately 3:00 to 3:30 A.M., June 17, 1983 (R 739, 753). He testified that a red bandana had been tied tightly around the victim's neck and that the deep bruising on the neck itself was consistent with the victim being strangled (R 758-759). Dr. Wright testified that he found five (5) fingernail marks on the victim's neck which in his opinion either resulted from the strangulation itself or from the victim trying to get the bandana off her neck (R 757). Dr. Wright testified that in such a murder the victim's heart would stop beating within 10 to 15 minutes after the ligature was

applied to the neck (R 823). Dr. Wright testified that the victim was probably conscious for one (1) minute after the ligature was applied (R 823).

Clearly, these facts support the trial court's finding that the victim's murder was especially heinous, atrocious and cruel. The victim was severely beaten and her pubic hair burned before she was strangled to death. Murder by strangulation evinces a cold calculated design to kill and is a method of killing to which this Court has held the factor of heinousness applicable. Adams v. State, 412 So.2d 850 (Fla. 1982); Alvord v. State, 322 So.2d 533 (Fla. 1975). It cannot be seriously questioned that the victim, prior to losing consciousness, was subjected to agony over the prospect that death was soon to occur. Dr. Wright testified that the five (5) fingernail marks on the victim's neck could have resulted from the strangulation itself or from the victim trying to get the bandana off her neck (R 757). The victim's death was clearly torturous and heinous, atrocious and cruel. See Jenkins v. State, 444 So.2d 947 (Fla. 1984); Routly v. State, 440 So.2d 1257 (Fla. 1983); Smith v. State, 407 So.2d 894 (Fla. 1981).

B. THE FACT THAT APPELLANT'S CONVICTION WAS BASED LARGELY UPON CIRCUMSTANTIAL EVIDENCE SHOULD NOT BE CONSIDERED A MITIGATING FACTOR.

Appellant argues that because his conviction was based largely on circumstantial evidence the nature, and quality of that evidence should be considered as a mitigating factor. This Court has rejected Appellant's argument. Buford v. State, 403 So.2d 943 (Fla. 1981). Whimisical doubt is not a mitigating circumstance which must be considered by a trial court in sentencing a defendant. Even if a conviction based upon circumstantial evidence were a mitigating factor to be considered by the trial court, such mitigating factor

would not be applicable to the instant case where there was no reasonable doubt that Appellant murdered Adella Simmons and the evidence of which was clearly overwhelming.

C. THE TRIAL COURT DID NOT ERR IN INSTRUCTING THE JURY.

Appellant complains that the trial court erred by not instructing the jury during the sentencing phase of the proceedings that Wigley had been sentenced to life in prison. It must be pointed out however, that at the time the jury was instructed in the instant case, June 5, 1984, Raymond Wigley had not yet been sentenced to life in prison (SR).

The jury in the Wigley case had only advised the court that Wigley be sentenced to life at the time of Appellant's advisory phase (SR). Therefore, the trial court was correct in not instructing the jury in the instant case because Wigley's advisory sentence could have been overridden by the trial court and was not final at that point. Appellee would also point out that if Appellant's jury had been instructed that the jury in Wigley's case recommended life, they undoubtedly would have been confused since they could not be aware of the evidence, confession and mitigating circumstances present in that case.

The trial court correctly sentenced Appellant to death. There were no mitigating circumstances applicable to Appellant (R 1473-1474). Even if the trial court improperly considered one or more aggravating factors or committed any other error in sentencing Appellant, such is harmless in view of the fact there were no mitigating factors and there were present at least one or more aggravating

factors which are listed in the statute. Sireci v. State, 399 So.2d 964 (Fla. 1981); Elledge v. State, 346 So.2d 998 (Fla. 1977).

Appellee would also point out that a proportionality review of this case will reveal that the death penalty was appropriate herein. Appellee maintains that in similar heinous killings by strangulation, this Court has determined a sentence of death to be proper. Adams, supra; Alvord, supra; Peek v. State, 395 So.2d 492 (Fla. 1980); Lemon v. State, 456 So.2d 885 (Fla. 1984).

POINT VI

DEATH BY ELECTROCUTION DOES NOT CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT.

Appellant contends that §922.10 Fla. Stat. (1983), is unconstitutional in that death by electrocution constitutes cruel and unusual punishment. Appellant's argument is without merit. Death by electrocution does not constitute cruel and unusual punishment. See Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 67 S.Ct. 374, 91 L.Ed. 422 (1947); Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978), cert. denied 440 U.S. 976, 99 S.Ct. 1548, 59 L.Ed.2d 796 (1979); Booker v. State, 397 So.2d 910, cert. denied 102 S.Ct. 493, 454 U.S. 957, 70 L.Ed.2d 261.

CONCLUSION

Based on the foregoing argument, Appellee submits that no error was committed by the trial court and respectfully requests that the judgment and sentence of the trial court be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Answer Brief of Appellee has been furnished, by United States Mail, to BRUCE H. LITTLE, ESQUIRE, 625 N.E. Third Avenue, Fort Lauderdale, Florida 33304, this 6th day of May, 1985.

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Of Counsel