IN THE SUPREME COURT OF FLORIDA

ROBERT ALLEN TEFFETELLER,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 66,672

ON APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR VOLUSIA COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

JIM SMITH
ATTORNEY GENERAL

RICHARD B. MARTELL
ASSISTANT ATTORNEY GENERAL
125 N. Ridgewood Avenue
Fourth Floor
Daytona Beach, Florida 32014
(904) 252-2005

COUNSEL FOR APPELLEE

TOPICAL INDEX

AUTHORITIES CITED

AUTHORITIES CITED
(cont'd)

AUTHORITIES CITED
(cont'd)

AUTHORITIES CITED
(cont'd)

STATEMENT OF THE CASE AND FACTS

While agreeing generally with appellant's Statement of the Case and Facts, appellee suggests that the most comprehensive, and appropriate, statement of the facts in this case is found in this court's prior opinion of Teffeteller v. State, 439 So.2d 840 (Fla. 1983). The instant appeal represents one following a resentencing proceeding, as mandated by such opinion; in such proceeding, the state did not formally reintroduce all of the evidence presented at the first trial, although a good deal was presented for a second time, and some new testimony was presented by both the state and defense.

In addition to calling such witnesses as were necessary to familiarize the jury with the homicide for which appellant was being sentenced, and a witness from Tennessee concerning appellant's prior conviction and escape from custody therefrom, the state introduced into evidence physical exhibits pertaining to appellant's prior convictions of violence, to-wit: his 1980 conviction of aggravated assault and his murder conviction from Texas (R 352-5; 411-421; 435-7; 1120-1136; 1171). The state also called several eyewitnesses to the Texas murder, as well as a psychiatrist who had examined appellant (R 365-387; 388-406; 757-775; 776-7); the report of yet another doctor was also formally introduced (R 1204-6). The defense called its own expert witness, Dr. Krop, as well as a number of prison workers familiar with appellant's behavior while incarcerated (R 525-631; 637-644; 645-8; 647; 725-30). Appellant himself testified at the sentencing hearing.

SUMMARY OF ARGUMENT

Appellant raises seven issues in this appeal from the imposition of his new sentence of death, following affirmance of his conviction for first degree murder and remand for resentencing in Teffeteller v. State, supra. Several of these points are not adequately preserved for appellate review. Specifically, although appellant claims that it was reversible error to introduce into evidence the charging document relating to one of his prior convictions for violent crimes, he offered no objection to its admission. Similarly, although appellant now objects to certain comments by the prosecutor during closing argument, he interposed no objection at the time. Neither of these points raise fundamental error.

Appellant also raises two points relating to jury selection. He first claims that he was denied individual voir dire of the prospective jurors, although the judge made it plain that appellant had only to renew his request if such was truly desired. Appellant attacks the excusal of four jurors, unalterably opposed to the death penalty, on grounds which no court has found persuasive.

Appellant also challenges the admission into evidence of a photograph of the victim's body and the denial of his motion to disqualify the trial judge. The photograph was relevant, given the scope of evidence admissible in a capital sentencing proceeding, and appellant's challenge to the judge was six years too late, unaccompanied by the requisite affidavits and legally insufficient.

Appellant's final attack is upon the sentence itself. As he concedes, there were three valid aggravating circumstances. Judge Foxman was within his prerogative in finding no mitigating factors, and the instant sentence should be affirmed.

POINT I

DENIAL OF APPELLANT'S MOTION FOR DISQUALIFICATION OF JUDGE AND APPOINTMENT OF SPECIAL PROSECUTOR WAS NOT ERROR.

ARGUMENT

On December 28, 1984 appellant filed a motion, pursuant to Florida Rule of Criminal Procedure 3.230, stating that he felt that both the judge and prosecutor were prejudiced against him, in that on January 18, 1979, the Volusia County Bar Association, of which both were members, had offered an "award" for the apprehension and trial of the murderer of Peyton Moore, the victim in this case; this motion was signed by appellant, and accompanied by a certificate of good faith signed by appellant's counsel, as well as an affidavit from appellant, and documents from the Bar Association (R 1017-23). The motion was called up for a hearing on January 7, 1985, at which time appellant testified, claiming that he had learned of the existence of the reward "sometime in 1979 or early 1980" and that he had told his then-appointed attorney to investigate it, to no avail, the latter telling him that there was no such reward (R 888-9). At this point, certain prior testimony of appellant's was brought to his attention. Specifically, on October 13, 1980 appellant had testified at a hearing held on his motion for change of venue prior to his trial and conviction in this case, that he was well aware of the existence of the reward offered by the Bar Association and that it had been awarded to the victim's widow (R 891-5). Judge Foxman denied the motion, finding it to be untimely and legally

insufficient (R 895-6, 1053-4).

Appellant contends that this ruling is erroneous, because in Livingston v. State, 441 So.2d 1083 (Fla. 1983), this court allegedly not only held that disqualification motions are sufficient if premised upon a defendant's subjective fear of prejudice, but also because Livingston allegedly excuses such inconvenient procedural factors as untimeliness. Appellee respectfully disagrees, and contends that Livingston was not intended to be read so as to require that all motions for disqualification, however defective, be granted, as appellant apparently believes. Additionally, far from excusing all compliance with the rules of criminal procedure, Livingston reiterated the formal requirements for motions for disqualification, noting that in addition to being timely, such motions had to contain a verified statement of the specific facts which indicate bias or prejudice requiring disqualification; the court expressly noted that Rule 3.230 required two affidavits stating that the party making the motion for disqualification would not be able to receive a fair trial before the judge presently assigned.

In addition to being legally insufficient, the instant motion was untimely and lacked the requisite accompanying affidavits; Rule 3.230(c) requires that motions to disqualify be filed no less than ten days prior to the proceeding involved, unless good cause is shown. In previous capital cases, this court has not overlooked such deficiencies in affirming the orders of denial rendered in the circuit court. See Heiney v. State, 447 So.2d 210 (Fla. 1984); Jones v. State, 411 So.2d 165 (Fla. 1982). Appel-

lant's explanation that the six-year delay in making the motion is excusable, because in essence the proceeding below was a new trial, is unconvincing, and hardly compatable with the limited purpose of the remand sub judice. Additionally, the affidavits accompanying the instant motion were insufficient, in that one was from appellant himself and that no other persons allegedly believed that appellant could not receive a fair trial before Judge Foxman, on the basis of his membership in the Volusia Bar Association. The judge was correct in finding the motion untimely, and his order of denial should be affirmed on that basis. See also Adler v. State, 382 So.2d 1298 (Fla. 3d DCA 1980); Giuliano v. Wainwright, 416 So.2d 1180 (Fla. 4th DCA 1982), motion found untimely where defendant knew of grounds for motion eighteen months beforehand.

Further, the motion was legally insufficient. In his brief, appellant contends that this court's prior decision of Bundy v. Rudd, 366 So.2d 440 (Fla. 1978) precludes any consideration of the merits of the motion by the effected judge, and that Judge Foxman violated such rule in denying the instant motion. This is incorrect. Trial judges have always retained the ability to deny motions for disqualification which fail to show that the movant has a well-grounded fear of not receiving a fair trial at the hands of the presiding judge. It is not an adjudication on the merits to find a motion legally insufficient; Judge Foxman did not dispute the fact that a reward was offered for those assisting in the apprehension and trial of the murderer of Peyton Moore, nor did he deny that he was a member of the

Volusia Bar Association.

The instant ruling in accordance with such precedents of this court as Tafero v. State, 403 So.2d 355 (Fla. 1981), Suarez v. State, 95 Fla. 42, 115 So. 519 (1928) and State ex rel Brown v. Dewell, 131 Fla. 566, 179 So. 695 (1938). In Tafero, the defendant moved for disqualification of the judge because he was a former highway patrolman, and the victim in that case was, similarly, a trooper. This court found that Tafero had presented nothing to warrant the judge's disqualification, and appellee finds appellant's fears in this case equally groundless. Similarly, in Dewell, this court recognized that disqualification motions could be denied where "frivolous or fanciful", and appellee again suggests that such is the result sub judice. The fact that local attorneys paid over a sum of money to the widow of the victim in this case says nothing as to the ability of the present judge to preside impartially over appellant's trial. This was not an instance in which there was any personal animosity alleged between the judge and appellant or the judge and appellant's counsel, compare Livingston, and appellant has failed to demonstrate reversible error as to this point.

POINT II

NO FUNDAMENTAL ERROR OCCURRED IN REFERENCE TO THE ADMISSION INTO EVIDENCE OF THE CHARGING DOCUMENT PERTAINING TO ONE OF APPELLANT'S PRIOR CONVICTIONS FOR CRIMES OF VIOLENCE

Prior to trial, appellant moved in limine to exclude from evidence the fact that he had previously been charged with the offense of sexual battery, in violation of section 794.011(3) Florida Statutes (1977); appellant had been brought to trial on this charge and convicted of the lesser offense of aggravated assault, one of the two prior convictions utilized by the state in establishing the existence of that aggravating factor of prior convictions for crimes of violence, pursuant to section 921.141(5)(b) Florida Statutes (1977)(R 12-15). The state drew the court's attention to this court's decision of Morgan v. State, 415 So.2d 6 (Fla. 1982), and the motion was denied (R 14-15). Subsequently in the proceeding, the information was introduced into evidence without objection (R 360-1). Additionally, a full transcript of appellant's trial in that case was admitted, and appellant discussed the incident during his testimony (R 1171; 749-50).

Appellant has failed to demonstrate any error. Morgan clearly held that a charging document, which gave rise to a prior conviction for a violent crime, was admissible, even if the conviction was for a crime of a lesser degree than that charged. This court noted that such was relevant not only to fully apprise the jury of the background of the defendant's prior conviction,

but that such was also relevant to rebut any allegation that the defendant lacked a history of criminal activity. Morgan is in accord with such recent precedents of this court as Perri v. State, 441 So.2d 606 (Fla. 1983), wherein this court noted that the details of a prior felony involving the use or threat of violence is properly admitted in capital sentencing proceedings. Inasmuch as the jury was presented with a full transcript of the trial as evidence, there is no reason to believe that they would give undue attention to the charge itself, as opposed to the conviction, and appellant had every opportunity to put the evidence in context. Morgan controls sub judice, and the instant sentence should be affirmed.

Finally, it is questionable whether any claim of error has been preserved sub judice, in that appellant indicated a lack of objection to the admission of the information at issue. Courts have held that one who loses a pre-trial motion in limine must still contemporaneously object at the time the contested evidence is admitted at trial in order to preserve any claim of error. See Crespo v. State, 379 So.2d 191 (Fla. 4th DCA 1980); German v. State, 379 So.2d 1013 (Fla. 4th DCA 1980). Such approach seems comparable with that regarding preservation of error adopted by this court in Parker v. State, 456 So.2d 436 (Fla. 1984), and the instant sentence should be affirmed.

POINT III

NO FUNDAMENTAL ERROR OCCURRED DURING THE PROSECUTOR'S CLOSING ARGUMENT

Prior the the sentencing proceeding, appellant moved for individual voir dire, on the grounds that it would be prejudicial for the venire as a whole to learn of appellant's prior death sentence; the parties anticipated that a good percentage of the panel would already know the history of the case (R 18-20). Appellant stated that at the time he did not feel that a juror's knowledge of the prior sentence would be grounds for challenge for cause, but still wished to prevent undue spreading of the word (R 19-21). Judge Foxman stated that he would begin the voir dire collectively and that appellant's motion could be renewed at any time, if circumstances warranted it (R 21-2).

After such pronouncement, the parties continued to discuss what role, if any, the prior sentence should play in the instant proceeding (R 23). Judge Foxman stated that he probably would not declare a mistrial if it came out that there had been a prior recommendation and imposition of the death penalty in the case, but that the matter should not become a feature of the proceeding (R 23). Both counsel indicated agreement with this ruling (R 23). During the trial, by appellee's count, the existence of the prior death sentence was disclosed twice. During redirect examination, concerning his activities in prison, appellant stated that he had been harrassed by one particular jailor, who would taunt him with such remarks as,

"You still alive? Aren't you dead yet?", and "Why don't you go ahead and hang yourself up? Graham's going to make hamburger out of you in that electric chair." (R 751). Additionally, Dr. Barnard, in describing his interview with appellant, stated that appellant had told him that he [Teffeteller] had had a jury trial, "was found guilty, received the death penalty," was sentenced and sent to the Florida State Prison, and that subsequently his case was heard on appeal and remanded back for a resentencing (R 761)(emphasis supplied). No objection was interposed to either of these statements (R 755, 761).

During the state's closing argument, the following took place:

> Another concern and caution that needs to be pointed out to you is this: You have been made aware, initially, through the testimony of Dr. Krop, I believe, and then subsequently through items or documents that have been introduced into evidence that, in fact, that defendant after the first trial received the death penalty and ended up on death row.
>
> You have also been made aware of the fact in the initial instructions, as well as during the voir dire examination that because of certain technical legal reasons there was the determination made that, in fact, a new sentencing hearing had to be held. Thus the reason for you being impaneled.
>
> It is very important for this defendant, for you, personally, knowing that you want to solemnly follow your oath under the law, it is very important for you to realize that you must not in any way let the fact that there was formerly imposed a death penalty influence you in returning a advisory recommendation of the death penalty in this case, because that would be improper. You should not speculate on the reasons why the former death penalty was imposed. And you should not consider that fact as evidence for the purposes of making your decision as to whether or not the aggravating or mitigating circumstances exist in this case.

> On the other hand and by the same token it would be improper for you to assume by virtue of the fact that a new sentencing hearing has been ordered, it would be improper for you to assume that, in fact, the death penalty is inappropriate by virtue of the fact that there had been a sending back of the case for a new sentencing hearing.
>
> So, in other words, you should not speculate, you should not consider at all the developments in that regard that led to this new sentencing hearing. And you must not speculate, you must not discuss it, and in the final analysis not consider it. You have been instructed and you will be instructed, again, that you must consider the evidence that you heard in the courtroom during this sentencing hearing, and it alone, as that evidence relates to aggravating and mitigating circumstances in determining whether or not your advisory recommendation should be death or should be life without a recommendation of parole for twenty-five years.

(R 805-7). No objection was interposed to any portion of the state's argument.

Appellant argues on appeal that the court below allowed the prosecutor to emphasize the fact that the first jury had recommended death, despite the fact that at no time "was it elicited that appellant had been on death row." (Brief of Appellant at 19). There are a number of things wrong with appellant's argument. First of all, as noted above, the fact that appellant had been previously sentenced to death was a fact known to the jury through testimony. Secondly, appellant's contentions notwithstanding, there is nothing in the record indicating that the fact that the original sentence followed a jury recommendation of death, as opposed to an override by the judge, was made known to this jury; the prosecutor scrupulously referred to the fact of the death sentence alone, and not its origin. Third, it should be apparent that the prosecutor did

not violate the spirit of the court's ruling, in that, far from emphasizing the matter, he strenuously, and properly, urged the jury not to consider it in their deliberations at all; appellant acquiesced in the ruling below, to the effect that mere mention of the sentence would not be grounds for a mistrial, and his sudden change of position on appeal has yet to be explained. Further, it is hard to fault the trial judge for "allowing" the prosecutor to do or not do anything in this matter, in that appellant made no objection below and never presented this matter to the trial court for adjudication.

This court has continually held that failure to object to a prosecutor's closing argument waives any attack upon such argument in the absence of fundamental error, as far as appellate preservation is concerned. See Parker v. State, supra; Johnson v. State, 442 So.2d 185 (Fla. 1983); Wilson v. State, 436 So.2d 908 (Fla. 1983); State v. Cumbie, 380 So.2d 1031 (Fla. 1980); Clark v. State, 363 So.2d 331 (Fla. 1978). In Rose v. State, 461 So.2d 84 (Fla. 1984), this court recently expressly declined to find a "death sentence exception" to the preservation requirement. See also Burr v. State, 466 So.2d 1051 (Fla. 1985). Appellant has simply failed to demonstrate that the above constituted fundamental error and as such, this court must regard this argument as waived. Compare Davis v. State, 461 So.2d 67 (Fla. 1984).

Indeed, appellant has come forward with no precedent for the proposition that knowledge of a defendant's prior sentence would irreparably taint his subsequent sentencing jury;

he has similarly failed to demonstrate that had such point been preserved, it would be one upon which relief would be granted. Even were there any precedent in this area, it is doubtful that such cases would be applicable in an instance such as this sub judice, where the defense, apparently, "let the cat out of the bag" first, and where the prosecutor affirmatively urged the jury to disregard the matter. This point has not been preserved for review, and appellant has failed to demonstrate reversible error. The jury in this cause had more than adequate evidence upon which to base their recommendation of death, and the instant sentence should be affirmed.

POINT IV

EXCUSAL OF FOUR PROSPECTIVE JURORS FOR CAUSE, WHO WERE UNALTERABLY OPPOSED TO THE DEATH PENALTY, WAS NOT ERROR

During the voir dire in this case, four prospective jurors, who stated that they were unalterably opposed to the death penalty, and would be unable to follow the judge's instruction to consider all sentencing alternatives, were excused for cause (R 53, 72, 98. 103). On appeal, appellant contends that this excusal violated the terms of Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), despite the fact that each juror stated that he or she could not vote for the death penalty under any circumstance. This point is patently without merit. See also Wainwright v. Witt, ___U.S.___, 105 S.Ct. 844 (1985); Brumbley v. State, 453 So.2d 381 (Fla. 1984); Herring v. State, 446 So.2d 1049 (Fla. 1984); Johnson v. State, 438 So.2d 774 (Fla. 1983). Additionally, the extent to which appellant specifically objected to the exclusion of any juror on the grounds of failure to comply with Witherspoon is extremely doubtful, and appellee contends that much of this argument is not properly before this court. Compare White v. State, 446 So.2d 1031 (Fla. 1984).

Appellant did, however, have a standing objection to the excusal of any juror unalterably opposed to the death penalty, on the basis that such violated his right to be tried by a fair cross-section of the community. This court has previously rejected such argument. See Caruthers v. State, 465 So.2d 496

(Fla. 1984); Copeland v. State, 457 So.2d 1012 (Fla. 1984). Further, the raising of this argument in this particular case is inappropriate, in at least two respects.

The instant proceeding was a re-sentencing; there was no trial. Appellant wishes to have on the panel jurors who could only vote his way, inasmuch as none would even consider the death penalty, and sentencing was the only issue before them; such jurors could spend their time outside the courtroom and mail in their verdicts, for all the attention that they would pay the proceedings or instructions. Appellee knows of no reason why the constitution would dictate that such bizarre scenario exists, and further maintains that even appellant is unwilling to carry his own argument to its logical, or illogical, extreme. Judge Foxman excused for cause two prospective jurors who stated that they could not consider life imprisonment as a potential verdict, in that all those convicted of first degree murder should receive the death penalty automatically (R 84-91; 108-111). If appellant truly wished a jury representing all facets of the community, he would be raising as a point on appeal the exclusion of these prospective jurors, as well as the other four. The instant sentence should be affirmed.

POINT V

INTRODUCTION INTO EVIDENCE OF STATE'S EXHIBIT #6 WAS NOT ERROR

Prior to the formal taking of testimony, the prosecutor brought forth much of the physical evidence which he intended to introduce. Specifically, the assistant state attorney proffered two photographs of the victim's body, which had apparently been admitted into evidence at appellant's trial, in order to prove, from the wounds, that force or violence had been used by appellant (R 421-2). The prosecutor's contention was that such evidence was admissible to prove that the instant homicide had been committed during a robbery or attempted robbery, so as to establish the existence of that aggravating factor set out in section 921.141(5)(d) Florida Statutes (1977)(R 422). Appellant objected on the basis that the photographs, only one of which was to be admitted, were unduly prejudicial and inflammatory. Finding that it was necessary for the state to familiarize the jury with all of the circumstances of the instant homicide, Judge Foxman allowed one photograph to be admitted (R 424-5). Following the photograph's admission, the judge reiterated the basis for his ruling on the record (R 434-5; 425-6).

Appellant argues that admission of the photograph is an error of such magnitude to mandate a new sentencing hearing. It is, perhaps, not inappropriate to quote from this court's recent decision of Henderson v. State, 463 So.2d 196, 200 (Fla. 1985), wherein an issue was raised pertaining to allegedly inflammatory photographs of murder victims; this court noted that

not only should it not be presumed that jurors are misled by gruesome photographs, but that "[T]hose whose work products are murdered human beings should expect to be confronted by photographs of their accomplishments." Appellant has failed to demonstrate that the admission of the instant photograph constitutes reversible error.

Inasmuch as the photograph was admitted at appellant's trial, and appellant never raised such issue as a point on appeal in reference to his conviction, appellee questions the propriety of the instant claim of error. Compare Riley v. State, 413 So.2d 1173 (Fla. 1982). Further, appellee can see no reason why this sentencing jury should be denied a piece of evidence which their predecessors at the original sentencing, and trial, had for their use. It must be recognized that section 921.141(1) Florida Statutes (1977) provides that in a capital sentencing proceeding, evidence may be presented as to any matter which the court deems relevant to the nature of the crime and that any evidence which the court deems probative may be received, regardless of its admissibility under the exclusionary rules of evidence. See also State v. Dixon, 283 So.2d 1 (Fla. 1973); Alvord v. State, 322 So.2d 533 (Fla. 1975); Elledge v. State, 346 So.2d 998 (Fla. 1977).

The photograph sub judice was relevant. It hardly seems provocative to let a sentencing jury see a photograph of the murder victim, when such jury has been assembled to impose sanction upon the perpetrator of such crime. Because this jury had not sat through appellant's entire trial, and heard all of

the evidence, the prosecutor was justified in presenting evidence concerning the crime itself; the picture was, perhaps, "living" proof of Teffeteller's criminal actions of January 14, 1979, and their consequences. Such evidence, as previously argued, was relevant as to whether or not a robbery had occurred, and was further clearly admissible pursuant to section 921.141(1). The instant sentence should be affirmed.

POINT VI

DENIAL OF APPELLANT'S REQUEST FOR INDIVIDUALIZED VOIR DIRE, ASSUMING THAT SUCH RULING WAS IN FACT EVER MADE, WAS NOT ERROR

As noted in Point III, infra, appellant moved for individual voir dire of the prospective jurors, immediately prior to voir dire itself, on the basis that he did not wish the entire panel contaminated, if several persons knew of the existence of the prior death sentence (R 18-21). Judge Foxman, well aware of the need for a fair trial and full and comprehensive voir dire, stated that he would begin collective voir dire, but that either the state or defense could renew the motion for individualized voir dire, should the need arise; the judge clearly stated that individual voir dire would be conducted if the parties "ran into any problems with the history of th[e] case." (R 22). The judge's final words on this subject were, "So, either one of you feel free to ask me to move it and go individually." (R 22).

Appellant never asked, which is not surprising, given the relative ease with which the jury was selected and the fact that foreknowledge of the prior sentence was apparently not a problem. Appellant now chooses to argue on appeal, however, that his motion should have been granted because one of the jurors was allegedly untruthful in his answers during voir dire as to whether or not he considered life inprisonment a waste of taxpayers' money (Brief of Appellant at 21). Inasmuch as this was not the basis of appellant's motion below, and inasmuch as appellant never renewed his request at any point during the voir

dire, appellee contends that appellant has failed to preserve any claim of error in this regard. See Steinhorst v. State, 412 So.2d 332 (Fla. 1982); Rivers v. State, 458 So.2d 762 (Fla. 1984), point on appeal concerning inability to backstrike jurors waived where appellant never attempted such; Richardson v. State, 437 So.2d 1091 (Fla. 1983), point on appeal concerning admission of testimony waived where counsel did not pursue motion to strike.

Even should this argument be regarded as preserved, appellant has failed to demonstrate that a new sentencing hearing is required. This court has held in previous capital cases that the granting of individual and sequestered voir dire is within the trial court's discretion. See Stone v. State, 378 So.2d 765 (Fla. 1979); Davis, supra. Further, an interesting precedent for comparison is Moody v. State, 418 So.2d 989 (Fla. 1982), in light of appellant's reliance upon Rule of Criminal Procedure 3.300, for the proposition that his consent was needed for any collective voir dire by the court. In Moody, this court not only found a lack of prejudice to the defendant through such practice, but also noted that, effective January 1, 1981, Florida Rule of Criminal Procedure 3.300(b), had been amended so as to remove the requirement that the parties consent prior to collective voir dire by the court. See Moody at n. 2. Inasmuch as the instant sentencing proceeding took place four years after such amendment, appellant's arguments in this vein are without merit. Cf. Dobbert v. Florida, 432 U.S. 296, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977); Kocsis v. State, 467 So.2d 384 (Fla. 5th DCA 1985).

Lastly, appellant's "evidence" of the need for such individualized questioning is unconvincing in the extreme, and his reliance upon Loftin v. Wilson, 675 So.2d 185 (Fla. 1953), misplaced. Following the sentencing proceeding in this case, the former foreman of the jury, one of the disgruntled pair of jurors who had voted for life imprisonment, wrote to appellant's counsel, contending that various improprieties had occurred during deliberation (R 1090). Pursuant to appellant's motion, and out of an abundance of caution, the jurors in this case were subsequently interviewed (R 1080-90; 899-908; 912-965). At such proceeding of February 27, 1985, it became clear that the allegations contained any former juror's letter were completely unfounded. Nevertheless, one former juror, Thomas Rudderow, stated that during the deliberations, and indeed while he was arguing with the author of the letter, he had stated that he did not feel that the taxpayers of Volusia County should have to pay for appellant's incarceration for the rest of his life, in that Teffeteller, based upon what he had done, did not deserve it (R 950-1).

Appellant's counsel then questioned Mr. Rudderow as to his answers during the preliminary voir dire. Counsel stated that he had asked the panel whether they felt that it would be a waste of taxpayer's money to keep someone in prison, instead of giving him the death penalty; Mr. Rudderow stated that he did not recall such question, but that he would not have agreed with the statement, in that his opinion in this case was not a general one, but was simply based upon his view of appellant (R 951-2).

The juror stated that if he had found the existence of any mitigating circumstance, he would not have hestitated to vote for life imprisonment (R 952). At the conclusion of the hearing, Judge Foxman found no evidence of any impropriety, and appellant filed no subsequent motion for a new sentencing hearing (R 964).

It is a well-established principal of law that jurors cannot subsequently impeach their own verdicts, especially as to matters which inhere in such verdicts themselves. See Linsley v. State, 88 Fla. 135, 101 So. 273 (1924); Russ v. State, 95 So.2d 594 (Fla. 1957); Parker v. State, 336 So.2d 426 (Fla. 1st DCA 1976). There was no impropriety sub judice or untruthfulness in voir dire. Judge Foxman gave appellant every opportunity to adequately interrogate the jurors both prior to their selection and subsequent to the proceeding. Compare Sims v. State, 444 So.2d 922 (Fla. 1983). Appellant has failed to demonstrate reversible error, cognizable on appeal, in reference to any argument contained in this point, and the instant sentence should be affirmed.

POINT VII

THE INSTANT SENTENCE OF DEATH IS APPROPRIATE, IN THAT IT IS SUPPORTED BY THREE VALID AGGRAVATING CIRCUMSTANCES, AND IN THAT IT WAS NOT ERROR FOR THE JUDGE TO FIND NO FACTORS IN MITIGATION

In his brief, appellant concedes that Judge Foxman properly found three aggravating circumstances in this case: that the instant homicide had been committed while appellant was under a sentence of imprisonment, pursuant to section 921.141(5)(a) Florida Statutes (1977); that the instant homicide was committed by one previously convicted of felonies involving the use or threat of violence, pursuant to section 921.141(5)(b) Florida Statutes (1977) and that the instant homicide was committed during an attempted robbery, pursuant to section 921.141(5)(d) Florida Statutes (1977)(R 1064-5). Appellant contends, however, that the judge should have found that he was under the influence of extreme mental or emotional disturbance at the time of the homicide, pursuant to section 921.141(6)(b) Florida Statutes (1977), and that he was acting under duress or the substantial domination of another person, pursuant to section 921.141(6)(e) Florida Statutes (1977). This argument is without merit.

The sentencing order in this case clearly indicates that the judge considered all evidence offered in mitigation, and found such to be insufficient. Judge Foxman specifically noted that he had considered the testimony concerning appellant's drug and alcohol use, but further observed that there was no proof that at the time of the offense appellant had been either under

the influence or incapacitated due to prior usage (R 1064-6). This court has repeatedly held that the finding or not finding of a specific mitigating circumstance is within the domain of the trial court, and that reversal is not warranted simply because an appellant may draw a different conclusion. See Stano v. State, 460 So.2d 890 (Fla. 1984); Smith v. State, 407 So.2d 894 (Fla. 1981).

Judge Foxman heard all of the evidence which appellant wished to present in mitigation, and accorded it the weight which he felt it merited. His conclusions are supported by the record, and the instant sentence should be affirmed. Compare Daughtery v. State, 419 So.2d 1067 (Fla. 1982); Riley v. State, supra; Lusk v. State, 446 So.2d 1038 (Fla. 1984). It is not surprising that the judge found no mitigating circumstances, given the fact that the "most" which appellant's own psychiatric witness could state was that he had no opinion as to the existence of any mitigating factor (R 566-7). Further, appellant himself undercut his own defense by asserting that he was not guilty of the murder, while simultaneously suggesting that his free will had been overcome by drugs, alcohol or the coercive nature of his partner in crime, George Overton, whom he subsequently murdered in Texas (R 733, 721). In any event, it is not without precedent for a sentencing judge in a capital sentencing proceeding to reject a defendant's self-serving declaration as to either intoxication, incapacity or subordination of will. Compare Simmons v. State, 419 So.2d 316 (Fla. 1982); White, supra; Ruffin v. State, 397 So.2d 277 (Fla. 1981). Given the existence of three valid aggra-

vating circumstances in this case, the presence of no valid mitigating, death is the appropriate sentence. Cf. Blanco v. State, 452 So.2d 520 (Fla. 1984); White, supra. The instant sentence of death should be affirmed.

CONCLUSION

WHEREFORE, for the aforementioned reasons, and based on the aforestated authorities, the instant sentence of death should be affirmed.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL

RICHARD B. MARTELL
ASSISTANT ATTORNEY GENERAL
125 N. Ridgewood Avenue, 4th Floor
Daytona Beach, Florida 32014
(904) 252-2005

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been furnished by mail to Carmen Corrente, Esquire, 309 Oakridge Blvd., Suite B, Daytona Beach, Florida 32018, this 17 day of June, 1985.

Of Counsel
Richard B. Martell