52 pages

IN THE SUPREME COURT OF FLORIDA

BILLY RAY NIBERT,

Appellant,

v. CASE NO. 67,072

STATE OF FLORIDA,

Appellee.

BRIEF OF APPELLEE

JIM SMITH
ATTORNEY GENERAL

THEDA R. JAMES
Assistant Attorney General
1313 Tampa Street, Suite 804
Park Trammell Building
Tampa, Florida 33602
(813) 272-2670

OF COUNSEL FOR APPELLEE

/tms

TABLE OF CONTENTS

TABLE OF CITATIONS

OTHER AUTHORITIES CITED

STATEMENT OF THE CASE AND FACTS

Appellee accepts appellant's statement of the case and facts as a substantially accurate account of the proceedings below, with such exceptions and additions as noted herein.

A. Pretrial Motions.

After thorough inquiry and admonition from the trial judge, appellant decided to let Public Defender Meyers continue to represent him. (R 773) Meyers then indicated that appellant had not been cooperating with him in preparing for the sentencing phase of the trial, and requested a continuance. (R 774, 775) The court denied the motion because counsel failed to set forth specific reasons why he would not be prepared to go forward at the time of trial. The court said:

> THE COURT: I'm not going to continue it short of you showing me a specific reason why it should be, such as, his mother is in the hospital or something like that, or some other important witness cannot be made available. Short of a demonstrable reason, I'm not going to be inclined to continue it. Like I said, if somebody that you need to have here can't be here because they're sick or out of the country or something, then I'll continue it, but you're going to have to give me a demonstrative reason.

(R 775 - 776)

Four days later, on April 8, 1985, appellant's trial commenced. Appellant did not request a continuance at that time. (R 103)

B. Trial-Jury Selection and Voir Dire.

During voir dire examination, a prosepctive juror, Stalvey, testified that she would "automatically" vote for the death

penalty if the defendant was found guilty. Relevant excerpts of her testimony are set forth below:

> MR. MEYERS (defense counsel): Okay. Do you think that if there is a finding of guilt that the death penalty should automatically be imposed?
>
> JUROR STALVEY: Yes, sir.
>
> MR. MEYERS: So in every case of firstdegree murder, then the death penalty should be imposed if the person has been found guilty; is that correct?
>
> JUROR STALVEY: Yes, sir.
>
> MR. MEYERS: So it should be an automatic thing?
>
> JUROR STALVEY: Yes, sir.
>
> MR. MEYERS: Okay. If a person is found guilty of first-degree murder, there should be an automatic death penalty?
>
> JUROR STALVEY: (Juror nodding head up and down.)
> MR. MEYERS: There shouldn't be any consid-erations about any other facts other than--
>
> JUROR STALVEY: No, if the facts are there.
>
> MR. MEYERS: Well, assuming the person has already been found guilty of first-degree murder.
>
> JUROR STALVEY: Oh -- well, yes, sir.
>
> MR. MEYERS: So in other words, it should be automatic death penalty if someone is found guilty of first-degree murder.
>
> JUROR STALVEY: Yes, sir.
>
> MR. MEYERS: So in this case if -- I'm making capital "I's" and capital "F's" -- if Mr. Nibert is found guilty of first-degree

murder --

JUROR STALVEY: Yes, sir.

MR. MEYERS: You would automatically vote for the death penalty.

JUROR STALVEY: Yes, sir.

(R 191 - 192)

Defense counsel challenged the juror for cause and the court addressed the prospective juror as follows:

THE COURT: Ma'am, if there was a finding of guilt - next to you -- at this point, you would automatically vote for the death penalty?

JUROR STALVEY: Not automatically, but --

THE COURT: Do you think there are some situations in which you would vote against the death penalty.

JUROR STALVEY: Yes.

(R 206)

Thereafter, the trial judge denied the challenge for cause and appellant expended a peremptory challenge on Stalvey. Appellant did not, thereafter, exhaust his peremptory challenges. (R 315)

Also, during voir dire, prospective jurors Graces, Davis, Fortson and Rask each stated that if the defendant were found guilty they would not vote in favor of the death penalty regardless of the evidence presented during the penalty phase of the trial. The relevant portion of the transcript is set forth below:

(The Court then addressed the prospective jurors as follows:)

THE COURT: Ma'am, at this point, you've decided in your mind if the defendant was found guilty, that you would vote against the death penalty regardless of the -- what you heard or didn't hear during the second part of the trial?

JUROR GARCES: Yes, I said that.

THE COURT: Okay. And you would automatically, ma'am -- no, Number 2 here. You're against the death penalty regardless?

JUROR DAVIS: Yes.

THE COURT: And, sir, you stated you're against the death penalty, and you know at this point you'd vote against it; is that correct? Is that correct?

JUROR PORTSON: Yes, Judge.

THE COURT: Okay. Is that true of you also, ma'am?

JUROR RASK: Yes, it is.

THE COURT: Okay.

(The bench conference continued as follows.)

THE COURT: That's 1, 2, 4, and 7. Okay.

What says the defense?

MR. MEYERS: I would like to for cause, Number 8.

After the jury was selected and sworn, the defense objected to the impaneling of the jury. (R 371)

In addressing the jurors on voire dire, the prosecutor explained the difference between premeditated murder and felony murder:

Now, the defendant has been charged with the crime of first-degree murder. In the classic case of first-degree murder, the key element is one of premeditation. A planned killing.

The defendant wanted the victim dead, planned the victim's death, carried it out. That is the key element of first-degree murder, premeditation. I believe everybody has heard of first-degree murder and premeditation as it works in the first-degree murder charge.

There is also another aspect of first degree murder in Florida, and that is what is known as the first-degree felony murder, law which Florida recognizes.

When you get into the first-degree felony murder, you are not concerned with premeditation. In essence what that law states is that if somebody is committing robbery or a rape or a burglary, and during the course of that robbery, rape, or burg-lary the victim is killed, even though the defendant had no intent or premeditated design to kill that person, he can still be found guilty of first-degree murder.

What the law says is that if you're committing one of these felonies and somebody dies during the course of these enumerated felonies such as burglary, robbery, rape, kidnapping, et cetera, somebody dies, and you can be found guilty of first-degree murder even though there is no premeditation involved.

In essence what the first-degree felony murder rule does is it allows the State, in proving a first-degree murder case, to substitute the commission of the felony for the element of premeditation.

Miss Wyatt, do you understand that, ma'am?

(R 150 - 151)

See also, R 237, 360.

The state and the defense were each given ten peremptory challenges. (R 205, 206, 256, 283, 306, 315) After defense counsel exercised his ninth challenge, he requested "a few extra" challenges and the motion was denied. (R 324) Appellant did not, thereafter, exhaust all of his peremptory challenges. (R 315)

After the jury was sworn, the trial judge instructed them as follows:

> It is your solemn responsibility to determine the guilt or innocence of the defendant and your verdict must be based solely on the evidence as it is presented to you in this trial and the law upon which the Court will instruct you at the close of the trial.
>
> (R 368)
>
> . . . You are concerned with the law only as the Court will instruct you on the law at the close of the trial.
>
> (R 369)
>
> Following the arguments of the attorneys, the Court will instruct you on the law applicable to the case.
>
> (R 370)

C. Trial -- Guilt Phase.

During a conference on jury instructions, the court denied the state's request for a charge on felony-murder. (R 546) Thereupon, defense counsel requested permission to argue to the jury during closing argument that felony murder case was not applicable to the case. The following discussion took place:

MR. MEYERS: May I comment that that has been officially resolved by the Court in my closing argument to the jury that there is -- because they still remember all --

THE COURT: I think they can still argue it on a premeditated basis. They can't argue it on a felony murder basis.

MR. MEYERS: I understand that, Your Honor, but I just want to mention or at least have the Court mention that this matter has been resolved, that this is not a felony-murder case or at least let me argue it, and he obviously --

THE COURT: No, because you will be arguing legal matters that are not to be considered.

MR. MEYERS: I think they still remember all of his earlier remarks, though, regarding felony murder, and I haven't had a chance at all to rebut them.

All I want is the jury to know that has been resolved and this is not a felony murder case any more. They must decide only on premeditation.

MR. BENITO: Judge, I just don't see how it can be speculation on the part of the jury--

THE COURT: Excuse me, I already made that decision. All right. You are entilted to tell them that they are only to consider this as to premeditated first-degree murder, felony murder is not part of it. But don't get into any argument about why it isn't.

MR. MEYERS: Okay, Your Honor.

(R 547 - 548)

MR. MEYERS: What I want to get cleared up

THE COURT: -- just as you will be able to respond to it.

> MR. MEYERS: Right, but I want to mention that the Court has somehow resolved the matter and there will not be a felony murder instruction because it's been resolved this is not a felony murder, but they may decide on first-degree murder for premeditation. That is what I want to do.
>
> THE COURT: You can do that.
>
> (R 549)

Defense counsel did not request a curative instruction. Counsel was apparently satisfied to make reference to this issue in his closing argument to the jury:

> We had talked about a robbery in the case involving the victim, Mr. Snavely, and I believe that we have cleared that up. Whatever supposed taking of money there was -- again, this is all according to Mr. Andruskiewiecz, that supposedly whatever taking of money there was occurred on the day before the killing and even Andruskiewiecz said he didn't believe it either because the figure that was mentioned by Mr. Andruskiewiecz was three thousand dollars and I think we can conclude that, number one, that certainly from Mr. Snavely's brother, that he didn't have money like that or things of value like that. . . .
>
> There is no evidence that anything has been taken from Mr. Snavely's house.
>
> (R 577)
>
> So, there is just absolutely no evidence on the day of the killing either by somebody's word, meaning Andruskiewiecz, that anything whatsoever was taken.
>
> Now, surely somebody is killed but because somebody is killed doesn't mean that has to be a robbery. There is many, many reasons why somebody is killed. Most killings, even if you read about them in the paper, are rather senseless types of things.

> They have no rhyme or reason whatsoever and that is what this is.
>
> So, certainly the Court is not going to instruct you that this had anything to do with the robbery. You are not going to hear it come from the Court that this is in connection with a robbery, and the reason that is important is because earlier you had heard perhaps the State would try to use that as supplying the motive, the intent for the killing, so that won't be applicable here.
>
> You can certainly find if you want to and if your deliberations conclude it, that there is premeditation but you will have to use other circumstances to do that. You are not going to be able to do like the prosecutor talked about, use a robbery or attempted robbery to supply that intent, so it doesn't mean that you can't find him guilty of first-degree murder, because you can, but you just can't infer that intent from a robbery or an attempted robbery so you will have to conclude that this was intentional another way.
>
> (R 579 -580)
>
> And you won't get any instructions regarding a robbery and if it occurred during a robbery or attempted robbery that supplies the intent. The court will instruct you on first-degree murder.
>
> (R 585)
>
> Initially, there was some talk about that, that if there is a robbery or attempted robbery, then that automatically supplies, you know the intent, but that wil not even be for your consideration, and listen to the Court's instructions.
>
> (R 604 - 605).

The trial judge instructed the jury only on premeditated murder. (R 612) Trial counsel did not object to the trial court's

failure to have the jury instructions reduced to writing. (R 625; Appellant's Initial Brief at 20).

Edward Guenther testified as an expert in shoe print analysis. In addition to his extensive background in general crime analyst, Guenther testified that he had special training in shoe print analysis:

> Q. What study and preparation have you made in the field of shoe print analysis?
>
> A. My training in shoe print analysis involved a fourteen-month training program which was compriseable of on-the-job training and classroom instruction from qualified examiners within our department.
>
> During this training program I did actual cases under supervision. Did many required readings and participated in practical exercises.
>
> Q. Did you successfully complete that training course?
>
> A. Yes.
>
> Q. Did you receive a certification for that, sir?
>
> A. Yes, I did, from our department.
>
> Q. How many of these shoe print comparisons have you been asked to make during the course of your work with the Florida Department of Law Enforcement?
>
> A. Approximately a hundred.
>
> Q. Have you ever had the occassion before to qualify in a Court of Law as an expert in the field of shoe print analysis?
>
> A. Yes.
>
> (R 466 - 467)

Defense counsel objected to the witness being qualified as an expert because he had "insufficient background and insufficient qualification." (R 467) The court responded: "The jury can make that determination for themselves," and permitted the witness to testify as an expert. (R 468, 474) Geunther testified that the defendant's shoe "could have" made the impressions found in the victim's home. (R 474) Guenther could not positively identify the appellant's shoe print as the same footprint found in the victim's home. (R 475)

At the close of the state's case, appellant moved for a directed verdict of acquittal on the ground that the state had failed to prove a prima facie case. (R 533) The motion was denied. (R 534)

Jack Andruskiewiecz testified that the appellant told him he made the victim "get on his knees" and he just "kept stabbing him and hitting bone." (R 498, 499) The medical examiner testified that the victim was stabbed seventeen times, eight ties in the back. (R 407, 408) Four of the wounds were to the victim's right hand which are characteristic of "defense wounds", and would indicate that the victim was trying to ward off his attacker. (R 410, 411) Three of the wounds were potentially fatal. Two of the stab wounds to the back went through the rib cage and pierced the lungs. The third fatal injury was a stab wound to the neck which cut several of the major blood vessels and penetrated the voice box or larynx. (R 408 - 409)

D. Trial--Sentencing Phase

After the jury returned its verdict, the court proceeded immediately to the penalty phase of the trial. (R 626 - 627)

The state announced that it would rely upon only two aggravating cricumstances; heinous, atrocious and cruel and cold and calculated. (R 627, 629) The trial judge agreed to instruct the jury only on those aggravating circumstances relied upon by the state. (R 631) Defense counsel stated that he had "no objection to the Court reading all the aggravating and all of the mitigating [circumstances] . . . " (R 131) Later, defense counsel said: "Whether you read them all or not, I will let the court decide." (R 632)

The prosecutor suggested that the Court read the two aggravating circumstances and then state why the other seven did not apply. (R 633) Defense counsel agreed (R 634) and the court instructed the jury as follows:

> Now, there are nine aggravating circumstances, only two of which the state will rely on in this case. Those two aggravating circumstances are . . .
>
> * * *
>
> Each aggravating circumstance must be established beyond a reasonable doubt before it may be considered by you in arriving at your decision.
>
> If one or more aggravating circumstances are established, you should consider all the evidence tending to establish one or more

> mitigating circumstances and give that evidence such weight as you feel it should receive in reaching your conclusion as to your advisory sentence.

(R 638 - 639)

On the question of mitigating circumstance, the court asked defense counsel which factors he would be relying on and the state objected arguing that the court should hear testimony before deciding which mitigating circumstances were applicable. The following exchange took place:

> THE COURT: All right. I will do it. What mitigating do you want?
>
> MR. BENITO: I would ask the Court to listen to his witnesses first to see what mitigating circumstances are estableished by the evidence.
>
> THE COURT: Well, I want to instruct them beforehand, not afterwards.
>
> MR. BENITO: I believe the Court would have to listen to the evidence presented in the second phase to determine what mitigating circumstances apply.
>
> THE COURT: I am asking which ones he is relying on.
>
> MR. MEYERS: I would be relying on Number B, the capital felony was committed while the defendant was under the influence of extreme mental or emotional distrubance.
>
> THE COURT: Okay.
>
> MR. MEYERS: I would be relying on "E", the defendant acted under extreme duress.
>
> THE COURT: Okay.
>
> MR. MEYERS: He was not under the domination of another person.

THE COURT: Okay.

MR. MEYERS: Then, after the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired.

THE COURT: Okay.

MR. MEYERS: He is twenty-seven years old, so I believe our courts have held that is not an age to be considered as youthful.

THE COURT: Well, I don't mean to be --

MR. MEYERS: I would like that one, Judge.

THE COURT: I think you should give it and argue it and let the Court tell you it is not one.

MR. MEYERS: Okay. Would be those four, Your Honor.

THE COURT: Okay.

MR. BENITO: Is the Court going to read those four at this particluar time?

THE COURT: Yes.

MR. MEYERS: Then, of course, under the Lockett decision we would be able to put on any mitigating circumstances without restriction and those are not enumerated specifically and I think the instructions cover that.

THE COURT: That is correct.

MR. BENITO: The state does not feel that some of those mitigating circumstances have been established at this time for the Court to instruct the jury prior to the evidence establishing those mitigating circumstances.

THE COURT: Well, you can get to the Supreme Court and back within the next five minutes you may succeed in that argument.

MR. BENITO: I can't do that, Judge. There is no way I can do that, Judge.

THE COURT: Bring in the jury.

Thereafter, without objection, the court instructed the jury on the mitigating circumstances as follows:

> The mitigating circumstances are:
>
> 1. The crime for which the defendant is to be sentenced was committed while he was under the influence of extreme mental or emotional disturbance.
>
> 2. The defendant acted under extreme duress or under jthe substantial domination of another person.
>
> 3. The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially imparied.
>
> 4. The age of the defendant at the time of the crime.
>
> * * *
>
> The mitigating circumstances need not be proven beyond a reasonable doubt by the defendant. If you are reasonably convinced that a mitigating circumstance exists, you may consider it as established.
>
> Now, the mitigating circumstances are not limited to the four that I read. The defendant can place before you any other mitigating circumstances that he deems appropriate.
>
> Now, the sentence that you recommended must be based upon the facts as you find them from the evidence and the law. You should weigh the aggravating circumstances against the mitigating circumstances and your advisory sentence must be based upon these considerations.

(R 639)

During the penalty phase of the trial, the defense presented testimony from three witnesses: appellant's ex-wife and his two employers. Mrs. Nibert testified that appellant has had a drinking problem since his early teens and both of his parents are alcoholics. (R 641 - 643) Appellant's two employers, Paul Hawks, Jr. and Paul Hawks, Sr., testified that appellant had a problem with alcohol but he was trustworthy and a good worker. (R 647, 648, 651 - 652)

After the jury returned an advisory sentence of death (R 682), the court adjudicated appellant guilty (R 683) and orally announced the sentence as follows:

> The Court does find that there are two aggravating and no mitigating circumstances and it is the judgment, order and sentence of this Court that the defendant be sentenced to die in the electric chair.
>
> * * *
>
> Please prepare a written order showing two aggravating and no mitigating and submit it on April 26, 8:30.

(R 684)

The prosecutor prepared an order and it was signed by the trial judge on April 11, 1985. (R 81 - 85)

SUMMARY

I. The prosecutor's remarks to the venireman during voire dire examination did not confuse the jurors on the issue of the applicability of the felony murder doctrine. Remarks by defense counsel during closing statement diminished the effects of the prosecutor's statement. In addition, there was no prejudice to the appellant as the trial court instructed the jury only on premeditated murder.

II. Trial counsel's failure to object to the instructions not being reduced to writing waived the error for purposes of appellate review.

III. Jurors who testified they would not vote in favor of the death penalty regardless of the evidence presented at trial were properly excused for cause.

IV. The trial court did not improperly delegate to the jury his responsibility to determine the question of expertise.

V. Evidence of the manner in which the homicide was committed and the nature and manner of the wounds inflicted was sufficient to establish the element of premeditation.

VI. Appellant's argument that he was forced to use peremptory challenge on a juror who should have been excused for cause must fail because trial counsel did not exhaust all of his peremptory challenges.

VII. Instructing jury during penalty phase of the trial prior to the taking of testimony and argument of counsel was waived by appellant's failure to object.

VIII. The trial court's order directing the prosecutor to prepare a written sentencing order consistent with the court's findings was sufficient under §921.141(3), Florida Statutes, and did not violate the general rule against delegation of judicial authority.

IX. The evidence adduced at trial was sufficient to sustain the trial court's finding that the murder was committed in a cold, calculated and premeditated manner.

X. The evidence adduced at trial was sufficient to support the trial court's finding that the murder was especially heinous, atrocious or cruel.

XI. The sentencing order in this case is clear that the trial judge gave consideration to all evidence presented by appellant in support of mitigation.

XII. When viewed in the context of prior decisions of this Court, a sentence of death in this case does not violate the Eighth Amendment of the United States Constitution.

ARGUMENT

ISSUE I

THE PROSECUTOR'S REMARKS TO THE VENIREMEN DURING VOIR DIRE EXAMINATION DID NOT DEPRIVE APPELLANT OF A FAIR TRIAL.

a. The Prosecutor's Remarks.

Appellant was charged by indictment with first-degree murder. (R 10) The unlawful killing of a human being when perpetrated from a premeditated design to effect the death of the person killed or any human being, or when committed by a person engaged in the perpetration of, or in the attempt to perpetrate, any arson, involuntary sexual battery, robbery, burglary, kidnapping, aircraft piracy or unlawful throwing, placing or discharging of a destructive device or bomb, or which resulted from the unlawful distributtion of opium or any synthetic or natural salt, compound, derivative, or preparation of opium by a person eighteen years of age or older, when such drug is proven to be the proximate cause of the death of the user, is murder in the first-degree. Section 782.04(1)(a), Florida Statutes (1983). Thus, murder in the first-degree may consist of either (1) a premeditated killing or (2) a "felony murder"; that is, a killing during the perpetration of, or attempt to perpetrate, a kind of felony specified in the statute. Given the nature of the crimes, an indictment charging premeditated murder permits the state to proceed on either theory of premeditated murder or felony murder. Bush v. State, 461 So.2d 936 (Fla. 1984).

In addressing the jurors on voir dire, the prosecutor explained the difference between premeditated murder and felony murder. (R 150 - 151, 237, 360). Appellant does not contend that the prosecutor's remarks were an incorrect statement of the law.

The latitude which is given the parties in examining prospective jurors is subject to the trial judge's discretion. Peri v. State, 426 So.2d 1021, 1025 (Fla. 3 DCA 1983); Essix v. State, 347 So.21d 664 (Fla. 3 DCA 1977). The materiality and propriety of voir dire questions are to be decided by the trial judge. Pait v. State, 112 So.2d 380 (Fla. 1959); Story v. State, 53 So.2d 920 (Fla. 1951); Pope v. State, 84 Fla. 428, 94 So. 865 (1922). It is the judge who controls the time and extent of the voir dire, Blackwell v. State, 101 Fla. 997, 132 So. 468 (1931), and the scope of the examination. Underwood v. State, 388 So.2d 1333 (Fla. 2 DCA 1980); Jones v. State, 378 So.2d 797 (Fla. 1 DCA 1979). Hypothetical questions having correct reference to the law of the case that aid in determining whether challenges for cause or peremptorily are proper, may, in the discretion of the trial court, be propounded to prosepective jurors. Pope v. State, supra. See also, Pait v. State, supra. It is not proper to propound hypothetical questions purporting to embody testimony that is intended to be submitted covering all or any aspects of the case, for the purpose of ascertaining from the juror how he will vote. Dicks v. State, 83 Fla. 717, 93 So. 137, 138 (1922).

The prosecutor's remarks to the prospective jurors, distinguishing premeditated murder from felony murder, were not improper. The remarks were not an incorrect statement of the law, Pope v. State, supra, and the prosecutor did not attempt to determine how the jurors would vote. Dicks v. State, supra.

Finally, the record is clear that the jury was properly instructed to follow the law as stated by the trial judge, not the attorneys. After the jury was sworn, the trial judge instructed them as follows:

> It is your solemn responsibility to determine the guilt or innocence of the defendant and your verdict must be based solely on the evidence as it is presented to you in this trial and the law upon which the Court will instruct you at the close of the trial.
>
> (R 368)
>
> . . . You are concerned with the law only as the Court will instruct you on the law at the close of the trial.
>
> (R 369)
>
> Following the arguments of the attorneys, the Court will instruct you on the law applicable to the case.
>
> (R 370)

Given the trial court's instructions to the jury, the prosecutor's remarks to the veniremen during voir dire did not mislead or confuse the jury.

b. The Ruling of the Trial Court that Felony Murder was Inapplicable and Defense Counsel's Request for a Curative Instruction to the Jury.

Contrary to appellant's claim, defense counsel did not

request a curative instruction. As demonstrated by the transcript of proceedings, counsel was apparently satisfied to argue to the jury during closing statement that felony murder has not an issue in the case. (R 577, 579, 585, 604 - 605) In Carlile v. State, 129 Fla. 860, 176 So. 862 (1937), cited by appellant, the court ruled that "[a] judgment will not be set aside because of the ommission of the judge to perform his duty in the matter unless objected to at the proper time." 176 So. at 864. On appeal, appellant claims he was entitled to a curative instruction to remove the prejudicial effect of statements made by the prosecutor during voir dire examination. Appellant did not object or request a curative instruction. The issue is waived under Carlile.

Carlile is also distinguishable on its facts. The prosecutor in Carlile "repeatedly trangressed the bounds of propriety vested in him." 176 So. at 864. The improper remarks were of such character that neither rebuke nor retraction could entirely destroy their improper influence. The nature of the comments in this case are quite different from the ones disapproved in Carlile. Even if the prosecutor's remarks were improper, defense counsel's closing argument to the jury certainly diminished the effect of these remarks.

c. Closing Arguments and the Court's Instructions to the Jury.

Any possibliity that the jury might have considered the felony murder rule was eliminated by defense counsel's closing

argument:

> We had talked about a robbery in the case involving the victim, Mr. Snavely, and I believe that we have cleared that up. Whatever supposed taking of money there was --again, this is all according to Mr. Andruskiewiecz, that supposedly whatever taking of money there was occurred on the day before the killing and even Andruskiewiecz said he didn't
>
> believe it either because the figure that was mentioned by Mr. Andruskiewiecz was three thousand dollars and I think we can conclude that, number one, that certainly from Mr. Snavley's brother, that he didn't have money like that or things of value like that.. . .
>
> There is no evidence that anything has been taken from Mr. Snavely's house.
>
> (R 577)
>
> So, there is just absolutely no evidence on the day of the killing either by somebody's word meaning Andruskiewiecz, that anything whatsoever was taken.
>
> Now, surely somebody is killed but because somebody is killed doesn't mean that has to be a robbery. There is many, many reasons why somebody is killed. Most killings, even if you read about them in the paper, are rather senseless types of things. They have no rhyme or reason whatsoever and that is what this is.
>
> So, certainly the Court is not going to instruct you that this had anything to do with the robbery. You are not going to hear it come from the Court that this is in connection with a robbery, and the reason that is important is because earlier you had heard perhaps the State would try to use that as supplying the motive, the intent for

> the killing, so that won't be applicable here.
>
> You can certainly find if you want to and if your deliberations conclude it, that there is premeditation but you will have to use other circumstances to do that. You are not going to be able to do like the prosecutor talked about, use a robbery or attempted robbery to supply that intent, so it doesn't mean that you can't find him guilty of first-degree murder, because you can, but you just can't infer that intent from a robbery or an attempted robbery so you will have to conclude that this was intentional another way.
>
> (R 579 -580)
>
> And you won't get any instructions regarding a robbery and if it occurred during a robbery or attempted robbery that supplies the intent. The court will instruct you on first-degree murder.
>
> (R 585)
>
> Initially, there was some talk about that, that if there is a robbery or attempted robbery, then that automatically supplies, you know the intent, but that will not even be for your consideration, and listen to the Court's instructions.
>
> (R 604 - 605).

Consistent with defense counsel's closing argument, the trial judge instructed the jury only on premeditated murder. (R 612)

d. No Prejudice to the Appellant.

Contrary to appellant's claim, the felony murder doctrine did not become a "feature" of the trial. Most of the argument concerning this doctrine was made by the defense not the

prosecution. With the exception of the prosecutor's remarks during voir dire examination, all references to felony murder were made by defense counsel. During closing argument, defense counsel repeatedly cautioned the jury that felony murder was not an issue in the case. (R 577, 579 - 580, 585, 604 - 605) The trial judge directed the jury to apply only the law "as instructed by the Court" and the judge charged the jury only on premeditated murder. (R 368, 369, 370, 612) Under the circumstances, it is very unlikely that the jury was confused about whether the felony murder rule was applicable to the case.

ISSUE II

FAILURE TO GIVE JURY WRITTEN INSTRUCTIONS AS REQUIRED BY FLORIDA RULE OF CRIMINAL PROCEDURE 3.390(b) WAS WAIVED FOR FAILURE TO OBJECT.

Florida Rule of Criminal Procedure 3.390(b) provides in pertinent part that "[e]very charge to a jury shall be orally delivered and charges in capital cases shall also be in writing. Appellant's trial counsel neither requested the charges be reduced to writing nor objected to the failure of the trial judge to do so. (R 625; Appellant's initial brief at page 20)

Where trial counsel neither requested the jury instructions be reduced to writing nor objected to the failure of the trial judge to do so, failure of the court to provide written instructions to the jury in violation of Florida Rule of Criminal Procedue 3.390(b), was waived and may not be raised on appeal. Vaught v. State, 410 So.2d 147 (Fla. 1982); McCaskill v. State, 344 So.2d 1276 (Fla. 1977).

The defendants in McCaskill argued that the trial judge failed to properly instruct the jury. Considering the instructions given as a whole, the court determined "there was no fundamental error and the jury was properly advised of the applicable law." 344 So.2d at 1278. In the case at bar, appellant does not contend that the trial judge improperly instructed the jury. Failure to comply with the procedural requirements of Rule 3.390(b) was waived for failure to object at trial.

ISSUE III

THE TRIAL COURT DID NOT ERR IN EXCLUDING FOUR PROSPECTIVE JURORS WHO SAID THAT EVEN IF THE DEFENDANT WERE FOUND GUILTY THEY COULD NOT VOTE ON THE DEATH PENALTY REGARDLESS OF THE EVIDENCE PRESENTED AT TRIAL. (RESTATED)

On voir dire examination, prospective jurors Graces, Davis, Fortson and Rask each stated that if the defendant were found guilty they would not vote in favor of the death penalty regardless of the evidence presented during the penalty phase of the trial. (R 203 - 204) The jurors were excused for cause. (R 282)

The United States Supreme Court recently held in Wainwright v. Witt, 469 U.S __, 105 S.Ct. __, 83 L.Ed.2d 841 (1985) that the proper standard for determining when a prospective juror may be excluded for cause because of his views on capital punishment is whether the juror's views would "prevent or substantially impair the performance of his duties as a juror." Adams v. Texas, 448 U.S. 38, 45, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980). Thus, the state may properly challenge a venireman if he refuses to follow the court's instructions and obey their oaths. Wainwright v. Witt, 83 L.Ed.2d at 849, 850-851. Applying the Witt-Adams standard to the facts of this case, we conclude that the jurors, Graces, Davis, Forston and Rask, were properly excused for cause.

Appellant's relieance on Grigsby v. Mabry, 758 F.2d 266 (8th Cir. 1985) is misplaced. This circuit has on several

occasions rejected this claim on the merits. See, Witt v. Wainwright, 755 F.2d 1396, 1398 (11th Cir. 1985); Young v. Kemp, 758 F.2d 514, 516 (11th Cir. 1985).

ISSUE IV

THE TRIAL COURT DID NOT ERR BY PERMITTING EDWARD GUENTHER TO TESTIFY AS AN EXPERT WITNESS IN SHOE PRINT ANALYSIS.

Edward Geunther was offerred by the state as an expert on shoe print analysis. (R 467) Appellant objected on the basis that Geunther had "insufficient background and qualifications." (R 467) The trial judge, having heard testimony from Geunther concerning his "special training" in the field of shoe print analysis, permitted the witness to testify as an expert. (R 466, 474)

Appellant argues on appeal that the trial judge improperly delegated to the jury, its responsibility of determining whether the witness qualifies as an expert. In support thereof, appellant points to this statement made by the trial judge: "The jury can make that decision for themselves." (R 468).

It is within the province of the trial court to determine whether the witness offered as an expert has such qualifications and knowledge through experience to qualify as an expert witness. Fred Howland, Inc. v. Morris, 143 Fla. 189, 196 So 472 (1940). The question of how much weight the expert testimony would have is a question for the jury. Behm v. Division of Administration, 3326 So.2d 579 (Fla. 1976); Slacter v. City of St. Petersburg, 449 So.2d 1006 (Fla. 2 DCA 1984); Taylor v. Posey, 283 So.2d 118 (Fla. 1 DCA 1973). The question of expertise should initially be determined by the court and the weight to be given such testimony is for the jury. Ritter v. Jimenez,

343 So.2d (Fla. 3 DCA 1977). The trial judge's statement, standing alone, cannot be considered an improper delegation of authority. It is reasonable to conclude that the judge's remark was a reference to the jury's responsibility to determine the weight to be given such testimony. Appellant has failed to show an improper delegation of judicial authority.

ISSUE V

THERE WAS SUBSTANTIAL COMPETENT EVIDENCE TO ESTABLISH THE ELEMENT OF PREMEDITATION.

At the close of the state's case appellant moved for a directed verdict of acquittal on the ground that the state had failed to prove a prima facie case. (R 533) Here the argument is made for the first time on appeal that the motion should have been granted because the state failed to prove the element of premeditation.

A motion for judgment of acquittal must fully set forth the grounds upon which it is based. Florida Rule of Criminal Procedure 3.380(b). The Third District Court of Appeal held in De la Cova v. State, 355 So.2d 1227, 1230 (Fla. 3 DCA) that a "bare bones motion for directed verdict" does not raise every possible claimed insufficienty in the evidence. cert. denied, 361 So.2d 831 (Fla. 1978). Appellant's argument, made for the first time on appeal, should not be considered unless it amounts to fundamental error.

Premeditation can be shown by circumstantial evidence. Sireci v. State, 399 So.2d 464 (Fla. 1981) Premeditation does not have to be contemplated for any particular length of time before the act. Id. at 967; McCutchen v. State, 96 So.2d 152 (Fla. 1957); Davis v. State, 138 Fla. 798, 190 So. 259 (1939); Hasty v. State, 120 Fla. 269, 162 So. 910 (1935); Rhodes v. State, 104 Fla. 520, 140 So. 309 (1932). Evidence from which premeditation may be inferred includes such matters as the nature of the weapon used; the presence or absence of adequate

provocation, previous difficulties between the parties, the manner in which the homicide was committed and the nature and manner of the wounds inflicted. Preston v. State, 444 So.2d 939 (Fla. 1984); Larry v. State, 104 So.2d 352, 354 (Fla. 1958). Whether or not the evidence shows a premeditated design to commit a murder is a question of fact for the jury. Preston v. State, supra; Larry v. State, supra; Davis v. State, supra; Snipes v. State, 17 So.2d 93 (Fla. 1944)

Jack Andruskiewiecz testified that appellant told him he made the victim "get on his knees" and he just "kept stabbing him and hitting bone." (R 498, 499) The medical examiner testified that the victim was stabbed seventeen times, eight times in the back. (R 407, 408) Four of the wounds were to the victim's right hand which would indicate they were "defense wounds". (R 410, 411) Three of the wounds were potentially fatal. Two of the stab wounds to the back went through the rib cage and pierced the lungs. The third fatal injury was a stab wound to the neck which cut several of the major blood vessels and penetrated the larynx. (R 408 - 409)

There is substantial evidence from which premeditation could have been inferred by the jury. Aside from Mr. Andruskiewiecz testimony, the record shows that the victim sustained multiple stab wounds and the nature of the injuries were particularly brutal. Considering all reasonable inferences which the jury could draw from the appellant's statements to Mr. Andruskiewiecz, and the nature and manner of the wounds inflicted on

the victim, the trial court did not err in denying appellant's motion for judgment of acquittal.

Appellant's reliance upon Tien Wang v. State, 426 So.2d 1004 (Fla. 3 DCA) pet. for rev. denied, 434 So.2d 889 (Fla. 1983) is misplaced. The homicide in Tien Wang was motivated by passion and there was no direct evidence elicited by the state bearing on the element of premeditation. In appellant's case, however, the crime was motivated by robbery and the victim sustained multiple stab wounds, several in the back. In addition, the state elicited testimony from Mr. Andruskiewiecz that appellant made the victim get on his knees during the attack. (R 498, 499, 503)

ISSUE VI

THE TRIAL COURT DID NOT ERR IN DENYING DEFENSE COUNSEL'S CHALLENGE FOR CAUSE TO PROSPECTIVE JUROR STALVEY.

Appellant contends that Stalvey, a prospective juror, made it crystal clear that she would "automatically" vote for the death penalty if the defendant were found guilty of first-degree murder. The voir dire examination disclosed the following:

> MR. MEYERS (defense counsel): Okay. Do you think that if there is a finding of guilt that the death penalty should automatically be imposed?
>
> JUROR STALVEY: Yes, sir.
>
> MR. MEYERS: So in every case of first-degree murder, then the death penalty should be imposed if the person has been found guilty; is that correct?
>
> JUROR STALVEY: Yes, sir.
>
> MR. MEYERS: So it should be an automatic thing?
>
> JUROR STALVEY: Yes, sir.
>
> MR. MEYERS: Okay. If a person is found guilty of first-degree murder, there should be an automatic death penalty?
>
> JUROR STALVEY: (Juror nodding head up and down.)
>
> MR. MEYERS: There shouldn't be any considerations about any other facts other than--
>
> JUROR STALVEY: No, if the facts are there.
>
> MR. MEYERS: Well, assuming the person has already been found guilty of first-degree murder.
>
> JUROR STALVEY: Oh -- well, yes, sir.

MR. MEYERS: So in other words, it should be automatic death penalty is someone is found guilty of first-degree murder.

JUROR STALVEY: Yes, sir.

MR. MEYERS: So in this case if -- I'm making capital "I's" and capital "F's" -- if Mr. Nibert is found guilty of first-degree murder --

JUROR STALVEY: Yes, sir.

MR. MEYERS: You would automatically vote for the death penalty.

JUROR STALVEY: Yes, sir.

(R 191 - 192)

Defense counsel challenged the juror for cause and the court addressed the prospective juror as follows:

THE COURT: Ma'am, if there was a finding of guilt - next to you -- at this point, you would automatically vote for the death penalty?

JUROR STALVEY: Not automatically, but --

THE COURT: Do you think there are some situations in which you would vote against the death penalty.

JUROR STALVEY: Yes.

(R 206)

Thereafter, the trial judge denied the challenge for cause and appellant expended a peremptory challenge on Stalvey. Appellant did not, thereafter, exhaust his peremptory challenges. (R 315) A request for additional peremptory challenges was denied because appellant had one challenge remaining when he made his request. (R 324)

It is reversible error for a court to force a party to use peremeptory challenges on persons who should have been excused for cause, provided the party subsequently exhaust all of his or her peremptory challenges or an additional challenge is sought and denied. Hill v. State, ___ So.2d ___ (FSC #63,902, opinion filed October 10, 1985)[10 F.L.W. 555]; Lusk v. State, 446 So.2d 1038, 1041 (Fla. 1984). Appellant did not exhaust all of his peremptory challenges. (R335) The request for additional challenges was denied because at the time the request was made appellant had one peremptory challenge remaining. (R 324)

First, we take issue with appellant's contention that the juror made "it crystal clear" that she would automatically vote for death if the defendant were found guilty. This contention is refuted by the record wherein it is shown that the juror retreated from this position during questioning by the court. (R 206)

Second, if the trial judge applied an incorrect standard, and we are not conceding that he did, the error was invited by defense counsel who repeatedly used the term "automatic" and "automatically" during his questioning of the juror. (R 191 - 192) See Gagnon v. State, 212 So.2d 337, 339 (Fla. 3 DCA 1968).

ISSUE VII

IN THE ABSENCE OF AN OBJECTION BY DEFENSE COUNSEL, ISTRUCTING JURY DURING PENALTY PHASE OF THE TRIAL PRIOR TO THE TAKING OF EVIDENCE AND ARGUMENT OF COUNSEL WAS NOT ERROR.

During the penalty phase of the trial, the court instructed the jury prior to the taking of testimony and argument of counsel. (R 636 - 641) Defense counsel did not object to this procedure. The prosecutor objected to the trial judge deciding what mitigating circumstances were applicable before he heard testimony on that issue. (R 634) Any alleged error in the giving of jury instructions prior to the taking of testimony was waived for failure to object. See Ford v. Wainwright, 451 So.2d 471 (Fla. 1984); Bottoson v. State, 443 So.2d 962 (Fla. 1983); Vaught v. State, 410 So.2d 147 (Fla. 1982). There was also no error in the trial court's failure to instruct on all statutory aggravating and mitigating circumstances. See Lemon v. State, 456 So.2d 885 (Fla. 1984).

Relying upon Florida Rule of Criminal Procedure 3.390(a), appellant contends that the trial court erred in instructing the jury prior to the presentation of evidence and argument of counsel. Rule 3.390(a) provides in pertinent part:

> The presiding judge shall charge the jury upon the law of the case at the conclusion of argument of counsel.

The sentencing procedure for capital cases is set forth in §921.141, Florida Statutes (1983). That statute, in

pertinent part provides as follows:

> . . . In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissiblity under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

Unlike Rule 3.390(a), §921.141(a) does not require the court to instruct the jury at the conclusion of counsel's argument.

ISSUE VIII

THE TRIAL COURT DID NOT FAIL TO PREPARE AN ADEQUATE STATEMENT OF FINDINGS TO SUPPORT IMPOSITION OF THE DEATH SENTENCE.

The jury returned an advisory sentence of death. (R 682) The court adjudicated appellant guilty (R 683) and orally announced the sentence as follows:

> The Court does find that there are two aggravating and no mitigating circumstances and it is the judgment, order and sentence of this Court that the defendant be sentenced to die in the electric chair.
>
> * * *
>
> Please prepare a written order showing two aggravating and no mitigating and submit it on April 26, 8:30.

(R 684)

At the court's request, the prosecutor prepared an order consistent with the trial judge's findings and the judge signed the order in open court on April 11, 1985. (R 81 - 85) Defense counsel did not object to this procedure. The error, if any, has not been preserved for appellate review.

In imposing the death sentence, the trial judge is required by statute to making "findings" in support of the sentence. Section 921.141(3) provides as follows:

> (3) **Findings in support of sentence of death.--** Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life

> imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:
>
> > (a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and
> >
> > (b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.
> >
> > In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the cirumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with §775.082.

In the present case, the trial judge announced his "findings" in open court and directed the prosecutor to prepare a written order consistent with these findings. This procedure was sufficient to meet the requirements of §921.141(3).

In accordance with the general rule as to delegation of powers by the judiciary, a judge may not delegate his judicial authority to another. As a result, the judge may not escape responsibility for any judgments signed by him by delegating their preparation to counsel or anyone else. 48A C.J.S. §62, Judges. Consequently, there is no delegaton of judicial power in imposing a sentence in accordance with a recommendation made by a state's attorney or in considering recommendations presented by

attorneys as long as the judge makes the final sentencing decision. 16 C.J.S, §175, Constitutional Law. Cf., Knott v. Knott, 395 So.2d 1196, 1198 (Fla. 3 DCA 1981) (the reduction to writing by the court of previously entered order is a purely ministerial act.)

In Carnegie v. State, 473 So.2d 782 (Fla. 2 DCA 1985), cited by appellant, the trial judge improperly delegated to the state's attorney, the judicial power to determine reasons for departure from a guideline sentence. By contrast, in this case, the trial judge made the appropriate findings and directed the prosecutor to prepare a written order consistent with these findings. The trial judge made the final sentencing decision and there was no improper delegation of judicial authority.

ISSUE IX

THE TRIAL COURT DID NOT ERR IN FINDING AS AN AGGRAVATING CIRCUMSTANCE THAT THE MURDER WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER.

The trial court found that the capital felony was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. Section 921.141(5)(i), Florida Statutes (1983). With reference to this aggravating circumstance, the trial judge found the following:

> 2. The capital felony for which defendant is to be sentenced was committed in a cold, calculatd and premeditated manner without any pretense of moral or legal justification. The evidence indicated that two days prior to the murder, the defendant revealed his intention to rob the victim. Specifically, defendant told witness, Jack Andruskiewiecz, on November 14, 1984, that he knew the victim had money and he planned to rob him. Further, said witness' testimony revealed that defendant had told witness that he had met the victim and had socialized on occassion with the victim. Defendant's familiarity with the victim reasonably suggests that the defendant knew he would need to kill said victim when he robbed him to prevent the victim from later identifying him to law enforcement authorities, again indicating calculated murder.
>
> Additionally, defendant told witness Jack Andruskiewiecz that he had made the victim get on his knees during the attack, and that coupled with the fact that the vicitm was stabbed seventeen (17) separate times clearly indicates a cold, premeditated killing.

(R 82 -83)

This agravating factor may be applied only when the crime exhibits "heightened premeditation", greater than that required

to establish premeditated murder. Gorham v. State, 454 So.2d 556 (Fla. 1984), cert. denied, ___ U.S. ___, 105 S.Ct. 941, 83 L.Ed.2d 953 (1985); Hardwick v. State, 461 So.2d 79 (Fla. 1984); Smith v. State, 424 So.2d 726 (Fla. 1982), cert. denied, ___ U.S. ___, 103 S.Ct. 3129, 77 L.Ed.2d 1379 (1983). This court has previously applied this aggravating circumstance to murders described as execution by contract murder or witness elimination murders. Herring v. State, 446 So.2d 1049, 1057 (Fla. 1984).

The evidence adduced at trial established that appellant told witness Andruskiewiecz two days before the murder that he was going to rob the victim. (R 503 - 504) In addition, there was testimony that the victim and defendant knew one another and a man fitting appellant's description was seen entering the victim's house almost an hour before the homicide occurred. (R 388 - 389, 392) Finally, there was testimony that the defendant made the victim get on his knees before he stabbed him. (R 499) We submit that these facts support the finding of the trial court that the murder was committed in a cold and calculated manner. See e.g., Duest v. State, 462 So.2d 446, 449 (Fla. 1985); Hill v. State, 422 So.2d 816 (Fla. 1982).

ISSUE X

THE TRIAL COURT DID NOT ERR IN FINDING, AS AN AGGRAVATING CIRCUMSTANCE THAT THE MURDER WAS ESPECIFICLALY HEINOUS, ATROCIOUS OR CRUEL.

As the second aggravating circumstance, the trial court found that the capital felony was especially heinous, atrocious or cruel. Section 921.141(5)(h), Florida Statutes (1983). With reference to this factor, the trial judge made the following findings:

> STATUTORY AGGRAVATING CIRCUMSTANCES [F.S. 921.141(5)]
>
> 1. The capital felony for which defendant is to be sentenced was especially heinous atrocious or cruel, to-wit: undisputed expert medical testimony to the effect victim Eugene Howard Snavely suffered seventeen (17) stab wounds which were consistent with having been inflicted with a knife; eight (8) of those stab wounds were to the victim's upper back. The medical testimony revealed that all of the wounds were painful and that hte victim could have remained conscious throughout the course of the attack. Furthermore, four (4) stab wounds to the victim's hand were characterized as defense wounds strongly indicating that the victim attempted to ward off the knife or grab the knife as the defendant repeatedly stabbed him.
>
> Additionally, the photographs of the victim's kitchen admitted at trial clearly indicated the vicious and brutal nature of the attack on said victim and additional evidence revealed that the victim left his kitchen and ran across the street for help after suffering all seventeen (17) stab wounds. James Snavely, the victim's brother, testified he answered a knock at his door to find his brother bleeding profusely and in desperate condition. At that time, the victim indicated to his brother that he had been stabbed with a knife that he

> (the victim) was holding in his right hand. The fact that the victim was holding the murder weapon strongly suggests that the victim pulled said knife from his body as he ran for help.
>
> The evidence clearly indicates that Eugene Howard Sanvely's death was not instantaneous and that totality of the circumstances surrounding his death lead to the inescapable conclusion that the defendant committed a conscienceless, pitiless and unnecessarily tortuous crime that sets it apart form the norm of capital felonies. See Proffitt v. State, 315 So.2d 461 (Fla. 1975) and Jennings v. State, 453 So.2d 1109 (Fla. 1984).

(R 81 - 82)

The evidence adduced at trial established that the victim sustained seventeen stab wounds. Eight of the wounds were in the back and others were characterized as "defense wounds" which would indicate that the victim attempted to ward off the attack. (R 407, 410 - 411) The medical testimony revealed that all of the wounds were painful and the victim would have remained conscious during the ordeal. (R 411 - 412) James Snavely, testified that the victim crossed the street, knocked on his front door and collapsed in the frontyard clutching a knife. (R 389 - 390) In addition, photographs of the victim's kitchen showed blood splattered on the kitchen cabinets, counter and floor. (R 421) We submit that these facts support the trial court's finding that he murder was especially heinous, atrocious or cruel. See Lusk v. State, 446 So.2d 1038 (Fla. 1984); McCrae v. State, 395 So.2d 1145 (Fla. 1980), cert. denied, 454 U.S. 1037, 102 S.Ct. 583, 70 L.Ed.2d 486 (1981).

ISSUE XI

THE TRIAL COURT DID NOT FAIL TO CONSIDER EVIDENCE PRESENTED BY APPELLANT IN SUPPORT OF MITIGATION.

Prior to entering the penalty phase of the trial, defense counsel agreed that only four statutory mitigating circumstances were applicable to this case: (1) the defendant was under extreme mental or emotional distrubance; (2) the defendant was acting under duress; (3) capacity of the defendant to appreciate the criminality of his acts was substantially impaired, and (4) the defendant's age. (R 634 - 635) The trial judge instructed the jury only on those factors relied upon by the defense. (R 638)

During the penalty phase of the trial, the court heard testimony from three defense witnesses: appellant's ex-wife, Linda Nibert, and his two former employers, Paul Hawks, Jr. and Paul Hawks, Sr. Mrs. Nibert testified that appellant has had a drinking problem since his early teens and both is parents are alcoholics. (R 641 - 643) Appellant's former employers testified that appellant has a problem with alcohol, but he was trustworthy and was a good worker. (R 647, 648, 651 - 652)

The trial court found no mitigating circumstances. The sentencing order provides:

> STATUTORY MITIGATING CIRCUMSTANCES §F.S. 921.141(6)]
>
> None.
>
> UNSUPPORTED STATUTORY MITIGATING CIRCUMSTANCES CLAIMED BY DEFENDANT [F.S. 921.141(6)]
>
> The capital felony for which defendant is to

be sentenced was not committed while defendant was under the influence of extreme mental or emotional disturbances nor was the capacity of defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law substantially impaired. Defendant's claim that he was intoxicated at the time of the attack is wholly inconsistent with the nature and circumstances of this particular premeditated murder.

NONSTATUTORY MITIGATING CIRCUMSTANCES

NONE, notwithsanding testimony to the effect that defendant has had an alcoholic problem since an early age.

By Law, the Jury's recommendation is entitled to great weight because it represents the judgment of the community as to whether the death penalty is appropriate

After considering only the evidence before the Jury, the Court finds that the aforesaid statutory aggravating circumstances clearly outweigh both the unsupported statutory mitigating cirumstances and the aforesaid possible nonstatutory mitigating circumstances.

Defendant, BILLY RAY NIBERT, is therefore adjudicated guilty of Murder in the First Degree of Eugene Howard Snavely and hereby sentenced to death by electrocution as provided by the Laws of the State of Florida.

The defendant, BILLY RAY NIBERT is also hereby advised of his right to appeal from this Sentence by filing Notice of Appeal within thirty (30) days of this date with the Clerk of this Court, and the Defendant's right to the assistance of counsel in taking said appeal at the expense of the state upon showing of indigency.

(R 83 - 84)

Appellant contends that the trial court should have considered the testimony relating to appellant's "alcohol problem" as being

relevant to the statutory mitigating circumstances in §921.141 (6)(b) and (f), Florida Statutes, extreme mental or emotional disturbance and capacity of the defendant to appreciate the criminality of his conduct.

The record in this case shows that the court expressly considered appellant's alcohol problem. (R 84) It is within the trial court's discretion to determine whether sufficient evidence exists of a particular mitigating circumstance and, if so, the weight to be given it. White v. State, 446 So.2d 1031 (Fla. 1984); Lusk v. State, supra; Engle v. State, 438 So.2d 803 (Fla. 1983), Daugherty v. State, 419 So.2d 1067 (Fla. 1982), cert. denied, 459 U.S. 1228, 103 S.Ct. 1236, 75 L.Ed.2d 469 (1983). The record is clear that the trial judge gave consideration to appellant's "alcohol problem". The fact that the judge did not find such evidence was sufficient to substantiate a finding of mitigation under statutory factors (b) and (f) does not indicate that he gave the evidence no weight at all.

Appellant also contends that the judge failed to consider evidence of non-statutory mitigating circumstances which were presented during the penalty phase of the trial.

The law is clear that the sentencing judge must consider in mitigation any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant offers as a basis for a life sentence. Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1981). The fact that the

judge did not find that Hall's good employment record was sufficient to substantiate a finding of mitigation does not indicate that he gave the evidence no weight at all. The law only requires that the defendant be permitted to present evidence in mitigation, and requires the sentencer to listen. Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). It is within the trial court's discretion to determine the weight to be given such evidence.

Appellant's contention that the trial court failed to consider the defendant's state of mind as a non-statutory mitigating circumstance is also without merit. The trial judge must consider "any of the circumstances of the offense that the defendant offers" as basis for mitigation. Eddings v. Oklahoma, supra. Although the trial judge heard testimony on the appellant's state of mind during the guilt phase of the trial, appellant did not offer this evidence as a basis for mitigation during the penalty phase of the trial.

ISSUE XII

GIVEN THE CIRCUMSTANCES OF THIS CASE, APPELLANT'S DEATH SENTENCE DOES NOT VIOLATE THE EIGHTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

The evidence disclosed that the victim, a fifty-seven year old man, was stabbed seventeen times, eight times in the back. The kitchen counter, cabinets and parts of the kitchen floor were covered with the victim's blood. (R 383, 407, 421) According to the testimony of Robert Miller, the medical examiner, some of the wounds were "defense wounds" which would indicate that the victim tried to ward off his attacker. (R 410 - 411) The wounds were painful and the victim would have remained conscious throughout the attack. (R 411 - 412) The aggravating circumstance of heinous, atrocious or cruel applies to "the conscienceless or pitiless crime which is unnecessarily torturous to the victim." State v. Dixon, 283 So.2d 1, 9 (Fla. 1973). The killing in this case falls squarely within this category when viewed in the context of prior decisions of this Court which have approved a finding of this aggravating circumstances. See Lusk v. State, supra (victim stabbed three times in the back while sitting in a prison dining hall); Washington v. State, 362 So.2d 658 (Fla. 1978)(victim repeatedly stabbed while tied to a bed); Barclay v. State, 343 So.2d 1266 (Fla. 1977)(victim stabbed while begging for mercy and then killed by shots to the head.)

Appellant asks this court to decide whether the finding of

a single aggravating circumstance, heinous, atrocious or cruel, can support a sentence of death. This court need not address that issue since in this case the court found two not one aggravating circumstance. Moreover, this court held in State v. Dixon, supra at 9, that when one or more aggravating circumstances is found, death is persumed to be the proper sentence unless it or they are overridden by one or more of the mitigating circumstances. Under Dixon, a finding of only one aggravating circumstance is sufficient to support a death sentence.

CONCLUSION

Based on the above-stated facts, arguments and authorities, Appellee would pray that this Honorable Court affirm the decision of the lower court.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL

THEDA R. JAMES
Assistant Attorney General
Park Trammell Building
1313 Tampa Street, Suite 804
Tampa, Florida 33602
(813) 272-2670

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U. S. Regular Mail to Douglas S. Connor, Assistant Public Defender, Hall of Justice Building, 455 N. Broadway Avenue, Bartow, Florida 33830 this 30th day of December, 1985.

OF COUNSEL FOR APPELLEE