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IN THE FLORIDA SUPREME COURT

FILED

ROBERT EARL DUBOISE,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. 67,~~028~~ 082

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

BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Issue XII of the Appellee's Answer Brief contains the Issue raised by the State as the Cross-Appellant; to-wit: Whether the Trial Court erred in granting the Defendant's Motion for Arrest of Judgment of Count II of the Indictment (Sexual Battery charge).

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SUMMARY OF THE ARGUMENTS

ISSUE I

Though the trial court found that DuBoise was arrested wouthout probable cause, the State demonstrated by clear and convincing evidence, that DuBoise consented to the taking of additional dental impressions approximately twelve hours after his arrest.

ISSUE II

DuBoise voluntarily disclosed the details of the murder of Barbara Grams to a fellow inmate subsequent to his lawful arrest for violating his probation. The statements implicating DuBoise in the crime were not obtained by law enforcement interrogation or as a consequence of any illegal incarceration.

ISSUE III

Police detectives asked inmate Claude Butler if he heard about the murder; and, if Butler should hear anything, to let the police know. Butler did not become a "State agent" simply by virtue of his decision to disclose the defendant's incriminating statements.

ISSUE IV

Despite the trial court's instructions to have all motions heard prior to trial, the defendant withheld his motions to suppress until after trial commenced and the jury was sworn. The trial court acted within its discretion in reserving ruling on the suppression motions until the conclusion of the trial.

ISSUE V

Appellant has failed to preserve this issue for appellate review. Furthermore, the prosecutor never suggested that he should be considered a 13th juror; to the contrary, the prosecutor advised the jury that he might have inadvertently failed to respond to an issue raised by the defense during his closing argument. The prosecutor's comment did no more than advise the jurors to hold the State to its burden in refuting the defendant's "lack of evidence" argument.

ISSUE VI

Although witness Claude Butler recalled having seen one of the jurors before, the juror did not recognize Butler. The court's inquiry was sufficient to refute any allegation of juror misconduct.

ISSUE VII

The unobjected to excusal of one juror because of her opposition to capital punishment did not deny DuBoise an impartial jury.

ISSUE VIII

The conscience of the court was satisfied that DuBoise violated one or more of the conditions of his probation.

ISSUE IX

The trial court's written sentencing order demonstrates that the Tedder standards were satisfied.

ISSUE X

Robert DuBoise was properly sentenced to death after he participated in the attempted robbery, he struggled with Barbara Grams, he raped Barbara Grams, and he knew Barbara Grams would be killed after she recognized Ray Garcia.

ISSUE XI

The trial court's finding of three aggravating circumstances and no mitigating circumstances supports the imposition of the death penalty.

ISSUE I

ARGUMENT

THE TRIAL COURT PROPERLY ADMITTED INTO EVIDENCE THE MODELS OF DUBOISE'S TEETH AND ALL TESTIMONY BASED UPON THE COMPARISON OF THOSE MODELS TO THE BITE MARK.

During the initial police investigation into the murder of Barbara Grams, Detective Saladino obtained voluntary bitemark impressions in beeswax from a number of suspects, including the defendant, Robert DuBoise. (R.938, 2595-2599) On September 20, 1983, DuBoise voluntarily accompanied Detective Saladino to the police station where DuBoise was photographed, fingerprinted and his bitemark impressions were taken. (R.942, 2599-2600) At the time the "beeswax" impressions were taken, DuBoise told Detective Saladino ". . .I know you're doing everybody, so I have nothing to hide. Go ahead and do it." (R.2600)

After receiving confirmation from Dr. Souviron that the bitemark impressions obtained from DuBoise were consistent with the bitemark left on Barbara Grams face, the police took DuBoise into custody at approximately 3:30 a.m. on October 22, 1983. (R.1003, 2602) During previous encounters with DuBoise, Detective Saladino always found DuBoise to be quiet, easygoing and cooperative. (R.2682) However, after DuBoise was arrested, he became very angry, violent and hostile; DuBoise attempted to bite and kick the officers who transported him

from the police station to central booking. (R.1003,2682)

At approximately 6:30 a.m. on the morning of his arrest, DuBoise received an injection of 10 mg. of "Haldol". (R.1538,2859) Detective Saladino conferred wth clinic personnel and confirmed that the effects of Haldol were very short -- the medicine was to calm DuBoise; it reached its peak after approximately 1 1/2 hours and would not affect the defendant's mental faculties. (R.2682-2683)

At approximately 3:00 p.m. on October 22, a search warrant was issued by Circuit Judge Griffin to obtain additional bitemark impressions from DuBoise. (R.2675, 2676, 2677, 2603) The police detectives went to the jail at approximately 4:00 p.m. and explained their purpose and why they were picking up DuBoise. (R.2675, 2684) DuBoise said, "I have nothing to hide. As a matter of fact, I want you to go ahead and do it." (R.2675) Though the officers had the search warrant in their possession, they did not serve the warrant because DuBoise consented to giving additional dental impressions. (R.2604, 2606, 2675)

When DuBoise was advised of the purpose of the dental procedure, he told the officers:

> "Fine, Go ahead and do it" (R.2604,2684)
>
> * * *
>
> ". . .I want to do it and get over with. I'll prove to you I did not bite that girl." (R.2605,2684)

*   *   *

"I didn't have anything to do with it."
(R.2684)

Because DuBoise sought to "prove" that he didn't bite the girl and consented to the additional dental impressions, Detective Saladino felt that it was unnecessary to serve the warrant. (R.2684) DuBoise was transported to Dr. Powell's office and remained at the dentist's office for approximately five hours. (R.897,888) While at Dr. Powell's office, DuBoise was told repeatedly that he did not have to volunteer for the dental impressions and photographs. (R.2606) According to Dr. Powell, DuBoise was cooperative; DuBoise was not angry and did not object to any of the procedures, he did not slur his speech and he did not appear to be under the influence of any substance. (R.898, 905) DuBoise walked into the office in a perfectly normal manner. DuBoise communicated with Dr. Powell "perfectly". (R.905)

Though the court determined that DuBoise's initial arrest was invalid, the trial court found that DuBoise consented to the taking of the additional dental impressions at the dentist's office. (R.1803)

Furthermore, Dr. Powell agreed that there was basically no distinction between the stone model made from the original beeswax impressions of DuBoise's teeth and the "first generation" cast of the soft impressions made after DuBoise's

arrest. (R.855)

The principle is well-settled that the issue of whether a valid consent to a search has been given is a question of fact for determination by the trial court and the court's finding will not be overturned on appeal unless clearly erroneous. James v. State, 223 So.2d 52, 56-57 (Fla. 4th DCA 1969). A warrantless entry is valid where consent is voluntarily and freely given. Schneckloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973). Whether an accused's consent was freely and voluntarily given is to be determined from the totality of the circumstances and the burden is on the State to prove voluntariness. Id.; Bumper v. North Carolina, 391 U.S. 543, 88 S.Ct. 1788, 20 L.Ed.2d 797 (1968). To sustain its burden, the State must prove voluntary consent by clear and convincing evidence. Norman v. State, 379 So.2d 643 (Fla. 1980).

In the instant case, there is ample support for the trial court's conclusion that the consent was voluntarily and freely given. The unrebutted testimony established that DuBoise was anxious to attempt to extricate himself from his predicament and adamently told the officers to "go ahead", "I want you to do it", "I'll prove to you that I did not bite the girl". During Detective Saladino's preliminary investigations, DuBoise anxiously cooperated and freely consented to the taking of his photographs, fingerprints and bitemark impressions in an effort to exclude himself from the

category of suspects. Once the investigation focused primarily on DuBoise, the defendant became even more adament about "proving" his innocence.

The examining dentist, Dr. Powell, confirmed the defendant's speech was not impaired; DuBoise walked into the office in a perfectly normal manner and he did not object to any of the procedures employed during the five-hour period he remained at Dr. Powell's office. The State's uncontradicted evidence refuted any inference that DuBoise was not acting under his own free will when he agreed to the additional dental impressions. See, e.g. Atkins v. State, 452 So.2d 529, 532 (Fla. 1984) [even if defendant was intoxicated when arrested, his consent given several hours later were not invalid]

Whether or not consent has actually been given or is simply a manifestation of consent produced by coercion is a question for the trial judge, and his determination must be accepted on appeal unless clearly erroneous, James v. State, 223 So.2d at 556, Jordan v. State, 384 So.2d 277, 279 (Fla. 4th DCA 1980). Sub judice, the trial court was satisfied that DuBoise voluntarily permitted or expressly invited and agreed to the taking of additional dental impressions. See, Jordan, 384 So.2d at 279. The trial court's ruling on a motion to suppress comes to the appellate court clothed with a presumption of correctness; and, in testing the accuracy of the trial court's conclusion, the appellate court should interpret the evidence and all reasonable inferences and

deductions capable of being drawn therefrom in the light most favorable to sustain those conclusions. McNamara v. State, 357 So.2d 410 (Fla. 1978); Johnson v. State, 438 So.2d 774 (Fla. 1983).

DuBoise claims that the prosecutor below did not attempt to rely upon the search warrant." (Brief of Appellant at 22, citing R.1541, 1795-1812) The record belies the defendant's claim, to wit:

> [THE COURT]: Let me make the record clear. I'm finding there is insufficient probable cause for the arrest in this case. It is very, very clear.
> Now why does it not make any difference?
>
> [PROSECUTOR]: Judge, just parenthetically. I understand the Court's ruling. Judge Griffin issued a search warrant, a Court of competent jurisdiction, issued a search warrant in this case and found probable cause, and the Court's theory of not allowing --
>
> [THE COURT]: Excuse me, excuse me. I have found there is no probable cause. If I am wrong the District Court will, or the Supreme Court will correct me.
> Now you say it doesn't make any difference. Why does it not make any difference?
>
> [PROSECUTOR]: Because Mr. DuBoise consented to his teeth being given at Dr. Powell's office.
>
> (R.1795)

As evidence by the foregoing, the State did not abandon any argument that the search warrant issued subsequent to DuBoise's arrest was valid. The trial court's ruling may be upheld under any appropriate theory. Hamelmann v. State, 113

So.2d 394, 397 (Fla. 1st DCA 1959); Smith v. Phillips, 455 U.S. 209, 71 L.Ed.2d 78, 85; 102 S.Ct. 940 (1982)(n.6). The validity of the search warrant was not contested and the officer's determination that it was unnecessary to serve the search warrant in light of DuBoise's consent does not diminish the validity of the search warrant or render the additional dental impressions inadmissible. As recognized in United States v. Ventresca, 380 U.S. 102, 13 L.Ed.2d 684, 85 S.Ct. 741 (1965) "in a doubtful or marginal case a search under a warrant may be sustainable where without one it would fall." 13 L.Ed.2d at 687. The Supreme Court has declined to adopt a per se rule excluding evidence seized subsequent to an illegal arrest. United States v. Leon, 468 U.S. 677, 104 S.Ct. 3405, 82 L.Ed.2d 677, 690, citations omitted. Sub judice, the officers acted in good faith in seeking a warrant for the procedure and yet found it unnecessary to execute the warrant in light of DuBoise's consent in an effort to exonerate himself by submitting to additional dental impressions. Though DuBoise may have believed that no incriminating evidence would be found, (1) DuBoise was not deceived about the purpose of the dental procedure, (2) he was coherent and in full control of his faculties, and, (3) consistent with his prior willingness to give his "bitemark impressions", DuBoise consented to the dental procedures. In view of the "totality of the circumstances", the dental impressions obtained subsequent to the defendant's arrest were properly introduced into evidence at trial.

ISSUE II

ARGUMENT

THE TRIAL COURT PROPERLY ADMITTED THE TESTIMONY OF INMATE CLAUDE BUTLER REGARDING VOLUNTARY ADMISSIONS DUBOISE MADE SUBSEQUENT TO HIS LAWFUL ARREST.

DuBoise argues that confessions secured as the result of an illegal arrest are inadmissible as violative of the Fourth Amendment, unless the State can prove that intervening events have broken the cause or link between the illegal arrest and the confession. In support of his claim, DuBoise relies on Taylor v. Alabama, 457 U.S. 687, 73 L.Ed.2d 314, 102 S.Ct. 2664 (1982), Dunaway v. New York, 442 U.S. 200, 60 L.Ed.2d 824, 99 S.Ct. 2248 (1979) and Brown v. Illinois, 422 U.S. 590, 45 L.Ed.2d 416, 95 S.Ct. 2254 (1975). Each of the cases relied upon by the defendant involves confessions obtained during custodial interrogation by police officers after the defendant's illegal arrests. Sub judice, the incriminating statements at bar were not obtained by the police during any illegal detention and interrogation but were voluntary disclosures made to a cellmate following DuBoise's lawful incarceration. The trial court wholly rejected DuBoise's claim that inmate Butler was an agent of the State and concluded that Butler was lawfully under arrest when his admissions were made.

As previously recognized, the United States Supreme Court has refused to adopt a per se rule that would render

inadmissible in the prosecution's case-in-chief "any evidence that came to light through a chain of causation that began with illegal arrest." Leon, 82 L.Ed.2d at 690. Citing Brown v. Illinois, supra.

In Brown v. Illinois, the court set forth the standard for determining whether an accused's confession was tainted by 'antecedent' illegality:

> "The question whether a confession is the product of a free will. . . must be answered on the facts of each case. No single fact is dispositive. . . The Miranda warnings are an important factor, to be sure, in determining whether the confession is obtained by exploitation of an illegal arrest. But they are not the only factor to be considered. The temporal proximity of the arrest and the confession, the presence of intervening circumstances, and particularly, the purpose and flagrancy of the official misconduct are all relevant. The voluntariness of the statment is a threshold requirement. And the burden of showing admissibilty rests, of course, on the prosecution." Id., at 603-604, 45 L.Ed.2d 416, 95 S.Ct. 2254 (footnotes and citations omitted).
>
> See also Dunaway v. New York, 442 U.S. 200, 218, 60 L.Ed.2d 824, 99 S.Ct. 2248 (1979).

Sub judice, there was no causal connection between DuBoise's voluntary disclosures to his cellmate and his original arrest. The trial court determined that the defendant's valid intervening arrest for the violation of probation was sufficient to purge the taint of the original

illegal arrest. Whether DuBoise may or may not have been arrested for violating his probation solely on a technical ground is of no import; his November arrest was concededly valid and reversible error cannot be predicated on conjecture or supposition. Sullivan v. State, 303 So.2d 632, 635 (Fla. 1974). DuBoise's inculpatory statements, having been disclosed to a fellow inmate subsequent to the defendant's lawful arrest, were not subject to exclusion as the product of an illegal arrest.

ISSUE III

ARGUMENT

THE TRIAL COURT PROPERLY ADMITTED TESTIMONY RELATING TO THE DEFENDANT'S INCULPATORY STATEMENTS DISCLOSED TO A FELLOW INMATE.

When inmate Claude Butler was called by the State to testify, the defense, for the first time, sought to exclude Butler's testimony arguing that Butler was a "State agent"[1/] (R.1026). Claude Butler and Robert DuBoise were amoung the sixteen inmates confined in a "behaviorial observation" cell at the Hillsborough County Jail (R.2337-2522; 1035, 1049). Though Butler did not recognize the defendant when DuBoise was first brought into the jail, Butler eventually remembered having seen DuBoise around Clearfield Park.

Detective Saladino met with Butler concerning his unrelated case. DuBoise's name was mentioned sometime during the conversation and Saladino asked if DuBoise talked about his case (R.2687). According to Detective Saladino Butler indicated that he was in the same cell with DuBoise and DuBoise was talking about [this girl]. (R.2687) Butler was quite vague and Saladino asked him, "What did you hear?". According to Saladino, the officers "sort" of told Butler, "If

1/ The prosecutor objected to the defendant's untimely motion brought during the middle of trial. (R.1030)

you see anything, hear conversation, call us. See what you can do for us or whatever." (R.2687)

> [Defense Counsel] Q. Nobody asked him to find out what he could find out?
>
> [Detective Saladino] A. No, not really.
>
> (R.2687)

According to Claude Butler, "He [Detective Saladino] asked him:

> "If Robert said anything pertaining to this case," he said, "If I didn't mind, to give him a call." He never gave me a direct order telling me to give him a call."
>
> (R.1073)
>
> [Defense Counsel] Q. . . .Did, perhaps, counsman asked you to see what you can find out about DuBoise or what he may have had to say?
>
> [Butler] A. No, I don't remember either one of them telling me to see what I could find out.
>
> (R.2778)
>
> [Defense Counsel] Q. At some later point in time, Saladino told you to call him, though, if Robert had told you anything else or said anything else?
>
> [Butler] A. He said if I wanted -- he didn't put it like that. He said more like, you know, if I wanted to, you know, if I had anything else that I wanted to say or if I remembered anything else that he said, to give him a call.
>
> (R.2778-2779)

Butler did not know what felony murder was and Butler believed that, in the long run, he would be helping DuBoise more than hurting him. (R.1042,1049,2780). Butler gave a sworn statement to the State Attorney's office regarding the admissions made by DuBoise and was advised, on the record, that the State could not and would not promise Butler anything in return for his testimony (R.1045). At the time of the sworn statement, the prosecutor advised Butler,

> "And I have told you and I am going to state so that it will be part of the permanent record, we appreciate what you are doing but I am not going to make any promises at this point in time concerning your sentences or your current charges. Do you have any problems with that?"
>
> (R.1083)

Butler entered a plea and was sentenced to five years imprisonment on his pending charges (R.1046). The prosecutor who was present at the time Butler gave his sworn statement was not involved in Butler's change of plea or sentencing (R.1086). The sentence was the same as that received by Butler's co-defendant (R.1084-1085). Butler readily admitted his guilt on the V.O.P. and battery charges and was able to take advantage of a favorable plea agreement 3/ and to the fact that Butler's co-defendant

3/ The kidnapping, grand theft and armed robbery incident involved Butler and two of his cohorts. Butler and his companions concocted a scheme to purportedly kidnap one of the cohorts, steal the company van that their companion would be driving and sell the van (R.1085- 1086).

had been caught in a "bunch of lies". (R.1084)

Despite the fact that DuBoise was aware that Butler had advised the police of his jailhouse admissions, DuBoise continued to speak with Butler about this case up until the time of trial (R.1049). In light of the fact that Butler received no benefit from the State in exchange for his testimony and inasmuch as Butler was essentially testifying against his friend, Butler was asked point-blank why he was testifying. According to Butler, he volunteered his testimony because (1) he did not condone forcing a woman to do anything against her will and (2) Butler did not feel that Robert DuBoise should take the whole "rap" for the offense (R.1047). Butler believed that he was helping DuBoise (R.1048).

The trial court found that Butler was not an agent of law enforcement at the time the admissions were made. As the trial court noted, "I don't know of any law that says law enforcement can't go to a cellmate and say, "Have you heard anything? answer, no. If you hear anything, let me know." (R.1029)

Butler was not told to interrogate DuBoise nor directed to engage DuBoise in conversation about the murder, Butler was not paid as a police informant, Butler was not promised anything by the State, no ruse was created to derive information from DuBoise, nor did the State suggest that Butler employ any techniques to obtain any statements from DuBoise.

As previously recognized, the trial court's ruling on a motion to suppress is presumptively correct, and this court should interpret the evidence and reasonable inferences and deductions drawn from the evidence in a manner most favorable to sustaining the trial court's ruling. McNamara v. State, 357 So.2d 410 (Fla. 1978), Johnson v. State, 438 So.2d at 776. As this court recognized in Johnson, supra, United States v. Henry, 447 U.S. 264, 100 S.Ct. 2183, 65 L.Ed.2d 115 (1980) and Malone v. State, 390 So.2d 338 (Fla. 1980) do not impose on the police an affirmative duty to tell an informer to stop talking with the suspect and not approach them again nor do they require that informers be segregated from the rest of the jail's population. In Maine v. Moulton, 38 Cr.L. 3037, 3042 (1985) five of the Supreme Court Justices held that the Sixth Amendment is violated when the State obtains incriminating statements by "knowingly circumventing the accused's right to have counsel present in a confrontation between the accused and a State agent." Here, Butler was not a State agent, the police did nothing more than ask Butler if he had heard anything from BuBoise about the murder and if he should hear anything, to let the officers know. During the Christmas holidays, Butler and DuBoise were talking to one another and DuBoise was depressed. Butler looked at DuBoise and said, "What's wrong, man?" and DuBoise claimed they, "were trying to stick him for something that he didn't do. . ." and DuBoise then admitted his involvement in the events leading to the death

of Barbara Grams (R.1038-1039).

Contrary to DuBoise's claim, there was never any plan to obtain statements from DuBoise, Butler's sentence was not dependent upon his testimony and the fact that DuBoise sought to "unload his troubles" on a fellow inmate does not warrant suppression of the inmate's testimony.

ISSUE IV

ARGUMENT

THE TRIAL COURT DID NOT ERR IN RESERVING RULING ON DUBOISE'S MOTIONS TO SUPPRESS UNTIL THE ISSUES WERE RAISED ON A NEW TRIAL.

On January 21, 1985, the trial judge scheduled the instant trial for February 25, 1985 at 8:30 a.m. The trial judge specifically advised the parties:

> "All motions heard prior to that time. No motions heard on the date of trial."
>
> (R.1757)

Notwithstanding the trial court's explicit directive, DuBoise claims that "the trial court refused to hear DuBoise's motions to suppress prior to trial". [Brief of Appellant at 35, Citing (R.724-725)] This page reference refers to argument presented on February 27, 1985, after the trial had already begun. On February 21, 1985, the defense filed its motions to suppress the bitemark impressions and dental photographs taken subsequent to DuBoise's arrest. (R.2087, 2091, 2114) The prosecutor objected to the defendant's failure to argue the motions to suppress prior to trial beginning and stated:

> "the first issue is they are bringing in the middle of a trial, after a jury has been sworn, any motion to suppress or anything when the court told them they had to do it prior to the trial starting."
>
> (R.724)

Rules 3.190(h)(4) and 3.190(i)(2), Florida Rules of Criminal Procedure, direct that Motions to Suppress shall be made before trial unless the opportunity did not exist or the defendant was not aware of the grounds for the motions. However, the trial court, in its discretion, may entertain the defendant's motions or objections at trial. Sub judice, though the defendant did not present his motions to suppress before trial commenced, the trial court agreed to entertain the motions in light of Rule 3.600, "Grounds for New Trial." (R.724) As recognized long ago by Justice Cardozo in Snyder v. Massachusetts, 291 U.S. 97, 122, 54 S.C.t 330, 338, 78 L.Ed. 674, 687 (1934): ". . .justice, though due to the accused, is due to the accusor also."

The defense was repeatedly admonished by the trial court "you should have argued this prior to trial", (R.742) The Defendant now has the temerity to claim that he is entitled to a new trial based upon the fact that the motions to suppress were not heard prior to his original trial. The trial court stated:

> "[THE COURT]: "See, I am trying to fashion my ruling in a way that is fair to both sides. See, I could say to you I am not going to listen to you because you should have argued this prior to trial, which clearly is in the record probably on sixteen occasions because unless this case is an exception, every time I ever set a case for trial I always say all motions heard prior to trial. No motions heard on trial date.
>
> So, I am giving you that. I am not saying I'm not going to hear you and I am

> not going to rule on it, but on the other hand, it wouldn't be fair to the State at this juncture because it should have been done prior to trial in order that they can appeal it.
>
> I won't put them out in left field by making some ruling that excludes this testimony so they can't appeal. I think that is the fairest way to do it and that is the way I'm going to do it. And, like I say, I don't think it serves any useful purpose to debate it."
>
> (R.742)

DuBoise relies on Land v. State, 293 So.2d 704 (Fla. 1974) in support of his argument that he is entitled to a new trial. In Land, this court determined that the trial court erred in refusing to grant the defendant an evidentiary hearing outside of the presence of the jury regarding the voluntariness of the defendant's confession. Sub judice, unlike Land, the trial court in no way limited the presentation of evidence on the defendant's behalf. In Bailey v. State, 319 So.2d 22, 28 (Fla. 1975) this court noted that it is advantageous for the State as well as defense "for the motion to suppress to be heard before jeopardy attaches by swearing of the jury after voir dire." The defendant's actions in withholding his motions until after the jury has been sworn is a great tactic for inducing error and should not be sanctioned. The defendant lacks a credible basis for claiming reversible error based on the trial court's attempt to fashion an equitable solution.

ISSUE V

ARGUMENT

THE TRIAL COURT DID NOT ERR IN DENYING DUBOISE'S MOTION FOR MISTRIAL BASED UPON THE PROSECUTOR'S COMMENT DURING HIS SUMMATION TO THE JURY.

During closing argument in the guilt phase, the prosecutor said:

> "Ladies and gentlemen, I have said enough. You have heard the evidence. I ask that you go back and if I missed something --invariably I have missed something, go back in the tone and tenure of what I have suggested to you and among each other say, What would Ober have done? How would he respond to that?
>
> (R.1608)

The defendant did not object to this comment either when it was made or at the conclusion of the prosecutor's closing. (R.1608) It was only after the jury instructions were concluded and the jury was excused to begin their deliberations that the defense asked for a mistrial on the basis of the prosecutor's comment. (R.1636-1638) Contrary to the defendant's claim, this issue has not been preserved for appellate review. As determined by this court in State v. Cumbie, 380 So.2d 1031, 1033-1034 (Fla. 1980), a defendant's motion for mistrial, made after jury instructions and retirement of the jury for deliberations, comes too late to preserve the defendant's objection for appeal. Sub

judice, as in Cumbie, the motion for mistrial, in order to be considered timely, must be made by the conclusion of the prosecutor's closing argument. The defendant's failure to object to the comment when made, failure to request a curative instruction, and failure to timely move for a mistrial precludes consideration of his claim on appeal. Assuming, arguendo, that this issue was preserved for appellate review, the defendant is not entitled to relief. The power to declare a mistrial should be exercised with great care and should be done only in cases of absolute necessity. Salvatore v. State, 366 So.2d 745, 750 (Fla. 1978), cert. denied, 444 U.S. 884, 100 S.Ct. 177, 62 L.Ed.2d 115 (1979). If an alleged error does no substantial harm and causes no material prejudice, a mistrial should not be granted. Breedlove v. State, 413 So.2d 1 (Fla. 1982), cert. denied, 459 U.S. 882, 103 S.Ct. 184, 74 L.Ed.2d 149 (1982). The principle is well-settled that wide latitude is permitted in arguing to the jury, and control of the comments lies within the discretion of the trial court. Breedlove, 413 So.2d at 8. An appellate court will not interfere unless there has been an abuse of discretion. Id. A new trial should be granted only when it is

> "'Reasonably evident that the remarks might have influenced the jury to reach a more severe verdict of guilt than it would otherwise have done.'" Breedlove v. State, 413 So.2d at 8, citing, Darden v. State, 329 So.2d 287, 289 (Fla. 1976), cert. dismissed, 430 U.S. 704, 97 S.Ct. 1671, 51 L.Ed.2d 751 (1977). Each case must be

> considered on its own merits and within the circumstances pertaining when the questionable statements were made. Darden v. State, 329 So.2d at 291.

In determining whether the prosecutorial comments are improper, the court is required to examine questionable comments in the context in which they were made. Darden, 329 So.2d at 291. Examining the whole of the prosecutor's remarks, it is clear that the comment did not suggest that the jury consider the prosecutor as another juror, Cf. Hill v. State, 477 So.2d 553 (Fla. 1985).

During the defense counsel's closing, he made a "lack of evidence" argument and repeatedly directed the jury's attention to the prosecutor's response to the evidence. The defense counsel advised the jurors that:

> "Mr. Ober will argue to you. . ."(R.1560)
>
> Mr. Ober has alluded to you. . ."(R.1561)
>
> Mr. Ober speaks of . . ." (R.1561)
>
> "He [Ober] would have you believe. . ." (R.1562)
>
> "Mr. Ober would lead you to believe. . ." (R.1562)
>
> "The State is going to argue. . ."(R.1562)
>
> "The State wants you to believe. . ." (R.1576)
>
> "Mr. Ober tried to make a big deal. . ." (R.1580)

"Mr. Ober wants you to link up. . ."
(R.1590)

During closing, the defense implicitly challenged the State to respond to and rebut each and every "lack of evidence" argument raised by the defense.

At the conclusion of the State's remarks, the prosecutor recognized that he might have unintentionally failed to address a particular argument raised by the defense and suggested to the jurors that, if he had missed something, to ask themselves how the prosecutor would have responded. (R.1608) This statement does no more than ask the jurors to hold the State to its burden of proof and demand that the State refute the defendant's "lack of evidence" arguments. Unlike Hill, supra, the statement made by the prosecutor in the instant case did not amount to "inexcusable prosecutorial overkill", Hill, 477 So.2d at 556; but was fair reply to the defense counsel's argument made just moments earlier. The defendant cannot be heard to complain about prosecutorial comment which he invited. Lynn v. State, 395 So.2d 621 (Fla. 1st DCA) Rev. denied, 402 So.2d 611 (Fla. 1981); Dixon v. State, 206 So.2d 55 (Fla. 4th DCA 1968).

Assuming, arguendo, this court determines that the prosecutor's statements were improper, any error was harmless error. Under the harmless error doctrine, a judgment may stand, even in the face of constitutional violation, when there is

no reasonable probability that the practice complained of might have contributed to the conviction. United States v. Hasting, 461 U.S. 499, 103 S.Ct. 1974, 76 L.Ed.2d 96 (1983); Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); State v. Murray, 443 So.2d 955 (Fla. 1984). The duty of the reviewing court is to consider the record as a whole and to ignore errors that are harmless. United States v. Hastings, 461 U.S. at 509; State v. Murray, 443 So.2d at 956. Thus, the court must consider whether, absent the prosecutor's allegedly improper remark, it is clear beyond a reasonable doubt that the jury would have returned the same verdict. See, Chapman v. California, 386 U.S. at 23-24; Breedlove v. State, 413 So.2d at 7-8. In the instant case, this one isolated comment, if error, was harmless under the circumstances.

ISSUE VI

ARGUMENT

THE TRIAL COURT DID NOT ERR IN DENYING THE DEFENDANT'S MOTION FOR MISTRIAL WHEN IT WAS DISCLOSED THAT WITNESS, CLAUDE BUTLER, RECOGNIZED ONE OF THE JURORS.

Sometime after Claude Butler completed his testimony, Butler indicated that he had recognized one of the jurors. (R.1329) When inquiry was made of Butler, he advised the parties that he had "been thinking about it all night, trying to remember where I knew him from". When asked which juror he was talking about, Butler responded: "I don't know". (R.2566) Butler thought he knew the juror, eventually identified as the young black male on the first row, from either "hanging around" the "Trophy Room" or "somewhere"; and the juror would not know Butler by his real name, but only by the initials "CC". (R.2567) Though Butler recalled having seen the juror before, the two were not even friends and Butler had just "seen him around". (R.2567)

The trial court conducted an individual inquiry of each juror (R.1332-1340) and none of the jurors indicated recognizing or knowing any of the witnesses who had testified.

The trial court was satisfied that a mistrial was not warranted under the circumstances of the case. Though Butler believed he recognized the juror, none of the jurors recalled recognizing any of the witnesses. The trial court was

satisfied that the juror, was not subject to disqualification based upon any purported acquaintence with witness, Claude Butler. DuBoise now claims that the "best procedure" would have been to confront the juror after Butler disclosed his identity. At trial, DuBoise did not suggest that the court's inquiry was insufficient.

In Turner v. Louisiana, 379 U.S. 466, 13 L.Ed.2d 424, 85 S.Ct. 546 (1965), the jury members were continuously in the company of bailiffs who were two of the State's principal witnesses. Finding that this type of association between the witnesses and jurors undermined the right to a trial by jury, the court emphasized the necessity of fully protecting the defendant's right of confrontation, cross-examination and counsel. Sub judice, the juror who was purportedly acquainted with Butler failed to recognize Butler even after Butler had testified. Dealing with the conduct of the jurors is left to the sound discretion of the trial court, Doyle v. State, 460 So.2d 353 (Fla. 1984). The trial court at bar did not err in denying the defendant's motion for mistrial after conducting an inquiry of each of the jurors.

ISSUE VII

ARGUMENT

THE EXCLUSION OF ONE PROSPECTIVE JUROR SO OPPOSED TO CAPITAL PUNISHMENT THAT HER IMPARTIALITY WAS AFFECTED DID NOT DEPRIVE DUBOISE OF AN IMPARTIAL JURY DURING THE GUILT/INNOCENCE PHASE OF TRIAL.

Prospective juror, Laura Niswonger, was excused for cause from the jury panel because of her beliefs against capital punishment. (R.256) Niswonger admitted that under no circumstances could she recommend the death penalty and emphatically stated, ". . . I don't believe in capital punishment". (R.256) No defense objection was made to the excusal of this juror. Having failed to object to the excusal of the prospective juror at trial, DuBoise is not entitled to consideration of his claim on appeal. Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 43 L.Ed.2d 594 (1977)

Constitutional principles recognized in jury selection cases allow the exclusion in capital murder cases of prospective jurors who cannot be impartial or cannot follow the law as instructed by the trial court. Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); Adams v. Texas, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980), Wainwright v. Witt, 469 U.S. ___, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985).

This court has consistently ruled that a capital defendant has no right to prevent the excusal of persons committed

to voting against a sentence of death, either on the ground of denial of cross-sectional community representation or on the ground that the practice produces juries that are "prosecution-prone". Kennedy v. Wainwright, 11 F.L.W. 65, (Fla., February 12, 1986), Dougan v. State, 470 So.2d 697 (Fla. 1985); Caruthers v. State, 465 So.2d 496 (Fla. 1985); Copeland v. State, 457 So.2d 1012 (Fla. 1984); Sims v. State, 444 So.2d 922 (Fla. 1983); Riley v. State, 366 So.2d 19 (Fla. 1978).

The procedure of exclusion has been upheld against constitutional challenge by the numerous federal circuit courts of appeal, McClesky v. Kemp, 753 F.2d 877 (11th Cir. 1985), Smith v. Balkcom, 660 F.2d 573 (5th Cir. 1981), modified, 671 F.2d 858 (1982); Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978), Keeton v. Garrison, 742 F.2d 129 (4th Cir. 1984) and state supreme courts, People v. Fields, 35 Cal3d 329, 197 CalRptr 803, 673 P.2d 680, 687-695, 34 CrL 2375 (1983); State v. Ortiz, 88 NM 370, 540 P.2d 850, 852-854 (1975); Commonwealth v. Szuchon, 484 A.2d 1365 (Pa. 1984).

The one appellate decision to the contrary is Grigsby v. Mabry, 758 F.2d 226 (8th Cir. 1985), which is pending review in the United States Supreme Court in Lockhart v. McCree, ____ U.S. ___, 106 S.Ct. 59, 88 L.Ed.2d 48 (1985). Even if the Supreme Court were to approve the Eighth Circuit's decision, DuBoise has failed to demonstrate any actual prejudice resulting from the unobjected to exclusion of one prospective juror or from the

jury selected in his case. Nothing in the voir dire indicates that any of the individual jury members selected could not decide the case fairly applying the law as instructed by the court. The jury recommended a sentence of life imprisonment by a vote of 12-0; and the record, considered as a whole, does not support DuBoise's claim that the exclusion of one prospective juror affected the outcome of the guilt phase of his trial.

ISSUE VIII

ARGUMENT

THE TRIAL COURT PROPERLY REVOKED APPELLANT'S PROBATION BASED UPON THE EVIDENCE ADDUCED AT TRIAL.

As of this date, this court has not yet ruled whether, in light of the amendment to Article I, Section 12 of the Florida Constitution, the exclusionary rule applies to probation revocation proceedings. Tamer v. State, 11 F.L.W. 83 (Fla., March 6, 1985). Assuming, arguendo, that the exclusionary rule applies to probation revocation proceedings, DuBoise has failed to demonstrate that the trial court erred in revoking his probation. DuBoise voluntarily accompanied Detective Saladino to the police department and consented to the taking of his fingerprints, photographs, and bitemark impressions. Additional dental models were taken of DuBoise's teeth after the detectives obtained a search warrant and after DuBoise consented to the procedure. (Issue I, supra) Likewise, the voluntary statements made by DuBoise to one of his cellmates, Claude Butler were not subject to exclusion. (Issues II and III).

Probation is a matter of grace. The purpose of the probation revocation proceeding is to satisfy the conscience of the court whether the accused has violated his probation. Bernhardt v. State, 288 So.2d 440 (Fla. 1974). In light of the identifying bitemark evidence against DuBoise, the defendant's

admissions to inmate Butler and the fact that DuBoise moved from his parent's residence to the Peter Pan Motel (R.1151), substantial evidence supported the trial court's finding that DuBoise violated one or more conditions of his probation, Meintzer v. State, 399 So.2d 133 (Fla. 5th DCA 1981); and the trial court did not abuse its discretion in revoking the defendant's probation.

ISSUE IX

ARGUMENT

THE TRIAL COURT DID NOT ERR IN SENTENCING DUBOISE TO DEATH AND IN OVERRIDING THE JURY'S RECOMMENDATION OF LIFE IMPRISONMENT.

In Tedder v. State, 322 So.2d 908, 910 (Fla. 1975) this court held that "in order to sustain a sentence of death following a jury's recommendation of life, the facts suggesting death should be so clear and convincing that virtually no reasonably person could differ." In Echols v. State, 10 F.L.W. 526 (Fla. 1985) this court emphasized the necessity of reviewing the trial court's sentencing order in jury override cases. In overriding the jury's advisory recommendation of life, the trial court, pursuant to Florida Statute §921.140(3) entered the following sentencing order:

AGGRAVATING CIRCUMSTANCES

A. THE CAPITAL FELONY WAS COMMITTED BY A PERSON UNDER SENTENCE OF IMPRISONMENT.

FACT:
There is no evidence in the record to support this circumstance.

CONCLUSION:
The capital felony was not committed by a person under sentence of imprisonment.

B. THE DEFENDANT WAS PREVIOUSLY CONVICTED OF ANOTHER CAPITAL FELONY OR OF A FELONY INVOLVING THE USE OF THREAT OF VIOLENCE TO THE PERSON.

FACT:
There is no evidence in the record to support this circumstance.

CONCLUSION:
The defendant has not previously been convicted of a felony involving the use or threat of violence to the person.

C. THE DEFENDANT KNOWINGLY CREATED A GREAT RISK OF DEATH TO MANY PERSONS.
FACT:
There is no evidence in the record to support this circumstance.

CONCLUSION:
The defendant did not knowingly create a great risk of death to many persons.

D. THE CAPITAL FELONY WAS COMMITTED WHILE THE DEFENDANT WAS ENGAGED, OR WAS AN ACCOMPLICE, IN THE ACOMMISSION OF, OR AN ATTEMPT TO COMMIT, OR FLIGHT AFTER COMMITTING OR ATTEMPTING TO COMMIT ANY ROBBERY, RAPE, ARSON, BURGLARY, KIDNAPPING OR AIRCRAFT PIRACY OR THE UNLAWFUL THROWIN PLACING OR DISCHARGING OF A DESTRUCTIVE DEVICE OR BOMB.

FACT:
1. The defendant admitted to Claude Butler that he had sexual intercourse with victim Barbara Grams.
2. The testimony of Hillsborough County Medical Examiner Dr. Lee R. Miller in addition to the evidence located at the scene of this offense, and the testimony of bite-mark expert Dr. Richard Souviron, corroborates the testimony of Claude Butler.

3. The defendant admitted to Claude Butler that he attempted to rob from the victim, Barbara Grams, her purse and she resisted. The evidence at the location of this offense supports that conclusion.

CONCLUSION:
The evidence illustrates beyond and to the exclusion of a reasonable doubt that the capital felony was committed while the defendant was engaged, or was an accomplice in a rape and robbery or in an attempt to commit those crimes.

E. THE CAPITAL FELONY WAS COMMITTED FOR THE PURPOSE OF AVOIDING OR PREVENTING A LAWFUL ARREST OR EFFECTING AN ESCAPE FROM CUSTODY.

FACT:
1. Claude Butler testified that victim Barbara Grams, recognized the defendant's accomplice Ray Garcia and that she would be able to identify Ray Garcia.

CONCLUSION:
The evidence illustrates beyond and to the exclusion of a reasonable doubt that the capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

F. THE CAPITAL FELONY WAS COMMITTED FOR PECUNIARY GAIN.

FACT:
The facts set forth in support of Aggravating Circumstance D. alone pertain here, as it relates to the offense of attempted robbery.

CONCLUSION:
This aggravating circumstance merges with circumstance D., above, as it relates to the offense of attempted robbery. Therefore the evidence does not support a finding that the capital felony was committed for pecuniary gain.

G. THE CAPITAL FELONY WAS COMMITTED TO DISRUPT OR HINDER THE LAWFUL EXERCISE OF ANY GOVERNMENTAL FUNCTIONS OR THE ENFORCEMENT OF LAWS.

FACT:
There is no evidence in the record to support this circumstance.

CONCLUSION:
The capital felony was not committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of law.

H. THE CAPITAL FELONY WAS ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL.

FACT:
1. Claude Butler testified that victim Barbara Grams was attacked by the Defendant and two others. That each of these individuals prevented her from fleeing to her safety as they sexually assaulted her. That the Defendants cohorts preceded to extinguish her life with two by four pieces of lumber.
2. That Hillsborough County Medical Examiner Dr. Lee R. Miller testified that victim Barbara Grams received multiple areas of trauma to the face and neck. In addition she sustained a broken rib. Dr. Miller further indicated that but for the most severe blow, the other injuries would have caused victim Barbara Grams pain prior to her death.

CONCLUSION:
The evidence illustrates beyond and to the exclusion of a reasonable doubt that the capital felony was especially heinous, atrocious or cruel.

I. THE CAPITAL FELONY WAS A HOMICIDE AND WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTITIFICATION.

FACT:
There is no evidence in the record to support this circumstance.

CONCLUSION:
The capital felony was a homicide but was not committed in a cold, calculated premeditated manner without any pretense of moral or legal justification.

MITIGATING CIRCUMSTANCES

A. THE DEFENDANT HAS NO SIGNIFICANT HISTORY OF PRIOR CRIMINAL ACTIVITY.

FACT:
There is no evidence in the record to support this circumstance, as the defendant was on three periods of probation for the offenses of burglary and grand theft.

CONCLUSION:
The court finds that the defendant has a significant history of prior criminal activity.

B. THE CAPITAL FELONY WAS COMMITTED WHILE THE DEFENDANT WAS UNDER THE INFLUENCE OF EXTREME MENTAL OR EMOTIONAL DISTURBANCE.

FACT:
The testimony of the defendant's father, Victor DuBoise, indicates a socioecomic background below that of the average citizen. The State of Florida stipulated with the defendant that his IQ was 79-80. The testimony of Claude Butler concerning the defendant's conduct before and after this offense negates this factor in mitigation.

CONCLUSION:
The capital felony was not committed while the defendant was under the influence of extreme mental or emotional disturbance.

C. THE VICTIM WAS A PARTICIPANT IN THE DEFENDANT'S CONDUCT OR CONSENTED TO THE ACT.

FACT:
There is no evidence in the record to support this circumstance.

CONCLUSION:
The victim was not a participant in the defendant's conduct nor consented to the act.

D. THE DEFENDANT WAS AN ACCOMPLICE IN THE CAPITAL FELONY COMMITTED BY ANOTHER PERSON AND HIS PARTICIPATION WAS RELATIVELY MINOR.

FACT:
1. The testimony of Claude Butler revealed that the defendant and two others intended to rob the victim of her purse.
2. That testimony revealed a struggle between the defendant and Barbara Grams.
3. That testimony further revealed that the other individuals beat the victim to death.
4. That the defendant consciously and intentionally planned to rob the victim with two others and was a principal in her homicide.

CONCLUSION:
The defendant was an accomplice in the capital felony committed by another person but his participation was not relatively minor.

E. THE DEFENDANT ACTED UNDER EXTREME DURESS OR UNDER THE SUBSTANTIAL DOMINATION OF ANOTHER PERSON.

FACT:
The evidence in the record and the findings of fact elsewhere herein (see Mitigating Circumstance B above), do not support this circumstance.

CONCLUSION:
The defendant did not act under extreme duress nor was he under the substantial domination of another person.

F. THE CAPACITY OF THE DEFENDANT TO APPRECIATE THE CRIMINALITY OF HIS CONDUCT OR TO CONFORM HIS CONDUCT TO THE REQUIREMENTS OF LAW WAS SUBSTANTIALLY IMPAIRED.

FACT:
Even considering the factors discussed in Mitigating Circumstance B, above, there is no evidence in the record to support this circumstance.

CONCLUSION:
The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was not substantially impaired.

G. THE AGE OF THE DEFENDANT AT THE TIME OF THE CRIME.

FACT:
The defendant's date of birth is October 31, 1964.

CONCLUSION:
The age of the defendant at the time of the crime is not a mitigating circumstance.
(R.2860-2867)

As evident from the trial court's sentencing order, the judge fully and fairly considered all of the relevant aggravating and mitigating circumstances before concluding that the death penalty was appropriate in the instant case.

ISSUE X

ARGUMENT

THE DEATH SENTENCE IS APPROPRIATE IN THIS CASE BECAUSE THE EVIDENCE ESTABLISHED THAT THE DEFENDANT KNEW THAT LETHAL FORCE WAS CONTEMPLATED.

In Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982), the Supreme Court addressed the issue of whether or not an aider and abettor to a felony during the course of which a murder is committed can constitutionally be given a death penalty. Enmund was the driver of the get-away car and there was no evidence that Enmund was present at the victim's door when the robbery escalated into murder. However, based on Enmund's participation and planning in executing the robbery, the State courts held Enmund liable for the murders. The court's decision left open the question of who had to make the finding of whether the felony murderer killed, attempted to kill or knew lethal force was contemplated. This issue was decided recently in Cabanna v. Bullock, 38 Cr.L. 3093 (1986). In Bullock, the defendant and a friend accepted a ride from a third party. The friend and the driver got into a fight, during which the defendant held the victim while the friend, Tucker, hit the victim in the face with a whisky bottle. Tucker beat the victim with his fist until the victim fell to the ground and then Tucker killed the victim by smashing his head with a concrete brick.

Bullock and Tucker then disposed of the body. At the conclusion of trial, the jury was instructed that it could find the defendant guilty of capital murder if he was present and aided another in committing a felony. Bullock was found guilty and was sentenced to death. In Bullock, the court stated:

> "If a person sentenced to death in fact killed, attempted to kill, or intended to kill, the Eighth Amendment itself is not violated by his or her execution regardless of who makes the determination of the requisite culpability; by the same token, if a person sentenced to death lacks the requisite culpability, the Eighth Amendment violation can be adequately remedied by any court that has the power to find the facts and vacate the sentence. At what precise point in its criminal process a state chooses to make the Enmund determination is of little concern from the stand point of the constitution. The state has considerable freedom to structure its capital sentencing system as it sees fit, for '[A]s the court has several times made clear, we are unwilling to say that there is any one right way for a state to set up its capital sentencing scheme.' Spaziano, at ___; See, also, Pulley v. Harris, 465 U.S. 37 (1984); Zant v. Stevens, 462 U.S. 862 (1983); Gregg v. Georgia, 428 U.S. 153, 195 (1976); Opinion of Stewart, Powell, and Stevens, JJ.). (38 Cr.L. at 3096

The finding that a defendant killed, attempted to kill, intended to kill or knew lethal force was contemplated, can be made by the jury, the trial judge, or the state appellate court. Sub judice, the trial judge made findings needed to satisfy Enmund and Cabanna. These findings are fairly supported

by the record and should not be disturbed on appeal. See, Tibbs v. State, 397 So.2d 1120 (Fla. 1981). DuBoise's death sentence does not violate the Eighth Amendment since the evidence adduced at trial supports a finding that DuBoise knew lethal force was contemplated.

ISSUE XI

ARGUMENT

THE TRIAL COURT DID NOT ERR IN SENTENCING DUBOISE TO DEATH AFTER FINDING THREE AGGRAVATING CIRCUMSTANCES AND NO MITIGATING CIRCUMSTANCES.

The sentencing order of the trial court is set forth in Issue X, supra.

According to DuBoise, the crime in this case is not properly characterized as especially heinous, atrocious or cruel and he compares his case to Simmons v. State, 419 So.2d 316, 319 (Fla. 1982). In Simmons, the victim was killed by two blows to the head with a hatchet but there was no proof that the victim was aware that he was going to be struck with the hatchet. Sub judice, Barbara Grams was pinned to the ground by her attackers, her rib was broken during the struggle and her face was battered and crushed. (See Exhibits, R.2290; 2286, 2298). Unlike the victim in Simmons, 19 year old Barbara Grams was not struck unexpectedly; but she was helplessly trapped and watched in terror as the boards were raised to bludgeon her to death. This murder -- in which the victim was fully aware of her impending doom -- was heinous, atrocious and cruel. Lemon v. State, 456 So.2d at 888.

According to DuBoise, he merely participated in a plan to snatch a purse. However, DuBoise not only accosted Barbara Grams on her last solitary walk home, he initiated the underlying

felony, DuBoise raped Barbara Grams, he held Barbara Grams on the ground against her will, he inflicted a grotesque bite on her face, DuBoise prevented her from escaping and continued on with the joint criminal venture knowing that Ray Garcia had been recognized and that Barbara would be killed to keep her from identifying the trio.

In essence, the defendant's argument is reduced to an observation that the trial judge should have given more weight to some of the mitigating factgors than he did. The trial judge is not compelled to give the weight desired by the Appellant to such matters. See Hargrove v. State, 366 So.2d 1 (Fla. 1978); Lucas v. State, 376 So.2d 1149 (Fla. 1979); Smith v. State, 407 So.2d 894 (Fla. 1981); Hitchcock v. State, 413 So.2d 741 (Fla. 1982).

Appellant suggests that none of the mitigating evidence was considered by the court. This is pure speculation on Appellant's part. See Palmes v. State, 397 So.2d 648 (Fla. 1981). Appellant was in no way restricted in presenting evidence to the court. Cf. Eddings v. Oklahoma, 455 U.S. 104, 71 L.Ed.2d 1, 102 S.Ct. 869 (1982). Although the consideration of all mitigating circumstances is required, the decision whether a particular mitigating circumstance is proven and the weight to be given it rests with the judge and jury. Lemon v. State, 456 So.2d 885 (Fla. 1984). Appellant's argument that the trial court "ignored" the mitigating factors is without merit and is directly refuted by the trial court's sentencing order.

ISSUE XII

CROSS-APPEAL

ARGUMENT

THE TRIAL COURT ERRED IN GRANTING THE DEFENDANT'S MOTION FOR ARREST OF JUDGMENT.

An indictment or information must fulfill two requirements: the defendant must be apprised of the charges sufficiently to enable preparation of a defense, and the allegations must be specific enough to protect the defendant against being placed in jeopardy twice for the same offense. Jent v. State, 408 So.2d 1024, 1030 (Fla. 1981). In State v. Kopulos, 413 So.2d 1195 (Fla. 2d DCA 1982), the court stated:

> All that is required of an indictment or information is that it sufficently apprise the defendant of the charges against him so that he may adequately prepare his defense and not be unfairly surprised by evidence he is called upon to meet.

On November 23, 1983, the Grand Jury returned a two-count indictment charging Robert DuBoise with first degree murder and sexual battery. (R.1966-1967) The second count of the indictment provides:

> The Grand Jurors of the County of Hillsborough, State of Florida, charge that ROBERT EARL DUBOISE, between the 18th day of August, 1983, and the 19th day of August, 1983, in the County and State aforesaid, did unlawfully and feloniously commit sexual

> battery upon BARBARA GRAMS, a person over the age of eleven (11) years, without the consent of the said BARBARA GRAMS, contrary to the form of the statute in such cases made and provided, to-wit:
>
> Florida Statute 794.011(3).
>
> * * * * * * * * * * * * * * * * * *
> INDICTMENT FOR SEXUAL BATTERY
> (Second Count)
> * * * * * * * * * * * * * * * * * *
>
> (R.1966-1967)

On February 6, 1984, the defendant filed a Motion for Statement of Particulars, pursuant to Rule 3.140(n), Florida Rules of Criminal Procedure. (R.1979) In his motion, DuBoise sought (1) the exact time, date and place of the alleged offense; (2) whether the defendant is alleged to be the actual perpetrator or an alleged aider and abettor of this alleged offense; and (3) all other material facts of the crime charged known to the State. . . (R.1979). At no other time during the pre-trial proceedings or during the trial, did DuBoise challenge the indictment charging him with sexual battery. The jury returned their verdict on March 7, 1985, finding DuBoise guilty as charged to count I of the indictment (first degree murder) and guilty of the lesser included crime of attempted sexual battery as to count II (R.1658). The judgments and sentences were entered by the trial court on March 7, 1985 and were filed on March 11, 1985. (R.2144, 2146) On March 19, 1985, DuBoise filed a motion for arrest of judgment regarding the attempted sexual battery conviction. (R.2155-2156).

Rule 3.610(a)(1), Florida Rule of Criminal Procedure, provides that the court shall grant a Motion in Arrest of Judgment only when "the indictment of information upon which the defendant is tried is so defective that it will not support a judgment of conviction." On June 7, 1985, the trial court granted the defendant's Motion for Arrest of Judgment, notwithstanding the court's recognition of the fact that the defendant was not embarrassed in the instant case and it was clear the defense "knew what they were defending."(R.1786, 2217)

If the insufficiency of the information or indictment is such that it does not wholly fail to charge a crime, the failure to timely raise the defect by a motion to dismiss constitutes a waiver of the insufficiency, Catanese v. State, 251 So.2d 572 (Fla. 4th DCA 1971) Rule 3.140(o), Florida Rule of Criminal Procedure, directs that

> No indictment of information, or any count thereof, shall be dismissed or judgment arrested, or new trial granted on account of any defect in the form of the indictment or information or of misjoinder of offenses or for any cause whatsoever, unless the court shall be of the opinion that the indictment or information is so vague, indistinct and indefinite as to mislead the accused and embarrass him in the preparation of his defense or expose him after conviction or acquittal to substantial danger of a new prosecution for the same offense.

In the present case, Appellant has not alleged, nor could he seriously argue, that he was misled or embarrassed in the preparation of his defense, or that he was exposed to being placed in jeopardy twice for the same offense. There is no evidence of any prejudice in the record.

Sub judice, the Indictment not only set forth the appropriate statutory provision, but the charged offense was identified within the concluding caption. In United States v. Pou, 484 F.Supp. 972 (S.D. Fla. 1979) the court declared that an indictment or information does not have to expressly allege each element of a crime if the statute violated is referred to in the information or indictment and the missing element is set forth in the statute. Similarly, in United States v. Chilcote, 724 F.2d 1498, 1505 (11th Cir. 1984), the court determined that "when the indictment specifically refers to the statute on which the charge was based, the statutory language may be used to determine whether the defendant received adequate notice."

When an information or indictment omits an element of the crime charged and no motion to dismiss is filed specifically directed to the alleged defect, such omission is waived unless the information or indictment wholly fails to charge a crime. Selley v. State, 403 So.2d 427, 428 (Fla. 5th DCA 1980), citations omitted. In State v. Cadieu, 353 So.2d 150 (Fla. 1st DCA 1977), the court recognized:

> The law does not favor a strategy of withholding attack on the information until the defendant is in jeopardy, then moving to bar the prosecution entirely.

Consequently, the charging document should be judged post-trial by a different and more liberal standard than had it been timely challenged before or upon arraignment by motion to dismiss. Because the indictment at bar did not wholly fail to charge a crime and Appellant failed to file any motion to dismiss, the alleged defect was waived.

CONCLUSION

Based on the foregoing facts, arguments and authorities, the judgment and sentence should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to W.C. McLain, Assistant Public Defender, Hall of Justice Building, P. O. Box 1640, Bartow, Florida 33830-1640 this 27 day of March, 1986.

K Blanco

OF COUNSEL FOR APPELLEE.