IN THE SUPREME COURT OF FLORIDA

ROBERT JOE LONG,

Appellant,

v.

THE STATE OF FLORIDA,

Appellee.

CASE NO. 67,103

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

BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

This is a direct appeal from a judgment for first-degree murder and sentence of death entered by the Circuit Court, Pasco County, Florida. In this brief, the parties will be referred to by their proper names or as they stand before this Court. The letter "R" will be used to designate a reference to the record on appeal. All emphasis is supplied unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Appellee accepts the Statement of the Case and Facts presented in the Brief of the Appellant with such exceptions or additions as set forth below.

Motion to Suppress Confession:

Contrary to Appellant's assertion, the record reflects that at the suppression hearing, Detective Price denied asking Appellant why he would need an attorney after Appellant's equivocal request for counsel. (R. 859-860). He also denied that he intended to prevent Appellant from exercising his right to counsel. (R. 850).

Motion to Suppress Evidence:

According to the testimony of Detective Wolfe and Helms at the suppression hearing on November 15, 1984, they were assisting

a task force investigating the sexual battery of [redacted] (R. 742-743, 773-775). They had been instructed to look for a subject, vehicle and/or apartment complex fitting the description given to the police by the victim, [redacted]. (R. 742-743, 773-775). The description the officers had was for a red Dodge Magnum with a white interior, with the word "Magnum" on the glove box door and a digital watch on the glove box. (R. 765). The description of the subject was of a white male, approximately 30 years old, medium build, slightly pudgy with a slight stomach, conservatively cut brown hair and a brown moustache. (R. 765). This information had been obtained by Detective Goeth based upon her interview with the victim and had been circulated to the Tampa Police Department by memo on November 6, 1984. (R. 721-723). On November 14, 1984, Detective Goeth received a report back from the F.B.I. analysis of the victim's clothing linking the evidence to evidence in the series of homicides being investigated by the Tampa Police Department and the Hillsborough County Sheriff's Office. (R. 723). On November 14, a meeting was held between members of the police department and sheriff's office at which time information was exchanged including the description of the suspect and vehicle (R. 724-725).

On the morning of November 15, 1984, while returning to police headquarters after patrolling for the suspect, Detective Helms and Wolfe spotted a vehicle and subject fitting the

description. (R. 746, 778). The detectives, prior to stopping the vehicle, were able to identify it as a red Dodge Magnum and were able to see that the driver was a while male with conservatively cut brown hair, between the ages of a teenager and old man. (R. 747, 778). The detectives were not able to see the subject's build and the interior of the vehicle until after the stop. After the stop, Detective Wolfe observed the word "Magnum" on the dashboard, the digital clock, the white interior, the red carpet and the Appellant's physical appearance. (R. 754-755). These observations confirmed their suspicions, but rather than arrest the Appellant then, the detectives released Appellant and reported their information to their superiors. (R. 758-763, 786-791). This information was then used in the affidavit of probable cause upon which the search warrant issued. (R. 2872-2887).

Detective Goeth testified that [redacted] had stated that after her abductor removed her from his apartment, they stopped nearby at what she believed was an automatic bank teller machine. (R. 728-729). The general geographic location of the apartment and bank machine was established by [redacted] statement that in that area, though blindfolded, she had seen around the blindfold, a Howard Johnson motel and Quality Inn motel as they were getting on the interstate. (R. 724-725). Goeth testified that the investigation revealed a single Tampa location at which these two motels were in

close proximity to each other. (R. 275). Further investigation established a list of automatic teller machine transactions, in that geographic area, conducted at the time and date in question. (R. 729-730). Detective Stephen Cribb of the Hillsborough County Sheriff's office had meanwhile compiled a list of all Dodge Magnum vehicles registered in Hillsborough County. (R. 800-801). Detective Cribb's comparison of the lists revealed a single name present on both lists, that of Appellant Long. (R. 801-802). This comparison was made on the afternoon of November 15, the same day as the stop of Appellant's vehicle by Detectives Wolfe and Helms. (R. 202).

Jury Selection and Jurors knowledge of Pre-trial Publicity:

Jurors Aldrich and Reigler indicated a willingness to try to set aside their prior knowledge of the case and decide the issues based solely on the evidence presented at trial. (Mr. Aldrich, R. 1164-1166, 1177-1179; Mrs. Reigler, R. 2329, 2337). Both also stated that if, at any time, they did have difficulty in setting aside their prior knowledge, they would bring that fact to the Court's attention. (Mr. Aldrich R. 1195-1196; Mrs. Reigler, R. 2354, 2366).

Prospective juror Grace Browning also indicated familiarity, through the media, with Appellant and his charges. However, she also stated she could put that knowledge aside and

and consider only the evidence presented in the courtroom. (R. 944, 946-947, 955, 958-959, 968, 970). Moreover, she expressly stated that she had not yet formed an opinion as to the guilt or innocence of the defendant. (R. 969).

Most of the remaining prospective jurors had, or could remember, little information about Appellant and this or other cases against him. Each indicated an ability to put aside all prior knowledge, information and feelings about Appellant and render a verdict based solely upon the evidence introduced at trial. (Mr. Thompson, R. 995, 1013-1014, 1019-1020; Mr. Casperson, R. 1050, 1056, 1062-1064, 1068; Mr. Sea, R. 1101, 1103, 1108-1109; 1113-1114, 1117-1119; Ms. Barth, R. 1198, 1200, 1203, 1205, 1212-1213; Mrs. Tillis, R. 1332, 1338-1339, 1340-1341; Mr. McBride, R. 1596-1598, 1604-1606, 1616-1617; Mr. Rosehe, . R. 2299-2300, 2311-2312; Mr. Miller, R. 1437-1438, 1463-1464; Mrs. Jackson, R. 2511-2512, 2521, 2526-2527; Mr. Moree, R. 2277, 2281, 2286). Moreover, prospective jurors Casperson (R. 1068), Barth (R. 1212), and Tillis (R. 1340-1341) expressly stated that they had not formed any opinion with respect to the guilt or innocence of the defendant.

SUMMARY OF THE ARGUMENT

Issue I:

Appellant's confession was freely and voluntarily given following a valid waiver of his Miranda rights. Appellant's request for counsel was, at best, equivocal. The detectives' subsequent statements did not constitute interrogation of Appellant. Appellant's subsequent confession was made voluntarily.

Issue II:

Prospective jurors familiar with the case stated that they could put their knowledge aside and reach a verdict based solely upon the evidence presented in court. It was, therefore, not an abuse of discretion for the Court to deny Appellant's motion for change of venue on the basis of pre-trial publicity.

Issue III:

The trial court did not abuse its discretion in denying challenges for cause to prospective jurors who stated that, despite prior knowledge of Appellant's case, they could reach a verdict based solely upon the evidence presented at trial.

Issue IV:

Neither Rule of Procedure nor statute provided for additional peremptory challenge in this case. The trial court did not

abuse its discretion in refusing Appellant's request for additional peremptory challenges.

Issue V:

The trial court did not abuse its discretion in denying Appellant's motion for continuance on grounds of pre-trial publicity where prospective jurors indicated they could set aside their knowledge of the case and reach a verdict based solely upon the evidence presented at trial.

Issue VI:

Based upon the information available to the officers at the time of the investigatory stop of Appellant, they had founded suspicion to believe the vehicle in which he was driving had been involved in the sexual battery which they were investigating. Information obtained as a result of the lawful stop could, therefore, properly be used in a probable cause affidavit upon which the search warrant issued. Evidence obtained pursuant to execution of the search warrant was, therefore, admissible.

Even if the evidence were obtained as a result of an unlawful stop, it was nevertheless admissible under the inevitable discovery doctrine on the basis of an independent investigation which had focused upon Appellant and his vehicle.

Issue VII:

The trial court did not abuse its discretion in excusing for cause a prospective juror who indicated he could not recommend a death sentence even under circumstances in which such a recommendation would be appropriate, even though Appellant had not yet questioned the juror on voir dire.

Issue VIII:

References to other murders in the area and a missing girl from Minnesota did not constitute similar fact evidence in that neither reference contained all the elements of another crime and neither reference was specifically connected to any prior act of the defendant. The references were not inadmissible Williams Rule evidence. Even if inadmissible, the references were harmless error.

Issue IX:

There is no evidence that the jury's recommendation was impermissibly based on non-statutory aggravating circumstances merely because several jurors knew of Appellant's pending charges where the jurors stated they could put aside their prior knowledge of Appellant and his charges and decide this case solely upon the evidence presented and the instruction of the Court.

Issue X:

The trial court's finding that the murder was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification is supported by substantial competent evidence notwithstanding some evidence to the contrary from Appellant's psychiatric expert witnesses. The weight to be given such evidence was a matter for the trial judge.

Similarly, the weight to be given evidence of mitigating circumstances is also for the trial judge to decide. Because the judge failed to find the mitigating factors urged by Appellant does not mean the judge did not consider the evidence.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS STATEMENTS ALLEGEDLY OBTAINED IN VIOLATION OF APPELLANT'S RIGHT TO REMAIN SILENT AND RIGHT TO COUNSEL UNDER THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Appellant argues the trial court erred in denying his Motion to Suppress Statements which he contends were obtained in violation of his right to remain silent and right to counsel under the Fifth Amendment to the United States Constitution.

A trial court's finding that a confession was freely and voluntarily given, on the basis of a full evidentiary hearing, comes to this Court clothed with a presumption of correctness. Acensio v. State, No. 67,888 (Fla. October 30, 1986)[11 FLW 549]. Appellant was arrested in Tampa on November 16, 1984 pursuant to an arrest warrant. (R. 816-817). He was advised orally of his Miranda rights from a preprinted consent form. The defendant was then given the form to read himself and sign. (R. 821-822, 863-864). Thereafter, Appellant voluntarily talked with police. Both Sergeant Price and Detective Latimer stated that Appellant did not appear to be under the influence of alcohol or narcotics,

and that Appellant was not threatened or offered promises in exchange for his statements. (R. 823-825, 864-865).

Appellant does not dispute the validity of his initial waiver but asserts that during the course of the interrogation, the topic of inquiry changed from the sexual battery of [redacted], for which he was arrested, to a series of murders. Appellant first argues that his initial waiver regarding interrogation about the sexual battery was not valid as to the interrogation regarding murder. This argument was rejected in S.T.N. v. State, 484 So.2d 616 (Fla. 4th DCA 1986). There is no requirement that a defendant be continually reminded of his rights once he has intelligently waived them. See, Bush v. State, 461 So.2d 936 (Fla. 1984).

Appellant next argues that he invoked his right to remain silent when, in response to a question whether he had picked up prostitutes in Tampa, he stated "I prefer not to answer that." (R. 841, 872). Appellant contends that at that point, the interrogation should have been terminated. However, Appellant's statement only indicates an unwillingness to answer questions regarding that particular topic. Appellant's limited invocation of silence on that subject did not make further inquiry on other subjects improper. See, Shriner v. Wainwright, 715 F.2d 1452 (11th Cir. 1983). Following Appellant's statement, the officers did not inquire further about picking up prostitutes. Instead,

they began to show Appellant photographs of the murder victims asking if he recognized them. (R. 843-845, 872-873). This inquiry was not improper in view of Appellant's limited invocation of his right to remain silent.

Appellant next contends that he invoked his right to have counsel present by stating "The complexion of things sure have changed since you came back into the room. I think I might need an attorney." (R. 846, 877). He argues his statement constituted a request for counsel which was not honored. Appellant's statement was equivocal at best. See, Valle v. State, 474 So.2d 796 (Fla. 1985); Waterhouse v. State, 429 So.2d 301 (Fla. 1983); King v. State, 436 So.2d 50 (Fla. 1983). In fact, both officers stated that they did not believe Appellant's statement was a request for counsel. (R. 856, 878). Sergeant Price's subsequent statement that nothing has changed and his statements regarding the case against Appellant, like those made by the officer in King, supra, did not constitute interrogation of Appellant within the meaning of Rhode Island v. Innis, 446 U.S. 291, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980). Accordingly, Appellant's incriminating statements were freely and voluntarily made. As Detective Latimer testified when Appellant indicated a desire not to discuss a particular subject matter, that desire was honored. (R. 881). Appellant has failed to show that the officers made improper inquiries after Appellant's equivocal statement regarding counsel.

Appellant's willingness to discuss some areas and not others, after his equivocal statement, clearly supports the conclusion that he voluntarily waived his Miranda rights and did not intend to terminate the interrogation to consult with counsel. The trial court's findings are supported by the record. The Court, therefore, did not err in denying Appellant's Motion to Suppress statements.

ISSUE II

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION FOR CHANGE OF VENUE.

Appellant contends that, because of the unusually large amount of publicity involved in this case, it was an abuse of the trial court's discretion to deny Appellant's motion for change of venue.

In McCaskill v. State, 344 So.2d 1276 (Fla. 1977), this Court set forth the test for determining whether a change of venue should be granted:

> "Knowledge of the incident because of its notoriety is not, in and of itself, grounds for a change of venue. The test for determining a change of venue is whether the general state of mind of the inhabitants of a community is so infected by knowledge of the incident and accompanying prejudice, bias, and preconceived opinions that jurors could not possibly put these matters out of their minds and try the case solely upon the evidence presented in the courtroom. Singer v. State, (Fla. 1959) 109 So.2d 7; Collins v. State, (Fla. App. 1967) 197 So.2d 574 and cases cited therein."
>
> 344 So.2d at 1278, quoting Kelley v. State, 212 So.2d 27 (Fla. 2nd DCA 1968).

The Court further noted that the defendant must show inherent prejudice in the trial setting or facts which permit an inference of actual prejudice from the jury selection process in order to merit a change of venue. 344 So.2d at 1278.

Appellant asserts that several members of the jury had knowledge of this or other murder charges against Appellant. Specifically, Appellant argues that the voir dire of Jurors Reigler, Aldrich, Jackson and Miller demonstrate that prejudice in the community was so pervasive as to require a change of venue in order for Appellant to receive a fair trial. However, careful review of the record reveals that each of these jurors stated they could put their knowledge and feelings aside and render a verdict based solely upon the evidence presented at trial. (Mrs. Reigler, R. 2329, 2337, 2354, 2366; Mr. Aldrich, R. 1164-1166, 1177-1179, 1195-1196; Mr. Miller, R. 1437-1438, 1463-1464; Mrs. Jackson, R. 2511-2512, 2521, 2526-2527).

As this Court stated in Davis v. State, 461 So.2d 67 (Fla. 1984), cert. den., __U.S.__, 105 S.Ct. 3540, 87 L.Ed.2d 613:

> Media coverage and publicity are only to be expected when murder is committed. The critical question to be resolved, however, is not whether the prospective jurors possessed any knowledge of the case, but rather, whether the knowledge they possessed created prejudice against [the defendant].
>
> 461 So.2d at 69.

In the case sub judice, even Mrs. Reigler and Mr. Aldrich, the most equivocal jurors in this regard, stated that if they did have any difficulty, at any time during the trial, in setting aside their prior knowledge and feelings about Appellant, they would call that to the Court's attention. (R. 2354, 2366, 1195-1196). Despite showing there was a great deal of pre-trial publicity, the record fails to demonstrate a "community so infected by knowledge of the incident and accompanying prejudice, bias, and preconceived opinions that jurors could not possibly put these matters out of their minds and try the case solely on the evidence presented in the courtroom." McCaskill, 344 So.2d at 1278. Indeed, the record reflects a jury willing and able to render a verdict free from bias and prejudice based upon the evidence presented.

As this Court has held,an application for change of venue is addressed to the sound discretion of the trial court, and the trial court's ruling will not be reversed absent a palpable abuse of discretion. Davis, 461 So.2d at 69. Here, as in Davis, the jurors, when questioned, stated they could decide the issues based upon the evidence heard in the courtroom. There is nothing in the record to indicate that the trial judge palpably abused his discretion in denying Appellant's Motion for Change of Venue. Davis, 461 So.2d at 69; Jackson v. State, 359 So.2d 1190, 1192 (Fla. 1978), cert. den., 439 U.S. 1102, 99 S.Ct. 881, 59 L.Ed.2d 63.

ISSUE III

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTIONS TO EXCUSE FOR CAUSE TEN PROSPECTIVE JURORS ON GROUNDS OF PRE-TRIAL PUBLICITY.

Appellant contends that the trial court erred in denying ten challenges for cause to prospective jurors by defense counsel. Of the ten challenges asserted, only two of these ten prospective jurors sat on the jury in Appellant's trial. The others were excused by peremptory challenge.

The competency of the challenged juror is to be determined by the trial court in its discretion, and the Court's decision will not be disturbed unless manifest error is shown. Ross v. State, 474 So.2d 1170 (Fla. 1985).

Appellant asserts that jurors Aldrich and Reigler should have been excused on the basis of their extensive knowledge of Appellant and this or other cases in which he was involved. Voir dire examination revealed that their knowledge was based upon information they had obtained from the news media. Both, however, indicated a willingness to try to set aside their prior knowledge of the case and decide the issues based solely on the evidence presented at trial. (Mr. Aldrich, R. 1164-1166, 1177-1179; Mrs. Reigler, R. 2329, 2337). Any equivocation in their answer that would raise a doubt as to their partiality was eliminated

by their statements that if, at any time, they did have difficulty in setting aside their prior knowledge, they would bring that fact to the Court's attention. (Mr. Aldrich R. 1195-1196; Mrs. Reigler, R. 2354, 2366).

Prospective juror Grace Browning also indicated familiarity, through the media, with Appellant and his charges. However, she also stated she could put that knowledge aside and consider only the evidence presented in the courtroom. (R. 944, 946-947, 955, 958-959, 968, 970). Moreover, she expressly stated that she had not yet formed an opinion as to the guilt or innocence of the defendant. (R. 969).

Most of the remaining seven prospective jurors had, or could remember, little information about Appellant and this or other cases against him. All seven indicated an ability to put aside all prior knowledge, information and feelings about Appellant and render a verdict based solely upon the evidence introduced at trial. (Mr. Thompson, R. 995, 1013-1014, 1019-1020;Mr. Casperson, R. 1050, 1056, 1062-1064, 1068; Mr. Seay, R. 1101, 1103, 1108-1109, 1113-1114, 1117-1119; Ms. Barth, R. 1198, 1200, 1203, 1205, 1212-1213; Mrs. Tillis, R. 1332, 1338-1339, 1340-1341; Mr. McBride, R. 1596-1598, 1604-1606, 1616-1617; Mr. Rosehe, R. 2299-2300, 2311-2312). Moreover, prospective jurors Casperson (R. 1068), Barth (R. 1212), and Tillis (R. 1340-1341) expressly stated that they had not formed

any opinion with respect to the guilt or innocence of the defendant.

Based upon the responses of the prospective jurors on the record sub judice, it cannot be said that the trial court manifestly abused its discretion in denying the above-referenced challenges for cause. See, Ross, 474 So.2d at 1173. Moreover, Appellant has failed to submit proof that casts doubt on the conclusion that he was convicted by a fair and impartial jury. See, Lusk v. State, 446 So.2d 1038, 1041 (Fla. 1984).

ISSUE IV

WHETHER THE TRIAL COURT ERRED IN DENYING APPELLANT'S REQUEST FOR ADDITIONAL PEREMPTORY CHALLENGES.

Appellant contends the trial court abused its discretion in refusing to grant his request for additional peremptory challenges. Appellant concedes that Fla. R. Crim. P. 3.350(e) expressly permits a trial court to grant additional peremptory challenges, in the interest of justice and in extenuating circumstances, only when an indictment or information contains two or more counts or when two or more charging documents are consolidated for trial. However, Appellant asserts that the trial court nevertheless did have discretion to grant additional peremptory challenges and should have done so on the basis of the unusually high level of publicity involved in this case.

The State submits that the trial court and the parties were bound by the provisions of Rule 3.350. Because this case involved a single charge and a single charging document, Appellant was limited to ten peremptory challenges. Under the rule, it was not within the trial judge's discretion to grant additional peremptory challenges. Moreover, State law makes no provision for any challenges beyond the statutory limitation.

Fla. Stat. §913.08(1985); See, Collins v. State, 197 So.2d 574 (Fla. 2nd DCA 1967).

Even if the Court could have granted additional challenges, its refusal to do so did not constitute an abuse of discretion requiring reversal. Appellant specifically stated that it was requesting additional challenges in order to excuse juror Shirley Reigler, who Appellant had been unable to successfully challenge for cause. However, Mrs. Reigler indicated, as did the other members of the jury, that she would put aside her information, knowledge and opinions about the Appellant and decide the case solely upon the evidence presented in court. (R. 2329, 2337). Moreover, she stated that if she had difficulty putting aside that prior information or feelings, she would bring that to the Court's attention. (R. 2354, 2366).

The right to peremptory challenges is not of constitutional dimension. State v. Neil, 457 So.2d 481 (Fla. 1984). Appellant has failed to demonstrate how denial of his request for additional peremptory challenges resulted in a denial of a fair trial.

ISSUE V

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION FOR CONTINUANCE.

Appellant contends that the trial court abused its discretion in denying his Motion for Continuance. Appellant asserts that because of the publicity of the case and the fact that three of the jurors had heard of Appellant's sexual battery conviction, the Court should have at least granted a continuance, if not a change of venue.

The granting or denial of a motion for continuance is within a court's discretion and will not be overturned absent a palpable abuse of that discretion. Lusk v. State, 446 So.2d 1038 (Fla. 1984), cert. den., ___U.S.___, 105 S.Ct. 229, 83 L.Ed.2d 158; Cooper v. State, 336 So.2d 1133 (Fla. 1976), cert. den., 431 U.S. 925, 97 S.Ct. 2200, 53 L.Ed.2d 239.

While the three prospective jurors to which Appellant refers did indicate some prior knowledge of this case or other cases involving Appellant from newspaper and television reports, all three did state that they could put their knowledge, information, and opinions aside and render a verdict based solely upon the evidence presented in court. (Mr. Aldrich, R. 1164-1166; 1177-1179; Mr. Miller, R. 1437-1438, 1463-1464; Mr. Moree, R.2277, 2281, 2286). Even Mr. Aldrich, the most equivocal,

stated he felt he could render a fair and impartial verdict and that if, at any time, he felt he could not be fair and impartial, he would bring that to the Court's attention. (R. 1195-1196). Furthermore, Mr. Moree, contrary to Appellant's indications, did not even serve on the jury which ultimately convicted Appellant. (R. 345, 2760-2761).

The record does not clearly and affirmatively establish that the trial court palpably abused its discretion in denying the Motion for Continuance. See, Lusk, 446 So.2d at 1140-1141.

ISSUE VI

WHETHER THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS PHYSICAL EVIDENCE SEIZED PURSUANT TO A SEARCH WARRANT ISSUED UPON THE BASIS OF INFORMATION OBTAINED AS A RESULT OF AN ALLEGEDLY UNLAWFUL STOP OF APPELLANT AND HIS VEHICLE.

Appellant contends that the temporary stop of his vehicle by Detectives Helms and Wolfe was unlawful and that any information they obtained therefrom was obtained in violation of his constitutional rights under the Fourth Amendment, and could not be used as the basis for the probable cause affidavit upon which the search warrant was issued. Appellant, therefore, argues that the hair and fiber evidence obtained from his vehicle upon execution of the search warrant should have been suppressed. Appellant submits that the Detectives did not have reasonable or founded suspicion which would justify an investigatory stop. The State disagrees.

According to the testimony of Detectives Wolfe and Helms at the suppression hearing on November 15, 1984, they were assisting a task force investigating the sexual battery of [redacted] (R. 742-743, 773-775). They had been instructed to look for a subject, vehicle and/or apartment complex fitting

the description given to the police by the victim, [redacted] (R. 742-743, 773-775). The description the officers had was for a red Dodge Magnum with a white interior, with the word "Magnum" on the glove box door and a digital watch on the glove box. (R. 765). The description of the subject was of a white male, approximately 30 years old, medium build, slightly pudgy with a slight stomach, conservatively cut brown hair and a brown moustache. (R. 765). This information had been obtained by Detective Goeth based upon her interview with the victim and had been circulated to the Tampa Police Department by memo on November 6, 1984. (R. 721-723). On November 14, 1984, Detective Goethe received a report back from the F.B.I. analysis of the victim's clothing linking the evidence to evidence in the series of homicides being investigated by the Tampa Police Department and the Hillsborough County Sheriff's Office. (R. 723). On November 14, a meeting was held between members of the police department and sheriff's office at which information was exchanged including the description of the suspect and vehicle. (R. 724-725).

On the morning of November 15, 1984, while returning to police headquarters after patrolling for the suspect, Detectives Helms and Wolfe spotted a vehicle and subject fitting the description. (R. 746, 778). The detectives, prior to stopping the vehicle, were able to identify it as a red Dodge

Magnum and were able to see that the driver was a white male with conservatively cut brown hair, between the ages of a teenager and old man. (R. 747, 778). The detectives were not able to see the subjects build and the interior of the vehicle until after the stop. After the stop, Detective Wolfe observed the word "Magnum" on the dashboard, the digital clock, the white interior, the red carpet and the Appellant's physical appearance. (R. 754-755).

The State contends that the information the officers had prior to the stop was sufficient under the circumstances to justify an investigatory stop. The officers had a very specific and detailed description of the suspect and vehicle from the BOLO report. The detailed description had been obtained from the victim herself who had ample opportunity to view both the vehicle and her abductor. On that basis, she must be considered a reliable source as distinguished from an anonymous tipster. See, State v. Rizzo, 396 So.2d 842, 843 (Fla. 2nd DCA 1981).

Although the victim's full description of the vehicle could not be verified by the officers before the stop, sufficient details of the description did match the suspect and vehicle, including the race, sex, hair style and color, and to a lesser degree, age of the suspect, as well as the make, model and color of the vehicle. Also, the vehicle was spotted in the area just south of the geographic zone in which the primary

search was concentrated. (R. 746). These facts taken together and considered on the totality of the circumstances are sufficient to give rise to a well-founded suspicion that the subject and his car were connected with the abduction and rape of [redacted] and would justify a temporary detention of Appellant to permit further investigation to either confirm or dispel the officer's suspicions. See, Waterhouse v. State, 429 So.2d 301 (Fla. 1983); Rizzo, supra; State v. Merklein, 388 So.2d 218 (Fla. 2nd DCA 1980).

Upon stopping Appellant's vehicle, the detectives made additional observations about Appellant and the vehicle which matched [redacted]s description. These observations confirmed their suspicions, but rather than arrest the Appellant then, the detectives released Appellant and reported their information to their superiors. (R. 758-763, 786-791). This information was then used in the affidavit of probable cause upon which the search warrant issued. (R. 2872-2887). The State does not contend that observations made after the stop could make an invalid stop valid; only that the stop was valid based upon the detective's pre-stop observations, and that post-stop observations could therefore properly be used to obtain a search warrant for the vehicle.

This case is distinguishable from those relied upon by Appellant. In contrast to the descriptions in Sumlin v. State, 433 So.2d 1303 (Fla. 2nd DCA 1983) and L.T.S. v. State, 391 So.2d 695 (Fla. 1st DCA 1980), the victim's description of her assailant was not vague, but very detailed and specific. Moreover, unlike in Sumlin, supra and Watts v. State, 468 So.2d 256 (Fla. 2nd DCA 1985), the pre-stop details observed by the detectives precisely matched the victim's description of the Appellant and his vehicle. Also, the detective's information was not based upon an anonymous tip, as in State v. Hetland, 366 So.2d 831 (Fla. 2nd DCA 1979), but upon the more reliable observations of the victim herself.

Accordingly, based upon the foregoing, the State contends that the investigatory stop of Appellant's vehicle was lawfully supported by founded suspicion, and that information obtained as a result of that stop was properly considered by the lower court in reviewing the affidavit of probable cause and issuing the search warrant, the execution of which led to the discovery of the hair and fibers in Appellant's vehicle. Therefore, that physical evidence was properly admitted into evidence at Appellant's trial.

However, even if this Court concludes that the stop was unlawful, the evidence was nevertheless admissible under the inevitable discovery doctrine. As Chief Justice Burger wrote for the United States Supreme Court in Nix v. Williams, 467 U.S. 431 , 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984):

> [T]he derivative evidence analysis ensures that the prosecution is not put in a worse position simply because of some earlier police error or misconduct. The independent source doctrine allows admission of evidence that has been discovered by means wholly independent of any constitutional violation . . . The independent source doctrine teaches us that the interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime are properly balanced by putting the police in the same, not a worse, position than they would have been in if no police error or misconduct had occurred. . . When the challenged evidence has an independent source, exclusion of such evidence would put the police in a worse position than they would have been in absent any error or violation. There is a functional similarity between these two doctrines in that exclusion of evidence that would inevitably have been discovered would also put the government in a worse position, because the police would have obtained that evidence if no misconduct had taken place. (Citations and footnote omitted) (Emphasis in text.)
>
> 467 U.S. at ___, 104 S.Ct. at 2501, 81 L.Ed.2d at 387.

Here, Detective Goethe testified that [redacted] had stated that after her abductor removed her from his apartment, they stopped nearby at what she believed was an automatic bank teller machine. (R. 728-729). The general geographic location of the apartment and bank machine was established by [redacted]'s statement that in that area, though blindfolded, she had seen, around the blindfold, a Howard Johnson motel and Quality Inn motel as they were getting on the interstate. (R. 724-725). Goethe testified that the investigation revealed a single Tampa location at which these two motels were in close proximity to each other. (R. 275). Further investigation established a list of automatic teller machine transactions, in that geographic area, conducted at the time and date in question. (R. 729-730). Detective Stephen Cribb of the Hillsborough County Sheriff's office had meanwhile compiled a list of all Dodge Magnum vehicles registered in Hillsborough County. (R. 800-801). Detective Cribb's comparison of the lists revealed a single name present on both lists, that of the Appellant Long. (R. 801-802). This comparison was made on the afternoon of November 15, the same day as the stop of Appellant's vehicle by Detectives Wolfe and Helms. (R. 202).

This separate investigation had thus begun to focus on Appellant and would inevitably have resulted in the issuance

of the search warrant for the vehicle, and the seizure of the physical evidence therefrom. See, Hayes v. State, 488 So.2d 77 (Fla. 2nd DCA 1986), cert. den., ___U.S.___, 107 S.Ct. 119 (1986). Accordingly, even if the initial stop of Appellant was unlawful, this independent investigation focusing on Appellant and his vehicle would permit the introduction of the physical evidence seized from the vehicle under the inevitable discovery doctrine.

ISSUE VII

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN EXCUSING A PROSPECTIVE JUROR FOR CAUSE, WITHOUT FIRST GIVING APPELLANT AN OPPORTUNITY TO QUESTION THE PROSPECTIVE JUROR REGARDING HIS BELIEFS ON CAPITAL PUNISHMENT.

Appellant contends that the trial court erred in excusing prospective juror Lewis McLeod for cause before defense counsel had an opportunity to question the prospective juror regarding his beliefs on capital punishment. Appellant asserts that his right to question McLeod should not have been limited, and that had he been permitted to inquire, he might have been able to rehabilitate McLeod.

A reversal based upon a limitation in voir dire must be based upon an abuse of the trial judge's discretion. Zamora v. State, 361 So.2d 776, 780 (Fla. 3rd DCA 1978). In the absence of demonstrable prejudice, not grounded upon mere speculation, reversal is not proper. Id. (emphasis added).

It is clear from the record that the prosecutor and Mr. McLeod were having difficulty in communicating their ideas to each other. (R. 2238-2246). Mr. McLeod stated that he was opposed to the death penalty. (R. 2234-2235). The State's questions then attempted to focus upon whether Mr. McLeod could as a juror, in appropriate circumstances, ever recommend the

death penalty, or whether his scruples against capital punishment would prohibit him from making such a recommendation. The trial court, satisfied that McLeod could not consider death as a possible penalty, granted the State's request that McLeod be excused for cause.

The Court's ruling is supported by McLeod's responses to the State's final series of questions offered to clarify the confusion. McLeod indicated he would not be able to return a recommendation of death even in circumstances where, under the law, such a recommendation would be appropriate. (R. 2250). Appellant's claim that he might have been able to rehabilitate McLeod clearly does not demonstrate prejudice, and is based upon mere speculation. It cannot be said, based upon this record, that the trial court abused its discretion in refusing Appellant an opportunity to question this prospective juror before excusing him for cause.

ISSUE VIII

WHETHER THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR MISTRIAL ON BASIS OF WILLIAM'S RULE VIOLATION WHERE CURATIVE INSTRUCTION WAS GIVEN TO DISREGARD THE STATEMENT, AND WHETHER THE COURT ERRED IN ADMITTING PORTION OF TAPED CONFESSION ALLEGEDLY REFERENCING COLLATERAL CRIMES.

Appellant contends that a reference by State's witness, Linda Phethean, to "murders of women in the area" was inadmissible under Fla. Stat. §90.404(2)(a)(1985) and Williams v. State, 110 So.2d 654 (Fla. 1959), and that in view of the statements, it was error for the Court to refuse to grant a mistrial.

The statement was made by the witness in explaining her decision to investigate an odor she detected while horseback riding, at which time she discovered the victim's body. (R. 1680-1681). Although the prosecutor argued that the statement was relevant to the witness's state of mind and motive in investigating the odor (R. 1684-1688), the trial judge excluded the evidence and gave the jury a curative instruction (R. 1692), but denied Appellant's Motion for Mistrial.

The State submits that the reference by the witness to other murders in the area does not constitute William's rule evidence of other crimes. Not only does the statement fail to

establish all the elements of another crime, it wholly fails to make any connection between the other murders and the defendant.

In Malloy v. State, 382 So.2d 1190 (Fla. 1979), the Florida Supreme Court held that evidence of an incident at a lounge, in which the accused pulled a rifle from a car, was admissible since:

> . . . the circumstances of the lounge incident do not establish all the elements of a crime and, consequently, the question of the admissibility of prior criminal acts is not present.
>
> 382 So.2d at 1192.

Because the statement sub judice does not establish the elements of another crime and makes no connection with Appellant, and because the statement was relevant to the witness's motives and state of mind, it was not inadmissible. Accordingly, denial of Appellant's Motion for Mistrial was not error.

However, even if the statement was inadmissible evidence of a collateral crime, the jury instruction to disregard the comment was sufficient to cure the error. See, Riley v. State, 367 So.2d 1091 (Fla. 2nd DCA 1979); and Fields v. State, 257 So.2d 241 (Fla. 1976). Moreover, in view of the overwhelming evidence against Appellant including physical evidence and his own confession, the failure of the Court to grant Appellant's Motion for Mistrial on the basis of a William's rule violation

must be considered harmless. See, Clark v. State, 378 So.2d 1315 (Fla. 3rd DCA 1980).

Appellant also contends that the reference in the taped confession to a missing girl from Minnesota also constitutes a suggestion that Long might have committed another crime. As the prosecutor argued to the trial court, a reading of the statement in context reveals that the detectives were attempting to determine whether the victim found in the pasture, later identified as Virginia Johnson, was a girl they knew to be missing from Minnesota. (R. 2590-2591). The portion of the tape to which Appellant objects in no way suggests that Appellant may have been involved with another crime. Again, as in Malloy, the statement does not establish the elements of another crime, and therefore, does not violate Williams, supra. The Court did not err in denying Appellant's request to exclude the referenced portion of the taped confession.

Even if the statement should have been excluded, in view of this overwhelming evidence against Appellant, admission of the statement was harmless error. Henderson v. State, 463 So.2d 196 (Fla. 1985).

ISSUE IX

WHETHER THE JURY'S RECOMMENDATION OF THE DEATH PENALTY WAS BASED UPON AN IMPERMISSIBLE CONSIDERATION OF APPELLANT'S OTHER CHARGES FOR WHICH CONVICTIONS HAD NOT BEEN OBTAINED.

Appellant contends that the jury improperly received evidence of non-statutory aggravating circumstances by virtue of two jury members who had knowledge of Appellant's other pending charges. However, as previously discussed, both jurors Aldrich and Reigler stated that they could put their knowledge, information and feelings aside and decide the issues solely upon the basis of the evidence presented in court and in accordance with the trial court's instructions. (Mr. Aldrich, R. 1164-1166, 1175-1179, 1195-1196; Mrs. Reigler, R. 2328=2329, 2337, 2340-2341, 2344, 2354-2357, 2366). Moreover, both stated that if they had any difficulty, at any time, in setting aside their knowledge about Appellant, they would bring that fact to the Court's attention. (R. 1195-1196; 2354, 2366).

The jury was properly instructed with respect to their consideration of the statutory aggravating circumstances sought to be established by the State. (R. 2148-2149). There is absolutely nothing in the record to suggest that any of the jury members violated their oaths and disregarded the Court's instructions by considering facts not properly in evidence.

Appellant's claim is based purely on speculation.

This case is clearly distinguishable from Robinson v. State, 487 So.2d 1040 (Fla. 1986), relied upon by Appellant. There, the Court found that the State, by offering improper evidence during the penalty phase, purportedly for impeachment purposes, had tried to do indirectly that which it could not do directly. Here, there was no such offer of evidence of other charges. The juror's knowledge of Appellant's other charges had been obtained before they were selected as jurors. When selected, they stated they would set aside such knowledge and not consider it in their deliberations. The potential for prejudice created by the situation in Robinson clearly is not present in this case. Appellant has failed to establish that the jury's recommendation was based upon an impermissible consideration of his other pending charges.

ISSUE X

WHETHER THE TRIAL COURT PROPERLY IMPOSED THE SENTENCE OF DEATH BASED UPON ITS DETERMINATION THAT THE AGGRAVATING CIRCUMSTANCES OUTWEIGHED THE MITIGATING CIRCUMSTANCES.

The trial court did not err in imposing a sentence of death under Florida Statute §921.141. Points raised by Appellant in this regard are each addressed below:

A. Whether the trial court erred in finding that the homicide was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.

The findings of the trial judge on aggravating and mitigating circumstances are factual findings which should not be disturbed unless there is a lack of competent evidence to support such finding. Sireci v. State, 399 So.2d 964 (Fla. 1981) and Lucas v. State, 376 So.2d 1149 (Fla. 1979). The aggravating factor of cold, calculated and premeditated, Section 921.141(5)(i), Florida Statutes, relates to the intent and state of mind of the killer at the time the murder is committed. Combs v. State, 403 So.2d 418 (Fla. 1981).

In Mason v. State, 438 So.2d 374 (Fla. 1983), the defendant broke into and entered the home of the decedent and armed himself with a knife taken from the kitchen. He proceeded to Ms. Chapman's bedroom where he stabbed her by lifting his arm up and coming down deliberately and with great force. The victim was not sexually assaulted nor were the premises robbed. There was nothing to indicate that the victim in any way provoked the attack. The defendant had no reason to commit the murder. On these facts, a finding of cold, calculated and premeditated was sustained. Mason v. State, 438 So.2d at 379.

A cold, calculated and premeditated finding was also upheld in Squires v. State, 450 So.2d 208, 212 (Fla. 1984). The victim in Squires was shot once in the shoulder. While he lay on the floor screaming in pain, the defendant shot him four times in the head at close range. See also, Hill v. State, 422 So.2d 816 (Fla. 1982) and Jent v. State, 408 So.2d 1024 (Fla. 1981).

Sub judice, Appellant picked up the victim, drove her to a bar in north Hillsborough County, where he stripped her and tied her up. She was then driven to a secluded area in Pasco county where she was raped and strangled to death. The circumstances of Virginia Johnson's death, coupled with the fact that death by strangulation is not instantaneous, support the conclusion that Appellant acted to effect the victim's death in a very deliberate, cold and calculated manner. Substantial competent evidence supports the

trial court's finding of this aggravating circumstance.

Appellant relies upon the testimony of the psychiatric experts to support his argument that he could not have acted in such a manner. The credibility of these expert witnesses and the weight to be given their testimony was a question for the judge and jury. (See, Issue X B & C, infra.) Moreover, Dr. Meher testified that Appellant knew what he was doing was illegal and that Appellant's act of taking the victim fifteen or twenty miles to a secluded area was to avoid being caught. (R. 1960-1961). He testified that Appellant did not have the ability or capacity to form a pretense of moral justification. (R. 1961). This testimony supports the conclusion that Appellant's acts were done with a heightened degree of premeditation or deliberation, and that they were done without any pretense of moral or legal justification. It cannot be said that the trial court erred in finding this aggravating circumstance supported by the evidence.

B & C. Whether the trial court erred in weighing the evidence of Appellant's allegedly defective mental condition in finding the crime was especially heinous, atrocious or cruel, and in determining the existence of any mitigating circumstances.

Appellant contends that the trial court failed to give adequate consideration to evidence of his mental condition in finding the crime was especially heinous, atrocious or cruel [1] and in weighing the evidence to determine whether Long's mental condition constituted a statutory or nonstatutory mitigating factor.

Although the consideration of all mitigating circumstances is required, the decision of whether a particular circumstance is proven and the weight to be given it rests with the judge and jury. Smith v. State, 407 So.2d 894 (Fla. 1981), cert. den 456 U.S. 984, 102 S.Ct. 2260, 72 L.Ed.2d 868 (1982). The trial judge expressly stated that he considered the evidence and found no credible evidence to support the mitigating circumstances offered on behalf of the defendant, and that the evidence presented in the guilt phase of the trial negated the mitigating circumstances. (R. 356-357).

1/ Appellant concedes that knowledge of impending death and strangulation can qualify as especially heinous, atrocious or cruel. Adams v. State, 412 So.2d 850 (Fla. 1982), cert. den. 459 U.S. 882, 103 S.Ct. 182, 74 L.Ed.2d 148 (1982); Alvord v. State, 322 So.2d 533 (Fla. 1975), cert. den. 428 U.S. 923, 96 S.Ct. 3234, 49 L.Ed.2d 1226 (1976). See also, Johnson v. State, 465 So.2d 499 (Fla. 1985).

Although Appellant offered evidence of his allegedly defective mental condition, the State also elicited testimony which could be considered to have cast doubt upon the reliability or credibility of Appellant's expert witnesses. (R. 1922-1924; 1979). Also, Dr. Maher testified that a manifestation of Long's mental defect was a diminished ability to relate proper events in sequence. (R. 1955). However, Appellant's taped confession shows no diminished ability to recount the sequence of events leading to Virginia Johnson's death. (R. 2653-2658). Moreover, Maher testified that Appellant was able to control his behavior with respect to doing what was necessary to fulfill his needs. (R. 1959-1960). Maher stated that Appellant knew what he was doing was illegal and that he could go to jail or die for it and that Appellant's act of taking the victim fifteen or twenty miles out in the country was done to avoid being caught. (R. 1960-1961).

The weight to be given this evidence was within the province of the trial judge in determining what, if any, mitigating circumstances were established.

Furthermore, there is no indication from the record that the trial judge limited his consideration of mitigating factors to only those which are statutorily enumerated. Because the Court failed to find the mitigating factors Appellant urged does not mean the judge did not consider the evidence.

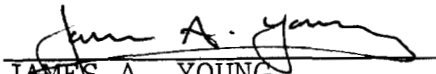
Riley v. State, 413 So.2d 1173, 1175 (Fla. 1982). See also, Woods v. State, No. 64,509 (Fla. April 24, 1986)[11 FLW 191]. Appellant has failed to establish error by the Court with respect to this point.

CONCLUSION

WHEREFORE, based on the foregoing reasons, arguments and authorities, the Appellee would urge this Honorable Court to render an opinion affirming the judgment and sentence of the trial court.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to W.C. McLain, Assistant Public Defender, Hall of Justice Building, P.O. Box 1640, 455 North Broadway, Bartow, Florida 33830 on this 25th day of November, 1986.

Of Counsel for the Appellee