IN THE SUPREME COURT OF FLORIDA

JAMES A. MORGAN,

Appellant,

vs.

STATE OF FLORIDA

Appellee.

CASE NO. 67,334

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellee was the prosecution and Appellant the defendant in the Criminal Division of the Circuit Court of the Nineteenth Judicial Circuit, in and for Martin County, Florida.

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

The following symbols will be used:

"R"	Record on Appeal, including transcripts of the pretrial motions.
"T"	Transcript of trial and sentencing proceeding.

All emphasis has been added by Appellee unless otherwise indicated.

STATEMENT OF THE CASE

Appellee accepts Appellant's Statement of the Case as found on pages one (1) through five (5) of his initial brief.

STATEMENT OF THE FACTS

Appellee accepts Appellant's Statement of the Facts as found on pages six (6) through twenty-one (21) of his initial brief, but would note that Appellant totally failed to present those facts which were adduced in the State's case in chief. Therefore, Appellee is supplying this Court with those facts in the following additions to Appellant's statement of the facts.

Miles Heckendorn, a captain with the Martin County Sheriff's Office, was one of the officers to investigate the scene of the murder (T 815). There was blood and broken glass from a vase in the dining room and TV area (T 822-823). He identified a photograph of the victim which showed lacerations on the head, face and neck, and a bite on her right breast (T 827). There were pieces of stationery on the floor (T 834). There were evident footprints (T 836).

Joan Waldron, a detective sargeant for the Stuart Police Department, also investigated the scene (T 854).

She observed a blood stain where the victim's back and buttocks had lain. There was a ten-inch crescent wrench covered in blood. She also observed the broken vase and stationery (T 855). Ms. Waldron observed the dead victim. Her white slacks were pulled down to her knees. Her blue blouse and bra were pulled up above her breasts. Her head was completely caked in blood. There was "a lot of damage to the head area." There was a stab wound and bite marks on her right breast. There was a washcloth on the kitchen floor, and smears on the floor, as if it was attempted to be cleaned up. There was a bread knife caked in blood on the floor. There were bloody footprints on pieces of the stationery. There was a letter in the kitchen dated Monday at 3:15 P.M. The letter stopped in midsentence (T 856). She took as evidence a bloody carpet from the bathroom, which had a bloody footprint on it. She took a bathroom towel which had a bloody smear on it (T 860-862). She also recovered the crescent wrench which was found in the living room, and the glass fragments (T 862-866). Other evidence included a washcloth (T 871), a towel (T 872), and the knife (T 873). Hair was recovered from the body (T 875). Ms. Waldron observed a white crusty substance on the victim's pubic hairs (T 877). Loose hair was recovered from the area around the body (T 881), and from under where the body had lain (T 883). The letter recovered in the kitchen was about real estate (T 897).

Dorothy Matthews lived across the street from the

victim (T 903). On the day of the murder (a Monday), Mrs. Matthews and Mrs. Trbovich went shopping. They returned home at about 12:30 P.M. Mrs. Trbovich was sixty-six years old at the time of the murder (T 905).

Anthony Cole was also Mrs. Trbovich's neighbor (T 906). He lived next door (T 907). On the day of the murder, he saw Appellant mowing the grass at Mrs. Trbovich's house (T 909-911). He left the neighborhood after 4:00 P.M. in a pickup truck with two other people (T 912). He saw the lights on in her house Monday evening while he was walking his dog, and they were still on when he walked his dog the next morning. Mr. Cole was concerned, so he looked in the window and saw Mrs. Trbovich on the floor of her kitchen (T 916). He went to the Matthews' house, got Mr. Matthews who had a key to Mrs. Trbovich's house, and they let themselves into Mrs. Trbovich's house (T 917-918). They discovered Mrs. Trbovich's body (T 918).

Since Mr. Matthews had died prior to this trial, an audio tape of his former testimony was played for the jury (T 931). He testified to going into the house (T 933-935). The wrench found in the living room did not belong to the victim (T 936).

Joan Waldron was recalled and testified that a comparison of the footprints found on the stationery with standards showed that they were made by Appellant (T 958).

Dr. Schofield was the medical examiner who performed the autopsy on Mrs. Trbovich (T 993-996). There

were a number of injuries to her face and forehead (T 998). There was an injury to the scalp from a crescent wrench (T 999). On the right side of her back were small-sized wounds consistent with stab wounds. There was a bite mark on her breast (T 1000). There was traumatic injury to the female genital area which was consistent with penetration by an object. Her wedding rings were fused to her finger, which was consistent with force from a blunt instrument (T 1001). Her wedding ring could not be removed since it was flattened from round to oval. Her left thumb was cut. There was almost a complete cutting away of the thumbnail, and bruising and traumatic injury to the adjacent fingers. There were also cuts to the right hand (T 1002). The wounds to the hands were defensive wounds (T 1003). She had a fracture in her left hand (T 1027). Her skull was crushed (T 1038). She had a fractured nose (T 1043). The vaginal area was bruised (T 1046-1047). There was major bleeding in the neck area. Mrs. Trbovich died as a result of the stab wounds (T 1066). Prior to the murder, she had been healthy (T 1067). The murder involved a large amount of wounds (T 1068). Mrs. Trbovich was in a great deal of pain as a result of the injuries (T 1072).

Dr. Williams, a dentist, took dental impressions from Appellant (T 1074-1076). Dr. Ford, a forensic dentist, compared these impressions with a photograph of the bite on Mrs. Trbovich's breast (T 1080-1086). Appellant has an

extra tooth. Due to its positioning, only .004% of the population would have such a tooth (T 1096). Dr. Ford concluded that Appellant inflicted the bite on Mrs. Trbovich's breast (T 1099). Her heart was pumping, and she was alive when the bite was inflicted (T 1100). The bite would be characterized as an "attack" or aggressive bite (T 1101).

Antonio Laurito, a criminalist, compared Appellant's footprints with those on the stationery (T 1102, 1107, 1111-1114).

Daniel Nippes, a criminalist, obtained hairs and fingernail scrapings from the victim (T 1116, 1119). He determined that there was saliva on Mrs. Trbovich's pubic hairs, but could not determine its origin (T 1120). The hairs which were found loose on the body and at the scene belonged to the victim (T 1122). The blood on the bathroom rug was the victim's (T 1123). Mr. Nippes determined that it was human blood on the bathroom towel, but not to whom it belonged. The blood found on the wrench was consistent with the victim's blood type (T 1125). The hair on the broken vase stem was consistent with the victim's. The blood on the stationery was consistent with that of the victim (T 1127). So was the blood on the washcloth and the knife (T 1128). The knife was found bent at the scene (T 1129). The fibers from the victim's fingernail scrapings were similar to the fibers of Appellant's jacket (T 1134).

Alvin Hodge was a serologist for the FBI (T 1139).

He determined that the stains on the pieces of tile removed from the kitchen were from human blood (T 1145).

Tommy Ray Morfield was a FBI fingerprint specialist (T 1146). He determined that the footprints on the tiles were from Appellant (T 1150).

POINTS INVOLVED

POINT I

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION BY DENYING APPELLANT'S MOTIONS FOR CHANGE OF VENUE?

POINT II

WHETHER THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN SUSTAINING THE STATE'S OBJECTION TO EXPERT TESTIMONY BY DR. CADDY AND DR. KOSON AS TO APPELLANT'S SANITY BASED UPON A HYPNOTIC SESSION?

POINT III

WHETHER THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTIONS FOR JUDGMENT OF ACQUITTAL SINCE PREMEDITATION WAS PROVED BEYOND A REASONABLE DOUBT, AND THERE WAS SUFFICIENT EVIDENCE TO SUPPORT A CONVICTION UNDER A FELONY MURDER THEORY?

POINT IV

WHETHER PROSPECTIVE JUROR FRANKLIN WAS PROPERLY EXCUSED FOR CAUSE?

POINT V

WHETHER THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION BY DENYING APPELLANT'S MOTION FOR MISTRIAL?

POINT VI

WHETHER APPELLANT WAS DEPRIVED OF A FAIR AND IMPARTIAL JURY VENIRE?

POINT VII

WHETHER THE IMPOSITION OF THE DEATH PENALTY UPON APPELLANT WAS PROPER AND DID IT CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT?

SUMMARY OF THE ARGUMENT

I. The trial court did not abuse its discretion by denying Appellant's motions for change of venue without prejudice to reconsider the motion if the voir dire process established that an impartial jury panel could not be found in Stuart. The voir dire, with the added protection of individual interviewing of any potential juror with prior knowledge about the case outside the presence of other potential jurors, provided Appellant with an impartial jury panel. Appellant did not use all his peremptory challenges.

II. Any evidence based upon a hypnotic session could only have been admitted if the party seeking to introduce it established its reliability, under the pre-Bundy II case law. Appellant failed to establish the reliability of the session, and the State's objection to the evidence was properly sustained. Moreover, Bundy II, which Appellee asserts is applicable sub judice, established a per se rule of inadmissility of evidence based upon a hypnotic session.

III. There was substantial competent evidence from which the jury could have found premeditation on Appellant's part, and the conviction is further supportable under a felony murder theory.

IV. Since prospective juror Franklin stated that her feelings regarding the death penalty would substantially impair her ability to function as a juror, she was properly stricken for cause.

SUMMARY OF THE ARGUMENT
(Continued)

V. Appellant's motion for a mistrial was properly denied since a questioning of the jury panel showed that it was not affected by the comment by prospective juror Blanks that he had been in court when "he had been convicted before." Further, since Appellant objected to an interviewing of the jury panel about the comment, he has not preserved the issue for appellate review.

VI. Death qualification of a capital jury panel has been previously approved by this Court many times. The process was also recently reapproved by the United States Supreme Court.

VII. The imposition of the death penalty upon Appellant did not establish cruel and unusual punishment, and the sentence is supported by a proportionality review and by the aggravating and mitigating factors found by the trial court, which included the mitigating factor of Appellant's youth at the time of the murder.

ARGUMENT

POINT I

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY DENYING APPELLANT'S MOTIONS FOR CHANGE OF VENUE.

Appellant alleges that the trial court improperly denied his motions for change of venue because a "confession" was featured in the local newspapers. Appellee asserts that there was no necessity for a change of venue, and that the motion was properly denied.

Appellant relies on the opinion of this Court in Oliver v. State, 250 So.2d 888 (Fla. 1971) as authority for the granting of his motions. However, Oliver does not control the case at bar. As previously noted by this Court, the holding in "Oliver has been restricted and refined." Straight v. State, 397 So.2d 903, 906 (Fla.), cert. den. 454 U.S. 1022, 102 S.Ct. 556, 70 L.Ed.2d 418 (1981), rehearing den. 454 U.S. 1165, 102 S.Ct. 1043, 71 L.Ed.2d 323 (1982). See e.g., Hoy v. State, 353 So.2d 826 (Fla. 1977), cert. den., 439 U.S. 920, 99 S.Ct. 293, 58 L.Ed.2d 265 (1978) and Dobbert v. State, 328 So.2d 433 (Fla. 1976).

Oliver, supra, involved the murder of a white by a black during a period of racial unrest. The confession was a "feature" of local news media coverage. The crime occurred in a relatively small community with only one newspaper. The situation sub judice is in sharp contrast.

Stuart may be a small community, but it is not isolated as is Tallahassee. It is in close proximity to the major metropolitan areas of West Palm Beach, Fort Lauderdale and Miami. The members of the venire panel revealed that they were readers of not only the local Stuart paper, but also the Palm Beach Post, the Miami Herald and the New York Times. Moreover, as found by the trial court, the articles cited in the motions were not "featured" in the local media (R 345).

Further, the trial court bent over backwards to assure that Appellant was not adversely affected by pretrial publicity. First of all, he denied Appellant's motion for change of venue without prejudice to have it heard again if it became apparent that impartial jurors could not be found. Secondly, the court arranged for individual voir dire of any members of the venire who expressed prior knowledge about the case. All of the jurors who sat at the trial either had no prior knowledge of the case or indicated that despite their prior knowledge they could be fair and impartial in trying the case. Moreover, the propriety of the denial of the motion was supported by the fact that during the voir dire process most of the panel indicated no knowledge of the case.

Appellant did not have any difficulty finding an impartial jury panel. In fact, he only exercised seven of his ten peremptory challenges (T 666, 686). If there were a problem with excessive pretrial publicity, then it would stand to reason that Appellant would have needed to use all of his challenges. Appellant was not prejudiced

by the location of his trial. See McCaskill v. State, 344 So.2d 1276, 1278 (Fla. 1977) and Straight, supra.

Of course, an application for change of venue is addressed to the trial court's sound discretion. Davis v. State, 461 So.2d 67 (Fla.), cert. den. ___U.S. ___, 105 S.Ct. 3540, 87 L.Ed.2d 663 (1985). Since all the jurors who served on Appellant's case indicated that they could put any prior knowledge aside, and serve with open minds, there has been no abuse of that discretion in the case at bar. Id., 461 So.2d at 69; Dobbert, supra.

POINT II

THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN SUSTAINING THE STATE'S OBJECTION TO EXPERT TESTIMONY BY DR. CADDY AND DR. KOSON AS TO APPELLANT'S SANITY BASED UPON A HYPNOTIC SESSION.

During trial, Appellant attempted to introduce testimony from a psychologist and psychiatrist that in their opinion, Appellant was insane at the time of the offense. However, both experts were unable to reach any conclusion regarding Appellant's sanity without relying upon a hypnotic session that they had conducted with Appellant on April 28, 1985 (T 1220, 1341). The State objected to any testimony by the doctors about statements made by Appellant during the hypnotic session, and to any conclusions drawn by the experts based on the session. This was an oral objection, not a written motion (T 1163). There is no requirement that objections to evidence be made in writing in the Florida Rules of Criminal Procedure. See e.g., 3.190, Fla.R.Crim.P. The State relied on Rodriguez v. State, 327 So.2d 903 (Fla. 3d DCA 1976), Bundy v. State, 455 So.2d 330 (Fla. 1984) [hereafter: Bundy I], and Bundy v. State, 471 So.2d 9 (Fla. 1985)[hereafter: Bundy II].

Prior to the Bundy II opinion, the law in Florida regarding the admissibility of hypnotically induced testimony was that the evidence was admissible on a case-by-case basis. Brown v. State, 426 So.2d 76, 90 (Fla. 1st DCA 1983); Key v. State, 430 So.2d 909 (Fla. 1st DCA 1983); Rodriguez,

supra. The issue was not specifically addressed in Bundy I, supra. In Brown, the first District Court of Appeal stated:

> Although the principle of hypnosis may itself be reliable and thus probative, our examination of the problems inherent in the process of hypnosis reveals that admissibility of such testimony will hinge on a case-by-case examination of the technique used to hypnotize the witness. The examination of the particular procedure employed in order to determine its reliability interrelates with the second prong of the relevancy test: legal relevancy. Due to the peculiar nature of hypnosis and its inherent potential pitfalls, the admissibility of hypnosis, as a tool for refreshing a witness' memory, is not so much a question of the reliability of the principle of hypnosis as it is a question of the reliability of the particular technique or procedure used in a given case. Hence, the probative value of hypnosis rests on both the reliability of the principle and the technique or procedure employed, both of which are inseparably intertwined. The court must first evaluate such evidence pursuant to Section 90.403, Florida Statutes, by weighing its probative value in an effort to decide if its admissibility would be substantially outweighed by dangers of unfair prejudice, confusion of the issues, misguidance of the jury, or needless presentation of the issues.
>
> Brown, 426 So.2d at 90 (footnote omitted)

The court further held that the burden is on the party seeking to introduce the evidence to demonstrate that the evidence of the hypnosis session will not cause undue prejudice or mislead the jury. Id., 426 So.2d at 90-91. The court in

Brown went into great detail as to what safeguards should be considered in determining the reliability of the hypnotic session. In the instant case, the trial court correctly concluded that Appellant had not established the reliability of the hypnotic session (T 1189). The trial court, after a proffer of the testimony by Dr. Caddy stated that it was "even firmer in [its] opinion" that the motion should be denied (T 1283).

There was no record of any sort made of the hypnotic session. This alone prevented the trial court from making a determination regarding the reliability of the hypnotic session. There was no showing of a lack of suggestiveness. This was a very important safeguard which was ignored in this case. The trial court made its renewed ruling based upon the testimony of the doctors regarding the procedures utilized. Under the criteria of Brown and Key, the session was not sufficiently reliable to permit the introduction of statements made by Appellant during the session, or of conclusions of sanity by the experts based upon those statements.

Dr. Caddy hypnotized Appellant with Dr. Koson present (T 1247). Thus, the safeguard that only the subject and hypnotist be present was not adhered to. The process took approximately four hours (T 1246). There was no record of what questions were asked or the manner in which they were conducted. The session was conducted by a psychologist and psychiatrist hired by the defense. As such, the session was not conducted by a "neutral and detached hypnotist" as recommended by Brown. Brown, supra, 426 So.2d at 91. The

session was conducted in the sheriff's office at the Martin County jail (T 1256). This was hardly the "independent location, such as a doctor's office, free from a coercive or suggestive atmosphere" suggested by Brown. Id., 426 So.2d at 92.

Further, there is no independent corroboration of the statements made by Appellant during the session. In response to the question "Did you want to kill her"?, Appellant stated "I don't know, but I wanted to hurt her." This is in sharp contrast with his statement made to a psychiatrist in a hypnotic session in 1981 that "I must kill her." (R 313, p. 12, T 1276-1277). The hypnotic session at issue here was conducted eight years after the murder. Under the pre-Bundy II standards, the testimony was properly excluded. Brown, supra; Key, supra; Rodriguez, supra.

Moreover, the evidence from, and expert opinions based on, the hypnotic session are clearly inadmissible under this Court's ruling in Bundy II. In Bundy II, this Court established a per se rule that no testimony based upon a hypnotic session would be admissible in Florida courts. Bundy, supra, 471 So.2d at 18. The hypnotic session in the instant case took place on April 28, 1985. The trial began on May 28, 1985. Bundy II was issued on May 9, 1985 and published in the Florida Law Weekly on May 17, 1985.[2] The opinion became final upon the denial of rehearing on July 11, 1985. Thus, although the hypnotic session took place

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[2] 10 F.L.W. 269

prior to the issuance of Bundy II, both Appellant and Appellee, as well as the trial court, were well-aware of the opinion at trial.

In declaring that the holding in Bundy II would be prospective only, this Court stated:

> We hold that any posthypnotic testimony is inadmissible in a criminal case if the hypnotic session took place after this case becomes final. We further hold that any conviction presently in the appeals process in which there was hypnotically refreshed testimony will be examined on a case-by-case basis to determine if there was sufficient evidence, excluding the tainted testimony, to uphold the conviction. We believe this holding balances the competing interests and is the most equitable place to draw the line.
>
> Id., 471 So.2d at 18-19.

Appellant's reading of this language that since the session took place prior to Bundy II becoming final, the admission of the evidence is allowed a strained one. Although this Court did not address the question of cases in the position of having had the session prior to the opinion becoming final, and prior to trial, it did state that cases presently on appeal at the time of the opinion must be reviewed to see whether there was sufficient evidence without the tainted testimony. This implies that if Appellant's case were on appeal instead of awaiting trial and the testimony had been admitted, the appellate court would have to review

the case to see if the admission of the evidence created reversible error. For Appellant to suggest that because he was merely awaiting trial, he could slip the testimony in, is contrary to the obvious intent of Bundy II.

As a general rule, it is decisional law in effect at the time of an appeal that governs a case, even if there is a change in that law. Lowe v. Price, 437 So.2d 147 (Fla. 1983). Bundy II and its rule of prospective application creates the same situation as Tascano v. State, 393 So.2d 540 (Fla. 1980), and State v. Neil, 457 So.2d 481 (Fla. 1984). This Court has held in both instances that the prospective changes in the law apply to all cases in the "pipeline" where the issue has been properly preserved. Spurlock v. State, 420 So.2d 875 (Fla. 1982); State v. Safford, 11 F.L.W. 117 (Fla. March 20, 1986). This Court has also held in a similar situation that the United States Supreme Court decision in Miranda [2] is not to be applied retroactively, but does apply to a situation where the interrogation took place prior to the issuance of the opinion, but trial began after the decision. State v. Statewright, 300 So.2d 674, 676 (Fla. 1974). Thus, Bundy II requires that the sustaining of the State's objection to the evidence based on the hypnosis session be affirmed.

Appellant's argument that the hypnotic session in the case at bar was merely for "investigative" purposes and

[2] Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

was thus admissible misinterprets this Court's holding. In Bundy II, this Court stated that hypnosis could be used for investigative purposes, and any corroborating evidence would be admissible. Bundy, supra, 471 So.2d at 19. However, the hypnotic evidence itself would not be admissible. Id.

Appellee would further point out that the testimony based upon the hypnotic session was introduced during the penalty phase of Appellant's trial. The jury came back with a recommendation for the death penalty, despite the evidence. The testimony of Dr. Caddy and Dr. Koson was impeached during cross-examination, and was challenged by Dr. Cheshire, a psychiatrist, who found Appellant sane at the time of the offense (T 1701). There was a question whether the doctors were able to find Appellant insane at the time of the offense under Florida law, since they were relying on the irresistable impulse doctrine. Thus, if the evidence had been admitted at the guilt phase, it is questionable that the result would have been any different.

The hypnotic session was not "reliable" within the meaning of the pre-Bundy II cases. Thus, the evidence was properly excluded from the trial. Under the per se inadmissibility rule of Bundy II, there is no question that the evidence was properly excluded. This exercise of discretion by the trial court was entirely proper, and must be upheld by this Court.

POINT III

THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTIONS FOR JUDGMENT OF ACQUITTAL SINCE PREMEDITATION WAS PROVED BEYOND A REASONABLE DOUBT, AND THERE WAS SUFFICIENT EVIDENCE TO SUPPORT A CONVICTION UNDER A FELONY MURDER THEORY.

Appellant argues that the state did not prove premeditation beyond a reasonable doubt. Appellee maintains the sufficiency of the evidence to support Appellant's conviction of premeditated murder, and in the alternative, his conviction of first-degree murder since the murder occurred in the course of a completed or attempted sexual battery.

Under Florida law, a motion for a directed verdict of acquittal should be denied unless there is no legally sufficient evidence on which to base a verdict of guilt. McGahee v. Massey, 667 F.2d 1357 (11th Cir. 1982). The accepted standard to be applied on review of denial of the motion is not whether the evidence fails to exclude every reasonable hypothesis but that of guilt, but rather when the jury might so reasonably conclude. Tsavaris v. State, 414 So. 2d 1087 (Fla. 1st DCA 1982); Amato v. State, 246 So.2d 609 (Fla. 3d DCA 1974). The jury having so concluded, this Court will not reverse a judgment based upon a verdict returned by the jury where there is substantial, competent evidence to support the conviction. Heiney v. State, 447 So.2d 210 (Fla. 1984); Rose v. State, 425 So.2d 521 (Fla. 1982), cert. denied, 461 U.S. 909, 103 S.Ct. 1883, 76 L.Ed.2d 812 (1983).

Premeditation is the fully formed conscious purpose to kill formed upon reflection and deliberation. Sireci v. State, 399 So.2d 964 (Fla. 1981); Davis v. State, 138 Fla. 798, 190 So.2d 259 (1930); O'Bryan v. State, 300 So.2d 323 (Fla. 1st DCA 1974). Premeditation can be inferred from evidence as to the nature of the weapon used, the presence or absence of adequate provocation, previous difficulties between the parties, the manner in which the homicide was committed, and the nature and manner of the wounds inflicted. Sireci v. State, supra; Hill v. State, 133 So.2d 68 (Fla. 1961); Larry v. State, 104 So.2d 352 (Fla. 1958); O'Bryan v. State, supra. Premeditation can be shown by circumstantial evidence. Sireci v. State, supra. Premeditation involves a prior intention to do the act in question, it does not have to be conceived for any particular period of time before the act and may occur a moment before the act. McCutchen v. State, 96 So.2d 152 (Fla. 1957); Thompson v. State, 397 So.2d 354 (Fla. 3d DCA 1981). That the decision to kill was made at all is sufficient to prove premeditation. Middleton v. State, 426 So.2d 548, 550 (Fla. 1982), cert. denied, 463 U.S. 1230, 103 S.Ct. 3573, 77 L.Ed.2d 1413 (1983). Of course, whether evidence establishes premeditation in a given case is a question of fact for the jury. Cannon v. State, 468 So.2d 1123 (Fla. 1st DCA 1985).

The evidence presented at trial established that Appellant struck Gertrude Trbovich repeatedly with a vase, and a wrench. He dragged her into the kitchen while she resisted, and stabbed her sixty times with a kitchen knife.

It has been held that the fact that a knife is used in an attack is a significant factor in determining premeditation. Preston v. State, 444 So.2d 939 (Fla. 1984); Cannon, supra. Further, this Court has recently noted:

> Where a person strikes another with a deadly weapon and inflicts a mortal wound, the very act of striking such person with such weapon in such manner is sufficient to warrant a jury in finding that the person striking the blow intended the result which followed. See Rhodes v. State, 104 Fla. 520, 140 So. 309, 310 (1932).

Buford v. State, 403 So.2d 943 (Fla. 1981), cert. den. 454 U.S. 1164 (1982).

Mrs. Trbovich suffered a number of injuries to her face and forehead (T 998). There was an injury to the scalp from a crescent wrench (T 999). On the right side of her back were small-sized wounds consistent with stab wounds (T 1000). Appellant bit Mrs. Trbovich on her right breast while she was still alive (T 1000, 1099, 1100). She also suffered traumatic injury to the female genital area which was consistent with penetration by an object (T 1002). There was saliva on her pubic hairs (T 1120). Her wedding rings were fused to her finger, which was consistent with force from a blunt instrument (T 1001). Her wedding ring could not be removed since it was flattened from round to oval. Her left thumb was cut. There was almost a complete cutting away of the thumbnail, and bruising and traumatic injury to the adjacent fingers. There were also cuts to the right hand (T 1002). The wounds to the hands were defensive wounds (T 1003). She had a

fracture in her left hand (T 1027). Her skull was crushed (T 1038). She had a fractured nose (T 1043). The vaginal area was bruised (T 1046-1047). There was major bleeding in the neck area. Mrs. Trbovich died as a result of the stab wounds (T 1066). Mrs. Trbovich was in a great deal of pain as a result of the injuries (T 1072). The injuries to Mrs. Trbovich support a finding by the jury of premeditation.

Further, Appellant's conviction is supportable under the felony murder doctrine, which the jury had been instructed on (T 1426-1427). The evidence showed either an attempted or completed sexual battery on Mrs. Trbovich. There was trauma to her vaginal area (T 1002). Her pants were pulled to her knees, and her blouse and bra were pulled above her breasts (T 856). She had a bite on her right breast (T 1000). There was saliva on her pubic hairs (T 1120).

Appellant's motions for judgment of acquittal were properly denied, and his conviction must be affirmed.

POINT IV

PROSPECTIVE JUROR FRANKLIN WAS PROPERLY EXCUSED FOR CAUSE.

Appellant argues that prospective juror Franklin was improperly excused from the jury panel for cause since she did not demonstrate that her views would "prevent or substantially impair the performance of [her] duties as a juror" as required by the opinion of the United States Supreme Court in Wainwright v. Witt, ___U.S. ___, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985). The State maintains that the record reflected that her feelings regarding the death penalty would have substantially impaired her performance as a juror. For a general discussion of death qualification of the jury, see Point VI, infra.

During the individual voir dire of Miss Franklin she discussed her difficulties with the case. She referred to the fact that her brother had also gotten in trouble with the law at age sixteen (T 240-251). She said "I don't know if I can be impartial based on the fact that this gentleman was sixteen years old when this has happened" (sic)(R 251). The voir dire continued as follows:

> Q. Because of what happened to your brother at that age of 16, and because at the time this offense was committed the defendant was 16, would that prevent you automatically from rejecting the idea of finding this defendant guilty of first degree murder?

A. It's not the fact of finding him guilty of first degree murder. It's the sentence. I know that is--there is only one of two choices. The sentence is either lifetime in prison, or death. One of the two. This was premeditated first degree murder is what he is on trial for. I think that I could have a 16 year old brother who was spending a life in prison or on the death row. And I visited, I went to prison for five years, and I went through all that. And I don't know if I can be impartial on that basis.

Q. Okay. If I understand you correctly, if the State proved to you beyond every reasonable doubt that the defendant committed first degree murder, you could return a verdict of guilty; is that?

A. I could, sure. Yes, I could.

Q. Even with your brother and the memories?

A. Uh-huh. Granted my brother was guilty. Yes, he was.

Q. Then we come to the penalty phase, and you understand that your role as a juror then would be an advisory capacity.

A. Right.

Q. The judge will instruct you on aggravating circumstances, mitigating circumstances. He would tell you to weigh those. Don't just add them up, weigh 'em. Okay. And come back with an advisory recommendation, and it doesn't have to be unanimous like the guilt phase. You understand that?

A. Right.

Q. Okay. Would you be impaired or be prevented from returning with an advisory opinion or recommendation of death because of what you have described to us here today?

A. Yes, I would.

Q. Under any circumstances?

Q. Could you not return a verdict, or an advisory opinion of death?

A. I'd have to hear the evidence. I really would. I'd have to hear it. It'd have to be pretty grave.

Q. Would that -- would your deliberations and your decisions in the penalty phase be substantially impaired --

A. Oh, yes, they would.

Q. - - by it, what you've described to us?

Q. Uh-huh. Uh-huh.

MR. SMITH: No further questions.

BY MR. MAKEMSON:

Q. Mrs. Franklin, I'm not going to beat this to death. I want to make sure I understand. If the judge instructs you have certain things to consider, aggravating circumstances you can consider, mitigating circumstances you can consider, and there is a catchall in there that says other circumstances of the case that you find as mitigating you are to consider.

Would your beliefs and your attitude you've just expressed, would it prevent you from considering those circumstances?

A. No.

Q. And you would then be able to consider them, and come up with an advisory recommendation, it may be that that advisory recommendation would be for life, would you be able to to do that?

A. No.

Q. Okay. Why not?

A. I can't understand why this case has gone on for eight years. I just can't -- I just cannot even fathom the fact that this case has been prolonged for eight years that this has gone on. I'm not here to make the laws. And I'm not here - - and I'm not the judge. I just have a hard time in understanding that this gentleman was 16 years old when this happened, and we're going to have to listen to testimony from eight years ago, we're going to have to listen to opinions that have been changed either one way or the other over the last eight years. And based on the experience that I had, I don't know if I could weigh what the judge says and return a conviction or whatever of guilty. Or of life imprisonment.

Q. Are you saying that you don't think that you could return an advisory opinion either way?

You've expressed, said that you could not recommend death?

A. No.

Q. And considering the circumstances would you be able to to recommend life?

A. Yes, I guess I could recommend. Yes, I could recommend life. But not--

Q. So you could weigh those circumstances and come to to a conclusion and recommentation?

A. Yes. Okay. Yes, I guess so.

MR. MAKEMSON: No further questions.

BY MR. SMITH:

Q. Mrs. Franklin, just briefly, is it your statement or testimony that in no situation, no circumstances could you return with an advisory opinion of death?

A. Oh, no.

Q. Never?

A. Oh, yes. I could. Oh, definitely.

Q. You could?

A. I do believe in the death penalty. I do believe in life imprisonment. Yes, I do.

Q. With the background that you've laid down for us and the fact that this defendant was 16 years old at the time of this crime --

A. Uh-huh.

Q. - - could you return under any circumstances an advisory opinion of death?

A. No.

Q. As far as any advisory opinion in coming to a recommendation as to sentence, would your oath as a juror and the instructions given to you by the judge, okay?

A. Uh-huh.

Q. Taking all that into consideration, would you be substantially impaired in reaching any sort of advisory opinion as to sentence? Because of what you told us.

A. I would be substantially impaired reaching a verdict of, or a decision for life, or for death, but even life imprisonment is very difficult based on the circumstances.

Not that I would not want to do and uphold my responsibility as a juror.

Q. I mean it's obvious you want to. But what you are telling us --

A. Yes, I do.

Q. - -because of the circumstances, you would be substantially impaired?

A. Yes.

MR. SMITH: No further questions.

BY MR. MAKEMSON:

Q. Is that substantially impaired to recommend death?

A. Yes.

Q. Is it also substantially impaired to recommend life?

A. I would have to hear -- I'd have to hear the trial.

Q. You can't say right now, your opinion would substantially impair your ability to weigh the circumstances and to recommend life?

A. I could recommend life if I knew that there was something that was going to be done other than that he was going to be sitting in prison for the rest of his life.

(Emphasis added) (T 252-257)

It is apparent from the above dialogue that Miss Franklin would have been substantially impaired from carrying out her duties as a juror. She stated that she couldn't recommend the death penalty, and would have great difficulty even recommending life imprisonment or even a finding of guilty knowing the possible outcome. As such, she was properly excused for cause under the doctrine of Wainwright v. Witt, supra.

Appellee would further point out that it did not exercise all of its peremptory challenges (T 666, 686). If Miss Franklin had not been excused for cause, it is likely that the State would have exercised one of these challenges, and thus no reversible error could have occurred.

POINT V

THE TRIAL COURT PROPERLY EXCERCISED ITS DISCRETION BY DENYING APPELLANT'S MOTION FOR MISTRIAL.

Appellant, without relying on any authority, states that the trial court erred in denying his motion for mistrial based upon a comment made by prospective juror Blanks during voir dire. Appellee asserts that the motion for mistrial was properly denied, and that there was no prejudice to Appellant.

Of course, a motion for mistrial is addressed to the sound discretion of the trial court. Ferguson v. State, 417 So.2d 639 (Fla. 1982); Jackson v. State, 419 So.2d 394 (Fla. 4th DCA 1982). Moreover, the power to declare a mistrial and discharge a jury 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. 885 (1979); Morales v. State, 431 So.2d 648 (Fla. 3d DCA 1983). There was no absolute necessity in the case at bar.

The following is the colloquy at issue:

THE COURT:

> To the two of you who have been seated just this afternoon, do either of you know anyone involved in this case, or are you related to anyone involved in case?

MRS. HURCHALLA: Yes.

MR. BLANKS: At the time he was convicted I was in court at the time.

BY THE COURT:

Q. Who do, you know?

A. Mr. Morgan. The guy over there.

Q. You know James Morgan?

A. Not personally, but at the time he was convicted, I was in court.

Q. Anything about that experience that might affect your ability to be fair and impartial to both the State and the defendant in this case?

A. No.

Q. Okay. Do you know anyone else involved in the case?

A. Naw.

(T 545-546)

Appellee would assert that there was absolutely no basis for a mistrial sub judice. The comment by Mr. Blanks must be considered in context. It was incidental in light of the extensive voir dire process. Not even the trial judge heard the comment (T 549). Nor did the assistant state attorney (T 561). As the court noted, the individual voir dire interview about propr knowledge and the ability to be impartial was sufficient to obviate any problem with the comment. The court stated: "I am not sure anybody heard accept (sic) those that were real close." (T 550).

The interview with Mr. Blanks established that he had been in court during Appellant's earlier trial on a school field trip for his sixth grade class (T 552, 557). Mr. Blanks

was only in court one day and was not present when the verdict was reached (T 553). As a layman, he didn't even understand the legal definition of "conviction." Most likely the other jurors did not either.

The State, " [i]n an abundance of caution," requested that the trial court interview those seated jurors who had not already indicated prior knowledge and their ability to be impartial despite the knowledge to establish that the other jurors could also be impartial (T 563-566). However, Appellant objected to this proposed procedure, and indicated he wanted a mistrial or nothing (T 566-568). This indicates that Appellant was not trying to cure any possible problem, he merely wanted a chance for a new jury venire. As such, he was playing both sides of the fence, and was not really concerned with the comment by Mr. Blanks. Thus, he should not be heard to complain on appeal about the denial of the motion for mistrial. Cf., Ferguson v. State, supra, (failure of defendant to preserve for appellate review objection to comments by prosecutor when he moved for mistrial, but did not request curative instruction).

Despite Appellant's objection to a curative procedure, the trial court made inquiry of the jury panel.

> THE COURT:
>
> Is there anything that's going on or anything that you've heard that might affect your ability to be fair and impartial in this case other than what we have specifically talked with you about, either individually out of the presence of the other jurors, or talked with you individually here in the court room, or

> talked with you collectively about it? Is there anything at all that might affect your ability to be fair and impartial in this case other than what we've covered? That is, anything that's happened over the course of the last almost three days of court time here. Anything at all to any of the ten of you who have been here some of you since Tuesday morning?
>
> A. (Jurors shake heads negatively).
>
> Q. Nothing at all that you want to tell us. I'm doing this more out of an abundance of caution than anything else. But it'd be a good time to bring that--if there is anything you wanted to tell us this would be an opportunity for you to mention. Nothing at all?
>
> A. (Jurors shake heads negatively).
>
> (T 602)

This procedure by the trial court established on the record that there was no prejudice to Appellant. None of the jurors indicated that they had heard Mr. Blanks' statement, or that if they had, that it had affected their impartiality. Appellant has failed to establish that he was denied an impartial jury panel. Reversible error cannot be based on speculation or conjecture. Sullivan v. State, 303 So.2d 632 (Fla. 1974), cert. denied, 428 U.S. 911, 96 S.Ct. 3226, 94 L.Ed.2d 1220 (1976).

Appellant was afforded a fair trial, and his conviction must be affirmed.

POINT VI

APPELLANT WAS NOT DEPRIVED OF A FAIR AND IMPARTIAL JURY VENIRE.

Appellant argues that the trial court erred in permitting that the jury be death qualified. Appellee maintains the propriety of the death qualification process.

In Dougan v. State, 479 So.2d 697, 700 (Fla. 1985), this Court reaffirmed its holding that a defendant is not entitled to have jurors serve on his jury who are inalterably opposed to the death penaly, and that a trial judge may excuse such jurors for cause. The Court has specifically rejected such a claim in terms of the denial of a defendant's right to a jury representing a fair cross section of the community. See Sims v. State, 444 So.2d 922, 924 (Fla. 1983); Maggard v. State, 399 So.2d 973, 976 (Fla. 1981). See also Nettles v. State, 409 So.2d 85-88 (Fla. 2d DCA 1982).

The Fifth Circuit in Spinkellink v. Wainwright, 578 F.2d 582, 596-598 (5th Cir. 1978) presumed without deciding that jurors who would automatically vote against the death penalty no matter what evidence was proved at trial constituted a "distinctive class", but held that the State of Florida had satisfactorily shown "weightier reasons" for the exclusion of such veniremen. The Court held:

> Florida has reached the reasoned determination that the parties' right under the sixth and fourteenth amendments to an impartial jury and the state's interest in just and evenhanded application of its laws, including Florida's death

> penalty statute, are too fundamental to risk a defendant prone jury from the inclusion of such veniremen. As the petitioner in his brief concedes, a defendant would be unjustified in objecting, for instance, to the exclusion for cause of a class composed of veniremen who are related to him, even if the veniremen state they could impartially judge his guilt or innocence, because the chance that such veniremen would be biased in favor of the defendant is too great. Petitioner's Brief at 57. Such danger is no less real when the excluded class is those veniremen properly struck under Witherspoon because of their conscientious scruples against capital punishment. The exclusion of such veniremen, therefore, does not violate the representative cross-section requirement of the Sixth and Fourteenth Amendments.
>
> 578 F.2d at 597-598.

Spinkellink has continued to be adhered to in the Fifth and Eleventh Circuits. Watson v. Blackburn, 756 F.2d 1055 (5th Cir. 1985); McCleskey v. Kemp, 753 F.2d 877 (11th Cir. 1985) (en banc); Smith v. Balkcom, 660 F.2d 573 (5th Cir. 1981) modified at 671 F.2d 858 (5th Cir. 1982).

The Appellee thus submits that as a matter of law, Appellant's position is without merit. Assuming, however, that "death qualified" jurors can be a distinct class, Appellee submits that Appellant has failed to support his allegations with any studies or other offer of proof.

In Witherspoon v. Illinois, 391 U.S. 510 (1968), the United States Supreme Court held that based on the few studies before it, there was insufficient evidence to establish "that the exclusion of jurors opposed to capital

punishment results in an unrepresentative jury on the issue of guilt or substantially increaes the risk of conviction." 391 U.S. at 518, 88 S.Ct. at 1775. See also Bumper v. North Carolina, 391 U.S. 543, 545, 88 S.Ct. 1788, 1790 (1968).

Since Witherspoon, additional studies and evidence have been presesnted to the federal courts to support defendant's claim of violation of the fair cross section requirement. See Grigsby v. Mabry, 758 F.2d 226 (8th Cir. 1985) (en banc); Keeten v. Garrison, 742 F.2d 129 (4th Cir. 1984); Smith v. Balkcom, supra, 660 F.2d at 577-578, n. 8; United States ex rel. Clark v. Fike, 538 F.2d 750, 761-762, n.1-4 (7th Cir. 1976); United States ex rel. Townsend v. Twomey, 452 F.2d 350, 360-363 (7th Cir. 1972). Based on the evidence presented, except for the Eighth Circuit, all of these courts have rejected the defendants' argument. Specifically, this Court in Dougan v. State, supra, found Grigsby to not be persuasive.[3]

Even if this Court were to find Grigsby persuasive, the instant case is not controlled by Grigsby. That is because unlike the defendant in Grigsby, the Appellant offered no evidence through any studies or expert witnesses, to show the effects of the death qualification voir dire process on jurors who serve on capital juries. Furthermore, Appellant did not even cite Grigsby to the trial court. As such, there is a basis for rejecting Appellant's impartiality argument as a matter of fact. See Nettles v. State, supra, 409 So.2d at 88.

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[3] Grigsby has been accepted for review by the United States Supreme Court in Lockhart v. McGee, 38 CrL. 4014.

This Court has allowed excusal for cause of prospective jurors where the record reflects that the juror's views would substantially impair the performance of his duties as a juror in the penalty phase of the trial. Herring v. State, 446 So.2d 1049, 1055 (Fla. 1985). It is interesting to note that this Court, in deciding Herring, supra, used the standard as established by the United States Supreme Court in Adams v. Texas, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed. 2d 581 (1980) and recently reaffirmed in Wainwright v. Witt, supra. Wainwright v. Witt has been acknowledged by this Court in Witt v. State, 465 So.2d 510 (Fla. 1985).

Wainwright v. Witt, supra, controls the issues in the case at bar, and Appellant's argument must fail.

POINT VII

THE IMPOSITION OF THE DEATH PENALTY UPON APPELLANT WAS PROPER AND DID NOT CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT.

Appellant argues at great length that the death penalty should not be imposed on a brain damaged sixteen year old child. However, there is nothing disproportionate about Appellant's sentence.

First of all, there is nothing in the record to show that Appellant's "brain damage" prevented him from appreciating the consequences of his acts. Florida law provides that such a non-statutory mitigating factor be considered by the jury in making its sentencing recommendation. So it was here, and Appellant received a recommended death sentence anyway. It is merely one in many factors that can be considered in the rendering of a sesntence.

Regarding the age issue, the capital sentencing statute sets forth the age of the defendant as being a circumstance which may be considered in mitigation. §921.141(7)(g), Fla. Stat. (1985). In State v. Dixon, 283 So.2d 1 (Fla. 1973), cert. denied in Hunter v. Florida, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974), this Court stated that the age circumstance

> allows the judge and jury to consider the effect that the inexperience of the defendant on the one hand or, in conjunction with subsection (a), the length of time that the defendant has obeyed the laws in determining whether or not one explosion of total criminality warrants the extinction of life.

283 So.2d at 10. Appellee submits that this statement presents the issue of age in proper prospective. That is, there should be no "bright-line test" as Appellant would suggest. Rather, age should be a factor to be considered along with all of the other circumstances, but should not alone be determinative.

Cases such as this where the defendant committed the crime at an early age pose the kind of issue which must prompt a thoughtful person to consider what capital punishment is supposed to be all about and how we as a society should handle it. A "bright-line test" would certainly be easy to apply, but the problem of violent crime does not lend itself to easy answers.

Nevertheless, as this Court indicated in Dixon, our statute has provided the mechanism for dealing with these kinds of issues. We as a society, through our legislature, have decided that there should be capital punishment, and this Court and the United States Supreme Court have repeatedly ruled that it is constitutional. No statute can be expected to provide perfect guidelines to fit every case. However, our statute does provide the mechanism for drawing the line in difficult cases, and that is the jury. In past cases this Court has referred to the jury as embodying the "conscience of the community" in capital sentencing. That is why the line of cases beginning with Tedder v. State, 322 So.2d 908 (Fla. 1975) have established that the advisory determination of the jury must be given great deference.

The jury must be given the opportunity to consider the character of the defendant, the nature of the crime, and all of the attendant circumstances, and thereafter reach a reasoned judgment regarding the penalty. In the instant case, as in the original two trials, a majority of the jury, acting as the conscience of the community, heard all of the expert and lay testimony during the penalty phase, evaluated the defendant and the act, and still decided that death was the appropriate sentence despite the fact that Appellant was sixteen years old at the time of the crime. Appellee submits that this is precisely the kind of issue concerning which the jury's advice should be given the kind of deference which this Court said it should be given in Tedder.

The death penalty was properly imposed on Appellant.

CONCLUSION

THEREFORE, based upon the foregoing reasons and authorities cited herein, Appellee respectfully requests that the judgment and sentence of the trial court be AFFIRMED.

Respectfully submitted,

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CERTIFICATE OF SWERVICE

I HEREBY CERTIFY that a true copy of the foregoing Answer Brief of Appellee has been furnished, by United States Mail, to ROBERT G. UDELL, ESQUIRE, 14 East 7th Street, Suite 8, Stuart, Florida 33497, this 4th day of April, 1986.

Joan Fowler Rossin
Of Counsel