IN THE SUPREME COURT
STATE OF FLORIDA

KIRK ALLEN HANSBROUGH,

Appellant,

v.

CASE NO. 67,463

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE NINTH JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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TABLE OF CONTENTS

Table of Contents (con't). PAGE:

TABLE OF CITATIONS

Table of Citations (con't)

(Table of Citations (con't).

Table of Citations (con't)

Table of Citations (con't).

Table of Citations (con't).

STATEMENT OF THE FACTS

The state accepts the defendant's version of the facts, subject to factual disagreements and additional pertinent facts set out below, as well as a differing chronology of events.

Pamela Jean Cole was killed around 3:00 p.m. on June 20, 1984 while working alone at the Ramsey Insurance Agency (R 570-572). She was discovered lying face down with blood and marks on her, in the back office, by a customer at 3:45 p.m. (R 572-574). She tried to talk to Pamela and soon realized that she was dead (R 576). Pamela had been stabbed thirty-one times (R 654-656; 659). Ten of the wounds were of the defensive type. She died of a stab wound to the heart, but the rest of the wounds, except for the defensive wounds, were in areas of the body where a knife stab could be potentially lethal (R 666). All of the wounds were inflicted upon her while she was still alive and caused pain (R 662). Because there were defensive wounds, the fatal wound was probably not administered first (R 671). Even the fatal wound would not have caused immediate death or loss of consciousness until the heart ceased pumping several minutes after the stabbing (R 659; 670-671). Pamela also suffered a traumatic injury to the left eye area, caused by blunt force or a fist (R 656-657). No murder weapon was ever found (R 862). A money bag containing approximately $110.00 was stolen (R 622).

Between 2:25 and 3:00 p.m. Kirk Allen Hansbrough gave Sharon Alden and her son a ride in his automobile to her chiropractor's office (R 677-678). Hansbrough drove by the insurance agency twice (R 678). Two or three weeks before, he told Robert Alden that he had staked out the place, knew when people would come and go, and wanted a diamond ring worn by a lady there and would take the finger with it if necessary (R 980). He also

had told Sharon Alden that it looked like an easy place to rob (R 694). Hansbrough told Sharon Alden that he had to take care of an errand and wanted to see a friend. He parked his car behind a shopping center by a gas station near the insurance agency, got out of his car and asked Alden to also get out of the car and stand in a position so that her son could not see what he was doing. Hansbrough then put something down his pants, which appeared to be a knife (R 679-680; 744). He instructed Alden to wait there and leave the motor running and walked off (R 680-681). What happened inside the insurance company is reflected in the various statements of Kirk Hansbrough.

Hansbrough was arrested on July 17, 1984 on a traffic charge, and after having been informed of his rights, and waiving the same, made a voluntary statement that he had been in the agency on the day of the murder to inquire about insurance, but denied that he was involved in any homicide (R 980-985; 848-854; Ex. 75). Hansbrough was arrested on the instant charges on July 23, 1984, was again advised of his rights, and voluntarily made a statement (R 991-994). He adhered to his prior statement initially, but then confessed to Officer Chisari that he went into the agency on June 20, 1984 to commit a robbery to obtain money to buy drugs (R 994). He asked for change for a twenty dollar bill and when Pamela took the bank bag out to make change, he grabbed for it, at which point, Pamela grabbed his hair and fought him. He stated that he did not remember stabbing Pamela, and from the point at which she grabbed his hair, could not remember anything until that point in time when he realized he was covered with blood and Pamela was lying on the floor, also covered with blood (R 944-947).

Two or three weeks after the homicide, however, Hansbrough told Robert Alden that "the bitch tried to fight me off and I had to fight back." (R 781). He did not tell Alden that he had no memory about what

had happened (R 782).

Shadrick Martin, Hansbrough's cellmate, testified that Hansbrough told him that he had intended to kill Pamela because she had punched him in the nose; that he intentionally stabbed her and that he was conscious during the entire incident (R 933-939). "When she hit him in the nose, he just lost his cool and was just making sure that she couldn't struggle any more than when he first started." (R 935). Hansbrough told him that he was going to surprise her from behind and knock her out but she turned and put up a struggle, busting his nose, and he became upset and started stabbing her (R 934). As he was getting the money, he saw that she was still moving, went over to her, at which point he got blood on his shoes, lifted her up, found she was still living, and stabbed her again in the neck or chest (R 935).

Attempts were made to discredit Martin's testimony by bringing out his criminal and psychiatric history, his reputation for untruthfulness, his fear that law enforcement officers were out to get him and that he was facing sentencing on a burglary charge and feared he would be stiffly sentenced (R 943-970; 1813-1817; 1589-1598). Two other cellmates testified they saw Martin reading Hansbrough's files, depositions and the autopsy report, but Martin denied this (R 1481; 1522-1524; 939; 941). The physical evidence in the case, however, reflected the same factual scenario with or without Martin's testimony.

There were blood stains in the back office on the wall next to Pamela (Ex 18; R 889). The splatters were caused while the victim was lying down (R 889). Martin testified that at this point Hansbrough got blood on his shoes (R 935). A bloody footprint was found on the victim's pants, which could have been made by Hansbrough's sneakers (R 814). Human blood was found on Hansbrough's right shoe (R 835-839). There were bloody shoe impressions on the carpet along the body running to the desk (R 594).

The desk had been ransacked, the drawers were open and a metal cash box had been opened and was lying on top of the desk (R 580). Blood spatters on a calendar on Pamela's desk could have come from Hansbrough (R 834-835). The money bag was kept in a credenza behind Pamela's desk, and blood was found on the credenza key (Ex. 14; R 839-840). Blood stains were also found on Hansbrough's shirt and pants and on the leg of a chair (R 835-840). The bloody shoe prints continued to the doorway where the carpet runner began (R 594). Blood stains were found on the door and wall outside Pamela's office, on the rear door, on the carpet in the outer office, and on the front door (R 593; Ex. 23;26;27;21). The blood on the south door was found to be human blood (R 840). A shoe print was found in the sand on the southeast corner of Thoni's Oil just around the corner (R 598;861;979). The impression could have been made by Hansbrough's sneakers (R 810-812).

Hansbrough related to Dr. Wilder, as well, that he had a memory loss at the time of the murder, however, in this version, after she grabbed him by the hair, he swung to the left, and the next thing he remembered was standing in a strange room seeing blood, and Pamela's body on the floor (R 1770). In this version, the memory loss did not occur at the time his hair was pulled, but after he had swung to the left.

On July 24, 1984, Hansbrough told Officers O'Keefe and Chisari, that he felt a lot better that morning, as the State of Florida was off his shoulders (R 867). On July 27, 1984, Hansbrough requested to see them and stated without being questioned that he knew what he had done was wrong (R 868).

After Hansbrough had gone to the insurance agency, Sharon Alden took his car and returned home to pick up a brace for her appointment with the chiropractor. She left her son to wait for Hansbrough (R 680-681). According to Hansbrough's confession, he grabbed the money bag and left the insurance agency.

He washed his hands at the service station restroom, put the money in his pocket and put the money bag in a trash receptacle (R 944-947). Mrs. Alden's son did not notice anything unusual about Hansbrough at the time he returned, and he talked to him, did not have any problem understanding what he said, and Hansbrough did not act strange (R 478). Sharon Alden returned a little past 3:00 p.m.. Hansbrough was waiting with her son (R 681). She testified that he did not act unusual (R 682). Hansbrough then drove her to the chiropractor's office (R 682;759). According to Hansbrough's confession, he then went home and showered (R 944-947). Sharon Alden's son Robert went with him and observed him change his shirt (R 749). Hansbrough washed his shoes to remove the blood from them (R 996). They went back to the chiropractor's office (R 749).

Hansbrough went inside the office to inquire if Sharon Alden was finished. He was a little aggravated because she was not through and he wanted to leave, but other than that, the assistant did not notice anything "funny" about Hansbrough (R 760).

Hansbrough then contacted Robert Alden, Sr., Sharon Alden's husband and purchased two dilaudid for ninety dollars (R 777-778). He seemed perfectly normal. Hansbrough admitted purchasing them with the money from the agency (R 944-947). Alden delivered them to Hansbrough in the chiropractor's parking lot (R 778;749-752;685). Alden testified that Hansbrough was in a hurry to get into the bathroom at the chiropractor's office to take the dilaudid (R 777-779). Sharon Alden testified that she could tell that Hansbrough had received a drug from her husband (R 685;719-721). Hansbrough told the Aldens that he had forgotten what it was like to do two at a time (R 685,779). Before he had stopped near the insurance agency, he told Sharon Alden that he wished he could get some, but that he did not have the money (R 685).

Earlier, Hansbrough had asked her for money for gas and she gave him two dollars (R 676). Hansbrough drove her home, and on the way, they saw police cars at the agency. Her son wanted to see them, but Hansbrough turned off and said, "No we don't need to." (R 686;750).

The theory of the defendant's case was that he was temporarily insane at the time of the murder, although it was conceded that he was sane at the time of the robbery (R 565-566). It was contended that such psychotic break was the result of drug withdrawal, among other things.

Robert Alden was Hansbrough's drug supplier (R 762). The morning of the murder Hansbrough had asked him for dilaudid and told him that he did not have the money, but would get it later in the day (R 770). Hansbrough told him he had been without drugs for four days (R 771-772). Alden testified that Hansbrough was no different than usual, except that his eyes were dilated and he was perspiring, possibly from the heat (R 771;792-796). Hansbrough acted like he wanted them quite bad, but not to the point where he needed them (R 771). Hansbrough was in control of his faculties, acted rational, and did not black out (R 771-772). Hansbrough, himself, stated that he did not recognize in himself a state of withdrawal (R 1094).

After being refused the dilaudids, Hansbrough went to John Boneff's house around noon. Hansbrough had a couple of beers and Boneff gave him five dollars (R 1681). Boneff testified that Hansbrough was fidgety and anxious to leave and was pacing in the carport while they talked (R 1681-1682).

Hansbrough then went to Sharon Alden's residence, around 12:30 to 1:00 p.m., looking for Robert Alden, who lived across the street, as the Alden's were separated (R 672-674). She did not smell alcohol on his breath and he did not appear intoxicated or high on drugs (R 677). She testified that Hansbrough was not feeling too good, like he had a bad cold and was "Jonesing it" or going through a mild withdrawal (R 700-716;689-698). However, Hansbrough

was in control of his faculties, rational and courteous, and never lost consciousness, either before or after he stopped near the insurance agency (R 691). Alden's son also did not notice anything unusual about Hansbrough when he returned from the insurance company (R 478). Robert Alden also testified that he seemed perfectly normal after the murder (R 778;749-752,685).

Officer Chisari testified that when he arrested Hansbrough on the evening of July 23, 1984, he did not appear to be under the influence of alcohol or drugs, or to be withdrawing from drugs (R 993). There was nothing to indicate that he was going through withdrawal the next day or on July 27, 1984 (R 869;999-1000). Shad Martin has also seen people addicted to drugs, but did not see Hansbrough going through withdrawal when he was placed in the cell with him (R 966).

Joyce Kurht, the Director of Nursing at the Orange County Jail testified that there were no requests on Hansbrough's inmate request forms to indicate that he was undergoing drug or alcohol withdrawal, and no exhibited signs of drug withdrawal were documented. He was under close supervision as suicidal and his behavior was documented three times a day (R 2021). The records reflected that he complained of headache and stomach problems, but Mylanta and Tylenol are passed out free to inmates upon request, and because of this, one thousand to two thousand are dispensed in the building each week. The only prerequisite is to fill out a slip claiming either a headache or stomachache (R 2022;2034). Hansbrough was only seen for athlete's foot and acne (R 2022).

Nora Fussall, Hansbrough's girlfriend, testified that he had no place to go and moved in with her and her husband;and that they formed a ménage a trois and used drugs and alcohol on a regular basis (R 1695-1699). At the end of October, 1983, she and Hansbrough moved in with his father, who had just been released from prison (R 1700-1701). Drug trafficking went on at the condo and

the father supplied them with drugs (R 1702). Hansbrough became heavily involved in dilaudids in November, 1983 (R 1700). She and Hansbrough moved in the middle of November to a house on Edgewater (R 1703-1704). Hansbrough's father was sent back to jail in the middle of December (R 1704). Hansbrough then did not have the drugs he was used to and would go to see the Aldens a couple of times a week (R 1704-1705). She testified that in the early part of 1984, he was restless and edgy, and said that he had a drug problem (R 1705). He went to a drug clinic, but was told that he was not sick enough to be admitted (R 1705-1706). He had a hard time sleeping unless there was marijuana to smoke himself to sleep; he had headaches and his stomach hurt (R 1708-1709). By April, he no longer shared dilaudids with her (R 1711). The incidents Fussall testified to, where Hansbrough acted strangely or "lost consciousness for brief periods of time" were drug related (R 1256). The time she found him in a closet, he had mixed drugs and used a large amount (R 1725-1726). Bizarre behavior was prompted on another occasion by the use of brown heroin, which he shot only once (R 1727-1730).

Sharon Alden testified that in the past she had seen Hansbrough shoot-up with dilaudid and that his father would sometimes prepare drugs for him (R 699-700). She testified that Hansbrough had a small habit and would take only one or two dilaudids a day, and that his habit cost $90 a day and would enlarge to $150 a day, only if he had that much money (R 693; 725-736). She testified that when Hansbrough was "Jones'ing it" all he could think about was getting dilaudid (R 709). Hansbrough would act normal when he was on drugs, and when he was without drugs he may have been irritable, but he did not act crazy or deranged, and was able to walk, talk and recognize people (R 692-693; 728-730).

Robert Alden testified that he would supply Hansbrough with dilaudid, usually one, sometimes two pills each time, twice a week (R 792). Alden testi-

fied further, that Hansbrough would act a little nervous when he did not have drugs, but was not shaking so you could notice it. He acted rationally, could communicate, and even drove his car (R 773-774). Hansbrough, however, would make statements such as "I need a fix, it's been a while." (R 773). Alden has never seen anyone show that amount of desperation for such a small habit (R 792). Hansbrough also told Alden 'My dad's always told me if I get in any real trouble, I should just act crazy, and I would beat the case that way; that I may have to spend some time in a mental institution." (R 782-783).

John Boneff, who at one time supported Hansbrough's mother, and was concerned with Hansbrough's welfare, confronted Hansbrough about his drug usage. Hansbrough told him that he was no longer shooting ten to fifteen dilaudids a day since his father went away, had quit, and only smoked pot occasionally. He later admitted to having an $80 a day dilaudid habit (R 1674-1676).

Further background information was brought out on other aspects of Hansbrough's life, as relating to his temporary insanity defense. His mother, Phila Jackson, testified that forceps were used to deliver Hansbrough and he had a large lump on the back of his head for over three months, but the physician never referred to it as a problem (R 1622). When Hansbrough was three or four years old, his father gave him hard liquor and got him drunk, and continued to do this when people were around (R 1625). At the end of 1969 or 1970, the father was sent to a penitentiary for nine years (R 1627). She then had economic problems and was supported by John Boneff and she started drinking too much (R 1629-1630). She hit Hansbrough with a belt with a buckle and other objects (R 1631). This was confirmed by John Boneff who testified that she would hit him with her fists, a belt with buckles, a clothes hanger or whatever was close to her (R 1671). Hansbrough, however, would laugh at her behind her

back; said that it did not hurt, and had behavior problems (R 1987). He had disciplinary problems in school and smoked marijuana in elementary school (R 1637). He wet his bed until he was fourteen years old, and was on Ritalin as a child for hyperactivity (R 1636). The father came back and took him from her when he was sixteen years old in 1978 (R 1634-1635). Hansbrough did not finish high school (R 1635). He had idolized his father since he was a small child (R 1640). While living with his father, he was arrested for falsifying prescriptions in North Carolina, and put in a deferred prosecution program (R 1654). In May, 1981, Hansbrough was taken to the hospital because of headaches (R 1644). He was referred to a neurosurgeon, who performed a CAT scan, which reflected an asymmetrical brain with a large left ventricle (R 1034-1035). It is not uncommon to have an asymmetrical brain (R 1038). Additional testing was interpreted as showing a positive EEG, indicating a right posterial parietal lesion (R 1034-1035). At the end of 1983 or 1984, he again went to the hospital, as he was throwing up blood and shaking all over (R 1647). After his incarceration, an EEG was performed which was negative, showing his nervous system had healed after being without drugs (R 1039;1202-1203). Before his arrest, Jackson testified that he was hyper and irritable (R 1647). He would take money from her and the children and pawned his brother's stereo (R 1648). After his father left in 1984, he was verbally abusive, but was not physically violent to her (R 1650). Nora Fussall, his girlfriend, also testified that he had never hit her or been verbally abusive (R 1720).

Sharon Alden testified that Charles Hansbrough was opposed to his son using drugs and did not give him drugs until he found out he had been using them on his own (R 755-756).

Hansbrough presented the testimony of three psychiatrists and two clinical psychologists. Based on the high forceps delivery, physical abuse as a child, medical and psychological tests and drug usage, which factors the doctors

attached differing significance to; the doctors testified that Hansbrough was sane at the time of the robbery and shortly after the murder, but was dissociated with reality at the time of the homicide, which dissociation probably was precipitated by the victim grabbing him, and his reaction was based on drug withdrawal, impaired personality development and brain tissue damage (R 1016-1806). On cross-examination, Dr. Krop, a clinical psychologist, testified that the brain damage was minimal and he could not be one hundred percent sure that there even was brain damage (R 1241). Dr. Fisher, a clinical psychologist, testified that no brain damage was indicated by the tests that he administered to Hansbrough (R 1372). Fisher also admitted that it was Hansbrough's own choice to use drugs and alcohol between the ages of eight to sixteen, when his father was in prison (R 1338). Dr. Wilder, also a psychiatrist, found no physical evidence of brain damage, and based his diagnosis on Hansbrough's upbringing and behavior (R 1788).

The state, on rebuttal, presented the testimony of three psychiatrists and one psychologist that Hansbrough was legally sane at the time of the homicide.

Dr. James Upson, a psychologist, examined Hansbrough and evaluated the MMPI test given him by Dr. Krop (R 1834;1838;1846). He testified that the profile plotted to be the "faked-bad profile" of a subject who consciously faked a bad illness. If the scores represented Hansbrough's state of mind, he would have been grossly psychotic, and the MMPI was not valid (R 1848-1849). The Wechsler Intelligence Scale also did not support the hypothesis that Hansbrough is suffering from minimal brain damage (R 1854). A sample of the Rorschach test given by Dr. Krop reflected that Hansbrough responded in a controlled manner and the responses did not indicate confusion or dissociation (R 1855). The Beck Depression Inventory reflected that Hansbrough was some-

what depressed (R 1855). He gave Hansbrough the Benton Visual Retention Test and it did not show organic brain damage (R 1857-1858). Hansbrough scored high on the Baron Welsh Aptitude Scale; indicating that he can deal comfortably with conflicting events (R 1858). The Thematic Apperception Test confirmed Hansbrough's picture of his life (R 1858-1859). It was his opinion that Hansbrough abused drugs, but was not drug dependent and possibly overstated the quantity of drugs he took at various times (R 1859-1860). When you go off dilaudid, in about eight to ten hours you start severe withdrawal symptoms, like a bad case of the flu, which goes on for three to four days (R 1860). For a twenty-four hour period on June 20, 1984, Hansbrough knew what he was doing, the consequences of what he was doing, and he knew right from wrong. He saw no data to diagnose Hansbrough as having a psychotic break or being temporarily insane (R 1861-1862). Hansbrough is not retarded (R 1882). Hansbrough most closely fits the DSM-3 description of an antisocial personality, and also very closely fits the section dealing with drug abuse (R 1886).

Dr. Ernest Miller testified that Hansbrough was legally sane at the time of the robbery and murder (R 1894-1895). Hansbrough is a sociopathic personality, who has a drug and alcohol dependency (R 1909). The EEG did not indicate that Hansbrough had an epileptic seizure at the time of the murder. With a temporal lobe disorder, there is a longer interval from the violent act until reality returns, and his memory loss should cover a more lengthy time span to be a manifestation of a dissociative state (R 1912-1913). By now, fragments of the acts Hansbrough disassociated should have returned, as they invariably do (R 1915-1916). The number of wounds suggest that Hansbrough was in a highly charged emotional state at the time the crime was committed (R 1918). The stab wounds, however, were not random and senseless, as a number were applied to the victim in a defensive posture, and the others were lethally placed

(R 1919). He testified further, that a high forceps delivery is usually innocuous (R 1926). He reviewed the jail medical records, and the material did not suggest that he was going through acute withdrawal of any drugs (R 1921).

A neurologist, Dr. Victor Robert, reviewed the records of Hansbrough's March, 1985, hospitalization, including the CAT scan and EEG, and saw no positive evidence of brain damage. The CAT scan showed only that the left ventricle was larger, which is a normal variation, as a large number of people may have such asymmetry (R 1951-1957).

Dr. George Barnard, a psychiatrist, testified that Hansbrough was legally sane at the time of the murder (R 1996). He did not see any indication of any serious mental disease or defect or major mental illness. There is no indication of abnormal thoughts or perceptions on the day of the crime--the only symptom is that he does not remember what took place. Prior to the crime, he cased the place and chose to go in when only one person was there, and he is able to relate events before and subsequent to the murder, which does not indicate a major mental illness. Moreover, dilaudid is not one of the drugs that would induce a psychosis. Hansbrough is merely a substance abuser and a sociopath (R 1998-1999).

Dr. Robert Kirkland, a psychiatrist, testified that Hansbrough was sane at the time of the homicide. He was not suffering from a major mental disorder that would interfere with his ability to know what he was doing and that it was wrong. Most likely, Hansbrough is lying about his memory loss or suppressed it after the act. Hansbrough has no past history of psychosis and recovered very soon after the act, which is not in keeping with the usual picture of psychotic illness, but is in keeping with someone who would like to avoid the consequences of his actions. Although Hansbrough may have been excited at the time of the homicide, it was not due to a psychotic mental condition (R 2043-2051).

Several doctors also testified that Hansbrough was competent to stand trial and did not meet the criteria for involuntary hospitalization (R 1996; 1752).

The prosecutor did not emphasize the testimony of Shadrick Martin and, in fact, in closing argument told the jury to forget Martin's testimony, as the physical evidence itself reflected that Hansbrough finished off the victim while she was lying on the floor, then returned to rummage through the desk (R 2107-2108).

The jury convicted Hansbrough of first-degree felony murder and armed robbery with a deadly weapon (R 2166-2167).

The state relied upon the evidence presented at trial during the penalty phase (R 2211).

Dr. Fisher's opinion that the homicide was committed while Hansbrough was under the influence of extreme mental or emotional disturbance or duress and that his capacity to appreciate the criminality of his conduct, or to conform his conduct to the requirements of law was substantially impaired, was based on severe withdrawal symptoms (R 2275-2278).

The jury recommended to the lower court, by a vote of seven to five, to impose a sentence of life imprisonment upon Hansbrough, without possibility of parole for twenty-five years (R 2344).

A sentencing hearing was held on July 12, 1985. Marie Burdick, the mother of Pamela Cole, testified that Hansbrough was the epitome of evil and that she would leave him to God (R 2939). Robert Burdick, the victim's father testified that Hansbrough deserved the death penalty under the statute, and because of the devastation to the families involved (R 2940-2941).

The sentencing court found four aggravating factors: (1) that the capital felony was committed while the defendant was engaged in a robbery; (2) it

was committed for the purpose of avoiding or preventing a lawful arrest; (3) it was especially heinous, atrocious or cruel and (4) it was committed in a cold, calculated and premeditated manner, without any pretense of moral or legal justification (R 2979). The court found non-statutory mitigating circumstances, but since they did not outweigh the aggravating circumstances, Hansbrough was sentenced to death (R 2983;6502).

In the interest of brevity, the state will discuss any disagreements with the statement of the case, relevant to the issues at hand, in the Argument section of this brief, as they pertain to such argument.

For purposes of clarity, the appellee has restated the issues in such manner as they appear in the table of contents herein.

SUMMARY OF ARGUMENT

The defendant's argument that the trial court erred in failing to suppress all physical evidence, statements by the defendant, witnesses and other evidence, is not preserved for appeal. No relief would be warranted in any event, as the defendant was stopped because of a cracked windshield, and an illegal left turn, and such stop was not pretextual. His girlfriend was not used as a police tool for interrogation purposes, and the evidence fully reflects that Hansbrough's later confession was the product of his own free will. The confession was, furthermore, not in violation of his rights, as he waived the same, wished to talk, and allowed the investigator to take notes.

The prosecutor told defense counsel he had only granted immunity to Robert Alden, had not prosecuted witness Martin on the burglary charge, and knew of no promises made to him in regard to his pending sentencing. Defense counsel simply disbelieved the prosecutor, and expected him to investigate his case for him without expending any more effort. Such disbelief is not the basis for an appeal without any further record support showing such promises. Moreover, the fact that the state attorney previously prosecuted the witness is a collateral matter, and the trial court did not err in disallowing inquiry into the same.

On direct examination by the state, a psychiatrist made a fleeting reference to a "polygraph" without disclosing who had taken it, what the area of questioning was, or what the results were, and such casual reference is not grounds for a mistrial.

The defendant's proposed jury instructions, as to temporary insanity, did not accurately reflect the law in regard to felony-murder, and the trial court properly rejected the same in favor of standard instructions.

The trial court properly refused to allow the defendant to introduce evi-

dence of a prior assault, and sexual battery on the dead victim, as it is only the height of speculation that such attack would develop a character trait of aggressiveness and that she acted accordingly on the day of the robbery-murder.

The defendant was sentenced to death, and in the event of a new sentencing proceeding, mandated by reversal, a new sentence of death would not be a heavier penalty.

The record fully supports the trial court's exclusion of two jurors, who because of staunch opposition to the death penalty, could not properly perform their duties. Juror Lucas was actually pro-life, aside from his misconception of the law, and was properly left on the jury.

The jury was mislead by unfounded psychiatric opinions, ignored other evidence, and the sentencing judge properly overrode their recommendation of life imprisonment.

The sentence on the armed robbery charge was legal, and in accordance with the sentencing guidelines.

I. THE TRIAL COURT DID NOT ERR IN FAILING TO SUPPRESS ALL PHYSICAL EVIDENCE, STATEMENTS OF THE DEFENDANT, WITNESSES, AND OTHER EVIDENCE OBTAINED AFTER THE DEFENDANT'S TRAFFIC STOP AND ARREST.

ARGUMENT

The defendant first complains that his initial stop on July 17, 1984, by the police was an illegal pretextual stop, and that the trial court erred in failing to suppress all derivative evidence resulting from that stop. He further contends that the statements he made after his arrest on July 23, 1984, were not freely and voluntarily made, but were derived as a result of police utilizing his girlfriend to persuade him to make an incriminating statement. Lastly, he complains that his statement of July 23, 1984, made subsequent to his arrest, was, in fact, made in violation of his Miranda rights.

The state will separately address these issues under subheadings A, B, C as follows.

A. THE STOP OF HANSBROUGH ON JULY 17, 1984, WAS A VALID AND NOT PRETEXUAL ONE RESULTING IN A VALID ARREST AND HANSBROUGH'S STATEMENT WAS VOLUNTARY AND INDEPENDENT OF ANY PRIOR ARREST, AS WAS HIS CONSENT TO HAVING HIS SHOES TESTED.

The defendant complains that the stop of July 17, 1984, was pretexual in order to interrogate him and that all derivative evidence therefrom should have been suppressed.

The issue has not been preserved for appeal. A tape of the July 17, 1984, statement was admitted into evidence and published to the jury without objection (R 986). Testimony as to the shoes and the actual admission into evidence of the shoes themselves, were not objected to (R 986-990;808). No objection was raised during testimony about the search after the confession, resulting in the seizure of Hansbrough's clothing (R 893-895). The actual confession was not objected to at trial. Hansbrough, in not properly renewing his various suppression motions at appropriate times, has waived this point on appeal. Parker v. State, 456 So.2d 436 (Fla. 1984); Herzog v. State, 439 So.2d 1372 (Fla. 1983); Rounds v. State, 382 So.2d 775 (Fla. 3d DCA 1980). Even if the issue was preserved, no relief is warranted.

It is an established principle that only the objective basis which may support particular police conduct, rather than the officer's subjective intent or belief, is pertinent to determining the propriety of the action in question. See, Scott v. United States, 436 U.S. 128, 98 S.Ct. 1717, 56 L.Ed. 2d 168 (1978); Brazial v. State, 416 So.2d 828 (Fla. 4th DCA 1982); State v. Perera, 412 So.2d 867 (Fla. 2d DCA), review denied, 419 So.2d 1199 (Fla. 1982); Thomas v. State, 395 So.2d 280 (Fla. 3d DCA 1981). Thus, that the police may have wished, or even intended to detain a suspect for another reason, does not invalidate an apprehension which follows the commission of a traffic or other offense, which would subject any member of the public to a similar detention. Bascoy v. State, 424 So.2d 80 (Fla. 3d DCA 1982); Crummie v. State,

367 So.2d 1106 (Fla. 3d DCA 1979); State v. Turner, 345 So.2d 767 (Fla. 4th DCA 1977); State v. Holmes, 256 So.2d 32 (Fla. 2d DCA 1971). In the present case, it is undisputed that Hansbrough was driving his car with a cracked windshield, a safety violation (R 2434;2541;2742). Although Hansbrough denies it, Officer Halleran also testified that he saw Hansbrough make an illegal left turn (R 2433;2742). Thus, Hansbrough was engaged in activity that would have subjected any citizen to a stop by a police officer. Furthermore, Hansbrough's license was suspended for two violations and Hansbrough was properly arrested for driving with a suspended license and issued a traffic citation (R 2439;2742;2470).

Even examining the subjective intent of the arresting officer, no pretexual stop is reflected. He testified that he only stopped the defendant on the basis of the cracked windshield and improper turn (R 2442). He received no request from headquarters, or other officers to stop Hansbrough's car, and would have remembered it if he had (R 2450). It was not until after he had stopped Hansbrough, that he learned over the police channel that he was a suspect (R 2438). It was not even the intention of surveillance Officer Michael Bethea to have the vehicle stopped so Hansbrough could be taken down for questioning, and if there was no cracked windshield, he would not have been stopped (R 2549). No one from homicide ever instructed him to stop Hansbrough (R 2548).

That once Hansbrough was validly arrested, the officer availed himself of the opportunity to question Hansbrough about the murder at the Ramsey Insurance Agency, did not render the prior stop a pretexual one, or his statement involuntary or inadmissible. Paperwork is often completed at the C.I.D.. (R 2442). Hansbrough was told he was a possible witness in the case, and that this was an opportunity to discuss it. Hansbrough responded "No problem, yes

yes, I will talk to you." (R 2483) He was read his rights and waived them (R 2488;2496). No threats or promises were made (R 2490). Although Chisari did help Hansbrough get out of jail on PTR, no discussion about such release occurred until the interview was over (R 2507). Hansbrough fully consented to give Officer Chisari his shoes for whatever purpose necessary, and testified at the suppression hearing that at the time it was okay with him for Chisari to take his shoes for whatever purposes." (R 2499;2505;2746). It is clear that Hansbrough's statement, as well as his later confession, and surrender of his sneakers were acts of free will, aside from any prior arrest, and unlike the cases cited by the defendant, no involuntary search or seizure occurred as a result of the invalid stop. It is also significant that the following day Hansbrough spoke to Officer Beal in a noncustodial setting, in which he was free to leave, and after being informed of his Miranda rights, and waiving the same, reiterated his statement of the day before, and provided even more detail, i.e., that he had been at Ramsey's at 2:30 p.m., the day of the murder, then went to visit the Alden's and took Sharon to the chiropractor's office (R 848-854). Thus, any information resulting in the testimony of the Aldens, was obtained through normal police work and was not the result of a pretextual stop. The actual confession was so attentuated as to have no connection with the July 17, 1984, stop of the defendant. Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). Consent to search the home for clothing was given by both the defendant and his girlfriend (R 893).

B. THE DEFENDANT'S STATEMENTS AFTER HIS ARREST ON JULY 23, 1984, WERE FREELY AND VOLUNTARILY MADE AND WERE NOT THE RESULT OF THE AUTHORITIES UTILIZING HIS GIRLFRIEND AS A POLICE TOOL.

The defendant complains that a statement was not freely and voluntarily given, but was made as a result of a promise that he would be allowed to be comforted and have a contact visit alone, with his long-time, live in girlfriend. He further alleges that she encouraged him to give a statement based on her conversation with Officer Chisari, that he would receive help for his drug problem and that Chisari wanted evidence to support his belief that it was not a first-degree murder case. In essence, it is Hansbrough's contention that Noral Fussall was acting as a police tool to entice him to make a statement, by promising a benefit to him for doing so.

This contention has been waived for appellate review. The defense made no objection at trial during Officer Chisari's testimony, in which he related Hansbrough's confession of July 23, 1984. Parker v. State, 456 So.2d 436 (Fla. 1984); Herzog v. State, 439 So.2d 1372 (Fla. 1985). Hansbrough has further waived the right to complain of this confession, and its admission is harmless, in view of the fact that at trial Hansbrough's psychiatrists, testifying in support of his temporary insanity defense, encompassed the facts of this very confession within their opinions, and thus, these very same facts were brought before the jury by the defendant himself. See, Alvarez v. State, 403 So.2d 1005 (Fla. 3d DCA 1981). Hansbrough's own defense was premised upon the facts of this confession. In view of the statements given by Hansbrough to Shadrick Martin and Robert Alden, as well as the physical evidence in the case, it is not likely, and Hansbrough has not demonstrated, that were this confession excluded, his defense would have been other than what it was. In fact, Hansbrough complains elsewhere in this brief of not being allowed to substantiate portions of this confession by introducing into evidence

the background of the victim.

Even, in the event, that this issue could be entertained on appeal, no relief could be afforded Hansbrough. Hansbrough testified at the suppression hearing that his girlfriend, Nora, did not tell him what to say (R 2742). Hansbrough further stated, "I was concerned whether she was going to stick with me through all this. After she told me she was going to stick with me, be there until the end, and if I went to jail, she would be there when the doors opened, I decided right then, myself, I'd go ahead and confess to it." (R 2729). Moreover, Hansbrough knew what the penalties were for first-degree murder (R 2730). Nora went into the defendant, not at the behest of the police, but because the defendant had requested to see her several times (R 2726). Hansbrough wanted to see Nora, simply because he was worried about her as he saw how upset she was upon his arrest, and he did not know what kind of questions she was being asked, or what she was going through (R 2726). Officer Chisari testified that there was a point in the interview, where he felt that Hansbrough was ready to tell the truth, at which point Hansbrough said, "Listen, is Nora out there?" Chisari said he would check. Hansbrough then said, "Let me talk to Nora." (R 2654). Chisari then asked Nora if she wanted to talk to the defendant (R 2655). Nora Fussall, herself, testified that Officer Chisari did not tell her to go in there and get Hanbrough to confess to killing someone, and that she did not feel obligated to extract the confession (R 2685-2686). She did not tell Hansbrough to confess to killing a lady (R 2688). Fussall did not want to know what had happened, why Hansbrough was there, or what he was charged with, and she merely told Hansbrough, "Do what you need to do to get these people to help you." (R 2687-2688). Although she contends that her actions were based upon a conversation with Officer Chisari, which she interpreted to mean that things would be

easier on Hansbrough if he told them what they needed to know, Officer Chisari testified that the only conversation he had ever had with Nora was to ask her if she wanted to talk to Hansbrough (R 2637;2644-2645). No testimony was presented which would have reflected that the defendant was promised a contact visit with Nora, if he confessed. The testimony below reflects only that Hansbrough had concern for his girlfriend, which is not enough to render the confession coerced. See, Coleman v. State, 245 So.2d 642 (Fla. 1st DCA 1971). His visit with Nora was not contingent upon a confession, in the first instance, and the confession was near at hand before the visit by Nora, and after such visit, a relieved Hansbrough decided to confess, knowing that Nora would stick by him. There is simply no basis for a finding that Hansbrough's confession was involuntary, because Nora was used as a tool of the police. This is not a case in which the police have coerced cooperation, see, e.g., Bumper v. North Carolina, 391 U.S. 543, 88 S.Ct. 1788, 20 L.Ed. 797 (1968), nor is this a case in which the state has injected a police informant into an otherwise protected area or relationship, see, e.g., United States v. Henry, 447 U.S. 264, 100 S.Ct. 2183, 65 L.Ed.2d 115 (1980).

The trial court correctly found that the actions of Officer Chisari were not, as the defense asserted, methods by which coercion and promises forced the defendant to give a statement, merely because he was allowed to see his fiance, a person with whom he had lived since 1981 (R 5093). In reviewing the totality of the circumstances, there is sufficient evidence to support the trial judge's finding that the confession was freely and voluntarily made.

C. THE DEFENDANT'S STATEMENT MADE ON JULY 23, 1984, SUBSEQUENT TO HIS ARREST, WAS NOT MADE IN VIOLATION OF HIS MIRANDA RIGHTS.

The defendant raises the novel argument that because he refused to give either a written statement or to allow his statement to be recorded after his arrest that he had effectively exercised his Miranda rights. There is absolutely no record support for such a contention.

The record reflects that Officer Chisari testified that he read Hansbrough his rights at 9:00 p.m., and Hansbrough signed a Miranda card (R 2628). Hansbrough simply preferred that the officer take notes, rather than taping the statement, or writing it out himself (R 2626-2627). Hansbrough indicated to Chisari that he understood his rights and wished to talk (R 2631). Hansbrough, himself, testified that he was read his rights, and that he was willing to talk to Chisari (R 2739-2740). He gave Chisari permission to take notes, as he preferred not to tape it, and not to write it out himself (R 2740). Simply because a defendant prefers one method of communication over another, does not mean that he is invoking his right to remain silent, especially when he subsequently testifies at a suppression hearing that he was willing to talk. This contention is without merit.

Although the contention is meritless, and could be easily disposed of or decided by the court, the issue should not be reached at all on the merits for the same reason that the issue within subheading B, in the appellant's brief, should not be entertained, i.e., that the defendant never objected at trial to the admission into evidence of his confession.

II. THE TRIAL COURT DID NOT ERR IN REFUSING TO REQUIRE THE PROSECUTOR TO DISCLOSE THE EXISTENCE OF PROMISES, IMMUNITY, LENIENCY OR PREFERENTIAL TREATMENT TO SHADRICK MARTIN, AND DID NOT ABUSE ITS DISCRETION IN REFUSING TO ALLOW THE DEFENDANT TO CROSS-EXAMINE STATE WITNESS, MARTIN, OR TO PRESENT THROUGH OTHER WITNESSES, THE FACT THAT THE STATE ATTORNEY HAD PROSECUTED ANOTHER CASE AGAINST MARTIN, IN WHICH MARTIN WAS ACQUITTED.

The defendant first contends that the trial court improperly refused to require the state to disclose on the record any promises or suggestions of leniency that it had offered Shadrick Martin.

In response to the defendant's motion for disclosure of existence of promises from the prosecutor, the prosecutor responded that the only promises or immunity given, had been given to Robert Alden. Shad Martin had already pled to his burglary charge, and was simply awaiting sentencing on the same. The prosecutor, Belvin Perry, did not handle the burglary case. Perry advised defense counsel to review the plea transcript, as he was not present at the time of the plea, and was unable to relate what was told to Shad Martin. The prosecutor further advised, that the case was handled by another Assistant State Attorney, Buck Blankner, and that defense counsel was free to contact Blankner for information as to the plea entered by Martin, and to set him for a deposition to ascertain what promises were made to Martin on behalf of the state (R 2821). The court ruled that defense counsel should review the plea transcript, and contact Blankner and attempt to ascertain such information before going forward on the motion for disclosure of existence of promises (R 2820-2822). The defense motion was denied, but subject to being refiled, if defense counsel was unable to get the desired information (R 2819).

The prosecutor advised defense counsel in regard to any promises or immunity, that only Robert Alden had been given immunity by him (R 2820). No promises were made to Martin at the time he gave his statement (R 970). Martin testified himself at trial that he was told, in no uncertain terms, that

the state attorney's office would make no terms with him (R 962;970). What is involved in this case, is not a failure on the part of the state to advise defense counsel as to any promises given to witnesses, but mere disbelief on the part of defense counsel, as to the fact that this prosecutor had made no deals with Martin. Under such circumstances, it certainly behooved defense counsel to further investigate, through means other than the statement of the prosecutor, in order to show that the prosecutor was acting in bad faith, and had, in fact, made a deal with Martin. No such misconduct is even represented herein. It is clear that a prosecuting attorney is not required to actively assist a defendant's attorney in an investigation of the case. State v. Coney, 294 So.2d 82 (Fla. 1973). This is especially true when a prosecutor has made representations to a defense attorney that no deals have been struck and the defense attorney simply disbelieves the prosecutor's representation. Defense counsel, evidently, made no attempt to, either review the plea transcript, or to interview the state attorney actually handling Martin's burglary charge at sentencing. Such mere disbelief, on the part of the defense counsel, is not an appropriate issue for appellate review, especially when it is totally unsupported by the record.

The defendant next complains of the fact that he was not allowed to bring out, through cross-examination, or to present through other witnesses, evidence that Martin had bragged that he had beat a murder charge with Belvin Perry as the prosecutor, and that he feared Perry was after him on the pending charge he was facing, because Martin had beaten Mr. Perry before. Omar Williamson testified that he would do anything to get out of jail, and was not going to do any jail time this time (R 958-959). He said Martin had a reputation for untruthfulness (R 1482-1488). David Bonham testified to the same fact (R 1523). He also stated that Martin had said he feared that he would be sentenced as an habitual offender (R 1525-1526). Martin was described as an

anti-social personality, who was manipulative, and had a great disregard for the truth (R 1813-1817;1827;1589-1601). Aside from his fear of being sentenced as an habitual offender, there was also testimony that Martin felt that law enforcement officers were out to get him, and that because of his previous charges, he was afraid of going to prison for a long time (R 1596-1598). Thus, Martin's fear of authorities, and his motive to lie was fully placed before the jury, without delving into the purely collateral matter that Martin had once been prosecuted by the same state attorney. The rules of evidence permit, in the discretion of the trial judge, a great lattitude on cross-examination, when in his judgment such a course is essential to the discovery of truth; but they do not permit an inquiry into collateral matters in no way connected with the issue. Eldridge v. State, 27 Fla. 162, 9 So.448 (1891). Nor was it error to disallow the bringing out of such collateral matters through the testimony of other witnesses. This is especially true, in view of the fact that it was demonstrated that the prosecutor had nothing to do with the pending sentencing of Martin on his burglary conviction. Moreover, impeachment of a witness on the basis of prior criminal activity, or dishonesty, is limited to past convictions, and not past arrests or pending charges, except when a prosecution witness is under pending criminal charges by the same prosecuting agency. Causey v. State, 11 F.L.W. 127 (Fla. 1st DCA Jan. 3, 1986). Here there were no pending criminal charges against Martin, but only a pending sentencing. The terms of any plea negotiations would be a matter of record, which could be ascertained by defense counsel upon review of the file at the state attorney's office, or in the clerk's office. Under the sentencing guidelines, a negotiated plea is a clear and convincing reason for departure, so if any reduced sentence were offered to Martin for testimony in this case, it would certainly be a matter of record. Furthermore, since counsel has never demonstrated that the prosecutor either struck a deal with

Martin, or would be involved in sentencing in any way, Martin's unbridled and unreasonable fears of the prosecutor, if they did exist, were in no way relevant or material to any issues at trial, especially in veiw of the fact that Martin's sentencing fears were properly placed before the jury.

III. THE TRIAL COURT PROPERLY DENIED THE DEFENDANT'S MOTION FOR A MISTRIAL, AS THE PSYCHIATRIST, ON DIRECT EXAMINATION BY THE STATE, REFERRED TO A POLYGRAPH ONLY CASUALLY IN LISTING THE VARIOUS MATERIALS HE HAD REVIEWED, DID NOT IDENTIFY THE PERSON WHO HAD TAKEN THE POLYGRAPH, AND DID NOT REFER TO THE RESULTS.

On direct examination, the following colloquy took place between the prosecutor and a psychiatrist, Dr. Ernest Miller.

> Q. And did you review any materials in this case in reference to Mr. Hansbrough and the facts surrounding the death of Pamela Jean Cole?
>
> A. Yes, sir. I had an opportunity to review voluminous material which was kindly furnished by yourself and later on by Mr. Muller, which included depositions of many witnesses, various affidavits and statements, arrest statements by the patient, by my patient, Mr. Muller's client, the report of the medical examiner, his deposition, several other items, including polygraph--
>
> Q. (Interposing) Keep going.
>
> A. Several other items, various sundry items, medical reports of the Florida Hospital, part of which was authored by Dr. Wilder and Dr.--some references to Dr. Murray and several other physicians who had examined Mr. Hansbrough at some point in time, including the laboratory data associated with those examinations.
>
> I've had an opportunity to look over the raw data of some psychological testing which was performed on Mr. Hansbrough, and several other items.

(R 1898).

The above colloquy reflects no mention of either who took the polygraph or its results. It also reflects the lack of a contemporaneous objection at the time the word "polygraph" was mentioned. In fact, direct examination was concluded and defense counsel cross-examined the psychiatrist before interposing a motion for mistrial on the basis of such off-handed reference (R 1932-1936). The motion for mistrial was denied and the defense refused to avail itself of an offered curative instruction (R 1976-1977). The colloquy further reveals that the answer of the psychiatrist was non-responsive and entirely

volunteered and such reference did not occur at the behest of the prosecutor, who is entirely innocent of any wrongdoing in this matter. In fact, the prosecutor interrupted this witness and started talking at the same time, so that the witness would not elaborate upon the taking of the polygraph. As a result, all that was made was a fleeting reference to a polygraph.

In Florida, the results of lie detector examinations are generally not admissible as evidence and should be excluded upon objection of any party. Kaminski v. State, 63 So.2d 339 (Fla. 1952). "The established rule, however, does not label the polygraph a tree whose every fruit is forbidden." Johnson v. State, 166 So.2d 798, 801 (Fla. 2d DCA 1964).

Although objectionable matter may be of such character that neither rebuke nor retraction may entirely destroy its sinister influence, such was not the case with respect to the testimony of Dr. Miller and the defendant's failure to object timely to the reference to the polygraph, where the influence of such reference does not create fundamental error, or to accept curative instructions, constitutes a waiver of the right to raise that question on appeal. Jenkins v. State, 380 So.2d 1042 (Fla. 4th DCA 1980); See, Ashford v. State, 274 So.2d 517 (Fla. 1973); Sullivan v. State, 303 So.2d 632 (Fla. 1974).

Although neither the results of a lie detector examination, nor testimony which indirectly or inferentially apprises a jury of the result of a lie detector test, is admissible into evidence, the mere fact that the jury is apprised that a lie detector test was taken is not prejudicial if the party taking the test is not identified, and no inference as to the result is raised. Hutchins v. State, 334 So.2d 112, 113 (Fla. 3d DCA 1976). In order to characterize this witness' fleeting reference to a polygraph examination as prejudicial and hence reversible error, it is necessary to indulge in both conjecture and the pyramiding of inferences. See, Sullivan; Johnson, supra. The

subject testimony merely made reference to a polygraph and did not indicate whether the defendant or someone else had taken such an examination or the results of such examination. To conclude that the mere reference to a polygraph is reversible error, presupposed that there exists a reasonable inference that the defendant took and failed a polygraph test. The witness' statement suggests no inference whatsoever.

Contrary to the defendant's assertions, the mere mention of the word "polygraph" does nothing to shake the defendant's credibility in the eyes of the jury in regard to his version of the incident, i.e., that he lost consciousness, when the taker of the polygraph was unnamed, the results undiscussed and the area of actual questioning unidentified. Moreover, evidence of the defendant's guilt was overwhelming as reflected in the statement of the facts, taken in a light most favorable to the state as the prevailing party. There was more than sufficient evidence, aside from the fleeting reference to a polygraph, for the jury to disbelieve the defendant's story of lost consciousness at the time of the murder.

IV. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY AS TO THE DEFENSE OF TEMPORARY INSANITY.

The defendant contends that it was error for the trial court not to give his special requested jury instructions concerning how the jury was to deal with the felony-murder issue, where the defendant was conceding sanity at the time of the robbery, but not at the time of the homicide (R 5212-5214). Hansbrough contends that the reason for the instruction was to advise the jury that, even if they found him sane at the time of the robbery, they could not find him guilty of first-degree felony-murder, if they found that he was insane at the time of the killing.

The state would submit that the requested special jury instructions would do nothing but confuse the jury. The defendant's instructions simply do not encompass the law in regard to felony-murder in the first instance. There is no requirement that in order to be found guilty of felony-murder, there must be an unpredictability, or a break in a chain of circumstances. All that is required is that the death occur as a consequence of, and while, a defendant is engaged in the commission of a felony. The trial judge gave the standard jury instruction on insanity (R 2154-2156). The jury was further instructed that only one verdict may be returned, as to each crime charged (R 2162). The jury was further instructed that if they found the defendant not guilty as charged in the indictment of murder in the first-degree by reason of insanity, that they would check the block opposite that statement (R 2162). They were further instructed that a finding of guilty or not guilty, as to one crime or one count, should not affect their verdict as to the other crimes charged in the other counts (R 2164). Under these instructions, simply because the defendant was found guilty of robbery, does not mean that the jury would automatically find him guilty of murder in the first-degree. Defendant's instructions are, again, simply not a correct statement of the law in regard

to insanity.

The defendant raises no other issues in regard to the burden of proof on insanity, and could not, at this point, as he did not request the trial court to give such instructions. Roman v. State, 475 So.2d 1228 (Fla. 1985).

V. THE TRIAL COURT PROPERLY REFUSED TO ALLOW THE DEFENDANT TO INTRODUCE EVIDENCE OF A PRIOR ASSAULT AND SEXUAL BATTERY ON THE VICTIM.

The defendant argues that because his medical witnesses testified that the grabbing of his hair by the victim triggered a psychotic break, causing temporary insanity, he should have been allowed to place before the jury evidence that the dead victim in this case had been previously assaulted and sexually battered in 1977. Although Hansbrough's defense was not that of self-defense, he sought to show that the victim was, in essence, the aggressor, whose actions triggered in him a psychotic momentary disturbance.

As discussed elsewhere in this brief, Hansbough's own psychological profile was largely incorrect and distorted because it was based upon his account of the murder without consideration of the physical evidence. When important pieces of the puzzle are missing, such as in the present case, resulting opinions are unfounded. It is bad enough, in the present case, that such incomplete psychological data resulted in the necessity of a jury override, but now, the defendant seeks to go even one step further, and, in essence, put before the jury the psychological profile of a dead person based on a decade-old sexual battery.

From the fact of the prior sexual battery, the defendant seeks to essentially introduce character evidence that the victim, because of such history, would have acted in conformity with it at the time of the murder, although it is unknown what effect the sexual battery even had upon her psychologically. What the defense attempts, is basically to introduce one isolated event and, without more, speculate that such event would change the victim's character in a certain way, and because of such new character, the victim would have acted in conformance with such character at the time of the murder. This is speculation upon speculation upon speculation. The past sexual battery

hardly proves character and, even if the victim did have a certain character, there is absolutely no proof that she acted in conformance with it at the time she was murdered.

Moreover, evidence of a person's character, or trait of his character is inadmissible to prove that he acted in conformance with it on a particular occasion, with few exceptions, not applicable to the instant case. § 90.404, Fla. Stat. (1985). In the present case, there is no proof that the victim had a propensity to strike back to prevent a robbery, and such evidence is not relevant, and is further not admissible as any character trait in this particular case. Such evidence should not be admissible as character evidence of the victim, in this case in particular, because character is not an issue, as Hansbrough's defense is temporary insanity and not self-defense. The defense in the present case, in no way rests upon the conduct of the victim. The defendant seeks to simply psychologically recreate what was in the victim's mind on June 20, 1984, on the basis of a ten-year old sexual battery, with the implication being that she was the aggressor.

The various psychiatrists and psychologists, who testified on behalf of the defendant, all related the incident of the hair pulling, as related to them by the defendant. Such incident was also brought out by Officer Chisari who related Hansbrough's confession to the jury. The fact that she fought him was placed before the jury, through the testimony of the medical examiner, which established a blunt-force trauma to her eye, probably caused by a fist, and numerous defensive wounds, indicating that a struggle had taken place. Such evidence was sufficiently placed before the jury for their consideration, without the speculative evidence sought to be introduced by the defendant. See, Palmes v. State, 397 So.2d 648, 655 (Fla. 1981).

Moreover, the testimony of Hansbrough's psychiatrists was premised upon the accuracy of his verson of the incidents leading to the murder. Rather

than depending upon speculation to bolster hearsay, it would behoove the defendant to have taken the stand himself, and placed these alleged acts before the jury for their consideration. Not having done so, he should hardly be heard to complain that his version remains unsubstantiated.

Furthermore, the exclusion of evidence of a prior sexual battery, if error, was harmless, as the physical evidence belies the defendant's version of the incident, as fully argued in other points herein.

VI. THERE ARE NO GROUNDS FOR REVERSAL TO ORDER A NEW TRIAL, BUT IN THE EVENT THAT THE CONVICTION SHOULD BE REVERSED, IT WOULD BE APPROPRIATE TO AGAIN SENTENCE THE DEFENDANT TO DEATH.

The defendant contends that the trial court erred in imposing the death penalty, and if this court reverses for a new trial, he should not again be faced with a possible death sentence if convicted, in light of the jury's recommendation of life imprisonment. This argument presupposes that this court will find the jury override to be improper. As argued elsewhere in this brief, the jury was lead astray in its sentencing recommendation, and the trial judge properly overrode the same. The trial judge, and not the jury, is the sentencer in Florida. Therefore, there would be no denial of due process by imposing a heavier sentence to punish Hansbrough for getting his original conviction set aside, when his original sentence was that of death. Thus, the dictates of North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 1071 (1969), would be fully complied with.

VII. THE TRIAL COURT DID NOT ERR BY FAILING TO EXCLUDE JURORS OR BY EXCLUDING JURORS WHO COULD NOT PERFORM THEIR DUTIES.

The defendant first complains that the trial court erred in excluding for cause, jurors Roger Hill and Virginia Jax, alleging that, although they were philosophically opposed to the death penalty, they could follow the law as the court instructed them.

The record reveals that Juror Hill was opposed to capital punishment and did not know whether he could vote to impose the death penalty, although he could envision a situation where he could vote to recommend that someone be sentenced to death in the electric chair (R 377). He stated upon questioning by the prosecutor that he could not vote to impose it even if the court gave him instructions concerning aggravating and mitigating factors and under the facts of the case, the death penalty was warranted (R 378). The reason he is opposed to the death penalty is his belief that it puts one on the same level as a criminal and he does not want to function on the same level as a criminal (R 379). On questioning by defense counsel, he stated first that in the case of the death penalty he would not keep his mind open and apply the law to the evidence as instructed by the court. He then stated that he would "not necessarily" keep his mind open and apply the law to the evidence but that he 'May, but would have deep reservations about it." He further stated "Well, if the crime (sic) would prefer death penalty to incarceration, then that's fine." When asked if the law was such where the test was not what the criminal preferred, but whether the mitigating circumstances were outweighed by the aggravating circumstances, would he conscientiously do his civic duty, even though he may not want to, Hill replied, "I suppose so"(R 380). He was then asked if he would be fair to the state and defense and he replied, "Yes, I guess." (R 381).

The questioning of Juror Virginia Jax was more elaborate and the actual colloquy is set out below:

THE COURT: Bring in the next.
(Thereupon, Prospective Juror Jax entered the courtroom at this time).

THE COURT: Would you state your name for the record, please?

MS. JAX: Virginia Jax.

MR. PERRY: Good evening, Mrs. Jax. Do you have any opinions, ideas, conclusions, attitudes, or notions concerning the defense of insanity?

MS. JAX: I just have a notion that anybody that commits any crime, a severe crime, has to be insane. I mean, I don't think they would make, would do it if they were within their right mind.

My definition of insanity is that they don't know what they're doing when they're doing it. And they're not taking responsibility for what they're doing when they're doing it.

MR. PERRY: Bearing in mind you have an opinion concerning insanity, and bearing in mind your concept or your definition of insanity may be different from what the Court will instruct you, could you follow the Court's definition if it was different from yours?

MS. JAX: Yes.

MR. PERRY: How do you feel about the death penalty?

MS. JAX: I don't believe in it. I feel the man that pulls the switch on the electric chair is as guilty as the man sitting in it.

MR. PERRY: Could you vote to impose the death penalty?

MS. JAX: No, I couldn't.

MR. PERRY: Thank you.

MR. MULLER: Ma'am, realizing that you have very strong personal beliefs, I think you indicated yesterday you realized that you knew this was a civic duty to serve on a jury. And I know it's been a particularly, I guess, testing situation for you because of this thing with Florida Hospital, too.

MS. JAX: Right.

MR. MULLER: If the court instructed you with regard to the law, and you've indicated you would want to follow the law; have you not?

MS. JAX: Right.

MR. MULLER: Would you conscientiously apply the evidence to the law and if, in this circumstance, the death penalty was warranted, would you follow the law? Would you consider it?

You know how the Court instructed you yesterday before we actually got started. And the Court indicated that you should consider whether a sentence of death should be imposed.

Would you do that under your civic duty?

MS. JAX: I don't think I understand what you're asking me. And I want to be sure what you're asking me before I answer.

MR. MULLER: Yes, ma'am. Even though you have personal feelings against the death penalty--

MS. JAX: (Interposing) Right.

MR. MULLER: (Continuing) You also have answered questions which shows that you have a sense of your duty here as a juror. And under the law of the state, would you follow the instructions to the evidence and consider the death penalty if it was warranted?

MS. JAX: I don't know how to answer that, because I'm not familiar with the law, what decisions can be, you know, can be reached.

MR. MULLER: What the Judge would do, in a separate penalty phase--there are eight, what they call statutory aggravating factors that you would weigh. And the State would put on evidence about that, and then there'd be evidence with regard to both statutory and non-statutory or mitigating factors. And you would be asked to weigh those factors. And I'm asking you if you understand your civic duty, if you would consider the death penalty and apply the rules as directed by the Judge, even though you have personal feelings against it?

MS. JAX: I'm not sure I could. I mean, I'm not sure--I'm just not sure I could send a man to the chair,

you know. That's just the way I feel, you know.

MR. MULLER: Well, can you envision any circumstances where--you know, we read in the paper about these mass murderers, serial murders, torturing babies, that kind of stuff in a case; could you apply the death penalty?

MS. JAX: You're getting hard. I don't know. I really don't know. I don't know how to answer it. Because I just don't know.

MR. MULLER: Would you follow the Judge's instructions on the law?

MS. JAX: Oh, yeah, I guess, yes, if he--

MR. MULLER: (Interposing) And if the Judge instructed you and your abiding conscience, you felt the evidence was there, would you do your civic duty and apply the penalty?

MS. JAX: I don't know if I could live with myself. You know, I really don't. And I don't know how else to answer your question. But to be honest, I just don't know that I could do it, I really don't.

MR. MULLER: Would you try?

MR. JAX: Yes, I would try. But I don't think I could. I mean, I don't know.

MR. MULLER: Would you listen to the Judge?

MS. JAY: Can I ask you a question? Is it appropriate to ask you a question?

MR. MULLER: Judge, I don't know whether I can answer it, or not.

THE COURT: Go ahead.

MS. JAX: Well, I'll ask the Judge if it's okay. If the jury found that, you know, the person was guilty, but recommended life, could you reverse what the jury recommended and give him, you know, the chair? Can that be answered?

MR. MULLER: Maybe, I'll have a shot at that.

MR. PERRY: I don't think that question should be answered.

MR. MULLER: May I make a comment, Your Honor? Mr. Perry has been talking about the trifurcated procedure, and I think that's a fair thing to comment on.

MR. PERRY: Go ahead.

MR. MULLER: The Judge ultimately makes the decision.

MS. JAX: Um-hum.

MR. MULLER: There's a third proceeding. And, in other words, it's the recommendation of the jury. But it's his decision, so he could override the jury's decision. Knowing that, would you be able to do your civic duty and follow the instructions of the Court in the second proceedings and, if appropriate, recommend the death penalty?

MS. JAX: I could try.

MR. MULLER: Would you do it?

MS. JAX: Yeah.

MR. MULLER: You would follow the law?

MS. JAX: I would follow the law.

MR. MULLER: No further questions.

MR. PERRY: No other questions.

THE COURT: Step outside. Please do not discuss the questions or the answers given with the other members.

MS. JAX: Thank you.

(Thereupon, the prospective juror departed the courtroom at this time).

The United States Supreme Court recently clarified the test set out in Witherspoon v. Illinois, 391 U.S. 510 (1968) in Wainwright v. Witt, 105 S.Ct. 844 (1985), and held that a prospective juror could be excluded if that person's views on capital punishment would prevent or substantially impair the performance of a juror's duties. Unmistakable clarity is not re-

quired. Id. at 852. Mere equivocation as to the effect of a possible death sentence on their performance as jurors does not prevent such exclusion where review of the record supports the trial court's excusal because their views would have substantially impaired their performance. Robinson v. State, 11 F.L.W. 167 (Fla. April 10, 1986).

It is absolutely clear that both of these jurors were vehemently opposed to the death penalty. One felt its imposition put one on the same level as the criminal and the other felt that the person that pulls the switch on the electric chair is as guilty as the man sitting in it.

Juror Hill stated that he could not vote to impose the death penalty, even if the court instructed him on aggravating and mitigating circumstances and under the facts that penalty was warranted. He simply would not keep his mind open and apply the law to the evidence. This established inadequacy as a juror was certainly not dispelled by the defense as he stated he "may" keep an open mind and apply the law to the evidence as instructed by the court but "would have deep reservations about it." He only "supposed" he would do his civic duty and only "guessed" he could be fair to the defense and state.

Juror Jax was adamant that she could not vote to impose the death penalty. Although she clearly wanted to follow the instructions of the court, because of her strong principles she could not be sure she could do so. After tortuous probing by defense counsel, she finally capitulated and said she could follow the law, but not until her role as a juror was diminished and she was made aware that the judge ultimately sentences a defendant to death. Even her questioning in this area was framed in terms of the jury recommending "life" and her unique concept of mental illness could lead to nothing but exoneration. It is clear that this juror had an unshakable bias against capital punishment, and all that was shown was that she could follow the

law to the extent of automatically recommending life imprisonment and leaving the actual decision of life or death to the judge. Both jurors were properly excused under Witt.

Along similar lines, Hansbrough further complains that the exclusion of anti-death penalty scrupled Jurors Hill and Jax caused the jury in the instant case to be more conviction prone in the guilt-innocence phase of trial and cites Grigsby v. Mabry, 758 F.2d 226 (8th Cir. 1985).

It should first be noted that at the time these jurors were excused, no contemporaneous objection or argument was made that their excusal would result in a conviction prone jury (R 382-385;474-475). Although prior to voir dire, the defense objected to any attempt by the state to have challenged for cause persons who indicate opposition to the death penalty (R 20-21), such challenge was not renewed by objection on the ground that their excusal would result in a conviction prone jury at the time these jurors were excused because their views would impair their performance of juror duties.

Even if this issue was preserved for appellate purposes, no relief could be accorded Hansbrough. On May 5, 1986, this issue was decided adversely to him by the United States Supreme Court in Lockhart v. McCree, No. 84-1865. In a 6-3 decision, the Court held that the constitution does not prohibit the removal for cause, prior to the guilt phase of a bifurcated capital trial, of prospective jurors, whose opposition to the death penalty is so strong that it would prevent or substantially impair the performance of their duties as jurors at the sentencing phase of trial.

Moreover, Hansbrough seems to be complaining of a death qualification process by mere questioning. In view of the status of the law, it behooved counsel to make a pretrial motion to bifurcate jury voir dire in such a way that allegedly "death qualifying" questions relating to the jurors attitudes

toward capital punishment would be reserved until the penalty phase of trial, to preserve the issue for appellate review. Because of the above facts, the defendant has waived the right to complain of voir dire. See, Hicks v. State, 415 So.2d 1137 (Fla. 1982); Thomas v. Wainwright, 11 F.L.W. 154 (Fla. Apr. 7, 1986).

Were this issue not waived for appellate purposes, no relief should be accorded, in any event. This issue was also decided adversely to Hansbrough. Lockhart v. McCree, No. 84-1865 (Slip. Op. p.6 n.7).

The defendant next complains that the trial court erred in failing to grant his motion to exclude for cause, Juror William Lucas. It is the defendant's position that Lucas indicated during voir dire, that if he found the defendant guilty of murder in the first-degree, he would recommend that he be executed.

Florida and most other jurisdictions adhere to the general rule that it is reversible error for a court to force a party to use peremptory challenges on persons who should have been excused for cause, provided the party subsequently exhausts all of his or her peremptory challenges, and an additional challenge is sought and denied. Hill v. State, 477 So.2d 553 (Fla. 1985). While the defendant recites that he was forced to use a peremptory challenge on Juror Lucas, he has totally failed to demonstrate that he subsequently exhausted all of his peremptory challenges, and sought an additional challenge which was denied. Thus, the defendant has neither alleged nor demonstrated reversible error. Even if this issue could be reached, no relief would be warranted. "The test for determining juror competency is whether the juror can lay aside any bias or prejudice and render his verdict solely upon the evidence presented and the instructions on the law given to him by the court." Lusk v. State, 446 So.2d 1038, 1041 (Fla.) cert. denied, 105 S.Ct. 229, 83

L.Ed.2d 158 (1984). As the facts will show, in the present case, Juror Lucas had no bias or prejudice to lay aside in the first place.

Juror Lucas first stated that if the facts warranted a recommendation that the death penalty not be imposed, he could follow the law and vote that way (R 424). It is clear from the transcript of voir dire that the juror's willingness to impose the death penalty upon a conviction of first-degree murder, without the defense of insanity having been proved, was based on his misconception of the law (R 426-431). Even operating under this misconception, Juror Lucas stated that there could be circumstances that would change his opinion (R 428). It is clear that this juror initially felt that if the defendant was found guilty of first-degree murder, the law demanded that he be executed (R 432). However, his own feeling was that, "I certainly don't want to see the young fellow executed. I want you to prove to me that there was circumstances--that I should be lenient because of the circumstances." (R 432). The juror personally felt that Hansbrough should not be executed because a man his age could get into a lot of trouble and in twenty-five years Hansbrough would be a different man with a different outlook (R 433). Upon having the law and the bifurcated procedure explained to him, Juror Lucas then stated that he would have to know more about Hansbrough's background in determining the penalty, such as whether this was his first offense, in which case he would not be for the death penalty because of his age (R 435). The juror stated that, "I would consider all those angles and possibilities, yes, to lower the penalty." (R 436). Thus, the juror would hold an open mind and consider life imprisonment as the penalty if he found that the mitigating circumstances outweighed the aggravating circumstances, even though the defendant may have been found guilty of first-degree murder (R 436).

In contrast to the equivocation demonstrated by Jurors Hill and Jax, the equivocation of Juror Lucas was legitimate and based on a misconception

of the law. Aside from this misconception, the record demonstrates that Juror Lucas' real feelings in this case tended toward pro-life. He stated that he would keep an open mind and look for factors which would cause him to recommend leniency in his advisory sentence. Thus, upon ascertaining the true state of the law, it would appear that Juror Lucas, if biased at all, was biased in favor of recommending life imprisonment as a proper sentence for Hansbrough and, therefore, the trial court did not err in denying the defendant's challenge to this juror.

VIII. THE SENTENCING COURT PROPERLY SENTENCED THE DEFENDANT TO DEATH OVER THE JURY'S RECOMMENDATION OF LIFE IMPRISONMENT.

"In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ." Tedder v. State, 322 So.2d 908, 910 (Fla. 1975). However, numerous decisions of this court make clear that under certain circumstances, it is appropriate for a court to sentence a capital offender to death, even though the jury has recommended life imprisonment. E.g., Mills v. State, 476 So.2d 172 (Fla. 1985); Porter v. State, 429 So.2d 293 (Fla.), cert. denied, 464 U.S. 865 (1983); Stevens v. State, 419 So.2d 1058 (Fla. 1982), cert. denied, 459 U.S. 1228 (1983); McCrae v. State, 395 So.2d 1145 (Fla. 1980), cert. denied, 454 U.S. 1037 (1981); Johnson v. State, 393 So.2d 1069 (Fla. 1980), cert. denied, 454 U.S. 882 (1981); Dobbert v. State, 375 So.2d 1069 (Fla. 1979), cert. denied, 447 U.S. 912 (1980); Hoy v. State, 353 So.2d 826 (Fla. 1977), cert. denied, 439 U.S. 920 (1978); Douglas v. State, 328 So.2d 18 (Fla.) cert. denied, 429 U.S. 871 (1976). The instant case, by all that is reasonable and just, should join the ranks of those decisions.

A review of the record should convince this court that the lower court's sentencing findings are fully supported by the record. The sentencing judge's findings clearly demonstrate that the jury override standard of Tedder v. State, has been more than satisfied. The trial court's findings are set out in an appendix herein for the convenience of the court and parties (R 6489-6508).

Where the jury's recommendation of life is not based on some reasonable ground of mitigation discernible from the record, and the weighing process, apart from the jury's recommendations, indicates a sentence of death, the

court should overrule the jury's recommendation, and impose a sentence of death. Stevens v. State, 419 So.2d 1058 (Fla. 1982), cert. denied, 459 U.S. 1228 (1983). Such was properly done in the present case.

The defendant does not dispute the trial court's findings under section 921.141(5)(d), that the capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or in the attempt to commit, or flight after committing or attempting to commit, any robbery, sexual battery, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb. The evidence adduced at trial, as reflected in the statement of the facts, clearly shows that Hansbrough robbed the clerk at the insurance company, and in the course thereof, killed her, to obtain money to later purchase drugs. This statutory aggravating factor was clearly proven beyond a reasonable doubt and is not in dispute.

The defendant does dispute the sentencing court's finding of the aggravating factor that the capital felony was committed for purposes of avoiding or preventing a lawful arrest or an escape from custody.

It is clear that the mere fact of death is not enough to invoke this factor when the victim is not a law enforcement officer. Riley v. State, 366 So.2d 19, 22 (Fla. 1978). Past cases show that a finding of this circumstance should be based on direct evidence as to motive, or at least, very strong inference from the circumstances. Rivers v. State, 458 So.2d 762, 765 (Fla. 1984). The evidence in the present case reflects that this circumstance was properly found.

"This aggravating circumstance most clearly applies when the offender's primary purpose is some antecedent crime such as burglary, theft, robbery, sexual battery, etc., for which the criminal then kills in order to avoid arrest and prosecution." Troedal v. State, 462 So.2d 392, 398 (Fla. 1984).

There is no doubt that Hansbrough went to the Ramsey Insurance Agency, not to murder, but to rob. Hansbrough indicated that he had been to the agency on June 18, 1984, to check on insurance and had, in fact, been in the building with Pamela Jean Cole and a co-worker. He told Dr. Barnard that he had gone to the agency to case it, figuring that it would be a good place to rob. He knew two females worked there and did not want to go in while the two were present. On the day of the crime, he went by Ramsey's and saw that one of the employee's vehicle was not there. He knew one woman drove a car and the victim a bicycle. It was at this point that he knew the victim would be the only person in the office (R 1983-1984). He went into the agency on the pretext of changing a twenty dollar bill. After he entered, someone else came in and then departed. Pamela was on the telephone, and when she completed her call, he requested information as to a down payment. Pamela looked through her files, but was unable to find his name and told him to come back the next day. He then asked her about change for twenty dollars and she started counting the money; he grabbed the money bag and turned to run (R 1900-1901;1983-1985). He told Shadrick Martin that he was going to surprise her from behind and knock her out, but she turned and put up a struggle (R 934).

It is crystal clear that the defendant had no intention of being apprehended. As stated above, he carefully cased the agency and picked an opportune moment to rob it. In furtherance thereof, he armed himself with a knife (R 679-680;744). After the robbery and murder, he disposed of the money bag in a trash can and washed his hands (R 944-947). He drove Sharon Alden to her chiropractor's office, then went to his home and showered and changed clothes and washed off the blood on his shoes, then returned to the chiropractor's office (R 682;759;944-947;749;996). No one noticed anything unusual about him (R 478;682). On the way back to Alden's house, after he

picked her up at the chiropractor's office, he carefully avoided driving near the crime scene, where police cars were parked (R 686;750). Under any of his accounts of the crime, he intended that his getaway would be a smooth one, by either knocking her out, or when the money bag was brought out by snatching it and running .

What next happened reflects only the actualization of his strong desire that his crime not be discovered. He stabbed Pamela thirty-one times, of which ten were defensive wounds. The rest of the wounds were lethally placed (R 654-656;659;666). The catalyst for such stabbing was an attempt on the part of the victim to either apprehend him or confine him within the agency by grabbing his hair as he turned to leave (R 1900-1901;1983-1985). Although the victim was not a law enforcement official, it is clear that she was acting, not to prevent a robbery, by grabbing his hair after he had the money bag and was leaving, but was acting as a vehicle of apprehension, or as one making a citizen's arrest, and for all intents and purposes, she put her life on the line and placed herself in much the same position as the policeman who tries to stop the fleeing felon. She was no less of an obstacle in his path, and in this respect he was also attempting to escape from her custody. Although the initial struggle may have come as a surprise, he left nothing to chance, took the aggressive, causing defensive wounds on the victim, and ensured his escape by the lethal positioning of the remaining wounds; fully intending to kill his human obstacle to escape. To find that this factor is not present, merely because Pamela lacked a law enforcement badge, does not comport with logic and reason. If Pamela had been successful in her endeavor without outside help, the defendant's actions were, at the least, aimed at "preventing" a lawful arrest. If Pamela's actions only slowed him down or drew attention to him as he was leaving, his actions were at least aimed at "avoiding" an ensuing lawful arrest.

While the above facts are sufficient in themselves to support this aggravating circumstance, the circumstances surrounding the robbery-murder are rife with "witness-elimination" elements, as well. Even if it could be argued that someone capable of lethally placing the majority of stab wounds, rather than randomly slashing and stabbing, was acting only out of anger because the victim had hit him in the nose (R 935), his later actions clearly reflect an intent to eliminate Pamela as a possible witness to what was now, not only a robbery, but an attempted murder as well. The dominant or only motive for murder at this point, was the elimination of Pamela Cole as a witness who had seen him on more than one occasion and could identify him.

The majority of the attack took place in the back office where the money bag was kept in a credenza (R 618). At this point in time, Pamela was lying on the floor, severely injured (R 889). Because of her physical condition, she was helpless to thwart the further taking of property; see, Clark v. State, 443 So.2d 973, 977 (Fla. 1983), or to further prevent the defendant from escaping and, hence, no other motive than witness elimination is apparent. If he killed her before he ransacked the desk, she was already disabled and unable to prevent him from opening the credenza, and the methodical way he stepped upon her to again knife her in a vital area (R 814;889), shows he was deliberately administering the coup de grâce to one helpless to prevent a further taking, but possibly able to identify him. If, as he told Shadrick Martin, he was getting the money when he saw her moving and went over and stabbed her again (R 935), he was stabbing someone now physically unable to detain him and the only motive was witness elimination. This is a case in which the defendant made sure the victim was dead before fleeing, and in so doing, practiced overkill. See, Vaught v. State, 410 So.2d 147 (Fla. 1982). Cf. Rembert v. State, 445 So.2d 337, 340 (Fla. 1984). Nor should his use

of Sharon Alden as a cover and his stealthy acts after the murder go unnoticed in his overall plan to avoid detection or apprehension. See, Washington v. State, 362 So.2d 658 (1978).

The defendant's complaints about the sentencing judge's reliance on the testimony of Shadrick Martin are not well taken. Even an honest man will sometimes lie and a liar may also tell the truth. Martin's testimony is supported by the physical evidence. Eliminating Martin's testimony cannot eliminate the fact that a helpless victim, who could neither prevent a robbery nor an escape, was methodically dispatched and her thigh evidently used as a fulcrum for the final stab, as evidenced by the bloody shoe print made by the defendant's sneaker on her leg (R 889-814).

That the murder was committed while the defendant was engaged in the commission of a felony, i.e., a robbery supports the finding of the aggravating circumstance that it was committed for the purpose of avoiding or preventing a lawful arrest. See, Fitzpatrick v. State, 437 So.2d 1072 (Fla. 1983). In such cases, there is an underlying crime to be concealed and one who may divulge it to be eliminated. Because premeditation does not have to be proven in the context of a felony murder, such does not make the murder unthought or unconsidered. Rivers v. State, 458 So.2d 762, 765 (Fla. 1984), relied on by the defendant, involved only the random shooting of a fleeing waitress and lacked the deliberateness of the present case. See, Johnson v. State, 442 So.2d 193 (Fla. 1983).

The defendant also disputes the sentencing court's finding of the aggravating factor that the murder was committed in a cold, calculated and premeditated manner.

This aggravating circumstance normally applies in those murders which are characterized as execution or contract murders, or witness-elimination

murders. This description, however, is not all inclusive. See, Menendez v. State, 419 So.2d 312 (Fla. 1982). For purposes of sentencing, the evidence must prove beyond a reasonable doubt, the heightened degree of premeditation, calculation, or a planning, which has been held to be required in order to find this aggravating circumstance. Cannady v. State, 427 So.2d 723 (Fla. 1983); Mann v. State, 420 So.2d 578 (Fla. 1982). It is clear that the premeditation of a felony cannot be transferred to a murder which occurs in the course of that felony for purposes of this aggravating factor. What is required, is that the murderer fully contemplate effecting the victim's death and the fact that a robbery may have been planned is irrelevant to this issue. Hardwick v. State, 461 So.2d 79, 81 (Fla. 1984). The present case, however, is far from the classic example of a felony murder, in which very little, if any, evidence of premeditation exists. Cf. Rembert v. State, 445 So.2d 337, 340 (Fla. 1984).

Although the sentencing judge found that the defendant entered the agency for the purpose of robbery, the judge found from the evidence that he methodically, and with a cold, calculated and premeditated manner, effected the death of Pamela Cole. His readiness to murder, if necessary, is evinced in his statement to Robert Alden that he wanted a diamond ring worn by one of the women at the agency, and would take the finger with it if necessary (R 980). The factual scenario is not simply that of a robbery getting out-of-hand, as the evidence sets the murder apart from the usual hold-up murder, in which an assailant becomes frightened and kills his victim before or during an attempt to make good his escape. The defendant fully contemplated effecting the victim's death. As discussed above, according to the testimony of Shadrick Martin, he was getting the money when he saw her moving and went over and finished her off. The physical evidence substantiates the fact that she was lying near the wall when he stepped upon her and again knifed her in a

vital area. In view of the fact that he had inflicted thirty knife wounds upon her already, and that she was now on the floor helpless and severely wounded, no conclusion can be drawn but that he was deliberately administering to her the final coup de grâce to ensure her death, especially in view of the fact that the previous wounds were lethally placed. See, Herring v. State, 446 So.2d 1049 (Fla. 1984); See, also, Parker v. State, 476 So.2d 134 (Fla. 1985); Cf. Griffin v. State, 474 So.2d 777 (Fla. 1985). In view of such overkill, the position in which the body was found, lying down, is also of great significance, for it is not a fighting but a defenseless position and could only have been the position of execution for the administration of what was intended as a mortal wound. See, Burr v. State, 466 So.2d 1051 (Fla. 1985). The sentencing judge also found the number of stab wounds, i.e., thirty-one, to be of significance. Of these, only ten were defensive wounds. Were they the result of a simple frenzied attack, they would not have been so lethally placed and positioned. At the least, after inflicting a large number of them and incapacitating a victim, nothing other than a premeditated desire to kill, could possibly propel one onward to inflict, in total, twenty-one of such wounds, especially since his escape was virtually ensured. The prone position of the victim and the blood splatter on the wall and the bloody shoe print on her thigh, are all highly reflective of deliberation, as he stood over her to kill her. Also worthy of notice, is the fact that there were stab wounds in the victim's back (R 659). The fact that he ransacked the desk and that Pamela had a traumatic injury to the eye caused by blunt force or a fist (R 658), discredits Hansbrough's story that he grabbed the money bag and ran and supports his statement to Martin that he intended to knock her out and take the money. In such a case, after premeditatedly arming himself with a knife, it is clear that he was prepared for and

did whatever it took to get the money.

As to both of the above aggravating factors, the defendant contends such findings are improper because the jury found the defendant guilty of felony murder, rather than premeditated murder. The jury instructions reflect that there was certainly enough evidence of premeditation for the issue to be placed before the jury, possibly warranting a verdict of guilty as to premeditated first-degree murder (R 2141-2165). Because the jury chose to find that the death occurred as a consequence of and while the defendant was engaged in the commission of a robbery and did not require the state to prove a premeditated design or intent to kill, although the state did prove it, does not mean the jury rejected the fact that the defendant premeditated. After finding that the death occurred in the perpetration of a felony, they were not required to reach that issue. The defendant has, by no means, received any sort of jury pardon by his conviction under a parallel murder statute, so that all the circumstances surrounding the crime cannot be taken into account at sentencing. Mere dispensation of the need to prove premeditation does not preclude consideration of calculated acts at sentencing, if so reflected by the evidence. Premeditation can certainly occur in the context of a felony murder, and is a proper sentencing consideration. Simply because its finding was not necessary for conviction, does not mean that the acts resulting from it are prohibited sentencing considerations.

There is no reason, further, to believe that the jury rejected Shadrick Martin's testimony merely because his unsavory background was placed before them or because their verdict rested upon a felony murder doctrine. Martin's testimony, along with Robert Alden's, contradicted Hansbrough's story of blacking out and the jury did not find Hansbrough to be temporarily insane. Moreover, Martin's testimony is supported by physical evidence. Blood stains

on Pamela's desk were consistent with Hansbrough's blood and reflect that a bleeding Hansbrough went right to the desk after incapacitating the victim (R 834-835). There initially was not a lot of blood on the desk, but after Hansbrough walked over to her and stepped in the blood next to her, then left a bloody shoe print upon her thigh, stood over her and finished her off, he became bloodied himself and left a bloody trail of footprints back to the desk, and got blood on the cash box, the credenza and then left a bloody trail as he exited (Ex. 3-28). None of the wounds would have caused immediate death or loss of consciousness for several minutes (R 658); Hansbrough could have escaped without inflicting the final stab wound. The footprint on her jeans, pool of blood, blood on the wall and bloody footprints leading to the desk, all substantiate the fact that Hansbrough consciously decided to dispatch the victim apart from any initial unexpected combat. If the jury disbelived Martin's testimony, they improperly discounted the physical evidence as well. Moreover, he armed himself with a deadly weapon for the occasion. If his story that he snatched the moneybag, then was drawn into combat, was true, there would have been no reason to later ransack the desk. The physical evidence reveals he was prepared to and did do whatever it took to get the money.

The defendant also disputes the sentencing court's finding of the aggravating factor that the murder was especially heinous, atrocious or cruel.

The victim was stabbed thirty-one times while alive and suffered more than considerable pain (R 654-656;659;662). Such repeated stabbing alone supports the finding of this factor. Bertolotti v. State, 476 So.2d 130 (Fla. 1985); Peavy v. State, 442 So.2d 200 (Fla. 1983); Morgan v. State, 415 So.2d 6 (Fla. 1982). Because of the presence of defensive wounds, it is clear that Pamela did not die right away, and even the fatal wound itself

did not cause immediate death or unconsciousness (59;670;671). Thus, she suffered severely for several minutes after the fatal wound, and for some period of time during the savage attack itself and the lethal placing of twenty other severe wounds. The victim suffered an agonizing death and such facts support the finding of this factor. Duest v. State, 462 So.2d 446 (Fla. 1985); Lusk v. State, 446 So.2d 1038 (Fla. 1984).

Pamela Cole was the victim of a vicious, barbaric and savage murder by the defendant. The nature and description of the wounds reflect that she tried to defend herself for some period of time. The defendant did not effect the instantaneous death of the victim and she endured the torturous knowledge of her impending death with excruciating pain. See, Ross v. State, 474 So.2d 1170 (Fla. 1985). The wounds in her back reflect that she was not permitted to retreat (R 659).

No mental deficiency or incapacity was demonstrated in this case, as discussed elsewhere, to offset the application of this factor. Contrary to the defendant's assertion, the state's psychiatrist did not testify that the murder was the result of a frenzy or craziness. It was, in fact, Dr. Kirkland's opinion that although Hansbrough may have been excited at the time of the homicide, it was not due to a psychotic mental condition (R 2043-2050).

The defendant next complains that the sentencing judge erred in failing to find the existence of statutory mitigating circumstances in relation to his mental or emotional condition at the time of the crime, his lack of significant prior criminal activity and his youthful age.

In particular, the defendant contends that the sentencing judge erred in failing to find the existence of the statutory mitigating circumstances that the offense was committed while he was under the influence of extreme mental or emotional disturbance; that he acted under extreme duress at the

time of the murder; and that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

Finding or not finding a specific mitigating circumstance applicable is within the trial court's domain, and reversal is not warranted simply because an appellant draws a different conclusion. Smith v. State, 407 So.2d 894 (Fla. 1981), cert. denied, 456 U.S. 984 (1982). This is particularly true, as well, in jury override cases where the jury's recommendation of life is not based on some reasonable ground of mitigation discernible from the record. In the present case, the jury had no possible basis to conclude that Hansbrough acted under the influence of extreme mental or emotional disturbance or under extreme duress or could not appreciate the criminality of his conduct or to conform his conduct to the requirements of law.

The sentencing judge was certainly correct as to the inapplicability of the mitigating factor of acting under extreme duress, or under substantial domination of another person. The defendant simply misconstrues the term "duress". "Duress" is often used in the vernacular to denote internal pressure, but it actually refers to external provocation, such as imprisonment, or the use of force or threats. Toole v. State, 479 So.2d 731, 734 (Fla. 1985). In the present case, there was absolutely no evidence that Hansbrough acted under external provocation.

The facts further show that Hansbrough was not acting under the influence of extreme mental or emotional disturbance, and that he had the capacity to appreciate the criminality of his conduct and to conform his conduct to the requirements of law. Only Dr. Fisher testified in the penalty phase and his opinion that the homicide was committed while Hansbrough was under the influence of extreme mental or emotional disturbance or duress, and that

his capacity to appreciate the criminality of his conduct, or to conform his conduct to the requirements of law was substantially impaired was based on the presence of severe withdrawal symptoms (R 2275-2278). Dr. Fisher's opinion is erroneous and should have been discounted by the jury because it is premised upon facts that do not exist. In the first place, Hansbrough's dilaudid habit was small and therefore withdrawal, at all, was unlikely, and if such withdrawal was possible, it would certainly be a mild form. Hansbrough, himself, reported to Dr. Barnard that for six months prior to his arrest he used only one or two dilaudids a day and smoked pot (R 1995). Sharon Alden testified that he had a small dilaudid habit and acted normal with or without drugs (R 692-693;725-736). Robert Alden testified that he supplied him with usually one, but sometimes two dilaudids, only twice a week (R 792). This testimony is substantiated by the testimony of Hansbrough's girlfriend, Nora Fussall, who testified that when Hansbrough's father was sent back to jail, he went to see the Aldens only a couple of time a week (R 1704-1705). When he purchased dilaudid from Robert Alden the day of the murder, he told him that he had been without drugs for four days (R 771-772). He told both the Aldens that he had forgotten what it was like to do two at a time (R 685-779). Alden has never seen anyone so desperate for such a <u>small</u> habit (R 792). The testimony of the witnesses as to Hansbrough's drug habit certainly supports Dr. Upson's opinion that Hansbrough overstated at times the quantity of drugs he actually took (R 1859-1860). Thus, the evidence presented at trial reflects that Hansbrough's habit was not large enough to trigger withdrawal to the degree that it would affect him mentally. He did not report vomiting, insomnia, or hallucinations (R 1365). He described his own withdrawal symptoms as only decreased sleep and appetite (R 1996). Hansbrough did <u>not</u> recognize in himself a state of withdrawal (R 1094). He was diagnosed by two doctors

as merely a substance abuser (R 1859-1860;1998-1999). Although Dr. Miller diagnosed him as being drug and alcohol dependent, the record reflects that Hansbrough did, in fact, have alcohol on the day of the murder and that his consumption of dilaudid, if it could be described as a habit at all, can only be described as a small one (R 1909;1681). Sharon Alden testified that the day of the murder he was going through only a mild withdrawal and was rational and in control of his faculties before and after he stopped at the insurance agency (R 478;689-698;700-716). Robert Alden testified that Hansbrough was no different than usual that day except that his eyes were dilated, but that he did not act like he needed dilaudid,and was in control of his faculties and acted rationally (R 771-796). Although one would logically expect a half-crazed junky to obtain a fix immediately after securing funds for the same, Hansbrough did not act in such a manner and after the robbery he did not go straight to Robert Alden to get drugs,but dropped his wife off at the chiropractor and then went home, took a shower, and went back to the chiropractor's office (R 682;759;944-947;996;749). Hansbrough did not act strange after the murder (R 478;682;760;944-947). He did not undergo withdrawal at the time of his arrest or while in jail (R 993;869;999-1000;966;2021). Moreover, Hansbrough had never been physically violent before in various other toxic or withdrawal states (R 1650;1720). Thus, the jury had no possible basis to find this mitigating factor from the testimony of Dr. Fisher.

The doctors who testified at the guilt/innocence phase of trial, for the large part, found that Hansbrough was a sociopath, who,because of his background, organic brain damage, or withdrawal,suffered from a "psychotic break." (R 1194;1260;1886;1909;1998-1999). Aside from this, there was no indication of a serious mental disease or defect and no abnormal thoughts on the day of the crime. The only symptom was that of memory loss (R 1998-1999). The fact

of such claimed amnesia, is clearly refuted by the record. Testing done by Dr. Upson showed a "faked-bad" profile of a subject who was consciously faking a bad illness and there was, further, no confusion or dissociation (R 848-855). Hansbrough, himself, told Alden that if he had ever gotten into any real trouble, his father had advised him to play crazy (R 782-783). Hansbrough had never been unconscious or had seizures and there was no proof of a seizure at the time of the murder (R 1992). The incidents related by his girlfriend in which he lost consciousness were all drug related and were the result of either mixing drugs or injecting brown heroin (R 1727-1730). According to Hansbrough, other than beer or marijuana, he had taken no drugs on the day of the murder. According to Dr. Miller, such memory loss is too short to be a symptom of a dissociative state and fragments of acts should have returned to Hansbrough by now (R 1912-1913). Even Dr. Fisher admitted that his evaluation would change if he knew that Hansbrough did not lose his memory (R 1362). Hansbrough's own statements reflect beyond a reasonable doubt that he suffered no such memory loss. He told Robert Alden that "the bitch tried to fight me off and I had to fight back." He told Alden nothing about a memory loss (R 781-782). He told Martin that he intended to kill Pamela because she had punched him in the nose and that he intentionally stabbed her and was conscious during the entire incident (R 933-939). He told him that he was going to surprise her from behind and knock her out but she turned and put up a struggle, busting his nose, and he became upset and started stabbing her (R 934). As he was getting the money he saw that she was still moving and went over to her, at which point he got blood on his shoes, lifted her up, found she was still living, and stabbed her again in the neck or chest (R 935). Martin's testimony is fully supported by the physical evidence in the case such as the blunt force injury to Pamela's eye and the ten defensive wounds, as well as the bloody trail leading from her body to

the desk, as fully discussed in other parts herein (R 656-656;666). He also told Officer Chisari that he had to fight her (R 944-947). Moreover, after his arrest he told the officers that he knew what he did was wrong (R 868). Although he told other doctors that the last thing he remembered was her grabbing his hair, he told Dr. Wilder that he remembered swinging to the left after she grabbed his hair (R 1770). Hansbrough clearly had a memory for details before and after the murder, and his statements to others, along with the physical evidence further reflect that he actually did have a memory for the murder itself. Thus, the only symptom on which a mental disease or defect could be based is not present in this case.

The evidence also reflects that there was no basis for the doctors to find that Hansbrough was brain damaged. There was no real evidence of brain damage (R 1372;1137-1138;1788;1241;1845;1857-1858). An assymetrical brain is not uncommon (F 1038;1951-1957). A forceps delivery at birth is usually innocuous and the physician in this case never referred to it as a problem (R 1926;1622). A positive EEG can be caused by a toxic state or withdrawal and Hansbrough himself attributes his headaches in 1981 to heavy quaalude use and even took quaaludes in the hospital, which would have affected his EEG at that time (R 1037). An EEG taken in 1985 when Hansbrough was not on drugs was normal (R 1039;1202-1203), nor did a later CAT scan reveal evidence of brain damage (R 1951-1957). Dr. Fisher even admitted that the March, 1985 medical records, including a neurological and mental status assessment, do not reflect organic brain damage and suggest that his own findings were not well founded (R 1373-1375). While Hansbrough's I.Q. may be dull/normal, he is not retarded (R 1201;1282). His school records indicated an ability to do the work but that he was disruptive (R 1163). Although Hansbrough was said to have been abused as a child, he stated that it did not hurt and he was, in fact, a disciplinary problem to his mother (R 1987;1637). Although

his father gave him alcohol at age three or four his next drink was not taken until he was thirteen years old (R 1994). He began drugs on his own at age eleven or twelve (R 1995). It was Hansbrough's own choice to take drugs and alcohol between the ages of eight and sixteen when his father was not present, and he took a long string of drugs on his own (R 1338;1033;1790). Thus, there was no non-volitional introduction by his father to alcohol and drugs which led to his present substance abuse, and such factor, not being present, would not have caused a personality warping. Thus, there was no basis for the jury to find that Hansbrough was either neurogically impaired or suffered organic brain damage.

Hansbrough never suffered from psychosis or had psychiatric treatment in the past (R 1993;2043-2051). Dilaudid alone, would not induce a psychosis (R 1998-1999). Hansbrough recovered his senses soon after the murder, which is in keeping with someone who wants to avoid the consequences of his act (R 2043-2051). Dr. Krop's finding of a mental defect was based on bizarre episodes reported by Hansbrough's girlfriend. However they were the result of ingesting exotic drugs or mixing drugs (R 1256-1257;1214-1215). Dr. Gilbert and Dr. Scott were evidently not aware of the physical evidence in the case. Dr. Gilbert was not aware of the position of the body or the bloody footprints leading from the body to the desk (R 1453). Dr. Scott testified that if Shad Martin's statements were true, he would have to reconsider his opinion and that the fact that Hansbrough killed her and then went to the desk and credenza weakens his theory of a psychotic episode (R 1164;1803;1453). It is not insignificant that Hansbrough admitted to Dr. Scott that he had talked to Martin (R 1158). As previously discussed, the physical evidence supports or substantiates the testimony of Robert Alden and Shad Martin that Hansbrough did know what he was doing at the time of the murder and suffered

no blackout or psychotic episode. Hansbrough also failed to mention the fact of the ransacking to the psychiatrists diagnosing him so that the opinions of his psychiatrists were based on incomplete information.

The evidence clearly showed that Hansbrough planned the robbery of the insurance agency, executed the plan, and deliberately killed the clerk. In preparation for the robbery, Hansbrough armed himself with a knife, which had only one practical purpose--the use for which, in fact, it was made. Hansbrough had the presence of mind to case the agency, secret a knife, and by his own account, devise the ruse of getting change of a twenty dollar bill before the murder. He had sense enough to conceal the crime afterwards. He was driven by a compulsion so weak, that he did not immediately secure drugs after obtaining money, but went about other activities. These facts, along with the absence of withdrawal, memory loss, and organic brain damage, should certainly lead the court to the conclusion that Hansbrough fully appreciated the criminality of his conduct and had no intention of conforming his conduct to the requirements of law and was not acting under extreme duress or under the substantial domination of another person. Johnson v. State, 442 So.2d 185 (Fla. 1983).

It is clear from the evidence that the victim was not a participant in Hansbrough's conduct or consented to the act of being murdered and that Hansbrough was more than simply an accomplice in the capital felony, whose participation was relatively minor, so that the sentencing judge correctly found the absence of these mitigating factors. This court has previously addressed the question of whether age, without more, is to be considered a mitigating factor. Peek v. State, 395 So.2d 492 (Fla. 1980), cert. denied, 451 U.S. 964, 101 S.Ct. 2036, 68 L.Ed.2d 342 (1981), but the question continues to be raised. "It should be recognized that age is simply a fact, every murderer has one, and it can be considered under the general instruction

that the jury may consider any aspect of the defendant's character or the statutory mitigating factor, section 921.141(6)(g), Florida Statutes (1981). However, if it is to be accorded any significant weight, it must be linked with some other characteristic of the defendant or the crime, such as immaturity or senility." Echols v. State, 484 So.2d 568, 575 (Fla. 1985). On the contrary, in the present case, Hansbrough's age, along with the other evidence, merely suggests that he is a youthful substance abuser, of sound mind and body who knew very well what he was undertaking and that such undertaking was without any pretense of moral or legal justification. Moreover, the sentencing judge's findings clearly reflect that Hansbrough's past criminal history was not insignificant. See, Funchess v. Wainwright, 772 F.2d 683 (11th Cir. 1985); Simmons v. State, 419 So.2d 316 (Fla. 1982). "One of the unfortunate side affects of admitting any and all nonstatutory mitigating evidence is that it encourages the introduction of evidence, which, in the context of the case, carries very little weight. Echols v. State, 484 So.2d 568, 576 (Fla. 1985). A review of the nonstatutory mitigating evidence in the present case reflects that the sentencing judge properly gave it little weight.

In the present case there are four aggravating circumstances and only nonstatutory mitigating circumstances of little weight. It is clear that the death sentence is proportionate to other cases involving similar robbery-death murders in which defendants were of youthful age. Herring v. State, 446 So.2d 1049 (Fla. 1984); Doyle v. State, 460 So.2d 353 (Fla. 1984); Deaton v. State, 480 So.2d 1279 (Fla. 1985). The findings of aggravating and mitigating circumstances by the sentencing judge are supported by sufficient competent evidence in the record from which the judge and jury could properly find the presence of appropriate aggravating or mitigating circumstances and the sentencing judge did not unreasonably reject the jury's recommendation. In view

of these facts, the trial court's sentence must be sustained.

IX. THE LOWER COURT PROPERLY SENTENCED THE DEFENDANT ON THE ARMED ROBBERY CHARGE.

The defendant argues first, that the sentencing judge erred in scoring him for victim injury on the armed robbery charge, which resulted in an improper guidelines range.

It is now clear that sentencing errors which do not produce an illegal sentence, or an unauthorized departure from the sentencing guidelines, require a contemporaneous objection in order to be preserved for appellate review. State v. Whitfield, 11 F.L.W. 182 (Fla. April 25, 1986). The scoring of victim injury in the present case, if error, was not objected to and, hence, the issue is waived for appellate purposes. Moreover, such scoring did not produce an illegal sentence, or form the basis for any sentencing departure that could be characterized as "unauthorized". In view of this, if error was committed, it was of the harmless variety, for the sentence will ultimately stand or fall upon the recited reasons for departure, and the difference of one year, in calculating the recommended sentence, would have had no impact upon the sentencing judge, who found reasons to depart almost seventy years from the recommended sentence.

The defendant next complains that the reasons for such departure were not clear and convincing, and that the case must be reversed and remanded for resentencing.

Hansbrough specifically complains that the fact that the robbery was planned in advance is an inherent component of any robbery, and an improper reason for departure. The state would submit that the issue is one of degree. Of course, all robberies involve some forethought, but that forethought can involve mere contemplation of the act, or it can involve cunning and strategy, which reflects a deeper commitment to breaking the law and avoiding detection, which is the mark of one much less amenable to rehabilitation, and more dan-

gerous to society. While the guidelines contemplate premeditation, they do not take into account the grandiose schemes of the cunning strategist. It is clear that Hansbrough cased the agency in advance, circled twice before entering, brought along what he hoped would be an alibi witness, armed himself, and devised a ruse to get the moneybag. He is not the ordinary robber, and should not be sentenced as one.

Hansbrough further complains that the sentencing judge improperly utilized the reason that he used a dangerous weapon in the commission of the armed robbery as a reason for departure, as the use of a dangerous weapon is an inherent component of armed robbery and, hence, may properly be viewed as already embodied in the guidelines recommended sentencing range.

One problem with the sentencing guidelines, is that they have, in essence, produced the functional concept of a "routine" rape, kidnapping and armed robbery, which is a troubling result, particularly in a case such as this. There is no doubt that Hansbrough used a dangerous weapon in the commission of the robbery. He used it not just to have the presence of it facilitate the commission of the robbery, but he "made" use of it, causing victim injury and death. This is not an inherent component of every robbery, nor is it a factor constituting criminal conduct for which there is no conviction, as the defendant was convicted of first-degree murder. It was the robbery, however, that lead to the murder, and the unusual circumstances surrounding it must be taken into account.

The Department of Corrections recommended disposing of the case in the most severe manner, and the defendant complains of the sentencing judge's reference to the same in his written order. The fact that the sentencing judge may have referred to such, reflects only agreement with the recommendation by the sentencing judge, based on his own valid reasons for departure, and the only issue is whether these reasons are valid. Not every utterance

should be construed as a reason for departure. Judges are entitled to their dicta.

Hansbrough complains also that the sentencing judge improperly considered, as a reason for departure, his sentence to death for first-degree murder. A review of the scoresheet, however, reflects that the imposition of a sentence of death is not contemplated, under either additional offenses at conviction, or prior record, and that consideration of such, does not constitute the contemplation of criminal conduct for which there is no conviction. Thus, consideration of the same runs afoul of neither Hendrix v. State, 475 So.2d 1218 (Fla. 1985), nor any guidelines prohibition.

While it may be improper for a trial court to depart from the guidelines sentencing range on the ground that the guidelines sentence would not be commensurate with the seriousness of the crime, such a departure is not improper where the guidelines do not contemplate additional aggravating factors. This is the very reason for, and purpose of, a departure sentence.

Hansbrough also complains of the sentencing judge's consideration of the fact that excessive force was used in the course of the robbery-murder, and his consideration of the cruelty of the crime, as established by the infliction of thirty-one stab wounds, and the pain and anguish of the victim. These are factors which are neither prohibited by the guidelines themselves, nor taken into account in calculating the guidelines score, nor are inherent components of the crime. See, State v. Mischler, 11 F.L.W. 139 (Fla. Apr. 13, 1986). Thus, departure grounded upon these reasons, is not improper.

Hansbrough complains of the extent of departure. A review of the statement of the facts, however, reflects that such departure was "deadly" accurate, as was the crime.

It is clear that Hansbrough's sentence was a legal one, as well. Section 775.082(3)(b), Florida Statutes (1985), states that "when a statute

specifically so provides, a person convicted of a felony of the first-degree may be sentenced to a term of imprisonment not exceeding life imprisonment." Section 812.13(2)(a), specifically provides for a term of years not exceeding life imprisonment, "if in the course of committing the robbery the offender carried a deadly weapon." The knife, so carried by Hansbrough, was not only a deadly weapon, but the weapon of death, as well. No argument can be made that it was not capable of being, or was not used as, a deadly weapon.

The state charged Hansbrough with and the jury convicted him of first-degree felony murder, with robbery being the underlying felony. In State v. Enmund, 476 So.2d 165 (Fla. 1985), this court held that the underlying felony is not a necessarily lesser included offense of felony murder. See, State v. Baker, 456 So.2d 419 (Fla. 1984); Bell v. State, 437 So.2d 1057 (Fla. 1983). It is also clear, under the facts of this case, that the felonious underlying conduct did not merge into the murder, forming one completed act, to prohibit dual convictions.

The purpose of the retention statute, is to prohibit the parole of a defendant without the trial judge's approval, until after the defendant has served a specified part of his sentence. Williams v. State, 374 So.2d 1086 (Fla. 2d DCA 1979). At this time, parole is not available to a defendant sentenced pursuant to the sentencing guidelines. § 921.001(8), Fla. Stat. (1983). Retaining jurisdiction, in this case, is not error, however, as the robbery sentence is consecutive to the death sentence, which sentence will not commence for at least twenty-five years, if reduced to life imprisonment. No one can predict the continuing validity and effect of the guidelines so far into the future. In any event, if such retention was error, it was harmless, in view of the validly imposed death sentence.

CONCLUSION

Based on the arguments and authorities presented herein, appellee respectfully prays this honorable court affirm the judgment and sentence of the trial court in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Answer Brief of Appellee has been furnished by mail to Chandler R. Muller, and Warren W. Lindsey, of Muller, Kirkconnell and Lindsey, P.A., 1150 Louisiana Avenue, Suite 1, Post Office Box 2728, Winter Park, Florida 32790, counsel for the appellant, this 9th day of May, 1986.

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