IN THE SUPREME COURT OF FLORIDA

SCOTT PATTERSON Appellant, v. STATE OF FLORIDA Appellee.	)	CASE NO. 67,830

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

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

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

The following symbol will be used:

"R" Record on Appeal

All emphasis has been added by Appellee unless otherwise indicated.

STATEMENT OF THE CASE

Appellee accepts Appellant's Statement of the Case as a generally accurate account of the proceedings below with such additions and exceptions as are set forth in the argument portion of the brief.

STATEMENT OF THE FACTS

Because Appellant's statement is self-serving, incomplete and argumentative, Appellee submits its own Statement of the Facts, as follows:

At the suppression hearing, Detective Pierson testified that on June 7, 1985, he received a call to go to Humana Hospital of Broward County to speak with a subject who had information about a suspect in a burglary (R.7). Pierson did not know that a homicide had occurred (R.8). Officer Scarlett had advised Pierson that Scarlett was waved down by the subject's father, who told the officer that his son had sustained an injury inflicted by a suspect of a burglary (R.8).

Upon arriving at the hospital, Pierson met with the subject, who identified himself as Scott Patterson, the Appellant in this cause (R.9). Detective Pierson interviewed Appellant in the emergency room to find out more about the suspect that had allegedly injured Appellant. Pierson viewed Appellant as a witness, and did not suspect Appellant of being involved in a homicide (R.9). This initial interview took place around 4:15 a.m. (R.10).

In this initial interview, Appellant informed Detective Pierson that he left Lobo's Pub and drove to a friend's house, spoke with the friend awhile, and then drove home (R.11). Upon pulling into his driveway, Appellant stated that he heard a noise that focused his attention on the residence which was located

diagonally across the street from his residence (R.11). Appellant stated that he then saw someone leaving the window area of this residence (R.11). Appellant stated that he then pursued the suspect, who re-entered the residence with Appellant chasing him (R.11). Appellant stated that chased the suspect out of the house, apprehended the suspect, became involved in a confrontation with the suspect, and the suspect stabbed him (R.12). Appellant described the suspect as a white male around 6 feet tall, with dark hair, and of average build (R.13)

This first interview between Pierson and Appellant lasted ten or fifteen minutes (R.13). Appellant was not a suspect. Pierson relayed the information that he received from Appellant back to the crime scene, where dogs were employed to track down the suspect identified by Appellant (R.13-14).

After Appellant was moved from the emergency room to a regular hospital room, Detective Pierson interviewed Appellant again, around 9:45 a.m. (R.15). Appellant's mother, who was a supervisor of nurses at the hospital, made a request to be present during this interview; the request was granted (R.19). Appellant was not a suspect during this second interview, and could have left the room if he desired (R.20). The purpose of this second interview was to obtain more information from Appellant concerning the suspect that Appellant had claimed to have seen in a better setting than the emergency room (R.20,25). The officers at the crime scene were following up on

Appellant's story (R.25). Detective Pierson interviewed Appellant as a witness, and decided to tape the interview because of office policy (R.21). Appellant had no objections to the interview (R.22). Appellant had not taken any medication that would have altered his conscious state (R.22).

In the second taped interview, Appellant repeated his earlier story about being stabbed by a suspect whom he chased out of his neighbor's house (R.31-58). After the completion of the second interview, Detective Pierson informed Appellant's mother that there were discrepancies in Appellant's story, and that he wanted to interview Appellant again (R.59). One of the discrepancies in Appellant's story was that there was no knife hole in the tee shirt that Appellant stated he was wearing when he was stabbed in the abdomen (R.59). Another discrepancy was that blood was found on Appellant's shoes, although Appellant stated that he was not wearing any shoes when he gave chase to the suspect (R.60). Detective Pierson wanted to interview Appellant a third time only to clear up these details (R.61).

When Detective Pierson went back into the room, Appellant's mother accompanied him (R.62). His mother encouraged Appellant to be honest with Detective Pierson; to tell him the truth (R.62). His mother then left the room (R.62). In this third interview, Appellant began to change his story (R.62). Appellant stated that he heard a noise at his neighbor's residence, he went over and looked into the window of the

residence, and saw Ms. Arseneau's body lying there. Appellant stated that he entered the house and began administrating CPR to Ms. Arseneau(R.62). After deciding that he needed additional help, Appellant stated that he exited the house to notify the police (R.62). While enroute to his own house, Appellant stated that he was attacked and subsequently stabbed, and was left lying in the front yard (R.63). When asked why he had not told this version before, Appellant responded that he didn't know (R.63).

After Detective Pierson discussed the details of this story with Appellant, Appellant finally confessed that he murdered Ms. Arseneau (R.64). At this time, Appellant was not in custody, and would have been allowed to leave the room if he had requested (R.65).

After Appellant confessed to the murder, Detective Pierson decided to get a tape recording of the confession (R.68). Before the fourth interview in which Appellant's confession was taped, Appellant was read the Miranda rights from a form, and Appellant checked the space indicating that he understood each of these rights (R.74-76). After the rights were read to Appellant, he signed the waiver form indicating that no threats or promises were made to him (R.76). Appellant then provided a taped confession to the murder. In his testimony at the suppression hearing, Appellant admitted that he understood the Miranda rights, and that Detective Pierson made no threats or promises to him (R.272-274). The trial court denied Appellant's motion to suppress the taped confession (R.1845).

In Appellant's pre-custody oral confession to Detective Pierson and in the taped confession, both of which were admitted into evidence at trial, Appellant provided the following account of the murder of Ms. Arseneau:

On the night of June 6, 1985, when Appellant returned home from Lobo's Pub, he saw a light on in Ms. Arseneau's house (R.1318,1337). Appellant went back inside his house, got a kitchen knife with a long blade, and went across the street to Ms. Arseneau's house. Appellant went over to the house "in hope of something" (R.1345). Appellant tried several windows of the house to gain entry, and then remembered a window that Ms. Arseneau's children had used frequently to enter the house (R.1559). Appellant lifted this window, which was Ms. Arseneau's bedroom window, and entered Ms. Arseneau's bedroom (R.1319,1338). Ms. Arseneau was lying on the bed asleep. After leaving the bedroom and examining other areas of the house, Appellant returned to Ms. Arseneau's bedroom and stood over her bed with the knife (R.1319,1343).

Ms. Arseneau suddenly woke up, startled (R.1338). Appellant conveyed the message that he was there to have sex with her (R.1372). After being forced to perform fellatio on Appellant, Ms. Arseneau was able to get the knife, and attempted to defend herself with the knife (R.1320). Although Ms. Arseneau was able to inflict an injury to Appellant's abdomen, Appellant took the knife from her, cutting his hands in the process

(R.1320). Ms. Arseneau then screamed very loudly, and struggled to resist Appellant (R.1320,1339). Appellant shoved a pillow into Ms. Arseneau's face, and then repeatedly stabbed her in the upper chest and neck regions (R.1320,1339). Appellant stabbed Ms. Arseneau about thirty times (R.886). Dr. Reeves, the medical examiner, testified that the blood in Ms. Arseneau's chest cavity indicated that she was able to survive a short period of time after the stabbings, and that Ms. Arseneau was probably conscious during the stabbings (R.917-918).

Appellant knew that he had stabbed Ms. Arseneau many times, and stayed by the bed until he was sure that she was dead, he didn't want to leave her "half-dead" (R.1354). After Ms. Arseneau was dead, Appellant fondled her breasts, and stuck a finger in her vagina (R.1349).

After killing Ms. Arseneau, Appellant placed his tee shirt, which he had removed, and the knife in the leg of one of Ms. Arseneau's pants (R.1356). Appellant used Ms. Arseneau's underwear to wipe away fingerprints and bloodstains (R.1573).

Appellant then returned to his house, where he attempted to place the knife back into the rack, but the blade of the knife broke as Appellant was trying to straighten the knife (R.1335). Appellant knew that the knife would connect him to the murder (R.1556). After pacing around the house to decide what to tell his father, Appellant woke up his father, and told his father that he had to go to the hospital (R.1358). Appellant told his

father the story about being injured attempting to apprehend a burglar suspect (R.1359). His father took Appellant to the hospital, and along the way, encountered Officer Scarlett (R.762). Appellant's father relayed Appellant's story to Officer Scarlett (R.765-769). Officer Scarlett then requested Detective Pierson to interview Appellant at the hospital (R.772).

POINTS INVOLVED ON APPEAL

POINT I

WHETHER THE TRIAL COURT ERRED IN ADMITTING APPELLANT'S CONFESSION WHICH WAS GIVEN FREELY AND VOLUNTARILY?

POINT II

WHETHER THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN ADMITTING PHOTOGRAPHS WHICH WERE RELEVANT TO SHOW FROM WHERE BLOOD SAMPLES WERE COLLECTED ON THE VICTIM'S BODY, TO DEPICT CRIME SCENE, AND TO PROVE PREMEDITATION?

POINT III

WHETHER THE TRIAL COURT PROPERLY DENIED APPELLANT MOTION TO REDUCE COUNT I OF THE INFORMATION TO SECOND DEGREE MURDER?

POINT IV

WHETHER THE TRIAL COURT MADE THE FINDINGS UPON WHICH THE SENTENCE OF DEATH WAS MADE? (Restated)

POINT V

WHETHER THE TRIAL ERRED IN IMPOSING THE DEATH SENTENCE ON APPELLANT WHERE THE EVIDENCE WAS APPROPRIATE TO SUPPORT THE TRIAL FINDINGS ON SPECIFIC AGGRAVATING CIRCUMSTANCES, AND THE COURT APPROPRIATELY CONSIDERED MITIGATION Evidence?

SUMMARY OF THE ARGUMENT

POINT I

The record reveals that Appellant's taped confession was freely and voluntarily given. Appellant was read the Miranda rights, checked the forms indicating that he understood each of these rights, and signed the waiver form. Further, Appellant admitted that no threats or promises were made to him.

In the three interviews that Detective Pierson conducted with Appellant prior to the recording of the confession, Detective Pierson was seeking only to acquire information and to clarify discrepancies concerning Appellant's story about being injured by a burglar. Appellant was viewed as a witness, rather than a suspect, and was free to leave if he desired.

Rather than improper influence by Detective Pierson, Appellant confessed to the murder because he could not explain away discrepancies in his story about chasing and being injured by a burglary suspect.

POINT II

The trial court properly exercised its discretion in admitting photographs. These photographs were not cumulative to the medical examiner's photograph because they were taken at the crime scene, and thus, were relevant to depict the crime scene, to show where of the victim's body blood samples were collected, and to prove premeditation. These photographs were not as

gruesome as photographs which this Court has deemed to be admissible.

POINT III

The trial court properly denied Appellant's motion, at the close of all evidence, to reduce the first-degree murder count of the indictment to second degree murder. There was enough legal sufficient evidence showing that Appellant had the capacity to form a specific intent to submit the jury the question of whether Appellant's alleged voluntary intoxication negated the specific intent element of first-degree murder under both the premeditated and felony-murder theories.

The record reveals that Appellant had the ability to walk and to drive a car normally. In addition, Appellant had the ability to make decisions and to act in accordance with these decisions during the commission of the murder. After the murder, Appellant was able to blame the murder of an unknown culprit. This evidence, along with Detective Pierson's testimony that Appellant did not have any symtoms of intoxication, was sufficient for the jury to reject Appellant's voluntary intoxication defense. Thus, the trial court did not err in denying Appellant's motion where the evidence was sufficient to submit this question to the jury.

However, even if it was conceded that Appellant was intoxicated to the extent that he could not form a specific

intent, the jury still could have found Appellant guilty of first-degree murder under the felony-murder theory because the underlying offense was sexual battery, a general intent crime. Thus, the trial court properly submitted the first degree murder count to the jury.

POINT IV

The record does not reveal that someone other than Judge Hinckley made the findings in the sentencing order. In addition, Judge Hinckley already had made his findings of aggravating circumstances when he requested the State Attorney to prepare the sentencing order. Thus, rather than abandoning his responsibilities to make findings, the judge only requested the State Attorney to perform the clerical task of putting onto paper the court's findings.

POINT V

The trial court correctly determined that the death penalty was appropriate in the present case. There is support in the record for the trial court's findings of aggravating circumstances. Appellant does not contest two of these aggravating circumstances: that Appellant was previously convicted of a felony involving violence or the threat of violence, and that the capital felony was committed while Appellant was engaged in a Burglary. Because Appellant was

convicted of armed sexual battery and burglary, the applicability of these two aggravating circumstances is not in dispute.

The third aggravating factor - that the murder was heinous, atrocious or cruel - is supported by the record. The victim, who tried to defend herself out of an awareness of her pending doom, suffered extreme mental anquish and physical pain.

The record also reveals that the trial court considered Appellant's age, and rejected it as a mitigating factor. It is within the province of the trial court to decide whether a particular mitigating circumstance has been proven.

The only mitigating circumstance that the trial court found to be applicable was Appellant's lack of a criminal record. Thus, the aggravating circumstances outweighed this lone mitigating circumstance. Therefore, the death penalty was appropriate.

POINT I

THE TRIAL COURT DID NOT ERR IN ADMITTING APPELLANT'S CONFESSION WHICH WAS GIVEN FREELY AND VOLUNTARILY.

Appellant provided at least four statements to Detective Pierson, two which were taped. In the last two statements, Appellant confessed to murdering the victim. Appellant was not in custody when the first three statements were provided to Detective Pierson (R.65). Prior to the giving of the fourth statment, Appellant was advised of and read his constitutional rights pursuant to Miranda v. Arizona, 384 U.S. 436 (1966). Appellant indicated that he understood these rights, and signed the waiver of rights form (R.74-76). In this statement, which was taped, Appellant reiterated the confession to the murder which he provided in the third statement. Appellant alleges that the trial court should have suppressed this taped confession because Detective Pierson exercised improper influence on Appellant. However, Appellee submits that the record in the present case supports the trial court's determination that the waiver of rights and the taped statement was voluntary.

A trial court's ruling on a motion to suppress comes to an appellate court clothed with a presumption of correctness, and all inferences must be drawn in favor of sustaining the court's ruling. Williams v. State, 441 So.2d 653 (Fla. 3rd DCA 1983); DeConingh v. State 433 So.2d 501 (Fla. 1983). The trial court's ruling should be affirmed if it is supported by competent evidence in the record. DeConingh, supra.

In the present case, competent evidence was presented at the suppression hearing to support the trial court's denial of the motion. DeConingh, supra. Detective Pierson, after being informed that Appellant had sustained injuries attempting to apprehend a burglar, went to the hospital to interview Appellant concerning the alleged burglar (R.8-9). At this time, Pierson did not even know that a homicide had occurred. In this first meeting and the subsequent meetings with Pierson, Appellant was not a suspect, and was not in custody (R.13). Contrarily, the police were searching for the suspect whom Appellant had described (R.13). After Appellant was moved out of the emergency room into a regular hospital room, Detective Pierson interviewed Appellant a second time to get more information concerning Appellant's allegation that he was injured attempting to apprehend a burglar (R.20). Appellant was not a suspect at this time, nor was he in custody (R.20). As a matter of fact, Appellant's mother, a nurse supervisor at the hospital, had moved Appellant from the emergency room to a regular room without any interference from the police (R.212). Because Appellant was a witness as opposed to a suspect, Detective Pierson did not provide the Miranda warnings to Appellant (R.25).

After the second interview with Appellant, Detective Pierson felt that there were discrepancies in Appellant's story, and interviewed Appellant a third time to clarify these discrepancies (R.65). Appellant still was not a suspect, and if

he desired, he would have been free to leave (R.65). Unable to explain away the discrepancies in his story, Appellant voluntarily confessed to the murder (R.65). Prior to taking the fourth statement from Appellant, Detective Pierson read Appellant the Miranda rights, and Appellant indicated that he understood these rights, and signed the waiver of rights form (R.74). In his testimony at the suppression hearing, Appellant admitted that he understood these rights (R.272), and that Detective Pierson did not make any threats or promises (R.274). Thus, there is competent evidence in the record, when all inferences is resolved in favor of sustaining the ruling, to support the trial court's denial of the motion to suppress. DeConingh, supra.

Contrary to Appellant's allegation, the record does not reveal that Detective Pierson exerted "improper influence" on Appellant. Rather than deluding Appellant, Detective Pierson informed Appellant that he was investigating a homicide (R.185). In regards to Appellant's claim that he did not understand the legal ramification of his confession, this Court has recognized that a police interrogator's job is to gain as much information about the alleged crime as possible without violating constitutional rights, and it is not his duty to apprise a suspect of the possible punishment for the crime under investigation. Stevens v. State, 419 So.2d 1058,1063 (Fla. 1982). Appellant knew that his confession would be used against him in court (R.278).

The record in the present case does not reveal that Appellant's confession resulted from psychological coercion, as contended by Appellant. Rather than any improper influence exerted by Detective Pierson, Appellant's inability to explain away the discrepancies in his story led Appellant to confess to the murder. Thus, if Appellant was under distress, this distress did not vitiate the confession because it originated from Appellant's own apprehension that he had to tell Detective Pierson "something" (R.279). See, State v. Caballero, 396 So.2d 1210,1213 (Fla. 3rd DCA 1981). Further, Appellant's confession was not rendered involuntary by Detective Pierson allegedly telling Appellant to get it off his chest because Appellant would feel better and it would be better for his mother. It is acceptable for an officer to use an "agitation and stroking" technique of questioning in which the officer picks at the psychological weaknesses of a suspect and reassures the suspect with protestations of personal friendship and confidence. Barnason v. State, 371 So.2d 680 (Fla. 3rd DCA 1979).

As to Appellant's claim that he had not slept for two days, this lack of sleep was not attributable to Detective Pierson. Appellant could have ended the interview at any time in order to get some sleep. The record does not reveal that Appellant made a request for sleep or rest. Appellant agreed to all the interviews, and even ordered his parents out of his hospital room prior to the third interview in which he confessed (R.222).

The record herein reveals that Appellant's taped confession was given freely and voluntarily. However, even if it was conceded that the trial court erred in admitting Appellant's taped confession, the error was harmles beyond a reasonable doubt in view of Detective Pierson's testimony which related the pre-custody oral confession of Appellant (R.1318-1329), and in view of Appellant's own testimony at trial in which he confessed to the crimes (R.1535-1576). Martin v. Wainwright, 770 F.2d 918 (11th Cir. 1985), modified and reh.denied 781 F.2d 185 (11th Cir. 1985); Ferrey v. State 457 So.2d 1122 (Fla. 3rd DCA 1984). The taped confession was only cumulative to Detective Pierson's testimony concerning Appellant's oral confession and Appellant's trial testimony.

Appellant has not demonstrated that the trial court erred in admitting his taped confession. Therefore, this Court should affirm the conviction below.

POINT II

THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN ADMITTING PHOTOGRAPHS WHICH WERE RELEVANT TO SHOW FROM WHERE BLOOD SAMPLES WERE COLLECTED ON THE VICTIM'S BODY, TO DEPICT CRIME SCENE, AND TO PROVE PREMEDITATION.

Appellant alleges that the trial court erred in admitting photographs, exhibits 59 through 66. The admission of photographic evidence is within the trial court's discretion and that court's ruling will not be disturbed on appeal unless there is a showing of clear abuse. Wilson v. State, 436 So.2d 908, 910 (Fla. 1983); Garmise v. State, 311 So.2d 747,749 (Fla. 3rd DCA 1975). Appellee submits that the trial court properly exercised its discretion in admitting the photographs at issue.

The photographs were introduced during the tesimony of Detective Charles Edel, who worked in the Forensic Service Unit of the Broward County Sheriff Office (R.1079). Detective Edel went to the crime scene to collect blood samples which were to be used to make a blood stain interpretation of the crime scene (R. 1084). The photographs were used to show the areas of the victim's body from which Detective Edel collected blood samples (R.1136). Thus, the trial court properly exercised its discretion in admitting the photographs sub judice where the said photographs were relevant to aid the jury by depicting the areas of the victim's body from which blood sampes were collected. Mazzara v. State, 437 So.2d 716,718-719 (Fla. 1st DCA 1983); Engel v. State, 438 So.2d 803,809 (Fla 1983); Edwards v. State 414 So.2d 1174 (Fla. 5th DCA 1982).

The photographs also were relevant to show the position of the victim's body in relation to the crime scene. Adams v. State, 412 So.2d 850,853 (Fla. 1982). The photographs that were admitted during the testimony of the medical examiner could not serve this purpose because they were not taken at the crime scene. Thus, the photographs at issue were not cumulative or repetitious, but relevant to different issues than the photographs introduced during the testimony of the medical examiner. See Foster v. State, 369 So.,2d 928,930 (Fla. 1979). While the focus of the medical examiner's testimony was the medical cause and manner of death, Detective Edel's testimony related to physical evidence that was obtained from the crime scene, and the photographs at issue aided this testimony by depicting the crime scene.

Further, the photographs sub judice were relevant to prove premeditation. See Booker v. State, 397 So.2d 910,914 (Fla.1981). Since Appellant employed a voluntary intoxication defense at trial, the photographs were relevant to show the premeditated and coldblooded intent of Appellant. See Foster v. State, supra. The position of the body on the bed with leg hanging over the bed indicated that Appellant had to overcome the victim's resistance (R.986). In addition, the fact that the victim's legs were spread and her gown was pulled above the waist, to expose her sexual organ (R.1091), indicates that the murder resulted from a desire for sexual gratification, and was

not the act of a person too intoxicated to form a premeditated design to murder. It should be noted that Appellant also was charged with sexual battery; the victim's photographs with the sexual organs exposed were certainly relevant to this offense.

Assuming arguendo that the photographs were gruesome, this Court has upheld the admission of even more gruesome photographs. In Booker v. State, supra, this Court affirmed the admission of a photograph which depicted a victim with a knife protruding from her neck. In Henderson v. State, supra, this Court sustained the admission of photographs depicting the victims' partially decomposed bodies where the photographs were relevant to issues in the trial. In Straight v State, 397 So.2d 903,907 (Fla. 1981), this court affirmed the admission of photographs which were quite gruesome because of the decomposition of the victim's body, which had been in water for twenty days. The photographs were relevant to corroborate testimony as to how death was inflicted. In these cases, this Court recognized that the test for admissiblity of photographs is relevancy. Henderson, supra at 200. Thus, the photographs sub judice were admissible because they were relevant to issues in the trial. Furthermore, as this Court recognized in Henderson, supra at 200, it is not to be presumed that gruesome photographs will so inflame the jury that they will find the accused guilty in the absence of evidence of guilt.

In the present case there was overwhelming evidence that

Appellant was guilty of the charges for which he was convicted. Appellant confessed to the charges. In addition, as will be discussed in Point III, the record reveals that Appellant was not so intoxicated that he was incapable of forming the requisite intent for the offenses. Therefore, if the trial court erred in admitting the photographs, such error was harmless beyond a reasonable doubt. Webb v. State, 62 So.2d 410 (Fla. 1957); O'Berry v State, 348 So.2d 670,671 (Fla 3rd DCA 1977).

Appellant has not demonstrated that the trial court abused its discretion in admitting the photographs at issue. Wilson, supra; Garmise, supra. Therefore, Appellant's conviction should be affirmed.

POINT III

THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION TO REDUCE COUNT I OF THE INFORMATION TO SECOND DEGREE MURDER.

At the close of all evidence in the case, Appellant moved the court for a judgment of acquittal on the first degree murder charge, alleging that the state failed to prove that Appellant had the specific intent to commit first degree murder (R.1623). In resolving this issue, this Court should be guided by the well-settled principle that a defendant, in moving for a judgment of acquittal, admits all facts stated in the evidence adduced and every conclusion favorable to the prosecution that a jury might fairly and reasonably infer from the evidence. Lynch v. State, 293 So.2d 44,45 (Fla. 1974); T.J.T. v. State, 460 So.2d 508,510 (Fla. 3rd DCA 1984). In the present case, it was apparent that the prosecution had presented legally sufficient evidence from which the jury could legally find that Appellant had the specific intent to commit first degree murder; thus, the court below properly denied the motion for judgment of acquittal on the first degree murder count. Lynch, supra; T.J.T., supra.

Appellant based his motion on the ground that his alleged voluntary intoxication rendered him incapable of forming either the specific intent to commit premeditated first degree murder or the specific intent to commit the underlying offense of felony-murder. First of all, contrary to Appellant's suggestion that voluntary intoxication can be treated as a matter of law or

a mixed question of law and fact, the law now is settled that the defense of voluntary intoxication is a question of fact for the jury. See Ekman v. State, 161 So. 716(Fla. 1935); Colson v. State, 73 So.2d 862 (Fla. 1954); Harris v. State, 415 So.2d 135,136 (Fla. 5th DCA 1982); Maudlin v. State, 382 So.2d 844 (Fla. 1st DCA 1980). Therefore, it would have been improper for the trial court to direct a verdict on the ground of voluntary intoxication. Harris, supra. In addition, the record herein reveals that the evidence was legally sufficient to submit the question of voluntary intoxication as a defense to the jury. Lynch v. State, supra.

Appellant's actions on the night of the murder, as revealed in his confession and in his testimony at trial, shows that Appellant was not deprived through intoxication of his capacity to form the specific intent to commit premeditated murder or burglary. After leaving the bar where he had his last drink, Appellant was still in control of his faculties, as evidenced by his ability to drive. Appellant not only drove to the house of his friend Terracciano (R.1279,1538), but also drove around the block a few times before parking his car (R.1551).

Further, the facts surrounding the murder indicates that Appellant had control of his mental processes. Appellant stated that he decide to go over to the victim's house because he knew something about her personal life, and went over there for "something" (R.1345). After deciding to go over to the victim's

house, Appellant decided to take along a kitchen knife with a long blade for caution (R.1337,1553). Before entering the victim's home, Appellant examined the windows in order to find one which could be opened (R.1557). Appellant was able to recall that the victim's children often entered the house through the victim's bedroom window, and Appellant decided to use this window, for his entry (R.1559). Appellant stated he let the victim see the knife, and the victim got the message of what he wanted (R.1368). After he had taken the knife away from the victim, Appellant put a pillow over the victim's head to keep her quiet (R.1339). After Appellant had stabbed the victim many times, Appellant decided to remain in the house because he did not want to leave the victim "half-dead" (R.1354). Before leaving the victim's house, Appellant put his clothes in a pair of the victim's pants (R.1356). Appellant grabbed a pair of the victim's underwear to wipe away bloodstains and fingerprints (R.1573). When Appellant returned to his house, he tried to place the knife back into the rack, but the blade broke (R.1357). The preceding acts by Appellant reveal that Appellant had the capacity to plan, to make decisions, and to act in accordance with his plans and decisions. Thus, on the basis of this evidence, the jury could find that Appellant had the capacity to form the specific intent to commit premeditated murder and burglary.

The ability of Appellant to fabricate an exculpatory

story immediately after the murder was further evidence from which the jury could find that intoxication had not deprived Appellant of the ability to form a specific intent. Immediately after the murder, Appellant returned home and told his father the story about Appellant being injured attempting to apprehend a burglar (R.1359). Thus, Appellant's efforts to conceal evidence of the crime and to place blame on a non-existent culprit was evidence from which the jury could find that Appellant was capable of forming a specific intent. Lynch v. State, supra.

Detective Pierson, who came into contact with Appellant shortly after the murder, testified that Appellant's speech was not slurred, that Appellant's eyes were not bloodshot and the pupils were not dilated, and that he did not detect an odor of alcohol emanating from Appellant (R.1270). Bonnie Baier, a nurse on duty in the emergency room when Appellant was admitted, filled out a form on which she checked that Appellant was cooperative and alert (R.1511). Nurse Baier also checked on the form that Appellant's eye pupils responded appropriately, and that Appellant's skin was not flushed (R.1513). Nurse Baier also stated that Appellant was aware of what was happening (R.1521). Thus, the testimony of Detective Pierson and Nurse Baier, who came into contact with Appellant shortly after the murder, provided further evidence from which the jury could find that intoxication had not deprieved Appellant of the capacity to form a specific intent to commit premeditated murder or burglary.

Lynch v. State, supra.

The record in the present case does not show that Appellant's voluntary intoxication negated the specific intent element of premeditated murder and burglary, contrary to Appellant's contention. None of the witnesses presented by the defense testified that Appellant was intoxicated to the extent that his faculties or mental processes were impaired. Frank Terracciano testified that Appellant walked normally (R.1458), and his girlfriend testified that Appellant was able to drive away in his car (R.1471). Although Dr. Arnold Zager, an expert paid by the defense, stated that in his opinion Appellant did not have the capacity to form the specific intent to commit a crime due to intoxication, Dr. Zager admitted that this opinion was based completely on an interview with Appellant that lasted a couple of hours (R.1611). Dr. Zager admitted that he did not receive any information from Appellant's friends or the medical personnel that treated Appellant on the night of the murder (R.1613). Dr. Zager stated that Appellant was capable of making certain judgments (R.1608). Although Appellant's blood-alcohol level probably was above .10 percent at the time of the murder, there was no criteria to determine how high Appellant's blood-alcohol level would have had to be to incapacitate him to form an intent. See Colson v. State, 73 So.2d 862 (Fla. 1954). As previously discussed, Appellant's actions on the night of the murder and observations of Appellant by Detective Pierson

indicate that Appellant was capable of forming the specific intent to commit a crime. Therefore, even if this court accepts Appellants incorrect contention that the defense of voluntary intoxication is a legal question, Appellee submits that this Court should still uphold the trial court's denial of the motion for judgment of acquittal because the defense of voluntary intoxication was not established as a matter of law. Britts v. State, 30 So.2d 363 (Fla. 1947).

The trial court properly denied Appellant's request to reduce count one from first degree murder to second degree murder; the evidence was legally sufficient for the jury to find that Appellant was not intoxicated to the extent that he was incapable of forming the specific intent to commit premeditated murder and burglary. Lynch v. State, supra; Colson v. State, supra.

However, even if it was conceded that Appellant's voluntary intoxication negated the specific intent element of premeditated murder and burglary, there still was sufficient evidence for the trial court to submit the first degree murder count to the jury under the felony-murder theory. Because the underlying felony for the felony-murder was sexual battery, a general intent crime, the defense of voluntary intoxication was not applicable for first degree murder under the felony-murder theory. Burford v. State, 11 F.L.W. 252 (Fla. June 13, 1986); Linehan v. State, 476 So.2d 1262 (Fla. 1985). In the taped

confession that was presented to the jury, Appellant admitted that he had forced the victim to have oral sex with him (R.1372), and the jury found Appellant quilty of sexual battery (R.1890). It was the commission of the sexual battery that triggered the events that lead to the murder. The jury was instructed on both the premeditated and felony murder theories of first degree murder (R.1722).

Appellant has not demonstrated that the court below erred in denying his request to reduce count one to second-degree murder. Therefore, Appellant's conviction should be affirmed.

POINT IV

THE TRIAL COURT MADE THE FINDINGS UPON WHICH THE SENTENCE OF DEATH WAS MADE. (Restated)

Appellant contends that the trial court erred by requesting the State Attorney to prepare the findings upon which the death penalty was based. However, the record herein reveals that the trial court made the findings provided in the sentencing order below.

First, although the trial court requested the State Attorney to prepare the sentencing order, the record does not reveal that the State Attorney prepared the sentencing order entered in this case. The sentencing order was signed by Judge Hinckley (R.1915), and there is nothing indicating that the findings underlying the order were made by someone other than Judge Hinckley. Thus, Appellant does not meet his burden of providing this Court with a record adequate to review the assigned error. Brice v. State, 419 So.2d 749 (Fla. 2d DCA 1982); Applegate v. Barnett Back of Tallahassee, 377 So.2d 1150 (Fla. 1977).

In addition, Appellant did not object when the trial court requested the State Attorney to prepare the sentencing order (1893). Therefore the issue was not preserved for appellate review. Appellee recognizes that the failure to interpose a contemporaneous objection is not fatal in circumstances where the trial court deputized another to fulfill

a function mandated by statute to be executed by the judiciary. Parker v. State, So.2d (Fla. 2d DCA 2095). However, the record in the present case does not reveal that the trial court delegated to the State Attorney the responsibility of preparing the findings for the imposition of the death penalty. Instead, the record shows that, in its oral pronouncement of the death sentence, the trial court had made findings supporting the death penalty. The trial court only requested the State Attorney to perform the clerical task of writing these findings on paper. Thus, the contemporaneous objection rule was applicable, and this issue was not preserved for appellate review.[1] Unlike in Carnegie v. State, 473 So.2d (Fla. 2nd DCA 1985) and Johnson v. State, 11 F.L.W. 425 (Fla. February 7, 1986), the trial court requested the State Attorney to do a clerical task rather than perform a judicial function.

Even if it was conceded that the issue was preserved for appellate review, Appellant's claim of error lacks merit. It can be assumed that the trial court made the findings in the sentencing order because these findings, although more specific, reflect the findings addressed by the court at the sentencing hearing. The trial court at the sentencing hearing outlined the evidence that supported its findings that the aggravating circumstances outweighed the mitigating circumstances (R.1820-

[1]The lack of a contemporaneous objection, even if it is not fatal to Appellant's claim, shows a lack of concern by Appellant with this clerical request.

1823). Likewise, the trial court in the sentencing order appropriately provides the findings for its determination that the aggravating circumstances outweighed the mitigating circumstances (R.1823). As in Palmes v. State, 397 So.2d 648,656 (Fla. 1981), all of the court's findings of aggravating circumstances were based on evidence adduced at trial. As Appellee will show in point V, there is support in the record for the trial court's findings. The jury, which was instructed on both the aggravating and mitigating circumstances that appear in the sentencing order (R.1788-1789), indicated through its recommendation of death that the aggravating circumstnaces outweighed the mitigation circumstances. The trial court's findings in the sentencing order were consistent with the recommendation of the jury, and fulfilled the requirements of Section 921.141(3), Florida Statutes (1983).

Even if it was conceded that the State Attorney wrote the trial court's findings into the sentencing order, Appellant was not prejudiced by this clerical task. As noted supra, the findings in the Sentencing Order reflect the trial court's determination at the sentencing hearing that the aggravating circumstances outweighed the mitigating circumstances. Furthermore, the Court at the sentencing hearing informed Appellant of the aggravating circumstances that would be applicable (R.1761), and in the oral pronouncement of the sentence, the trial court provided the evidence upon which the

aggravating circumstnaces were based (R.1820-1823). Thus, Appellant was afforded the opportunity to object to these aggravating circumstnaces and to present mitigating circumstances. Locket v. Ohio, 438 U.S. 586 (1978). The record herein does not reveal that Appellant was prejudiced. Furthermore, Appellant does not contend that he was prejudiced by the alleged error, nor does he contend that the sentencing order contained nonrecord findings made after the sentencing hearing. See Gardner v. Florida, 430 U.S. 349 (1976).

Even if it was conceded that the trial court assigned the task of preparing the sentencing order to the State Attorney, this assignment would not constitute reversible error where the record does not reveal that the trial court abandoned its function of making the written findings pursuant to Section 921.141(3). See Lee v. State, 166 So.2d 131,133 (Fla. 1964). As previously discussed, the sentencing order was signed by Judge Hinckley, and there is nothing in the record to indicate that the findings in the sentencing order were made by someone other than Judge Hinckley. The findings reflect the evidence presented by Judge Hinckley in his oral pronouncement of the death penalty.

Unlike in the present case where the trial court did not abandon its judicial function, the trial court in the cases relied upon by Appellant clearly abandoned and delegated their judicial responsibilities. In Carnegie v. State, 473 So.2d 782,783 (Fla. 2nd DCA 1983), the trial court stated that it

intended to incorporate into the judgment and sentence written reasons for departure to be submitted by the state at a later date. The responsibility of preparing the written reasons for a guidelines departure also was delegated to the State Attorney in Johnson v. State, 11 F.L.W. 315 (Fla. 2d DCA February 7, 1986). These cases involved an abandonment of a judicial function, and thus, are distinquishable from the present case.

Appellant has not demonstrated that the trial court abandoned its function of setting forth in writing its findings pursuant to Section 921.141(3). Therefore, Appellant's sentence should be affirmed.

POINT V

THE TRIAL COURT DID NOT ERR IN IMPOSING THE DEATH SENTENCE ON APPELLANT WHERE THE EVIDENCE WAS APPROPRIATE TO SUPPORT THE TRIAL FINDINGS ON SPECIFIC AGGRAVATING CIRCUMSTANCES, AND THE COURT APPROPRIATELY CONSIDERED MITIGATION EVIDENCE.

Appellant alleges that the trial court erred in imposing the death penalty upon Appellant for various reasons. A review of the sentencing record reveals that these reasons lack merit.

First of all, Appellant contends that the trial court, in its oral pronouncement of the death penalty, improperly considered lack of remorse as an aggravating circumstance. However, as in Suarez v State, 481 So.2d 1201,1209-1210 (Fla 1985), the trial court's reference to the lack of remorse was made after the judge concluded that there was sufficient aggravating circumstances existing to justify the sentence of death, as revealed by the following excerpt from the oral pronouncement of sentence:

> ...This Court is taking into consideration all the facts that I recall of the trial, itself, as well as the notes that I have taken, as well as the benefit of counsel having gone over it. It is the law of this land, the law of this State that the aggravating circumstances and that the mitigating circumstances should be presented to a jury, and as to those circumstances they were argued by the attorneys and submitted to that jury. After that argument that jury, a jury of your piers, by the 7/5 vote indicated the aggravating circumstances were outweighing and greater than the mitigating

> circumstances. This Court affirms their finding in that regard. It is the feeling of this Court the aggravating circumstances having outweighed the mitigating circumstances, that that is the application this Court should take to the determination of sentence. Based upon that opinion, based upon the testimony, based upon the mitigating circumstances and the circumstances that were found by the jury, based upon the opinions, the facts, based upon the aggravating circumstances that occurred during the course of the trial reflecting back on the scene, itself, this Court has gone over the record with regard to it, it would appear and did appear to this Court that you had been in a position of feeling little or no remorse during the course of the trial. There was an indication that there was an expression of it afterwards, but I saw none otherwise...(R.1820-1821).

Since the trial had already concluded that the aggravating circumstances warranted the death penalty, the reference to Appellant's lack of remorse was not a finding by the trial court of an additional and improper aggravating circumstances. Vaught v. State, 410 So.2d 147,151 (Fla. 1982). Further, this oral reference was not a part of the formal written findings of fact in support of the death sentence prepared in accordance with Section 921.141(3),Florida Statutes (1983) (R.1910); Brown v. State, 473 So.2d 1260,1265 (Fla. 1985). The trial court's statement that Appellant showed a lack of remorse merely constituted an observation and expression of opinions. Suarez, supra.

Secondly, Appellant contends that the trial court erred

in not applying age as a mitigating factor. However, it is within the province of the trial court to decide whether a particular mitigating circumstance in sentencing has been proven and to decide the weight to be given it. Daugherty v. State, 419 So.2d 1067,1071 (Fla. 1982); Riley v. State, 413 So.2d 1173 (Fla. 1982). The trial court is not obliged to find mitigating circumstances. Suarez v. State, supra. The following excerpt from the sentencing order reveals that the trial court considered age as a mitigating factor and rejected it:

> The age of the defendant at the time of the crime.
>
> CONCLUSION
> This mitigating circumstance does not apply. Although the defendant was approximately five (5) months short of his twentieth birthday, his background and demeanor establish that he is not of tender age but was an adult and capable of functioning as such. As noted in Echols v. State, 10 F.L.W. 526 (Fla. September 20, 1985), age is simply a fact and every murderer has one. "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." In this case nothing in the record warrants the attribution of any mitigating significance to the defendant's age. (R.1919).

As this Court concluded in Peek v. State, 395 So.2d 492,498 (Fla. 1981), there is no per se rule which pinpoints a particular age as an automatic factor in mitigation. In deciding whether age is a mitigating circumstance, the trial court has to consider the evidence adduced at trial and at the sentencing

hearing. Peek, supra. In the present case, Appellant had been married (R.1770); had spent two years in the army (R.1769); had a high school diploma (R.1768); and was working as a salesman for a lumber company when the murder occurred. These facts, together with the calculated manner in which the murder was carried out and with Appellant's efforts to conceal his crimes, support the trial court's finding that Appellant was a functioning adult, and that there was no mitigating significance to Appellant's age. In regards to Appellant's claim that the trial court erred in not considering age along with other personal factors as mitigating circumstances, Appellant presented these factors at the sentencing hearing, and it was within the province of the trial court to reject these factors as mitigating circumstances. Daugherty v. State, supra.

Thirdly, Appellant contends that there was no basis for the trial court's finding that the murder was heinous, atrocious, or cruel. However, the mindset or mental anguish of the victim is an important factor in determing whether this aggravating circumstance applies. Phillip v. State, 476 So.2d 194,196 (Fla. 1985); Adams v. State, 412 So.2d 1257,1265 (Fla. 1983). The record in the present case reveals that the victim, Ms. Arseneau, suffered extreme mental anguish and physical pain immediately prior to her death. When the victim awoke, Appellant was standing over her bed with a long kitchen knife (R.1319). Appellant forced the victim to perform oral sex on him

(R.1320). During the rape, the victim managed to get the knife to defend herself, but Appellant took the knife from her (R.1320). The victim screamed and struggled as Appellant placed a pillow over her head, and commenced to stab her thirty times (R.1320). The medical examiner testified that the blood in the victim's chest cavity indicated that the victim survived a short period of time after the stabbings, and that the victim probably was conscious during the stabbings (R.911-917). The victim's struggle to defend herself shows that she was aware of her impending fate, and was indicative of her mental anguish. Heiney v. State, 447 So.2d 210,216 (Fla. 1984); Ross v. State, 474 So.2d 1170,1174 (Fla. 1985). Thus, the record supports the trial court's finding that the murder was heinous, atrocious, and cruel.

The record in the present case supports the trial court's determination that the aggravating factors outweighed the mitigating factors. The trial court found that the following aggravating factors were applicable (R.1910-1915):(1) that the defendand was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person (Appellant was contemporaneously convicted of armed sexual battery; [R.1890]); (2) that the capital felony was committed during the commission of a Burglary (R.1891); and that the capital felony was especially heinous, atrocious or cruel. The only mitigating circumstance that the court found was applicable

was that Appellant had no significant history of prior criminal activity (R.1913). Thus, in view of the trial court's findings, which are supported by the record, the death penalty was appropriate in the present case.

The cases relied upon by Appellant are distinguishable from the present case. In Ross v. State, supra, although this Court concluded that the murder was heinous, atrocious or cruel, this Court held that the death penalty was inappropriate because the trial court erred in not considering as a mitigating factor that the murder resulted from a domestic dispute and that the victim realized the Defendant was having difficulty controlling his emotions. Unlike in Ross, the murder in the present case did not result from a domestic dispute. In Amazon v. State, 11 F.L.W. 105 (Fla. March 21, 1986), the jury recommended life imprisonment, but the trial court overrode the jury and imposed the death penalty. This Court in Amazon concluded that the death penalty was improperly imposed because the facts underlying the trial court's findings as to aggravating factors did not meet the "the clear and convincing" standard of Tedder v State, 322 So.2d 908,910 (Fla. 1975), required for a jury override. In the present case, the jury recommended death by a seven to five vote; therefore the Tedder clear and convincing standard was not applicable. In the other cases relied upon by Appellant, the aggravating factors did not outweigh the mitigating factors as in the present case. See Drake v. State, 441 So.2d 1079 (Fla.

1983); Herzog v. State, 439 So.2d 1372 (Fla. 1983); McKennon v. State, 403 So.2d 389 (Fla. 1981).

Even if it was conceded that the trial court erred in finding as an aggravating factor that the murder was heinous, atrocious, and cruel, such error was harmless beyond a reasonable doubt where the remaining aggravating circumstances outweighed the lone mitigating circumstance, Appellant's lack of a criminal record. Vaught v. State, 410 So.2d 147,151 (Fla. 1982); Barclay v. State, 463 U.S. 939,958, 77 L.Ed.2d 1134,1149 (1983); Hargrave v. State, 366 So.1, 5 (Fla. 1979). In addition to the murder being heinous, atrocious, or cruel, the trial court sub judice found as aggravating factors that the Defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person, and that the capital felony was committed while the Defendant was engaged in the commission of a Burglary (R.1911) Since Appellant was convicted of armed sexual battery, a felony involving the threat of violence, and burglary, the record herein supports the trial court's findings as to these aggravating factors, and Appellant does not contest these factors. Thus, these two factors would be sufficient alone to outweigh the one mitigating factor. Vaught, supra; Barclay, supra.

Furthermore, if it was conceded that the trial court erred in not considering Appellant's age and personal background as mitigating factors, the three aggravating factors attributable

to the murder would still outweigh the mitigating factors. Meeks v. State, 410 So.2d 147,151 (Fla. 1982); Vaught, supra; Hargrave, supra. In Vaught and Meeks, this Court indicated that when a murder is heinous, atrocious or cruel, and other aggravating factors are present, these aggravating circumstances would outweigh such mitigating factors as age and lack of a criminal record.

Appellant has not demonstrated that the trial court erred in imposing the death penalty. Therefore, this Court should confirm the death penalty imposed below.

CONCLUSION

Appellee, based on the foregoing argument and authorities cited, requests this Honorable Court to affirm Appellant's conviction and sentence of death.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Answer Brief of Apellee has been furnished by United States Mail to, HARRY GULKIN, ESQUIRE, 1700 East Las Olas Boulevard, Fort Lauderdale, Florida 33301, this 1st day of August, 1986.

Eddie J. Bell

OF COUNSEL