IN THE SUPREME COURT OF FLORIDA

RICHARD WALLACE RHODES,	)	
Appellant,	)	
v.	)	Case No. 57,842
STATE OF FLORIDA,	)	
Appellee.	)	

APPEAL FROM THE CIRCUIT COURT
OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY

AMENDED BRIEF OF APPELLEE

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TABLE OF CONTENTS

TABLE OF CITATIONS

PRELIMINARY STATEMENT

RICHARD WALLACE RHODES will be referred to as the "Appellant" in this brief and the **STATE OF FLORIDA** will be referred to as the "Appellee". The record on appeal will be referenced by the symbol "R" followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

Appellee accepts the statement of the case and facts as set forth by the appellant with additions and deletions as set forth in the brief and as follows: (1) Detective Porter asked Rhodes if he had, in fact, stolen Karen Nieradka's vehicle. In response, Rhodes stated:

> "If that is the worse you ever charge me with, I will plead guilty to that. If you can promise me I'll spend the rest of my life in a mental hospital facility, then I will say how the victim died."

(R 1956)

(2) Michael Guy Allen testified that he asked Rhodes, What did you do, did you shoot her or something?" and Rhodes said, "No, I didn't shoot her.". He then got up and went to the door and took his hands and went like this right here. (indicating) And he said, "I tried to break her fucking neck.". He said she fought him and he got scratches all over him. (R 2080 - 2081)

SUMMARY OF THE ARGUMENT

Issue I - Officer Drawdy testified at the motion to suppress hearing that he told the defendant that he was under arrest for operating a motor vehicle without a license. Drawdy then ran a motor vehicle check, which produced no evidence of a valid license. Based on this evidence, Drawdy formally arrested the defendant and charged him under **§322.03 Fla. Stat. (1983).** Appellant now argues that since Drawdy did not have this information at the initial arrest, that any statements made subsequently should have been suppressed. This contention is without merit. Officer Drawdy had sufficient probable cause to effect the arrest at the time of the initial stop when defendant failed to produce a valid driver's license under **S322.15 Fla. Stat. (1983),** as this court has held that failure to produce a valid driver's license is an arrestable offense. And, when Officer Drawdy received information that not only did Rhodes not have a driver's license on him, but he, in fact, did not have a valid Florida driver's license, arrest was proper under **§322.03.** The trial court correctly denied the motion to suppress.

Issue II - Appellant's contention that incriminatory statements he made to Edward Cottrell should have been suppressed because Cottrell was under the belief that the state was encouraging him to elicit information from Rhodes is without merit and is unsupported by the law. A review of the facts in the instant case disclose no strategim deliberately designed to elicit an incriminating statement. Malone V. State, infra. First, Cottrell approached the authorities on his own initiative, indicating

scheming on his part, rather than the government's. Second, there was no knowing exploitation as forbidden by Molten, infra, in the absence of more action on the state's behalf tending to indicate a deliberate elicitation of incriminating information. The informant was neither encouraged nor discouraged from obtaining further information. This was in accord with this Court's decision in Dufour v. State, infra. Further, the trial court found that this case was on all fours with this Court's decision in Johnson v. State, infra.

As both Cottrell and Detective Porter agreed that Cottrell was not promised anything and was not asked to give any further information, and the evidence shows that the state did not attempt to keep Cottrell near Rhodes to gain information, it is clear that there was not secret interrogation by investigatory techniques that were the equivalent of direct police interrogation. The trial court correctly denied the motion to suppress, and the statements were correctly admitted.

Issue III - The statements that appellant made to Michael Allen were appropriately admitted. Two of the statements were threats made by the defendant to witnesses. These were clearly admissable under Jones v. State, infra and Goodman v. State, infra, (an attempt by a defendant or third person to induce a witness not to testify or to testify falsely is admissable on the issue of defendant's guilt provided it is shown that the attempt was made with actual participation, knowledge, or authorization of the defendant). The third statment concerned a threat against Richard Nieradka, the victim Karen Nieradka's husband.

Appellant's contention to the contrary, the statement was not admitted to show character or propensity of the accused, but rather, was an admission of guilt by the defendant, and therefore, was relevant to the material fact in issue. All three of the challenged statements were relevant to prove appellant's guilt and were, therefore, admissable into evidence.

Issue IV - During the course of the trial, the appellant challenged the admission of a color video-tape and photographs made of the victim. These photographs and videotapes were taken at the Wyoming Antelope Club and were relevant to show where the body was found, and what kind of condition the body was in at the time it was found. The video added to the photographs by giving a three dimensional view of the location and exactly what was detailed in digging Karen's body out of the debris in order to take the other photographs of it. It indicates fairly just what kind of material that was laying on top of the body. The law is well established that admission of photographic evidence is within the trial court's discretion, and that a court's ruling will not be disturbed on appeal, unless there is a clear showing of abuse. And, as this Court has repeatedly stated, allegedly gruesome and inflammatory photographs are admissable into evidence if relevant to any issue required to be proven in the case. As these photographs were relevant, appellant has failed to show that the trial court abused their discretion.

As for the admission of photographs of Karen Nieradka's corpse at the medical examiner's office, as previously noted, the issues of whether cumulative or whether photographed away from

the scene are routine issues basic to a determination of relevancy and not issues arising from any exceptional nature of the proffered evidence. The photographs were relevant to show the condition of the body before autopsy and show the manner in which the body and the evidence was preserved. Further, the photographs were used by Dr. Wood to illustrate her explanation of the autopsy. As such, the photographs were relevant and properly admitted.

Issue VI - Appellant claims that his statement that he studied forensic lobotomy in prison suggested his guilt of a collateral crime, was not relevant to any issues in the case, and should not have been admitted. The evidence was relevant as it showed consciousness of guilt on the appellant's part, and was, therefore, properly before the jury. It has long been the well-settled law of this state that all relevant evidence is admissable even if it tends to establish the accused is guilty of a crime other than that for which he is standing trial.

Because of defense counsel's tactical decision, the jury was not instructed to disregard the statement, and the statement was not ordered to be stricken from the record. Appellant claims that because the trial court failed to do so, prejudice resulted despite the fact that the objection was sustained. It is the state's position that this statement was admissable and, therefore, it was not necessary or prejudicial that the jury was not instructed accordingly. Further, as it was appellant's counsel's decision that a curative instruction not be given, he can not be heard to complain at this point that a curative instruction could

have been given.

Issue VII - Appellant contends that Paul Collins should have been allowed to testify that Karen Nieradka told him that on the night of her death, Rhodes had borrowed her car and taken it to New Port Richey. He contends this statement should have been admissable under the state of mind exception to the hearsay rule. This exception allows the admission of statements demonstrating the declarant's state of mind when it is at issue in the case. In the instant case, the victim's mental state was not at issue. Appellant was charged with murder in the first degree and convicted of murder in the first degree. Rhodes was not charged with theft of the auto, and it was not at issue at this trial. Further, Rhodes admitted several times that Karen had not rented him the car. Thus, statements that Karen had loaned him the car were not relevant to any fact at issue in the trial.

Issue VIII - It is the law in this state that rebuttal evidence explains or contradicts material evidence offered by the defendant. The testimony presented in rebuttal to the defense's case was admissable as it showed the prejudice of the witness, Sandra Nieradka, and put her credibility into question.

Issue IX - Appellant challenges two comments made to the prosecutor during closing arguments. The challenged remarks were a comment on the evidence, and in no way prejudiced appellant's case as the evidence clearly established that appellant was guilty beyond a reasonable doubt. Further, the prosecutor's reference to the book, LOOKING FOR MR. GOODBAR is a matter within the discretion of the trial judge, and appellant has failed to

show an abuse of that discretion. The use of the illustration in this case was especially pertinent because of Rhodes own reference to the book. Margaret Tucker a co-worker of Rhodes at the "Clearwater Sun" testified that Rhodes said his girlfriend had been strangled in a lumber yard off of Sunset Point Road. Rhodes told Tucker that his girlfriend shouldn't have been "looking for Mr. Goodbar". Tucker then testified as to what the book was about. As such, these comments were a fair comment on the evidence presented.

Issue X - Appellant claims that the trial court should not have given an instruction on flight over the defense's objection, because there was no evidence to support the instruction. The record belies this contention. Trooper Drawdy testified that on the day he arrested appellant, he had information that the car was headed out of state. Further, appellant himself said he was taking the car up north to dump it, and then heading to Las Vegas.

Appellant also argues that the time frame given in the indictment, not the statement of particulars, should have been given to the jury. The law in this state is that it is not essential that the date of the offense proved at trial be the date stated in the indictment or the information. A bill of particulars, however, may narrow the information or indictment as to the time within which acts alleged as constituting the offense may be proved. Thus, the statement of particulars in the instant case narrowed the date of the offense from within any time within the statute of limitations to between February **28**, and March 2,

1984. This was not an expansion of the indictment as claimed by the appellant, but rather a narrowing. The trial court properly instructed the jury that they had to find the crime committed within this period of time.

Appellant also argues that an instruction on second degree felony murder should have been given, as it was supported by the evidence. While appellant is correct in his assertion that a defendant is entitled to an instruction on the theory of his defense when it is supported by the evidence; the theory that Rhodes was only an aider and abettor that was not present during the commission of the crime was never presented to the jury. The story concerning Crazy Angel and Karen did not support a finding that Rhodes was an accessory before the fact, as he denied any prior knowledge of a felony. Further, as Rhodes recanted this story, he himself denied that this was a theory of defense. An instruction based on a recanted story would simply have misled the jury and the trial court correctly denied giving such an instruction.

Issue XI - Appellant contends that, while it may not have been intended, the court's comment to the alternate jurors in front of the jury necessarily influenced the deliberating jurors by conveying that the court felt that a capital conviction was imminent. To the contrary, appellee contends that the instruction given to the alternate jurors in the instant case, did not presuppose the need for a second phase. The court very clearly said, "in the event you are needed for a second phase" - "if the defendant is found guilty of murder" - "in case you are

needed". The court also pointed out that the jury could recall these instructions having been given to them during voir dire, explaining the process of a two phase trial. There is nothing in this direction to the jurors that would lead them to believe that a conviction was expected. A careful review of the record shows that the evidence was so clear and convincing as to leave no reasonable doubt, but that appellant was guilty of the crime for which the jury convicted him. As such, the error, if any, was harmless, and appellant has failed to show any prejudice that resulted thereby.

Issue XII - The taped statement of the prior victim was properly admitted during the sentencing phase because appellant was accorded a full and fair opportunity to rebut. The prosecutor's cross-examination of appellant's character witness was proper to show witness bias and to test the witness' knowledge of appellant's character by her knowledge of specific acts. Furthermore, prosecutorial comment was neither erroneous, nor prejudicial, and when considering the record as a whole, this Court must apply the harmless error rule thereto.

Issue XIII - Appellant contends that it was error for the trial judge to respond to the jury's question regarding the possiblity of being polled during the penalty phase without first consulting counsel. The jury's question in the instant case was not a request for additional instructions within the preview of Rule 3.410, Fla. R. Crim. P.. It was merely a question regarding procedure, and the trial court responded correctly. Despite appellant's contentions that, if he had been consulted, he could

have recommended a course of action that could have avoided a prejudicial situation, appellant fails to suggest what that recommended course of action could have been. Further, the Constitution does not guarantee appellant a perfect trial, only a fair trial. A review of the record in the instant case shows that appellant received a fair trial and was guilty beyond a reasonable doubt. No prejudice resulted, and a new sentencing phase is not warranted.

Issue XIV - Appellant's argument herein appears to be twofold: (1) that the findings of the trial court are not specific enough to meet the requirements of §921.141(3), Fla, Stat, (1985) and (2) that since the trial court's written order was not filed until eleven months after the notice of appeal was filed, and more than six months after the record on appeal was transmitted to this Court, the circuit court had lost all jurisdiction over this cause. In the instant case, the trial judge made oral findings of fact at the sentencing hearing of September 12, 1985, which were transcribed in the record. These findings were also set forth in a written order dated the same day. This Court has repeatedly held that oral pronouncements of findings of fact are sufficient to meet the requirements of §921.141 (which requires written findings of fact) once the oral pronouncement has been transcribed. Both the oral and the written findings in the instant case were sufficient to support a finding of death.

Issue XV - Appellant contends that the trial court included improper aggravating circumstances, while excluding allegedly mitigating circumstances during the sentencing phase of

appellant's trial. The state disagrees, however, and would contend that the trial court properly applied **§921.141, Fla. Stat. (1984),** in sentencing Richard Rhodes to death. Further, appellant's claim as to the trial court's failure to credit enough weight to the mitigating evidence, it appears that the appellant's real complaint is that the trial court did not give the same weight to the proferred evidence that appellant would desire. The trial court did consider and found non-persuasive that which was submitted by the appellant; although the court did consider "evidence of a long-term personality disorder". Since no palpable abuse of discretion has been established, affirmance is required.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT CORRECTLY DENIED APPELLANT'S MOTION TO SUPPRESS BASED ON THE CLAIM THAT STATEMENTS MADE BY APPELLANT WERE THE PRODUCT OF AN ILLEGAL ARREST.

Appellant argues that statements he made while incarcerated in Citrus County should have been suppressed because they were made after he was illegally arrested. The facts in the instant case do not support this conclusion.

At the motion to suppress hearing, Trooper Robert Drawdy testified that on March 2, 1984, he had occasion to stop Richard Wallace Rhodes. (R.2806-8) Drawdy was heading north on U.S. 19 when he observed a black pick-up truck approaching him at a high rate of speed. The truck was headed south. He pulled the pick-up truck over, the two occupants of the pick-up truck came out of the window on the passenger's side. They appeared to be very excited. The driver of the car, Jesse Whoots, told the officer that they were after a white Dodge Dart, that the man had "rammed him off". They had a slip of paper which had the tag number of the automobile. The vehicle was supposedly just ahead of them. Drawdy got the driver's license number from Jesse Whoots, put it in his pocket and told them to proceed south on U.S. 19, that he would go on and see if he could overtake the vehicle which they were looking for. The truck had damage on the right hand side. The passengers explained to him that this was the reason they came out through the window because they couldn't get the door open. (R.2810) The officer got about 3 miles from where he had

stopped the pick-up truck and passed an abandoned building which was located on the west side of U.S. 19. As he was about to pass the building, he noticed the tail lights of a white Dodge Dart behind the building. By the time he made a U-turn and got back to the building, he saw the Dodge Dart pull out and start heading south. He pulled in behind the car and pulled it over. The tag number on the Dodge matched the tag number given to him by Jesse Whoots. As he approached the Dodge, he could see a number of duffle bags or cloth bags in which you pack clothes, piled fairly high in the back seat. (R.2811) He asked Rhodes for his driver's license and was told that he had just been ripped off by an armed gunman and that the man had taken his wallet, his identification, and all his money. At that time, the two men in the pick-up truck approached. Rhodes and the two men began screaming at each other. Trooper Drawdy then placed Rhodes under arrest for operating a motor vehicle without a driver's license. (R.2812-13) Drawdy proceeded to verify the ownership of the vehicle. Rhodes had a registration to Karen Nieradka and a piece of paper purportedly written by Karen giving him authority to drive the car. The officer ran a license check on Rhodes and could find no information regarding his driver record in the computer in Tallahassee. After that, he informed Rhodes that he was under arrest for no valid driver's license. (R.2817) When Rhodes was placed in the patrol car, he was read his Miranda rights. Drawdy testified that if Rhodes had told him he had a Nevada driver's license he could have run it through the computer and verified it through Nevada. They did run a considerable amount of

information between himself and the passenger to make an attempt to establish whether or not he had a valid driver's license. (R.2823) He also asked Whoots and Connors if they had Mr. Rhodes identification, they denied it. Their pick-up truck was searched for a weapon. (R.2825)

After his arrest, while incarcerated in the Citrus County Jail, Rhodes made inculpating statements to cellmates, Trooper Drawdy and later to Detectives Porter and Kelly who were investigating the Nieradka murder. **(R.1840, 1883, 1893, 1894, 2005, 2006)** Appellant claims these statements should have been suppressed as a product of an illegal arrest.

There are two statutes governing the requirement of having a driver's license while operating a motor vehicle. Section **322.03** provides that no person shall drive any motor vehicle upon a highway in this state unless such person has a valid driver's license under the provisions of this chapter. Section **322.15** (1) provides that every licensee shall have his operators license in his immediate possession at all times when operating a motor vehicle and shall display the same upon the demand of a patrol officer, peace officer, or field deputy or inspector of the department. Section **322.15** also provides that no one shall be convicted under this statute if prior to or at the time of his court appearance, he produces in court or to the Clerk of the court a license issued to him and valid at the time of his arrest.

Officer Drawdy testified that he told the defendant that he was under arrest for operating a motor vehicle without a

license. He then ran a motor vehicle check which produced no evidence of a valid license. Based on this evidence, Drawdy formally arrested the defendant and charged him under S322.03.

Appellant now argues that since Drawdy did not have this information at the initial arrest, that any statements made subsequently should have been suppressed. This contention is without merit. Officer Drawdy had sufficient probable cause to effect the arrest at the time of the initial stop when defendant failed to produce a valid driver's license under §322.15[1] The subsequent computer check gave Drawdy probable cause to arrest Rhodes under §322.03.

In Alb v. State, 399 So.2d 483 (Fla. 3d DCA 1981), the court affirmed an adjudication of delinquency based on underlying charges of burglary and petit theft upon a holding that when police officers on routine midday patrol observed a juvenile crouched down in a yard at the rear of a private residence and, as they approached closer and exited the patrol car, they saw the juvenile walk away from the home and drop a glass piggy bank filled with coins, the officers had a legally well-founded concern for the safety of property in the vicinity so as to justify their stop of the juvenile. The court further noted that that concern was not dispelled by the juvenile's explanation of his presence and conduct and the officers therefore had probable cause to effect the arrest of the juvenile on a charge of loiter-

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[1] This court has previously held in State v. Gustafson, 258 So.2d 1 (Fla. 1972), that the officer has authority to take a person into custody for failure to have a driver's license in his possession and to arrest him for it.

ing and prowling. The court noted that the fact that the police formally arrested the juvenile for a different crime (burglary) upon their discovery within minutes of stopping the juvenile that the home next door to where they first saw the juvenile had been burglarized and the piggy bank stolen therefrom does not effect the validity of the juvenile's detention.

It should be noted that in the instant case, Appellant was not formally arrested until after the officer had run the computer check. Further, there were no inculpatory statements made between the initial arrest and the subsequent formal arrest.

Appellant also argues that the computer check did not reveal enough information to sustain the arrest. This is contrary to the officer's testimony as he stated that he provided all the information into the computer that was provided to him by the defendant. This information would include checking out-of-state licenses. Further, it should be noted that Florida law requires all residents of this State who operate motor vehicles to have a valid Florida driver's license. The only persons that are exempt are non-residents who are at least 16 years of age. The non-resident driver must have in his immediate possession a valid operators license issued to him in his home state or country. Section 322.04, Fla. Stat. (1985). Rhodes did not do so and was therefore in violation of the law.

Therefore, while the initial stop and arrest was proper based upon the information the officer had at the time, even if it were not, the subsequent formal arrest was based upon probable cause and unquestionably valid. The trial court correctly denied the motion to suppress.

ISSUE II

WHETHER INCRIMINATORY STATEMENTS RICHARD RHODES MADE TO EDWARD COTTRELL SHOULD HAVE BEEN SUPPRESSED AS OBTAINED IN VIOLATION OF RHODES' RIGHT TO REMAIN SILENT, RIGHT TO COUNSEL, AND RIGHT TO DUE PROCESS OF LAW.

Appellant Richard Rhodes, while incarcerated in the Pinellas County Jail made several inculpatory statements to fellow inmate Edward Cottrell. These statements were the subject of a motion to suppress hearing prior to Richard Rhodes' trial. (R.2832-2879)

At the motion to suppress hearing, Cottrell testified that after hearing several inculpatory statements by Richard Rhodes, he approached prison officials who then referred a detective to him. Cottrell testified that the detective (Detective Porter) did not offer him a deal or ask him to get any more information. And, in fact, Porter expressly stated in response to Cottrell's query as to whether Porter wanted him to get any more information, that Porter could not tell Cottrell to do that because it would make him an agent of the State.

Detective Porter testified consistent with Cottrell's testimony. Porter claimed that he had told Cottrell that he couldn't ask him to get any information from Rhodes because that would make him an agent of the State. He also testified that he refused Cottrell's request to not be transferred away from Rhodes.

Both Cottrell and Porter agreed that Cottrell was not promised anything and he was not asked to get any further information.

Nevertheless, Appellant contends that because Cottrell believed he would be rewarded and because he was not expressly told not to talk to Rhodes, that Cottrell became an agent of the State when he took it upon himself to talk to Rhodes about the case and therefore under the authority of Maine v. Moulton, 474 U.S. ___, 106 S.Ct. ___, 88 L.Ed.2d 481 (1985); United States v. Henry, 447 U.S. 264, 100 S.Ct. 2183, 65 L.Ed.2d 115 (1980); and Malone v. State, 390 So.2d 338 (Fla. 1980), Rhodes' statements should have been suppressed.

This position is contrary to the law.

In Henry, the Court found an informant's testimony inadmissible when the informant, the defendant's cellmate, was approached by the police and instructed to "be alert" to any statement the defendant might make. The informant thereby became an agent for the illicit purpose of obtaining incriminating statements from the accused in the absence of counsel. The Court, in applying Massiah v. United States, 377 U.S. 201 (1964), and finding that Henry's right to counsel had been violated, essentially affirmed that the government would not be permitted to obtain by trickery or stealth incriminating evidence it could not have legitimately obtained. In analyzing whether the government had impermissibly "deliberately elicited" the information from the defendant through its informant, 447 U.S. at 272, the Court focused upon certain elements of the government/informant relationship: the government's initial contacting of the witness, known to have a history as a paid informant, its subsequent instructions to "be alert" to the defendant's statements and the

"contingency" arrangement providing for the witness's compensation. These elements indicated an orchestrated plan reflective of the government's intentions to set the stage for an interference with Henry's right to the assistance of counsel.

In the subsequent Moulton decision, the Court found that the state had "knowingly circumvented Moulton's right to have counsel present at a confrontation between Moulton and a police agent," 106 S.Ct. at **490**, and so violated the defendant's Sixth Amendment rights. In spite of the opinion's fairly broad language equating the state's "knowing exploitation . . . of an opportunity to confront the accused without counsel being present" with its "intentional creation of such an opportunity," 106 S.Ct. at **487**, the Court found such "knowing exploitation" on fairly outrageous facts.

First, the individual acting as a government agent, Colson, was no mere cellmate of Moulton's. Rather, he was a co-defendant, facing trial on the same charges as Moulton, and apparently aligned with Moulton against the state in the adversarial process. Upon reaching an agreement with the authorities, Colson used his position to uncover incriminating evidence which legitimately lay beyond the authorities' reach.

Secondly, although Colson originally approached the police, it was the latter who conceived and set into motion, albeit with Colson's consent, the flagrant violations of Moulton's rights which followed. The authorities first placed a recording device upon Colson's telephone, with instructions to activate the device upon receiving anonymous phone threats or calls from Moulton. By

this means, three conversations were recorded between Colson and Moulton. In the third conversation, Moulton asked Colson to set aside an entire day so that the two of them could meet and plan their defense.

The authorities then obtained Colson's consent to be equipped with the body wire transmitter in order to monitor and record the meeting. Although the police acknowledged at trial their awareness that the two were meeting to discuss the charges on which they both have been indicted, Colson was instructed "not to attempt to question [Moulton], just be himself in the conversation." 106 S.Ct. at 481. At the meeting, the two discussed and planned their alibi, and so necessarily detailed the commission of various crimes. Through joking and pretentions of forgetfulness, Colson induced Moulton to repeatedly incriminate himself. Upon the admission into evidence of several portions of this tape, Moulton was convicted.

In Malone, a cellmate of Malone's was, unknown to Malone, an informer for the state. Two and one half weeks after meeting Malone, the informer met with a detective who asked him to assist in finding the body of Jesse Woodward by just listening to whatever Malone said about the case and reporting anything he heard about where the body was located. The informer suggested a plan to the police by which he might be able to obtain the information from Malone as to where Woodward's body was hidden. The plan was to have the informer transferred to another County Jail and then to have him come back and visit Malone in civilian clothes. Prior to being transferred, the informer went back to his cell

and told Malone he was being released and assured Malone that he knew a black female attorney whom he would try to retain for Malone. Under the misimpression that the informer would be able to assist him on the outside, Malone then told the informer that he had killed Woodward, that there were several things he wanted the informer to do for him, and that he would tell the informer about them when he returned on visitation day. Sometime later, dressed in civilian clothes, the informer returned to jail, as requested by Malone. Anxious to insure that he would not be linked to Woodward's body, Malone gave the informer directions to where the body was located and instructed the informer to dispose of the remains. From the directions given by Malone, the police were unable to find the body. Pursuant to police direction, the informer returned to the jail and told Malone that he was unable to locate the body from the previous directions. Malone then gave more detailed directions, but the police were still unable to find the body. The co-defendant, Freddie Morris, ultimately led the police to the body, which was located in the area described by Malone and his directions to the informer. After reviewing these facts, the court held that incriminating statements made to the cellmate should have been suppressed because those statements, made in the absence of counsel, with no prior waiver of counsel, were directly elicited by the state's strategy deliberately designed to elicit incriminating statements from the defendant.

A ruling on a motion to suppress is presumptively correct, and a reviewing court should interpret the evidence and reason-

able inferences and deductions drawn from the evidence in a manner most favorable to sustaining the trial court ruling. Johnson v. State, 438 So.2d 774 (Fla. 1983); McNamara v. State, 357 So.2d 410 (Fla. 1978).

A review of the facts in the instant case disclosed no "strategem deliberately designed to elicit an incriminating statement." Malone v. State, supra.

First, Cottrell approached the authorities on his own initiative, indicating scheming on his part rather than the government's. Bottoson v. State, 443 So.2d 962 (Fla. 1983), cert. denied, 105 S.Ct. 223 (1984); Barfield v. State, 402 So.2d 377 (Fla. 1981). This Court has recently affirmed the vitality of this factor in a Sixth Amendment right to counsel analysis, noting the Moulton court's statement that "the identity of the party who instigated the meeting at which the government obtained incriminating statements was not decisive or even important to our decisions in Massiah or Henry," 106 S.Ct. at 486-87, refers to the initiation of contact between the accused and the agent, rather than the agent and the government. In Henry, in fact, a crucial element of the state's intentional creation of a situation likely to induce Henry to make incriminating statements involved its initial contacting of the agent and its subsequent instructions to "be alert" to Henry's statements.

Further, as this Court held in Dufour v. State, 11 F.L.W. 468 (Fla. Sept. 4, 1986), there is not "knowing exploitation" as forbidden by Moulton in the absence of more action on the state's behalf tending to indicate a deliberate elicitation of incrimina-

ting information. This Court noted that after approaching authorities with information of Dufour's planned escape attempt, the informant was neither encouraged nor discouraged from obtaining further information.

> As we held in **Johnson v. State,** 438 So.2d 774, 776 (Fla. 1983), **cert. denied,** 465 U.S. 1051 (1984), "**Henry** and **Malone** do not impose on the police and affirmative duty to tell an informer to stop talking and not approach them again nor do they require that informers be segregated from the rest of a jail's population." We find no violation of appellant's right to counsel.
>
> Dufour, supra, at 468.

The trial court in the instant case found that this case was on all fours with this Court's decision in Johnson v. State, supra. Appellant claims that the trial court erred in this finding because in Johnson the detectives did not direct the informant, either directly or surreptitiously to talk to the defendant and because the informant in the instant case actively solicited incriminating statements from the defendant. Clearly, this is a defense interpretation of the facts and is not supported by the trial court's finding below.

Finally, in Kuhlmann v. Wilson, 477 U.S. ____, 91 L.Ed.2d 364, 106 S.Ct. ____ (1986), the United States Supreme Court held:

> As our recent examination of this Sixth Amendment issue in **Moulton** makes clear, the primary concern of the **Massiah** line of decisions is secret interrogation by investigatory techniques that are the equivalent of direct police interrogation. Since "the Sixth Amendment is not violated whenever - by luck or happenstance - the state obtains incriminating statements from the accused after the right to counsel has attached," 474 U.S., at citing **United States** v. **Henry, supra,** at 276 (Powell, J., concurring), a defendant does not make

> out a violation of that right simply by showing that an informant, either through prior arrangement or voluntarily, reported his incriminating statements to the police. Rather, the defendant must demonstrate that the police and their informant took some action, beyond merely listening, that was designed deliberately to elicit incriminating remarks. (emphasis added)
>
> (Id.)

As both Cottrell and Porter agreed that Cottrell was not promised anything and he was not asked to get any further information and the evidence shows that the state did not attempt to keep Cottrell near Rhodes to gain information, it is clear that there was not secret interrogation by investigatory techniques that were the equivalent of direct police interrogation. The trial court correctly denied the motion to suppress and the statements were correctly admitted.

ISSUE III

WHETHER THE COURT BELOW ERRED IN PERMITTING STATE WITNESS, MICHAEL ALLEN, TO TESTIFY CONCERNING STATEMENTS ALLEGEDLY MADE BY RICHARD RHODES WHICH DEFENDANT CLAIMED WERE IRRELEVANT AND PREJUDICIAL.

During appellant's trial, Michael Allen, a fellow inmate of Richard Rhodes at the Pinellas County Jail, testified that he had been a cellmate of Rhodes for approximately a week when the detectives came in and interviewed everybody in the cell; they asked everybody if Rhodes had spoken to them concerning the case. After they left, Michael Allen asked Richard Rhodes who he supposedly had killed. Rhodes responded that it was some girl he was out partying with. He said that he had been drinking with this girl and they went to a motel. Allen asked, "What did you do, did you shoot her or something?" Rhodes said, "No, I didn't shoot her." At that time, Rhodes got up, went to the door and took his hand placing it at his neck and said, "I tried to break her fucking neck." (R.2080-81). Rhodes told Allen that he and this girl had got it on and that afterwards she got mad at him and told him that she was going to tell her old man on him for some reason and he said he knocked her out. Rhodes told Allen that Karen had got what she deserved. (R.2082) About a month or a month and half later, Rhodes told Allen that there was a guy in county jail that had given a deposition against him and he was now in prison in Michigan. Rhodes asked Allen if he knew anybody in prison up in Michigan so he could send word to him.

After the detectives interviewed Rhodes' cellmates, Rhodes

told Allen that that just goes to show that they didn't have "no evidence'' against him, because they were trying to find somebody in the cell that could help them out. He said he made sure they didn't have "no evidence". Rhodes also said that if anybody in this cell had told the detectives anything at all about his case, that he would find out through his lawyer and that the snitch would be dead. It would be a dead snitch. (R.,2083) Allen also testified that one morning a detective came to the cell and Rhodes' cell door was open. The detective went in to Rhodes cell, and was in there a couple of minutes. After the detective left, a guy named Wayne Templeton yelled down to Rhodes, "Rhodes, what was that all about?'' Rhodes said that the detective had told him that the girl he killed, her old man was in jail. Rhodes said that he thought that the sheriff's department was trying to set him up with Nieradka's husband. He said that if he ever went out in the hallway wearing leg shackles and handcuffs, he thought this guy would be out there waiting on him. Rhodes said if he ever went out there and Nieradka was waiting for him, he would get worse than his old lady got. (R.2084)

Rhodes specifically objected to the admission of three of these statements: 1) the threat against the witness in Michigan, (2) the general threat against his fellow cellmates, 3) the threat against Richard Nieradka.

The first two statements were admitted upon the authority of Jones v. State, 385 So.2d 1042 (Fla. 1st DCA 1980) and Goodman v. State, 418 So.2d 308 (Fla. 1st DCA 1982). (R.2070-71)

In Goodman, supra, the First District citing Jones, supra,

stated:

> An attempt by a defendant or third person to induce a witness not to testify or to testify falsely is admissible on the issue of defendant's guilt provided it is shown that the attempt was made with the actual participation, knowledge, or authorization of the defendant. Duke v. State, 106 Fla. 205, 142 So. 886 (1932). Id. at 1043. Since the threat in this case was an attempt by the defendant to induce a witness to testify falsely, and was shown to have been made with actual participation by the defendant, the testimony was properly admitted.

Goodman, at 309.

Appellant argues that the statement concerning a prisoner in Michigan should not have been admitted under the Goodman theory because Rhodes' statement was not evidence of a threat; that it was very equivocal and could have meant anything. Therefore, it was irrelevant. Appellant argues it was prejudicial because the jury was left to speculate as to what Rhodes meant by the statement.

The state suggests that that is exactly what the jury is intended to do. As a trier of fact, the statement was presented to the jury for them to interpret what Rhodes meant by the statement. Clearly, based upon Rhodes' statement that Harvey Duranso, who was in prison in Michigan before he was brought down to testify against Rhodes, had given a 95 page deposition against Rhodes, coupled with Rhodes' statement that he wanted to get word to him in Michigan and his threat against anyone who snitched against him, the jury could infer that Rhodes was intending to threaten Harvey Duranso to prevent him from testifying.

Interpreting facts is within the jury's province.

The second remark - Rhodes' remark to Allen that if anyone in the jail cell had told the detectives anything at all about the case, Rhodes would find out through his lawyer and the snitch would be a dead snitch - was also admissible under the law as set forth in Jones and Goodman. Appellant argues, however, that these cases can be distinguished because they regarded specific threats against specific individuals.

Beyond the fact that Goodman nor Jones limits the admission of such evidence to only specific threats against specific individuals, the threats in the instant case were specific enough even under the appellant's theory. The threat in the instant case was limited to Rhodes' cellmates.

Whether or not the threat were actually communicated to the individuals is irrelevant because the testimony is submitted on the issue of defendant's guilt. All the law requires is that it is shown that the threat was made with the actual participation, knowledge, or authorization of the defendant. These statements were clearly linked to the defendant and therefore, admissible.

The third statement concerned Richard Nieradka, the victim Karen Nieradka's husband. The statement was made after Rhodes became aware that Richard Nieradka was also in jail. Appellant's claims that this was an irrelevant prejudicial piece of testimony; that Rhodes' comment obviously was not a threat to induce a witness to testify falsely or not to testify, as it was not communicated to Nieradka and was not linked to any testimony he might give against Rhodes. Appellant also argues that the remark

about what Nieradka's "old lady got" did not prove anything, because Rhodes did not say he was the one who inflicted any injury to her.

Appellant's argument takes the statement out of context to reach an erroneous conclusion. What Rhodes said was that he had just found out that the girl he killed, her "old man" was in jail with him. He then followed this with a threat against Nieradka that if he met him in the hallways, he would get worse than what his old lady got. (R 2084) As the reference to what happened to Karen Nieradka followed Rhodes' admission that he had killed her it is obvious that the statement was an admission as to culpability and shows Rhodes' knowledge of facts of the crime.

It is a fundamental principle of evidence that any fact relevant to prove a fact in issue is admissible into evidence unless its admissibility is precluded by some specific rule of evidence. Stone v. State, 378 So.2d 765 (Fla. 1979); State v. Wadsworth, 210 So.2d 4 (Fla. 1968). This testimony was admissible on the issue of the defendant's guilt. Beyond the admission that he killed her, the statement also showed knowledge of the facts of the crime.

Appellant argues that these statements were similar to highly prejudicial evidence of collateral crimes. To support this contention, appellant relies on Jackson v. State, 451 So.2d 458 (Fla. 1984), Drake v. State, 400 So.2d 1217 (Fla. 1981), etc. In Jackson, this Court held that admission of testimony with respect to an occasion when Jackson pointed a gun at a witness and boasted of being a "thoroughbred killer" was reversible

error. This court found that this testimony was precisely the kind forbidden by the Williams rule and 590.404 (2). Similarly, in Drake, this Court held that the similarity between two incidents in which Drake during the course of sexual assaults, tied his victims' hands behind their backs and the murder was not sufficiently unusual to point to defendant and was, therefore, irrelevant to prove his identity as a murderer. In both Drake and Jackson, the court found that there was a violation of the Williams rule.

In Williams v. State, 110 So.2d 654 (Fla. 1959), this Court held that "evidence of any facts relevant to material fact in issue except where the sole relevancy is character or propensity of the accused is admissible unless precluded by some specific exception or rule of exclusion." The statement in the instant case was not admitted to show character or propensity of the accused but rather, was an admission of guilt by the defendant and therefore relevant to the material fact in issue.

Further, as appellant himself points out, the threat against Nieradka was not evidence of a crime. In Malloy v. State, 382 So.2d 1190 (Fla. 1979), this Court held that where the circumstances of an incident do not establish all the elements of the crime, the question of admissibility of prior criminal acts is not present. Id. at 1192.

All three of these statements were relevant to prove appellant's guilt and were, therefore, admissible into evidence.

ISSUE IV

WHETHER THE TRIAL COURT ERRED IN ADMITTING INTO EVIDENCE COLOR PHOTOGRAPHS AND A COLOR VIDEO TAPE OF THE VICTIM OVER THE OBJECTION OF DEFENDANT THAT THEY WERE CUMULATIVE, IRRELEVANT, AND HAD THE EFFECT OF INFLAMING THE JURY, THEREBY DENYING HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

At the guilt phase of Richard Rhodes' trial, the state introduced into evidence photographs and video tapes of the body of the victim lying in the rubble at the Wyoming Antelope Club. There were also photographs of the victim's severed leg and color photographs of the victim on the medical examiner's table.

Appellant claims that the state engaged in overkill in the quantity and type of photographic evidence it presented to the jury. Appellant contends that the introduction of both the photographs and the video tape was cumulative and prejudicial and that presentation of both the photos and the tapes was pointless and could have served only to arouse the jurors' emotions. Appellant also claims that introduction of photographs of Karen Nieradka's corpse at the medical examiner's office was inexplicable and irrelevant. Appellant argues that because these photographs were admitted that he is entitled to a new trial not tainted by this prejudicial, inflammatory evidence.

The test of admissibility of photographs in a situation such as this is relevancy and not necessity. Photographs are admissible where they assist the medical examiner in explaining to the jury the nature and manner in which the wounds were inflicted. Bush v. State, **461** So.2d **936** (Fla. **1984)**; Welty v. State, **402** So.2d 1159, **1163** (Fla. **1981)**; Bauldree v. State, **284** So.2d **196**

(Fla. 1973). This court has repeatedly stated:

> The current position of this court is that allegedly gruesome and inflammatory photographs are admissible into evidence if relevant to any issue required to be proven in the case. Relevancy is to be determined in a normal manner, that is, without regard to any special characterization of proffered evidence. Under this conception, the issues of "whether cumulative", or "whether photographed away from the scene," are routine issues basic to a determination of relevancy, and not issues arising from any "exceptional nature" of the proffered evidence. State v. Wright, 265 So.2d 361, 362 (Fla. 1972). See, also, Henninger v. State, 251 So.2d 862, 864 (Fla. 1971); Meeks v. State, 339 So.2d 186 (Fla. 1976); and Bush v, State, supra.

In Williams v. State, 228 So.2d 377 (Fla. 1969 , this court noted that similarly gruesome photographs depicted a view which was "neither gory nor inflammatory beyond the simple fact that no photograph of a dead body is pleasant." Id. at 379.

In Henderson v. State, 463 So.2d 196 (Fla. 1985), Henderson argued that the trial court erred by allowing into evidence gruesome photographs which he claimed were irrelevant and repetitive. This court found that the photographs, which were of the victims' partially decomposed bodies, were relevant.

> Persons accused of crimes can generally expect that any relevant evidence against them will be presented in court. The test of admissibility is relevancy. Those whose work products are murder of human beings should expect to be confronted by photographs of their accomplishments. The photographs were relevant to show the location of the victims' bodies, the amount of time that had passed from when the victims were murdered to when

the bodies were found and the manner in which they were clothed, bound and gagged.

(Id. at 200)

This court further held that 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. This court presumed that jurors are guided by logic and thus, are aware that pictures of the murder victims do not alone prove the guilt of the accused. Id. at 200.

In Gore v. State, 475 So.2d 1205 (Fla. 1985), this court disagreed with Gore's contention that the trial court reversibly erred in allowing into evidence two prejudicial photographs, one depicting the victim in the trunk of Gore's mother's car and the other showing the hands of the victim behind her back. This court held that the photographs placed the victim in Gore's mother's car, showed the condition of the body when first discovered by police, and showed the considerable pain inflicted by Gore in binding the victim and, met the test of relevancy and were not so shocking in nature as to defeat their relevancy. Id. at 1208.

In the instant case, the photographs and the video tapes taken at the Wyoming Antelope Club were relevant to show where the body was found and what kind of condition the body was in at the time it was found. The video added to the photographs by giving a three dimensional view of the location and exactly what was detailed in digging Karen's body out of the debris in order to take the other photographs of it. It indicates fairly just

what kind of material that was laying on top of the body. The state felt that it was important for the jury to understand how deeply the body was buried in all of the debris. This was to dispell any belief that the jury might have that the killing did not take place at the Fort Harrison Sunset Hotel instead of at the Wyoming Antelope Club where the body was found. The court found the tape was admissible in that it did not appear to be bloody or colored in any sense. The trial court found that there was no prejudice to the defendant in the admission of these tapes. (R.1498) The law is well-established that admission of photographic evidence is within the trial court's discretion and that a court's ruling will not be disturbed on appeal unless there is a clear showing of abuse. Wilson v. State, 436 So.2d 908 (Fla. 1983).

Similarly, the photographs of the body at the scene were held to be relevant to the ability of the medical examiner to determine the cause of death, by showing the condition of the body. (R.1515) Further, the court noted that the addition of the photographs would be beneficial to the jury in that they could take them with them during their deliberations. (R.1517)

Further, appellant appears to concede that either the video tape or the photographs would have been admissible; they are simply challenging the admission of both as cumulative. Clearly, each piece of evidence served its purpose. The tape by showing a three dimensional view of what was actually involved in withdrawing the body from the berm and the photographs by showing a close up condition of the body and by allowing the jury to take them

back during their deliberations. This evidence was not cumulative and was relevant to the material issue at hand.

As for the admission of photographs of Karen Nieradka's corpse at the medical examiner's office, as previously has been noted the issues of whether cumulative or whether photographed away from the scene are routine issues basic to a determination of relevancy and not issues arising from any exceptional nature of the proffered evidence. State v. Wright, 265 So.2d 361 (Fla. 1972). The photographs were relevant to show the condition of the body before the autopsy. The medical examiner, Dr. Wood, testified as to what they depicted. The photographs were used to show the way the hands were packed and a technician testified as to some of the items that were taken from the hands. The photographs showed the jury the way the evidence was preserved. As such, the photographs were relevant and properly admitted.

ISSUE V

WHETHER THE TRIAL COURT ERRED IN ADMITTING TESTIMONY OF FBI SPECIAL AGENT MICHAEL MALONE THAT APPELLANT CLAIMED WAS OUTSIDE THE AREA OF HIS EXPERTISE AND AN EXPERT IN HAIR AND FIBER ANALYSIS.

Under the evidence code, a witness may be qualified as an expert by knowledge, skill, experience, training, or education. Section **90.702,** Fla. Stat. To qualify as an expert witness, one must have acquired such special knowledge of the subject matter either by study of the recognized authorities on the subject or by practical experience that he can give the jury assistance and guidance in solving a problem to which their equipment of good judgment and average knowledge is inadequate. Seaboard Airline R. Company v. Lake Region Packing Association, **211** So.2d **25** (Fla. 4th DCA **1968).** A witness can become an expert where he is shown to have sufficient knowledge, whether that knowledge is gained by books, experiments, experience, or other reliable sources, so that his opinion would be of value, his evidence may be admitted. Depfer v. Walker, **123** Fla. **862, 169** So. **660 (1936).**

Under the evidence code, the court determines preliminary questions concerning the qualification of a person to be a witness. Section **90.105(1),** Fla. Stat. **(1984).** Thus, the decisions are in accord that when a witness is offered as an expert or skilled witness, it is for the trial court to determine whether or not he has been shown to possess the requisite qualifications and special knowledge to authorize his testimony.

Dedge v. State, 442 So.2d 429 (Fla. 5th DCA 1983); Koran v. State, 213 So.2d 735, **cert. denied,** 402 **U.S.** 948, 29 L.Ed.2d 118, 91 S.Ct. 1603. The trial court's decision is entitled to great weight in the appellate court and his determination will not be disturbed on appeal absent a clear showing of abuse of discretion. Vitale Fireworks Manufacturing Company v. Marini, 314 So.2d 176 (Fla. 1st DCA 1975); Johnson v. State, 314 So.2d 248 (Fla. 1st DCA 1975). This is true because of the superior advantage possessed by the trial judge, who hears the testimony and observes the witnesses.

Regarding testimony by experts, the evidence code provides that if scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion.

Michael Malone testified that he was a special agent with the FBI for 15 years. He has a bachelor in science degree in biology and a master in science degree in biology. After spending approximately 4 years in the field, he was assigned to the FBI lab in Washington. There he received 1 year's training under the direction of older, experienced examiners until they deemed him competent to handle cases on his own. This training consisted of hair and fiber school at the FBI academy. He attended various lectures, seminars and read available literature in the field. (R. 1862) After being qualified for a few years,

Mr. Malone started teaching the hair and fiber schools at the FBI academy in Quantico. He lectured extensively with the Air Force OSI in their forensic program in Washington, D.C. (R.1863) He has testified in approximately 250 trials in 37 states. (R.1864) Defense counsel agreed with his expertise. (R.1864)

Malone testified that he examined hair that came from the victim's hands and determined that the hairs from both of her hands were her own. (R.1873) Malone testified that 99 times out of 100 any hairs you find in the hands of a murder victim turn out to be their own hairs. Before the trial court would allow the expert to testify as to why hairs would be found in the hands of the victim, the State was required to establish that this was an area within his expertise. (R.1874)

Malone then testified that during the course of his training he was taught that victim's hair would appear in the victim's hands. (R.1875) Based on that predicate, the trial court overruled defense objection and held that Malone was an expert in this field. Malone then testified that in death throes, the moment before death, people have a tendency to grab their own hair and the vast majority of hairs found in a dead victim's hands are their own hairs. Malone testified that it was based on his experience and the experience of every hair examiner he has ever talked to. (R.1876-77)

In short, Malone's testimony was that during the course of his training he was taught that the hair found in a victim's hands was usually their own and this was true because during

death throes people had a tendency to grasp at their own hair. This training was supported by his own experience in examining thousands and thousands of hairs during the 15 years of his work in this field.

Rhodes contends that the expert did not have such knowledge as would aid the trier of fact in its search for truth because "the only source of his knowledge was hearsay from an anonymous medical examiner". Appellant appears to be arguing that every expert should have to testify as to the identity and the credentials of his professors; testimony that facts were gained during training and were supported by numerous years of experience are not sufficient under this theory.

Appellant also argues that this testimony was not relevant to any issue in this cause; that it added nothing to the search for truth at Rhodes' trial. Ironically, appellant then goes on to argue that he was prejudiced by the admission of this testimony because of the importance it played in the outcome of the trial.

The fact that Karen Nieradka was pulling her hair out while being strangled to death by Richard Rhodes aided in the finding of premeditation to support a guilty verdict on first degree premeditated murder and supported the aggravating circumstances of especially heinous, atrocious, or cruel. Obviously, this fact helped to illuminate the circumstances surrounding the death of Karen Nieradka. As such, it was relevant and properly admitted.

ISSUE VI

WHETHER THE ADMISSION OF A STATEMENT ABOUT STUDIES IN PRISON WAS PREJUDICIAL ERROR WHEN THE EVIDENCE WAS RELEVANT TO SHOW CONSCIOUSNESS OF GUILT ON THE APPELLANT'S PART.

Detective Steve Porter of the Pinellas County Sheriff's Department testified, among other things, to statements made by Richard Rhodes when he was interviewed on March 26, **1984.** (R.1893-1912) Porter testified:

> At that point he made a statement he says, I know you can't prove I did it. I studied forensic lobotomy in prison. Too much time has elapsed for you to prove that I did it.

Appellant claims that Rhodes' statement that he "studied forensic lobotomy in prison" suggested his guilt of a collateral crime, was not relevant to any issue in the case, and should not have been admitted. Appellant claims it was prejudicial evidence tending to prove nothing more than bad character or propensity. The point is without merit.

The evidence was relevant as it showed consciousness of guilt on the appellant's part; and was, therefore, properly before the jury.

It has long been the well-settled law of this State that all relevant evidence is admissible even if it tends to establish that the accused is guilty of a crime other than that for which he is currently standing trial. Williams v. State, 110 So.2d **654** (Fla. **1959);** Green v. State, 190 So.2d **42** (Fla. 2d DCA **1966);**

Fla, Stat. §90.402 (1983). In analyzing the meaning of Williams, supra the Second District said:

> "We analyze **Williams** to mean that evidence of other offenses is admissible if - it is relevant and has probative value in proof of the instant case or some material fact or facts in the issue in the instant case."

The evidence at issue here was relevant because it helped to establish guilty knowledge on the appellant's part. Case law of this State recognizes the relevance of this type of evidence even when it establishes that the accused is guilty of some currently uncharged crime. For example, in Mankiewicz v. State, **114** So.2d **684** (Fla. 1959), **cert. denied, 456 U.S. 965,** this Court ruled such evidence was proper. The Court approved the admission of evidence establishing the theft of a car from near the scene at which Mankiewicz was shot shortly after the shooting. It also approved the introduction of evidence of Mankiewicz' arrest in a stolen car a short time later together with evidence showing his attempted escape from a jail. The Court applied the rule of relevance to this evidence and found it relevant to establish consciousness of guilt.

In Sireci v. State, **399** So.2d **964, 968** and Straight v. State, **397** So.2d **903** (Fla. 1981), this Court applied the rule of relevancy in upholding the admission of evidence showing the accused to be guilty of uncharged crimes. In Sireci, this Court ruled admissible evidence from one of Sireci's former cellmates that Sireci had told him he had attempted to have a witness

against him killed. In Straight, this Court found evidence that Straight fled from police and used a gun when they tried to apprehend him in California, was relevant as it showed consciousness of guilt on Straight's part.

More recently, in Floyd v. State, 11 F.L.W. 594 (Fla. 1986), this Court held that it was not error for an officer to testify to Floyd's statement at the police station that: "I know the police are mad at me for running, but I've been in jail before and I don't want to go back." This Court disagreed with Floyd's argument that it was error in letting the jury hear that he had been incarcerated at a prior time. The testimony against Floyd was relevant to the issue of flight and was, therefore, admissible.

In the instant case, Rhodes' statement was relevant as it showed guilty knowledge and planning. After murdering Karen Nieradka, Rhodes took the time to wrap Karen Nieradka's body in old carpeting in order to prevent or at least delay discovery of the body. Rhodes' statement shows that he knew if he could delay the discovery of the body that the State's ability to prove the case would be severely hindered.

While the State maintains that this statement was admissible and that its probative value sufficiently outweighed its prejudicial value, the defense's objection to the admission of the statement was sustained by the trial court.

This Court recently addressed this identical issue in Johnston v. State, 11 F.L.W. 585 (Fla. 1986). In Johnston, the

appellant claimed that the trial court erred in denying his Motion for Mistrial after an investigating officer testified about a phone call he had received from Johnston in which Johnston indicated he wanted to make a deal with the judge. Johnston told the officer that he was scared because he had already gone to jail for two years for something. The trial court sustained council's contemporaneous objection, instructed the jury to disregard the remark, and denied the motion for mistrial.

This Court held that a Motion for Mistrial is addressed to the sound discretion of the trial judge and should only be granted in the case of absolute necessity. Salvatore v. State, 366 So.2d 745 (Fla. 1978). Citing Ferguson v. State, 417 So.2d 639 (Fla. 1982), this Court held that the trial court did not abuse its discretion in denying a motion for mistrial made immediately after a witness testified that he met Ferguson in prison. After carefully reviewing the record in Johnston, this Court concluded that any alleged prejudice, which may have resulted from a reference to prior incarceration, was fully alleviated by the curative instruction.

While a curative instruction was not given in the instant case, it was not done so at the request of defense counsel. Both counsel and the judge felt that this remark did not warrant a curative instruction because the emphasis had been placed on the fact that he had studied forensic lobotomy, not the fact that he had been in prison. Thus, in light of the particular facts of this case, the curative instruction would only have emphasized

the remark to the jury.

Because of defense counsel's tactical decision the jury was not instructed to disregard the statement and the statement was not ordered to be stricken from the record. Appellant claims that because the trial court failed to do *so,* prejudice resulted despite the fact that the objection was sustained.

It is the State's position that this statement was admissible and, therefore, it was not necessary nor prejudicial that the jury was not instructed accordingly. Further, as it was appellant's counsel's decision that a curative instruction not be given, he cannot be heard to complain at this point that a curative instruction could have been given. Lucas v. State, **376** So.2d **1149** (Fla. **1979).**

Additionally, as the trial court noted, this statement is not prejudicial because the average layman does not know the difference between prison and jail and therefore, the jury could have concluded that Rhodes learned this while he was in jail in Citrus County prior to being arrested for the murder of Karen Nieradka. Or, alternatively, the jury could have concluded that during the course of Rhodes' education he studied forensic lobotomy in a prison; not necessarily as an inmate. Further, the point of this statement was not that Rhodes was in prison, but that he had expected that his hiding of the body, delaying discovery, had precluded the state from proving that he was the murderer.

The statement was relevant to prove guilty knowledge and as

the failure to give a curative instruction was at Rhodes' request, no error resulted from the failure to do so.

ISSUE VII

WHETHER THE COURT BELOW ERRED IN EXCLUDING ON HEARSAY GROUNDS, TESTIMONY OF DEFENSE WITNESS PAUL COLLINS AS TO A STATEMENT MADE BY KAREN NIERADKA.

Appellant contends that the trial court erred in excluding the proffered testimony of Paul Collins. Collins testified that eight or nine months prior to the trial, toward the end of the week, he saw Rhodes and a girl named Karen in Mano's Tavern. Collins borrowed $10 from Rhodes and agreed to pay him back the next night. When Collins returned the following night, Rhodes was not there. Collins asked Karen where he was, and she replied that he had her car in New Port Richey and should be back later on. Based on a Motion in Limine by the state, the trial court refused to let Collins testify as to Karen's statement that Rhodes had her car in New Port Richey and should be back later on.

Appellant contends that this statement should have been admissible under the state of mind exception to the hearsay rule. **Section 90.803(3)(a), Fla. Stat. (1985).** Under the "state of mind" hearsay exception, a statement demonstrating the declarant's state of mind when at issue in a case is admissible. In the instant case, the victim's mental state was not at issue. Appellant was charged with murder in the first degree and convicted of murder in the first degree. Rhodes was not charged with theft of the auto, and it was not at issue at this trial. Further, Rhodes admitted several times that Karen had not rented him the car. (R **1825, 1835, 1956, 2012 - 2014)** And, he also

admitted in an attempt to cover himself, that he wrote the note allegedly written by Karen giving him permission to have the car. (R 378) See Kennedy v. State, 385 So.2d 1020 (Fla. 5 DCA 1980); Hunt v. State, 429 So.2d 811? (Fla. 2 DCA 1983) Absent a showing of error, this Court should not tamper with the trial judge's determination of admissibility. Jones v. State, 440 So.2d 570 (Fla. 1983); Buckman v. Seaboard Coastline, 381 So.2d 229 (Fla. 1980).

Additionally, it should be noted that even if this testimony had been admissible, the failure to admit it was not harmful error, as the evidence adduced at trial clearly showed that Karen loaned out her car frequently to many people. (R 1989) In light of this, it is clear that the only reason the defense wanted to admit this evidence was to show that on the night of the alleged crime, one witness put Rhodes in New Port Richey with Karen Nieradka's car. Thus, the testimony was sought to be admitted not for Karen Nieradka's state of mind, but for the truth of the matter asserted. As such, the trial court properly denied admission.

ISSUE VIII

WHETHER THE TRIAL COURT ERRED IN ALLOWING THE STATE TO PRESENT REBUTTAL EVIDENCE?

Richard Rhodes put on a defense that attempted to throw suspicion on the victim Karen Nieradka's estranged husband, Richard Nieradka. To support this contention, defense put on Sandra Nieradka, Richard Nieradka's present wife. Sandra testified that she and Richard got married in June, 1984. (R 22, 28) On November 28, she had a fight with Richard. He had been drinking all day, because he had been called into the Sheriff's Department for a handwriting analysis concerning Karen's death. Sandra testified that she tried to get him to leave the bar, but he wouldn't: so she left and went back to the house. When she returned later, he wasn't there. (R 22, 29) She then went to the house, got a pistol, put it in her purse and then went to his mother's. (R 2230) When she went back to her house and walked in the door, Richard grabbed the purse, pulled the pistol out and shot at her. (R 2231) Sandra claimed that they started scuffling and he started choking her and he said, "This is how I killed Karen." (R 2236)

On cross-examination, the state asked her if she had her husband arrested for failure to deliver a hired vehicle up in North Carolina. (R 2237) Sandra denied it. She admitted that she never told the police officers who investigated the shooting about the fact that Richard had choked her and that he had made the statement, "This is how I killed Karen." (R 2238) She also admitted that she had not said anything about it in her sworn

statement to the state attorney. (R 2240) Sandra denied that the first time she had said anything about it, was after she received divorce papers from her husband, even though the state pointed out that he filed them the 26th, and she gave the statement on the 28th. (R 2244) Sandra also admitted that she felt shut out because he wouldn't talk about his wife's death and because he was so upset even though he was supposed to be in love with her (Sandra). (R 2245) Sandra testified that when he found out about Karen's death, Richard went crazy. He was very violent with the police officers. He told her a few times that he was going to kill the guy that did it to her. (R 2247) Nevertheless, she claims that she didn't know whether he was upset or distraught. (R 2245 - 2246)

To show prejudice of the witness, Sandra Nieradka, the state called Richard Nieradka on rebuttal. Richard testified that he was in Pinellas County Jail at the present time on a fugitive warrant for failing to return a car he had rented while they were in North Carolina. (R 2273 - 2275) He stated that she went to school with about 95% of the police force and probably dated the other 5%. and implied that Sandra had him arrested through this influence. (R 2274 - 2275)

Richard also testified about his marriage to Karen. He stated that they had split up for about six months when she died. He said it was all his fault that they split up. (R 2278) He testified that he had filed for divorce from Sandra on the 26th of July, and he denied ever choking Sandra or saying,

"This is how I killed Karen.". (R **2279)** Richard also denied shooting the gun at Sandra. (R **2281)**

Nieradka also testified that Sandra had called his probation officer to report violations of probation Richard had committed. (R **2283 - 2284)** Richard testified that Sandra had told him a couple of times that she wanted to see him in jail. The last time she said it was in North Carolina, the day before he was arrested. (R **2285)** When Detective Porter told him about Karen's death, he turned into an animal.

Also during the state's rebuttal, Margaret Tucker testified that when she was at the State Attorney's Office, Jackie Ellis made the statement that the reason she and Sandra were there was that Sandra was going to make sure Richard didn't get out of jail. (R **2305 - 2307)**

Detective Steve Porter testified that when he told Richard Nieradka that Karen had died, that Richard jumped up out of his chair, he said, "She's not dead. You're lying." He kept repeating this over and over. He became very emotional to the point of disbelief. He began pushing the detective about the room, and had to be physically subdued to control him. He was emotionally distraught and began crying and sobbing. (R **2313)**

Appellant claims that this evidence should not have been admitted because it was either hearsay, impeachment on collateral matters, or did not serve to rebut anything presented by the defense.

It is the law in this state that rebuttal evidence explains or contradicts material evidence offered by the defendant. Britton v. State, 414 So.2d 638 (Fla. 5 DCA 1982); Kirkland v. State, 86 Fla. 64, 97 So. 502 (1923). See also, Dornau v. State, 306 So.2d 167 (Fla. 2 DCA 1974). The order of presentation of evidence and witnesses is largely a function of the trial court's discretion; this discretion is broad enough to allow the state to introduce, after the defendant's case, evidence not strictly in rebuttal, *so* long as the evidence was admissible in the main case. Britton, supra; Williamson v. State, 92 Fla. 980, 111 So, 124 (Fla. 1926). Inquiries into collateral matters are allowed when they reflect on the credibility of the witness. McClain v. State, 395 So.2d 1164 (Fla. 2 DCA 1981).

The testimony presented in rebuttal to the defense's case, was admissible as it showed the prejudice of the witness, Sandra Nieradka, and put her credibility into question. The testimony of Richard Nieradka contradicted Sandra Nieradka's and the testimony of all the witnesses explained Sandra's motives for making the accusation that Richard Nieradka had threatened to choke her and claimed to have killed his wife.

Further, as the court in Britton, noted, where testimony is presented to the jury, and such testimony would have been admissible to the state's case in chief, the trial court has the discretion to admit the testimony on rebuttal. Id. at 639.

Appellant also claims that the statement of Margaret Tucker was double hearsay and, therefore, inadmissible under §90.802 of

the Florida Evidence Code, This testimony was admissible under the state of mind exception to the hearsay rule. Sandra Nieradka's state of mind was at issue because it threw light on her motive for testifying and affected her credibility.

ISSUE IX

WHETHER THE TRIAL COURT BELOW ERRED IN DENYING RICHARD RHODES' MOTIONS FOR MISTRIAL DUE TO HIS CHALLENGE FOR REMARKS THE PROSECUTOR MADE DURING HIS FINAL ARGUMENTS TO THE JURY.

Appellant challenges two comments made by the prosecutor during closing arguments. The first comment was made by the prosecutor when he stated, "Don't let that admitted murderer walk out of here.". The second comment came when he attempted to analogize the facts of the case to the book, LOOKING FOR MR. GOODBAR. The defense objected to both and made a motion for mistrial for both.

In general, wide latitude is permitted in arguing to a jury. Thomas v. State, 326 So.2d 413 (Fla. 1974); Spencer v. State, 133 So.2d 729 (Fla. 1961), cert. denied, 372 U.S. 904, 83 S.Ct. 742, 9 L.Ed.2d 730 (1963). Logical inferences may be drawn, and counsel is allowed to advance all legitimate arguments. Spencer. The control of comments is within the trial court's discretion, and an appellate court will not interfere unless an abuse of such discretion is shown. Thomas; Paramore v. State, 229 So.2d 855 (Fla. 1969), modified 408 U.S. 935, 92 S.Ct. 2857, 33 L.Ed.2d 751 (1972) A new trial should be granted only when it is "reasonably evident that the remarks might have influenced the jury to reach a more severe verdict of guilt than it would have otherwise done". Darden v. State, 329 So.2d 287, 298 (Fla. 1976). Each case must be considered on its own merits, however, and within the circumstances surrounding the complained of remarks. Cf. Paramore, supra, with Wilson v. State, 294 So.2d

327 (Fla. 1974). In Breedlove v. State, 413 So.2d 1 (Fla 1982), this court stated:

> "Besides use of Gibson's statements, he points to three other prejudicial or inflammatory remarks: (1) allegations of other criminal acts (rape); (2) 'vituperative' characterization (referring to Breedlove as an animal); (3) appeal to community prejudice (violence in Dade County). The judge refused to grant mistrial, finding the state's argument not prejudicial, due to the context in which the objected to remarks were made. Some of the remarks may have been improper, but we do not find them so prejudicial that a new trial is required."

(Id. at 8)

The remarks in the instant case do not reach the level of those in Breedlove. Rather, they are nothing more than proper advocacy and comments on the evidence.

When the propriety of prosecutorial comments is questioned on appeal, the key question to be asked is, "whether or not [we] can see from the record that the conduct of the prosecuting attorney did not prejudice the accused, and unless this conclusion can be reached, 'the judgment should be reversed". Coleman v. State, 420 So.2d 354 (Fla. 5 DCA 1982). In the instant case, the evidence clearly established that the appellant was guilty as charged. Appellant was in no way prejudiced by the prosecutor's comments.

Specifically, the first comment ("Don't let that admitted murderer walk out of here.") was a proper comment on the evidence. Rhodes had admitted to Michael Allen, Edward Cottrell, Harvey Duranso and John Bennett, that he had committed murder.

Based on these facts and evidence, the prosecutor was entitled to make this comment based on his view of the evidence. This case is readily distinguishable from Meade v. State, 431 So.2d 1031 (Fla. 4 DCA 1983), as relied upon by appellant. In Meade, the prosecutor called the defendant "a real live murderer." There were no facts printed in the opinion that could lead one to believe that Meade had admitted to being such. Therefore, in Meade the prosecutor's comment was not an interpretation of the facts and, as such, was improper. The prosecutor in Meade also made several other improper comments.

In the instant case, the trial court properly found this to be a proper view of the evidence and overruled defense objection to it. (R 2426)

Likewise, the second challenged comment (analogies to LOOKING FOR MR. GOODBAR) was also proper. Appellant claims it was an improper comment on facts not in evidence. This is not a correct characterization of the comment as it was not a comment on facts not in evidence. Rather, it was an analogy to literature used to illustrate the facts of the case.

Generally, it is within the discretion of the trial court to permit or refuse to permit counsel to read to the jury in his argument recognized or standard medical or other books treating of art or science claimed to be pertinent to the question in issue. Counsel is permitted to quote from memory or read brief extracts of historical matters to illustrate a discusion of the facts as long as they do not perform the office of evidence. 23A C.J.S., Criminal Law §1092(b).

While appellee can find no cases where a use of literature in closing arguments has been challenged, there are those instances where the prosecutor has relied on the Bible in closing argument. It has been held that the reading of passages from the Bible is not ground for reversal. In Paramore v. State, 229 So.2d **855** (Fla. 1969), this Court held that counsel should not be so restricted in argument as to prevent references by way of illustration to principles of divine law relating to transactions of men as may be appropriate to the case. See also **88 C.J.S., Trial § 818;** Kabase v. State, **31** Ala. Appeals **77,** 12 So.2d **758** (Ala. **1943).** In Paramore, This Court held that this is a matter within the discretion of the trial judge and that Paramore failed to show an abuse of that discretion.

The use of the illustration in this case was especially pertinent because of Rhodes' own reference to the book. Margaret Tucker, a co-worker of Rhodes at the "Clearwater Sun", testified that Rhodes said his girlfriend had been strangled in a lumber yard off of Sunset Point Road. Rhodes told Tucker that his girlfriend 'shouldn't have been looking for Mr. Goodbar.' Tucker then testified as to what the book was about. (R **1581 - 1583)**

The trial court repeatedly overruled defense objections to the comment, but, nevertheless asked the prosecutor to limit his analogy and not go into the facts of the book.

Appellant has failed to show an abuse of discretion by the trial court in denying the objections. He has also failed to show any prejudice which would warrant the giving of a new trial. No error was committed and no relief is necessary.

ISSUE X

WHETHER THE COURT BELOW ERRED IN INSTRUCTING THE JURY ON FLIGHT, IN GIVING AN INSTRUCTION REGARDING PROOF OF THE TIME OF COMMISSION OF THE CRIME, AND IN REFUSING TO INSTRUCT ON SECOND DEGREE FELONY MURDER.

A. Flight Instruction

Appellant claims that the trial court should not have given an instruction on flight over the defense's objection, because there was no evidence to support the instruction.

Case law regarding flight instruction holds that a jury can be instructed on flight when the evidence clearly establishes that an accused fled the vicinity of a crime or did anything indicating an attempt to avoid detection or capture. Shively v. State, 474 So.2d 352 (Fla. 5 DCA 1985). Florida courts have continuously held that in appropriate circumstances, an instruction on flight is proper. See Bundy v. State, 471 So.2d 9 (Fla. 1985); Bradley v. State, 468 So.2d 378 (Fla. 1 DCA 1985).

In the instant case, there was sufficient evidence to support the giving of the instruction. Trooper Drawdy testified that on the day he arrested appellant, that he had information that the car had originally been headed north. upon pursuit of Rhodes, Trooper Drawdy spotted Rhodes' car behind a building. By the time Drawdy turned his patrol car around and got back to the point where he had seen Rhodes, Rhodes had pulled out and was then headed south on U.S. 19 (R 1780 - 1797)

Additionally, Detective Kelly testified that the defendant told him he was given $5,000 to take the car and disappear. (R

2012) He also testified that the defendant said he was lying when he said he was going to Jan's, rather than heading up north at the time he was arrested. (R 2020) The defendant also said he was taking the car up north to dump it and then heading to Las Vegas.

Appellant argues that the fact that Rhodes was headed up north before he was stopped by Officer Drawdy does not mean he was attempting to elude detection, but rather that he was in the area of his girlfriend, Jan Pitkins. The evidence does not support this contention, because the Citrus/Hernando County line is north of New Port Richey and therefore, appellant could not have been headed in that direction. Further, Trooper Drawdy's testimony shows that when he originally spotted Rhodes' car, it was hidden behind a building and therefore, the jury could have inferred that Rhodes was attempting to avoid detection. The law does not require that the flight be for the crime charged. See Bundy v. State, supra. And, the fact that he had already turned south before he was stopped adds to the inference that he was fleeing rather than taking away from it, in that he knew the officer was pursuing him. Further, on the tape played for the jury, Rhodes said he was going to 'Vegas' and that he had tried to drive the car out of state. (R 376)

Based on the foregoing facts, the evidence was sufficient to support the giving of the instruction.

B. Instruction Regarding Proof of Time of Commission of Crime.

The indictment returned by the grand jury alleged that the

murder of Karen Nieradka occurred between February 29, 1984, and March 2, 1984. (R 21) Upon the defense's request, a statement of particulars was filed by the state which gave the time of the homicide as "sometime between 12:01 a.m. on February 28, 1984 and 11:59 p.m. on March 2, 1984". (R 194)

Appellant argues that the time frame given in the indictment, not the statement of particulars, should have been given to the jury. Appellant wants to have his cake and eat it too.

The law in this state is that it is not essential that the date of the offense proved at trial be the date stated in the indictment or the information. Sparks v. State, 273 So.2d 74 (Fla. 1973). This is true because of the availability of a motion for statement of particulars and since, under our discovery proceedings, a defendant is no longer in the position of having to prepare a defense just from the four corners of the indictment or information. Sparks, supra. Thus, the state was never in the position to have to prove the offense occurred during the time frame set forth in the indictment. The trial court was correct in not instructing the jury that it was.

Nevertheless, a bill of particulars may narrow the information or indictment as to the time within which acts alleged as constituting the offense may be proved. Smith v. State, 253 So.2d 465 (Fla. 1 DCA 1971). Thus, the statement of particulars in the instant case narrowed the date of the offense from within any time within the statute of limitation to between February 28 and March 2, 1984. This was not an expansion of the indictment

as claimed by the appellant, but rather a narrowing. The trial court properly instructed the jury that they had to find the crime committed within this period of time.

Further, there is a substantial competent evidence that the murder was committed within this period of time. The victim's best friend, Rebecca Barton, testified that she last saw Karen on February 29, that they had spent the evening with some friends, and that Karen had eventually left in the company of Richard Rhodes. (R 1601) Dan Karnath testified that on March 3, 1984, he found the possessions of Karen Nieradka laying beside the Anclote River. (R 1655) Jan Pitkin testified that in late February or early March, Rhodes came to her place with the items which were later identified as Karen Nieradka's. (R 1824) The defendant himself made several statements as to the date of the offense, and these varied between February 28, 1984, from 12:00 midnight to 12:30 a.m., to February 29, 1984, from 12:00 midnight to 12:30 a.m.. (R 1901)

The testimony of Juanita Bruce was suspect and the jury was not required to believe her when the state showed that she had made an earlier statement to the police stating that the last time she saw Karen Nieradka was in late February.

The trial court properly instructed the jury as to the time frame and no error was committed.

C. Second Degree Felony Murder

Appellant argues that an instruction on second degree felony

,murder should have been given, as it was supported by the evidence. Appellant argues that from the evidence presented, the jury could have concluded that Rhodes was aiding and abetting a robbery or sexual battery by Crazy Angel, but that Rhodes was not present at the murder. This claim is based upon one of the statements given by the appellant to Detectives Porter and Kelly in which he stated that he drove Karen and Crazy Angel to the Sunset Hotel and waited outside for their return. Crazy Angel later emerged, and informed Rhodes that he had killed Karen. (R **375 - 376, 1924 - 1925, 1928)** Crazy Angel then threatened Rhodes that if he didn't keep his mouth shut and get rid of Karen's car, that he'd rip Rhodes' throat out like he did Karen's. **(R 376)** Rhodes claimed that he thought Crazy Angel and Karen were going to the hotel to have sex and that he had no idea whatsoever that Crazy Angel was going to kill her. (R **380)** At no point during this story did Rhodes ever mention the fact that Crazy Angel said that he had sexually battered Karen or that he had robbed her.

Additionally, although, this story was given to the detectives on March 26, **1984,** during the second and third interviews conducted that evening, Rhodes recanted this story during the fourth interview, (R **2011)** Rhodes later went on to give several other versions of the events of the evening and finally told the officers that he was telling them all of these stories to push it off on someone else. (R **1951)**

Based upon the foregoing, the trial court was correct in refusing to instruct the jury on second degree felony murder. The

'elements of second degree felony murder are set forth in §782.04(3) Fla. Stat,. The statute provides that when a person is killed in the perpetration of an enumerated felony by a person other than the person engaged in the perpetration of such felony, the person perpetrating such felony is guilty of murder in the second degree.

This court in State v. Lowery, 419 So.2d 621 (Fla. 1982), citing its decision in Adams v. State, 341 So.2d 765 (Fla. 1976), stated:

> "In Florida, as in the majority of jurisdictions, the felony murder rule and the law of principles combine to make a felon generally responsible for the lethal acts of his co-felons. **Only if the felon is an accessory before the fact and not personally present, does liability attach under the second degree murder provision of the applicable statute in the instant case."**

Id. at 623

Accordingly, this court held that although Lowery was not personally present during the commission of the robbery, he was an accessory before the fact. **Section 776,011, Fla, Stat. (1971),** makes an accessory before the fact to the robbery (Lowery) a principle in the first degree or a perpetrator or the robbery. During the perpetration of the robbery, Moss was killed by a person other than Lowery (the person engaged in the perpetration or attempting to perpetrate the robbery). This Court held that under the statute, Lowery could be found guilty of murder in the second degree. Id. at 624.

Rhodes, however, never claimed to be an accessory before the

fact and, in fact, he claimed that he thought Crazy Angel and Karen were going there to have consentual sex. He didn't know until afterwards that a felony had been committed (Karen's murder). Rhodes never claimed that Karen was sexually battered or that Crazy Angel had robbed her. (R 373 - 380, 1924) And, in fact, he denied knowing anything was going to happen. (R 380)

Further, Rhodes recanted that story. (R 1940)

While appellant is correct in his assertion that a defendant is entitled to an instruction on the theory of his defense when it is supported by evidence, the theory that Rhodes was only an aider and abettor that was not present during the commission of a crime, was never presented to the jury. The story concerning Crazy Angel and Karen did not support a finding that Rhodes was an accessory before the fact as he denied any prior knowledge of a felony. Further, as Rhodes recanted this story, he himself denied that this was a theory of defense. An instruction based upon a recanted story would simply have misled the jury and the trial court correctly denied giving such an instruction.

ISSUE XI

WHETHER THE TRIAL COURT BELOW ERRED IN INSTRUCTING THE ALTERNATE JURORS IN THE PRESENCE OF THE JURORS WHO ULTIMATELY FOUND RICHARD RHODES GUILTY OF MURDER, TO REMAIN IN THE COURTROOM IN CASE THEY WERE NEEDED FOR A PENALTY PHASE.

Florida Rule of Criminal Procedure **3.280(b)** states:

> "At the conclusion of the guilt or innocence phase of the trial, each alternate juror will be excused with instructions to remain in the courtroom. The jury will then retire to consider its verdict, and each alternate will be excused with appropriate instructions that he may have to return for an additional hearing should the defendant be convicted of a capital offense."

In the instant case, however, Judge Hansel instructed the alternate jurors in the presence of the jury as follows:

> "The alternates are now excused from deliberations, but you are requested - Mrs. Yoblinski, **Ms.** Arnold - to kindly wait in the courtroom, in the event you are needed for the second phase, which was explained to you during voir dire, if you recall, which is the recommendation to the court as to the penalty, which is the second phase, if the defendant is found guilty of murder in the first degree. Therefore, at this time, Mrs. Yoblinski, **Ms.** Arnold, if you will step down and remain in the courtroom until the call of the court in case you are needed. Okay?"

Appellant contends that, while it may not have been intended, the comment of the court below necessarily influenced the deliberating jurors by conveying that the court felt that a capital conviction was imminent. Appellant contends that thereby Rhodes' conviction was seriously tainted and cannot stand.

In Jones v. State, 332 So.2d 615 (Fla. 1976), this Court

held that where a trial court had erroneously restricted an appellant's right to peremptorily challenge a potentional juror before that juror is sworn in chief, that the error must never-the-less be considered harmless where a careful review of the record shows that the evidence, though circumstantial, was *so* clear and convincing as to leave no reasonable doubt, but that appellant was guilty of the crimes for which the jury convicted him. Where the evidence of guilt is overwhelming even a constitutional error may be rendered harmless. See also, Rivers v. State, 458 So.2d 762, 764 (Fla. 1984); Boatwright v. State, 452 So.2d 666, 668 (Fla. 4 DCA 1984); United States v. Vinadetti, 587 F.2d 728 (11th Cir 1979). Section **924.33 Fla.** Stat, **(1985).**

In United States v. Hasting, 461 U.S. 499, 103 S.Ct. 1974, 76 L.Ed.2d 96 (1983) the Court held that the harmless error rule governs even constitutional violations under some circumstances. The court recognized that, given the myriad of safeguards provided to assure a fair trial, and taking into account the reality of the human fallibility of the participants; there can be no such thing as an error free, perfect trial, and that the Constitution does not guarantee such a trial. Brown v. United States, 411 U.S. 223, 36 L.Ed.2d 208, 93 S.Ct. 1565 (1973), citing Bruton v. United States, 391 U.S. 123, 20 L.Ed.2d 476, 88 S.Ct. 1620 (1968). In Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), the court noted that when courts fashion rules whose violations mandate automatic reversals, they "retreat from their responsibilities, becoming in-

stead 'impregnable citadels of technicality'."

Since Chapman, the court has consistently made clear that it is the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless, including most constitutional violations and this Court has responded accordingly. See Jones, supra; Hitchock v. State, 413 So.2d 741 (Fla. 1982).

The instruction given to the alternate jurors in the instant case, did not presuppose the need for a second phase. The court very clearly said, "in the event you are needed for a second phase" - "if the defendant is found guilty of murder" - "in case you are needed". The court also pointed out that the jury could recall these instructions having been given to them during voir dire explaining the process of a two phase trial. There is nothing in this direction to the jurors that would lead them to believe that a conviction was expected.

A careful review of the record shows that the evidence was so clear and convincing as to leave no reasonable doubt but that appellant was guilty of the crime for which the jury convicted him. As such, the error was harmless and appellant has failed to show any prejudice that resulted thereby.

ISSUE XII

WHETHER THE PENALTY PHASE OF RICHARD RHODES' TRIAL WAS TAINTED BY EVIDENCE HE WAS UNABLE TO CONFRONT, IMPROPER CROSS-EXAMINATION, OF A DEFENSE WITNESS, AND IMPROPER AND INFLAMMATORY ARGUMENT BY THE PROSECUTOR?

(as stated by the appellant)

A. Inadmissible Evidence

During the penalty phase of appellant's trial, the state introduced into evidence a judgment and sentence from the State of Neveda showing appellant's conviction for battery with a deadly weapon and attempted robbery. (R 396, 2595 - 2596) The state's purpose for introducing said evidence was to show that appellant was previously convicted of a felony involving the use or threat of violence to the person pursuant to **§921.141(5)(b), Fla. Stat. (1984).**

The state further introduced the testimony of Capt. Jerry Rolette of the Mineral County Sheriff's Department, State of Nevada. Rolette discussed his investigation concerning the Nevada incident, and identified the taped interview he conducted with the 60 year old victim, Ms. Jema Adduchio. (R 2637 - 2639) The tape was played before the jury, and contained Ms. Adduchio's account of the appellant's attack on her.

Appellant had previously moved in limine to exclude the taped statement and Rolette's testimony (R 1191 - 2636); however, appellant's motion was denied. (R 2632) From this denial, appellant predicates error and contends that because he could not cross-examine the taped statement, his Sixth Amendment right of

confrontation was violated; thus, he should be afforded resentencing. Appellant's contention is unavailing. **Section 921.141(1), Fla. Stat. (1984)** provides that:

> In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements.

(Emphasis added)

In Elledge v. State, 346 So.2d **998** (Fla. 1977), this Court addressed the question of whether it was proper to admit the testimony of a witness concerning her description of the circumstances surrounding a murder for which the defendant had been previously convicted, and whose testimony was introduced during the penalty phase of the capital murder charge for which the defendant was subsequently convicted. On August **24**, 1974, the defendant, Elledge, brutally murdered a woman in Hollywood, Florida. Elledge took and drove the victim's car until he wrecked it on August 25th. He thereafter took a bus from Hollywood to Jacksonville, but not before he had killed a watchman at a Pantry Pride food store in Hollywood which he was robbing in order to obtain funds with which to escape. On August 26th, Elledge, during the course of committing an armed robbery, killed the motel owner (Nelson) in the presence of Nelson's wife. Elledge was initially convicted for the Nelson murder.

Elledge was subsequently convicted for his initial Hollywood murder, and during the penalty phase of that trial, Mrs. Nelson, the widow of the victim of the Jacksonville murder, testified in detail concerning the events surrounding that crime. On appeal, Elledge asserted that it was error to admit Mrs. Nelson's testimony.

This Court stated (citing Provence v. State, **337** So.2d **783** (Fla. 1976)), that the essential element for the aggravating circumstances of **§921.141(5)(b),** Fla. Stat., is the prior conviction of a felony involving the use or threat of violence to the person, and that it was, therefore, proper for the sentencing court to permit Mrs. Neloson to testify concerning the events which resulted in the prior conviction *as* opposed to restricting the evidence to the bare admission of the conviction. The Court so held because,

> we believe the purpose for considering aggravating and mitigating circumstances is to engage in a character analysis of the defendant to ascertain whether the ultimate penalty is called for in his or her particular case. Propensity to commit violent crimes surely must be a valid consideration for the jury and the judge. It is a matter that can contribute to decisions as to sentence which will lead to uniform treatment and help eliminate total arbitrariness and capriciousness in the imposition of the death penalty.

Elledge v. State, **346** So.2d at **1001**

In Delap v. State, **440** So.2d **1242** (Fla. 1983), this Court reaffirmed its earlier holding in Elledge and stated that, "[i]f a defendant was previously convicted of any violent felony, any evidence showing the use or threat of violence to a person during

'the commission of such felony would be relevant in a sentencing proceeding." 440 So.2d at 1255.

Again, in Stano v. State, 473 So2.d 1282, 1289 (Fla. 1985), this Court held that "in a sentencing proceeding, the state may introduce testimony as to circumstances of a prior conviction, rather than the bare fact of that conviction".

Indeed, Elledge, Delap, Stano and §921.141(1), all allow for the admission of such evidence in establishing §921.141(5)(b), provided, however, that the defendant is accorded a fair opportunity to rebut the same. The state agrees with appellant's assertion that the Sixth Amendment right of confrontation applies to the sentencing process. See, Specht v. Patterson, 386 US. 605, 87 S.Ct. 1209, 18 L.Ed.2d 326 (1967), and Engle v. State, 438 So.2d 803 (Fla. 1983). The state also agrees that the taped interview with the prior victim which was played during the sentencing hearing of the instant trial constitutes hearsay. The state, however, disagrees with appellant's claim that because he could not cross-examine the taped statement, his right of confrontation was violated. For the state adamantly contends that the decision of the United States Supreme Court in Williams v. New York, 337 U.S. 241, 69 S.Ct. 1079, 93 L.Ed. 1337 (1949), holding that due process does not require that a defendant be allowed to cross-examine witnesses testifying at his sentencing proceeding, is controlling in the present case.

The Williams court (per Justice Black) stated that,

> [a] sentencing judge, however, is not confined to the narrow issue of guilt. His task within

> fixed statutory or constitutional limits is to determine the type and extent of punishment after the issue of guilt has been determined. Highly relevant - if not essential - to his selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics. And modern concepts individualizing punishment have made it all the more necessary that a sentencing judge not be denied an opportunity to obtain pertinent information by a requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial.

337 U.S. at **247.**

> We must recognize that most of the information now relied on by judges to guide them in the intelligent imposition of sentences would be unavailable if information were restricted to that given in open court by witnesses subject to cross-examination. The type and extent of this information make totally impractical if not impossible open court testimony with cross-examination.

337 U.S. at 250. The Williams court went on to state that,

> The due-process clause should not be treated as a device for freezing the evidential procedure of sentencing in the mold of trial procedure. So to treat the due process clause would hinder if not preclude all courts - state and federal - from making progressive efforts to improve the adminstration of criminal justice.

337 U.S. at 251.

The state's position on this issue is further buttressed by the fact that the record indicates that counsel for appellant was well-appraised of the existence of the taped statement long before its introduction; thus, no violation of Gardner v. Florida, **430 U.S. 349, 97** S.Ct. **1197, 51** L.Edf.2d **393** (1977), is present. Furthermore, the appellant was accorded a full opportunity

to rebut the taped statement by either subpoenaing its declarant, or by taking the stand himself to so rebut. The appellant, however, chose not to do so; therefore, his failure to rebut renders his contention on this point erroneous.

Moreover, when appellant pled guilty to the Nevada offense, he is deemed to have admitted the facts as presented by the prosecutor in that case - including Mrs. Adduchio's account of the attack.

Appellant cites Engle v. State, 438 So.2d 803, 814 (Fla. 1983), to support his proposition on this issue. Engle is distinguishable from the instant case in that a confession of a co-defendant, which implicated Engle, was introduced during Engle's sentencing. This Court vacated Engles' death sentence stating that a defendant cannot require a co-defendant to waive his constitutional right to remain silent and force him to testify during the sentencing procedure. This Court also stated that the problem presented by a confession of a co-defendant is not present in a consideration of a presentence report. If a defendant disputes the latter, he can secure confrontation and cross-examine its preparers or otherwise rebut the same.

The instant case is more analogous to the situation in the PSI report, and should be so treated.

Appellant's contention that the contents of the tape were not as represented by the prosecutor in the motion in limine, thereby prejudicing appellant, is wholly without merit. The record reflects that counsel for appellant was well-appraised of

the contents of the tape before its introduction. (R **2618 - 2619)**

B. Improper Cross-Examination

Appellant's contention that the prosecutor improperly questioned appellant's character witness is wholly without merit.

Janet Foltz, a member of a prison ministry team, testified on behalf of Rhodes and stated that she had seen a change come over him at the Pinellas County Jail. (R **2685)** That he became a person who cared about others, and that he was continually changing and growing spiritually. (R **2685 - 2689)** On cross-examination, the witness was asked whether she knew a Becky Meisner. (R **2690)** The witness responded that she did know Ms. Meisner, that they were friends and that Ms. Meisner is also part of the prison ministry team. (R **2690)**

The prosecutor then asked the witness whether she knew of Ms. Meisner's relationship with appellant. She responded that Ms. Meisner and the appellant had discussed plans for their getting married. (R **2691)**

The state contends that the prosecutor's comment concerning the witness' friend and appellant's possible marriage is both relevant and permissible in that the question goes to impeachment of the credibility of the witness by showing her bias pursuant to **§90.608 (1)**(b)**, Fla. Stat. (1984).**

The prosecutor further asked the witness if she knew whether or not appellant was caught coming back from the courthouse on August **8, 1985,** with shanks (knives) in his shoes. (R **2694)** She

replied that she did not. Appellant contends that this question was improper and highly prejudicial. The state contends otherwise.

Section 90.405 (2), Fla. Stat. (1984), provides:

> When character or trait of character of a person is an essential element of a charge, claim, or defense, proof may be made of specific instances of his conduct.

In Cornelius v. State, **49** So.2d 332 (Fla. 1950), this Court held that a witness who testifies to the general reputation or character of a defendant may be cross-examined as to whether he had heard of specific acts of violence,

> " . . . because the true purpose of such cross-examination is to enlighten the jury as to whether the witness actually - as a matter of fact - knows the general reputation of the defendant and to place the jury in a better position to pose upon the credibility of the witness' testimony ."

49 So.2d at 335

Appellant cites Robinson v. State, **487** So.2d **1040** (Fla. 1986), to support his proposition on this issue. Robinson, however, is not applicable to the instant case. The Robinson court held that it was improper for the prosecution to bring out two crimes for which the defendant was not charged on cross-examination of defendant's character witness. The Court so held because the state was attempting to show evidence of other violent felonies in order to prove the statutory aggravating circumstances of **§921.141(5)** (b), **Fla. Stat. (1983).** This Court relied on its earlier holding in Dougan v. State, **470** So.2d **697** (Fla. 1985), to so rule in Robinson. Neither Dougan nor Robinson are remotely based

on impeachment of a character witness by knowledge of specific acts of the defendant pursuant to **§90.405(2), Fla, Stat.** In that impeachment of a character witness by her knowledge of specific acts is the issue presented; this Court's ruling in Cornelius is controlling.

C. Prosecutor's Improper, Inflammatory Argument

Appellant contends that the prosecutor made five improper and inflammatory comments during closing argument of the penalty phase, that such comments were prejudicial to appellant; thus, requiring a new penalty phase trial. The state disagrees and will address each comment in the order given in appellant's brief.

As to the prosecutor's first comment, the state would contend that appellant has not and is unable to demonstrate actual prejudice resulting therefrom. Should this Court find the comment improper, however, this Court has held "that prosecutorial error alone does not warrant automatic reversal. [Such] misconduct must be egregious indeed to warrant our vacating the sentence and remanding for a new penalty phase trial." State v. Murray, 443 So.2d 955 (Fla. 1984). Therefore, appellant's inability to show the egregious nature of said comment renders such alleged error harmless.

As to the second statement, the state contends that it is a fair comment on the evidence adduced at trial. See, Breedlove v. State, 413 So.2d 1 (Fla. 1982). Furthermore, this comment directly related to the aggravating circumstances of the crime

being especially heinous, atrocious, or cruel; and cold, calculated and premeditated pursuant to **§921.141(5)(h) & (i), Fla. Stat. (1984).**

As to the third statement, the state contends that it is a fair comment on the evidence adduced at trial. Breedlove. And said comment directly related to the statutory aggravating circumstance of **§921.141(5)(b), Fla. Stat, (1984).**

As to the fourth comment, the state contends that the prosecutor's statement was not improper; however, should this court find it *so,* the impropriety should be ruled harmless under State v. Murray, supra.

As to the fifth comment, the state contends that it is a fair comment on the evidence adduced at trial in that it was based on the admission of a party-opponent. Furthermore, the comment related to the statutory aggravating factor of **§921.141(5)(i), Fla. Stat. (1984).**

As to appellant's Issue XII, the state would lastly contend that any error lying herein is most susceptible to application of the harmless error rule pursuant to the United States Supreme Court's holding in United States v. Hasting, **461** U.S. **499, 103** S.Ct. **1974, 76** L.Ed.2d **96 (1983).**

The Supreme Court in Hasting, reversed the Seventh Circuit's ruling which had previously held that a prosecutor's comments concerning defense evidence impermissibly compromised the defendant's Fifth Amendment rights. In *so* reversing, the Supreme Court stated,

> "Since Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), [this] Court has consistently made clear that it is the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless, including most constitutional violations. The goal . . . is to conserve judicial resources by enabling appellate courts to cleanse the judicial process of prejudicial error without becoming mired in harmless error.
>
> 461 U.S. at 509

The state would, in conclusion, assert that any error found in the playing of tape, the cross-examination of appellant's character witness, and the prosecutorial comments should all be held harmless. For when this Court reviews the record as a whole and considers the magnitude of the crime committed, the clear evidence of guilt, and the inconsistency of the scanty evidence tendered by appellant, this Court must affirm the instant sentence of death.

ISSUE XIII

WHETHER THE COURT BELOW ERRED IN ANSWERING THE QUESTION FROM THE JURY WITHOUT NOTIFYING COUNSEL FOR THE STATE OR COUNSEL FOR THE DEFENSE, AND WITHOUT CONDUCTING THE JURY INTO THE COURTROOM?

During the jury's deliberations in the penalty phase of Richard Rhodes' trial, Judge Hansel, in response to the jury's question, informed the jury, through the Baliff, that it was a possibility that they would be polled. (R **2735 - 2754, 2756)** Appellant objected and moved for a mistrial, which was denied. (R **2757)**

Appellant now contends that the procedure followed by the court below was improper, that the **Florida Rules** of **Criminal Procedure, §3.410,** mandates anytime the jury requests additional instructions, they must be conducted into the courtroom and the instructions given only after notice to the prosecuting attorney and to counsel for the defendant. Appellant contends that the question in the instant case falls within the express notice requirements of **Rule 3.410,** and therefore reversal is mandated.

In Williams v. State, **488** So.2d **62** (Fla. **1986),** this Court held that the trial court's denial of the jury request for a copy of the jury instructions without giving notice to counsel is per se reversible. This holding was based upon this Court's decision that a jury request for copies of instructions was a request for additional instructions within the express notice requirements of **Florida Rule** of **Criminal Procedure 3.410.** Nevertheless, this Court went on to hold that communications outside the express

notice requirements of **Rule 3.410** should be analyzed using the harmless error principles. Accord, Hitchcock v. State, **413** So.2d **741** (Fla. **1981).**

The jury's question in the instant case was not a request for additional instructions within the perview of **Rule 3,410,** It was merely a question regarding procedure, and the trial court responded correctly.

Appellant also contends that, even if the occurrence below would be considered the type of communication that is outside the express notice requirements of **Rule 3.410,** the error here cannot be considered harmless. Appellant contends that prejudice resulted because the jurors may have feared they would again be required to announce their individual verdicts in open court and tell the world how they voted on the penalty recommendation. Appellant contends that as the jury recommended death by a vote of seven to five, the swaying of a single vote by the possibility of being polled, may have meant the difference of life and death for Richard Rhodes. Appellant suggests that had appellant been consulted, they could have recommended a course of action that would have avoided such a prejudicial situation. This claim of prejudice lacks merit.

The constitution does not require a new trial every time a juror has been placed in a potentially compromising situation . . . because it is virtually impossible to shield jurors from every contact or influence that might theoretically effect their vote. Smith v. Phillips, **455** U.S. **209, 217, 71** L.Ed.2d **78, 102**

S.Ct. 940 (1982). There is scarcely a lengthy trial in which one or more jurors does not have the occasion to speak to the trial judge about something, whether it relates to a matter of personal comfort or to some aspect of the trial. Rushen v. Spain, 464 U.S. 114, 78 L.Ed.2d 267, 104 S.Ct. 453 (1983). Not every contact with jurors constitutes a deprivation of constitutional rights. United States v. Gagnon v. 470 U.S. 84 L.Ed.2d 486, 106 S.Ct. __ (1985).

The question in the instant case was a question only regarding procedure. The trial court answered correctly. Despite appellant's contentions that if he had been consulted, he could have recommended a course of action that could have avoided such a prejudicial situation, appellant fails to suggest what that recommended course of action could have been. Further, it is more reasonable to assume that the jurors would have feared recommending the death penalty and having to stand up and announce that, than recommending a life sentence. The constitution does not guarantee appellant a perfect trial, only a fair trial. A review of the record in the instant case shows that appellant received a fair trial and was guilty beyond a reasonable doubt. No prejudice resulted, and a new sentencing phase is not warranted.

ISSUE XIV

WHETHER THE FINDINGS OF THE COURT BELOW IN AGGRAVATION AND MITIGATION ARE SUFFICIENT TO SUPPORT IMPOSITION OF THE DEATH PENALTY UPON RICHARD RHODES.

Appellant's argument herein appears to be two-fold: (1) that the findings of the trial court are not specific enough to meet the requirements of **§921.141(3) Fla. Stat. (1985)** and, **(2)** that since the trial court's written order was not filed until eleven months after the notice of appeal was filed and more than six months after the record on appeal was transmitted to this court, the circuit court had lost all jurisdiction over the cause.

As to the first claim, **§921.141(3)** provides:

> "**(3)** FINDING IN SUPPORT OF SENTENCE OF DEATH- Notwithstanding the recommendation of the majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death it shall set forth in writing its findings upon which the sentence of death is based as to the facts:
>
> (a) that sufficient aggravating circumstances exist as enumerated in subsection (5), and
>
> (b) that there are insufficient mitigating circumstances to outweigh the aggravating circumstances.
>
> And each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings."

In the instant case, the trial judge made oral findings of fact at the sentencing hearing of September 12, 1985, which were

transcribed in the record. (R **2959 - 2960)** These findings were also set forth in a written order dated the same day, September **12, 1985. (R 2986)** This order was filed on September **24, 1986.** (R **2985 - 2986)**

This Court has repeatedly held that oral pronouncements of findings of fact are sufficient to meet the requirements of §921.141 which requires written findings of fact once the oral pronouncement is transcribed. Thompson v. State, **328** So.2d 1 (Fla. **1976);** Cave v. State, **445** So.2d 341 (Fla. **1984).** Both the oral and the written findings in the instant case were sufficient to support a finding of death.

This court in Holmes v. State, **374** So.2d **944** (Fla. **1979)** reviewed a similar case, and found that the sentence imposed was the result of a reasoned judgment. In Holmes, the trial court's order stated:

> "As to aggravating circumstances the court finds: subsection (e), that the capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody. Subsection (g), the capital felony was committed to disrupt the enforcement of laws. Subsection (h) the capital felony was especially heinous and atrocious."
>
> "As to mitigating circumstances the court finds: Subsection (a) that the defendant has no significant history of prior criminal activity, but that none of the other mitigating circumstances listed in the statute were present."

This Court reviewed that order imposing a sentence of death and held:

> "Defendant also says that the findings of fact entered by the trial judge were inadequate.

> **There is no prescribed form for the order containing the findings of mitigating and aggravating circumstances,** The primary purpose for requiring these findings to be in writing is to provide an opportunity for meaningful review by this court *so* that it may be determined that the trial judge reviewed the issue of life or death within the framework provided by the statute. It must appear that the sentence imposed was the result of reasoned judgment. The finding meets these criteria."

(Id. at **950)**

Accordingly, the findings in the instant case were sufficient and specific enough to provide meaningful review.

Appellant's second argument is based on this Court's recent opinion in Van Royal v. State, 11 F.L.W. **490** (Fla. September **18, 1986).** In Van Royal, the judge did not set forth in writing or orally for the record, the reasons for imposing the death penalty as required by **§921.141(3), Fla, Stat, (1981).** The record on appeal in Van Royal was filed on March **7, 1985,** but it was not until April 15, **1985,** that the trial court entered its written findings as to aggravating and mitigating factors in support of the death penalty. This Court noted that more than a month had elapsed between the time the jury in Van Royal recommended life sentences and the time the judge overrode the jury recommendation of life by orally sentencing appellant to death. This Court then went on to distinguish the case from Cave v. State, **445** So.2d **341** (Fla. **1984);** Ferguson v. State, **417 So.2d 639** (Fla. **1982);** and Thompson v. State, **328** So.2d 1 (Fla. **1976),** because unlike Cave, Ferguson, and Thompson, the judge did not recite the findings upon which the death sentences were based into the record.

Roreover, the findings in Van Royal were not made for an additional six months until after the record on appeal had been certified to this Court.

This Court found three significant factors mandating reversal of the death sentence in Van Royal: The surrender of jurisdiction; the non-compliance to the statute coupled with override; and, the inadequacy of the record. Additionally, Justice Ehrlich noted that the filing of written answers immediately after a defense motion attacking this dereliction in duties makes it clear that trial judge's delay in Van Royal was not the function of the weighing process or "reasoned judgment". None of these factors exist in the instant case. Instead, we have an oral pronouncement of the findings of fact in support of the death penalty, compliance with the statute before jurisdiction was relinquished, and a complete record on appeal which reflects the careful weighing and reasons for judgment. The sentence should not be vacated.

And, in fact, this Court has held in both Cave and Ferguson that vacation is not mandated. In Cave, the appellant was found guilty of first degree murder and sentenced to death by the trial court. He thereupon filed the timely notice of appeal which was pending before this Court. Appellant then moved to dismiss for lack of jurisdiction and, further, that the death sentence be vacated, that the cause be remanded for the imposition of a sentence of life imprisonment, and that the matter be directed to the Fourth District Court of Appeal for further appellate

review. As grounds therefore, the appellant cited §921.141(3), Fla, Stat. This Court noted that the State of Florida agreed that no separate written findings of fact were contained in the record on appeal, but instead, moved this court to temporarily relinquish jurisdiction to the trial court so that the written findings required under §921.141(3), Fla. Stat. (1981) could be prepared by the trial court and the record on appeal supplemented with these written findings. This Court in Cave stressed that the trial judge did dictate his written findings in support of the death sentence into the record at the time of the sentencing.

> "We have previously held that '[s]uch dictation, when transcribed, becomes a finding of fact in writing and provides the opportunity for meaningful review, as required by §921.141, Fla. Stat.'"

This Court denied the appellant's motion to dismiss and relinquished jurisdiction to the trial court to provide written findings of fact to be entered as supplement to the record on appeal. Even more on point is Ferguson v. State, supra, where this Court held that a similar challenge was moot as the written findings of fact had been provided in a supplemental record. Id. at 641.

In the instant case, Judge Hansel provided on the record oral pronouncements of finding of fact and the same day provided a written order setting forth these factors. That this order was not filed until a year later has no bearing on the fact that this record supports the imposition of death, and this case was based

on a well reasoned decision. This Court's concern in Van Royal was that the record did not support a contemporaneous, well reasoned basis for imposing the death sentence. Judge Hansel's providing of the reasons on the record at the time of sentencing and writing the order the same day, clearly shows that these reasons were hers at the time of sentencing, and that they provided a well reasoned basis for imposing the death sentence. Further, unlike Van Royal, and Ferguson, the trial court's imposition of the death penalty was based on the jury's recommendation and was not a jury override. To vacate the death penalty on these facts would ignore the great weight that a jury's recommendation should be given.

Accordingly, the death sentence was properly applied and vacation of the sentence was not warranted.

ISSUE XV

WHETHER THE TRIAL COURT INCLUDED IMPROPER AGGRAVATING CIRCUMSTANCES AND EXCLUDED PROPER MITIGATING CIRCUMSTANCES IN SENTENCING RICHARD RHODES TO DEATH RENDERING THE INSTANT DEATH SENTENCE UNCONSTITUTIONAL UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION?

As to this issue, Appellant predicates error on four points and contends that the trial court included improper aggravating circumstances, while excluding allegedly mitigating circumstances during the sentencing phase of appellant's trial. The State disagrees, however, and would contend that the trial court properly applied §921.141, Fla. Stat. (1984), in sentencing Richard Rhodes to death.

A. There Was Sufficient Evidence To Support The Trial Court's Finding That The Murder Of Karen Nieradka Was Committed While Appellant Was Engaged In The Commission Of a Robbery Or Sexual Battery.

The State contends that there was substantial evidence adduced at trial to support the lower court's finding that the appellant was engaged in a robbery when he murdered Karen Nieradka.

Edward Cottrell was called as a witness for the State. Cottrell and the appellant were both incarcerated in the Pinellas County jail. They got to know each other, and that is when appellant began to speak to him about the instant case. Rhodes told Cottrell that after he had killed the victim, he took "[her]

ring, a watch, and her clothes, and her purse, and some things and he hid her body in some rubbish that was in the motel." (R.2033) Rhodes further stated that "he took her money out of her purse" (R.2035), and "threw her clothes and her purse off into a river between Hudson and New Port Richey." (R.2034) Rhodes also stated that "he sold her watch and her eight-track tapes to a guy in a bar next to a tattoo parlor in Hudson." (R.2034)

Barbara Tannis testified that she was Karen Nieradka's best friend for about a year and that she was very familiar with the victim's personal property. (R.1981) She further testified that the victim invariably wore several rings on her fingers. (R.1982)

During appellant's taped statement, he told the detectives that on the night she died, Karen had on rings and a necklace and that she was carrying a purse. (R 379) Dr. Joan Wood, the chief medical examiner for Pinellas and Pasco Counties, testified that the only jewelry found on the body was a necklace, there were no rings. (R.1700)

Dan Karnath discovered the victim's belongings on the shore of the Anclote River near the Anclote Bridge. He found articles of clothing, a purse, and several suitcases. (R.1656)

Robbery in the case sub judice is also evinced by the fact that on March 2nd, 1984, the appellant was stopped by Trooper Drawdy of the Florida Highway Patrol. Appellant was driving the murder victim's car. Appellant could not produce a driver's license (R.1781), but produced a note allegedly written by his "girlfriend" which stated:

> This letter is to show that Mr. Rhodes can use my car while I'm away because of the fact that I have no idea how long I will be away. Let it be known that the use of my car to Mr. Rhodes has no time limit or date limit. On the date when this letter was signed, if anything should happen to me while I'm away, please turn ownership over to Richard Rhodes.

James Outlan, a handwriting expert with the Florida Department of Law Enforcement, testified that it was his opinion that the appellant wrote the aforementioned note. (R.2106) That the victim did not sign said note. (R.2108) And that someone attempted to simulate the signature of the victim. (R.2109)

After appellant was placed under arrest by Trooper Drawdy for driving without a license, the latter searched appellant and found a dog tag in appellant's left front trowser pocket. (R.1789) Evidence was adduced at trial that the dog tag belonged to Richard Nieradka, the victim's estranged husband. (R.2394)

Barbara Tannis identified the victim's key ring. The key ring contained a key to the victim's mother's house and a key to the victim's storage box in Clearwater. (R.1982) This key ring was in the possession of appellant when he was arrested by Trooper Drawdy. If the victim had given appellant her car, why would she give him the keys to her mother's house?

In McCloud v. State, 335 So.2d 257, 258 (1976), this Court held that to prove the crime of robbery (as opposed to larceny), there must be "[in] addition to a mere taking, a contemporaneous or precedent force, violence, or an inducement of fear for one's physical safety. Any degree of force suffices to convert larceny

'into robbery." The State would contend that a contemporaneous or precedent force was exerted against the present victim in order to rob the same, and that force was murder.

The State has shown that there were numerous articles of the victim in appellant's possession. And when "possession is fairly recent, exclusive and unexplained or unsatisfactorily explained, such circumstances raise the presumption that the one charged was the thief." Cone v. State, 69 So.2d 175 (Fla. 1954).

Regarding the sexual battery, the State contends that there is substantial evidence upon which the trial court could base its finding that the murder of Karen Nieradka was committed during or after the commission of sexual battery by the appellant.

Walter Kelly, Jr., an official with the Pinellas County Sheriff's Department, was assigned to assist Detective Porter in interrogating appellant. During one of their interview sessions, appellant stated that his friend Kermit told him that he (Kermit) had killed the victim. Appellant went on to say,

> Kermit stated Karen didn't want to put out. He tried to hold her down and choked her in the process. By "put out," means give out sexual favors.
> Kermit advised Richard (appellant) that he had taken her to the third floor and after she said that she was cold he got some rugs and they covered her up. Kermit pulled her pants off and she began to fight. In trying to hold her down, he grabbed her by her throat and she began to bleed from her mouth.
>
> (R.2019)

Note that appellant changed his story many times, and that his stories often contained fictitious persons. Indeed, defense

counsel stipulated that Kermit Villeneuve had never been in the State of Florida, at least during the time of the murder. (R.2137) The state is, therefore, including appellant's aforementioned statement to show what probably happened on the night of the murder.

Edward Cottrell (Appellant's cellmate), testified that appellant said,

> He [Rhodesl tried to get into her pants, so to speak, make love to her, whatever, and she resisted and evidently it happened twice. So the second time, to what I gather, she hit him or something like that and he hit her back and choked her and hit her in the head, in the neck, with a board.
>
> **(R.2033)**

Appellant told a similar story to Michael Guy Allen. (R 2080 - 2081)

Dr. Joan Wood, chief medical examiner for Pasco/Pinellas Counties, examined the body at the time of its discovery and testified that the only clothing present on the body was a brassiere. The brassiere was in a circle around each shoulder. **(R.1694, 1695)** This finding is consistent with the State's contention that a sexual battery had, in fact, occurred. Since the body was already in an advanced state of decomposition, Dr. Wood was unable to scientifically prove sexual battery.

In light of the appellant's statements to Officer Kelly, appellant's statements to Edward Cottrell and the findings of Dr. Wood, the State contends there is adequate evidence upon which the trial court could find that Karen Nieradka was killed during the commission of a sexual battery. And it is a well-established

'appellate rule that all evidence and matters appearing in the record must be considered which support the trial court's finding that the murder of the victim was committed while appellant was engaged in the commission of a robbery and a sexual battery. See, Echols v. State, **484** So.2d **568, 576** (Fla. **1985).**

B. The Court Properly Found The Murder Of Karen Nieradka To Be Especially Heinous, Atrocious Or Cruel.

Appellant contends that since no one (other than the appellant) really knows the circumstances surrounding the victim's death, the trial judge had no factual basis to find the murder to be especially heinous, atrocious or cruel; thus, rendering the instant sentence erroneous. The State disagrees.

Dr. Joan Wood, the chief medical examiner for Pasco/Pinellas Counties, testified that in her expert opinion, the victim died by means of manual strangulation. **(R.1701)** Dr. Wood based her opinion on the fact that the Hyoid bone in the neck had been fractured. Appellant claims that the Hyoid bone could have been fractured by some method other than manual strangulation. However, Dr. Wood testified that in her experience, there have only been two instances, where the Hyoid bone had been broken by means other than manual strangulation. In both of those cases, the fracture was attributed to a "direct karate blow right under the chin, deliberately aimed at that area." **(R.1706)** In those cases, there was evidence of blows to the head area which "consisted of fractured bones and bleeding on the surface of the brain."

(R.1706) The instant corpse showed no evidence of other fractures around the Hyoid region, nor was there evidence of bleeding on the brain or rupture of any internal organs. (R.1704) Dr. Wood further stated that "people in car accidents, people crushed in buildings that fall, or people who parachute to their deaths" do not exhibit fractured Hyoid bones. (R.1706)

Dr. Maples, Curator of Anthropology at the Florida State Museum, testified that the instant broken Hyoid bone is consistent with manual strangulation. (R.1752) And, that "it (the broken Hyoid bone) occasionally is seen in a hanging death, but that's relatively rare." (R.1752) "It's occasionally seen in an expert karate chop, but other than that, its rarely fractured in any event." (R.1752) Contrary to what appellant claims in his brief, Dr. Maples stated that it is highly unlikely that a fracture to the Hyoid bone could occur post-mortem. (R.1757)

There is further evidence to indicate that the victim was strangled by appellant. Janette Pitkin dated appellant on occasion. She testified that on one evening in late February or early March, the appellant came up to Hudson to visit her. While they were watching T.V., appellant placed his thumb on Ms. Pitkin's throat and said something like, "Do you know how easy it would be to kill somebody by pushing right there?" (R.1828)

Harvey Duranso, a Citrus County cellmate of the appellant, testified that,

> He (appellant) had stated that they were the police; were trying to pin a murder rap on him; and that it was some girl -- he mentioned her name, and it was the same girl that had

> been mentioned on the newscast. And he had mentioned her name at the time and he said that "Between me and you," he said, "the only people that know what occurred is me," pointed to his mouth, and he said, "and I'm not going to tell." And he said the other person is the girl and he went like this with his hands like he was strangling somebody (indicating).
>
> (R.1840)

During his stay at the Pinellas County jail, appellant told another inmate, Edward Cottrell, that when the victim rebuffed appellant's attempts "to get into her pants", "he hit her and choked her." **(R.2033)**

Appellant also met Michael Guy Allen at the Pinellas County jail. "[They] got along better than anybody in the cell." **(R.2079)** During one of their conversations, Allen asked appellant, "What did you do? Did you shoot her or something?" **(R.2080)** Appellant replied, "No, I didn't shoot her. . . I tried to break her fucking neck." **(R.2080, 2081)**

While Detectives Porter and Kelly were interviewing appellant, he stated that he witnessed Kermit trying to hold the victim, and "he grabbed her by her throat and she began to bleed from her mouth." **(R.2019)** Again, note that appellant used several fictitious absent persons in his many conflicting stories to police, and that the State introduces this comment to show how the victim probably came to her early demise.

This Court has repeatedly held that murder by strangulation is especially heinous, atrocious and cruel. See, Alvord v. State, **322** So.2d **533, 540** (Fla. **1975**); Johnson v. State, **465** so.2d **499, 507** (Fla. **1985**); Byrd v. State, **481** So.2d **468, 474**

(Fla. **1986).** Appellant's contention that the victim may have been unconscious during the strangulation is contradicted by the testimony of Michael Malone. Mr. Malone is a special agent with the FBI. He is an expert in hair and fiber analysis, and the defense stipulated him as such. **(R.1864)** Malone testified that the victim had tufts of hair in both of her hands. And that the hair in both her hands were her own. (R.1873) He further stated that "in the death throes, the moment before death, people have a tendency to grab their own hair." **(R.1876, 1877)** The State would submit that this pulling out of one's own hair demonstrates the agony the victim suffered, and the cruel and heinous nature of her death. Therefore, this Court must agree with the trial court in its finding that the murder of Karen Nieradka was heinous, atrocious, and cruel.

C. The Trial Court Did Not Err In Finding That Richard Rhodes Murdered Karen Nieradka In a Cold, Calculated and Premeditated Manner, Without Any Pretense of Moral or Legal Justification.

Appellant contends that there was insufficient evidence to support the trial court's finding that the murder was committed in a cold, calculated, and premeditated manner. The State contends otherwise.

The findings of the trial judge on aggravating and mitigating circumstances are factual findings which should not be disturbed unless there is a lack of competent evidence to support such finding. Sireci v. State, **399** So. d **964** (Fla. **1981)** and

'Lucas v. State, 376 So.2d 1149 (Fla. 1979). The aggravating factor of cold, calculated and premeditated, Section 921.141(5)(i), Florida Statutes, relates to the intent and state of mind of the killer at the time the murder is committed. Combs v. State, 403 So.2d 418 (Fla. 1981).

In the case sub judice, appellant took the victim to an old motel slated for demolition. Appellant stripped the victim of her clothing, raped or attempted to rape her, then strangled the victim to death. He wrapped her body in a roll of carpet. This last act was obviously intended to prevent the discovery of the corpse. Premeditation may be inferred from the circumstances surrounding the homicide. Hill v. State, 133 So.2d 68 (Fla. 1961)

The circumstances of the victim's death, coupled with the fact that death by strangulation would take between "three to five minutes" (R.1709), support the conclusion that the appellant acted to effect the death of Karen Nieradka in a very deliberate, cold and calculated manner. Indeed, the State adamantly contends that murder by strangulation does, per se, support a finding that death was effected in a cold, calculated and premeditated manner.[1] For when a murderer chokes the life out of his victim with his bare hands, and that act takes between three to five minutes to complete, such an act defines the word "cold" and

[1] Just as this Court has held that the act of striking with a deadly weapon is sufficient to warrant a jury in finding premeditation. See, Rhodes v. State, 104 Fla. 420, 140 So. 309, 310 (1932) and Buford v. State, 403 So.2d 943 (1981).

vitiates any claim of heated spontaneity without a cooling off period as opposed to murder by a single gunshot wound.

Dr. Afield testified as a defense witness. He is an expert in psychiatry, and examined the appellant. He testified that "[he] thought Mr. Rhodes was indeed sane. [He] did not find him to show any degree of not knowing right from wrong." (R.2650, 2651). Dr. Afield's testimony supports the conclusion that appellant's acts were done with a heightened degree of premeditation or deliberation, and that they were done without any pretense of moral or legal justification. Therefore, it cannot be said that the trial court erred in finding this aggravating circumstance supported by the evidence.

D. The Trial Court Properly Considered Evidence Presented In Mitigation.

Appellant's real complaint, as to this point, is that the trial court did not give the same weight to the proffered evidence in mitigation that appellant would desire. This argument is unavailing. See, Smith v. State, 407 So.2d 894 (Fla. 1981); Michael v. State, 437 So.2d 138 (Fla. 1983); Lusk v. State, 446 So.2d 1038 (Fla. 1984); White v. State, 446 So.2d 1031 (Fla.1984); Lucas v. State, 376 So.2d 1149 (Fla. 1979); and Hargrave v. State, 366 So.2d 1 (Fla. 1978).

Relevant to the instant contention is this Court's decision in Lucas v. State, supra. In Lucas, this court refused to interfere with the trial court's decision regarding mitigating circumstances, noting:

> Appellant next argues that the evidence supports the existence of at least two mitigating circumstances which the trial court failed to take into consideration. During the sentencing hearing, defense counsel produced a psychiatrist who testified that appellant knew right from wrong, but suffered from a sociopathic personality resulting in defective judgment. Other witnesses testified to appellant's abnormal appearance and behavior on the evening of the shooting. Appellant contends that this testimony proves that he was under extreme mental or emotional disturbance at the time of the commission of the offense (section 921.141(6)(b)) and could not appreciate the criminality of his conduct. (Section 921.141(6)(f)). In response, the state argues that it lies within the province of the trier of fact to weigh the evidence presented. We agree. The jury and the judge heard the testimony, and apparently concluded that the testimony should be given little or no weight in their decisions. We find nothing in the record which compels a different result.
>
> 376 So.2d at 1153-54.

In Hargrave v. State, 366 So.2d 1 (Fla. 1978), **cert. denied,** 444 U.S. 919, 100 S.Ct. 239, 62 L.Ed.2d 176 (1979), this Court considered a similar question and held:

> Returning to appellant's argument that the trial judge erred in failing to find the mitigating circumstances delineated above, we respond that the jury and the judge could have resolved the evidence in favor of appellant's position, but neither was compelled to do so. We are not here dealing with a case where either the jury or the court considered or failed to consider matters it should have considered. Appellant simply disagrees with the force and effect given to the testimony of a psychologist and a psychiatrist at the sentencing hearing. . . [T]he trial judge did not ignore or fail to consider the psychological evidence bearing on mitigation. Obviously, he and the jury were not persuaded that it pro-

> vided a sound basis for establishment of the statutory mitigating circumstances.
>
> Id. at 5-6.

Appellant states in his brief that Dr. Afield concluded that on or about February 29, 1984, Rhodes was under the influence of extreme mental or emotional disturbance, and his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. Appellant deletes the fact that Dr. Afield testified that "[Appellant] does know right from wrong and he did *so* at the time of the alleged offense. He does so today." (R.2654)

The trial court, in its written findings, did consider "evidence of a long-term personality disorder," but the trial court also found that the appellant "showed that he had the capacity to appreciate the criminality of his conduct and in addition the capacity to cover his tracks and to try to outwit and confuse those investigating the crime." (R.2986)

The trial court did consider and found non-persuasive that which was submitted by appellant; since no palpable abuse of discretion has been established, affirmance is required.

CONCLUSION

Based on the foregoing facts, arguments and authorities, appellee would ask that this Honorable Court affirm the judgment and sentence of the trial court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Robert F. Moeller, Assistant Public Defender, P. O. Box 1640, Bartow, Florida 33830-3798, this 22nd day of December, 1986.

OF COUNSEL FOR APPELLEE.
OF COUNSEL FOR APPELLEE.