IN THE SUPREME COURT OF THE STATE OF FLORIDA

ERIC BRIAN HOLSWORTH,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 67,973

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellee was the prosecution and Appellant the defendant in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida, The Honorable Robert W. Tyson Jr., Presiding.

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

The following symbols will be used:

"R" Record on Appeal

"AB" Initial Brief of Appellant

All emphasis has been added by Appellee unless otherwise indicated.

STATEMENT OF THE CASE

On October 12, 1984, the Grand Jury of the Seventeenth Judicial Circuit of Florida, in and for Broward County, Florida, issued and filed a three count Indictment charging Appellant with first degree murder (Count I); Attempted first degree murder (Count II); and burglary with the intent to commit a battery (Count III); (R-2411,2412). The Indictment specifically charged that on June 9, 1984, Appellant murdered Alice Dzikowski, and on that same date attempted to murder Gloria Salerno, after entering, by burglary, the mobile home occupied by the two women (R-2411,2412). Pursuant to these charges, Appellant was arrested on September 26, 1984,(R-44). The Indictment shows that Appellant responded to these charges on October 18, 1984, by entering a plea of not guilty, in open court (See reverse side of R-2412).

Continuance was granted to the defense, and a waiver of speedy trial was entered (R-34,37), and trial was set for April 16, 1985 (R-38). On July 9, 1985, the defense again moved for a continuance (R-44); and said motion was denied (R-57). Subsequently, various pre-trial and discovery motions were heard (R-57-450). On July 10, 1985, the jury selection process began (R-409,410,450-454). Following the jury selection process, trial began on July 17, 1985 (R-915,923,927). Trial was concluded on August 1, 1985 (R-1910); and the jury returned a verdict of guilty as charged on all counts (R-2085,2086). The sentencing/penalty phase of the trial commenced on August 2, 1985 (R-2093), and following those proceedings, the jury returned an advisory sentence recommendation of life imprisonment as to Count I, with no possibility of parole for 25 years (R-2321). Appellant came before the trial court for sentencing on November 1, 1985 (R-2327). The trial court declared Appellant an habitual offender, and sentenced Appellant to two consecutive life terms on Counts II and III (R-2358-2368). As to Count I, first degree murder, the trial court elected not to follow the jury's advisory sentence, and imposed a sentence of death (R-2368,2389,2404-2406).

The trial court recorded the following findings (R-2728-2738); in support of it's decision to impose the death penalty:

> 1. As a statutory aggravating circumstance, it was established that Appellant had twice previsouly been convicted of other felonies involving the use or threat of violence (R-2390-2393).

2. As a statutory aggravating factor, it was estalished that the instant murder was committed by Appellant in the course of an armed burglary (R-2394-2395).
3. It was established, as a statutory aggravating circumstance, that the murder at issue was especially henious, atrocious or cruel (R-2396-2397).
4. The trial court found these aggravating factors had been proven beyond and to the exclusion of every reasonable doubt (R-2398).
5. After a consideration of the various statutory and non statutory mitigating factors urged by Appellant, the trial court found that none had been established (R-2398-2404).
6. The trial court found that in number and substance, aggravating factors were compelling (no mitigating factors were found); and stated that the advisory sentence had been given "great weight and consideration" (R-2404-2405).
7. The court announced that the imposition of the ultimate penalty was based upon a factual/evidentiary body which had been proven beyond and to the exclusion of every reasonable doubt (R-2405).
8. The court reached it's sentencing decision on due deliberation, and not as an arbitrary or capricious conclusion (R-2405).
9. The court found that no reasonable person could differ with a sentence of death in this case (R-2405).

Appellant's Motion for New Trial came to be heard on November 6, 1985; and said motion was denied (R-2407-2409). Appellant filed Notice of Appeal on November 22, 1985 (R-2750); and this appeal follows.

STATEMENT OF THE FACTS

Appellant's Statement of the Case and Facts contains certain factual narratives which are not supported by references to any specific portion of the instant record, (AB-1,5,9); or

which refer to portions of the record which do not contain the factual items purported to be reflected there (AB-1-3,6,10,11, 13,15);(R-427,1579,2705). For example, the Miami Herald article referred to is not a part of the instant record. The only article on record is dated July 20, 1985 (R-2585,2679), ten days after the ore tenus motion for change of venue. The " 9 to 3" jury vote regarding the advisory sentence, purportedly to be found at page 2705 of the record is, an argument from a defense memorandum.

Therefore, Appellee does not accept Appellant's Statement of the case and facts, and offers the following as a statement of facts so far as can be determined from the evidence, and matters of record below.

At some time very near midnight, on the morning of June 9, 1984, Appellant (R-1593,1595), Appellant entered the mobile home of Alice Dzikowski and her mother Gloria Salerno (R-980-982,994,1123-1126,1138). Appellant was determined to have entered through a window of the trailer, and, based upon the evidence, exited from the same window (R-1003,1005,1029,1060, 1061,1064,1065,1116,1130-1132,1165,1166,1197,1198,1337,1338, 1531,1532,1543,1593). Once inside the trailer, Appellant found Alice Dzikowski dozing or asleep, armed himself with a kitchen knife, and attacked her (R-1003,,1005,1006,1072-1076,1431,1325, 1533,1538,1539,1541). Despite efforts to resist the attack (R-(1443,1449), Alice Dzikowski was stabbed or cut in nine different wounds (R-1429). The five inch deep stab wound which killed her, penetrated her lung, diaphragm, and heart sac, and passed through

her heart (R-1432-1440). Alice Dzikowski was conscious when Appellant began to attack her mother, Gloria Salerno (R-1538, 1539) and was conscious when medical help arrived approximately fifteen minutes later (R-1002,1005,1123,1124,1126,1129). Alice Dzikowski did not die until some time later, at a hospital (R-1471,1606,1607).

Gloria Salerno, Alice Dzikowski's mother (R-1530), was asleep in another room, but was awakened by her daughter's screams at the time of the attack (R-1533,1534). When she ran to her daughter's aid, Mrs. Salerno was grabbed from behind by Appellant, who placed his hand over her mouth, brandished a knife, and said "I'll get you bitch - I'll get you mama" (R-1534-1537). Mrs. Salerno saw her daughter lying on a couch nearby and heard her moaning, and concluded that her daughter had been stabbed (R-1538-1539). Mrs. Salerno began screaming and struggled with Appellant, attempting to escape his grasp (R-1538,1539). During that struggle, she briefly got away from Appellant, at which time she was able to see his face (R-1575-1577), but he came at her, and wounded her with a knife, causing lacerations on her face, arm, chest, and hand (R-1558,1559). At one point Mrs. Salerno grabbed the blade of the knife Appellant was using, and broke it off, whereupon Appellant seized another kitchen knife, and resumed his attack (R-1540-1543). As a result of the struggle, Mrs. Salerno lost the use of one of her fingers (R-1546), had a punctured lung, and was apparently in need of plastic surgery to mend both her injured finger as well as the laceration on her face which required twenty-seven sutures when

Mrs. Salerno was first treated (R-1547,1604,1605). Mrs. Salerno testified that her identification of Appellant was positive, and that she was certain that no one else had been in her trailer during the attack (R-1547,1548,1575-1577,1593-1595). Mrs. Salerno and her daughter did not know Appellant, and Mrs. Salerno had never seen Appellant prior to this incident (R-11,1550,1551). At a live line-up, Mrs. Salerno recognized Appellant "immediately" (R-295).

Upon ceasing the attack, Appellant made his escape through a hallway, into a bedroom of the trailer (R-1529,1533, 1534,1543). A neighbor who had been alerted by "horrifying screams", made telephone contact with the police, when she went to Mrs. Salerno's aid (R-995-1001). The neighbor, Mrs. Morris, heard noises from the hallway into which Appellant had retreated, feared that she too might be in danger, and thus fled (R-1002,1003,1005,1029). Mrs. Morris testified that she heard thumping sounds, and screaming which stopped and then started again, over a period of about ten minutes (R-995-999,1023). Appellant's fingerprints were found near a window which showed signs of forced entry, in a bedroom at the end of the hallway through which Appellant had fled (R-12,1060,1061,1064,1065, 1116,1130-1132,1162-1166,1197,1198,1529,1531-1533,1543).

Ms. Lindsey, who lived in a trailer near Appellant and victims, saw Appellant, about one hour after the murder, and said that Appellant had been covered in blood (R-1757-1759,1771-1773). Appellant was at the time trying to gain entry to her trailer (R-1774,1775). While she did not recognize Appellant at

that time, the next day, both Ms. Lindsey and her sister concluded that it was Appellant, and not Howard Miller that Ms. Lindsey had seen on the morning of the crime (R-1776,1779,1780-1783). Ms. Lindsey testified that she was reluctant to come forward with information, since she was apprehensive about giving testimony in a murder trial (R-1782-1785).

Appellant's mother, with whom Appellant was living at the time of the murder, could not account for Appellant's whereabouts at the time of the crime (R-1310-1312). Appellant ceased living with his mother on the day following the offense (R-1310,1313). Having learned that he was the subject of a police inquiry, Appellant guit his job without reason, and left town without explanation (R-1313,1350-1356); saying only that he was going up north, and that he was in trouble, and had done "something stupid" (R-1405-1408). Florida authorities eventually found Appellant in California, where he was being held after a California deputy discovered that Appellant was the subject of a Florida arrest warrant (R-7,8,338-343,1381-1383,1483-1485). The following facts are of relevance to the issues raised in Appellant's initial brief.

POINT I

On July 10, 1985, Appellant moved, ore tenus, for a change of venue (R-409,427). The motion was prompted by a newspaper article which appeared in the Miami Herald on July 10, 1985 (R-410,411). The prosecutor stipulated that the edition of the Miami Herald in which the article was published, was present in the grand venire jury room (R-429,430). The motion for change

of venue was denied because the jury selection process had not yet begun, and no witness could state that any of the grand venire/prospective jurors had read the article in question (R-429-431). The trial court stated that any member of the voir dire panel who had seen the newspaper article, or any other press coverage would be dismissed for cause (R-430-433). This was done (R-461,463,464,472,573,574).

Of the jurors who actually sat on the jury in Appellant's case, none came forward to say that they had ever seen the newspaper article at issue (R-630,658,714-716,720,728, 729,745,746,986). Mrs. Carol Weber, an associate publisher for the Miami Herald (R-714), stated that she consciously avoided reading newspaper when she was called for jury duty (R-716), and had not read the particular article in question (R-745,746). Although Appellant had the opportunity, he did not exercise a peremptory challenge to excuse Mrs. Weber (R-451,705-707,734, 779,806,897,915). Before, and during the trial, jurors were instructed not to allow themselves to be exposed to any press coverage of the trial (R-532,630,682,728,729,783,871,918,1118, 1324,1676,1874).

POINT II

On July 9, 1985, Appellant's counsel was consulting with a psychologist about the possibility of offering a voluntary intoxication defense. The name of the psychologist was not disclosed at that time (R-43,47,48,55,56). Appellant indicated that a psychiatrist, and a psychologist might be called as witnesses at the sentencing phase of the trial (R-58-59),

regarding Appellant's use of intoxicants at the time of the crime. When the testimony of Dr. Varsida was first proffered, at the guilt phase, the prosecutor objected, stating that he had been informed that Dr. Varsida was a potential witness prior to the proffer, but had been informed by the defense that the doctor would testify if at all, at the sentencing phase only (R-1855-1857). At the time Dr. Varsida's testimony was proffered, the prosecution had been given no formal notice of the intent to offer his testimony, nor any indication as to whether the defense of voluntary intoxication was to be asserted, nor any indication that the doctor had prepared a report, or had otherwise documented to basis of the testimony being offered (R-1371,1789, 1850,1855-1859). The defense stated that the doctor would not be offered in support of an insanity defense, but rather to establish Appellant's use of intoxicants at the time of the crime (R-1856-1857). The prosecutor's objection was that there had, at that point, been no evidence admitted which showed that Appellant had used any drugs at the time of the murder (R-1856,1857). The doctor's testimony was excluded as the product of a discovery violation, and because it lacked evidentiary or factual support (R-1858).

Dr. Varsida was paid as an expert witness for the defense, in order to offer the doctor's opinion as to the effect of intoxicants alleged to have been consumed by Appellant at the time of the murder (R-1851-1853,2222,2223,2225,2226,2231,2235, 2242) The doctor's findings were not reduced to writing until after the conclusion of the sentencing phase sub judice (R-

1371,1856,2232,2374). The defense of voluntary intoxication although not the subject of formal notice, was asserted (R-949,1366-72,1374-79,1399,1414-16,1838-29,1843-46). Doctor Varsida's opinion as to Appellant's capacity for specific intent on the night of the murder was based upon the unsworn, out-of-court, unrecorded statements of Appellant purportedly made to the doctor; and upon a statement by Mrs. Salerno (R-1852-1858,2232, 2242,2243,2247-50). The doctor did not attempt to verify Appellant's purported statements, or to determine the context of Mrs. Salerno's statement (R-1851,1852,1856,1858,2222,2223,2225, 2227,2230,2231,2247-50). Appellant did not testify at the guilt phase below. Mrs. Salerno did not believe that Appellant's behavior at the time suggested that he had been on drugs, and stated that she thought she had smelled alcohol on his breath. She also stated that she did not understand why Appellant had called her mama (R-1534,1536-38,1541,1579-81,1838-39,1853,1855-58,2225,2230-32). Witnesses who had seen Appellant hours before, and hours after the murder, did not testify that they had seen Appelant consume alcohol or drugs, and did not testify as to any visible signs of his intoxication at that time (R-1312,1320-21,1323,1370,1371,1375-79,1398-99). The trial court gave an instruction on the defense of voluntary intoxication, stating that this was done in order to extend every element of fairness to Appellant (R-1838-39,1900,1901). The defense presented evidence of Appellant's past marijuana and alcohol consumption (R-1838-39,1843,1846-49). The jury posed a question during deliberations, concerning the difference between the charging document

and the jury instructions regarding specific intent (R-2639).

Prior to trial, a hearing was held to determine if probable cause existed to compel Appellant to stand for a live line-up (R-5-21). At that hearing, it was asserted by the State, that probable cause existed, based upon the reliability of the victim's prior identification of Appellant in a photo display; based upon a composite drawing obtained from Mrs. Salerno's opportunity to view her assailant, and the fact that Appellant's fingerprints had been found at the crime scene (R-7,9,10). The trial court found there was sufficient probable cause, and allowed the line-up to be held (R-19,21).

Mrs. Salerno gave a description to police within hours of the attack. This allowed the creation of a composite drawing (R-9,10,234,235,241,242,263,283,284,287). Three days after the crime, Mrs. Salerno was shown six photographs, one of which depicted the Appellant. The police used a photo-copy machine to reproduce the photos shown to Mrs. Salerno, so that they would not look like "mug shots". The particular photo of Appellant was two years old at the time of the photo display (R-12-14,242,244, 247,249). Mrs. Salerno selected thrree of those photos and said that the men shown there resembled her assailant; but ended the photo display because she was under the ihnfluence of medication (R-248,288-291,303,1606). The police did not attempt to influence Mrs. Salerno's selection during the photo array (R-242-244,247-249,288). Mrs. Salerno testified that she had an opportunity to view her attacker at the time of the offense (R-9,10,246,286,1548,1575-1577,1585).

The live line up occurred about three months after the photo display, and the police used persons as closely resembling Appellant as possible (R-232,248,254,255,274-75). All persons in the line up were told they could position themselves where they wanted, could exchange articles of clothing among them, and were each given eye glasses to wear (R-254,255). Appellant's counsel was present during the live line-up (R-21,221,253). Appellant was in position number five in both the photo display and the line-up, apparently by coincidence and not by design (R-13,14, 254-255,266,267). Mrs. Salerno testified that her identification of Appellant at the line up was not affected by the photo disply (R-290,297-98). The policeman who conducted the line up said that it would have been impossible to place the same persons in both the photo display and line-up (R-13,14,267).

Prior to the live line up, Mrs. Salerno was not made aware that a suspect was going to be placed in the line-up (R-18,252,269,272,292,293,295). At the live line up, Mrs. Salerno immediately recognized Appellant as the man who had attacked her (R-295,298).

Appellant's fingerprints were found at the crime scene (R-1060-65,1072-76,1093). Appellant was identified by a resident of the trailer partk situated near the crime scene. She saw Appellant, with blood on him, within one hour of the crime, whereupon he attempted to enter her trailer (R-1770-73,1776,1779-85).

POINT IV

The trial court listed written reasons for the decision

to override the advisory sentence offered by the jury (R-2389-2406,2728-2738). The trial court found three statutory aggravating factors had been established, based upon the evidence, beyond a reasonable doubt (R-2390,2393-2397,2404,2405,2728-2733).

The first aggravating circumstance according to the trial court, was supported by evidence that Appellant had previously been convicted of two felonies involving the use or threat of violence (R-1609-12,2153-62,2728-29,2746-49). As to this aggravating circumstance, the trial court did not consider the two violent felonies which were a part of the criminal espisode now at issue (R-2390,2730). The second statutory aggravating circumstance was, said the trial court, supported by evidence that the murder was committed by Appellant during the course of an armed burglary (R-2085-86,2394,2412,2731).

The trial court based the third statutory aggravating circumstance was supported by evidence that the murder of Alice Dzikowski was heinous, artocious and cruel (R-995-98,1424,1429-41,1471,1533-34,1538-39,1606-7,2396-97,2732-33).

As to statutory and non statutory mitigating factors, the trial court found that none had been established by the evidence presented (R-2404,2737). The court found that there was evidence that Appellant had a significant criminal history (R-1609-12,2153-62,2398-99,2733-34,2746-49). The trial court found no evidence to support a conclusion that Appellant had acted under the influence of extreme mental or emotional disturbance (R-58,59,1350,1371-72,1379,1417,1580-81,1852-56,1858,2186-

88,2192-95,2222,2231-32,2249,2254,2257,2258-61,2272-73,2374, 2399,2400,2734). The court found no evidence to support a finding that the victim consented to being stabbed to death (R-11,1550-51,1587,1589,1624-32,1443,1449-50,2400,2734). The court found that there was no evidence to conclude that there had been any impairment of Appellant's capacity to understand the criminality of his conduct, nor any evidence of drug or alcohol induced impairment of Appellant's ability to conform his conduct to the requirements of the law (R-949,1312,1320-23,1366-79,1398-99,1414-16,1429-34,1534-43,1579-81,1789,1838-39,1843-46,1850-59,2019-22,2041,2075-81,2222-27,2230-35,2239-42,2247-50,2400-02,2735-36). The trial court found that evidence of Appellant's age, character record and past alcohol and drug use, were not supportive of mitigation (R-1379-1399,1417,1838-49,1871-72,2186-88,2192-95,2272-73,2771-74,2385,2388,2402-03,2736). It was found that there was no evidence to suggest that Appellant was amenable to rehabilitation (R-2144-50,2159,2166-69,2362,2369-73,2385,2403-04,2701-04,2715,2721,2726-27,2736-37,2746-49). The trial court stated that it's findings regarding the sentence at issue were based upon evidence/facts proven beyond a reasonable doubt, and that the court's sentence was based upon due deliberation, absent caprice or arbitrary reasoning (R-2405,2737-38). The trial court found there were substantial aggravating factors, no mitigating factors, and found that despite having given great weight to the advisory sentence, "no discernable reason of record" would support imposition of a life sentence (R-2405,2738). The trial court found the record was clear and convincing to the extent

that no reasonable person could disagree with the imposition of a death sentence (R-2405,2738).

POINT V

The trial court found that the evidence supported a finding that the incriminating statements admitted into evidence against Appellant were voluntarily made by Appellant and thus admissible (R-323-26,330-36,338-46,350,359-60,371-73,377,393-399,1383-84,1485-86). There was evidence that Appellant left the State of Florida immediately after the crime (R-1310,1313,1351-56,1405-08,1479-1484,1487,1552,1559).

POINT VI

The trial court ruled that evidence of one collateral crime was admissible as having been offered pursuant to due notice, and as offered to prove a common plan, scheme, absence of motive, and identity (R-85,89-107,190,1907,2417-20). Testimony regarding the collateral crime was brief (R-95,1609-1612). Appellant committed an instant crime within one year of his release from incarceration for the collateral crime (R-106,107, 2346). There was evidence indicating similarities between the crime at issue and the collateral offense, relevant to the issue of identity, opportunity, common plan, and lack of motive (R-90-96,105-107,1315-16,1408-09,1487-89,1533-37,1540-43,1550-51,1610-14,1769-73,1776,1779-85,1792,1794). Appellant was identified by persons who knew him from the neighborhood where he lived, and where the crime occurred (R-1595,1776-83). Over Appellant's objection, the jury was instructed upon how to properly consider evidence of a collateral crime (R-1908,2047-48).

POINT VII

During their deliberations, with Appellant present in the courtroom (R-2075,2078), the jury returned to the courtroom with a question (R-2075-2081,2639). The question sought to clarify the distinction between premediated murder, and felony murder (R-2639). The trial court referred the jury to the written instructions already given them, explained the distinction between premeditated and felony murder, and the jury indicated the jury's question had been answered (R-2079-81). When the jury returned to their deliberations, and before they first returned to the courtroom with their question, Appellant objected to the trial court's response to the question, saying that the trial court emphasized first degree murder over the other charges, and stated further that the court should have re-instructed on all homicide charges (R-2076-78,2081-82). Appellant moved for a mistrial, but did not request curative instructions (R-2082). The original charge to the jury included all homicide instructions, and the instructions regarding reasonable doubt (R-2014-2057). The defense commented that the trial court had read the instructions "very well", and offered no objections to the instructions originally given (R-2057).

POINTS INVOLVED ON APPEAL

POINT I

WHETHER THE DENIAL OF APPELLANT'S MOTION FOR CHANGE OF VENUE WAS ERROR, AND PRESS COVERAGE OF THE INSTANT CASE DID AFFECT ANY SINGLE JUROR, NOR THE JURY AS A WHOLE?

POINT II

WHETHER PURSUANT TO THE RELEVANT RULES OF DISCOVERY AND EVIDENCE, THE TESTIMONY OF DR. VARSIDA WAS PROPERLY EXCLUDED?

POINT III

WHETHER THE IN-COURT IDENTIFICATION OFFERED BY THE VICTIM WAS THE PRODUCT OF ANY UNRELIABLE OUT OF COURT PROCEDURE, AND WAS THUS PROPERLY ADMITTED?

POINT IV

WHETHER THERE WAS ERROR IN THE TRIAL COURT'S DECISION TO DECLINE TO FOLLOW THE JURY'S RECOMMENDATION OF A LIFE SENTENCE?

POINT V

WHETHER APPELLANT'S OUT OF COURT STATEMENTS MADE TO POLICE OFFICERS WERE PROPERLY ADMITTED?

POINT VI

WHETHER EVIDENCE OF A COLLATERAL CRIME WAS PROPERLY ADMITTED?

POINT VII

WHETHER THE TRIAL COURT'S RESPONSE TO A QUESTION POSED BY THE JURY WAS PROPER?

SUMMARY OF ARGUMENT

POINT I

Appellant has not shown that any of the jurors who tried his case were ever exposed to the newspaper article now complained of. The particular juror alleged to have been prejudiced because of her particular employment, could have been excused upon exercise of a peremptory challenge, but was not. Appellant's motion for change of venue was procedurally improper, and the trial court was particularly cautious in preventing media

coverage from contaminating the jury. The judgment below should be affirmed.

POINT II

The testimony of Dr. Varsida, as tendered by Appellant, was the product of clear discovery violations, and was pure hearsay, unsupported by any other evidence. It was offered as an opinion on an ultimate issue, without the declarant's factual foundation for the opinion having been established or proffered. As such, the testimony was inadmissible, and the trial court's ruling regarding the admissibility of the testimony should be affirmed.

POINT III

Appellant has not shown any evidence that the identification by the victim was the product of suggestive techniques. Nor has it been shown that Appellant was in any way prejudiced by the use of Mrs. Salerno's identification. Appellant was identified by another witness; Appellant's fingerprints were found at the scene of the crime, and Appellant did not deny his presence there, but instead relied upon an affirmative defense. The judgment below should not be disturbed.

POINT IV

The jury's recommendation was contrary to the evidence, and was not supported by any rational basis in fact. There were several statutory aggravating factors, and no mitigating factors were substantiated. The judgment and sentence of the trial court should be affirmed.

POINT V

Appellant's statements to police officers were not the product of coercion. Appellant was not interrogated, and the statements complained of were made either in conversations initiated by Appellant, or were shown to have been spontaneous utterances not offered in response to any questions. The judgment of the trial court should stand.

POINT VI

Evidence of a single collateral crime was offered for legitimate purposes, not to show propensity or bad character. The evidence was not a "feature" of the trial, and included indications of a pattern of similarities pointing to Appellant as the perpetrator of the collateral crime and the crime charged. The judgment of the trial court should be affirmed.

POINT VII

Appellant has not shown that the trial court abused it's discretion by responding to a direct, specific, question from the jury. Appellant's argument is based upon speculation, and it differs from the argument and objection offered below. The judgment below should stand.

ARGUMENT

POINT I

THE DENIAL OF APPELLANT'S MOTION FOR CHANGE OF VENUE WAS NOT ERROR, AND PRESS COVERAGE OF THE INSTANT CASE DID NOT AFFECT ANY SINGLE JUROR, NOR THE JURY AS A WHOLE.

Contrary to Appellant's assertion, his ore tenus motion for change of venue was not properly before the trial court. Moreover, assuming arguendo that the motion was proper, the facts of the instant case clearly indicate that none of the jurors empaneled below ever saw the newspaper article which is the subject of Appellant's complaint. Thus, pursuant to the rules of criminal procedure, and in light of current case law, Appellant has shown no good cause why his motion for change of venue should have been granted. Nor has Appellant shown that the jury sub judice was exposed at any time, to any press coverage of the case, let alone to any coverage that would have prejudicied the jury against the defendant.

It is a clear requirement that motions for a change of venue shall be in writing, and must be accompanied by at least three affidavits; one of the movant, and two from other persons, setting forth facts upon which the motion is based See Fla.Rule Crim.P. 3.240(b)(1)(1985). Appellant offers no record evidence of compliance with the aforesaid rule, and thus has not preserved this issue for appeal by showing that a proper motion was before the court.

Assuming arguendo that the ore tenus motion for change

of venue was sufficient (R-427), the facts of the instant case, and relevant case law clearly indicate Appellant's argument is without merit.

Appellant asks this Court to apply the "Oliver rule" to the instant case (AB-21), in apparent reliance upon Oliver v. State, 250 So.2d 888, 890 (Fla. 1971). As this Court stated in Straight v. State, 397 So.2d 903, 906 (Fla. 1981), "the genral rule of Oliver has been restricted and refined," and thus in the instant case, Appellee would submit that Oliver is not applicable. Indeed, in Straight, supra, this Court clearly announced that the publishing of a confession by the media is not per se grounds for the granting of a change of venue See Straight, 397 So.2d at 906.

A motion for change of venue is addressed to the discretion of the trial court, and the denial of such motions will be reversed only when the record shows a manifest abuse of discretion See Johnson v. State, 351 So.2d 10 (Fla. 1977); Jackson v. State, 359 So.2d 1190, 1192 (Fla. 1978); and Davis v. State, infra.

In fact, this Court has held that the denial of a change of venue is not an abuse of discretion even in cases where all of the jurors were shown to have been exposed to press coverage of the case in which they sat. Thus, the mere existence of publicity is not, of itself, grounds for the granting of a change of venue See McCaskill v. State, 344 So.2d 1276, 1278 (Fla. 1977); Jackson, supra, 359 So.2d at 1192; Copeland v. State, 457 So.2d 1012, 1017 (Fla. 1984). The test for the propriety of a

denial of a requested venue change is whether the prevailing state of mind in the subject community is so infected with knowledge of the crime, that no juror could possibly put aside bias, prejudice or preconceptions, and decide the case upon the facts in evidence See McCaskill, supra. In the instant case, while jurors did not see or hear any media reports, they also indicated that they would decide the case only upon the evidence (R-598,717,718,720,722,726-729). There is nothing in the record to indicate that an inflamed community, collective preconception, or biased mind set prevailed or even existed sub judice. Nor has Appellant shown that even one of the jurors seated below ever read or heard any press coverage of the trial. Appellant showed only that the newspaper containing the article now complained of was present in the room occupied by the grand venire, that is, the entire jury pool for the Broward County Courts (R-428). Hundreds of persons occupied that room, and the defense investigator stated only that he had seen someone reading the newspaper. He did not state that anyone was seen reading the article complained of (R-429,430). The trial court stated that any potential juror exposed to that or any other press coverage would be excused for cause (R-430,431), a perfectly acceptable procedure See Davis v. State, 461 So.2d 67, 69, 70 (Fla. 1981); Straight, supra; Copeland, supra 457 So.2d at 1017. The trial court excused two potential jurors who had been exposed to press coverage of the case (R-573, 574). The trial court and the prosecutor both instructed the venire panel not to read or listen to any media accounts of the proceedings (R-630,682,728,729,783).

Several times during the jury selection process, the panel as a whole, and various individual jurors who were eventually seated, indicated they have not seen any print media or television coverage of the case (R-630,658,714-716,720,728,729,745,746,868, 869,894). Despite the opportunity to do so, Appellant exercised far less than the total of his peremptory challenges (R-705,707,734,779,806,897,915). See Pitts v. State, 307 So.2d 473, 479 (Fla. 1st DCA 1975). Thus, having shown none of the seated jurors were actually exposed to media coverage of the case, having not exhausted peremptory challenges, and having enjoyed full advantage of the trial court's willingness to excuse any jurors likely to have been influenced by press coverage, Appellant has not shown any evidence of an abuse of discretion by the trial court in denying the initially improper motion for change of venue.

Appellant asks this Court to assume that the juror Weber, an associate editor for the Miami Herald, must have read her paper's article concerning Appellant's trial (AB-17,20). This argument ignores the plain fact that Ms. Weber unequivocally stated that she had consciously avoided reading the periodical during the venire process (R-716,745,746). Moreover, Appellant's original motion for a venue change came before Mrs. Weber was empaneled, and Appellant's renewed motions did not assert Ms. Weber's occupation as a grounds for granting the motion (R-427,1120,1689-1691). Also, Appellant's renewed motions were equally improper as the first, and in any event, Appellant could have exercised a peremptory challenge to excuse Ms. Weber, but

chose not to do so. Thus, any claim that the trial court erroneously allowed Ms. Weber to sit is unfounded, and is akin to invited error. Even throughout the course of trial, the jurors were several times instructed not to read or listen to media accounts of the case, and when asked, the panel indicatd they had not done so (R-918,1118,1120,1122,1189,1324,1525,1526,1676, 1689,1691,1874,1996,2173). The instant record is devoid of any evidence of error, and the judgment below should be affirmed.

POINT II

PURSUANT TO THE RELEVANT RULES OF DISCOVERY AND EVIDENCE, THE TESTIMONY OF DR. VARSIDA WAS PROPERLY EXCLUDED.

At trial, Appellant offered the testimony of Dr. Varsida, in order to show that Appellant lacked specific intent to commit murder, due to voluntary intoxication (R-1855-1859);(AB-22). This proffered testimony was properly excluded, since the testimony was offered in violation of the rules of discovery, and was inadmissible pursuant to the rules of evidence.

A. The Discovery Violation

Appellant made various demands for discovery, and the record shows the State's compliance in providing the defense with all relevant information (R-29-32,36,37,2428,2429,2438). The rules of procedure make the discovery obligation reciprocal, and provide for sanctions in the event that one party, at any stage of the proceedings, fails in it's obligation of disclosure See

Fla.R.Crim.P. §§3.220(b);(3);(4);(i);(ii)(1985). Among the possible sanctions is the exclusion of any evidence offered in violation of the rules of discovery See Richardson v. State, 246 So.2d 771, 775; and Fla.R.Crim.P. §§3.220(f);(J)(1);(2)(1985). In addition to it's obligation pursuant to the rules, the defense was required to come forward with evidence to support the affirmative defense of voluntary intoxication See Linehan v. State, 476 So.2d 1262, 1264 (Fla. 1985). Thus, at any stage of the proceedings wherein it became apparent that an expert witness would be offered in support of the intoxication defense, the Appellant's counsel had an obligation to provide notice of the intended reliance upon the affirmative defense, and an equal obligation to provide a list of any expert witnesses to be offered in that regard. Appellant did not meet that obligation.

Dr. Varsida was hired by the defense for the express purpose of offering his opinion as to Appellant's intoxication and lack of capacity to form specific intent on the date of the crime charged (R-1851-1853,2222,2223,2225,2226,2231,2235,2242); (AB-22). The doctor interviewed Appellant on July 10, 1985 (R-2234); but there is no evidence that the doctor was ever deposed by either party, nor any evidence that the interview with Appellant was ever recorded. The doctor came to court with only his written notes, and his findings were not reduced to writing until the guilt phase of this trial had concluded (R-1371,1856, 2232,2374). There can be no doubt that the defense knew as early as July 10, 1985, when the doctor interviewed Appellant; and then throughout the trial, that the affirmative defense of voluntary

intoxication would be asserted, and that Dr. Varsida would be called to testify in that regard. The record shows that from the opening day of trial this was among Appellant's theories of defense (R-949,1366-72,1374-1379,1399,1414-1416,1838,1839,1843-1846). Yet, until Dr. Varsida's testimony was proffered on July 31, 1985, the State had received no formal notice of the intent to rely on the affirmative defense of voluntary intoxication, no transcription of the interview with Appellant, no deposition from the doctor, nor any report of findings made as a result of the interview (R-1371,1789,1850,1855-1859). Moreover, the defense actually conceded that it had misled the State by indicating on July 12, 1985 that Dr. Varsida would be called, if at all, only during the penalty phase of the bifurcated trial below (R-1856-1857). Thus, despite the opportunity to notify the State, the defense gave no notice of Dr. Varsida's status as a potential expert witness during the twenty-one days between July 10, and July 31 of 1985. Moreover, defense counsel admitted giving the misleading indication that Dr. Varsida would not be offered at the guilt phase of the trial.

On such a factual basis, the trial court was correct in concluding that the defense had willfully, and substantially violated the rules of discovery, resulting in direct prejudice to the State (R-1855-1859). Because of the defense counsel's failure to give notice, the State was unaware of any potential need to assemble lay witnesses to testify as to their possible knowledge of Appellant's state of sobriety on the date of the crime. Likewise, the State was precluded from obtaining expert

witnesses to rebut Dr. Varsida's proffered opinion as to specific intent. Indeed, the entire posture of the State's case might have been changed, if the affirmative defense, and Dr. Varsida's status as a potential expert witness, had been raised and duly noticed according to the rules of discovery. Thus, pursuant to Linehan, supra, 476 So.2d at 1264; Richardson, supra, 246 So.2d at 775; and the rules of discovery/criminal procedure cited hereinabove, the testimony of Dr. Varsida was the product of a discovery violation, and was properly excluded by the trial court after due and sufficient inquiry.

B. The Hearsay, Relevance, and Materiality Problems

Assuming arguendo that Dr. Varsida's proffered testimony was not the product of a discovery violation, the testimony offered was gross hearsay; it lacked any evidentiary basis for admission, and thus was properly excluded.

To be admissible, evidence must be relevant, i.e.; must tend to establish a material fact, and even if relevant, must be admissible under all of the other rules of evidence, including the hearsay rule. See Fla.Evid.Code(1985) §§90.401;90.402; 90.801; McCrae v. State, 395 So.2d 1145, 1152 (Fla. 1980).

Evidence in the form of an opinion offered by an expert, must be based upon other evidence which is at some point introduced, and cannot be admitted if it will mislead or confuse the jury See Fla.Evid.Code(1985) §§90.40;90.702;90.704. Tafero v. State, 403 So.2d 355, 360 n.4 (Fla. 1981); Holt v. State, 422

So.2d 1018, 1019 (Fla. 1st DCA 1982); Chiles v. Beaudoin, 384 So.2d 175 (Fla. 2d DCA 1980). While experts may render opinions based upon hypothetical factual scenarios, it is clear that ultimately, the facts upon which an opinion is based must be disclosed, and within the witnesses' personal knowledge or observation in order for the opinion testimny to be admissible See Fla.Evid.Code(1985) §§90.604;90.702;90.704;90.705; See Holt, and Chiles, supra; and Orange Park v. Pope, 459 So.2d 418, 421 (Fla. 1st DCA 1984).

The testimony of Dr. Varsida was proffered by the defense, not to prove psychosis or insanity (R-949,1371,1372-1415,1855-1857,2231), and not in the setting of a hypothetical, where the doctor would be asked to assume that Appellant had been intoxicated. Rather, the doctor, based upon the out of court, unrecorded, alleged statements of Appellant, sought to give his opinion that Appellant was incapable of forming specific intent on the date of the offense charged. The testimony offered was pure hearsay. It was an opinion based upon and offered, to prove the truth of Appellant's alleged statements made to the doctor, which had been made out of court, unrecorded, and which were self serving on the ultimate issue of voluntary intoxication on June 8, 1984 See Fla.Evid.Code(1985) §§90.801(1),(a)(1)(c); (R-1852-1858,2232,2242,2243,2247-2250). The doctor made no attempt to verify the truth of Appellant's assertions, nor was any attempt made to verify the statements of the victim; statements the doctor relied upon to corroborate his findings (R-1851,1852, 1854,1856,1858,2222,2223,2225,2227,2230,2231,2247-2250).See,

Chiles, supra; and Jacobs v. State, 380 So.2d 1093, 1094 (Fla. 4th DCA 1980). As shown hereinabove, the doctor's findings were never recorded or written down, and Appellant did not testify so as to verify those alleged statements which were the basis of the doctor's opinion. (R-1371-1856). Had Dr. Varsida personally contacted the victim, Gloria Salerno, he would have learned that she never believed, or had any basis to believe, that her attacker had been on drugs (R-1537,1579-1581,1838,1839,1853,1855-1858,2225,2230-2232). Mrs. Salerno explained she did not think Appellant had acted "crazy", or had appeared to be on drugs, but testified only that she could not understand why Appellant called her "mama", when in fact she had never seen him before (R-1534, 1536,1538,1541,1579-1581,1839,2232). The aforesaid citations to the record also indicate that Appellant's "wobbly" appearance at the end of the attack was explained by his attempt to run through a dark, narrow hallway while Mrs. Salerno was grasping his ankle. Thus, clearly Dr. Varsida's testimony sought to introduce, for their truth, the unverified, out of court statements of Appellant. The doctor's testimony thus offered an opinion on the ultimate issue of voluntary intoxication. But because that opinion was based upon hearsay, and facts unknown to, and unverified by the doctor, the opinion was not admissible See Fla.Evid.Code(1985)§§90.604;90.702;90.703;90.704;90.705; 90.801. See Land v. State, 156 So.2d 8, 11 (Fla. 1963); McCullers v. State. 143 So.2d 909, 914, 915 (Fla. 1st DCA 1962).

The doctor's testimony was equally lacking in

credibility because of the fact that it was sought and obtained for the express purpose of bringing Appellant's hearsay statements before the court (R-1851,1852,2226,2227, 2231, 2235); See, Land, and Jacobs, supra.

Neither Appellant, nor any State or defense witnesses tstified that Appellant had used alcohol or drugs on the day of the murder. Thus, there was no evidentiary foundation for the admission of the doctor's opinion See Gardner v. State, 480 So.2d 91,93 (Fla. 1985); Burch v. State 478 So.2d 1050, 1051 (Fla. 1985); Linehan v. State, supra ; Cirack v. State, 201 So.2d 706, 708-710 (Fla. 1967); and Fla.Evid.Code(1985) §90.702. In fact, the evidence showed only that Mrs. Salerno thought she had smelled beer on Appellant's breath (R-1581). However, witnesses who had seen Appellant in the hours preceding, and the hours following the murder, did not see Appellant consuming alcohol (beer), or drugs, and did not notice any visible signs of intoxication (R-1312,1320-1321,1323,1370,1371, 1375-1379,1398,1399) Whether the defense intended to rely upon alcohol induced intoxication, or the "borderline" personality of Appellant as aggravated by drug and alcohol consumption on the night of the crime (R-2230,2231);(AB-22); the plain fact remains that despite the clear requirement of such voluntary intoxication defenses, no evidence of any kind was introduced to prove that Appellant had in fact ingested any form of intoxicant on the night of the murder. In addition, there was unrebutted evidence to the contrary. For that reason, the testimony of Dr. Varsida was properly excluded (R-1855-1859); See Preston v. State, 444

So.2d 939, 944 (Fla. 1984); Jones v. State, 289 So.2d 725, 729 (Fla. 1979); and Cirack, supra.

Appellant suggests that because the jury was given an instruction on the defense of voluntary intoxication, the alleged error of the trial court in excluding Dr. Varsida's testimony somehow becomes clear. This argument misinterprets the rules of evidence, as well as the rulings of this Court.

Mrs. Salerno testified that she thought she had smelled beer on Appellant's breath (R-1581), and defense witnesses testified that they had in the past seen Appellant drink alcohol and smoke marijuana (R-1838,1839,1843,1846,1847-1849). Thus, in an abundance of caution, the trial court allowed the jury to hear the instruction on voluntary intoxication, despite reservations about the relevancy of both the testimony of past drug use, and the instruction itself (R-1838-1839,1900,1901). Indeed, in light of this Court's ruling in Gardner, supra, 480 So.2d at 93, it is doubtful that Appellant was entitled to the instruction at all See also, Preston, supra 444 So.2d at 944. However, the propriety of that jury instruction, and the fact that it may have been justified by even the barest minimum of evidence, has no bearing on the rules governing the admissiblity of evidence, which clearly impose the requirement that there be evidence of the actual fact of intoxicatin at the time of the offense. The circumstances of the crime (repeated stabbing, burglarized entry, flight, and an attack upon the murder victim's mother in order to escape, while the victim clearly was dying), were such that the jury was legally correct in finding that Appellant harborded the

specific intent to kill Alice Dzikowski See Preston v. State, supra, 444 So.2d at 944; Buford v. State, 403 So.2d 943, 949 (Fla. 1981); Tedder v.State, 322 So.2d 908, 910 (Fla. 1975); and see (R-1429,1432-1434,1539,1543,2041). Thus, the jury instruction on voluntary intoxication as given below, shows that despite the consideration of arguably irrelevant evidence of past intoxication, and despite an arguably unjustified instruction, the jury based upon competent evidence tending to show Appellant was not intoxicated, and upon evidence as to the circumstances of the crime, found that Appellant had formed the specific intent to murder Alice Dzikowski. The conviction for first degree murder was thus supported by the evidence.

In addition, the question posed by the jury during it's deliberations does not indicate concern with Appellant's capacity to form intent, but rather, indicated that the jury was at first concerned about the language of the indictment which includes "felonious intent" language, and the jury instructions on felony murder, and other lesser included offenses which in some instances do not require a finding of specific intent (R-2019-2022,2075-2081). That the jury needed re-instruction on the felony murder rule is not probative of Appellant's assertion that the trial court erred in excluding the testimony of Dr. Varsida. The doctor's testimony was entirely inadmissible and was properly excluded. Even if it is assumed arguendo that the testimony of Dr. Varsida was erroneously excluded, in light of the overwhelming evidence of Appellant's guilt, any error associated with this single evidentiary ruling was certainly harmless See State v.

Murray, 443 So.2d 955 (Fla. 1984); Palmes v. State, 397 So.2d 648, 653-656 (Fla. 1981); cert. den. 454 U.S. 882 (1981); Anderson v. State, 439 So.2d 961 (Fla. 4th DCA 1983); and United States v. Hasting, 461 U.S. 499, 76 L.Ed.2d 96, 107 (1983).

Finally, trial courts have broad discretion in deciding the admissiblity of expert testimony, and Appellant has shown no abuse of that discretion See Way v. State, 11 F.L.W. 492, 493 (Fla. September 18, 1986). The judgment below should not be disturbed.

POINT III

THE IN-COURT IDENTIFICATION OFFERED BY THE VICTIM WAS NOT THE PRODUCT OF ANY UNRELIABLE OUT OF COURT PROCEDURE, AND WAS THUS PROPERLY ADMITTED.

The trial court denied Appellant's Motion to Suppress Line-Up Show-Up Photograph, Other Pre Trial Identification and Courtroom Identification of the Defendant (R-313-317,2415,2416). However, Appellant's motion (R-2415,2416), cited no case law upon which the court below was to evaluate the identification procedures complained of. The record clearly reveals that the trial court of it's own accord, correctly evaluated the challenged out of court identification according to the standards announced in the decisions of this Court, and the Supreme Court of the United States See Grant v. State, 390 So.2d 341-344 (Fla. 1980); Manson v. Brathwaite, 432 U.S. 98, 53 L.Ed.2d 140, 149,154 (1977); and Neil v.Biggers, 409 U.S. 188, 34 L.Ed.2d 401, 408, 412 (1971); (R-9,10,12-14,18,221,234,235,242,243,246,248,252,254-

255,258-260,266,269,272,264,283,286,288,292,293,295,296,298,313-317). In such a context, there can be no doubt that the trial court's decision to allow the admission of testimony regarding the identification of Appellant, comes to this Court with a strong presumption of correctness See McNamara v. State, 357 So.2d 410,412 (Fla.1978). Moreover, it is important to note that there is no strict exclusionary rule governing the admissibility of out of court identifications. The interest protected is one of due process, to insure that only reliable evidence is admitted. Even in the event that suggestive identification procedures were used, so long as the witness who offers the identification is in court and subject to cross examination, the subject identification and it's reliability will be a jury question, and will be subject to exclusion only when the police are found to have used such suggestive methods that mistaken identification would have been inveitable See Simmons v. United States, 390 U.S. 377, 19 L.Ed.2d 1247 at 1253 (1968); Manson, supra, 53 L.Ed.2d at 149,153 n.13,n.14,153,154,155; and Neil, supra, 34 L.Ed.2d at 410-412. See also Downer v. State, 375 So.2d 840, 846 (Fla. 1979); and State v. Freber, 366 So.2d 426, 428 (Fla. 1978)

In the instant case, Appellant asserts that impermissible identification techniques were used. Specifically, that Mrs. Salerno was shown a photo line-up in which she identified three possible suspects, one of which was Appellant. Second, says Appellant, this photo display was followed by a live line-up, wherein Appellant was the only one of the persons viewed who

had appeared in the previous photo display. Appellant concedes these techniques were not suggestive per se (AB-25), but asserts that additional facts in the instant case, and the "totality of the circumstances" amounted to a denial of due process. This argument is without merit.

Mrs. Salerno gave an accurate description of Appellant only a few hours after she had been attacked (R-9-10,234,235,-241,242,263,283,284,287), although the Appellant's appearance had changed somewhat betwen the time of the murder and the hearing on Appellant's Motion to Suppress, one year later (R-242,298,299). This initial identification has universally been regarded as the most reliable See Freber, supra, 366 So.2d at 428 n.2; Grant, supra, 390 So.2d at 343; Downer, supra, 375 So.2d at 846; Neil, supra, 34 L.Ed.2d at 412; and Manson, supra, 53 L.Ed.2d at 150. Three days after the attack, and her initial description, the police, based on that description, placed Appellant's photo in a group of five other photos. From that photo display, Mrs. Salerno identified three possible suspects, one of which was Appellant. All of the pictures were photostatic copies, so that the pictures would not appear to be "mug shots" (R-12,13,242-244,247,249). The photograph of Appellant which was used in that photo display was two years old at the time, so that it is no surprise Mrs. Salerno did not immediately recognize Appellant (R-14). Additionally, Mrs. Salerno had been given an injection just prior to viewing the photographs, so that she became groggy, and discontinued her identification process in order not to be confused by the effects of the drug (R-291,303,1606). What is

most important is that Mrs. Salerno was not "coached" nor offered any suggestion as to who to pick from the photo display (R-242-244,247-249,288). Thus, the victim's failure to single out Appellant at the photo display stage does not in any way detract from the reliability of her eventual identification See Simmons, supra, 19 L.Ed.2d at 1253; Manson, supra, 53 L.Ed.2d at 150,155; Grant, supra, 390 So.2d at 342. The police sub judice did not in any way emphasize Appellant's photo, or make it stand out among the others in the group, and actually took steps to avoid that kind of suggestiveness. In fact, since Mrs. Salerno selected three photos which seemed to depict individuals of similar appearance, there can be no doubt that the photo line up was not unreasonably suggestive. The photo showing followed the crime by only three days, and was preceded by a reliable description of Appellant made within hours of the crime, and which led to the placement of his photograph in the photo array. Mrs. Salerno testified that she had ample opportunity to observe Appellant during the crime (R-9,10,246,286,1548,1575-1577,1585). Contrary to Appellant's assertion (AB-27), the fact that she was the victim does not render her identification infirm. In fact, testimony from the victim adds to the reliability of an identification See Neil, supra. 34 L.Ed.2d at 412. Since she believed Appellant had murdered her daughter, it is certain Mrs. Salerno had ample motivation to remember Appellant's face (R-1539,1548,1550-1551,1585,1593). About three months after the photo display, the police held a live line-up, using persons as similar to Appellant in appearance as was possible (R-232,258,

254,255,274-275). All of the subjects in that line up were given eye glasses to wear, and all were told that they could position themselves where they wanted, and could exchange articles of clothing if they so desired (R-254-255). In the interval between the photo display and live line- up, Mrs. Salerno was instructed not to read or watch newspaper reports of the case, and was never told that the police had a suspect in custody (R-18,252,269,272, 292,293,295). The police officer who conducted the line-up said that it would have been impossible to assemble the same persons for the live line-up who had appeared in the photo display (R-13,14,267). In any event, Mrs. Salerno's testimony clearly shows that the live line-up was not influenced by the photo array shown to her three month's earlier (R-290,297,298). Indeed, it is not per se improper for the police to conduct a photo display prior to a live line-up, even if the photo display is held immediately prior to a live line-up See Grant, supra, 390 So.2d at 342,344; Simmons,supra 19 L.Ed.2d at 1254 n.6; and Neil, supra, 34 L.Ed.2d at 410. Since there were three months between the photo display and live line-up sub judice, and since the victims own testimony indicates those two events were not associated in her mind, and since the positioning of Appellant as number five in both displays was inadvertant, and partly the result of Appellant's own choice, no error has been shown (R-254,255,266,297,298).

No coercion or suggestion was used in either the photo or live display (R-243,244,246,248,252,258-260,288,295,296). The victim had ample reason and opportunity to remember Appellant's appearance, gave an accurate description of Appellant within

hours of the crime, and positively, without hesitation or prompting of any kind, picked Appellant from a live line up only three months after the crime (R-295-298). Appellant's fingerprints were found at the crime scene (R-1060-1065,1072-1076,1093). A resident of the trailer park where Mrs. Salerno lived at the time of the crime, positively identified Appellant as the man she saw, covered in blood, trying to get into her trailer, within one hour of the attack at issue (R-1770-1773, 1776,1779-1785). Mrs. Salerno was available at trial for cross examination, and verified her out of court identification. Appellant was unable to convince the jury of any alibi defense, and has shown not even the slightest evidence that the victim's out of court identification was the product of suggestive police procedure, nor the result of an inherently unreliable perception by Mrs. Salerno. Thus, the standards of the aforementioned case law have been met, and there has been no showing sufficient to overcome the presumption that the decision of the trial court was correct.

The judgment below should be affirmed.

POINT IV

THERE WAS NO ERROR IN THE TRIAL COURT'S DECISION TO DECLINE TO FOLLOW THE JURY'S RECOMMENDATION OF A LIFE SENTENCE.

Appellant argues that the trial court erroneously rejected the jury's recommendation that a life sentence be imposed (AB-28). Appellant offers a pre-trial statement by the

prosecutor as evidence of this alleged error. The prosecutor's remark (R-138), was a correct statement of the law (R-139), offered in opposition to an improper pre-trial motion by the defense See Sireci v. State, 399 So.2d 964, 970 (Fla. 1981). As the prosecutor correctly stated (R-138-139,2378), it was not the State's role to offer any recommendation as to sentencing, before the case and all evidence has been heard. Thus, the prosecutor's remark, taken out of context, is not relevant to this Court's inquiry into the propriety of the jury override sub judice. Appellant next argues that error in the trial court's override is illustrated by the fact that the trial court rejected the jury's "9 to 3 or a 3 to 1 ratio" vote, upon which the jury had recommended a life sentence (AB-27,28). Appellant asserts that there was no legal justification for the rejection of the majority holding of "reasonable people"; a "cross section, [and] the conscience of the community". Appellee has found no record of the affidavit upon which the "9 to 3, or 3 to 1" vote ratio is asserted (R-2382,2705,2378); See Brice v. State, 419 So.2d 749, 750 (Fla. 2d DCA 1981). Moreover, Carol Weber, and the other jurors that Appellant alleged to have been prejudicied against him (AB-17-21), are now asserted to have represented a cross section and conscience of the community, whose recommendation of life imprisonment should have been followed. See Castor v. State, 365 So.2d 701, 703 (Fla. 1978); and Sapp v State 411 So.2d 363, 364 (Fla. 4th DCA 1982).

Appellee submits that when the evidence in it's totality, and the decision of the jury in the guilt phase are

viewed together, it can be concluded that the jury's recommendation of life had no rational or evidentiary basis, and was thus properly rejected See Francis v. State, 473 So.2d 672, 676 (Fla. 1985); Brown v. State, 473 So.2d 1260, 1270, 1271 (Fla. 1985); Stevens v. State, 419 So.2d 1058, 1065 (Fla. 1982); McCrae v. State, 395 So.2d 1145, 1155 (Fla. 1981); and Buford v. State, 403 So.2d 943, 953 (Fla. 1981)

Appellant concedes the existence of two aggravating factors (AB-29). Appellant's assault upon Mrs. Salerno and his prior convictions for two violent felonies, are of the same nature as the instant offense. This evidence supported consideration of the two aggravating factors upon which the trial court relied. In his brief, Appellant offers no opposition to those findings (R-2390-2395); See Harwick v. State, 461 So.2d 79, 81 (Fla. 1984); Squires v. State, 450 So.2d 208, 212, 213 (Fla. 1984); and §§921.141(5)(b); and (d) Fla. Stats. (1985). Appellant challenges the application sub judice, of the statutory aggravating factor enumerated by §921.141(5),(h) Fla.Stat. (1985). Appellee submits that evidence was presented which demonstrated that the murder of Mrs. Dzikowski was heinous, atrocious and cruel, so that consideration of that aggravating factor was proper.

A method of murder, particularly stabbing, which subjects the victim to great pain, as well as the tormenting knowledge of impending death, will support an aggravation pursuant to the aforesaid statutory factor See Garcia v. State, 11 F.L.W. 251 (Fla. June 5, 1986); Duest v. State, 462 So.2d 446,

449 (Fla. 1985); Mason v. State, 438 So.2d 374, 379 (Fla. 1984); Preston v. State, 444 So.2d 939, 946 (Fla. 1984); Routly v. State, 440 So.2d 1257, 1265 (Fla. 1983); Waterhouse v. State, 429 So.2d 301, 307 (Fla. 1983); Stevens v. State, 419 So.2d 1058, 1064 (Fla. 1982); Buford, supra, 403 So.2d at 951-952 and State v. Dixon, 283 So.2d 1, 9 (Fla. 1973). The aforesaid cases all involved particularly savage and gruesome murders, where the victim was subjected to prolonged anguish at the thought of impending death. In the instant case, similar facts were shown. The victim was repeatedly stabbed upon no apparent provocation, and despite her defensive efforts. One blow in particular penetrated the victim's heart. She was conscious, undoubtedly in great pain, knew she was dying, and was left for dead by the Appellant. Appellant then attacked Mrs. Salerno in the presence of her daughter, Alice Dzikowski. It was thus possible, and evidence indicated, that Alice Dzikowski agonized over the thought of not only her own impending death, but over what may have appeared to her as the impending death of her mother as well (R-995-998,1005,1023,1126,1138,1430-1434,1440,1441,1471,1533,1536-1539,1607,2732). Not only do the facts sub judice support a finding that the murder was henious, atrocious and cruel, but they also show that as the trial court stated (R-2404,2405), there was no evidence on record to support the jury's recommendation See Buford, supra, 403 So.2d at 953; Steven, supra, 419 So.2d at 1065; Engle v. State, 438 So.2d 803, 813 (Fla. 1983); (reversed on other grounds i.e., because jury heard evidence for which defendant had no opportunity of cross-

examination); and Francis, supra, 473 So.2d at 676. At the guilt phase below, the jury was allowed the presumption that Appellant fully understood and anticipated that Alice Dzikowski's death would be the result of his conduct. The jury's verdict indicated their belief that the presumption was valid, and their recommendation at sentencing was thus unreasonable See Brown v. State, 473 So.2d 1260, 1270, 1271 (Fla. 1985); and Buford, supra. The trial court expressly held that there had been no evidentiary basis for a finding that the crime charged was committed under the influence of Appellant's extreme mental or emotional disturbance (R-2734). There was evidence that Appellant was not disturbed. Thus, the trial court was not obliged to find this statutory mitigating circumstance See Garcia, supra 11 F.L.W. at 253; Mason, supra, 438 So.2d at 379; Johnson v. State, 442 So.2d 185, 189 (Fla. 1983); Stevens, supra 419 So.2d at 1064; Daugherty v. State, 419 So.2d 1067, 1070-1071 (Fla. 1982); McCrae, supra, 395 So.2d at 1155; Sireci, supra 399 So.2d at 971; and LeDuc v. State, 365 So.2d 149, 151, 152 (Fla. 1978). Appellant offered testimony that his parents divorced during his childhood, and that upon remarriage, Appellant's second father was an alcoholic (R-2254-2257),and on two occasions, struck Appellant during an argument. This does not suggest a "history of child abuse" (AB-32), nor does it compel a finding that the crime was the result of Appellant's psychological or emotional problems See Sireci, Daugherty, Stevens, Mason and McCrae, supra. Appellant offered only irrelevant hearsay evidence as to any alleged emotional illness,

despite plans and opportunity to call expert witnesses on this matter (R-1371,1372,1852-1856,1858,2222,2231,2232,2249,2374). This does not support the mitigating factor of emotional duress or mental illness See Lucas v. State, 376 So.2d 1149, 1153 (Fla. 1979); Martin v. State, 420 So.2d 583 (Fla. 1982); Routy, supra, 440 So.2d at 1266; Stano v. State, 460 So.2d 890, 894 (Fla. 1984); McCrae, supra, 395 So.2d at 1155; Johnson v. State, 465 So.2d 499, 507 (Fla. 1985); Johnson, supra, at 442 So.2d at 189; Stevens, supra, 419 So.2d at 1064; Mason, supra, 438 So.2d at 379; Buford, supra, 403 So.2d at 953; Sireci, supra, 399 So.2d at 971; and Lockett v. Ohio, 438 U.S. 586, 57 L.Ed.2d 973, 990 n.12 (1978). There was evidence contrary to Appellant's assertion that he was emotionally ill (R-1350,1379,1417,1580,1581,2186-2188,2192-2195,2258-2261,2272,2273). This statutory mitigating factor was properly dismissed as unfounded (R-2399,2734); See also Williams v. State, 437 So.2d 133, 136 (Fla. 1983). The trial court did not ignore or refuse to hear Dr. Varsida's testimony (R-2401,2402,2735,2736). In fact, Dr. Varsida was heard by the jury at the sentencing phase, despite the fact that Dr. Varsida's testimony constituted gross hearsay, unsubstantiated by any previously admitted evidence (R-2239-2248,2248-2250). Additionally, there was evidence presented which contradicted Appellant's assertion that he had ingested drugs and alcohol just before the crime (R-1312,1320-1321,1323,1370,1371, 1375-1379,1398,1537,1579-1581,1838,1839,1851,1852,1854,1856, 1858,2222,2223,2225,2227,2230,2231,2247-2250); See also, Appellee's argument in Point II of the instant brief. Nothing

prevents the trial court from excluding unsubstantiated or misleading hearsay evidence such as Dr. Varsida's testimony See Lockett, supra, 57 L.Ed.2d at 990 n.12. Moreover, the specific nature of Dr. Varsida's testimony is such that this Court has previously approved trial court rulings which rejected the materiality, relevance or credibility of such evidence at sentencing See Cooper v. State, 11 F.L.W. 352, 353 (Fla July 17, 1986); Mason, supra, 438 So.2d at 379; Stevens, supra, 419 So.2d at 1064; Martin v. State, 420 So.2d 583 (Fla. 1982); Lucas v. State, 376 So.2d 1149, 1153 (Fla. 1979); Buford, supra 403 So.2d at 953; and Hall v. State, 403 So.2d 1321, 1325 (Fla. 1981). The jury, at the guilt phase, rightfully presumed and found, that Appellant had no diminished capacity of intent Brown, supra, 473 So.2d at 1270; Buford, supra 403 So.2d at 953; Preston v. State, 444 So.2d 936, 944 (Fla. 1984); and Tedder v. State, 322 So.2d 908, 910 (Fla. 1975). This illustrates that the jury's recommendation was not based upon a rational foundation, conflicted with the evidence presented, and reflects that undue weight was given to the testimony of Dr. Varsida; testimony which Appellant was not legally entitled to at trial, and which was unworthy of credibility in mitigation See LeDuc, supra, Linehan, supra 476 So.2d at 1264; McCrae, supra 395 So.2d at 1155; Francis, supra, 473 So.2d at 676; and see Appellee's arguments hereinabove at Point II (R-2405). Trial courts are not obliged to accept and apply unsubstantiated mitigating factors, so long as the evidence is presented to the jury, and weighed by the court and the jury See Tedder, supra; Engle, supra 438 So.2d at

813 (reversed on other grounds); Brown, supra, 473 So.2d at 1271; Martin, supra; Smith v. State, 407 So.2d 894, 901, 902 (Fla. 1981). All of the "evidence" which Appellant suggests as proof of a history of child abuse, his "borderline personality", and history of substance abuse, along with so called "evidence" of intoxication during the crime, are in fact an assemblage of hearsay. These assertions are based upon one statement by Glorida Salerno, which Appellant has misinterpreted. This so called evidence was combined with the purest form of hearsay, and offered to the trial court and the jury. As shown repeatedly hereinabove, Mrs. Salerno never suggested that her assailant had been on drugs, or even that he was drunk. She never said that he acted crazy, only that he said something which to her, had not made any sense. Dr. Varsida, a well paid defense witness, based his testimony upon the out of court, self serving, unrecorded, and alleged statements of Appellant, and upon the strained interpretation of Mrs. Salerno's single statement about the smell of alcohol on Appellant's breath. The trial court correctly perceived the infirmity of this "evidence", although it did allow the jury to hear it. There had not been the slightest showing, nor even any offer, of competent evidence of voluntary intoxication that was necessary to support any challenge to Appellant's capacity to understand the criminality and consequences of his actions. This voluntary intoxication defense was the only one that would have been legitimate during the guilt phase, since a true insanity defense had not been raised See Hall, supra, 403 So.2d at 1325; Stevens, supra 419 So.2d at 1064;

Cirack, supra and Preston, supra 444 So.2d at 944. Without any evidence of intoxication on the night of the offense, and with competent evidence indicating Appellant had not been under the influence of alcohol or drugs, no statutory or non-statutory mitigating cicumstances had been established by Appellee. Thus it is clear that the jury's recommendation was unsupported by evidence, and without a logical foundation of facts. That is the reason our system of justice allows a court, after due consideration, to reject a jury recommendation See McCrae, Stevens, Francis. Routly, Brown, Tedder, Buford, Preston, LeDuc, and Valle v. State, 474 So.2d 796, 806 (1985).

The evidence clearly established that Appellant murdered Alice Dzikowski. His fingerprints were found at the crime scene, inside the home of two women he did not know (R-12,1060-1065,1072-1076). The Appellant was identified positively by one of the victims, and by a nearby resident who saw Appellant, covered in blood, desperately trying to avoid a police manhunt (R-258,295,297-298,1548,1550,1551,1595,1771-1775,1779-1783). Appellant's wherebouts at the time of the crime were not accounted for (R-1311,1312), and Appellant was then living in the same neighborhood as the victims within walking distance of their home (R-1310). In that same trailer park, only three years previously, Appellant had committed a similar assault; also at a time when he had been living nearby with his mother (R-1315-1317,1609-1612). Appellant suddenly left town within one day of the crime at issue now, giving no reason for his sudden departure. Appellant indicated only that he had "done something

stupid" (R-1349-1356,1405-1410).

The trial court had weighed all of the evidence, and had considered all of the mitigating and aggravating factors, and had allowed the jury to do the same. The court then made express and deliberated findings; including a finding that the jury's recommendation was not supported by the evidence, and was unjustified by any reasonable weighing of the aggravating and mitigating factors (R-2404-2405,2737-2738).

Although Appellant may have been a "model prisoner" (AB-32); (R-2369-2373); the plain facts indicated that upon his return to society, Appellant would present a danger of repeated criminal activity. Thus, to the extent that the jury found Appellant a candidate for rehabilitation, this was contradicted by the evidence, and thus properly rejected by the trial court as a factor in mitigation (R-2142-2144,1146,2149-2150,2159,2167, 2169,2385,2403,2404) See Elledge v. State, 346 So.2d 998, 1001 (Fla. 1977); Valle, supra, 474 So.2d at 804. Appellant committed the instant crime within ten months of his release from a term of incarceration which had been imposed upon Appellants conviction for an assault committed in the same trailer park where the victims of the instant crime lived, less than a mile from Appellant's residence at the time of both offenses (R-1487-1489,2335,2346,2358,2361-2364,2398-2399,2403).

Thus, the circumstances of the instant offense, the substantial evidence of guilt, the total lack of mitigating factors, the finding of three valid statutory aggravating factors, the thorough deliberation and express findings of the

trial court, the full opportunity of the defendant to offer evidence in mitigation, and the clear showing of the way in which the jurys recommendation was unreasonable; all demonstrate that the trial court's decision to reject the jury's advisory sentence was correct See Williams v. State, 437 So.2d 133 (Fla. 1983); Johnson, supra, 465 So.2d at 507; Valle, supra; Hoy v. State, 353 So.2d 826, 832, 833 (Fla. 1977); Daugherty, supra, 419 So.2d at 1071; Routly, supra; Mason, supra; Brown,supra, 473 So.2d at 1270,1271; and Tedder. supra.

POINT V

APPELLANT'S OUT OF COURT STATEMENTS MADE TO POLICE OFFICERS WERE PROPERLY ADMITTED.

Appellant made several statements when first apprehended by a California Deputy Sheriff, and then again while being transported from California to Florida (R-1381,1384,1385,1484-1486). The trial court excluded one of the statements made by Appellant, finding that it had been the result of the interrogation which had not been preceded by adequate advisement as to the right against self incrimination (R-396,397).

Thus, only two of the three statements made to Deputy Abeles were admitted as evidence at Appellant's trial. Of those two statements actually admitted, Appellant alleges error as to one statement only. Therefore, Appellee presumes that Appellant concedes the admissibility of the other; i.e., the particular statement Appellant made after he had questioned Deputy Abeles (R-345,346,395). In fact, the trial court found that particular

statement was spontaneous and voluntary. Absent any argument to the contrary in Appellant's brief, and in light of the presumption of correctness which accompanies the trial court's ruling, Appellant's statement to the effect that only "one died, and the other is critical," was properly admitted (R-359); See Garcia, supra, 11 F.L.W. at 252; and Williams v. State,441 So.2d 653, 656 (Fla. 3d DCA 1983); Rhode Island, infra; Stevens, supra, 419 So.2d at 1062; and Palmes v. State, 397 So.2d 648 (Fla.).

The other statement made to Deputy Abeles, is the only one that Appellant now asserts was erroneously admitted (AB-35). The record reveals that this particular statement was not the result of interrogation, and was not a response to any implied or express coercion, undue influence, or any dialogue intended to, or obviously capable of eliciting an incriminating response (R-393-395). When Deputy Abeles first placed Appellant in custody, it was known only that Appellant was the subject of an out standing warrant in a foreign jurisdiction (R-338,341,342,343). Despite the fact that he was handcuffed and informed that he was being held on the basis of an outstanding felony warrant (R-343,344,1383,1384), Appellant did not feel that he had been arrested, knew that he need not give any statement at that time, and was aware of his rights regarding self incrimination (R-371-373). It is important to note that Appellant now claims that his statement was the result of a direct question from Deputy Abeles (AB-35). However, the testimony of Deputy Abeles, as well as the findings of the trial court, indicate that the Deputy did not ask Appellant what he was wanted for. Instead, the Deputy made a

statement, to which Apellant voluntarily responded (R-344,394, 395,1384). Deputy Abeles was not investigating any crime, made no direct interrogation of Appellant, made a remark not designed, nor reasonably apparent to the Deputy as one that would be likely to elicit any criminal response. There has been no showing that Deputy Abeles applied any express or implied coercion. Therefore, it has not been shown that the trial court's ruling on Appellant's suppression motion was error See Rhode Island v. Innis, 446 U.S. 291, 64 L.Ed.2d 297, at 306-308(1980); Garcia, supra, 11 F.L.W. at 252; Stevens, supra, 419 So.2d at 1062; Lornitis v. State, 394 So.2d 455, 458 (Fla. 1st DCA 1981); Williams, supra, 441 So.2d at 655.

Indeed, at least one Florida court has held that the remark made by Deputy Abeles was not of the type that must be regarded as an interrogatory, and not of the type that was calculated or was apparent as likely to have elicited an incriminating response See Herron v. State, 404 So.2d 823, 824 (Fla. 1st DCA 1981). Again, since the trial court's ruling as to this particular statement is presumed correct (See Garcia, and Williams, supra), Appellee submits that no showing has been made which would justify disturbing that ruling.

The next argument offered by Appellant, is that the trial court erroneously admitted the statements Appellant made while being returned to the State of Florida. Here again, the record shows that Appellant was not interrogated, but instead, had offered a voluntary remark during a conversation initiated by Appellant.

While in the custody of the homicide detective investigating the instant case, and during the air journey that returned him to this state, the following dialogue occcurred:

> The airline pilot informed passengers that the plane was passing over the Hoover, or Boulder Dam (R-323,1485).
>
> Appellant then initiated a conversation about the State of Texas (R-323,325, 1486).
>
> During that conversation, Appellant stated that he was familiar with that state because his father lived in Texas (R-325,326,332,1486).
>
> Detective Ewing then informed Appellant that the Detective had been aware of Appellant's ties in the State of Texas (R-332,1486).
>
> Appellant then inquired as to how the Detective knew about Appellant's father in Texas, and after the Detective responded, Appellant gave the statement he now complaines of as having been erroneously admitted (R-324,325,326,1486).

The statements Appellant made to Detective Ewing on the airplane, have not been preserved for review. When they were offered at trial, Appellant objected only to the admission of the hearsay statements of the airplane pilot (R-1485). However, Appellant did not object to Detective Ewing's testimony regarding Appellant's statements. Therefore, notwithstanding the ruling on Appellant's motion to suppress, the statements and their admissiblity cannot be reviewed now See Herzog v. State, 439 So.2d 1372, 1377 (Fla. 1983); Bowles v. State, 414 So.2d 236 (Fla. 4th DCA 1982); and Rounds v. State, 382 So.2d 775 (Fla. 3d DCA 1980). Moreover, Appellant has made no showing that the

statements he made during the flight to Florida were the result of interrogation or its functional equivalent. In fact, Appellant initiated all but one of the conversations now at issue. Likewise, there has been no showing that Appellant was subjected to coercion (express or implied), or that the police acted in any manner calculated or reasonably likely to influence Appellant improperly (R-331,333-336). Therefore, Appellant now alleges error based upon the admission of testimony that was clearly admissible, which in part was not properly preserved, and which even if assumed arguendo to have been erroneously admitted, was harmless in light of overwhelming evidence Appellant's guilt See Rhode Island, supra, 64 L.Ed.2d at 306-308; Stevens, supra 419 So.2d at 1062; Garcia, supra, Herron, supra, State v. Caballero,396 So.2d 1210, 1213, 1214 (Fla. 3d DCA 1981); and Lornitis, supra, 394 So.2d at 458-460.

Also, Appellant has not shown, nor does the evidence indicate, that Appellant had a diminished capactiy to understnad his right to be free from self incrimination, or that he was obviously vulnerable to a coerced waiver of that right (R-323,326,330,333,334,350,359,360,371). Thus, pursuant to Rhode Island, supra, the statements complained of were admissible.

The jury was aware, from other testimony, that Appellant fled the jurisdiction immediately following the crime charged (R-1313,1314,1352-1354,1404-1408). The statement to which Appellant offers no objection now (i.e. to the effect that "only one died and the other is critical), was arguably the most damaging of all those actually admitted, since it implies knowledge of the

crime. Combined with the overwhelming evidence of guilt (see Point IV hereinabove), the aforesaid factors all point to the conclusion that even if error is assumed for the sake of argument, it is clear that such error would have been harmless.

The judgment below should be affirmed.

POINT VI

EVIDENCE OF A COLLATERAL CRIME WAS PROPERLY ADMITTED.

Appellant alleges error in the admission of collateral crime evidence pursuant to the so called "Williams" rule See Williams v. State, 110 So.2d 654 (Fla. 1959); Williams v. State, 117 So.2d 473 (Fla. 1960); and §90.402(2)(a) Fla.Stat. (1985).

In his argument (AB-39-41), Appellant offers no citation to any decisions from this Court, and does not fully state the trial court's findings regarding the similarites between the challenged collateral crime, and the instant offense. Moreover, it is suggested by the record that Appellant's argument is based upon his trial counsel's desire to "build a record" rather than upon a Clear showing of an abuse of discretion (R-65-67,70,84-87,89-107,2684-86).

As he did at trial, Appellant now offers only two District Court cases as authority for his challenge to the admissibiliof the evidence at issue (R-99,107). Although a proper instruction was given, Appellant sought to prevent the jury from being given the instructions required to be given once Williams rule testimony has been admitted (R-1908); See §90.404(2)(b)2 Fla.Stat. (1985). Thus, despite proper notice

given at trial (R-85,2417), Appellant now offers only a minimum of authority in support of his challenge to the evidence now complained of; authority which contains dicta sympathetic to Appellant's argument, but which is far from dispositive of the issue, since numerous and more recent decisions of this Court exist See Dix v. State, 485 So.2d 38 (Fla. 2d DCA 1985); and Bradley v. State, 378 So.2d 870 (Fla. 2d DCA 1979). Despite Appellant's efforts to "build a record" (R-65-67,70,84-87,89-107,1908), the trial court exercised an abundance of caution (R-89), and conducted a full hearing on the admissibility of Williams rule evidence (R-89-107). Although instructed that the evidence would be admissible unless authority to the contrary became known (R-107), Appellant even now has not referred to even one decision of this Court, and has not seen fit to cite the very cases from which the Williams rule has emerged. Moreover, the trial court listed no less than ten points of similarity between the collateral crime and the crime charged (R-105-107). Appellant's brief contains four of those points (AB-39). Appellee submits that in light of the presumption of correctness that clothes the trial court's ruling, Appellant has not shown that the ruling now challenged should be disturbed See Blanco v. State, 452 So.2d 520, 523 (Fla. 1984); and Welty v. State, 402 So.2d 1159, 1162-3 (Fla. 1981).

Evidence of collateral crimes will be admissible if offered to prove any fact in issue other than the accused's propensity to commit crimes. The fact that the proffered evidence will prejudice the defendent is not determinative of the

admissiblity of such evidence See Medina v. State, 466 So.2d 1046, 1048, 1049 (Fla. 1985); McCrae, supra, 395 So.2d at 1152; Sireci, supra, 399 So.2d at 968; and Williams v. State, supra, 110 So.2d 654.

Here, the challenged testimony was not offered to show Appellant's propensity to commit crimes, nor to show bad character. This is evidenced by the prosecution's decision to omit evidence of a second collateral crime of a similar nature (R-85,93). The evidence complained of was offered inter alia, to show a common scheme, plan, or method; motive, or lack thereof, identity, and opportunity (R-93,94,101-103,190,1907). These are all proper reasons for a proffer of evidence collateral crimes See Sireci; and McCrae, supra, Franklin v. State, 229 So.2d 892, 894 (Fla. 3d DCA 1969); and See also §90.404(2)(a)(1985).

The fact that both the collateral crime and the instant offense were committed within two-thousand feet of each other, and within the same or, a lesser distance of Appellant's residence at the time of each crime (R-93,94,96,1315,1316,1408, 1409,1487,1489), certainly tends to prove opportunity. A common plan or scheme was suggested by evidence that in both crimes, Appellant used the cover of darkness, the vulnerability of women alone with their daughters and asleep in their house trailers, surreptitious entry, and death threats (R-90-93,101,104,105,106, 1533,1537,1610-1613). Additionally, in both crimes Appellant covered the mouths of his victims, battered and threatened them in response to their screams, and then quickly fled, the same way he had entered (R-94,1534,1536,1540,1541,1543,1611-1613). In

neither crime was there any apparent motive or provocation (R-1550,1551,1612). Such similarities in the plan or scheme of two crimes can be used to show the identity of the perpetrator See McCrae, supra, 395 So.2d at 1152, Mason v. State, 438 So.2d 374, 377 (Fla. 1983).

It is important that the similarities between the two crimes are such that they point specifically to the defendant, especially where identity is the basis for the offer of evidence See Mason, supra and Drake v. State, 400 So.2d 1217, 1219 (Fla. 1981). In the instant case, the similarities did specifically implicate Appellant in both crimes. In both cases, Appellant was identified as a suspect by young girls who knew him from having seen him in the neighborhood (R-92,93,1614,1769-1773,1776,1779, 1780-1785,1792,1794). In both cases Appellant was identified by the victims themselves. The fact that Appellant lived nearby during both crimes, and during early morning hours burglarized trailers, threatened two mothers who were alone with their daughters, struggled with them, covered their mouths, and threatened them in response to their screams, upon no apparent provocation, was more than sufficient to meet the State's burden to offer similarities that implicated Appellant See Franklin, supra, 229 So.2d at 894; McCrae, supra 395 So.2d at 1153; Mason, supra, 438 So.2d at 376, 377. Compare; Drake, supra, 400 So.2d at 1219 (where the State failed to establish the identity element upon which the offer of Williams rule evidence was offered); Bradley v. State, 378 So.2d 870, 872 (Fla. 2d DCA 1979); (where the collateral crime was burglary and the crime charged was

dealing in stolen property); and Dix v. State, 485 So.2d 38 (Fla. 2d DCA 1986); (where on review it was established that similarities between the two crimes were "few, if any", and where the witness to the collateral crime could not positively identify the defendant).

The prosecutor sub judice did not make the evidence of collateral crimes a "feature" of the trial See Oats v. State, 446 So.2d 90, 94 (Fla. 1984); and Williams, supra, 117 So.2d 473. The transcribed direct testimony of Ms. Cutler spans five pages of the instant record; hardly an indication that evidence of collateral crimes was predominant in this trial See Townsend v. State, 420 So.2d 615, 617 (Fla. 4th DCA 1982); (R-95). Nor was the collateral crime too distant in time to have been inadmissible as remote or irrelevant See Thompson v. State, 11 F.L.W. 485, 486 (Fla. September 18, 1986); where this Court reversed the admission of evidence of a collateral crime two years distant from the crime charged, but did not state that remoteness was the basis of the infirmity of such evidence. See also, Townsend, supra, 420 So.2d at 618, where a collateral crime six years distant was not held to have been remote; and Rossi v. State, 416 So.2d 1166,1168 (Fla. 4th DCA 1982); (Williams rule evidence and it's remoteness in time must be evaluated on a case by case basis). In the instant case, the collateral crime preceded the instant offense by three years, but the instant crime followed Appellant's release from incarceration by less than one year (R-106,107,2346). Because the evidence was otherwise admissible, it should not be excluded simply because

the collateral crime occurred some three years prior to the crime charged (R-106,107); Oats, Rossi, and Townsend, supra.

Finally, it is important to compare this case to two recent decisions of this Court i.e.; Peek v. State, 488 So.2d 52 (Fla. 1986); and Thompson, supra 11 F.L.W. at 486. In Thompson, this Court found no convincing similarities in the two crimes being compared. In fact, dissimilarities outnumbered similarities. Also, the body of evidence presented in the Thompson case was less than convincing. In fact, Justice Boyd was of the opinion that the evidence was insufficient even to justify conviction. In the instant case, evidence was overwhelming, and included identification by the victim and by a witness to Appellant's flight from the crime scene (R-1595,1776,1783). Similarities were manifold here (R-105-107); and the jury was instructed as to the proper consideration of Williams rule evidence (R-2047,2048). In Peek, this Court found that the evidence of a collateral crime, admitted over Appellant's objection, was such that dissimilarities outweighed similarities Peek, supra, 488 So.2d at 55; (In Peek the collateral and charged crimes occurred within two months of each other, in the same city, involved victims of the same race and gender, and involved the same type of offense, i.e. rape). The charged crime involved extreme violence, while the collateral crime did not. The first victim was elderly, the second was not. One victim was bound, the other was not. One crime involved a forced home entry, the other did not. One crime took place during daylight hours, and the other occurred at night.

With such dissimilar features on record in the Peek case, it is apparent why this Court rejected admissibility pursuant to the Williams rule, since there were no facts pointing directly to the defendant as the perpetrator. However, in the instant case, as previously shown, both offenses involved victims of similar ages, in similar situations (in trailers alone with their daughters); both crimes occurred at night, and involved batteries motivated by Appellant's desire to avoid detection. Both offenses were shown to have occurred within walking distance of each other, and of Appellant's residence, and involved similar death threats to the victims. Also the Appellant was, in both crimes, identified almost immediately by persons who recognized him from the neighborhood, but the actual victims had never seen Appellant prior to the assault. In short, the comparison of the collateral and charged crimes sub judice includes a significant number of factors which point to Appellant as the perpetrator, so that an analysis under Peek would not support a reversal of the trial court's ruling. The dissimilarities between the collateral and charged crime are not as significant as Appellant suggests, and were far outweighed by the similar factors which clearly pointed to Appellant as the perpetrator of both crimes. The collateral crime was not a feature of the trial, and was offered by the State for legitimate purposes other than character attack. Therefore, Appellant has not shown that the evidentiary ruling was in error, and even assuming arguendo that it was, there has been no showing of fundamental prejudice See Wilson v. State, 330 So.2d 457 (Fla. 1976); Colewell v. State, 448 So.2d 540 (Fla. 5th

DCA 1984); §924.33 Fla.Stat. (1985); and §59.041 Fla.Stat. (1985). The judgment below should be affirmed.

POINT VII

THE TRIAL COURT'S RESPONSE TO A QUESTION POSED BY THE JURY WAS PROPER.

Appellant's final argument is that the trial court gave an improper response to a question posed by the jury. Appellee respectfully submits that this argument is without merit.

Pursuant to Appellant's counsel's request (R-2076,2077), the trial court determined the precise nature of the question posed by the jury (R-2079-2081). The jury wanted to know if they could return a verdict of guilty as to Count I, based upon either a finding of premeditated murder, or in the alternative, based upon a finding that the victim died as a result of Appellant's conduct during the commission of an underlying felony (R-2079,2080-2081). The decision of the trial court to limit any re-instruction to the specific question posed by the jury, was within the trial court's discretion Henry v. State, 359 So.2d 864, 866, 867 (Fla. 1978); Engle v. State, 438 So.2d 803, 809-811 (Fla. 1983); and Garcia, supra, 11 F.L.W. at 253 (Fla. June 5, 1986). When a jury question is specific, it is not necessary to redefine any unrelated concepts. See Henry, Engle, and Garcia, supra. Moreover, for the trial court to respond to a jury question by exceeding the scope of such a question, would give the jury the impression that the trial court was an advocate rather than an arbiter See Henry, supra, 359 So.2d at 867.

It is important to note that when, as here, the jury

question is one regarding the elements of first degree murder, and nothing more, it can be assumed that the jury had already decided that the killing at issue was unlawful See Engle, supra, 438 So.2d at 811. This is significant for a number of reasons.

First, the jury sub judice had already concluded, at the time they posed their question, that Appellant had unlawfully taken the life of his victim. Thus, it would be unwarranted speculation to now assume that their verdict was based upon a finding of premeditation, or upon a finding consistent with the felony murder theory. A verdict of guilty as to the charge of first degree murder, regardless of which theory the jury chose to support the verdict, would ultimately subject Appellant to the possible imposition of the death penalty See Cabana v. Bullock, 474 U.S. ___, 88 L Ed.2d 704, 106 S.Ct. ___ (1986). Once there has been a sufficient evidentiary showing, and a resultant finding of culpability, the theory chosen to support that finding becomes irrelevant Cabana, supra, 88 L.Ed.2d ag 714, 715, 717, 720 n.6. Thus, Appellant's argument is based upon speculation that the jury relied upon a particular theory of first degree murder, and ignores the fact that the trial court addressed the specific question posed by the jury. In Griffin v. State, 414 So.2d 1025 (Fla. 1982); this Court held that it is not error to exclude a re-instruction on premeditated murder, when the jury specifically requested re-instruction on felony murder. Moreover, in Griffin, there was evidence that the jury had not originally been instructed on the elements of the underlying felony. Also, the defense in Griffin raised the possibility that

the jury had reached a verdict before the challenged re-instruction was given, and that the trial court refused to inquire into that circumstance. Even under such conditions, this Court found no error. In the instant case, the record shows, and Appellant acknowledged, that the initial charge to the jury was adequate and complete. The jury heard instructions on reasonable doubt, the elements of murder; specific intent relevant murder, and relevant to the underlying felony; and the specific elements of the underlying felony as well (R-2019-2024,2027-2029,2033-2034,2039-2040,2057). Thus, compared to Griffin, the jury sub judice was fully informed, before they posed a question, as to reasonable doubt, the elements of the underlying felony, and specific intent. Therefore, it is even more logical here, to conclude that the jury had found an unlawful killing, and that their verdict of first degree murder was supported by the evidence, regardless of which of the two theories they applied to that evidence.

The trial court referred the jury to all of the instruction relevant to premeditated and felony murder (R-2079,2080). Moreover, the jury was informed that either of those theories, if found to have been supported by the evidence, would justify a verdict of guilty as to first degree murder (R-2081). In response to that re-instruction, the jury indicated that their specific question had been answered (R-2081). This leads to the conclusion that any further instruction would have confused the jury, and would have led to an improper impression of the trial court's function See Henry, supra, 359 So.2d at 867. Moreover,

it has not been shown that there was error in the trial court's decision to refer the jury to the written instructions, rather than to re-read them orally. The Henry case suggests that the opposite is true. While the jury was not specifically re-instructed (but was originally instructed), on the elements of the underlying felony (here, burglary with the intent to commit a battery), it is only speculation to conclude that the verdict sub judice was arrived at upon a finding consistent with either the pre-meditated or felony murder theory See Cabana, supra. Moreover, the specific question posed by the jury did not ask for a definition of specific intent. Rather, the jury asked whether individual findings of specific intent, or an alternate finding of general intent, could independently support a verdict of guilty as to first degree murder. Therefore, the re-instruction that was appropriate sub judice did not necessitate re-instruction as to the specific intent element of the underlying felony, since the jury had already been given that instruction, did not ask that it be repeated, and did not ask for any instruction that necessarily would include the definition of specific intent relevant to burglary. That is to say, the jury asked if first degree murder could be supported by a finding consistent with the felony murder theory. Therefore, it can be assumed that at that point, the jury had already concluded that the underlying felony (burglary) had been committed with the specific intent to perpetrate a battery. Engle, supra. The jury presumably would not rely upon the felony murder theory if they had not already concluded that the evidence supported conviction as to the

underlying felony. Indeed, the jury did convict Appellant of that underlying felony (R-2642).

In sum, it is speculation to assert that the jury adopted either the pre-meditated murder theory, or the theory of felony murder. It is a known fact however, that the jury had at some point, concluded that Appellant had harbored the specific intent to commit an armed burglary, and the specific intent to attempt the murder of Gloria Salerno (R-2641,2642). The trial court was within it's discretion to limit its re-instruction to the specific question posed by the jury. That question asked only if the premeditation theory, and the felony murder theory, could, independent of each other, support a verdict of guilty as to first degree murder. The jury had heard the initial charge, and did not ask for re-instruction on specific intent as to premeditated murder, nor specific intent as to the underlying felony. Thus, the ommission of an instruction on specific intent relevant to the underlying felony was not error.

Additionally, Appellant has asserted that he preserved this issue for appeal (AB-43). In fact, the record citation offered by Appellant (R-2082) shows that Appellant offered his objection after the jury had retired to deliberate, did not request a curative re-instruction and did not base his objection upon the same grounds tht he now argues (R-2076,2078,2081-2084). What Appellant argued below, is that the court had paraphrased the jury instructions and had thereby placed undue emphasis on the theory of premeditated murder, and had implied comment upon the defendant's guilt as to premeditated murder (R-

2081-2082). The defense felt that the jury should have been re-instructed on felony murder, but did not request any re-instruction on the elements of the underlying felony (R-2076,2083); See Sapp v. State, 411 So.2d 363 (Fla. 4th DCA 1982).

Moreover, the objection now asserted as proof of preservation did not include the proper request for curative instructions, and was made after the jury retired (R-2081,2082) (AB-43). Thus Appellant now seeks review of invited error See Pope v. State, 441 So.2d 1073, 1076 (Fla. 1983); Ferguson v. State, 417 So.2d 639, 641 (Fla. 1982); Adams v. State, 412 So.2d 850 (Fla. 1982); Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982); McCrae v. State, 395 So.2d 1145, 1155 (Fla. 1980); Sullivan v. State, 303 So.2d 632 (Fla. 1974); Sapp, supra; and Brice v. State, 419 So.2d 749 (Fla. 2d DCA 1982). Appellant begins with the unfounded assumption that a particular theory of two available, was elected by the jury, and then asserts that the jury should have been re-instructed on the elements of the underlying felony; notwithstanding his failure to request such an instruction and notwithstanding the fact that that argument was not asserted below.

The judgment below should be affirmed.

CONCLUSION

Wherefore, based upon the foregoing arguments and the authorities cited therein, Appellee respectfully requests 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 copy of the foregoing Answer Brief of Appellant has been furnished by U.S. Mail to, H. DOHN WILLIAMS, JR., ESQUIRE, 200 S.E. 6th Street, Suite 304, Fort Lauderdale, Florida 33301, this 3rd day of November, 1986.

OF COUNSEL