IN THE SUPREME COURT OF FLORIDA

JOSEPH HENRY GARRON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. 67,986
(Capital Case)

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

BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

JOSEPH HENRY GARRON will be referred to as the "Appellant" in this brief, and the STATE OF FLORIDA will be referred to as the "Appellee." The record on appeal consists of twelve (12) volumes and will be referenced by the symbol "R" followed by the appropriate page number.

STATEMENT OF THE CASE

Appellee accepts Appellant's statement of the case subject to any changes and additions noted in the argument.

STATEMENT OF THE FACTS

A. The Guilt Phase

On the evening of November 11, 1982, Appellant was at home with his two stepdaughters, Linda and Tina Garron (R.57). Linda was watching television in the living room with Appellant, and Tina was in her bedroom (R.58). Appellant's wife, Le Thi Garron, had gone to the grocery store (R.57). Appellant drank a glass of wine (R.58). Appellant, who had become extremely religious in recent years, began denouncing God (R.59, 106-107). Appellant made an obscene remark to Linda and told her God could not help her now (R.59). He then touched the side of her thigh (R.59-61). At that point, Linda's mother returned home (R.61).

Linda testified that Appellant had previously touched her in a sexual way (R.61). Appellant had rubbed her butt while she was in bed and once told her he would give her dog away unless she let him climb into bed with her and rub her back (R.69). Linda had also seen Appellant lying in his bed on top of Tina (R.74). On that occasion, Appellant was wearing only his underwear, and Tina was wearing a nightgown which was lifted above her knees (R.74). Linda reported Appellant's acts to a school counselor (R.75). An H.R.S. representative visited their home, but no further action was taken (R.75).

On this evening, when Linda heard her mother drive up, she rushed outside to tell her what had happened (R.76). Appellant denied that anything had happened (R.77). He and Le Thi began arguing. Le Thi told her daughters to pack their clothes; they were leaving (R.77).

Linda then saw Appellant with a gun (R.81). She saw him put a towel around the gun so it could not be seen (R.82). Linda told her mother Appellant had a gun, but he denied it (R.82). Le Thi and Appellant were in their bedroom (R.83). Linda saw her mother back into the bathroom from the bedroom (R.83). Le Thi looked frightened; Appellant was pointing a gun at her (R.83). Linda heard two shots (R.85). Her mother was on the floor (R.85). She had been shot in the chest (R.85).

Linda and Tina ran from Appellant (R.86). Tina stopped at the telephone (R.86). She called the operator and requested the police (R.87). Linda saw Appellant run toward Tina (R.88). He held the gun in two hands, aimed and shot Tina (R.88).

Linda ran from the back porch (R.88). As she ran, Linda heard the door open and saw Appellant running (R.89). She heard another shot which she thought was aimed at her (R.89-92). Linda ran to the home of a neighbor, Mary Lombardi, and Lombardi called the police (R.88).

Dr. Joan Wood, the chief medical examiner for Pasco and Pinellas Counties, testified that Le Thi received two bullet wounds (R.150-152). She died from a gunshot wound to the chest (R.163). The gun used to kill Le Thi was shot approximately three feet from the victim (R.159). Dr. Wood testified that Le

Thi died three to five minutes after she was shot (R.160). Le Thi probably became unconscious one minute after she was shot (R.160).

Tina suffered three gunshot wounds to her chest and one to her left leg (R.153-157). Two of the chest wounds were fatal (R.160). Two of the chest wounds were shot from distances of one and one-half to three feet (R.513-156). According to Dr. Wood, Tina was alive when all four shots were fired (R.161). Tina probably died one to two minutes after the fourth shot was fired (R.161).

Clinton Vaughn, a deputy with the Pasco County Sheriff's Office, was dispatched to the scene at approximately nine or ten o'clock that evening (R.183). Vaughn found Appellant in the backyard on the ground (R.185). Appellant had been shot and was moaning (R.186). Vaughn asked Appellant if he had been shot and Appellant responded "yes" (R.186). Vaughn asked Appellant if anyone else had been shot, and Appellant pointed toward the trailer (R.186). Vaughn asked Appellant who did the shooting, and Appellant responded that he did (R.186). A revolver was located at Appellant's feet (R.186).

Vaughn entered the trailer and found the bodies of Tina and Le Thi (R.187). They were both dead (R.187). Vaughn went outside and advised Appellant of his Miranda rights (R.188). Appellant indicated that he understood his rights (R.189). Appellant never told Vaughn he did not remember the shooting (R.199).

Virginia Pleak, Appellant's half-sister, testified on behalf of Appellant. Pleak and Appellant had the same mother but different fathers (R.325). Their mother abandoned them when Appellant was an infant and later regained custody (R.325-331). While they were growing up, their mother was married several times and lived with several boyfriends (R.331-333). Pleak described Appellant as a normal teenager (R.338). However, on cross-examination, Pleak admitted that Appellant had been placed in the Detroit Child Guidance Clinic because he was very aggressive and was having problems at school (R.429).

At age 17, Appellant was involved in an accident and was in a coma for about three months (R.338,342). As a result of the accident, Appellant suffered brain damage, has a speech impediment and does not walk normally (R.343-349). Appellant was treated at a mental hospital and a rehabilitation center following his accident (R.347-349).

Appellant then lived with his mother for three years (R.353). During that period, Appellant attempted suicide (R.353). Appellant's step-father got Appellant a job with the maritime union as a deckhand (R.357). Appellant began drinking heavily and often displayed uncontrollable anger when drinking (R.357-360).

Pleak saw Appellant in Florida in 1981 (R.368). Appellant had become involved with a religious cult and was not taking his medication (R.368-371). While she was in Florida, Pleak observed Appellant drinking (R.383). In her opinion, Appellant's mental condition had deteriorated (R.383).

Dr. Stewart Berstein, an expert in the field of psychiatry, treated Appellant in 1961 (R.463). Appellant was being treated for severe temper outbursts (R.465). Prior to Appellant's accident, he had been in juvenile court three times and was arrested once for breaking and entering (R.468-471). Appellant had been deficient at school and was a behavior problem at home (R.468-471). Dr. Bernstein's final diagnosis was chronic brain syndrome post traumatic type with behavioral disturbance (R.476). Dr. Bernstein explained that this meant Appellant suffered an injury to his brain which affected his memory, neurological functioning, judgment and emotional status (R.476).

The State was permitted to call Dr. Bernstein out of order for its rebuttal case (R.512). Dr. Bernstein testified that it is his expert and personal opinion that psychiatrists should testify in medical terms, not legal terms, and therefore, should not direct themselves to the question whether a defendant knew right from wrong at the time he or she committed an offense (R.515). This is also the position of the American Psychiatric Association (R.515).

Dr. Subhash Tiwari, an expert in the fields of psychiatry and neurology, examined Appellant at Bayonet Point Hospital on November 12, 1982 (R.521). Dr. Tiwari saw Appellant for approximately 20 minutes (R.522). Appellant knew where he was and the date (R.523). Appellant could not recall the events of the preceding night (R.525).

On cross-examination, Dr. Tiwari stated he was not with

Appellant long enough to form an opinion about whether or not Appellant was psychotic at the time (R.536). However, at a previous deposition, Dr. Tiwari had stated he did not think Appellant was psychotic at the time (R.536). Appellant did not say anything on November 12 that made Dr. Tiwari think Appellant was psychotic (R.538). After the November 12 visit, Dr. Tiwari prescribed Haldol in case Appellant became violent or agitated (R.542). However, Appellant did not appear to be in need of any psychotropic medication (R.542).

Weyman Meadows is an in-take counselor for the Department of Health and Rehabilitative Services (R.555). In March 1981, Meadows investigated Linda's report that her father had made sexual advances toward her (R.555-556). After discussions with Linda and a visit to the Garron home, Meadows concluded there was no indication of sexual abuse (R.557-577).

Dr. James A. Fesler, an expert in the field of psychiatry, was appointed by the court to examine Appellant (R.623-625). Fesler examined Appellant on March 30, 1983 (R.625). Dr. Fesler reviewed Appellant's history and interviewed Appellant for about an hour (R.626-628). Appellant told Dr. Fesler he did not remember what had happened and did not know why he was in jail (R.631,639). Appellant believed all of his family was still alive (R.631-639). In Dr. Fesler's opinion, Appellant became psychotic in early 1980 and remained psychotic until the day of the interview (R.643-644). Dr. Fesler attributed Appellant's condition to his head injury and his abuse of alcohol and drugs (R.644). In Dr. Fesler's opinion, Appellant was insane at the

time he shot his wife and stepdaughter (R.649).

On cross-examination, Dr. Fesler testified that during the examination, Appellant was able to respond rationally and correctly to questions about his name, his age, the identity of the President of the United States, his brothers and sisters, and his childhood (R.655). The prosecutor asked whether Dr. Fesler recalled a conversation he had with William Webb, a former assistant state attorney, wherein Webb related a hypothetical using the facts of this case and asked whether those facts would change Dr. Fesler's opinion about Appellant's sanity at the time of the offense (R.660-665). Dr. Fesler did not recall the hypothetical or that he told Webb he would consider Appellant sane under those facts (R.666).

Dr. Radha Majundar, an expert in the field of psychiatry, also examined Appellant at the request of the court (R.730-734). Dr. Majundar examined Appellant on March 30, 1983 for approximately one hour and twenty minutes (R.734-735). Dr. Majundar reported that at the time of the interview, Appellant was agitated and not in touch with reality (R.736). Dr. Majundar opined that Appellant was actively psychotic when she spoke to him (R.739). Dr. Majundar's diagnosis was that Appellant suffers from organic brain symdrome, some mental retardation and temporal lobe epilepsy (R.741). In Dr. Majundar's opinion, Appellant did not know right from wrong at the time he committed this offense (R.746).

Carol Medders is a counter girl at Dunkin' Donuts (R.795). Appellant came to the doughnut shop on a daily basis (R.796). Appellant became very religious about a year and a half ago (R.798). After he became religious, Appellant talked about no longer needing his medication (R.802). Medders noticed that Appellant became more moody, his speech was disoriented and he had difficulty concentrating (R.803). Medders never saw Appellant get upset; she never saw him do anything psychotic or bizarre (R.806, 810-811). Medders saw Appellant the day before the murders occurred (R.811). Appellant did not do anything psychotic or bizarre on that day and appeared to know right from wrong (R.811).

Mary Lombardi was a neighbor of Appellant (R.816). On the evening of the shooting, Linda came to her door (R.817). Linda was terrified and was yelling "he's chasing me; he's going to shoot me" (R.817). Linda told Lombardi Appellant had shot her mother (R.819). Lombardi testified Linda did not tell Lombardi that her sister had been shot (R.819). Linda related the incidents that led up to the shooting to Lombardi (R.821).

On cross-examination, Lombardi testified that she did not recall telling Bill Webb, two days after the shooting, that Linda stated "he shot my mother and he shot my sister" (R.825). Lombardi did not recall Linda telling her Appellant had made sexual advances toward her (R.826).

Dr. Thomas Thieman, an expert in the field of psychiatry, was hired by the public defender's office to examine Appellant

(R.831-833). Dr. Thieman examined Appellant at the Pasco County Jail on September 5, 1984 (R.833). Dr. Thieman diagnosed Appellant as having organic brain symdrome, chronic alcohol dependency, an anti-social personality and temporal lobe epilepsy (R.839-841). Appellant told Dr. Thieman he did not recall the shooting (R.844). Appellant's account of the events came mainly from the newspapers and what he was told (R.844). Appellant told Dr. Thieman he did not consciously and knowingly kill his wife and stepdaughter (R.847). In Dr. Thieman's opinion, Appellant was insane at the time he committed this offense (R.850).

During the State's rebuttal case, the prosecutor called William Webb. Webb was the assistant state attorney who initially worked on this case (R.938). Webb was in private practice at the time of the trial (R.938). On November 12, 1982, as part of the state attorney investigation, Webb interviewed Mary Lombardi (R.940). Lombardi was placed under oath (R.940). Lombardi told Webb that on the night of the shooting, Linda told her Appellant had just shot her mother and her sister (R.945). Lombardi also told Webb she had previously seen Appellant wear a firearm in a holster on his property and that Appellant viciously beat his dogs (R.947).

Webb was present at Appellant's advisory hearing (R.948). The hearing was held at Bayonet Point Hospital (R.950). At that hearing, Appellant was advised he had a right to be represented by an attorney and if he could not afford an attorney, the court would appoint the public defender's office to represent

Appellant (R.953). Appellant told the court he wanted to retain his own attorney (R.953). According to Webb, Appellant appeared to understand what was going on during the hearing (R.953). Appellant's answers to questions asked were responsive (R.963). Appellant did nothing bizarre or psychotic during the hearing (R.963). Appellant did nothing which made Webb think he could not distinguish right from wrong at the time (R.965). Webb stated that in his opinion Appellant was sane under Florida law (R.966). An objection and motion to strike this answer was sustained (R.966). Webb then testified that in his opinion Appellant was sane at the time of the hearing (R.966).

Webb also testified that after he received Dr. Fesler's report, Webb telephoned Dr. Fesler (R.967). Webb related a hypothetical to Dr. Fesler based on the facts of this case and asked Dr. Fesler whether these facts would change Dr. Fesler's opinion as to whether Appellant was sane at the time of the hearing (R.963-975). Dr. Fesler told Webb that those facts would indicate sanity (R.976).

The State recalled Dr. Tiwari. Dr. Tiwari examined Appellant on March 15, 1984 (R.988). When Dr. Tiwari asked Appellant about the events that occurred on November 12, 1982, Appellant stated he was uncertain whether he recalled the events independently or from accounts he had read (R.989). Appellant told Dr. Tiwari that after shooting his wife and stepdaughter Appellant put the .38 revolver to his chin and fired a shot (R.989).

The State then recalled Edward Bigler, an expert in the area of firearm analysis and identification (R.993). Bigler examined both handguns recovered from the scene of the shooting (R.993). Bigler testified there was no way to determine which firearm was used to inflict the wound on Appellant's chin (R.998). Bigler never reported to anyone in law enforcement that Appellant shot himself with the .38 caliber revolver (R.1000).

William Scott Phillips was a detective with the Pasco County Sheriff's Department on the day of the shooting (R.1003). Phillips was sent to the hospital to talk to Appellant (R.1004). Phillips and Appellant knew each other previously (R.1005). Appellant recognized Phillips (R.1005). Appellant appeared coherent at the time (R.1005). Appellant was advised of his Miranda rights and indicated he understood his rights (R.1005-1006). Phillips was also present at Appellant's advisory hearing (R.1006). Appellant appeared to understand what was going on during the hearing (R.1006). Appellant did nothing on the evening of November 11 to make Phillips think Appellant did not know right from wrong (R.1007).

Steve Morgan, a Pasco County deputy sheriff, testified that he saw Appellant at the hospital on November 11 (R.1022). Morgan asked Appellant if Linda could stay with the McDonald family, and Appellant indicated she could (R.1023). Appellant appeared to understand the question (R.1023).

Ross Greco rode to the hospital in the ambulance with Appellant and guarded Appellant for two to three days

(R.1024-1025). Appellant appeared rational and coherent during that time (R.1026). Greco's opinion, based on his observations of Appellant, was that Appellant was sane on November 11 (R.1027).

Donn Gallahue is a deputy with the Pasco County Sheriff's Department (R.1031). He was present in 1981 when Weyman Meadows interviewed Appellant (R.1031). Appellant appeared rational and coherent at the time (R.1032). Gallahue was a supervisor at the Pasco County Jail from May 1983 through May 1984 (R.1033). Appellant was incarcerated in that institution during that time (R.1034). Appellant was elected a spokesman for his unit (R.1034). Based on Gallahue's contacts with Appellant in 1981 and at the jail, it was Gallahue's opinion Appellant was sane at both points in time (R.1036).

Don Venedan, a corrections officer with the Pasco County Jail was initially assigned to transport Appellant to and from the trial (R.1043). Venedan testified that during a recess following Dr. Bernstein's testimony Appellant had a conversation with Dr. Bernstein (R.1045). Dr. Bernstein stated, "I'm sorry, I don't remember you." Appellant replied, "I remember you." (R.1045).

The State recalled Linda Garron. Linda testified that Appellant drove, did shopping, used credit cards and paid the family bills (R.1052-1056). Based on her previous contact with Appellant, it was Linda's opinion Appellant knew right from wrong on November 11 (R.1057). On cross-examination, Linda stated she had never known anyone who was insane (R.1066).

Linda had difficulty explaining how an insane person would act and stated it could manifest itself in many different behaviors (R.1069-1972).

B. Penalty Phase

During the penalty phase, the State introduced the medical examiner's reports on Le Thi and Tina (R.1286).

Sharon Denning, a supervisor for the Pasco County Clerk of Circuit Court was called as a witness. Denning offered records indicating that in 1974 Appellant was charged with aggravated assault and was placed on probation (R.1293-1294).

The psychiatric reports of Drs. Helman and Frieson, which were prepared in 1974, were admitted over defense counsel's objection (R.1298-1305).

Dr. Timothy Fjordbak, an expert in forensic psychology, testified on behalf of the defense (R.1309-1310). Dr. Fjordbak was a clinical psychologist at Chatahoochee State Hospital (R.1311). Appellant was admitted to the hospital in December 1984. In January 1985, Dr. Fjordbak determined Appellant was incompetent to stand trial (R.1312). Dr. Fjordbak testified Appellant was actively psychotic in December 1984 (R.1316). Appellant's psychosis manifests itself in significant paranoid thinking and unrealistic beliefs (R.1315). Dr. Fjordbak testified further that when Appellant is not on his medication, he is incompetent and psychotic (R.1321). However, Appellant's mental state is improved when he is on medication (R.1321). It was Dr. Fjordbak's opinion that Appellant would do well in a closely- structured environment (R.1322).

On cross-examination Dr. Fjordbak testified that when he examined Appellant in July 1985, Appellant had a full appreciation of the penalties that could be imposed for the murders and indicated a strong desire to be acquitted (R.1328). Dr. Fjordbak opined that Appellant has a greater than average likelihood of being aggressive or violent with other people (R.1331). Dr. Fjordbak testified Appellant was more likely to commit a violent offense than the average individual (R.1344).

Virginia Pleak testified about Appellant's childhood and his relationship with his mother (R.1357-1358). The prosecution was permitted to cross-examine Pleak as to her bias and credibility (R.1361-1362). In response to the State's questions, Pleak testified that she loved her brother despite the fact that Appellant murdered Tina and Le Thi, and was previously charged with breaking and entering, and lied about being in the military, and told her he killed a man in Turkey or Greece (R.1362-1366). Pleak stated no matter what Appellant has done in the past or might do in the future, she will still love him (R.1367). Pleak also testified she thought Appellant could be violent again if released (R.1368).

SUMMARY OF THE ARGUMENT

Issue I: There is nothing in the record which reveals that Appellant chose to exercise his rights to remain silent and consult with counsel after being advised of those rights. The comments challenged by Appellant were made in the context of describing Appellant's behavior immediately after and the day following the murders. The witness' statements and prosecutor's comments refer only to whether Appellant appeared to understand his rights and the proceedings during the advisory hearing. Thus, there was no due process violation under State v. Burwick, infra, and Wainwright v. Greenfield, infra.

Issue II: It is not inherently prejudicial for a prosecutor to testify at trial. William Webb did not actively participate in the trial of this case. In fact, at the time of trial, Webb was no longer associated with the state attorney's office. Webb's opinion was only that Appellant appeared sane at the time of the advisory hearing. Webb did not give an opinion as to Appellant's guilt. Accordingly, Appellant was not prejudiced by the admission of Webb's testimony on this matter.

Issue III: The opinions of the State's rebuttal witnesses regarding Appellant's sanity were proper. Lay witnesses may testify as to a defendant's mental condition, provided the testimony is based upon personal knowledge or observation. Each of the witnesses testified as to their contact with Appellant and their observations during that contact. It was appropriate for the witnesses to give an opinion based on those observations.

Issue IV: The introduction of William Webb's testimony to impeach Mary Lombardi was appropriate because Lombardi was previously furnished with the time, place, persons present and questions purportedly asked, and she stated she did not recall the inquiry.

The admission of Officer Phillips' testimony to impeach Mary Lombardi is also not a basis for reversal of Appellant's conviction. The content of that statement was already admitted through Linda Garron, and the defense did not object when Officer Phillips related what Linda Garron told him about the events of that evening.

Issue V: The rebuttal testimony of Dr. Bernstein was proper. The psychiatrists who testified that Appellant was legally insane at the time he committed the murders recognized the difficulty in attempting to determine, long after an offense was committed, whether a criminal defendant knew right from wrong at the time he or she committed an offense. It was appropriate for the State to present evidence that experts in the field, including the American Psychiatric Association, have concluded that psychiatrists should not make such a determination.

Appellant did not object to the questions asked of Dr. Majundar about what she was being paid in this case. Thus, that issue was not preserved for appeal. Furthermore, the questions were related to any interest or motive Dr. Majundar might have had for testifying in this case.

The use of the APA position paper was appropriate under Section 90.706. The trial court recognized this writing as authoritative. A mistrial was not necessary after the State asked Dr. Fesler an improper question. The trial court's instruction that the jury disregard that question was sufficient.

There was no objection to the prosecutor's comments during closing argument at trial. Thus, this Court is precluded from considering this issue unless the prosecutor's comments constituted fundamental error. The prosecutor's remarks were fair comments on the testimony and credibility of the psychiatrists. There was no fundamental error.

Issue VI: The State's use of Williams rule evidence was proper. The evidence was not introduced solely to show bad character on the part of Appellant. The evidence was relevant to the issue of motive and to rebut Appellant's insanity defense.

Issue VII: Section 921.141(1) allows the trial court broad latitude in admitting evidence during the penalty phase of a trial. The reports were introduced for the limited purpose of proving Appellant had been convicted of aggravated assault in 1974. The reports were also inherently reliable. The trial court determined the reports were probative and also that the defense could rebut the reports. Accordingly, there was no error in admitting the reports.

Alternatively, if this Court determines there was error in

admitting the reports, it cannot be considered reversible error because the jury had been presented with the substance of those reports during the guilt phase of the trial.

Issue VIII: Appellant introduced the subject of Appellant's future propensity for violence into the proceeding. Accordingly, it was appropriate for the prosecutor to negate the mitigating evidence presented by Appellant by questioning the doctor about Appellant's actions should he not take his medication or be confined to structured surroundings. Furthermore, it is clear from the trial court's sentencing order that future dangerousness was not considered by the sentencer.

Issue IX: Improper comments or the admission of improper evidence does not per se require the vacation of the death sentence. The challenged comment was made during impeachment of Appellant's sister and was not raised again. The State did not refer to this incident in discussing the aggravating circumstances in this case, and the trial court made no reference to the remark in its findings on aggravating and mitigating circumstances. Any error in making this remark was harmless.

Issue X: Those comments to which no objection was made at trial cannot be raised in this appeal. The remaining comments considered separately or together, cannot be said to have so fundamentally tainted the penalty-phase proceeding as to require a remand for resentencing.

Issue XI: A plea of guilty without adjudication of guilt is considered a "conviction" under Section 921.141(5)(b). Similarly, this Court should determine that a plea of nolo contendere without adjudication of guilt is also a conviction under that section. However, even if this Court determines Appellant's conviction in 1974 for aggravated assault should not have been considered, Section 921.141(5)(b) is still applicable because the trial court should have considered Appellant's conviction for the murder of Le Thi Garron.

Based on the evidence in this case, it is apparent Appellant's dominant motive for murdering Tina Garron was to prevent her from reporting her mother's murder to the police.

The record clearly supports the trial court's finding that the murder of Tina Garron was especially heinous, atrocious or cruel. Tina was shot four times at point blank range. According to the medical examiner, Tina was alive when all four shots were fired and lived approximately one to two minutes after the fourth shot was fired. Appellant's actions also support the trial court's finding that the murder was committed in a cold, calculated and premeditated manner.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED IN ADMITTING TESTIMONY REGARDING APPELLANT'S RESPONSES WHEN HE WAS ADVISED OF HIS MIRANDA RIGHTS BY POLICE AND DURING HIS ADVISORY HEARING AND IN ALLOWING THE PROSECUTOR TO COMMENT ON THIS TESTIMONY DURING CLOSING ARGUMENT.

Appellant was charged with two counts of first-degree murder. In his defense, Appellant presented evidence that he was insane at the time of the offense. In order to rebut Appellant's defense, the State presented witnesses, during its case in chief and on rebuttal, who testified as to Appellant's mental and emotional state immediately after and the day after the murders. Appellant contends that this testimony and the prosecutor's comments about that testimony during closing argument constituted impermissible comments on Appellant's exercise of his rights to remain silent and to be represented by counsel. Appellee submits the statements challenged by Appellant cannot be construed as comments on the exercise of those rights. Accordingly, Appellant's first point on appeal must fail.

In State v. Burwick, 442 So.2d 944 (Fla. 1983), cert. denied, 466 U.S. 931, 104 S.Ct. 1719, 80 L.Ed.2d 191 (1984), this Court held it was reversible error to allow the State to rebut the defendant's insanity defense by introducing testimony that, after being advised of his Miranda rights, the defendant refused to make a statement and requested an attorney. The

United States Supreme Court has also held that the State may not use a defendant's exercise of his constitutional rights against him, after implicitly assuring that the invocation of those rights will not be penalized. Wainwright v. Greenfield, 474 U.S. ___, 106 S.Ct. ___, 88 L.Ed.2d 623 (1986).

However, in both of those cases it was recognized that it is permissible for a prosecutor to elicit testimony which would demonstrate that an accused was rational and coherent at the time of his arrest without mentioning that he exercised his constitutional rights to remain silent and to consult counsel. State v. Burwick, 442 So.2d at 948; Wainwright v. Greenfield, 88 L.Ed.2d at 632. This is exactly what the prosecutor did in the case at bar. The prosecutor's questions of the police officers and the former state attorney were directed only to the issue of Appellant's behavior at the time of his arrest and during his advisory hearing the following day - whether Appellant appeared rational and coherent, whether Appellant understood the questions he was being asked, whether Appellant's answers to those questions were responsive, and whether Appellant appeared to understand his rights.

A. Appellant's responses following Miranda warnings.

Appellant contends that the testimony of Deputies Vaughn, Ferguson and Phillips regarding Appellant's responses after he had been advised of his Miranda rights constituted improper comments on Appellant's right to remain silent. That testimony, which is set forth in Appellant's brief, appears in the record at R.188-189, 203, 1005-1006.

In none of these instances did the prosecutor ask or the witness volunteer that Appellant chose to exercise his constitutional rights. Furthermore, the witness' statements are not "fairly susceptible" to such interpretation. See, State v. Thornton, 11 F.L.W. 325 (Fla. Jul. 17, 1986). Accordingly, there was no due process violation.

Appellant relies on Maness v. State, 341 So.2d 246 (Fla. 4th DCA 1976) for the proposition that the State may not present evidence that a defendant was properly warned of his constitutional rights where the State is not seeking to introduce a statement of the defendant into evidence. However, Maness is distinguishable because in that case the prosecutor asked the arresting officer whether the defendant made any statements after being advised of his constitutional rights, and the officer replied that he had not. Such testimony was not elicited in the case at bar.

Furthermore, other cases have held that testimony about whether an arrestee understood his Miranda rights cannot be construed as a comment on the arrestee's exercise of his right to remain silent. In Holland v. State, 340 So.2d 931 (Fla. 4th DCA 1976), an opinion written just weeks before the Maness decision, the Fourth District Court of Appeal held the arresting officer's testimony that the defendant made no response when the officer asked him if he understood his Miranda rights could not be construed as a comment on the defendant's right to remain silent.

Similarly, in Thomas v. State, 367 So.2d 260 (Fla. 3d DCA 1979), cert. denied, 378 So.2d 350 (1979), the Third District Court of Appeal ruled that a police officer's testimony that he asked the defendant to read the constitutional rights warning interrogation form and to place his initials after each right and that the defendant complied with this request could not reasonably be construed as a comment on the defendant's right to remain silent.

In the instant case, the witnesses were asked only whether Appellant indicated he understood his Miranda rights. There is nothing in the record to indicate that Appellant chose to remain silent. Moreover, the testimony was elicited in the context of Appellant's behavior shortly after he committed the offense. This testimony cannot reasonably be construed as a comment on Appellant's right to remain silent.

Appellant also asserts that the prosecutor erred by including in his hypothetical to Dr. Thieman the fact that immediately after the shooting Appellant indicated that he understood his constitutional rights (R.882). This was a fact in evidence and, therefore, was appropriate for inclusion in the hypothetical.

Finally, Appellant challenges the prosecutor's references during closing argument to the testimony of Phillips and Vaughn (R.1124-1127). In determining whether the prosecutor improperly commented on Appellant's right to remain silent, the appropriate inquiry is whether the comment is "fairly susceptible" to inter-

pretation as a comment on Appellant's right to remain silent. State v. Kinchen, 490 So.2d 21 (Fla. 1985); Thornton v. State, 11 F.L.W. at 325. The comments challenged by Appellant are not fairly susceptible to interpretation as a comment on Appellant's right to remain silent. At no point does the prosecutor state that Appellant remained silent after being advised of his Miranda rights. Furthermore, the prosecutor's statements were made in the context of Appellant's behavior following the murders.

B. Appellant's responses during advisory hearing.

In its rebuttal case, the State called William Webb, a former prosecutor who handled the early stages of this prosecution. Webb was present at Appellant's advisory hearing. Webb testified that during the hearing, when the judge advised Appellant that he had a right to be represented by counsel in this case and if he could not afford an attorney the public defender's office would be appointed to represent him, Appellant stated that he wanted to retain his own attorney (R.953).

Appellee submits that Webb's statement that Appellant indicated he wanted to retain his own attorney was not a comment on Appellant's invocation of his right to counsel. Rather, the purpose of the statement was to show that at this hearing, held the day after the shooting, Appellant had the presence of mind to decide whether the accept representation by the public defender or hire his own attorney.

Appellant argues further that the prosecutor's comments during closing argument about Webb's testimony also constituted

error. Those statements, too, were directed only to Appellant's behavior during the advisory hearing and his ability to understand the proceedings and make decisions regarding his representation by counsel.

The statements of Webb and of the prosecutor during closing argument cannot be construed as comments on Appellant's exercise of his right to counsel. Accordingly, there was no due process violation.

Appellant also challenges the inclusion in the hypothetical to Dr. Thieman of the defendant's behavior during the advisory hearing as related by Webb (R.884). These facts were in evidence and were, thus, appropriate for inclusion in this hypothetical.

C. Harmless error.

Should this Court reject the preceding arguments, Appellee submits that any error in this case was harmless in light of the other evidence in this case. The State presented the testimony of Linda Garron, an eyewitness to the murders. As to Appellant's sanity at the time of the offense, there was ample evidence regarding Appellant's behavior prior to and after the shootings from which the jury could conclude Appellant was sane at the time he committed the offenses. Thus, it is clear beyond a reasonable doubt that the error contributed to Appellant's conviction. Accordingly, reversal of Appellant's conviction on this ground is not warranted. State v. DiGuilio, 11 F.L.W. 339 (Fla. Jul. 17, 1986); Brannin v. State, 11 F.L.W. 485 (Fla. Sept. 18, 1986); Diaz v. State, 11 F.L.W. 1763 (Fla. 3d DCA Aug. 12, 1986).

ISSUE II

WHETHER THE TRIAL COURT ERRED IN PERMITTING WILLIAM WEBB, A FORMER ASSISTANT STATE ATTORNEY WHO HAD ORIGINAL RESPONSIBILITY FOR PROSECUTING THIS CASE, TO TESTIFY THAT IN HIS OPINION APPELLANT WAS SANE AT THE TIME OF HIS ADVISORY HEARING.

During the testimony of William Webb, in the State's rebuttal case, Webb was questioned about Appellant's behavior during the advisory hearing. Webb testified, based upon his observations, that Appellant appeared to be sane at that time. Appellant argues that this testimony was improper and denied him a fair trial.

This Court recently considered the question whether a state attorney's office must be disqualified from prosecuting a case when two assistant state attorneys, who were not involved in the prosecution of the case, were to be State witnesses. State v. Clausell, 474 So.2d 1189 (Fla. 1985). This Court determined there is "no inherent prejudice in allowing an assistant state attorney who is not prosecuting the case to testify on behalf of the State." Id. at 1190. However, if specific prejudice is demonstrated, the state attorney's office should be disqualified. Id. In that case, this Court specifically rejected the contention that allowing an assistant state attorney to testify in a case prosecuted by another member of the same office gives undue weight and credibility to the testimony of the assistant state attorney. Id. at 1191. Compare, Shargaa v. State, 102 So.2d 804 (Fla. 1958), cert.

denied, 358 U.S. 876, 79 S.Ct. 114, 3 L.Ed.2d 104 (1958).

In the case at bar, there is even less likelihood that Appellant suffered prejudice as a result of Webb's testimony. Webb testified he is no longer associated with the state attorney's office and is currently in private practice. Thus, it is unlikely that the jury gave Webb's testimony any undue weight.

Webb was called as a witness to testify, in part, as to Appellant's behavior during the advisory hearing. As more fully set forth in Issue III, it was permissible for Webb, as a lay witness, to give an opinion on Appellant's mental condition, based upon Webb's personal observations. See, Rivers v. State, 458 So.2d 762 (Fla. 1984).

Webb testified he was present at Appellant's advisory hearing which lasted approximately 20 minutes (R.948,963). Webb recalled that the judge advised Appellant of his rights, and Appellant indicated he understood these rights and wanted to retain his own attorney (R.953). Webb testified that all of Appellant's responses were rational and intelligent (R.965). Appellant did nothing during the hearing which Webb considered bizarre or which made Webb think Appellant was psychotic or could not distinguish right from wrong at the time (R.964-965). Webb testified he was familiar with the legal definition of insanity in the State of Florida (R.964). Finally, Webb testified that, in his opinion, based on his observations during the hearing, Appellant was sane during the advisory hearing (R.966). Appellee submits this testimony was proper opinion

testimony of a lay witness. Therefore, the trial court appropriately admitted this evidence.

Appellee recognizes that prior to testifying that in his opinion Appellant was "sane," Webb testified it was his opinion Appellant was "sane under the definition of Florida law" (R.966). That answer was the subject of a motion to strike and an objection on behalf of Appellant (R.966). The trial court sustained the objection (R.966). Thus, that error was cleared up at trial and cannot form the basis for reversal of Appellant's conviction.

State v. Hayes, 473 S.W.2d 688 (Mo. 1971); People v. Arends, 155 Cal.App.2d 496, 318 P.2d 532 (1957); and United States v. McKoy, 771 F.2d 1207 (9th Cir. 1985), cited by Appellant, are clearly distinguishable from the instant case. In State v. Hayes, the prosecuting attorney actively prosecuted the case and was also the State's chief witness. In People v. Arends and United States v. McKoy, 771 F.2d 1207 (9th Cir. 1985) the attorney/witness was not prosecuting the case, but gave an opinion on the defendant's guilt.

As previously stated, Webb was not the prosecuting attorney in this case. In fact, the State disassociated Webb from the state attorney's staff by eliciting testimony that Webb had been in private practice for approximately two years prior to trial (R.938).

Furthermore, Webb did not give an opinion as to Appellant's guilt. Appellant's attempt to equate the issue of guilt with

the issue of sanity must fail. Appellee would submit those are separate concepts. Moreover, recognizing that sanity was a primary issue in this case, the key determination for the jury was whether Appellant was sane at the time he committed the offense, not at the time of the advisory hearing. Webb offered no opinion on that issue.

Cases from other jurisdictions have found no error in admitting the testimony of a former prosecutor or prosecutor not associated with the case on issues other than the guilt of the defendant. In State v. Washington, 229 Kan. 47, 622 P.2d 986 (1981), the testimony of an assistant district attorney, who handled rape cases and was a rape counselor but who was not involved in that prosecution, regarding the number of victims who have physical injury to their sex organs after a rape attack was held admissible. In McKenzie v. State, 507 P.2d 1333 (Okla. Crim. App. 1973), a witness gave testimony at trial that differed from the testimony she gave at a preliminary hearing. The witness explained the difference in the testimony by stating that she was drunk at the preliminary hearing. The State called the prosecutor who was present at the preliminary hearing, but not involved in the trial, to testify that the witness appeared drunk at the hearing. The appellate court found no error in admitting that testimony.

Appellee submits there was no prejudice in allowing Webb, who was not an assistant state attorney at the time of trial, to testify as to his observations of Appellant's behavior during

the advisory hearing. Accordingly, this testimony cannot form the basis for reversal of Appellant's conviction.

In the alternative, Appellee would argue any error in admitting Webb's testimony was harmless under the standard set forth in State v. DiGuilio, supra. The State presented numerous lay witnesses who testified that Appellant appeared sane before and after he committed the offense. In fact, William Phillips was also present at the advisory hearing, and he testified that Appellant appeared to understand the nature of that proceeding and answered questions rationally during the hearing (R.1006). Thus, Webb's testimony was merely cumulative. It is clear beyond a reasonable doubt that this testimony did not contribute to Appellant's conviction.

ISSUE III

WHETHER THE TRIAL COURT ERRED IN ADMITTING LAY OPINIONS OF THE STATE'S REBUTTAL WITNESSES ON THE ISSUE OF APPELLANT'S SANITY.

Appellant's third contention is that the trial court erred in allowing the State's rebuttal witnesses to give lay opinions on the issue of Appellant's sanity because none of the witnesses, with the exception of Linda Garron, had a sufficient foundation upon which to render such an opinion.

The question of Appellant's sanity or insanity at the time of the offense is a question of fact for the jury. Byrd v. State, 297 So.2d 22 (Fla. 1974); State v. McMahon, 485 So.2d 884 (Fla. 2d DCA 1986). In making its determination, a jury may reject the testimony of experts and rely solely on the testimony of lay witnesses. State v. McMahon, 485 So.2d at 886; Sands v. State, 403 So.2d 1090 (Fla. 3d DCA 1981); State ex rel. Bludworth v. Kapner, 394 So.2d 541 (Fla. 4th DCA 1981). In this case, the jury determined Appellant was sane at the time he committed the murders. Appellee submits there was competent evidence to support that conclusion, and therefore, the jury verdict should be accepted. See, Tibbs v. State, 397 So.2d 1120 (Fla. 1981), aff'd., 457 U.S. 31, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982).

Appellant argues that, with the exception of Linda Garron, none of the State's lay witnesses had a sufficient foundation upon which to base an opinion as to Appellant's sanity. Under

Florida law, "an otherwise qualified witness who is not a medical expert can testify about a person's mental condition, provided the testimony is based upon personal knowledge or observation." Rivers v. State, 458 So.2d at 765; Cannon v. State, 107 So. 360 (Fla. 1926); Hixon v. State, 165 So.2d 436 (Fla. 2d DCA 1964). Appellee would, therefore, submit the only restriction on lay opinion testimony is that the witness testify based upon relevant facts known to and detailed by the witness. Hixon v. State, 165 So.2d at 441.

To rebut Appellant's defense of insanity, the State presented the testimony of Linda Garron, Detective Phillips, Deputy Greco, Deputy Gallahue and William Webb. Each of these witnesses testified in detail about the contact they had with Appellant and their observations during that contact. The witnesses then gave their opinions, based upon their own personal knowledge and observations, that Appellant was sane at the time they observed Appellant. That testimony was clearly admissible and provided competent evidence from which the jury could conclude Appellant was sane at the time he committed this offense.

Appellant also challenges Linda Garron's testimony on the ground she lacked the maturity to give an opinion as to Appellant's sanity. It is the responsibility of the jury to judge the credibility of a witness, and because credibility goes to the weight, rather than the sufficiency, of the evidence, this Court should not reweigh that testimony. State v. McMahon, 485 So.2d at 886; Tibbs v. State, 394 So.2d at 1123.

ISSUE IV

WHETHER THE TRIAL COURT ERRED IN ALLOWING STATE REBUTTAL WITNESSES TO TESTIFY REGARDING THE PRIOR STATEMENTS OF WITNESS MARY LOMBARDI.

Mary Lombardi, a defense witness and neighbor of the Garron family, testified on direct examination that Linda Garron ran to the Lombardi home on November 11, 1982, shouting, "Please, you [sic] got to believe me, he's going to shoot me. He's chasing me. He's going to shoot me." (R.817,818). Fourteen year old Linda was hysterical and told Lombardi that her father [Appellant] was shooting the gun in the house, that he shot her mother and that she had seen blood on her mother (R.818-823). Linda was screaming that her mother and sister were in the house and she was afraid for her sister (R.818,819). Lombardi recalled telling the police dispatcher that "she [Linda Garron] knows the mother is shot, possibly her sister, too. . ." (R.819). On direct examination, Lombardi stated, "She [Linda] didn't say she saw her sister shot, no." (R.819). After the defendant was taken into custody, and Linda was taken to the hospital, Linda told Mrs. Lombardi, "I can't believe that he really killed my mother and my sister. I can't believe they're gone." (R.822).

On cross-examination, Lombardi was asked about the sequence of events following the shooting. After the police arrived on the scene, Lombardi went to the hospital with Linda (R.823-824).

A day or two after the shooting, Lombardi gave a sworn statement at the state attorney's office (R.824-825). On cross-examination, the prosecutor continued:

> [PROSECUTOR] Q. And then about a day or so later you were told to come to the State Attorney's Office, right?
>
> [MARY LOMBARDI] A. Yes.
>
> Q. Our office upstairs?
>
> A. Right.
>
> Q. Where you met a gentleman who placed you under oath and asked you what you knew about what occurred that night?
>
> A. Right.
>
> * * * *
>
> A. I know I talked to you and there was another man, but what his name was, I do not recall.
>
> Q. But you do remember coming to the State Attorney's Office?
>
> A. I do remember coming here.
>
> Q. Like a day or so after?
>
> A. Probably a day or so.
>
> Q. Do you remember Bill Webb asking you what Linda told you when she first got into the home, into your home?
>
> A. Yeah.
>
> Q. Do you remember telling him that Linda stated, he shot my mother, my sister in there, he shot my sister?
>
> A. No, she didn't say that.
>
> Q. You didn't say that?
>
> A. No, she didn't say that, no.

Q. Do you remember talking with Bill Webb and him saying to you: I'm really concerned because the only defense in this case is insanity, so I want you to tell me everything that would help him, Bill Webb, find out if there was any indication of craziness on the part of the defendant; do you remember him asking you that inquiry?

A. No.

Q. You don't?

A. No.

(R.824-825)

* * * *

Q. Now, you spoke about Linda Garron telling you a story. Did she ever tell you that the defendant made sexual advances towards her?

A. No.

(R.826)

During cross-examination of Lombardi, the prosecutor specified (1) the time [a day or two after the shooting]; (2) the place [state attorney's office]; (3) the persons present [Lombardi and Prosecutor William Webb], and (4) the words said in the prior inconsistent statement [Lombardi telling Webb that Linda stated, "He shot my mother, my sister's in there, he shot my sister."] (R.824-825). Thus, an adequate predicate was laid for the introduction of the prior inconsistent statement. Courtney v. State, 476 So.2d 301 (Fla. 1st DCA 1985), Rowe v. State, 128 Fla. 394, 174 So. 820 (1937). The prosecutor may attack the credibility of a defense witness by introducing statements of the witness that are inconsistent with the

witness' present testimony. §90.608(1)(a), Fla. Stat. (1985). If, on cross-examination, the witness denies, or fails to remember, making such a statement, the fact that the statement was made may be proved by another witness. §90.614(2), Fla. Stat. (1985); Williams v. State, 472 So.2d 1350 (Fla. 2d DCA 1985).

Sub judice, Lombardi was questioned on cross- examination regarding the circumstances surrounding her original interview at the State Attorney's Office and her purported statements to the prosecutor. When Lombardi denied making the prior statement (R.825), the State correctly introduced the rebuttal testimony of former prosecutor William Webb. On rebuttal, Webb testified that Lombardi advised him that Linda Garron arrived at her home "very upset" and that "her father had just shot her mother and had just shot her sister." (R.945). On rebuttal, Webb also testified that he questioned Lombardi about the Appellant's mental state and asked Lombardi if there was any bizarre or unusual conduct on the part of the defendant (R.947). According to Webb, Lombardi said the only thing remotely related to that question was the fact that she saw Appellant wear a firearm in a holster and that Appellant had dogs, which Webb knew from prior investigations had been beaten by Appellant (R.947-948). Aside from that, Lombardi advised Webb that she knew nothing regarding any unusual, irrational or bizarre conduct on the part of Appellant (R.948).

The introduction of this testimony was appropriate on rebuttal. Lombardi had been previously furnished with the

time, place, persons present and question purportedly asked and stated that she did not recall the inquiry (R.825). Furthermore, the statements attributed to Lombardi merely corroborated Linda's testimony that she told Lombardi her sister had been shot and showed that Lombardi, a neighbor who was not well-acquainted with the Garron family, saw Appellant wearing a gun and knew that he kept dogs on the property.

Officer Scott Phillips was also called as a State witness on rebuttal and testified that he went to the hospital following the shooting episode. At the hospital, Officer Phillips spoke briefly to Appellant, interviewed Linda Garron for approximately 45 minutes and then interviewed Mary Lombardi (R.1005, 1017). During the interview at the hospital and outside the presence of Lombardi, Linda Garron told Phillips about the defendant's sexual advances and innuendos (R.1016). Officer Phillips testified he recognized Appellant as a frequent customer in a local doughnut shop and recalled seeing Appellant "dozens" of times during a period of two years. Officer Phillips testified further that he observed nothing unusual, strange or crazy about Appellant during their numerous encounters (R.1008, 1009). According to Officer Phillips, Lombardi related that Linda Garron ran to her house and told Lombardi, "My mother's been shot. My sister's been shot. He is killing everybody." (R.1013). In addition, Officer Phillips testified that Lombardi told him Linda had told her Appellant had previously made sexual advances and sexual innuendos toward Linda (R.1014).

The trial court has wide discretion concerning the

admissibility of evidence and, in the absence of an abuse of discretion, its ruling will not be disturbed on appeal. Jent v. State, 408 So.2d 1024 (Fla. 1982). The statements attributed to Lombardi regarding Appellant's sexual advances toward Linda were already admitted into evidence through the trial testimony of Linda Garron. Furthermore, no defense objection was lodged against Officer Phillips acknowledging what Linda Garron advised him. In fact, it was the defense counsel who inquired of Phillips, "And when you -- Linda first told you there in the hospital about the sexual advances and verbal sexual innuendos, was that in the presence of Mrs. Lombardi?" (R.1016). Since the content of the statement, i.e., that Linda advised others of Appellant's sexual impropriety, was already in evidence without objection, Appellant does not present a credible basis for relief.

Moreover, even if there had been a defense objection to Phillips' testimony regarding Linda Garron's prior consistent statements at the hospital, the objection would not have been well-founded. Though, generally, a witness' testimony cannot be corroborated by a prior consistent statement, McElveen v. State, 415 So.2d 746 (Fla. 1st DCA 1982), Linda Garron's statements at the hospital were admissible (1) to prove that the statements were made to the police officer and constituted a relevant circumstance surrounding the prosecution of Appellant's offenses, §90.801(1)(a), Fla. Stat. (1985); Barnes v. State, 477 So.2d 6 (Fla. 2d DCA 1985); and (2) to rebut the defense attack on Linda Garron's credibility. Id. at 7; §90.801(2)(b), Fla. Stat. (1985).

Here, no objection was made nor error committed in allowing Officer Phillips to testify regarding the prior consistent statement of Linda Garron. The content of Linda Garron's prior consistent statement was identical to the subject matter of the prior inconsistent statement attributed to Mary Lombardi at the hospital. The facts to be inferred were merely cumulative in light of the overwhelming evidence of Garron's guilt. Assuming, arguendo, any error occurred with respect to Lombardi's prior inconsistent statement, the error was harmless under the circumstances. Tobey v. State, 486 So.2d 54 (Fla. 2d DCA 1986); Teffeteller v. State, 439 So.2d 840 (Fla. 1983), cert. denied, 465 U.S. 1074, 104 S.Ct. 1430, 79 L.Ed.2d 754 (1984).

ISSUE V

WHETHER THE TRIAL COURT ERRED IN ADMITTING THE REBUTTAL TESTIMONY OF DR. BERTSTEIN, AND WHETHER THE PROSECUTOR'S IMPEACHMENT OF THE PSYCHIATRISTS WHO TESTIFIED FOR THE DEFENSE AND COMMENTS DURING THE CLOSING ARGUMENT REGARDING THE PSYCHIATRISTS' TESTIMONY WERE PROPER.

Appellant's first contention in Issue V is that the testimony of Dr. Bernstein during the State's rebuttal case was improper rebuttal. As Appellant points out, Dr. Bernstein was called for rebuttal out of order for Dr. Bernstein's convenience (R.493). Thus, although Dr. Bernstein's rebuttal testimony came during the early part of the defense's case, the State was permitted to elicit testimony from Dr. Bernstein to counter the evidence that would subsequently be brought out during the defense's case.

The trial court has broad discretion in determining the range of subject matter upon which an expert may testify, and absent a clear showing of error, that exercise of discretion should not be overturned on appeal. Johnson v. State, 393 So.2d 1069 (Fla. 1980), cert. denied, 454 U.S. 882, 102 S.Ct. 364, 70 L.Ed.2d 191 (1981); Endress v. State, 462 So.2d 872 (Fla. 2d DCA 1985). The trial court determined Dr. Bernstein could give an opinion about the ability to determine whether an individual knew right from wrong at the time he or she committed an offense (R.510). In light of the evidence subsequently brought out during the defense's case, it cannot be said that the admission of that evidence was clearly erroneous.

Drs. Fesler and Majundar examined Appellant in March 1983. Dr. Thieman examined Appellant in September 1984. Based on their interviews, all three psychiatrists determined Appellant was unable to distinguish right from wrong on November 11, 1982. Dr. Majundar testified that "legal insanity" is a diagnosis created by lawyers and is not a determination she is ordinarily called upon to make in her practice (R.765). Only about five percent of Dr. Majundar's practice involves determining whether criminal defendants are legally insane (R.765). Dr. Thieman testified that only about one percent of his practice is devoted to determining whether criminal defendants are legally insane (R.865). All of the psychiatrists recognized the difficulty of going back and attempting to determine whether a defendant knew right from wrong at the time he or she committed an offense (R.678,783,789-790,875). On cross-examination, Dr. Fesler was asked whether he was aware of the position of the American Psychiatric Association on whether psychiatrists should render an opinion on "legal insanity" (R.696). Dr. Fesler could not recall what the APA position was (R.696). Thereafter, the prosecution read from the APA position paper on this issue (R.698).

In rebuttal, Dr. Bernstein testified that it is his "personal and professional opinion that psychiatrists should testify in medical terms and not in legal terms, thus should not direct themselves to the ultimate question of being able to distinguish between right and wrong" (R.515). Dr. Bernstein's

opinion was formed based on his experience as well as the position paper of the APA (R.515).

Dr. Bernstein's rebuttal testimony was proper in light of the aforementioned testimony of Drs. Majundar, Fesler and Thieman. Those psychiatrists recognized the difficulty in attempting to determine, long after an offense was committed, whether a criminal defendant knew right from wrong at the time he or she committed an offense. It was appropriate for the State to present evidence that experts in the field, and in fact, the American Psychiatric Association have concluded that psychiatrists should not make such a determination.

Appellant also contends that the prosecutor improperly impeached Drs. Majundar and Fesler during cross-examination. The extent of cross-examination is within the sound discretion of the trial judge and that exercise of discretion will not be overturned except in cases of clear abuse. Rose v. State, 472 So.2d 1155 (Fla. 1985). All witnesses are subject to cross-examination for purposes of discrediting them by showing bias, prejudice or an interest in the outcome of the case. Marr v. State, 470 So.2d 703 (Fla. 1st DCA 1985), cert. dismissed, 475 So.2d 696 (Fla. 1985); Watts v. State, 450 So.2d 265 (Fla. 2d DCA 1984); Hannah v. State, 432 So.2d 631 (Fla. 3d DCA 1983).

Appellant argues the State's questions regarding how much Dr. Majundar was being paid and the discrepancy between her ordinary rate of $100 per hour and the bill she sent the State, $520 for a one-hour deposition, were improper. Appellant did

not object to these questions during trial. Accordingly, this issue was not preserved for appeal. Steinhorst v. State, 412 So.2d 332 (Fla. 1982). Furthermore, these questions were clearly related to any interest or motive Dr. Majundar might have for testifying in this case.

Appellant also challenges the State's use of the position paper of the American Psychiatric Association to impeach Dr. Fesler's testimony. A learned treatise or other writing may be used in cross-examination of an expert. §90.706, Fla. Stat. (1985).

Initially, Appellee would note that the fact that Dr. Fesler never specifically recognized the APA position is irrelevant because the trial court ruled that, if Dr. Fesler did not recognize this writing as authoritative, the court would recognize it as such (R.693, 697). Appellee further submits this was proper, relevant impeachment. In light of Dr. Fesler's testimony, it was appropriate for the State to point out that there are experts in the field of psychiatry who question a psychiatrist's ability to determine whether a criminal defendant knew right from wrong at the time he or she committed an offense and that the American Psychiatric Association has concluded that psychiatrists should not make such a determination.

Appellant also contends the trial court erred in refusing to grant a mistrial after the prosecutor asked Dr. Fesler "would it help to refresh your recollection if I told you that their position is you can't do what you said you have been doing?" (R.696) The power to declare a mistrial should be exercised

with great care and should be done only in cases of absolute necessity. Salvatore v. State, 366 So.2d 745, 750 (Fla. 1978), cert. denied, 444 U.S. 885, 100 S.Ct. 177, 62 L.Ed.2d 115 (1979). If an alleged error does no substantial harm and causes no material prejudice, a mistrial should not be granted. Breedlove v. State, 413 So.2d 1 (Fla. 1982), cert. denied, 459 U.S. 882, 103 S.Ct. 184, 74 L.Ed.2d 149 (1982).

The trial court instructed the jury to disregard the prosecutor's question. The question was not so prejudicial and inflammatory that the trial court's instruction could not cure the error. Accordingly, a mistrial was not necessary.

Finally, Appellant contends the prosecutor's comments during closing arguments regarding the psychiatrists' testimony were improper. There were no objections made to the challenged comments. In the absence of fundamental error, the failure to object precludes consideration of this point on appeal. Davis v. State, 461 So.2d 67 (Fla. 1984), cert. denied, ___ U.S. ___, 105 S.Ct. 3540, 87 L.Ed.2d 663 (1985); Bassett v. State, 449 So.2d 803 (Fla. 1984). To be considered fundamental error, the error must be so basic to a fair trial as to taint the entire trial. Davis v. State, 461 So.2d at 71. The alleged prosecutorial misconduct must amount to a denial of due process. Donnelly v. DeChristofaro, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974).

The comments of the prosecutor, separately or considered as a whole, did not constitute fundamental error. Wide latitude is

permitted in arguing to the jury. Breedlove v. State, 413 So.2d at 8. The prosecutor's remarks were fair comments on the testimony and credibility of the psychiatrists.

Appellant challenges the prosecutor's reference, during closing argument, to the reports of Drs. Frieson and Helman. Although those reports were not introduced until the penalty phase of the trial, the reports were provided to Drs. Fesler and Majundar by the state attorney's office, and both psychiatrists were questioned about the effect, if any, of this report on their opinions as to Appellant's sanity (R.668-669, 760-761). No objections were made to this testimony. In fact, defense counsel subsequently recognized this testimony was proper (R.1304). Accordingly, it was appropriate for the prosecutor to comment on this testimony during closing argument.

ISSUE VI

WHETHER THE TRIAL COURT ERRED IN ADMITTING THE TESTIMONY OF LINDA GARRON THAT APPELLANT HAD PREVIOUSLY ENGAGED IN SEXUAL CONDUCT WITH HIS STEPDAUGHTERS.

Appellant's sixth point on appeal is that the trial court erred in permitting Linda Garron to testify that prior to the night of the murders Appellant had engaged in sexual conduct with her and her sister, Tina.

Linda testified that on the night of the murders Appellant made an obscene remark and touched her thigh (R.59-61). At that moment, Linda's mother returned home, and Linda ran outside and told her what Appellant had done (R.77). Le Thi told her daughters to pack their clothes; they were leaving (R.77). Appellant denied that anything had occurred and an argument ensued (R.77). Appellant then got his gun and shot Le Thi and Tina (R.82-83, 88). Linda testified further, over the defense's objections, that Appellant had previously touched her in a sexual manner (R.61). Linda tesified that when she was in the seventh grade, Appellant threatened to give her dog away unless she let Appellant climb into bed with her and rub her back (R.69). Appellant had previously touched her butt while she was in bed (R.69). Linda also testified that she once saw Appellant pin her sister down on his bed (R.74). On that occasion, Appellant was dressed only in his underwear, and Tina's nightgown was pulled above her knees (R.74).

Evidence of collateral crimes, wrongs or acts is admissible if it is relevant to prove any factual issue. However, if the sole relevance of that evidence is to prove the bad character or criminal tendencies of the accused, the evidence is inadmissible. Williams v. State, 110 So.2d 654 (Fla. 1959), cert. denied, 361 U.S. 847, 80 S.Ct. 102, 4 L.Ed.2d 86 (1959); Sireci v. State, 399 So.2d 964 (Fla. 1981), cert. denied, 456 U.S. 984, 102 S.Ct. 2257, 72 L.Ed.2d 862 (1982). Section 90.404(2)(a) of the Florida Statutes provides that such evidence is admissible when relevant to prove a material fact in issue, "such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. . ." (emphasis added).

At the hearing on the defense's motion in limine and at trial, the prosecutor contended this evidence was relevant to the issue of motive and to rebut Appellant's insanity defense (R.63-68, 1837-1846). This Court held similar evidence admissible in Christopher v. State, 407 So.2d 198 (Fla. 1981), cert. denied, 456 U.S. 910, 102 S.Ct. 1761, 72 L.Ed.2d 169 (1982). In that case, the defendant was engaged in an incestuous relationship with his daughter. The trial court ruled that evidence of the relationship was admissible to establish motive because there was evidence that one of the victims knew of the relationship and attempted to stop the defendant from taking his daughter away by calling the police. This Court agreed that such evidence tended to show motive for the murders. Id. at 201. Similarly, evidence in this case

that Appellant had been engaging in this sexual misconduct with his stepdaughters over a period of years was relevant to the issue of motive.

Evidence that Appellant had previously engaged in this type of conduct, and therefore, that his actions toward Linda on the night of the murders were not merely a one-time, mental lapse was also relevant to rebut Appellant's defense of insanity. Cf., Rossi v. State, 416 So.2d 1166 (Fla. 4th DCA 1982).

Alternatively, should this Court determine this was improper Williams rule evidence, Appellee would submit any error was harmless error and, therefore, not a ground for reversal. Where proof of guilt is clear and convincing so that even without the collateral evidence introduced in violation of the Williams rule, the defendant would clearly have been found guilty, the violation of the Williams rule may be considered harmless. Clark v. State, 378 So.2d 1315 (Fla. 3d DCA 1980); McKinney v. State, 462 So.2d 46 (Fla. 1st DCA 1984).

In this case, the evidence of Appellant's guilt was overwhelming. Linda Garron was an eyewitness to the shootings and testified in detail about the events of that evening. The main issue was whether or not Appellant was sane at the time he committed the offense. Appellee would submit that, under the circumstances of this case, the jury's primary focus was on the credibility of the psychiatrists versus lay witnesses who observed Appellant prior to or shortly after the murders were committed. The determination that Appellant was sane at the time he committed the offense could be made even without the

Williams rule evidence. Accordingly, any error in admitting that testimony was harmless error.

Appellant also challenges the prosecutor's statement during final closing argument that when Linda saw Appellant on top of Tina in his bed, Tina's nightgown was "up to her chest." Linda's exact statement was that Tina's nightgown was "slightly lifted up from her, from her knees" (R.75). Appellee would submit that, although the prosecutor's comment was an exaggeration of Linda's testimony, that isolated remark was not of such a character as to taint the entire trial and deny Appellant his constitutional right to due process. See, Donnelly v. DeChristoforo, supra. Accordingly, this remark cannot be the basis for reversal of Appellant's conviction.

ISSUE VII

WHETHER THE TRIAL COURT ERRED IN ADMITTING PSYCHIATRIC REPORTS PREPARED IN 1974 BY DRS. HELMAN AND FRIESON BECAUSE THOSE DOCTORS WERE UNAVAILABLE FOR CROSS-EXAMINATION.

In this issue, Appellant contends that the trial court erred in admitting the psychiatric reports of Drs. Frieson and Helman because the doctors were unavailable for cross-examination.

During the penalty phase, the State introduced evidence to show that Appellant had previously been convicted of a felony involving the threat of violence to another. As part of the proof in that regard, the State sought to introduce the reports of Drs. Frieson and Helman. Drs. Frieson and Helman were appointed in 1974, after Appellant had been charged with aggravated assault, to examine Appellant to determine his sanity at the time he committed that offense. Both doctors concluded Appellant was sane at the time he committed the offense and prepared reports setting forth the details of their examinations and their opinions as to Appellant's condition. Those reports contain statements which identify Appellant as the perpetrator of that crime.

The State contended it was introducing the reports of Drs. Frieson and Helman only for the purpose of proving that it was indeed Appellant who committed the aggravated assault. The defense objected on the grounds the reports were hearsay and the defense was unable to cross-examine the doctors because both

doctors are dead. Relying on the broad scope of admissibility of evidence during the penalty phase and the fact that the defense could hypothetically rebut the reports, the trial court overruled the defense's objections (R.1300-1305).

Section 921.141(1), of the Florida Statutes provides, in pertinent part:

> In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida.

The language of that section indicates that, with the exception of illegally-seized evidence, the trial judge should have the broadest latitude in admitting evidence during the sentencing portion of the jury's deliberations. Messer v. State, 330 So.2d 137, 142 (Fla. 1976); on remand, 403 So.2d 341 (Fla. 1981), cert. denied, 456 U.S. 984, 102 S.Ct. 2259, 72 L.Ed.2d 863 (1982); Alvord v. State, 322 So.2d 533, 539 (Fla. 1975), cert. denied, 428 U.S. 923, 96 S.Ct. 3234, 49 L.Ed.2d 1226 (1976).

Appellee would submit it was not error to admit the psychiatrists' reports. The reports were admitted for the

limited purpose of identifying Appellant as the perpetrator of the 1974 aggravated assault. It was not unreasonable for the trial court to determine that the defense could rebut this evidence by presenting witnesses who would testify that Appellant did not commit that offense. Moreover, these reports were inherently reliable. The reports were prepared by doctors appointed by the court in a prior criminal proceeding. In light of the broad scope of admissibility of evidence in the penalty phase, the reports were appropriately admitted.

Alternatively, should this Court determine it was error to admit the psychiatrists' reports, Appellee would submit any error was harmless because the jury had been apprised of the contents of those reports during the guilt phase of the trial. In Harich v. State, 437 So.2d 1082 (Fla. 1983), cert. denied, 465 U.S. 1051, 104 S.Ct. 1329, 79 L.Ed.2d 724 (1984), the defendant alleged the trial court erred in admitting statements during the penalty phase that had been suppressed in the guilt phase of the trial. This Court determined the statements should not have been admitted because they were the product of a violation of the defendant's rights under the Fourth and Fifth Amendments. However, the court held the admission of the statements was not reversible error because the substance of those statements had already been presented to the jury in testimony relating to unsuppressed statements of the defendant and the defendant's own testimony. Id. at 1086.

Similarly, in the case at bar, the substance of Dr. Frieson's and Dr. Helman's reports was presented to the jury during the testimony of other psychiatrists. The reports were provided to Drs. Fesler and Majundar after those doctors submitted their reports to the trial court (R.668, 760). During the trial, the doctors were questioned about the substance of those reports without objection from the defense (R.668-669, 760-761). Thus, the jurors were aware, prior to the admission of the psychiatrists' reports in the penalty phase, that these two doctors had examined Appellant in 1974; that they had all of the information regarding Appellant's medical history that Drs. Fesler and Majundar had; that Appellant was on medication at the time; that both doctors were of the opinion Appellant was sane at the time; and that Dr. Helman opined that Appellant had been an aggressive person throughout his life (R.668-669, 760-761). Accordingly, any error in admitting the reports into evidence during the penalty phase cannot be considered reversible error because the jury had been presented with the substance of those reports during the guilt phase of the trial.

ISSUE VIII

WHETHER THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR A MISTRIAL DURING CROSS-EXAMINATION OF DR. FJORDBAK.

Appellee submits the prosecutor's cross-examination of witnesses and statements in argument were proper to show the non-statutory mitigating circumstance that Appellant was not dangerous in a structured environment should not be found in this case. It is clear from defense counsel's direct examination of Dr. Fjordbak that the doctor's testimony was being offered to demonstrate not only the statutory mitigating circumstances involving his mental condition, but also, the non-statutory mitigating circumstance of adjustment to prison life and lack of dangerousness in secured facilities.

On direct examination, Dr. Fjordbak testified as follows:

> I think Joe does better in a highly structured environment. Organic people, psychotic people and in his particular situation someone who is organic and psychotic benefit from an environment that is closely structured and where you have people who can assist you in pursuing your daily activities and events.
>
> (R.1322).

Defense counsel then asked the following question and received this answer:

> Q. Doctor, if Joe Garron stayed on his medication and is in a very structured environment, is there any reason to suspect that he would again become violent?

> A. I think that there is a good possibility that he would not. I think that with the appropriate structure and on the medication that he would adjust quite successfully to that kind of environment.
>
> (R.1323)

Thus, Appellant introduced the subject of his future propensity for violence into the proceeding.

The prosecutor then questioned the doctor concerning Appellant's actions should he not take medication or be in the structured surroundings. This Court held in Agan v. State, 445 So.2d 326 (Fla. 1983), cert. denied, ____ U.S. ____, 105 S.Ct. 225, 83 L.Ed.2d 154 (1984) that such argument/discussion is appropriate to negate mitigating evidence offered. In Agan, the defendant argued the trial court had improperly considered lack of remorse as an aggravating circumstance. It was held that the evidence was not considered in aggravation but to negate mitigating evidence. The defense had argued the fact that the defendant had confessed and pled guilty should be mitigating factors. The lack of evidence was the reason for rejecting these facts as mitigating.

It is clear from the trial court's order on sentencing that future dangerousness was not considered by the court (R.2353-2356). Rather, the trial court chose to view the evidence presented in this area as non-statutory mitigating when the court found "The defendant has been a model prisoner." (R.2355).

The fact that the trial judge did not consider this testimony in weighing the aggravating and mitigating circumstan-

circumstances distinguishes this case from Miller v. State, 373 So.2d 882 (Fla. 1979). The trial court in Miller, found significant aggravating and mitigating circumstances. The trial court found the mitigating factors offset the aggravating factors but for one other factor, that the sentence of life does not mean life and the defendant could get out and commit another offense. Id. at 885.

There is no doubt that this was the factor that tipped the scales in the weighing process in Miller. Sub judice, Appellant's future violence was not a part of the equation. See, Goode v. Wainwright, 410 So.2d 506, 509 (Fla. 1982). In fact, Appellant's ability to adjust to pr'son life was added to the weight in mitigation.

Appellee further submits the decision in Teffeteller v. State, supra, does not help Appellant. Nothing in that opinion suggests the prosecutor's argument was the result of the type of mitigating evidence offered by the defendant. Here, the prosecutor was responding to Appellant's mitigation argument. Agan v. State, supra. When viewed in context, the cross-examination and comments by the prosecutor were within permissible bounds. Cf., Bush v. State, 461 So.2d 936 (Fla. 1985), cert. denied, ___ U.S. ___, 106 S.Ct. 1237, 89 L.Ed.2d 345 (1986).

ISSUE IX

WHETHER THE TRIAL COURT ERRED IN PERMITTING THE STATE TO CROSS-EXAMINE VIRGINIA PLEAK ABOUT THE FACT THAT APPELLANT ONCE TOLD HER HE HAD KILLED SOMEONE IN TURKEY OR GREECE.

Improper comments or the admission of improper evidence does not per se require the vacation of a death sentence. A determination must be made as to whether or not the erroneously admitted evidence prejudiced the defendant. Cf., Teffeteller v. State, supra. Based on the record in this case, this Court can determine that the one reference to a statement about a killing in Greece or Turkey did not contribute to Appellant's sentence of death for the murder of his stepdaughter.

During the prosecutor's cross-examination of Appellant's sister, he attempted to demonstrate that her testimony should be given little, if any, weight since she would say the same thing regardless of how many crimes Appellant had committed. In this view, he asked the question concerning a prior killing. Appellee is aware of this Court's holding in Robinson v. State, 487 So.2d 1040 (Fla. 1986); however, this case is distinguishable. The prosecutor in Robinson questioned several witnesses concerning other offenses committed by the defendant while in jail. Additionally, the State again mentioned these offenses in oral argument before the jury.

Sub judice, there was but one reference to the fact that Appellant told his sister he had committed this act. The prosecutor never alluded to the alleged incident in his

argument. When the prosecutor argued the statutory aggravating circumstance of prior violent felony, he only mentioned the 1974 plea to an aggravated assault charge. Moreover, the trial judge made no reference to this remark in his findings on aggravating and mitigating circumstances.

Appellant was convicted of two capital murders, the murder of his wife and one of his daughter. Although the jury by a 9-3 vote recommended a sentence of death for the wife's murder, the judge sentenced him to life upon his own weighing of the aggravating and mitigating circumstances. The jury in regard to the murder of Tina, recommended by a 12-0 vote that Appellant be given the death penalty. The judge agreed and in a well-reasoned order outlined the considerations demonstrating that the aggravating circumstances outweighed the mitigating.

One such consideration was Appellant's violent history. The court stated:

> 1. Florida Statute 921.141(5)(b). The defendant was previously convicted of another capital felony or of a felony involving the use of threat of violence to the person.
>
> The crime of aggravated assault is a felony involving the threat of violence to another person, and the defendant was previously convicted of that crime.
>
> At the time of the imposition of sentence on Count I, the defendant had also been convicted of the capital felony on Count II (the first degree murder of Le Thi Garron), however, that conviction has not been considered inasmuch as the appeal period has not yet expired.
>
> (R.2353)

The trial court makes no reference to any other activities by

Appellant.

The murder for which Appellant received the death penalty involved his stepdaughter. Tina was attempting to contact the police after her father had shot her mother. Appellant witnessed this attempt and shot Tina four times. Additionally, Appellant shot at the second stepdaughter as she fled the premises. Despite the mental disturbance of Appellant, the facts of this murder are so egregious that a recommendation of death would have resulted without any erroneously admitted evidence. Accordingly, any error in this instance was harmless.

ISSUE X

WHETHER THE CONDUCT OF THE PROSECUTOR DURING CLOSING ARGUMENT IN THE PENALTY PHASE OF TRIAL WAS SO EGREGIOUS THAT A REMAND FOR RESENTENCING IS REQUIRED.

Appellant contends the prosecutor's comments during closing argument in the penalty phase of the trial were so improper that a new sentencing hearing is required. Appellee would submit several of the challenged comments were not objected to and, therefore, may not be raised on appeal. The remaining comments simply do not rise to the magnitude of a denial of fundamental fairness.

"Comments of counsel during the course of a trial are controllable in the discretion of the trial court, and an appellate court will not overturn the exercise of such discretion unless a clear abuse has been made to appear. Teffeteller v. State, 439 So.2d at 845. This Court has held that during the penalty phase of trial, which is advisory only, prosecutorial error must be egregious to warrant vacating the sentence and remanding for resentencing. Bertolotti v. State, 476 So.2d 130 (Fla. 1985). "Each case must be considered upon its own merits and within the circumstances pertaining when the questionable statements are made." Bush v. State, 461 So.2d at 941, quoting, Darden v. State, 329 So.2d 287, 291 (Fla. 1976), cert. dismissed, 430 U.S. 704, 97 S.Ct. 1671, 51 L.Ed.2d 751 (1977). Only where clear prosecutorial abuse exists will the case be remanded for resentencing. Bush v. State, 461 So.2d at 942.

Appellant challenges the prosecutor's arguments that a recommendation of death was necessary to deter others from committing similar crimes (R.1416, 1432). In Gibson v. State, 351 So.2d 948, n.3 (Fla. 1977), cert. denied, 435 U.S. 1004, 98 S.Ct. 1660, 56 L.Ed.2d 93 (1978), the prosecutor made similar arguments about deterring others from committing such offenses. This Court held that those comments, taken in the context in which they were made, were not so prejudicial as to require reversal. Similarly, the comments in this case were not so improper as to taint the entire penalty phase of the trial. Furthermore, defense counsel's objections to both remarks were sustained, and the jury was instructed to disregard those comments. Thus, any error was cured at the time the error was committed.

Appellant also challenges comments of the prosecutor which Appellant contends were designed to evoke sympathy for the victims. At R.1419-1421, the prosecutor refers briefly to Le Thi and Tina. He discusses the type of people they were and states that they each had a right to a long, healthy life. The trial court overruled objection to that argument, and Appellee would submit that was not an abuse of discretion. These comments simply cannot be said to have vitiated the entire penalty phase hearing.

Similarly, the comments about Linda, who escaped physical injury but saw both her mother and sister shot by Appellant, are not of such a character as to require reversal (R.1431-1432). A

similar appeal for sympathy and revenge for the family of the victim was held by this Court to be of minor impact in Bush v. State, supra.

Appellant also contends the prosecutor's reference to the pain Tina and Le Thi must have been in just before they died was improper (R.1424). No objection was made at the time these statements were made. Accordingly, this point was not preserved for appeal. Rose v. State, 461 So.2d 84 (Fla. 1984), cert. denied, ___ U.S. ___, 105 S.Ct. 2689, 86 L.Ed.2d 706 (1985); Jones v. State, 411 So.2d 165 (Fla. 1982), cert. denied, 459 U.S. 891, 103 S.Ct. 189, 74 L.Ed.2d 153 (1982). Furthermore, these statements were made in reference to the State's contention that this crime was particularly heinous, atrocious and cruel. This Court has recognized that "the mindset or mental anguish of the victim is an important factor in determining whether the aggravating circumstance of heinous, atrocious and cruel applies." Jennings v. State, 453 So.2d 1109 (Fla. 1984).

Appellant also contends several of the prosecutor's comments constituted misstatements of the law (R.1430-1431, 1433). Each of defense counsel's objections was sustained by the trial court, and the jury was advised to disregard those remarks. Thus, any error was cured at the time the comments were made. Furthermore, the jury was correctly instructed by the court as to the aggravating and mitigating circumstances to be considered and the weighing of those circumstances (R.1444-

1447). For those reasons, reversal is not required based on these comments.

Finally, Appellant argues that the cumulative effect of the prosecutor's comments warrants a remand for resentencing. Appellee would submit that, in light of the evidence of aggravation in this case, the prosecutor's comments taken as a whole, cannot be said to have so fundamentally tainted the penalty phase proceedings as to require a remand for resentencing. This was not a close case. The jury recommended the death penalty by a 12-0 vote. In fact, the jury voted 9-3 to recommend the death penalty for Le Thi's murder, but the judge determined the appropriate sentence for that murder was life imprisonment. As will be discussed fully in the following issue, the evidence of aggravation in this case was overwhelming. It is apparent from the record that regardless of any prosecutorial misconduct, the jury's recommendation would have been the same. Accordingly, Appellant's sentence should be affirmed.

ISSUE XI

WHETHER THE AGGRAVATING CIRCUMSTANCES FOUND BY THE TRIAL COURT ARE ADEQUATELY SUPPORTED BY THE RECORD AND WHETHER THE IMPOSITION OF THE DEATH PENALTY WAS APPROPRIATE.

As his final point on appeal, Appellant contends that the aggravating circumstances found to exist in this case are not adequately supported by the record. In its written findings, the trial court determined the following aggravating circumstances applied: Appellant was previously convicted of a felony involving the use or threat of violence to the person, §921.141(5)(b), Fla. Stat. (1985); the capital felony was committed for the purpose of avoiding or preventing lawful arrest, §921.141(5)(c); the capital felony was especially heinous, atrocious or cruel, §921.141(5)(g); and the capital felony was a homicide and was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification, §921.141(5)(i). The trial court found the following statutory mitigating circumstances existed: the capital felony was committed while Appellant was under the influence of extreme mental or emotional disturbance, §921.141(6)(b); and the capacity of Appellant to appreciate the criminality of his conduct or conform his conduct to the requirements of law was substantially impaired, §921.141(6)(f). The trial court determined the fact that Appellant had been a model prisoner to be a non-statutory mitigating circumstance.

Appellee submits each of the aggravating circumstances is adequately suported by the record. Furthermore, upon weighing of the aggravating and mitigating factors, it is apparent death was the appropriate sentence in this case.

A. Appellant was previously convicted of a felony involving the use or threat of violence.

In 1974, Appellant pleaded nolo contendere to the charge of aggravated assault (R.1293-1294). Adjudication of guilt was withheld, and Appellant was placed on probation. Appellant successfully completed his term of probation (R.1307-1308). The trial court relied upon this conviction as an aggravating circumstance under Section 921.141(5)(b).

Appellant argues that a plea of no contest without an adjudication of guilt is not a conviction within the meaning of Section 921.141(5)(b). In McCrae v. State, 395 So.2d 1145 (Fla. 1980), cert. denied, 454 U.S. 1037, 102 S.Ct. 583, 70 L.Ed.2d 586 (1981), the defendant pleaded guilty to the charge of assault with intent to commit murder but had not been adjudicated guilty prior to his commission of a capital felony. This Court rejected the defendant's contention that because there had been no adjudication of guilt that offense could not be considered as an aggravating circumstance. Id. at 1154.

This Court should also find that a plea of nolo contendere without adjudication of guilt may be considered as an aggravating circumstance under Section 921.141(5)(b). Appellee

recognizes that in McCrae this Court states that "convicted" under Section 921.141(5)(b) means a valid guilty plea or jury verdict of guilty after a trial. Id. However, Appellee would submit the issue whether a valid nolo contendere plea is a "conviction" under that section was not before this Court in McCrae, and therefore, McCrae is not dispositive. Furthermore, applying the rationale of McCrae to the case at bar, it is clear that a plea of nolo contendere, even where adjudication of guilt is withheld, must be considered a "conviction" under 921.141(5)(b).

In McCrae, this Court recognized that the sentencing court must conduct an overall character analysis of a defendant and that a prior conviction for a violent felony is an extremely important factor in the sentencing process. Id. Thus, the Court found it illogical to treat a plea of guilty to a felony involving violence that is disposed of by a sentence that includes withholding adjudication of guilt differently than a plea of guilty with adjudication of guilt.

The fact that a defendant pleads nolo contendere does not detract from the legality of a sentence. Maselli v. State, 446 So.2d 1079 (Fla. 1984). Prior to accepting a nolo contendere plea, the sentencing judge must be satisfied that the plea is voluntary and there is a factual basis for the plea. Fla. R. Crim. P. 3.170(j); Id. at 1080. Once the court accepts the plea, the defendant may be sentenced. See, Vinson v. State, 345 So.2d 711, 715 (Fla. 1977).

Appellee would submit if Appellant had pleaded nolo contendere, been adjudicated guilty and then placed on probation, it is clear that would be considered a "conviction" under Section 921.141(5)(b). Cf., Maselli v. State, supra. Accordingly, for the same reasons given by this Court in McCrae, the fact that adjudication of guilt was withheld did not preclude the sentencing court from considering this prior violent felony as an aggravating circumstance.

Moreover, Appellee would submit even if this Court determines the sentencing court should not have considered Appellant's prior conviction for aggravated assault, Section 921.141(5)(b) still applies because the sentencing court erroneously refused to consider Appellant's conviction for the murder of Le Thi Garron. This aggravating factor should be considered by this Court. See, Echols v. State, 484 So.2d 568, 576 (Fla. 1985).

The trial court refused to consider Appellant's conviction for Le Thi's murder based on this Court's decision in Oats v. State, 446 So.2d 90 (Fla. 1984) (R.1295-1296, 2353). In Oats, this Court held that where a defendant is convicted of a violent felony prior to being sentenced for a capital felony and the prior conviction is subsequently vacated, the vacated conviction cannot be used as an aggravating circumstance. Id. at 95. In this case, the trial court reasoned that because the appeal process for the conviction for Le Thi's murder had not run and thus, that conviction was subject to vacation, Oats precluded the court from considering that conviction.

Appellee submits this Court's decision in Oats does not preclude the consideration of a conviction which is still subject to appeal. It is settled that a sentencing court may consider convictions for violent felonies entered contemporaneously with a defendant's conviction for a capital felony. See, Lucas v. State, 376 So.2d 1149 (Fla. 1979). This Court has also held that convictions which are on appeal at the time of sentencing may be considered "convictions" for purposes of Section 921.141(5)(b). Peek v. State, 395 So.2d 492 (Fla. 1980), cert. denied, 451 U.S. 964, 101 S.Ct. 2036, 68 L.Ed.2d 342 (1981).

Accordingly, Appellant's conviction for the murder of Le Thi Garron should have been considered as an aggravating circumstance.

B. The capital felony was committed for the purpose of avoiding lawful arrest.

The evidence in this case was that following the shooting of her mother, Tina Garron ran for the telephone, called the operator and requested the police (R.87). At that point, Appellant ran toward Tina and shot her four times (R.88). There was also testimony that when Linda Garron ran from the home screaming for help, Appellant ran from the house and fired another shot (R.89). Finally, knowing that Linda had gotten away, Appellant attempted suicide (R.186).

There was nothing in the record to show the victim had done anything to provoke Appellant's actions against her. Thus, as

the trial court found, the only plausible explanation for Tina's murder is that Tina was killed because she was attempting to report her mother's murder to the police (R.2354). That being the dominant motive for Tina's murder, the finding that Section 921.141(5)(e) was applicable was clearly proper. Oats v. State, 446 So.2d at 95.

C. The capital felony was especially heinous, atrocious or cruel.

This Court has previously defined heinous as "extremely wicked or shockingly evil;" atrocious as "wicked and vile;" and cruel as the "infliction of a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others." Maggard v. State, 399 So.2d 973 (Fla. 1981), cert. denied, 454 U.S. 1059, 102 S.Ct. 610, 70 L.Ed.2d 598 (1981); State v. Dixon, 283 So.2d 1 (Fla. 1973), cert. denied sub nom., Hunter v. Florida, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974). Appellant's actions cleary fell within those definitions.

Tina Garron was shot four times at close range (R.153-156). According to Linda Garron, Appellant approached Tina, levelled his firearm to a steady firing position using both hands, took aim and began to shoot (R.88). According to Dr. Woods, the medical examiner, the first two bullets entered Tina's chest, and the third shot shattered her left leg (R.157-161). Tina then fell to the floor and was shot again in the chest (R.161). Only two of the wounds were fatal (R.160). Dr. Woods testified Tina was alive when all four shots were fired and lived approxi-

mately one to two minutes after the final shot was fired (R.161).

The record clearly supports the trial court's finding that this crime was especially heinous, atrocious or cruel.

D. The capital felony was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.

Appellee recognizes the aggravating circumstance that the murder was committed in a cold, calculated and premeditated manner generally applies to murders characterized as execution or contract murders or witness-elimination murders. McCray v. State, 416 So.2d 804 (Fla. 1982). However, this description was not intended to be all-inclusive. Id. at 807. Appellee submits the record supports the trial court's finding that Appellant acted with heightened premeditation when he killed Tina Garron.

The record reflects that, during an argument with his wife, Appellant got a gun from his closet and hid the gun in a towel so it would not be detected (R.82). Appellant denied that he had the gun (R.82). He then proceeded to shoot Le Thi (R.83-85). After Appellant shot Le Thi, Tina ran to the phone to call for help (R.87-88). Appellant ran toward Tina and, from a relatively close range, took aim and shot her four times (R.88).

In Herring v. State, 446 So.2d 1049 (Fla. 1984), cert. denied, ___ U.S. ___, 105 S.Ct. 396, 85 L.Ed.2d 330 (1984), the defendant shot a convenience store clerk during the robbery of the convenience store. Defendant fired the first shot in

response to what he thought was a threatening movement by the clerk. After the clerk had fallen to the floor, the defendant shot him two more times. This Court found those facts sufficient to establish the aggravating circumstance of cold, calculated and premeditated. Similarly, in the case at bar, although Appellant's initial shot was obviously in response to Tina's attempt to call for help, Appellant's further carefully aimed shots, including the final shot after Tina had fallen helplessly to the floor, reflected the heightened premeditation required to establish this aggravating circumstance. Thus, there was no error in finding this murder was committed in a cold, calculated and premeditated manner.

E. Summary

Appellee submits each of the aggravating circumstances found by the trial court is adequately supported by the record and established beyond a reasonable doubt. However, should this Court determine any of the aggravating circumstances was erroneously considered, this Court clearly may uphold the death sentence based upon the weight of the remaining aggravating circumstances. Cf., Barclay v. Florida, 463 U.S. 939, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983); Zeigler v. State, 402 So.2d 365, 376-377 (Fla. 1981), cert. denied, 455 U.S. 1035, 102 S.Ct. 1739, 72 L.Ed.2d 153 (1982).

Finally, Appellee submits the death penalty is proportionately correct in this case. Cf., Way v. State, Case No. 64,931 (Fla. Sept. 18, 1986).

CONCLUSION

Based upon the foregoing arguments and citations of authority, the judgment and sentence of death should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Douglas S. Connor, Assistant Public Defender, Hall of Justice Building, Post Office Box 1640, Bartow, Florida 33830 this 24 day of September, 1986.

Kim W. Munch
OF COUNSEL FOR APPELLEE