IN THE SUPREME COURT OF FLORIDA

WILLIAM T. TURNER,

Appellant,

-v- CASE NO. 67,987

STATE OF FLORIDA,

Appellee.

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

William T. Turner was the defendant in the court below and the State of Florida was the prosecution. Both parties will be referred to as they appear before this court.

The following symbols will be used in this brief followed by the appropriate page number(s) in parentheses:

"R" - Record on Appeal

"T" - Transcript of Trial Proceedings

STATEMENT OF THE CASE

Appellee accepts appellant's statement of the case.

STATEMENT OF THE FACTS

Appellee generally accepts appellant's statement of the facts but appellee takes exception with several of appellant's conclusions and interpretations of the record.

Appellee strongly disagrees with appellant's statement that the record was not clear as to whether appellant left the apartment in pursuit of his daughter, or of Joyce Brown, or encountered Joyce Brown on the street after leaving the apartment. The record shows that appellant's daughter left the scene in search of help and that appellant left the apartment and continued directly to the telephone booth or pay phone where Joyce Brown was attempting to summon police. It was then and there that he began stabbing and slashing her to death. (T 632).

In dealing with the testimonies of officers Venosh and Aikens, appellant dwells on the statement of Officer Aikens to the effect that appellant at the time of his arrest said "go ahead and kill me . . . it's not worth living for." (Appellant's brief, p. 3). Appellant ignores the testimony of Officer Venosh who stated that appellant's remarks were "please don't kill me." (R 653). Also, on p. 4 of his brief, appellant characterizes all of the fifty-one knife wounds inflicted on Joyce Brown as being "stab wounds." The medical examiner also testified that a number of the wounds were slash wounds. (T 532). Appellant's statement that multiple stab wounds are more frequently associated with

homosexual murderers, in view of the record here, was a gratuitous and pointless remark.

As to appellant's alleged perceptions of his estranged wife allegedly having sexual intercourse with another man on the night of his thirty-ninth birthday, no evidence was presented at trial that there was any real factual basis for appellant's claimed perception. Appellant has neglected to mention in his statement of the facts that every shred of justification or mitigation to be associated with these murders came from the mouths of the examining psychiatrists based upon what they had been told by appellant about the matter and what events were said to have triggered what acts. Appellee confesses that it is unable to decipher appellant's term "borderline intelligence" as used on p. 7 of his brief with reference to appellant.
Query: Borderline relative to what?

Finally, appellant's reference to documents relevant to his hitch in the Air Force which he sought to have before the court is now moot subject matter in that this corut has already denied appellant's motion to augment the record by its order dated March 26, 1986.

SUMMARY OF ARGUMENT

As to Issue I

The record reflects the presence of appellant at the beginning of the jury selection process and there is no reliable indication in the record that the defense attorney was separated from his client for the voir dire conference. Defense counsel expressly waived the presence of defendant, on the record, at the beginning of the charge conference. The charge conference is not a crucial part of a criminal trial and absence of defendant does not compromise any constitutionally guaranteed right. Defendant's presence at voir dire conference and charge conferences are waivable even in capital cases.

As to Issue II

Gruesomeness of the photographs are not proper grounds for their exclusion when they are representative, relevant, of probative value, and of assistance to the jury. In a case where defendant admits having created the gruesome scene himself he should not be heard to complain that same is prejudicial. A copy of a tape recording of an official police department incoming call made by a victim while she was being stabbed to death is relevant and of probative value to show identification of the assailant and criminal intent.

As to Issue III

The trial court did not abuse its discretion in refusing the admission into evidence of a Baker Act order and examination of appellant when appellant was summarily released after the examination, there being no finding of mental illness. The trial court properly found that such documents would be of no material assistance to the jury in determining the issues presented to it.

As to Issue IV

The sanity of the appellant was a question for the jury to resolve, based upon the evidence presented. The jury's finding in this regard should not be disturbed where a reasonable jury could reach the same result based on the evidence presented.

As to Issue V

Premeditation is a question for the jury to decide and premeditation may be provable by circumstantial evidence. When a reasonable jury could have reached the same result based upon the same evidence presented in the case at bar, the jury's findings in this regard should not be disturbed.

As to Issue VI

Where the evidence showed that appellant arrived at the premises occupied by his victims and without provocation entered therein and committed an assault which resulted in the death of

one of the victims therein, there was substantial evidence of burglary and the jury properly found that appellant had broken and entered into the premises with intent to commit the assault therein that he did commit, resulting in the death of Shirley Turner. On the facts, the court properly instructed the jury as to the doctrine of felony murder.

As to Issue VII

The trial court properly refused to instruct the jury in this case respecting claimed mitigating circumstances in that there was no evidence presented at trial that appellant was acting under any duress whatsoever when he murdered Shirley Turner and Joyce Brown. The court properly found that defendant's age (39) at the time of the murders was of no significance and no evidence to this effect was presented. As to defendant's family history, role as parent, "dull normal" intelligence, military record, employment record, etc., the jury heard it all from various defense witnesses and was free to attach any significance it cared to, to any of these factors under the court's instruction that the jury may consider "any other aspect of the defendant's character, record, or circumstance of the offense." Appellant has demonstrated no prejudice by the court's refusal to specifically instruct the jury in considering factors which it knew anyway, that it might consider in advising the court as to a recommended sentence.

As to Issue VIII

Where the appellant pursued his victim, Joyce Brown, for some distance, took time to argue with her about her alleged transgressions respecting appellant's family, and then proceeded to methodically cut and stab her to death, the jury properly found that the killing was done in a cold, calculated, and premeditated manner. Further, where appellant inflicted a total of fifty-one cutting and slashing wounds on the body of Joyce Brown, many of which were not fatal, the jury properly found that the killing was heinous, atrocious or cruel. In not rejecting the jury's recommended sentence of death the trial court properly found that there was ample basis in the evidence for the jury's recommendation and that the evidence supported their recommendation.

As to Issue IX

Based upon the evidence presented, the court found proper and adequate basis for imposition of the death penalty. In the murder of Joyce Brown, appellant's acts were attenuated in that there were separate aspects to the pursuit of the victim, accusations against her, and denials by the victim, and the relatively slow killing process from which a reasonable jury and the trial court itself could identify distinct aggravating factors. Where the evidence supports a finding by the court that certain aggravating factors occurred distinct from one another,

such a finding does not amount to doubling of aggravating circumstances.

As to Issue X

Appellant has made no showing that the trial court either abused its discretion or departed from the essentials of law in concurring with the jury's recommended sentences as the two killings were not contemporaneous although essentially part of the same transaction. The aggravating and mitigating factors in the two cases were distinctive and both the jury and the trial court took proper note of same and acted accordingly and within their respective provinces.

ARGUMENT

ISSUE I

APPELLANT WAS NOT DENIED DUE PROCESS OF LAW AS HIS ABSENCE FROM THE VOIR DIRE CONFERENCE AND THE CHARGE CONFERENCE WAS VOLUNTARY. (Restated.)

Appellee concedes that appellant was not physically present in chambers along with the trial judge and counsel for the parties during the charge conference. The record is devoid of any evidence that appellant was either absent or involuntarily excluded from the voir dire conference. The record shows clearly that appellant was present when jury selection began. (T 93). There is no reason to conclude that he was thereafter abandoned by counsel or cut adrift from the proceedings that transpired in the voire dire conferences that followed. (T 208, 290). Moreover, defense counsel expressly waived his client's appearance at the charge conference. (T 838, T 1031-32). Appellant, on appeal, is not represented by the same attorney who represented him at trial. Therefore, there is no reason to assume that trial defense counsel did not consult with his client concerning these issues and it must be presumed at this point that trial counsel was competent enough to ensure that his client's best interests would not be compromised by his absence from the jury room or chambers while the trial judge conferred with counsel concerning jury challenges and later, jury charges. From the record, there is no reason to presume that

trial defense counsel did not confer with his client respecting any matter or aspect of the trial in which the defendant could have been reasonably expected to render assistance to his attorney.

It is important to remember that neither the voir dire conference nor the jury charging conference involves confrontation with witnesses, some of whom might be familiar to the defendant and concerning whom the defendant might render real assistance to counsel with respect to potential testimony. A question arises as to what contribution a defendant might make in assisting counsel in his overall defense, during voir dire conference or charging conference. Appellee submits that a layman client could make no real contribution to his defense in these settings. Appellee submits that the charging conference is not a crucial stage of a trial and that it is abundantly clear from the record in the case at bar that appellant's absences did not deprive him of a fundamentally fair trial. Howard v. State, ____ So.2d ____ (Fla. 3d DCA 1986), Case No. 83-2337, opinion filed March 11, 1986, 11 F.L.W. 622. If appellant in the case sub judice is of "borderline intelligence" as counsel has characterized him on p. 7 of his brief there is created the reasonable inference that competent trial counsel might have acted in his client's best interest in counseling him and advising him that his presence would not be advantageous. Here again, this court should not presume that trial defense counsel

acted irresponsibly or that appellant was absent from the voir dire conference.

Even a capital defendant is free to waive his presence at a crucial stage of the trial. Counsel may make the waiver on behalf of a client, provided that the client, subsequent to the waiver, ratifies the waiver, either by examination by the trial judge, or by acquiescence to the waiver with actual or constructive knowledge of the waiver. Amazon v. State, ____ So.2d ____, Case No. 64,117, opinion filed March 13, 1986, 11 F.L.W. 105, citing Peede v. State, 474 So.2d 808 (Fla. 1985).

Appellee is aware of this court's holding in Francis v. State, 413 So.2d 1175 (1982). However, in that case, the defense counsel had told Francis that he could not go into the jury room with the judge and respective counsel, for the voir dire conference. It was uncontested that his counsel had not obtained his express consent to challenge peremptorily the jury in his absence. No such evidence exists in the case sub judice. There is no evidence that defendant was absent from the voir dire conference or that defendant's nonparticipation was not entirely voluntary. When there has been no showing that the defendant was unprotected during his absence (if such be the case), or that occurrences or omissions prejudiced the proceedings against him, prejudice will not be presumed where the record shows free and voluntary ratification by the defendant of proceedings which

occurred during his absence. State v. Melendez, 244 So.2d 137 (Fla. 1971). Although Melendez was a noncapital case, the rule that emanated is a sound one. Is this court now to presume that defense counsel acted so irresponsibly as to not be in easy touch with his client for consultation should the necessity arise? The record in the case sub judice suggests that defendant was always nearby in the court room during both conferences. (Appellant's brief, p. 11.) The general rule is that a client is bound by the acts of his attorney if done within the scope of the attorney's authority. Howard v. State, surpa. Appelle submits that absent evidence that appellant was excluded from either the voir dire or the charge conference, the fact that appellant may not have been immediately and physically present at proceedings where a layman defendant, in the judgment of his attorney, could not have offered material assistance to counsel respecting juror challenges and the sophisticated art of drafting jury instructions, does not warrant reversal in what was overall a more than fair trial for appellant. By allowing the charge conference to proceed without contesting the issue of his client's presence, appellant's counsel effectively waived any objection that could have been made concerning appellant's absence. Id. See also Mangeri v. State, 460 So.2d 975, 980, n. 9 (Fla.3rd DCA 1984).

Appellant's perception of the rule is considerably flawed. This is yet another case in which appellant was

represented at trial by counsel other than the one who represents him on appeal. An energetic, competent and zealous defense attorney should not be inferentially boiled in oil by appellate counsel who urges upon this court the proposition that trial counsel could not have possibly discussed the desirability or undesirability of appellant's presence at the voir dire and jury charge conferences. A simple examination of the record in the case sub judice shows clearly that trial counsel did a quality job and that the results, on the evidence before the jury and the savagery of the murders, could not likely have been affected by appellant's presence or absence during conferences between the attorneys and the trial judge which did not involve confrontation with witnesses.

On the other hand, the rule, as appellant perceives it, invites fraud by defendants and/or defense counsel. A shrewd defense counsel of questionable ethics could effectively sabotage an otherwise perfect trial with the unwitting cooperation of a trusting prosecutor and trial judge presuming that defense counsel is competent enough to consult with his client as to any and all crucial aspects of the trial. Such stringent application of a general rule could create havoc if counsel sought to create built-in error in the event of an adverse verdict.

In either scenario, unless the trial judge deigns to intervene on behalf of the defendant, trial counsel could

silently permit the conferences to take place in defendant's absence as a fool-proof appellant insurance policy against the possibility of a conviction. Such cynical manipulations of our criminal justice system might never go uncovered as a practical matter due to the pervasiveness of the attorney/client privilege and the obvious interest both would have in maintaining the charade. Appellee makes no such contention that there was unethical behavior in the instant case as the record reflects none. In any case, appellant has failed to make out a case of appellant's absence from the voir dire conference or deprivation of any fundamental or constitutionally guaranteed right. In State v. Smith, 240 So.2d 807 (Fla. 1970), this court quoted from Gibson v. State, 194 So.2d 19 (Fla.2d DCA 1967):

> The Florida cases are extremely wary in permitting the fundamental error rule to be the "open sesame" for consideration of alleged trial errors not properly preserved. Instances where the rule has been permitted by the appellate Courts to apply seem to be categorized into three classes of cases: (1) where an involved statute is alleged to be unconstitutional, (2) where the issue reaches down into the very legality of the trial itself to the extent that a verdict could not have been obtained without the assistance of the error alleged, and (3) where a serious question exists as to jurisdiction of the trial Court. (p. 20)

Id. at 810.

Section 924.33, F.S., is a workable and sensible statute which appellee submits should be given much consideration when-

ever an appellate court is considering undoing the work of a jury when the evidence in the case has been so strong and compelling as in the case sub judice.

In Johnson v. Wainwright, 463 So.2d 207 (Fla. 1985), this court tacitly confirmed that not all objected-to alleged violations of even a capital criminal defendant's right to confrontation constitute fundamental error, intimating that the defense counsel's explicit waiver of defendant's presence, on his behalf, respecting the testimony of a psychiatrist in a first-degree murder case would have precluded the defendant from successfully urging this volitional absence as error upon direct appeal. Johnson involved a petition for writ of habeas corpus, which was denied.

This view is consistent with the subsequent holding of the United States Supreme Court in United States v. Gagnon, 470 U.S. ____, 84 L.Ed.2d 486 (1985), that where a defendant has actual knowledge of an in-chambers meeting between the trial judge and a juror at which his counsel is present, and the defense raises no contemporaneous objection to the defendant's exclusion therefrom, no express personal waiver of the defendant's right to be present is required and his volitional absence may not fruitfully be raised as constitutional error on direct appeal. In the case sub judice, the absence of defendant complained of does not present a confrontational question but

rather technical discussions concerning jury challenges and jury instructions respectively. To paraphrase this court in Johnson v. Wainwright, supra, at 211, 212:

> Counsel could very reasonably have decided that the issue was not a promising one because of the waiver and the lack of prejudice to the defense.

Appellee urges that this Honorable Court should not presume that defense trial counsel did not consider the desirability of appellant's presence at both the jury voir dire and jury charging conferences and did not discuss same with his client.

Reversible error cannot be predicated upon conjecture. Sullivan v. State, 303 So.2d 632, 635 (Fla. 1974), cert.denied, 428 U.S. 911 (1976); Jacob v. Wainwright, 450 So.2d 200, 201 (Fla. 1984), cert.denied, ____ U.S. _____, 83 L.Ed.2d 205 (1984).

As the Third District put it in Strate v. State, 328 So.2d 29, 30 (Fla.3d DCA 1976), cert.denied, 336 So.2d 1184 (Fla. 1976):

> A firmly established maxim is that a final judgment or order of the trial court comes to this court on appeal clothed with a presumption of correctness and the one who asserts error has the burden of showing it. From this burden devolves the duty of an appellant to make any reversible error clearly, definitely, and fully appear. Failure to meet this burden impels the conclusion that there is no error in the record and the judgment or order appealed must be affirmed. [Emphasis ours.]

ISSUE II

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING THE INTRODUCTION INTO EVIDENCE OF FORTY-THREE OFFICIAL PHOTOGRAPHS AND A COPY OF AN OFFICIAL POLICE TAPE RECORDING OF AN IN-COMING TELEPHONE CALL FROM ONE OF APPELLANT'S VICTIMS AS SHE WAS REPEATEDLY STABBED, TO DEATH. (Restated.)

A. The Probative Value of the Photographs Outweighed Any Prejudicial Impact (Restated.)

Time and time again this country's trial and appellate courts are faced with the irony that this issue presents, namely, that of appellant claiming that the pictorial representation of the bloody scene that he created through his own unprovoked acts should not have been exhibited to the jury as part of the state's burden to prove what it has alleged in the charging document. In these times, the burden of proof the law places on the state is exceptionally weighty where crimes alleged to warrant the death penalty are charged. See § 921.141(5). This section lists nine aggravating circumstances which, if they outweigh any mitigating circumstances presented under subsection (6), together with any nonstatutory mitigating factors, may justify the imposition of the death penalty. Subsection (5)(h) relates to a capital felony that was "especially heinous, atrocious, or cruel." If the crime that was the subject of the case at bar was purportedly any of these things what better method of informing the jury or clarifying oral testimony is there than consideration of

photographs taken at the crime scene before the evidence has been disturbed. The law is well-settled in Florida that "where they are otherwise properly admitted, it is not a valid objection to the admissibility of photographs that they tend to prejudice the jury. Competent and material evidence should not be excluded merely because it may have a tendency to cause an influence beyond the strict limits for which it is admissible." Mardorf v. State, 196 So. 625 (Fla. 1940), quoting from Wharton's Criminal Evidence, 11th Ed., § 773, p. 1321.

The Mardorf court further observed:

> The value of a pictorial representation of the scene of a crime is obvious. From the very nature of the crime of homicide, it is not possible for the trial jury to view the premises before physical appearance of the scene is changed by removal of the victim's body. It is common knowledge that the descriptions given by witnesses, however conscientious, who have observed the body of a murdered person in the surroundings will vary often to a surprising degree. No better way has so far been devised to show the scene of a homicide than a photograph taken before the body of the deceased and the objects near or around it have been disturbed.
>
> * * *
>
> We close our discussion of the correctness of the court's action in admitting the pictures with the observation that the defendant could not complain because of the shocking nature when the horrible scene disclosed was one which he, himself, created.

Appellant's statement at the bottom of p. 16 of his brief, to-wit: "The detailed photographs shocked the jury and colored their reception of the defense." , is sheer conjecture and unsupported in the record.

In the case at bar, the jury had already heard the testimonies of the eyewitnesses and they knew that appellant had killed the two victims by stabbing and slashing them many, many times with a Buck knife. The official photographs depicting a true representation of the results of his dastardly deeds came as no surprise to the jurors.

In the case sub judice, the pictures were relevant to depict not only identity but the nature and extent of the victims' injuries, the manner of death, the nature of the force and violence used, and also were relevant to the issue of premeditation.

The admission of photographic evidence is within the trial court's discretion and the trial court's ruling should not be disturbed on appeal unless there is a showing of clear abuse. Wilson v. State, 436 So.2d 908 (Fla. 1983).

B. The Number of Photographs Introduced Into Evidence Did Not Constitute Prejudicial Error (Restated.)

The crimes in the case sub judice was not a who-dunit. The jury had heard the testimonies of enough eyewitnesses who

described how appellant stabbed his estranged wife, Shirley Hart Turner, more than twenty times and pursued his second victim, Joyce Ann Brown, and slashed and stabbed her more than fifty times. Because it was uncontroverted that appellant was the perpetrator of these brutal murders the number of photographs admitted were not disproportionate with the number of wounds involved and the quantum of proof already before the jury prior to their viewing of the offical photographs. In actuality, the photographs were little more than illustrative of the testimony of the medical examiner who examined the bodies and performed the autopsies. Dr. Bonofacio Floro, the deputy chief medical examiner for district four, testified in great detail concerning the great number of wounds found on each of the victims, i.e., which of the wounds could have been fatal, which contributed to exsanguination of the victims and which wounds were defensive in nature, etc. (T 497-546). The great number of wounds on the victims were appellant's doings and it was proper for the state's medical witness to inform the jury in detail in order to aid in their understanding of how the crimes were committed. If the photograhs aided the jury in their understanding of the matter, then the number of photograhs, vis-a-vis the number of wounds hardly amounted to prejudicial effect over and beyond their probative value.

The burden of proof was on the state to show premeditation. What more dependable way could there be than to

show through photographs the extensive damage to the victim's bodies that appellant effected with his knife? What better proof that appellant knew that what he was doing would likely cause their deaths? What the camera saw, appellant saw.

C. The Trial Court Did Not Abuse Its Discretion in Allowing the Introduction Into Evidence of a Copy of a Tape Recording of an Official Police Department Incoming Telephone Call Made by One of the Victims as She was Being Stabbed to Death (Restated.)

On p. 19 of his brief appellant states that counsel offered to stipulate to premeditation on the part of appellant in exchange for the prosecution not offering the subject tape recording into evidence. Appellee is unable to verify that appellant ever offered such a stipulation as the transcript page number (T 619) given in appellant's brief does not bear out this contention. All that appellee has been able to find in the transcript to this effect is shown at T 617 as follows:

> MR. COXE: Your Honor, I would certainly, for purposes of this argument that the State makes on this tape, stipulate that it was the defendant who was stabbing Joyce Brown in the phone booth if that's the sole purpose that this is being introduced to show.
>
> THE COURT: Well, let me get a statement, Mr. Kunz, as to specifically what it is being offered to prove.
>
> * * *
>
> MR. KUNZ: Yes, sir, it's being offered to prove, number one, the identity of the assailant of Ms. Brown

> in that phone booth on the morning of July 3rd 1984. Secondly, its being offered with respect to some statements. If you listen carefully to the tape, you will hear the defendant after he made some remarks to Ms. Brown with respect to messing up his family, he kept repeating, yes, you did, yes, you did, as he stabbed her or that's what the jury can infer from the circumstances of that particular tape and coupled with all the testimony from the medical examiner, the number of wounds and what have you.
>
> In addition, Judge, I think it's another fact, another circumstance that the jury can look at in determining, in assessing premeditation, with respect to his conscious intent, did he know what he was doing and, again, Judge, our last thing would be that this is -- there can be no more reliable account of an actual murder than to have a tape recording when the victim is murdered, surrounding all the circumstances. Based on those items, Judge, the State would submit that it's relevant and its probative value clearly outweighs any prejudicial value and it would not mislead the jury.

(T 617, 618).

Again, appellee represents to the this Honorable Court that appellee never offered any stipulation as to the element of premeditation, and that appellant's statement to this effect on p. 19 of his brief is a falsity. Appellant's argument that admitting the tape recording into evidence created "mass prejudice" in the jurymen's minds is conclusory and self-serving. By this point in the trial the jury was already aware, to a large extent, what appellant had done to his victims and it

was incumbent upon the state to prove premeditation and the heinous, atrocious or cruel nature of his deeds.

Appellant has cited no legal authority to the effect that admission of the tape recording of the sounds of Joyce Brown's murder by appellant by the court was an abuse of discretion. All relevant evidence is admissible until it is shown to be inadmissible for some lawful reason. Echols v. State, ____ So.2d ____, Case No. 64,247, opinion filed Sept. 19, 1985, 10 F.L.W. 526. Relevant evidence is evidence tending to prove or disprove a material fact. § 90.401, Florida Evidence Code. See also Brackin v. Boles, 452 So.2d 540 (Fla. 1984).

The admission of evidence is a matter within the sound judicial discretion of the trial judge, whose decision in that regard must be reviewed in the context of the entire trial. Division of Corrections v. Wynn, 438 So.2d 446 (Fla.1st DCA 1983). See also, Toyota Motor Company, Ltd. v. Moll, 438 So.2d 192 (Fla.4th DCA 1983); Pesaplastic, C.A. v. Cincinnati Milacron Co., 750 F.2d 1516 (11th Cir. 1985).

Appellant has failed to demonstrate any abuse of judicial discretion in admitting the police department's tape recording of the slow and cruel death of Joyce Ann Brown. The recording clearly demonstrated to the jury the identity of the assailant, the assailant's purported motive in the killing, assailant's cold, calculated reasoning and justification in his own mind for

the assault and the heinous, atrocious and cruel manner in which it was carried out by documenting her protests and agonizing death. The state was under a duty and burden to prove all of the foregoing beyond and to the exclusion of every reasonable doubt.

ISSUE III

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REFUSING THE ADMISSION INTO EVIDENCE OF AN EX PARTE ORDER FOR INVOLUNTARY EXAMINATION (BAKER ACT). (Restated.)

Apparently, it was as puzzling to the trial judge as it is to appellee as to why appellant attaches any importance or relevancy to an ex parte order entered by another judge for a mental examination of appellant based upon certain fears sworn to and subscribed by the deceased, Shirley Turner, and the other murder victim, Joyce Brown. Appellant was examined and summarily discharged (R 228), the diagnosis being "marital problems." (R 230). Considering that appellant had been examined by three psychiatrists and a clinical psychologist prior to trial, with reports filed with the court (R 233-250), and that the three psychiatrists testified at trial (T 763, 833, T 872-932, 935-1010), it should come as no small wonder that the court felt that it had before it and the jury more than enough recent evidence concerning appellant's mental condition, past and present. Appellant never proffered the testimony of any witness that had any role whatsoever respecting this earlier examination which was performed in March, 1984 at University Hospital, several months before the murders. On the other hand, the court put no restrictions on counsel concerning inquiry to the psychiatrists on the stand as to information they had gleaned from the Baker Act report, which resulted in summary discharge for appellant. (R

228). In other words, the jury was never sheltered from the fact that in March, 1984, appellant's wife and future victim and Joyce Ann Brown had signed the necessary papers to have appellant examined, on grounds of his allegedly bizarre behavior, as particularized in their affidavits. The staff findings, such as they were, became obfuscated after appellant committed the murders the following June and was subsequently, on several occasions, examined by the three psychiatrists and the clinical psychologist. No restrictions were placed on counsel by the court with regard to any questions counsel wanted to ask the expert witnesses concerning their reliance or nonreliance on these records. The jury was made fully aware of what had transpired.

The records that appellant sought to be admitted were unauthenticated, hearsay, and of no probative value. Questions of relevancy are the province of the trial judge and subject to its sound discretion. In the case at bar, refusal to admit these documents into evidence was within the discretionary power of the trial court and its ruling, in the case sub judice, should not be disturbed as appellant has shown no good cause therefor. Division of Corrections v. Wynn, supra.

It was simply a question of relevance and probative value and the court found none.

ISSUE IV

THE STATE MET IS BURDEN OF PROVING BEYOND A REASONABLE DOUBT THAT APPELLANT WAS SANE AT THE TIME OF THE MURDERS. (Restated.)

In attempting to make his point before this court, appellant has, figuratively speaking, resorted to climbing into the jury box and substituting his views of what the evidence proved in this regard, for that of the jury. In his argument, appellant has done no more than state the general law and conclude that there was reasonable doubt as to appellant's sanity at the time he committed the murders. Appellant is content to dwell upon some differences in the appraisals of the three psychiatrists who testified at trial rather than examine the total picture which includes the observations of eyewitnesses to the crimes and appellant's attendant behavior. The two court-appointed psychiatrists, although perhaps not agreeing totally on the mechanisms, were both of the opinion that, under the M'Naughten Rule, appellant met the legal tests of sanity at the time he committed the murders. Dr. Stinson, a psychiatrist, considerably less experienced than Dr. Miller, was of a different opinion. The jury was free to weigh the relative values of the psychiatrists' opinions, to couple it with the observations of the lay eyewitnesses, and arrive at its own conclusions. The law is well settled that weighing of conflicting evidence is the exclusive province of the jury. Appellant has made no showing in

his argument that the jury's findings in this case should be set aside.

> It is the law of Florida that all men are presumed sane, but whether there is testimony of insanity sufficient to present a reasonable doubt of sanity in the minds of the jurors the presumption vanishes and the sanity of the accused must be proved by the prosecution as any other element of the offense, beyond a reasonable doubt. [Emphasis the court's.]

Holmes v. State, 374 So.2d 944 (Fla. 1979), cert. denied, 446 U.S. 913 (1980). But

> Since Florida law leaves to the jury the decision as to whether there has been sufficient evidence of insanity presented to rebut the presumption of sanity, it is crucial that the jury be clearly instructed on the state's ultimate burden to prove that the defendant was sane. [Emphasis ours.]

Yohn v. State, _____ So.2d _____, Case No. 65,504, opinion filed July 11, 1985, 10 F.L.W. 378.

In the case sub judice, the court's instructions to the jury regarding the legal tests for insanity and the state's burden of proof are not at issue in this appeal. The determination of a defendant's mental condition at the time of the offense is a question of fact for the jury. Bryd v. State, 297 So.2d, 24 (Fla. 1974); Collins v. State, 431 So.2d 225 (Fla.4th DCA 1983). The jury may accept or reject expert testimony. The jury has the prerogative of relying solely on lay testimony and rejecting the testimony of the defendant's expert witness. The testimony of lay eyewitnesses who observed appellant just moments

before, during, and after the murders is sufficient to suport the jury's rejection of the insanity defense. State v. McMahon, ____ So.2d ____ (Fla.2d DCA 1986), Case No. 84-2471, opinion filed March 6, 1986, 11 F.L.W. 747.

> The fact that some of the evidence conflicted does not wipe out the evidence that tends to support the state's charge, and render the evidence insufficient.

Aman v. State, ____So.2d _____ (Fla.4th DCA 1986), Case No. 85-633, opinion filed March 12, 1986, 11 F.L.W. 645, citing Abbott v. State, 334 So.2d 642 (Fla.3d DCA 1976), cert. denied, 431 U.S. 968, 97 S.Ct. 2926, 53 L.Ed.2d 1064 (1977).

George Barnard, M.D., a forensic psychiatrist appointed by the court to examine appellant, testified that there was no immediate stressor associated with appellant's actions on the evening of July 2, 1984. (T 895). The doctor noted that appellant visited his estranged wife's premises around midnight but went home, slept for some hours, and returned to the scene around 6:00 a.m. where he committed the murders without provocation.

Ernest Carl Miller, M.D., a court-appointed psychiatrist, noted that appellant's victims were purposefully chosen (T 959); that his actions did not involve random, senseless acts (T 960). The doctor opined that there was hot blood--hate, rage, and fear (T 991), but that the appellant remembered cutting his

wife. (T 1007). In the doctor's professional judgment, there was no isolated explosive disorder affecting appellant's behavior during this episode. (T 1010). Dr. Daniel Stinson, a psychiatrist, testified for the defense, but his background in forensic psychiatry in relation to criminal cases was far less extensive than those of doctors Barnard and Miller. In any case, the decision as to whether the presumption of sanity had been rebutted belonged to the jury. Yohn v. State, supra.

ISSUE V

THE TRIAL COURT DID NOT ERR IN ADJUDICATING APPELLANT GUILTY AS THERE WAS SUFFICIENT EVIDENCE OF PREMEDITATION TO SUPPORT THE VERDICT OF GUILTY OF FIRST-DEGREE MURDER. (Restated.)

Appellant has cited familiar law in support of his argument that there was insufficient proof of premeditation in the case at bar. It requires only a casual examination of the facts as they unfolded on the occasion in question to understand why the jury in the case at bar apparently had no difficulty in finding that there was premeditation, beyond every reasonable doubt, in both instances of murder.

Appellant's murderous intent toward his estranged wife Shirley and her friend, Joyce Brown, had manifested itself before. Cynthia Dawson, Joyce Brown's older daughter, recalled for the court an earlier statement by appellant that he would kill Shirley and Joyce (T 578). The neighbors, James Andrews (T 348) and Daniel Robinson (T 371), both testified concerning appellant's deliberate actions on the morning in question, i.e., that appellant arrived at the premises of Shirley Turner and Joyce Brown armed with a shotgun and a knife, that he blasted away at the house with the shotgun several times into various windows, forced his way in and then emerged shortly thereafter in pursuit of Joyce Brown, finally catching up with her in a phone booth where he methodically stabbed and cut her to ribbons.

Appellant's own brief, p. 20, presents a partial transcript of the police complaint officer's tape of the argument that ensued between appellant and Joyce Brown moments before the fatal assault. This, by itself shows a rational mental process and, indeed, a pause for accusation before he began cutting and stabbing his second victim.

In order to establish "premeditated design" as an element of murder in the first degree, it is not necessary that purpose and intent to kill another human being need exist for any particular length of time, and it is sufficient if between formation of the intent to kill and the act of killing there lapses enough time for the slayer to be fully conscious of a deliberate purpose and intent to kill another human being. Snipes v. State, 17 So.2d 93 (Fla. 1944).

A review of the facts, even as set out by appellant himself shows clearly that the two targets for his rage were deliberately selected and that there was no homicidal rampage on appellant's part involving indiscriminate attacks on passersby. It is undisputed that on the evening before the murders appellant had come to Shirley Turner's premises and appellant perceived that she was having sexual relations with some other man. Some hours later he returned armed with a shotgun and a Buck knife, proceeded to force his way inside where he methodically stabbed and cut Ms. Turner to death, as described in detail by the

couple's daughter, Anetra Turner (T 626, et seq.). In front of the whole neighborhood, appellant ran down the block to the phone booth where Joyce Brown was attempting to call the police, engaged in an argument with her, and then cut and slashed her to death. Dr. Floro, the medical examiner, described the multiple wounds as an "overkill." (T 543). The victim was still alive during at least a portion of the stabbings and hemorrhaging (T 549). The victims were methodically selected and killed for reasons that appellant perceived to be valid. In his own terms, he related to Dr. Miller that he believed that his wife was involved in a lesbianistic relationship with Joyce Brown, that his wife was a prostitute and that the atmosphere was bad for their daughter, although there was no evidence presented to the effect that any of these convictions of appellant had any factual basis. The jury's findings that the element of premeditation was proved beyond a reasonable doubt as to both victims should not be disturbed. Findings of fact are the exclusive province of the jury.

Appellee submits that appellant's characterization of the court-appointed psychiatrists' evaluation of appellant respecting his sanity at the time of the murders is a distortion of the record.

The bottom line for both of these doctors was that appellant, at the time of the killings, had "the ability to

reason accurately" and "knew what he was doing." (Dr. Barnard T 890, 891). ". . . I think that he did know the nature and consequences of his acts and the wrongfulness of his acts at the time he committed them." (Dr. Miller, T-955).

The jury had the benefit of eyewitness accounts of the murders, the testimonies of lay persons who were familiar with appellant and his machinations and, finally that of three experts in the field of forensic psychiatry. The jury had before it sound bases for finding appellant sane at the time of his crimes. There has been shown no basis for overturning their judgment on this important issue. Premeditation may be established by circumstantial evidence. Tedder v. State, 322 So.2d 908 (Fla. 1975). See also Snipes v. State, supra. Pursuit of a victim can be a relevant circumstance. The brutality of this homicide and other factors warrant an inference of premeditation. Larry v. State, 104 So.2d 352 (Fla. 1958).

ISSUE VI

THE TRIAL COURT DID NOT ERR IN INSTRUCTING THE JURY ON THE DOCTRINE OF FELONY MURDER. (Restated.)

Under this issue it appears that appellant is focusing on the murder of his estranged wife, Shirley Hart Turner, as it was she whom appellant killed immediately after breaking into the home shared by Ms. Turner and Ms. Brown. Ms. Brown was not murdered inside the house but down the street in or around a telephone booth while she was attempting to summon police.

Appellee strongly disagrees with appellant as to what the evidence showed on this point. It is undisputed that appellant arrived at Ms. Turner's premises armed with a single shot shotgun and a Buck knife. (T 629). It s undisputed that appellant fired the shotgun at the door and windows a number of times, (T 350, 351, 629), reloading the single shot weapon each time before breaking into the house and immediately stabbing his estranged wife to death. (T 630). He did not harm his daughter nor Joyce Brown, at that time. As soon as appellant entered the house he went straight for his wife who fled into the room occupied by the two young children who lived there. (T 634). Without hesitation, he stabbed her to death then and there. Was it unreasonable for the jury to conclude that when appellant broke into the house he intended to do what he did do, i.e., commit an assault therein? Despite his telling one of the psychiatrists that he intended to

pull a "commando raid" on the house and rescue his daughter, this he did not do when he had every opportunity. The daughter was in the house but appellant did not gather her up in his arms and "rescue" the child. The daughter, Anetra, testifed that her father totally ignored her even though she was climbing all over him and hitting him in order to make him stop stabbing her mother. (T 631). After he killed Shirley, he again ignored the child and went out the door in pursuit of Joyce Brown. (T 630, 631).

The child testified that when appellant confronted her mother in the child's room he cursed her and said: "You're the bitch I want," T 630, as he began stabbing her. After the child ran from the house her father ran out and pursued Ms. Brown to the telephone booth where she began begging him for her life. (T 632). Appellant's statement on p. 28 of his brief to the effect that Dr. Miller testified that the appellant at the time of the crime did not have the intent to commit an offense is without a record reference and it is unclear from appellant's argument as to whether he represents this as Dr. Miller's own conclusion or something appellant told him during one of their interviews.

Appellant's argument that the record is silent as to the intent with which appellant entered the apartment is without merit. The law is well settled that intent may be established by circumstantial evidence and the jury had before it a wealth of

circumstantial evidence, including appellant's remarks, "you're the bitch I want," from which it could logically and properly find that the elements of felony murder were evident with respect to the murder of Shirley Hart Turner. The court acted correctly in instructing the jury on the doctrine of felony murder incidental to the crime of burglary.

ISSUE VII

THE TRIAL COURT DID NOT ERR IN REFUSING TO INSTRUCT THE JURY AS TO APPELLANT'S REQUESTED INSTRUCTIONS ON STATUTORY MITIGATING CIRCUMSTANCES. (Restated.)

A. There Was no Evidence of Extreme Duress

Appellant's argument that "Dr. Miller's testimony is consistent with his earlier testimony on direct examination as the state's expert witness that the appellant under duress regressed to a psychotic state" T 957 (Emphasis added), Appellant's Brief, p. 30, is a falsity. That was not Dr. Miller's testimony. On p. 957 of the trial transcript, Dr. Miller is recorded as saying:

> It did show a characterologic problem and a man who might, who might, conceivably, under stress, regress to a psychotic state. [Emphasis ours.]

Dr. Miller did not mention the word "duress," therefore, appellant's argument to this effect must be totally disregarded by this court as support for appellant's argument that the court allegedly erred in not instructing the jury concerning nonexistent evidence of "duress." Black's Law Dictionary, 4th Ed., defines duress as "unlawful constraint exercised upon a man whereby he is forced to do some act that he otherwise would not have done." The record in the case sub judice is devoid of any evidence whatsoever that appellant was being forced (by another) to do any act that he otherwise would not have done. It is clear

from the record that the only force acting upon appellant surrounding these murders was his own blind hatred of the two victims.

B. Evidence of the Defendant's Age at the Time of the Crimes is Irrelevant in That His Age at the Time of the Crimes (39) Was Significant of Nothing (Restated.)

In appellant's brief it is stated as fact that on the night of appellant's thirty-ninth birthday he observed his wife having intercourse with another man. (Appellant's Brief, p. 31). Not one shred of evidence was produced at trial to this effect. Dr. Miller's testimony seems to reflect that appellant may have told him that he saw his wife engaged in some sexual liaison. This aspect of appellant's argument should be disregarded and, at most, might represent a rationalization by appellant in acting out his intense hatred of his wife.[1]

Returning to appellant's age as a mitigating factor, the courts of Florida have never entertained age per se as a mitigating factor in capital cases. Age, coupled with other aspects of a defendant's psychological makeup, might possibly have some bearing on a case, in a given situation. Is there something magical or mystical about age thirty-nine? Appellant argues that he had reached some mid-life crisis on that magical

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[1] See Dr. Barnard's report, R 247. Appellant's statements to the two psychiatrists, in this regard, were not entirely consistent.

day which, at least in part, prompted him to brutally murder his wife and another woman. This is utter nonsense and appellant has cited no authority attesting to the notion that thirty-nine is middle-aged and, if it was, what it had to do with anything.

Conceivably, the age of a ten-year-old ax murderer might be cognizable by the court pursuant to the applicable statute. If a ninty-two year old senile person were to poison his or her ninty-two year old spouse perhaps the age of the perpetrator might serve as a mitigating factor-but a thirty-nine year old? Certainly not.

In a 1982 case this court held that the judge in that case was not required to find the appellant's age (23) to be a mitigating factor in a hatchet murder. Simmons v. State, 419 So.2d 316 (Fla. 1982), citing Songer v. State, 322 So.2d 481 (Fla. 1975), vacated, 430 U.S. 952 (1977).

Age twenty-five of a defendant in a first-degree murder case did not require an instruction on age as a mitigating circumstance. Lara v. State, 464 So.2d 1173 (Fla. 1985). See also Washington v. State, 362 So.2d 658 (Fla. 1978), cert. denied, 441 U.S. 937 (1979). Appellant argues:

> Dr. Stinson rendered an opinion that the psychosocial stressor that triggered the events was the fact that on the night of the appellant's thirty-ninth birthday, having reached middle age, he perceived his life before him and behind him, his estranged wife

> having sexual intercourse with another man, and the ensuing loss of his family." (T 826).

This was not the doctor's testimony on p. T 826 and this argument has been fabricated out of thin air. There was no reference whatsoever as to appellant's philosophizing about middle age. The doctor made no reference to appellant's age but only in passing observed that the killings took place on the night of appellant's birthday (the doctor didn't mention his age) and "if he did see and if this was not a delusion, and if it is a delusion it still goes along with the psychosis, saw his wife having intercourse with another man." Appellant's attempt to take comfort in this portion of Dr. Stinson's testimony to urge upon this court that the psychiatrist attached any significance to the fact that the evening in question was the evening of his thirty-ninth birthday, as opposed to just being his birthday, is a deception and cannot be dignified, even as an example of hard-sell rhetoric.

> There is no per se rule which pinpoints a particular age as an automatic factor in mitigation. The propriety of a finding with respect to this circumstance depends upon the evidence adduced at trial and at the sentencing hearing.

Peek v. State, 395 So.2d 492 (Fla. 1980), cert.denied, 101 S.Ct. 2036 (1981).

In 1975 this court held that at age eighteen one is

considered an adult responsible for one's own conduct. Songer v. State 322 So.2d 481 (Fla. 1975).

C. The Court's Refusal to Instruct the Jury on Requested Statutory Mitigating Circumstances was Not Error in the Case Sub Judice. (Restated.)

Appellant's argument under this sub-issue amounts to nothing more than a treatise on the general requirement that juries be properly instructed concerning mitigating circumstances, if any. There was no evidence in this case that defendant acted under any duress whatsoever. Quite to the contrary, he acted alone and not driven by any external force--only by the hatred that he harbored within himself. The record is clear that all of appellant's murderous acts were done in full view of a number of kinfolk, bystanders, and police and that appellant was examined by three psychiatrists in open court providing the jury with ample evidence upon which to base its findings that appellant appreciated the criminality of his conduct. Neither the court, the jury, nor the examining psychiatrists, attached any particular significance to the fact that appellant was thirty-nine years of age at the time he committed these crimes. Appellant has failed to demonstrate that the fact that he became worked up over being rejected by his estranged wife on his birthday, played any appreciable role in portending the slaughter that was to follow. In actuality, the jury was given carte blanche to consider any mitigating circumstances that it desired

to. (T 209). Throughout the penalty phase of the trial appellant was permitted to present any and all mitigating evidence and circumstances that he desired to, however irrelevant and emotional that some of it was.

ISSUE VIII

THE TRIAL COURT ACTED CORRECTLY IN FINDING THAT THE MURDER OF JOYCE BROWN WAS COLD, CALCULATED, AND PREMEDITATED; HEINOUS, ATROCIOUS AND CRUEL, AND IN NOT REJECTING THE JURY'S RECOMMENDATION THAT THE DEATH PENALTY BE IMPOSED. (Restated.)

A. Aggravating Factors

It is deceitful for appellant to argue as established fact that appellant entered his estranged wife's apartment in an effort to rescue his daughter from what he perceived to be the evil influence of his estanged wife and her alleged lesbian lover. Appellant would be speaking more candidly if he did not attempt to misphrase the testimony of Dr. Miller, to-wit:

> Q That he did honestly in his own mind believe that?
>
> A Let me put it this way: he professed to believe this and I have not any information to cause me to believe that he did not earnestly think that that was happening. [Emphasis added.]

(T 984)

Appellant further argues that when appellant broke into his wife's quarters that he exhibited "none of the traditional motives for burglary, i.e., pecuniary gain, sexual gratification, etc." Appellant conveniently forgets that one of the elements of burglary, i.e., the specific intent prong, can be intent to commit an assault therein which is precisely what appellant did

on the occasion in question. Therefore, appellant's argument on this point utterly fails. Again, it was entirely proper for the jury to conclude that when appellant broke into the house there was within him the intent to do what he did do.

Appellant concedes that the brutal stabbing murder of Joyce Brown was reprehensible but maintains that it was not "unnecessarily torturous" or so at variance with the "norm" of deliberate killings as to meet the standard in State v. Dixon, 283 So.2d 1 (Fla. 1973), cert. denied, 416 U.S. 943 (1974). Appellee disagrees, as this court has on a number of other occasions found that acts of other killers, under similar circumstances, i.e., methodical stabbing and slashing until the victim finally becomes comatose and dies from the wounds or bleeds to death, met this standard. In any case, § 921.141(5) is the applicable law today and the law which appellee will rely upon.

Appellant incorrectly states on p. 40 of his brief that the trial court's finding of a prior threat by William Turner to Shirley Turner is not supported by the record and is taken (only) from the presentence investigation. This is not true. Cynthia Dawson, the late Joyce Brown's older daughter, during her testimony, recalled an incident where appellant threatened the lives of Shirley Brown and Joyce Brown:

BY MR. KUNZ

Q Now, Ms. Dawson, your mother made a statement you just testified to the police that "you all are going to wait until he kills us," is that correct?

A Yes.

Q Now, where was the defendant when she made that statement?

A He was leaning up against his car.

Q Was he in hearing proximity of your mother?

OBJECTION BY MR. COXE

* * *

A Yes.

BY MR. KUNZ

Q Did you observe the defendant, did he do anything when your mom made that statement?

A He smiled and dropped his head.

Q And did there come a time later that evening where Mr. Turner returned to your mom's house when you were present?

A Yes, he did.

Q And did he say anything to your mom when he returned that evening?

A Yes.

Q What did he say?

A He told her, he said "Yeah, you were right, you know what you told them was true." He said, "You and Shirley won't live to tell nobody about it."

* * *

Q Okay. Now, did there come another time, Ms. Dawson, where you observed Mr. Turner over there talking to your mom?

A Yes.

Q And what happened on that time with respect to what Mr. Turner said to your mom?

A He was telling my mother about her and Shirley being lesbians and calling them bitches.

Q And what exactly did he say?

A He told her, he said, "I'm sick of this shit about you and Shirley." He say, "you all ain't nothing but two old damn lesbians," and he said, "I'm tired of this shit." He said, "just like you said once before, you don't live to tell nobody about it."

(T 577, 578)

If the foregoing words do not constitute a prior threat, appellee is at a loss to suggest what would, other than a notarized statement of intent to kill them at a particular time and place. Next, appellant argues that the killings of Shirley Turner and/or Joyce Brown were not done in a cold, calculated, premeditated manner and again, appellee must disagree.

It has already been established that around midnight on the evening before the murders appellant arrived at the house of Shirley and Joyce and either made some observations or heard some sounds that he claims were suggestive of sexual intercourse between Shirley Turner and some unknown man. Then appellant returned to his home and slept and smoked cigarettes until near 6:00 a.m. the next morning when he returned to his wife's house armed with a single-shot shotgun and a Buck knife. After shooting up the house he broke inside and stabbed his wife to

death. Why would anyone after stewing and sleeping for hours, already, he claims, knowing that his wife was having some kind of illicit sexual affair, return to the place where this had happened, armed with a shotgun and a knife, and then do what he did without some degree of rational planning. The stressor, <u>if any</u>, had occurred <u>six hours earlier</u>, according to the court-appointed psychiatrist.

Dr. Miller testified:

> The circumstances of the murder[s] were such as to suggest to me that this was not just a random, senseless act, that the victims were chosen purposefully. . . .
>
> * * *
>
> There was a basis for his choosing whom he did.
>
> * * *
>
> This--the fact that this was effective, what was done in these instances, albeit in a pathological sense, effective, shows the planning ability which is less consistent with psychosis and more consistent with adequate reality testing.

(T 959, 960, 961)

Certainly these opinions of the examining psychiatrist were applicable as to the murder of Shirley Turner but, while appellant was stabbing Shirley Turner to death, Joyce Brown fled the house and ran to the telephone booth. If the psychiatrist's opinion is to be accepted, then appellant was apparently not able to effect the murder of Joyce Brown on the premises, as he probably intended to do, but, after killing Shirley it was

necessary for him to pursue her elsewhere as she had already fled. The record is clear that when appellant broke into the house that he went for his estranged wife first, who retreated into the children's room where she was stabbed to death. (T 629). Apellant, without provocation, broke into the house and killed his estranged wife. He had armed himself even prior to going from his own living quarters to those of his wife. He cornered his wife in the children's room, cursed her and said to her, "you're the bitch I want." (T 630). Appellee will not belabor this point further.

Appellant further urges upon this court that the evidence did not show that the murder of Joyce Brown was done in a heinous, atrocious or cruel manner or that the murder of Joyce Brown was premeditated. For the advocate, all things are arguable, even the absurd. But viewing the evidence from the neutral viewpoint of a judge or jury, appellant's argument would appear ridiculous. As pointed out on p. 20 of appellant's brief, after appellant pursued Joyce Brown down the street to the telephone booth where she was attempting to summon police, he paused before killing her to argue with her

> Man: you're the one. You're the one. Your're the one.
>
> * * *
>
> (Screaming) Woman: I didn't do nothing, William.
>
> Man: Yes, you did.

Woman: I didn't do nothing.

Man: Yes, you did.

This tit-for-tat argument went full cycle nine or ten times and the last thing that the police dispatcher heard was "(inaudible [unintelligible] screaming) William--". At the bottom of p. 20 of his brief, appellant says:

> The appellant did not contest the issues of identity or premeditation because his main defense was insanity. [Emphasis ours.]

There was no stipulation as to premeditation and appellant's argument against admitting the tape recording (Issue II) is inconsistent with his argument on the instant point. Be that as it may, appellant took the time to argue with Joyce Brown about her alleged bad influences on his family and then proceeded to cut and slash her fifty-one times. There was enough premeditation evidence here to satisfy any reasonable jury in the free world.

Appellant would have this court adopt the view that stabbing and cutting a woman fifty-one times out on the street until she collapsed either from fatal wounds or exsanguination falls short of being heinous, atrocious or cruel. Under similar fact situations in the past, this court has taken the opposite view.

> We agree that the mindset or mental anguish of the victim is an important factor in determining whether the

> aggravating circumstances of heinous, atrocious and cruel applies.
>
> * * *
>
> As important is the totality of the circumstances of the incident and whether they reflect that this was a conscienceless, pitiless and unnecessarily torturous crime that sets it apart from the norm of capital felonies. [Emphasis added.]

Jennings v. State, 453 So.2d 1109, 1115 (Fla. 1984), citing State v. Dixon, 283 So.2d 1 (Fla. 1973).

Methodically stabbing someone to death can support a finding of heinous, atrocious or cruel in aggravation and in support of imposition of the death penalty. Medina v. State, 466 So.2d 1046 (Fla. 1985). Cf. Preston v. State, 444 So.2d 939 (Fla. 1984); Peavy v. State, 442 So.2d 200 (Fla. 1983).

Because it represents the judgment of the community as to whether the death penalty is appropriate, a jury's recommendation is entitled to great weight. Odom v. State, 403 So.2d 936 (Fla. 1981). If the evidence shows that the accused had ample time to form a purpose to kill the deceased and for the mind of the killer to become fully conscious of his own design, it will be deemed sufficient in point of time in which to enable the killer to form premeditated design to kill. Buford v. State, 403 So.2d 943 (Fla. 1981). Where a person strikes another with a deadly weapon and inflicts a mortal wound, the very act of striking the person with such a weapon in such manner is sufficient to warrant

the jury finding the person striking the blow intended the result which followed. Id.

This court in 1978 approved imposition of the death penalty in cases where one of the victims was stabbed nine times, there being only four of which wounds could have caused death but none of which wounds were instantly fatal. Washington v. State, 362 So.2d 658 (Fla. 1978).

In the matter of Joyce Brown there were seventeen stab and incise wounds in the chest area alone, five of which went through the chest wall and into the heart or the left lung. There were four stab wounds on the right side, three of which went through the chest wall and perforated the right lung. Dr. Floro testified that three of the four wounds on the right side would have been fatal and five of the seventeen wounds on the left side of the chest would have been fatal, accompanied by bleeding and at the same time air getting into the lung causing difficulty of breathing and ventral death, perhaps eventually. In Joyce Brown's abdominal area there were so many wounds that the doctor was unable to count them due to exposure of internal organs. There was a large hole in the abdomen which was made by several stab and incise wounds. The doctor defined incise wounds as a conglomeration of stabbing and cutting or stabbing and slashing. There was even a stab wound on her left forehead. There were slashes in the webs of the fingers which the doctor

said he considered as defense wounds. (T 531-536). All totaled there were fifty-one stab and slash wounds on the body of Joyce Brown and she died as the result of multiple stab wounds of the body, chest and abdomen. (T 537). In short, she was stabbed repeatedly, the knife inflicting both fatal and non-fatal wounds, until she collapsed and died, all the time pleading for her life. In the case sub judice there is more than ample ground for the trier of fact to find that this killing was heinous, atrocious and cruel. The jury's recommendation of the death penalty is supported by the evidence.

B. Mitigating Factors

On p. 43 of his brief, appellant asserts that all evidence in mitigation must be considered and weighed. This is not a correct statement of the law. All relevant evidence in mitigation should be considered and weighed but relevancy is the domain of the trial judge and unless an abuse of discretion is demonstrated its rulings must stand. In the case sub judice the jury recommended the death penalty in connection with the murder of Joyce Brown. In sentencing appellant the trial judge apparently found no fault with the jury's verdict and sentence recommendation as he adjudicated appellant guilty and imposed the death penalty. The jury is an embodiment of the community and its recommendations as to the penalty to be imposed in a capital

case is entitled to great weight by the trial court in its own deliberation.

It appears that appellant is now alleging error on the part of the trial judge because the trial court did not reject the jury's weighing process as to aggravating factors vis-a-vis mitigating factors.

The jury in the case at bar heard nothing about appellant's prior criminal history and thus, from their viewpoint, appellant had no prior criminal history and in the minds of the jury he suffered no prejudice. Appellant should not now be heard to conject that because the trial judge was aware, through the presentence investigation, that appellant had a criminal past (which did not involve any serious acts of violence) that the trial judge's weighing process was somehow flawed.

Appellee submits that although appellant might well have been disturbed if he thought of his wife as having sexual relations with other men, or that she was a prostitute, or that she was a lesbian, or that she was anything bad that he chose to think about her, the evidence did not show, nor did the court's examining psychiatrists believe, nor did the jury believe, that whatever emotional disturbance appellant was suffering from, was enough to substantially impair his mental capacity. The trial court agreed and arrived at its own final decision based upon its own weighing of aggravating and mitigating factors. As to

appellant's age at the time of these killings, appellant has presented nothing, absolutely nothing, to suggest that appellant's thirty-ninth birthday, or his birthday per se, should mitigate what he did, in any respect. It is an absurd argument and one which should be totally disregarded by this court.

Appellant drones on about various and sundry nonstatutory mitigating factors which he concludes that either the court or the jury disregarded in arriving at the results of the balancing test. The fact that appellant was honorably discharged from the Air Force in 1968, many years ago, is of little import here. Although the rendition of military service to the nation is commendable, it is not a feat that has not been duplicated by millions of other men equally well. Active military service which ended in 1968 is not a factor that deserved consideration in terms of mitigating two violent, bloody killings on the part of appellant. This kind of flag-waving and falling back on stale and undistinguished military service to mitigate two heartless murders should be rejected and disapproved of by this court.

ISSUE IX

APPELLANT'S DEATH SENTENCE IS NOT UNCONSTITUTIONAL. (Restated.)

Appellant's reliance upon Provence v. State, 377 So.2d 773 (Fla. 1976), cert. denied, 431 U.S. 969 (1977), is misplaced as the only issue in Provence that remotely resembles any issue sub judice was whether or not the circumstance of removal of money from the body of a person who had just been shot to death could be counted as both a killing for pecuniary gain and a murder committed in the act of commission of a robbery. This court held in that case that commission of a crime for pecuniary gain could only be counted as one aggravating factor because the testimony and evidence indicated that the assailant killed the victim for other reasons and that the removal of the money from the victim's person after the shooting was an afterthought. It is appellee's position that the holding in that case offers no support to appellant's contention.

In the case sub judice it is uncontested that appellant ran from the house where he killed his estranged wife down the street to the place where Joyce Brown was attempting to call the police on a pay telephone. He approached her, argued with her, and then proceeded to stab and slash her to death. Considering that Joyce Brown had fled from the house after appellant had broken in and commenced to stab and cut his estranged wife to death the jury had to conclude that he went to the house to kill them both (in

view of his prior threats to do just that) and that while he was killing his wife Brown managed to flee but he went after her, caught up with her, and killed her by stabbing and slashing her fifty-one times. The analytical concept of cold, calculation and premeditation under the facts of this case is not the least incompatible or inconsistent with heinousness, atrociousness and cruelty once he caught up with her. On this point appellant has reached out far and wide but his argument is devoid of both substance and merit under the facts of this case.

ISSUE X

THE TRIAL COURT ACTED PROPERLY IN ADOPTING THE JURY ADVISORY RECOMMENDATIONS IN BOTH COUNTS AND SENTENCING APPELLANT TO A TERM OF LIFE IN COUNT I AND DEATH IN COUNT II. (Restated.)

Appellant's conclusion that "the trial court did not make an independent judgment whether the death sentence should be imposed in light of the jury recommendation of life in Count I . . . " is a self-serving conclusion and based on conjecture. Appellant is saying to this court that the trial judge failed to do his job--in that he rubberstamped the jury's recommendations and therefore ignored his obligations under the law. If the evidence supports the jury's recommendation then certainly the evidence supports judicial determinations that are consistent with the jury's recommendations. As appellant points out, the primary standard for review of death sentences is that the recommended sentence of the jury should not be disturbed unless there appear to be strong reasons to believe that reasonable persons could not agree with the recommendation. [Appellant's brief, p. 59, citing Le Duc v. State, 365 So.2d 149, 151 (Fla. 1978)].

Appellant makes much over the fact that the jury recommended life imprisonment rather than the death sentence as to Count I of the charges but recommended the death sentence as to Count II. For anyone familiar with the trial transcript and record in this case, the fact that the jury made different recommendations as to

the penalties to be assigned for the killings of Shirley Turner and Joyce Brown, respectively, there is no mystery at all. This was a thoughtful jury and the evidence in the case at bar, to a far greater degree, supports the jury's selectivity than it supports appellant's outright conjecture that the jury acted on some non-rational basis and the trial court rubberstamped their recommendations.

Although during the entire trial, there was not one scintilla of direct evidence to the effect that Shirley Turner was either a prostitute or a lesbian or that Joyce Brown was her partner in some kind of lesbianistic relationship,[2] appellant claimed that this was the case, although he did not testify at trial. He only conveyed this impression to the examining psychiatrists as a belief or possible delusion of his own. At any rate, if appellant really did believe that his estranged wife was responsible for the breakup of the marriage and for an allegedly bad environment for the child, Anetra, then perhaps his wrath, justified or not, directed toward Shirley was at least understandable and the jury gave him the benefit of the doubt, although it was unanimous in finding that the murder of Shirley was premeditated. But the jury must have viewed appellant's actions toward Joyce Brown in a different light. Could not an

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[2] Joyce Brown shared one of the rooms in the house with her "fiance," Sammy Couch. Shirley Turner had her own room. (T 589, T 628).

angry William Turner have transferred the anger and hatred he felt toward his wife to any third party who was a convenient scapegoat--somebody he could blame in addition to the wife? Consider that when appellant broke into the women's home and began to kill his estranged wife outright, Joyce Brown fled the premises and ran to a telephone booth several houses away. After Shirley had been murdered, appellant took the time to reflect and decided to pursue Joyce down the block in order to kill her also. The daughter, Anetra, was nowhere near, as appellant suggests, but was trying to get help from a neighborhood man. (T 632). The record is clear that appellant had no purpose in running down the block other than to catch and kill Joyce which he did by stabbing and slashing her fifty-one times, his work being interrupted once by the passing of a police car. (T 353, 354). Perhaps the jury regarded Joyce Brown as a totally innocent stranger to the Turners' domestic problems. Perhaps Joyce Brown was viewed as the good samaritan who took in Shirley Turner and her child and shared her home with them. It seems clear that the jury regarded appellant's killing of Joyce Brown as being senseless, pitiless and cruel. Other than appellant's own beliefs, the foundations for which are obscure, no evidence was presented that Joyce Brown was anything other than Shirley Turner's innocent friend.

From the record in this case, it is no wonder that the trial court saw little or nothing in the way of mitigating factors

respecting the murder of Joyce Brown. If there were mitigating factors, and certainly the jury found there were some, respecting the other murder (Shirley Tuner), there was nothing to commend appellant respecting Joyce Brown. Appellant pursued her and caused her a relatively slow, painful, and horrible death. The jury saw its clear duty and it did its duty. Appellant has failed to show even one convincing reason why the trial judge should have overruled the jury's verdict as to Count II.

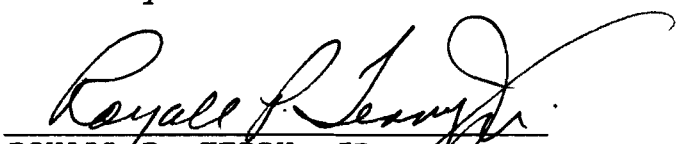
CONCLUSION

The jury apparently believed that appellant's beliefs or delusions concerning his estranged wife's lifestyle and/or the perceived bad environment that this was creating for one of the couple's children was sufficient to mitigate the possible penalty from death in the electric chair to life imprisonment, although it still found by unanimous consensus that appellant's murder of his estranged wife was premeditated. As to Count I, the jury gave appellant a break and the benefit of a doubt but it rejected appellant's contention that he was driven beyond his own control when he stabbed and slashed Joyce Brown fifty-one times, causing her an agonizing death. The jury apparently found that Joyce Brown was sufficiently removed from appellant's domestic problems, that her cruel murder was the result of blind anger and hate, not psychosis.

The trial judge, after independently weighing the aggravating and mitigating factors, must have arrived at the same conclusion and properly adopted them as the court's rulings.

Based on the evidence, the trial court should be affirmed.

JIM SMITH
Attorney General



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have furnished a copy of the foregoing Brief of Appellee to Clyde M. Collins, Jr., Esq., Cotney & Collins, 233 East Bay Street #1016, Jacksonville, Florida 32202, by United States Mail, this 5th day of May, 1986.

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