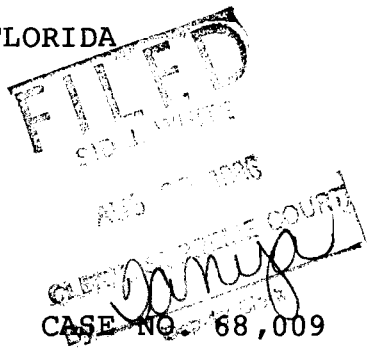
IN THE SUPREME COURT OF FLORIDA



ROY CLIFTON SWAFFORD,

Appellant,

v.

CASE NO. 68,009

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR VOLUSIA COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

JIM SMITH
ATTORNEY GENERAL

BELLE B. TURNER
ASSISTANT ATTORNEY GENERAL
125 North Ridgewod Avenue
Fourth Floor
Daytona Beach, Florida 32014
(904) 252-2005

COUNSEL FOR APPELLEE

TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS CONT'D

TABLE OF CITATIONS CONT'D

TABLE OF CITATIONS CONT'D

TABLE OF CITATIONS CONT'D

TABLE OF CITATIONS CONT'D

OTHER AUTHORITIES CITED

STATEMENT OF THE CASE AND FACTS

Appellee accepts and adopts appellant's recitation of the case and facts with the following additions. For continuity, some facts related by appellant are necessarily repeated.

Mrs. Brenda Rucker, a 27 year old Ormond Beach resident, was working at the Fina gas station on the corner of U.S. 1 and Granada Avenue in Ormond Beach, Florida, on February 14, 1982 (R 712, 727, 747, 754).[1] She was seen by an Ormond Beach police officer from the adjacent police station at 5:40 a.m. emptying trash cans and opening up for business. (R 711)

Approximately 6:20 a.m. George Brown, a plastering contractor, arrived at the Fina station (R 738). Although the store was open and the lights were on, there was no attendant to be found (R 739-740). Brown looked and waited for 5 to 10 minutes, then called the police at 6:27 a.m. (R 739).

Ormond Beach Police Officer Dennis O'Donnell was dispatched at 6:27 to the Fina station and arrived there a few minutes later (R 721-722). When he arrived there were several customers in the store (R 722). One cash register was open and the drawer was sitting on the counter (R 722). An inventory of the two cash registers revealed that one was untouched and the other was missing thirty-four dollars ($34.00) in one dollar bills (R 729-730). Appellant was acquitted of armed robbery (R 1660). Ms. Rucker's purse was found behind the counter and her car was parked outside (R 724, 727). Fingerprints processed at the scene

---

[1] (R) refers to the record on appeal. (AB) refers to the appellant's initial brief.

were inconclusive (R 753).

The next afternoon, February 15, 1982, Brenda Rucker's body was found in a wooded area by a dirt road called Old Sugar Mill Run, near Tomoka State Park, 6.5 miles from the Fina station (R 746-748, Exhibit 10). Her body was found face down, fully clothed in a Fina station uniform (R 747, 761-762). She had been shot nine times, twice in the back of the head. In her vagina and anus was acid phosphatase, indicating the presence of semen (R 769, 1119). The medical examiner concluded that she had been sexually battered based upon the acid phosphatase and superficial lacerations on her arms (R 769). Appellant was convicted of sexual battery (R 1659).

The medical examiner was unable to state an opinion as to the order the wounds were inflicted, however, there were entrance wounds in both the front and back of the body, at different angles (R 1623). There were six entrance and exit wounds in her legs; two bullets entered the front of the right leg and exited in the back, one bullet entered the front of the left leg and exited in the back (R 765-767). The right arm had an entry and exit wound (R 766). There was some hemorrhage associated with this wound (R 766). The only other bullet that entered and exited the body was described as the fatal wound (R 1004). This bullet entered the back, 48 inches above the sole of the left foot, went through the heart, and exited near the left nipple, 50 inches above the sole of the left foot (R 711, 1011-1012). None of these five bullets that exited the body were recovered (R 901). The medical examiner had no opinion as to the position of

the body when the wounds were inflicted or the directions of the bullets, no opinion as to whether Brenda Rucker was shot at the same location that the body was discovered and no opinion as to how long before the discovery of the body that death occurred (R 762, 782, 784, 1013).

There were four bullets or bullet fragments removed from the body and entered into evidence (R 989-992, 1119). Three of these bullets were conclusively identified as being fired from state's exhibit 14, the .38 caliber Smith and Wesson gun, and the fourth bullet was probably fired from the gun (R 1127). One of these bullets was fired into Brenda Rucker's abdomen from the front of the body. There was hemorrhage associated with this wound, but because of the other fatal chest wound, the medical examiner was unable to determine whether this wound was inflicted premortum, perimortum or postmortum (R 1002). Brenda Rucker bled to death; three of her body's five liters of blood drained into her chest cavity (R 1011). Another bullet entered from the rear, into the left buttock. This wound was ". . .definitely made while the victim still had good circulation . . ." because of the hemorrhage associated with the wound, indicating that it was inflicted some time before death (R 901). The remaining two bullets that stayed in her body were fired into the back of the head. One of these wounds was behind the right ear, and powder burns around the wound indicated that it was a contact wound (R 765). These head wounds were inflicted perimortum, and could have been fatal (R 770).

The body was discovered face down (R 746). She was fully

clothed when shot; all but the head wounds caused corresponding holes in her clothing (R 764). There was bleeding and trauma of of the anus (R 1020). The bullet that went through her heart exited her body and was not found, but one head wound, also from the back, was made at close contact. These facts lead to the conclusion that the sexual battery occurred first, then she was shot, with the last two shots in the head being the last shots fired. The gun had to be reloaded at least once.

On Friday, February 12, 1982, at about midnight, five people left Nashville, Tennessee, bound for Daytona Beach to attend the Daytona 500 race on Sunday (R 797, 842). Ricky Johnson drove his 1971 Chevrolet Impala, the other passengers were his father, Carl Johnson, his brother-in-law, Roger Harper, his cousin, Roy Swafford and a friend, Chan Hirtle (Exhibit 8, R 797, 841, 853, 873, 886). They arrived in Daytona Beach about noon on Saturday (R 797). At Swafford's suggestion, they rented a campsite in Tomoka State Park (R 798, 842, 854). Their campsite was one and one half miles from where the body was found.

After setting up camp, three of the men went out drinking on Saturday night, Swafford, Ricky Johnson, and Chan Hirtle (R 801, 843). They returned to the campsite about midnight, Swafford said he had a date, and left alone in the car (R 802, 844, 855). Swafford did not return until the next morning.

Sunshine Patricia Atwell was a dancer at the Shingle Shack, and worked this Saturday night, into Sunday morning (R 912). She testified that Swafford left the Shingle Shack about midnight with his friends, then returned alone about 1:00 to 1:30 a.m. (R

915). He waited for her to finish work, then they left together about 3:00 a.m. (R916, 919). They went to the house of a friend of his until almost 6:00 a.m. (R 916). Although they had what was described as a "full and adult relationship" (R 919), Atwell was positive of the time because "6:00 o'clock is my cut off time" (R 917).

Swafford left her at the Shingle Shack where her car was parked, and she saw him depart, driving north on U.S. 1, just after 6:00 a.m., following a route that necessarily passed the Fina Station (R 917-918). The traffic was very light (R 720, 740). Brenda Rucker was abducted about 6:15 a.m.

Swafford returned to the campsite after daybreak. The court took judicial notice of the fact that sunrise occurred at 7:04 a.m. on February 14, 1982 (R 1249). The other campers said that when Swafford arrived it was daylight, enough light to see (R 803, 845, 856, 876). Two of them estimated the time as 6:00 to 6:30 a.m. (R 862, 876), but they based that estimation on the time that the sun rose in Nashville, which is one hour behind Eastern Standard Time (R 765,1249). The area they were camping in what was described as a "jungle", a thick hammock that would not let much light in (Exhibit 11, R 851, 908). Therefore, Swafford arrived at the campsite about an hour after Mrs. Rucker was abducted.

Sunday evening after attending the car race, Swafford and his friends returned to the Shingle Shack (R 807, 858). Chan Hirtle gave money to some black people outside the bar for drugs (R 858). When it appeared he was about to the left empty handed,

he enlisted the aid of Swafford and Roger Harper (R 808, 858). Both Hirtle and Harper testified that Swafford pulled a gun and got their money back (R 808, 858). This gun looked "exactly" like exhibit 14 (R 810). This gun was in the defendant's possession some months before (R 811). A few minutes after Swafford pocketed the gun and they all went inside, the police arrived (R 813, 858). Swafford, Hirtle and Ricky Johnson were arrested for aggravated assault (R 1565). The gun was recovered sixteen hours after the murder. It was not until over a year later, on a tip from Harper, that this gun was positively established to be the gun that was used by Brenda Rucker's murderer (R 1557).

There was some discrepency in the versions of exactly how this gun was recovered from the Shingle Shack. Witnesses were testifying to events over three years in the past. However, any contradictions went to the weight of the evidence and not its admissibility as the murder weapon. Contrary to the objections at trial and the allegations in the statement of judicial acts to be reviewed, this is not a question of chain of custody, but more of an issue of the weight of the evidence that the gun was Swafford's. The chain of custody of the police was established, and even stipulated to by the defense (R 108, 1074, 1086).

All agreed that Swafford went in the bathroom minutes after displaying the gun, emerged, then the gun was immediately discovered in the bathroom (R 812-813, 1044-1050, 1094-1099). One witness testified she saw Swafford place the gun in the bathroom trash can (R 1094). Only one gun was used in the

aggravated assault, all agreed Swafford carried the gun, and only one gun was recovered that evening (R 1066, 1156). This gun was stolen from Nashville, the appellant's hometown, several months before the murder (R 1026, 1028, 1158-1159). The gun was seized sixteen hours after the murder. Finally, Swafford told his friends in the car on the return trip that he was mad the police had seized "his gun" (R 814, 848). No reasonable hypothesis to the contrary has ever been suggested. All of this evidence established beyond a reasonable doubt that the murder weapon belonged to Roy Swafford.

To facilitate this honorable court's independent review of the sufficiency of the evidence, appellee would suggest that the evidence adduced was more than sufficient to establish guilt beyond and to the exclusion of any reasonable doubt. Besides establishing Swafford's physical proximity to the scene of the crime and Swafford's possession of the murder weapon, the state introduced several admissions made by Swafford.

The first of these admissions was made to Ernest Johnson, and is discussed more fully in Point One infra. Over objection, Johnson was allowed to testify that a few months after the Rucker murder, in April or May, 1982, Swafford suggested that they abduct a white female from a food store parking lot,"do what they wanted with her", then shoot her twice in the head "so we won't get caught" (R 961-963). They went so far as to select a woman, Swafford pulled a pistol and told Johnson to drive up beside her (R 965). When he realized Swafford was serious and when Johnson saw a child restraint seat in the woman's car, he insisted they

abandon the plan (R 965). Besides being admitted as similar fact evidence, with further facts expounded in point I, this evidence was also admitted for the purpose of explaining the following admission (R 952). As the two men were driving away from their aborted abduction, Johnson asked Swafford how someone could do something like that, to which Swafford replied, ". . . you just get use to it. . ." (R 965, 1543). This admission, that someone could get used to abducting, sexually molesting and murdering a young woman was very relevant to this case.

The second and third admissions occurred during an attempted escape the day of pre-trial conference on September 11, 1985, (R 1249). The second admission is the fact of the escape itself, which is indicative of knowledge of guilt. Swafford and another inmate charged with first degree murder, Michael Anderson, freed themselves from their handcuffs and ran away as they were being transported back to the county jail (R 1161-1167). They jumped into an awaiting car driven by a female accomplice (R 1188). Jacob Ehrhart, a corporal with the Volusia County Sheriff's Department, saw the men running and pursued the car into the parking lot of Fish Memorial Hospital (R 1189). Swafford and Michael Anderson ran into the hospital (R 1189).

Robert Nolin, a reporter with the Daytona Beach News Journal, received a call in the news room from "Roy" and "Mike" (R 1224-1226). The caller gave details of the escape and related other pertinent facts that established that he was Roy Swafford (R 1211-1218, 1226-1228). "Roy" twice told Nolin "we're both murderers" (R 1228), and confirmed this quote in a second call,

although he added that he was "innocent until proven guilty" (R 1231). This is the third admission.

Appellant entered pleas of guilty in Volusia County case number 84-4290, on January 30, 1986, and was sentenced to fifteen years incarceration on Count I, escape, and received seven concurrent life sentences for seven counts of kidnapping, consecutive to Count I. These convictions and sentences are not before this honorable court.

The defense conceded that evidence of the escape was admissible (R 1171). The only objection was sustained (R 1171-1176). The defense objected to the admission of evidence of other crimes committed during the escape, including the armed robbery of Ehrhart and the holding of hostages in the hospital (R 1181-1185). The court sustained their only objection, and limited the testimony of any other crime (R 1185). The word "hostage" was never used (R 1193), and Ehrhart did not relate any other crimes committed during the escape. The defense agreed to calling Ehrhart and concurred in his testimony (R 1184). There was no objection to Nolin's testimony before the jury, despite ample opportunity to do so (R 1223).

The state rested (R 1249). The defense moved for judgment of acquittal, which was denied after argument (R 1251-1261).

The defense presented two witnesses, Paul Seiler and Lieutenant Bushdid. The state had started to call Seiler as a court witness, but abandoned it for reasons not apparent in the record (R 737-738). Seiler said he was driving his motorcycle home from work on Sunday morning, February 14, 1982 (R 1262-

1263). He stopped at a traffic light by the Fina Station at 6:18 a.m. (R 1264-1265). There was no traffic (R 1265). He saw a man and a woman in the Fina station (R 1265). The woman walked from behind the counter and out the door with the man behind her (R 1265). The man got in the car and drove away in a car he said was a 1975 Monte Carlo, but it could have been a 1971 Impala (R 1266-1267, 1286). Seiler described the white man as being in his late 20's to early 30's, 160 to 170 pounds, 5'10" to 6'0", with brown hair (R 1269). Swafford was 34 years old, 165 pounds, 5'8" tall, is white and has brown hair (R 1558).

The defense recalled Lt. Bushdid as a defense witness to testify that he put out a BOLO (be on the lookout) bulletin based on Seiler's description (R 1294-1295). The state's objection that this was hearsay and irrelevant was sustained (R 1296, 1310-1312). This issue is more fully discussed in Point Two, infra. The defense then rested (R 1314), and unsuccessfully renewed their motion for judgment of acquittal (R 1319). The defense stipulated to the correctness of the jury instructions (R 1329).

The state argued that they had established that Roy Swafford was camping near the scene of the crime and travelling along a route that necessarily passed the Fina station, when the traffic was very light, exactly the time the crime occurred. The gun seized hours after the murder was proven to be Swafford's, and conclusively proven to be the murder weapon. The admissions given to Johnson, Nolin, and the escape further established guilt. The defense emphasized the presumption of innocence, and claimed that all the evidence was circumstantial. They argued

that Swafford was not the murderer because he did not match Seiler's description and because of the short time between leaving Atwell and arriving at the campsite. From the fact that none of the bullets that exited the body were found, the defense inferred that the murder/sexual battery did not occur where the body was found, requiring even more time. In rebuttal, the state noted that the body was found very near the campsite and pointed to the admissions as direct evidence of guilt.

Appellant was found guilty of counts I and II of the indictment, premeditated murder and sexual battery (R 1509, 1658-1659). Appellant was acquitted of armed robbery; a notation on the verdict form says, "not guilty due to lack of sufficient evidence" (R 1660).

The next day, November 7, 1985, the jury reconvened for the sentencing phase (R 1431). The state presented testimony from a father and son, Warren and Heath Milner, concerning a violent crime perpetrated against them by Roy Swafford (R 1439-1442, 1434-1437). On June 19, 1982, the family was swimming at Panama City Beach (R 1434, 1441). They returned to their motorhome to find Swafford inside, collecting valuables, and Roger Harper outside (R 1435, 1442). The father and the two men struggled over a shotgun and it discharged into the wall (R 1435, 1443-1444). At Swafford's command, Harper retrieved a .38 pistol from their car, and handed it to Swafford (R 1435, 1444). Swafford shot Mr. Milner in the face from five feet with the pistol (R 1444). The bullet injured his tongue, throat, severed the cartoid artery, and exited out the back of his neck (R 1444-

1445). After he fell, Swafford fired another shot into his hip (R 1445). Swafford was convicted of burglary with an assault as a result of this incident (R 1446).

The state introduced certified convictions of six other felonies (R 1447-1449), then rested (R 1456). The defense proffered the testimony of Swafford's absent father, that Swafford was an Eagle Scout (R 1458). The state did not object (R 1459). The defendant elected not to testify (R 1460). The defense and state again stipulated to the instructions to the jury (R 1461).

After deliberating nearly two hours, the jury recommended the death penalty by a vote 10 to 2 (R 1493). The court reconvened five days later for sentencing (R 1498). On November 12, 1985, the Honorable Kim C. Hammond entered his findings of fact in support of the sentence of death for premeditated first degree murder (R 1617-1619). Appellant elected not to be sentenced under the guidelines for the sexual battery, and the court imposed a consecutive life sentence for that crime (R 1504, 1666). The aggravating and mitigating circumstances found by the trial court in support of the death sentence are discussed at length in Point Three, infra.

Motion for new trial filed November 20th was denied on November 22, 1985 (R 1668-1670). Notice of appeal was filed December 2, 1985 (R 1672).

One of the grounds alleged in the motion for new trial and in the statement of judicial acts to be reviewed that has not been discussed heretofore is the denial of the motion for change

of venue (R 1668, 1673). Although the defense contended that the case had been widely publicized, nothing in the record indicates extensive, prejudicial publicity. The defense's motion to individually voir dire the veniremen was granted (R 7-8). The defense's motion for additional peremptory challenges was granted (R 10, 1614). The defense had at least twelve of their thirty peremptory challenges left when the jury was empaneled (R 10, 525, 535, 569, 579, 616). The court denied the motion for change of venue after empaneling an impartial jury because of the " . . .wealth of jurors with absolutely no knowledge of the case. . .(R 670).

Appellee contends that there is competent, substantial evidence to uphold the verdicts and sentences in this case.

SUMMARY OF ARGUMENT

POINT ONE: Ernest Johnson's testimony of Swafford's solicitation to murder was admissible as similar fact evidence and also for the purpose of placing into context an incriminating admission. Swafford's statement that "you get used to it" is inseparable from the explanation of what "it" refers to, the abduction of a white female from a food store for sexual purposes, then eliminating the witness by "shooting her twice in the head to make damn good and sure that she's dead". It was not error to admit this testimony.

POINT TWO: The trial court correctly sustained the state's objection on the ground of hearsay to the introduction of a BOLO description put out by Lt. Bushdid on the basis of Paul Seiler's description because it was not an extrajudicial identification. Even if it was error, any error is harmless since Seiler testified to the same description.

POINT THREE: The sentence of death is supported by five valid aggravating circumstances, weighed against one nonstatutory mitigating circumstance that is of slight significance. Heightened premeditation and the cold and calculated manner the murder was committed is supported by evidence proving Swafford reloaded his gun to inflict multiple fatal injuries, including a close contact wound behind the right ear. The location and manner of the murder, lack of other apparent motive and statements to Ernest Johnson establish that the

dominant motive for this murder was to eliminate the only witness to the other crimes committed upon the victim by appellant. The long death ride, sexual battery and multiple bullet wounds caused mental anguish and physical pain for the victim, making this murder especially heinous, atrocious or cruel. Even if one of the five aggravating circumstances was improperly found, the sentence should nonetheless be affirmed because the absence of any significant mitigating circumstance insures that the result of the weighing process could not have been different.

POINT FOUR: Appellant did not present his claims concerning the constitutionality of the death penalty statute to the trial court and has therefore waived consideration of the issues on appeal. He fails to point out any support in the record for his laundry list of alleged infirmities. Each claim has been rejected many times and no reason to revisit them has been offered.

POINT ONE

THE TESTIMONY OF ERNEST JOHNSON WAS PROPERLY ADMITTED UNDER EITHER OF TWO THEORIES: AS SIMILAR FACT EVIDENCE OR AS AN ADMISSION OF GUILT.

During the state's case, Ernest Johnson testified over defense objection to a conversation between Johnson and Swafford that occurred in Nashville a few months after Brenda Rucker's murder (R 960-971). This testimony was admitted under two separate theories of admissibility, as similar fact evidence and as an admission of guilt. §§90.404 (2)(a), 90.803 (18) Fla. Stat. (1985) (R 951-955). Appellee contends that the pervasive similarities in the scenario related by Johnson and the Rucker murder demonstrate a modus operandi such that the testimony is admissible to prove identity under the Williams rule. Williams v. State, 110 So.2d 654 (Fla.), cert denied 361 U.S. 847, 80 S.Ct. 102, 4 L.Ed.2d 86 (1959). However, even if this honorable Court finds that the similarities between the two events does not establish a modus operandi, nevertheless, the testimony was admissible to clarify Swafford's admission that "you get used to" abducting, raping and murdering young women.

Johnson testified that in April or May, 1982, he met Swafford at a car race at the fairgrounds (R 961). After the race, they went to Swafford's brother's house and drank beer (R 962). Swafford and Johnson left the house in Swafford's car (R 962). Swafford suggested that they "go get a girl" (R 963). Johnson asked where he was going to get a girl, to which Swafford replied, ". . . I'll get her. . . You won't have to worry about

nothing. . .. [W]e'll get one and we'll do anything we want to her. . .we won't get caught. . .(because) I'll shoot her in the head twice and I'll make damn good and sure that . . .she's dead. . .. [T]here won't be any witnesses." (R 963-964). The object of seizing the woman was for sexual purposes(R 1563).

The two men then sat in a grocery store parking lot, watched several women come and go, and Swafford selected a victim (R 964). Swafford directed Johnson to drive up next to the woman, and Swafford produced a pistol (R 964-965). Johnson, realizing that Swafford was serious, saw a baby carrier in the woman's car and insisted they abandon Swafford's plan (R 965). Swafford still wanted to abduct the woman, but Johnson insisted he wanted no part in it (R 965). As the men drove away, Johnson asked how someone could do something like that and Swafford responded, "you just get used to it". (R 965).

Appellee contends that the murder in this case and the crime related by Johnson are so similar that a unique modus operandi is established, identifying Swafford as Brenda Rucker's murderer. The similarities can be summarized as follows:

Johnson's testimony	Rucker Murder
1. met at racetrack, occurred right after a car race	1. occurred just before a car race
2. April or May, 1982	2. February 14, 1982
3. 1:30 to 2:00 A.M.[2]	3. 6:15 A.M.

[2]Appellant incorrectly states that the time was "afternoon" (AB 20,24)(R 968).

Johnson's testimony cont'd	Rucker murder
4. riding in a car when plan proposed to abduct woman in car	4. Rucker was abducted, transported 6.5 miles; Swafford left Atwell driving towards scene of crime.
5. victim was a young female	5. victim was a young female
6. object was sexual (R 963, 1543)	6. victim sexually battered
7. avoid identification and/or capture by "shooting her twice in the head to make sure she's dead."	7. shot twice in head as well as front, back of body, insuring death
8. pistol/handgun used	8. .38 Smith and Wesson handgun used
9. victim selected from food store parking lot	9. victim abducted from gas/food store
10. alcohol used that day, into evening	10. Swafford drank at the Shingle Shack from about 6 p.m. to 1 a.m.

Appellant contends that none of these similarities are unusual enough to establish a modus operandi. Perhaps in the course of human behavior, no single fact is unusual, but when taken together, the abduction by car, sexual battery and murder with a pistol of a young girl in the early morning hour, is not usual behavior. The events must be considered as a whole to determine similarity. Chandler v. State, infra.

The dissimilarities between the two incidents, including the location, the presence of another person, and the fact that one plan was completed, ". . .suggest differences in the opportunities with which (Swafford) was faced rather than significant differences in modus operandi as in Drake [v. State,

400 So.2d 1217 (Fla. 1981)]." Chandler v. State, 442 So.2d 171, 173 (Fla. 1983). In Chandler, the prior incident occurred seven years before the murder, in Texas, and did not result in death. Despite these differences, this honorable Court concluded that the crimes were similar and the testimony admissible as similar fact evidence. The fact that one was a murder and the other was not is not dispositive. See Mason v. State, 438 So.2d 374 (Fla. 1983), Randolph v. State, 463 So.2d 186 (Fla. 1984), Oats v. State, 446 So.2d 90 (Fla. 1984). This difference can also be explained by the fact that Johnson, not Swafford, insisted that the plan be abandoned. Even after Johnson saw the child restraint seat, Swafford said, "Let's go. Let's go do it." (R 965). The fact that Swafford invited Johnson along could indicate that Swafford was getting bolder and more confident that he would not be caught.

Appellee also relies upon Justus v. State, 438 So.2d 358 (Fla. 1983), to establish that Johnson's testimony is admissible as similar fact evidence. In Justus, the victim was abducted from a store parking lot, sexually battered and shot in the head. The next day in Georgia, the same scenario was repeated. This Court held that the Georgia murder was relevant to show identity and lack of mistake. Id. at 364. The time factor, a few months versus the next day is not a significant difference. See Chandler v. State, supra. The points of similarity between these two events ". . . have some special character (and are) so unusual as to point to the defendant." Drake v. State, 400 So.2d at 1219. This pervasive similarity distinguishes this case from

Drake and Peek v. State, 488 So.2d 52 (Fla. 1986). Johnson's testimony was extremely brief; it is not suggested that it became a feature of the trial. Williams v. State, 117 So.2d 473 (Fla. 1960).

Even if this evidence should not have been admitted as similar fact evidence, it is nonetheless admissible as an admission of guilt. The trial court accepted the testimony for this purpose, as an admission (R 951-955). The trial court's rulings on the admissibility of evidence are presumptively correct and should not be disturbed absent an abuse of discretion. Booker v. State, 397 So.2d 910 (Fla. 1981); Welty v. State, 402 So.2d 1159 (Fla. 1981). Despite the assumption of prejudicial error for improperly admitted similar fact evidence, a judgment and sentence should be reversed only if the error is harmful. §924.33 Fla. Stat. (1985), Straight v. State, 397 So.2d 903 (Fla. 1981). The fact that Johnson's testimony is admissible upon the independent ground that it is an admission makes any error harmless. Analysis of whether this testimony is Williams rule evidence is unnecessary since it is admissible for another purpose. See, King v. State, 436 So.2d 50 (Fla. 1983).

Appellant would separate the final statement, "you get used to it" from the events immediately preceeding the statement. However, the events related by Johnson are relevant to explain what "it" refers to, the seizing of a young woman for sexual purposes, then killing her to avoid detection. The testimony was admissible ". . .to explain the context of an incriminating admission; consequently, its admission at trial was not error."

Phillips v. State, 476 So.2d 194, 196 (Fla. 1985). The entire scenario related by Johnson was admissible to explain the context of the admission that "you get used to it". Indeed, without placing the admission in context thereby demonstrating the relevance to this case, reversible error could have occurred. Jackson v. State, 451 So.2d 458 (Fla. 1984).

Appellee contends that the legal issue presented herein is exactly the same as an issue this Court faced in Waterhouse v. State, 429 So.2d 301 (Fla. 1983), cert. denied, 464 U.S. 977, 104 S.Ct. 415, 78 L.Ed.2d 352 (1984). In Waterhouse, the murder victim had been sexually battered ". . .by the insertion of a large object. . ." in the rectum. Id. at 303. At trial, a cellmate testified that after Waterhouse's arrest, he committed or attempted to commit sexual battery on another inmate. After the incident, Waterhouse said, "I wonder how he'd like a Coke bottle up his ass like I gave her." This Court explained:

> The relevance of his admission lies in its connection to the medical examiner's testimony that the victim's rectal lacerations were consistent with the insertion of an object such as a Coke bottle. The statement was therefore relevant and the testimony was admissible to prove the context in which the statement was made. The ruling was not error. Id. at 306.

Even though the testimony described an unrelated and possibly incomplete criminal act, it was ". . .relevant because it included, and explained the context of, an incriminating admission made by appellant." Id. at 306. In Waterhouse, as here, the incriminating admission did not specify the victim; in the Waterhouse admission there was not even a suggestion of

death. Appellee submits that the specificity of the admission, or lack thereof, is a matter of weight and not admissibility. The whole statement containing the admission must be received in evidence. Bennett v. State, 96 Fla. 237, 118 So. 18 (1928).

When testimony is relevant to a material fact in issue, it is admissible despite the fact that it involves other criminal conduct. See, King v. State, supra, Herzog v. State, 439 So.2d 1372 (Fla. 1983). Admissions are direct evidence of guilt, and so are relevant and admissible. Michael v. State, 437 So.2d 138 (Fla. 1983). The trial court correctly allowed the testimony of Ernest Johnson to be admitted into evidence. There was no abuse of discretion. Johnson's entire testimony was relevant to prove the context of an incriminating admission. The ruling was not error.

Assuming arguendo that it was error to admit this testimony under both theories, nonetheless, any error is harmless. Appellee contends that there was sufficient evidence without this testimony to establish guilt, and it did not affect the verdict, beyond a reasonable doubt. There were other admissions relevant to show Swafford's guilt. The fact that appellant escaped from jail is unquestionably relevant to show his guilty conscience. Mackiewicz v. State, 114 So.2d 684 (Fla. 1959), cert. denied, 362 U.S. 965, 80 S.Ct. 883, 4 L.Ed.2d 878 (1960); Washington v. State, 432 So.2d 44 (Fla. 1983); Kokal v. State, 11 F.L.W. 348 (Fla. July 17, 1986). All defense objections on this issue were sustained; the defense conceded that the escape itself was admissible evidence (R 1171-1176). Similarly, a voluntary

statement to a news reporter during the escape that "we're both murderers" is a conscious admission of guilt.

In addition to the direct evidence in the form of admissions, there was substantial circumstantial evidence establishing that appellant was guilty. Swafford's proximity to the scene of the crime was indisputable. He was seen driving north on Ridgewood Avenue (U.S. 1) at the time of the murder. Despite his argument to the contrary, the description given by Paul Seiler of a man leading a woman out of the Fina station could be the appellant (R 1262-1265, 1269, 1558). The traffic was very light, almost nonexistent, and appellant's route necessarily passed the Fina station. The body was found just over a mile from his campsite. Most important is his possession of the gun that was positively established to be the murder weapon, just sixteen hours after the murder (R 811, 814, 848, 1094). No explanation for these circumstances that is consistent with innocence has ever been suggested. See, Rose v. State, 425 So.2d 521 (Fla. 1982).

Appellee relies upon Waterhouse and the other authorities cited for the proposition that Ernest Johnson's entire testimony was admissible to explain the context of an incriminating admission. It was not error to admit this relevant and probative evidence. Appellant has failed to establish a palpable abuse of discretion in the admission of this testimony.

POINT TWO

THE TRIAL COURT CORRECTLY REFUSED TO ADMIT TESTIMONY FROM LT. BUSHDID CONCERNING A BOLO DESCRIPTION BECAUSE SEILER'S CREDIBILITY WAS NOT IMPEACHED TO ALLOW ADMISSION OF A PRIOR CONSISTENT STATEMENT AND BUSHDID'S TESTIMONY WAS INADMISSIBLE HEARSAY.

The defense presented testimony from Paul Seiler to support their claim of misidentification. Seiler drove home from work on Sunday morning, February 14, 1982 (R 1262-1263). He stopped at a traffic light by the Fina station at 6:18 a.m. (R 1264-1265). There was no other traffic (R 1265). Seiler saw a man and a woman in the Fina station. The woman walked from behind the counter and out the door with the man behind her (R 1265). The man got in a car and drove away. He said the car was a 1975 Monte Carlo, but on cross examination, agreed that it could have been a 1971 Impala (R 1266, 1286). Seiler described the white man as being in his late 20's to early 30's, 160 to 170 pounds, 5'10" to 6'0", with brown hair (R 1269). He also described his clothing. The police report from the Shingle Shack arrest sixteen hours after the murder described Swafford as a 34 year old white male, 165 pounds, 5'8" tall, with brown hair (R 1558).

The question that immediately comes to mind is why didn't the state call Paul Seiler as a witness? Swafford generally fits this description. At one point during the state's case, the prosecutor tried to call Seiler as a court witness, indicating that he did not want to vouch for Seiler's credibility (R 737-738). One possible explanation apparent from the record is that Seiler called the police on several occasions to report sightings

of the assailant which proved to be mistaken (R 1283). Appellee contends that the defense called Seiler not so much because the description he gave was of someone else, but because the state didn't call him as a witness. This defense is like that of an octopus, a cloud of ink to hide behind quickly dissipates. In any event, the end result is that Seiler did testify, and gave his description of the man that abducted the victim.

In an effort "to show that the police took him seriously" the defense then called Lieutenant Bushdid of the Ormond Beach Police Department (R 1296). The proffered testimony what that based on Seiler's description, Bushdid put out a "be on the lookout" or BOLO bulletin. (R 1294-1295). The description was exactly the same as the description Seiler testified to, with the single additional factor that the assailant had a full beard with a reddish tint (R 1295). Swafford had a moustache (R 1588). The state objected to the testimony from Bushdid concerning the BOLO bulletin on the basis of relevance and hearsay. The court sustained the objection, and this ruling is alleged to be error.

Appellant relies upon State v. Freber, 366 So.2d 426 (Fla. 1978) to support his contention that this evidence was erroneously excluded. In Freber, the police officer was permitted to testify to the identification of Freber by the victim in a live lineup. The victim's identification at trial was tentative. In Freber, the police officer witnessed a live line up, and testified to an observable identification, "that's the man who robbed me". This extrajudicial identification is an exception to the hearsay rule. Here, the situation is very

different. Seiler's testimony was not impeached in any way, yet the defense sought to corroborate his testimony by showing that he had made a prior consistent statement to the police. Bushdid's testimony merely echoed Seiler's testimony that Seiler saw a man he described at the scene of the murder. This is classic hearsay. Bushdid's issuance of a BOLO bulletin in no way validates Seiler's description. Appellee relies upon Hendrieth v. State, 483 So.2d 768 (Fla. 1st DCA 1986), to establish that it was proper to exclude this evidence.

Despite the trial court's wide discretion in the admissibility of evidence, should this honorable court conclude that it was error to exclude this testimony, the judgment should still be affirmed because any error is harmless. §924.33, Fla. Stat. (1985). An error in the admission of evidence is harmless when the matters improperly excluded are before the jury through other testimony. Straight v. State, 412 So.2d 332 (Fla. 1982), Hendrieth v. State, supra. Seiler's description of the assailant was before the jury without Bushdid's testimony. Appellant does not contend that Bushdid's testimony, if accepted by the jury, would require a finding by the jury that he did not commit the murder. Wright v. State, 473 So.2d 1277, 1280 (Fla. 1985), cert. denied, _____ U.S. _____, 106 S.Ct. 870 (1986). Any error is harmless in light of Seiler's testimony.

POINT THREE

THE FINDINGS OF FACT IN SUPPORT OF THE DEATH PENALTY ESTABLISH THAT THE TRIAL JUDGE CORRECTLY FOUND FIVE AGGRAVATING CIRCUMSTANCES. EVEN IF ONE WAS IMPROPERLY FOUND, IN LIGHT OF THE SLIGHT WEIGHT AFFORDED THE ONE NONSTATUTORY MITIGATING CIRCUMSTANCE, THE SENTENCE SHOULD BE AFFIRMED.

After the sentencing hearing, the jury rendered an advisory sentence of 10 to 2 in favor of the imposition of the death penalty (R 1661). The trial judge considered the advisory sentence for several days, then on November 12, 1985, entered the required findings of fact and sentenced Swafford to death [3] (R 1617-1619). The court found five aggravating circumstances, each discussed below, and one nonstatutory mitigating circumstance, that appellant was an eagle scout in the Boy Scouts of America. Appellee contends that each aggravating circumstance was established beyond a reasonable doubt and were all properly found.

A. The defendant was previously convicted of a felony involving the use of violence to the person. §921.141 (5)(b), Fla. Stat. (1985).

On January 30 , 1983, appellant was convicted of burglary with an assault and sentenced to thirty years. The court heard testimony from Warren and Heath Milner concerning this crime which occurred on June 19, 1982. The Milner family was swimming at Panama City Beach (R 1434, 1441). They returned to their

---

[3]Appellant was also sentenced to life imprisonment for count II, sexual battery, which is not assailed here (R 1666). Appellant elected not to be sentenced pursuant to the guidelines (R 1504).

motorhome to find appellant inside, collecting valuables (R 1442). During an ensuing scuffle, Swafford shot Mr. Milner in the face from a distance of a few feet with a .38 caliber pistol (R 1444-1445). After he fell to the floor, Swafford shot him again in the hip (R 1445).

This crime certainly qualifies as a life threatening crime in which Swafford directly came in contact with a human victim. Lewis v. State, 398 So.2d 432 (Fla. 1981). In addition, Swafford has several other prior felony convictions. Appellant concedes this aggravating circumstance was properly found.

B. The capital felony as committed while the defendant was engaged in the commission of sexual battery. §921.141 (5)(d), Fla. Stat. (1985).

After arguing that three of five aggravating circumstances were improperly found, appellant contends that since the sexual battery was the basis for his conviction of first degree felony murder, this circumstance was improper (AB 42-44).

The first fallacy in this argument is that appellant was not convicted of felony murder, but instead convicted of premeditated murder. He was indicted for premeditated murder and the jury found him guilty as charged (R 1509, 1658). The state established beyond a reasonable doubt that the murder was premeditated, even to a heightened degree. Brenda Rucker was abducted and transported 6.5 miles to a secluded location and shot nine times until death was inevitable. Swafford had to reload his pistol at least once. There was ample time to form a purpose to kill and for the mind of the killer to form a premeditated design to kill. Buford v. State, 403 So.2d 943

(Fla. 1981), cert. denied, 454 U.S. 1163, 102 S.Ct. 1029, 71 L.Ed.2d 320 (1981). The manner that the death occurred, the nature and number of wounds inflicted and the instrument of death establishes premeditation. Larry v. State, 104 So.2d 352 (Fla. 1958).

The second problem with his argument is that it concededly has been rejected many times; even if he had been convicted of felony murder, this circumstance is proper. See, Mills v. State, 476 So.2d 172 (Fla. 1985); Quince v. State, 414 So.2d 185 (Fla. 1982).

C. The capital felony was committed for the purpose of avoiding or preventing a lawful arrest. §921.141 (5)(c), Fla. Stat. (1985).

In support of this finding, the trial court stated, "one of the factors identifying the defendant in this case as the murderer was that he believed he could avoid arrest by shooting his victim." (R 1617). This refers to appellant's admission to Ernest Johnson (see point I supra). Swafford told Johnson that they could abduct a woman, do anything they wanted to her, and avoid detection by shooting her in the head twice to "make sure that she's dead." (R 964). Swafford assured him that "there won't be no witness" (R 964). In addition to Swafford's statement, the manner of killing establishes that the dominant motive for murder was to eliminate the only witness to the other crimes committed by appellant on this victim. Swafford drove her to an isolated spot and shot Rucker nine times, including in the abdomen, the heart, and twice in the head. He had to reload his gun at least once, then pumped more bullets into her body, to

make "damn good and sure that she's dead."

In arguing that this reason was improperly found, appellant relies heavily on his position that Ernest Johnson's testimony was inadmissible. For the reasons expressed in point I, infra, appellee disagrees. However, even assuming that this testimony was not admissible in the guilt phase, it is definitely admissible in the sentencing phase with its relaxed evidentiary standards. §921.141 (1), Fla. Stat. (1985), Harich v. State, 437 So.2d 1082 (Fla. 1983), Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2454, 57 L.Ed.2d 973 (1978). As in Johnson v. State, 442 So.2d 185 (Fla. 1984), appellant's argument is based on the faulty premise that the testimony is inadmissible. The credibility of the witness is a determination for the finder of fact. Johnson, supra. There was no error in relying on Ernest Johnson's testimony in part to establish this circumstance.

Appellee recognizes that "the mere fact of death is not enough to invoke this section when the victim is not a law enforcement official." Oats v. State, 446 So.2d 90, 95 (Fla. 1984). "Proof of the requisite intent to avoid arrest and detection must be very strong in these cases." Riley v. State, 366 So.2d 19, 22 (Fla. 1978). It must be clearly shown that the dominate motive for the murder was the elimination of witnesses. Menendez v. State, 368 So.2d 1278 (Fla. 1979).

Appellant points to a line of cases where defendants with looser lips specifically stated to friends or cellmates that the particular murder victim was killed to avoid identification. Herring v. State, 446 So.2d 1049 (Fla. 1984); Wright v. State,

473 So.2d 1277 (Fla. 1985); Pope v. State, 441 So.2d 1073 (Fla. 1983); Clark v. State, 443 So.2d 973 (Fla. 1984). The fact that a direct confession is present in other cases does not mean that a more general admission is insufficient to establish the witness elimination motive. There are several cases upholding this circumstance with the same sort of general admission that appellant objects to here. See, Bottoson v. State, 443 So.2d 962 (Fla. 1983) (dead men are the best witnesses), Martin v. State, 420 So.2d 583 (Fla. 1982) (dead witnesses won't talk), Kokal v. State, 11 F.L.W. 348 (Fla. July 19, 1986) (dead men can't tell lies). This incriminating admission distinguishes this case from Bates v. State, 465 So.2d 490 (Fla. 1985), Caruthers v. State, 465 So.2d 496 (Fla. 1985), and Rivers v. State, 458 So.2d 762 (Fla. 1984).

Appellant's argument implies that in order to find that the murder was committed to avoid arrest, there must be some statement to that effect, either from appellant directly or from one of his accomplices. This is not supported by the caselaw. Even in the absence of a statement that the motive for the murder was witness elimination, this circumstance has been found to exist based upon the manner and location of the murder. Routly v. State, 440 So.2d 1257 (Fla. 1983); Harich v. State, 437 So.2d 1082 (Fla. 1983); Burr v. State, 466 So.2d 1051 (Fla. 1985); Card v. State, 453 So.2d 17 (Fla. 1984); Cave v. State, 476 So.2d 180 (Fla. 1985).

The fact that appellant drove Brenda Rucker to an isolated spot to murder her indicates that the motive was to eliminate her

as a witness. Card, supra, (victim of Western Union robbery was driven to isolated spot to be murdered), Cave, supra, (convenience store clerk kidnapped, transported 13 miles to isolated location to be murdered) Harich, supra, (two girls transported from convenience store to isolated location, sexually battered, one murdered).

Further, the manner of killing suggests that Swafford wanted to be sure she was dead. In Rembert v. State, 445 So.2d 337 (Fla. 1984), this circumstance was improperly found because Rembert hit his elderly victim in the head and left him alive. If the motive was witness elimination, this Court reasoned Rembert would have "made sure the victim was dead before fleeing." Id. at 340. By shooting Brenda Rucker nine times, including several potentially fatal wounds, Swafford made sure she was dead before fleeing. Burr, supra, (robbery victim shot in head ensuring death), Herring, supra (robbery victim shot second time to ensure death).

There is no other readily apparent motive for this murder. Clark, supra. Since the clothing had bullet holes in it and the victim had been sexually battered, the sexual battery preceeded the murder. The nonfatal bullet wounds to her legs and body proves that she posed no threat to Swafford's escape, but she did pose a threat to later identification of him as her assailant. Kokal supra. This death was not the result of ". . .the same hostile aggressive impulses which triggered the initial (sexual) attack and not a reasoned act motivated primarily by the desire to avoid detection." Doyle v. State, 460 So.2d 353, 358 (Fla.

1985). The repeated firing of a weapon, stopping to reload, then the deliberate placement of several fatal wounds are clearly reasoned acts motivated by a desire to avoid detection. See, Vaught v. State, 410 So.2d 147 (Fla. 1982). This conclusion is not mere speculation as in Bates, supra, but the only plausible inference from these facts. Cf. Griffin v. State, 474 So.2d 777 (Fla. 1985). No other motive has ever been suggested. Unlike Bates, no property was taken from this victim. Appellant's statement to Johnson further establishes that Swafford intended to eliminate any witnesses to the sexual assault, and is another distinguishing factor from Griffin, Doyle, and Bates.

Lastly, it is not improper doubling to find this factor, avoidance of arrest, and also that the murder was cold, calculated and without any pretense of justification. Burr, supra; Herring, supra; Cooper v. State, 11 F.L.W. 352 (Fla. July 25, 1986). Separate facts exist in this case to establish both aggravating circumstances.

D. The capital felony was especially heinous, atrocious, or cruel. §921.141 (5)(h), Fla. Stat. (1985).

> The defendant carried the victim, Brenda Rucker, away from the place of her employment to an isolated spot in Volusia County, sexually battered her vaginally and/or (anally), then proceeded to shoot her at least nine (9) times in and about her person. Wounds were found on her about her legs, abdomen, chest and head. (R 1618).

This aggravating circumstance focuses on the physical torture and mental anguish that the victim suffered prior to death. State v. Dixon, 283 So.2d 1 (Fla. 1973). Appellee contends that the facts of this case establish this aggravating circumstance

beyond a reasonable doubt. This murder was shockingly evil or extremely wicked.

Brenda Rucker walked away from the store and got into Swafford's car. She was transported 6.5 miles, a ride that took several minutes. Finally they reached an isolated spot in the woods. The physical evidence indicates that she was alive and conscious during and after the sexual battery. It can be inferred that this caused mental anguish and physical pain.

Appellant objects that the sexual battery established another aggravating circumstance, (5)(d), and to rely upon that fact here is improper doubling. Appellee counters that two different aspects of the sexual battery are relied upon for each circumstance. The salient consideration here is the contribution of the sexual battery to the victim's suffering. There are additional facts, namely the bullet wounds, that contribute to the factual finding that this murder was heinous, atrocious or cruel.

Appellant cites Purdy v. State, 343 So.2d 4 (Fla. 1977) and Shue v. State, 366 So.2d 387 (Fla. 1978), for the proposition that, "the mere act of rape is not especially heinous, atrocious or cruel." (AB 38). Appellee respectfully disagrees with both the authorities cited and the conclusion. To force someone to spend the last few minutes of their life as an unwilling participant in a brutal sexual attack is cruel. In both Purdy and Shue, the child victim did not die. Appellee suggests that in striking the only aggravating circumstance in the face of statutory mitigating circumstances in each case, this Court was

straining to impose a life sentence for capital sexual battery. Eventually, this honorable Court ensured it would never again be faced with reviewing a death sentence when the victim was not murdered. Buford v. State, supra. Appellee questions the validity of Purdy and Shue as authority for the proposition that sexual battery prior to death is not heinous, atrocious or cruel. Like other physical indignities inflicted before death, sexual battery is physical torture and causes mental anguish. The trial court was correct in finding that it contributed to the wickedness and cruelty of the murder. See, Ferguson v. State, 417 So.2d 631 (Fla. 1982).

Additional suffering was caused by the infliction of nine bullet wounds to the legs, abdomen, chest and head. The wounds were inflicted at different angles, in the front and back of the body (R 1623). The bullet that entered and exited her right arm caused hemorrhaging (R 766). At least three other wounds were inflicted while she was alive and possibly conscious, because of the bleeding associated with the wounds. One of the wounds in the lower abdomen, the left buttock and a chest wound were all premortum (R 1000-1005). The point in time that she lost consciousness cannot be medically determined; the cause of death was hemorrhaging from the chest wound (R 770). All the other wounds were perimortum (R 999-1002). Since she bled to death, she did not die immediately. Without a doubt, the last hour of Brenda Rucker's life was extremely unpleasant. Her picture in death is hardly serene (Exhibit 5). The only living witness declined to discuss the suffering she endured, her pleas for

mercy, or precisely when she slipped into unconsciousness, but that doesn't mean she didn't feel mental anguish and physical pain from the torture of sexual battery and multiple bullet wounds.

The three factors cited by the trial judge to support the factual findings comport with prior decisions of this honorable Court. A long ride during which the victim begins to guess his fate is heinous, atrocious, or cruel. Stano v. State, 460 So.2d 890 (Fla. 1984); Parker v. State, 476 So.2d 134 (Fla. 1985); Routly v. State, supra (but victim in trunk of car); Griffin v. State, 414 So.2d 1025 (Fla. 1982). A beating or other physical abuse before the murder constitutes cruelty. Kokal, supra; Arango v. State, 411 So.2d 172 (Fla. 1982). Multiple gunshot wounds near death is heinous, atrocious or cruel. Troedel v. State, 462 So.2d 392 (Fla. 1984) (victim shot in legs, head), Byrd v. State, 481 So.2d 468 (Fla. 1985) (four superficial bullet wounds before strangled).

Appellee contends that this aggravating circumstance has been found to exist in cases very similar to the instant case: Lightbourne v. State, 438 So.2d 380 (Fla. 1983) (victim forced to engage in oral sex then shot in head); Smith v. State, 424 So.2d 726 (Fla. 1982) (convenience store clerk abducted, raped, shot in head); Harich, supra, (sexual battery, shot in head, then neck cut), Parker, supra, (convenience store clerk abducted, roughly handled, shot in head); Preston v. State, 444 So.2d 939 (Fla. 1984) (convenience store clerk abducted, multiple stab wounds).

Appellant cites four cases to establish that "more gruesome

killings" than his received life sentences. Halliwell v. State, 323 So.2d 557 (Fla. 1975), Burch v. State, 343 So.2d 831 (Fla. 1977), Chambers v. State, 339 So.2d 204 (Fla. 1976), and Jones v. State, 332 So.2d 615 (Fla. 1976). In all but Halliwell, the jury recommended life. When the death penalty is imposed after an advisory sentence for mercy, the facts must be such that no reasonable person could differ that death is appropriate. Tedder v. State, 322 So.2d 908 (Fla. 1975). Here, the jury vote was 10 to 2 for death. In each of these cases there were substantial mitigating factors, unlike this case. Jones, supra, (long term paranoid psychosis); Chambers, supra, (significant history of drug abuse, mental disturbance); Halliwell, supra (no prior arrests, highly decorated Green Beret in Vietnam, emotional strain); Burch, supra, (no prior criminal history, substantial impairment).

Even if this honorable court determines that death was "instantaneous and painless", Cooper v. State, 336 So.2d 1133 (Fla. 1976), or that the suffering was not prolonged, Gorham v. State, 454 So.2d 556 (Fla. 1984), any error is harmless in light of the other, proper aggravating circumstances and slight weight afforded to the fact that appellant was an eagle scout. Sims v. State, 444 So.2d 922 (Fla. 1983).

E. The capital felony was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. §921.141 (5)(i), Fla. Stat. (1985).

In support of this finding the trial court first observed that "the evidence supports the finding that the defendant was of a state of mind that he believed that he could seize a female and

do what he wished to her and shoot her twice in the head to eliminate any witnesses." (R 1618). To the extent that this finding is predicated upon the testimony of Ernest Johnson, appellee relies upon arguments presented heretofore to refute that claim. §921.141 (1), Fla. Stat. (1985). Appellee contends that it can be inferred from the known facts that Swafford intended to kill his victim from the moment he seized her. Second, the court stated, ". . . not only did the defendant empty his firearm into the victim one time, but he would have had to reload his five-shot revolver again and (shoot) her while she was completely helpless." (R 1618). Phillips v. State, 476 So.2d 194 (Fla. 1985), Herring, supra, ("coup de grace" shot). The head wound behind the right ear was a close contact wound, indicating an execution style killing. Burr, supra, Ferguson v. State, 417 So.2d 639 (Fla. 1979), Eutzey v. State, 458 So.2d 755 (Fla. 1984). Swafford seized his victim at random; there is no pretense of moral or legal justification.

This case is materially different from the cases cited by appellant to support his allegation of disproportionality. This is not a frenzied and violent attack indicating an emotionally deranged killer; this is a cold blooded murder. Cf. Preston v. State, 444 So.2d 939 (Fla. 1984), Mann v. State, 420 So.2d 578 (Fla. 1982). Unlike Peavy v. State, 442 So.2d 200 (Fla. 1983), and Brown v. State, 473 So.2d 1260 (Fla. 1985), this is not a residential burglary when the killing of the elderly victims appears to be an afterthought. Appellant incorrectly states that the murder was not cold and calculated in Smith v. State, 424

So.2d 726 (Fla. 1982). Appellee relies upon Smith and Harich as support that this sentence is in proportion to prior death penalty cases.

"The facts speak for themselves. This was an execution type slaying. The sentence of death was appropriate and should be affirmed." Sullivan v. State, 303 So.2d 632, 638 (Fla. 1974).

F. The trial court properly found none of the statutory mitigating circumstances applicable. §921.141 (6) Fla. Stat. (1985).

There was absolutely no evidence to support any statutory mitigating circumstance. The defense was misidentification. Although there was some evidence that Swafford drank beer earlier in the evening, the evidence indicates that he did not drink for five or six hours prior to the 6:30 a.m. murder. Limited alcohol use alone does not establish any mitigating circumstance.

The only mitigating circumstance found was that appellant was an eagle scout in the Boy Scouts of America. This fact is entitled to slight weight. As the trial court commented when weighing these factors, at some point in his life Swafford had the training and potential to become a productive member of society but instead became a murderer. No reasonable person could disagree that the aggravating factors ". . . are of far more weight. . .". (R 1619).

Although appellee maintains that each is proper and supported by the evidence, should this honorable court determine that one or two aggravating circumstances were improperly found, appellee contends that the sentence of death should be affirmed. This Court has repeatedly held that when one

or more aggravating circumstance is found ". . . death is presumed to be the proper sentence unless it or they are overridden by one or more of the mitigating circumstances provided in section 921.141 (6), Florida Statutes (1983)." Valle v. State, 474 So.2d 796, 806 (Fla. 1985). See also, Griffin v. State, 474 So.2d 777 (Fla. 1985); Peede v. State, 474 So.2d 808 (Fla. 1985); Maxwell v. State, 443 So.2d 967 (Fla. 1983). In light of the absence of any significant mitigating circumstance and four or five aggravating circumstances this court can know that the result of the weighing process could not have been different. Bassett v. State, 449 So.2d 803 (Fla. 1984); Brown v. State, 381 So.2d 690 (Fla. 1980). Appellee respectfully requests this honorable Court affirm the sentence.

POINT FOUR

THE ISSUE OF THE CONSTITUTIONALITY OF THE FLORIDA CAPITAL SENTENCING STATUTE IS NOT PRESERVED FOR REVIEW SINCE NONE OF THE ARGUMENTS WERE EVER PRESENTED TO THE TRIAL COURT; THERE IS NO RECORD SUPPORT IN THIS CASE FOR THE CLAIMS MADE.

Appellant contends that section 921.141, Florida Statutes (1985), is unconstitutional on its face and as applied because it allegedly denies due process of law and constitutes cruel and unusual punishment. Appellant concedes that all of his arguments in support of this contention have been specifically or impliedly rejected by this honorable court and federal courts. Most of these arguments were presented verbatim in appellant's brief in Stano v. State, 473 So.2d 1282 (Fla. 1985) and Stano v. State. 460 So.2d 890 (Fla. 1984). The court summarily disposed of the claims, stating simply that Stano, like Swafford, "concedes that all of these points have been presented to and rejected by this Court on numerous occasions. We see no reason to revisit these claims here." Stano v. State, 473 So.2d at 1289. Swafford has shown no reason to revisit the exact same claims already rejected many times.

None of these alleged constitutional infirmities were presented below, and no order appears anywhere in the record. Therefore, appellant has waived consideration of the issues of the statute's constitutionality as applied to his case. Trushin v. State, 425 So.2d 1126 (Fla. 1982). Even constitutional rights can be waived if not timely presented. Ray v. State, 403 So.2d 956 (Fla. 1981). See also, Maggard v. State, 399 So.2d 973 (Fla.), cert. denied, 454 U.S. 1059, 102 S.Ct. 610, 70 L.Ed.2d

598 (1981); Eutzy v. State, 458 So.2d 755 (Fla.), cert. denied, 105 S.Ct. 2062, 85 L.Ed.2d 336 (1984). When no objection is made before the trial court, the defendant is in no position to raise the point on appeal. Brown v. State, 381 So.2d 690 (Fla. 1980).

Further, there is no record support present or even suggested for the claims made. Appellant presents a laundry list of alleged infirmities without any factual support whatsoever. Many of his claims are directly disputed by the record, for instance, the claim based on Cooper, and Songer[4] is belied by the fact that the trial judge found a nonstatutory mitigating circumstance in this case. Appellant lacks standing to advance these claims. Appellant has failed to demonstrate support in the record for any of his claims. See, Spaziano v. State, 489 So.2d 720 (Fla. 1986). No attempt has been made to relate the general and undifferentiated allegations of constitutional infirmities to the record in this case. This honorable Court is not required to fill in the blanks in appellant's argument. Appellee respectfully requests this honorable Court to decline to reach the merits of this argument for the foregoing reasons.

As conceded by appellant, all of his arguments have been rejected on numerous occasions. See, Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976); Barclay v. Florida, 463 U.S. 939, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983); Spaziano v. Florida, ___ U.S. ___, 104 S.Ct. 3154, (1984); Medina

---

[4]Cooper v. State, 336 So.2d 1133 (Fla. 1976), Songer v. State, 365 So.2d 696 (Fla. 1978).

v. State, 466 So.2d 1046 (Fla. 1985); Randolph v. State, 463 So.2d 186 (Fla. 1984); Peavy v. State, 442 So.2d 200 (Fla. 1983); Tafero v. State, 403 So.2d 355 (Fla. 1981); Booker v. State, 397 So.2d 910 (Fla. 1981); Lockhart v. McCrae, 106 S.Ct. 1758 (1986).

CONCLUSION

Based upon the authorities and arguments presented herein, appellee respectfully requests this honorable Court to affirm the judgment of guilt for sexual battery and premeditated murder, and affirm the sentence of death imposed upon Roy Clifton Swafford.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL

Belle B. Turner

BELLE B. TURNER
ASSISTANT ATTORNEY GENERAL
125 North Ridgewood Avenue
Fourth Floor
Daytona Beach, Florida 32014
(904) 252-2005

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Answer Brief of Appellee has been furnished, by delivery, to James B. Gibson, Public Defender, Seventh Judicial Circuit, and Daniel J. Schafer, Assistant Public Defender, 112 Orange Avenue, Suite A, Daytona Beach, Florida, 32014, Counsel for Appellant, this 21st day of August, 1986.

Belle B. Turner

Belle B. Turner
Of Counsel