IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

MARTIN GROSSMAN,

Appellant,

v. CASE NO. 68,096

STATE OF FLORIDA,

Appellee.

BRIEF OF APPELLEE

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SUMMARY OF THE ARGUMENT

I. Bruton, requiring severance where nonconfessing defendant is implicated by a nontestifying co-defendant, is inapplicable to appellant's situation. Rather, the existence of his two joint confessions meets the Parker v. Randolph exception to the requirement of severance. That is, severance is not required where the defendant's admission interlocks with the co-defendant's statement.

Grossman's admissions interlock with Taylor's on all issues including premeditation. Any possible danger of them not interlocking was removed by the trial court's excision of that part of Taylor's statement regarding Grossman's reasons for committing the murder.

Alternatively, any error in admitting Taylor's statement was harmless due to procedural safeguards implemented to assure Taylor's statement was applied solely to him, and because Grossman's own statments were sufficient to convict him of first degree murder.

II. None of the items seized pursuant to the search of appellant's bedroom or car were introduced at trial or at the penalty phase. Therefore, any possible error in denying the motion to suppress was harmless.

Denial of suppression would have been proper, however, due to Mrs. Grossman's valid consent to the search.

III. The prosecutor's remarks were not misleading, but an accurate statement of the jury's role in sentencing. The manner and context in which they were delivered did not minimize the

jury's role in imposing the death penalty, and the jury instructions adequately admonish the jury of the seriousness and gravity of their task.

The instruction requested by the defense regarding the weight to be given the jury's recommendation would have been an inaccurate statement of the law and, therefore, misleading.

IV. This trial was continued once to accomodate defense counsel's schedule. Co-counsel was appointed in order to prepare for trial. Arrangements were made to contact the late-discovered witness, Smith, and the court was willing to continue the trial should his presence at trial be required by the defense. Defense counsel had nine months to prepare for the inevitable penalty phase and Mrs. Grossman was, in fact, available to testify at the penalty phase. The trial judge obviously did not abuse his discretion in denying continuance.

V. The defense did not, at trial, and does not on appeal, present any evidence of prejudice due to the presence of television cameras in the courtroom; therefore, exclusion of the cameras would have been unwarranted. Reversal of Grossman's conviction for the release of the videotape of the crime scene, after it had been shown at trial, would presume the jury's inability or unwillingness to abide by their oath not to expose themselves to media coverage of this trial. There is no evidence of this and no prejudice has been demonstrated due to the release of the videotape.

VI. Defense had been told that Park's personnel file contained no incident reports of her using her weapon and then re-

fused to narrow the request for subpoena duces tecum to those reports. The subpoena was, therefore, improperly requested as fishing expedition and properly denied. Besides that, the records sought were public record.

Defense suggested, and then asserted a defense to Grossman's conduct based on his "reaction" to Officer Park's contemplated use of force. Therefore, her demeanor was placed into consideration and evidence on her demeanor was properly admitted. Alternatively, any error in admitting victim demeanor evidence was cured by defense's impeachment.

VII. Evidence of the burglary and of Grossman's probation were admissible to show motive, intent and the entire context of the crime for which Grossman was on trial. The evidence was limited to prevent prejudice to the appellant. The evidence of threatening Hancock and ordering the burial of the guns was likewise admissable to establish the entire context of the murder. These incidents also are admissable to show consciousness of guilt. Testimony of these incidents was opened to the state by defense's impeachment of Hancock.

VIII. The state contends that these photos are not gory or gruesome. Even if they are gory, they are still admissable to show the crime scene and the cause of death. The fact that the photos were corroborative of other evidence does not make them inadmissable, the test is relevancy.

IX. First of all, the t-shirt was not introduced into evidence. Secondly, the circumstances surrounding the recovery of the sneakers were sufficient to support as finding that the

sneakers were what their proponent said they were - Grossman's. The sneakers were recovered from a lake bottom and had been partially burned, just as Hancock had indicated.

X. Blood splatter analysis, not being within the common experience of ordinary people, is susceptible to expert testimony at trial. Larry Bedore is, by study and practical experience, qualified to testify as an expert in blood splatter analysis. Though he had not studied photographs of the splatters at deposition, he subsequently had and was able to testify as to his analysis.

XI. There was ample evidence that Grossman had been arrested before he beat and killed Officer Park. Therefore, the question of escape was a proper one for the jury. There was ample evidence that Grossman intended to take, at least, his own gun which was in the custody of Park and, at most, her gun. Therefore, the question of robbery was a proper one for the jury. There was ample evidence that Grossman entered Park's vehicle intending to either assault and/or batter her, to keep her from radioing in, to retrieve his gun and to kill her. Therefore, the question of burglary was a proper one for the jury. Because questions existed as to the commission of these crimes, jury instructions on them were necessary and proper.

XII. Sufficient evidence of premeditation was presented to uphold Grossman's first degree murder conviction. For instance, Grossman severely beat Park, called Taylor over to help him, thought she'd gone unconscious, and took aim before shooting her.

XIII. The accomplice jury instruction was properly denied

since Hancock was not an accomplice to the murder, and the jury was adequately cautioned to be suspect of his testimony due to his possible complicity in altering evidence. The jury was cautioned to apply evidence of Taylor's testimony solely to his guilt or innocence so any error of denial to give the accomplice in regard to Taylor's instruction was cured.

XIV. Appellant does not establish any error or prejudice in the denial of special penalty phase instructions. Since the standard jury instructions adequately state what he requested and accurately state the law, the denial of the special instructions is not error.

XV. More than ample evidence exists to support the trial judge's findings that the three aggravating factors were sufficient to support a sentence of death. There is no evidence that the judge did not consider the mitigating factors urged by the defense since they were presented during sentencing.

XVI The trial judge complied with the requirements of §921.141(3) in that he orally pronounced his finding that aggravating circumstances outweighed any mitigating circumstances and entered his written order before relinquishing jurisdiction to this court.

XVII This Court has upheld the constitutionality of the Florida death penalty statute against each of the attacks enumerated by the appellant.

ISSUE I

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING DEFENDANT'S MOTION TO SEVER.

The appellant argues that the admission of co-defendant Taylor's confession, which implicated him, is prejudical error requiring the reversal of Grossman's conviction. Specifically, appellant argues that the admission of Taylor's statement entitles him to severance of his trial. Neither the facts nor the law support this contention.

A criminal defendant is not always entitled to severance. The fact that a defendant might have a better chance of acquittal or a strategic advantage if tried separately, does not establish the right to severance. McCray, infra. Just because one's acts are more reprehensible than one's co-defendant's, one is not entitled to severance. Williams v. State, 383 So.2d 722 (Fla. 1 DCA 1980).

> "The objective of the [severance] rule is not to provide defendants with an absolute right, upon request to separate trials when they blame each other for the crime. Rather, the rule is designed to assure a fair determination of each defendants guilt or innocence. This fair determination may be achieved when all the relevant evidence regarding the criminal offense is presented in such a manner that the jury can distinguish the evidence relating to each defendant's acts, conduct, and statements; and can then apply the law intelligently and without confusion to determine the individual defendant's guilt or innocence. The rule allows the trial court, in its discretion, to grant severance when the jury could be confused or improperly influenced by evidence which applies to only one of several defendants.

McCray v. State, 416 So.2d 804, at 806 (Fla. 1982); O'Callaghan v. State, 429 So.2d 691, at 695 (Fla. 1983).

Whether to grant or deny a motion for severance is a discretionary matter for the trial court. It is immaterial whether the appellate court would have granted a severance; rather, the test is whether the trial court abused its discretion. Menendez v. State, 368 So.2d 1278 (Fla. 1979). The record in this case reflects no abuse of discretion; consequently, this point on appeal must be rejected.

Appellant's statement of the holding of Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968) is correct, but reliance on that holding is misplaced. This is not a case of a non-confessing defendant who has maintained innocence, being implicated by the statement of a non-testifying codefendant thereby violating the confrontation clause. Grossman and Taylor had made two joint statements in which Grossman admitted his guilt which were properly in evidence. Besides the existence of self-incriminating statements, Grossman's defense was not innocence and did not rely on shifting the blame to Taylor. Any prejudice due to Taylor's statement, which corroborated Grossman's own admission of guilt, is non-existent.

It has long been held that the confrontation clause is not violated by admission of a non-testifying co-defendant's interlocking confession at a joint trial. See Parker v. Randolph, 442 U.S. 62, 99 S.Ct. 2132, 60 L.Ed.2d 713 (1979). As Justice Rehnquist reasoned:

> "Thus, the incriminating statements of a co-defendant will seldom, if ever, be of devastating character referred to in **Bruton** when the incriminated defendant has admitted his own guilt . . .

> . . . Successfully impeaching a codefendant's confession on cross-examination would likely yield small advantage to the defendant whose own admission of guilt stands before the jury unchallenged."
>
> (60 L.Ed.2d 723)

The instant case presents the situation permitted by Parker. In a joint statement to Brian Hancock, Grossman himself admitted that he followed Peggy Park to her vehicle, hit her repeatedly with her flashlight, wrested her gun away and then shot her at point blank range. (R 1957 - 2036) In a second statement made with Taylor, Grossman told Brian Allen (his friend from Jacksonville) the same story. (R 2038 - 2070) Appellant has no complaint about the admissability of these joint statements, but urges reversible error in the admission of Taylor's subsequent statement to the police.

Taylor's statement told the same story as that told by Grossman in the joint statments. (R 2285 -2308) Grossman did not present a defense that was inconsistent with Taylor's statements. Therefore, because his own admissions of guilt were properly before the court, the prejudice Bruton is designed to prevent is not present and severance due to Taylor's statement is not mandated.

Appellant argues that the statements are not interlocking as envisioned by the court in Parker since Taylor's statement contained the only evidence of premeditation and/or motive. However, this assertion is belied by the evidence. Evidence of premeditation abounds.

Hancock testified that Grossman had said he'd been put under arrest and that he'd shot Officer Park to avoid going back to

jail. (R 1966 - 1968) On cross-examintation, it was established that though Hancock's statement to the police had omitted these facts, (R 2016) Hancock was able to surmise these reasons from Grossman's actions and subsequent comments on the incident. (R 2036) Hancock was able, in at least these instances, to differentiate which defendant was speaking when.

Allen testified that Grossman had said Officer Park had told him he was going back to prison before Grossman went to her vehicle, beat her, then shot her. (R 2046) Allen also testified that Grossman had adjusted his grip on the flashlight and resumed striking Officer Park after saying to Taylor "she still won't go, she still won't go [unconscious]". (R 2048 - 2049) Allen was also able to tell which defendant was telling which part of the story.

Taylor's statement on deposition included more explicit references to premeditation, but before admitting it at trial, the judge ruled that any testimony as to Taylor's opinion of why Grossman did what he did was prohibited. (R 2284) Any possibility that the statement did not interlock with the others was thereby removed by this excision.

All three of these statements are consistent as to the facts. Each statement clearly demonsrates the involvement of each defendant as to crucial facts such as time, location, felonious activity and awareness of the overall plan or scheme. The statements are substantially identical in detail and Grossman's statements would have been sufficient to convict him of first degree murder. These statements were therefore interlocking and,

as envisioned by Parker, present an exception to Bruton's requirement of severance.

Additional evidence of premeditation was presented by witness Brewer's testimony. (R 2084 - 2110) Brewer, a fellow inmate, testified that Grossman's motivation for the murder was the avoidance of arrest by Officer Park. Though this statement does not interlock, it does present additional evidence of premeditation and or motive.

Appellant's reliance of Lee v. Illinois, 476 U.S. ___, 106 S.Ct. 2056, 90 L.Ed.2d 514 (1986) is also misplaced. As noted before, these statements were consistent, even as to premeditation. The stories of Grossman's involvement were consistent. It is also notable that in Lee, error was predicated on the prosecution's invitation to the court to consider the wrong confessions and the court's express reliance on one defendant's confession to convict the other. There is no evidence of any such misreliance by the prosecutor or the judge in the instant case.

The state does not concede error, but if the court should find admission of Taylor's required severance, the state contends that any error is harmless. As noted above, the two joint statements contained enough evidence to convict Grossman of first degree murder. The statements interlocked and were not contrary to any defense relied upon by Grossman.

It is important to note that before admitting Taylor's statement, the judge excised any mention of Taylor's opinion of Grossman's reasoning, and then cautioned the jury that the statement could be considered as evidence only against Taylor. (R

2287) Additionally, the trial judge allowed Grossman's attorney to cross-examine Officer Desmarias, thereby affording him the opportunity to impeach the officer's testimony. (R 2306) Grossman's attorney was allowed to cross-examine all witnesses last and was given the final closing argument slot at the end of the trial. The jury was instructed to limit Taylor's statement to Taylor during jury instructions. (R 2548) Besides the two joint statements, Grossman also made a statement to Brewer, a fellow inmate, that Grossman had affirmatively wished to avoid arrest (R 2114) and that was Grossman's motive for the murder.

When assessed in the context of the entire case against Grossman, any possible error due to the admission of Taylor's statement is clearly harmless. See, Lee, supra; Harrington v. California, 395 U.S. 250, 89 S.Ct. 1726, 23 L.Ed.2d 284 (1969); Schneble v. Florida, 405 U.S. 427, 92 S.Ct. 1056, 31 L.Ed.2d 340 (1972); Brown v. United States, 411 U.S. 223, 93 S.Ct. 1565, 36 L.Ed.2d 208 (1973); Adams v. State, 445 So.2d 1132 (Fla. 2 DCA 1984).

Because the trial court did not abuse its discretion in denying Grossman's motion to sever, the conviction should be upheld on appeal. See, Menendez, supra and Crum v. State, 398 So.2d 810 (Fla. 1981).

ISSUE II

THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION TO SUPPRESS THE ITEMS SEIZED FROM HIS BEDROOM AND CAR.

Appellant challenges the denial of his motion to suppress items obtained pursuant to a search of his bedroom and his car. It should be noted at the outset that none of these items were introduced into evidence either during the trial or the penalty phase. These items seized during the search did not lead to other evidence which was introduced at trial. Therefore, any possible error in denying the suppression of such items is harmless beyond any doubt.

Had the items appellant sought to suppress been introduced into evidence, the trial court judge would not have erred in denying the motion to suppress since a valid consent to the search was obtained. Consent to a search is, of course, a recognized exception to the warrant requirement. Schneckloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973). Consent to search may be given by a third party if that third party is a co-occupant and possesses authority of access and right of control to the premises. United States v. Matlock, 415 U.S. 164, 94 S.Ct. 988, 39 L.Ed.2d 242 (1974).

This common authority is decided on the basis of the following criteria:

> (1) the individual's reasonable expectation of privacy in the area; (2) whether others generally had access to the area; and/or (3) whether the objects searched were the personal effects of the individual unavailable to consent.
>
> Preston v. State, 444 So.2d 939 (Fla. 1984), citing Silva v. State, 344 So.2d 559 (Fla. 1977).

It is clear that, when measured against these criteria, Grossman's mother could validly consent to the search about which appellant complains. Mrs. Grossman owned the house and garage that were searched. (R 1274 - 1275) Martin did not pay rent, but did help her out now and then. (R 2613) Mrs. Grossman had full access to the room and entered it occasionally. (R 1275) The room had a lock, but it was unlocked, (R 1276) and Grossman had never given his mother instructions not to enter the room or mess with his things. (R 1277) Martin was a 19 year old son living under his mother's roof, not a boarder. The keys to Grossman's car were on the dresser in the room he occupied. (R 1281 - 1282) Grossman's car was inoperable in Mrs. Grossman's garage and contained the tires from Mrs. Grossman's van in the trunk. (R 1279) The tires did not belong to Grossman.

It is clear that Grossman had no reasonable expectation of privacy in the room or in the car, that Mrs. Grossman had equal access to Martin's room and the car in her garage, and that the tires were not the personal effects of Martin. Since there is no doubt that Mrs. Grossman's consent was freely and voluntarily given (she called her attorney before signing the consent forms, (R 179, 873)), the consent to this search was valid. There being a valid exception to the requirement for a warrant, the denial of the suppression of the fruits of the search was proper, and cannot support reversal of Grossman's conviction.

ISSUE III

THE PROSECUTOR'S REMARKS DURING VOIR DIRE DO NOT RENDER IMPOSITION OF THE DEATH PENALTY INVALID AS A VIOLATION OF THE EIGHTH AMENDMENT SINCE THE REMARKS WERE AN ACCURATE STATEMENT OF THE JURY'S ROLE IN SENTENCING.

The remarks made by the proseuctor during voir dire do not invalidate the imposition of the death penalty in Mr. Grossman's case. Firstly, the statements were nonmisleading and accurate statements of the jury's role in sentencing according to Florida law. Secondly, the manner and context in which the statements were delivered do not, as appellant argues, tend to minimize the jury's role in imposing the death penalty. Lastly, the standard jury instructions admonish the jury to undertake the task of sentencing with the most profound seriousness and gravity.

The statements made by the prosecutor are not of the caliber of those which warranted the reversal of the death penalty in Caldwell v. Mississippi, 472 U.S. ___, 105 S.Ct. ___, 86 L.Ed.2d 231 (1985). The prosecutor's remarks did not impermissibly suggest to the jury that an appellate court would review the sentence, rather, the remarks summarized the law in Florida. That is, that the jury returns an advisory verdict in a capital case while the judge ultimately imposes the sentence.

The remarks complained of were made during jury selection. They were as follows:

> Prosecutor: "The jury ultimately makes a recommendation to the Judge as to whether or not they think the death penalty should be imposed as to a particular defendant" (R 1346)
>
> * * *
>
> Prosecutor: "The judge is the person who ultimately passes sentence, that your recommendation to his is that

only, a recommendation. He has to consider your recommendation, but he doesn't have to follow it." (R 1442)

* * *

Potential Juror: "I would hate to . . . sentence to death."

Prosecutor: You don't have to do that. The judge will do that. (R 1449)

* * *

Prosecutor: "Did you understand ma'am that the jury's function in the so-called sentencing part of the trial is to make a recommendation to the judge, so to speak, the conscience of the community, whatever, and the Judge, Judge Farnell, he gets paid to impose the sentence. he has the same options. He can sentence life or the death penalty." (R 1513)

The only one of these statements that might possibly tend to minimize the jury's role is the third one. But, the others, especially the fourth, accurately reflect the jury's role in Florida. Ours is not a state in which the ultimate responsibility for imposing the death penalty lies with the jury, subject only to appellate review. That decision resides with the trial judge. See Darden v. State, 475 So.2d 217 (Fla. 1985).

As stated by Justice O' Connor in her concurring opinion in Caldwell, California v. Ramos, 463 U.S. 992, 103 S.Ct. 3446, 77 L.Ed.2d 1171 (1983) (relied on by the court in Caldwell), does not suggest that the Federal Constitution prohibits the giving of accurate instructions regarding postsentencing procedures. It is true that after the jury makes its recommendation, the judge decides anew whether to impose death.

The standard jury instruction, which had been revisited by this Court just weeks prior to this trial, see The Florida Bar re: Standard Jury Instructions Criminal Cases, 477 So.2d 985

(Fla. 1985), makes it clear that the jury's decision is an advisory one.

> "As you have been told, the final decision as to what punishment shall be imposed is the responsibility of the judge; however, it is your duty to follow the law that will now be given you by the court and render to the court and advisory sentence . . ."

These same instructions caution the jury:

> "Before you ballot, you should carefully weigh, sift, and consider the evidence, and all of it, realizing that human life is at stake, and bring to bear your best judgment in reaching your advisory sentence."

The additional instruction requested by the appellant, that a recommendation of death is entitled to great weight, would be misleading. The weight the judge affords their recommendation is immaterial to the jury's determination of the appropriate sentence. Additionally, the recommendation of death is not entitled to any greater consideration than life, so the requested instruction is not an accurate statement of the law. Therefore, including the requested instruction might have been prohibited by Caldwell. the jury was adequately reminded of their awesome task by the standard instruction.

When an appellate court passes upon the propriety of the trial court's refusal to give a requested jury instruction, it is duty bound to consider the items refused in connnection with all other charges bearing on the same subject - in this case, the standard jury instruction. If, when thus considered, the law appears to have been fairly presented to the jury, issues predicated on such refusal to give such instruction must fail. Askew v. State, 118 So.2d 219 (Fla. 1960).

Because the prosecutor's remarks were an accurate statement

of the law and did not tend to minimize the jury's role in imposing the death penalty and because the standard jury instructions, as given, adequately caution the jury as to their responsibility, Grossman's death penalty need not be reversed.

ISSUE IV

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING APPELLANT'S MOTION TO CONTINUE.

Even though death penalty cases command closest scrutiny, it is still the obligation of an appellate court to review with caution the exercise of experienced discretion by a trial judge in matters such as a motion for continuance. Cooper v. State, 336 So.2d 1133, cert. denied, 431 U.S. 925, 97 S.Ct. 2200, 53 L.Ed.2d 239 (1977). If the trial court denies a motion for continuance, the court's ruling will not be disturbed unless a palpable abuse of discretion is demonstrated to the reviewing court. Jent v. State, 408 So.2d 1024, 1028 (Fla. 1981), cert. denied, 457 U.S. 1111, 102 S.Ct. 2916, 73 L.Ed.2d 1322 (1982). The state contends there has been no palpable abuse of discretion demonstrated which would require reversal of Grossman's conviction.

A chronology of the pre-trial activities is helpful to an understanding of the judge's decision not to continue this trial. Mr. McCoun was appointed to represent Grossman on January 3, 1985. (R , 112) On March 20, 1985, a motion to continue was submitted (R 71 - 72) which resulted in setting the pre-trial conference for May 13, 1985, (R 78) and the trial for August 20, 1985. (R 128) In response to a motion to remove McCoun from the case, McCoun moved and the court granted, the appointment of co-counsel in March, 1985. (R 77, 78)

Thirteen days before the trial scheduled to begin in August, defense counsel again moved to continue. (R 123 - 126) This motion was granted and the trial was continued two more months,

from August 20, to October 22, 1985. (R 134)

On October 17, 1985, four days before trial, defense counsel again moved for continuance. (R 165 - 167) Pursuant to a hearing (R 1222 - 1238), the motion was denied. Two primary reasons were, and are again, asserted as requiring continuance: the late discovery of a witness to Grossman's statement to Brewer, and lack of preparation for the penalty phase of the trial.

Defense counsel first learned of the state's intention to rely on Brewer's statement on August 8, 1985. (R 129) A deposition (arranged by the state) was scheduled for September 18, 1985, (R 1229) which had to be continued due to the volume of testimony of other deponents. Mr. McCoun rescheduled it for the following week, but was unprepared at that time to take testimony. (R 754) Defense was reminded of the state's intent to use Brewer's statement on October 8, 1985 (R 154) and defense counsel moved for disclosure of any plea agreement with Brewer for his testimony on October 16, 1985. (R 161 - 162) For reasons not attributable to the state, Brewer's deposition was not held until October 17, 1985.

At that deposition, Brewer testified that another trustee, Don Smith, had also heard the statement Grossman made to Brewer. (R 1136) The state had had no knowledge of Mr. Smith's existence prior to that deposition, but the state located the witness in Kentucky. His location was made known to the defense, who called Smith on October 21. (R 1263) At pretrial hearing (R 1222 - 1238, 1263), on October 17 and 22, 1985, it was established that Mr. Smith was willing to fly down to testify and

that the state would have no objection to continuing the trial during the trial should it become necessary for the defense to call Mr. Smith as a witness. The defense did not exercise this option.

As for preparedness for the penalty phase of the trial, defense had nine months, plus appointed co-counsel, to work on what was an imminent part of a first degree murder trial. The co-counsel was given carte blanche to enter and leave the trial, so he could have been preparing the penalty phase while the trial progressed.

One of the defense's main arguments for continuance was the feared unavailability of Mrs. Grossman due to her illness. However, the state offered to continue the penalty phase should Mrs. Grossman prove unavailable. Mrs. Grossman was there to testify.

The nature of information which became known so close to trial (Don Smith's existence) does not rise to the level of that which required reversal in Brown v. State, 426 So.2d 76 (Fla. 1 DCA 1983). The defense was not required to try to locate experts in this case, just a sole witness to rebut a highly impeachable witness who offered only cumulative testimony. He was contacted prior to trial, and allowances would have been made had the defense decided to call Mr. Smith. Brewer was not a key witness as was the last minute witness discovered in Anderson v. State, 314 So.2d 803 (Fla. 3 DCA 1975).

The court made several concessions to counsel's demanding schedule including one continuance and the appointment of co-counsel. Arrangements were made to deal with the late

discovered witness and Mrs. Grossman's illness. The court did not abuse its discretion in denying continuance. Therefore, reversal of Grossman's conviction cannot be predicated on this issue.

ISSUE V

THE TRIAL COURT DID NOT ERR IN ALLOWING TELEVISION CAMERAS IN THE COURTROOM OR IN RELEASING THE VIDEOTAPE OF THE CRIME SCENE TO THE PRESS DURING THE TRIAL.

A defendant does not have an absolute constitutional right to exclude electronic media coverage from judicial proceedings. State v. Green, 395 So.2d 532 (Fla. 1981). Any general effect resulting from public notoriety of the case will not suffice to trigger electronic media exclusion; wider dissemination of judicial proceedings is not a reason to exclude the camera from the courtroom. Green, supra at 536.

A motion to limit or exclude television coverage of a trial must attempt to show, with specificity, that television will deleteriously affect the trial. Maxwell v. State, 443 So.2d 967 (Fla. 1983) Neither defendant in this case submited a written motion. Defendant's Taylor's oral motion, which was adopted by Grossman's counsel, (R 1314 - 1315) complained only that the location of the camera in front of the jury would have a tendency to alter the proceedings to the detriment of his client. The state pointed out that the camera was not in front of the jury, but to their right, which would make it behind them as they attended to the trial. (R 1315) Defendant's motion was clearly insufficient to cause the exclusion of the camera, but the judge took it under advisement anyway. As in Green, there is no indication in this case that the cameras were situated where they interfered with the proceeding or the defense.

Neither the United States Supreme Court, nor this court has found the presence of camera in the courtroom to constitute a per

se denial of due process. In order to have cameras excluded from a courtroom during trial, a defendant must show prejudice of constitutional dimensions. Jent, supra. Appellant asserts no constitutionally cognizable claims on appeal; in fact, appellant doesn't show any prejudice at all.

Likewise, appellant's claim that releasing the videotape or the crime scene to the press after it had been shown in the courtroom is not supported by any colorable constitutional violations. Indeed, appellant asks us to indulge in the presumption that the jury either could not or would not abide by their solemn oath and directions from the court. This court refused to do so in Petition of Post-Newsweek Stations, Florida, 370 So.2d 764, 777 (Fla. 1979) and should again refuse in this case.

The jury, though not sequestered, was cautioned not to expose themselves to media accounts of this trial no less than five times. (R 1786, 1809, 2071, 2138, 2317) Even assuming they violated their instructions, electronic media added nothing by their commentary that the print media would not have published after having viewed the tape in the courtroom. Additionally, elaborate arrangements were made to prevent any alteration, loss or destruction of the evidence. (R 1889 - 1894)

Accordingly, appellant's conviction should not be reversed for the denial to exclude media from the courtroom, or for the release of the videotape to the press after it had been shown in the courtroom.

ISSUE VI

THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S REQUEST FOR A SUBPOENA DUCES TECUM OR IN ADMITTING EVIDENCE OF OFFICER PARK'S DEMEANOR.

A subpoena duces tecum may not be utilized primarily for the purpose of discovery, either to ascertain the existence of documentary evidence, or to supply the facts needed for litigation, nor can it be employed for a mere "fishing expedition" or general inquisitional examination of records with a view to ascertaining whether something of value may show up therefrom, or merely for the information of the public. Imparato v. Spicola, 238 So.2d 503 (Fla. 2 DCA 1970).

When the defense sought a subpoena duces tecum to obtain Peggy Park's personnel file, ostensibly to obtain any reports of incidents in which she had used her gun, a hearing on the motion was held (R 1211 - 1220) at which the judge found that the defense's request was too broad. Counsel was invited by the court to narrow the request to include only those incident reports, as opposed to Park's entire personnel file. (R 1216 The defense refused to narrow the scope of the subpoena sought and specifically stated that they wanted the whole file. (R 1216)

It is clear that their request was merely a fishing expedition which was rightfully denied by the trial court. Defense had been told by Lt. Gainer of the Fresh Water Game and Fish Commission that Park's file contained no such incident reports and they still sought the file. (R 1183 - 1197) Additionally, the records they sought are public records, as easily accessible to the defendant as to the state.

It was during this pre-trial conference that the possibility of a defense centered on the legality of Officer Park's actions first arose. (R 1214) In defense counsel's opening argument, the actions of the victim were called into question. Counsellor McCoun throughout the trial indicated that his client was trying to prevent violence against himself and that his actions were a "reaction" to actions taken by the victim. (R 1828 - 1829)

The assertions or suggestions of a defense placed the demeanor of the victim into consideration. **Rule 90.404(1)(b)1, Fla. Evidence Code** expressly allows evidence of the character of the victim be admitted at trial where a pertinent trait of the character of the victim is offered by the accused or where the prosecution needs to rebut the trait. **Rule 90.404(1)(b)2,** allows evidence of the trait of peacefulness of the victim to rebut evidence that the victim was the aggressor.

The jury was allowed to hear the reasons defense counsel objected to evidence of Officer Park's demeanor (R 1835) at which time the defense pointed out that how she acted fifteen minutes prior to the incident was irrelevant to how she acted during the incident. Any error by the trial court in admitting evidence of Park's demeanor was thereby cured.

The trial court did not err in denying the subpoena request as being too broad and did not err in admitting testimony of Officer Park's demeanor, since the defense had called her actions into question. Even if admission of such evidence was error, it does not affect a substantial right of the defendant and cannot support the reversal of this judgment. **90.104(1), Fla. Stat.**

ISSUE VII

THE TRIAL COURT DID NOT ERR IN ADMITTING EVIDENCE OF OTHER CRIMES.

Appellant cites four instances where evidence of other crimes committed by Grossman were allegedly erroneously admitted: the burglary of Brian Hancock's parents; crimes for which Grossman was put on probation; alleged threats to kill Hancock; and Grossman's orders to Hancock to bury the weapons subsequent to the murder.

None of these "other crimes" were introduced to prove bad character or criminal propensity as urged by the appellant. Any fact relevant to prove a fact in issue is admissible into evidence even though it points to a separate crime, unless it's admission is precluded by a specific rule of exclusion. Williams v. State, 110 So.2d 654 (Fla. 1959), cert. denied, 361 U.S. 847, 80 S.Ct. 102, 4 L.Ed.2d 86 (1959). So long as evidence of other crimes is relevant for any purpose, the fact that it is prejudicial does not make it inadmissible. Ruffin v. State, 397 So.2d 277 (Fla. 1981), cert. denied, 454 U.S. 882, 102 S.Ct. 368, 70 L.Ed.2d 194 (1981); and Sireci v. State, 399 So.2d 964 (Fla. 1981).

That Grossman had stolen the 9mm gun Officer Park found him in possession of, and that the theft of that gun put Grossman in violation of his probation, were relevant to prove Grossman's motive and intent. Grossman had to either kill Officer Park or face returning to jail when caught possessing a stolen gun. Prior criminality or the possibility of getting caught as a result of prior crimes or a possible probation violation as a

motive for murder of a police officer is relevant and therefore admissable. See Johnson v. State, 130 So.2d 599 (Fla. 1961); Mackiewicz v. Cochran, 114 So.2d 684 (Fla. 1959) and McVeigh v. State, 73 So.2d 694 (Fla. 1954).

It should be noted that though several guns were stolen in the burglary of Hancock's parents house and defense was denied a request to limit testimony to the 9mm, (R 1794), only testimony of the 9mm involved in the incident was introduced. It should also be noted that, though testimony was elicited that Grossman was on probation at the time he murdered Peggy Park, (R 1949 - 1951) the state did not ask what the underlying crimes were. Evidence that Grossman was on probation for theft and burglary was not brought out until defense witness, Mrs. Grossman, testified during the penalty phase. (R 2614) The defense had then opened the subject of these prior crimes to cross-examination by the state (R 2620 - 2621)

Not only is the burglary and the probation evidence admissible to prove motive and intent under Williams Rule, the trial judge expressly found it admissible to establish the entire context out of which this criminal action occurred. (R 1316) This court has held the "entire context" theory is valid reason to introduce other crime evidence. See Ruffin, supra, Smith v. State, 365 So.2d 704 (Fla. 1978), and Heiney v. State, 447 So.2d 210 (Fla. 1984). As in these cases allowing other crime evidence in to establish the entire context of the crime, the evidence in Grossman's case was an incident and not made a feature of his trial.

As with the two instances of crime which occurred prior to the murder, the two instances of crime following the murder were admissible to establish the entire context of the crime for which Grossman was being tried. This situation is similar to that in Andrea Hicks Jackson v. State, Slip Op No. 64,973, Fla. Sup. Court, issued Nov. 13, 1986, wherein evidence of acts taken by the defendant subsequent to murder for which she was on trial were admitted. This court held that they were not evidence of collateral crimes, but of consciousness of guilt. Additionally, the evidence of threatening Hancock and ordering the guns buried do not establish all the elements of a crime and consequently the question of prior criminal acts is not present. See Malloy v. State, 382 So.2d 1190 (Fla. 1979).

The state also asserts that the instance of Grossman threatening to kill Hancock and the instance of Grossman commanding Hancock to bury the guns were proper in anticipation of the defense's impeachment of Hancock as a witness. (R 2011 - 2023) The reason Hancock finally came forward to tell the police what he knew, and his fear of being an accomplice were opened to the state by defense impeachment.

The trial court is afforded discretion in determining the admissibility of extrinsic evidence and its decision will not be reversed absent an abuse of discretion. United States v. Chilcote, 724 F.2d 1498 (11th Cir. 1984), cert. denied, 467 U.S. 1218, 104 S.Ct. 2665, 81 L.Ed.2d 370 (1984). Because evidence of these other crimes was relevant to prove motive and intent and to establish the entire context of this murder, the trial judge did

abuse his discretion. Therefore, admission of this evidence does not support reversal of Grossman's conviction.

ISSUE VIII

THE TRIAL COURT DID NOT ERR IN ADMITTING TWO PHOTOS AS THEY WERE RELEVANT AND NOT GORY OR GRUESOME.

At the outset, the state contends that the picture of the victim at the scene and the picture of the wound were not gory or gruesome. (See. Vol. XVII, Record on Appeal) The pictures were carefully culled from many photos and chosen as least offensive. (R 1923 - 1925).

Even if the photos are considered gory, "the fact that the photographs are offensive to our senses and might tend to inflame the jury is insufficient by itself to constitute reversible error, but the admission of such photographs must have same [sic] relevancy, either independently or as corrobative of other evidence." Foster v. State, 369 So.2d 928 (Fla. 1979), citing Young v. State, 234 So.2d 341 (Fla. 1970).

Thus, allegedly gruesome and inflammatory photographs are admissible if relevant to prove any issue required to be proven in a case. Foster, supra, citing State v. Wright, 265 So.2d 361 (Fla. 1972).

> Relevancy is to be determined in the normal manner, that is, without regard to any special characterization of the proffered evidence. Under this conception, the issues of 'whether cumulative' or 'whether photographed away from the scene' are routine issues basic to a determination of relevancy, and not issues arising from any 'exceptional nature' of the proffered evidence.

Adams v. State, 412 So.2d 850, 853 (Fla. 1982), citing Wright, supra.

These photographs were relevant to show the crime scene and the cause of death. The facts that the medical examiner testified as to the cause of death and that a videotape of the crime

scene was shown do not relieve the state of its burden to prove their case beyond a reasonable doubt. The photographs were merely corroborative of this evidence. Their corroborative nature does not render them inadmissible.

Because these photos were not gory and gruesome, and because they were relevant to prove material issues, they were properly admitted. Their admission, therefore, cannot support a reversal of Grossman's conviction.

ISSUE IX

THE TRIAL COURT DID NOT ERR IN ADMITTING THE SNEAKERS BECAUSE THE EVIDENCE WAS SUFFICIENT TO IDENTIFY THEM AS BEING GROSSMAN'S.

It must be noted that the t-shirt recovered in the lake was not introduced into evidence, just the tennis shoes. There was evidence sufficient to establish these sneakers as being the ones Hancock and Grossman had burned and thrown into the lake since the requirements of identification, as a predicate to admission of evidence, "are satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims it to be." **Rule 90.901, Fla. Evidence Code.**

Hancock testified that they (Grossman, Taylor and he) had partially burned Grossman's sneakers. (R 1964) He further testified that Taylor had told him Grossman's sneakers were in a lake in Deer Park and that he (Hancock) had told the police that story. (R 1972) The evidence introduced consisted of a partially burned pair of sneakers that the police had recovered from a lake pursuant to Hancock's directions. (R 2122 - 2124)

These are circumstances enough to show these are Grossman's sneakers. The evidence necessary to satisfy the identification requisite need not amount to clear or irrefutable proof. State v. Fischer, 387 So.2d 473 (Fla. 5 DCA 1980).

> Any fact which in the course of ordinary affairs tends to satisfy a person of average judgment as to the identity of an individual is admissible as evidence bearing on that issue, and evidence offered on issue of identification, need not in itself constitute clear or irrefutable proof. 29 Am.Jur.2d, Evidence, section 367. Id. at 475".

Additionally, the state contends that any possible error in

admission of these sneakers is harmless because proof of ownership of shoes is not prejudicial. It is not illegal to burn one's own shoes and have them thrown in a lake. See, Herman v. State, 396 So.2d 222, 229 (Fla. 4 DCA 1981) The existence of these shoes served only to establish the credibility of Hancock's story especially since any blood found on the shoes was insufficient to be typed as possibly being the victim's.

Because the circumstances leading to the recovery of these shoes are sufficient to support a finding that they were the shoes Hancock said were Grossman's, they were properly admitted. Their admission cannot support the reversal of Grossman's conviction.

ISSUE X

THE TRIAL COURT DID NOT ERR IN ACCEPTING LARRY BEDORE AS AN EXPERT WITNESS AND IN ADMITTING HIS TESTIMONY ON BLOOD SPLATTERS.

The rules of evidence make it clear that expert testimony is admissible if scientific, technical or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue. **Section 90.702, Fla. Stat.** "In order to qualify as an expert witness, one needs only to have acquired such specialized knowledge of the subject matter of his testimony, either by study or by practical experience, that he can give the jury assistance and guidance in solving a problem to which their good judgment and average knowledge is inadequate. Allen v. State, 365 So.2d 456 (Fla. 1 DCA 1978).

Larry Bedore has been trained in blood splatter analysis (R 2260), as part of his ten year law enforcement career. He and other crime scene analysts have done independent research, including experimentation with human blood that has produced a series of controlled splatter patterns for use in comparing actual blood splatters. (R 1161, 2260) Bedore has, in the past, been qualified as a blood splatter expert (R 2264), in this same court. (R 1161)

At the time of his deposition, Bedore had not studied all the photographs taken in this case, (R 1163) but had made observations from which he could draw conclusions as to the splatters. (R 1162 - 2271) Bedore had not gone to the scene to do splatter analysis, (R 1161) but primarily to supervise the medical examiner technicians in gathering evidence. (R 1157)

On cross-examination, Bedore said he'd examined the blood splatter patterns for the purpose of determining whether or not the victim was inside the vehicle at the time. (R 2272) He assured the court he was comfortable with his stated conclusion that Park was shot while her head was in her car. The defense counsel impeached Bedore with the statements he made at his deposition.

It is clear that Bedore has studied and amassed practical experience in blood splatter analysis. Though whatever he can ascertain could possibly be done by anyone with common sense, he's built on that common sense by observation, training and experience His evidence aided the jury in understanding the evidence and in determing whether Officer Park was in her car when she was shot.

The interpretation of blood splatter patterns can hardly be considered as the sort of knowledge that is within the "common experiences of all men walking in ordinary walks of life" as enunciated in Mills v. Redwing Carriers, Inc., 127 So.2d 453 (Fla. 2 DCA 1961). An additional difference between the situation in Mills and the instant case, is that the expert in Mills said he was not an expert on the conclusions to which he testified. Bedore maintained he was an expert.

Had Bedore not been qualified as an expert witness, his testimony would have, at the very least, been analogous to that non-expert testimony allowed in David Eugene Johnston v. State, slip Op. No. 65,525, Fla. Supreme Court, issued Nov. 13, 1986. As such is it still admissible even if Bedore is found to have

improperly been qualified an expert.

There being no abuse of discretion in admitting Bedore as an expert, admission of his testimony regarding concluding the blood splatters was not in error and cannot support reversal of Grossman's conviction.

ISSUE XI

THE TRIAL COURT DID NOT ERR IN GIVING JURY INSTRUCTIONS ON BURGLARY, ROBBERY AND ESCAPE SINCE EVIDENCE HAD BEEN PRESENTED FROM WHICH THE JURY COULD FIND APPELLANT HAD COMMITTED THESE CRIMES.

As found by the trial judge, questions existed as to the felonies of burglary and robbery, as well as to an arrest (and therefore possible escape). (R 2348) The existence of sufficent evidence of these crimes were questions for the jury. They were, therefore, rightfully instructed on the law of these crimes.

Contrary to the appellant's assertion, there was evidence that Grossman had been arrested by Officer Park. Grossman had told Hancock she'd said "you're under arrest" (R 1966), and Grossman had told Allen she'd said "Mr. Grossman, you are going back to prison . . . come with me" (R 2046 - 2047), and Grossman told Brewer she had arrested him for possession of the 9mm gun. (R 2087 - 2088) There was testimony from Taylor that Grossman had been arrested prior to the murder. (R 2291)

Besides there being evidence that Grossman had been arrested, there is evidence of escape. This court has approved State v. Akers, 367 So.2d 700 (Fla. 2 DCA 1979), in which the Second District Court of Appeal held:

> " . . . For conviction under the escape statute, the state need show only (1) the right to legal custody and (2) a conscious and intentional act of the defendant in leaving the established area of such custody. **Watford v. State**, 353 So.2d 1263 (Fla. 1 DCA 1978).

State v. Ramsey, 475 So.2d 671 (Fla. 1985) approving Akers, supra. The state has more than met that burden in this case in that it was clear Park had the right to legal custody; finding

Grossman in possession of a 9mm gun, coupled his admission of probationary status The act requirement is met by several of the acts that took place aafter Grossman followed Park to her car.

In Ramsey, this court found a violation of the escape statute where the accused had not been restrained and the arrest procedure had not progressed to the point where the deputy had removed his handcuffs from their carrying place. Id. at 671. Park's arrest of Grossman was still in the early stages, but evidence of an arrest existed. Therefore, evidence of all elements of escape had been presented, so the jury instruction was properly given.

A robbery is the taking of something in the custody of someone else by force or violence or assault or by putting in fear with the intention to deprive. Appellant's argument that there was no evidence of specific intent to deprive Officer Park of any property is belied by the evidence. It is well established that specific intent, being a state of mind, is rarely, if ever, susceptible of direct proof. Rozier v. State, 402 So.2d 539 (Fla. 5 DCA 1981). However, it was easily inferrable that Grossman intended to take both his gun and driver's license which were in Park's custody pursuant to his arrest. Taylor testified that Grossman asked where his drivers license and gun were after they had returned to the van. The intent to take her own gun from Officer Park is also inferrable from the fact that he took it.

As for evidence to support the instruction on burglary, Larry Bedore's testimony (blood splatter) was evidence that

Park's head was in the car when she was shot. (R 2264) There was evidence that Grossman had shot Park at point blank range, (R 1966) or at least at close range. (R 2255) The flashlight with Grossman's palm prints on it (R 2205) was found inside the car. (R 1885, 2145) It is well established that the term "entered" in the burglary statute does not require an intrusion by the whole body, but includes the insertion of any part. State v. Spearman, 366 So.2d 775 (Fla. 2 DCA 1978).

In proving the required intent for burglary, the state need only prove an intent to commit an offense, not the intent to commit a specified offense. Toole v. State, 472 So.2d 1174 (Fla. 1985). The circumstances of this case are clear evidence that Grossman had an intent to assault and/or batter Park when he went after her, that he had an intent to keep her from using her radio to call in his license, and that he had an intent to re-take his gun and license or to obtain her gun. There is also evidence that he had an intent to kill Officer Park to avoid being returned to jail.

Because evidence of each of the felonies of escape, robbery and burglary existed, the trial judge properly instructed the jury on them as underlying felonies for the felony murder doctrine. The giving of such instructions cannot therefore support the reversal of Grossman's conviction.

ISSUE XII

THERE WAS COMPETENT SUBSTANTIAL EVIDENCE TO SUPPORT APPELLANT'S FIRST DEGREE MURDER CONVICTION ON A PREMEDITATION THEORY.

Appellant argues that because the death of Officer Park occurred in a matter of seconds, there is insufficient evidence to support the premeditation theory of first degree murder. This argument is not supported by the law or the facts.

> Premeditation can be shown by circumstantial evidence. **Spinkellink v. State,** 313 So.2d 666 (Fla. 1975) cert. denied, 428 U.S. 911 (1976). "Premeditation is a fully formed conscious purpose to kill, which exists in the mind of the perpetrator for a sufficient length of time to permit reflection, and in pursuance of which an act of killing ensues." **Sireci v. State,** 399 So.2d 964, 967 (Fla. 1981), cert. denied, 456 U.S. 984 (1982). There is no prescribed length of time which must elapse between the formation of the purpose to kill and the execution of the intent; a few moments' reflection will suffice. **McCutchen v. State,** 96 So.2d 152 (Fla. 1957).

Provenzaro v. State, (Fla., October 16, 1986)[11 F.L.W. 541]. In Provenzaro the defendant shot his victim after a short chase and an abrupt verbal warning. The court in Provenzaro cites Washington v. State, 432 So.2d 44 (Fla. 1983) in which, much like the instant case, premeditation was found to exist where a short struggle preceeded the shooting of a deputy.

The evidence is this case clearly supports a finding of premeditation. For one thing, Park was heard over her police radio to say "I'm hit", followed by a scuffle and an unintelligible scream at 8:18 p.m. (R 1847, 1863 - 1864) Her body was found by a fellow officer at 8:26 p.m. (R 1865) This is evidence that some time passed during which Grossman contemplated killing Officer Park.

There was testimony that Grossman grabbed Peggy Park around

the neck to stop her from using her radio. (R 2047) Grossman then beat Officer Park several (he said twenty to thirty) times in the head before wresting her gun from her hand. (R 1967, 2048, 2088, 2292) Grossman called for Taylor to help him during his struggle. (R 2048, 2291 -2292) Grossman expressed consternation to Taylor that Officer Park wouldn't pass into unconsciousness from his beating. Grossman and Taylor had time to believe she had finally passed out, (R 2049) prior to Taylor being kicked. It is uncontested that Grossman took aim before firing, it was not a wild shot. (R 2070, 2295) Grossman was aware that he'd shot her in the side of the head, not the back, (R 2087) and was collected enough to worry about retrieving his drivers license from her car. (R 2051, 2296)

Immediately after Officer Park found the gun in the van, Grossman pled with her stating he was on parole. (R 1967, 2047, 2291) There was plenty of time before the beating, time during the beating, and then time after the first but before the second shot for Grossman to contemplate killing Peggy Park.

Grossman's conviction cannot, therefore, be reversed for an absence of evidence of premeditation.

ISSUE XIII

THE TRIAL COURT DID NOT ERR IN REFUSING TO GIVE THE JURY INSTRUCTION REGARDING TESTIMONY OF ACCOMPLICES.

Appellant argues that Brian Hancock was an accomplice, and so the accomplice jury instruction should have been given. Brian Hancock was not an accomplice to murder, the crime for which Grossman was on trial. (R 2397) To be an aider and abettor, an intent to participate in the perpetration of the crime must be shown. A.Y.G. v State, 414 So.2d 1158 (Fla. 3 DCA 1982). Hancock had absolutely no knowledge of the crime until after it had been accomplished and Grossman and Taylor had come home.

Because Hancock was not an accomplice, the refusal to give jury instruction 2.04(b) was correct. Hancock was involved in burying the gun and burning Grossman's clothes. The jury was aware of his involvement. A warning that his testimony could be less than credible or induced by possible complicity was included in the instruction that was given:

> "Did the witness have some interest in how the case should be decided?"
>
> * * *
>
> "Has the witness been offered or received any gift, any money, preferred treatment, or other benefit in order to get the witness to testify?" (R 2546)

Appellant argues that the accomplice instruction (R 2.04(b)) should have been given in regard to Taylor especially since his testimony was the only evidence that Grossman pulled the trigger. Taylor's testimony was not, as argued previously, the only evidence that Grossman killed Park. Grossman never indicated otherwise in any of the statements made either jointly with Tay-

lor to Hancock and Allen or singly to Brewer. As it was, the jury was cautioned to apply Taylor's statement only as to Taylor's guilt. (R 2548) The cases cited by the appellant as requiring reversal due to the absence of this accomplice jury instruction are inapplicable to Grossman's case. Hancock was not an accomplice and the jury was adequately cautioned as to Taylor's testimony. Neither was Grossman implicated solely by the testimony of either, or even both, of these witnesses. Therefore, refusal to give the accomplice jury instruction cannot support reversal of Grossman's conviction.

ISSUE XIV

THE TRIAL COURT DID NOT ERR IN REFUSING TO GIVE THE SPECIAL PENALTY PHASE JURY INSTRUCTIONS.

Defense counsel requested seven special jury instructions for the penalty phase. (R 234 - 243) These were denied by the trial court and the standard jury instructions were given. Jury instructions must be viewed in light of the evidence before reversible error can be ascertained; if it appears that the jury has not been confused or deceived, the judgment must be affirmed. Yacker v. Teitch, 330 So.2d 828 (Fla. 3 DCA 1976).

The **Florida Standard Jury Instructions** for the death penalty have been revisited and found to aequately state the law by this court as late as October 10, 1985. See The Florida Bar re: Standard Jury Instructions Criminal Cases, 477 So.2d 985 (Fla. 1985). The refusal to augment or to restate them, in this case, cannot support reversal.

The first instruction rejected by the court was that the jury's recommendation was entitled to great weight. Under Tedder v. State, 322 So.2d 908 (Fla. 1975), the jury recommendation of life is to be given great weight by the judge. The application of Tedder doesn't relate to a jury instruction, it is a legal doctrine for the judicial weighing of a life recommendation. How the court is to function after the jury has made its recommendation is irrelevant to jury deliberations.

The weighing of mitigating and aggravating circumstances were the subjects of appellant's second and third instructions. The jury, in receiving the standard instructions, was cautioned no less than four (R 2708 - 2712) times to weigh both kinds of

factors. They were admonished to consider all the evidence to establish mitigating circumstances if any aggravating ones are found, as well as to the lesser burden required to find mitigating factors. (R 2710) The jury was further cautioned not to act hastily and to carefully weigh and sift all the evidence. (R 2711)

As in Jackson v. Wainwright, 421 So.2d 1385 (Fla. 1982), cert. denied, 364 U.S. 1229, 103 S.Ct. 3572, 77 L.Ed.2d 1412 (1982), the trial court's instruction when considered in its entirety, was a proper admonishment to the jury that they were not to add up the aggravating and mitigating factors in a mechanistic and wooden fashion, but were to weigh the "totality of the circumstances in arriving at a reasoned judgment. Id. at 1389.

The essence of appellant's fourth and fifth instructions that any aspect of a defendant's character, etc., could be considered mitigating and that possible mitigating factors are limitless, were expressed in the instructions given. (See 2710) The instructions on mitigating circumstances, when read in conjunction with the express limitation and consideration of aggravating circumstances, advises the jury that the list of mitigating factors is not exhaustive. See Randolph v. State, 463 So.2d 186 (Fla. 1984), cert. denied, 105 S.Ct. 3533, 87 L.Ed.2d 656 (1985).

Additionally, it does not appear that the trial judge precluded the defendant from offering any evidence of non-statutory mitigation. So, there is no violation of Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) as urged by the appellant. The trial judge correctly ruled that the standard

jury instruction adequately covered the instructions on mitigating circumstances. See Delap v. State, 440 So.2d 1242 (Fla 1983), cert. denied, ___ U.S. ___, 104 S.Ct. 3559, 82 L.Ed.2d 860 (1984).

As for appellant's sixth requested instruction, the jury was instructed to consider any "circumstance of the offense", (R 2710) which allows them to consider defense's arguments that the defendant did not intend to kill the victim. The jury was given an adequate and accurate statement of the law. The burden is on the appellant to demonstrate that the instructions given were misleading or not a statement of the law. Appellant cannot just pick a line out of a case and demand reversal of a sentence because that language was not included in the jury instructions. Appellant must prove the jury instruction is erroneous and prejudicial. Appellant does not meet this burden.

Alternatively, the state contends that there is no evidence that Grossman did not intend to kill Peggy Park when he wrested her gun from her and shot her. The defense attorney's theory , as expressed in opening and closing arguments, is not evidence. Therefore, an instruction on the absence of intent would have been contrary to the evidence.

The seventh contested instruction, which was actually number 8 as requested (R 243), deals with the jury's power to reject the death penalty even in the absence of mitigating factors. Florida's death penalty statute provides that death is the appropriate penalty if the jury finds aggravating circumstances. State v. Dixon, 283 So.2d 1 (Fla. 1973), cert. denied, 416 U.S. 943, 94

S.Ct. 1950, 40 L.Ed.2d 295 (1974) This requested instruction is contrary to the emphasis of the Florida law. Additionally, the jury is supposed to make a reasoned decision. The jury is not supposed to arbitrarily decide to ignore the existence of aggravating circumstances.

The state adopts its argument in Issue XI and XII to counter appellant's assertion that there was no evidence that this murder occurred during a robbery and/or a burglary. Evidence that the crime occurred during an escape is abundant. At the very least, it is evident, beyond a reasonable doubt that Grossman was hindering law enforcement functions when he shot Officer Park. She had taken his drivers license and gun and was in the process of radioing for information when he began beating her. The existence of evidence for the heinous, atrocious or cruel circumstance is addressed in Issue XV. The trial court did not err in giving the instruction on aggravating factors based on these circumstances.

This court has frequently held that it is adequate to instruct the jury according to the standard instruction under the statute. Peek v. State, 395 So.2d 492 (Fla. 1981), Mason v. State, 438 So.2d 374 (Fla. 1983).

ISSUE XV

THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE FINDING OF THREE AGGRAVATING AND NO MITIGATING FACTORS.

Sufficient evidence existed to support a finding that this crime was committed while engaged in the commission or attempt to commit or flight after committing a robbery or a burglary. As expressed in Issue XI, it was proven beyond a reasonable doubt that things (guns, license) in the custody of the victim were taken by force, and assault and by putting in fear, with the intent to deprive.

As expressed in Issue XI, it was proven beyond a reasonable doubt that Grossman entered Park's conveyance intending to commit assault, battery and/or murder. Therefore, the first aggravating circumstance was proven and it was not error for the judge to so find.

The second aggravating factor was likewise proven to exist. There is no question that this murder was committed to avoid or prevent a lawful arrest. Grossman was on probation and was illegally in possession of a gun. Park had taken his license and was in the process of radioing in for further information. The evidence regarding Grossman's custody (for proof of affecting an escape) was presented in Issue XI. If this evidence does not rise to a beyond reasonable doubt standard, it does not matter since the first prong of the aggravating circumstance is met.

That the crime was committed to disrupt or hinder the lawful exercise of governmental function is also established beyond a reasonable doubt. Grossman was on probation and illegally in possession of a gun. Knowledge of these facts made it incumbent

upon Officer Park to investigate Grossman's situation. She was attempting to do so when murdered. Therefore, the second aggravating circumstance was proven and it was not error for the judge to so find.

This murder was accompanied by additional acts which set the crime apart from the norm, making it conscienceless, pitiless, and unnecessarily tortuous. Grossman savagely beat Peggy Park twenty to thirty times with her heavy flashlight. Then Grossman called for reinforcements. Taylor joined in restraining her. She was, by this time, frightened enough to feel the need to draw her revolver to defend herself. Though the death may have resulted instantaneously, from the gunshot, the struggle and beating prior to the shot was long enough, and painful enough to be considered wicked and designed to inflict a high degree of pain. See Christopher v. State, 407 So.2d 198 (Fla. 1981), where Christopher knocked down the victim who then tried to close the door. Christopher pushed it open and shot the victim who was sitting on the bed. See also Wilson v. State, 436 So.2d 908 (Fla. 1983) where being beaten with a hammer before death by gunshot was found especially heinous, atrocious and cruel.

The fact that the victim lingered for several minutes, conscious of impending death, are factors the court should consider in determining heinous, atrocious or cruel. See Phillips v. State, 476 So.2d 194 (Fla. 1985), Washington v. State, 362 So.2d 658 (Fla. 1978); Knight v. State, 338 So.2d 201 (Fla. 1976) and Funchess v. State, 341 So.2d 762 (Fla. 1976).

Just because the court did not expressly find the specific

mitigating factors urged by the defendant, does not mean they were not considered. The court obviously rejected defendant's arguments of lack of prior history of violence, deprived adolescence, remorse and good jail behavior as having no valid mitigating weight. See Mason v. State, 438 So.2d 374 (Fla. 1983) and Brown v. State, 473 So.2d 1260 (Fla. 1985).

Competent, substantial evidence exists to support the finding of the three aggravating circumstances and the lack of mitigating factors. A sentence of death is appropriate upon a finding of three aggravating and no mitigating circumstances. White v. State, 446 So.2d 1031 (Fla. 1984). Therefore, Grossman's sentence should not be reversed.

ISSUE XVI

THE TRIAL COURT COMPLIED WITH THE REQUIREMENTS OF **§921.141(3), FLORIDA STATUTES.**

The appellant asserts that because the trial court pronounced sentence on Decmber 13, 1986, without orally pronouncing specific findings of fact regarding aggravating and mitigating circumstances; and the appellant filed his notice of appeal on December 20, 1986, thereby terminating the trial court's jurisdiction; and the trial court entered its written order on March 19, 1986, the death penalty must be vacated under this court's recent holding in Van Royal v. State, (Fla. Sept. 18, 1986)[11 F.L.W. 490].

The state contends, however, that the trial court met the requirements of **§921.141(3), Fla. Stat.,** and that the trial court is not divested of jurisdiction to file it's written order subsequent to the filing of the notice of appeal; and that the holding in Van Royal is not dispositive of this case. **Section 921.141(3)** reads:

> Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts.
>
> (a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and
>
> (b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

At the sentencing hearing, Judge Farnell said:

> "The Court has considered the aggravating and mitigating circumstances presented in the evidence in this case and has considered the recommendation of the jury and the

> recommendation included in the presentencing investigative reports and determined that sufficient aggravating circumstances exist and that there are insufficient mitigating circumstances to outweigh the aggravating circumstances."
>
> (emphasis supplied)(R 2763)

Judge Farnell made the determination required by the statute before pronouncing sentence. It is clear that statute contemplates the entry of the written order, wherein the judge enumerates which aggravating and mitigating factors he relied upon after the sentencing hearing by the separate paragraph that follows:

> In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsection (5) and (6) and upon the records of the trial **and the sentencing proceedings.** If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment **§921.141(3), Fla. Stat. 1983).** (emphasis added)

If the statute is construed to require written reasons contemporaneous to the oral pronouncement of sentence, that portion requiring consideration of the testimony and argument presented at the sentencing hearing is rendered a nullity.

The next hurdle is the data by which the written reasons have to be filed. The appellant urges that since the filing of a notice of appeal divests the trial court of jurisdiction, the reasons must be entered before that date. The state contends, however, that **Florida Rule of Appellate Procedure 9.600(a)** provides the lower court concurrent jurisdiction with the appellate court to render orders on procedural matters. Once the court has found that insufficient mitigating factors exist to

outweigh the aggravating ones, and the penalty is pronounced, then written findings are procedural.

Were the statute and rule interpreted otherwise, the death penalty could be avoided. A conscientious judge could pronounce sentence and retire immediately to chambers to draft written reasons, taking into account that evidence presented at the sentencing hearing. A cunning defense attorney could then turn to the clerk and enter a prepared notice of appeal, thereby avoiding imposition of the death penalty. Surely the statute does not contemplate such a procedural loophole.

Appellee further argues that this case is closer to the situation in Ferguson v. State, 417 So.2d 639 (Fla. 1982) that that in Van Royal. In Ferguson, the trial judge had orally pronounced his findings at sentencing and later filed them in writing. Justice Adkins wrote, "[i]nasmuch as the supplemental record included the trial judge's written findings, this issue is moot," in response to appellant's argument based on the failure to provide written reasons.

In the instant case, Judge Farnell's written reasons were included in the trial record before it was certified as the record on appeal, before the trial court surrendered jurisdiction to this court. Therefore, this record is neither inadequate as that decried in Van Royal, nor incomplete.

This case further differs from Van Royal because we do not have a jury override. It is clear from the judge's statement at sentencing (see above) the death penalty had been based on a well-reasoned application of the aggravating and mitigating

factors argued by counsel for both sides.

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

If this court finds that this sentence cannot be upheld, the state would argue that remand for resentencing, rather than remand for imposition of a life sentence is proper. First of all, this is not a Tedder v. State, supra, situation where the appellate court should reduce a death sentence on any reasonable basis because the jury has recommended life. This jury recommended the death penalty unanimously.

Secondly, when §921.141(3) is read in its entirety, it is obvious that life is the required sentence if the trial judge does not specifically find that enough mitigating factors exist to outweigh the aggravating ones. Judge Farnell clearly made this finding before pronouncing sentence.

Thirdly, this court's imposition of life is tantamount to finding per se, that the aggravating factors do not outweigh the

mitigating. This appears to violate the prohibition against the arbitrary application of the death penalty contrary to the United States Supreme Court holding in Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). The per se life sentence based on procedural events precludes the application of relevant sentencing criteria.

Since the court complied with §921.141(3), Grossman's sentence should not be vacated. If, however, the court finds this case indistinguishable from Van Royal, the state would contend that remand for resentencing and not the arbitrary imposition of a life sentence, is warranted.

ISSUE XVII

SECTION 921.141, FLORIDA STATUTES, IS CONSTITUTIONAL.

This Court has on numerous ocassions upheld the constitutionality of Florida death penalty statute against each of the attacks enumerated by appellant. In Sireci v. State, 399 So.2d 964, 970 (Fla. 1981), this Court stated there was no requirement that the state notify the defendant by indictment or otherwise of the aggravating circumstances intended to be proven. **Section 921.141(5)** defines the only aggravating circumstances which can be considered in a capital case and satisfies the due process notice requirement. See also, Lightbourne v. State, 438 So2.d 380 (Fla. 1983). Appellant's argument that the statute invades the judicial rulemaking prerogative was rejected in Booker v. State, 397 So.2d 910 (Fla. 1981), and Morgan v. State, 415 So.2d 6 (Fla. 1982).

In Thomas v. State, 456 So.2d 454 (Fla. 1984) and Thompson v. State, 389 So.2d 197 (Fla. 1980), the statute was upheld against attacks that the death penalty constituted cruel and unusual punishment. **Section 921.141** has been repeatedly upheld against arguments that it violates due process and equal protection. Ferguson v. State, 417 So.2d 639 (Fla. 1982) and Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 918 (1976). The procedure for sentencing as outlined in the statute controls and channels discretion so that the sentence is a matter of reasoned judgment. Alford v. State, 307 So.2d 433 (Fla. 1975).

This Court in State v. Dixon, 283 So.2d 1 (Fla. 1973)

considered the constitutionality of the death penalty statute as well as the aggravating and mitigating factors. It was determined that §921.141 is constitutional, and the aggravating circumstances were reasonable and can be easily understood by the average person. The validity of these factors was also upheld in Lightbourne v. State, supra; Smith v. State, 424 So.2d 726 (Fla. 1982); Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978) and Songer v. Wainwright, 571 F.Supp. 1384 (M.D. Fla. 1984).

Appellant's claim that the statute limits the mitigating to the factors listed in §921.141(6) was rejected in Songer v. State, 365 So.2d 696 (Fla. 1978). The claim that the death penalty is being imposed in a discriminatory manner based on the race of the victim has been consistently rejected. See, Smith v. State, 457 So.2d 1380 (Fla. 1984); State v. Henry, 456 So.2d 466 (Fla. 1984), and Adams v. State, 449 So.2d 819 (Fla. 1984).

CONCLUSION

Based on the above stated facts, argument, and authorities, appellee would ask that this Honorable Court affirm the judgment and sentence of the lower court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Elizabeth G. Mansfield, DILLINGER & SWISHER, P.A. 5511 Central Avenue, St. Petersburg, Florida 33710, this 2nd day of December, 1986.

Lauren Hafner Sewell
OF COUNSEL FOR APPELLEE.