IN THE SUPREME COURT OF FLORIDA

CLARENCE JACKSON,

Appellant,

v. CASE NO. 68,097

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
IN AND FOR HILLSBOROUGH COUNTY
STATE OF FLORIDA

BRIEF OF THE APPELLEE

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PRELIMINARY STATEMENT

CLARENCE JACKSON will be referred to as the "Appellant" in this brief. The STATE OF FLORIDA will be referred to as the "Appellee". The record on appeal consisting of 23 volumes will be referred to by the symbol "R" followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

Appellee accepts Appellant's Statement of the Case and Statement of the Facts subject to the following changes and additions:

Appellant's employment at the gasoline station lasted only three months. (R 1768) After that, appellant spent most of his time on 22nd Street purchasing and using drugs. (R 1768 - 1769). Although Appellant was not working, he always carried large amounts of cash. (R 558, 1690) Appellant provided the money for drugs for himself, James Lucas, Roger McKay and Terrence Milton. (R 577, 563)

James Lucas died between the time of Appellant's first trial and the time of his second trial. (R 2080) Therefore, Lucas' prior testimony was read to the jury. (R 549) Lucas testified that on September 12, 1981, he was with Appellant for several hours on 22nd Street. (R 577) They were using heroin and cocaine. (R 477) Later that day, Lucas saw Appellant come from the bushes with Roger McKay. (R 584) McKay and Appellant had been arguing. (R 584)

Lucas, McKay and Appellant got into Appellant's car. (R 585) Appellant was driving. (R 586) Appellant was looking for a minister. (R 587) On the way back to Tampa, Appellant said he didn't feel well, and he asked Lucas to drive. (R 587) Appellant sat in the back seat, and McKay was sitting in the front passenger seat. (R 589) Appellant and McKay began arguing about drugs. (R 589) Lucas then heard a shot. (R 591) McKay said

"Unc shot me" and fell into Lucas' lap. (R 591) Appellant told Lucas to sit McKay up and continue driving. (R 591)

Appellant told Lucas where to drive and ordered him to stop on a secluded dirt road. (R 594 - 595) Lucas was afraid to run because Appellant had a gun. (R 595 - 596) Appellant took the keys from Lucas. (R 595) Appellant carried McKay's body out of the car to the trunk and put a garbage bag halfway over McKay. (R 595) Appellant then pulled a knife from the trunk and threatened to cut McKay, but he shot him again instead. (R 596) Appellant then put McKay in the trunk and ordered Lucas to get back in the car and drive. (R 596)

Appellant directed Lucas to a car wash. (R 597) He had the car washed and tried to wipe some blood from the seat. (R 597 - 599) Appellant also tried to repair the tear the bullet had made in the seat. (R 603)

Appellant and Lucas returned to 22nd Street. (R 603) Appellant threatened to harm Lucas if he told anyone. (R 603) They went to Lucas' house and injected more heroin. (R 604) They stayed at Lucas' house until nightfall. (R 604) They left Lucas' house because Appellant wanted to find Terrence Milton. (R 606) Appellant told Lucas that Milton had been causing problems between Appellant and his wife. (R 606)

Appellant and Lucas went back to 22nd Street and found Milton. (R 610) Milton purchased more drugs for Appellant. (R 610) Milton, Lucas and Appellant left the area in Appellant's car. (R 612) McKay's body was still in the trunk. (R 614)

Appellant began arguing with Milton. (R 615) Appellant accused Milton of causing problems between him and his wife and said he was tired of always buying drugs and having his friends use them for themselves. (R 615) Appellant told Lucas to tell Milton where McKay was. (R 616) Lucas told him McKay was in the trunk dead. (R 616) Milton tried to get out of the car, but the door was locked. (R 616) Then, Appellant leaped over the seat and shot Milton. (R 617)

Appellant then grabbed Milton around the neck and hit him in the head with the gun. (R 618) Milton was crying and pleading to be taken to the hospital. (R 618) Milton begged Appellant not to shoot him again. (R 618) Appellant asked Milton whether he tell the police if Appelant took him to the hospital, and Milton said no. (R 619) Appellant then hit Milton in the head with the gun a few more times and told Milton to lay on the floor and keep quiet. (R 619)

They drive around for three to four hours. (R 620) Milton kept trying to get Appellant to take him to the hospital, but Appellant refused. (R 620) Appellant had Lucas stop on a dirt road. (R 62?) He told Milton to get out of the car, but Milton said he could not because he was shot. (R 622) Appellant forced Milton to get into a garment bag and then ordered him to lay down on the seat. (R 623) Appellant then put another bag over Milton. (R 623)

Appellant ordered Lucas back in the car, and they started driving back to Tampa. (R 624) Appellant stopped Lucas on a

bridge. (R 625) Milton had gotten halfway out of the bag. (R 625 - 626) Appellant grabbed Milton by the hair, put a gun to his head and fired two shots. (R 626 - 627) Appellant pulled Milton from the car and threw him into the river. (R 628) He then took McKay's body out of the trunk and threw it into the river. (R 628)

Appellant and Lucas left the scene, and Appellant stopped at several places disposing of evidence. (R 631 - 633) They drove back to Tampa and went to the Club Tubii. (R 634) For the next few days Lucas and Appellant were together constantly. (R 635 - 643) Lucas finally ran from Appellant on Thursday. (R 643 - 644) Lucas ran to a passing police car and told them someone was trying to kill him. (R 646)

The bodies of Milton and McKay were discovered by employees of the Department of Transportation. (R 761 - 762) The police were notified, and a dive team was called to retrieve the bodies. (R 764, 783) The dive team was also instructed to look for evidence near the bodies. (R 785) The divers located a .32 caliber pistol. (R 785 - 786)

The police traced the pistol to Moses John Maxwell. (R 797 - 800) Maxwell purchased the pistol at a pawn shop in December 1980. (R 800) He sold the gun to Richard Jackson, Appellant's brother, to buy medicine for his wife. (R 803 - 804) Richard Jackson testified that he gave the gun to Appellant several months before the murders and had not seen it since. (R 807 - 809)

Gilbert Sutton testified he saw Appellant and Lucas at the Club Tubii at around 2:00 or 2:30 on Sunday morning. (R 855) A few days after that, Sutton saw Lucas run from the Paradise Bar. (R 858) Appellant was chasing Lucas. (R 858)

Sylvester Dumas saw Appellant with McKay on Saturday, September 12, 1981, at about 11:30 a.m. or 12:00 noon. (R 969) Appellant and McKay were arguing about money. (R 969) Later, Appellant gave McKay money to buy drugs. (R 970) Dumas tried to go with Appellant and McKay to inject the drugs, but Appellant did not want Dumas with them. (R 972) Dumas saw Appellant, Lucas and McKay get into Appellant's car. (R 979) That was the last time Dumas saw McKay. (R 985) Dumas saw Milton on September 12, at around 5:30 or 6:00 p.m. (R 986) That was the last time he saw Milton. (R 987)

Dumas saw Appellant and Lucas together around the Paradise Bar on Sunday, Monday, Tuesday and Wednesday. (R 989 - 999) They were both using drugs. (R 989, 991, 999) On Monday, both men were carrying guns. (R 991) Lucas got upset; Appellant said nothing. (R 994 - 995, 997 - 998)

When Dumas heard the news report that two bodies had been found in the river, he called the police and described Milton and McKay and the clothing they were wearing when he last saw them. (R 966, 1000) The police came to Dumas' home, told him the bodies found were his friends and took Dumas in for questioning. (R 1002) Dumas was later released and went to 22nd Street to tell his friends about Milton and McKay. (R 1002, 1004) As

he approached the Paradise Bar, Dumas saw Lucas run from the bar toward a police car. (R 1004 - 1005) Lucas was screaming that a man was trying to kill him. (R 1004 - 1005) Appellant was chasing Lucas, but when Appellant saw the police car, he turned and disappeared. (R 1004 - 1005)

Sergeant Al Luis worked on this investigation. (R 1222) As a result of information received, Luis talked to James Lucas. (R 1226 - 1227) Lucas refused to talk to them twice, but finally made a statement. (R 1226 - 1228) Lucas took Luis and Detective Davis on the route he and Appellant had taken. (R 1229) Lucas led them to several pieces of evidence including a yellow garment bag, wire hangers, a tennis shoe belonging to one of the victims and a .357 Magnum. (R 936, 1231 - 1236)

Appellant's son, Darrei, and wife, Ramona, testified that Appellant was with them on Saturday, September 12, 1981, and that they had a dinner party with neighbors that evening. (R 1418 - 1420, 1558 - 1559) Although they were both present when Appellant was arrested, neither told police Appellant was with them when the murders were committed. (R 1447, 1579, 1641) Clara Aponte and Eileen Rivera both testified they attended a dinner party at Appellant's home on September 12, 1981, and Appellant was present. (R 1357 - 1358, 1540 - 1543) However, neither witness testified at Appellant's first trial; and at previous depositions, neither could recall the date of the dinner party. (R 1369 - 1372, 1548, 1819)

Finally, Appellee does not accept as fact Appellant's statements that witnesses commented on Appellant's right to remain silent and that the prosecutor made objectionable arguments during the penalty phase of Appellant's trial. (Appellant's brief at 11, 13)

SUMMARY OF THE ARGUMENT

Issue I: Evidence of collateral crimes, wrongs or acts is admissible as long as it is relevant to prove any factual issue. The testimony which Appellant contends was improper Williams rule evidence was relevant to establish motive, state of mind and the context out of which the crimes arose. The testimony also supported other evidence that two guns were used to commit the murders. Thus, the challenged testimony was properly admitted.

Alternatively, any error in admitting this testimony was harmless error. The evidence against Appellant was overwhelming. The challenged testimony cannot be said to have contributed significantly to Appellant's conviction.

Issue II: The statement of Detective Davis that Appellant "appeared very calm" when he was arrested was a reference only to Appellant's demeanor at that time and is not "fairly susceptible" to being interpreted as a comment on Appellant's right to remain silent. Therefore, neither Detective Davis' statement, nor the prosecutor's reference during closing argument to the statement can be grounds for reversal of Appellant's conviction.

The challenged statement of Detective Luis was a direct response to a question asked by defense counsel. Having invited the error, Appellant cannot seek reversal on this ground.

Alternatively, should this Court determine any of these statements constituted error, the error is clearly harmless in light of the context in which the statements were made and the evidence in this case.

Issue III: On cross-examination of Sylvester Dumas, defense counsel questioned Dumas about favorable treatment he may have received after his arrest in January 1985 and about charges pending against him for which he would be sentenced after Appellant's trial. Each of these instances occurred after August 1982, when Dumas gave consistent testimony. Therefore, Dumas' prior consistent statement was properly admitted to rebut defense counsel's implied assertion of improper influence, motive or recent fabrication.

Issue IV: The question whether Denis Collins had ever been convicted of a crime was proper. The objection to the question about the nature of that conviction was sustained. There was no error on this ground.

The prosecutor then attempted to impeach Collins by showing bias. Although this was proper impeachment, this Court has held the particular question asked to be improper. However, the error was not so egregious as to warrant a mistrial. Rather, defense counsel should have requested a curative instruction. Furthermore, any error was harmless error in light of the minor significance of Collins' testimony.

Issue V: Appellant and his wife were not permitted to explain prior inconsistent statements on direct examination. This ruling was made based on the state of the law at the time of Appellant's trial. Therefore, it cannot be said that the trial court erred in restricting the testimony of these witnesses in this regard.

Issue VI: Sylvester Dumas' statement from a prior deposition that, in his opinion, James Lucas was a liar was properly excluded. That statement and his statement at trial were not inconsistent because at trial Dumas was asked whether he was aware of Lucas' reputation in the community for truthfulness. Moreover, the deposition statement was inadmissible because under Section 90.609 only a witness' general reputation in the community, not another individual's opinion of that reputation, is admissible.

Issue VII: One of the comments challenged by Appellant was not objected to at trial and, therefore, was not preserved for appeal. Furthermore, there was nothing improper about either of the comments. Any error, however, cannot be considered to have tainted the entire penalty phase of the trial.

Issue VIII: The trial court gave the standard penalty phase instruction regarding the jury's role in sentencing Appellant. There was no objection to the instruction. Therefore, this issue was not preserved for appeal. Furthermore, this Court has recently held that such an instruction does not contravene Caldwell v. Mississippi, infra.

Issue IX: The record supports the trial court's finding that this murder was especially heinous, atrocious or cruel. The victim suffered extreme physical and mental pain for several hours prior to his death and was aware death was imminent. The record also supports the finding that the capital felony was committed in a cold, calculated and premeditated manner. The record

established that Appellant carefully removed all traces of the first murder and then lured his second victim to his car with the intent to kill him.

Should this Court find either of these aggravating circumstances was not established, death is still the appropriate sentence. The trial court found other aggravating circumstances and no mitigating circumstances sufficiently established in this case.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED IN ADMITTING EVIDENCE OF COLLATERAL CRIMES, WRONGS OR ACTS WHICH APPELLANT'S CONTENDS TENDED ONLY TO PROVE APPELLANT'S BAD CHARACTER AND PROPENSITY TO COMMIT CRIMES.

As his first point on appeal, Appellant contends the trial court erred in admitting certain testimony of James Lucas and Sylvester Dumas which Appellant contends was improper Williams[1] rule evidence. In partial support of this contention, Appellant relies on the fact that this Court reversed Appellant's first conviction because the trial court erroneously admitted testimony of Sylvester Dumas that Appellant once pointed a gun at Dumas and boasted of being a "thoroughbred killer." Jackson v. State, 451 So.2d 458, 460 (Fla. 1984). That testimony was not repeated at Appellant's second trial. Moreover, the testimony Appellant challenges does not relate to that incident at all. Accordingly, this Court's prior ruling has no relevance to the instant case. Appellee would also note that the testimony of James Lucas introduced at Appellant's second trial was the same as that introduced during Appellant's first trial. This Court previously found no error in the admission of that testimony. Jackson v. State, supra.

Evidence of collateral crimes, wrongs or acts is admissible if it is relvant to prove any factual issue. Williams v. State,

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[1] 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).

110 So.2d 654 (Fla. 1959), cert. denied, 361 U.S. 847, 80 S.Ct. 102, 4 L.Ed.2d 86 (1959); Heiney v. State, 447 So.2d 210 (Fla. 1984), cert. denied, 469 U.S. 920, 105 S.Ct. 303, 83 L.Ed.2d 237 (1984). The fact that such testimony is prejudicial does not render it inadmissible as long as it is relevant for any purpose. Ashley v. State, 265 So.2d 685 (Fla. 1972). However, if the sole relevance of that evidence is to prove the bad character or criminal tendencies of the accused, the evidence is inadmissible. Williams v. State, 110 So.2d at 662.

Section 90.404(2)(a) of the Florida Statutes provides that such evidence is admissible when relevant to prove a material fact in issue, "such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . . " (emphasis added). It has also been held that such evidence is admissible to establish the entire context out of which a defendant's criminal conduct arose. 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); Smith v. State, 365 So.2d 704 (Fla. 1978), cert. denied, 444 U.S. 885, 100 S.Ct. 177, 62 L.Ed.2d 115 (1979); United States v. Harrell, 737 F.2d 971 (11th Cir.1984), cert. denied, 470 U.S. 1027, 105 S.Ct. 1392, 84 L.Ed.2d 781 (1985).

James Lucas died between the time of Appellant's first trial and the time of his second trial. Therefore, at the second trial, the state sought to admit, in its entirety, Lucas' testimony from the first trial. Appellant objected to the relevance

of certain portions of the testimony, and a hearing was held. (R 2077 - 2147) The trial court found, generally, that the challenged testimony did not go to Appellant's bad character or propensity to commit crimes, but rather was relevant to Appellant's motive, his mental condition at the time of the crimes and the circumstances surrounding the crimes. (R 2126 - 2127) The court also found the probative value of the testimony outweighed any unfair prejudice it might create in the minds of the jurors. (R 2127)

The testimony challenged by Appellant is quoted in its entirety in Appellant's initial brief.

The last quoted section of James Lucas' testimony (R 689 - 690) was read during defense counsel's cross-examination of Lucas, and therefore, cannot be grounds for reversal of Appellant's conviction. Appellee would submit that testimony is not improper Williams rule evidence. Moreover, the defense cannot inject error into the proceeding and then on appeal seek reversal of the defendant's conviction on that ground.

The remaining portions of Lucas' testimony and all of Dumas' testimony also were properly admitted. Appellee would note initially that there is nothing illegal or necessarily wrong with Appellant being in possession of a bulletproof vest. More importantly, however, the testimony about the vest, Appellant's possession of firearms and Appellant's previous assaults were relevant in this case.

The challenged testimony was relevant to establish motive, the entire circumstances surrounding this crime and Appellant's state of mind at the time he committed the murders. The testimony also supported other evidence that more than one gun was used to commit the murders. The evidence introduced by the State at trial showed that Appellant had long been supplying the money for drugs for himself, Lucas, Milton and McKay. In exchange, these three individuals would inject Appellant (he was unable to inject himself) and would purchase and carry Appellant's drugs in case there was ever an arrest. Lucas, McKay and Milton depended on Appellant to support their own drug habits. The State's theory at trial was that Appellant killed Milton and McKay because he thought they were cheating him out of drugs and taking advantage of him. He was also angry because Milton had been giving poor injections causing sores and abscesses which made Appellant's wife suspect he was using drugs. As to why Lucas would help Appellant and not inform the police, the State sought to show that not only was Lucas dependent on Appellant for drugs, he was also afraid of Appellant. The testimony which Appellant now challenges was relevant to and supported the State's theory.

In United States v. Harrell, supra, members of the Outlaws motorcycle club were tried for several drug charges. During the trial, the government introduced evidence about their lifestyles, including the fact that the members supported themselves by profits from drug sales and their wives' and girlfriends' forced prostitution, and numerous incidents of violence. The Eleventh

Circuit held this evidence was properly admitted to enhance the jury's understanding of the events which led to the charges.

In Heiney v. State, supra, this Court held that evidence during a defendant's murder trial that prior to killing the victim, the defendant had argued with two other individuals, shot one of them in the abdomen and then tried to leave town was relevant to prove motive and to establish the entire context out of which the crime arose.

Similarly, the testimony which Appellant has challenged was relevant to establish the circumstances of these murders and Appellant's state of mind at the time the crimes were committed. Alternatively, should this Court determine that this was improper Williams rule evidence, Appellee would submit that any error was harmless error, and therefore, not a ground for reversal. Where proof of guilt is clear and convincing so that even without the collateral evidence introduced in violation of the Williams rule, the defendant would clearly have been found guilty, the violation of the Williams rule may be considered harmless. Clark v. State, 378 So.2d 1315 (Fla. 3 DCA 1980); McKinney v. State, 462 So.2d 46 (Fla. 1 DCA 1984). The evidence in this case overwhelmingly supported Lucas' version of the events which occurred on September 12, 1981. The evidence as a whole clearly established Appellant's guilt. The challenged testimony cannot be said to have contributed significantly to Appellant's conviction.

ISSUE II

WHETHER THE TRIAL COURT ERRED IN REFUSING TO GRANT A MISTRIAL AFTER TWO WITNESSES AND THE PROSECUTOR ALLEGEDLY COMMENTED ON APPELLANT'S EXERCISE OF HIS RIGHT TO REMAIN SILENT.

Appellant next contends the trial court erred in refusing to grant a mistrial following comments by two witnesses and the prosecutor which Appellant alleges refer to the exercise of his right to remain silent. The determination of whether to grant a mistrial is within the sound discretion of the trial court. Doyle v. State, 460 So.2d 353 (Fla. 1984) A mistrial is only appropriate where the error committed was so prejudicial as to vitiate the entire trial. Duest v. State, 462 So.2d 446, 448 (Fla. 1985); Salvatore v. State, 366 So.2d 745, 750 (Fla. 1978), cert. denied, 444 U.S. 885, 100 S.Ct. 177, 62 L.Ed.2d 115 (1979). If an alleged error does no substantial harm and causes no material prejudice, a mistrial should not be granted. Breedlove v. State, 413 So.2d 1 (Fla. 1982), cert. denied, 459 U.S. 882, 103 S.Ct. 184, 74 L.Ed.2d 149 (1982). None of the comments which Appellant alleges were error warranted mistrial.

A. Detective Davis' Comment

On direct examination of Detective Davis, the prosecuctor asked Davis about Appellant's demeanor at the time he was arrested. Davis responded that Appellant "appeared very calm." (R 1211) During closing arguments, the prosecutor referred to the fact that Appellant appeared calm at the time he was arrested. (R 1896) Appellant contends these remarks were comments on his post-arrest silence.

This Court has approved the "fairly susceptible" test for determining whether the remarks of a prosecutor or witness constitute an improper comment on an accused's right to remain silent. Kinchen v. State, 490 So.2d 21 (Fla. 1985). Thus, the question is whether the comments are fairly susceptible of being interpreted by the jury as comments on the defendant's exercise of his right to remain silent. Id. at 22. An error caused by such improper comments is subject to the harmless-error doctrine. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986).

Neither the statement of Detective Davis, nor the prosecutor's reference during closing argument to that statement, can be construed as a comment on Appellant's right to remain silent. The testimony merely referred to Appellant's demeanor at the time of his arrest, which, as the trial court noted, is proper. Giamo v. State, 245 So.2d 116 (Fla. 3 DCA 1971), cert. denied, 404 U.S. 1019, 92 S.Ct. 681, 30 L.Ed.2d 666 (1972) Nothing was said at that point about Appellant's Miranda warnings or his refusal to make any statements. There was no argument by the prosecutor that Appellant's failure to make a statement at the time of his arrest was proof that his alibi was fabricated.

Appellant's attempt to equate the term "calm" with the term "quiet" and thereby turn the comment into a reference to Appellant's post-arrest silence must fail. This Court must construe the comments in the context in which they were made. Darden v. State, 329 So.2d 287, 291 (Fla. 1976), cert. dismissed, 430 US. 704, 97 S.Ct. 1671, 51 L.Ed.2d 751 (1977). While "calm" may

sometimes be used as a synonym for "quiet," it is not necessarily so, and in the context in which this comment was made, it cannot be construed as such.

The cases relied upon by Appellant are easily distinguished. In Hall v. State, 364 So.2d 866 (Fla. 1 DCA 1978), cert. denied, 373 So.2d 461 (Fla. 1979), the prosecutor stated during closing argument that the defendant was "sitting over here quietly." Similarly, in Kembro v. State, 346 So.2d 1083 (Fla. 1 DCA 1977), the prosecutor stated that the defendant "has continued sitting right there in that chair and has not gotten up here . . . " In David v. State, 369 So.2d 943 (Fla. 1979), the prosecutor queried "If [the defendant] had a business failure, why didn't he say anything about the Jozefyks, the groves and about the Foxes?" In Torrence v. State, 430 So.2d 489 (Fla. 1 DCA 1983), pet. for rev. denied, 438 So.2d 834 (Fla. 1983), the defendant took the stand to explain the circumstances under which he had obtained stolen property. During cross-examination, the prosecutor asked whether the defendant had told his story to anyone else, and the defendant replied, "No."

In each of those cases, the challenged statement unquestionably was a direct reference to the defendant's post-arrest silence. On the other hand, in the instant case, the prosecutor's question and the detective's response went only to Appellant's demeanor at the time of arrest. The comments to which Appellant objects simply are not "fairly susceptible" to interpretation as comments on Appellant's exercise of his right to remain silent.

Should this Court determine the comments were susceptible to such interpretation, Appellee submits any error was harmless and cannot be grounds for reversal of Appellant's conviction. Under the harmless-error doctrine, a conviction may stand, even in the face of a constitutional violation, when there is no reasonable possibility that the practice complained of might have contributed to the conviction. United States v. Hasting, 461 U.S. 499, 103 S.Ct. 1974, 76 L.Ed.2d 96 (1983); Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); State v. Murray, 443 So.2d 955 (Fla. 1984). The duty of the reviewing court is to consider the record as a whole and to ignore errors that are harmless. United States v. Hasting, 461 U.S. at 509; State v. Murray, 443 So.2d at 956.

This Court has determined that comments on a defendant's silence are subject to the harmless-error doctrine. State v. DiGuilio, supra. Thus, this Court must determine whether, absent Detective Davis' statement and the prosecutor's reference to the statement in closing argument, it is clear beyond a reasonable doubt that the jury would have returned the same verdict. Id. at 1135

In this case, the alleged error was clearly harmless. Although Lucas' credibility in this case was an important issue, the fact is that, if believed, Lucas provided a detailed, eyewitness account of the brutal murders in this case. Lucas' story was supported by other physical evidence in the case. Therefore, although Lucas' credibility was attacked on cross-examination,

the jury chose to believe his version of the events of that day. Furthermore, while it is true that the prosecutor attacked Appellant's alibi, he never did so by arguing that Appellant's silence at the time of arrest was evidence that alibi was fabricated.

B. Detective Luis' Comment

Detective Al Luis, one of the lead investigators was called as a defense witness. One of the reasons he was called was to explain or admit that no further leads were investigated after Lucas gave his statement and Appellant was arrested, even though Luis had information that other people were angry with the victims. (R 1558 - 1566) During the course of direct examination, defense counsel asked whether anyone had interviewed Appellant's wife and son about the night of the murders. (R 1561 - 1562) In response, Detective Luis stated:

> A. No. We at that point had no reason to interview them. Mr. Jackson made no statement to us when we arrested him insofar as any possible information that they may have.
>
> (R 1562)

Detective Luis' statement was in direct response to a question asked by defense counsel. Accordingly, having invited the error, Appellant cannot seek reversal on this ground. Jackson v. State, 359 So.2d 1190 (Fla. 1978), cert. denied, 439 U.S. 1102, 99 S.Ct. 881, 59 L.Ed.2d 63 (1979); Clark v. State, 363 So.2d 331 (Fla. 1978); Castle v. State, 305 So.2d 794 (Fla. 4 DCA 1975), aff'd, 330 So.2d 10 (Fla. 1976); Jennings v. State, 457 So.2d 587 (Fla. 3 DCA 1984).

Furthermore, if this Court concludes there was error, it was clearly harmless error under the authorities cited above, and therefore, cannot be grounds for reversal of Appellant's conviction.

ISSUE III

WHETHER THE TRIAL COURT ERRED IN ADMITTING THE PRIOR CONSISTENT STATEMENT OF SYLVESTER DUMAS.

Appellant next challenges the trial court's admission of the prior consistent statement of Sylvester Dumas. Generally, a witness' testimony cannot be corroborated by a prior consistent statement. Jackson v. State, 498 So.2d 906 (Fla. 1986). However, an exception to this rule is recognized when the statement is offered to rebut an expressed or implied charge of improper influence, motive or recent fabrication. §90.801(2)(b), Fla. Stat. (1985); Jackson v. State, 498 So.2d at 910; Gardner v. State, 480 So.2d 91 (Fla. 1985); Van Gallon v. State, 50 So.2d 882 (Fla. 1951). This exception is only applicable where the prior consistent statement was made "prior to the existence of a fact said to indicate bias, interest, corruption, or other motive to falsify." Jackson v. State, 498 So.2d at 910.

In Wilson v. State, 434 So.2d 59 (Fla. 1 DCA 1983), defense counsel cross-examined a state witness extensively about her own plea negotiations, the State's sentencing recommendations in her case and the fact that her sentencing was being delayed until after the defendant's trial. The court held that the witness' prior consistent statement, which was made at the time of her arrest and before any plea negotiations had taken place, was properly admitted to rebut defense counsel's implied assertion of improper influence, motive or recent fabrication.

Similarly, in the instant case, defense counsel implied that Sylvester Dumas' testimony was the result of improper influence,

motive or recent fabrication. Thus, defense counsel questioned Dumas about whether he received favorable assistance from law enforcement officers following his arrest in January 1985. (R 1021 - 1022) Defense counsel also questioned Dumas about the fact that he was awaiting sentencing on other charges, and the sentencing was to occur in October, after Appellant's trial. (R 1024 - 1025) Each of these instances occurred after August 1982, the time when Dumas gave the prior consistent testimony. Therefore, Dumas', prior consistent statement was properly admitted to rebut defense counsel's implied assertion of improper influence, motive or recent fabrication.

ISSUE IV

WHETHER THE TRIAL COURT ERRED IN REFUSING TO GRANT A MISTRIAL WHEN THE PROSECUTOR ASKED DEFENSE WITNESS DENNIS COLLINS IF HE HAD EVER BEEN ARRESTED FOR HOMICIDE.

As his fourth point on appeal, Appellant contends that the prosecutor improperly impeached defense witness Dennis Collins and that the trial court erred in refusing to grant a mistrial on that basis.

The prosecutor asked Collins whether he had ever been convicted of a crime, and Collins responded that he had. (R 1520) The prosecutor then inquired as to the nature of that crime. Defense counsel objected to that question, and the objection was sustained. (R 1520 - 1524) Thus, the jury did not hear an answer to that question. There was no error on this ground. The prosecutor's initial question was entirely proper. See, Jackson v. State, 498 So.2d 906 (Fla. 1986); Fulton v. State, 335 So.2d 280 (Fla. 1976). Defense counsel's objection to the second question was appropriately sustained, and no answer was given.

The prosecutor subsequently asked whether Collins had ever been arrested on a homicide charge. (R 1524) The purpose of this question was to impeach Collins' credibility by showing that nine years ago Collins was arrested for homicide and defense counsel, who was then an assistant state attorney, subsequently dismissed the charges. (R 1525) Defense counsel's objection was sustained. (R 1525)

Appellee would submit this line of impeachment was proper to show bias on the part of Collins under §90.608, Fla. Stat.

(1985). However, this Court has held a party cannot impeach a witness by reference to a crime for which there has been no conviction. Fulton v. State, 335 So.2d at 284. Thus, the particular question asked by the prosecutor may have been improper. However, the question did not warrant granting a mistrial.

As stated in Issue II of this brief, a mistrial is only appropriate where the error committed was so prejudicial as to vitiate the entire trial. Duest v. State, 462 So.2d 446, 448 (Fla. 1985); Salvatore v. State, 366 So.2d 745, 750 (Fla. 1978), cert. denied, 444 U.S. 885, 100 S.Ct. 177, 62 L.Ed.2d 115 (1979). If an alleged error does no substantial harm and causes no material prejudice, a mistrial should not be granted. Breedlove v. State, 413 So.2d 1 (Fla. 1982), cert. denied, 459 U.S. 882, 103 S.Ct. 184, 74 L.Ed.2d 149 (1982). The trial court did not abuse its discretion in refusing to grant a mistrial on this ground. The appropriate remedy in this case was to ask for a curative instruction. See, Mabery v. State, 303 So.2d 369 (Fla. 3 DCA 1974). Appellant failed to request such an instruction.

Furthermore, any error on this ground was clearly harmless. Dennis Collins' testimony was of little significance in this case. The substance of his testimony was that he had a room at Appellant's brother's house, and one weeknight Appellant came to the house to borrow his brother's truck to move something. (R 1516 - 1518) Collins could not recall the date of this incident. (R 1518) In light of the other evidence in this case, it cannot be said that the prosecutor's improper attempt to impeach this witness tainted the entire proceeding.

ISSUE V

WHETHER THE TRIAL COURT ERRED IN REFUSING TO ALLOW APPELLANT AND APPELLANT'S WIFE TO EXPLAIN THEIR PRIOR INCONSISTENT STATEMENTS ON DIRECT EXAMINATION.

During the defense's case, Appellant and his wife were called as witnesses. Both of them had previously given inconsistent statements, and on direct examination, defense counsel sought to have them explain the inconsistencies. (R 1595, 179?). Pursuant to the prosecutor's objections, the trial court refused to allow this testimony on direct examination on the grounds that it was improper impeachment. (R 1597, 1754, 1758 - 1759) Appellant contends the trial court committed reversible error by prohibiting this testimony on direct examination.

Appellant relies on Bell v. State, 491 So.2d 537 (Fla. 1986). In Bell, this Court held there was nothing improper about allowing counsel, on direct examination, to ask his or her own witness about a prior inconsistent statement in order to "take the wind out of the sails" of an attack on the witness' credibility. Id. at 538. However, Bell was decided after Appellant's trial. In ruling on the State's objections, the trial court relied upon the law in effect at the time of the trial, which was that such anticipatory rehabilitation was improper. (R 1754, 1758 - 1759) See, Ryan v. State, 457 So.2d 1084 (Fla. 4 DCA 1984), pet. for rev. denied, 462 So.2d 1108 (Fla. 1985); Price v. State, 469 So.2d 210 (Fla. 5 DCA 1985), aff'd. on other grounds, 491 So.2d 536 (Fla. 1986).

The scope and limitation of cross-examination lies within the sound discretion of the trial court and is not subject to review except for clear abuse of discretion. Sireci v. State, 399 So.2d 964 (Fla. 1981), cert. denied, 456 U.S. 984, 102 S.Ct. 2257, 72 L.Ed.2d 862 (1982). The trial court cannot be considered to have abused its discretion by applying the law in effect at the time of this trial.

Furthermore, the fact that Bell effected a change in the law does not warrant reversal on this ground. Bell makes clear that what is at issue is not a defendant's substantive rights, but merely trial strategy. In her concurring opinion, Justice Barkett states, "[c]ourts are not in the business of insuring 'tactical advantages' to one side or the other without any legal basis," and "[i]f a jury is going to hear it, it matters not when it is heard." Id. at 538 (Barkett, J., concurring).

In the instant case, the prosecutor did use the prior inconsistent statements for impeachment on cross-examination. Both witnesses explained the reasons for the inconsistencies. Moreover, defense counsel conducted re-direct examination and could have given both witnesses further opportunity to explain the prior inconsistent statements if counsel thought this was necessary. Reversal is not warranted in this case simply because defense counsel was not permitted to destroy the prosecutor's tactical advantage by having Appellant and his wife explain their inconsistent statements on direct examination.

ISSUE VI

WHETHER THE TRIAL COURT ERRED IN REFUSING TO ALLOW DEFENSE COUNSEL TO IMPEACH STATE WITNESS SYLVESTER DUMAS WITH STATEMENTS MADE AT A PRIOR DEPOSITION.

Appellant next argues defense counsel should have been permitted to impeach Sylvester Dumas with statements made during a prior discovery deposition. During cross-examination, Dumas testified he was not familiar with James Lucas' reputation in the community for truth and veracity. (R 1038) On re-direct examination, Dumas testified he "couldn't say that [Lucas] had that reputation in either way of truthful or untruthful." (R 1065) On re-cross examination, defense counsel challenged Dumas' testimony that he was unaware of Lucas' reputation in the community for truth and veracity and attempted to impeach Dumas with the following statements from a prior deposition. (R 1067 - 1069):

> Q. All right. And the length of time that you knew "Crunch" throughout his lifetime and your lifetime would be, roughly, what? Several years?
>
> A. Many years.
>
> Q. Many years?
>
> A. Uh-huh. Maybe eighteen years or more or so.
>
> Q. And you know "Crunch's" reputation, I guess, in this community, don't you.
>
> A. Uh-huh.
>
> Q. Guys you hang around with?
>
> A. Uh-huh.

Q. Would you consider yourself, and this is an aside, but would you consider "Crunch" to be a truthful person or is he a liar?

A. He's a liar.

(R 3150 - 3151)

The trial court properly excluded these statements. First of all, Dumas' statements were not inconsistent. At trial, Dumas was asked about Lucas' reputation in the community for truth and veracity. At the deposition, Dumas was asked whether, in his opinion, Lucas was a truthful person or a liar. Contrary to Appellant's suggestion, there was no ambiguity in the question and the response. The questions simply were not the same, and therefore, Dumas' answers cannot be considered inconsistent.

Secondly, Dumas' statement during the discovery deposition was inadmissible under §90.609(1), Fla. Stat. (1985). Under Section 90.609, only a person's general reputation in the community for truthfulness is admissible. An individual's personal opinion as to a witness' reputation for truth and veracity is not admissible. Antone v. State, 382 So.2d 1205, 1214 (Fla. 1980), cert. denied, 449 U.S. 913, 101 S.Ct. 287, 66 L.Ed.2d 141 (1980).

ISSUE VII

WHETHER THE PROSECUTOR MADE IMPROPER ARGUMENTS DURING HIS PENALTY PHASE CLOSING ARGUMENT SUCH THAT A REMAND FOR RESENTENCING IS REQUIRED.

Appellant contends the prosecutor's comments during closing argument in the penalty phase of the trial were so improper that a new sentencing hearing is required. Appellee would submit one of the challenged comments was not objected to and therefore, may not be raised on appeal. Furthermore, neither of the comments rises to the magnitude of a denial of fundamental fairness.

"Comments of counsel during the course of a trial are controllable in the discretion of the trial court, and an appellate court will not overturn the exercise of such discretion unless a clear abuse has been made to appear." Teffeteller v. State, 439 So.?d 840, 845 (Fla. 1983). This Court has held that during the penalty phase of trial, which is advisory only, prosecutorial error must be egregious to warrant vacating the sentence and remanding for resentencing. Bertolotti v. State, 476 So.2d 130 (Fla. 1985). "Each case must be considered upon its own merits and within the circumstances pertaining when the questionable statements are made." Bush v. State, 461 So.2d 936, 941 (Fla. 1985), cert. denied, ___ U.S. ___, 106 S.Ct. 1237, 89 L.Ed.2d 345 (1986), quoting, Darden v. State, 329 So.?d 287, 291 (Fla. 1976), cert. dismissed, 430 U.S. 704, 97 S.Ct. 1671, 51 L.Ed.2d 751 (1977). Only where clear prosecutorial abuse exists will the case be remanded for resentencing. Bush v. State, 461 So.2d at 942.

First, Appellant challenges the following comments:

> I would suggest to you that in prison Mr. Jackson can visit him, that he can write letters to his family and receive letters from his family. That he can read books, have friends, see the sun come up in the morning, smell coffee. But Terrence and Roger can't do any of those things any more.

(R 2008) This argument was not simply asking that Appellant be put to death because the victims could no longer enjoy life. It was a response to the anticipated argument by defense counsel that life imprisonment was sufficient punishment for Appellant's crimes. The prosecutor was pointing out to the jury why the death penalty was the appropriate penalty in this case. Furthermore, even if the comments were improper, they cannot be said to have been so improper as to taint the entire penalty phase of the trial.

Appellant also challenges these comments of the prosecutor:

> I said it before and in closing let me just say that Sylvester Dumas was afraid that no one would care. I'm going to ask you to go back in this jury room and I'm going to ask you to do your duties, nothing more but nothing less, and I'm going to ask you to show Sylvester Dumas that this community does care about those sort of crimes and I'm going to ask you to recommend to this judge that Mr. Jackson be executed on both counts.

(R 2011) No objection was made at the time these were made. Accordingly, this issue was not preserved for appeal. Rose v. State, 461 So.2d 84 (Fla. 1984), cert. denied, ___ U.S. ___, 105 S.Ct. 2689, 86 L.Ed.2d 706 (1985); Jones v. State, 411 So.2d 165 (Fla. 1982), cert. denied, 459 U.S. 891, 103 S.Ct. 189, 74 L.Ed.2d 153 (1982).

Moreover, there was nothing improper about the prosecutor's comments in the context in which they were made. The victims in this case were known drug addicts. Neither apparently had a job, and both spent most of their time just "hanging out" on 22nd Street looking for ways to support their habits. Thus, it was imperative that the prosecutor point out that, whatever else, Terrence Milton and Roger McKay were human beings, and their murders should not be considered less reprehensible than the murders of more respectable people.

ISSUE VIII

WHETHER THE TRIAL COURT ERRED IN GIVING THE STANDARD JURY INSTRUCTIONS DURING THE PENALTY PHASE OF THIS TRIAL?

As his eighth point on appeal, Appellant challenges the standard jury instructions given during the penalty phase of his trial. Appellee would note initially that no objection was made to the jury instruction prior to the time the jury retired to consider the penalty to recommend. Accordingly, this issue was not preserved for appeal. Fla. R. Crim. P. 3.390(d).

Furthermore, Appellant is not entitled to reversal on the merits of this issue. The following instructions of the trial court are pertinent to this Court's consideration of this issue:

> THE COURT: All right. Ladies and Gentlemen of the Jury, you have found the Defendant guilty of two counts of First Degree Murder. The punishment for these crimes is either death or life imprisonment without the possiblity of parole for twenty-five years.
>
> The final decision as to what punishment shall be imposed rests solely with the judge of this court. However, the law requires that you, the Jury, render to the court an advisory sentence as to what punishment should be imposed upon the Defendant.

(R 1999)

> As you have been told, a 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 be now given to you by the Court and render to the Court an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty, and whether

> sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist.
>
> (R 2015)

> 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 bar your best judgment in reaching your advisory sentence.
>
> (R 2018)

In the face of those instructions, any argument that the jury was not fully aware of the magnitude of its responsibility in sentencing is clearly without merit. Furthermore, this Court has recently held that the standard jury instruction is a correct statement of Florida law, and therefore, the giving of that instruction does not contravene Caldwell v. Mississippi, 472 U.S. ___, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985). Aldridge v. State, 12 F.L.W. 129 (Fla. Mar. 12, 1987).

Appellee would add that this case is clearly distinguishable from Adams v. Wainwright, 804 F.2d 1526 (11th Cir. 1986), wherein the trial court substantially departed from the standard penalty phase instructions. In the instant case, the trial judge gave the standard jury instruction.

ISSUE IX

WHETHER THE TRIAL COURT ERRED IN IMPOSING THE DEATH PENALTY FOR THE MURDER OF TERRENCE MILTON.

Florida law provides for a separate sentencing procedure once a defendant has been convicted of capital murder. At the sentencing hearing, the jury and the judge are presented additional evidence which is relevant to the nature of the offense and the character of the defendant. This Court has consistently held that death is the appropriate sentence where there are one or more aggravating circumstances and no mitigating circumstances. Blanco v. State, 452 So.2d 520 (Fla. 1984), cert. denied, 469 U.S. 1181, 105 S.Ct. 940, 83 L.Ed.2d 953 (1985); Alford v. State, 307 So.2d 433 (Fla. 1975), 428 U.S. 912, 96 S.Ct. 3227, 49 L.Ed.2d 1221 (1976).

The trial court properly found three aggravating circumstances had been established beyond a reasonable doubt: (1) Appellant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person; (2) the capital felony was especially heinous, atrocious or cruel; and (3) the capital felony was a homicide and was committed in a cold, calculated and premediated manner, without any pretense of moral or legal justification. (R 2552 - 2554) The trial court found further that no statutory mitigating circumstance applied in this case. (R 2555)

Appellee challenges the trial court's findings that the murder was especially heinous, atrocious or cruel and was committed

in a cold, calculated and premeditated manner. It is the duty of this Court to review the sentence of death to determine whether there are clear and convincing reasons warranting imposition of the death penalty. Harvard v. State, 375 So.2d 833 (Fla. 1977); Antone v. State, 382 So.2d 1205 (Fla. 1980), cert. denied, 449 U.S. 913, 101 S.Ct. 287, 66 L.Ed.2d 141 (1980). The purpose of this review is to determine whether the jury and trial judge acted with procedural recitude and to ensure relative proportionality among death sentences. Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981). Appellee submits the jury and judge followed all of the procedural requirements, and the facts and circumstances of this case justify the imposition of the death sentence.

A. THE CAPITAL MURDER WAS ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL

This Court has defined the aggravating circumstance of especially heinous, atrocious or cruel as follows:

> It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and, that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies - the conscienceless or pitiless crime which is unnecessarily torturous to the victim.

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).

Appellant's characterization of the murder of Terrence Milton as a "simple shooting death" totally ignores the record in this case. The record established that after murdering Roger McKay, Appellant induced Terrence Milton into going for a ride in Appellant's car and shot him in the back. (R 617) Milton did not die as a result of that bullet. (R 619) He was forced to lie on the back floor of Appellant's car while being driven for several hours to remote areas of Hillsborough County. (R 620) During that time, Milton pleaded and negotiated to be taken to the hospital. (R 619 - 620) Appellant refused. (R 619) Instead, Milton was beaten in the head several times with a gun. (R 618 - 619, 623) Milton was then forced to get into a garment bag, which Appellant zipped up, and then forced to lie down again on the back seat. (R 623) As they continued to drive around, Milton struggled to get out of the bag. (R 626) Appellant then stopped the car on a bridge, dragged Milton from the car by his hair, shot him in the head twice and threw his body into the Hillsborough River. (R 626 - 628)

As the trial court found, Appellant obviously suffered extreme physical and emotional pain between the time he was first shot until the time he died. Appellant's reliance on Teffeteller v. State, 439 So.2d 840 (Fla. 1983) is misplaced. In Teffeteller, the victim received a single gunshot and then lingered before death in a hospital. In the instant case, after the initial shooting, the victim suffered for hours in Appellant's car. He knew his friend had already been killed, and therefore,

his own death was likely. He pleaded for his life, was beaten several times and was finally shot in the head twice.

The physical pain Milton suffered was sufficient to find this murder especially heinous and cruel. Furthermore, the mental pain which Milton must have suffered, obviously aware death was imminent, has also been found sufficient to constitute a finding that this felony was especially heinous, atrocious and cruel. See, Way v. State, 496 So.2d 126 (Fla. 1986); Scott v. State, 494 So.2d 1134 (Fla. 1986); Routly v. State, 440 So.2d 1257 (Fla. 1983), cert. denied, 468 U.S. 1220, 104 S.Ct. 3591, 82 L.Ed.2d 888 (1984); Knight v. State, 338 So.2d 201 (Fla. 1976).

Should this Court find this aggravating circumstance was not established beyond a reasonable doubt, death is still the appropriate sentence. The trial court found other valid aggravating circumstances, no statutory mitigating circumstances; and concluded that certain non-statutory mitigating factors, i.e., Appellant's model behavior while incarcerated, constituted only a "mildly mitigating" circumstance. (R 2555) In such a situation, a sentence of death is proper under §921.141, Fla. Stat. (1985). Armstrong v. State, 429 So.2d 287 (Fla. 1983), cert. denied, 464 U.S. 865, 104 S.Ct. 203, 78 L.Ed.2d 177 (1983); Antone v. State, supra.

B. THE CAPITAL MURDER WAS COLD, CALCULATED AND PREMEDITATED.

The aggravating circumstance of cold, calculated and premeditated is found to exist when the "facts show a particularly lengthy, methodic, or involved series of events or a substantial period of reflection and thought by the perpetrator." Preston v.

State, 466 So.2d 939 (Fla. 1984). This aggravating circumstance ordinarily applies to those murders characterized as executions or contract murders. McCray v. State, 416 So.2d 804 (Fla. 1982).

The record in this case clearly supports the trial court's finding that the murder of Terrence Milton was committed in a cold, calculated and premeditated manner. It was established that, after he killed Roger McKay, Appellant cleaned his car to remove any traces of that crime. (R 597 - 603) He then met with Terrence Milton and gave Milton money with which to purchase drugs. (R 610) Appellant had Milton accompany him and Lucas to his car, under the pretense of going to James Lucas' house. (R 612) Appellant then told Milton they were going to Appellant's house in Lutz. (R 613) On the way, Appellant began arguing with Milton. (R 615) Milton was then told that McKay was in the trunk dead. (R 616) Milton tried to ge out of the car, but Appellant shot him. (R 617)

The murder of Terrence Milton was clearly planned in a cold, calculated and premeditated manner. Appellant sought out Milton with every intention of killing Milton as he had killed McKay. There was no passion or sudden provocation involved in the killing. There was also no allegation the act was committed in self-defense. Accordingly, the facts of this case clearly warranted a finding that this crime was committed in a cold, calculated and premeditated manner.

Should this Court determine this aggravating circumstance was not established by clear and convincing reasons, Appellee

submits death is still the appropriate sentence. As pointed out in subsection A of this issue, the trial court found other valid aggravating circumstances, no statutory mitigating circumstances and only a "mildly mitigating" non-statutory circumstance in this case.

CONCLUSION

Based on the above stated facts, arguments 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 W. C. McLain, Assistant Public Defender, Hall of Justice Building, 455 North Broadway, P.O. Box 1640, Bartow, Florida 33830-3798, this 7th day of April, 1987.

K Blanco for Kim Munch

OF COUNSEL FOR APPELLEE.