IN THE SUPREME COURT OF THE STATE OF FLORIDA

JERRY WILLIAM CORRELL,

Appellant,

vs. CASE NO. 68,393

STATE OF FLORIDA,

Appellee.

_____/

REPLY BRIEF OF APPELLANT

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POINT I

THE TRIAL COURT ERRED IN DENYING THE MOTION TO SUPPRESS THE DEFENDANT'S STATEMENTS OF JULY 1, 1985.

The Appellee contends in Point I of its Brief that the Appellant waived his objection to the admission of the Appellant's taped statement of July 1, 1985, and which was the subject of the Motion to Suppress Statements, on the grounds that no objection had been made to the testimony of Detective Diane Payne. Detective Payne's testimony consisted of a general summary of the Appellant's July 1, 1985, taped statement to her. The Appellee then contends that the taped statement was cumulative to the unobjected to testimony of Detective Payne and therefore the admission of the taped statement is not reversible error since the jury had already been apprised of the same information through a different, unchallenged source, citing Echols v. State, 484 So.2d 568 (Fla. 1985). The Appellant strongly disagrees with the Appellee's assertion that the taped statement was cumulative to the earlier testimony of Detective Payne. A comparison of the testimony of Detective Payne (TR-1075-1081) with the taped statement given by the Appellant (Exhibit 199) indicates that there were many matters discussed in the taped statement which were not testified to by Detective Payne in her earlier testimony. Therefore, the taped statement cannot in any way be considered cumulative with the earlier unobjected to testimony of Detective Payne. Consequently, the Appellant did not waive his objection to the introduction

of his taped statement of July 1, 1985.

Proceeding to the merits of the Motion to Suppress Statements, it is clear that the Appellant should have been advised of his right to an attorney under Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602 (1966). From the evidence presented at the Hearing on the Motion to Suppress Statements, and in light of the totality of the circumstances, it was reasonable for the Appellant to believe that his freedom of movement was restrained at least until such time as he was informed otherwise. See Drake v. State, 441 So.2d 1079 (Fla. 1983), cert denied 104 S.Ct. 2361 (1984). Failure to advise the Appellant of his Miranda warnings dictates that the Appellant's July 1, 1985, statement should have been suppressed by the trial court. Failure of the trial court to suppress the statement constitutes reversible error. Therefore, the Appellant's convictions should be reversed and this cause remanded for a new trial.

POINT II

THE TRIAL COURT ERRED IN ADMITTING INTO EVIDENCE OVER DEFENSE OBJECTION, PHOTOGRAPHS THAT WERE CUMULATIVE AND SO GRUESOME AS TO UNDULY PREJUDICE THE DEFENDANT.

The Appellee first questions the extent to which this Point is properly before this Court as it contends that neither this Court nor the court below was apprised as to the identity of those individual photographs which the Appellant found objectionable. Appellant contends that trial counsel did specify which photographs he found to be objectionable and therefore this Point has been properly preserved for appeal.

As has been previously noted by both the Appellant and the Appellee, the Appellant filed a Motion for Pre-trial Hearing to Determine Admissibility of Photographs on November 26, 1985. (TR-3934-3935). Two hearings were conducted on this Motion, one on December 10, 1985, and the other on December 12, 1985. The hearing that was conducted on December 10, 1985 related to photographs that had been taken by personnel of the Orange County Sheriff's Department. During this hearing, the Appellant objected to specific photographs that the State proposed to offer in evidence during the trial of this cause. The grounds for the objection of each specific photograph was also stated by trial counsel.

On December 12, 1985, a hearing was held on the admissibility of photographs taken by the Medical Examiner. During this hearing, the Appellant also objected to specific photographs that the State proposed to offer into evidence during

the trial. Trial counsel again stated the objections for each specific photograph.

At the time that the photographs were introduced into evidence, trial counsel stated that he had no objection to the exhibits except for the "other" objections "already on the record". (TR-629, TR-758, TR-800). Appellant contends that the trial court was in fact apprised as to the identity of those photographs which Appellant found objectionable. At the two hearings that were conducted on the Appellant's Motion for Pre-trial Hearing to Determine Admissibility of Photographs, trial counsel did in fact specify which individual photographs he found to be objectionable. Although trial counsel did not again specify which photographs he found to be objectionable when the State introduced them into evidence, his general objection in effect renewed the specific objections he had made during the Hearings on December 10, 1985 and December 12, 1985. Therefore, trial counsel did specifically apprise the trial court as to those photographs that he found to be objectionable at the time they were introduced by the State into evidence. See Jackson v. State, 451 So.2d 458 (Fla. 1984).

The Appellant sufficiently preserved this Point for appeal purposes. The trial court erred in admitting into evidence the objected to photographs. Therefore, Appellant is entitled to a reversal of his convictions in this cause.

POINT V

THE TRIAL COURT ERRED IN ALLOWING DONNA VALENTINE TO TESTIFY THAT SUSAN CORRELL WAS AFRAID OF THE DEFENDANT.

As previously noted in both the Appellant's Brief and the Appellee's Brief, during the course of the testimony of Donna Valentine the following took place in her direct examination by the State: (TR-527-529):

QUESTION: How would you characterize the relationship between Susan Correll and the defendant during the period of their separation and then after their divorce?

ANSWER: They were friendly with each other. Susan would get upset many times because of mental abuse.

QUESTION: Alright. Now during this period of time, did she display or exhibit any fear of the defendant?

ANSWER: Yes, she had.

The Appellant objected to this testimony on the basis that it was hearsay testimony and did not go to any question of whether or not the Appellant committed the acts charged in the Indictment. (TR-528). After the Court overruled the objection the following questioning then took place:

QUESTION: The question was, did Susan Correll display or exhibit fear of the defendant?

ANSWER: Was she afraid of Jerry?

QUESTION: Did she display anything that appeared to you as fear of the defendant?

ANSWER: Yes, in language.

The Appellee first questions the preservation of this Point for appeal arguing that Ms. Valentine's answer of "Yes,

in language" to the question of "Did she display anything that appeared to you as fear of the defendant?" was not hearsay in that such testimony was a result of the witness' own observations.

Appellant contends that this testimony was in fact hearsay and takes issue with the Appellee's argument that this language could have been a statement such as, "I just bought a new deadbolt for the front door, and you know why." This language conjures up thoughts that Donna Valentine was specifically told by Susan Correll that she was afraid of the Appellant. No other logical inference can be drawn from the testimony of Ms. Valentine. Therefore, this Point has been sufficiently preserved for appeal.

Susan Correll's extrajudicial statements to Donna Valentine do not fall within the state of mind exception contained in Florida Statute Section 90.803(3)(a) as her state of mind was neither at issue nor probative of any material issue raised in this murder prosecution.

The Appellee next contends that even if the admission of this evidence was improper, the error was harmless. In the case of State v. DiGuilio, 491 So.2d 1129 (Fla. 1986), this court indicated that the burden is on the State to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict. This court further indicated in DiGuilio that the application of the harmless error test required an examination of the entire record including an examination of the permissible evidence on which the jury could

have legitimately relied and an even closer examination of the impermissible evidence which might have possibly influenced the jury's verdict. The State's evidence against the Appellant was almost wholly circumstantial. The improperly admitted hearsay statements of Susan Correll was an attempt to impute the state of mind of the Appellant at the time of these homicides. Therefore, the admission of the hearsay statements cannot be deemed harmless under the circumstances of this case. See Kennedy v. State, 385 So.2d 1021 (Fla. 5th D.C.A. 1980); Bailey v. State, 419 So.2d 721 (Fla. 1st D.C.A. 1982); Hunt v. State, 429 So.2d 811 (Fla. 2nd D.C.A. 1983).

The trial court should not have allowed the testimony of Donna Valentine into evidence. This error not being harmless, the Appellant's convictions should be reversed and this cause remanded for a new trial.

POINT VI

THE TRIAL COURT ERRED IN GRANTING THE STATE'S ORAL MOTION TO REDACT THE LAST SIX OR SEVEN PAGES OF THE TRANSCRIPT OF THE DEFENDANT'S STATEMENT GIVEN TO DETECTIVE PAYNE ON JULY 1, 1985.

The Appellee first contends that the record on appeal does not contain the redacted or excised portions of the Appellant's statement of July 1, 1985, and therefore questions whether this Point has been preserved for appeal. This Point has been sufficiently preserved for appeal since the redacted portions of the Appellant's statement of July 1, 1985, are contained in the record on appeal. Exhibit 199 consists of the entire taped statement that the Appellant made to Detective Payne on July 1, 1985, as well as a transcript of that statement with the last six or seven pages of the taped statement redacted from it. Based on the trial court's ruling on the State's oral motion to redact, when the tape was played to the jury during the trial of this cause, it was stopped partway into the tape. The transcript reflects only that portion of the tape that was played to the jury. The redacted portions of the Appellant's statement are contained in the tape which is a part of the record on appeal. Therefore, this Court is able to review the redacted portions of the Appellant's statement in deciding this Point on appeal.

The Appellant agrees with the Appellee's position that not everything an individual defendant says must be admitted, regardless of relevancy. The Appellant contends that the

redacted portion of the tape was in fact relevant and should not have been redacted from the statement. In fact the trial court found the redacted portion of the tape not to be inadmissible stating (TR-938):

> THE COURT: I have to agree. I am not saying there is anything objectionable about that portion of the tape. My ruling was simply that the State should not be required to present it.
>
> If you wish to present it, if Mr. Correll wishes to present it, he will have that opportunity because I am not saying that portion is not admissible or is entirely irrelevant.
>
> I don't think self-serving statements, such as these rambling self-serving statements, the State should not be required to place before the jury in their case.

Since the trial court found that the redacted portions of the tape were in fact admissible, the State should have been required to play the entire tape to the jury. Echols v. State, 484 So.2d 568 (Fla. 1985).

The Appellee next contends that the trial court's ruling on the motion to redact did not prohibit defense counsel, on cross-examination of Detective Payne, from seeking to introduce the redacted portions of the statement. A literal reading of the court's ruling would indicate that the Appellant was prohibited from cross-examining Payne concerning the redacted portions and that the only possible way that these statements could be presented to the jury would be by way of testimony of the Appellant himself or possibly requiring the Appellant to call Detective Payne as a witness. The trial

court's ruling prohibiting the Appellant from cross-examining Detective Payne concerning the redacted portions of the taped statement violated the Appellant's right to a full and fair cross-examination of the witness. See Steinhorst v. State, 412 So.2d 332 (Fla. 1982); Ackerman v. State, 372 So.2d 215 (Fla. 1st D.C.A. 1979); Thalheim v. State, 38 Fla. 169, 20 So. 938 (Fla. 1896); West v. State, 53 Fla. 77, 43 So. 445 (Fla. 1907); Coco v. State, 62 So.2d 892 (Fla. 1953).

The granting of the State's oral motion to redact by the trial court constitutes reversible error. Therefore, the Appellant's convictions should be reversed and this cause remanded for a new trial.

POINT VII

THE TRIAL COURT ERRED IN ALLOWING INTO EVIDENCE PURPORTED WILLIAMS RULE EVIDENCE.

The Appellee initially argues in this Point on appeal that this Point is not properly before the Court as the Appellant did not object to this purported Williams Rule evidence at the time the evidence was introduced at trial. The record indicates that after the selection of the jury but prior to any of the testimony being presented, the Appellant objected to the introduction of the Williams Rule evidence on the grounds that it was too remote in time and that it did not relate to the crimes charged in the Indictment. (TR-437). Additionally, the Appellant objected to the admissibility of this evidence on the grounds that since there were no eyewitnesses to the alleged incident, the evidence was merely speculative. (TR-438). The court thereupon denied the Appellant's objection to the admissibility of this Williams Rule evidence. (TR-440).

On January 31, 1986, two days after the Appellant's objection to this Williams Rule evidence, the State called two witnesses to testify concerning this similar fact evidence. (TR-1132-1337; 1138-1145). At the time of the testimony of these two witnesses, another objection was not made by the Appellant to this similar fact evidence. The Appellant contends that although no objection was made at the time the two witnesses were called to testify, the initial objection to this testimony was sufficient to preserve this Point for appeal purposes.

The purpose of an objection is to apprise the trial

judge of what is perceived as being error so that the court can make a ruling thereon. As this court stated in Jackson v. State, 451 So.2d 458 (Fla. 1984), citing Castor v. State, 365 So.2d 701 (Fla. 1978):

> "The objection must be both timely and 'sufficiently specific both to apprise the trial judge of the putative error and to preserve the issue for intelligent review on appeal'".

When the Appellant objected to this Williams Rule evidence prior to the commencement of the testimony, he apprised Judge Stroker of the perceived error in allowing the admission of this similar fact evidence and specifically stated the grounds for said objection. Judge Stroker was then able to rule on the admissibility of this Williams Rule evidence. This court should therefore not consider this Point on appeal waived by the mere failure of the Appellant, immediately prior to the testimony of the two similar fact evidence witnesses, to say "I renew my objection to this testimony" and then the court denying said renewed objection.

The Appellant previously discussed the merits of this Point on appeal in his Initial Brief. (See Point VII, pages 53-59). It is the Appellant's position that the details of the incident involving the slashing of Richard Henestofel's tires and the alleged slashing of Susan Correll's tires on May 15, 1982, were not sufficiently similar to be relevant and that this court's decisions in Peek v. State, 488 So.2d 52 (Fla. 1986), Drake v. State, 400 So.2d 1217 (Fla. 1981) and Thompson v. State, 494 So.2d 203 (Fla. 1986) dictate that this purported Williams

Rule evidence be found to have been inadmissible.

Finally, the Appellee contends that if it was error to admit this Williams Rule evidence, such error was harmless. In making this argument, the Appellee noted this court's holding in Straight v. State, 397 So.2d 903 (Fla. 1981), regarding the presumed harmful effect of any erroneous admission of uncharged criminal activity. Therefore, the admission into evidence of the inadmissible Williams Rule evidence in this cause is presumed to be harmful. Even applying the harmless error test enunciated in State v. DiGuilio, supra, a case which did not deal with the admission of Williams Rule evidence but instead dealt with the issue of a comment on a defendant's silence, there is a reasonable possibility that the jury in this case gave undue weight to the Williams Rule evidence in reaching their verdicts.

For the reasons stated, the trial court committed reversible error in allowing this Williams Rule testimony into evidence. This error not being harmless, the Appellant's convictions should be reversed and this cause remanded for a new trial.

POINT VIII

THE TRIAL COURT ERRED IN ALLOWING THE TESTIMONY OF STATE'S WITNESS, DAVID MURRAY.

Appellee contends in this Point on appeal that the Appellant did not object to the testimony of David Murray on the grounds that the state of mind of Susan Correll was not at issue in the trial of this cause and that therefore, this issue has not been preserved for appeal purposes. The Appellant disagrees with this argument as it appears that during the argument on the Appellant's objection to the testimony of David Murray, the court directly dealt with the issue of the state of mind of Susan Correll. While the court was reviewing the case of Barwick v. State, 82 So.2d 356 (Fla. 1955), it noted at TR-1238:

> THE COURT: Well, this case, although partially on point, applies to the state of mind of the defendant in establishing a self-defense rationale. That was whether in his own mind there was a clear and present danger justifying his actions. Therefore, the state of mind was particularly relevant in that case.
>
> It appears that the State in this case is offering this not so much to demonstate the state of mind of the defendant, but that he had in the past threatened, I think, to kill Susan Correll; is that correct?

Therefore, this Point has been sufficiently preserved for appeal.

The testimony of Mr. Murray was totally irrelevant to the charges contained in this Indictment. Even if the fact that one evening in 1982 or 1983 the Appellant threatened to kill Susan Correll if she dated or went out with other men was

relevant, the Appellant still cannot conceive the relevancy of the fact that on this particular evening, Susan Correll was white as a ghost and just total fear (TR-1244); that she started crying and became very, very, very scared (TR-1245); and that when Mr. Murray and his wife would leave their residence, Susan would lock all the doors, deadbolt them, make sure all the windows were locked, and bring the Murray's German Sheppard into the house (TR-1246) as this testimony directly related to the state of mind of Susan Correll.

As was previously discussed in Point V of Appellant's Initial Brief, a homicide victims' state of mind prior to the fatal incident generally is neither at issue nor probative of any material issue raised in a murder prosecution. Hunt v. State, 429 So.2d 811, 813 (Fla. 2nd D.C.A. 1983). Although exceptions to this rule of law do exist, none of these exceptions are applicable to the case at bar.

Allowing the testimony of Mr. Murray concerning the state of mind of Susan Correll during an incident that occurred some time in 1982 or 1983 was highly prejudicial to the Appellant. The error in allowing this testimony dictates that the Appellant's convictions be reversed and this cause remanded for a new trial.

POINT IX

THE TRIAL COURT ERRED IN ALLOWING DAVID B. BAER TO TESTIFY CONCERNING THE RESULTS OF BLOODTESTS CONDUCTED BY WAY OF THE ELECTROPHORESIS PROCESS.

The Appellee first contends that the cases of People v. Young, 340 NW.2d 805 (Mich. 1983) and People v. Brown, 220 Cal.Rptr. 637 (Cal. 1985) which were relied upon by trial counsel when objecting to the testimony of Mr. Baer concerning the results of the electrophoresis process and which were also cited by the Appellant in his Initial Brief, do not necessarily represent the mainstream in legal thinking on the issue of the admissibility or reliability of evidence obtained through electrophoresis. The Appellee then cites a number of cases from different jurisdictions which have expressly approved admission of such evidence. A review of the cases cited by both the Appellant and the Appellee makes it clear that the acceptance of tests for typing stale body fluid stains is a matter of substantial legal controversy. Where that issue remains open, it is the Appellant's position that the party offering the evidence has the burden of proving in the trial court that a consensus of scientific opinion has been achieved. This was not proven by the State in the trial of this cause.

In the case of People v. Young, supra, the Supreme Court of Michigan remanded the case to the trial court for an evidentiary hearing to determine whether the results of electrophoresis had achieved general scientific acceptance for reliability among impartial and disinterested experts. A hearing

on the admissibility of the electrophoresis process was held in the trial court and the record of the hearing was transmitted to the Supreme Court. Witnesses were called by both the State and the defense. Supplemental briefs were then filed and the cause was reargued before the Supreme Court.

Based on the evidence presented at this hearing, the Michigan Supreme Court in the case of People v. Young, 391 NW.2d 270 (Mich. 1986), concluded that the prosecution had failed to demonstrate general acceptance of the reliability of electrophoresis of evidentiary bloodstains by the scientific community. A copy of this decision is provided in the Appendix to this Reply Brief. Appellant would note that it would appear that the case of People v. Young, supra, is the most exhaustive and complete legal review of the electrophoresis process. Therefore, the Appellant contends that the Young case, supra, is more important than any other case either cited by the Appellant or the Appellee in assisting this court in ruling on the merits of this Point on appeal.

Appellant agrees with the Appellee that while this court in the case of Bundy v. State, 471 So.2d 9 (Fla. 1985), did discuss the test enunciated in Frye v. United States, 293 F. 1013 (D.C. Cir. 1923), concerning the admissibility of new methods of proof, it did not expressly indicate whether or not such test was the law in the State of Florida. This court can resolve this Point on appeal without ruling on the applicability of Frye as the record is clear that the State failed to show the reliability of the electrophoresis process.

The trial court erred in allowing Mr. Baer to testify as to the results of the bloodtests conducted by way of the electrophoresis process. Consequently, the Appellant's convictions should be reversed and this cause remanded for a new trial. Alternatively, since this issue appears to be one of first impression within the State of Florida, the Appellant would request this court to remand this case to the trial court, as was done in People v. Young, supra, for an evidentiary hearing to determine whether the results of the electrophoresis process have achieved general scientific acceptance for reliability.

POINT XII

THE TRIAL COURT ERRED IN NOT CONDUCTING A RICHARDSON HEARING IN DETERMINING WHETHER OR NOT TO ALLOW BARBARA PIZZAROZ TO TESTIFY ON BEHALF OF THE DEFENDANT.

The Appellee argues that this Point has not been preserved for review as Judge Stroker did not expressly deny the Appellant the opportunity to call Barbara Pizzaroz as a witness and that the Appellant made no attempt to actually call Ms. Pizzaroz as a defense witness during the presentation of his evidence. Appellee further argues that trial counsel deferred to the trial court's statement of its initial inclination not to allow Ms. Pizzaroz to testify.

From the record it is obvious that the trial court denied the Appellant's request to be allowed to call Ms. Pizzaroz as a witness stating at TR-1404:

> THE COURT: Well, I don't think I would let the State interject a witness at this state in the proceedings, based upon what had gone on in the course of trial. Especially if it was a witness known to everyone before, to have some involvement in the case. So I don't think I would allow the defense to do it either.

Since the trial court was made aware of the Appellant's desire to call Barbara Pizzaroz as a witness, and the court specifically denied this request, there was no logical reason to attempt to call Ms. Pizzaroz as a witness so that the court could again rule that it would not allow her testimony. The record also shows that trial counsel did not defer to the court's ruling but instead acknowledged that the court was not going to allow

Ms. Pizzaroz to testify. Therefore, this Point has been adequately preserved for review on appeal.

Appellee further argues that there was not an adequate proffer of the testimony of Barbara Pizzaroz. The record indicates that the Appellant wished to call her as a witness to testify concerning conversations she had had on July 3, 1985, with James Nagle and Guy Kettlehone, both of whom had been called as court witnesses in the State's case in chief. (TR-1402). Consequently, there was an adequate proffer of the testimony of Ms. Pizzaroz.

Appellee next contends that to the extent that it was required, the trial court complied with the dictates of Richardson v. State, 246 So.2d 771 (Fla. 1971) when making its determination not to allow the Appellant to call Ms. Pizzaroz as a defense witness. It is the Appellant's position that the trial court, although being apprised as to the nature of Ms. Pizzaroz' testimony as well as for the reason for the failure of Appellant to list her on a witness list, did not determine whether this discovery violation prevented the State from properly preparing for trial and then determine the appropriate sanction to impose for such violation. Smith v. State, 372 So.2d 86 (Fla. 1979). The trial court also failed to inquire into the feasibility of rectifying any prejudice to the State by some means short of excluding this witness. See Adams v. State, 366 So.2d 1236 (Fla. 2nd D.C.A. 1979); O'Brien v. State, 454 So.2d 675 (Fla. 5th D.C.A. 1984); Peterson v. State, 465 So.2d 1349 (Fla. 5th D.C.A. 1985). The trial court could

very easily have allowed the State to obtain the deposition of Ms. Pizzaroz and then determined what prejudice, if any, there was due to the Appellant's failure to have previously listed her as a defense witness. The trial court failed to do this. Therefore, the trial court did not comply with the dictates of Richardson v. State, supra and Bradford v. State, 278 So.2d 624 (Fla. 1973).

This court has continously held that error committed under Richardson, supra, can never be harmless. See Cumbie v. State, 345 So.2d 1061 (Fla. 1977); Smith v. State, 500 So.2d 125 (Fla. 1986); and Bradford v. State, supra. Therefore, the trial court's error in failing to conduct a Richardson Hearing to determine whether or not to allow Barbara Pizzaroz to testify on behalf of the Appellant constitutes reversible error as a matter of law. Consequently, the Appellant's convictions should be reversed and this cause remanded for a new trial.

POINT XV

THE TRIAL COURT ERRED IN IMPOSING THE DEATH PENALTY ON THE DEFENDANT FOR THE MURDERS OF SUSAN CORRELL, MARY BETH JONES, TUESDAY CORRELL, AND MARY LOU HINES.

The trial court found that the murder of Susan Correll was committed during the course of a sexual battery, pursuant to Section 921.141(5)(d), Florida Statutes (1983). The Appellee contends that the evidence was sufficient to support this aggravating circumstance. It is the Appellant's position that the evidence that was presented in this cause did not establish beyond a reasonable doubt that the Appellant had any type of sexual intercourse with Susan Correll between June 30, 1985, and July 1, 1985. The grounds for this argument were previously discussed in Point XV of the Appellant's Initial Brief. (See pages 96-97).

Even if this court determines that the evidence proved beyond a reasonable doubt that the Appellant had sexual intercourse with Susan Correll between June 30, 1985, and July 1, 1985, the evidence did not prove beyond a reasonable doubt that the murder of Susan Correll was committed during the course of a sexual battery. Based on the evidence, there is a reasonable hypothesis that the Appellant did not have sexual intercourse with Susan Correll until after she had died. The Appellee cites the case of McCrae v. State, 395 So.2d 1145 (Fla. 1980), and McCrae v. Wainwright, 439 So.2d 868 (Fla. 1983), for the proposition that a rape can occur either shortly before or immediately following death. The McCrae case can be distinguished

from the case at bar in that McCrae was actually charged with attempted rape and his murder conviction was based upon the felony murder theory. Such is not the situation in the case at bar as the Appellant was not charged with sexual battery and the Appellant's conviction for first degree murder was based on premeditation and not on felony murder. Additionally, in the case of McCall v. State, 12 FLW 578 (Fla.5th D.C.A. Feb.19,1987) the District Court held that neither sexual battery nor robbery can be committed against a corpse. Therefore, based on the District Court's ruling in McCall v. State, supra, the trial court erred in finding as an aggravating factor that the murder of Susan Correll was committed during the course of a sexual battery.

Appellee next contends that the trial court did not err in finding that the murder of Susan Correll was especially heinous, atrocious or cruel, pursuant to Section 921.141(5)(h), Florida Statutes (1983). This aggravating circumstance has not been proven beyond and to the exclusion of every reasonable doubt. As previously noted in Point XV of Appellant's Initial Brief, the murder of Susan Correll was not accompanied by such additional acts as to set the crime apart from the norm of capital felonies. Her murder was not a conscienceless or pitiless crime which was unnecessarily torturous to her. See State v. Dixon, 293 So.2d 1 (Fla. 1973).

Finally, the Appellee contends that the trial court found as an additional aggravating circumstance that the Appellant had been previously convicted of another capital

felony pursuant to Section 921.141(5)(b), Florida Statutes (1983). It is the Appellant's position that based on the sentencing order entered by the trial judge, this aggravating circumstance was found to apply only to the murder of Mary Lou Hines. If this court should disagree with Appellant's initial position, then the Appellant would have to concede that this was a valid aggravating circumstance.

The Appellee argues that the trial court did not err in imposing the death penalty upon the Appellant for the murder of Mary Beth Jones. The trial court found pursuant to Section 921.141(5)(d), Florida Statutes (1983), that the murder of Mary Beth Jones was committed during the course of a robbery wherein it was alleged that the Appellant stole her automobile. The Appellant contends that this aggravating circumstance was not proven beyond a reasonable doubt as the facts presented at trial would indicate that the Appellant decided to take the automobile of Mary Beth Jones after she had died, and therefore the taking of the automobile was not committed during the course of the murder. As the Fifth District Court of Appeal noted in the case of McCall v. State, supra, a robbery cannot be committed against a corpse. Appellee also argues that the trial court could have found that the murder of Mary Beth Jones occurred during the course of a robbery and that the trial judge could have found that a robbery was proven by the theft of money from Ms. Jones' purse after the Appellant had stabbed her. There was no evidence presented at the trial of this cause that would have proven beyond a reasonable doubt that the Appellant

took money from Mary Beth Jones at any time during the incident that occurred between June 30, 1985, and July 1, 1985. The fact that the Appellant's blood was found inside Ms. Jones' purse and on her wallet and a bloodstained $20.00 bill was found on his person after his arrest does not prove beyond a reasonable doubt that the $20.00 was taken from Ms. Jones' purse and/or wallet. Even if it was proven that the Appellant took money from Ms. Jones' purse and/or wallet, the evidence would indicate that the taking occurred after the death of Mary Beth Jones. Since a robbery cannot be committed against a corpse, see McCall v. State, supra, the trial court could not have found this aggravating circumstance to exist.

Appellee next contends that the murder of Mary Beth Jones was committed for the purpose of avoiding or preventing a lawful arrest, pursuant to Section 921.141(5)(e), Florida Statutes (1983). As previously argued in Point XV of Appellant's Initial Brief, this aggravating circumstance was not proven beyond a reasonable doubt. This court stated in the case of Rembert v. State, 445 So.2d 337 (Fla. 1984), that:

> "Proof of the requisite intent to avoid arrest and detection must be very strong in these cases."

Such proof does not exist in this cause to support the trial court's finding that the murder of Mary Beth Jones was committed for the purpose of avoiding or preventing a lawful arrest.

Appellee argues that the trial court could have found that the murder of Mary Beth Jones was heinous, atrocious and cruel, pursuant to Section 921.141(5)(h). This aggravating

circumstance as to the death of Mary Beth Jones was not proven beyond a reasonable doubt. The standard to apply in this particular aggravating circumstance is quite clear. According to the case of State v. Dixon, supra, this court stated:

> "What is intended to be included in the category of heinous, atrocious, and cruel 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."

The record in this cause contains no evidence that Mary Beth Jones remained conscious more than a few minutes after she was assaulted. Therefore, she was incapable of suffering to the extent contemplated by this aggravating circumstance. See Teffeteller v. State, 439 So.2d 840 (Fla. 1983).

Finally, Appellee contends that the trial court found as an aggravating circumstance surrounding the death of Mary Beth Jones that the Appellant had been previously convicted of another capital felony. It is the Appellant's position that the trial court found this aggravating circumstance to only apply to the death of Mary Lou Hines. If this court should disagree with Appellant's position, then Appellant would have to concede that this was a valid aggravating circumstance surrounding the death of Mary Beth Jones.

Appellee contends that the trial court did not err in imposing the death penalty on the Appellant for the murder of Tuesday Correll. The trial court found that the murder of Tuesday Correll was committed for the purpose of avoiding arrest,

pursuant to Section 921.141(5)(e). This aggravating circumstance was not proven beyond a reasonable doubt as there was a lack of proof of the requisite intent on the part of the Appellant to avoid arrest and detection.

The trial court also found that the murder of Tuesday Correll was especially heinous, atrocious, or cruel, pursuant to Section 921.141(5)(h). This aggravating circumstance was not proven beyond a reasonable doubt as the murder of Tuesday Correll was not accompanied by such additional acts as would set this crime apart from the norm of capital felonies. The record contains no evidence that Tuesday Correll remained conscious more than a few minutes after she was assaulted. Therefore, she was incapable of suffering to the extent contemplated by this aggravating circumstance. See Teffeteller v. State, supra.

The trial court next found that the murder of Tuesday Correll was committed in a cold, calculated, and premeditated manner without any pretense of legal or moral justification, pursuant to Section 921.141(5)(i), Florida Statutes (1983). This aggravating circumstance was also not proven beyond and to the exclusion of every reasonable doubt. This aggravating circumstance emphasizes cold calculation before the murder itself. What is required is that the murderer fully contemplates effecting the victim's death. Hardwick v. State, 461 So.2d 79 (Fla. 1984). No evidence was presented at the trial of this cause which proved beyond a reasonable doubt this heightened degree of premeditation, calculation, or planning, which this court has consistently

held is required to find this aggravating circumstance.

Finally, the Appellee contends that the trial court found as an aggravating circumstance surrounding the murder of Tuesday Correll that the Appellant had previously been convicted of a prior capital felony. The Appellant contends that this aggravating circumstance was found by the trial judge to only apply to the murder of Mary Lou Hines. Should this court disagree with Appellant's position, then Appellant would concede that this was a valid aggravating circumstance.

The Appellee takes the position that the trial court did not err in imposing the death penalty upon the Appellant for the murder of Mary Lou Hines. The trial court found that the murder of Mary Lou Hines was especially heinous, atrocious, or cruel, pursuant to Section 921.141(5)(h). This aggravating circumstance surrounding the death of Mary Lou Hines was not proven beyond a reasonable doubt. The record in this cause contains no evidence that Mary Lou Hines remained conscious more than a few minutes after she was assaulted. Therefore, she was incapable of suffering to the extent contemplated by this aggravating circumstance.

The trial court also found when imposing the penalty of death upon the Appellant for the murder of Mary Lou Hines that he had been previously convicted of a capital felony. Applying the rationale argued by the Appellee in support of its position that this aggravating circumstance was found to exist in imposing the death penalty upon the Appellant for the murders of Susan Correll, Tuesday Correll, and Mary Beth Jones, this

aggravating circumstance cannot validly be found to exist in imposing the death penalty for the murder of Mary Lou Hines. Mary Lou Hines was the victim in Count I of the Indictment and therefore at the time of the Appellant's conviction of her murder, no previous conviction existed. Therefore, this aggravating circumstance cannot be found to exist for the murder of Mary Lou Hines.

Finally, the Appellee contends that the trial court did not err in failing to find any mitigating circumstances when imposing the death penalty upon the Appellant. As previously noted in Point XV of Appellant's Initial Brief, the trial court erred in failing to find the Appellant's age as a mitigating circumstance, pursuant to Section 921.141(6)(g), Florida Statutes (1983). Also, in light of the testimony concerning the Appellant's drug and alcohol usage on the night of the murders as well as the testimony that the murders were the result of an angry domestic dispute between the Appellant and Susan Correll, the trial court erred in failing to find that the murders were committed while Appellant was under the influence of extreme mental or emotional disturbance, pursuant to Section 921.141(6)(b), Florida Statutes (1983). Finally, the trial court erred in failing to find the existence of non-statutory mitigating circumstances.

It appearing from the record that at most there was one aggravating circumstance surrounding the murders of Susan Correll, Tuesday Correll, and Mary Beth Jones, but that there are

three mitigating circumstances which greatly outweigh the one aggravating circumstance, the Appellant's sentence of death for these three murders should be vacated and this cause remanded to the trial court for the imposition of a life sentence without eligibility for parole for twenty-five years for each of these three murders. Based on the fact that no aggravating circumstances existed surrounding the murder of Mary Lou Hines, the Appellant's sentence of death for her murder should be vacated and this cause remanded to the trial court for the imposition of a life sentence without eligibility for parole for twenty-five years.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief of Appellant has been furnished to Richard Martel, Assistant Attorney General, 125 North Ridgewood Avenue, Fourth Floor, Daytona Beach, Florida, 32014, by mail delivery this 2ND day of April, 1987.

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