IN THE SUPREME COURT OF FLORIDA

CASE NO. 68,482

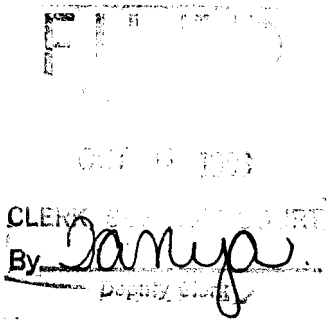
JOHNNY PERRY,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.



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AN APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA CRIMINAL DIVISION

* *

BRIEF OF APPELLEE

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TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS
CONTINUED

TABLE OF CITATIONS
CONTINUED

CASES

TABLE OF CITATIONS
CONTINUED

TABLE OF CITATIONS
CONTINUED

TABLE OF CITATIONS
CONTINUED

TABLE OF CITATIONS
CONTINUED

TABLE OF CITATIONS
CONTINUED

OTHER AUTHORITIES

INTRODUCTION

Appellant, Johnny Perry, was the defendant in the trial court. Appellee, the State of Florida, was the prosecution. The parties shall be referred to in these terms.

The symbol "R" will designate the Record on Appeal. The symbol "T" will designate the transcript of proceedings. The symbol "AB" will designate the appellant's brief.

STATEMENT OF THE CASE AND FACTS

Appellee rejects appellant's Statement of the Case and Facts. Appellee restates the Statement of the Case and Facts as follows:

In a three count indictment filed for the record on April 2, 1985, the appellant, Johnny Bell Perry, was charged with the following offenses: (1) The First Degree Murder of Kathryn Miller in violation of section 782.04(1) of the Florida Statutes, (2) The Armed Robbery of Kathryn Miller in violation of section 812.13 of the Florida Statutes, and (3) The Burglary of a Dwelling, located at 10633 S.W. 120th Street, Dade County, Florida, the property of Anthony and/or Kathryn Miller in violation of section 810.02 of the Florida Statutes. (R: 1-2) On Wednesday, March 13, 1985, the body

of the deceased was found by police officers inside the residence located at 10633 S.W. 120th Street. (T: 641, 654).

Although lead homicide investigator Steven Parr learned on March 15, 1985 that the fingerprints of Johnny Perry had been found inside the residence, the detective continued to pursue a thorough and general investigation of the case. (T: 972) Detectives Steven Parr and Jeffrey Geller first met the appellant at his place of residence on Monday, March 18th. (T: 974) The appellant and his wife, Gina, were renting a room from an individual named Dorothy Pines. (T: 975).

After inviting the detectives inside, the appellant admitted that he had once lived at the home of his mother-in law which is located next to the victim's residence. (T: 976) On March 13th, the appellant contended, he and his wife were in the process of moving from the home of an individual named Elizabeth Taylor to Dorothy Pines's residence. (T: 981) The appellant maintained that he was with his wife all day on March 13th. (T: 982)

However, the appellant stated that he had never been inside the Miller residence and he never handled any of Kathryn Miller's possessions. (T: 979) Perry agreed to

put this summary of his March 13th activities in the form of a sworn statement to police officers on March 19th. (T: 982-983).

Detective Parr met the appellant at the homicide office at approximately 10:30 am on March 19th. (T: 983) In an initial statement, Perry simply repeated his statement from the March 18th interview. (T: 985)[1]

After Detective Parr conferred with an assistant state attorney, the appellant was arrested at twelve o'clock noon and his Miranda rights were read to him from a constitutional rights form. (T: 986-987, 1034)[2] The appellant agreed to answer questions without the presence of an attorney. (T: 991)[3]

[1]At 11:30 a.m., Detective Parr told Mr. Perry to "tell the truth." (T: 340) The State declined to use the appellant's initial confession which was given from 11:30 a.m. to 11:50 a.m. in its case in chief. (T: 380, 927). The Court held that any statement from the point where the police accused the defendant of lying up until the time he was given Miranda warnings was to be suppressed. (T: 928)

[2]The appellant stated that he understood his rights, but he refused to sign the constitutional rights form. (T: 989-991) The appellant was not threatened, coerced, or promised anything in return for speaking with the detectives. (T: 991)

[3]In the presence of Sergeant Douglas Buttshaw, the appellant admitted that Miranda warnings had been read to him and that he wanted to continue answering questions. (T: 1157)

Just before noon on March 13th, the appellant stated, he drove alone in his wife's green Volkswagen to the office of a local newspaper, "The Flyer," in an effort to reacquire his former job. (T: 992-993) He then stopped at the Miller residence and the victim opened the door. (T: 993)[4]

Due to financial problems, the appellant went to the Miller home "to take something." (T: 993) The appellant asked the victim to give him "some gold," but when she tried to escape, he grabbed her by the hair. (T: 993) The appellant proceeded to hit her with a shoe and then he stabbed her with a knife [5] at least twice. (T: 994)

Mr. Perry took the victim's purse and a silver tray. (T: 994) He sold the tray to a drug dealer and threw the purse on the highway near South Miami Hospital. (T: 994)

[4]Johnny Perry resided at the home of his mother in law, Bernice Bing, from November, 1984 to January, 1985. (T: 1175-1177) Mrs. Bing's home is located next door to the Miller redidence. (T: 1175) The appellant knew Mrs. Miller because on one occasion she paid him to do some yard work outside her home. (T: 1177)

[5]Inside the Miller kitchen, three knives, one butcher type knife, and a brown handled turning fork were being held in a knife block. (T: 734) The fork is not normally placed in this knife block. (T: 846) Another matching knife was found inside a kitchen drawer. (T: 736-737) The appellant claimed that the knife which he used during the murder was located in his own residence. (T: 995) No knives were found in the appellant's residence. (T: 1041)

At 1:00 p.m., Detective Parr left the interview room and the appellant remained in this room with Detective Geller. (T: 1035) Mr. Perry continued to have a conversation with Detective Geller. (T: 1035)[6]

The appellant then stated that an unknown individual had accompanied him to The Flyer office, but he would not reveal the other individual's identity. (T: 1037) Mr. Perry said that the police should know that he did not strangle the victim because fingerprints would then be visible on her neck. (T: 1037)[7]

Upon his return, Detective Parr asked Mr. Perry about his conversation with Detective Geller. (T: 998-999) The appellant stated that the individual who had accompanied him to The Flyer office had actually killed Kathryn Miller. (T: 999) When the police offered to verify the presence of another person at The Flyer office, the appellant declined the offer because he characterized this assertion about the presence of another person as being untrue. (T: 999-1000)

[6]The appellant did not ask for an attorney or state that he did not want to talk to Detective Geller. (T: 1036)

[7]Before the appellant made this remark, Detective Geller did not indicate that the victim had been strangled. (T: 1037) During this conversation, only police officers knew that the victim had been strangled. (T: 1038)

The appellant maintained that he had previously been in the cabana area of the Miller home and that he had walked from the front door to the kitchen area. (T: 1001) When questioned directly by Detective Parr, the appellant replied that he had killed Kathryn Miller. (T: 1001)

Detective Parr and Sergeant Douglas Buttshaw were standing outside the interview room in full view when the appellant and his wife were inside this room conversing with each other. (T: 1002) The appellant looked in the direction of the police officers and said, "If I plead guilty to this, will I get the electric chair or will I be sentenced to prison for fifty years?" (T: 1003)

Officer Andres Falcon of the homicide section transported the appellant to the Dade County Jail. (T: 1054) Mr. Perry asked to see the arrest affidavit which listed the charges: (1) murder in the first degree, (2) armed robbery, and (3) armed burglary. (T: 1055-1056, 1168-1169) He read the affidavit and pointed to charges number two and three and said, "Beat, Beat. You ain't got the knife." (T: 1056, 1169)[8]

[8]The testimony of Officer Andres Falcon was confirmed by Officer Archie Moore who also accompanied the appellant to the Dade County Jail. (T: 1166-1169)

Detective Geller received Mrs. Miller's purse, her dry cleaning receipt and miscellaneous papers from Robert Gardner. (T: 823-825) Mr. Gardner found this property in the area of the 7500 block of S.W. 71st Avenue. (T: 827) On S.W. 71st Avenue near Sunset Drive, Steven Benson found a small leather coin purse and inside the purse a receipt had the name of Kathryn Miller. (TL 902)

On March 13, 1985, John Edward Samuel, an employee of the Franmar Bus Transportation company, was driving a bus on Route 874 near the 87th Avenue exit. (T: 804) He discovered a wallet at about 12:55 p.m. (T: 810)[9]

The wallet was turned over to Dan Martinelli, the Vice President of the Franmar Corporation. (T: 814) An identification card inside the wallet listed the home telephone number of Kathryn Miller and the business telephone number of Anthony Miller. (T: 816) Mr. Martinelli contacted Mr. Miller and stated that he wanted to return Mrs. Miller's wallet. (T: 817)

Mr. Miller immediately drove home and he discovered his wife's body inside their home. (T: 841-842) From the

[9]Route 874 is both near and accessible to the homicide scene. (T: 831)

residence of next door neighbor Mary Braaksma, Mr. Miller contacted the police. (T: 843)

The victim was situated in a small foyer which was located down a hallway from the front door. (T: 654)[10] Directly above the victim's head, approximately three feet, five inches from the floor, crime scene technicians discovered a palm print. (T: 658) The print was photographed at the scene and a portion of the wall itself was removed for further analysis. (T: 663)

Fingerprint technician Richard Laite testified that the palmprint impression on the wall was made by the appellant. (T: 944) Moreover, Johnny Perry's fingerprints appeared on the dry cleaning receipt, a plastic chair, and a drinking glass. (T: 944) [11]

Dr. Eugene Scheuerman, the associate medical examiner of Dade County in March of 1985, examined the victim at the residence and performed an autopsy. (T: 747,750) In his opinion, the victim received a minimum of six blows to the

[10]A rug, usually situated near the front door, was out of position. (T: 842)

[11]The results of the fingerprint analysis were conclusive. (T: 944)

head. (T: 765) The autopsy revealed that the victim was strangled. (T: 765-766)

The victim's right hand had a defensive wound. (T: 768) Mrs. Miller sustained six stab wounds in the left front of her chest and some breathing efforts occurred after she suffered these chest wound injuries. (T. 748)

Kathleen Sierra, of 1252 S.W. 107th Court, testified that on March 13, 1985, she left the Miami Dade Community College South Campus at 11:50 a.m., crossed the intersection at 107th Avenue and 120th St. and to the left saw a green Volkswagen in the Millers' driveway. (T: 878)[12] The presence of the green Volkswagen at this location during this time frame was confirmed by Salvador Gonzalez. (T: 884-887)

On direct examination, the appellant maintained that Kathryn Miller invited him to her house on March 13, 1985 in order to give him a gift. (T: 1095) He basically

[12]This witness knew the Miller family for seven or eight years. (T: 880) Alexander Washington, a letter carrier, testified that between 11:30 a.m. and 11:50 a.m. on March 13, 1985, he gave Mrs. Miller her mail. (T: 872)

maintained that he had a discussion with Mrs. Miller in the cabana area of the residence and then left.[13]

The jury found the appellant guilty as charged in Counts I and II of the indictment. (R: 160-161, T: 1302) However, the jury found the appellant not guilty of burglary as charged in the indictment. (R: 163, T: 1302)

During the penalty phase of the trial, the State presented evidence that the appellant was previously arrested for attempted sexual battery. (T: 1338-1366) The charge was reduced to a misdemeanor and the defense stipulated that the appellant was convicted of this misdemeanor. (T: 1368-1369)

Dr. Scheuerman testified that a blow to the head would cause a great deal of pain, as compared to other parts of the body, because of the abundance of nerve endings. (T: 1379-1380) Severe trauma was illustrated by an injury to the victim's lip. (T: 1380)

During manual strangulation, the minimal time for a person to become unaware of his or her surroundings is

[13]On direct examination, the appellant admitted handling drinking glasses inside the Miller home. (T: 1101)

between three and four minutes. (T: 1381) The person being manually strangled experiences asphyxia, a terrifying death. (T: 1381) From the stab wounds, the victim should have had the sensation that she was drowning because the blood was "spilling into her airway and mixing with air." (T: 1308)

The jury imposed a sentence of life imprisonment. (T: 1484) The Court found no mitigating factors and as to Count I of the indictment, sentenced the appellant to death. (R: 235, T: 1509) The appellant received a consecutive sentence of 134 years imprisonment on Count II of the indictment. (R: 236, T: 1508) A Notice of Appeal was filed on February 28, 1986.

On March 13, 1985, two drinking glasses found outside the Miller home on a table contained cool water. (T: 679)

In his properly admitted confession, the appellant specifically stated that he had not been inside the bathroom of the Miller home. (T: 1000) However, on direct examination, the appellant contended that before he entered the Miller bathroom on March 13, 1985, the victim removed some clothes from the bathroom sink. (T: 1121)

POINTS INVOLVED ON APPEAL

I

WHETHER THE TRIAL COURT ERRED BY DENYING A MOTION TO SUPPRESS THE APPELLANT'S CONFESSION

II

WHETHER THERE WAS MISCONDUCT BY THE JURORS DURING THE GUILT PHASE OF THE TRIAL

III

WHETHER THE TRIAL COURT ERRED BY REFUSING TO GIVE A JURY INSTRUCTION ON THIRD DEGREE MURDER

IV

WHETHER THE TRIAL COURT PROPERLY FOUND THAT A CONTEMPORANEOUS CONVICTION TO THE CAPITAL FELONY MAY BE USED AS AN AGGRAVATING FACTOR

V

WHETHER THE TRIAL COURT PROPERLY FOUND AS AN AGGRAVATING FACTOR THAT THE CAPITAL FELONY WAS COMMITTED IN ORDER TO AVOID ARREST

VI

WHETHER THE TRIAL COURT PROPERLY FOUND AS AN AGGRAVATING FACTOR THAT THE CAPITAL FELONY WAS ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL

VII

WHETHER THE TRIAL COURT PROPERLY FOUND AS AN AGGRAVATING FACTOR THAT THE CAPITAL FELONY WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER

VIII

WHETHER THE TRIAL COURT ERRED BY REFUSING TO FIND AS A MITIGATING FACTOR THAT THE APPELLANT HAD NO SIGNIFICANT HISTORY OF PRIOR CRIMINAL ACTIVITY

IX

WHETHER THE TRIAL COURT ERRED BY NOT FINDING ANY MITIGATING FACTORS TO BALANCE AGAINST THE AGGRAVATING FACTORS

X

WHETHER THE TRIAL COURT ERRED BY RECEIVING TESTIMONY ON THE JURY'S RECOMMENDATION IN THE PENALTY PHASE AND WHETHER THE RECORD SHOWED MIS-CONDUCT BY DEFENSE COUNSEL AND THE JURY DURING THE PENALTY PHASE

SUMMARY OF THE ARGUMENT

At approximately 12 noon on March 19, 1985, appellant was arrested and given Miranda warnings. He then agreed to speak with the police officers.

However, at approximately 11:30 a.m. on March 19, 1985, Detective Steven Parr told appellant to "tell the truth." The State did not use the initial confession which was given from 11:30 a.m to 11:50 a.m. The initial voluntary, unwarned statement did not cause the subsequent warned statement to become inadmissible.

During the guilt phase of the trial, a juror expressed his opinion in open court on the appellant's testimony to an alternate juror. There was no misconduct during this phase of the trial because the jurors did not receive any outside communications. They only relied on evidence which was admitted during the course of the trial.

The evidence presented at trial could not justify a finding of third degree murder. Moreover, the definition of third degree murder does not include robbery. In this case, appellant was convicted of robbery. He was charged and convicted of first degree murder which is two steps removed from third degree murder.

Appellant's contemporaneous conviction for robbery qualified as an aggravating factor. It was sufficient that the robbery conviction was established prior to the penalty phase of the trial.

Appellant went to the Miller residence on March 13, 1985 in order to take property. He did not expect the victim to be at home. Mrs. Miller was acquainted with the appellant. From the surrounding circumstances, it is evident that the only motive for the murder was the elimination of the only witness.

The victim was severely beaten and manually strangled. She continued to breathe after sustaining stab wounds. A "defense wound" was observed on the victim's right hand. The severe beating, manual strangulation, the presence of a defense wound, and the infliction of multiple stab wounds qualified this offense as being a particularly heinous, atrocious, or cruel capital felony.

Appellant first struck the victim and then stabbed her. The evidence indicated that a knife was retrieved by the appellant from the kitchen. He had adequate time to form the heightened level of required premeditation and therefore the capital felony was committed in a cold, calculated, and premeditated manner.

Appellant had a significant history of prior criminal activity. He had been arrested for an attempted sexual battery. He had been arrested either for passing bad checks or for the use of a stolen credit card in another jurisdiction. Appellant had also transported the victim of a second degree murder to purchase cocaine.

The trial court found five aggravating factors and no mitigating factors. The facts supporting the death sentence were so clear and convincing that no reasonable person could recommend life imprisonment.

The trial court may poll the jurors individually on their recommended sentence. The trial judge's decision to overrule the jury's recommendation was only based on facts supporting aggravating factors and the lack of facts to show the presence of any mitigating factors.

Defense counsel improperly appealed to the jury's emotions in closing argument during the penalty phase. Six jurors allowed their personal disapproval of the death penalty to influence their decison on the appropriate penalty in this case. If this Court does not uphold the trial court's overruling of the jury's life sentence recommendation, then this case should at least be remanded for a reconsideration of the penalty by another jury.

ARGUMENT

I

THE TRIAL COURT DID NOT ERR BY DENYING A MOTION TO SUPPRESS THE APPELLANT'S CONFESSION

In Oregon v. Elstad, 470 U.S. ___, 105 S.Ct. 1285, 84 L.Ed.2d 222 (1985), the Supreme Court held that a voluntary, unwarned statement does not render a subsequent warned statement inadmissible. A finding that an initial statement technically violated Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), does not end the Court's inquiry.

> There is no warrant for presuming coercive effect where the suspect's initial inculpatory statement, though technically in violation of Miranda, was voluntary. The relevant inquiry is whether, in fact, the second statement was also voluntarily made . . . . We hold today that a suspect who has once responded to unwarned yet uncoercive questioning is not thereby disabled from waiving his rights and confessing after he had been given the requisite Miranda warnings.
>
> Elstad, supra, 105 S.Ct. at 1298

If the initial statement, while obtained in technical violation of Miranda, was in fact voluntary, then the trial court should suppress the later statements if it finds that they were involuntarily given. State v. Madruga-Jimenez, 485 So.2d 462 (Fla. 3d DCA 1986); Martin v. Wainwright, 770 F.2d 918 (11th Cir. 1985), United States v. Wauneka, 770 F.2d 1434 (9th Cir. 1985); Smith v. Wainwright, 777 F.2d 609 (11th Cir. 1985). Moreover, in Elstad, supra, at 1296, the Court held that "absent deliberately coercive or improper tactics in obtaining the initial statment, the mere fact that the suspect had made an unwarned admission does not warrant a presumption of compulsion."

In United States v. Ballard, 586 F.2d 1060 (5th Cir. 1978), the court stated that "(e)ncouraging a suspect to tell the truth" cannot be said to overcome the defendant's will. On March 19th, at 11:30 a.m., Detective Steven Parr told the appellant to tell the truth. (T: 340)[1] At approximately 12 noon, the appellant was placed under arrest and given Miranda warnings. (T: 986-987, 1034)

Despite its inadmissibility under Miranda, the appellant's initial confession was voluntary. Jurek v.

[1]The appellant's initial confession was made between 11:30 a.m. and 11:50 a.m. on March 19, 1985. (T: 286-289)

Estelle, 623 F.2d 929, 937 (5th Cir. 1980)(en banc), cert. denied, 450 U.S. 1002, 1014, 101 S.Ct. 1709, 68 L.Ed.2d 203, 214 (1981), Martin v. Wainwright, supra, at 928. The appellant was not promised anything, misled, or threatened prior to making this initial statement. (T: 282-284, 313)

Until the moment the police officer told the appellant to tell the truth, the record indicated that Johnny Perry was free to leave. (T: 379, 928, 930-931) A non-custodial situation is not converted to one in which Miranda applies only because a reviewing court concludes that questioning took place in a coercive environment. Williams v. State, 403 So.2d 453 (Fla. 1st DCA 1(81). Oregon v. Mathiason, 429 U.S. 492, 97 S.Ct. 711, 50 L.Ed.2d 714 (1977) The warning requirements of Miranda are limited to a suspect who is actually in custody. State v. Clark, 384 So.2d 687 (Fla. 4th DCA 1980). Prior to the police statement asking Mr. Perry to tell the truth, the appellant was simply being questioned in a homicide investigation room and therefore he was not formally in custody. Roman v. State, 475 So.2d 1228 (Fla. 1985)

In the instant case, the giving of the Miranda warnings "serves to cure the condtition that rendered the unwarned statement inadmissible." Elstad, supra, at 233. The Supreme Court was concerned about the loss of highly

probative evidence when neither the initial nor the subsequent statements were coerced.

> This Court has never held that the psychological impact of voluntary disclosure of a guilty secret qualifies as state compulsion or compromises the voluntariness of a subsequent informed waiver . . . . When neither the initial nor the subsequent admission is coerced, little justification exists for permitting the highly probative evidence of a voluntary confession to be irretrievably lost to the factfinder.
>
> There is a vast difference between the direct consequences flowing from coercion of a confession by physical violence or other deliberate means calculated to break the suspect's will and the uncertain consequences of disclosure of a 'guilty secret' freely given in response to an unwarned but noncoercive question.

Elstad, supra.

An examination of the surrounding circumstances of the second statement indicates that it was voluntarily made. (T: 986-987, 1034) The appellant waived his Miranda rights and the subsequent statement was properly admitted. Elstad, supra.

II

THERE WAS NO EVIDENCE OF IMPROPER CONDUCT BY THE JURY IN THE GUILT PHASE OF THE TRIAL.

The general principle is that where juror misconduct is charged, the party asserting it must show prejudice by the preponderance of the credible evidence. United States v. Benedetti, 587 F.2d 728 (5th Cir. 1979), United States v. Riley, 544 F.2d 237 (5th Cir.), cert. den, 430 U.S. 932, 97 S.Ct. 1554, 51 L.Ed.2d 777 (1977), McMillon v. Estelle, 523 F.2d 1020 (5th Cir.); United States v. Wayman, 510 F.2d 1020 (5th Cir.), cert. den. 423 U.S. 846, 96 S.Ct. 84, 46 L.Ed.2d 67 (1975).

Nothing in the record indicated that the jurors relied on evidence which was not admitted during the course of the trial. Russ v. State, 95 So.2d 594, 600-601 (Fla. 1957). The jurors did not receive an outside communication nor did any individual juror rely upon material facts within his or her own personal knowledge. Remmer v. United States, 347 U.S. 227, 74 S.Ct. 450, 98 L.Ed. 654 (1954)

The appellant's claim here is based upon the following assertions by defense counsel:

> Mr. Lamons: "I am not 100 percent certain about this, but it concerns me greatly, and I am not quite certain what I just heard.
>
> The second juror over in the back row just leaned over to the alternate juror and said, 'He is lying' . . .
>
> I don't want any type of special instruction or charge, but I thought I would bring it to the court's attention."
>
> (T: 1105)

Even if this allegation indicated evidence of juror misconduct, this issue was not adequately preserved for purposes of appellate reivew. Castor v. State, 365 So.2d 701 (Fla. 1978). Defense counsel did not actually make an objection to apprise the trial jduge of the alleged error and to preserve the issue for review on appeal. Rivers v. State, 307 So.2d 826 (Fla. 1st DCA), cert. den. 316 So.2d 285 (Fla. 1975), York v. State, 232 So.2d 767 (Fla. 4th DCA 1969)

III

THE TRIAL COURT DID NOT ERR BY REFUSING TO GIVE A JURY INSTRUCTION ON THIRD DEGREE MURDER.

Third degree murder is defined as "the unlawful killing of a human being, when perpetrated without any design to effect death, by a person engaged in the perpetration of, or in the attempt to perpetrate, any felony other than, . . . robbery". Section 782.04(4), Fla. Stat. Because the jury found the appellant guilty of robbery (R. 161), the failure to instruct on third degree murder was at most harmless. Bush v. State, 461 So.2d 936 (Fla. 1984).

The trial court instructed the jury on first degree murder, first degree felony murder, second degree murder, and manslaughter. (R: 164-173, T: 1266-1272) Only the failure to instruct on the next immediate lesser included offense charged constitutes reversible error. State v. Abreau, 363 So.2d 1063 (Fla. 1978); Acensio v. State, 477 So.2d 38 (Fla. 2d DCA 1985). As a matter of policy, the jury had the opportunity to exercise its "pardon power" and return a verdict of second degree murder, but it chose not to do so. Bufford v. State, 473 So.2d 795 (5th DCA 1985). Furthermore, because second degree murder is a necessarily included offense of first-degree premediated and felony murder, third degree murder is two steps removed from first

degree murder. Linehan v. State, 476 So.2d 1262 (Fla. 1985), State v. Furr, 11 F.L.W. 357 (Fla. July 25, 1986).

No reading of the evidence would justify a finding of third degree murder. Echols v. State, 484 So.2d 568 (Fla. 1985), Dean v. State, 83 So.2d 777 (Fla. Unit B, 1955); Hancock v. State, 276 So.2d 223 (Fla. 1st DCA 1973); Enriquez v. State, 449 So.2d 845 (Fla. 3d DCA 1984); Benjamin v. State, 462 So.2d 110 (Fla. 5th DCA 1985).

According to appellant's properly admitted confession,[2] the victim allowed him to enter the residence, and when she tried to escape after his request for money, he began to attack her. (T: 993-995) This action by the appellant eliminated any need for an instruction on third degree murder. Clayton v. State, 272 So.2d 860 (Fla. 3d DCA 1973). Any alleged entitlement to a third degree murder instruction was negated by the evidence in the instant case. Fla.R.Crim.P. 3,510(b), Hancock, supra, at 224, Stewart v. State, 420 So.2d 862 (Fla. 1982), Williams v. State, 400 So.2d 542 (Fla. 3d DCA 1981).[3]

[2]The court entered a finding that the confesssion was voluntarily given without threats or coercion. (T: 928)

[3]On direct examination, appellant disavowed his confession and called this statement a lie. (T: 1118-1121)

Finally, immediately before the trial judge gave the instructions to the jury, defense counsel did not make an objection. (T: 1263-1300). In order to preserve this issue for appellate review, the defense must object to the failure to give an instruction before the jury retires. Zuberi v. State, 343 So.2d 664 (Fla. 3d DCA 1977); Febre v. State, 158 Fla. 853, 30 So.2d 367 (1947); Blatch v. State, 216 So.2d 261 (Fla. 3d DCA 1968); Fla.R.Crim.P. 3.390(d).

IV

A CONVICTION ENTERED CONTEMPORANEOUS TO THE FIRST DEGREE MURDER CONVICTION MAY BE USED AS AN AGGRAVATING FACTOR.

Because the trial court found that the the capital felony was committed during the commission of a robbery, the contemporaneous robbery conviction can be counted as a prior felony involving the use or threat of violence to the person. (T: 1503) Section 921.141(5)(b), Florida Statutes provides as an aggravating factor:

> (b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

The robbery conviction was established prior to the penalty phase of the trial. (R. 161) In Ruffin v. State, 397 So.2d 277, 283 (Fla.), cert. denied. 454 U.S. 882, 102 S.Ct. 368, 70 L.Ed.2d 194 (1981), this Court expressly held "that in determining the existence or absence of the mitigating circumstance of no significant prior criminal activity, 'prior' means prior to the sentencing of the defendant and does not mean prior to the commission of the murder for which he is being sentenced." See also Lucas v.

State, 376 So.2d 1149 (Fla. 1979), Francis v. State, 473 So.2d 672 (Fla. 1985).[4]

> The legislative intent is clear that any violent crime for which there was a conviction at the time of sentencing should be considered as an aggravating circumstance. Prior convictions in existence at the time of sentencing is a normal factor considered in all sentencing and is generally recognized as appropriate in sentencing guidelines.
>
> King v. State, 390 So.2d 315 (Fla. 1980).

Therefore, it was entirely proper in the instant case for the trial judge to find an aggravating circumstance based upon the appellant's contemporaneous conviction for robbery. Fitzpatrick v. State, 437 So.2d 1072 (Fla. 1983).

[4]Appellant has misinterpreted the holding in Handwick v. State, 461 So.2d 79 (Fla. 1984). This decision stands for the proposition that a previous conviction was established by the defendant's contemporaneous convictions for the robbery and sexual battery of the murder victim.

V

THE TRIAL COURT DID NOT ERR BY FINDING AS AN AGGRAVATING CIRCUMSTANCE THAT THE CAPITAL FELONY WAS COMMITTED IN ORDER TO AVOID ARREST.

In his confession, the appellant admitted that he went to the Miller home "to take something." (T: 296, 993) During an informal interview at the residence of the appellant on March 18th, Johnny Perry contended that if the victim's automobile was not in the driveway, then she was not at home. (T: 979-980) [5] On the day of the homicide, he did not see the victim's car in front of the house. (T: 993). [6]

The appellant knew the victim because on one occasion, he had done some yard work for her. (T: 854) Testimony by the victim's husband indicated that Mrs. Miller expressed concern about the way the appellant looked at her in the neighborhood. (T: 1162-1163)

[5]The appellant was able to describe the victim's automobile. (T: 979)

[6]Letter carrier Alexander Washington testified that between 11:15 a.m. and 11:30 a.m. on March 13, 1985, the garage door of the Miller residence opened and Mrs. Miller's car entered the garage. (T: 869) The Miller family had a garage door opener installed two days before the homicide. (T: 841)

By the appellant's own admission, the victim opened the door of her home for him. (T: 297) The intended robbery went awry as he "panicked" and began to attack her when she tried to escape. (T: 297) This evidence supports the trial judge's finding that the murder was committed for the purpose of avoiding arrest and prosecution. Wright v. State, 473 So.2d 1277 (Fla. 1985), Johnson v. State, 442 So.2d 185 (Fla. 1983); Vaught v. State, 410 So.2d 147 (Fla. 1982). Prior cases show that a finding of this aggravating factor should be based on direct evidence as to motive or at least very strong inferences from the circumstances. Oats v. State, 446 So.2d 90 (Fla. 1984); Bolender v. State, 422 So.2d 833 (Fla. 1982), cert. den. 461 U.S. 939, 103 S.Ct. 2111, 77 L.Ed.2d 315 (1983).

Proof of the requisite intent to avoid detection is strong in the instant case. Lightbourne v. State, 438 So.2d 380 (Fla. 1983); Adams v. State, 412 So.2d 850 (Fla. 1982); Routly v. State, 440 So.2d 1257 (Fla. 1983); Johnson v. State, 465 So.2d 499 (Fla. 1985). The dominant or only motive for the murder in the instant case was the elimination of the only witness. Clark v. State, 433 So.2d 973 (Fla. 1983).

There was adequate evidence in the record from which the trial judge could properly find that the capital felony was committed in order to avoid arrest because the appellant

knew the victim and because the victim's unexpected presence at the residence disrupted the prior robbery plan. (T: 854, 1162-1163, 979-980, 993) This disruption created a very strong inference that the victim was killed in an effort to avoid detection for the robbery. [7]

[7]It is recognized that under Riley v. State, 366 So.2d. 19, 22 (Fla. 1978), where the victim is not a law enforcement officer, "proof of the requisite intent to avoid arrest and detection must be very strong." However, a defendant need not expressly state his motive to kill the victim in order to establish intent to avoid arrest. Martin v. State, 420 So.2d 583 (Fla. 1982), cert. den. ___ U.S. ___, 103 S.Ct. 1508, 75 L.Ed.2d 937 (1983); Griffin v. State, 414 So.2d 1025 (Fla. 1982); Washington v. State, 362 So.2d 658 (Fla. 1978), cert. den. 441 U.S. 937, 99 S.Ct. 2063, 60 L.Ed.2d 666 (1979).

The cases cited by appellant in opposition are inapposite. Due to the disruption of the planned robbery, the inference that the murder was committed to avoid arrest in the instant case was much stronger than the intent expressed in Carruthers v. State, 465 So.2d 496 (Fla. 1985). In Rembert v. State, 445 So.2d 337 (Fla. 1984), the victim was alive before the flight of the defendant. Finally, in Rivers v. State, 458 So.2d 762 (Fla. 1984), it was speculative to assert that a fleeing waitress was shot to prevent her from contacting the police.

VI

THE TRIAL COURT DID NOT ERR BY FINDING AS AN AGGRAVATING CIRCUMSTANCE THAT THE CAPITAL FELONY WAS ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL.

The perpetration of a particularly heinous, atrocious or cruel capital felony constitutes an aggravated capital felony., Fla. Stat. §921,141(6)(h). In Alford v. State, 307 So.2d 433, 444 (Fla. 1975), this Court interpreted these terms.

> It is our interpretation that heinous means 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 felolnies ___ the conscienceless or pitiless crime which is unnecessarily tortuous to the victim.

See also State v. Dixon, 283 So.2d 1 (1973), cert. den. 94 S.Ct. 1950, 416 U.S. 943, 40 L.Ed.2d 295, Fleming v. State, 374 So.2d 954 (Fla. 1979); Kampff v. State, 371 So.2d 1007 (Fla. 1979); Maggard v. State, 399 So.2d 973 (1081) cert. den. 102 S.Ct. 610, 454 U.S. 1059, 70 L.Ed2d. 598.

Testimony by former Associate Dade County Medical Examiner Eugene Scheuerman indicated that the victim continued to breathe after sustaining all of the injuries. (T: 748) Scratches on the victim's neck and redness in her eyes was evidence of manual strangulation. (T: 749-750, 765-766).

A person will generally be aware of his or her surroundings for a minimum of three to four minutes during manual strangulation. (T: 1381) Someone experiencing manual strangulation would suffer asphyxia, a terrifying form of death. (T: 1381)

The victim suffered at leaxt six blows to the head. (T: 765, 1368) Blunt force caused severe bruises to the victim's head and face. (T: 760) A blow to the face will cause a great deal of pain as compared to blows suffered on other parts of the body. (T: 1378-1380)

Additional blunt force trauma was observed immediately below the victim's neck. (T: 764) There was no evidence to suggest that the blunt force trauma caused the victim to become unconscious. (T: 1385) The blunt force trauma injuries could have been caused by an open hand. (T: 782)

A "defense wound" was observed on the victim's right hand. (T: 768) Mrs. Miller sustained a total of six stab

wounds in the left front area of her chest. (T: 768) Blood and air coming out of the holes in the body indicated that the victim felt that she was drowning in her own blood. (T: 1383)

The severe beating, manual strangulation, and the presence of a defense wound easily qualified the capital felony as being heinous. Quince v. State, 414 So.2d 185 (Fla. 1982); Peek v. State, 395 So.2d 492 (Fla. 1980), cert. den., 451 U.S. 964, 101 S.Ct. 2036, 68 L.Ed.2d 342 (1981); Heiney v. State, 447 so.2d 210 (Fla. 1984); McCrae v. State, 395 So.2d 1145 (Fla. 1981); Brown v. State, 473 So.2d 1260 (Fla. 1985); Johnson v. State, 465 So.2d 499 (Fla. 1985), Alvord v. State, 322 So.2d 533 (Fla. 1975), cert. den. 428 U.S. 923, 96 S.Ct. 3234, 49 L.Ed.2d 1226 (1976). The fact that a victim was brutally beaten while trying to protect herself from blows before she was fatally stabbed supports the finding that the murder was especially heinous, atrocious, and cruel. Wilson v. State, 11 F.L.W. 471 (Fla. Sept. 12, 1986).

The infliction of multiple stab wounds also supports a finding that the homicide was especially heinous, atrocious, or cruel. Duest v. State, 462 So.2d 446 (Fla. 1985); Morgan v. State, 415 So.2d 6 (Fla. 1982); Medina v. State, 466 So.2d 1046 (Fla. 1985); Washington v. State, 362 So.2d 658 (Fla. 1978). Moreover, in the instant case, because

the victim was killed in her own home, this case is "far different from the norm of capital felonies" where the murder occurs in a public place. Breedlove v. State, 413 So.2d 1 (Fla. 1982)

As previously noted, the victim's breathing efforts continued after the infliction of all the injuries. (T: 748) Asphyxia is a terrifying form of death. (T: 1381) The blunt trauma did not casue unconsciousness. (T: 1385)

The extreme pain and horror which the victim must have suffered prior to her death has therefore been shown. McCrae, supra, at 1153,. This Court stated in Dixon, supra, at 9, that Fla. Stat. §921.141(5)(h) applies to "the conscienceless or pitiless crime which is unnecessarily tortuous to the victim." Based upon all the evidence, the trial court's finding of the existence of the heinousness factor is adequately supported by the record. Quince, supra, Morgan, supra, McCrae, supra.

VII

THE TRIAL COURT DID NOT ERR BY FINDING AS AN AGGRAVATING CIRCUMSTANCE THAT THE CAPITAL FELONY WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER

According to the appellant's own properly admitted confession, he first struck the victim and then stabbed her. (T: 297, 993-994) The victim was found in a foyer area near two bedrooms which shared a common bath. (T: 654) There was blood found in the bathroom sink. (T: 686)

The kitchen is located in a different area of the Miller residence. (T: 653, 675) A fork, apparently out of place, was being held in a knife block. (T: 677, 734, 846) A matching knife was found inside a kitchen drawer. (T: 736-737)

To show that the capital felony was committed in a cold, calculated and premeditated manner, what is required is that the murderer fully contemplate the victim's death. Hardwick v. State, 461 So.2d 79, 81 (Fla. 1985). Also of significance is the fact that the appellant in the instant case killed the victim totally without provocation. Jones v. State, 440 So.2d 570 (Fla. 1983); Mason v. State, 438 So.2d 374, 379 (Fla. 1983). In short, section 921.141 (5)(i), Florida Statutes relates to the killer's state of

mind, intent, and motivation. Johnson v. State, 465 So.2d 499, 507 (Fla. 1985). Mason, supra, at 379.

Evidence showing that the victim had been severely beaten, strangled, and stabbed is sufficient to support a finding that the homicide was committed in a cold, calculated, and premeditated fashion. Michael v. State, 437 So.2d 138 (Fla. 1983). The appellant had adequate time to form the heightened level of premeditation required to support this factor. Card v. State, 453 So.2d 17 (Fla. 1984); Squires v. State, 450 So.2d 208 (1984), cert. den. 105 S.Ct. 268, 83 L.Ed.2d 204; Herring v. State, 446 So.2d 1049 (Fla. 1984). Although this Court has recognized that the cold, calculated, and premeditated factor usually applies to execution or contract murders, or to witness elimination murders, this description is not all inclusive. Mendendez v. State, 419 So.2d 312 (Fla. 1982), McCray v. State, 416 So.2d 804 (Fla. 1982); Combs v. State, 403 So.23d 418 (Fla. 1981), cert. den. 456 U.S. 984, 102 S.Ct. 2258, 72 L.Ed.2d 862 (1982). However, as shown under point V, supra, the murder was committed for the purpose of witness elimination, Burr v. State, 466 So.2d 1051 (Fla. 1985) and the trial court made such a finding. (T: 1504)

The heightened level of premeditation required by Jent v. State, 408 So.2d 1024 (Fla. 1981), cert. den. 457 U.S.

1111, 102 S.Ct. 2916, 73 L.Ed.2d 1322 (1982) may be shown by a series of aggressive acts which gives the defendant ample time to contemplate his actions and their associated consequences. Rose v.State, 472 So.2d 1155 (Fla. 1985). Appellant in the case sub judice had enough time during a series of acts to think about his conduct. Stano v. State, 460 So.2d 890 (Fla. 1984), Card, supra, at 23-24. Appellant beat and strangled the victim and then he retrieved a knife in order to stab her. (T: 297, 653, 675, 677, 734, 736-737, 846, 993-994)

In Herring, supra, a second shot was fired after the store clerk had fallen to the floor.

> We have previously stated that this aggravated circumstance is not to be utilized in every premeditated murder prosecution. Rather, this aggravated circumstance applied in those murdrers which are characterized as execution or contract murders or witness elimination murders. We have also held, however, that this description is not intended to be all inculsive. In the instant case, the evidence does reflect that appellant first shot the store clerk in response to what appellant believed was a threatening movement by the clerk and then shot him a second time after the clerk had fallen to the floor. The facts of this case are sufficient to show the heightened premeditation required for the application of this aggravating circumstance as it has been defined.

Id. 446 So.2d 1057.

Therefore, the stabbing in the instant case was performed with the heightened level of premeditation required to support this aggravating factor. Johnson v. State, supra, at 507, Hill v. State, 422 So.2d 816 (Fla. 1982), cert. den. 460 U.S. 1017, 103 S.Ct. 1262, 75 L.Ed.2d 488, (1983), Compare Griffin v. State, 474 So.2d 77 (Fla. 1985). Appellant's painstaking efforts to effectuate the murder in the instant case are clearly illustrated by the record. Squires, supra, at 212.

VIII

THE TRIAL COURT DID NOT ERR BY REFUSING TO FIND AS A MITIGATING CIRCUMSTANCE THAT THE APPELLANT HAD NO SIGNIFICANT HISTORY OF PRIOR CRIMINAL ACTIVITY

The record indicated that the appellant was placed under arrest on January 20, 1985 for the attempted sexual battery of sixteen year old Diane Gail Knight. (T: 1339-1340, 1506-1507) Detective Bixby testified on th e contents of the victim's sworn statement. (T: 1329) Under §921.141(1), Fla. Stat., hearsay statements are admissible during the sentencing phase of a capital case if the defense had an opportunity for rebuttal.

Defense counsel had an opportunity to read the statement. (T: 1330) He also had the oportunity to speak with Detective Bixby prior to her testimony. (T: 1330)

The defense attorney cross examined this detective. (T:1369-1375) The initial sexual battery case was reduced to a battery by the prosecutor's office. (T: 1368) Defense counsel stipulated that appellant was convicted of a misdemeanor. (T: 1334) Appellant manually strangled Miss Knight until she agreed to remove her clothing. (T: 1355, 1506-1507)

In addition, the appellant knowingly transported the victim of a second degree murder to purchase cocaine. (T: 1409, 1507) When this murder occurred, the appellant admitted that he smoked marijuana. (T: 1410, 1507) It could not be established that the appellant knew that this victim was going to be killed. (T: 1409) Finally, appellant's military history included an arrest for either passing bad checks or the use of a stolen credit card in New York. (T: 1410, 1507)

A court may consider any criminal activity in deciding whether a defenant had a significant history of prior criminal activity, not only evidence of prior convictions. Fla. Stat. §921.141(6)(a), Funchess v. Wainwright, 772 F.2d 683 (11th Cir. 1985). A defendant's confession that he committed burglaries was sufficient to support the trial court's refusal to find this mitigating factor. Washington v. State, 362 So.2d 658, 666-667 (Fla. 1978), cert den. 441 U.S. 937, 99 S.Ct. 2063, 60 L.Ed.2d 666 (1979), Mills v. State, 462 So.2d 1075, 1081 (Fla. 1985).

In short, section 921.141(6)(a) makes no reference to an conviction. Smith v. State, 407 So.2d 894 (Fla. 1982) Appellant's significant prior history of criminal activity was plainly shown and therefore this mitigating factor was not applicable. Simmons v. State, 419 so.2d 316 (Fla. 1982).

IX

NO MITIGATING CIRCUMSTANCES WERE FOUND TO BALANCE AGAINST THE PROPERTY AGGRAVATING CIRCUMSTANCE

Appellant has apparently conceded, as an aggravating factor, that the capital felony was committed while he was engaged in the commission of a felony. Fla. Stat. §921.141 (5)(d). He committed the murder during the commission of a robbery and this finding amounts to an aggravating factor. (T: 1503) See White v. State, 446 So.2d 1031 (Fla. 1984), Fitzpatrick v. State, 437 So.2d 1072 (1983), cert. den. 104 S.Ct. 1328, Preston v. State, 444 So.2d 939 (Fla. 1984), Washington v. State, 362 So.2d 658, 666 (1978), cert. den., 99 S.Ct. 2063, 441 U.S. 937, 60 L.Ed.2d 666, Lightborne v. State, 438 So.2d 380 (1983), cert. den. 104 S.Ct. 1330; Teffeteller v. State, 112 F.L.W. 435 (Fla. August 29, 1986).

Appellant relies upon Tedder v. State, 322 So.2d 908 (Fla. 1975) in order to argue that the trial court erred by sentencing him to death, after receiving a jury verdict recommending a sentence of life imprisonment. (AB: 34-37) But when one or more aggravating circumstances is found, death is presumed to be the proper sentence unless it or they are overriden by one or more of the mitigating circumstances provided in section 921.141(6), Florida Statutes

State v. Dixon, 283 So.2d 1,9 (1973), cert. den. 416 U.S. 943, 94 S.Ct. 1950, 40 L.E.d2d 295 (19674), Middleton v. State, 426 So.2d 548 (Fla. 1982); Groover v. State, 458 So.2d 226 (Fla. 1984); Parker v. State, 458 So.2d 750 (Fla. 1984).

The following aggravating circumstances have been supported by the record in this case:

1. Fla. Stat. §921.141(5)(b) - The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person. (See point IV, supra)

2. Fla. Stat. §921.141(5)(d) - The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to committ, any robbery, sexual baterry, arson, burglary, or aircraft pivarcy or the unlawful throwing, placing, or discharging of a destructive device or bomb. (See point IX, supra.)

3. Fla. Stat. §921.141(5)(e) - The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody. (See point V, supra)

4. Fla. Stat. §921.141(5)(h) - The capital felony was especially heinious, atrocious, or cruel. (See point VI, supra)

5. Fla. Stat. §921.141(5)(i) - The capital felony was a homicide and was committed in a cold, calculated and premeditated manner without any pretence of moral or legal justification. (See. point VII, supra)

As previously noted, under authority of Washington, supra, at 666-667, appellant had a prior criminal history and therefore the mitigating circumstance outlined in Fla. Stat. §921.141(6)(a) was not applicable. Moreover, at the time of the commission of the capital felony, appellant was twenty one years old. (T: 1088, 1461)

In Fitzpatrick, supra, at 1078, this Court held that a twenty year old defendant was not entitled to have his age considered to be a mitigating factor. See also Simmons v. State, 419 So.2d 316 (Fla. 1982). Finally, the non-statutory evidence was known to the trial court and it appears that such evidence was considered and rejected. (T: 1507-1508). "The trial judge need not have expressly addressed each non-statutory mitigating factors in rejecting the same, and we will not disturb his judgment simply because appellant disagrees with the conclusions reached." Mason v. State, 438 So.2d 374, 380 (Fla. 1980). But in the instant case, the trial court expressly addressed and re-jected evidence of the appellant's good character as a non-statutory mitigating factor. (T: 1507-1508)

In overruling the jury's recommendation, the trial court found several aggravating circumstances and no mitigating circumstances. (T: 1502-1510). Section 921.141(3), Florida Statutes (1981), provides:

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

It is well established that when aggravating circumstances are supported by the record and the jurors' recomendation is not based on a valid mitigating factor (statutory or non-statutory) which can be supported by the record, the trial judge has the authority to overrule the jury's recommendation and sentence a defendant to death. Brown v. State, 473 So.2d 1260 (Fla. 1985); McCrae v. State, 395 So.2d 1145 (Fla. 1980), cert. den., 454 U.S. 1041, 102 S.Ct. 583, 70 L.Ed.2d 486 (1981); Porter v. State, 429 So.2d 293 (Fla.), cert. den. ___ U.S.___, 104 S.Ct. 202, 78 L.Ed.2d 176 (1983); Bolender v. State, 422 So.2d 833 (Fla.

(1982), cert. den. 461 U.S. 939, 103 S.Ct. 2111, 77 L.Ed.2d 315 (1983); Miller v. State, 415 So.2d 1262 (Fla., 1982), cert. den. 459 U.S. 1158, 103 S.Ct. 802, 74 L.Ed.2d 1005 (1983).

An examination of the record shows that there was no reasonable basis to support the jury's recommendtion of life imprisonment. Stevens v. State, 419 So.2d 1058 (Fla. 1982), cert. den. 459 U.S. 1228, 103 S.Ct. 1236, 75 L.Ed.2d 469 (1983). The trial judge was justified in overriding the jury's recommendation. Hoy v. State, 353 So.2d 826 (Fla. 1977), cert. den. 439 U.S. 920, 99 S.Ct. 293, 58 L.Ed.2d 265 (1978).

Therefore, the test outlined in Tedder, supra was satisfied. "In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ." Id, at 910. The death penalty was the appropriate penalty in the instant case. Dixon, supra.

X

THE TRIAL COURT DID NOT ERR BY RECEIVING TESTIMONY ON THE JURY'S RECOMMENDATION IN THE PENALTY PHASE, AND THE RECORD INDICATED MISCONDUCT BY DEFENSE COUNSEL AND THE JURY DURING THE PENALTY PHASE

The trial judge can poll the jurors individually concerning their recommended sentence of death. Whitney v. State, 132 So.2d 599 (Fla. 1961), Stanton v. State, 5 So.2d 4 (Fla. 1941). Moreover, the trial court's questioning of a jury foreman on whether seven or more jury members agreed with an advisory sentence was held to be proper. Meeks v. State, 336 So.2d 1142 (Fla. 1976). In the instant case, the trial court's decision to override the jury's recommendation on the sentence was based solely upon evidence to support aggravating circumstances and a lack of proof to show the existence of any mitigating circumstances. (T: 15-2-1510)

In his argument to the jury during the penalty phase of the trial, defense counsel appealed to the jury's emotions:

> "He (the appellant) is a very young man, barely in his twenties when this crime occurred.
>
> Consider all those things that were said by those witnesses,these people that love him.

> Let's not create two tragedies. If you decide for life imprisonment, it is not like Johnny is going to be out tomorrow.
>
> Life imprisonment is life with no possibility of parole or pardon for twenty five years. Johnny Perry would probably spend the rest of his life in jail.
>
> Again, you must think deeply about this matter. This is something you can't change your mind at a later date. Death is final.
>
> I leave you with a thought that today Johnny is alive, and where there is life, there is hope."
>
> (T: 1475-1476)

It is improper for defense counsel to attempt to influence the granting of a life sentence through an emotional appeal. White v. State, 403 So.2d 331, 340 (Fla. 1981); Porter v. State, 429 So.2d 293, 296 (Fla. 1983). The trial judge's function in the penalty phase is "primarily to insure the jury's adherence to law and to protect against a sentence resulting from passion rather than reason." Chambers v. State, 339 So.2d 204, 208 (Fla. 1976).

As previously stated, the record does not indicate a reasonable basis to support the jury's recommendation of life imprisonment (see point IX, supra) The jury's recommendation was most likely the result of defense counsel's emotional closing argument. Francis, supra, at 676.

The assistant state attorney said the six jurors who voted for life imprisonment would have recommended a life sentence under any circumstances. (T: 1499) It is clear that a prospective juror may be excused when his views toward captial punishment would "substantially impair the performance of his duties as a juror" in the penalty phase. Adams v. Texas, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980), see also Herring, supra, at 1053-1056, Fleming v. State, 374 So.2d 54 (Fla. 1979), Welty v. State, 402 So.2d 1159 (Fla. 1981).

The fact that the jurors allowed their negative views on the death penalty to influence their decison on the appropriate punishment amounted to misconducted. Adams v. Texas, supra. Only the alternate juror, Ms. Gay, expressed oppositon to the death penalty during voir dire. (T: 591-595) The other six jurors who later expressed negative feelings about the death penalty to the prosecutor did not voice this concern during voir dire. (T: 427-596) Therefore, at a minimum, if this court does not uphold the overruling of the jury's recommendation of life imprisonmnent, this case should be remanded for the reconsideration of the penalty issue by a new jury panel.

CONCLUSION

Based upon the above cited legal authority, the State of Florida urges this Honorable Court to affirm the judgment and sentence in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF APPELLEE was furnished by mail to LANE ABRAHAM, ESQ., Attorney for Appellant, 2000 S. Dixie Highway, Suite 217, Miami, Florida 33133 on this 2nd day of October, 1986.

Mark J. Berkowitz

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