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IN THE SUPREME COURT OF THE
STATE OF FLORIDA

JOHN GARY HARDWICK, JR.,

Appellant,

vs. CASE NO. 68,769

STATE OF FLORIDA,

Appellee.

APPEAL FROM THE FOURTH
JUDICIAL CIRCUIT

Capital Case

ANSWER BRIEF OF APPELLEE

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OTHER AUTHORITIES

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PRELIMINARY STATEMENT

Appellant was the defendant in the Circuit Court of Gadsden County. The State of Florida was the prosecuting authority in the circuit court and is the Appellee on appeal. Citations to the record on appeal and the transcript of the trial will be referred to by the symbols "R" and "T" respectively followed by the page number in parenthesis.

STATEMENT OF THE CASE AND FACTS

The Appellant's statement of the case and facts is acceptable to the Appellee to the extent stated. However, for the purposes of disposition of this case the Appellee will cite the following additional facts from witness Buettner's testimony.

At the close of the State's case the Appellant proffered the testimony of David Buettner of the United States Navy. Seaman Buettner testified that he told Chief petty officer Dombrowski that he and two other individuals killed a man in Jacksonville. (T 773) Mr. Buettner testified that he a marine and another sailer took a young man out to Heckscher Drive where they physically beat him, stabbed him in the back with a bayonet, and shot him in the back of the head with a .38. (T 775) The witness stated at the time he made the statement to Dombrowski he did not recall identifing the victim as a man named Keith. (T 775) Mr. Buettner further testified that he told the CPO that the killing took place on either February 2nd or February 3rd, 1985. (T 776) During cross examination the witness admitted that he had a very vivid imagination, the story he told Dombrowski was not true but had been reconstructed from information he recieved from another person. He explained that he implicated himself and that he added to the story from what he had seen on T.V. (T 777) The witness further testified that he told Dombrowski that they had dumped the body on Heckscher Drive along a seaway. (T 778) On

re-direct the witness confirmed that his statement to Dombrowski was based not on personal knowledge but rather a conversation with an individual he identified as "banana man". (T 790)

SUMMARY OF ARGUMENT

ISSUE I

The trial court was correct in denying the admission of evidence tendered by the Appellant since the testimony sought to be introduced was irrelevant, inherently unreliable and totally unworthy of consideration by the court or the jury. The evidence was not admissable pursuant to §90.404(2)(a) Fla.Stat. Moreover, §90.404(2)(a) Fla.Stat. applies to the use of similar crime evidence by the state against the defendant. Moreover, the facts contained in Mr. Buettner's testimony do not contain a crime which is so similar in it's method and circumstance to the Appellant's alleged defense that it could have created in the mind of the jury a reasonable doubt as to guilt.

ISSUE II

The trial court was correct in denying the Appellant's motion to withdraw or appoint co-counsel. The Appellant is not entitled to appointed counsel of his choice. The trial court conducted a hearing and correctly found that there was no basis for removal of court appointed counsel. The Appellant's request to represent himself was equivocal, therefore, the court was justified in not discharging court appointed counsel. Even if the court had concluded that the Appellant had requested to represent himself, it correctly conducted a hearing into his ability to represent himself and concluded that he was not capable of doing so.

ISSUE III

It is well established in Florida law that the scope and limitation of cross examination lies within the sound descretion of the trial judge. The trial court acted within it's discretion by refusing to allow cross examination concerning testimony that was untrue.

ISSUE IV

The trial court was correct in denying the defendant's motion for a mistrial since there was no violation of the witness sequestration rule which was serious enough to warrant that type of sanction.

ISSUE V

The trial court was correct in denying the Appellant's requested jury instruction on intoxication since there was no evidence presented that the Appellant was intoxicated at the time of the offense.

ISSUE VI

The evidence offered by the prosecution was legally sufficient to support the Appellant's conviction. Contrary to the Appellant's assertion the circumstantial evidence rule does not apply since there was direct evidence of the Appellant's guilt in the form of his confession. Moreover, the State's evidence that the Appellant owned and carried a .357 magnum, the Appellant's threats to kill the victim, and the Appellant's confession following the murder is sufficient evidence to support the juries finding of guilt.

ISSUE VII

The trial court was correct in finding aggravating

circumstances of a felony conviction involving the use or threat of violence to a person. The medical examiners testimony supported the trial court's finding that the murder was committed during the commission of a kidnapping. The fact that the Appellant was a drug dealer and that he was consumed with the idea that Pullum had stolen his drugs supports the court's finding that the murder was committed for pecuniary gain. The medical examiner's testimony that the victim would have been conscious for approximately five to six minutes after the first stab wound, and the fact that he suffered the pain of several stab wounds supports the court's finding that the murder was heinous, atrocious and cruel. Moreover, the fact that the Appellant told people prior to the killing that he was going to kill Pullum for taking his drugs supports the finding that the murder was committed in a cold, calculated and premeditated manner. No evidence was introduced to support the Appellant's contention that he committed the murder while impaired from the use of drugs and alcohol.

ISSUE VIII

The trial court did not improperly double aggravating circumstances since each circumstance has a separate factual basis.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED IN DENYING THE ADMISSION OF EVIDENCE TENDERED BY THE APPELLANT FOR THE PURPOSE OF ESTABLISHING APPELLANT'S INNOCENCE. (RESTATED)

The Appellant contends that the trial court below erred by excluding the testimony of Seaman Buettner. The Appellants contention that Buettner's testimony was relevant is totally unfounded.

Relevant evidence is evidence tending to prove a material fact and is admissible except as provided by law. F.S. 90.401; 90.402. The trial court has wide discretion concerning the admission of evidence and absence abuse of discretion it's ruling should not be disturbed. Welty v. State, 402 So.2d 1159 (Fla. 1981); Booker v. State, 397 So.2d 910 (Fla. 1981). The Appellee submits that the trial court did not abuse its discretion by refusing to admit the evidence since it was totally lacking in credibility and relevance. The witness admitted that his story to CPO Dombrowski was a product of his vivid imagination. True, he did state that it was partially based on something a third party told him, however, he also admitted that he recreated part of the crime based on T.V. Even if this Court were to determine that Mr. Buettner's statement had some basis in fact and was therefore credible the evidence is still irrelevant. Witness

Buettner's story does not even fit the case at hand. For instance, the victim was killed in December and Buettner has his victim being killed in February. (T 796-797) The medical examiner testified that the Appellant's victim was dispatched with a small single edge knife. Buettner however, says that his victim was stabbed with a bayonet. (T 777) The medical examiner also testified that the victim Pullum had a gun shot wound that comminced on the inside of the back of the left forearm and exited the right side of the mid-forearm and continued with a wound to the right lower back of the victim. He also testified that there were two stab wounds in the chest and another stab wound in the back. (T 369) Buettner testified that his victim was stabbed in the back. The medical examiner also testified that the victim had blows to the head administered immediately after death. Buettner testified that his victim was first beatened then stabbed and shot in the back of the head. (T 775) The Appellee submits that the record clearly shows that the trial court was correct in excluding the evidence since the testimony was inherently unreliable, totally unworthly of consideration by the Court or the jury and could have confused and mislead the jury.

Next the Appellant contends that the evidence was admissible as similar fact evidence of other crimes pursuant to Section 90.404(2)(a), Fla.Stat. The Appellee submits that the Appellant is precluded from arguing error based on this ground because

defense counsel below did not attempt to introduce the evidence for that purpose. Counsel on appeal is bound by the acts of trial counsel.

Should the Court however determine that the Appellant has properly preserved the issue then his argument must still fail. To support his position the Appellant cites Morano v. State, 418 So.2d 1223 (Fla. 3rd DCA 1982). The Appellant's reliance upon the Courts decision in Morano is misplaced. The Court in Morano stated that a reading of the entire statute indicated that it only applied to the use of similar crime evidence by the State against the defendant in a criminal trial. The Court in Morano determined that the defendants evidence tending to show that the crime was committed by the State's chief witness was admissable pursuant to §90.402 Fla Stat. In determining that the defendant's evidence was admissable the Morano Court stated:

> There is authority supportive of Appellant's argument that it's proffered evidence should be admitted. Where defendant offers evidence which is of substantial probative value and such evidence tends not to confuse or prejudice, all doubts should be resolved in favor of admissability. Polk v. United States, 342 F.2d 163 (Fla. 5th Cir. 1965); Commonweath v. Keizer, 385 N.E.2d 1001 (Mass. 1979). Where evidence tends, in anyway, even indirectly, to prove a defendants innocence, it is err to deny its admission. Chanler v. State, 366 So.2d 64 (Fla. 3rd DCA 1979); Watts v. State, 354 So.2d 145 (Fla. 2nd DCA 1978). In Commonweath v. Keizer, supra the Court permitted defendant to show

> that crimes of a similar nature had been committed by some other person so closely connected in point of time and method of operation as to cast doubt upon the identification of the defendant as the person who committed the crime. The evidence appellant sought to have committed herein is of a crime alleged to have been subsequently committed by the State's key witnesses which is so similar, in its method and circumstances, to the events surounding the defendants alleged defense that it could if heard by the jury, raise a reasonable doubt as to the defendants guilt. Because the similar crime evidence is relevant, non-prejudicial, and not inadmissible by any rule of law, it should have been admitted.

Id. 1225. The Appellee agrees that evidence which tends to show that the defendant did not commit a crime is admissable. However, in the instant case the facts contained in Mr. Buettner's testimony do not concern a crime which is so similar in its method and circumstances to the Appellant's alleged defense that it could have created in the mind of the jury a reasonable doubt as to his guilt.

The Appellant also cited Pahl v. State, 415 So.2d 42 (Fla. 2nd DCA 1982). In Pahl the District Court of Appeal held that the trial court erred in refusing to allow introduction of evidence that one victim had intentionally set three fires shortly before the fire in question. The Court's decision in Pahl again sets forth the proposition that a defendant may prove his innocence by introducing evidence that someone else committed the crime. There is, however, a rather obvious distinction

between the evidence proffered in Pahl and the evidence proffered in the instant case. In Pahl the defendant had proffered the testimony from three eye witnesses indicating that they had observed the victim intentionally set three fires shortly before her death. The testimony was offered to show that the victim could have started the fire in question, either accidentially or deliberatly. In the instant case, the defendant proffered the fabricated story of a sailor or the unsubstantiated story of an obscure figure tenuiously identified as "Banana man". In the two cases cited by the Appellant the Court was dealing with competent material and relevant evidence from identifiable witnesses who hadn't already admitted that they were lying. Even in the most liberal court before a defendant is permitted to waive a cloke of guilt to place on the back of another the yarn must at least have some basis in fact.

The Appellant next contends that the proffered evidence was admissible as an exception to the hearsay rule. The Appellant is again attempting to argue admissibility based upon grounds that were not argued below. The record indicates that the evidence was not proffered as a statement from an unavailable declarant. The following exchange took place in the record:

> The Court: It still sounds to me like, number 1, that we have got a witness who is saying that whatever he said before was totally untrue as far as his direct knowledge. And I am assuming at this point that the hearsay statements of "Banana Man" are not being offered?

> Mr. Tassone: I didn't think this was the opportunity to offer them, Your Honor.
> The Court: I think you are right. Just want to make sure.

(T 796). And the Appellee submits that the Appellant is precluded from raising these matters for the first time on appeal and that he is bound by the acts of trial counsel.

The Appellee submits that before a statement can be admissible as an exception to the hearsay rule pursuant to the penel interest exception not only must a declarant be unavailable he must also be known. Testimony that the statement came from a person known as "Banana Man" is not sufficient identification of the declarant to know that the statement was made or that a person name "Banana Man" even exists.

The Appellee submits further that the evidence is inadmissible pursuant to Section 90.403, Fla.Stat. which makes relevant evidence inadmissible if its propative value is substantially outweighted by the danger of prejudice, confusion of issues, or misleading of the jury. In the instant case, as pointed out by the trial court, even assuming that there was some basis in fact, from what the witnesses described it sounded as if he was describing a murder other than the one that was the subject of the trial. There was nothing to connect his testimony to the subject murder. Consequently, the trial court was correct in excluding the evidence.

ISSUE II

WHETHER THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S MOTION TO WITHDRAW OR APPOINT CO-COUNSEL. (RESTATED)

The Appellant first claims that the trial judge violated Faretta v. California, 442 U.S. 806 (1975), and Jones v. State, 449 So.2d 253 (Fla. 1984) by not allowing him to waive his right to counsel and represent himself following allegedly inadequate inquiries in regard to his motion to withdraw or appoint co-counsel.

Although, a criminal defendant who faces imprisonment has the absolute right to the assistance of counsel, he also has, in the absence of unusual circumstances the absolute right to waive such assistance and defend himself if such waiver is assertained, after a thorough inquiry, to be knowing and intelligent. Faretta v. California; Smith v. State, 407 So.2d 894 (Fla. 1981), cert. denied, 456 U.S. 984 (1982); See Fla.R.Crim.P. 3.111; Baranko v. State, 406 So.2d 1271 (Fla. 1st DCA 1981), dismissed, 412 So.2d 463 (Fla. 1982); Carter v. State, 408 So.2d 766 (Fla. 5th DCA 1982).

Upon receiving a motion from a criminal defendant to discharge his court appointed attorney, the trial must first determine whether adequate grounds exist for replacement of the attorney. Nelson v. State, 274 So.2d 256 (Fla. 4th DCA 1973).

In the instant case the appellant's attorney filed a motion to withdraw, citing as grounds therefore various disagreements between himself and his client.

The appellant contends that the trial court did not make adequate inquiries in regard to his motion and therefore denied him his right to represent himself. The appellee submits that the trial court, as required by Nelson v. State, supra, and Smith v. State, 444 So.2d 542 (Fla. 1st DCA 1984), conducted a hearing to determine whether or not grounds existed for the replacement of the defendant's counsel. After hearing from all parties concerned the court made a decision that the attorney who was appointed to handle the case was not incompetent and that the appellant was not entitled to a new attorney (T 63-76). An indigent defendant has no right to select a particular court appointed attorney, See Donald v. State, 166 So.2d 453, 457 (Fla. 2nd DCA 1964); Wiltz v. State, 346 So.2d 1221 (Fla. 3rd DCA 1977), cert. denied, 358 So.2d 135 (Fla. 1978); Hucklebury v. State, 337 So.2d 400 (Fla 2nd DCA 1976); Jones v. State, 429 So.2d 396 (Fla 1st DCA 1983), cert. denied, ___ U.S. ___, 104 S.Ct. 234 (1983). Which moreover, "there is no sixth amendment right to 'meaningful' attorney-client relationship" where difficulties arise between the attorney and the client due to the client's obstinance, Morris v. Slappy, 461 U.S. 1, 14,(1983) note 6; and "neither the exercise of the right to self representation or to appointed counsel may be used as a device to abuse the

dignity of the court or to frustrate orderly proceedings." Jones v. State, 449 So.2d 253, 257 (Fla. 1984), cert. denied, ___ U.S. ___, 83 L.Ed.2d 305 (1985); See also Faretta v. California, 422 U.S. 806, 834.

The appellee submits that after making a determination that court-appointed counsel was not incompetent, the trial must then advise the defendant that if his request to discharge his attorney is granted he will be unrepresented. State v. Smith, supra. The court must also explain to the defendant the disadvantages and dangers of self-representation. Faretta v. California, supra.

If the court is convinced that the defendant is in fact waiving counsel, it must then make inquiries to determine that the defendant is making his choice voluntarily and intelligently. Faretta, supra; Parker v. State, 423 So.2d 553 (Fla 1st DCA 1982). A waiver shall not be accepted if the defendant is unable to make a rational choice due to his "mental condition, age, education, experience, or the nature or complexity of the case," Fla.R.Crim.P. 3.11 (d); accord, Ausby v. State, 358 So.2d 562 (Fla 1st DCA 1978), cert. denied, 365 So.2d 715 (Fla. 1978). Any inquiry therefore, pursuant to Faretta v. California must touch upon these matters. See State v. Smith, 444 So.2d 542 (1st DCA 1984); Tucker v. State, 440 So.2d 60 (Fla. 1st DCA 1983); review denied, 447 So.2d 888 (Fla. 1984); Varner

v. State, 436 So.2d 407 (Fla. 1st DCA 1983), review denied, 447 So.2d 888 (Fla. 1984); Martin v. State, 434 So.2d 979 (Fla 1st DCA 1983); Cann v. State, 420 So.2d 908 (Fla. 1st DCA 1982), reviewed denied, 430 So.2d 452 (Fla. 1982); Costello v. Carlisle, 413 So.2d 834 (Fla. 1st DCA 1982).

The process of determining whether a defendant has waived his right to counsel and by doing so requests self-representation is not always easy for a trial court to determine. The trial court can easily follow the procedures set forth in Faretta, supra where the defendant comes into court and unequivocally requests that he be permitted to represent himself. The difficulty arises where, as in the instance case, the defendant, after indicating his dissatisfaction with trial counsel, vacillates upon the issue of self-representation.

After the court concluded that no sufficient reason existed to remove the appointed counsel it then inquired as to whether or not the Appellant wanted to represent himself. The record indicates that the Appellant stated that he was not choosing to represent himself (T 66, 67). Moreover, he also stated numerous times that he did not feel that he was capable of adequately representing himself (T 66, 70, 74, 665, 666). The trial court concluded therefore, based upon the Appellant's assertions that he was not adequately qualified to represent himself that he was not invoking the right of self-representation but merely

requesting a new attorney. As pointed out by the Appellee above, the defendant does not have a right to pick and choose his own attorney.

The appellant next contends that this court's decision in Jones v. State, 449 So.2d 253 (Fla. 1984) applies and that therefore he should have been allowed to represent himself. In Jones v. State, this court determined "defendants who without good cause refuse appointed counsel that do not provide there own counsel, are presumed to be exercising the right to self-representation". The State submits that the court's decision in Jones does not apply since even a defendant who requests to represent himself subsequently waive that right by vacillating on the issue or abandoning his request. Brown v. Wainwright, 665 F.2d 607 (11th Cir. 1982).

The appellee submits that even if the trial court had determined that the appellant had unequivocally waived his right to counsel or, pursuant to Jones, presumed that he had done so, it was not automatically required to allow the appellant to represent himself. Pursuant to the court's decision in Jones, supra, even if a trial court presumes that a defendant is exercising his right to self-representation the court must still proceed with a Faretta inquiry. The appellee submits that even if the trial court erred in it's determination that the defendant had not requested self-representation, the appellant was still

not entitled to represent himself since the court found that he was not capable of doing so. The trial court's decision not to allow self-representation was correct since that right is not absolute and need not be allowed if it would jepordize a fair trial on the issues. Williams v. State, 427 So.2d 768 (Fla. 2nd DCA 1983). Moreover, a competent sui juris defendant is only able to represent himself in the absense of unusual circumstances. The fact that the appellant was being tried for first degree murder, his statement that he was incapable of representing himself, the appellant's eqivocal assertion of his right, and the nature of the evidence in the case were all unusual circumstances which justified the court's decision to deny self-representation. Consequently, the conviction should be affirmed.

ISSUE III

WHETHER THE TRIAL COURT ERRED IN RESTRICTING THE DEFENSE COUNSEL'S CROSS EXAMINATION OF DEPUTY CHARLES KESINGER. (RESTATED)

It is well established in Florida law that the scope and limitation of cross examination lies within the sound discretion of the trial judge. Hernandez v. State, 360 So.2d 39 (Fla. 3rd DCA 1978); Powe v. State, 413 So.2d 1272 (Fla. 1st DCA 1982). Furthermore, the trial judge's discretion is not subject to review unless there is an abuse of discretion. Dennis v. State, 214 So.2d 661 (Fla. 3rd DCA 1968), cert.denied, 89 S.Ct. 900, 393 U.S. 1101, 21 L.Ed.2d 794; Sireci v. State, 399 So.2d 964 (Fla. 1981); Duncan v. State, 457 So.2d 242 (Fla. 1st DCA 1984); Gelabert v. State, 407 So.2d 1007 (Fla. 5th DCA 1981); United States v. Rubin, 733 F.2d 837 (11th Cir. 1984). And Appellant must also show that the abuse of discretion was clearly prejudicial. United States v. Alonzo, 740 F.2d 862 (11th Cir. 1984).

In the instant case there was no abuse of discretion on the part of the trial judge. The Appellant sought to elicit testimony concerning a statement made to witness Buettner by a person known as "Banana Man". Clearly Buettner's statement, based upon what he was told by Banana Man, was hearsay. As previously pointed out in Appellant's brief and Appellee's brief,

Buettner's statement that he committed the offense was fabricated, and what wasn't fabricated was based upon what he was told by "Banana Man". Certainly the trial court did not abuse its discretion by restricting cross-examination concerning Buettner's untrue statement to Dombrowski. Even if some of Beuttner's statement were true it certainly came from Banana Man and would therefore be hearsay. In addition, the Appellant has failed to show that the restrictions on his cross-examination were prejudicial. He certainly would have been able to advance his theory of defense by use of other evidence had it been available. Clearly, a criminal defendant cannot be prejudiced because he is not permitted to introduce or cross examine a state witness concerning untrue, fabricated, or perjured testimony.

In support of his argument the Appellant cites Coxwell v. State, 361 So.2d 148 (Fla. 1978). The Appellant's reliance on Coxwell is misplaced because in Coxwell the cross examination which the defendant was unable to pursue was directed toward the state's principal witness and a person who had been directly involved in conversation with the defendant concerning plans to murder his wife. The case did not deal with false statements made to a third party or any statements made by an unknown person. By the same token, this court's decision in Coco v. State, 62 So.2d (Fla. 1953) also does not apply since in this case, unlike Coco, the defendant was not denied the opportunity to elicit testimony from a key prosecution witness regarding a

critical factual issue in the case.

The Appellant also relies upon this court's decision in Breedlove v. State, 413 So.2d 1 (Fla. 1982) to support his argument that he did not attempt to introduce the statement to prove the truth of the matter asserted but rather to show that the statement was made. The instant case differs, however, since the statements in Breedlove were made to the witness testifying at the time. The statement which Appellant sought to have introduced was made to a third party, not to Detective Kesinger. Moreover, the Appellee contends that the Appellant was in fact attempting to have the statement introduced in order to prove that someone else had committed the offense.

The Appellant has failed to show an abuse of discretion by the trial court or that any restriction that was placed on his cross examination was prejudicial. He would certainly be able to advance his theory of defense by the introduction of any competent evidence which he may have possessed. Consequently, the Appellant's claim should be rejected by this Court and the conviction sustained.

ISSUE IV

WHETHER THE TRIAL COURT ERRED IN DENYING THE DEFENDANTS MOTION FOR MISTRIAL ON ALLEGED VIOLATION OF THE WITNESS SEQUESTRATION RULE. (RESTATED)

Next, the Appellant claims that the trial court erred when it denied his motion for a mistrial based upon an alleged violation of the rule of sequestration. The purpose of the rule as delineated by the Supreme Court in Steinhorst v. State, 412 So.2d 332 (Fla. 1982) citing Dumas v. State, 350 So.2d 464 (Fla. 1977) is of course to prevent a witness from supplementing his testimony by what he hears from other witnesses as they testify. See also, Odom v. State, 403 So.2d 936 (Fla. 1981), cert.denied, 456 U.S. 952, 102 S.Ct. 1970, 72 L.Ed.2d 440 (1982).

When a violation of this sequestration rule does occur a court may impose various sanctions--excluding the witness from testifying, striking a witnesses testimony or citing the witness for contempt. As an extreme measure the Court could declare a mistrial. The witness's violation of a sequestration order does not automatically require exclusion of the witness's testimony. United States v. Monico, 702 F.2d 860 (1983). Moreover, even though the witness's failure to comply with the rule may affect the weight of his testimony, whether such a witness is permitted to testify is generally left to the sound discretion of the trial court. U.S. v. Swartz, 487 F.2d 236, cert. denied, 94 S.Ct.

1572, 415 U.S. 981, 39 L.Ed.2d 871. In the instant case the Appellant did not request the Court to strike or exclude testimony or cite any one for contempt, but, rather, requested the most extreme sanction a mistrial.

It is well settled that a motion for a mistrial should be granted only in cases of absolute legal necessity. Wilson v. State, 436 So.2d 908, 911 (Fla. 1983). A motion for mistrial is addressed to the trial court's sound discretion, Salvatore v. State, 336 So.2d 745, 750 (Fla.) cert.denied, 440 U.S. 885 (1979) and a mistrial should be granted "only when the error committed was so prejudicial to vitiate the entire trial". Cobb v. State, 376 So.2d 230, 232 (Fla. 1979). With these standards in mind, it should be readily apparant that an appellate court should rarely reverse a trial court's exercise of discretion in ruling on a motion for mistrial. This is especially true under the facts of Appellant's case. The Appellant has failed to demonstrate any abuse of the trial court's discretion.

In the instant case one witness Richard Jones was interviewed by the Court concerning discusions between himself and other witnesses. (T 549, 551) When first questioned about these discusions with other witnesses he indicated that the conversations dealt with what other witnesses knew, what they did or what witnesses were there. (T 549, 551) On cross-examination the witness Jones indicated that no one discussed what their

testimony was or what it was going to be when they went into the courtroom. (T 554) The witness Jones explained that the witnesses in the hallway were wondering what happened once they went inside the courtroom. (T 554) And he also stated that the various witnesses discussed methods used by Perry Mason to confuse or upset witnesses, in a general discusion of other courtroom scenes from television shows such as Perry Mason, Barnaby Jones and Columbo. In response to the Court's questions, Jones indicated that no one discussed the defendant's statement. (T 555) Following the questioning of Jones, the court directed the attorneys to interview the witnesses in the hallway to determine if there had been any violation of the rule of sequestration. (T 556, 559)

Appellant's attorney and the Assistant State Attorney reported to the Court that as a result of their interviews with the witnesses outside the courtroom there were no discussions between the witnesses except in regards to television shows. (T 561, 562, 563) Following the report by the attorneys the Court made a determination that there had not been any substantial violation of the rule of sequestration. (T 564) Following this inquiry the Court, after the jury retired for deliberation, interviewed the witnesses Daniel Dimaggio and Connie Wright. These two witnesses both admitted to discussing television shows with each other however they denied they discussed the case between themselves or with other witnesses. (T 937-942) The

trial court's interview of those two witnesses was prompted by the defense counsel's assertion that he had received a telephone call from a woman who informed him that the witnesses had discussed details and facts concerning the case. This woman was never produced by defense counsel nor did she come forth on her own. The record overwhelmingly supports the trial court's finding that there was no violation of the rule of sequestration; therefore the trial court did not abuse its discretion in denying the motion for mistrial. The Appellant's judgement and sentence should be affirmed.

ISSUE V

WHETHER THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S REQUESTED JURY INSTRUCTION ON INTOXICATION. (RESTATED)

The Appellant next contends that the trial court erred in denying his requested jury instruction on intoxication. The Appellee has no argument with the basic proposition that a defendant is entitled to have the trial court instruct the jury on his defense theory, if the theory has foundation in evidence and legal support. U.S. v. Williams, 728 F.2d 1402 (11th Cir. 1984); Bufford v. Wainwright, 428 So.2d 1389 (Fla. 1983) cert.denied, 104 S.Ct. 372; Smith v. State, 424 So.2d 726 (Fla. 1982); Palmes v. State, 397 So.2d 648 (Fla. 1981).

In the instant case the trial court was correct in denying the requested jury instructions, since no evidence of the Appellant's intoxication was introduced at trial. The Appellant has cited several places in the record which he contends contain evidence of the Appellant's intoxication. The Appellant first cites the testimony given by the witness Hyzer. Mr. Hyzer's testimony found in the record at T 508-524. Mr. Hyzer makes no mention that the defendant was intoxicated. Mr. Hyzer encountered the Appellant at 8:00 the morning of December 25, 1984. (T 513-514) On cross-examination the Appellant's attorney did ask the witness if he had anything to drink on Christmas Eve and his answer was "not a lot." (T 517) The defense attorney did

not ask any questions concerning the sobriety or intoxication of Mr. Hardwick. The witness did testify that Mr. Hardwick was involved in selling qualudes; however, that is not evidence of intoxication. In fact the questions regarding the use of qualudes seem to be directed toward Mr. Hyzer's use of qualudes (T 517). In his brief the Appellant next directs the Court's attention to Mr. DiMaggio's testimony.

During direct examination of witness DiMaggio concerning the Appellant's condition, when he made incriminating statements to witnesses when asked if the appellant was intoxicated the witness answered "no." (T 427) On cross examination Appellant's counsel did ask Mr. DiMaggio questions concerning partying and drinking. However, these questions again were directed to the witness's behavior, his level of intoxication on the afternoon of December 24 and his ability to remember, not in regard to the appellant's condition on that date. Evidence that a particular witness used alcohol and drugs at a party is not evidence of the Appellant's intoxication, even if Appellant was attending that party. (T 428-440) The testimony of the witness Showalter indicated that the Appellant was not intoxicated at the time he pointed a .357 magnium at the witness and the victim. (T 320) This incident apparently took place late on December 23, or early December 24, 1984. (T 310, 315) On cross-examination the witness was asked if he had used alcohol or drugs and his response was no. (T 323) The witness was also asked if Jeff Barkley took any

drugs or alcohol and the witness responded that Barkley was messed up. (T 323-324, 328) The witness was also specifically asked if he could smell any alcohol on the Appellant, to which he replied "no." (T 328-329)

The Appellant also cites Detective Kesinger's testimony as evidence which supported his requested jury instruction on intoxication. Detective Kesinger's testimony concerning the Appellant's incoherent and intoxicated behavior does not support the requested jury instruction since it was given during proffered evidence, outside the hearing of the jury. (T 622) The defendant offered no evidence during his case of any kind. Since there was no evidence before the jury that the Appellant was intoxicated at the time he committed the offense the trial court was correct in refusing to give the requested jury instruction. Consequently, the Appellant's claim should be rejected by this Court and the conviction sustained.

ISSUE VI

WHETHER THE EVIDENCE OFFERED BY THE PROSECUTION WAS LEGALLY SUFFICIENT TO SUPPORT THE APPELLANT'S CONVICTION. (RESTATED)

The Appellant contends that the State's evidence was insufficient to support his conviction for first degree murder. The Appellant contends that the conviction rested soley upon circumstantial evidence which did not exclude all reasonable hypothesis of innocence.

The Appellee submits that there was sufficient evidence to support the jury's finding of guilt. The Medical examiners testimony revealed that the victim had been shot with a .357 or .38 caliber pistol. The medical examiner also indicated that the victim had been and stabbed. (T 368-369) The State introduced testimony from witnesses who indicated that the Appellant owned and often carried a 357 magnum pistol. (T 309, 418-419) Jeffrey Showalter testified that on the night of December 23, 1984 he was present when the defendant threatened to kill the victim by pointing a 357 magnum at him. (T 316) The same witness also testified that a few minutes after the victim was threatened by the defendant he saw the defendant's car stop right next to the victim. (T 317-319) the witness Dimaggio also testified that the defendant told him that the victim Keith PullUm had riped him off and that he would take care of him. (T 423-424)

In addition to the circumstantial evidence there was direct evidence of the defendant's guilt introduced at trial. The witness Dimaggio testified that on December 24, 1984 the defendant told him that he had taken care of the person that had stolen his qualudes and that if Keith Pullem walked through this door he had a ghost. (T 426) This conversation was also heard by the witness Connie Wright. The witness Hyzer testified that the defendant confessed to him that he had shot the victim and thrown him into the jellies where no one would find him but the Sharks. (T 514-515) Detective D.L. Hill testified that he was present when the Appellant made the statement that a man can't go around robbing dope dealers and not expect to get killed (T 595).

The Appellant erroneously contends that the circumstantial evidence rule applies to the instant case. The Appellant's ascertain is incorrect, however, since the Appellant's confession of guilt constitutes direct not circumstantial evidence. Dunn v. State, 454 So.2d 641 (Fla. 5th DCA 1984). This direct evidence of guilt makes the circumstantial evidence rule inapplicable Micheal v. State, 437 So.2d 138 (Fla. 1983).

The circumstantial evidence and the testimony of the witness that the Appellant confessed to the crime is substantial, competent evidence which supports the defendant's guilt. The judgment and sentence of the court should be sustained.

ISSUE VII

WHETHER THE TRIAL COURT ERRED IN FINDING THE MURDER WAS; COMMITTED WHILE ENGAGED IN A KIDNAPPING; COMMITTED FOR PECUNIARY GAIN; HEINOUS, ATROCIOUS AND CRUEL, AND COLD CALCULATED AND PREMEDITATED; AND REJECTING THE EVIDENCE OF STATUTORY AND NON-STATUTORY LITIGATING CIRCUMSTANCES TO JUSTIFY THE IMPOSITION OF THE DEATH PENALTY.

The appellant contends that for various reasons the trial court erred imposing the death penalty. The trial court was correct in finding the aggravating circumstance of a felony conviction involving use or threat of violence to a person pursuant to §921.141(5)(b).

The trial court's finding that the murder was committed during the commission of a kidnapping is supported by the record. Dr. Floro, the medical examiner testified that the victim's hands could have been tied behind his back (T 414). This conclusion was based upon the nature of the entry and reentry of the gunshot wound and a small scratch to the back of the victim's hand (T 409-410). Jeffrey Showalter testified that he observed the Appellant stop his car next to the victim shortly after the Appellant had threatened to kill Pullum. The Appellee contends that the court could have reasonably concluded that the victim would not have voluntarily gone with the appellant after he had been threatened with death. The appellee submits that there was sufficient evidence for the trial court to conclude

that the victim was confined and that the confinement was not merely incidental to his murder. Stano v. State, 460 So.2d 890 (Fla. 1984).

The finding of the aggravating circumstance that the murder was committed for pecuniary gain was supported by the trial courts finding that the appellant was motivated to kill Pullum in order to establish and maintain his reputation as a drug enforcer and collector of his drug business accounts. This finding is based upon the evidence in the record which indicates that prior to the killing the appellant informed several people that he thought that the victim had ripped him off and that he would kill him for doing so. The court's finding is also supported by the Appellant's statements to the effect that someone couldn't rip off drug dealers and expect to get away with it (T 313, 316, 423, 424, 426, 492, 494, 587). The finding that a murder took place for pecuniary gain does not have to be based upon the facts establishing a robbery or other property crime, but may be established by evidence that the murder took place to further the defendants illegal business activities. Parker v. State, 458 So.2d 750 (Fla. 1984) cert. denied 105 S.Ct. 1855, 85 L.Ed.2d 152.

In State v. Dixon, 283 So.2d 1 (Fla. 1973), this court established the standard for determining what capital crimes were to be considered heinous, atrocious, and cruel:

> What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies-the conscienceless or pitiless crime which is unnecessarily torturous to the victim.

Facts in the instant case certainly establish that the murder of Keith Pullum was heinous, atrocious and cruel. The trial court's finding that the victim was aware of his impending death is supported by the evidence that his life was threatend by the appellant shortly before he entered the appellant's automobile. Unquestionably, after having been so violently threatened a few minutes before entering the car, the victim had to know that he was taking his last ride. Additional support for this finding can be found in the medical examiner's testimony that the victim would have been concious for approximately five to six minutes after the first fatal stab wounds were administered by the appellant. This Court has held that evidence that a victim knew of his impending death supports a finding of heinous, atrocious and cruel. Stano v. State; Clark v. State, 443 So.2d 973 (Fla. 1983); Duest v. State, 462 So.2d 446 (1985). The appellee submits that the stab wounds, gunshot wounds and blows to the head were acts which set the crime apart from the norm of capital felonies, constituting a consciousless or pitiless crime that falls within the standards set in Dixon supra. The evidence demonstrated that the victim would have suffered the pain of each stab wound before he died and that he would have had several

minutes to contemplate his own impending death.

The Appellant correctly points out that there was no evidence as to whether the victim was shot before he became unconscious, however, that fact is not significant since the appellant did suffer physical pain and the mental anguish of his impending death between the infliction of the vicious stab wound and his unconsciousness. The appellant contends that there was no evidence of torture, however, the appellee submits that repeated stab wounds are in fact a type of torture. The degree of violence that amounts to torture may be open to academic discussion, however, the appellee submits that for physical abuse to be torture, the victim does not have to be bound, gagged and suffer physical abuse for numerous hours.

The Appellant contends that the statutory mitigating factor of limited capacity was established by the evidence. The appellee submits there was absolutely no evidence introduced at trial to indicate that the defendant had a reduced or limited mental capacity due to drug dependency, drug abuse, or alcholism (T 508-524, 427, 428-440).

The trial court's finding that the homicide was committed in a cold, calculated and premeditated manner is supported by the record. See 921.141(5)(i)Fla.Stat. The premeditation necessary to support a finding that a murder was committed in a cold, calculated and premeditated manner must rise to a level beyond

that which is required for a first degree murder conviction. Card v. State, 453 S.2d 17 (1984) cert. denied 105 S.Ct. Fla. 396, 83 L.Ed.2d 330. The Appellee submits that the evidence presented established beyond a reasonable doubt premeditation at a level which exceeded that necessary for first a degree murder conviction.

As pointed out by this court in Hill v. State, 422 So.2d 816 (Fla. 1982) in determining the existance of the aggravated circumstance of cold, calculated and premeditated, a trial court is to focus it's attention not on the method of killing but rather the perpetrators state of mind. In the instant case the trial court did just that in making it's determination. The evidence presented to the court clearly shows that on December 24, 1984, the appellant pointed a gun at the witness Showalter and the victim and told them in no uncertain terms that if he didn't get his drugs back he would kill one or the other of them. This alone would be enough to support the court's finding, however, in addition to the direct threat to the victim there is also evidence that prior to the killing the appellant had told at least one other person that he was going to kill Keith Pullum for taking his drugs (T 323-424). This direct threat to the victim and the appellant's announced intention that he would kill Pullum because of taking his drugs was sufficient evidence to demonstrate that appellant's state of mind was such that he intended to kill Pullum and that this decision had been made long

before the first blow was struck. See Hill v. State, 422 So.2d 816 (Fla. 1982). The threats to the victim and the statements to third parties are sufficient to support the court's finding that the murder was in a cold, calculated and premeditated manner. Johnson v. State, 438 So.2d 774, (Fla. 1983).

The Appellant unconvincingly argues that the record is insufficient to conclude that the killings were an execution. The appellee submits that the appellant's preoccupation with the theft of his drugs; and getting even with the culprit, and his eventual decision that Pullum was the thief is sufficient evidence to support the trial court's finding that the murder was in fact an execution.

The Appellant contends that the murder was committed while his mental status was impaired from the use of drugs and alcohol. To support his contention he cites testimony in the record to indicate that state witnesses and friends of the Appellant had been involved in the use of qualudes and alcohol for several days prior to the murder. The Appellant has failed to cite anything in the record where there was direct testimony or evidence that the Appellant himself was impaired during the time of the murder. There is in fact evidence that witness Hyzer, Showalter, Dimaggio, and others participated in parties in the days prior to the murder. The evidence that the Appellant's friends and acquaintances attended parties and used drugs does

not support the conclusion that he was impaired. The witness Hyzer testified to drug and alcohol use by various people and at various times, but was never asked on direct or cross examination about the sobriety of Mr. Hardwick. Witness Dimaggio and Showalter both testified that when they saw the appellant he was not intoxicated (T 427, 320, 517, 323, 328-329).

In support of his arguement the Appellant cites detective Kesinger's testimony that the Appellant had to be physically carried from the building soon after his arrest on account of his consumption of illicit drugs (T 622). This testimony, however was presented on proffer by the state. The evidence was never before the jury, or the judge as a trior of fact. Even if it had been admitted, certainly it is not evidence that the appellant was intoxicated at the time he committed the offense. The aggravating circumstances justify the imposition of the death sentence. Consequently the appellant's sentence should be affirmed.

ISSUE VIII

WHETHER THE TRIAL COURT IMPROPERLY DOUBLED AGGRAVATING CIRCUMSTANCES BY FINDING THE HOMOCIDE HEINOUS! ATROCIOUS AND CRUEL, AND, COLD, CALCULATED AND PREMEDITATED BASED ON THE SAME FACTS. (RESTATED)

The Appellant contends that the trial court improperly doubled the aggravating factor of §921.141(5)(h) Fla.Stat. heinous, atrocious and cruel, with the aggravating factor of §921.141(5)(i) Fla.Stat. cold, calculated and premediatated manner without any pretense of moral or legal justification.

In Stano v. State, this court clarified the distinction between the two aggravating factors objected to by the appellant:

> . . . Heinous, atrocious or cruel pertains more to the nature of the killing and the surrounding circumstances while cold, calculated, and premeditated pertains more to state of mind, intent and motivation.

Appellee submits that a so-called doubling up of aggravating circumstances only occurs improperly where the two circumstances are based upon the same facts. Such was the result in Oats v. State, 446 So.2d 90 (Fla. 1984), where the trial court considered individually the aggravating factors of commission of a murder during a robbery and a murder for pecuniary gain. This Court determined that the two aggravating factors could not be considered individually because the only evidence that the crime was committed for pecuniary gain was the same evidence of robbery underlying the capital crime.

In the instant case there was no such improper "doubling-up" of aggravating circumstances. The trial court based it's finding that the homicide was heinous, atrocious and cruel on the evidence that the victim was stabbed, knew of his impending death and suffered the pain of several stab wounds before losing consciousness. This was evidence of the method of the killing and the circumstances surrounding it. The trial court's finding that the homicide was carried out in a cold, calculated and premeditated manner was based upon the fact that the defendant had told the witness Demaggio that he was going to kill Pullum and Appellant's December 24, threat on Pullum's life in the presence of witness Showalter, and the fact that a few minutes later he picked up Pullum and took him to an isolated area. The court's finding was based upon evidence which went to the state of mind of the appellant rather than the methods used to committ the offense. The appellee submits that the trial court's finding was proper since it's findings contained distinct proof as to each factor. Hill v. State ,supra, Stano v. State, supra; Mason v. State, 438 So.2d 374 (Fla. 1983).

CONCLUSION

Since the appellant's sentence was not based upon an improper doubling of aggravating circumstances his sentence should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been forwarded to lyde M. Collins, Jr., 707 Peninsular Place, Jacksonville, Florida, 32204, by U.S. Mail this 22nd day of January, 1987.

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