IN THE SUPREME COURT OF FLORIDA

FRANK LEE SMITH,
Appellant,
v.
STATE OF FLORIDA,
Appellee.

CASE NO. 68,834

ANSWER BRIEF OF APPELLEE

ROBERT A. BUTTERWORTH
Attorney Genera
Tallahassee, FL

AMY DIEM
Assistant Attorney General
111 Georgia Avenue, Ste. 204
West Palm Beach, FL 33401
(305) 837-5062

Counsel for Appellee

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LIST OF CITATIONS

Other Authorities:

PRELIMINARY STATEMENT

Appellee was the prosecution and Appellant the defendant in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida.

In the brief, the parties will be referred to as they appear before this Honorable Court of Appeal except that Appellee may also be referred to as the State.

The following symbols will be used:

"R"	Record on Appeal
"AB"	Appellant's Initial Brief

All emphasis has been supplied unless the contrary is indicated.

STATEMENT OF THE CASE

Appellee accepts Appellant's Statement of the Case as found on pages VIII through XI of Appellant's Initial Brief.

STATEMENT OF THE FACTS

Appellee accepts Appellant's Statement of the Facts as found on pages X through XVII of Appellant's Initial Brief, to their limited extent, with the following additions and/or clarifications:

Deputy Pearson was one of the first officers to arrive at the victim's residence at 12:02 a.m. on April 15, 1985. (R502). Deputies Frey and Wargin were already present and performing CPR on the victim. (R502). Pearson obtained a description from the victim's mother, Dorothy McGriff, and broadcasted it over the radio. (R503).

Deputy Burke was also dispatched to the crime scene where he proceeded to the southeast bedroom of the victim's residence and noted a large amount of blood on the bed and a box located nearby. (R509-510). Burke photographed the house and started processing items for fingerprints. Burke observed the northeast bedroom window open which allowed enough space for a man to crawl through. (R512). On one of the beds right next to the window was a portable Zenith TV no more than a foot away from the window. (R512). Burke testified that the poor condition of the house affected his ability to process the scene. (R513-514). The house was very dirty with holes in the floor and walls. (R514). Burke noticed greasy soot over everything because the residents were using a makeshift stove to cook on. (R514). Grease coated many items on the house because of poor ventilation and no hood fan on the stove. (R514). The grease

made his fingerprint powder cake up. Burke was able to seize a quilt and curtains from the northeast bedroom, a screwdriver and small tank top from the couch, as well as the TV set and two pieces of the cardboard boxes that were located in the southeast bedroom. (R515-516). Outside the house on the ground just below the window of the southeast bedroom was a large rock covered in blood. (R516). A portion of the backyard fence was sagging and looked as though someone had recently jumped over it because the bushes next to the fence were broken. (R517). Across the street from the victim's residence was a vacant lot. (R578). Officers located a blue windbreaker jacket and plaid shirt in the bed of a pickup truck parked under some trees. (R578).

On April 16, 1985, Detective Haaren was asked to look at the victim's residence to ascertain if a laser would be of any value in removing fingerprints. (R725). Haaren submitted four latent prints which were determined to be of no value. (R730).

Howard Seiden, a forensic serologist with the sheriff's department, examined vaginal smears taken from the victim at the hospital. (R831). He found few spermatoza in the vaginal smears but indicated that the heavy bleeding endured by the victim would dilute or negate the possible quantity of sperm cells. (R833).

Dr. Epstein, the emergency room physician, testified that when Shandra Whitehead was brought into the hospital she was resuscitated, although she remained unresponsive to any stimulation and had no evidence of cerebral cortical activity. (R715). Epstein noted an injury to her forehead area in the

form of a laceration and bruise marks around her neck. (R715-716).

The autopsy conducted by Dr. Ronald Reeves on April 24, 1985, revealed that the victim weighed forty-seven pounds at death. (R573). The child had many lacerations to the right side of the scalp and face. (R575). A linear laceration had been sutured in the right parietal portion of the scalp above the right ear. Also present was a three-eights inch round laceration on the dorsal aspect of the scalp. (R575). The medical examiner described an injury beneath the scalp which caused a very severe hemorrhage. (R577). Dr. Reeves also observed another area of severe hemorrhage measuring four inches on the vortex of the scalp. (R577). A three-quarter inch irregular laceration in the right temporal area of the scalp penetrated the scalp and also caused extensive hemorrhage. (R578). Immediately below this laceration was a depressed fracture of the skull, indicating extreme impact. (R578). Dr. Reeves testified that this fracture could not occur by striking someone with a hand but required an instrument. (R578). Dr. Reeves also observed a one-quarter inch purplish contusion to the forehead with a similar contusion located to the right of this contusion. (R579).

Upon examining the genital area, the medical examiner found that the vaginal and anal openings were greatly enlarged. (R580). He observed severe trauma to the entire inside of the vagina. (R580). Virtually all of the inside of the vagina was exudated and traumatized. (R581). The trauma created a one-

quarter inch tear to the external opening of the vagina. (R582). Dr. Reeves also observed extensive bleeding relating to the trauma which occurred to the anus. (R581). The anus had a one-quarter inch tear. (R582). Dr. Reeves also examined the child's brain which was soupy in consistency - extremely soft compared to a normal brain. (R586). Dr. Reeves' opinion as to the cause of death was trauma to the head caused by multiple blows to the head which in turn caused the brain to swell. (R585).

Chiquita Lowe testified that she was flagged down by a man near the victim's house as she was driving past the victim's house at 10:30 p.m. on April 14, 1985. (R668). The man who flagged her down came from the victim's yard. (R669). When he asked her for money, Lowe observed the man to have pores in the skin on his cheeks with hair growing underneath these pores. (R671). She described the man as five feet eleven inches or six feet tall. (R671). Gerald Davis was also in the neighborhood at this time. (R672). Lowe stopped at the stop sign and talked to Davis for a short while after speaking to the man. (R672-673).

Gerald Davis came into contact with this same man who started hissing at him from the vacant lot across the street from the victim's residence. (R746). Davis kept walking and was almost to the corner when Chiquita Lowe drove up. (R746-747). After Chiquita left, the voice started hissing at him again. (R748). Davis spurned the man's sexual advances. Davis noticed that the man ran as if he was "knock-kneed" (R576) and that one

eye was sort of "dead, like sleepy." (R751). Davis estimated the height of this man to be six feet to six feet one inch tall. (R757). The man that approached him was wearing a jacket lined with wool (R762-763) and had blue pants on.

On April 15, 1985, Chiquita Lowe was asleep at the home of her uncle, Jack Lampley when she was awakened by the sounds of a person trying to sell a TV set to her uncle. (R876-877). Lowe saw the side of the salesman's head from the back door. (R677). There was no doubt in Lowe's mind that this salesman was the same man who asked her for money the night of the killing. (R677). She immediately phoned the police. (R678).

Jack Lampley testified that he observed a man come into his yard with a TV. (R804). The man attempted to sell the TV to his mother. (R805). Lampley testified he had seen this man before. (R805). Lampley saw a sketch of the murder suspect furnished by Roosevelt Delaney and recognized the sketch of the suspect to be the same man who had just attempted to sell him a TV. (R806).

Lampley identified Appellant in court as the person who had attempted to sell him a TV. (R807-808). Lampley had also selected Appellant's photograph from a photographic lineup. (R808).

Lt. Phil McCann canvassed the northwest Lauderdale area on April 18 after being notified that Lowe had seen the suspect in that area. (R853). After Apellant was identified and arrested, he was interviewed by Detectives Scheff and Amabile.

Scheff advised Appellant of his rights. (R890). Appellant was advised twice of his rights. (R891). Scheff read Appellant his rights in their entirety and explained the rights waiver form to Appellant. (R891). Appellant indicated he understood the rights waiver form and signed it. (R891). Amabile testified that no threats were made to Appellant and that he did not appear to be under the influence of drugs. (R892). Appellant initialed his answers to his rights and signed his name as Frank L. Smith. (R898). Scheff advised the Appellant that they were investigating the assault and rape of an eight year old girl. (R898). Appellant stated that he had heard all about the crime but that he had not been in the area of the victim's residence for months. (R899, 979). Scheff told Appellant that he had two witnesses who saw the suspect on the street. (R900, 982). Appellant had no reaction to this information. Appellant was informed that the mother saw the suspect leaving the house to which Appellant had no reaction. (R900, 982). Scheff then informed Appellant that victim's brother who was also in the house had seen the suspect. (R900, 983). Appellant became emotional and said that it was impossible for the boy to have seen him as it was too dark. (R900, 984). Appellant said the lights were out. (R984).

On April 19, 1985, Amabile and Scheff showed Chiquita Lowe some photographs. (R902). Lowe selected photograph number two, which was Appellant's photograph, as the man who was outside

the victim's residence at 10:30 p.m. on April 14. (R679-680). Lowe testified that what was unusual about the person she saw was that one eye was droopy and looked like it was weak or needed glasses. (R683-684). Lowe identified Appellant in court as the man she observed outside the victim's residence. (R680). Lowe was also shown another photographic lineup which did not contain Appellant's photo from which she did not make an identification. (R684).

Two photographic lineups were also shown to Gerald Davis. (R909). One lineup contained a photograph of another suspect but Davis did not make an identification from this lineup. Another photographic lineup was shown to Davis containing Appellant's photo. Davis indicated that photograph number two looked like the individual that approached him on April 14 (R753-759) but he was not one hundred percent positive. (R909). Davis felt insecure making an identification from a photograph and said he would be more comfortable with a live lineup. (R988). A live lineup was conducted at the courthouse for Davis' behalf on April 29, 1985. (R989). The sheriff's office selected five individuals with a resemblance to Appellant. (R911). Appellant was allowed to select the location where he wished to stand. Davis was told to view everyone and that if he made a selection he would be brought back outside where a representative from the public defender's office was also present. (R912). After Davis viewed the lineup, he was brought back outside and asked if he recognized anyone. Davis selected

Appellant who was standing in the fifth position. (R913, 989). A taped statement was then taken of Davis at the sheriff's office. (R917). Davis expressed reservations with regard to his identification. (R917). Davis' reservation was that the person he selected seemed smaller than the man that approached him on the street. (R918,991). Davis mentioned that the man he saw was approximately six feet tall. Scheff told Davis that the suspect which he selected from the live lineup was six feet tall and that the suspect might have appeared smaller because everyone in the lineup was approximately the same height. (R918, 991-992). Scheff testified that it soon became apparent that it was not the identification Davis was having problems with but having to appear in court. Davis was reluctant to appear in court. (R992). After having this conversation with Davis, Davis then said that suspect number five was in fact the person he saw on the night of the attack. (R993).

Dorothy McGriff viewed the sketches of the suspect but was unable to make an identification from the sketches. She testified that she cannot recognize people from sketches. (R661). On April 19, she was shown a photographic lineup and selected photo number two which was Appellant's photo. (R651, 908, 985). She screamed, pointing her finger at the photograph of Appellant saying, "that is the man that did my baby". (R986-987).

Other facts will be cited as appropriate throughout the body of the brief.

POINTS ON APPEAL

POINT I

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION TO EXCLUDE TESTIMONY WHERE THE TRIAL COURT CONDUCTED A RICHARDSON INQUIRY?

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WHETHER APPELLANT WAS DENIED A FAIR TRIAL BY ANY ACTIONS ON THE PART OF THE STATE?

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SUMMARY OF ARGUMENT

I. The trial court correctly denied Appellant's motion to exclude testimony where the court conducted adequate inquiry into the state's violation of the discovery rule. Appellant suffered no prejudice where the court allowed him the opportunity to depose these witnesses prior to trial.

II. Appellant was not denied a fair trial by any actions on the part of the prosecutor where they were either unpreserved for appellate review, meritless, or constituted harmless error. The comment made by the prosecutor was not susceptible as being a comment on failure to testify and no improper character attack occurred.

III. The trial court correctly called Gerald Davis as a court witness where the prosecutor could not vouch for his credibility. Further, the prosecutor's questons were not an attempt to impeach Davis but merely refreshed his recollection.

IV. There was substantial, competent evidence to support the jury's verdict of guilt on all counts.

V. The trial court did not err in various rulings at trial. Any error, if at all, must be deemed harmless.

VI. The trial court properly departed from the sentencing guidelines on Count III where it stated clear and convincing reasons.

VII. The trial court correctly sentenced Appellant to death where there were no mitigating factors and five aggravating factors and where the jury unanimously recomended death.

POINT I

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING APPELLANT'S MOTION TO EXCLUDE TESTIMONY WHERE THE TRIAL COURT CONDUCTED A RICHARDSON INQUIRY.

Appellant alleges that the trial court erred in failing to conduct a Richardson hearing on whether the prosecutor failed to disclose to trial counsel for Appellant several state witnesses he intended to call at trial. Appellee submits that Appellant's argument is without merit because he misapprehends what the purpose of a Richardson hearing is. In Richardson v. State, 246 So.2d 771 (Fla. 1971), and its progeny, the courts have established that if, during the course of trial proceedings, a violation of a discovery obligation under Rule 3.220 of the Florida Rules of Criminal Procedure, is brought to the trial court's attention, the trial court must make adequate inquiry into whether the state's violation of the rule was inadvertent or willful, whether the violation of the rule was trivial or substantial, and what effect, if any, it had upon the ability of the defendant to property properly prepare for trial, and if appropriate what sanctions should be applied. See, Kilpatrick v. State, 376 So. 2d 386 (Fla. 1979); Lucas v. State, 376 So.2d 1149 (Fla. 1979); Wilcox v. State, 367 So.2d 1020 (Fla. 1979); Cumbie v. State, 345 So.2d 1051 (Fla. 1977). Thus, a Richardson inquiry is not required until the trial court has determined that the state had in fact violated a discovery rule. Justus v. State 438 So.2d 358, 365 (Fla. 1983).

At the January 21st hearing on Appellant's motion in limine regarding proffered similar act testimony, defense counsel brought to the trial court's attention that he had received an amended witness list on January 10, 1986. (R123). During the course of the discussion on similar act testimony, defense counsel informed the court:

> The thing that happened four days later, number one, if he said it was a hot T.V., I'm unaware of it and I'm unaware of all these witnesses up until today. I got the witness list today of four or five people including this Pearl Lampley, whoever she is, claiming that the defendant made the statement, where is the little red girl at, do you want to buy a T.V. (R131).

The court then stated, "If there is a violation as to the rule as to notice, we are certainly going to have to take the depositions of these witnesses and prepare". (R133). The State asserted that there was no prejudice as the granddaughter, Chiquita Lowe, had given a deposition to Mr. Gallagher [Appellant's former defense attorney] months ago in which she related the circumstances of the suspect returning to her house. (R133). The State argued:

> This is not a surprise to the defendant that this whole incident occurred. It's not a surprise to the defendant. He came to the house and talked to the grandmother about the T.V. This has all been known for months and months.
>
> What wasn't known until Chiquita Lowe came into my office yesterday was the exact name of the grandmother. I gave a prior amended answer to discovery a week or so ago listing the grandmother as a witness. Yesterday I came up with her name, Pearl Lampley, and gave the details as much as I could as to what

the evidence was. (R134).

Appellant then argued he was prejudiced by this late disclosure:

> I was never aware if the grandmother could identify him the day of trial. She lives in the same house with Chiquita Lowe who all she's done is talk about the case for the past nine months. I don't know who Pat Lampley or Jack - I haven't the foggiest idea. (R135).

The court then found that Appellant's former public defender, Tom Gallagher, knew of the situation and the need for further discovery and investigation and denied Appellant's motion to exclude testimony. (R136,137). However, the trial court gave Appellant's attorney an opportunity to take their depositions prior to trial. (R136). The trial court found that the "defendant was on notice of the situation, was on notice of what has occurred out there, could have further discovered I believe these four witnesses and can also ask as to the incident, can further be discovered and their statement taken prior to trial". (R137).

It is well established that a trial judge has broad discretion in determining whether the State has complied with discovery. See Justus, supra at 365. Rule 3.220 of the Florida Rules of Criminal Procedure is part of the general discovery of Florida. Like all discovery procedures, fairness is the watchword." Watson v. State, 291 So. 2d 661, 662 (Fla. 4 DCA 1979). The discovery rules were "designed to furnish a defendant with information which would bona fide assist him in the defense of the charge against him. [They] were never intended to furnish

a defendant with a procedural device to escape justice". Richardson, supra at 774. The rules of procedure were not designed to eliminate the onerous burdens of trial practice, but rather to avail the defense of evidence known to the State. Cooper v. State, 336 So.2d 1133, 1138 (Fla. 1976). The State has no duty to do for the defense, work which the defense can do for itself. State v. Counce, 392 So.2d 1029, 1031 (Fla. 4 DCA 1981).

Contrary to Appellant's assertions, the trial court did in fact hold a Richardson hearing. See, e.g. Shrum v. State, 401 So. 2d 941 (Fla. 5 DCA 1981). Again, the State informed the court that as a new prosecutor on the case he had amended the witness list to include several new witnesses. (R133). The court conducted an inquiry as to how these witnesses might have prejudiced the defense. It is apparent from the record that the current defense counsel, Mr. Washor, was aware at the very least of the grandmother's existence. (R135). What defense counsel wasn't aware of was "if the grandmother could identify him the day of trial". (R135). With any amount of due diligence, defense counsel could have discovered this information by deposition. Clearly, the court was unpersuaded by Appellant's prejudice argument. The State argued that the defense had been on notice that Appellant had been to the Lampley residence in an attempt to sell a television for months. (R133). The granddaughter, Chiquita Lowe, who not only observed Appellant the time of the crime, gave a deposition to Appellant's former attorney under which she related the circumstances of Appellant

coming to her grandmother's house. (R133). The court specifically found that the defense was aware of this allegation and denied Appellant's motion to exclude. (R136-137). Implicit in this ruling is a finding of lack of prejudice to the defense. However, the court did allow the defense to take the depositions of these witnesses prior to trial. The court obviously believed that the opportunity to depose the witnesses cured the State's failure to comply with discovery. (R136). Also implicit in the trial court's denial of Appellant's motion to exclude is a finding that the State's discovery violation was trivial after listening to the reasons for late disclosure from the State. Appellant's complaint seems to be that the trial court didn't use the magic words and call the hearing a "Richardson" hearing or make formal findings in this regard. However, a trial court's failure to make formal findings in a Richardson hearing does not constitute reversible error. See, Baker v. State, 438 So.2d 905, 906 (Fla. 2d DCA 1983).

Finally, Appellant's defense strategy was not changed by virtue of these additional witnesses. Appellee maintains that neither Roosevelt Delaney nor Pat, Jack and Pearl Lampley were crucial to the State's case. The State had ample other evidence of identification of Appellant aside from his sighting at the Lampley residence. Moreover, the only testimony of the new witness who did in fact testify, Jack Lampley, was merely cummulative of Chiquita Lowe's testimony that she saw Appellant leaving her residence as she looked out the back door. (R677).

Thus, the trial court made a sufficient Richardson inquiry and did not abuse its discretion in denying Appellant's motion to exclude.

POINT II

APPELLANT WAS NOT DENIED A FAIR TRIAL BY ANY ACTIONS ON THE PART OF THE STATE.

Appellant alleges that misconduct on the part of the prosecutor prevented him from receiving a fair trial. Appellee submits however that no misconduct occurred and that Appellant did receive a fair trial

Appellant first complains that the prosecutor's closing argument was fairly susceptible as being a comment on Appellant's failure to testify. Appellee would initially point out that no objection nor motion for mistrial was made to this argument and that the issue is not preserved for appellate review. Pope v. Wainwright, ___ So.2d ___, 11 F.L.W. 533 (Fla. October 16, 1986); O'Callaghan v. State, 429 So. 2d 691 (Fla. 1983); State v. Cumbie, 380 So.2d 1031 (Fla. 1980); Clark v. State, 363 So. 2d 331 (Fla. 1978).

A careful review of the record indicates that this argument was in response to an artful defense ploy which backfired during cross-examination of Jack Lampley on his identification of Appellant. Appellant, who opened the door to this argument, should not be heard to complain about it on appeal. During cross-examination of Jack Lampley, the following occurred:

> Q: (By Mr. Washor) Based on this prior acquaintance that you had with this man you recognized him to be somebody that you knew had a lot of scars on his chest, isn't that correct?

A: (By Mr. Lampley) Yes.
Q: I believe you said the right side of his chest was marked with scars?

A: Yes.

Q: That looked like knife marks?

A: Yes, I recall.

Q: Frank, could you please stand up. Judge, does he have permission - let me do it this way. Would you please step down. Please open your shirt, Frank and show your chest to Mr. Lampley.

Mr. Dimitrouleas (Prosecutor): Your Honor, I'm going to ask if it's appropriate with the court that Mr. Smith take off all his clothes above the waist so that the witness can observe.

Mr. Washor: You can take your whole shirt off.

This is the man you positively ----------

Mr. Dimitrouleas: Wait a minute, if we could, take the whole shirt off.

Q: (By Mr. Washor) Were the scars all over his chest?

A: No, but he's got a scar.

Q. Isn't that what you said, he had scars all over his chest?

A: Yes.

Q: This man does not have scars all over his chest, does he?

A: Not all over.

Mr. Dimitrouleas: Your Honor, would the record reflect Mr. Smith does have a scar around his collar bone going down his arm and another scar on his humerus. Maybe if the court could ask the defendant to walk in front of the jury. (R811).

Appellant submits that it was certainly not improper for the State to ask Appellant to reveal his scar where the defense challenged Jack Lampley's identification. It was Appellant's attorney who requested that Appellant take off his shirt. (R811). Requiring an accused to give an exemplar does not violate constitutional prohibitions. See, e.g. State v. Edge, 397 So.2d 939 (Fla. 5th DCA 1981) (blood tests are not testimonial evidence protected by the fourth or fifth amendment); Joseph v. State, 316 So.2d 585 (Fla. 4th DCA 1975) (compelling accused to speak a certain phrase heard by a robbery victim for purpose of identification held permissible); Morris v. State, 184 So.2d 199 (Fla. 4th DCA 1966) (requiring one accused of armed robbery to wear in a lineup a red plaid jacket worn by the robber held constitutional).

The record reveals that the prosecutor's closing argument taken in context was not a comment calling to the jury's attention that the accused had not testified in his own defense at trial. The remark made was a comment on the accuracy of Lampley's identification where his identification was based in part on the presence of scars. These comments were not fairly susceptible of being interpreted by the jury as comments on his failure to testify. State v. Shephard, 479 So.2d 107 (Fla. 1985). In Harris v. State, 438 So.2d 787 (Fla. 1983) cert. denied 104 S.Ct. 2181, this court held that a prosecutor's statement during closing argument that addressed a critical issue of whether the defendants confession was voluntary and, in doing

so, described the defendant's demeanor during interrogation by comparing it to his demeanor as he appeared at trial was not a comment on his failure to testify. Moreover, this argument fell into the category of an "invited reply" by the preceding argument of defense counsel who devoted most of his argument, if not all, to attacking the credibility of the identifications made at trial. (R1108-1111, 1113-1124, 1126, 1133-1135, 1137-1141). See, Ferguson v. State, 417 So.2d 631 (Fla. 1982); State v. Mathis, 278 So.2d 280 (Fla. 1973).

In Hall v. State, 403 So.2d 1321 (Fla. 1981) this Court held that a remark made by a prosecutor with regard to the defendant's being asleep was not a comment on the defendant's failure to testify and though it may have improperly implied a lack of interest on the part of the defendant in his own trial proceedings, was not so prejudicial that a mistrial was required. Certainly, the remark made by the prosecutor sub judice was no more egregious than the remark made in Pope, supra, where the defendant was characterized as grinning from ear to ear.

The comment made in the case at bar was induced by Appellant's own behavior. In White v. State, 356 So.2d 882 (Fla. 3 DCA 1978), cert. denied 365 So. 2d 894, defense counsel announced to the court that the defendant had asked to take the stand against the advice of his counsel and was called to the stand to testify. The defendant, however, remained at counsel table with his head hung low and hands at his side. When the

court asked him whether he needed help getting to the stand the defendant did not answer and remained seated in the same position. The prosecutor's remark that "it must be obvious that the defendant does not wish to take the stand" was held not to be a comment on silence but rather was induced, if not invited, by the defendant's behavior. See also, Courson v. State, 414 So.2d 207 (Fla. 3DCA 1982) (prosecutor's remark that "may the record reflect the defendant was writing with his left hand in court" was made for the purpose of establishing that the defendant was left handed and did not constitute a comment on silence.)

Should this Court find the remark to constitute a comment on Appellant's failure to testify, Appellee submits that the error is harmless under the dictates of State v. DiGuilio, 491 So.2d 1129 (Fla. 1986), in light of the overwhelming evidence of guilt against Appellant. At bar, it is clear that the alleged comment on silence did not possibly influence the jury's verdict where Appellant was identified at the scene by two witnesses within an hour of the commission of the crime and who was also identified by the mother of the victim as being at her residence at the time the crime occurred. Moreover, this evidence, coupled with Appellant's incriminating statement that the victim's brother could not have seen him in the house as it was too dark, constitutes substantial evidence of guilt and any error, if at all, is harmless beyond a reasonable doubt.

Turning to Appellant's second alleged prosecutorial impropriety, Appellant argues that the prosecutor improperly

attacked Appellant's character by eliciting evidence of unrelated criminal activities calculated to show bad character or propensity to commit crimes. Appellant argues that the testimony of Gerald Davis that the man who approached him on the street asked him if he wanted to "get high" constitutes reversible error. Appellee submits that this issue is not preserved for appellate review where Appellant neither objected to this line of inquiry nor moved for a mistrial, thus belying Appellant's argument of prejudicial effect. (R748-749). The proper procedure to take when objectionable comments are made is to object and request a curative instruction. Duest v. State, 462 So.2d 446 (Fla. 1985); Ferguson v. State, supra, Clark v. State, supra,. Similarly, the statement made by Detective McCann that Appellant called him by his last name although McCann never told him his last name also went unobjected to (R854a) as did the testimony that Appellant initially identified himself as Elijah Israel. (R897).

Appellant's argument that the testimony of McCann that Appellant called him by his last name was prejudicial to Appellant is specious. Taken in context, this testimony hardly has the effect of implicating Appellant in prior criminal involvement as Appellant's strained construction would have it:

> Q: (By Prosecutor) Did you have an occasion to transport him back to the Sheriff's office?
>
> A: (By McCann) Yes, sir, I did.
>
> Q: During that transportation, what, if any, manner did he have occasion to

address you on?

A: He called me by my last name, McCann.

Q: Prior to his calling you by McCann has there been any mention by you of your name?

A: No, sir.

Q: Now, pursuant to your investigation in this case, have you been able to ascertain whether or not the Defendant is over eighteen years of age?

A: Yes, sir. (R854A)

Thus, the record reveals the remark to be quite innocuous.

The testimony of Gerald Davis regarding the suspect wanting to use drugs and the testimony of McCann that Appellant called him by his last name hardly became a feature of the trial. See, Oats v. State, 446 So.2d 90, 94 (Fla. 1984). The transcribed testimony spans no more than three transcribed pages of the instant record; hardly an indication that evidence of collateral crimes was a predominant feature in this trial.

Appellee posits that the testimony of McCann that Apellant referred to him by his last name although Appellant had never been informed of his last name is not improper evidence of a collateral crime. At first blush, it doesn't appear to infer any prior criminal involvement at all. It is only after pyramiding inference upon inference that the remark takes on this connotation. In Evans v. State, 422 So.2d 60 (Fla. 3 DCA 1980), the appellate court found that a reference to a mug shot in police files does not necessarily convey to the jury that the

defendant has committed prior crimes or has previously been in trouble with the police.

It is axiomatic that evidence of other crimes is admissible if it is probative of a material issue other than the bad character of an individual. Williams v. State, 110 So. 2d 654 (Fla. 1959). Section 90.404(2)(a), Florida Statutes (1985) lists proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident as some of the issues to which the evidence of collateral crimes may be relevant. It is Appellee's position that Davis' testimony that the Appellant approached him from the vacant lot across the street from the victim's residence and asked him if he wanted to use drugs is relevant to identity and opportunity. The state introduced this testimony not to show bad character, but to establish the identity of Appellant. His testimony also showed opportunity as it placed him at the scene of the crime an hour prior to its occurrence and rebutted Appellant's statement to the police that he had not been in the victim's neighborhood for months. (R979).

Appellee also contends that the testimony of Gerald Davis was so inextricably entwined with the crimes charged that an intelligent account of the incident could not be portrayed by Davis without this testimony. The testimony that Appellant approached him on the street one hour prior to the commission of the crime near the victim's residence and asked him if he wanted to use drugs was part of the res gestae of the crimes charged and

necessary to show the context of the criminal episode. In Smith v. State, 365 So.2d 704, 707 (Fla. 1978), cert. denied 444 U.S. 885 (1979), this Court stated that "[a]mong the other purposes for which a collateral crime may be admitted under Williams is the establishment of the entire context out of which the criminal conduct arose."

Similarly, in Hall v. State, supra, this court held that collateral evidence with respect to another murder committed on the same evening by the defendant was admissible to prove identity because the weapon used in that murder was located underneath the body of the victim in the case at trial. The collateral crime showed the general context in which the criminal action occurred. See also, Heiney v. State, 447 So.2d 210 (Fla. 1984), cert. denied ___U.S.___, 83 L. Ed. 2d 237.

Appellant also urges as error the prosecutor's reference to Appellant as a weirdo during closing arguments. (R1157). However, this comment was not objected to and is not preserved for appellate review. Ferguson v. State, supra, Clark v. State, supra. Additionally, Appellant's argument overlooks the testimony of Gerald Davis that Appellant's "outlook was strange for one, a weird guy, you know, he was like rugged looking and I really didn't want to be bothered with him." (R750). In arguing to the jury, the prosecutor merely commented on the evidence by arguing:

> I don't care how much Gerald Davis' testimony is attacked, how much his identification is attacked, there has never been any question as to the fact

> that there was a weird strange guy that was talking to Gerald Davis that evening and what he said was bizarre. (R1156).

Moreover, the prosecutor never referred directly to Appellant as being a "weirdo", the prosecutor stated:

> If a weirdo, if someone that has all these frustrations up in him wants a release, where is he going to go? What is the easiest mark, little Shandra Whitehead's home. That is the area he was hanging out in right before he came into contact with Chiquita Lowe. (R1157-1158).

Appellee submits that this remark, although arguably ill-advised, did not prejudice Appellant's right to a fair trial where such an observation could properly be deduced from the evidence and was amply supported by the record, sub judice. See, e.g., Darden v. State, 329 So.2d 287 (Fla. 1976), cert. denied 430 U.S. 704; Collins v. State, 180 So.2d 340 (Fla. 1965). Appellant also argues that the prosecutor "improperly emphasized the breakdown of the victim's mother on the witness stand...by reminding the jury 'that she became an emotional wreck when she saw this photograph...she started wailing and screaming...that is the one who did my baby.'" (AB24).

This argument was not objected to and is not preserved for appeal. Clark, supra. Appellant misapprehends the nature of this argument. It was not calculated to emphasize the grief-stricken mother's breakdown on the stand but rather, was an attempt by the prosecutor to argue the accuracy of the mother's identification where Appellant challenged her identification during his closing argument. (R1114-1118). The defense argued

that not only was her identification inaccurate but that she wanted somebody to pay for this crime. (R1117). Indeed, defense counsel argued that it "does not mean that Mr. Smith did it because a woman here is crying that her daughter is dead." (R1113). Thus, the prosecutor's argument was in fair reply to the argument of defense counsel. Ferguson, supra. The prosecutor countered Appellant's argument stating:

> You know, if she is out to get some emotional relief, if she's just there to have someone put in jail for the terrible crime against her daughter and just rationalize in her own mind, okay; someone is going to pay for it. Isn't she going to pick out somebody in the first lineup when she gets the opportunity? She didn't.
>
> Gerald Davis didn't because none of these men did the crime. When she's given the opportunity to look at State's Exhibit Number 81 in evidence, she starts wailing and screaming, points out number two. That is the one that did my baby. You will never convince Dorothy McGriff she doesn't know who did this crime. She didn't even want to look at him. (R1174).

Appellant also argues in his shot-gun fashion that the prosecutor appealed to the emotions of the jury in requesting a fair verdict for the victim. Appellant's selective references to the record taken out of context do not reveal what was truly argued. The prosecutor asked the jurors "to use your common sense in this case and I ask you to return a fair verdict, a fair verdict not only for the Defendant, but a fair verdict for Shandra Whitehead, also." (R1179). As such, it becomes clear that this argument was not an appeal to the emotions of the

jury. The prosecutor was more than fair to Appellant. Moreover, the defense attorney obviously did not feel this argument was prejudicial as he did not object to it, leaving this issue unpreserved for appeal as well. Clark, supra.

Finally, Appellant's argument that the prosecutor coached Gerald Davis in his identification of Appellant is based on speculation. The trial court obviously did not find the testimony of Della Irving, Appellant's aunt, to be believed, as the judge stated, "Rather incredible testimony it appears." (R1250). The prosecutor testified that he never took Gerald Davis to the courtroom door to point out the Appellant nor would he ever consider doing something like that. (R1248). Reversible error should not be based on speculation. Sullivan v. State, 303 So. 2d 632 (Fla. 1974), cert. denied 428 U.S. 911 (1976).

Thus, none of the prosecutorial comments individually or collectively constitute such grave error as to vitiate the entire trial. See Cobb v. State, 376 So.2d 230 (Fla. 1979).

POINT III

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING GERALD DAVIS TO BE CALLED AS A COURT WITNESS.

Prior to the testimony of Gerald Davis, the prosecutor requested that the court call Davis as a court witness "based on his changing his testimony from the sworn statement to the police to what he said on deposition." (R742). The prosecutor also stated that he couldn't vouch for Davis' credibility and that Davis was now saying that before he made a live line-up identification the police showed him a photographic line-up again which was contrary to what he had said in the sworn statements. (R742-743). The court overruled Appellant's objections. (R743).

Davis' trial testimony was equivocal, to say the least. During the prosecutor's direct examination of Davis, he testified that he couldn't remember if the suspect who approached him on the street had any scars. (R758). Davis remembered having a conversation with the police and giving a deposition in which he stated that he thought the suspect had a scar. (R758). Davis testified that this statement was based on something that the police told him. (R758). Davis testified that he couldn't remember when he indicated to the police that the suspect had a scar. (R758-759). The prosecutor then showed Davis his April 29th sworn statement given to the police in an effort to refresh his recollection. (R759). Davis then recalled that the police did question him about a scar at that time. (R759). The prosecutor then directed Davis' attention to his June 25, 1985

deposition. This refreshed Davis' recollection as to another time when Davis indicated that he observed a scar. (R760). Davis testified that the indication of a scar that he gave in his June 25th deposition would have occurred after he viewed the live line-up. (R760). However, Davis testified he did not see a scar during the live line-up. (R761) In this deposition, Davis had stated that the suspect had a scar under his eye. (R761).

During the prosecutor's direct examination, Davis also testified that the suspect who approached him had on a jacket, blue pants, and work boots. (R762). He described the jacket as being made up of heavy wool. (R762). Davis testified on direct examination that he could not recall the material on the inside of the jacket. (R762). Davis' recollection was once again refreshed by the April 29 statement and he remembered that the suspect was wearing a windbreaker jacket lined with wool. (R763).

Not surprisingly, Davis' cross-examination testimony became vague and inconsistent with what he had just testified to during the prosecutor's direct examination. Davis testified on cross-examination that he couldn't remember if the suspect had on a long sleeve shirt or a jacket (R766-767), after just testifying that the suspect had been wearing a jacket. (R760,762). Appellant's attorney refreshed Davis' recollection with his first statement given to the police, and then Davis testified that the suspect was wearing a shirt and a jacket. (R767). Davis testified that he didn't say the jacket was made of vinyl and didn't remember saying the jacket was made of vinyl, although he

acknowledged that in his statement he said the suspect had a vinyl jacket. (R767). Notably, David had just testified minutes earlier that the jacket was made of wool. (R762).

Also during cross-examination, Davis testified that he had probably told the police at one time that the suspect had a scar although his current testimony was that the suspect didn't have any scars. (R769). This testimony occurred after the prosecutor had elicited that Davis stated in his June 25 deposition that the suspect had a scar. (R760-761). Davis acknowledged that in his first statement to police, he had told them that the suspect had no scars. (R770). It wasn't until his second, April 29 statement, that he stated the suspect had a scar. (R773). When asked if the police officers had anything to do with his all of a sudden saying that the suspect had a scar, Davis testified that it was the police who asked him if the suspect had any scars. (R773). When asked by Appellant's attorney if he said to police that he thought there was a scar on the suspect's face during the time he was attempting to develop a composite sketch, Davis testified that it was the police who put the scar on the face and that he couldn't remember. (R787). Davis was shown his deposition testimony, and testified that he remembered one scar line on the suspect's face. (R788). Davis testified that this mark looked as if someone had cut him. (R788). Davis then acknowledged that he had just testified during trial that the mark was more like hair bumps. (R788). Finally, Davis acknowledged that he did indeed say that the mark

was at one time a cut, and at another time a hair bump, although he was under oath on both occasions. (R788). Davis further testified that before he viewed the live line-up, the police showed him a photograph of the Appellant. (R789).

Appellant argues that the trial court erred in allowing Gerald Davis to be called as a court witness. Appellee submits that Appellant's argument is without merit. The trial court not only properly called Davis as a court witness on the ground that his expected trial testimony would be different than that given in prior statements, but also on the ground that the prosecutor could not vouch for his credibility. The State requested that the court call Davis on this ground (R742) and the court granted the motion in part on this ground. (R743).

Appellee would initially point out that it was not improper for the court to call Davis as a court witness on the grounds that the witness has become uncooperative, because the moving party does not wish to vouch for the credibility of the witness, or because the party previously calling the witness has been surprised at trial by testimony given. Brumley v. State, 453 So.2d 381 (Fla. 1984); Delanie v. State, 362 So.2d 689, 690 (Fla. 2 DCA 1978). See also McCloud v. State, 335 So.2d 257, 160 (Fla. 1976) (where person had given deposition in advance of trial and prosecutor warned that such person was unwilling or unable to recall any specifics, trial court had discretion to allow witness to be called as a court witness). Thus, notwithstanding Appellant's argument that the court improperly

called Davis as a court witness where he allegedly gave no adverse testimony, it is submitted that the trial court did not abuse its discretion in calling Davis as a court witness where the prosecutor could not vouch for his credibility. Brumley, supra; Williams v. State, 443 So.2d 1053 (Fla. 1 DCA 1984). Moreover, Davis was a proper court witness even though he was not an eye witness. Appellant's reliance on Jackson v. State, ___ So.2d___, 11 F.L.W. 609 (Fla. Nov. 26, 1986) is misplaced. Appellant relies on dicta in Jackson for the proposition that a court witness must be an eye witness to the crime. Certainly, Section 90.615, Florida Statutes (1985) imposes no such limitation on who a court may call as a witness. In Jackson, supra, this Court recognized that most Florida cases where a witness has been called as a court witness involved an eyewitness. True, an eyewitness normally possesses relevant and material evidence but many crimes do not have eyewitnesses. Jackson mandates that the person called as a court witness possess material and relevant information necessary to the factual question in issue. It is indisputable that Davis had material and relevant information such that he was properly called as a court witness. Davis observed a man in a vacant lot across the street from the victim's residence approach him with regard to using drugs. This occurred approximately one hour before the crime. When Davis rejected his advances, he observed the man to walk away in the direction of the victim's residence. Davis later identified this person from a

photographic line-up and live line-up, although he was not absolutely positive of his identification.

Appellee submits that Appellant's reliance on Jackson, supra, and Parnell v. State, ___So.2d___, 11 F.L.W. 2273 (Fla. 4 DCA Oct. 29, 1986) is further misplaced where Appellant misapprehends the nature of the prosecutor's questioning. Sub judice, the record reveals that the State was not engaged in impeaching Davis with prior inconsistent statements, but rather, was refreshing the recollection of this witness by showing him his prior sworn statements. (R759, 760, 762, 763). It is not as if the prosecutor read the witness questions and answers from his prior statements.

After being shown his statements, Davis was then able to testify from present recollection as to the description of the suspect. It is proper to refresh a witness' recollection by showing him prior statements. See, Hill v. State, 355 So.2d 116 (Fla. 4 DCA 1978) (witness' memory may be jogged by reference to prior statements, and prior statements may be considered for impeachment purposes.) It was Davis' present recollection of his prior descriptions given to the police and in a deposition which proved adverse to the State.

Should this Court find that impeachment occurred, Appellee submits it was certainly not improper where Davis' testimony was riddled with inconsistencies and proved adverse to the State. Davis testified that he remembered stating in the past that the suspect had a scar. (R758). However, Davis

maintained that in this deposition testimony the suspect had a car was based on something the police told him (R758); thus, paving the way for defense counsel's argument that Davis' identification of Appellant was suggested to him by police and unreliable. (R1133, 1136, 1137, 1138-1141).

Appellant also argues that the prosecutor's allegedly improper impeachment led to the State's bringing similar inconsistent statements of Davis "through Detectives Amabile and Scheff regarding identification procedures. (Tr vol. VI, pgs. 907,991), and regarding the mentioning of the scar on the suspect (Tr. vol. VII, pg. 1014). (AB28). A review of the record at 907 and 991 reveal no improprieties and are not even relevant as to whether Davis' identification was suggested. (R907). Moreover, Scheff's testimony that he suggested to Davis that perhaps all the line-up suspects being of the same height may have made Appellant appear smaller was proper impeachment to Davis' testimony that his description of a scar was based on something the police told him. (R758). Scheff's testimony regarding Davis' description of a scar was elicited by Appellant's attorney on cross-examination. (R1014).

Appellant also alleges that the prosecutor improperly impeached Appellant with regard to his description of the jacket that the suspect was wearing. On direct examination, Davis testified that the suspect who approached him had on a jacket made up of heavy wool. (R762). However, on cross-examination he stated that he couldn't remember if the suspect had on a jacket

or long sleeve shirt. (R766-767). After his recollection was refreshed, he testified that the suspect was wearing both a shirt and a jacket. (R767). Davis testified that he remembered that in his first statement given to the police he stated that the jacket was made of vinyl, and not wool. (R767). Defense counsel elicited from Scheff that Davis described the suspect as wearing a jacket. (R1016). No improper impeachment occurred.

Appellant's reliance on Jackson, supra and Parnell supra, is improper where as the Appellee demonstrated above, any impeachment was proper. Additionally, Jackson and Parnell are distinguishable from the case sub judice. Jackson involved the defendant's mother being called as a Court witness to testify that Jackson had not admitted the robbery and murder. The state anticipated this testimony as it was consistent with her earlier sworn deposition testimony. The purpose of calling the mother as a court witness served to enable the State to call an impeaching witness to testify that the mother had told him that Jackson had confessed. Unlike the case at bar where Davis possessed material and relevant information, the mother's testimony that her son did not admit to the crimes was not relevant to the issue of guilt and was not even adverse to the State. The instant case and Jackson cannot even be compared as no such subterfuge was indulged in by the prosecutor sub judice.

Additionally, Jackson, and Parnell, supra, involved alleged inculpating statements supposedly made by the defendants which were the subject of the improper impeachment. This is in

contrast to the identification testimony adduced below. The Jackson and Parnell inculpatory statements are more prejudicial in nature than the identification testimony elicited at bar.

Appellant further contends that the admission of prior inconsistent statements by Davis was error where they were used as subtantive evidence. It should be remembered that any inconsistency testified to by Davis was testified to from present memory and not through the State's admission of prior inconsistent statements. Moreover, the record reveals that any alleged prior inconsistent statements were not treated or argued as substantive evidence. Appellant's attorney did not object to the State's subject or manner of inquiry nor did he request a limiting instruction and should not be heard to complain on appeal that he did not receive one. See, e.g., Milton v. State, 438 So.2d 935 (Fla. 3d DCA 1983) (trial court not obligated to give instruction on limited purpose for which similar crime evidence was to be considered absent request by defense counsel.

Should this Court find that improper impeachment occurred, Appellee submits the error is harmless as it did not use to the level of fundamental error. White v. State, 446 So.2d 1031 (Fla. 1984); Dickey v. State, 458 So.2d 1156 (Fla. 1 DCA 1984). The jury reached a fair and impartial verdict aside from Davis testimony. There was ample other evidence of identification such as to render any error harmless. (See Point IV, infra.)

POINT IV

THERE EXISTED SUBSTANTIAL, COMPETENT EVIDENCE TO SUPPORT THE CONVICTION AND SUSTAIN THE DETERMINATION OF GUILT. (RESTATED).

When it is shown that the jurors have performed their duty faithfully and honestly and have reached a reasonable conclusion, more than a mere difference of opinion as to what the evidence shows is required for this Court to reverse. Hitchcock v. State, 413 So.2d 741 (Fla. 1982). On appeal from conviction, this Court will review the record for the purpose of determining whether it contains substantial, competent evidence, which, if believed, will support the finding of guilt by the trier of fact; the weight of the evidence is ordinarily a matter which falls within the exclusive province of the jury to decide, and this court will not reverse a judgment based upon a jury verdict when there is competent evidence which is also substantial in nature to support the jury's verdict. Rose v. State, 452 So.2d 521 (Fla. 1982), cert. denied 103 S.Ct. 1883; Welty v. State, 402 So. 2d 1159 (Fla. 1981).

There existed in this case clear, substantial, and competent evidence to support the verdict and judgment. There was substantial evidence given by the State's witnesses to lead the jury to believe that Appellant committed the crimes he stands convicted of. Although Gerald Davis' identification of Appellant was not positive, there was ample other evidence of identification. The reviewing court is not to reweigh the evidence to determine its sufficiency to support the conviction,

because the determination of the credibility is within the province of the jury; it is the jury's duty to resolve factual conflicts, and, absent a clear showing of error, its findings will not be disturbed. Jent v. State, 408 So.2d 1024 (Fla. 1982). It is, therefore, well settled that the credibility of witnesses, and the weight to be given their testimony, is for the jury to decide. Hitchcock, supra; Coco v. State, 80 So.2d 346 (Fla. 1955), cert. denied 76 S.Ct. 57 (1955); United States v. Molinares, 700 F.2d 647 (11th Cir. 1983).

The test to be applied in judging the sufficiency of the circumstantial evidence is whether the evidence is not only consistent with guilt but also inconsistent with any reasonable hypotheses of innocence. Ross v. State, 474 So.2d 1170 (Fla. 1985), Pinder v. State, 366 So.2d 38 (Fla. 2d DCA 1978), approved 375 So.2d 838 (Fla. 1981). It must be remembered that the test is not whether appellate counsel or the appellate court can think of a reasonable hypothesis of innocence, but rather whether the evidence was such that the jury might have reasonably concluded there was no reasonable hypotheses of innocence. The following facts are inconsistent with any reasonable hypothesis of innocence:

Chiquita Lowe testified that on April 14, 1985, at approximately 10:30 p.m., she was coming from the park and was driving down the victim's street when a man flagged her down. (R668). Contrary to Appellant's assertions, Lowe testified that when he flagged her down, he was coming from Whitehead's yard.

(R669). When the man, later identified by her as the Appellant, asked her for money, his face was only eighteen inches away. (R678) She noticed he had pores in the skin on his cheeks and hair growing underneath these pores. (R671). She described the suspect as five feet eleven inches to six feet tall. (R671). He had scraggly, unkempt hair (R671), and weighed approximately one hundred ninety pounds .(R672). On Thursday, April 18, Lowe was awakened at her residence regarding a man attempting to sell a television. Lowe went to the back door of her home and saw the same man who approached her on the street. (R677). She saw the side of his face. (R699). She had no doubt that this was the same person she had seen previously. (R677). On April 19, she was shown photographs by Scheff and Amabile (R902), and immediately pointed out the photograph of the man she saw on both occasions. (R678-679). She selected Appellant's photograph. In selecting his photograph, she made her identification based on the person she observed by her car. (R681). Lowe testified the police didn't point out this photograph to her nor did they give any hints. (R681). Lowe identified Appellant in court as the man who solicited her for money. (R680). Detective Amabile testified that Lowe made a positive identification of Appellant's photograph. (R903). Lowe recalled that the night Appellant was seen in front of the victim's residence he was wearing a white shirt and blue windbreaker. (R682). Deputy Burke located a blue windbreaker jacket in the bed of the pickup truck located in a vacant lot across the street from the victim's residence.

(R518). Lowe identified State's Exhibit 65 as looking like the windbreaker she observed. (R683). Lowe further testified that Appellant's eye was "droopy like it was weak". (R683). Lowe stepped down from the witness stand, took a good look at Appellant, and reiterated that Appellant as the man who approached her on the street. (R706-707).

Gerald Davis also observed a man in the vicinity of the victim's residence. Davis testified that one of the man's eyes appeared sleepy. (R751). Davis was shown two photographic line-ups. (R753). Davis selected Appellant's photograph as looking like the person that approached him on the street. (R753-754). The police did not help Davis make this identification. (R754). Davis selected Appellant from a live line-up as looking like the man that approached him. (R755). Davis had estimated the height of the person who approached him on the street to be approximately six feet or six feet one inch tall. (R757). Davis described the suspect as wearing a windbreaker type of jacket lined with wool. (R763). Davis identified Appellant in court as the man who approached him on the street. (R764). Davis' original description to the police of the suspect was that the person was approximately six feet tall, weighed one hundred sixty to one hundred seventy pounds, muscular with a chubby stomach, tacky beard and kinky hair. (R766). The suspect had a chest. (R770). Davis testified that he made his live line-up identification based on who he observed the night of April 14. (R789). Davis couldn't swear that the person he selected from

the live line-up was the same man he saw on April 14, but he did look like the man. (R792). Detective Amabile testified that Davis was not shown a photograph of Appellant before viewing the live line-up. (R911). Amabile testified that they selected five individuals with a resemblance to Appellant and asked them to pose in a live line-up. (R911). After viewing the line-up Davis was brought outside and asked in the presence of a public defender if he recognized anybody. (R912,913). Davis expressed reservations as to height. (R917-918). Detective Scheff testified that no photographs of Appellant were shown to Davis on April 29, the day of the line-up. (R989).

Dorothy McGriff, the victim's mother, saw the suspect reaching into her home at approximately 11:30 p.m. (R635). She backed her vehicle up and pointed her headlights in his direction (R636) as he was attempting to get something out of the window. (R637). McGriff grabbed a weapon and chased him. (R638). She was shown a photographic line-up on April 19 and selected Appellant's photograph (R642,651) without any help from police. (R643). She identified Appellant in court as the person she saw outside her window on April 14. (R644-645). She testified that she was positive in her photographic identification. (R645). McGriff had described the suspect as having a medium build, heavy in the chest, black man, dark skin with jeans, brown suede shoes, and an orange T-Shirt with writing across the chest. (R650). McGriff testified that she could describe the side of the suspect's face. (R659). McGriff cannot base an identification on

sketches and needed photographs. (R661). She testified she could recognize the man based on his face, shoulders, and whole body. (R662). Amabile testified that when McGriff was shown the photographic line-up containing Appellant's photograph (R906-907,908) she gasped, got very hysterical, pointed to the second photograph and cried, "that is the man that did my baby". (R907). Scheff testified in a similar fashion. (R986-987).

Physical evidence showed that the the northeast bedroom window was missing the bottom portion and left open a space large enough for a man to crawl through. (R511-512). A television was found sitting on the bed next to this window. (R512). The southeast bedroom window was partially boarded up but the top of it had an eight inch opening. (R513). The dirty condition of the house affected Burke's ability to take prints. (R514). Burke discovered a large rock outside the house below the southeast bedroom window. (R516). Only smudges were left on the television set which were unidentifiable. (R556). (R730).

Howard Seiden, forensic toxologist, examined vaginal smears taken from the victim but located only two or three intact spermatozoa (R835) due to the heavy bleeding of the victim which had the effect of diluting the possible quantity. (R832-833). He was unable to pick up any blood group substance in the sperm foreign to the victim. (R839). Hair strands examined but unsuitable for comparison purposes (R834). Seiden was unable to exclude Appellant as a suspect based on hair fragments. (R841-842).

Jack Lampley was present when Appellant attempted to sell a television. Jack Lampley had seen Appellant previously. (R805). Lampley testified that when his niece, Chiquita Lowe, saw a composite sketch brought over by Roosevelt Delaney, she panicked. (R807). Lampley selected Appellant's photograph (R808) and identified him in court as the person who had been to his home. (R807-808).

Finally, the state admitted into evidence the Appellant's statement to Scheff and Amabile that the victim's brother could not have seen him in the house as it was too dark and the lights were out. (R900, 984). There was no evidence whatsoever that Appellant committed these crimes with another person.

Appellant belatedly argues that the identification procedures used were suggestive and created a substantial likelihood of misidentification. However, a pre-trial motion to suppress identification was never filed and Appellant's attorney never objected to his identification, as Appellant so concedes. (AB43). Thus, the argument is not preserved for appeal. Malloy v. State, 382 So.2d 1190 (Fla. 1979); Douglas v. State, 328 So.2d 18 (Fla. 1976), cert. denied 429 U.S. 871.

Appellant's entire argument as to tainted identification goes to the weight, rather than admissibility of the identification evidence. In Grant v. State, 390 So.2d 341 (Fla. 1980), cert. denied 451 U.S. 913 (1981), this court adopted the two-pronged test of Manson v. Brathwaite, 432 U.S. 98 (1977), for

determining whether an out-of-court identification should be excluded:

> (1) Did the police employ an unnecessarily suggestive procedure in obtaining an out-of-court identification;
>
> (2) If so, considering all the circumstances, did the suggestive procedure give rise to a substantial likelihood of misidentification.

390 So.2d at 343. The Grant court explained that a suggestive procedure, by itself, will not be enough to exclude the out-of-court identification. The procedure, even if found to be suggestive, will be admissible if it possesses certain "features of reliability." This Court identified those features of reliability as including:

> The opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.

390 So.2d at 343, quoting Neil v. Biggers, 490 U.S. at 199-200.

Applying the first prong of this test, no impermissibly suggestive procedure was used during the line-up. Amabile testified that he selected five individuals with a resemblance to the Appellant for the line-up. (R911). The individuals were of approximately the same height although their ages varied. Further, the police did not give any hints to Davis as to who he should select. In Johnson v. State, 438 So.2d 774

(Fla. 1983) cert. denied 104 S.Ct. 1329, this court held that the fact that only the defendant present in the line-up had suntan and blonde hair and that his inmate uniform was lighter blue than those of other inmates in the line-up did not render the line-up impermissibly suggestive. Davis testified that he made his line-up identification based on who he observed the night of April 14 and not on any photographs he was shown. (R789).

Even if this Court should find the line-up procedure to be suggestive, and applying the second prong of Grant, supra, Appellee submits that this out-of-court identification was admissible where it contained features of reliability. Sub judice, Davis had fifteen minutes of contact with the suspect from the time the hissing began to the time Davis got rid of him. (R776). He spoke to the suspect for two to three minutes. (R776). Davis was able to select Appellant's photograph from a photo line-up mere days after observing the suspect, and helped police artists do a sketch of the individual. As to the level of certainty of Davis' identification, although he was not positive, he did consistently testify that Appellant looked like the man he saw on April 14. (R755, 764, 792, 797) and Appellant's photograph looked like the man he observed. (R753-754, 795-796). The fact that an identification is less than positive does not render it inadmissible.

Appellee would further clarify that the descriptions of the suspect were not as much at variance as Appellant would have it seem. The suspect's height was estimated to be between five

feet eleven inches to six feet tall by Chiquita Lowe (R671), and six feet tall by Davis. (R766).

Chiquita Lowe described the suspect as having scraggly, unkempt hair, (R671) as did Davis who described the suspect as having an unkempt beard (R757) and kinky hair. (R766).

Lowe also described the suspect as having big arms and chest (R688) as did Davis who described the suspect as muscular and having a chest. (R766). Dorothy McGriff, who chased the suspect, described him as heavy in the chest. (R650).

Should this Court find that Davis' line-up identification was unreliable under Grant, supra, Appellee submits that his in-court identification was not tainted where an independent basis existed for it. In the instant case, the basis for Davis' in-court identification of Appellant was his observation of Appellant on April 14. (R755, 789, 797). Thus, assuming arguendo that the pretrial line-up was suggestive, the identification of Appellant at trial cured the problem. This rendered any error harmless. See, e.g., Salter v. State, 382 So.2d 892 (Fla. 4DCA 1980) (defendant failed to demonstrate reversible error since the identification testimony was based upon an observation independent of line-up.)

Finally, and importantly, Appellant's argument overlooks the positive identifications given by Dorothy McGriff and Chiquita Lowe. Each witness, including Davis, independently selected Appellant's photograph from a photographic line-up without aid from the other witnesses or police. Chiquita Lowe

certainly had the opportunity to observe Appellant when his face was only eighteen inches away from her. (R678). She selected Appellant's photograph immediately (R678-679), and identified Appellant in court as this man. (R680). Her photographic identification was positive. (R903). Dorothy McGriff was positive in her photographic identification of Appellant. (R642, 645, 651, 661-662). When shown Appellant's photograph, McGriff had an immediate reaction. (R907). She also had no problem identifying Appellant in court as the man she saw outside her window. (R644-645). Thus, there was ample reliable evidence of identification aside from Davis' identification.

Appellee thus maintains that there existed substantial, competent evidence to support the conviction. Appellant is far from the "in the interest of justice" relief exception set forth in Tibbs v. State 397 So.2d 1120 (Fla. 1981), as no fundamental injustice can be shown. Clearly, the evidence against Appellant was overwhelming and he is not entitled to a new trial in the interests of justice. Tibbs, supra.

POINT V

THE TRIAL COURT DID NOT ERR IN MAKING VARIOUS RULINGS.

Appellant alleges that the trial court made various errors, which taken cummulatively, prevented the Appellant from receiving a fair trial. Appellee submits, however, that the trial court's various rulings on evidentiary and procedural matters were either not error or if error were harmless, not affecting Appellant's right to a fair trial.

Appellant first contends that the trial court erred in denying Appellant's motion to suppress the results of an allegedly illegal stop. Appellee would initially point out that the ruling of a trial court on a motion to suppress comes to the appellate court clothed with a presumption of correctness, and the reviewing court must interpret the evidence and reasonable inferences and deductions derived therefrom in a manner most favorable to sustain the trial court's ruling. McNamara v. State, 357 So.2d 719 (Fla. 1978).

The State submits that the trial court correctly denied Appellant's motion to suppress. Appellee submits that the stop was proper not only on the basis of the founded suspicion of criminal activity possessed by officer McCann, but also on the criminal activity witnessed by McCann where McCann observed Appellant carrying a concealed weapon.

McCann testified during the suppression hearing that he observed Appellant walking in a northerly direction on the 800

block of N.W. 14th Terrace. (R30-31). McCann noticed Appellant was carrying a bag and observed at waist high proximity the outline of a straight-blade knife tucked in the small of his back and concealed by a T-Shirt. (R31). McCann drove by Appellant, turned around, and came back to the Appellant. (R31). He exited his car and told Appellant to get prone for a search. (R31). A wooden-handled straight-blade butcher knife with a seven inch blade was discovered on Appellant's person. (R32). McCann secured the knife for his safety and placed Appellant under arrest for carrying a concealed weapon. Appellee maintains that in light of this testimony, the stop was not pretextual in nature. McCann testified had this not been Frank Smith, he would have definitely stopped and arrested the person anyway. (R31, 38). Appellant's argument requests the officer to turn a blind eye to a violation of the law. Carrying a concealed weapon is a serious offense. Thus, the stop was not pretextual in nature and valid on this ground. State v. Kehoe, ___So.2d___, 11 F.L.W. 2488 (Fla. 4 DCA Nov. 26, 1986); State v. Ogburn, 483 So.2d 500, 501 (Fla. 3 DCA 1986); Bascoy v. State, 424 So.2d 80 (Fla. 3d DCA 1982); State v. Holmes, 256 So.2d 32 (Fla. 2 DCA 1971), aff'd 273 So. 2d 753 (Fla. 1972).

Additionally, Appellee submits that at the very least a founded suspicion of criminal activity existed to justify the stop of Appellant based upon articulable facts supporting a reasonable suspicion that Appellant had committed the crimes he

stands convicted of. In United States v. Hensley, 469 U.S. ___, 105 S.Ct. 675, 83 L.Ed. 2d 604 (1985), the Supreme Court applied the fellow officer rule to an investigative Terry stop based upon a "wanted flyer". In Hensley, supra, the Court held that if a wanted flyer or bulletin has been issued by a police department on the basis of articulable facts supporting a reasonable suspicion that the wanted person has committed an offense, then objective reliance on that flyer by officers of another police department justifies the stop by such other officers to check identification, to pose questions to the person, and to detain the person briefly while attempting to obtain further information. The Court noted that in a Terry stop, restraining police action until after probable cause is obtained will not only hinder the investigation but might also enable the suspect to flee and remain at large. The law enforcement interest at stake in these circumstances outweigh the individual's interest to be free of the stop and detention that is no more extensive than permissible in the investigation of imminent or ongoing crimes.

Appellee submits that the police possessed a founded suspicion of criminal activity sufficient to justify an investigative stop of Appellant by McCann. McCann testified that at the time he stopped Appellant, he had a BOLO for a Frank L. (R33). At the time Appellant was stopped on April 18, the police had already spoken to Gerald Davis on April 15 (R883), and to

Chicquita Lowe on April 16 (R885). Sketches were drawn of the suspect on April 17. (R968). Deputy Pearson had obtained a description from Dorothy McGriff on April 15. (R503). However, Appellant's identity became crystalized when on April 18th he went to the Lampley residence to sell a television. Jack Lampley knew Appellant and recognized a sktech of Appellant to be the person just at his house attempting to sell a television. (R806). Chiquita Lowe called the police indicating that the suspect had been seen in the area. (R932,971). These sketches were circulated in the victim's neighborhood. (R888). Detectives Scheff and Amabile then drove through the neighborhood handing out copies and speaking to people in an attempt to gather information and locate the suspect. (R888, 972). Amabile testified that while handing out copies, they came across a group of people standing on a street corner. (R44-45,888). One of the people indicated that he had just seen someone in the area with a television who resembled the sketch. (R888-889). A Mr. Mobley stepped forward and said he thought he knew the person in the composite. (R973). Mobley told Scheff and Amabile that the sketch looked like a person he knew as Frank L. who had just been in the neighborhood. (R44-45,973). Scheff asked several units to respond to the area to help with the search. (R973). Lieutenant McCann responded and took Mobley with him in his vehicle. (R974). Mobley and McCann shortly thereafter located Frank L. walking down the street. (R35). McCann testified during

the suppression hearing that Mobley knew Frank L. on sight. (R35). Thus, Appellant's argument that Appellant was stopped on the basis of a vague description has no support in the record. The information contained in the BOLO bore sufficient indicia of reliability and the police officers were justified in relying on the BOLO as the basis for their reasonable suspicion that Appellant was the suspect whom they had been searching for. See, State v. Webb, 398 So.2d 820 (Fla. 1981); Tennyson v. State, 469 So.2d 1331 (Fla. 5 DCA 1985) (stop of defendant was lawful where defendant matched description provided by victims of robbery deputies were investigating).

Appellant next contends that the trial court erred in denying the motion to suppress statements alleging that the statements were not freely and voluntarily made. Appellant's argument is without merit. The function of a trial court when presented with the issue of the voluntariness of an incriminating statement is solely to determine the admissibility of the attacked evidence. Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed. 2d 908 (1964); McDole v. State, 283 So.2d 553 (Fla. 1973). In the instant case, the state clearly established by a preponderance of the evidence that the confession was freely and voluntarily made. Lego v. Twomey, 404 U.S. 447, 92 S.Ct. 619, 30 L. Ed. 2d 618 (1972); Stone v. State, 378 So.2d 765 (Fla. 1979).

During the suppression hearing, McCann testified that when he transported Appellant to the police station he advised

him of his rights. (R41). Detective Scheff testified that at 4:00 p.m. on April 18 he introduced himself to Appellant and read him his rights. (R46). He gave Appellant a copy of a rights waiver form and asked him to read along. (R46,51). Scheff read his rights out loud to him. (R46). Appellant would answer yes or no to questions and initial the waiver form. (R48-49,51). Scheff testified that after the rights were read, he asked Appellant to sign the waiver form if he agreed to it. (R53). Appellant signed the form as Frank L. Smith. (R48,54). Detective Amabile was present while Appellant was questioned. (R76). Amabile testified that Scheff advised Appellant of his rights immediately. (R77). Amabile testified that Scheff handed a rights form to Appellant and that Scheff, using the exact same form, read Appellant his rights. (R77). Amabile testified that Appellant indicated his answers on the spaces provided and after it was completed returned it to Scheff. (R77). Scheff testified that there was nothing about Appellant's demeanor that suggested that he did not understand any of the rights explained to him. (R54). Appellant never stated that he did not wish to speak with them. (R54) and never asked for an attorney. (R54).

Scheff indicated to Appellant that he wanted to discuss a very serious crime with him that occurred on April 14. (R56). Appellant denied involvement in the case and said he had not been in that vicinity. (R56). Scheff then indicated that the suspect had been seen by some witnesses - Gerald Davis, Chiquita Lowe,

and Dorothy McGriff. (R58). Appellant had no reaction to this information. (R59). Scheff then told Appellant that the victim's brother Reginald had also seen the person who committed the crime. (R59). Appellant became agitated and stated that it was impossible for the brother to have seen him as it was too dark. (R59). Appellant said the lights were out. (R59). Scheff asked Appellant how he knew this and Appellant asked if Scheff hadn't mentioned the lights being out. (R60). Scheff then told Appellant that he had no idea whether the lights were out. (R60). It was at this point that Appellant indicated that he had been tried for murders in the past and was not going to furnish any information that would be damaging to his case. (R60). His interview lasted approximately two hours.(R64). The trial court denied the motion to suppress with regard to the statements made to Scheff and Amabile. (R88).

Looking at the totality of circumstances, it is clear that Appellant's statement was freely and voluntarily made. He had been advised of his rights twice. He appeared to understand them and acknowledged that he understood them by initialing his responses. He signed a waiver of his rights. (R48,53,898). A statement made is not rendered inadmissible because it appears to be induced by deception practiced by the officer. Frazier v. Cupp 394 U.S. 731, 89 S.Ct. 1420, 22 L.E. 2d 684 (1969); Burch v. State, 343 So.2d 831 (Fla. 1977); Paramore v. State, 229 So.2d 855, 858 (Fla. 1969). In Frazier, supra, the Supreme Court found

that the misrepresentation by the officer that the defendant's co-defendant had confessed, while relevant, was insufficient to make an otherwise voluntary statement inadmissible. Other factors present in the instant case reveal that the confession was voluntary. Furthermore, there is no record support for the proposition that Appellant requested an attorney. A request for an attorney must be invoked by a defendant in some unambiguous manner. Doyle v. State, 460 So.2d 353, 356 (Fla. 1984). Appellant never invoked a right to counsel. Smith v. Illinois, 469 U.S.___, 105 S.Ct.___, 83 L.Ed. 2d 488 (1984). Thus, Appellant's reliance on Michigan v. Jackson, 475 U.S.___, 106 S.Ct.___, 89 L.Ed 2d 631 (1986) is misplaced where Appellant never asserted a right to counsel.

The record further reveals that Appellant executed a valid waiver of his right to remain silent. Signing a waiver of rights form is generally deemed sufficient evidence of voluntary and intelligent waiver of one's constitutional right not to be questioned concerning one's guilt. Hoffman v. State, 474 So.2d 1178 (Fla. 1985); McNeil v. State, 438 So. 2d 960 (Fla. 1 DCA 1983).

In any event, Appellee submits that any error, if at all, in admitting Appellant's statements was harmless in light of other incriminatory evidence offered at trial, including the identification of Appellant by the victim's mother as he was standing outside the window to her home. In Milton v.

Wainwright, 407 U.S. 371, 92 S.Ct. 2174, 33 L.Ed. 2d 1 (1972), the Supreme Court held that because the jury had heard, in addition to the challenged confession, overwhelming evidence of petitioner's guilt, any error in the admission of the confession made to the police officer; ever assuming arguendo that the challenged confession should have been excluded, was harmless beyond a reasonable doubt.

Appellant also challenges the admission into evidence of certain photographs taken of the victim. Appellee submits that this argument is without merit where the record reveals that the trial court closely scrutinized the photographs to make sure that they were not duplicitous. (R561-566). The court allowed into evidence two photographs taken of the victim. (R566). One photograph depicted the injuries to the anus and vagina of the victim and another photograph showed only injuries to the scalp. (R561). The court allowed into evidence only one of the two photographs depicting the injuries to the anus and vagina that the state attempted to offer. (R563). These photographs were relevant to proving felony murder through sexual battery. These photographs were relevant not only in depicting the identity of the victim but also the nature and extent of her injuries, manner of death and nature of the force used. The photographs were not so gruesome or inflammatory as to create undue prejudice in the minds of the jury. Wilson v. State, 436 So.2d 908 (Fla. 1983); Booker v. State, 397 So.2d 910, cert. denied 102 S.Ct. 493;

Straight v. State, 397 So.2d 903 (Fla. 1981), cert. denied 102 S.Ct. 556. Photographs that are otherwise relevant are not incompetent merely because they tend to prejudice the jury. Leach v. State, 132 So.2d 329 (Fla. 1961), cert. denied 82 S.Ct. 636. Thus, if a photograph is relevant to an issue required to be proven in a case, the fact that the evidence is gruesome and offensive does not bar admissibility. Adams v.State, 412 So.2d 850 (Fla. 1982) cert. denied 103 S.Ct. 182.

Appellee further submits the trial court did not abuse its discretion in limiting the cross-examination of Shirley McGriff regarding her relationship with a person named Marvin. (R612). This argument is not preserved for appellate review where Appellant did not present this argument to the trial court. Smith v. State, 390 U.S. 129, 88 S.Ct. 748, 19 L.Ed. 2d 956 (1968); Duncan v. State, 450 So.2d 242 (Fla. 1 DCA 1982); Powe v. State, 413 So.2d 1272 (Fla. 1 DCA 1981). The right to cross-examination is not unlimited and once there is sufficient cross-examination to satisfy the confrontation clause, further questioning is within the court's discretion.

Appellee maintains that Appellant was allowed adequate cross-examination of Shrley McGriff. Appellant was allowed to elicit that Dorothy McGriff had an off and on relationship with Marvin. (R612). Shirley McGriff's opinion to the police as to who could have been a suspect was irrelevant and speculative.

Furthermore, any error, if at all, was harmless where

Appellant was accorded a reasonable opportunity to present evidence of his defense and his theory of the case to the jury. Here, Appellant's defense was misidentification. Had the jury been informed that Marvin was considered as a suspect by Shirley McGriff, it cannot be said that the jury would have reached a different verdict on the issue of guilt, where there was other ample evidence to sustain the verdict. Moreover, Appellant was allowed to establish that there were other suspects investigated besides Appellant during cross-examination of the detectives. (R945-946, 1021-1027). Appellee fails to see how the mention of one more suspect, Marvin, would have added to Appellant's defense.

Appellant also alleges error where the trial court denied his request for an independent chemist to examine the semen. Appellant did not make this motion until after the jury had determined his guilt. (R1279). Appellant's attorney indicated that he wanted the sperm sample independently tested for his motion to mitigate. (R1279-1280). Appellant argued that the testimony at trial by Mr. Seiden was that the item containing sperm which he examined for a blood group could not eliminate Appellant as a suspect nor did it inculpate him. (R1380). Appellant also contended that perhaps an independent chemist would have better equipment. (R1380).

The state responded to this motion arguing that there hadn't been any showing that an independent chemist had more

sophisticated equipment and that it would be an exercise in futility as Seiden only located one or two sperm cells when he examined the material months ago and that at that point in time it was impossible to blood type the substance based on the few number of sperm cells present. (R381). The state further indicated that when the substance was originally tested by Seiden, the substance would have been shipped back to a laboratory for storage and that it hadn't been refrigerated since that time. (R1382). The state also pointed out that this evidence was discoverable during the year awaiting trial.(R1382). Obviously, Appellant failed to take advantage of the opportunity to examine the substance and waited until after a verdict of guilt before considering this option.

In Melendez v. State, ___So.2d___, 11 F.L.W. 639 (Fla. Dec. 11, 1986) this court held that there was no denial of due process in the failure of police investigators to collect and preserve a blood sample, a stain on the seat of the victim's car and other items. As this court recognized, "The concern is that the accused have access to exculpatory evidence, not all possible pieces of evidence that the police have rejected as worthless". Id at 639. At bar, it is clear that this evidence would not have played a significant role in Appellant's defense. The evidence must "possess an exculpatory value that was apparent before the evidence was destroyed." California v. Trombetta, 467 U.S. 479, 489 (1984). At bar, there has been no showing that the evidence

ever possessed exculpatory value and Appellant's argument lacks substance.

The trial court correctly denied Appellant's Motion to Disqualify the Trial Court where it was legally insufficient. During this hearing, Appellant's attorney alleged that the trial court made a statement that Appellant's chances looked fifty-fifty to his former attorney, Tom Gallagher, during a hearing on a Motion to Suppress. (R96-97). The court denied the motion, finding it to be legally insufficient as a matter of law and fact. (R97). A review of the motion filed indicates that only one affidavit was filed with respect to this motion which set forth grounds for disqualification, namely, the affidavit of Frank Smith. (R1487-1488). Fla. R.Crim.P. 3.230(b) provides that a motion to disqualify shall be accompanied by two or more affidavits setting forth the fact relied upon to show the grounds for disqualification. Thus, the motion was legally insufficient on this ground alone. Heiney v. State, 447 So.2d 210 (Fla. 1984), cert. denied 105 S.Ct. 303. In Tafero v. State, 403 So.2d 355 (1981), cert. denied 102 S.Ct. 1492, rehearing denied 102 S.Ct. 2000, this court held that the test for sufficiency of an affidavit for disqualification is whether or not the sworn statement shows that the movant has a well-grounded fear of not receiving a fair trial at the hands of the judge. The facts given in the sworn statement must tend to show personl prejudice. Id. At bar, Appellant did not demonstrate an actual, well-

founded fear that he would not receive a fair trial. Bare allegations of prejudice should not suffice to require a judge to recuse himself. State ex. rel. Aguiar v. Chappell, 344 So.2d 925 (Fla. 3 DCA 1977). A statement that Appellant's chances looked fifty-fifty, even if true, does not, in and of itself, indicate that the trial court was prejudiced against Appellant.

Appellee further submits that the trial court did not abuse its discretion by denying Appellant's motion for change of venue. Appellee would initially point out that a motion for change of venue is a matter addressed to the sound discretion of the trial court and will not be disturbed on appeal absent a showing of abuse of discretion. Johnson v. State, 351 So.2d 10 (Fla. 1977). It is Appellee's position that there was no need for a change of venue and that the trial court properly denied this motion.

Knowledge of a criminal incident because of its notoriety is not, in and of itself, grounds for a change of venue. McCaskill v. State, 344 So.2d 1276 (Fla. 1977). The test for determining a change of venue is whether the general state of mind of the inhabitants of a community is so infected by knowledge of the incident and accompanying prejudice, bias and preconceived opinions that jurors could not possibly put these matters out of their minds and try the case solely upon the evidence presented in the courtroom. Id. at 1278. Appellee submits that Appellant has failed to demonstrate that it was

impossible for him to receive a fair and impartial trial in Broward County because of pre-trial publicity. Out of all the prospective jurors examined only two (2) had heard about the case. (R181-186). The trial court individually voir dired those persons who had prior knowledge of the case. (R181-183,184-186). All of the jurors who sat at trial either had no prior knowledge of the case or indicated that despite their prior knowledge they could decide the issues based on the evidence heard, the exhibits examined in the courtroom, and the instructions on the law given by the court. Thus, there is nothing in the record to indicate that the trial court abused its discretion in denying Appellant's motion for change of venue. See, e.g., Dobbert v. Florida, 432 U.S. 282 (1977); Tafero v. State, supra; Straight v. State, 397 So.2d 903 (Fla. 1981); Jackson v. State, 359 So.2d 1190 (Fla. 1978).

Appellant next complains that the trial court erred in refusing Appellant's request to interview the grand jurors. (R1383). Appellant's attorney alleged that he had learned from Appellant's aunt, Bertha Irving, that a grand juror, Mattie Ellison, knew both Appellant's family and the victim's family. (R1383). Appellant did not raise this motion until after a verdict of guilt had been returned. However, as the record reveals, Appellant's attorney was not even sure that the Mattie Ellison on the grand jury was the same Mattie Ellison which allegedly knew both families. (R1384). Thus, it appears

Appellant merely wanted to go on a fishing expedition. Appellant's challenge came too late. Porter v. State, 478 So.2d 33 (Fla. 1985) (attack on grand jury indictment because of qualifications of grand jurors must be made before verdict is rendered, and failure to challenge a grand juror at proper time results in waiver; thus claim that grand juror was married to relative of victim and should not have served on grand jury made on appeal from denial of motion for post conviction relief was not timely raised.)

It is presumed that a grand juror is qualified and exercises sound judgment. Herman v. State, 396 So.2d 222 (Fla. 4 DCA 1981), cert. dismissed 402 So.2d 610. An inference that a grand juror is possibly biased is insufficient to show that a grand juror had a state of mind which prevented her from acting impartially. Herman, supra. In Porter v. State, supra, this court held that even if the defendant had the right to voir dire examination of grand jurors after the grand jury had been impaneled, the indictment charging the defendant with first degree murder was not subject to dismissal on the grounds that the defendant had not been allowed to voir dire the grand jury where the defendant did not file a motion to challenge juror or jurors, but rather, his motion was for voir dire of grand jury to determine if he had basis to so challenge. Thus, in light of public policy in favor of shielding the proceedings of the grand jury from public scrutiny, Clein v. State, 52 So.2d 117 (Fla.

1951), the trial court correctly denied Appellant's request.

Appellant next alleges that the trial court erred in admitting into evidence sketches made by police artists as hearsay. Appellee submits such evidence was relevant to the issue of identity and properly authenticated. (R598-600, 860-863). Section 90.801 (2)(c), Florida Statutes (1985), provides that a statement is not hearsay if the declarant testifies at trial and is subject to cross-examination and the statement is one of identification of a person made after perceiving him. Thus, the trial court correctly admitted these sketches. Any error, if at all, would be harmless where these sketches were merely cumulative of other identification testimony.

Finally, Appellant argues that the trial court erred in reading back the testimony of Chiquita Lowe at the jury's request. However, it is within the trial court's discretion to have the court reporter read back the testimony of witnesses upon request of a jury. Lustins v. State, 142 Fla. 288, 194 So. 803 (Fla. 1940), Simmons v. State, 334 So.2d 265 (Fla. 3 DCA 1976), Fla R. Crim. P. 3.410. The court's action in allowing Lowe's testimony to be read back to the jury was responsive to their question. (R1231). Moreover, prior to having this testimony read back, the court requested that the jury return to the jury room for further deliberations and that they rely on their collective memories. (R1232). However, the jury returned with a second request to hear Lowe's testimony (R1233); whereupon, the court

allowed the entire testimony of Lowe to be re-read. (R1234-1236). No abuse of discretion has been shown.

POINT VI

THE TRIAL COURT DID NOT ERR IN IMPOSING A DEPARTURE SENTENCE ON COUNT III.

Appellant argues that the trial court erred in departing from the sentencing guidelines in sentencing Appellant to a life term on Count III, Burglary with an Assault (R1545, 1551), instead of the three and one half to four and one half years recommended range called for by the guidelines (R1548). It should be noted that Appellant has not challenged the propriety of the trial court's order finding Appellant to be a habitual offender. Indeed, Appellant's trial attorney conceded that Appellant fell within the habitual offender statute. (R1397). Instead, Appellant argues that habitual offender status is not a clear and convincing reason for departure.

Appellant's argument overlooks the other reasons relied upon for departure by the trial court. The court stated, "I find the departure of the sentence should be imposed because the cruelty and excessive force has been used in these crimes and several unscorable convictions, capital convictions of '86 and '66, juvenile adjudication for manslaughter, even in itself is sufficient enough to aggravate." (R1403, 1545). The court adopted the findings of the state in this regard. (R1403). The state argued that Appellant's sentence shoud be aggravated due to his unscorable convictions under the guidelines - his 1966 capital conviction for murder, his 1986 conviction for murder and sexual battery convictions, and his 1960 adjudication for

manslaughter. (R1402). The State argued that the particular cruelty and excessive force used in commission of the offense was also a valid reason for departure. (R1402).

Appellee maintains that the trial court did not err in sentencing Appellant. While Appellee acknowledges that habitual offender status has been disapproved as a reason for departure, Whitehead v. State, ___So.2d___, 11 F.L.W. 553 (Fla. October 31, 1986), Appellee submits that there are at least three clear and convincing reasons for departure.

First, the trial court departed from the sentencing guidelines range based upon Appellant's 1960 juvenile adjudication for manslaughter. (R1402-1403). Fla. R. Crim. P. 3.701(d)(5)(c) requires the scoresheet to reflect, as part of Appellant's prior record, "all prior juvenile dispositions which are the equivalent of convictions as defined in section (d)(2), occurring within three years of commission of the primary offense and which would have been criminal if committed by an adult". However, the trial court may properly consider any juvenile convictions more than three years old as a reason for departure. Weems v. State, 469 So.2d 128, 130 (Fla. 1985); Brown v. State, ___So.2d___, 11 F.L.W. 50 (Fla. 5 DCA December 26, 1985). Thus, this was a proper reason for departure.

The trial court also departed on the basis of Appellant's 1966 murder conviction. (R1403). Convictions not scored in the guidelines scoresheet because they are remote in

time may nonetheless be considered as justification for an upward departure from the guidelines. Weems, supra; Hendrix v. State, 475 So.2d 1218 (Fla. 1985); Mullen v. State, ___So. 2d___, 11 F.L.W. 303 (Fla. 5 DCA January 30, 1986). Additionally, Appellant's unscorable 1986 convictions for murder and sexual battery are also a valid reason for departure. Smith v. State, 454 So.2d 90 (Fla. 2 DCA 1984).

The trial court's finding of excessive use of force was also a proper reason for departure on Appellant's conviction for burglary with an assault. Certainly, use of lethal force is not an essential element of burglary with an assault and killing the victim is not an inherent component of this crime. Thus, the trial court's consideration of the excessive amount of force used in the instant case was proper. Williams v. State, ___So.2d___, 12 F.L.W. 122 (Fla. 5 DCA December 18, 1986); VanTassel v. State, ___So.2d___, 11 F.L.W. 2602 (Fla. 1 DCA December 10, 1986) (excessive use of force valid reason for departure in conviction for sexual battery); Leopard v. State, ___So.2d___, 11 F.L.W. 1662 (Fla. 1 DCA July 31, 1986) (excessive use of force valid reason for departure in armed robbery and kidnapping conviction where defendant murdered victim by stabbing). Bailey v. State, ___So.2d___, 11 F.L.W. 1664 (Fla. 1 DCA July 31, 1986) (departure for excessive use of force proper on attempted second degree murder and false imprisonment convictions where victim was

repeatedly stabbed).

Appellee submits that under Albritton v. State, 476 So.2d 158 (Fla. 1985) it is clear beyond a reasonable doubt that the absence of any invalid reasons would not have affected th departure sentence. The record is clear that the trial court would have departed from the guidelines based on any of the reasons alone. (R1403). Thus, there is no error where the court would have departed from the guidelines sentence based upon any or all of the reasons given.

POINT VII

THE TRIAL COURT DID NOT ERR IN ACCEPTING THE JURY'S RECOMMENDATION AND IMPOSING A SENTENCE OF DEATH.

The primary standard for this Court's review of death sentences is that the recommended sentence of a jury should not be disturbed if all relevant data was considered, unless there appears strong reason to believe that reasonable persons could not agree with the recommendation. Tedder v. State, 322 So.2d 908 (Fla. 1975). The standard is the same regardless of whether the jury recommends life or death. LeDuc v. State, 365 So.2d 149 (Fla. 1978).

In the instant case the jury unanimously recommended that Appellant be sentenced to death. (R1364-1365, 1527). The trial court, after finding five (5) aggravating circumstances to be applicable, accepted the jury's recommendation and sentenced Appellant to death. (R1549, 1552-1561). Appellant argues that the trial court erroneously imposed a sentence of death for several reasons. Appellee will address each of Appellant's contentions separately and show that each is without merit.

Appellee would initially point out that there are three aggravating circumstances found by the court which are clearly valid - the capital felony was committed by a person under sentence of imprisonment (R1552); the defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person (R1553-1554), and that

the capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, any robbery, sexual battery, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing or discharging of a distinctive device or bomb. (R1554). Appellant has not challenged these aggravating circumstances on appeal.

Advancing to Appellant's argument that the trial court erred in finding that the murder was committed in a cold and calculated manner, Appellee submits that the trial court correctly found this aggravating factor applicable beyond a reasonable doubt. In the instant case, the testimony of the medical examiner revealed that the victim's injuries to the head were caused by repeated blows inconsistent with the use of a hand. (R578, 585). A large rock was found outside the southeast bedroom's window which was covered in blood. (R516, 961). Shirley McGriff testified during the penalty phase that she was familiar with the victim's house and had never seen any rocks around the home. (R1288). Appellant was seen by Chiquita Lowe in the vicinity of the victim's yard prior to the crime and shortly thereafter Appellant made sexual advances towards Gerald Davis. Appellant indicated that since he had been rejected he would just have to go over to the field and masturbate. (R749). Shortly thereafter, Appellant entered the victim's house with a large rock.

Appellee submits that the Appellant's taking of a rock

inside the home demonstrates the kind of heightened premeditation necessary to qualify for the death penalty. Appellant argues that this is not the type of execution or contract murder to which this factor normally applies. However, this Court has previously stated that this factor "ordinarily applied in those murders which are characterized as execution or contract murders, although that description is not intended to be all inclusive." McCray v. State 416 So.2d 804, 807 (Fla. 1982). Appellant obviously had a cold and calculated purpose in bringing in a rock, namely, to strike his victim with it to effect her death. This was done as coldly and premeditatively as was his subsequent attempted removal of the television. There is no evidence that this attack was provoked by the victim, a mere child.

In Rose v. State, 472 So.2d 1155 (Fla. 1985), this court held that the trial court properly found as an aggravating circumstance that the murder was cold, calculated, and premeditated where the defendant searched for an object before finding a concrete block used to kill the victim, carried the block to the victim, and repeatedly hurled the block onto the head of the helpless and defenseless victim. Thus, where the instrument of death was not taken from the victim's premises, the court correctly found that the murder was committed in a cold, calculated, and premeditated fashion. See, e.g., Huff v. State, ___So.2d___, 11 F.L.W. 451 (Fla. August 28, 1986) (defendant's heightened premeditated design evidenced by fact

that he must have brought murder weapon with him into his parent's car that day).

Appellant also argues that the trial court erred in finding that the crime committed was especially heinous, atrocious, or cruel. Appellee submits that beyond a shadow of doubt this aggravating factor is supported by the record. The evidence is uncontroverted that the victim was alive when she received this beating. Appellee would first submit that the brutal senseless beating which the victim was forced to endure sets this crime apart from the norm of capital felonies and clearly reflects the conscienceless, pitiless, and unnecessarily torturous nature of this crime such that the court's finding of this aggravating circumstance was proper. The manner of death is a proper consideration in this regard. See, e.g., Lambrix v. State, ___So.2d___, 11 F.L.W. 503 (Fla. September 25, 1986) (finding of heinousness proper where victim Moore killed by being hit over head); Floyd v. State, ___So.2d___, 11 F.L.W. 594 (Fla. November 20, 1986) (finding of heinousness appropriate where victim was repeatedly stabbed); Heiney v. State, 447 So.2d 210 (Fla. 1984), cert. denied 105 S.Ct. 303 (record supported finding of heinousness where victim bludgeoned with claw hammer); Thomas v. State, 456 So.2d 454 (Fla. 1984) (finding of heinousness proper where victim died as a result of severe beating), Bundy v. State, 455 So. 2d 330 (Fla. 1984) (capital felony especially heinous considering that female victims were bludgeoned, sexually

battered, and strangled).

This court has frequently upheld a finding of this aggravating factor where elderly women have been beaten or stabbed. Certainly, an eight year old child is as defensive and helpless to such an attack as an elderly woman and such action is equally vile and wicked. See, e.g., Johnston v. State, So.2d___, 11 F.L.W. 585 (Fla. November 13, 1986) (finding of heinousness proper where 84 year old victim who had retired to bed for the evening was strangled and repeatedly stabbed); Wright v. State, 473 So.2d 1277 (Fla. 1985) (75 year old woman's death as result of multiple stab wounds properly found to be heinous); Peek v. State, 395 So. 2d 492 (Fla. 1980), cert. denied 451 U.S. 964 (1981) (beating, rape, and strangulation of 65 year old woman is heinous). In Quince v. State, 414 So. 2d 185 (Fla.) cert. denied 459 U.S. 895 (1982), the 82 year old victim was sexually assaulted while alive, similar to the case sub judice. However, the medical examiner could not determine whether the elderly woman was conscious or unconscious during the battery. Strangulation was the cause of death. This court found that the severe beating, raping, and strangulation easily qualified as heinous.

Moreover, the instant case, should be compared to Buford v. State, 403 So.2d 943 (Fla. 1981). In Buford, a seven year old girl was abducted and sexually assaulted. The defendant then snuffed out her life by dropping a concrete block on her head

causing severe wounds to the head and fractures of the skull. This court upheld a finding of heinousness. Appellee submits that the murder sub judice was equally atrocious and vile. In LeDuc v. State, 365 So.2d 149 (Fla. 1978), this court upheld a finding of heinousness where the defendant raped and murdered a nine year old girl. The trial court's sentencing order reflected that the brutality and age of the child and the way the rape-murder was carried out justified this finding. See also, Dobbert v. State, 375 So.2d 1069 (Fla. 1979) (finding of heinousness appropriate where defendant murdered his nine year old daughter when he constantly beat, kicked, and hit her with his fists and other objects.); Goode v. State, 365 So.2d 381 (Fla. 1978), cert. denied 99 S.Ct. 2419 (finding of heinousness upheld where defendant killed 10 year old boy after having committed an anal sexual assault upon him). Clearly, the facts support the court's finding that the victim's murder was especially heinous. Although the victim's death may not have been as grizzly or gruesome as those cited by Appellant, it is entirely correct to apply this factor to the case at bar.

Appellee further submits that the death penalty imposed is proportionate as compared with other cases imposing the death penalty. See, e.g., Atkins v. State, ___So.2d___, 11 F.L.W. 567 (Fla. November 7, 1986); Roman v. State, 475 So.2d 1228 (Fla. 1985) (death sentence appropriate where defendant sexually assaulted two year old girl and left her for dead in a shallow

grave whereby she asphyxiated); Bundy v. State, 471 So.2d 9 (Fla. 1985) (death sentence upheld where defendant murdered 12 year old Kimberly Leach); Buford v. State, supra, (death sentence proper where defendant killed seven year old girl); Dobbert v. State, supra, (death sentence proper for murder of nine year old girl); Goode v. State, supra, (death sentence appropriate for murder of 10 year old boy); LeDuc v. State, supra, (death sentence upheld where defendant murdered nine year old girl); Alford v. State, 307 So.2d 433 (Fla. 1975) (death sentence proper for sexual assault and murder of 13 year old girl).

Thus, the court correctly found that the murder was not only heinous and atrocious but cold, calculated and premeditated as well. The trial court correctly sentenced Appellant to death. There were no mitigating circumstances applicable to Apellant. (R1557-1561). Even if the trial court improperly considered these two aggravating factors or committed any other error in sentencing Appellant, such error is harmless in view of the fact that there were no mitigating factors and there were present at least one or more aggravating factors which are listed by the statute. Sireci v. State, 399 So.2d 964 (Fla. 1981); Elledge v. State, 346 So.2d 948 (Fla. 1977).

Appellant's argument that the trial court failed to consider important mitigating circumstances, particularly circumstances dealing with the Appellant being under the influence of extreme mental or emotional disturbance and the

Appellant's diminished capacity to appreciate the criminality of his conduct is without merit. On the contrary, the record reveals the trial court did give due consideration to these mitigating circumstances. Appellant's argument appears to be more in the nature of a disagreement with the force to be given to mitigating evidence. However, mere disagreement with the force to be given to mitigating evidence is not a sufficient basis to challenge a death sentence. Quince v. State, supra.

During the sentencing hearing, Dr. Kreiger testified that although Appellant was not floridly psychotic, he was seriously disturbed. (R1302-1303). His verbal conversations with Appellant suggested that he had hallucinations, although he didn't observe any behavior during his July 5, 1985 examination which indicated Appellant was actively hallucinating. (R1303-1304). He characterized Appellant's mental disorder as a Schizophrenic disorder with paranoid features. (R1304). However, Kreiger also noted that Appellant's memory was intact at the time of his examinations. (R1306). He was able to relate that he had been arrested by McCann and that a woman identified him on the basis of his shoulders. (R1306). Kreiger believed that Appellant was able to conform to societal rules. (R1308).

Dr. Zager examined Appellant on August 8, 1985, and concluded that Appellant was legally competent although he manifested evidence of possibly maladapted behavior which he labeled a paranoid disorder. (R1311).

Based on this testimony, the trial court found that there was "no evidence on which the court could draw a reasonable inference, let alone reasonably convince this court of the application of this Mitigation Circumstance" (R1558) and concluded that Appellant was not under the influence of extreme mental or emotional disturbance. The court further found that as to the mitigating circumstance of diminished capacity, that "the defendant was not dull, but rather smart, and he knew and appreciated the criminality of his own conduct in the homicide." (R1559). It is well established that it is within the trial court's discretion to determine whether sufficient evidence exists of a particular mitigating circumstance and, if so, the weight to be given it. White v. State, 446 So.2d 1031 (Fla. 1984). In the instant case, the trial judge simply found that Appellant's evidence of mental disturbance did not rise to a sufficient level to be weighed as a mitigating circumstance. The fact that the judge did not believe Appellant's mitigating evidence in its totality rose to the level of mitigation with respect to sentencing did not demonstrate that the court ignored this evidence. The expert testimony on extreme emotional disturbance was hardly compelling. Furthermore, the record was replete with evidence that Appellant's capacity was not diminished or substantially impaired. He had the forethought to bring a rock into the victim's home to use as a weapon. Dr. Zager found him to be of average intelligence (R1307) and that he

had the capacity to appreciate the criminality of the crimes accused of. (R1307-1308). Appellant himself testified that he was educated and attended a junior college for a year and a half. (R1330-1331). Thus, the record supports that trial court's finding of no mitigating circumstances and refutes Appellant's claim that the trial court did not consider evidence in mitigation. As the court stated:

> The court has not arrived at these findings and conclusions arbitrarily, capriciously or irrationally, but rather after due deliberation and through reasoned and deliberate judgment after thoroughly reviewing the evidence and weighing the Statutory Aggravating Circumstances and considering the Statutory and Non-Statutory Mitigating Circumstances of which there are none of the latter. The inescapable conclusions speak for themselves. (R1560).

Appellant also posits that the trial court erred in considering Appellant's juvenile manslaughter conviction. However, Appellant opened the door to this conviction when his aunt, Della Irving, testified that he would not hurt anybody. (R1324). As occurred in the instant case, one "opens the door" to an otherwise proscribed area or topic by asking questions relating to that area. Payne v. State, 426 So.2d 1296 (Fla. 2 DCA 1983). Indeed, Appellant interrupted the argument on this issue and stated he didn't mind discussing the stabbing. (R1326) Appellant's previous conviction was for a violent felony and as such, relevant. Details of prior felonies involving use or threat of violence are properly admitted in the penalty

phase. Perri v. State, 441 So.2d 606, 608 (Fla. 1983). See also Muehleman v. State, ___So.2d___, 12 F.L.W. 39 (Fla. January 8, 1987) (no error in admitting into evidence during penalty phase a social history report detailing defendant's juvenile criminal record).

Finally, Appellee submits that the trial court did not improperly minimize the jury's role in the death sentence procedure.

At the outset of the trial, the court correctly informed the jury that they render an advisory sentence and that the imposition of punishment was the function of the court. (R187). This was a correct statement of the law. See, Thompson v. State, 328 So.2d 1 (Fla. 1976). A review of the record reveals that Appellant's fears are not well-founded and thus, his reliance on Caldwell v. Mississippi, ___U.S.___; 105 S.Ct. 2633 (1985) is misplaced. In the instant case there was nothing erroneous about informing the jury of the limits of its sentencing responsibility where the significance of the jury's responsibility was also stressed. (R187-188). As this court stated in Pope v. Wainwright, ___So.2d___, 11 F.L.W. 533, 535 (Fla. October 16, 1986), "it would be unreasonable to prohibit the trial court or the state from attempting to relieve some of the anxiety felt by jurors impaneled in a first degree murder trial". Informing a jury of its advisory function does not unreasonably diminish the jury's sense of responsibility. Id. Thus, the reliability of

the jury's recommendation was not undermined by this non-misleading and accurate information. As in Pope, supra, the trial court sub judice also stressed the significance of the jury's recommendation in his final instructions. Appellant's selective reference to the juror's comment that he wasn't sure of his responsibility (R190) reveals that he was confused about his responsibility during the guilt phase and not the sentencing phase. The trial court then informs the prospective juror that his responsibility is to apply the law to the established facts (R191). Appellant's citation to this juror's comment was characteristically out-of-context. Contrary to Appellant's assertions, the court did instruct the jury that it could consider any other aspect of the defendant's character, or record, and any other circumstances of the offense. (R1356). The court instructed the jury that it could consider any evidence presented at trial or the penalty phase in mitigation of sentence. (R1357). Finally, the court stressed their responsibility and charged them that "the fact that your recommendation is advisory does not relieve you of your solemn responsibility, for the court is required to and will give great weight and serious consideration to your verdict in imposing sentence." (R1357-1358). The judge charged that they should not act hastily or without due regard to the gravity of these proceedings (R1358), and realize that a human life is at stake. (R1358). Appellant has failed to establish that the jury did not

comprehend its duty.

CONCLUSION

WHEREFORE, based upon the foregoing argument and authorities cited hrein, Appellee respectfully requests that the Judgment and Sentence of Death of the trial court be AFFIRMED.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, FL

Amy L. Diem

AMY L. DIEM
Assistant Attorney General
111 Georgia Avenue, Ste. 204
West Palm Beach, FL 33401
305: 837-5062

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Answer Brief of Appellee has been furnished by U.S. Mail to Michael D. Gelety, Esq., 1700 East Las Olas Blvd., Ste. 300, Fort Lauderdale, FL 33301, this 26th day of February, 1987.

Amy L. Diem
Of Counsel