IN THE SUPREME COURT OF FLORIDA

DOUGLAS JACKSON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 68,862

ANSWER BRIEF OF APPELLEE

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TABLE OF CONTENTS

TABLE OF CONTENTS
(Continued)

TABLE OF CITATIONS

TABLE OF CITATIONS
(Continued)

TABLE OF CITATIONS
(Continued)

TABLE OF CITATIONS
(Continued)

TABLE OF CITATIONS
(Continued

TABLE OF CITATIONS
(Continued)

TABLE OF CITATIONS
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PRELIMINARY STATEMENT

The Appellant was the defendant in the court below. The Appellee, the State of Florida, was the prosecution. In this brief, the parties will be referred to as they appear before this Court. The symbol "R" will used to designate the record on appeal. All emphasis has been supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

The Appellee accepts the Appellant's Statement of the Case and Facts as being a substantially true and accurate account of the proceedings below. The Appellee respectfully notes the following omissions or areas of disagreement.

1. The jurors first became aware that the Appellant had been in prison when Appellant's counsel cross-examined Appellant's wife, Karen Jackson. During that examination, counsel brought out the fact that she had written Appellant letters while he was in prison. (R. 662-663). Appellant's incarceration in prison was again brought to the jury's attention during the testimony of Norman Carroll, who testified for the Appellant. Mr. Carroll testified that he first met Appellant in the Broward County Jail and that Appellant had become a minister when he left Broward County and went to state prison. (R. 850-855). While Appellant was in prison, his wife wrote him numerous letters which were admitted into evidence as Defendant's Exhibit 4. Those letters made numerous references to Appellant's incarceration.

2. During his testimony, Appellant stated that Livingston was a criminal, and that he would not offer Livingston any job assistance because of Livingston's character and illegal activity in the community. (R. 879). Prior to cross-examination, the prosecutor received permission from the trial court to inquire of Appellant as to how he knew of Livingston's criminality. (R. 909). Appellant denied recalling anything

about Livingston's arrest in 1979 for conspiracy to commit robbery, the same incident which Appellant had been arrested for. (R. 911-912).

3. Officer Pace and Karen Jackson both testified, without objection, to the incident in which Karen Jackson claimed Appellant had handcuffed her to the bed. (R. 576, 594-595).

4. None of the comments made by the trial court were objected to by the Appellant.

5. Karen Jackson testified that the Appellant came to the home of Walter and Edna Washington, with the co-defendant, Livingston on the night of the murders. (R. 599-607). She told how Appellant forced his way into the bedroom where she was hiding. (R. 605-606). The photographs of the Washington home corroborated her testimony. (R. 484-488, 606). She testified that she was forced to pack her and the children's belongings, and that Livingston had a gun which he was holding on everyone. (R. 606-608). She testified that she took her belongings and put them in the back of Appellant's truck. (R. 609). Karen Jackson stated that Appellant told her not to try anything, and she saw Walter Washington and Larry Finney come out of the house with their hands behind their back. (R. 609). She and her children were placed in the cab of the camper, the Washingtons and their two children, Finney and Livingston were in the back. (R. 609-610). This was corroborated by the testimony of Shirley Jackson who saw the Appellant and Karen Jackson putting things in the camper (R. 786-787) as well as seeing Edna Washington getting into the back of the camper (R. 788), and the Appellant locking

the camper and then driving off. (R. 788).

Karen Jackson then testified that the Appellant drove the camper into Broward County. The Appellant passed the abandoned car, turned around and then he stopped by the car. (R. 612). Appellant got out of the camper and standing behind the camper, talked to Livingston. The Appellant opened the back of the camper and ordered the victims to get into the abandoned car. (R. 612-613). Karen Jackson heard gunshots. She heard Livingston tell the Appellant to hurry up. (R. 614). Then she heard a big boom. (R. 614). Appellant returned to the truck and stated that his face felt like it was on fire. (R. 614). Later that night she put cold cream on Appellant's face where he had been burned. (R. 615). This was corroborated by Detective Schlein's observation of the Appellant and the photographs. (R. 468-470, 722).

Karen Jackson's testimony as to the Appellant's involvement was corroborated by the co-defendant, Aubrey Livingston. (R. 675-686). Livingston's testimony differed from Karen Jackson's only in his denial of his involvement, i.e., that he did not have the gun, and he did not get out of the truck by the abandoned vehicle. (R. 608, 626, 677-678, 685). Karen Jackson's testimony was further corroborated by the testimony of Barbara Finney, which related Appellant's search for Karen Jackson prior to the murders, and her observance of Appellant's camper in the area of the victim's house. (R. 559-560). In addition Officer Pace testified that Appellant told him on the day of the murders that he was going to see his wife that day.

(R. 578).

Appellant also admitted on the stand that some of the statements, for example, when he last saw his wife, and when he received the burns on his face, which he made to Detective Schlein, were false. (R. 899-903, 919-920).

Other evidence which linked the Appellant to the crimes were that he had keys which fit the handcuffs found on the scene (R. 498), other handcuffs were found in the Appellant's vehicle (R. 495), the yellow rope found in the Appellant's home (R. 491) matched that found on Walter Washington's wrists (R. 532-534), and that .38 caliber shells were found at Appellant's home. (R. 489).

6. Detective Schlein denied that his prior disciplinary proceedings involved a finding of committing or suborning perjury. (R. 75). The trial court noted that at the time Schlein took the statements he was a detective, and at the time of trial he was a captain. (R. 75, 767). Appellant never alleged that the disciplinary proceedings in the unrelated cases were any basis for a motive to lie or bias against Appellant in the instant case.

7. The trial court sustained the state's objection to Appellant's question to Barbara Finney concerning what the victim, Larry Finney's, non-birth brother, Alvin, did for a living. (R. 573).

8. During the state's voir dire, Juror Smith admitted that he knew some police officers who were acquaintances of his. (R. 358). Appellant had no questions for Juror Smith

concerning his relationship with the police officers.

9. Dr. Tate, the medical examiner testified that the photographs of the children showed a "pugilistic attitude", caused by the muscles retracting from the heat. The pictures showed the children's location in the car, and indicated that they were alive at the time the fire started. (R. 778-780). The pictures of Edna Washington showed the bullet wound to her head. (R. 777). The picture of Larry Finney showed the metal chain or necklace that was identified as being worn by him. (R. 777, 571). The picture also showed the gunshot wound to his chest. (R. 771-773). The pictures of Walter Washington showed the three gunshot wounds, (R. 774-775) and Washington's hands tied behind his back. (R. 773).

10. During opening statement, when the prosecutor commented on the barbequing of people, the trial court sustained the Appellant's objection (R. 396). However, Appellant did not ask for a curative instruction. (R. 397).

11. Appellant did not object to the state's opening statement (R. 382), to Aubrey Livingston's testimony (R. 683), or to Livingston's statement (R. 751) all of which referred to Edna Washington's pregnancy.

POINTS INVOLVED ON APPEAL

Appellee respectfully rephrases Appellant's Points on Appeal as follows:

I

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTIONS FOR A MISTRIAL WHERE THE PROSECUTOR'S CONDUCT WAS NOT IMPROPER AND DID NOT DENY APPELLANT A FUNDAMENTALLY FAIR TRIAL?

II

WHETHER THE COMMENTS AND TREATMENT OF THE TRIAL COURT TOWARDS APPELLANT'S COUNSEL WERE IMPROPER OR PREJUDICIAL WHERE THEY WERE MADE WITHIN THE TRIAL COURT'S RESPONSIBILITY FOR THE TONE AND TEMPO OF THE PROCEEDING, TO ASCERTAIN THE TRUTH, AND TO CURTAIL PURSUIT OF IRRELEVANT MATTERS?

III

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN RESTRICTING APPELLANT'S CROSS-EXAMINATION OF STATE WITNESSES IN MATTERS WHICH WERE COLLATERAL AND IRRELEVANT TO THE PROCEEDINGS?

IV

WHETHER THE TRIAL COURT COMMITTED ERROR, REVERSIBLE OR OTHERWISE IN VARIOUS EVIDENTIARY AND PROCEDURAL RULINGS?

V

WHETHER THE TRIAL COURT ERRED IN ACCEPTING THE JURY'S RECOMMENDATION AND IMPOSING THREE SENTENCES OF DEATH?

SUMMARY OF THE ARGUMENT

1. The trial court properly allowed the state to inform the jury of the Appellant's true status, i.e., conviction, at the time he received the letters from his wife. Karen Jackson was the key witness at Appellant's first trial. The Appellant in attempting to impeach Karen Jackson's testimony at the retrial, introduced the letters. The jury in order to give proper weight to the letters, was entitled to know that the circumstances surrounding the writing of the letters, i.e., that Appellant was in prison having been convicted at the time of the letters, and not simply awaiting trial. However, because the jury had been previously informed that Appellant had been in prison since 1981, any error was harmless beyond a reasonable doubt, where the jury could have reasonably inferred that Appellant had been previously convicted. Furthermore, the overwhelming nature of the evidence, combined with the jury's lengthy deliberation, including asking for the rereading of the testimony of the one impartial witness who placed Appellant at the victims' home, indicates that the jury was not influenced by their knowledge that Appellant had been previously convicted.

The trial court properly allowed the state to inquire of Aubrey Livingston concerning his prior arrest with the Appellant, when Appellant had attempted to use Livingston as a character witness, and Appellant had denied knowledge of Livingston's prior arrest, after Appellant attacked Livingston's character.

The trial court properly allowed the testimony of the

prior handcuffing incident involving Karen Jackson, only ten days before the murders, where the incident indicated the depth of Appellant's marital problems and his treatment of Karen Jackson, both which was relevant to Appellant's motive in killing the people who gave his wife refuge when she left him.

2. Appellant never objected to any of the comments by the trial court. However, a review of the comments in their context of the entire record shows that they were the proper exercise of the trial court's discretion in preserving the tone and tempo of the proceeding, in commenting on the evidence and curtailing the pursuit of irrelevant matters.

3. The trial court properly granted the state's motion in limine prohibiting the Appellant from cross-examining Detective Schlein concerning two unrelated alleged police department reprimands, where the evidence was not proffered as reputation evidence, but as acts of misconduct. The trial court also properly sustained the state's objection to the Appellant's question to Barbara Finney concerning what the victim Larry Finney's, non-birth brother Alvin did for a living, as such was irrelevant.

4. The trial court did not abuse its discretion in not permitting additional vior dire of Juror Smith where the juror answered all questions about any friendships with police officers on the initial vior dire. The inadvertent sighting by the jury of Appellant in handcuffs at the elevator did not require a mistrial. The trial court properly admitted the photographs of the deceased bodies where the pictures were relevant to prove

identity, and assisted the medical examiner in explaining to the jury, the nature and manner in which the wounds were inflicted. Testimony concerning Edna Washington's pregancy was also admissible to establish her identity. A mistrial was not required because of the prosecutor's comment during opening statement where the Appellant's objection was sustained and no curative instruction was requested. The trial court properly admitted the .38 caliber cartridges found at Appellant's home as a circumstance indicating the Appellant's involvement in the murders. Finally, any errors were harmless beyond a reasonable doubt.

5. The trial court did not err in accepting the jury's recommendation and imposing three death sentences where the murders were committed during the commission of a kidnapping, Appellant had been previously convicted of another capital offense, the murders were cold and calculated, and heinous, atrocious and cruel. The evidence clearly supported the finding of the latter two aggravating circumstances where Appellant drove the victims from Dade County to Broward County, forced them into an abandoned car, shot the three adults, and set the car on fire, killing the children. Furthermore, the trial court properly considered, but did not find additional mental mitigating circumstances. A life sentence is not mandated although, the co-defendant Livingston received such a sentence, where the evidence clearly shows that Appellant was the instigator and dominant participant in the murders. The death penalty for Appellant was not disproportionate and was properly imposed.

ARGUMENT

I

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING APPELLANT'S MOTIONS FOR A MISTRIAL WHERE THE PROSECUTOR'S CONDUCT WAS NOT IMPROPER AND DID NOT DENY APPELLANT A FUNDAMENTALLY FAIR TRIAL. (Restated).

Appellant complains of three incidents of alleged prosecutorial misconduct which he alleges deprived him of a fair trial. Appellee would note that in each instance before proceeding, the prosecutor discussed the evidence which he sought to introduce with the trial court and Appellant's counsel. Appellee submits that when each incident is reviewed in context, the trial court was correct in its rulings, allowing the prosecutor to proceeding the manner in which he did.

1. The Defendant's Prior Conviction in the Instant Case.

Appellee does not disagree with the basic holding that it is improper and generally prejudicial for a jury to be informed that a defendant at retrial had been previously convicted of the crime for which he is presently on trial for. However, the Appellee submits that such knowledge in and of itself does not require reversal of a defendant's conviction. The "special facts" of each case must be reviewed. See Marshall v. United States, 360 U.S. 310, 312 (1959).

During the trial, the Appellant took the stand in his own defense. During his direct testimony, Appellant testified that he had been in prison since his arrest on the present charges and for nothing else. (R. 863). Later, the following

colloquy occurred:

> Q. While you were awaiting this trial on these charges, did you receive any letters from you wife?
>
> A. Yes, numerous letters from my wife.
>
> Q. Was there anything unusual about them?
>
> A. Yes. In her letters she stated that she loved me, she was sorry for our breakup, she was sorry for the situation that I was in, she couldn't wait until I get back with her, she wanted me to not give up on her, to turn my back on her, and she mentioned that she was pregnant or while I was away, and that she didn't want me to have any ill feelings towards her or forget her because of that or, some what a letter of begging me somewhat to have faith in her and to not turn my back on her.
>
> Q. Let me show you what has been marked for identification as Defense Exhibit B and ask you if you can identify these.
>
> A. Yes. These are the letters that I received from my wife while awaiting trial.
>
> MR. ZIMMERMAN: I would ask that those letters be admitted into evidence as Defendant Exhibit 4.
>
> * * *
>
> THE COURT: Recieved and filed, Defense 4.

(R. 906-907). (Emphasis added).

Prior to beginning cross-examination, the prosecutor requested permission to ask the Appellant about his status when he received the letters because he was not awaiting trial. The trial court stated that defense counsel's question had been misleading and allowed the prosecutor to proceed. The following colloquy then occurred during cross-examination of the Appellant:

> Q. Where were you, Mr. Jackson, when you received those letters from your wife?
>
> A. In prison.
>
> Q. You were really awaiting trial there, were you.

A. Yes, I gather.

Q. What?

A. Yes.

Q. You had already been to trial, hadn't you?

A. I was awaiting a new one, yes.

Q. You hadn't been granted a new trial, had you.

A. Some of those letters, yes.

A. But not all of them, no.

A. No, not all of them, no.

Q. When you were in the prison, you weren't awaiting trial, you hadn't been granted a new trial yet, had you?

A. Some of the letters I had, yes.

Q. But not all of them?

A. I just stated that.

Q. And you had been convicted when you were in prison, right?

[Defense counsel objects]

Q. That wasn't your status, awaiting trial, your status was convicted, wasn't it?

A. Which side of the fence are you talking about, sir? Some of those letters was received on both sides.

Q. But at least some of them, your status was as being convicted, correct?

A. Yes.

(R. 910-911).

Appellee submits that the trial court properly allowed the state to inform the jury of Appellant's status of the time he received the letters from his wife. As this Court is aware, Karen Jackson was the main witness against the Appellant, not only in the instant case, but in the first trial. The Appellant, in attempting to impeach Karen Jackson's credibility, introduced her letters written to Appellant while he was in prison.

Appellant introduced the letters to show that Karen Jackson had stated that she still loved Appellant, that she was sorry for the situation that he was in, and that she wanted to get back with him. In introducing the letters, Appellant gave the jury the impression that the letters were written while he was awaiting trial. However, as shown, supra, that was not true.[1]

Appellee submits that there is a great deal of difference between a person's motivation for writing letters of this kind to a person awaiting trial for a crime which he has never been convicted of, and to a person in prison after he has been convicted for the crime. This is especially true in the instant case, where Karen Jackson's testimony in the first trial was critical to Appellant's conviction.[2] In one of her letters, Karen Jackson wrote "I know how you feel when I don't write you. But the pressure is greater for me knowing where you are and what you may be going through." See Def. Exh. 4 at p. 38. Thus, the background for Karen Jackson's admittedly confused feelings for Appellant (See Def. Exh. 4 at p. 48) needed to be shown to the jury so that they could properly determine the evidentiary weight to be given the letters.

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[1]It should be noted that Defendant's Exhibit 4, consists of 79 pages, containing letters from Karen Jackson to Appellant from approximately April 7, 1982 until February 12, 1984. This Court did not reverse Appellant's convictions and sentences until January 31, 1985. Jackson v. State, 464 So.2d 1181 (Fla. 1985). Thus, Appellant's trial testimony that some of the letters were written after he had been granted a new trial was untrue.

[2]Furthermore, in this case Appellant was sentenced to death, a fact not brought to the jury's attention.

When a defendant attempts to impeach a state witness with prior statements of that witness, the door is opened to allow the state to introduce the circumstances surrounding the giving of that statement. In Lambrix v. State, 494 So.2d 1143 (Fla. 1986), this Court discussed an attempt by the defendant to impeach a state witness with a prior inconsistent statement made while the witness was incarcerated for aiding the defendant in an earlier escape from prison. The defendant wanted to impeach the witness without laying the proper predicate for the impeachment because he did not want to open the door to evidence that would be harmful to his case. This Court in discussing the proper predicate, noted that if defense counsel had produced the witness prior statement, that would have opened the door to allow the State to introduced the circumstances surrounding the witness' making of the statement, i.e., why she was incarceration. 494 So.2d at 1147.

The present case is very similar to Lambrix because Appellant's introduction of Karen Jackson's letters opened the door to allow the state to introduce the circumstances surrounding the writing of the letters. Thus, the trial court did not err in allowing the prosecutor to elicit from Appellant the fact that he was not simply waiting trial in prison, but at the time he received the letters he was convicted.

The Appellee would submit that the present case is distinguishable from the cases cited by Appellant. In both United States v. Williams, 568 F.2d 464 (5th Cir. 1978), and Cappadona v. State, 495 So.2d 1207 (Fla. 4th DCA 1986), the jury

had been advised through the news media that the defendant had previously been convicted at a prior trial. The decision in Williams which was relied upon by the Fourth District in Cappadona was based on the premise that the jury became aware of "inadmissible evidence which was strongly probative of guilt." 568 F.2d at 470-471. The Appellee submits that under the "special facts" of this case, the jury did not receive inadmissible evidence, but evidence that was admissible based on the Appellant's own testimony.[3]

However, if this Court should find that the trial court erred in allowing the state to elicit from Appellant the true facts surrounding the writing and receipt of the letters, Appellee submits, that under the unique facts of the present case, the error was harmless beyond a reasonable doubt. See State v. DiGuilio, 491 So.2d 1129 (Fla. 1986).

First, it must be stressed that through testimony brought out by Appellant, the jury was already aware that from 1981 until the trial in 1986, Appellant had been first in the Broward County Jail and then sent to state prison. Appellant's witness Mr. Carroll testified about his meeting Appellant in jail and then Appellant's leaving Broward County and going to state

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[3]In addition, Robinson v. State, 487 So.2d 1043 (Fla. 1986) is distinguishable in that the state did not try to admit improper evidence by one method which it could not do by another. Obviously both the prosecutor and the trial court were aware that under normal circumstances a jury's knowledge of the Appellant's prior conviction would result in a mistrial. A mistrial had occurred in the case just a few months before. When the Appellant introduced the letters, the state clearly had a right to let the jury know of the full circumstances surrounding the writings of the letters in order to evaluate the weight to be given to them.

prison.[4] Appellant then elicited from Karen Jackson, the fact that she had written Appellant letters while he was in prison. A review of the actual letters which were introduced as Defendant's Exhibit 4, reveals numerous references and inferences to Appellant's incarceration. (Def.'s Ex. 4 at pp. 2, 5, 11, 21, 33, 36, 43, 47, 50, 51, 52, 56, 58, 60, 63, 67, 71, 78). There were also references about Appellant's case. (Def.'s Ex. 4 at p. 63). Finally, Appellant himself testified that he had been in prison on these charges since his arrest.

In People v. Boose, 85 Ill. App. 3d 457, 40 Ill. Dec. 760, 406 N.E.2d 963 (1980), the defendant was on trial for murder of a guard at the instituion where the defendant was incarcerated. The defendant pled guilty, then successfully appealed and received a trial on the charge. While awaiting his appeal the defendant made statements concerning the murder to a fellow inmate. During the inmate's testimony, reference was made to the defendant's appeal. The appellate court found the testimony to be harmless where the evidence against the defendant was overwhelming, the jury had been made aware of the defendant's prior criminality because of where the homicide took place and because of "the fact the jury was equally aware the matter had taken almost seven years to come to trial, a circumstance which may well have inferred previous legal proceedings." 406 N.E.2d at 965.

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[4]Although Mr. Carroll stated he met Appellant in jail in 1980, that was obviously in error.

Appellee submits that the same considerations that were found in Boose to constitute harmless error beyond a reasonable doubt are present in the instant case. The evidence against Appellant was overwhelming. Karen Jackson testified that the Appellant came to the home of Walter and Edna Washington, with the co-defendant, Livingston on the night of the murders. (R. 599-607). She told how Appellant forced his way into the bedroom where she was hiding. (R. 605-606). The photographs of the Washington home corroborated her testimony. (R. 484-488, 606). She testified that she was forced to pack her and her children's belongings, and that Livingston had a gun which he was holding on everyone. (R. 606-608). She testified that she took her belongings and put them in the back of the Appellant's truck. (R. 609). She saw Walter Washington and Larry Finney come out of the house with their hands behind their back. (R. 609). She and her children were placed in the cab of the camper, the Washingtons and their two children, Finney, and Livingston were in the back. (R. 609-610). This was corroborated by the testimony of Shirley Jackson who saw the Appellant and Karen Jackson putting things in the camper (R. 786-787), as well as seeing Edna Washington getting into the back of the camper (R. 788), the Appellant locking the camper and then driving off. (R. 788).

Karen Jackson then testified that the Appellant drove the camper into Broward County. The Appellant passed the abandoned car, turned around and then she stopped by the car. (R. 612). Appellant got out of the camper and standing behind

the camper, talked to Livingston. The Appellant opened the back of the camper and ordered the victims to get into the abandoned car. (R. 612-613). She heard gunshots. Livingston then got into the back of the camper and Karen Jackson heard Livingston tell the Appellant to hurry up. (R. 614-). Then she heard a big boom. (R. 614). Appellant returned to the truck and stated that his face felt like it was on fire. (R. 614). Later that night she put cold cream on Appellant's face where he had been burned. (R. 615). This was corroborated by Sergeant Schlein's observation of burns on the Appellant's face and the photographs. (R. 468-470, 722). Appellant told Karen Jackson not to think about it. (R. 615).

Karen Jackson's testimony as to the Appellant's involvement was corroborated by the co-defendant, Aubrey Livingston. (R. 675-686). Livingston's testimony differed from Karen Jackson's only in his denial of his involvement. (R. 677-678, 685). Karen Jackson's testimony was further corroborated by the testimony of Barbara Finney, which related Appellant's search for Karen Jackson prior to the murders, and her observance of Appellant in his camper in the area of the victim's house. (R. 559-560). In addition Officer Pace testified that Appellant told him on the day of the murders that he was going to see his wife that day. (R. 578).[5] Appellant's involvement and intent to

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[5]There was other physical evidence to implicate the Appellant, including the handcuffs found on the scene, which Appellant's keys fit (R. 498); other handcuffs found in the Appellant's car (R. 495); the yellow rope found in the Appellant's home (R. 491), which matched that found on Walter

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commit these crimes can further be demonstrated by the statements which he told to Sergeant Schlein, which Appellant admitted at trial were false. (R. 899-903, 919-920).

Finally, of equally great importance is the fact that the jury deliberated almost ten (10) hours, and asked to have Shirley Jackson's testimony reread. (R. 1084). Shirley Jackson was the one independent witness who unequivocally put Appellant at the Washington home of the time of the kidnapping, thus making Appellant's testimony that he was at home, unbelievable. It is clear that it was Shirley Jackson's testimony which was the key in convicting Appellant, and not the jury's knowledge that Appellant had been previously convicted before. Thus, any error was harmless beyond a reasonable doubt.

2. Appellant's Prior Arrest

Appellant during his cross-examination of the co-defendant, Aubrey Livingston, asked Livingston "had he ever known Appellant to be in trouble with the law in this case. Unfortunately for Appellant, Livingston answered "yes, a few times." (R. 697). Appellant then attempted to impeach Livingston's answer with his deposition answer to the same question which was "no, not particularly." (R. 697-698). Then Livingston admitted that he did not know Appellant particularly to be in trouble with the law. (R. 698)

The prosecutor then proffered that he wanted to ask Livingston about Appellant's prior arrest with Livingston.

Washington's wrists (R. 532-534); as well as the .38 caliber shells found at Appellant's home. (R. 489).

Appellant objected, and the trial court agreed. (R. 702). Then Appellant during his testimony stated that Livingston was a criminal, street wise guy, and that he would never offer Livingston any job assistance because of Livingston's character and illegal activity in the community. (R. 879). Prior to cross-examining the Appellant, the prosecutor received permission from the trial court to inquire of Appellant as to how he knew of Livingston's criminality. (R. 909). On cross-examination, Appellant denied recalling anything about Livingston's arrest in 1979 for conspiracy to commit robbery, the same incident which Appellant had been arrested for. (R. 911-912).

Aubrey Livingston was then recalled by the state. Livingston admitted to being arrested on March 22, 1974 for conspiracy to commit robbery and that Appellant was aware of his arrest because both he and Appellant were arrested for the same charge. (R. 931). On cross-examination, and redirect; it was brought out that the charges against both Appellant and Livingston were dropped. (R. 933-934). The Appellant on surrebuttal then explained to the jury the facts behind the arrest. (R. 938).

Appellee submits that the testimony concerning the Appellant's prior arrest was admissible for two reasons. The first reason is that the testimony was proper rebuttal or cross-examination by the state of a character witness for the Appellant.

In Lewis v. State, 377 So.2d 640, 644 (Fla. 1979), this Court held that the testimony of a witness that he had never

heard anything bad about the defendant placed the defendant's character in issue. Appellee submits that as in Lewis, the Appellant's questions, and Livingston's answers, placed Appellant's character in issue even though such questioning was not phrased in terms of Appellant's general reputation in the community. 377 So.2d at 644. Once Appellant's character was placed in issue, it was proper for the state to inquire as to whether Livingston knew that Appellant had been arrested before. Id. at 644-645. See also Cornelius v. State, 49 So.2d 332, 335 (Fla. 1950); Carley v. State, 143 Fla 108, 197 So. 441, 442 (1940); Kite v. State, 126 Fla. 77, 170 So. 445 (1936).

Appellee further submits that the State could also pursue this area of questioning when Appellant claimed he had no knowledge of Livingston's prior arrest. Appellant had clearly opened the door to Livingston's rebuttal testimony. Furthermore, the prosecutor did not improperly argue to the jury Appellant's prior trouble with the law. (R. 1051). The prosecutor's argument was a proper reply to Appellant's counsel's argument to the jury concerning Livingston's "reluctant" testimony that Appellant had never been in trouble with the law. (R. 1020, 1032-1033). Appellant cannot make misstatements in his testimony at trial or arguments to the jury, and then expect the state to not respond. The Appellant elicited the testimony, and opened the door to the testimony which he now claims was impermissible. When testimony or argument is responsive to a defense question or testimony, a defendant cannot claim error on appeal. See, e.g., Lewis v. State, supra; Williams v. State, 462

So.2d 36, 37 (Fla. 1st DCA 1984). Thus, Appellee submits that there was no error or abuse of discretion by the trial court in allowing the state to elicit the testimony concerning Appellant's prior arrest. Furthermore, any error was harmless where there was significant evidence of guilt that reduced the likelihood that the otherwise improper testimony had a substantial impact on the verdict. See United States v. Rodriquez-Arevalo, 734 F.2d 612 (11th Cir. 1984).

3. Prior Handcuffing of Karen Jackson

During direct examination of Cynthia Manuel, Mrs. Manuel testified that about ten (10) days before the murders, Karen Jackson had come over to her house with Edna Washington. She stated that Karen was acting frightened. (R. 542). On cross-examination, Appellant's counsel asked Mrs. Manuel if she had known that Karen and Appellant were separated. Mrs. Manuel replied that she had found out that morning when Karen and Edna had come over to her house. (R. 548). On redirect, the state then asked Mrs. Manuel what Karen had told her about the Appellant. To that question Mrs. Manuel stated that Karen had told her that she had left Appellant; that Appellant had beat her up and handcuffed her to the bed. (R. 549).

Officer John Pace testified, without objection, that on February 12, 1981, he had first met Karen Jackson in reference to having been handcuffed at home by her husband. (R. 576). Karen Jackson then testified without objection that she separated in 1981 from the Appellant because she had been physically abused by Appellant. She testified about an incident where Appellant took

off her clothes and handcuffed her to the bed. Karen Jackson stated that after the incident she went to Edna Washington's house and called the police. (R. 594-595).

Appellee would initially note that Appellant's failure to object to Officer Pace's testimony or to Karen Jackson's testimony precludes him from raising their testimony as error in this appeal. There is no indication that such an objection would have been futile because it is not known if the trial court allowed Mrs. Manuel's testimony only as proper redirect based on questions elicited by Appellant during cross-examination.

However, it is clear that the testimony was properly admitted. There is no question that Appellant's marital problems and his treatment of Karen Jackson was relevant to Appellant's motive in killing the people who gave his wife refuge when she left him. It is well established that evidence of other prior bad acts are admissible to show motive for subsequent crimes and to establish the "entire context" of the crimes charged. See, e.g., Phillips v. State, 476 So.2d 194, 196 (Fla. 1985); Heiney v. State, 447 So.2d 210, 213-214 (Fla. 1984); King v. State, 436 So.2d 50, 54-55 (Fla. 1983); Washington v. State, 432 So.2d 44, 47 (Fla. 1983); Tumulty v. State, 489 So.2d 150 (Fla. 4th DCA 1986). Thus, the testimony was relevant and admissible and not simply a character attack on the Appellant. Furthermore, any error was harmless.

The state in presenting its evidence against the Appellant did not act improperly. All the testimony was relevant to issues that were either raised properly by the state or by the

Appellant. Appellant complains now because he did not like the doors which he opened. Any errors that were made did not deprive Appellant of a fair trial because for the reasons stated supra, were harmless beyond a reasonable doubt.

POINT II

THE COMMENTS AND TREATMENT OF THE TRIAL COURT TOWARDS APPELLANT'S COUNSEL WERE NOT IMPROPER OR PREJUDICIAL, WHERE THEY WERE MADE WITHIN THE TRIAL COURT'S RESPONSIBILITY FOR THE TONE AND TEMPO OF THE PROCEEDINGS, TO ASCERTAIN THE TRUTH, AND TO CURTAIL PURSUIT OF IRRELEVANT MATTERS. (Restated).

Appellant alleges that various comments made by the trial court, in the presence of the jury, showed dissatisfaction with Appellant's trial counsel and defense and his preference for the prosecution, to the extent that he was deprived of a fair trial. Appellee submits that a review of the record in its entirety shows that the Appellant's allegations are simply not founded. See Brown v. State, 367 So.2d 616, 620 n.3 (Fla. 1979); Hayes v. State, 368 So.2d 374, 377 (Fla. 4th DCA 1979); Lister v. State, 226 So.2d 238, 239 (Fla. 4th DCA 1969).

Initially, Appellee would submit that Appellant has failed to preserve this issue for review. Appellant did not object to any of the comments by the trial court which he now raises on appeal as reason for reversal. There has been no showing whatsoever that any objection by counsel would have been futile. Nothing in the record is revealed that should have dissuaded counsel from making a contemporaneous objection. As such, this issue may not be raised by Appellant for the first time on appeal. See Pope v. Wainwright, 496 So.2d 798 (Fla. 1986); Herzog v. State, 439 So.2d 1372, 1376 (Fla. 1983).

Appellee submits that these comments were not such as to constitute fundamental error. Herzog v. State, supra. It is

well recognized that the conduct of counsel during the progress of the trial is under the supervision and control of the trial court in the exercise of its discretion. Murray v. State, 154 Fla. 683, 8 So.2d 782, 784 (1944). See also Paramore v. State, 229 So.2d 855, 860 (Fla. 1969). Furthermore the protection of witnesses under examination is included in the court's duty to maintain dignity of law in the courtroom. Baisden v. State 203 So.2d 194, 196 (Fla. 4th DCA 1967). Thus, in determining whether the remarks of a trial judge are prejudicial, the burden is on the defendant to show prejudice, the trial court is presumed to be in the best position to decide when a breach has been committed and what corrective measures are required, the remarks are to be considered in light of the circumstances, with the ultimate consideration being the probable effect of the language upon the jury. Baisden v. State, supra at 197.

Appellant in his brief makes the following complaints about the trial court's conduct. Appellant alleges that the trial court attacked defense counsel when the court commented that the state was correct that the revolver, which defense counsel was eliciting testimony about, had been the subject of his own motion on limine that was granted,[6] and later when the trial court sustained the state's objection to defense counsel questioning a witness about the gun which was not in evidence due to the Appellant's own motion. Only in by stretching one's

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[6]Appellant also now complains about the prosecutor's comment in closing argument about the pre-trial motion. Yet no objection was made at the time of trial.

imagination, could the trial court's comments be construed as informing the jury that the defense counsel was obstructing justice by making objections. However, a review of the trial court's comments in context show that they were nothing more than the court's ruling on objections. An adverse ruling does not mean that the trial court is adverse to or prejudiced against the Appellant. Huff v. State, 495 So.2d 145, 148 (Fla. 1986). The same is true of Appellant's complaint concerning the trial court's comment on defense counsel's question about the .38 caliber gun. (R. 509). The record simply does not support Appellant's assertion that the trial court made defense counsel look foolish.

Appellant next complains about the trial court's statement to counsel that they could not wait for counsel to re-read the witness' deposition for further questions for cross-examination. (R. 570). As this Court held in Van Royal v. State, 497 So.2d 625 (Fla. 1986), there is no impropriety in the judge exercising control of the trial by urging counsel to proceed with their cases.

Appellant also complains of the trial court's comments during cross-examiantion of Barbara Finney, Officer Pace, and Karen Jackson, Dr. Larry Tate, and Shirley Jackson. A review of the trial court's comments when reviewed in context show that the trial court was only exercising its responsibility to maintain the tone and tempo of the proceedings. When defense counsel continually repeated questions or answers, the trial court properly stopped counsel from repeatedly covering the same

ground. See Turner v. State, 297 So.2d 640, 642 (Fla. 1st DCA 1974). Even without the state's objection the trial court has the duty to curtail pursuit of irrelevant matters.

Appellant's complaints concerning the trial court's protecting Shirley Jackson is without merit. Apparently as the record reflects, defense counsel continued to ask the same questions over and over again. The trial court has an obligation to protect witnesses as part of its duty to maintain the dignity of law in the courtroom. See, e.g., Lewis v. State, 411 So.2d 880, 881 (Fla. 3d DCA 1981); Blake v. State, 336 So.2d 454, 455 (Fla. 3d DCA 1976). Again, Appellant's complaints concerning the trial court's desire to speed up the questioning is without merit.

There is absolutely no indication in the record that defense counsel felt threatened or cowered by the trial court. In fact, defense counsel never urged the trial court's treatment of him as grounds for a new trial. (R. 1345). Finally, it should be noted that the trial court instructed the jury to disregard anything that he may have said or done that made them think he preferred one verdict over another. (R. 1075). Juries are presumed to have followed the trial court's instructions. See United States v. Cortez, 757 F.2d 1204, 1208 (11th Cir. 1985). Appellant has failed to demonstrate otherwise. These comments, when viewed in context, and in relation to the seven days of trial, the court's actions and comments did not deprive Appellant of a fair trial.

III

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN RESTRICTING APPELLANT'S CROSS-EXAMINATION OF STATE WITNESSES IN MATTERS WHICH WERE COLLATERAL AND IRRELEVANT TO THE PROCEEDINGS. (Restated).

As Appellant has acknowledged trial judges are vested with considerable discretion in regulating the manner of cross-examination of witnesses. Demps v. State, 395 So.2d 501, 505 (Fla. 1981). The court's rulings will not be disturbed unless a clear abuse of discretion is shown. Maggard v. State,399 So.2d 973 (Fla. 1981).

At the prior trial, the state moved in limine to prevent the Appellant from cross-examining Detective Schlein concerning two alleged internal police department reprimands. The Appellant proffered in one case, State v. Hunwick, that Detective Schlein had obtained a search warrant for a home after he had already searched the home, and that he had counseled a junior officer to lie on the witness stand. (R. 72-74). In the second case, State v. Overhusler, Appellant alleged that Detective Schelin had repeatedly tried to get the state's key witness to testify falsely. (R. 74). Appellant alleged that as a result of police department hearings of these cases, Detective Schlein was demoted (R. 71) and suspended by the department, (R. 75), but later reinstated. (R. 767). Detectie Schlein stated that Appellant's facts were wrong, that he had never been accused of committing or suborning perjury, that he had never been demoted, and that his testimony on those cases was never

challenged in any way that would suggest that he was not telling the complete truth. (R. 74). Detective Schlein did admit that he had been suspended for three days because of the Hunwick case, but denied that the suspension was the result of suborning perjury. (R. 75).

Nothing further was proffered by the Appellant, even though told by the trial court that he could do so later, (R. 75), to prove that Detective Schlein's suspension or any other disciplinary proceedings were the result of a finding of Detective Schlein committing or suborning perjury. In granting the state's motion in limine, the trial court noted that at the time of the investigation the murders in the instant case, Schlein was a detective, and now he was a captain, hardly indicating a demotion. (R. 75, 767).

Appellee submits that the trial court properly granted the state's motion in limine. First it should be noted that Detective Schlein was hardly, as Appellant has stated, a key state witness. The bulk of Schlein's testimony, involved the playing of the taped statements of the Appellant (R. 707-725), and the co-defendant, Livingston. (R. 727-757).[7] Although, Detective Schlein also testified about the burn marks he saw on Appellant's face (R. 764), reference to the marks and where and when they were received were part of the taped statement (R. 722-723), as well as pictures were taken of the Appellant's face (R.

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[7]Neither tape's admissibility was challenged by Appellants.

460), so the jury could evaluate them independent of Schlein's testimony.

Secondly, the proffered impeachment testimony was inadmissible under the rules of evidence. Under section 90.609, Florida Statutes (1985), a party may attack the character of a witness only by reputation evidence referring to character relating to truthfulness. There was no character witness proffered by Appellant who would have testified to Detective Schlein's reputation in the communitiy for truthfulness. The only evidence proffered by Appellant were alleged general acts of misconduct on the part of the witness. As such they were properly excluded. See, e.g., Washington v. State, 432 So.2d 44, 47 (Fla. 1983); Nelson v. State, 99 Fla. 1032, 128 So. 1, 3 (1930). Furthermore, under section 90.610, Florida Statutes (1985), a witness's credibility may be impeached only by convictions of crimes that are felonies or misdemeanors involving dishonest or a false statement. A police department reprimand is not a conviction for purposes of the statute.

In Brookings v. State, 495 So.2d 135 (Fla. 1986), this Court held that the defendant could not question a state witness about a "false statement" arrest which occurred three years prior to trial where there was no conviction of the charge. 495 So.2d at 140-141. Similarly in Rolle v. State, 386 So.2d 3 (Fla. 3d DCA 1980), the court held that the trial court properly refused to permit the defendant to question a state witness about a pending investigation for perjury in an unrelated case. See also Whitley v. State, 265 So.2d 99 (Fla. 3d DCA 1972) (trial court

properly limited cross-examination of witness as to his dismissal of sheriff's department).[8]

It is clear, that based on the above cases, the trial court properly granted the state's motion in limine. It should be further noted, that Appellant never alleged in the trial court how these departmental reprimands in unrelated cases occurring years after the investigation of the murders in the instant case presented Detective Schlein with an interest, bias, or motive to lie in this case, or even show a defect in his capacity to accurately testify. Compare Gamble v. State, 492 So.2d 1132 (Fla. 5th DCA 1986).[9] Thus, the trial court did not abuse its discretion in restricting Appellant's cross-examination of Detective Schlein.

Appellee also submits that there was no error in the trial court's sustaining the state's objection to Appellant's question to Barbara Finney concerning what the victim, Larry Finney's, non-birth brother Alvin did for a living. (R. 573). Although, Appellant proffered that Alvin was a drug dealer, no proffer was made as to how that remotely related to the murders

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[8]At trial, the state relied on State v. Pettis, 10 FLW 1878, in which the Fourth District held that the defendant could not question a police officer about certain departmental reprimands. On rehearing, the state's certiorari petition was jurisdictionally dismissed, 488 So.2d 877 (Fla. 4th DCA 1986), but on November 26, 1986, this Court granted review in Case No. 69,067.

[9]Appellant stated that the purpose of the proffered evidence was to show a "sorrowful reputation for truthfulness." (R. 71).

or how it showed that the murder was committed by someone other than the Appellant.[10] Appellee asserts that the question is similar to that disallowed in Proffit v. State, 315 So.2d 461, 464 (Fla. 1975) (trial court properly refused the defendant to pursue questions dealing with whether victim was a dealer in marijuana and whether his death was the result of these dealings). See also Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982). Thus, the trial court properly sustained the state's objection.[11]

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[10]Mrs. Finney did testify that the police asked her if she knew anyone that Larry Finney may have been associated with that dealt drugs. (R. 571). However, Appellant did not pursue that line of questioning or show its relevance.

[11]Appellee would submit that any error in restricting cross-examine of either Detective Schlein or Mrs. Finney was clearly harmless beyond a reasonable doubt.

IV

THE TRIAL COURT DID NOT COMMIT ERROR, REVERSIBLE OR OTHERWISE, IN VARIOUS EVIDENTIARY AND PROCEDURAL RULINGS. (Restated).

Appellant alleges that the trial court made various errors of fact and law, which taken cumulatively, prevented the Appellant from receiving a fair trial. Appellee submits that the trial court's various rulings on evidentiary and procedural matter were either not error or if error were harmless, not affecting Appellant's rights to a fair trial.

1. The Trial Court Did Not Abuse its Discretion in Not Permitting Additional Voir Dire of Juror Smith

During the initial voir dire, Juror Smith was asked by the prosecutor if he knew any police officers. Juror Smith replied that he did, that they were acquaintances, and that he had not discussed their cases with them, except one case in which he had been a victim of assault and battery (R. 356), nor did he discuss the criminal justice system with them. (R. 358). Appellant had no questions for Juror Smith concerning his relationship with police officers.

After the jury sworn, Appellant's counsel's law clerk told counsel that he heard someone who worked for the Broward County Sheriff's Office state that Juror Smith was a friend of his. Counsel asked the court to inquire further of Juror Smith because when Juror Smith was asked by Appellant's counsel on voir dire, Smith had said he had no friends in law enforcement. (R.

380). As the record demonstrates, that statement was incorrect.- Not only did Appellant's counsel not ask Juror Smith any questions concerning friends in law enforcement, Juror Smith had responded to the prosecutor's questions in voir dire, that he did have friends or acquaintances who were police officers.

The extent to which parties may examine prospective jurors on vior dire is a matter within the sound discretion of the trial judge. Kalinosky v. State, 414 So.2d 234, 235 (Fla. 4th DCA 1982). Where counsel, either through intention or inadvertence fails to fully examine any of the prospective jurors with regard to their acquaintance with, or bias or prejudice for or against either party, it is not an abuse of discretion for the trial court to refuse further examination. Mizell v. New Kingsley Beach, Inc., 122 So.2d 225, 226 (Fla. 1st DCA 1960). See also United States v. O'Neill, 767 F.2d 780, 784-785 (11th Cir. 1985). Thus, in the instant case, not only was Appellant's counsel incorrect in statement concerning the questions he asked Juror Smith on voir dire, he was incorrect about Juror Smith's answers. As such, the trial court clearly did not abuse its discretion in refusing to inquire further of Juror Smith

2. The Trial Court Did not Abuse its Discretion in Denying Appellant's Motion for Mistrial when the Jurors Inadvertently Saw Appellant in Handcuffs at the Elevator.

During trial, Appellant's counsel stated that it was brought to his attention that the jury has seen Appellant in handcuffs at the elevator. (R. 418), and based on that sighting, requested a mistrial. The state cited to the trial court, the

opinion in Neary v. State, 384 So.2d 881, 885 (Fla. 1980) in which this Court held that the inadvertent sight by the jury of the defendant in handcuffs was not so prejudicial as to require a mistrial. The trial court then denied the motion for mistrial. (R. 415). Based on Neary, there is no question that the trial court did not abuse its discretion in denying Appellant's motion for mistrial. See also Maxwell v. Wainwright, 490 So.2d 927, 930-931 (Fla. 1986); McCoy v. State, 175 So.2d 588, 591 (Fla. 2d DCA 1965); United States v. Diecidue, 603 F.2d 535, 549-550 (5th Cir. 1979); McCoy v. Wainwright, 396 F.2d 818 (5th Cir. 1968).

3. The Trial Court Did Not Abuse its Discretion in Admitting into Evidence a Photograph of the Deceased Bodies.

It is well established that the admission into evidence of photographs of a deceased victim is within the sound discretion of the trial court. Wilson v. State, 436 So.2d 908, 910 (Fla. 1983); Swan v. State, 322 So.2d 485, 487 (Fla. 1975). "Relevancy" not "necessity" is the test for admissibility of gruesome photographs. Welty v. State, 402 So.2d 1159, 1163 (Fla. 1981). Straight v. State, 397 So.2d 903, 907 (Fla. 1981).

Appellee submits that the picture was admissible where it was relevant not only to prove identity of each decedent, but also to show the deteriorated condition of the bodies which would have corroborated the medical examiner, Dr. Tate's testimony as to the condition of the bodies. Photographs are admissibile where they assist the medical examiner in explaining to the jury the nature and manner in which the wounds were inflicted. Bush v. State, 461 So.2d 936, 393-940 (Fla. 1984). See also Dillen

v. State, 202 So.2d 904 905 (Fla. 2d DCA 1967).

In particular, Exhibit 7, was a picture of the four year old child, Terrance Manuel. The picture depicted a "pugilistic attitude", the position in which the body was found. The heat caused the muscles to retract and double up so that the body was in a fighter's position. The picture indicated that Terrance was alive at the time the fire started. (R. 778-779). Exhibit 8, was a picture of the two year old child, Reginald Washington. It showed the child's location on the left rear floorboard of the car. Reginald was also alive at the time the fire started. (R. 779-780). Both children died of smoke and soot inhalation. (R. 778, 779).

Exhibit 9 was a picture of Edna Washington. The picture depicted the head and chest area which showed a hole in the back of the skull. Ms. Washington died of a gunshot wound to the head. (R. 777). Exhibit 10, was a picture of Larry Finney. The picture shows a metal chain or necklace (R. 771), which was identified as worn by Finney. (R. 571). The picture also depicts the gunshot wounds in the head and chest. The cause of Finney's death was a gunshot wound to the chest. (R. 771-773). Exhibits 11 and 12 are photographs of Walter Washington. Exhibit 11 shows the three gunshot wounds, one to the head, one to the chest, and one in the thigh. Either the shot to head or chest would have been fatal. (R. 774-775). Exhibit 12 depict, Washington's hands tied behind his back. (R. 773).

All the pictures were relevant to show identity and the circumstances surrounding the victims' death, see, e.g, Brumley

v. State, 453 So.2d 381, 386 (Fla. 1984); Wilson v. State, supra, 436 So.2d at 910, as well as the premediated and cold blooded intent of the Appellant. See, e.g., Adams v. State, 412 So.2d 850, 853-854 (Fla. 1982); Booker v. State, 397 So.2d 910, 914 (Fla. 1981). Thus, the trial court did not abuse its discretion in admitting the photographs of the deceased bodies.

4. The Trial Court Did Not Abuse its Discretion in Allowing Testimony Referring to the Pregnancy of Edna Washington.

Initially, it must be noted that the only testimony and reference to Edna Washington's pregnancy that the Appellant objected to was during the medical examiner's testimony. (R. 777). Appellant did not object to the state's opening statement (R. 382); to Aubrey Livingston's testimony (R. 683), or Livington's statement (R. 751), all of which referred to the pregnancy. Thus, Appellee submits that Appellant has waived any objections to all testimony concerning Edna Washington's pregnancy.

Appellee would submit however that the testimony concerning the pregnancy of Edna Washington was admissible to establish identity. Edna Washington's pregnancy was a fact in the case. A defendant must take his victims as he finds them. See, e.g., Welty v. State, 402 So.2d 1159 (Fla 1981) (circumstances surrounding victim's loss of leg relevant to show identity); Ruffin v. State, 397 So.2d 277 (Fla. 1981) (victim was eight months pregnant). However, if Edna Washington's pregnancy was not admissible, Appellee submits it was not so prejudicial so

as to require a new trial.

5. The Trial Court Did Not Abuse its Discretion in Denying the Defendant's Motion for Mistrial Because of the Prosecutor's Opening Statement.

During his opening statement, the prosecutor was discussing the evidence concerning the burns on Appellant's face and how he got them, specifically Appellant's statement to Detective Schlein that he had received them when a barbeque exploded in his face. (R. 395-396). It was at that point, when the prosecutor referred to the barbequing of people. (R. 396). Appellant's counsel objected and the trial court sustained the objection. (R. 396). At the close of the state's opening statement, the Appellant moved for a mistrial. The trial court denied the motion. Appellant made no request for a curative instruction. (R. 397). As such, the Appellant has not preserved this issue for appeal. Castor v. State, 365 So.2d 701 (Fla. 1978); Clark v. State, 363 So.2d 331 (Fla. 1978).

Because the comment was argument, the trial court was correct in stating that it was not proper for opening statement. However, although strongly worded, as a comment on the evidence, it would have been proper in closing argument. See United States v. Taylor, 792 F.2d 1019, 1027-1028 (11th Cir. 1986). Furthermore, if improper, the comment reflected an emotional reaction to the case and did not make the trial fundamentally unfair and was harmless beyond a reasonable doubt. The trial court did not abuse its discretion in denying

Appellant's motion for mistrial.

6. The Trial Court Did Not Abuse its Discretion in Allowing the Introduction of the .38 Caliber Cartridges.

The three adult victims were killed by six (6) .38 caliber bullets. The murder weapon was never found. Two .38 caliber cartridges were found in front of the Appellant's home. (R. 489). The projectiles recovered from the victims were consistent in caliber as the fired cartridge cases. (R. 524). Appellee submits that the cartridges were relevant as a probative circumstance to show access by the Appellant to the type of bullets which were used to kill the victims.

Appellant's contention that the admission of the .38 caliber cartridges was a character attack on the Appellant is simply without merit. The fact that cartridges were found outside Appellant's home hardly shows a propensity to commit crimes. The cartridges were only one of many pieces of circumstantial evidence, i.e., the handcuffs, the rope, which corroborated in some way the testimony of Karen Jackson and Aubrey Livingston. The admission, even if error, was harmless in light of the other overwhelming evidence against the Appellant; see pp. 17-19, supra.

Appellant has failed to demonstrate any error or prejudice on the part of the trial court in its various evidentiary and procedural rulings which denied him a fair trial.

V

THE TRIAL COURT DID NOT ERR IN ACCEPTING THE JURY'S RECOMMENDATION AND IMPOSING THREE SENTENCES OF DEATH. (Restated).

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 reasons to believe that reasonable persons could not agree with the recommendation. LeDuc v. State, 365 So.2d 149 (Fla. 1978). The Appellant alleges various reasons why death is not a proper penalty in this case. Appellee will address each of Appellant's contentions separately and show that each is without merit.

1. The Murders Were Committed in a Cold, Calculated and Premeditated Manner.

The trial court in its sentencing order found that the murders were committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. (R. 1399). Appellee submits that the trial court's findings are amply supported by the record where they show either a particularly lengthy, methodic, or involved series of atrocious events or a substantial period of reflection and thought by the Appellant, which rises to a level beyond that which is require for a first degree murder conviction. Card v. State, 453 So.2d 17 (Fla. 1984); Jent v. State, 408 So.2d 1024 (Fla. 1981).

Despite Appellant's statement to Karen Jackson that he was simply going to hold the victims hostage and place them in the car on the side of the road (R. 610, 613), his actions showed

otherwise. Appellant drove the victims from Dade County to Broward County in a locked camper. Once in Broward County, Appellant found an abandoned car in which he ordered the victims into. (R. 612-613). The three adults were then shot. An explosion was heard and Appellant returned to the truck stating that his face felt like it was on fire. (R. 614). Furthermore, as the trial court found, Appellant had a motive to kill the victims as they had given refuge to his wife before during martial disputes (R. 549) and one victim was his wife's alleged boyfriend. (R. 562). These were not heat of passion murders.

The evidence shows a lengthy, methodic and involved series of atrocious events which rises to that level beyond that which is required for first degree premeditated murder. See, e.g, Scott v. State, ___ So.2d ___, 11 FLW 505 (Fla. September 25, 1986); Provenzano v. State, ___ So.2d ___ 11 FLW 541 (Fla. October 16, 1986); Jackson v. State, ___ So.2d ___, 11 FLW 589 (Fla. November 13, 1986). Furthermore, Edna Washington, along with the other two adults, were shot execution style. She was shot in the back of the head. (R. 1986). This aggravating circumstances clearly applies in execution type murders. See Routly v. State, 440 So.2d 1257 (Fla. 1983). Appellee cannot conceive of a more cold calculating, premeditated murder without any pretense of moral or legal justification. See, e.g., Way v. State, 496 So.2d 126 (Fla. 1986); Card v. State, supra; Herring v. State, 446 So.2d 1049 (Fla. 1984); Routly v. State, supra; Harich v. State, 437 So.2d 1082 (Fla. 1983); Bolender v. State, 422 So.2d 833 (Fla. 1982); Jent v. State, 408 So.2d 1024 (Fla.

1981).

Appellee submits that the trial court's mentioning of lack of remorse in his sentencing order did not constitute an improper consideration of a nonstatutory aggravating circumstance. Compare Menendez v. State, 368 So.2d 1278 (Fla. 1979). Although, Appellant's lack of remorse was briefly discussed under the aggravating factor of cold, calculated, and premeditated, it merely constituted an expression of opinion by the trial judge after the aggravating circumstance had been found. See Suarez v. State, 481 So.2d 1201 (Fla. 1985). However, if the trial court improperly considered Appellant's lack of remorse, Appellee submits that it was harmless error as it was at most redundant to the finding that the murders were cold and calculated. This is not an extreme case in which this sort of error will require a remand for consideration of the sentence. See Pope v. State, 441 So.2d 1073, 1078 (Fla. 1983).

The Appellee submits however, that the trial court properly considered the way the bodies of the children were disposed of in finding that the murders were cold and calculated. Although it is unclear whether, Edna Washington may have died from her bullet wounds before the fire was started, it is clear that the children were alive when the fire started, and the fire, i.e., the soot and smoke inhalation, was their cause of death. (R. 778-780). Thus, it was the disposal of their live bodies that was the cause of their deaths and as such the trial court properly considered this factor. However, any improper consideration of this factor did not affect the finding that the

murder of Edna Washington or the children was cold, calculated and premediated without any moral or legal justification.

2. The Murders were Heinous, Atrocious and Cruel and Under Any Proportionality Review the Death Sentence is Appropriate.

The trial court found the murders to be heinous, atrocious, and cruel. (R. 1398). In support of this finding the trial court found that the victims were abducted at gunpoint and placed in the locked pickup truck, driven to an isolated area, and forced into an abandoned vehicle. The three adults were shot. The car then was then set afire, killing the two infants.- These findings are clearly supported by the record. In addition, the trial court's reference to Edna Washington's pregnancy was relevant, where Ms. Washington expressed pain from her pregnancy during the time she was being kidnapped. (R. 683, 751). In fact, Appellant does not dispute these facts, and admits that the murders were "reprehensible." See Brief of Appellant at p. 40.

In cases in which the victims have died through fire, this Court has consistently upheld the death penalty. Burning a person alive is clearly a consciousless or pitiless crime which is unnecessarily torturous to the victim. See Way v. State, supra; Bolender v State, 422 So.2d 833 (Fla. 1982);[12] Jent v. State, 408 So.2d 1024 (Fla. 1981); Smith v. State, 365 So.2d 704 (Fla. 1978).

In addition, in numerous cases in which there has been

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[12]In Bolender, this Court approved the trial court's override of a jury recommendation of life.

fear and emotional strain proceeding a victim's death, even if instaneous, this Court has upheld not only the finding that the murder was heinous, atrocious and cruel, but the sentence of death as well. See, e.g., Preston v. State, 444 So.2d 939, 945 (Fla. 1984); Routly v. State, 440 So.2d 1257, 1265 (Fla. 1983); Adams v. State, 412 So.2d 858, 857 (Fla. 1982); Francois v. State, 407 So.2d 885, 890 (Fla. 1981). It is thus clear, that not only does this aggravating circumstance apply to the murders of Edna Washington and her two children, that under any proportionality review, the death sentences is warranted.

3. The Trial Court Did Not Fail to Consider Mitigating Factors.

Appellant alleges that the trial court erred in failing to consider "the mitigating factors of extreme mental and emotional disturbance and the resultant diminished capacity to appreciate the criminality of the acts." See Appellant's Brief at p. 41, and the disparity in treatment of the co-defendant, Aubrey Livingston. Appellee submits both claims are without merit.

a. The Mental Mitigating Factors

It is clear that the trial court listened to all evidence that was presented at the trial and sentencing phases. This is not a case in which the trial court refused to allow any mitigating evidence to be admitted. In reviewing the evidence that was presented the trial court found one to exist, that the Appellant had no significant history of prior criminal activity.- (R. 1399). The trial court simply did not find any other miti-

gating factors existed which applied to Appellant's case. (R. 1400). It is well established that so long as the mitigating evidence is considered, the trial court's determination of lack of mitigation will stand absent palpable abuse of discretion. Pope v. State, 441 So.2d 1073, 1076 (Fla. 1983).

Appellant alleges that his domestic problems with his wife were sufficient to require the trial court to find the mental type of mitigating factors. Clearly, even if Appellant suffered from domestic emotional distress, it was not so extreme as to require the trial court to find it to be mitigating. See, e.g., Lemon v. State, 456 So.2d 885, 888 (Fla. 1984). See also Johnston v. State, ___ So.2d ___, 11 FLW 585, 588 (Fla. November 13, 1986); Toole v. State, 479 So.2d 731, 734 (Fla. 1985); Medina v. State, 466 So.2d 1046, 1050 (Fla. 1985). In addition there was evidence to contradict the presence of these mental mitigating circumstances. The witnesses presented by the Appellant, showed that even though he had problems with his wife, if anything he was a stable person. (R. 1107-1110, 1113, 1121, 1122-1123). See, e.g., Provenzano v. State, supra, 11 FLW at 543; Mason v. State, 438 So.2d 374, 379 (Fla. 1983); Michael v. State, 437 So.2d 138, 141 (Fla. 1983). Furthermore, there was no psychiatric testimony presented. In fact, such excusing of his actions may have been in conflict with Appellant's continual denial of guilt. (R. 1165). Clearly, the trial court did not abuse its discretion in not finding any further mitigating circumstances.

b. The Sentence of the Co-Defendant

At his retrial on these charges, the co-defendant, Livingston, was again convicted on all counts of first degree murder and kidnapping. However, after deliberating the jury recommended life sentences for Livingston. Prior to his sentencing, the state entered into an agreement with Livingston, in which in return for his testimony at Appellant's trial, the state would not recommend the death penalty. (R. 1192). Livingston testified at Appellant's trial, and later at his sentencing, in accordance with the jury's recommendation, the trial court sentenced Livingston to life imprisonment.

At trial, Livingston testified that although he was with Appellant during the night of the murders, Appellant was the one who forced his way into the Washington's home, held the gun on the victims, tied up the two male victims, eventually shot the adult victims and set the vehicle on fire. (R. 673-685). Livingston's testimony corroborated Karen Jackson's testimony, except where he tried to minimize his own involvement. Karen Jackson testified that she only saw Livingston with the gun, (R. 608, 626), and that Livingston had also gotten out of the truck when the victims were placed in the abandoned car. (R. 613). However, Karen Jackson did not testify as to who tied up Finney and Washington or who shot the adults. Thus, the evidence is unclear on Livingston's actual participation in those events.

The evidence is clear that it was Appellant, not Livingston who had the motive for committing the murders. Livingston's participation was to aid Appellant. Although, it is unclear who actually shot the adults, there is no question that

it was Appellant, acting alone, who set fire to the car, killing the children.[13] Thus, Livingston and Appellant were not equal participants in the three murders for which Appellant received the death sentence.

This Court has continually approved the imposition of the death penalty when the circumstances indicate that the defendant was the dominating force behind the homicide, even though the defendant's accomplice received a life sentence for participation in the same crime. See Marek v. State, 492 So.2d 1055, 1058 (Fla. 1986) (co-defendant had received a life sentence recommendation at his separate trial, and defendant was the dominant participant); Garcia v. State, 492 So.2d 360, 368 (Fla. 1986) (no disparity where one co-defendant, also a triggerman received life sentences after trial); Woods v. State, 490 So.2d 24, 27 (Fla. 1986); Deaton v. State, 480 So.2d 1279, 1283 (Fla. 1985); Hoffman v. State, 474 So.2d 1178, 1182 (Fla. 1985); Tafero v. State, 403 So.2d 355, 362 (Fla. 1981); Meeks v. State, 339 So.2d 186, 192 (Fla. 1976). In the instant case, there is no question that Appellant was the dominating force behind these atrocious homicides, and in light of the respective jury recommendations, the trial court's sentences of death was proper and did not constitute disparate sentencing.

C. Any Errors by the Trial Court in Its Sentencing Order Would Be Harmless Error.

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[13]The evidence is as consistent with Appellant taking the gun from Livingston and shooting the adults, as it is with Livingston, on Appellant's request or knowledge, shooting the adults.

Appellee submits that if this Court should find that the trial court improperly found one of the aggravating circumstances or committed any other sentencing error, then this Court should still affirm the sentence of death. Appellee submits that the instant case is one in which this Court "can know" that the result of the weighing process would not have been different had the impermissible factors not been present. See, e.g, Bassett v. State, 449 So.2d 803 (Fla. 1984); Vaught v. State, 410 So.2d 147 (Fla. 1982); Brown v. State, 381 So.2d 690 (Fla. 1980).

The record shows that after considering the mitigating evidence which was presented, the trial court was extremely concerned that the Appellant had brutally killed five people, two of which were children. (R. 1397-1399). Even when the single mitigating circumstance of no significant history of prior criminal activity is weighed against the three well-founded aggravating circumstances, it is clear that the trial court's decision to impose the death penalty would have been unaffected by the elimination of any unauthorized aggravating circumstance.[14] There can be little question that a comparison of the facts in the instant case clearly shows that the death penalty is the appropriate sentence. See cases cited at pp. 44 supra.

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[14]If this Court should find that a remand is necessary, Appellee submits that it is not required that a new sentencing jury be impanelled, only that the trial court reconsider its sentence.

CONCLUSION

Based upon the foregoing reasons and citaitons of authority, the State respectfully submits that the judgments and sentences of death should clearly be AFFIRMED.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief of Appellee has been furnished to MICHAEL GELETY, ESQUIRE, Attorney for Appellant, 1700 E. Las Olas Boulevard, Suite 300, Fort Lauderdale, Florida 33301 by United States Mail delivery this 12 day of January 1987.

Penny H. Brill

Of Counsel