IN THE SUPREME COURT OF FLORIDA

JOHNNY LEATRICE ROBINSON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 68,971

ON APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR ST. JOHNS COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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SUMMARY OF ARGUMENTS

POINT I. Robinson personally acquiesced in defense counsel's concededly valid waiver of his presence for two brief portions of the trial: during preliminary qualifications of the venire and during testimony in the penalty phase of a defense witness. The absences were brief and wholly voluntary. This issue was not preserved by specific, timely objection. Appellant's position is admittedly contrary to this honorable Court's holding in Amazon.

POINT II. The murder weapon was stolen in a burglary one week before the murder. To avoid admissible and relevant testimony concerning this burglary, and recognizing that the state could easily establish these facts, the defense stipulated that Robinson fired the fatal shots. The gun was never recovered; Robinson said he dismantled and discarded the weapon. During cross-examination of a state witness, Detective Charles West, counsel asked how West knew the picture of a gun depicted the murder weapon. West replied he knew the gun was the same from the description in the burglary report. This issue is not preserved because no curative instruction was requested. The trial court correctly ruled that any error was invited. There was no prejudice to appellant.

POINT III. The defense failed to sustain their burden of production to introduce some evidence of acute intoxication to warrant a jury instruction concerning voluntary intoxication. Although there was circumstantial evidence to indicate some consumption of alcohol, the evidence did not show acute intoxication.

POINT IV. During defense counsel's closing argument, the judge interrupted what even appellant concedes was an improper line of argument. Defense counsel then chastised himself and apologized to the court. This issue was not preserved by objection, request for a curative instruction, or motion for mistrial. This issue does not present an error of fundamental proportions.

POINT V. This issue is not preserved for appellate review by specific, timely objection. The comments complained of are fair responses to the evidence presented. Even if the comments are improper, it was not error to deny the motion for mistrial. Any error is harmless.

POINT VI. A decision from this honorable Court subsequent to the sentences imposed for the noncapital offenses in this case indicates that consecutive life sentences constitute a departure from a recommended guidelines sentence of life imprisonment. Although three consecutive life

sentences were imposed, the trial court did not give written reasons for departure. Nevertheless, this honorable Court should affirm the sentences imposed because clear and convincing reasons for departure exist. Judicial economy would best be served if this Court would take notice of these reasons.

POINT VII. The sentence of death was properly imposed and should be affirmed. Appellant concedes at least three of seven aggravating circumstances were properly found, balanced against no statutory mitigating circumstances. Appellant's difficult childhood is entitled to slight weight in light of the seven aggravating circumstances properly found in this case. Even if one or more of the aggravating circumstances is improper, the sentence should still be affirmed.

POINT VIII. Appellant did not present his claims concerning the constitutionality of the death penalty statute to the trial court and has therefore waived consideration of the issues on appeal. He fails to point out any support in the record for his laundry list of alleged infirmities. Each claim has been rejected many times and no reasons to revisit them has been offered.

POINT I

THROUGH COUNSEL, ROBINSON ASKED TO BE EXCUSED FOR TWO BRIEF PORTIONS OF HIS TRIAL, COUNSEL VALIDLY WAIVED ROBINSON'S PRESENCE. THIS ISSUE IS NOT PRESERVED FOR REVIEW.

Appellant contends that his brief absence from the courtroom during two portions of the trial rendered it fundamentally unfair. He concedes his attorney waived his presence, that the absences were voluntary and at his request, yet asserts a "per se right to be present at all states, critical or not", (AB 22), that can only be validly waived by the defendant personally. Appellant acknowledges this position is contrary to this Court's holding in Amazon v. State, 487 So.2d 8 (Fla. 1986). Further, this issue was not preserved by objection. U.S. v. Gagnon, 105 S.Ct. 1482, 84 L.Ed.2d 486 (1985).

No objection on this ground was presented to the trial court in any fashion. This is the best indication that appellant's absence was voluntary. See, U.S. v. Gagnon, supra. Appellant's failure to object waives consideration of this issue for appellate review. Wainwright v. Sykes, infra; Teffeteller v. State, 495 So.2d 744 (Fla. 1986).

Before jury selection began, in a sidebar conference, the court asked defense counsel if he wanted his client present during general qualifications of the jury, and counsel replied, "No, sir". (R 181)[1] The reason for this became readily apparent

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[1](R) refers to the record on appeal; (AB) refers to appellant's initial brief.

later at another sidebar conference, when the court informed defense counsel that Robinson was in the hallway and wanted a suit of clothes to change into, which was provided by counsel. Obviously the defendant left the courtroom briefly to make himself more presentable to the venire. Immediately after the second sidebar conference, the court ordered the bailiff to "go get the defendant." (R 188) The defense and state then announced "ready" and the proceedings began. Robinson was voluntarily absent from the courtroom for less than seven pages of the transcript. This absence was for his benefit, to affect a costume change. Robinson personally acquiesced in counsel's valid waiver of his presence by his actions.

The second absence from the courtroom was during the penalty phase, during the testimony of defense witness, Dr. Harry Krop. Robinson's childhood and psychosexual history included incestuous homosexual experiences which were embarrassing to him and he asked to be excused. (R 754-756) Robinson concedes that the record reflects his actual knowledge of trial counsel's waiver. Robinson consulted with his attorney. The court took great care in assuring Robinson that he could return at any time. (R 756) Dr. Krop was a defense witness and the defendant's presence is most crucial during presentation of the state's case. Anyway, he was able to assist in his defense because he was in the witness room, immediately adjacent to the courtroom, with the door open. (R 756)

In Amazon, this honorable court rejected the contention that it was fundamental error for the trial court to accept a waiver

of the defendant's presence through trial counsel.

> A capital defendant is free to waive his presence at a crucial stage of the trial. Peede v. State, 474 So.2d 808 (Fla. 1985). Waiver must be knowing, intelligent, and voluntary. Francis v. State, 413 So.2d 1175 (Fla. 1982). Counsel may make the waiver on behalf of a client, provided that the client, subsequent to the waiver, ratifies the waiver either by examination by the trial judge, or by acquiescence to the waiver with actual or constructive knowledge of the waiver. See, State v. Melendez, 244 So.2d 137 (Fla. 1971). Here, trial counsel clearly waived Amazon's presence knowingly, intelligently and voluntarily. Amazon knew of the waiver, because he had been consulted by his attorneys on the point and advised to waive his presence. He authorized his attorneys to make the waiver. His authorization was knowing and intelligent and as voluntary as any decision made by a client who relies upon and accepts advice of counsel. Amazon subsequently acquiesced to the waiver, with actual notice, and now cannot be heard to complain.*
>
> *When a waiver is required of the defendant as to any aspect or proceeding of the trial, experience clearly teaches that it is the better procedure for the trial court to make inquiry of the defendant and to have such waiver appear of record. The matter would thus be laid to rest. Id. at 11.

Amazon was decided about two months before the trial. Appellee agrees that this matter would have been laid to rest had the court followed the better procedure suggested above. However, the defendant's personal waiver is not required so no error occurred here.

Robinson requests an evidentiary hearing be conducted to determine if he voluntarily and knowingly absented himself from the trial proceedings. The state would not oppose such action,

however, we contend that an evidentiary hearing is unnecessary where the record, taken with fair inferences therefrom, demonstrate that Robinson asked to leave the courtroom. See, Dufour v. State, 495 So.2d 154 (Fla. 1986). By his actions he demonstrated actual acquiescence to the waiver by counsel. Appellant has failed to demonstrate sufficient cause for this court to overrule its decision in Amazon, See also, Herzog v. State, 439 So.2d 1372 (Fla. 1983); Peede v. State, 474 So.2d 808 (Fla. 1985). Appellant has failed to demonstrate any prejudice to him caused by his absence, therefore, any error is harmless. §924.33, Fla. Stat. (1985), Garcia v. State, 492 So.2d 360 (Fla. 1986.

Appellant cites Hall v. Wainwright, 733 F.2d 766 (11th Cir. 1984) for the proposition that a defendant must be present at all critical stages of a capital trial despite Amazon. (AB 324) However, reliance on Hall is misplaced for many reasons. First, the defendant failed to object below, barring review of this issue. Hall v. Wainwright, supra (J. Hill, specially concurring); U.S. v. Gagnon, supra, Wainwright v. Sykes, 443 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977). Second, the issue is one of state law; no valid claim of a denial of due process is presented by a claim of this variety. Hopt v. Utah, 110 U.S. 574 (1884); Frank v. Magnum, 237 U.S. 309 (1915). Third, there is authority that neither general qualifications of the jury panel nor examination of a defense witness in post-verdict proceedings are critical stages in the trial. Frank v. Magnum, supra; Howard v. Kentucky, 200 U.S. 164 (1906); Hall v. State, 420 So.2d 872

(Fla. 1982); U.S. v. Redd, 759 F.2d 699 (9th Cir. 1985). A critical stage is one in which a defendant's absence might frustrate the fairness of the proceedings. U.S. v. Stratton, 649 F.2d 1066 (5th Cir. 1981). Fourth, a defendant can knowingly and voluntarily waive his presence, which Robinson did here. Proffitt v. Wainwright, 685 F.2d 1227 (11th Cir. 1982), modified on rehearing, 706 F.2d 311 (1983). Last, even if error occurred, it was harmless. Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); U.S. v. Benavides, 549 F.2d 392 (5th Cir. 1977).

POINT II

THE TRIAL COURT CORRECTLY RULED THAT DETECTIVE WEST'S REPLY THAT INCLUDED ONE REFERENCE TO A BURGLARY, IF ERROR, WAS INVITED BY DEFENSE COUNSEL'S QUESTION.

One week before Beverly St. George's murder, the murder weapon and two other firearms were stolen from Lloyd Cogburn's house in a burglary. The state had substantial evidence indicating that Robinson was both the murderer and the burglar: his car was seen by several witnesses in the vicinity of the burglary, casings at the murder scene were matched through ballistics to the stolen weapon, eyewitness testimony from Clinton Bernard Fields established that Robinson used a weapon exactly like the stolen weapon to murder Beverly St. George. To avoid the introduction of this evidence, which the defense conceded was admissible, they entered into a stipulation that Robinson fired the fatal shots. (R 21)

Appellee disagrees with appellant's assessment of this stipulation as a very important concession. (AB 29) The state was ready, willing, and able to establish these facts. Rarely does the state have eyewitness testimony, ballistics evidence and a confession. Appellant astutely acknowledged this abundant evidence, and sought to lessen its impact.

Appellant assumes that West's statement was improperly admitted into evidence. Appellee disagrees. At best, evidence of the burglary that netted the murder weapon violated the court's order to refrain from mentioning it. The burglary was concededly relevant and admissible. Appellee contends that the impropriety here is not of the same proportion or character as

improperly admitted testimony.

Appellant contends that he was denied a fair trial because of one word. During examination by defense counsel, Detective West was asked how could he know that a picture of a weapon depicted the murder weapon if the murder weapon was never recovered. West replied that he knew it was the same because a description of the weapon was "reported on the stolen list, the burglary list, yes, sir, we have a description of the weapon." (R 435-436)

Defense counsel objected, and at a time later provided, moved for a mistrial. (R 436, 472) However, to preserve this issue for review, appellant should have requested a curative instruction. Ferguson v. State, 417 So.2d 639 (Fla. 1982). Appellant may attempt to explain his failure to adequately preserve this issue by claiming counsel did not want to emphasize the word, however, it is equally plausible that counsel, as did the trial court, believed the jury disregarded the statement.

Even if preserved, the trial court's ruling was correct in all respects. Appellant's counsel admitted that he objected to the single word "burglary". (R 472) The court concluded that the jury did not hear the word, and even if they had, any error was harmless. (R 473) The court also found that the comment was invited by defense counsel's question: ". . .you were asking him how he knew that that was the type of gun that had been fired, and he was trying to explain to you how he knew. So . . . although ordinarily improper . . . it was invited by defense counsel." (R 473) Clark v. State, 363 So.2d 331 (Fla. 1978);

White v. State, 466 So.2d 1073 (Fla. 1984); McCrae v. State, 395 So.2d 1145 (Fla.), cert. denied, 454 U.S. 1041 (1980); Francois v. Wainwright, 741 F.2d 1275 (11th Cir. 1984). The trial court's ruling in this regard was entirely proper. Appellant cannot sustain his burden of demonstrating this action was a palpable abuse of discretion. Duest v. State, 462 So.2d 446 (Fla. 1985). Motion for mistrial should be granted only when further time and expense would be wasteful, if not futile, only in cases of absolute necessity. Johnsen v. State, 332 So.2d 69 (Fla. 1976); Salvatore v. State, 366 So.2d 745 (Fla. 1978). One single word cannot be of such character as to vitiate the entire proceedings and render the trial fundamentally unfair, especially here, where no request for curative instruction was made and the remark was invited by defense counsel. See, Huff v. State, 495 So.2d 145 (Fla. 1986).

Appellee contends that this statement was not evidence of a collateral crime. Jackson v. State, 11 F.L.W. 589, 590 (Fla. November 13, 1986). The evidence was not introduced to establish any element of the crime charged, but was relevant to the issue of possession of the murder weapon. If evidence tending to show the commission of another crime is relevant or admissible for any other purpose, it is admissible. Medina v. State, 466 So.2d 1046 (Fla. 1985).

Appellant is unable to show that he was prejudiced by this remark because subsequent evidence, also received without objection, established that appellant was a suspect in a burglary. After he was arrested, Robinson personally filled out

two waiver of rights forms, one of which indicates that he was being questioned in reference to a burglary. (R 29, 531) The word "burglary" is in his own handwriting. The admission into evidence of this form renders any error harmless. In Johnston v. State, 11 F.L.W. 585, 587 (Fla. November 13, 1986), this court recently faced a similar question. This honorable court stated, "Reference to (marijuana possession at arrest) was hardly prejudicial in light of subsequent evidence regarding appellant's heavy drug usage on the evening in question." Id. at 587. It is not improper, and any error is harmless.

POINT III

THE DEFENSE FAILED TO SUSTAIN THEIR BURDEN OF PRODUCTION TO WARRANT AN INSTRUCTION ON THE AFFIRMATIVE DEFENSE OF VOLUNTARY INTOXICATION.

Appellee agrees that voluntary intoxication is an affirmative defense to specific intent crimes such as first degree murder, robbery and kidnapping. Linehan v. State, 476 So.2d 1262 (Fla. 1985); Gardner v. State, 480 So.2d 91 (Fla. 1985). Appellee acknowledges the defense request for the instruction was submitted in writing and denied by the trial court. (R 36) Defense counsel objected at the close of the instruction, after the jury retired. (R 700) The motion for new trial included this ground. (R 88) However, the trial court's ruling was correct because appellant failed to produce some evidence of acute intoxication.

The only physical evidence of intoxication presented during the guilt phase consisted of three Old Milwaukee beer cans found at the scene of the crime. (R 423, 433) Clinton Bernard Fields, the eyewitness to and participant in the murder, testified that earlier in the evening he saw Robinson drinking from a pint of Hennessy cognac, but Robinson walked and talked fine, drove the car and appeared normal. (R 497-498) Besides Robinson's statement wherein he claimed to have consumed unspecified amounts of cognac, gin and beer, the only other evidence of intoxication was presented during the penalty phase. Appellee contends that none of Dr. Krop's testimony can be relied upon to establish intoxication because Dr. Krop did not testify during the guilt phase. Appellant does not call this court's attention to any

other evidence in the record to establish this affimative defense. Appellee contends that this evidence was insufficient to establish the level of intoxication necessary for this defense. Even assuming that Fields did not drink any of the three beers, [2] and assuming Robinson drank each beer in rapid succession, he could have probably passed a breathalizer test. The level of intoxication necessary for an intoxication defense is much greater than mere impairment.

In Linehan, this court made it clear that evidence of alcohol consumption does not mandate giving this instruction. "Where the evidence shows the use of intoxicants but does not show intoxication, the instruction is not required." Id. at 1264. The instruction is not required here because the appellant demonstrated, at best, only the use of intoxicants. Appellant did not sustain his burden of production to establish any evidence of intoxication to any degree, much less intoxication to the degree that he was unable to form the specific intent required to commit these offenses.

Appellant complains that there was some evidence to support the theory, and therefore, the trial court usurped the jury's duty to weigh the sufficiency of the evidence by denying the requested instruction. Gardner, supra. Appellant fails to recognize that he must produce some evidence of acute intoxication, not just consumption of alcohol. This evidence

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[2]The medical examiner tesified there was no alcohol in Beverly St. George's blood. (R 460).

must be sufficient to sustain his burden of proof. Linehan, supra. The function of the trial court is to determine whether as a matter of law, the defense has sustained his burden of production. Here, the trial court correctly concluded that the defense did not sustain their burden.

In Gardner, this honorable Court reversed the judgment and sentence because the trial court did not instruct the jury on the defense of voluntary intoxication. However, in Gardner, there was much more evidence of intoxication. On the day of the murder, Gardner drank two or three quarts of beer, as well as smoked several high potency marijuana cigarettes. There was testimony that Gardner "looked high". In this case, the witness testified Robinson walked, talked, and appeared fine. No marijuana was smoked by Fields or Robinson. In Gardner, this court stated:

> We have held that jury instructions regarding intoxication need not be given in every case in which evidence has been adduced at trial that the defendant had consumed alcoholic beverages prior to the commission of the offense. It is not error to refuse such an instruction when there is no evidence of the amount of alcohol consumed during the hours preceeding the crime and no evidence that the defendant was intoxicated. Id. at 93.

The trial court correctly concluded that there was no evidence presented of intoxication to the degree that Robinson was unable to form the specific intent necessary to commit the crimes charged. Hooper v. State, 476 So.2d 1253 (Fla. 1985). Appellant was able to provide a detailed account of the crime. Buford v. State, 403 So.2d 943 (Fla. 1981); Cooper v. State, 492 So.2d 1059 (Fla. 1986). No error occurred.

POINT IV

THE ISSUE OF THE PROPRIETY OF THE TRIAL COURT'S INTERRUPTON OF CLOSING ARGUMENT IS NOT PRESERVED AND IS NOT FUNDAMENTAL ERROR.

During defense counsel's closing argument, the trial court interrupted him and said, "Mr. Pearl, we'll not refer to tricks. Fair argument of counsel by either side are not tricks." (R 644) Defense counsel responded, "Thank you, your Honor. I withdraw the comment. I have been properly chastised and I apologize." (R 644) Robinson contends this exchange rendered his trial fundamentally unfair.

Appellant concedes that this issue is not preserved by objection, and agrees that counsel "probably acquiesced" in the court's action. (AB 39) Appellee contends that this issue is waived by lack of preservation. Teffeteller v. State, 495 So.2d 744 (Fla. 1986).

Appellant argues that his lack of preservation should be excused because an objection would have been futile and because the error was fundamental.

An objection and request for curative instruction would have allowed the trial court to immediately correct any perceived error. Since appellant considers the judge "the vortex of the entire judicial proceedings" (AB 37), then an explanation from him to the jury in the form of a curative instruction would have dissipated any wisp of error.

Appellee contends that counsel chastised himself; the judge only interrupted an argument that even he concedes was improper. To suggest that he was not the only one engaging in improper argument clouds the issue. If he took umbrage at any

prosecutorial argument, he should (and did) object. Furthermore, at other times, the trial court welcomed or praised defense counsel, and "chastised" the prosecutor. (R 199, 202, 580, 616, 665, 797) As part of the instructions, the trial court told the jury to disregard anything he said or did that made the them think he preferred one verdict over another. (R 73, 693) This cured any potential error caused by interrupting defense counsel's closing argument.

This issue does not present an error of fundamental proportions. Fundamental error is error of such a magnitude that it would have prevented the jury from reaching a fair and impartial verdict. White v. State, 446 So.2d 1031 (Fla. 1984). Robinson has failed to establish that fundamental error occurred here.

POINT V

THE TRIAL COURT CORRECTLY DENIED THE MOTION FOR MISTRIAL DURING THE PENALTY PHASE BECAUSE THE PROSECUTOR'S COMMENTS WERE PROPER, OR IF IMPROPER, HARMLESS.

Appellant contends in this first point concerning the sentence that the prosecutor impermissibly injected argument concerning nonstatutory aggravating factors on two occasions: by arguing that Robinson showed no remorse, and during cross-examination, by asking about racial prejudice.

This issue is not preserved by specific, timely objection. Robinson v. State, 487 So.2d 1040 (Fla. 1986); Steinhorst v. State, 412 So.2d 332 (Fla. 1982). Different grounds for reversal are argued on appeal than were presented to the trial court. Although apellant's trial counsel objected, it was not until after the evidence was admitted upon which the comments were based that he posed an objection. Therefore, the objection was untimely and inspecific, and failed to preserve the issue.

Appellee contends that the two comments complained of herein are both proper comments on the evidence as it existed before the jury. Dufour v. State, 495 So.2d 154, 160 (Fla. 1986); U.S. v. Fogg, 651 F.2d 551 (5th Cir. 1981), cert. denied, 456 U.S. 905, 102 S.Ct. 1751, 721 L.Ed.2d 162 (1982). The first allegedly impermissible comment was, "He showed no remorse, according to Dr. Krop." (emphasis added) (R 821) The trial court correctly ruled that this argument was commenting on unobjected to testimony, and was proper. (R 780) The second comment was during the cross-examination of Dr. Krop. Appellant claims the prosecutor "suddenly" asked if Robinson was racially

prejudiced. Actually, this line of questioning was developed earlier, without objection from the defense. (R 781, 785) Robinson's own statement opens this door by claiming that he shot the victim a second time because, "I had to. How do you tell someone I accidently shot a white woman." (R 33, 534, 781). Although appellant alleges that he is a negro, the victim was caucasian and the jury was composed of caucasians, there is nothing in the record to substantiate this claim. See, State v. Neil, 457 So.2d 481 (Fla. 1984). In any case, these two statements are proper comments on unobjected to evidence as it existed before the jury. Dufour, supra.

Even if the two statements by the prosecutor are found by this Court to be improper, it was still not error to deny the motion for mistrial. Appellant has failed to demonstrate an abuse of judicial discretion. Johnston v. State, 11 F.L.W. 585 (Fla. November 13, 1986); Baker v. State, 336 So.2d 364 (Fla. 1976). Prosecutorial misconduct does not require reversal . §924.33, Fla. Stat. (1985); State v. Murray, 443 So.2d 955 (Fla. 1984). Further, it is not error to deny a motion for mistrial on the basis that the jury's recommendation is tainted by improper argument where, as here, "the jury was properly instructed on the aggravating factors it could consider . . ." Garcia v. State, 492 So.2d 360, 366 (Fla. 1986)

This Court has previously held that arguments directed towards the appellant's lack of remorse do not taint the jury's recommendation. Valle v. State, 474 So.2d 796 (Fla. 1985). There is no indication that the trial court considered either appellant's lack of remorse or the races of the participants in

his finding of aggravating factors. Further, "the jury is presumed to follow the judge's instruction as to the evidence it may consider. Grizzell v. Wainwright, 692 F.2d 722, 726-727, (11th Cir. 1982), cert, denied, 461 U.S. 948, 103 S.Ct. 2129, 77 L.Ed.2d 1307 (1983)." Id. at 805. Here the jury was properly instructed on the evidence it could consider, and there is nothing to indicate that they relied upon the prosecutor's remark in closing argument or on cross-examination. See, Skinner v. Wainwright, 715 F.2d 1452 (11th Cir. 1983). Robinson has failed to establish a palpable abuse of discretion that warrants reversal of the sentence.

POINT VI

CONSECUTIVE LIFE SENTENCES ARE NOT A DEPARTURE FROM A RECOMMENDED GUIDELINES SENTENCE OF LIFE.

At the outset, appellee disputes the claim that an improper departure from the sentencing guidelines violates Robinson's constitutional right to due process of law. This court has repeatedly held that the sentencing guidelines are procedural rules and do not afford new constitutional rights. Eg. State v. Jackson, 478 So.2d 1054 (Fla. 1985).

Appellant was sentenced to three consecutive life sentences for the three noncapital offenses. (R 90-95). The trial court did not give written reasons for departure from the recommended guidelines sanction of life imprisonment because he did not believe the sentence imposed was a departure. (R 96, 871-876). "If life is life . . . under the guidelines, then how has he gotten more time by consecutive life sentences?" (R 875). This logical argument seems reasonable.

Appellant is correct that pursuant to Rease v. State, 493 So.2d 454 (Fla. 1986), it appears that this is a departure sentence. Sentences on other counts, consecutive to a life sentence, arising from the same incident, are departures from a recommended sentence of life imprisonment. Rease was decided subsequent to the imposition of this sentence. Appellee would request this honorable court to limit the holding of Rease to those cases where the consecutive sentences are a term of years, for instance, the sixty-year term consecutive to life as in Rease. In the instant case, all three sentences are life with no

parole. Appellee questions how consecutive life sentences could ever be served. It seems logically impossible, barring reincarnation. When the consecutive sentence is a term of years, the holding of Rease has more logical appeal than in cases like this, where the consecutive sentences are life with no parole.

Should this honorable court determine that the sentences imposed constitute a departure without written reasons, appellee respectfully requests this court to nonetheless affirm the sentences imposed. There are several obvious clear and convincing reasons for departure. The unscored capital offense of first degree murder is a clear and convincing reason for departure. McPhaul v. State, 496 So.2d 1009 (Fla. 2d DCA 1986); Smith v. State, 454 So.2d So.2d 90 (Fla. 2d DCA 1984). The evidence of emotional stress caused by the crime for the victim and her family is a clear and convincing reason for departure. (R 141-143). Hankey v. State, 485 So.2d 827 (Fla. 1986). The excessive brutality of the murder is established by the fact that it was especially heinous, atrocious, or cruel. Lerma v. State, 11 F.L.W. 473 (Fla. September 11, 1986). When such clear reasons for departure exist, this court can determine beyond a reasonable doubt that the same sentence would be imposed. See, Albritton v. State, 476 So.2d 158 (Fla. 1985).

Appellee contends judicial economy would best be served if this court took notice of obvious clear and convincing reasons for departure and affirmed on a harmless error theory. §924.33, Fla. Stat. (1985). The uncertainty created by the constant state of flux in this area of the law has dramatically increased the

judicial resources devoted to sentencing. Cases bounce between the trial courts and district courts three or four times before final resolution. Shorter sentences of several years often expire before the appellate process is complete. A giant step in solving this dilemma would be to alter Albritton so that if clear and convincing reasons for departure are apparent in the record, then the state has established its burden of establishing beyond a reasonable doubt that the same sentence would be imposed. The court's failure to cite these reasons, or its reliance on improper reasons should be harmless error.

POINT VII

THE FINDINGS OF FACT IN SUPPORT OF THE DEATH SENTENCE ESTABLISH THAT THE TRIAL COURT CORRECTLY FOUND SEVEN AGGRAVATING CIRCUMSTANCES. EVEN IF ONE WAS IMPROPERLY FOUND, IN LIGHT OF THE ABSENCE OF STATUTORY MITIGATING CIRCUMSTANCES AND ONE NONSTATUTORY MITIGATING CIRCUMSTANCE, THE SENTENCE SHOULD BE AFFIRMED.

After the sentencing hearing, the jury rendered an advisory sentence of nine to three in favor of the imposition of the death penalty. (R 80-81) The trial judge considered the advisory sentence for three weeks, then on June 19, 1986, entered the required findings of fact and sentenced Robinson to death. (R 144-148)

The trial court found seven aggravating circumstances and no statutory mitigating circumstances. Robinson's difficult childhood was cited as the single nonstatutory mitigating circumstance, although he argues on appeal that other nonstatutory mitigating circumstances were established.

Appellee contends that the trial court's conclusions are entirely correct. Appellant assails only four of the seven aggravating circumstances thereby admitting that three were properly found: the capital felony committed while Robinson on parole, his previous conviction of a violent felony, and the capital felony was committed during a sexual battery and kidnapping. Appellant also concedes that no statutory mitigating circumstances should have been found as his argument is devoid of contention to the contrary. This honorable Court has held numerous times:

> When one or more of the aggravating

> circumstances is found, death is presumed to be the proper sentence unless it or they are overridden by one or more of the mitigating circumstances provided in section 921.141 (6), Florida Statutes (1983). Valle v. State, 474 So.2d 796, 806 (Fla. 1985).[3]

Accordingly, appellee contends that even if appellant's argument is accepted in its entirety, nonetheless, death is the appropriate sentence in this case.

A. The capital felony was especially heinous, atrocious or cruel. §921.141 (5)(h), Fla. Stat. (1985).

In support of this aggravating circumstance, the trial court stated:

> Defendant jammed the pistol into the face of Beverly St. George and fired. Prior to her execution she had begged Defendant not to harm her. She obviously was terrorized - having been taken out of her automobile at gun point in the middle of the night by two strange men, handcuffed, taken to a remote cemetery, sexually assaulted three times and shot. Her fear of harm or death during the commission of the crimes and prior to her death was proved beyond and to exclusion of reasonable doubt.
>
> This murder was especially wicked, evil, atrocious and cruel. (R 145)

Appellant contends that some of these statements are not factually supported by the record, specifically, that the victim begged for mercy and knew her fate. (AB 49-50) Appellee disagrees. It was reasonable for the trial court, based on all the circumstances, to infer that the victim suffered immense mental agony. Way v. State, 496 So.2d 126, 129 (Fla. 1986). The

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[3]Judgment and sentence were subsequently vacated by the United States Supreme Court on other grounds.

medical examiner testified that the wound to Ms. St. George's cheek was a contact wound, made while the gun was tightly pressed to her cheek. This fact belies the contention that she "could not have known the (first shot) was coming." (AB 50) Further, the victim's abduction at gunpoint, long ride to a remote area, and multiple sexual assaults were established beyond a reasonable doubt.

Appellant contends that since Ms. St. George was probably unconscious after the first gunshot wound, this case is indistinguishable from Teffeteller v. State, 439 So.2d 840 (Fla., 1983). See also, Mills v. State, 476 So.2d 172 (Fla. 1985); Jackson v. State, 11 F.L.W. 609 (Fla. November 26, 1986). Each of these cases are distinguishable in that the victims were shot at close range during a struggle, during a robbery. Although the defendant claimed this killing occurred during a struggle, the jury's verdicts and trial judge's findings rejected this version. The jury accepted Fields' testimony that Robinson announced he was going to kill Ms St. George, walked over to her, placed the gun against her cheek and fired. To ensure death, he shot her again.

A single gunshot wound to the face does not negate the mental angush suffered beforehand, during the abduction, robbery, and sexual batteries. Mills v. State, 462 So.2d 1075 (Fla. 1985). Mental anguish suffered before death can be considered in establishing this factor. Phillips v. State, 476 So.2d 194 (Fla. 1985); Scott v. State, 494 So.2d 1134 (Fla. 1986). The fear and emotional strain preceeding death may also be considered. Adams

v. State, 412 So.2d 850 (Fla. 1986), cert. denied, 459 U.S. 882, 103 S.Ct. 182, 74 L.Ed.2d 148 (1982); Parker v. State, 476 So.2d 134 (Fla. 1985). The abduction and long ride during which the victim begins to guess at her fate is cruel. Preston v. State, 444 So.2d 939 (Fla. 1984); Routly v. State, 440 So.2d 1257 (Fla.), cert. denied, 468 U.S. 1220, 104 S.Ct. 3591, 82 L.Ed.2d 888 (1984). Far from being reassured, appellee contends that evidence showing Ms. St. George continually asked if they meant her harm indicates she had a well founded fear of death that proved correct. See, Melendez v. State, 11 F.L.W. 639 (Fla. December 11, 1986); Cf. Bundy v. State, 471 So.2d 9 (Fla. 1985).

Appellant does not dispute the evidence of multiple sexual batteries before death. Like other physical indiginities inflicted before death, sexual battery is physical torture and causes mental anguish. To force someone to spend the last few moments of their life as an unwilling participant in a sexual battery is cruel.

B. The capital felony was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. §921.141 (5)(i), Fla. Stat. (1985).

The trial court based this finding on the facts that the victim was shot in the face at point blank range, his prior announcement of his intention to kill her, and the second shot into her head while she lay on the ground to ensure death. (R 146)

The extremely close range shots to the head indicate this was an execution style slaying. Squires v. State, 450 So.2d 208

(Fla.), cert. denied, 469 U.S. 892, 105 S.Ct. 268, 83 L.Ed.2d 204 (1984); Troedel v. State, 462 So.2d 392 (Fla. 1984); McCray v. State, 416 So.2d 804 (Fla. 1982). The gun was procured in advance, there was no sign of struggle, and the victim was shot in the head, indicating that this murder was cold, calculated and premeditated. Eutzy v. State, 458 So.2d 755 (Fla.), cert. denied, 471 U.S. ___, 105 S.Ct. 2062, 85 L.Ed.2d 336 (1984). The fact that Robinson admittedly stood over Beverly St. George and fired a second shot to her head to make sure she was she was dead contributes to this finding. Herring v. State, 446 So.2d 1049 (Fla.), cert. denied, 469 U.S. 296, 105 S.Ct. 396, 83 L.Ed.2d 330 (1984). Robinson chose his victim at random, there is no pretense of moral or legal jusification for this pitiless murder.

"The facts speak for themselves. This was an execution type slaying. The sentence of death was appropriate and should be affirmed." Sullivan v. State, 303 So.2d 632, 638 (Fla. 1974), cert. denied, 428 U.S. 911, 96 S.Ct. 3226, 49 L.Ed.2d 1220 (1976).

C. The capital felony was committed for the purpose of avoiding or preventing a lawful arrest. §921.141 (5)(c), Fla. Stat. (1985).

The trial court found this aggravating circumstance based upon Robinson's statements to Fields that he had to kill Beverly St. George because she could identify him and his car. (R 145)

Appellant acknowledges this testimony but claims that "the trial court engaged in impermissible doubling (because) the written findings supporting this aggravating circumstance are

practically indistinguishable from the ones utilized by the trial court in support of its findings that the murder was cold, calculated and premeditated. (AB 56) Provence v. State, 337 So.2d 783 (Fla. 1976). There is nothing improper about utilizing direct statements of a witness elimination motive to support a finding of cold, calculated and premeditated murder. See, Dufour v. State, 495 So.2d 154, 163 (Fla. 1986). Further, this fact was but one of several cited to support the other circumstance: the manner indicated heightened premeditation and an execution style slaying, there was no pretense of justification. If each of these two aggravating circumstances are supported by evidence, it is not improper doubling. Cooper v. State, 492 So.2d 1059 (Fla. 1986); Burr v. State, 466 So.2d 1051 (Fla.), cert. denied, 469 U.S. 989, 105 S.Ct. 396, 83 L.Ed.2d 330 (1984).

Appellee recognizes that "the mere fact of death is not enough to invoke this section when the victim is not a law enforcement official." Oats v. State, 446 So.2d 90, 95 (Fla. 1984). "Proof of the requisite intent to avoid arrest and detection must be very strong in these cases." Riley v. State, 366 So.2d 19, 22 (Fla. 1978). It must be clearly shown that the dominant motive for the murder was the elimination of witnesses. Menendez v. State, 368 So.2d 1278 (Fla. 1979). The finding should be based on direct evidence of motive or at least strong circumstantial evidence. Oats, supra.

Robinson's statements before and after the murder provide direct evidence that the primary motive for this murder was to eliminate a witness. Cf. Doyle v. State, 460 So.2d 353 (Fla.

1984). A verdict of guilty to premeditated murder, instead of felony murder, helps support this finding. Cf. Rivers v. State, 458 So.2d 762 (Fla. 1984). The antecedent crimes of robbery and sexual battery were Robinson's primary purpose and he then killed in order to avoid arrest and prosecution for those crimes. Cf, Troedel, supra. Robinson admittedly shot Ms. St. George a second time to make sure she was dead. Herring, supra; Burr, supra. The isolated location supports this finding. Card v. State, 453 So.2d 17 (Fla.), cert, denied, 469 U.S. 989, 105 S.Ct. 396, 83 L.Ed.2d 330 (1984); Cave v. State, 476 So.2d 180 (Fla.) cert. denied, 106 S.Ct. 1241 (1985); Harich v. State, 437 So.2d 1082 (Fla.) cert. denied, 465 U.S. 1051, 104 S.Ct. 1329, 79 L.Ed.724 (1982). There is no readily apparent motive other than witness elimination. Clark v. State, 443 So.2d 973 (Fla.), cert. denied, 467 U.S. 1210; 104 S.Ct. 2400, 81 L.Ed.2d 356 (1984). The undisputed direct evidence of Robinson's witness elimination motive establishes that he murdered Ms. St. George to avoid arrest. Herring, supra; Clark, supra; Johnson v. State, 465 So.2d 499 (Fla.), cert. denied, ____ U.S. ____, 106 S.Ct. 186, 88 L.Ed.2d 155 (1985); Kokal v. State, 492 So.2d 1317 (Fla. 1986); Wright v. State, 473 So.2d 1277 (Fla.), cert. denied, 106 S.Ct. 870, 88 L.Ed. 909, (1985).

D. The capital felony was committed for pecuniary gain. §921.141 (5)(f), Fla. Stat. 1985).

Immediately after Robinson forced the victim into the backseat of his car, he handcuffed her and took her purse. He put the purse on the front seat of the car. The purse contained

$200. After the murder, Robinson took the money out of the purse and kept it all. The actual taking of the purse occurred early in the episode, definitely while the victim was alive. The jury convicted Robinson of armed robbery. The trial court concluded that one of the reasons murder was committed was for robbery.

Appellee disagrees with Robinson's statement that the intent was to deprive necessary for robbery did not arise until after the murder. (AB 54) "It is sufficient that the capital felony occurred during the same criminal episode as the enumerated felony." (emphasis added) Way v. State, 496 So.2d 126, 128 (Fla. 1986); Adams supra; Scott v. State, 411 So.2d 866 (Fla. 1982).

Appellee relies upon Bates v. State, 465 So.2d 490 (Fla. 1985), for the proposition that this aggravating circumstance was properly found. "Finding pecuniary gain in aggravation is not error when several felonies, including robbery, have occurred. See, Smith v. State, 424 So.2d 726 (Fla. 1982)." Id. at 492. See also, Routly,supra, Lightbourne v. State, 438 So.2d 380 (Fla.), cert. denied, 465 U.S. 1051, 104 S.Ct. 1330, 79 L.Ed.2d 725 (1983); Peek v. State, 395 So.2d 492 (Fla.), cert. denied, 451 U.S. 964, 101 S.Ct. 2036, 68 L.Ed.2d 342 (1980).

E. After considering all evidence, the trial court correctly found only one nonstatutory mitigating circumstance.

The trial court has broad discretion in finding or not finding nonstatutory mitigating circumstanaces, so long as all the evidence was properly considered. Hargrave v. State, 366 So.2d 1 (Fla.), cert, denied, 444 U.S. 919, 100 S.Ct. 239, 62

L.Ed.2d 176 (1979); Pope v. State, 441 So.2d 1073 (Fla. 1983); Porter v. State, 429 So.2d 293 (Fla.), cert. denied, 464 U.S. 865, 104 S.Ct. 202, 78 L.Ed.2d 310 (1983); Floyd v. State, 11 F.L.W. 594 (Fla. November 20, 1986). Appellant makes no contention that his presentation of mitigating evidence was restricted in any way, nor does he claim the trial judge failed to consider mitigating evidence. As such, appellant has failed to demonstrate an abuse of the broad discretion afforded the trial judge.

The court found that Robinson had a difficult childhood as a nonstatutory mitigating circumstance. Appellant argues that other aspects of his upbringing should have been cited in mitigation. (AB 58) Appellee contends that the trial court did not err in finding that Robinson's abuse at the hands of his family did not rise to the level of a nonstatutory mitigating circumstance. Johntson v. State, 11 F.L.W. 585 (Fla. November 13, 1986). Further, the evidence of alcohol use does not compel a finding of substantial impairment. Cooper, supra, Simmons v. State, 419 So.2d 316 (FLa. 1982). Robinson gave a detailed account of the crime, indicating that he was not intoxicated. Cooper, supra; Buford v. State, 403 So.2d 943 (Fla.), cert. denied, 454 U.S. 1163, 102 S.Ct. 1037, 71 L.Ed.319 (1982).

F. Even if one or more aggravating circumstance was improperly found, the sentence of death should nonetheless be affirmed.

Appellant concedes that at least three aggravating and no statutory mitigating circumstances were properly found. Appellee contends that all seven aggravating factors were correctly found

to be supported by evidence beyond a reasonable doubt. However, even if this honorable Court disapproves of one or more aggravating circumstances, in light of the multiple aggravating circumstance that remain which are weighed against no statutory mitigating circumstances and one nonstatutory mitigating circumstance that the judge determined was entitled to slight weight, appellee respectfully requests the sentece of death be affirmed. Jackson v. State, 11 F.L.W. 589 (Fla. November 13, 1986); Dufour v. State, supra.

This case is factually similar to other cases in which the sentence of death was affirmed. Puiatti v. State, 495 So.2d 128 (Fla. 1986); Marek v. State, 492 So.2d 1055 (Fla. 1986); Mills v. State, 462 So.2d 1075 (Fla. 1985); Doyle, supra; Card, supra; Squires, supra; Ruffin v. State, 397 So.2d 277 (Fla. 1981); Hall v. State, 403 So.2d 1319 (FLa. 1981). Robinson was the primary participant in the murder; it is of no consequence that the coparticipant who was less culpable received a life sentence. Deaton v. State, 480 So.2d 1279, 1283 (Fla. 1985) (and cases cited therein).

POINT VIII

THE ISSUE OF THE CONSTITIONALITY OF THE FLORIDA CAPITAL SENTENCING STATUTE IS NOT PRESERVED FOR REVIEW SINCE NONE OF THE ARGUMENTS WERE EVER PRESENTED TO THE TRIAL COURT; THERE IS NO RECORD SUPPORT IN THIS CASE FOR THE CLAIMS MADE.

Appellant contends that section 921.141, Florida Statutes (1985), is unconstitutional on its face and as applied because it allegedly denies due process of law and constitutes cruel and unusual punishment. Appellant concedes that all of his arguments is support of this contention have been specifically or impliedly rejected by this honorable Court and federal courts. Most of these arguments were presented verbatim in appellant's brief in Stano v. State, 473 So.2d 1282 (Fla. 1985) and Stano v. State, 460 So.2d 890 (Fla. 1984). The court summarily disposed of the claims, stating simply that Stano like Robinson, "concedes that all of these points have been presented to and rejected by this court on numerous occasions. We see no reason to revisit these claims here." Stano v. State, 473 So.2d at 1289. Robinson has shown no reason to revisit the exact same claims already rejected many times.

None of these alleged constitutional infirmities were presented below, and no order appears anywhere in the record. Therefore, appellant has waived consideration of the issues of the statute's constitutionality as applied to his case. Trushin v. State, 425 So.2d 1126 (Fla. 1982). Even constitutional rights can be waived if not timely presented. Ray v. State, 403 So.2d 956 (Fla. 1981). See also, Maggard v. State, 339 So.2d 973 (Fla.), cert. denied, 454 U.S. 1059, 102 S.Ct. 610, 70 L.Ed.2d

598 (1981); Eutzey v. State, 458 So.2d 755 (Fla.) cert. denied, 105 S.Ct. 2062. 85 L.Ed.2d 336 (1984). When no objection is made before the trial, the defendant is in no position to raise the point on appeal., Brown v. State, 381 So.2d 690 (Fla. 1980). Many of his claims are not preserved, for instance, the claim based on McCleskey v. Kemp, 753 F.2d 877 (11th Cir. 1985) and Hitchcock v. Wainwright, 770 F.2d 1514 (11th Cir. 1985).

Further, there is no record support present or even suggested for the claims made. Appellant presents a laundry list of alleged infirmities without any factual support whatsoever. Appellant lacks standing to advance these claims. Appellant has failed to demonstrate support in the record for any of his claims. See, Spaziano v. State, 489 So.2d 720 (Fla. 1986). No attempt has been made to relate the general and undifferentiated allegations of constitutional infirmities to the record in this case. This honorable Court is not required to fill in the blanks in appellant's argument. Appellee respectfully requests this Court to decline to reach the merits of this argument.

As conceded by appellant, all of his arguments have been rejected on numerous occasions. See, Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976); Barclay v. Florida, 463 U.S. 939, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983); Spaziano v. Florida, ___ U.S. ___, 104 S.Ct. 3154 (1984); Medina v. State, 466 So.2d 1046 (Fla. 1985); Randolph v. State, 463 So.2d 186 (Fla. 1984); Peavy v. State, 442 So.2d 200 (Fla. 1983); Tafero v. State, 403 So.2d 355 (Fla. 1981); Booker v. State, 397 So.2d 910 (Fla. 1981); Lockhart v. McCrae, 106 S.Ct. 1758 (1986).

CONCLUSION

Based upon the authorities and arguments presented herein, appellee respectfully requests this honorable court to affirm the judgments of guilt for premeditated murder, armed robbery, kidnapping and sexual battery, and the consecutive life sentences and sentence of death imposed upon Johnny Leatrice Robinson.

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 by delivery to Assistant Public Defender, Christopher S. Quarles, Counsel for Appellant, 112 Orange Avenue, Suite A, Daytona Beach, Florida, 32014, this 13th day of January, 1987.

Belle B. Turner
OF COUNSEL