IN THE SUPREME COURT OF FLORIDA

CASE NO. 69,496

ALTON MOORE,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

FILED
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****

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

****

BRIEF OF APPELLEE

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TABLE OF CONTENTS

Page

INTRODUCTION.. 1

STATEMENT OF THE CASE................................ 2

STATEMENT OF THE FACTS............................... 2-18

ISSUES PRESENTED 19-20

I.

WHETHER THE TRIAL COURT ERRED IN REFUSING TO STRIKE CERTAIN JURORS FOR CAUSE?

II.

WHETHER THE TRIAL COURT ERRED IN GIVING THE STANDARD JURY INSTRUCTION ON EXCUSABLE HOMICIDE, WHERE THE INSTRUCTION WAS ACCEPTED BY DEFENSE COUNSEL AND THERE WAS NO EVIDENCE TO SUPPORT EXCUSABLE HOMICIDE?

III.

WHETHER THE TRIAL COURT ERRED IN ADMITTING INTO EVIDENCE THE VICTIM'S DYING DECLARATION AND A RECORDING OF THE VICTIM'S CALL TO THE POLICE 911 NUMBER?

IV.

WHETHER THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION FOR MISTRIAL BASED ON THE PROSECUTOR'S COMMENT THAT AN OBJECTION BY DEFENSE COUNSEL WAS "UNPROFESSIONAL" AND "UNETHICAL?"

TABLE OF CONTENTS CONT'D

V.

WHETHER THE TRIAL COURT ERRED IN ADMITTING INTO EVIDENCE THREE PHOTOGRAPHS OF THE VICTIM WHICH DEPICTED THE VARIOUS WOUNDS TO HER NECK?

VI.

WHETHER THE TRIAL COURT ERRED IN FINDING THAT THE STATE HAD NOT USED PEREMPTORY CHALLENGES TO EXCLUDE JURORS SOLELY ON THE BASIS OF RACE?

VII.

WHETHER THE TRIAL COURT ERRED IN SENTENCING THE DEFENDANT TO DEATH WHERE PRIOR TO TRIAL THE STATE HAD OFFERED A PLEA TO FIRST DEGREE MURDER AND LIFE?

VIII.

WHETHER THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION TO SUPPRESS HIS CONFESSION AND IN FINDING THAT THE CONFESSION WAS FREE AND VOLUNTARY?

IX.

WHETHER THE TRIAL EVIDENCE WAS SUFFICIENT TO SUSTAIN THE DEFENDANT'S CONVICTION FOR ARMED BURGLARY WITH AN ASSAULT?

X.

WHETHER THE TRIAL COURT ERRED IN FINDING THREE AGGRAVATING, NO STATUTORY MITIGATING AND NO NONSTATUTORY MITIGATING FACTORS, AND THAT THE PROPER SENTENCE WAS DEATH?

XI.

WHETHER THE DEATH PENALTY CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT?

TABLE OF CONTENTS CONT'D

XII.

WHETHER THE TRIAL COURT COMMITTED CUMMULATIVE ERRORS WHICH TAKEN TOGETHER DEPRIVED THE DEFENDANT OF A FAIR TRIAL?

SUMMARY OF ARGUMENT.................................. 21-23

ARGUMENT... 24-70

CONCLUSION... 71

CERTIFICATE OF SERVICE............................... 71

TABLE OF CITATIONS

Cases | Page

Anderson v. State,
463 So.2d 276 (Fla. 3d DCA 1984).................. 69

Atkins v. State,
497 So.2d 1200 (Fla. 1986)......................... 66

Booker v. State,
397 So.2d 910 (Fla. 1981).......................... 49

Brown v. State,
431 So.2d 247 (Fla. 1st DCA 1983).................. 39

Brumbley v. State,
453 So.2d 381 (Fla. 1984).......................... 49

Castor v. State,
365 So.2d 701 (Fla. 1978).......................... 35

Daugherty v. State,
419 So.2d 1067 (Fla. 1982)......................... 67

Davis v. State,
461 So.2d 67 (Fla. 1984)........................... 24

Dyken v. State,
89 So.2d 866 (Fla. 1956)........................... 50

Floyd v. State,
497 So.2d 1211 (Fla. 1986)......................... 64

Fraley v. State,
426 So.2d 983 (Fla. 3d DCA 1983)................... 57

Frazier v. Cupp,
394 U.S. 731, 89 S.Ct. 1420,
22 L.Ed.2d 684 (1969).............................. 60

Frazier v. State,
467 So.2d 447 (Fla. 3d DCA 1985)................... 57

Grant v. State,
171 So.2d 361 (Fla. 1965).......................... 60

Grimes v. State,
64 So.2d 920 (Fla. 1953)........................... 41,42

TABLE OF CITATIONS

Cases	Page
Hill v. State, 477 So.2d 553 (Fla. 1985)	24,25,37 69
Hoffman v. State, 474 So.2d 1178 (Fla. 1985)	34
Hooper v. State, 476 So.2d 1253 (Fla. 1985) cert. denied, 106 S.Ct. 1501 (1986)	24,39
Leach v. State, 132 So.2d 329 (Fla. 1961)	49
Leduc v. State, 365 So.2d 149 (Fla. 1978)	66
Lemon v. State, 456 So.2d 885 (Fla. 1984)	67
Mason v. State, 438 So.2d 374 (Fla. 1983)	67
McRane v. State, 194 So.2d 634 (Fla. 1940)	41
Mills v. State, 264 So.2d 71 (Fla. 1st DCA 1972)	41
Murray v. State, 491 So.2d 1120 (Fla. 1986)	38
Parker v. State, 476 So.2d 134 (Fla. 1985)	53,54
People v. Johnson, 461 N.E. 2d 585, (Ill. App. 1 Dist. 1984)	44
People v. Slaton, 354 N. W. 2d 326 (Mich. App. 1984)	44
Profitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976)	68

TABLE OF CITATIONS

Cases	Page

Provenzano v. State,
497 So.2d 1177 (Fla. 1986)........................ 66

Reddish v. State,
167 So.2d 858 (Fla. 1964)......................... 50

Rhea Land Co. v. Duncan,
151 So. 487 (Fla. 1933)........................... 62

Rollins v. State,
148 So.2d 274 (Fla. 1963)......................... 69

Rivers v. State,
458 So.2d 762 (Fla. 1984)......................... 37,69

Rosa v. State,
412 So.2d 891 (Fla. 3d DCA 1982).................. 50

Rose v. State,
492 So.2d 1353 (Fla. 5th DCA 1986)................ 53

Ross v. State,
474 So.2d 1170 (Fla. 1985)........................ 24

Routly v. State,
440 So.2d 1257 (Fla. 1983)........................ 61

Squires v. State,
450 So.2d 208 (Fla. 1984)......................... 64

Stano v. State,
473 So.2d 1282 (Fla. 1985)........................ 25

State of Washington v. Rupe,
683 P.2d 571 (Wash. 1984)......................... 44

State v. Manning,
12 F.L.W. 1155 (Fla 3d DCA May 5, 1987)........... 60

State v. Murray,
443 So.2d 955 (Fla. 1983)......................... 48

State v. Neil,
457 So.2d 481 (Fla. 1984)......................... 52,54

State v. Wright,
265 So.2d 361 (Fla. 1972)......................... 49

TABLE OF CITATIONS

Cases | Page

Steinhorst v. State,
412 So.2d 332 (Fla. 1982).......................... 38

Straight v. State,
397 So.2d 903 (Fla. 1981).......................... 49

Suarez v. State,
478 So.2d 1173 (Fla. 3d DCA 1985).................. 39

Sunrise Medical Group, P.A. v. Propst,
430 So.2d 533 (Fla. 4th DCA 1983).................. 62

Swain v. Alabama,
380 U.S. 202, 85 S.Ct. 824,
13 L.Ed.2d 759 (1965).............................. 54

Swan v. State,
322 So.2d 485 (Fla. 1975).......................... 49

Taylor v. State,
491 So.2d 1150 (Fla. 4th DCA 1986)................. 53

Teffeteller v. State,
439 So.2d 840 (Fla. 1983).......................... 41

Thomas v. State,
59 So.2d 517 (Fla. 1952)........................... 49

Tillman v. State,
44 So.2d 644 (Fla. 1950)........................... 41

Tillman v. State,
471 So.2d 32 (Fla. 1985)........................... 35

United States v. Adamson,
665 F.2d 649 (11th Cir. 1982)...................... 35

United States v. Castaneda-Castaneda,
729 F.2d 1360 (11th Cir. 1984)..................... 60

United States v. Sims,
617 F.2d 1371 (9th Cir. 1981)...................... 35

Washington v. State,
362 So.2d 658 (Fla. 1978).......................... 64

TABLE OF CITATIONS

Cases Page

Wheeler v. State,
362 So.2d 377 (Fla. 1st DCA 1978).................. 69

Wilson v. State,
436 So.2d 908 (Fla. 1983).......................... 49

Woods v. State,
490 So.2d 24 (Fla. 1986)........................... 53

OTHER AUTHORITIES

Fla. Stat. 90.803(6) (1981)........................ 43

Fla. Stat. 913.03(10) (1970)....................... 25

INTRODUCTION

Appellee, the **State of Florida**, was the prosecution in the trial court and Appellant, **Alton Moore**, was the defendant. The parties will be referred to as they stood in the lower court. The symbol "T" will designate both the record on appeal and the trial transcript, which are numbered consecutively. All emphasis is supplied unless the contrary is indicated.

STATEMENT OF THE CASE

The State accepts the defendant's Statement of the Case as accurate.

STATEMENT OF THE FACTS

The testimony and physical evidence adduced at the defendant's trial are as follows:

Technician Carol Vincent:

Vincent processed the crime scene, marking several critical pieces of evidence and attempting to lift latent prints from various surfaces. She observed a wooden handled knife and matching knife sharpener, both located on the living room floor near the stairway landing (T.709, 717, 720). In the kitchen she observed a butcher block with two knife slots empty (T.723), and pieces of egg splattered on the floor (T.730). In front of the fireplace in the living room were a pair of woman's pantyhose with a shoe entangled inside (T.724), and a pair of pants ripped open at the seams (T.725). A red pull-over hat was located under a table in the living room (T. 725). Vincent attempted to lift latent prints off various surfaces and objects, without success (T. 734-737). She sent several items to Tallahassee for laser print analysis (T.744).

Officer Edward Croughwell:

Croughwell is the custodian of Telex Communications Records of the Miami Police Department (T.743). His duties include the storing, security, and maintenance of the 911 emergency phone tapes for the Miami Police Department. He testified as to the manner in which the 911 calls are received and recorded (T.744), and that they are stored in a locked cabinet to which he has sole access (T.745). He further stated that these tapes are recorded and stored in the normal course of business (T.746). Croughwell explained how the 911 system operates, with the call being entered in a computer so that units can then be dispatched to the address of the caller (T.748). Croughwell, pursuant to State subpeona, produced a 911 tape containing a call received at 6:34 a.m. on August 29, 1985 (T.783). The content of the tape was a hoarse voice stating "Help me, Help me," and "He cut my throat" (T.779, 780). The tape was not tampered with in any way, and was a complete recording of the transmission (T.783). The tape was not admitted at this juncture.

Dr. Todd Cameron Gray (Medical Examiner):

Dr. Gray performed the autopsy on the victim. The victim had bulges in the eyes indicative of pressure on the chest or neck (T.791). She had no injury to the genitals (T.792). She had a scar indicating open heart surgery

(T.793). Dr. Gray refers to three photographs taken at the coroner's office prior to the autopsy. Although the position of the victim's head, in a reclined position, does exaggerate the wounds somewhat (T.800), the wounds are in the same condition as when inflicted (T.801). There were no photographs taken in which the victim 's head was not reclined (T.802). There were multiple wounds on both sides of the neck (T.804). There was also a bruise on the right shoulder (T.807). The largest wound was located on the left side of the neck, extending from just below the ear down across the throat area (T.809). There were at least seven distinct wounds (T.810), and there were bruises on the neck consistent with hand or arm pressure. There were also bruises on the tongue consistent with pressure being applied to the head or neck area (T.811). The victim had swallowed her own blood (T.812). The wounds were consistent with the wooden knife found in the living room (T.813).

Dr. Gray was then given a hypothetical based on the version of events related by the defendant in his confession; a man holding a woman from behind, pulling back on her head with one arm and slicing back and forth across the front of her neck with his free hand. Dr. Gray stated that the wounds were consistent with this scenario (T.815-816). Gray also stated that based on the severity of the wounds, including the severe pain, tremendous blood loss, and the gurgling sounds made when breathing, the victim would realize that she probably would not survive (T.817-818).

Regina Burger (Fire Rescue):

Burger was the first fire rescue member to reach the victim. She testified initially outside the presence of the jury, in order for the court to consider the admissibility of the victim's dying declaration, and then repeated her testimony before the jury. She arrived at the victims residence sometime after 6:30 a.m. (T.829). After entering the front door, she observed a woman attempting to crawl up the stairs. The woman was naked from the waist down (T.830). There was a trial of blood and feces on the stairway. Burger had to close the wounds to the victim's throat with her hand, both to prevent further blood loss and to allow the victim to breath (T.831). Burger asked the victim if she did this to herself, and the victim shook her head in the negative. Burger then asked who did this, and the victim replied "Al". Burger asked "Al who?", and the victim replied "Gardner" (T.832). The victim had no pulse or blood pressure, even after being put in a military shocksuit (T.833). The victim was on the verge of unconsciousness, and Burger had to scream at her to keep her awake (T.834). The victim responded by grabbing Burger's arms, with tearful eyes and an intense look of fear on her face. Burger stated that she had seen this same look of fear and impending doom on dying people many times before (T.846). She also explained that in her deposition she had used the phrase "Al the Gardener", because since the incident she had heard other

officers use that phrase. However, she had realized her mistake almost immediately. She was certain she actually heard "Al Gardner" (T.836). Based on her testimony, the court ruled that the victim's statement satisfied the requirements of a dying declaration. Burger subsequently testified before the jury (T.912-959). She essentially repeated her prior testimony, adding that the victim's shirt was so blood soaked that she initially thought it was a red shirt (T.920), that the hallway wall was covered in feces, that the victim's throat was cut from ear to ear, exposing the muscles and throat lining, and that when the victim first tried to speak Burger could hear gurgling and air escaping, thus forcing her to close the wounds with her hand (T.921).

At the close of Burger's testimony the State moved to admit the recording of the victim's 911 call (T.943). Burger testified outside the jury's presence that the voice on the tape sounded like the voice of the victim (T.954). The court then ruled that the State had satisfied its burden of relevancy, and admitted the tape pursuant to the business records hearsay exception (T.956). The tape was then played for the jury (T.959).

Patricia White:

White provided the legal identification of the victim (T.890).

Spencer Jenkins (victim's brother):

Spencer Jenkins lived with the victim and their sister at the time of the murder. The victim woke him at 5:00 a.m. and he left for work at approximately 5:40 a.m. As he passed the bus stop around the corner from his home he saw "Al", the defendant, seated on the bench (T.897). He stated that the defendant is often seated there in the morning when he passes by. The defendant was wearing a wool pullover hat (T.899), although he did not remember the color (T.907). Both the victim and his sister Thelma were still at the house when he left (T.899).

Thelma Holmes (Victim's sister);

Thelma stated that the usual morning routine of the household is for Spencer Jenkins to leave first, then Thelma, and finally Birdie (the victim) (T.962). The victim would prepare her lunch and leave approximately 20 minutes after Thelma (T.964). The victim would leave her purse on a chair at the bottom of the stairway (T.965). She would always start her car, retrieve her lunch, lock the door and depart, usually around 6:15 a.m. (T.965-966). That morning Thelma observed the defendant with his bicycle at the bus stop. "Al" had done yard work and painting at their house (T.967). He had done so for a year or two, the last time in January of that year. She often saw the defendant at the bus stop,

usually with his girlfriend (T.968). The defendant was wearing a red knit hat and army coat (T.969). He waived the bus down for Thelma, but he did not board the bus. Later in the day, she was notified by the police and returned home. The house was in a shambles, though it had been in tidy condition when she left (T.974). She identified the red hat in the living room as the hat worn by the defendant that morning (T.976). She did not know the defendant's last name, only "Al". She was never able to locate the victim's purse (T.980). The victim and the defendant had never had any relationship. The defendant had been alone at the bus stop, which is unusual because he was usually with his girlfriend (T.984).

Detective Wellons:

Wellons arrived at the scene at approximately 7:40 a.m. In the kitchen he observed a burnt egg which had exploded in a pan on the stove, apparently after the water boiled off (T.994-998). He also observed the knife and sharpener, blood, feces, pantyhose with shoe inside, red cap and other items already described above. Based on the victim's dying declaration, and the identification of the red hat by the victim's sister, Wellons conducted an area canvas and located the defendant's house. The defendant was not at home, so Wellons left his card with the defendant's sister (T.1001). The following morning the defendant called Wellons

and stated that he wanted to talk about Birdie Jenkins (T.1003). Wellons then picked up the defendant at his home and transported him to the homicide office. The defendant was calm and rational (T.1006). They arrived at approximately 7:50 a.m. The defendant then made several phone calls and used the restroom (T.1009). The defendant was read his miranda rights. The defendant initially stated that he last saw the victim two weeks ago, and that they used to be lovers (T.1018). He denied any involvement in the murder. Wellons then turned the questioning over to the lead detective, John Buhrmaster.

Detective John Buhrmaster (lead detective):

Arrived at the scene at 7:30 a.m. He located the knife and sharpener at the foot of the stairs (T.1031). There was blood and feces the entire length of the stairway. (T.1032). At the top of the stairs is a bedroom containing the phone. There was a pool of blood next to the phone (T.1032). Regina Burger told Buhrmaster of the dying declaration, stating it was "Al Gardner" or Al Gordon". (T.1034). The victim's sister identified the hat as the same one the defendant had been wearing that morning at the bus stop (T.1036). She also told Buhrmaster the defendant did gardening work in the neighborhood.

The following morning he took over the interview of the defendant at approximately 9:25 a.m. He repeated the miranda warnings previously given by Detective Wellons (T.1043). At this point the defendant denied being at the house or having any knowledge of the murder. He stated he liked the victim very much and would help locate her killer if possible (T.1045-1048). He admitted being in the area at the time (T.1049). Buhrmaster then told the defendant about the victim's dying declaration. The defendant became extremely nervous, but still denied the crime (T.1050). Buhrmaster then told the defendant he knew the defendant committed the murder because his hat was found at the scene. Buhrmaster also told the defendant he intended to get fingerprints and other evidence against the defendant (T.1051). When the defendant was told that his hat had been found on the scene he broke into a sweat and goosebumps (T.1052). He then admitted he was in the house, and related his version of the murder. The defendant had also begun crying when faced with the evidence against him (T.1058). At approximately 11:10 a.m. a court reporter was summoned and the defendant gave a formal statement, which concluded at 12:13 a.m. (T.1053, 1099). The defendant then made several phone calls (T.1100). The defendant told Buhrmaster he liked his manner of questioning, especially the way Buhrmaster confronted him with facts about the case (T.1101). The defendant had also shown Buhrmaster two scratch marks from the incident (T.1102). Buhrmaster then bought the defendant lunch at

Burger King (T.1102). On cross-examination Burhmaster stated that he would not hesitate to use deception with a suspect, but that he did not lie to this defendant, with the exception of his statement "I know you did it" (T.1139-1142).

Defendant's Statement:

During Buhrmaster's testimony the defendant's statement was read to the jury (T.1061-1099). The statement is also contained in the record on appeal (T.1766-1794).

The defendant stated he is self-employed as a handyman (T.1767). The defendant knew where he was and the purpose of the interview, and had never been treated for any mental illness (T.1768). The defendant stated he understood his rights, that he was willing to talk without an attorney, and that he had not been promised anything to talk (T.1769).

The defendant had been at the bus stop the prior morning. He saw both the victim's brother and sister. He was wearing a green fatigue jacket and red pullover hat (T.1771). The defendant went to the victim's house about 6:00 a.m. and was let in by the victim. He stated this was a regular occurrence, and they would talk and have sex together (T.1773). The affair had been going on about two years. The victim was in the kitchen boiling two eggs (T.1774). The defendant asked her about money which she supposedly owed

him. According to the defendant, she had been paying him for sex for the past eight months, sometimes as much as $50 to $100. She now owed him five or six hundred dollars (T.1775). The victim refused to pay, saying she owed the defendant nothing (T.1776). The defendant insisted on payment, but the victim again refused. The defendant then demanded payment, and at this point the victim brushed up against the butcher block containing the knives (T.1777). The defendant then grabbed the victim around the waist (T.1778). He grabbed two knives from the block, one of which turned out to be a sharpener. The defendant is six feet three inches and 195 lbs. The victim still refused to pay the money, stating she wasn't afraid. At this point the defendant was holding the knife in front of him, with the victim three feet away (T. 1779). The defendant again demanded payment. He began sharpening the knife to frighten her into paying him (T.1780). The victim again refused to pay.

The victim then walked into the living room, laid down on the floor, and stated she wanted to have sex (T.1781). The defendant carried both the knife and sharpener into the living room. The victim told the defendant to rip her pants and be rough with her. He stated the victim liked him to be rough (T.1781). She also wanted him to tear her pantyhose, but did not touch her top (T.1782). They then had sex, with the defendant remaining dressed.

The defendant then demanded money once more. He grabbed her neck from behind and said "give me my money" (T.1783). The defendant had grabbed the victim with his left arm. She struggled and scratched him (indicating the stratched area). At this point the defendant was choking her from behind with his left arm (T.1784). The defendant then grabbed the knife with his right hand and cut the defendant's throat from left to right then right to left. The defendant then saw all the blood and became frightened. He said he didn't really mean to cut her, only scare her (T.1785). The defendant then became very frightened because he realized what he had done, and fled the house (T.1786). He denied taking the victim's purse (T.1787). He remembers now that he left his hat at the scene. At no time had the victim threatened the defendant (T.1789). Her only actions were to struggle to get free (T.1792). He did not try and get help because he was scared, and didn't know what to do. The statement then concluded with the following exchange:

> Q. You realize by us talking to you that she's dead?
>
> A. Yes.
>
> Q. You realized what you did was wrong?
>
> A. Yes.
>
> Q. And you're an adult, you're 38 years old, you know right from wrong?
>
> A. Yes.

> Q. We appriciate (sic) you calling and coming down here and we appriciate (sic) you sitting talking to us and telling us the entire incident, because like we told you in the beginning we like to get the story straight.
>
> A. Right.
>
> Q. You do know that you are going to be arrested for this.
>
> A. Yes.
>
> Q. How do you feel that you have been treated?
>
> A. Very good.
>
> Q. Anybody promised you or threatened you in any way?
>
> A. No.
>
> Q. Has anyone done anything wrong to you?
>
> A. No.
>
> Q. How do you feel now that you have talked to us about this?
>
> A. I feel relieved.
>
> Q. How do you mean?
>
> A. I feel sorry about her being dead, but I know I can't change that. I just feel good that I got it off my chest.
>
> Q. Everything you've told us that truth.
>
> A. Yes.
>
> (T.1793-1794).

The State then rested, and the defendant presented the following testimony:

Dr. Norman Reichenberg:

Reichenberg, a psychologist, stated that he never discusses the facts of the case with a defendant (T.1160, 1178). Not only did he not discuss the case at all with the defendant, he did not even know what crimes the defendant was charged with (T.1180). He denied that the field of forensic psychology exists (T.1162). He did not question the defendant concerning his past mental history (T.1178, 1182-1184). He did not know the legal definition of insanity, (T.1188-1190), stating:

> "I am not required to know the proper legal definition of insanity, just the psychological reason of insanity. I can't function as an attorney."

According to Reichenberg, all paranoid schizophrenics are insane (T.1188). In arriving at his diagnosis, he relied exclusively on several tests, in which the defendant responded to various cards and drawings, and the defendant's reports of voices and astroprojections (T.1165-1174). The major basis of his conclusions was the defendant's response to the house-tree-person drawing (T.1190). Reichenberg concluded by stating that the defendant had been insane since adolesence (the defendant was then 38 years old) (T.1193).

Dr. Castiello:

Dr. Castiello examined the defendant twice to determine sanity (T.1201). The defendant is a paranoid schizophrenic (T.1202), and has probably been so since birth. On direct examination defense counsel did not ask what findings Dr. Castiello made as to sanity in his reports.[1] Rather, defense counsel questioned whether the defendant's various statements could be believed (T.1202-1209). Castiello stated that because of certain highly implausible statements of the defendant, especially his story that a mystery lady told him his girlfriend and child would be killed if he didn't confess (T.1206-1208), Castiello would have difficulty accepting anything the defendant said at face value (T.1209). On cross-examination, following an unsuccessful "outside the scope of direct" objection by defense counsel, Castiello affirmed that he found the defendant sane in his first report (T.1210), and sane with reservations in his second (T.1212). The reservations stem from the fact that he cannot accept anything the defendant says at face value.

Ralph Garcia (police technician):

Garcia testified that he lifted several prints at the scene and forwarded them for analysis by print examiners (T.1221-1223).

[1] These two reports are part of the record on appeal. (T.1665-1669), 1670-1672.)

Ivan Almeida (latent examiner):

None of the prints lifted by Garcia were matched to the defendant (T.1231-1232).

George Borghi (Serologist):

The smears from the victim were negative for the presence of acid phosphate, indicating no sperm was present (T.1240).

The defense then rested, and the State presented the following rebuttal testimony:

Dr. Albert Jaslow:

Dr. Jaslow is a psychiatrist, as was Dr. Castiello. Defense counsel stipulated that he was qualified to render an opinion in forensic psychiatry (T.1248-1249). He examined the defendant twice for sanity at the time of the offense (T.1250). He found the defendant was reasonably intelligent, and had no history of mental illness (T.1251). He detected no active psychosis or history of active psychosis. The defendant knew right from wrong at the time of the murder, and that what he did was wrong (T.1251-1251). The defendant denied the crime and blamed his confession on a mystery lady in order to help his case (T.1252). Parts of his police

statement are self-serving, a means to downplay wrongdoing and explain his behavior (T.153). There is no evidence of delusions, hallucinations or active psychosis. Although scizophrenia can interfere with thought processes, nothing in the defendant's statement or interviews with Jaslow indicate any abnormal thought process at the time of the offense (T.1254). The defendant was legally sane at the time of the offense, as he knew right from wrong and understood the consequence of his actions (T.1255). Jaslow diagnosed the defendant as a schizophrenic with paranoid tendencies (T.1265).

Leroy Jackson

Jackson had known the defendant for ten years, and saw him almost every day. He saw the defendant the morning of the crime and talked to him about landscaping Jackson's lawn (T.1278). They also talked about Jackson's garden. This conversation occurred at Jackson's home, one block from the victim's house. After the conversation the defendant left, stating he was going home. Jackson had never seen the defendant act strangely the entire 10 years he knew him. (T.1280).

ISSUES PRESENTED

I.

WHETHER THE TRIAL COURT ERRED IN REFUSING TO STRIKE CERTAIN JURORS FOR CAUSE?

II.

WHETHER THE TRIAL COURT ERRED IN GIVING THE STANDARD JURY INSTRUCTION ON EXCUSABLE HOMICIDE, WHERE THE INSTRUCTION WAS ACCEPTED BY DEFENSE COUNSEL AND THERE WAS NO EVIDENCE TO SUPPORT EXCUSABLE HOMICIDE?

III.

WHETHER THE TRIAL COURT ERRED IN ADMITTING INTO EVIDENCE THE VICTIM'S DYING DECLARATION AND A RECORDING OF THE VICTIM'S CALL TO THE POLICE 911 NUMBER?

IV.

WHETHER THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION FOR MISTRIAL BASED ON THE PROSECUTOR'S COMMENT THAT AN OBJECTION BY DEFENSE COUNSEL WAS "UNPROFESSIONAL" AND "UNETHICAL?"

V.

WHETHER THE TRIAL COURT ERRED IN ADMITTING INTO EVIDENCE THREE PHOTOGRAPHS OF THE VICTIM WHICH DEPICTED THE VARIOUS WOUNDS TO HER NECK?

VI.

WHETHER THE TRIAL COURT ERRED IN FINDING THAT THE STATE HAD NOT USED PEREMPTORY CHALLENGES TO EXCLUDE JURORS SOLELY ON THE BASIS OF RACE?

VII.

WHETHER THE TRIAL COURT ERRED IN SENTENCING THE DEFENDANT TO DEATH WHERE PRIOR TO TRIAL THE STATE HAD OFFERED A PLEA TO FIRST DEGREE MURDER AND LIFE?

VIII.

WHETHER THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION TO SUPPRESS HIS CONFESSION AND IN FINDING THAT THE CONFESSION WAS FREE AND VOLUNTARY?

IX.

WHETHER THE TRIAL EVIDENCE WAS SUFFICIENT TO SUSTAIN THE DEFENDANT'S CONVICTION FOR ARMED BURGLARY WITH AN ASSAULT?

X.

WHETHER THE TRIAL COURT ERRED IN FINDING THREE AGGRAVATING, NO STATUTORY MITIGATING AND NO NONSTATUTORY MITIGATING FACTORS, AND THAT THE PROPER SENTENCE WAS DEATH?

XI.

WHETHER THE DEATH PENALTY CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT?

XII.

WHETHER THE TRIAL COURT COMMITTED CUMMULATIVE ERRORS WHICH TAKEN TOGETHER DEPRIVED THE DEFENDANT OF A FAIR TRIAL?

SUMMARY OF ARGUMENT

Of the five jurors the defendant unsuccessfully challenged for cause, two were concerned only that their businesses would suffer during the trial. Such concerns are not grounds for cause. Juror Dolan's somewhat low regard for psychiatrists and psychologists was likewise insufficient to establish cause, as was Juror Mor's preference for psychiatrists over psychologists. Mor stated unequivocably that he would consider life imprisonment as a penalty, and follow the court's instructions as to sentencing. Juror Lopez, although concerned that an insane defendant should not be automatically set free, nevertheless stated that he believed in the insanity defense. In addition, Lopez' concern about the disposition of an insane defendant was not raised as a ground for cause in the trial court, and hence should not be considered on appeal.

The jury instruction on excusable homicide was specifically agreed to by defense counsel, and in any event there was no evidence to support it.

The victim's dying declaration was properly admitted, based on the testimony of the paramedic and coroner as to her probable knowledge of imminent death. The 911 recording was properly admitted as a business record.

The prosecutor's comment that defense counsel had acted in an unprofessional and unethical manner was accurate, though unnecessary, and certainly not grounds for mistrial. The coroner's photographs of the victim were highly relevant and served to illustrate his testimony as to the nature of the wounds, and were therefore admissible.

The defendant failed to demonstrate that the prosecutor exercised peremptory challenges solely on the basis of race, and the reasons volunteered by the prosecutor for his challenges were perfectly legitimate. The fact that the defendant was offered a plea to first degree murder and life prior to trial, in no way prohibits the State from seeking the death penalty after the offer is rejected by the defendant.

The defendant's confession was free and voluntary. The defendant's miranda rights were scrupulously honored, he was well treated, and was not promised anything or coerced in any way. The fact that the lead detective confronted the defendant with the evidence against him was not overbearing coercion, but rather sound police procedure.

The evidence was clearly sufficient to sustain the defendant's conviction for armed burglary with an assault, as the defendant admitted to threatening the victim with the knife prior to the murder.

The three aggravating factors were all proven beyond a reasonable doubt, as the defendant had a prior conviction for sexual battery and committed the murder during an armed burglary, and the facts demonstrated a brutal murder which was heinous, atrocious and cruel in the extreme. The defendant did not present any evidence that his capacity was impaired or that he was under the influence of a severe disturbance, thus these mitigating factors were properly rejected. The trial court's determination that the defendant's cooperation with police, and family and social background, did not rise to the level of a nonstatutory mitigating factor, was entirely justified.

Finally, the evidence of the defendant's commission of the crime, and his sanity at that time, was totally overwhelming, and any error therefore harmless.

ARGUMENT

I.

THE TRIAL COURT PROPERLY REFUSED TO STRIKE CERTAIN JURORS FOR CAUSE.

The defendant argues that prospective jurors Mor, Lopez, Dolan, Woodruff, and Yi should all have been stricken following defense motions to strike for cause. As demonstrated below, all five motions were properly denied by the trial court.

Whether a juror should be stricken for cause is a mixed question of law and fact. Hill v. State, 477 So.2d 553 (Fla. 1985), Davis v. State, 461 So.2d 67 (Fla. 1984). The trial court is afforded broad discretion in its ruling, and the defendant has the heavy burden of demonstrating manifest error before the trial court's determination will be upset on appeal. Hill, supra, Ross v. State, 474 So.2d 1170 (Fla. 1985), Hooper v. State, 476 So.2d 1253 (Fla. 1985).

The defendant must demonstrate that the juror possesses a state of mind regarding the defendant, the case, the victim, or the instigator of the complaint, that will prevent

him from being impartial. Fla. Stat. 913.03 (10) Florida Statutes (1970). The issue presented is whether the juror can lay aside any bias or prejudice and render a verdict based solely on the evidence and the court's instructions. Stano v. State, 473 So.2d 1282 (Fla. 1985), Hill, supra.

Jurors Woodruff and Yi:

The defendant's sole basis for challenging Woodruff and Yi was their concern for their businesses, and the economic hardship their absence would create. The State submits that economic hardship is not, standing alone, sufficient basis for dismissing a juror for cause. In its discretion the court, or by agreement the parties may see fit to excuse a particular juror where the hardship appears especially severe. Where a juror states that he would hold one side or the other responsible for his distress, such announced prejudice might warrant dismissal. However, in the present case neither Woodruff nor Yi even hinted at such feelings. Economic hardship is an unfortunate byproduct of our jury system, especially for self-employed citizens, however it is not among the four grounds for cause in the above cited statute. The defendant has cited no case to support its position, and the State has likewise located none.

The defendant makes much of the fact that prospective juror Yi actually served on the jury and was elected foreman,

and that the trial lasted beyond the three days promised by the trial court. If anything, the fact that Yi was elected and served as foreman shows that he took his oath seriously, and conscientiously set himself to the task at hand.

Juror Dolan:

At the outset of voir dire the prosecutor informed the panel that insanity was a possible issue in the case, and that the court would instruct the jury as to that defense. He then asked the panel if they would all abide by their oaths and listen to the instructions of the court (T.366-367). The jurors as a group responded in the affirmative (T.367).

Dolan stated that he had a low regard for psychiatrists and psychologists because these professions are still in their infancy, but that he would put aside his individual feelings concerning these fields and listen to the expert testimony (T.367-368). He stated that a person is innocent until proven guilty (T.385), and that he would be fair and impartial and follow the court's instructions (T.390). He felt that psychiatrist's are just beginning to understand their field, but are working very hard to achieve knowledge (T.399). He affirmed that he would follow the court's instructions on the insanity defense (T.400), and he would keep an open mind on this issue (T.400).

At one point defense counsel asked the entire panel if they had any problems with returning a verdict of not guilty by reason of insanity, if the State failed to prove sanity beyond a reasonable doubt, and the jurors as a group replied in the negative (T.428-429). The trial court on its own initiative instructed the panel that it had a duty to listen to the evidence on insanity, keep an open mind, and follow the court's instructions on insanity (T.558-563).

The State submits that based on the above responses, there was no basis whatever for the defendant's motion to strike Dolan for cause. The fact that he holds psychiatrists and psychologists in low regard is not grounds for cause, especially where he stated he would put those views aside and listen to their testimony, and where he stated he would be fair and impartial, keep an open mind, and follow the court's instructions.

Juror Mor:

Mor stated that he studied psychiatry in school, and that he has more faith in psychiatrists than psychologists because the former are more exact (T.370-371). He does not have much faith in psychologists, but would listen to their testimony (T.401-402). He specifically stated that he believes a person can be legally insane because of mental illness, and hence not criminally responsible (T.403). He

also stated he understood the shifting burden of proof on insanity (T.413), and that he would have no problem with returning a not guilty by reason of insanity verdict if the State failed to prove sanity beyond a reasonable doubt (T.428). Mor's exchange with defense counsel concerning the death penalty was as follows:

> MR. SMITH: What about you, Mr. Mor, you feel the same way that you would be only able to consider the death penalty?
>
> MR. MOR: I would also consider a life sentence.
>
> MR. SMITH: But you just told me a minute ago, correct me if I'm wrong, you felt in a first degree murder case that death is the only penalty, your own personal opinion.
>
> MR. MOR: I believe that society doesn't have to pay for other people's mistakes. If they're not allowed to live with us, we don't have to pay for it.
>
> MR. SMITH: Do you feel that death is the only penalty or life in prison?
>
> MR. MOR: If no other considerations, he's complete guilty and the balance everything is against him, the State proved everything, yes, I consider that the sentence.
>
> MR. SMITH: Let's go back a moment. If you were on this jury and you listened to all the evidence in the case and you were asked to decide whether or not Mr. Moore was guilty or not guilty, you would return a verdict of guilty of first degree murder and if you were asked to deliberate and decide whether or not there should be a penalty of life in prison or whether there should be

> death penalty and you recommendation to the Judge-- would the only recommendation you would be able to give would be death or would you consider life in prison?
>
> MR. MOR: I would consider it.
>
> MR. SMITH: You would follow instructions that the Judge would give you as to whether or not certain facts go towards the imposition of life as opposed to death or whether certain facts go towards imposition of death as opposed to life?
>
> MR. MOR: Of course.
>
> MR. SMITH: You would do that?
>
> MR. MOR: Of course.
>
> (T.431-433).

Based on the above responses by Mor, the trial court was entirely justified in refusing to dismiss him for cause. As to the insanity defense, he specifically stated that he believed in the insanity defense and that he would have no problem returning a verdict of not guilty by reason of insanity. The fact that he would favor psychiatrists over psychologists, because the former is a more exact science, is hardly grounds to strike for cause, and in any event he stated he would consider the testimony of both.

In regards the death penalty, Mor stated unequivocally that he would consider a life sentence, weigh the aggravating and mitigating factors, and follow the courts instructions as to sentencing. The challenge for cause was thus properly denied.

Juror Lopez:

Lopez stated that psychiatry is not an exact science, but that he would listen to and consider the opinions of the experts in arriving at his decision on insanity (T.373-374). He stated that in his opinion the insanity defense is overused (T.377). The following critical exchange is reprinted in full, including the responses of prospective juror Tedder, who was subsequently stricken for cause based on her views of psychiatrists.

> Is there anybody that thinks because of their own views they would have difficulty following that instruction, in applying that to the case if it was given?
>
> JURORS: (No response).
>
> MR. SMITH: Anyone? Mrs. Tedder, do you think you would have trouble following that instruction or would that cause you some problem?
>
> MR. TEDDER: It all depends on what comes up in the case.
>
> MR. SMITH: You said you have some problems with psychiatrists. I know you told Mr. Band that they sometimes see things that you don't. These people will be qualified as experts in the area of psychiatry and psychology. Do you think you would have trouble with what they have to say because of your views about psychiatrists.
> MR. TEDDER: I have to tell the truth. I will have trouble with that, the legal abilities. I'm bothered by those things.

MR. SMITH: We want you to tell us the truth.

MR. TEDDER: That's what I am saying.

MR. SMITH: Mr. Lopez, how do you feel? Do you agree?

MR. LOPEZ: I think we are interested in the frame of mind of the person at the time of the incident, when it took place. When was he evaluated, three weeks later?

THE COURT: That is something to be determined later on. That goes to the weight of the evidence, once its been submitted to you.

Do you understand, but that is not the question being asked of you.

Mr. Smith, please repeat.

MR. SMITH: You responded you thought the defense issue of insanity is overused. Do you have a view about insanity or about psychiatrists or all of this we're talking about that would prevent you from being fair to somebody that asserts a defense of that type?

Do you think you would be unfair to somebody?

MR. LOPEZ: I feel that anybody that takes another person's life is a bit insane, premeditated, takes a person's life. I don't see how you could let somebody off because of that factor.

MR. SMITH: You don't think somebody could be legally insane?

MR. LOPEZ: I -- I believe he can be. I don't believe he should be let go because he is.

THE COURT: What do you mean by the phrase let go?

MR. LOPEZ: Set free.

MR. SMITH: Let me just ask you this, Mr. Lopez, if the Judge were to further instruct you, and I believe he will in this case, if you were selected as a juror, if your verdict in this case is that the Defendant is not guilty because legally insane, that does not mean he will be released from custody. The Judge can conduct an additional proceeding to determine if he should be committed to a mental hospital, kept in jail or given treatment.

If the Judge were to tell you that, would that satisfy you and would you be able to listen to the instructions?

MR. LOPEZ: If he gets committed to a hospital when deemed insane, where does he go, go to jail or set free?

MR. SMITH: Unfortunately, that is not for your consideration in this case. Your consideration is whether or not someone is guilty or not guilty in accordance to the instruction the Judge gives. Will that interfere with your decision making?

MR. LOPEZ: No.

MR. SMITH: You're not going to be thinking about, well, this guy is going to be getting out sometime in the future?

MR. LOPEZ: Yes, I will.

MR. SMITH: That may prevent you from following these instructions about insanity?

MR. LOPEZ: Probably it would, yes.

(T.405-408).

Defense counsel made the following motion to exclude Lopez for cause:

MR. BAND: Lopez acceptable.

MR. SMITH: Move to Challenge for Cause. He had the same views with Mrs. Tedder regarding insanity defense. He does not believe in insanity defense.

THE COURT: Denied.

MR. SMITH: The comment was he shouldn't be letting them live because of the insanity defense. I had to explain to him about the possibilities about what the Court could do and even when I gave that explanation, he still was not satisfied with the insanity defense.

(T.441).

First and foremost, the legal and factual grounds raised by defense counsel in the trial court are far different than those argued by the defendant in his brief. At trial defense counsel stated that Lopez should be excused for cause because; a) he possessed the same views as Mrs. Tedder

regarding the insanity defense, b) he does not believe in the insanity defense, c) he commented that the defendant should not be allowed to live because of the insanity defense, and d) even after an explanation as to the Court's possibilities, he was still not satisfied with the insanity defense. In fact the defendant did not have the same views as Mrs. Tedder, as he specifically stated he would listen to and consider the testimony of psychiatrists, something Tedder refused to do. He did not say or indicate that he did not believe in the insanity defense, rather that he agreed a person could be legally insane, although a person should not be set free because of it. Lopez never stated a defendant should not be allowed to live because of the insanity defense, but rather they should not automatically be set free. Lopez did not express dissatisfaction with the defense itself, instead expressing concern only as to the ultimate disposition of the defendant. In sum, the grounds presented in the trial court were clearly without merit, and the motion to strike for cause thus properly denied.

In his brief the defendant raises, for the first time, Lopez' concern for the disposition of an insane defendant, and the effect it may have had on his ability to follow the court's instruction. The State urges this Court to limit its consideration to the specific grounds asserted by defense counsel in the trial court. In Hoffman v. State, 474 So.2d 1178 (Fla. 1985), this Court refused to consider certain

grounds as a basis for dismissal for cause, where those particular legal and factual grounds had not been presented to the trial court. See also Tillman v. State, 471 So.2d 32 (Fla. 1985), and Castor v. State, 365 So.2d 701 (Fla. 1978). During voir dire hundreds and often thousands[2] of questions and responses are given. It is the responsibility of the moving party to state with specificity the legal and factual grounds for dismissal. This allows the court to prevent needless errors, and preserves the issue for intelligent and informed review. Castor, supra, United States v. Adamson, 665 F.2d 649 (11th Cir. 1982), United States v. Sims, 617 F.2d 1371 (9th Cir. 1981).

In his brief the defendant relies primarily on a specific facet of Lopez' testimony: that his concern over an insane defendant being set free may prevent him from following the Court's instructions on insanity. This argument was not presented to the trial court. Had it been, the trial court could have reopened voir dire, as it did with prospective juror Mack (T.445-447), who was then stricken for cause. Having failed to present this specific ground to the trial court, the defendant cannot now claim it as a basis for error.

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[2] In the instant case jury selection commenced on page 300 and terminated on page 662 of the trial transcript, with juror questioning responsible for the lion's share of this segment.

Even if this Court disagrees, and reaches the merits of this specific ground, the defendant has failed to satisfy his heavy burden of demonstrating manifest error. Lopez stated that psychiatry is not an exact science, that the insanity defense is overused, that insanity should be based on the defendant's conduct at the time of the offense, and that a defendant should not be immediately set free when found guilty by reason of insanity. A sizable majority of the population, lawyers and laymen alike, would agree with these observations. Lopez specifically agreed that a person could be legally insane. Lopez' concern for setting an insane killer free was deliberately played upon by defense counsel. After defense counsel read the three possible dispositions of an insane defendant, Lopez asked "If he gets committed to a hospital when deemed insane, where does he go, go to jail or set free?" Counsel then abruptly cut Lopez off, telling him "Unfortunately, that is not for your consideration" (T.407). That may have been the case, but to undertake to explain the court's options, then refuse to answer a question from an obviously confused juror regarding those options, is unforgiveable.

Finally, the key question, on which the defendant now so heavily relies, was a loaded one: "That may prevent you from following these instructions about insanity[3]?". Lopez'

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[3] A layman might well wonder what instructions counsel is referring to. The jurors had heard several, the most recent concerning the possible dispositions of an insane (Continued)

response was equally equivocal: "Probably it would, yes" (T.408).

In sum, the defendant has failed to demonstrate that the Court's refusal to dismiss Lopez for cause constituted an abuse of discretion[4].

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defendant.

[4] A harmless error analysis would appear futile in view of Hill, supra, wherein this Court held that refusal to strike for cause, when erroneous, was per se reversible. In the final segment of this brief, the State will offer reasons why the court may wish to reconsider the per se rule of Hill, in light of its holdings in Rivers v. State, 458 So.2d 762 (Fla. 1984).

II.

> THE TRIAL COURT DID NOT ERR IN GIVING THE STANDARD JURY INSTRUCTION ON EXCUSABLE HOMICIDE, WHERE DEFENSE COUNSEL SPECIFICALLY AGREED TO THE INSTRUCTION AND WHERE THERE WAS NO EVIDENCE TO SUPPORT A FINDING OF EXCUSABLE HOMICIDE.

During the charge conference defense counsel specifically agreed to the standard jury instruction on excusable homicide:

> THE COURT: That is right. Just a struck page. Strike the whole page.
>
> Page 9 begins with "Manslaughter before."
>
> MR. SMITH: Correct.
>
> THE COURT: That would be Page 9.
>
> Page 10, which is the finish of the manslaughter charge.
>
> Page 11, begins with excusable homicide? Correct? Are we both agreeing on that?
>
> MR. SMITH: Yes sir.
>
> (T.1300)

Having consented to the instruction, it is well settled that the defendant is prohibited from claiming that the instruction was erroneous on appeal. Murray v. State, 491 So.2d 1120 (Fla. 1986), Steinhorst v. State, 412 So.2d 332 (Fla. 1982).

In addition, there was no evidence whatsoever to support excusable homicide and it certainly was not argued by the defendant as a basis for aquittal. Any error in the instruction was therefore harmless beyond any doubt. Hooper v. State, 476 So.2d 1253 (Fla. 1985); cert. denied, 106 S.Ct. 1501 (1986), Suarez v. State 478 So.2d 1173 (Fla. 3d DCA 1985); Brown v. State, 431 So.2d 247 (Fla. 1st DCA 1983).

III.

THE TRIAL COURT PROPERLY ADMITTED EVIDENCE OF THE VICTIM'S DYING DECLARATION AND THE RECORDING OF HER CALL TO THE POLICE 911 EMERGENCY NUMBER.

DYING DECLARATION

Regina Burger, the fire rescue member who treated the victim at the scene and testified as to her dying declaration, found the victim crawling in a pool of her own blood and feces. The knife wounds were so gaping that Burger had to close them with her hands to allow the victim to breath. She could hear gurgling and air escaping with each breath. The victim had lost so much blood she had no pulse or blood pressure, and her white shirt was so drenched with blood that Burger mistook it for a red shirt. Burger had to scream at her to keep her awake. The victim's eyes were clouded with tears, and her face exhibited an intense look of fear. Burger stated she had seen that look of fear and impending doom in dying people many times before. Dr. Gray stated that the victim had swallowed her own blood and that based on the severity of the wounds, severe pain, near total blood loss, and gurgling sounds when breathing, the victim probably knew she would die.

Whether a dying declaration should be admitted is a mixed question of law and fact, and the trial court's ruling

will not be disturbed absent a patent abuse of discretion. Teffeteller v. State, 439 So.2d 840 (Fla. 1983). The appreciation of inevitable death, without hope of recovery, is the essential prerequisite to admission. Tillman v. State, 44 So.2d 644 (Fla. 1950), Teffeteller, supra. However, it is not necessary for the victim to verbally express knowledge of impending death. Rather it can be inferred from the circumstances, including medical testimony. McRane v. State, 194 So.2d 634 (Fla. 1940), Mills v. State, 264 So.2d 71 (Fla. 1st DCA 1972).

In Mills, supra, the victim's throat had been slashed and he was left to die by the roadside. At the time of the dying declaration he had no pulse or blood pressure, was barely breathing and in deep shock. The victim did not state he knew he was going to die, saying only that his brother cut him. The facts of the instant case are virtually identical to Mills, and as in Mills, the trial court's ruling should be affirmed.

The defendant cites Grimes v. State, 64 So.2d 920 (Fla. 1953), for the proposition that a dying declaration should not be admitted where evidence of the declaration is contradictory. In Grimes, five witnesses were present, with one stating that the declaration was spoken and four stating it was not. In the instant case, because of the victim's difficulty in speaking, Burger had initially told Detective

Buhrmaster she heard "Al Gardner" or "Al Gordon", and subsequently related in her deposition "Al the Gardener." These variations are a far cry from the direct conflict found in Grimes, and are certainly not a basis for holding the declaration inadmissible.

911 RECORDING

Edward Croughwell testified that he is the official custodian of records of the Telex Communications section of the Miami Police Department. His duties are the storage, security and maintenance of the 911 tapes. He testified how the tapes are received and recorded on large master tapes in the regular course of business, 24 hours a day, after which they are stored in a locked cabinet to which he has sole access. He also testified that when a 911 call is received, the computer automatically processes the phone number in order to determine the address, so that emergency personnel can be immediately dispatched. Pursuant to a State subpoena, he reproduced, from the master tape of August 29, 1985, a tape containing a single call received at 6:34 a.m., which contained a hoarse voice stating "Help me, Help me", and "He cut me". This tape was a complete, unaltered reproduction of the original.

The State sought to admit the tape as a business record pursuant to Fla. Stat. 90.803(6), Florida Statutes (1981). The defendant made numerous objections prior to its ultimate admission: the tape is not a valid business record (T.746, 749, 763, 779, 943, 955), and the tape is irrelevant and inflammatory (T.746, 749, 753, 764, 943, 944, 955). The defendant asserted that it was not a proper business record because both parties must be acting in the normal course of business (T. 779, 943).[5] The defendant argued it was irrelevant because it did not prove any fact in issue, but rather served only to inflame the jury. The defendant also argued it was irrelevant because the voice was not properly identified as being the victim's.

The State responded that it had satisfied all the requirements of the business records exception, citing several out-of-state cases admitting 911 tapes. The tape was relevant because the victim stated "He cut my throat"[6], and the voice was identified by paramedic Burger, who stated it sounded like the victim's.

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[5] As the court pointed out (T.943), a patient who relates symptoms to a doctor is not acting in the normal course of business either, yet once the patient's words are recorded in his or her medical file, they become part of a valid business record.

[6] As the prosecutor pointed out (T.942), the defendant had not conceded that he committed the crime. Defense counsel argued that because of the defendant's mental condition, his confession should not be believed. To bolster this theory, the defense called the fingerprint experts to testify that none of the prints on the scene matched the defendant.

In its brief the defendant raises two grounds not presented to the trial court. First, that there was no testimony as to how the recording device operates, and secondly, that portions of the tape were inaudible. Having failed to raise these grounds below, they are not subject to consideration on appeal. Tillman, Hoffman, Castor, supra.

The State submits that all the requirements of the business records exception have been satisfied, and that this Court should join several of its sister states in holding that 911 police recordings are admissible on that basis. State of Washington v. Rupe, 683 P.2d 571 (Wash. 1984), People v. Johnson, 461 N.E. 2d 585 (Ill. App. 1 Dist. 1984), and People v. Slaton, 354 N.W. 2d 326 (Mich. App. 1984).

The tape was clearly relevant, as it contained the phrase "He cut my throat." As noted by the prosecutor, although the defendant put his sanity in issue, he did not concede that he committed the murder. The tape was also properly identified. In addition to the testimony of Burger that the voice sounded like the victim's, a large pool of blood was located in the upstairs bedroom next to the phone. Perhaps the best proof that the victim made the call, which neither the court nor the parties considered, was the fact that fire rescue was dispatched to the scene. Had the victim not called, the computer could not have analyzed the phone number and determined the victim's address, resulting in the dispatch of fire rescue.[7]

IV.

THE TRIAL COURT PROPERLY DENIED THE DEFENDANT'S MOTION FOR MISTRIAL BASED ON THE PROSECUTOR'S COMMENT THAT DEFENSE COUNSEL'S OBJECTION DURING CROSS-EXAMINATION WAS "UNPROFESSIONAL" AND "UNETHICAL".

Throughout the trial defense counsel repeatedly accused the prosecutor of misconduct, ranging from the prosecutor's desire to have the defendant's rape case tried first (the unrelated rape had occurred some six weeks before the murder), to his introduction of the 911 tape and autopsy photos. The tenor of defense counsel's verbal assaults varied from the obscene[8] to the downright vicious[9].

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[7] Burger stated that they had received an alarm to respond to the victim's address to treat someone with breathing difficulty (T.917). Obviously, the 911 operator had problems understanding the victim.

[8] In assessing the prosecutor's motives for admission of the 911 tape, defense counsel offered the following:

> MR. SMITH: Judge, you have been a trial lawyer before you became a Judge. I think we should cut basically the bullshit which is what this is all about. What they want is the substance of the tape.
>
> (T.763).

[9] In his brief, the defendant deletes the most exciting portions of the argument on his motion for mistrial:

> MR. SMITH: I want to move for a mistrial. This unethical person has the nerve to say in front of a jury --
>
> THE COURT: Who are you pointing to?

(Continued)

Turning to the incident at issue, it is certainly true

> MR. SMITH: This person, to say that another lawyer is unprofessional in front of a jury.
>
> Judge, this a death case. This is a first degree murder case. He has the nerve to make those comments when his partner leaves out a portion of a report and tries to mislead the jury.
>
> I am moving for a mistrial. I think you should cite him and hold him in contempt and put him in jail because that is where he belongs.
>
> THE COURT: The statement has not elevated to the status of a contempt action.
>
> MR. SMITH: It is consistent with his conduct through the entire trial.
>
> MR. BAND: I am commenting on the comments that he made continuously when Buhrmaster would testify and Mr. Sakin was introducing evidence, he had a comment each time and I think by his excitement he acted in an unprofessional manner and it is unprofessional.
>
> MR. SMITH: When these Nazis try to convict somebody and put them in an electric chair based upon the tactics exhibited in this courtroom, they should be in jail.
>
> MR. BAND: We are Jewish.
>
> THE COURT: Both sides --
>
> MR. SMITH: You wouldn't know it, scum.
>
> MR. BAND: Listen to this person. Get that down on the record.
>
> THE COURT: Mr. Band, both sides will stop name calling. Both sides will end it.

(Continued)

that the prosecutor's reading of only a portion of the expert's conclusion was misleading. However, it is equally true that the prosecutor has an absolute right to question an expert on whatever portions of the expert's report he chooses. He also has an absolute right to look extremely silly when on redirect defense counsel questions the expert as to the omitted portions of the report. Such is the art, and pitfalls, of cross-examination. This is not to say that defense counsel is prohibitted from objecting. He may state a <u>legal</u> objection at any time. What he <u>cannot</u> do is interrupt the State's cross-examination with sarcastic comments, as defense counsel did here. The prosecutor was eminently justified in objecting to defense counsel's interruption. He definitely should have omitted the words "unprofessional" and "unethical" from his objection, though defense counsel's comment was both. In any event, to argue that the use of these two adjectives mandated a mistrial is, quite frankly, ridiculous.

> I can appreciate tempers being lost but name calling will not go on. It will not continue from this point on.
>
> MR. SMITH: We are moving for a mistrial.
>
> THE COURT: I will deny the Motion for a Mistrial.
>
> I am cautioning both sides to watch your expressions of anger.
>
> (T.1215, 1216).

The cases cited by the defendant all deal with attacks upon defense counsel by the trial court, and none even remotely resemble the facts at hand. As stated in State v. Murray, 443 So.2d 955 (Fla. 1983), the comments by the prosecutor must seriously undermine the fairness of the proceeding before a mistrial is warranted. That is certainly not the case here.

V.

THE TRIAL COURT PROPERLY ADMITTED THREE AUTOPSY PHOTOGRAPHS DEPICTING THE WOUNDS TO THE VICTIM'S NECK.

The admission of photographic evidence is within the trial court's discretion, and will not be disturbed absent a showing of clear abuse. Wilson v. State, 436 So.2d 908, 910 (Fla. 1983). In Wilson nine autopsy photographs of the two victims were admitted, and this Court held such photographs are admissible "if relevant to any issue required to be proven in a case", citing State v. Wright, 265 So.2d 361, 362 (Fla. 1972). The gory nature of the photographs does not detract from their admissibility, so long as they are relevant. Booker v. State, 397 So.2d 910 (Fla. 1981), Thomas v. State, 59 So.2d 517 (Fla. 1952). Where the photographs serve to illustrate and corroborate the coroner's testimony as to cause of death, they are admissible. Brumbley v. State, 453 So.2d 381 (Fla. 1984), Straight v. State, 397 So.2d 903 (Fla. 1981), Swan v. State, 322 So.2d 485 (Fla. 1975), Leach v. State, 132 So.2d 329 (Fla. 1961).

In the instant case the photographs (R.1760-1762) were highly relevant, as they served to illustrate the nature and path of the wounds to the victim's neck, and to assist the jury in understanding the testimony of Dr. Gray as to the wounds. In his confession the defendant stated he cut back and forth across the victim's neck, and this is highlighted

by the photographs. It must be stressed that the defendant did not concede that he committed the crime, as in most insanity cases. Rather he used the insanity issue to attack the veracity of his confession. Therein lies the relevance of the three photographs.

The defendant relies on three factors in his argument. First, that the photographs were not taken at the scene, but rather at the coroner's office hours later. The defendant seems to forget that the victim was alive at the scene, and was immediately rushed to the hospital in a desperate though futile attempt to save her life. In addition, even the cases cited by defendant hold that photographs taken after removal from the scene are nevertheless admissible, so long as they are relevant. Reddish v. State, 167 So.2d 858 (Fla. 1964), Dyken v. State, 89 So.2d 866 (Fla. 1956).

Secondly, the defendant argues that the photographs were inadmissible because sutures from medical therapy were visible, citing Rosa v. State, 412 So.2d 891 (Fla. 3d DCA 1982). In Rosa the Third District reversed because the bloody photographs, showing evidence of surgical tubes and sutures, were totally irrelevant. The fact that a photograph containes sutures is hardly grounds to exclude an otherwise relevant photograph, especially where the sutures are insignificant in relation to the wounds themselves.

Finally, the defendant asserts that the photographs are "posed", in that the victim's head is in a reclining position in all three photographs. The coroner testified that the wounds might be slightly exaggerated because of the position of the head, but that they were in the same condition as when inflicted. They were therefor relevant, and were properly admitted.

VI.

THE TRIAL COURT PROPERLY FOUND THAT THE PROSECUTOR HAD NOT USED PEREMPTORY CHALLENGES TO EXCLUDE JURORS SOLELY ON THE BASIS OF RACE.

Initially it must be noted that both the victim and defendant are black, and although the dictates of State v. Neil, 457 So.2d 481 (Fla. 1984), apply in every case, the concerns embodied in Neil are certainly diminished. Prosecutorial motives are the key, and where both victim and defendant are of the same race, there is no obvious motive for the prosecutor to exercise peremptories solely on the basis of race.

In the instant case defense counsel requested a Neil inquiry when the State exercised four consecutive challenges to excuse black jurors (T.643-645). Prior to that point, the State and defendant had each excused one black juror, one had been accepted as a juror, and one had been excused for cause. The trial court did not have an opportunity, pursuant to Neil, to determine if the defendant had demonstrated a strong likelihood that the State had exercised peremptories solely on the basis of race. Rather, the State readily offered its reasons for striking the four black jurors in question (T.643-644). As to juror Rogers, she had been arrested for heroin possession and carrying a concealed firearm (T.645). Juror Murray had also been a defendant in two

criminal cases, carrying a concealed firearm (T.645) and assault and battery (T.646), and had expressed opposition to the death penalty. As to juror Douglas, she had also expressed reservations concerning capital punishment (T.646). Finally, as to juror Frederick, her stepson was in prison for murder (T.640).

This Court has repeatedly held that the mere exclusion of a number of blacks is not sufficient to warrant a Neil inquiry. Parker v. State, 476 So.2d 134 (Fla. 1985), (exclusion of four blacks, standing alone, is insufficient to satisfy "strong likelihood" test), Woods v. State, 490 So.2d 24 (Fla. 1986), (exclusion of five blacks, by itself, insufficient to trigger Neil inquiry). See also Rose v. State, 492 So.2d 1353 (Fla. 5th DCA 1986), and Taylor v. State, 491 So.2d 1150 (Fla. 4th DCA 1986). In the instant case the issue is somewhat moot, since the prosecutor offered his reasons before the trial court ruled on the defendant's request for a Neil inquiry. Nevertheless the State submits that this Court need not address the reasons offered by the prosecutor, as the defendant failed to demonstrate a strong likelihood that the prosecutor exercised peremptories solely on the basis of race. In any event the prosecutor's reasons clearly satisfied the second prong of Neil. The fact that two of the jurors had twice been criminal defendant's, that one had a stepson in prison for murder, and that the fourth had strong views against capital punishments, are all valid

reasons having nothing whatever to do with the jurors race. The defendant's Neil challenge was thus properly denied.

The defendant argues that the trial court's use of the phrase "systematic exclusion", indicated that it was applying the pre-Neil standard of Swain v. Alabama, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965). It is more than apparent that the trial court was referring to systematic exclusion in the instant case. In Parker v. State, supra, this Court had no difficulty understanding that "systematic exclusion", as used by the trial court. referred only to the case at hand. The same is true here as well.

VII.

THE TRIAL COURT DID NOT ERR IN SENTENCING THE DEFENDANT TO DEATH WHERE THE DEFENDANT HAD REJECTED THE STATE'S PLEA OFFER OF FIRST DEGREE MURDER WITH A LIFE SENTENCE PRIOR TO TRIAL.

The record regarding plea discussions indicates the following. The parties appeared before Judge Orr May 22, 1986. Judge Orr inquired if the parties had discussed a plea (T.125). Prosecutor Scott Sakin announced the State would offer a plea only to first degree murder. The court inquired as to discussions concerning second degree murder, and Mr. Sakin replied that they had discussed it, but based on the nature of the crime, and discussions with the victim's family, the State could not offer a plea to second degree murder (T.125-126). The court then asked defense counsel his position on the plea to first degree murder (T.127). Defense counsel stated it was unacceptable (T.127, 129).

The above discussions all occurred prior to trial on the defendant's unrelated rape case. On June 6, 1986 the defendant was convicted of sexual battery with slight force, and acquitted of robbery, in that case (T.133-134).

On July 21, 1986, the parties appeared before Judge Sepe, the trial judge. Following a hearing on the defendant's motion to suppress, the defendant presented a motion to preclude the State from seeking the death penalty (T.206-

207). Defense counsel contended that the State was not preceding in good faith, since they had previously offered a plea to second degree murder (T.214). The Court instructed defense counsel to present his evidence as to prosecutorial vindictiveness (T.217-219). Defense counsel called as a witness his assistant, Henry Rauch (T.219). Rauch testified that following a suggestion by Judge Orr, he and prosecutor Sakin discussed the feasibility of a plea to second degree murder (T.220-221). Sakin suggested that if a plea to second was acceptable to the defendant, Sakin would seek approval from his superiors. Rauch specifically acknowledged that the State never offered a plea to second degree murder (T.223-224). The following day Sakin announced that the State could only offer a plea to first degree murder (T.224). The Court's response was "That's it? Where do you see vindictiveness in this?" (T.225). Defense counsel again accused the prosecutor of vindictiveness for offering life one moment and seeking death the next (T.229,230). The Court asked prosecutor Sakin if he had ever characterized the case as "a second degree murder case" (T.231), and Sakin replied "Never. Nothing close to that" (T.223). Sakin then explained his discussions with Rauch were conditioned on approval from his superiors (T.223-234). Prosecutor Michael Band then explained the process which resulted in the State's decision not to offer a plea to second degree murder (T. 235-237). He stated that a plea to second degree murder was never a serious possibility in this case, but that if the

defendant indicated a willingness to plead to first degree murder, the State would consider it (T.239). The Court then inquired if the State had offered a plea to life (T.240). Band stated that defense counsel had previously indicated a plea to life was unacceptable, and he therefor had not discussed it further (T.240). Defense counsel then pointed out the State had offered a plea to first degree murder and life, which the defendant had rejected (T.240-241). Mr. Band then explained that even if the defendant indicated a willingness to plead guilty to first degree murder, Band would still need approval from his superiors to waive the death penalty (T.241-243). The trial court then denied the defendant's motion to preclude the death penalty, finding that the above described events were not evidence of vindictiveness, but rather a normal part of the prosecutorial decision-making process (T.243-247).

The above facts clearly demonstrate that the prosecution did not pursue a vindictive course of conduct. There is absolutely no authority to support the defendant's argument that once a plea to life is offered by the State, and rejected, the State is thereby precluded from seeking the death penalty. The two Third District cases cited by the defendant, Fraley v. State, 426 So.2d 983 (Fla. 3d DCA 1983), and Frazier v. State, 467 So.2d 447 (Fla. 3d DCA 1985), hold only that a trial court cannot offer a plea at the close of the evidence, then render a stiffer sentence after the jury

returns a guilty verdict, without stating its reasons on the record. The defendant's argument is devoid of merit, and should be rejected outright by this Court.

VII.

THE TRIAL COURT PROPERLY DENIED THE DEFENDANT'S MOTION TO SUPPRESS HIS CONFESSION.

The conduct of the police officers who questioned the defendant, and in particular Detective Buhrmaster, was not only constitutional, but exemplary as well. The Detectives left their business card at the defendant's residence, and the defendant called and requested an interview concerning the murder. Upon arrival he was allowed to use the telephone and given refreshment and access to the restrooms. His miranda rights were scrupulously honored, with the defendant specifically agreeing to speak without an attorney present. The defendant was promised nothing. He was treated humanely and courteously by the officers, who bought him lunch after the interview was concluded. The entire process lasted only three hours. The defendant conceded in his statement that he had been well treated, and that he felt good that he had gotten the murder "off my chest".

The defendant finds it objectionable that, after he initially denied his involvement, Detective Buhrmaster confronted him with the victim's dying declaration and the discovery of the defendant's hat at the scene. The State submits that far from being objectionable, Buhrmaster's strategy was perfectly acceptable. Buhrmaster did not badger or verbally abuse the defendant, rather he placed the State's

cards squarely on the table. The defendant himself stated that he liked Buhrmaster's style, especially the way Buhrmaster confronted him with the facts.

The defendant claims that Buhrmaster deceived the defendant and played upon his weaknesses. The record flatly contradicts these assertions. Buhrmaster stated that although he considered deception a legitimate tactic, he did not lie to the defendant. When confronting the defendant, Buhrmaster did state that based on the evidence, he knew the defendant committed the murder. Even if this is viewed as deception, it would not render the confession involuntary. As the Third District recently observed, "deception short of an overbearing inducement is a valid weapon of the police arsenal." State v. Manning, 12 F.L.W. 1155, 1157 (Fla. 3d DCA May 5, 1987). See also Frazier v. Cupp, 394 U.S. 731, 89 S.Ct. 1420, 22 L.Ed.2d 684 (1969), Grant v. State, 171 So.2d 361 (Fla. 1965), United States v. Castaneda-Castaneda, 729 F.2d 1360 (11th Cir. 1984).

The evidence overwhelmingly demonstrated that the defendant's confession was free and voluntary, and thus properly admitted.

IX.

THE EVIDENCE WAS SUFFICIENT TO SUSTAIN THE DEFFENDANT'S CONVICTION FOR ARMED BURGLARY WITH AN ASSAULT.

It is not necessary for the State to prove unlawful entry, only that the defendant remained in the structure with the intent to commit an offense therein. Routly v. State, 440 So.2d 1257, 1262 (Fla. 1983). The defendant admitted in his statement that he deliberately armed himself with a kitchen knife, and that he used the knife to threaten the victim into giving him money. He also stated that he sharpened the knife in front of the victim for that same purpose, which is corroborated by the discovery of the sharpener in the living room, along with the murder weapon. From this the jury was certainly entitled to find that the victim suffered a well founded fear of imminent violence. The defendant's arguments to the contrary are without merit, and the defendant's conviction and sentence for armed burlary with an assault should therefore be affirmed.

X.

THE TRIAL COURT PROPERLY FOUND THREE AGGRAVATING FACTORS, NO MITIGATING FACTORS, AND NO NONSTATUTORY MITIGATING FACTORS, AND PROPERLY IMPOSED THE DEATH PENALTY.

AGGRAVATING FACTORS

1). **The defendant was previously convicted and adjudicated of a felony involving the use or threat of violence to the person.**

On June 6, 1986, in Case No. 85-22092, the defendant was convicted and adjudicated of sexual battery with force not likely to cause serious injury (T.133). The defendant argues that the State should have been precluded from using this conviction due to prosecutorial vindictiveness, in that the State deliberately proceeded to trial on the sexual battery case first, so that it could employ the conviction at the sentencing phase of the instant case.

The scheduling of cases within its docket is a matter entrusted to the sole discretion of the trial court. Rhea Land Co. v. Duncan, 151 So. 487 (Fla. 1933), Sunrise Medical Group, P. A. v. Propst, 430 So.2d 533 (Fla. 4th DCA 1983). The sexual battery occurred on July 16, 1985, and the murder

six weeks later, on August 29, 1985 (T.142). The trial court scheduled the cases on the basis of the date the crimes occurred:

> THE COURT: Which case case occurred first in time?
>
> MR. SAKIN: The sexual battery case, July 1985.
>
> MR. SMITH: Mr. Moore was arrested on murder first.
>
> THE COURT: Which, according to the State's allegation, which events occurred first, the rape or murder?
>
> MR. SAKIN: Rape.
>
> THE COURT: Go with the rape first.
>
> (T.115).

The court reiterated its "first in time" reasoning several times (T.122, 123, 210, 211). The trial court acted entirely within its discretion, and this aggravating factor was therefor properly found by the trial court.

2). **The defendant committed a capital felony while engaged in the commission or attempt to commit a burglary.**

The defendant was properly convicted of armed burglary with an assault, hence the trial court correctly found this aggravating factor.

3). **The Capital Felony was especially heinous, atrocious and cruel.**

After slitting the victim's throat from ear to ear, the defendant fled, leaving her to suffer a slow, excruciatingly painful death. Her life's blood poured out as she struggled upstairs to the telephone, leaving a grissly trail of feces and blood on the stairway, and a large pool of blood by the phone. In addition to the pain, the victim swallowed her own blood, and could hear gurgling sounds as the air escaped through the gaping hole in her neck. Her white top turned completely red with blood. When Regina Burger found the victim she was attempting to crawl back up the stairs, stairs now covered with her own blood and feces. The victim's eyes were full of tears, her faced consumed with fear. Burger saw a look of impending doom, a look she had seen in dying patients before. Burger had to shout at the victim, who had no pulse or blood pressure, to keep her conscious as they rode to the hospital. The victim repeatedly grabbed Burger's arms in a desperate bid to hang on. Dr. Gray stated that based on the pain, blood loss, escaping air and severity of the wounds, the victim probably knew she was dying.

The State submits that if the above facts do not qualify as heinous, atrocious and cruel, nothing would. See Floyd v. State, 497 So.2d 1211 (Fla. 1986), Squires v. State, 450 So.2d 208 (Fla. 1984), Washington v. State, 362 So.2d 658 (Fla. 1978).

4). **The capital felony was not committed while the defendant was under the influence of extreme mental or emotional disturbance.**

The defendant fails to distinguish between two critically different concepts. The first is the mere diagnosis of mental illness. The experts all agreed the defendant was schizophrenic, Drs. Reichenberg and Castiello diagnosing paranoid schizophrenia, and Dr. Jaslow schizophrenic with paranoid tendencies. The second concept, the one relevant here, is whether at the time of the offense the defendant was actively suffering some extreme disturbance. This distinction was not lost upon the trial court (T.1615-1616). There was no evidence whatsoever that at the time of the murder, the defendant was under the influence of a mental disturbance. Dr. Reichenberg testified that the defendant was a paranoid schizophrenic, but offered no testimony as to the defendant's state of mind at the time of the offense. Dr. Reichenberg did not even discuss the case with the defendant. Dr. Jaslow, on the other hand, testified that there was no evidence of any mental disturbance at the time of the offense. The best evidence of the defendant's state of mind was his detailed statement barely 24 hours after the offense, as well as the testimony of the defendant's friend, Leroy Jackson, who calmly conversed with the defendant the morning of the murder concerning the state of his lawn and garden. In sum, there was no evidence that at the time of

the offense, the defendant was under the influence of an extreme mental or emotional disturbance. See Atkins v. State, 497 So.2d 1200 (Fla. 1986); Provenzano v. State, 497 So.2d 1177 (Fla. 1986); and Leduc v. State, 365 So.2d 149 (Fla. 1978).

5). **The defendant's capacity to appreciate the criminality of his conduct, and to conform his conduct to the requirements of the law was not substantially impaired.**

The defendant did not raise the rejection of this mitigating factor as error, however defendant's appellate counsel has informed undersigned this was due to a misreading of the transcript and sentencing order, in that counsel mistakenly believed this mitigating factor had been found by the trial court. The issue will therefor be addressed.

As stated above, the defendant presented no evidence that the defendant was in any way mentally impaired at the time of the offense. Dr. Reichenberg did not question the defendant concerning the offense. Dr. Castiello twice found the defendant sane. Dr. Jaslow found no evidence of impairment whatever. Again, the mere diagnosis of mental illness is insufficient. Atkins, Provenzano, Leduc, supra. The mental illness must be shown to have substantially affected the defendant's capacity at the time of the offense,

something the defendant utterly failed to do. The defendant's own statement was the State's best evidence on this point.

6). The trial court properly found no non-statutory mitigating factors.

The trial court was justified in determining that the defendant's cooperation with police, and family and social background, did not rise to the level of a nonstatutory mitigating factor. Lemon v. State, 456 So.2d 885 (Fla. 1984), Mason v. State, 438 So.2d 374 (Fla. 1983), Daugherty v. State, 419 So.2d 1067 (Fla. 1982).

XI.

THE DEATH PENALTY DOES NOT CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT.

As noted by the defendant, this is not a viable issue. Profitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976).

XII.

THE DEFENDANT WAS NOT DENIED A FAIR TRIAL DUE TO CUMULATIVE ERRORS BY THE TRIAL COURT.

The State is precluded from arguing harmless error as to the first issue on appeal, denial of challenges for cause, by virtue of Hill v. State, supra[10]. However, as to the remaining issues, any error was harmless beyond a reasonable doubt based on the overwhelming nature of the evidence, both as to the defendant's commission of the offense and his sanity at the time. The victim's dying declaration, the discovery of the defendant's hat at the scene, and his detailed confession, containing numerous details only the killer could know, demonstrated beyond any doubt that he committed the murder of Birdie Jenkins. The defendant presented no evidence as to his insanity at the time of the

[10] In Hill this Court announced that erroneous denial of a defense challenge for cause is per se reversible, even though the objectional juror was then peremptorily stricken by the defendant. Oddly, this Court did not mention Rollins v. State, 148 So.2d 274 (Fla. 1963), in which this Court applied harmless error in the identical situation. In Anderson v. State, 463 So.2d 276 (Fla. 3d DCA 1984), the Third District stated it felt constrained to apply harmless error based on Rollins, supra. See also Wheeler v. State, 362 So.2d 377 (Fla. 1st DCA 1978). In addition, this Court has recently held that failure to allow backstriking is subject to harmless error. Rivers v. State, 458 So.2d 762 (Fla. 1984). The State does not expect this Court to recede from the per se rule announced in Hill, although we urge the Court to do so. However, the Court could at least give Rollins a decent burial, and recognize that Hill was not a restatement of existing law, but rather a significant departure.

offense. The State's expert, and particularly the defendant's own statement the following day, irrefutably dispell any doubt as to his sanity at the time of the murder. Any error was thus harmless beyond a reasonable doubt.

CONCLUSION

The judgment and sentence rendered below are proper, and should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that a true and correct copy of the foregoing **BRIEF OF APPELLEE**, was furnished by mail to **MAY L. CAIN**, Esquire, Suite 401, 11755 Biscayne Blvd., North Miami, Florida 33181 on this 29 day of June, 1987.

RALPH BARRIERA
Assistant Attorney General

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