IN THE SUPREME COURT OF FLORIDA

JAMES ANSEL HARMON,

Appellant,

v. CASE NO. ~~69,824~~

STATE OF FLORIDA,

Appellee.
_____/

ANSWER BRIEF OF APPELLEE

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

KEVIN KITPATRICK CARSON
ASSISTANT ATTORNEY GENERAL
125 N. Ridgewood Avenue
Fourth Floor
Daytona Beach, Florida 32014
(904) 252-1067

COUNSEL FOR APPELLEE

TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS (CONTINUED)

TABLE OF CITATIONS (CONTINUED)

TABLE OF CITATIONS (CONTINUED)

TABLE OF CITATIONS (CONTINUED)

OTHER AUTHORITIES

STATEMENT OF THE CASE

The appellee notes the following areas of disagreement with the appellant's statement of the case:

1. The appellee disagrees with appellant's statement that the state elicited testimony that appellant was, in the past, addicted to cocaine. The witness testified that appellant had a cocaine habit and kicked the habit (R 624).

2. The appellee disagrees with appellant's statement that appellant's cross-examination of Larry Bennett was restricted. The state's objection was sustained because appellant's question had been answered (R 790-791).

3. The appellee disagrees with appellant's statement that the trial judge commented, either directly or indirectly, on the credibility of Larry Bennett. This issue is discussed more fully in Point Three of this brief.

4. The appellee disagrees with appellant's argument that the trial court "forced" the defense counsel to continue the trial into the evening hours, when defense counsel were "extremely fatigued." This exaggerates the facts, there being no force used nor any claim of "extreme fatigue." This issue is discussed more fully in Point Four in this brief.

5. The appellee disagrees with appellant's allegation that cross-examination by the state implied that appellant was wanted for collateral crimes in Texas (R 1212-1214). The record reveals that appellant testified, on direct examination, that appellant was wanted in Texas for something appellant had done in Alabama (R 1173).

6. Sometime later, in sentencing Bennett, the trial court specifically found that the facts of the crime indicated that Bennett was guilty as an accessory after the fact in the murder, "if he was guilty of that." (See, appendix).

STATEMENT OF FACTS

The appellant offers the following additions and corrections to appellant's statement of the facts:

1. Appellant's gun was approximately 1-1/2 to 2 feet away from the back of the victim's head when appellant shot the victim (R 726-727, 735-736).

2. Mark Shadle testified that appellant had admitted shooting the victim (R 483). Appellant also asked Shadle to help appellant manufacture an alibi (R 510).

3. Stephen Germany estimated that the victim (his father) had at least $2500, in cash, at the house before the murder (R 277). He further testified that, at the time his father's body was discovered, he thought Marion Germany might have had prior knowledge of the murder (R 293-294).

4. When appellant and Bennett split up in Texas (before appellant traveled to Florida), appellant told Bennett to stick to the story appellant was going to tell. Appellant also said, "loose lips sink ships." (R 766)

5. Appellant took the witness stand, claimed an alibi defense, and admitted lying to Investigator Combs in Florida (R 1191).

SUMMARY OF ARGUMENT

POINT ONE: The vast majority of alleged collateral crime evidence, which appellant claims was erroneously admitted into evidence, was allowed into evidence by appellant without objection. As such, appellant's arguments, as they relate to this evidence, are not preserved for appellate review. Some of the remaining evidence about which appellant complains is not collateral crime evidence. Other claims by appellant are not supported by the evidence. There is sufficient independent evidence of appellant's guilt to render harmless any alleged error. The alleged collateral crime evidence was not made a feature of the trial by the state.

POINT TWO: The out-of-court statements, offered through two state witnesses, were not offered to prove the truth of the matter asserted therein, and therefore, were not hearsay. The disputed testimony was tied-up through other witnesses.

POINT THREE: The trial court did not comment on the credibility of Larry Bennett. It correctly guided the use of impeachment evidence.

POINT FOUR: Appellant has failed to show that either of his trial attorneys were unable to adequately represent him during the evening portion of his trial. Contrary to the advocacy of the appellant, appellant's attorneys did not claim that they were extremely fatigued or that the effectiveness of their representation of appellant was impaired in any way.

POINT FIVE: The ultimate decision as to whether the death penalty should be imposed rests with the trial judge. The trial

court, in finding four aggravating factors and no mitigating factors, properly overruled the jury recommendation of life imprisonment.

POINT SIX: The trial court finding that there are four aggravating factors is supported by evidence proven beyond a reasonable doubt. The court properly considered and weighed the evidence in mitigation in finding that no mitigating circumstances existed in this case.

POINT SEVEN: Florida's capital sentencing statute has been repeatedly held to be constitutional by previous decisions of this court. This issue was not preserved for appellate review.

POINT ONE

THE EVIDENCE OF ALLEGED COLLATERAL CRIMES, WHICH REMAIN PRESERVED FOR APPEAL, WERE RELEVANT TO ISSUES OTHER THAN PROPENSITY TO COMMIT THE CRIME CHARGED OR BAD CHARACTER OF THE APPELLANT.

ARGUMENT

In his first point on appeal, appellant claims that reversible error occurred during his trial by virtue of the admission into evidence of collateral crime and bad acts which lacked probative value, were offered in evidence only to show appellant's bad character or criminal propensity, and which became a feature of the trial. The appellee respectfully disagrees. In support of his argument, appellant provides a long list of allegedly "objectionable" evidence.

At the outset, it should be noted that appellant candidly admits that all of the allegedly improper evidence he calls to the attention of this court, with the exception of about six facts or statements, was admitted without a single objection being first presented to the trial court. As a result, under the settled law of this state, appellant's complaints in this court regarding this evidence have not been preserved for appeal. Richardson v. State, 437 So.2d 1091 (Fla. 1983); Ferguson v. State, 417 So.2d 639 (Fla. 1982); Clark v. State, 363 So.2d 331 (Fla. 1978). Appellant does not have the privilege of refraining from making a timely objection to matters he feels are prejudicial, and then waiting until he has been convicted before raising a cry of prejudice. See, German v. State, 379 So.2d 1013 (Fla. 4th DCA 1980). This is the kind of "sandbagging" that the

Florida contemporaneous objection rule was designed to prevent. See, Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 2508, 53 L.Ed.2d 594 (1977), Castor v. State, 365 So.2d 701 (Fla. 1978).

As legal authority for support of his claim of error, appellant relies on Williams v. State, 110 So.2d 654 (Fla. 1959). In Williams, this court held that though similar fact evidence of other crimes is admissible when relevant to prove any fact in issue, an exception to the rule of admissibility exists when the sole relevance of the similar fact evidence is to show bad character or a propensity of the accused to commit the charged crime. The Williams rule is a more specific application of the general principle that evidence is admissible if relevant to prove a fact in issue unless its admissibility is precluded by some specific rule of exclusion. Ruffin v. State, 397 So.2d 277 (Fla. 1981).

The evidence presented in this case is not similar fact evidence, and, as a result, does not fall within the Williams rule. See, Gorham v. State, 454 So.2d 556 (Fla. 1984). Thus, appellant's claim, raised for the first time on appeal, that he is entitled to notice of intent to use similar fact evidence is without merit. Therefore, the test of admissibility of the evidence becomes its relevance. Additionally, appellant did not complain of lack of notice in the trial court so this argument is not preserved for appeal. Castor, supra.

The first collateral crime evidence to which appellant claims to have interposed a contemporaneous objection and preserved for appellate review, relates to a statement by a

witness, on redirect examination, that appellant had a cocaine habit and kicked the habit. (R 264). Appellant has not preserved this issue for review. When appellant objected to the prosecutor's redirect examination of the witness regarding her conversations about drugs with appellant, the legal basis for the objection was as follows:

> MR. SHELNUTT: Judge, that's beyond the scope of (cross) examination.

(R 623-624). The trial court overruled the objection.

It is settled, in Florida, that to meet the objectives of the contemporaneous objection rule, an objection must be sufficiently specific both to apprise the trial court of the putative error and preserve the issue for intelligent appellate review. Castor, supra. In order for a legal argument to be cognizable on appeal, it must be the specific argument asserted as legal ground for objection in the trial court. Steinhorst v State, 412 So.2d 332, 338 (Fla. 1982); Rosemond v. State, 489 So.2d 1185 (Fla. 1st DCA 1986). Since appellant did not object to the prosecutor's redirect examination on the basis of an allegedly improper attack on character by the use of collateral crime evidence, he may not now assert that argument on appeal. Appellate counsel must be bound by the acts of trial counsel. Castor, supra. Had a proper basis for the objection been stated, the trial court would have been able to consider the examination in the proper context and the prosecutor might have been required to explore and explain the reason for which he sought to elicit the testimony. The objection was properly overruled on the basis that the prosecutor's redirect examination was not beyond the

scope of appellant's cross-examination. See, Ehrhardt, Florida Evidence, § 104.2 (2d Ed 1984).

During cross-examination of Kathy Gates, appellant sought to elicit favorable evidence relating to a trait of his character and present himself as a person who maintained long term relationships and who had feelings for other people. Appellant was seeking, on cross-examination, to portray himself in a positive light to the jury. This set the factual background for the prosecutor's redirect examination which sought to qualify and limit the effect of appellant's cross-examination by offering, in rebuttal, evidence that appellant also had a character trait of self-indulgence, as demonstrated by his use of drugs. There was no prejudice by this admission, since the witness also said that the appellant had kicked his drug habit (R 624). Appellant opened the door to the prosecutor's rebuttal evidence. See, **§ 90.404(1)(a), Fla. Stat. (1985).**

Even if evidence of appellant's former drug habit was improperly admitted, a reversal is not required. The basis for prohibiting admission of collateral crimes is as follows:

> **Evidence that the defendant has committed a similar crime, or one equally heinous, will frequently prompt a more ready belief by the jury that he might have committed the one with which he is charged, thereby predisposing the mind of the juror to believe the prisoner guilty.**

Nickels v. State, 90 Fla. 659, 685, 106 So. 479, 488 (1925) (Emphasis supplied). Appellant's former drug habit is not similar and not as equally cold-hearted as the murder, nor was

appellant's habit a crime of violence. Therefore, it is unreasonable that a jury would infer from appellant's former habit that appellant would commit first-degree murder. Since there was sufficient direct evidence of appellant's guilt of first-degree murder, any error was harmless. See, Craig v. State, 12 F.L.W. 269 (Fla. May 28, 1987).

Appellant next claims that, over objection, the trial court erroneously allowed the state to introduce collateral crime evidence "that (appellant) was involved with stolen jewelry." The record simply does not support appellant's assertion. The trial court specifically advised the prosecutor and appellant's trial attorneys, that the witness, Mark Shadle, was only to talk about going to South Carolina, picking up some diamonds for the appellant, selling the diamonds, and splitting the proceeds with appellant (R 472-473). The prosecutor was told not to mention that the diamonds might be stolen (R 474). The prosecutor complied with the court order (R 489-490). Thus, appellant's claim that collateral crime evidence that he was involved with stolen jewelry was improperly admitted into evidence is without merit. The discussion regarding diamonds was not offered for the single purpose of impugning appellant's character, but rather, was offered to demonstrate to the jury the trust relationship which had developed between appellant and Shadle. This allowed the jury to see the entire relationship which existed between the two men. It was relevant to assist the jury in understanding why appellant would admit committing murder to a person who was otherwise a complete stranger. See, Waterhouse v. State, 429

So.2d 301 (Fla. 1983). Parenthetically, the appellee notes that this court has permitted evidence of other murders to be considered by a jury in order to establish the entire context out of which a charged murder occurred. See, Smith v. State, 365 So.2d 704 (Fla. 1978).

Appellant's claim that evidence of a plan shared by appellant, Larry Bennett, and Marion Germany to commit insurance fraud and get rich, indirectly, in the appliance business, appears to have been preserved for review. This testimony was elicited during redirect examination of Larry Bennett (R 923-924), after appellant, during cross-examination, questioned Bennett about the intent of Bennett and appellant to get rich in the appliance business (R 800). During cross-examination of Bennett, appellant placed his character in issue through Larry Bennett (R 795-801). Though Bennett considered appellant to be a likeable fellow, other people did not (R 797). Bennett and appellant were good friends, similar to a father/son or older brother/younger brother type of relationship (R 797). Appellant kept Bennett from getting caught (R 798). The insurance fraud evidence was not offered to prove bad character, but was offered to make clear, for the jury, the relationship between Bennett and appellant. Bennett was allowed to testify, without objection by appellant, that Bennett had never before seen appellant do anything violent (R 918).

Reversal of appellant's conviction is not required if the testimony regarding insurance fraud is erroneously admitted; insurance fraud is not a crime which is "similar" or as "equally

heinous" as murder, so that it is highly unlikely and unreasonable to presume that a jury would infer that because a person might use appliances in insurance fraud, the same person would murder a friend. See, Johnston v. State, 497 So.2d 863 (Fla. 1986). Larry Bennett also testified that violence was out-of-character for appellant (R 744). Since there was sufficient direct evidence of appellant's guilt of first-degree murder, any error was harmless.

Appellant's claim that evidence that Texas authorities wanted appellant for other unrelated crimes was admitted over his objections is without merit. The record reflects that the state presented no such evidence and that it was appellant who actually testified about this during his own direct examination (R 1173, 1212-1213). As a result, this aleged error was also created by appellant so he cannot now complain on appeal. White v. State, 446 So.2d 1031 (Fla. 1984); Clark, supra. Appellant admitted having six (6) felony convictions (R 1202).

Appellant's claim that a jury instruction constitutes objectionable collateral crime evidence is not supported by the record. The trial court was properly instructing the jury that it was not permitted to know the nature of appellant's six (6) prior felony convictions which the state had used in impeaching the appellant (R 1360-1362). Appellant's attorney had attempted to mislead the jury into believing that the prior convictions were for non-violent felonies, invited this situation, and thereby is precluded from complaining on appeal. White, supra; Clark, supra.

Appellant's claim that collateral crime evidence of appellant engaging in "unnamed illegal activity with Marion Germany" is also unsupported by the record. The transcript of appellant's conversation with Investigator Combs demonstrates that the disputed excerpt relates only to illegal activities of Marion Germany, not appellant (SR 8-9). The disputed excerpt does not connect appellant to any illegal activities.

Finally, appellant's claim that collateral crime evidence which allegedly showed that appellant had been incarcerated in a Kentucky county jail was improperly admitted, is simply not supported by the record. The witness, Mickey Powell, testified that it was Powell who was incarcerated in the jail when Powell met appellant. There was no testimony that appellant was incarcerated in the Kentucky jail at the time appellant met Powell (R 647-648). Appellant expressed satisfaction with the clarifying instruction on the issue which was given by the trial court at appellant's request (R 649-650).

Any error in admitting any collateral crimes into evidence was harmless beyond a reasonable doubt. Larry Bennett observed appellant commit the murder (R 726-727). Appellant admitted killing the victim to Mark Shadle (R 483). Shadle testified that appellant attempted to solicit him to assist in providing appellant with an alibi (R 510). Appellant admitted being untruthful with law enforcement officers who were investigating the crime (R 1249-1251, 1255-1257). The disputed evidence was not unduly emphasized as it was presented to the jury. The prosecutors did not refer to any alleged collateral crimes in

closing argument to the jury. Thus, it is clear that any alleged collateral crimes which were admitted into evidence were not turned into a feature of the trial by the state. A trial court is not required to, on its own motion, give a cautionary instruction for the reception of collateral crime evidence. Ashley v. State, 265 So.2d 685, 694 (Fla. 1972). No reversible error has been demonstrated regarding this point on appeal.

POINT TWO

THE TESTIMONY OF STEPHEN GERMANY AND THE MEDICAL EXAMINER DID NOT CONTAIN HEARSAY SINCE THE OUT-OF-COURT STATEMENTS WERE NOT OFFERED TO PROVE THE TRUTH OF THE MATTER ASSERTED THEREIN.

In this second point on appeal, appellant claims that hearsay testimony was improperly admitted, over objection, twice during his trial. Appellant claims that certain testimony of Stephen Germany, the victim's son, and Keith Gauger, the medical examiner's investigator, was hearsay.

The testimony of Stephen Germany was a part of a line of questioning which began with the following question from the prosecutor relating to the last time that Stephen had seen his father alive:

> Q. And would you tell us briefly what the circumstances were around your seeing him?

(R. 264-256). Shortly after this question was asked, Stephen Germany testified, over appellant's hearsay objection, as follows:

> A. Around 5:00 on Monday, Marion called me and said that he was supposed to be here already on Monday but something had happened with his daughter's well and it wasn't working and he had to stay there until it was fixed and asked me was I planning on going back over there anytime soon.

(R 269). Considered in its entire context, it is clear that Stephen Germany's testimony regarding Marion Germany's statements was not offered to prove that Marion Germany was supposed to be in Florida on Monday, or that something had happened to Kathy

Germany's well, or that Marion had stayed in South Carolina until the well was fixed. This testimony was a part of other testimony which was also offered to explain Stephen Germany's actions in going to Ocala and eventually participating in the investigation of his father's murder.

Hearsay is an out-of-court statement, other than one made by the declarant who testifies at the trial or hearing, offered to prove the truth of the matter contained in the statement. Breedlove v. State, 413 So.2d 1, 6 (Fla. 1982); **§ 90.801(1)(c), Fla. Stat. (1985).** In Florida, there are three reasons for excluding hearsay from evidence: (1) The declarant does not testify; (2) the jury cannot observe the declarant's demeanor; and (3) the declarant is not subject to cross-examination. Id. The hearsay rule does not prevent a person from testifying regarding what he has heard; rather, it is a restriction on the proof of a fact through out-of-court statements. Id. Merely because a statement is inadmissible for one purpose does not mean that it is inadmissible for another purpose. Id.

Since Stephen Germany's recitation of what Marion Germany said over the telephone was offered to describe the circumstances leading up to Stephen's involvement in the investigation of his father's murder, and not for the truth of Marion's statements, under the rationale of Breedlove, the statement was not hearsay. Appellant's citations of authority relating to the hearsay rule are thus inapplicable to appellant's case. Appellant's claim in his brief that Stephen's statement improperly bolstered Marion Germany's testimony was not the legal

argument for inadmissibility which was presented to the trial court so that it has not been preserved for review. Steinhorst v. State, 412 So.2d 332 (Fla. 1982). In closing argument, appellant's theory of defense was primarily that Larry Bennett had killed the victim (R 429, 1348, 1350-1354), claiming that Bennett needed money for a drug habit (R 1352). Although appellant argued that one of the possible theories of defense was that Bennett and others murdered the victim (R 1364), appellant, in closing argument did not seriously suggest that Marion Germany was involved.

Appellant cannot claim prejudice by Stephen Germany's testimony. Marion Germany testified under oath at appellant's trial and was subject to cross-examination (R 586-612). Appellant apparently had no objection to Stephen Germany's testimony, so long as Marion testified (R 268).

The testimony of Keith Gauger, the medical examiner's investigator, regarding Stephen Germany's statement that Stephen's father had been murdered was not hearsay, under the rationale of Breedlove, supra, because it was not offered to prove the truth of the matter asserted therein. Regardless of appellant's argument, the testimony was not prejudicial. Doctor Techman, the pathologist who autopsied the victim, testified that the victim died from a single gunshot wound to the head (R 230-231), fired from about 1-1/2 to 2 feet away (R 243). In his closing argument to the jury, appellant conceded that the victim's death was caused by the criminal act of another (R 324).

Appellant has failed to demonstrate prejudicial error by the

admission of the disputed statements into evidence.

POINT THREE

THE TRIAL COURT PROPERLY LEFT THE ISSUE OF WITNESS CREDIBILITY FOR RESOLUTION BY THE JURY.

Contrary to the advocacy of the appellant, the testimony of Larry Bennett was not the "only" evidence which linked appellant to the scene of the crime. Witness Mark Shadle testified that appellant, while in jail awaiting trial, admitted murdering the victim (R 483). Additionally, one of appellant's own witnesses connected appellant with committing the murder (R 943).

Though appellant's counsel on appeal claims that appellant's trial attorney impeached Larry Bennett with "numerous prior inconsistent statements throughout cross-examination", he fails to show this court where, in the record, this alleged impeachment occurred. Bennett candidly admitted any discrepancies (R 857), voluntarily mentioned any discrepancies to defense counsel (R 823), and explained that any discrepancies were the result of intoxication and confusion (R 784, 819-820, 823), brought on by his total astonishment that the murder had occurred (R 728). Appellant's attorney allowed Bennett to vouch for Bennett's own credibility (R 795). Bennett tried to explain to appellant's attorney that the attorney was inquiring about details which Bennett had not considered significant at the time this incident was unfolding (R 810). The record affirmatively refutes appellant's claim that he impeached Larry Bennett, since, based upon the testimony of Bennett, Shadle, and others, the jury found appellant guilty of first-degree murder.

Appellant first claims error by virtue of the following

colloquy between the prosecutor and the trial court:

> MR. MOORE: Judge, that's consistent with what he said here today and it's not inconsistent with what he's asked on his other statements.
>
> THE COURT: It appears to me to be also, but it's for the jury to decide that. Okay.

(R 827). This discussion represents the objection by the prosecutor to the method of which defense counsel was attempting to impeach Larry Bennett. Since **section 90.608(1)(a), Florida Statute (1985)** only allows a party to attempt to impeach a witness by the use of prior inconsistent statements, the introduction of a consistent statement did not fall within the scope of that section. The trial court overruled the prosecutor's objection and the defense counsel was obviously satisfied with the court's statement that the matter of whether the statements were consistent or inconsistent was for the jury to decide. Appellant's trial counsel voiced no objection to the statement by the trial court so that, by the settled law of this state, any alleged error in this colloquy was not preserved for review. Clark v. State, 363 So.2d 331 (Fla. 1978); Castor v. State, 365 So.2d 701 (Fla. 1978). There deposition testimony was, in fact, consistent with Bennett's trial testimony.

The full context of the trial testimony which appellant next claims contains error is as follows:

> Q. Let me ask you what Mr. Germany was doing immediately prior to his being shot by Mr. Harmon, as you say?
>
> A. Sitting at the table and drinking a cup of coffee talking to

me.

Q. Okay. You say that he was drinking a cup of coffee as you testify here today?

A. I don't know if he was in the process of--drinking it, but that's what he was doing at the table, sitting there having a cup of coffee.

Q. Okay. Now, you have indicated to Mr. Phillips on direct examination that you had gone in and put some coffee water on?

A. Yes, sir.

Q. Are you saying now that the--the coffee water was on, it was already made and that either you or Buck had already made the cup of coffee?

A. What I'm saying is when I went into the house, I--before I went in, I asked Buck if he had the coffee water on. He said yeah. I went in, and found there wasn't enough of hot water left to make me a cup of coffee so I put a couple of cups in the tea kettle and put it on the stove.

Q. So you are saying that--today that he was drinking the cup of coffee. Did you ever make another statement that is inconsistent with that you just gave in court?

A. Not to my knowledge.

MR. SHELNUTT: I refer counsel and Your Honor to the statement of October 26th on page 3, questions 29 and 30.

BY MR. SHELNUTT:

Q. "QUESTION": What did you say to him arriving there out of the blue?

"ANSWER: I said: Buck, you got the coffee water on? I put the coffee

water on and standing there talking to the man.

"QUESTION: Okay. Then what happened?

"ANSWER: He got shot in the back of the head."

So the coffee wasn't actually made; was it?

A. That's--

MR. MOORE: Again, I don't think that's inconsistent, Judge.

THE WITNESS: That's--

MR. SHELNUTT: Judge--

THE WITNESS: That's consistent. That's the same thing.

MR. SHELNUTT: May we approach the bench?

THE COURT: Yes.

(Bench conference:)

MR. SHELNUTT: Judge, with all due respect to the court, the jury is the one that's going to have to determine whether or not those statements are consistent or inconsistent and, if you keep telling the jury that those statements are consistent, then I think you are invading the province of the jury.

THE COURT: I only said that once. I didn't say that.

MR. SHELNUTT: Judge, you said it at least two or three times.

THE COURT: No. I said it one time, I said I don't know, it's a jury question.

MR. SHELNUTT: So then--

THE COURT: But--the state has the right to object everytime you say that, because what you are trying to--what you are--I don't want you to do is take a statement that he knows is consistent and keep saying it's inconsistent.

MR. SHELNUTT: Judge, what I'm doing is I'm pointing out is he says he's drinking a cup of coffee, another time he said the coffee water is on, but apparently it's not made yet.

THE COURT: Wait a minute. He could have one cup of coffee and one hot water and then he didn't have enough to make another cup for himself that's--you can't make things inconsistent that aren't.

MR. MOORE: That's why we're objecting, Judge.

MR. SHELNUTT: Judge, I'm not trying to--I'm trying to give the--I am reading verbatim from the statements that--

MR. MOORE: Mark, the jury can hear you.

THE COURT: But you can't say something in a prior statement even though it's verbatim and expect him to say the same verbatim thing again. If it's substantially the same, then it's not inconsistent.

MR. MOORE: I agree

MR. SHELNUTT: Judge, I would ask that you refrain from any comments from the bench.

THE COURT: All I'll say is sustained or overruled.

MR. SHELNUTT: Thank you.

MR. MOORE: Thank you.

(Bench Conference ended).

THE COURT: Overruled.

MR. SHELNUTT: Thank you, Judge.

(R 837-841). A reading of the entire colloquy between the court, the prosecutor, the witness, and appellant's defense counsel reveals that defense counsel was cross-examining Bennett about Bennett's statement that Bennett was putting on coffee water and that the victim was having a cup of coffee immediately before the victim was murdered (R 837). Defense counsel argued to Bennett that the coffee was not actually made (R 839). The record reflects that Bennett had begun to answer the defense attorney's question, but Bennett was interrupted by the prosecutor's objection that the trial testimony was consistent with deposition testimony, and interrupted again by defense counsel (R 839). Finally, Bennett explained to defense counsel that the statements were consistent (R 839). At this point, in a bench conference, defense counsel accused the trial court of commenting on the consistency of the purported impeachment evidence "at least two or three times." (R 839). The trial court admitted saying that testimony was consistent on one occasion, but correctly pointed out that it had also stated that it would leave the consistency of the testimony for the jury to determine (See, R 827). The court denied making any other statements regarding the consistency of the alleged impeachment testimony and the record reflects (contrary to the "sic" notation and advocacy of the appellant in his brief), that it was Larry Bennett who told defense counsel that the testimony was consistent (R 839). The prosecutor pointed out that it was objecting to the defense

attorney's method of attempting to impeach Bennett because the defense attorney was taking a statement which was consistent and saying that it was inconsistent (R 840). The trial court also recognized that defense counsel was trying to make statements that were consistent appear inconsistent (R 840-841).

The portion of the record, reproduced above, demonstrates that the statements which defense counsel tried to portray as inconsistent were actually consistent. As a result, the comments of the trial court were judicially proper in response to that portion of the cross-examination to which the prosecutor objected, and the court had addressed. Accord, Crews v. Warren, 157 So.2d 553 (Fla. 1st DCA 1963) (affirming trial court comments regarding consistency of impeachment evidence sought to be introduced as inconsistent).

The third trial court comment, to which appellant next objects, also related to an attempt by defense counsel to impeach by allegedly prior inconsistent statements and, arose in the context of the following proceedings:

> Q. Let's talk about the parts of the wallet.
>
> How many pieces was that little wallet cut up in?
>
> A. To the best of my recollection, two.
>
> Q. Okay. Is that what you told us this morning under direct examination?
>
> A. I don't think--I don't think I said how many pieces this morning.
>
> Q. Okay. You don't remember saying something like several pieces?

A. No.

Q. Okay. Did you ever make a statement that is inconsistent with the one you just gave about the parts of the wallet?

A. That's so--that's so--so vague--

Q. Did you or did you not?

A. I don't know. Did I?

Q. I wish I could--

A. I--I don't know.

Q. You don't remember?

A. No, sir.

MR. SHELNUTT: Okay. I'd refer counsel to page 29 of the December 18th statement. We'd better go to page 28.

BY MR. SHELNUTT:

"QUESTION: What was James doing while you were driving?

"ANSWER: Cutting the wallet up, cutting the identity up.

"QUESTION: What was he using to cut it up?

"Knife.

"QUESTION: What kind of knife?

"ANSWER: My pocket knife.

"QUESTION: What was the purpose of that?

"ANSWER: I don't know. I guess he was trying to get rid of any evidence that would link him to it.

"QUESTION: What happened to all of these shredded pieces of evidence?

"ANSWER: Out the window.

"QUESTION: As you were driving up the road?

"ANSWER: Starting on 326, up the road.

"QUESTION: A little bit at a time or all at once?

"ANSWER: A little bit at a time."

Does that sound like it was cut up in two pieces to you?

(R 851-853). The prosecutor objected to defense counsel's method of using apparently consistent statements in an attempt to impeach the witness by allegedly inconsistent statements. The trial court sustained the objection and defense counsel asked that the jury be allowed to judge the consistency of the statements (R 853). The court further stated:

THE COURT: If I--If I make a wrong ruling, if you think it's wrong, say so accept on the law. This is a question of fact; but I think that was consistent, but it's up to the jury to use their own judgments on that.

(R 853). There was no objection to this statement by the trial court, defense counsel obviously being satisfied with the court granting his request that the jury be allowed to ultimately assess whether the statements were consistent. As a result, appellant's argument regarding this allegedly improper comment was not preserved for review. Clark, supra; Castor, supra.

The comment by the trial court was not, as appellant now asserts, a comment on appellant's guilt, the credibility of Larry Bennett, or upon the weight to be given the evidence.

Appellant's trial counsel did not address such a claim to the trial court. Rather than an impermissible comment, as alleged by appellant, this was a proper comment directed toward trial counsel's improper method in this instant, of attacking Larry Bennett's credibility. Simply put, Larry Bennett's desposition answer was not inconsistent with his trial testimony. On direct examination by the prosecution, Bennett had testified that appellant had cut the victim's wallet and identification into what Bennett believed were fairly large" pieces, though Bennett could not recall specifically (R 745-746). On cross-examination, when pressed specifically about the wallet, Bennett testified that the wallet had been cut up into two pieces, to the best of his recollection (R 851). Bennett denied defense counsel's accusation that Bennett had previously said that the wallet had been cut into several pieces (R 851). Defense counsel then confronted Bennett with Bennett's deposition testimony in which defense counsel and Bennett had discussed the cutting up of both the wallet and the identification (not the wallet, alone, as defense counsel had asked during cross-examination) (R 852). Bennett's deposition answer, regarding the pieces of the wallet and identification, was clearly consistent with his trial testimony. Thus, the trial court's comment to defense counsel that counsel was improperly using consistent statements in an attempt to impeach witness credibility through prior inconsistent statements was a proper judicial function. Crews, supra.

The final trial court comment which appellant alleges was improper, arose in the context of redirect examination by the

prosecutor. The prosecutor asked Larry Bennett about the ways Bennett had changed since being placed in jail on murder charges and the following colloquy took place:

> A. I--I was raised--I was raised in a Christian home and--
>
> MR. SHELNUTT: Judge, there again, I object. This is irrelevant. This got nothing to do with this case.
>
> THE COURT: It may have something to do with his credibility perhaps; but I think that's far enough as that's concerned. If you want to cross on that afterwards, you'll be allowed to.
>
> MR. PHILLIPS: Okay.
>
> THE COURT: But I think that's enough on that subject.

(R 926). No objection was raised to the reference by the trial court to the fact that the objectionable testimony related to credibility, defense counsel obviously being satisfied that his objection to Bennett's "Christian home" remark had been sustained. As a result, this final argument regarding an allegedly improper comment was not preserved for appellate review. Clark, supra; Castor supra.

This final comment by the trial court was not a comment on the credibility of Larry Bennett. Appellant's trial attorney had objected to Bennett's remark because the attorney recognized that it was leading to a statement about religious beliefs prohibited by **section 90.611, Florida Statutes (1985).** Appellant's attorney objected on an improper basis--irrelevance. Had the trial court overruled the trial counsel's objection, the objection would have

been correctly overruled and appellant would not have been able to allege a different ground on appeal. **Ehrhardt, Florida Evidence § 104.2 (2d Ed. 1984).** The trial court merely stated the proper basis for objecting to evidence relating to religious beliefs--credibility--and sustained the objection. The trial counsel recognized this and interposed no objection. The trial court merely provided information which defense counsel was required to state in court in order for his objection to be sustained--a proper basis for exclusion of evidence.

Appellant's reliance on Gordon v. State, 449 So.2d 1302 (Fla. 4th DCA 1984), Millett v. State, 460 So.2d 489 (Fla. 1st DCA 1984) and Williams v. State, 305 So.2d 45 (Fla. 1st DCA 1974), in support of his argument that the comments by the trial court were improper, is misplaced. Those cases are distinguishable.

In Gordon, the defendant, himself, was testifying and the trial court stated, in the jury's presence, that what the defendant said was untrue. In our case, Larry Bennett, not the appellant, was testifying. The trial judge did not suggest, in any way, honesty or dishonesty on the part of Bennett or the appellant and directed his attention to whether appellant's attorney was correctly using evidence of inconsistent statements in attacking Bennett's credibility. Millett, is distinguishable in the same respect as Gordon, because the defendant himself was testifying. In Millett, however, the trial court apparently impugned the character of the defendant on four occasions by calling his answers "double statements" and saying that he was

"interjecting" unresponsive answers. The defendant's attorney objected to the comments by the court as comments on the defendant's credibility. In our case, appellant's attorney voiced no objection on grounds of improper comment on witness credibility and it was not appellant who was testifying, it was Larry Bennett. Certainly, a trial judge can, in the first instance, make a determination whether a prior statement which is sought to be introduced into evidence as "inconsistent" is actually inconsistent with the testimony under attack. There is no other way of controlling an improper attack on credibility by a defendant. Accord, Crews, supra.

In Williams, supra, the trial court had repeatedly interjected itself into the trial, taking over cross-examination of a witness beyond the scope of direct examination. Noting the lack of objection during the trial to the questions and actions of the trial court, the district court of appeal affirmed the conviction. The district court also found that the actions of the trial court did not constitute fundamental error. As in Williams, there was no objection based on credibility grounds in our case. The alleged error in our case was not as extreme as in Williams, so that no fundamental error has occurred.

From the foregoing, it is clear, and the record reflects that at all times, that the trial court properly left matters of witness credibility for determination by the jury. The testimony of the state witnesses, including Larry Bennett and Mark Shadle, as well as appellant's own witness, Peter Detalente, provides sufficient evidence to sustain appellant's first-degree murder

conviction. Appellant has failed to demonstrate reversible error on this point.

POINT FOUR

THE APPELLANT HAS FAILED TO DEMONSTRATE THAT THE TRIAL COURT ABUSED ITS DISCRETION IN CONDUCTING THE TRIAL PAST 7:00 P.M., EVEN IF THE ISSUE WAS PRESERVED FOR APPEAL.

After the state had rested its case (R 936), and the appellant had presented his first witness (R 939-947), a recess was taken for supper (R 948). At approximately 7:00 p.m., after return from the recess, one of appellant's two attorneys (Mr. Eddy), objected to continuing the trial any further into the evening on the grounds that "this is the first time the defense has had an opportunity to present its case" (R 948). In support of this argument, Mr. Eddy stated that he believed that appellant was entitled to a "fresh jury, fresh judge, and fresh defense counsel", and that "it would be imminently unfair to (appellant) to require this jury to proceed to the defense' case." (R 948). Mr. Eddy threatened to move for mistrial if the trial court continued the trial any further that evening (R 948). Mr. Eddy did not claim that the effectiveness of his representation of the appellant was impaired in any way. In an effort to bolster Mr. Eddy's request, appellant's second attorney, Mr. Shelnutt, addressed the trial court saying:

> ". . . it may sound a little petty; but after we go past 9:00 or 10:00 o'clock or even--even after 8:00 o'clock, I have hard contact lenses which make it just about impossible to see . . ."

(R 948-949). Like Mr. Eddy, Shelnutt did not claim that the effectiveness of his representation of the appellant was impaired in any way at the time of this discussion. Though the trial

court proceeded with testimony, it does not appear that either Shelnutt or Eddy moved for mistrial. Additionally, there was never any ruling on any purported motion for mistrial, nor did trial counsel pursue such a ruling.

The trial proceeded with Attorney Shelnutt questioning the first witness called after the recess (R 955). Shellnutt examined a witness until he indicated that he had no further questions (R 992, 1009, 1010, 1011).

Attorney Eddy examined the next witness, Bob Sheally, (R 1011). Both Shelnutt and Eddy interposed and argued objections (R 1020). Eddy indicated to the trial court he had no more questions to ask this witness (R 1018, 1024). This procedure continued with Shelnutt alternately examining the next two witnesses, arguing any objections they might have, and indicating to the trial court that their examination of the witnesses was complete (R 1025, 1032, 1034, 1036, 1041, 1045, 1046, 1055, 1059). The proceedings adjourned for the evening at 9:30 p.m. (R 1061). The appellant was to testify the next day. At no time during the testimony which followed the supper recess, did the judge, jurors, or any of the attorneys complain about their ability to devote their attention and energy to the trial proceedings.

At the outset, it should be noted that appellant's trial counsel did not actually move for mistrial, but merely threatened to move for mistrial. Additionally, trial counsel did not pursue a ruling on either his objection to proceeding with the trial or any alleged motion for mistrial. As a result, this issue has not

been preserved for appeal. See, Richardson v. State, 437 So.2d 1091 (Fla. 1983). Appellant's trial attorneys were apparently satisfied with the adjournment of the trial proceedings at the point which allowed appellant to testify the following day. Nevertheless, at no time during the testimony which followed the supper recess, did either of appellant's trial attorneys claim that they were "extremely too fatigued" to proceed, or that they were unable to adequately represent the appellant; that the judge or jurors were not devoting attention to the proceedings, or that Mr. Shelnutt's contact lenses caused Shelnutt any problems which adversely affected his performance.

The record thus refutes appellant's arguments in this point, and reflects that both of his trial attorneys adequately presented his defense. Since the record fails to establish that any physical condition of appellant's trial attorneys prevented them from adequately representing appellant, and appellant has failed to demonstrate an abuse of discretion by the trial court in this ruling, the trial court's ruling should be affirmed. Jackson v. State, 464 So.2d 1181 (Fla. 1985).

POINT FIVE

THE TRIAL COURT PROPERLY SENTENCED APPELLANT TO DEATH OVER THE JURY'S RECOMMENDATION OF LIFE IMPRISONMENT WHERE THE FACTS SUGGESTING DEATH AS AN APPROPRIATE PENALTY WERE SO CLEAR AND CONVINCING THAT VIRTUALLY NO REASONABLE PERSON COULD DIFFER.

In Tedder v. State, 322 So.2d 908 (Fla. 1975), this court discussed the standard to be applied in reviewing the override of a jury recommendation of a life sentence by a trial court as follows:

> A jury recommendation under our trifurcated death penalty statute should be given great weight. In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ.

322 So.2d at 910. This court reversed Tedder's death sentence, specifically finding that the aggravating factor of the murders were heinous, atrocious, and cruel, was improper. Likewise, the finding that Tedder knowingly caused great risk of death to many persons was improper. Three persons are not "many persons" in the context of this aggravating factor. Johnson v. State, 393 So.2d 1069, 1073 (Fla. 1981). The aggravating factor that the crime was committed during the course of a kidnapping was not supported by the facts. This court noted Tedder's age as a mitigating factor. Thus, there was "no reason to override the jury's advisory sentence", because there were no valid aggravating factors present.

Subsequently, affirming a jury override in Hoy v. State, 353

So.2d 826 (Fla. 1977), this court clarified the pronouncement in Tedder, saying:

> The advisory recommendation of the jury is to be accorded great weight, but the ultimate decision as to whether the death penalty should be imposed rests with the trial judge.

353 So.2d at 832. (Emphasis supplied).

Tedder is distinguishable from our case, since, as pointed out in Point VI, infra, the trial court found four aggravating circumstances which are clearly sustained by the evidence and other materials presented to the trial court during the guilt and sentencing phases of appellant's trial. The trial court also properly found that there were no mitigating circumstances applicable to ameliorate the enormity of appellant's offense, there being either no evidence to support the factors argued to the jury or insufficient evidence for the alleged circumstances to be considered in mitigation. Appellant's deceptive, self-serving nature, and admitted lies to law enforcement officers investigating the crime, caused justifiable concern to the trial court regarding appellant's credibility.

During argument at the sentencing phase of the trial, appellant's counsel argued mitigating factors to the jury which were either not proper and/or not supported by evidence. (See, Point VI, infra). Appellant's counsel engaged in an argument which was calculated to sway the jury through emotional appeal. Counsel told the jury that appellant's fate was "ultimately (in their) hands." (R 1836) Cf., Hoy, supra. Counsel mentioned the Bible and told the jurors that they were going to decide whether

or not to "kill" appellant (R 1837). Even after the prosecutor objected to this type of argument, counsel persisted in implanting this argument in the minds of the jurors, saying: "Before you go back and decide to kill (appellant) . . ." (R 1840); "(appellant's) fate is literally in your hands." (R 1841); "please give (appellant) his life . . ." (R 1842). This court, affirming a jury override in Porter v. State, 429 So.2d 293 (Fla. 1983), recognized that emotional appeals to jurors by defense attorneys may cause a jury to recommend life and that a trial court may properly consider this in sentencing a defendant to death. Thus, the trial court in our case struck the proper balance between passion and reason in overruling the jury's recommendation of life and sentencing appellant to death.

The fact that a majority of the jury returned an advisory sentence of imprisonment in 35 minutes is not significant. See, Gardner v. State, 313 So.2d 675 (Fla. 1975) (affirming jury override and death sentence where unanimous jury deliberated 25 minutes), reversed on other grounds, Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977).

Appellant's argument that his death sentence should be reversed because this court has reversed death sentences imposed over a jury recommendation of life in cases which were much more "heinous" than the murder of the victim in our case was rejected by this court in Eutzy v. State, 458 So.2d 755, 758 (Fla. 1984). In all of the cases appellant relies on to support his argument, this court has found strong evidence of mitigating circumstances which supported the jury recommendation of life.

There were four aggravating factors and no mitigating factors in appellant's case, so that death is presumed to be the appropriate penalty. State v. Dixon, 283 So.2d 1 (Fla. 1973). Additionally, there is no reasonable basis for the jury to recommend life. Therefore, the trial judge was justified in overruling the jury's recommendation. See, e.g., Burr v. State, 466 So.2d 1051 (Fla. 1985); Eutzy. supra; Routly v. State, 440 So.2d 1257 (Fla. 1983).

POINT SIX

THE TRIAL COURT IMPOSED THE DEATH SENTENCE BASED UPON APPROPRIATE AGGRAVATING CIRCUMSTANCES AND PROPERLY FOUND THAT NO MITIGATING CIRCUMSTANCES EXISTED.

In this point on appeal, appellant asserts that the trial court found improper aggravating circumstances and failed to consider relevant mitigating factors. The trial judge, in its order finding that the death penalty was warranted in this case, found four aggravating and no mitigating factors (R 1730-1732). This written order refutes appellant's claim that the trial court considered lack of remorse as an aggravating factor in this case.

A. THE APPELLANT WAS PREVIOUSLY CONVICTED OF A FELONY INVOLVING THE USE OR THREAT OF VIOLENCE TO A PERSON.

The first aggravating circumstance found applicable was section **921.141(5)(b), Florida Statutes (1985)**, which reads:

> The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

Evidence of appellant's felony conviction for armed robbery for which appellant was sentenced to 8 years in prison in South Carolina, was presented by the state and allowed into evidence by appellant, without objection (R 1772). Appellant concedes that this conviction supports a finding of this factor, but argues that the trial court erred by adding that appellant had admitted to appellant's own psychiatrist that appellant had previously been convicted of 5 counts of armed robbery, relying on Estelle v. Smith, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981). Smith is distinguishable from our case.

At the outset, it should be noted that appellant raised no contemporaneous objection or Smith argument in the trial court to consideration by the trial judge of appellant's admission of the five (5) prior armed robbery convictions contained in this psychiatric report. As a result, appellant waived this argument and it was not properly preserved for appeal. Quince v. State, 477 So.2d 535 (Fla. 1985); Steinhorst v. State, 412 So.2d 332 (Fla. 1982). The record on appeal supports waiver by appellant of any Smith claim. During the sentencing phase of the trial, appellant's counsel specifically allowed the trial judge to look at the psychiatric report (R 1795), and filed it with the court (R 1799-1800). At the sentencing hearing, after the jury's recommendation of a life sentence, appellant's counsel specifically referred the trial court to appellant's psychiatric report, quoting from the report in arguing against imposition of the death penalty (R 1454). Thus, it is clear that appellant intended that the trial judge consider the report in deciding whether or not to impose the death penalty. Appellant cannot take advantage of a situation he created on appeal. McCrae v. State, 395 So.2d 1145 (Fla. 1981) Parenthetically, during the guilt phase of the trial, appellant testified on cross-examination that he had six (6) prior felony convictions (R 1202).

Even if appellant's Smith claim is not deemed waived, Smith is distinguishable. In Smith, the Supreme Court held that the admission of a psychiatrist's testimony at the penalty phase of a murder case violated a defendant's Fifth Amendment privileges

against self-incrimination where the defendant was not advised before the compulsory examination of his right to remain silent, and that any statement he made could be used against him. The trial court, on its own motion, had ordered Smith to submit to a pre-trial psychiatric examination to determine his competency to stand trial. Smith's attorneys had no notice of the court ordered examination and the state offered the psychiatrists testimony to the jury during the penalty phase regarding the issue of Smith's future dangerousness, an issue unrelated to competence to stand trial. The Supreme Court specifically distinguished Smith from the case where a defendant initiates a psychiatric evaluation and intends to introduce psychiatric evidence of the penalty phase, noting that voluntary statements are not barred by the Fifth Amendment. 101 S.Ct. at 1876, 1877.

Our case stands in stark contrast to and represents the "different situation" envisioned in the Smith case. In our case, appellant's attorney initiated the psychiatric examination for use during the penalty phase in presenting mitigating evidence to the jury. Appellant voluntarily submitted to the examination, on advice of counsel, so that no compelled self-incrimination issue is present on our facts. Accord, Buchanan v. Kentucky, 107 S.Ct. 2906 (1982). Appellant's admission of prior armed robbery convictions was relevant to the determination of the existence of the statutory mitigating factor relating to lack of significant history of prior criminal activity and was admissible as an exception to the hearsay rule. See, §§ 921.141(6)(a) and 90.803(18), Fla. Stat. (1985). Appellant voluntarily took the

examination in hope of avoiding the death penalty. Finally, the psychiatric evaluation was equivalent to a pre-sentence investigation report, the existence of which appellant was aware, the relevant contents of which were stated in the record and contained his own admissions, and which appellant had ample opportunity to refute. A trial court may validly consider such reports, in overriding a jury recommendation of life, despite the fact that they were not considered by the jury. Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51, L.Ed.2d 393 (1977); Brown v. State, 473 So.2d 1260 (Fla. 1985); Porter v. State, 429 So.2d 293 (Fla. 1983) (trial court access to deposition which jury did not see).

B. THE CAPITAL FELONY WAS COMMITTED FOR PECUNIARY GAIN.

The next aggravating factor applied was that the capital felony was committed for pecuniary gain. **§ 921.141(5)(f), Fla. Stat. (1985).** The evidence supports the finding of this factor.

The victim's son testified that the victim always kept $2500, in cash, in the victim's wallet in the victim's back pocket (R 276-277). The victim's brother, Marion Germany, testified that, while in Florida, appellant had told him that appellant needed $10,000 "quick". (R 592) Mickey Powell testified that appellant tried, on two or three different occasions, to borrow $2500 from the victim and that appellant mentioned being broke and needing $10,000 (R 659). The victim had refused to loan the money to appellant (R 609). Larry Bennett testified that Bennett and appellant drove from South Carolina to the victim's house in Florida (R 721-722), and that,

once inside, appellant shot the victim (R 727), and then reached down and took the wallet from the victim's back pocket (R 729-730). Appellant gave Bennett part of the money for gas (R 746-747). Mark Shadle testified that appellant admitted shooting the victim in the process of robbing the victim (R 483). This evidence demonstrates a planned entry of the victim's home to murder the victim and take the victim's money.

This court has upheld this aggravating factor in other robbery-murder cases. In Stevens v. State, 419 So.2d 1058 (Fla. 1982), pecuniary gain was approved as an aggravating factor where the evidence revealed that the defendant took money from the convenience store cash register, the property of the victim's employer, which had been in the victim's possession prior to the robbery and abduction. In Porter v. State, 429 So.2d 293 (Fla. 1983), pecuniary gain was found to be a proper factor where the defendant deliberately selected the victims, entered the victims' home, killed them, and then stole numerous items, including their television and car--factual circumstances identical to those suggested by the evidence in our case.

In Echols v. State, 484 So.2d 568 (Fla. 1985), this court reaffirmed its rulings that the aggravated factors that a murder was committed during a robbery, **section 921.141(5)(d), Florida Statutes (1985)**, and the murder was committed for pecuniary gain, are merely restatements of each other and that these factors may not be doubled up when based upon the same facts. The fact that a murder is committed during the course of a robbery is merely another way of saying that the murder was committed for pecuniary

gain. Thus, pecuniary gain was a valid aggravating factor in Heiney v. State, 447 So.2d 210 (Fla. 1984), where the murder victim (as in our case), was found to have his pants pocket turned inside out and possessed no identification; the victim's wallet was found in the defendant's suitcase; the victim's credit card was used to buy gasoline, and the victim's credit card was used to make purchases throughout the United States. Appellant's suggestions of refusal to loan money and dissatisfaction with business dealings as motives for this murder lack record support.

Pecuniary gain and the aggravating factor that a murder is committed to avoid arrest, **section 921.141(5)(e), Florida Statutes (1985)**, have been found to exist together as dominant motives for murder in the following cases: Stevens, supra; Porter, supra; Parker v. State, 458 So.2d 750 (Fla. 1984); Bolender v. State, 422 So.2d 833 (Fla. 1982); and, Meeks v. State, 339 So.2d 186 (Fla. 1976), to name a few. Murder for pecuniary gain was properly found as an aggravating factor in the instant case.

C. THE CAPITAL FELONY WAS COMMITTED IN A COLD, CALCULATED, AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION.

The trial court found as its third applicable aggravating circumstance, that 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).** This factor is also supported by the evidence.

Appellant, along with Larry Bennett, left South Carolina at approximately 11:00 p.m., (R 805), and arrived at the victim's

residence in Florida at daybreak (R 722). Appellant knew the victim was alone (R 250-251, 264-265, 595-598, 1116). Contrary to appellant's assertion in his brief, Larry Bennett testified that only Bennett did not know specifically what the reason for appellant's sudden desire to go to Florida was (R 714, 721-722, 811-814). The .22 caliber revolver, used in the murder, was in the car on the way to Florida (R 738, 826-827). Appellant carried the weapon into the house, walked into and then exited the bathroom, stood behind the victim and, while holding the gun 18 inches to two (2) feet from the victim's head (R 736), purposefully shot one bullet into the back of the victim's head (R 726-728), killing the victim (R 230-231). Appellant put the gun in his belt and told the astonished Larry Bennett to shut up (R 729). Appellant then took the victim's wallet and money (R 729-730). Appellant and Bennett were in the house only 15 minutes before driving back to South Carolina (R 739-740). The victim was 68 years old when he was murdered (R 238).

This court has held that this aggravating factor applies to murders which are characterized as execution murders, contract murders, or witness elimination murders, though this description is not intended to be all inclusive. Herring v. State, 446 So.2d 1049, 1057 (Fla. 1984). This circumstance can be found also when the facts show a substantial period of reflection and thought by the killer. Preston v. State, 444 So.2d 939, 946 (Fla. 1984). A heightened premeditation, greater than that level of premeditation required to be proven during the guilt phase of the murder trial, is required for the application of this

circumstance. Herring, supra; Preston, supra. This level of premeditation may be inferred from the manner and nature of the killing. Heiney, supra at 217.

This was a cold-hearted, cold-blooded murder. The appellant shot the victim, an elderly man whom he did not need to shoot to rob and whom he considered to be a friend (R 1095), causing the victim's death (R 230-231). The murder was an "execution style" killing (R 881). The murder was calculated and premeditated. The meeting of appellant with the victim was no chance encounter. It was based upon a preconceived plan, with plenty of time for lengthy reflection and thought by the appellant. Appellant left South Carolina for Florida in the middle of the night, purposefully carried the gun into the victim's house, pointed the gun at the victim's head, (though appellant did not need to shoot the victim to rob him), and fired one bullet into the back of the victim's head in a location calculated to cause the victim's death. There was no evidence of a struggle between the victim and the appellant.

This court has upheld this aggravating factor in other cases where a victim has died from a single, purposefully placed, gunshot. In Burr v. State, 466 So.2d 1051 (Fla. 1985), this factor was found to be appropriate where a victim was shot in the back of the head while kneeling down, indicating an execution killing. In Parker v. State, 458 So.2d 750 (Fla. 1984), the immediate shooting of a victim, execution style, was held to justify this finding. Where, as in our case, a defendant procured a gun in advance, the victim was shot once in the head,

execution style, and there was no sign of struggle, this court held that this evidence was sufficient to warrant a finding that the murder was committed in a cold, calculated, and premeditated manner. See, Eutzy v. State, 458 So.2d 755 (Fla. 1984). See also, Herring, supra. The fact that the jury found appellant guilty of felony murder does not mean that it acquitted him of premeditated murder--it simply means that the jury made a choice, as instructed (R 1601). See, Bates v. State, 465 So.2d 490 (Fla. 1985). The final decision, regarding the existence of this factor at the sentencing hearing, was the responsibility of the trial judge. The trial judge properly found this aggravating factor.

D. THE CAPITAL FELONY WAS COMMITTED FOR THE PURPOSE OF AVOIDING ARREST.

The fourth and final aggravating factor found by the trial judge was that the capital felony was committed in order to avoid arrest. **§ 921.141(5)(e), Fla. Stat. (1985).** Decisions of this court as cited in the cases in discussion of the pecuniary gain aggravated factor, supra, have made it clear that the commission of a murder to avoid arrest can co-exist as an aggravating factor with the pecuniary gain factor. In short, a capital murder can have two dominant purposes.

Appellant's claim that the aggravating factors of cold, calculated, and premeditated, and avoidance of arrest have been impermissively doubled is without merit. This court has held repeatedly that the aggravating factors of witness elimination and "cold, calculated and premeditated" can co-exist. See, e.g., Cooper v. State, 492 So.2d 1059 (Fla. 1986); Kokal v. State, 492

So.2d 1317 (Fla. 1986); Pope v. State, 441 So.2d 1073 (Fla. 1983). While cold, calculated,premeditated goes to the **manner** of the crime, witness elimination goes to the **motive**. A cold, calculated murdr is one which is more contemplative, more methodical, and more controlled in manner. Nibert v. State, 508 So.2d 1 (Fla. 1987). That appellant killed to avoid arrest is supported by strong evidence. The victim knew, as friends, both Bennett (R 756), and appellant (R 1095). Upon arrival at the victim's residence, Bennett identified himself (R 723-724). Appellant entered the house after Bennett. While Bennett was speaking with the victim, Bennett called appellant's name, after which appellant shot the victim in the head (R 483). Appellant told Bennett to clean up the mess and to wipe up whatever Bennett touched to get rid of fingerprints (R 730-731). Appellant later dismantled the gun, cut up the victim's wallet, and disposed of both (R 745-746). When appellant and Bennett split up, appellant told Bennett to stick to the story appellant would tell and said, "Loose lips sink ships" (R 766).

In cases, such as our case, where it was shown that the victim actually knew and could identify the killer, this court has found this aggravating factor to be proper. See, Bates v. State, 465 So.2d 490 (Fla. 1985); Routly v. State, 440 So.2d 1257 (Fla. 1983); Clark v. State, 443 So.2d 973 (Fla. 1983). This factor has also been found when the defendant cleans up the murder scene. Bolender v. State, 422 So.2d 833 (Fla. 1982). Where a defendant, after killing a store clerk, was heard to say, "Dead witnesses don't talk", this court also found the avoidance

of arrest factor to be appropriate. Johnson v. State, 442 So.2d 185 (Fla. 1983). The trial court properly found this aggravating factor.

E. THE TRIAL COURT PROPERLY FOUND THAT NO MITIGATING FACTORS EXISTED.

In its order imposing the death penalty, the trial court indicated its finding regarding mitigating circumstances as follows:

> **The Court hereby finds no mitigating circumstances in this case, either under Florida Statutes 921.141(g) or otherwise.**

(R 1731). This specific objection raised on appeal to this summary finding was not argued to the trial court so it was not preserved for appellate review. Steinhorst v. State, 412 So.2d 332 (Fla. 1982). Nevertheless, the statement indicates that the trial court considered all of the statutory mitigating circumstances and all discernable non-statutory mitigating factors and did not consider that any of the tendered factors mitigated against imposition of the death penalty. There is no prescribed form for an order containing findings of mitigating and aggravating circumstances. Holmes v. State, 374 So.2d 944 (Fla. 1979). Contrary to appellant's advocacy, Hall v. State, 381 So.2d 683 (Fla. 1978), does not require a detailed finding of mitigating factors when a judge finds no mitigating factors. There is no requirement that a trial court must find anything in mitigation. Porter v. State, 429 So.2d 296 (Fla. 1983). With unmistakeable clarity, the trial court, in our case, indicated that no mitigating circumstances were found. This court has held

that it is within the province of the sentencing court to determine whether a mitigating circumstance has been proven and weight to be given it. Riley v. State, 413 So.2d 1173 (Fla. 1982); White v. State, 446 So.2d 1031 (Fla. 1984). As long as all of the evidence and all of the mitigating circumstances are properly considered, a trial judge's failure to find a factor in mitigation will not be reversed simply because a defendant draws a different conclusion. Johnston v. State, 497 So.2d 863 (Fla. 1986). Mitigating factors must ameliorate the enormity of a defendant's guilt. Eutzy v. State, 458 So.2d 755 (Fla. 1984).

In this appeal, appellant argues that there are mitigating factors offered through psychiatric testimony, which should have been found. Among these factors are the allegations that: Appellant was a good son and father; appellant believed in God and Jesus and had attended church regularly until 1976; psychiatrists testimony that appellant was a smart individual who could contribute to society; and that appellant had polio in childhood and, as an adult, had ulcers and hypertension.

There is no evidence to support appellant's allegation that he is a good father and good son. This "good father" had five (5) prior armed robbery convictions, one for which the record reveals he was sentenced to 8 years in prison. The fact that one's father is in prison for forcefully depriving innocent people of their belongings is hardly something that a young boy can be proud to proclaim to his friends. Neither can committing murder and thereby depriving an innocent person of their constitutional right to life, liberty and the pursuit of

happiness. Appellant could hardly provide for his son's financial and emotional needs while in prison. There is no evidence of such support. Appellant's selfish decisions to rob and murder people were hardly in his son's best interests. The same reasoning goes for appellant as a "good son." It is highly unlikely that appellant's mother brought him up to rob and kill. The trial court properly found reliance on this alleged mitigating circumstance to be unreasonable.

A defendant's conversion to Christianity was held to have been properly rejected as a mitigating factor in Daugherty v. State, 419 So.2d 1067 (Fla. 1982). Appellant's beliefs were with him at the time he pointed the gun at the victim, but this did not stop him from blasting the victim's life away. This factor was properly weighed and rejected.

There was no error in rejecting the psychiatrist's testimony concluding that appellant was capable of contributing to society. The trial court could properly weigh appellant's "defensiveness" exhibited during the psychiatric examination, along with appellant's inconsistent statements to law enforcement and appellant's philosophy "Loose lips sink ships", in rejecting this evidence as mitigation. Indeed, as a result of appellant's inconsistency and selfserving statements, his credibility was rightfully questioned. Johnston, supra, at 872. All of the factors described by the psychiatrists existed prior to the murder, but did not stop it. Rather than contribute to society, appellant took the victim out of society and deprived other innocent citizens of their hard earned dollars. Neither

appellant's former childhood polio, nor his alleged hypertension and ulcers can ameliorate the enormity of his crime. The trial court properly concluded that relying on this alleged mitigation was unreasonable.

The only statutory mitigating circumstance which appellant might allege applies, is appellant's age of 40 years (R 1840-1841). **§ 921.141(6)(g), Fla. Stat. (1985).** Rejecting age 23 as a mitigating factor in Songer v. State, 322 So.2d 481, 484 (Fla. 1975), this court noted, "(T)oday one is considered an adult, responsible for one's own conduct at the age of 18 years." Appellant's argument, in the trial court (R 1840-1841), that he would be 65 years old when he got out of prison and rendered harmless to society, was rejected as not ameliorating the enormity of a defendant's offense in Eutzy, supra. Age must be linked with some characteristic of the defendant such as immaturity or senility. Echols v. State, 484 So.2d 568, 575 (Fla. 1985). (58 years age of defendant's suggested maturity, knowledge of consequences of acts). Appellant also argued in the trial court that the state's previous plea offer to recommend a life sentence if appellant pled guilty to first-degree murder indicated that the state did not feel that the death sentence was appropriate. Appellant's attorney personally guaranteed the jury that the prosecutor was seeking the death penalty only because appellant went to trial (R 1834). The argument of the attorney that the prosecutor was trying to punish the appellant going to trial was not evidence, nor was there any evidence to support it. Additionally, conversations made in plea and compromise

negotiations are not admissible in evidence. **§§ 90.408 and 90.410, Fla. Stat. (1985).** Thus, this is not a proper factor for mitigating a sentence. To hold otherwise would eliminate plea negotiations. A trial judge is never bound in sentencing by negotiations which occurred between a prosecuting attorney and the defense counsel. Davis v. State, 308 So.2d 27 (Fla. 1975). Since there is no evidence of intent by the prosecutor to punish appellant for going to trial, the trial judge properly found this factor to have been improper and unreasonable to consider. See, Hitchcock v. State, 413 So.2d 741, 746 (Fla. 1982).

At the trial level, appellant's attorney alleged that the disparity between the sentence of appellant and Bennett was a factor which should have been considered in mitigation, since both appellant and Bennett had been indicted for first-degree murder (R 1452, 1839). Indictments and informations are not evidence. Disparate treatment of accomplices of equal culpability appears to remain a proper mitigating factor, if reasonably applied. Eutzy, supra at 760. For this factor to be reasonably applied, a jury must be presented with evidence ending to prove the accomplices equal culpability. Id. It is improper and unreasonable to consider this factor where a co-defendant is actually guilty of a different, lesser crime. Id. In our case, some insight into the trial court's rationale for finding that the jury consideration of this factor was unreasonable, is found in the transcript of Bennett's sentencing which occurred sometime after appellant's conviction (See, appendix). In that hearing, the judge who tried appellant's case, specifically found that the

facts of the crime indicated that Bennett was guilty in Buck Germany's death as an accessory after the fact, "if he was guilty of that." (App. at p. 7). This finding is supported by the record in our case, so that relying on the alleged disparate treatment of Larry Bennett as a mitigating factor would be unreasonable. As a result, our case is similar to other jury override cases, affirmed by this court in which disparate treatment of co-defendants was supported by the facts. See, Bolender v. State, 422 So.2d 833 (Fla. 1982); Routly v. State, 440 So.2d 1257 (Fla. 1983).

Smith v. State, 403 So.2d 933 (Fla. 1981), relied on by appellant to suggest that the sentencing jury may consider the credibility of the state's witness as a factor mitigating the death sentence, and Wasko v. State, 505 So.2d 1314 (Fla. 1987), relied upon by the appellant to suggest that the jury recommendation of life may have been based upon the jury questioning the relative roles of appellant and Bennett during the murder, are both distinguishable from our case. In Smith, the co-defendant had been found guilty of third-degree murder for his part in the killing. At the defendant's separate trial, the state presented other reliable testimony that the defendant and the co-defendant had participated in the beating of the victim. The defendant's conviction was based primarily on the testimony of the co-defendant, who said that the defendant had ordered the killings. It was revealed at trial, that the co-defendant had five to ten felony convictions; had been granted favors by the state in return for his testimony, and, had admitted that he lied

when it would "suit (his) fancy." This court reversed the jury override, apparently based upon the evidence of the questionable believability of the co-defendant's testimony.

In Wasko, supra, the defendant confessed to being involved in the murder. The defendant and co-defendant were later indicted for the murder. The co-defendant pled guilty to second-degree murder. The defendant went to trial. At the defendant's trial, the state did not call the co-defendant as a witness because it had the defendant's confession as evidence. The defendant was permitted to call the co-defendant to testify as an adverse witness. As a theory of defense, the defendant said that the co-defendant committed the murder. The defendant was convicted of first-degree murder. The trial court sentenced the defendant to death, despite the jury recommendation of life. In vacating the death sentence, this court found that the trial court had misapplied one aggravating factor, that the defendant had no significant prior criminal history, and that the defendant had presented sufficient evidence of his good character, good employment record, and good family background. It was these mitigating factors, along with the possibility that the jury may have questioned the respective roles of the two admitted killers, that caused this court to reverse the jury override.

In our case, the appellant denied being present at the crime scene in any capacity. Appellant admitted lying to law enforcement officers, who were investigating the crime, so that it appears that the appellant lies when it conviences him. It was appellant who said, "Loose lips sink ships." Appellant has

six prior felony convictions, five of which the judge (unlike the jury), was aware were armed robberies. The evidence established that Bennett was dominated by, and dependent on, the appellant. Bennett had no criminal history except for a drunk driving conviction (R 911). Bennett's testimony that appellant shot the victim was supported by appellant's admission to Mark Shadle. The jury, in convicting the appellant of first-degree murder, obviously believed the testimony of Bennett and Shadle. As this court noted in Burr v. State, 466 So.2d 1051 (Fla. 1985):

> **(A) "convicted defendant cannot be 'a little bit guilty.' It is unreasonable for a jury to say in one breath that a defendant's guilt has been proven beyond a reasonable doubt and, in the next breath, to say someone else may have done it, so we recommend mercy." Buford v. State, 403 So.2d 943, 953 (Fla. 1981), cert. denied, 454 U.S. 163, 102 S.Ct. 1037, 71 L.Ed.2d 319 (1982).**

466 So.2d at 1054.

The trial court properly held that there were no mitigating factors in appellant's case.

POINT SEVEN

FLORIDA'S CAPITAL SENTENCING STATUTE IS CONSTITUTIONALLY SOUND ON ITS FACE AND AS APPLIED; APPELLANT HAS FAILED TO PRESERVE THE MYRIAD ISSUES HE NOW RAISES FOR APPELLATE REVIEW.

In his final point on appeal, appellant raises a number of varied challenges to the constitutionality of Florida's death penalty statute. In doing so, appellant candidly concedes that this court has rejected each of these challenges in the past. It should be noted that the various arguments appellant now raises in this appeal have never been presented specifically to the trial court, so as to preserve them for appellate consideration by this court. As a result, they have not been preserved for appellate review under this state's contemporaneous objection rule. See, Ferguson v. State, 417 So.2d 639 (Fla. 1982); Williams v. State, 414 So.2d 509 (Fla. 1982); Steinhorst v. State, 412 So.2d 332 (Fla. 1982).

In fact, as this court noted in Lightbourne v. State, 438 So.2d 380 (Fla. 1983), Florida's death penalty statute has been repeatedly upheld against claims of denial of due process, equal protection, as well as against assertions that it involves cruel and unusual punishment. See, Proffitt v. Florida, 428 U.S. 224, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976); Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978), cert. denied, 440 U.S. 976, 99 S.Ct. 1548, 59 L.Ed.2d 796 (1979); Ferguson v. State, supra; Foster v. State, 369 So.2d 928 (Fla. 1978), cert. denied, 444 U.S. 885, 100 S.Ct. 178, 62 L.Ed.2d 116 (1979); Alvord v. State, 322 So.2d 533 (Fla. 1975); State v. Dixon, 283 So.2d 1 (Fla.

1973).

Appellant argues that the statute does not sufficiently define aggravating circumstances; that it fails to provide a standard of proof for evaluating aggravating and mitigating factors; and that it does not provide for individualized sentencing determinations through the application of presumption, mitigating evidence and (other unnamed) factors. This court, however, has continuously held that the aggravating and mitigating circumstances enumerated in **section 921.141** are not vague and provide meaningful restraints and guidelines to the discretion of judge and jury. Lightbourne, supra; Dixon, supra. Furthermore, the constitutionality of the statute and the mechanics of its operation have been consistently upheld despite numerous and varied challenges. Proffit v. Florida, supra; Spinkellink v. Wainwright, supra; Ferguson, supra; Alvord, supra.

Furthermore, appellant's suggestion that the death penalty by electrocution is cruel and unusual, or that the failure to require notice of aggravating circumstances, as well as the "arbitrary and unreliable application of the death sentence", results in denial of due process, has likewise been consistently rejected. Proffit v. Florida, supra; Spinkellink v. Wainwright, supra; Dixon, supra.

Similarly, appellant's argument that the "cold, calculated, and premeditated" aggravating circumstance outlined in **section 921.141(5)(i), Florida Statutes (1985)**, makes the death penalty virtually automatic, absent a mitigating circumstance, has been rejected by this court's consistent and clear pronouncement that

such an aggravating factor does not apply in all premeditated murder cases, but only under certain factual circumstances. Harris v. State, 438 So.2d 787 (Fla. 1983); Jent v. State, 408 So.2d 1025 (Fla. 1981).

The remainder of appellant's constitutional challenges should also be rejected. Appellant's claim that a defendant's due process rights were violated by failure to notify him of the aggravating circumstances to be utilized to justify the imposition of the death penalty has been previously raised, and disposed of in Sireci v. State, 399 So.2d 964 (Fla. 1981). See also, Menendez v. State, 368 So.2d 1278 (Fla. 1979); Stano v. State, 460 So.2d 889 (Fla. 1984).

CONCLUSION

Based on the arguments and authorities presented herein, appellee respectfully requests this honorable court to affirm the judgment and sentence of the trial court in all respects.

Respectfully submitted

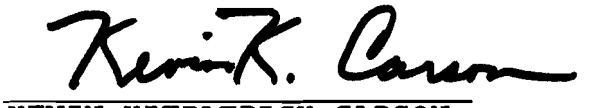
ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

KEVIN KITPATRICK CARSON
ASSISTANT ATTORNEY GENERAL
125 N. Ridgewood Avenue
Fourth Floor
Daytona Beach, Florida 32014
(904) 252-1067

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Answer Brief of Appellee and Appendix has been furnished by mail to Christopher S. Quarles, Assistant Public Defender, and counsel for the appellant, 112 Orange Avenue, Suite A, Daytona Beach, Florida 32014, this 9 day of September, 1987.



KEVIN KITPATRICK CARSON
COUNSEL FOR APPELLEE