IN THE SUPREME COURT OF FLORIDA

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| RUDOLPH HOLTON,<br><br>Appellant,<br><br>v.<br><br>STATE OF FLORIDA,<br><br>Appellee. | ) | Case No. 66,861 |

APPEAL FROM THE CIRCUIT COURT
OF THE THIRTEENTH JUDICIAL CIRCUIT
IN AND FOR HILLSBOROUGH COUNTY

# BRIEF OF APPELLEE


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## PRELIMINARY STATEMENT

RUDOLPH HOLTON will be referred to as the "Appellant" in this brief and the STATE OF FLORIDA will be referred to as the "Appellee". The Record on Appeal, which consists of will be referenced by the symbol "R" followed by the appropriate page number.

## STATEMENT OF THE CASE AND FACTS

Appellee accepts appellant's statement of the case and facts, except as noted here and in the argument as appropriate.

### Physical Evidence

Physical evidence linking Holton to the murder includes the photographs of the defendant taken at 3 p.m. June 24, 1986, during Detective Durkin's first interview with appellant. R376. Those photographs showed scratches on the right front chest of the defendant, consistent with scratches having been made within 24 to 36 hours of when the photographs were taken. R285. The victim's mother testified that her daughter had very long fingernails like her own. R525. The pictures also show a cut on appellant's knuckle which appellant first told Detective Durkin in the initial interview was the result of a fight. R377. Appellant later told Durkin he cut it on a window. Id.

The state introduced a black shaving kit into evidence. Witness Schenck, the man who gave the black male who looked like appellant a ride from St. Petersburg to the house where the murder occurred, said the hitchhiker had the black bag with him when he picked him up. R326. He found the bag in his car the morning after the murder when he was awakened by the fire trucks and gave it to police when they questioned him. R327. Schenck testified he passed out in his car after the black male left the car. R332. During the night, a police officer told him he could not leave his car in the middle of the street, so he pushed it under the street lamp, rolled up his windows, and locked his

doors. R334. Newsome said he saw appellant with the shaving kit, and the victim, around 11:00 p.m. outside the house where the body was found. R352. He also saw a white man in a car across the street. Id. Pamela Woods also saw a white man who looked like Schenck in the area the night of the murder. R588. Woods said she did not see appellant with a shaving kit, but she did see him with a black bag about the size of a legal folder and about a foot thick. R590. It may be inferred that appellant had the shaving kit with him during the night, but put or left it in Schenck's car before Schenck rolled up his windows and locked the doors when awakened during the night by a police officer.

Witness Testimony

Two independent and unrelated witnesses testified that appellant was wearing a white t-shirt with red lettering the night of the murder. Schenck testified the man he picked up was wearing a white t-shirt with red lettering. When he told police the t-shirt was red, he explained at trial that he was referring to the lettering, not the shirt, although he wasn't sure the officer understood this. R339. He also testified he initially hedged his story because of the involvement of marijuana, and he did not want to be arrested on a drug charge. Id. Schenck originally testified the black male said he was going to go get some more marijuana from his "sister," R332, but he later said the black male could have said "brother," R340-41, suggesting the black male was using "street language" rather than referring to a specific family member.

Carrie Nelson, the woman who saw appellant duck into the house where the murder occurred around 11 p.m. the night of the murder, also testified appellant wore a white t-shirt with red lettering. She said it did not resemble state's exhibit 31. Exhibit 31 was the t-shirt Detective Durkin took from appellant's room at Red Clemmons' house. R376. Appellant admitted the t-shirt was his. R384. In his initial interview with Durkin, appellant said he had thrown away his clothes the day before the murder, and put on a blue t-shirt and black shorts the night of the murder. R384.

Three people placed appellant at the house the night of the murder: Schenck, Nelson, and Newsome. Newsome saw appellant with the victim and spoke to appellant outside the house. The fingerprint on the cigarette package places appellant inside the house, in the front room adjacent to the one where the victim was found. Appellant admitted to being inside the house, but he initially repeatedly denied he had ever been in the front of the house. R376. When confronted with the cigarette pack, he admitted he had been in the front part of the house within the week before the murder. R381-83. He also denied the cigarette pack was his, and said someone must have put his fingerprint on it. R472.

Red Clemmons testified that he got up several times during the night of the murder to use the bathroom, but he never looked in appellant's room, and, therefore, never saw appellant between the time Clemmons says he saw appellant come home, and 6:00 a.m. the following morning. R499, 516 & 517.

Ms. Leonard, the Star Service Station attendant, said she recognized appellant's picture when police showed it to her the night after the murder. R480. She said she wasn't sure if appellant was familiar because she lived in the same neighborhood, or because he had purchased gasoline at the station. Id. (Holton had recently been released from prison. R494. There is no evidence he owned a car. He couldn't raise $80 for drug treatment because he would buy drugs with it instead. R764.) Leonard testified appellant was not one of the two people she remembered buying gas in a can the night of the murder. R481-82.

## The Confession

Birkins testified that Holton told him he killed a young girl, R289, that he had strangled her with his hands, R296-97, that he didn't know she was dead until he noticed she wasn't breathing after he had sex with her, R306, and that he had met the girl in the neighborhood, possibly at the Little Savoy Bar, R298.

## SUMMARY OF THE ARGUMENT

I. DISCRIMINATORY JURY SELECTION.

Mere inquiry from the trial court as to reasons for striking a particular juror is not dispositive of whether the judge has determined the burden has shifted. Preliminary reasons from the state for striking assist the trial judge in making the initial determination. In the instant case, the evidence was insufficient to establish a prima facie case of discriminatory striking, the burden never shifted and the trial court correctly denied appellant's objection.

11. IMPROPER QUESTION REGARDING FACTS ONLY THE KILLER COULD KNOW.

Appellant failed to preserve the issue for review. Duque found fundamental error in the context of multiple other errors. Such "fundamental error" was not dispositive in that case. The jury sub judice was deprived of an explanation of what the inculpatory facts were because appellant's objection prevented further questioning.

Holton's jailhouse confession was unrebutted in every respect except for the purchase of gasoline at a specific station. The gas station attendant admitted Holton looked familiar, and the jury could have weighed this in rejecting her testimony that she did not recall selling gasoline to Holton the night of the murder.

A defendant's denial of fingerprint evidence cannot sustain a conviction where the fingerprint evidence is the only inculpatory evidence. Ivey.

III. NO MURDER/ARSONS AFTER APPELLANT'S ARREST.

Defense counsel invited the question when she made the issue a prominent feature of the cross- and recross-examination of Birkins.

IV. CLOSING ARGUMENT, GUILT PHASE.

Appellant waived appeal. The argument did not "poison" the minds of the jury. Wasko. The complained-of remarks are not fundamental error. Id.

V. LIMITATION ON BALLENGER'S TESTIMONY.

Defense counsel admitted at trial that Ballenger could testify only to old scars on Holton. The only matters relevant at trial were the fresh wounds. The excluded testimony was irrelevant.

VI. PHOTOGRAPHS USED AT TRIAL.

The photographs and slides were relevant to illustrate the medical examiner's testimony. They also corroborated the state's theory that the victim scratched appellant's chest.

VII. REFUSAL TO CONTINUE THE TRIAL.

Defense counsel waited until the day of the defense case to inform the court of the problem. The deposition was inadmissible. Defense counsel suggested a stipulated statement be read to the jury, and, with counsel's full participation, such a statement was prepared and read. Any error in failing to continue trial was more than cured by the statement.

VIII. SUFFICIENCY OF THE EVIDENCE AS TO PREMEDITATION.

Strangulation, attempts to destroy the evidence, flight, exculpatory statements to police, the nature and manner of the

injuries to the victim, and the brutality of the killing support premeditation.

IX. SUFFICIENCY OF THE EVIDENCE AS TO FIRST DEGREE ARSON.

Appellant failed to preserve this issue. On the merits, appellant was not a medical expert and could not know to a medical certainty that the victim was dead when he set the fire. He also knew the house was frequented by other drug addicts. No case says a dead human being is not within the purview of the first degree arson statute.

X. SUFFICIENCY OF THE EVIDENCE AS TO SEXUAL BATTERY.

Appellant failed to preserve this issue. On the merits, the evidence is sufficient.

XI. INSTRUCTION ON UNNATURAL AND LASCIVIOUS ACTS, SECTION 800.02.

The jury was instructed on the necessarily included offenses yet convicted for the charged offense. Failure to instruct on an optional lesser offense is not error under such a circumstance. Abreau. Had the victim consented, the act would not fall within the purview of section 800.02.

XII. PROSECUTORIAL QUESTIONING IN THE GUILT PHASE.

Appellant waived the issues. On the merits, the jury already knew of the child from defense examination during the guilt phase. The serial questions regarding the testimony of state's witnesses merely invited appellant to rebut factual matters he had personal knowledge about.

XIII. GUILT PHASE CLOSING ARGUMENT.

The issues are unpreserved. The prosecutor's comment on premeditation was an accurate statement of the law. The remain-

der of the unobjected-to argument was likewise proper.

XIV. SENTENCING PROCEDURE.

The record does not show the state attorney prepared the sentencing order. The order is properly in the record. Fla. R. Crim. P. 9.140(d). The record supports the sentences for arson and sexual battery.

XV. SENTENCING ORDER.

The attempted robbery conviction and the arson support the "prior violent felony" factor. The rape conviction supports the "in the course of rape" factor. Strangulation is heinous, atrocious, and cruel. Tompkins. The facts show the murder involved heightened premeditation to eliminate the witness to appellant's sexual deviance. The record is silent as to any impaired capacity of the defendant when he killed the victim.

## ARGUMENT

### ISSUE I

THE TRIAL COURT CORRECTLY DETERMINED THAT THERE WAS NO STRONG LIKELIHOOD OF RACIALLY DISCRIMINATORY JURY SELECTION ON THE PART OF THE STATE.

State v. Neil, 457 So.2d 481 (Fla. 1984), established two-stage process for trial courts when a criminal defendant charges racially discriminatory use of peremptory challenges on the part of the State.

> The initial presumption is that peremptories will be exercised in a nondiscriminatory manner. A party concerned about the other side's use of peremptory challenges must make a timely objection and demonstrate on the record that the challenged persons are members of a distinct racial group and that there is a strong likelihood that they have been challenged solely because of their race. If a party accomplishes this, then the trial court must decide if there is a substantial likelihood that the peremptory challenges are being exercised solely on the basis of race. If the court finds no such likelihood, no inquiry may be made of the person exercising the questioned peremptories. On the other hand, if the court determines that such a likelihood has been shown to exist, the burden shifts to the complained-about party to show that the questioned challenges were not exercised solely because of the prospective jurors' race. The reasons given in response to the court's inquiry need not be equivalent to those for a challenge for cause. If the party shows that the challenges were based on the particular case on trial, the parties or witnesses, or characteristics of the challenged persons other than race, then the inquiry should end and jury selection should continue.

457 So.2d at 486-87 (footnotes deleted). Regardless of whether the state offers reasons for one or more challenges to prospective black jurors, the initial step in appellate review must be a

determination of whether the trial court erred in its ruling on whether there was a "strong likelihood" challenges were being made in a racially discriminatory manner, vel non.

Parker v. State, 476 So.2d 134 (Fla. 1985), offers guidance on the proper role of reasons for challenges offered by the state when the defendant has failed to meet his initial burden. In Parker, the defendant initially objected to the strike of a prospective black juror and the court ruled there was no systematic exclusion at that stage. When a second objection was made the trial court noted that the prospective juror had hesitated in answering questions about the death penalty. When the defense objected a third time, to the challenge of yet another prospective black juror, the state voluntarily gave three facially nondiscriminatory reasons for striking the prospective juror. The court noted that the juror had asked to be excused and the court had refused. At this point, the state had challenged nine prospective jurors, five white and four black. After quoting most of the above-quoted language from Neil, this Court held:

> Although Parker had shown that the challenged prospective jurors belonged to a "distinct racial group," it is clear from this record that he failed to demonstrate "a strong likelihood" that these prospective jurors were challenged solely on the basis of their race. This record does not reveal the requisite likelihood of discrimination to require an inquiry by the trial court and a shifting of the burden to the state. In fact, we find this record reflects nothing more than a normal jury selection process. For these reasons, we find no error in the jury selection process.

476 So.2d at 138-39. This Court in no way addressed the merits of the reasons volunteered by the state in Parker. This is, of

course, the proper procedure since the burden had not shifted to the state to rebut a presumption of discriminatory challenges. If the burden did not shift, then the appellate tribunal had no reason to consider whether the reasons for the strike rebutted the presumption of discriminatory strikes, since there was no presumption to rebut.

The fact that the Parker opinion lists the reasons offered by the state suggests that such reasons may be relevant in determining whether the defendant met his initial burden to establish a "strong likelihood". The state does not dispute this point sub judice. But where, as in Parker, the defendant fails in the initial burden, further examination of the reasons offered by the state simply has no place in the two-pronged Neil paradigm. There is no presumption for the state to rebut: the reasons offered by the state have served their purpose and there is nothing left to do.

This Court has already followed this procedure in another death case, King v. State, 12 F.L.W. 502 (Fla. Sept. 24, 1987). In that case, upon a defense Neil objection, the judge accepted the state's offer to place a reason for the challenged strike in the record. Stating a rationale very similar to that used by the judge in the cas sub judice, the trial judge ruled that "I think her [the challenged witness's] statement with regard to uneven imposing of the death penalty is certainly more than sufficient justification for excusing her. Overrule that objection." 12 F.L.W. at 503.1

In rejecting the Neil claim, this Court held:

> In State v. Neil, 457 So.2d 481 (Fla. 1984), this Court held that peremptory challenges cannot be exercised solely on the basis of race. . . . King has met the first two parts of the **Neil** test [timely objection and members of a distinct racial group] but not the third, i.e. a strong likelihood of being challenged solely because of race. As the above-quoted portion of the record shows the state had several reasons for excusing this prospective juror. The trial judge listened to and questioned this woman, listened to counsel's argument, and evaluated the credibility of all concerned on this issue. We see no reason to disturb his ruling on excusing this prospective juror or his ruling that no systematic exclusion had occurred when the state previously excused the second black prospective juror.

12 F.L.W. at 503 (emphasis added). This discussion clearly shows that this Court considered the reasons offered by the state to be relevant to determining that the defendant had failed to show a "strong likelihood," and that the reasons offered deserved no further inquiry once this Court determined that the defendant's initial burden had not been met.

The first district appears to have followed this Court's lead in a recent decision. In McCloud v. State, 12 F.L.W. 2801 (Fla. 1st DCA Dec. 9, 1987), the defendant was tried in two separate trials. In the first, the state used eight of ten peremptory challenges to exclude eight of the nine black members of the venire. The ninth served on the jury. In the second trial, the state challenged seven black members of the venire and one white member. In both cases, the defendant moved to strike the venire

and for a mistrial. In both cases, the state volunteered non-racial reasons for the challenges. The first district held that, pursuant to Neil, merely showing that a number of blacks were excluded from the jury was

> not sufficient to entitle a party to inquire into the other party's use of peremptories. Furthermore, in the instant case the state gave nonracial reasons for striking most of the black jurors. The court apparently found these reasons adequate to assure it that there was no substantial likelihood the challenges were being exercised on the basis of race.
>
> We are compelled to affirm the trial court's decision as the defense failed to carry its initial burden of demonstrating that there was a strong likelihood that the jurors were challenged solely because of race. In addition, the state's action of volunteering nonracial reasons for the striking of the jurors and the trial judge's consideration and acceptance of those reasons require the affirmance of the trial judge's denial of the defendant's motion for mistrial in each case.

12 F.L.W. at 2802 (citations deleted, emphasis added). In other words, regardless of whether the state gave reasons for striking prospective black jurors, the defendant's failure to carry his initial burden compels affirmance. See also United States v. David, 662 F.Supp. 244, 246 (N.D. GA. 1987) (on remand for Batson hearing, prima facie case not made and "obviates the need to consider the government's explanation for each of its strikes," id., but the trial court found reasons credible "given the present appellate posture of the case . . .").

In the instant case, the state did not spontaneously volunteer its reasons for striking prospective juror Crawford. The trial judge inquired of the prosecutor why he was striking Crawford and further inquired how the stated reason was relevant

to the case. However, there is no indication in the record that the trial court required the state to provide reasons in the court's exercise of its power under the second stage of a Neil inquiry, despite Holton's assertion in his initial brief at 18 that the state's response was so required. As the McCloud court observed, "[i]n the instant case, as in many other cases arising under Neil the precise procedure prescribed by the supreme court was not followed." 12 F.L.W. at 2802.

The fact that a trial court makes inquiry of the state as to why it is striking a prospective juror is not dispositive of the question of whether the trial court has made a determination that the defendant has met his initial burden and the burden has shifted to the state. Neil holds that, absent meeting his initial burden, the defendant cannot compel an inquiry into the state's reasons for striking. Neil does not prohibit the state from spontaneously volunteering, or from offering in response to a trial court's inquiry, preliminary reasons for his strikes to aid the court in determining whether there is a "strong likelihood" of discriminatory peremptory challenges.

In the instant case, the trial judge's inquiry merely constituted a preliminary investigation to determine whether the defendant's initial burden had been met. The state's prosecutor would have been free to decline to answer the trial court, under the Neil paradigm, and to stand on the facts without a reason on the record, awaiting the trial court's initial determination as to the defendant's burden. The state's prosecutor was likewise free to provide a preliminary answer to assist the court in its

decision. This is clearly what was happening in the instant case, as the prosecutor only had the opportunity to provide the first of an unknown number of racially neutral reasons for the strike. The prosecutor responded to the court's first question, "Why are you striking this juror?" with "Number one, I said if a battered . . . ." R124. After the further inquiry as to how this first stated reason was relevant to the case, the court then ruled that the strike was not a systematic exclusion, and that the state clearly could strike the prospective juror.

Considering the unsettled nature of the law vis-a-vis Neil issues, the trial judge cannot be blamed for failing to state explicitly that the defendant had failed to meet his initial burden. However, it is clear that the trial judge never went beyond the first prong of the Neil paradigm or else he would have, at the very least, inquired of the state what other reasons the state had for striking, since the state's initial response to the judicial inquiry explicitly noted further reasons existed. Absolute adherence to the Neil paradigm would have resulted in the trial court, in making his ruling, stating that the defendant's initial burden had not been met, or, alternatively, that it had been met and that the state now had the burden to go forward with further reasons and/or argument.

Holton's argument on this first issue wholly ignores the two-step Neil paradigm, and confuses the defendant's initial burden with the ultimate question of whether there was racially discriminatory striking. Holton attempts to ignore the threshold question of whether he met his initial burden at trial, and asks

this Court to address the ultimate issue as if the trial judge either ruled that the initial burden had been met, or that he should have so ruled. In so doing, Holton attempts to place the state in the stance of having to overcome a presumption of discriminatory striking which simply did not arise in this case. Acquiescence with Holton's flawed position would only further confuse the lower courts in their effort to comply with the dictates of Neil.

The rigorous review appellant urges be applied in this case is the standard appellant further urges is reserved for reasons offered to overcome a presumption against the state, see, e.g., Slappy v. State, 503 So.2d 350 (Fla. 3d DCA 1987), pending on review No. 70,331 (Fla. argued Nov. 3, 1987). To subject any reason offered by the state in the initial phase of a Neil proceeding to such rigorous review would discourage prosecutors from volunteering reasons for striking or responding to a preliminary inquiry from the trial court. Such reasons, offered during the first phase of a Neil proceeding, can significantly aid the trial court in its obviously difficult task of determining whether there is a "strong likelihood" of discriminatory striking. An offering of such preliminary reasons would be relevant to many of the factors discussed infra which might be considered in the initial determination of whether a presumption of discriminatory striking arises.

However, at the threshold stage of a Neil proceeding, any reasons offered by the state would be made in that context, i.e. the focus of the court's attention at that point is not on the

reasons offered by the state but on the totality of the circumstances at the time the defendant alleges discriminatory striking.

The reasons offered at the initial stage would, of course, presage reasons offered if the court were to make a finding that the defendant's initial burden had been met. But the prosecutor could not be expected to have fully developed his reasons for striking at that point. Trial practice is a highly subjective art, and requiring the prosecutor in a preliminary inquiry to fully identify his reasons for striking one or more prospective jurors is unrealistic. The prosecutor in this case indicated he had more than one reason for striking Mrs. Crawford. Given even the additional time announcement of a formal finding that the burden had shifted, the prosecutor surely could have provided the trial court with expansion of his initial reason and the further reasons explicitly alluded to in his first response. However, there was no necessity for this since the trial court did not rule that the burden had shifted.

In summary, the initial inquiry in any review of a Neil issue must be whether the record permits an inference of discriminatory striking.

The state does not dispute that the striking of even one black prospective juror solely for racial reasons violates the rationale of Batson v. Kentucky, 476 U.S. __, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). United States v. Gordon, 817 F.2d 1538 (11th Cir. 1986). However, when the question is whether the striking of a single prospective black juror raises an inference of dis-

criminatory exercise of peremptory challenges, the defendant bears a heavy burden. Cf. Gamble v. State, 257 Ga. 325, __, 357 S.E.2d 792, 795 (1987) (a relatively weak explanation as to one of several strikes against prospective black jurors may be sufficient to rebut a prima facie case of discriminatory striking where the explanations as to all the others are persuasive).

No Florida case law exists addressing factors which might be relevant under this narrow set of circumstances. In fact, little Florida law exists addressing the question of what is necessary to raise the inference in other than general terms. The Supreme Court of Alabama recently established tentative trial procedure and standards for Neil-type issues based on Batson, and in so doing summarized the case law on criteria for ascertaining whether a prima facie case of discriminatory striking arises.

> We now set out some general guidelines for lower courts to follow until this Court, under its rule-making power, can adopt a more specific rule of procedure, or until the Legislature adopts a procedure that would comport with the State and Federal Constitutions. This inquiry should become a part of the trial record so that there will be a sufficient record for appellate review. People v. Wheeler, 22 Cal.3d 258, 280, 583 P.2d 748, 764, 148 Cal.Rptr. 890, 905 (1978); see generally, Jackson, supra [Ex Parte Jackson, (MS. 84-1112, Dec. 19, 1986)].
>
> The burden of persuasion is initially on the party alleging discriminatory use of peremptory challenges to establish a prima facie case of discrimination. In determining whether there is a prima facie case, the court is to consider "all relevant circumstances" which could lead to an inference of discrimination. See Batson, 476 U.S. at __, 106 S.Ct. at 1721, citing Washington v. Davis, 426 U.S. 229, 239-42 (1976). The following are illustrative of the types of evidence that can be used to raise the inference of discrimination.

1. Evidence that the "jurors in question share(d) only this one characteristic--their membership in the group--and that in all other respects they (were) as heterogeneous as the community as a whole." Wheeler, 22 Cal.3d at 280, 583 P.2d at 764, 148 Cal.Rptr. at 905. For instance "it may be significant that the persons challenged, although all black, include both men and women and are a variety of ages, occupations, and social or economic conditions," Wheeler, 22 Cal.3d at 280, 583 P.2d at 764, 148 Cal.Rptr. at 905, n.27, indicating that race was the deciding factor.

2. A pattern of strikes against black jurors on the particular venire; e.g., 4 of 6 peremptory challenges were used to strike black jurors. Batson, 476 U.S. at 106 S.Ct. at 1723.

3. The past conduct of the offending attorney in using peremptory challenges to strike all blacks from the jury venire. Swain, supra [Swain v. Alabama, 380 U.S. 202 (1965)].

4. The type and manner of the offending attorney's questions and statements during voir dire, including nothing more than desultory voir dire. Batson, 476 U.S. at ___, 106 S.Ct. at 1723; Wheeler, 22 Cal.3d at 281, 583 P.2d at 764, 148 Cal.Rptr. at 905.

5. The type and manner of questions directed to the challenged juror, including a lack of questions, or a lack of meaningful questions. Slappy v. State, 503 So.2d 350, 355, (Fla. Dist. Ct. App. 1987); People v. Turner, 42 Ca.3d 711, 726 P.2d 102, 230 Cal.Rptr. 656 (1986); People v. Wheeler, 22 Cal.3d 258, 583 P.2d 748, 764, 158 Cal.Rptr. 890 (1978).

6. Disparate treatment of members of the jury venire with the same characteristics, or who answer a question in the same or similar manner; e.g., in Slappy, a black elementary school teacher was struck as being potentially too liberal because of his job, but a white elementary school teacher was not challenged. Slappy, 504 So.2d at 352 and 355.

7. Disparate examination of members of the venire; e.g., in Slappy, a question designed to provoke a certain response that is likely to disqualify a juror was asked to black jurors, but not to white jurors. Slappy, 503 So.2d at 355.

8. Circumstantial evidence of intent may be proven by disparate impact where all or most of the challenges were used to strike blacks from the jury. Batson, 476 U.S. at ___, 106

S.Ct. at 1721; Washington v. Davis, 426 U.S. at 242.

**9.** The offending party used peremptory challenges to dismiss all or most black jurors, but did not use all of his peremptory challenges. See Slappy, 503 So.2d at 354, Turner, supra.

Ex Parte Branch, No. 86-500, slip op. at 18-20 (Ala. Sept. 18, 1987) (copy of slip op. attached as Appendix). As the Alabama Supreme Court noted in its opening comment, the standards it propounded are preliminary in nature, and the State of Florida does not propose sub judice that this Court adopt the Branch criteria or its own in resolution of the instant case. However, the nine criteria propounded in Branch do provide a context within which to analyze the question of whether Holton showed, or could have shown, a "strong likelihood" of discriminatory strikes sufficient to shift the burden to the state.[2] At this point, the State serially addresses the nine factors propounded in Branch in the context of the instant case.

1. The prospective jurors in question shared only their race and in all other respects were as heterogeneous as the community as a whole.

The first two black prospective jurors struck by the state demonstrated ambivalence about the death penalty. This was noted by the trial judge in denying defense counsel's first objections to the striking of these two prospective jurors. R63.

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2/ Appellant also notes that the Alabama Supreme Court corrects some of the doctrinal error arising in the third district's opinion in Slappy. While Slappy listed certain criteria as indicative of discriminatory striking in the context of analyzing whether the state has overcome a presumption of discriminatory strikes in the second stage of the Neil paradigm, Branch properly assigns relevance to such criteria to the threshold stage.

2. A pattern of strikes against blacks on the particular venire.

Again, the first two blacks stricken were opposed to the death penalty. R63. A total of only three blacks, including Mrs. Crawford, were stricken at the time defense counsel objected to the striking of Mrs. Crawford. R123. The state had challenged one non-black prospective juror at the time it struck Mrs. Crawford. R90 (prospective juror Stoller). The state subsequently struck prospective jurors Decker (R129), Keller (R135), and Warren (R161). Presumably, all were white as no objection was raised by the defense.

Several jurors were seated after Mrs. Crawford was excused, and the record fails to show whether any of them were black. Although appellant asserts in his brief that Blue, Lampley, and Crawford were the only blacks on the venire, there is no record support for this. The burden is on appellant to establish this fact, if true. The question of whether the jury which finally was empaneled contained any black jurors is therefore unresolved, and appellant may not argue that this alleged fact supports an inference of discriminatory strikes.

The case law shows that merely striking some number of prospective black jurors is insufficient to raise an inference of a "strong likelihood" of discriminatory striking, in keeping with Neil's holding that numbers alone are insufficient. Woods v. State, 490 So.2d 24 (Fla.), cert. denied, ___ U.S. ___, 107 S.Ct. 446, 93 L.Ed.2d 394 (1986) (state challenged five blacks, defendants two, one was dismissed for cause, and the ninth sat as an

alternate); Parker v. State, 476 So.2d 134 (Fla. 1985) (four blacks stricken); Blackshear v. State, 504 So.2d 1330 (Fla. 1st DCA 1987) (all-white jury of six, eight blacks struck by the state, defendant failed to meet initial burden); Taylor v. State, 491 So.2d 1150 (Fla. 4th DCA), review denied, 501 So.2d 1284 (Fla. 1986) (five black and three white prospective jurors challenged, leaving an all-white panel); Finklea v. State, 471 So.2d 608 (Fla. 1st DCA 1985) (nine black prospective jurors stricken leaving all-white panel).

3. Past conduct of the offending attorney in striking all blacks from the venire.

The record is silent on this point, but defense counsel made no such allegation at trial.

4. Type and manner of offending attorney's questions and statements during voir dire, including nothing more than desultory voir dire.

A review of the voir dire sub judice shows a spirited inquiry of all members of the venire by both defense and prosecution, including inquiry of all three challenged black prospective jurors.

5. Type and manner of questions directed to the challenged juror, including lack of questions or lack of meaningful questions.

The record shows Mrs. Crawford was questioned extensively by the state when she first was called, R65-71. This initial inquiry showed she apparently had no reservations about imposing the death penalty, that she investigated employment discrimina-

tion complaints, and that she conducted hearings as a hearing officer in pursuit of her occupation. Returning to Mrs. Crawford, R75, the prosecutor at first got her name wrong, then received an ambivalent answer to an inquiry:

> Q. [Prosecutor Epsicopo] Mrs. Diaz, are you going to have trouble with us not having a motive?
> A. [Mrs. Crawford] My name is Crawford.
> Q. I am sorry. Mrs. Crawford. Mrs. Diaz was just excused [for cause, and Mrs. Crawford had taken Diaz' position, #7, in the jury box, R65]. Will you have a problem with that?
> A. I don't think so.
> Q. You say, "I don't think so." Is it because you are not quite sure or that is just a phrase?
> A. It should have been no.
> Q. Huh?
> A. I should have said no. I would not have any problem with that.
> Q. Okay. Thank you . . .

R75. Finally, the state questioned Mrs. Crawford about the battered woman hypothetical and excused her. R117-18. The defense also questioned Mrs. Crawford extensively, determining that she knew several attorneys, including one past and one present assistant state attorneys, R82, that she had no problem imposing the death penalty, R83, and that she understood there was a different quantum of proof in a criminal trial as opposed to the hearings she conducted in her job, R86-87.

Clearly, the type and manner of questioning Mrs. Crawford was nondiscriminatory in nature.

6. Disparate treatment of members of the venire with the same characteristics or who answer a question in the same or similar manner.

No one on the jury had Mrs. Crawford's experience in trial-type hearings or had otherwise served in an investigative quasi-judicial position. One of the other black prospective jurors, Lampley, was a lawyer, but he worked for Commerce Clearinghouse (a loose-leaf case law publisher in Tampa), R59, and was excused for his view that the death penalty was unequally imposed.

The prosecution expressly asked six jurors early in voir dire whether the fact the victim was a prostitute would affect their impartiality or cause them to look down on the victim. R19. This was asked prior to Crawford being seated, R65, *so* defense counsel's assertion at R83 that Crawford had already been asked by the state whether the victim's lifestyle would prejudice her, was in error.

The initial six witnesses stated they would not be prejudiced by the victim's lifestyle. The state later asked a subsequently seated prospective juror if she would have any problems with the fact that the victim "put herself in a situation" resulting in her death. R116. That witness answered she would not have a problem. Very shortly thereafter, the state propounded its battered woman question to Crawford. R117-18. In light of the state's explanation, that Crawford's answer to the battered woman question suggested a lack of sympathy for a woman who puts herself in a bad situation, R124, Crawford's disparate response to a question similar to that propounded to at least seven other prospective jurors, and designed to discover the identical information (i.e. the juror's attitude towards a victim who may have placed herself in a perilous situation), negates the applicability of this factor.

7. Disparate examination of members of the venire.

While the battered woman question was propounded only to Crawford, it was designed to elicit the same information as the question regarding lifestyle propounded to the other seven jurors discussed in the immediately preceding paragraph, i.e. would the prospective juror feel sympathy for the victim or have a problem with the fact that the victim, a prostitute, may have gotten herself into a bad situation.

At this point in the proceedings, the state could not know what theory of defense the defense would use. The defense could have admitted appellant killed the victim, but urge, consistent with much of the informant's account of appellant's confession, that it occurred as the unfortunate outcome of consensual intercourse. In such a case, the state would be interested in knowing whether prospective jurors would feel harshly about the victim, or anyone who got themselves into a bad sitation.

Appellant argues that Crawford could have given no answer not open to justification for the state's challenge. However, the cold record does not reflect body language, tone of voice or other nonverbal cues which may have indicated to the state, and the court, that Mrs. Crawford's answer indicated a certain hard-heartedness for battered woman who get themselves into a bad marriage, or for prostitutes who get themselves into a bad situation.

8. Circumstantial evidence of intent by disparate impact when all or most of the challenges were used to strike blacks.

As urged supra, numbers alone do not create an inference of discriminatory challenges. The state struck a total of seven prospective jurors, only three of whom were black. R887-88 (jury panel sheets) and previous citations to the record.

9. Use of peremptory challenges to eliminate most or all black prospective jurors, but failure to use all peremptory challenges.

Again, the record fails to show whether all the blacks available in the venire were peremptorily challenged by the state, or that any of the jurors seated subsequent to the striking of Crawford were not black. The burden was on appellant at trial to establish the inference, and the burden is doubly upon appellant in this appeal to overcome the presumption of correctness which cloaks the trial court's ruling before this Court. The record further does not reflect how many peremptory challenges the state was permitted at trial.

The record does show that the state twice accepted the jury with Mrs. Crawford as a member when the judge called for challenges. R109 & 114.

Thus, using the comprehensive compendium of criteria propounded by the Alabama Supreme Court, under no view of the record may it be concluded that appellant satisfied his intitial burden of establishing a "strong likelihood that [the black jurors were] challenged solely because of their race." Neal, 457 So.2d at 486.

Assuming, arguendo, this Court finds that appellant ~~did~~ satisfy his initial burden, the state urges that the prosecutor's reason clearly shows a nonracial reason for striking that passes

whatever standard of review this Court chooses to use. At the time this brief is being prepared, Slappy remains pending before this Court. Slappy is the first case to come to this Court addressing the question of what standard of review should be used in examining the reasons for the strike of a black juror.

Initially, the state urges that a prima facie race-ne tral explanation is sufficient to overcome the burden on the state in a second-stage Neil analysis. However, in the event Slappy or some permutation of the standards in that opinion is adopted by this Court, the state urges that the prosecutor's reasons sub judice pass muster.

Appellant urges only one factor is relevant in the Slappy criteria: ". . . disparate examination of the challenged juror, i.e., questioning challenged venireperson *so* as to evoke a certain response without asking the same question of other panel members." Slappy, 503 So.2d at 355. The state has already addressed this factor in its discussion supra under factor number seven of the Branch criteria for determining whether the initial burden has been met.

The state urges here that the Alabama Supreme Court has placed this factor in the appropriate context, i.e. as relevant only to determine whether a "strong likelihood" exists of discriminatory strikes. To place this factor in the context of establishing that the state has failed to meet its burden once the burden has shifted would virtually paralyze the state in its voir dire of jury venires. If the state cannot ask individualized questions of specific venire members, based on their backgrounds

and other relevant information, then the jury selection process will be severely damaged. A question of a specific venire member may be completely irrelevant if asked of any other member of the venire, simply because it is relevant only in light of the specific background of the venire member asked.

Placing this factor in the first stage of a Neil analysis as the Alabama court has done permits the state to conduct individualized questioning, allows the defendant to use possibly race-biased "trick" questions to establish a prima facie case, but further permits the state to explain away the apparent race-bias in the second stage of the Neil paradigm. If this Court undertakes such an analysis sub judice, the state's reason offered for asking the question more than adequately explains the race-neutral character of the question.

In the instant case, it appears that the assistant state attorney misapprehended the scope of Mrs. Crawford's job, and believed that there may have been some social work aspect to it which would bring her in contact with abused women. When Mrs. Crawford corrected the prosecutor, he still pursued the question. This action is understandable since the prosecutor had already mentally framed the question, as he later explained, to discover whether Crawford would be unsympathetic about the predicament the victim may have placed herself in. The nature of the question, in light of the explanation offered, shows that the prosecutor may have been less than nimble in responding to a change in his information about the scope of Mrs. Crawford's job, but it does not constitute a trick question, or a "Catch-22"

where the venire member could not give a correct answer no matter what. The trial judge was in a better position than this Court to make a factual determination of the prosecutor's truthfulness in explaining his reason for asking the question. Batson v. Kentucky, 476 U.S. ___, 106 S.Ct. 1712, 90 L.Ed.2d at 89 n.21 (1986) (great deference is due trial court's findings in a Batson determination as such findings will be based largely on evaluation of credibility).

It should be further noted that Mrs. Crawford gave an initially ambivalent answer to the prosecutor earlier in voir dire when she responded "I don't think so" to the state's inquiry whether the lack of a motive would prove a problem. R75. The prosecutor said he had more than one reason for striking Mrs. Crawford, and this may well have been one of those additional reasons. In reviewing the reasons for striking a jury in the context of a second-stage Neil analysis, the appellate court should examine not only the reasons offered by the state in the record, but the totality of the circumstances apparent from the record. **See**, e.g., Neil, 457 So.2d at 487 n.10 (propriety of a challenge may not be apparent to someone not at trial, but apparent to the presiding judge). Cf. Parker, 476 So.2d at 138-39 (entire record relied upon in determining initial burden not met).

In Macklin V. State, 491 So.2d 1153 (Fla. 3d DCA 1986), the court held:

> Contrary to appellant's contention that he demonstrated a strong likelihood that four potential black jurors were peremptorily stricken solely because of their race, the record

> reveals a valid basis for exclusion in at least three instances. Appellant has failed to show that there was a strong likelihood that the fourth juror was challenged solely on the basis of race . . ., we therefore find that reversal under Neil is inappropriate.

491 So.2d at 1154 (entire text of opinion quoted with citations deleted). The Macklin panel appears to have conducted a unitary review, i.e. mixing the question of whether valid reasons exist for strikes with the threshold issue of whether there was a strong likelihood of discriminatory striking. Nevertheless, the brief analysis shows that the record is relevant, beyond any reasons which might be offered by the state. Macklin also demonstrates that, given four challenged strikes, where the strikes for all but one are supported by clear reasons in the record, the apparent absence of a valid reason for the fourth strike will not require reversal where the appellant has failed to meet his initial burden. In the instant case, only three strikes are at issue but the circumstances are otherwise indistinguishable.

The state further urges that, in weighing a race-neutral explanation for the strike of a single juror, this Court bear in mind the wisdom offered by the Georgia Supreme Court:

> The explanation offered for striking each black juror must be evaluated in light of the explanations offered for the prosecutor's other peremptory strikes, and, as well, in light of the strength of the prima facie case [established by the defendant in shifting the burden to the state]. The persuasiveness of a proffered explanation may be magnified or diminished by the persuasiveness of companion explanations, and by the strength of the prima facie case.
>
> A court charged with the duty of determining whether the prosecutor has rebutted a prima facie case may be less troubled by one relatively weak explanation for striking a

> black juror when all the remaining explanations are persuasive than where several of the prosecutor's proffered justifications are questionable. Similarly, a weak prima facie case may be rebutted more readily than a strong one.

Gamble v. State, 257 Ga. 325, ___, 357 S.E.2d 792, 795 (1987). See also United States v. David, 803 F.2d 1567 (11th Cir. 1986) (failure to explain every peremptory strike not necessarily fatal to rebutting a prima facie case).

In the instant case, appellant's argument that he has met the initial burden of showing a "strong likelihood" is grounded solely on the alleged disparate questioning of prospective juror Crawford, and the fact that she was the third prospective black juror challenged. As urged initially by the state, this does not show a "strong likelihood," but if it does, the prima facie case is very weak. The challenges to the first two jurors go virtually unchallenged by appellant in this appeal, since the record so clearly shows their opinions regarding the death penalty. The trial judge felt the reasons for striking the first two jurors so obvious he himself offered them, and made no inquiry of the prosecutor, either at the time of their striking or when inquiring about Crawford.

Thus, even if this Court agrees with appellant that the explanation for striking Mrs. Crawford is weak, appellant's prima facie case of discriminatory striking is even weaker, and his appeal on this point must fail.

Finally, if this Court finds that the trial judge failed to conduct a proper second phase Neil inquiry, the proper procedure would be to remand the case to the trial court for such an in-

quiry. Pearson v. State, 12 F.L.W. 2147 (Fla. 2d DCA Sept. 4, 1987). The record clearly shows the prosecutor had more than one reason for striking Crawford, but never had the opportunity to state them in the record. The record itself shows at least one other reason, i.e. Mrs. Crawford's ambivalent answer regarding lack of a motive. And the prosecutor may be able to state other reasons arising from nonverbal observations apparent only to those in attendance at trial. Neil, 457 So.2d at 487 n.lO.

## ISSUE II

THE PROSECUTOR'S QUESTION REGARDING THE JAIL-HOUSE INFORMANT'S KNOWLEDGE OF FACTS ONLY THE KILLER WOULD KNOW WAS NOT PRESERVED AND IS NOT FUNDAMENTAL ERROR.

Appellant's argument on this issue resolves into two sub-issues; the complained-of question was error, and it was fundamental error because of the overall weakness of the state's case.

Appellant argues that the complained-of question was error. The issue was not preserved for review. Appellant failed to request a curative instruction or to move for mistrial after the trial court sustained his objection on both occasions. Absent fundamental error, a criminal defendant is deemed to have waived error when he fails to request a curative instruction or to move for mistrial after the trial court has sustained an objection to impermissible prosecutorial comment. Lara v. State, 464 So.2d 1173, 1180 (Fla. 1985) (prosecutorial comment during sentencing phase of death case); Clark v. State, 363 So.2d 331, 335 (Fla. 1978) (failure to request mistrial after objection to impermissible comment on right to remain silent constitutes implied waiver).

Appellant sub judice does not argue that the alleged error in the instant case was properly preserved for review. The thrust of his argument addresses the purported fundamental nature of the alleged error, impliedly conceding the waiver issue. The only case cited by appellant in support of the fundamental nature of the alleged error is Duque v. State, 498 So.2d 1334 (Fla. 2d

DCA 1986). However, in Duque, three comments by the prosecutor[3] were found to be error. The court ruled that two of the comments were properly preserved for appeal, and the third, the reference to a defense witness as a "scum bag" known as such around the courthouse, was not preserved for appeal. However, "the totality of the circumstances shows that defendant did not receive a fair trial and . . . we should, under the facts of this case, consider that contention [the "scum bag" reference] as involving fundamental error." 498 So.2d at 1338.

In the opinion, the court found a total of four substantial errors. The first was failure to permit a defense backstrike, the second involved failure to allow voir dire of the jury regarding a prejudicial newspaper account, the third was the three instances of improper prosecutorial comment (including the scum bag reference), and the fourth concerned admission of prejudicial hearsay testimony. In light of the properly preserved errors, any one of which would probably have been sufficient for reversal, the court's conclusion as to the unpreserved scum bag comment was not dispositive of the case, and, had it been the only error arising at that trial, the state urges that "the totality of the circumstances" would not have resulted in a finding of fundamental error on this point.

Appellant urges that the thrust of the allegedly improper comment by counsel constitutes fundamental error because it bol-

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3/ Appellant's assertion that the prosecutor in Duque is the same as the prosecutor who conducted the instant trial is unsupported by the record, nor do the two Duque opinions reflect who was the prosecutor in those trials. The state strongly protests this irrelevant ad hominem attack on Mr. Esposito.

stered the credibility of an otherwise incredible witness, Flemnie Birkins, the jailhouse informant.

Holton argues that Birkins' account of Holton's confession was totally uncorroborated except for the fact that the fire was of incendiary origin. This is simply untrue. The record shows the following elements in Holton's confession to Birkins:

(1) He killed a girl, R289;

(2) by strangling her, R289;

(3) he went to the Star gas station on Nebraska, R289;

(4) he bought a can of gas, R289;

(5) he returned to the house and set it on fire, R289;

(6) he had his hands around the victim's throat as he strangled her, R296;

(7) when cross-examined as to whether Holton said he strangled the victim "Not with something else but with his hands?" Birkins responded "With his hands." R297;

(8) Holton said he didn't mean to kill her, R297;

(9) Holton told Birkins he met the victim at the Little Savoy or in that area, R298.

Of these nine elements, only the third, the matter of where the gasoline was purchased, was the object of testimony inconsistent with Birkins' testimony. The record shows that the girl was killed; that she was strangled; that the perpetrator purchased a flammable liquid; that he set the house on fire after the victim was dead, R270; that the ligature around the victim's neck tightened from the heat from the fire, subjecting her neck to a "terrific . . . compression," R268 (testimony of medical examiner),

which the jury could infer destroyed any evidence of prior strangulation by the hands (the photographs may also show the flesh in that area was damaged by the fire destroying such evidence); the testimony that Holton strangled the victim with his hands is not inconsistent with the use of the hands to tie and tighten the ligature (Birkins did not agree with defense counsel that Holton's confession was that he used his hands to the exclusion of a ligature, R297); an assertion by Holton that he didn't mean to kill the victim is consistent with remorse or an attempt to avoid responsibility after his arrest for his premeditated act; and the Little Savoy was a landmark in the case, since this was the bar Johnny Lee Newsome was headed towards when he saw the victim speaking with Holton outside the vacant house, R351, and the bar was in the general neighborhood.

The only substantive inconsistency raised by the defense in Birkins' testimony as to Holton's statements was the place where the flammable liquid was purchased. The jury had the opportunity to observe Birkins, the Star station attendant, and the remainder of the witnesses, and their resolution of this inconsistency should not be disturbed. Birkins may have incorrectly remembered this relatively insignficant detail, or Holton may have incorrectly stated his actions, or the Star station attendant may have been in error.

Appellant's assertion that Birkins was extensively impeached is likewise unsupported by the record. Appellant claims impeachment on the issue of whether Birkins received consideration for his testimony in the sentencing for his own criminal case.

Appellant's Initial Brief at **26.** However, the mere fact that Birkins could have been sentenced as an habitual offender and wasn't does not support the conclusion that the sentencing decision was based on his testimony sub judice. Birkins himself volunteered the fact that he would be ultimately sentenced at a later date, **R292,** suggesting he did not fully understand the technical legal distinctions appellant now attempts to argue constitute impeachment. Certainly the jury could so conclude.

Appellant argues that Birkins was impeached as to the number of times he had been in prison. Appellant's Initial Brief at **26.** However, the record does not show that Birkins had served four separate terms, as that number appears only in a statement by defense counsel in cross-examination, and Birkins' response does not indicate agreement to that assertion. **R300.**

Appellant asserts Birkins was impeached on whether he had sought any benefit as a result of his coming forward. While Birkins had filed a pro se motion for release on his own recognizance, his only reference in that motion to his testimony sub judice was that he was being threatened by other inmates as a result of his coming forward. **R307.** Birkins explained that he sought release because his mother was ill, ~~id.~~, and that his reference in the motion to law enforcement officers who would testify in his behalf referred to sheriff's deputies at the jail who supervised him, not Tampa Police officers connected with the instant case. R304.

Appellant points to the discrepancies in Birkins' testimony as to where Holton spoke with him constitute impeachment. It is

clear from reading the record that the discrepancies are insignificant, i.e. the conversations occurred on the first floor of the jail, the discrepancy amounts to whether one occurred in the infirmary or in the hallway outside the infirmary, etc.

Finally, appellant urges that the discrepancy as to whether Birkins mentioned the victim's age to detectives constituted impeachment. Birkins testified that his motivation for coming forward was "Because it was bothering me real bad," R291. Detective Noblitt testified that Birkins told him he came forward because "he did not believe it was right that a young, seventeen-year-old girl should be killed like that." R463. Birkins did not mention the age of the victim when he gave his deposition. R306. The jury could infer that Birkins did not know the age of the girl, but did know she was young and felt that it was wrong for such a young girl to be murdered. The testimony of two detectives who worked very closely on the case that Birkins said she was 17 could constitute simply filling in a blank mentally, the victim's specific age, on hearing Birkins' statement about a young girl.

Regardless of the explanations for any of the alleged impeachment, the jury resolved the discrepancies in favor of the state with the opportunity to observe the demeanor of all the witnesses, and this Court should not substitute its judgment on these factual issues.

Appellant complains that "the jury never heard a single underlying fact to support [the conclusion that Birkins knew facts only the killer could know]; consequently, they could only conclude that they were being asked to trust in the State's

assertion." Appellant's Initial Brief at 29. Yet, the jury was denied testimony on this point because of appellant's objections. The state would have flouted the trial judge's rulings had it pursued that line of questioning after the trial court had sustained appellant's objections.

In addition, the state cannot be accused of bad faith in raising the question a second time. The complained-of question was put to the witness twice, within a few moments of each other. Immediately after the objection to the first question was sustained, R459, the defense undertook redirect wherein it elicited the inforamtion that the murder had appeared in televised news stories and that prisoners had access to televisions at the jail. R459-60. The clear implication was that Birkins could have learned about the murder from such stories. The state then recrossed, first eliciting the information that police generally held back certain facts from reporters, then asking the complained-of question the second time, prefaced by the comment that the defense had opened the door. R460.

Appellant's further attacks the state's case regarding the fingerprint evidence. Appellant's Initial Brief at 31. Appellant cites to Ivey v. State, 176 So.2d 611 (Fla. 3d DCA 1965), for the proposition that Holton's changing story that he had never been in the house, had never been in the front of the house, and that the fingerprint on the cigarette pack was not his, cannot cure insufficiency as to the fingerprint evidence.

However, Ivey is distinguishable sub judice and has been so distinguished in the past. In Ivey, the fingerprint was found in

an area accessible to the public--the defendant's denial that he had never been in the town where the crime occurred was held to not cure the original insufficiency, i.e. the fingerprint was the only evidence linking the defendant to the crime. Subsequent cases developed the principle that fingerprints found in a public place may not support conviction when they are the sole evidence of guilt. See e.g., Zeigler v. State, 402 So.2d 365, 373 (Fla. 1981), cert. denied, 455 U.S. 1035 (1982) (fingerprint evidence admissible when not the sole basis for finding guilt and it corroborates testimony of witnesses); Amell v. State, 438 So.2d 42 (Fla. 2d DCA 1983), hab. corp. den. 450 So.2d 485 (Fla. 1984) (fingerprints found in place not open to general public are sufficient to support guilt); Williams v. State, 308 So.2d 595 (Fla. 1st DCA), cert. denied, 321 So.2d 555 (Fla. 1975) (state has burden to show fingerprints could only have been made at time of crime, absent other inculpatory evidence).

In the instant case, the fingerprint evidence corroborated the testimony of witnesses that Holton was in the house the night of the murder, and the remainder of the state's case constituted more than sufficient other inculpatory evidence to render Ivey wholly inapplicable sub judice.

## ISSUE III

DEFENSE COUNSEL INVITED THE LINE OF QUESTIONING REGARDING POSSIBLE SUBSEQUENT MURDER/ARSONS.

Appellant fails to quote the entire colloquy between witness Newsome and defense counsel. It is obvious from reviewing the full record surrounding defense cross and recross that defense counsel was attempting to show the possibility that someone other than Holton was killing and burning people in the area. When Newsome first testified that he was a witness in another murder case, R359-60, it was defense counsel who first brought up the possibility that a murder and arson were involved in that case. R360. Defense counsel asked Newsome if there were a fire involved in the aggravated assault case for which Newsome was jailed at the time he heard Holton confess, and if there were a fire involved in the other murder case in which Newsome was a witness. Id. Newsome denied a fire was involved in either case. Id. The state objected on the grounds of relevancy. R360-61.

Defense counsel was not about to give up on this line of questioning. After the state conducted a brief redirect showing the state had made no promises to Newsome for his testimony, R367-68, defense counsel on recross immediately began reexamination about the other murder case. R368. The state objected on the ground that the questioning went beyond the scope of redirect, but the objection was overruled. Defense counsel then hammered home the idea that another murder and arson had occurred:

THE COURT: Overrule the objection [as beyond the scope].
BY MS. MORGAN [defense counsel]:
Q. That case involves a fire and a body being found in that house, doesn't it?
A. No.
Q. It doesn't?
A. Huh-uh.
Q. Who is the defendant in that case? Who are you testifying about now?
A. Rudolph Holton.
Q. No, the other case you are testifying in.
A. Anthony Williams.
Q. Pardon me?
A. Anthony Williams.
Q. Where did that murder occur?
A. At the Red Top Bar.
Q. Not over at the house on Estelle Street?
A. No. I done supposed to be the victim of that but I wasn't. I am supposed to have been burnt up on the house on Estelle Street, but I wasn't. Everybody thought it was me burnt up in the house. That was how that came about.
Q. So, people thought you were there in the house on Estelle when it was burnt up and there was someone else?
A. It was someone else.
Q. Did you used to hang out in that house on Estelle Street?
A. I never have.
Q. But people thought the body in there must be you?
A. Yea.
Q. I don't have any further questions.

R368-70. It is difficult to fathom exactly what murder/arson case defense counsel was eliciting information about. Was it the murder case against Anthony Williams, and if so, was it the murder arising from a shooting at the Red Top Bar, or was it a subsequent murder designed to intimidate Newsome to keep him from testifying about the Red Top shooting? Was it some murder/arson totally unrelated to the Red Top case? These are the kinds of questions the leading questions and Newsome's responses must have

created in the jurors' minds. Even more to the point, was this other murder/arson before or after the one in the instant case? It is impossible to determine from the record.

In the light of the issue raised by defense counsel and made a substantial feature of her cross-examination and recross of Newsome, the state's desire to clear up the question during direct examination of Detective Durkin is obvious. Durkin testified immediately after Newsome, and the question raised sub judice comes just 15 pages after conclusion of the recross of Newsome quoted supra. Appellant cannot now come to this Court and complain that his defense counsel did not open the door for this single question to Durkin, to clear up any confusion defense counsel created when she examined Newsome. See, e.g., Huff v. State, 495 So.2d 145 (Fla. 1986) (death case, opinion testimony that detective believed defendant was guilty admissible after defense opened the door); Dragovich v. State, 492 So.2d 350 (Fla. 1986) (death case, testimony that defendant exercised right to remain silent, to explain why subsequent voluntary statement not tape-recorded when all other statements had been, admissible to rebut "obvious inference" created by defense counsel that detective's account of unrecorded statement was less than truthful); Blair v. State, 406 So.2d 1103 (Fla. 1981) (state-elicited testimony that inferred defendant had impregnated his daughter, in trial for murder of the wife and mother, permissible after defense opened the door by eliciting testimony that defendant and his wife had argued the day she died about defendant "spending too much time with" daughter); Jackson v. State, 359 So.2d 1190

(Fla. 1978), cert. denied, 439 U.S. 1102 (1979) ("Appellant cannot initiate error and then seek reversal based on that error." Id. at 1194).

The inference created by the defendant need not be blatantly obvious in order to open the door for state rebuttal. In Dodson v. State, 356 So.2d 878 (Fla. 3d DCA), cert. denied, 360 So.2d 1248 (Fla. 1978), the defendant testified during questioning by his attorney on direct about an auto theft twelve years previous, then testified that he had been convicted of "other crimes" and "other felonies." On cross-examination, the state brought out that the "other crimes" included a second auto theft and thefts of property on breaking and entering. The third district held the defendant opened the door to this questioning because his testimony on direct created an inference that the defendant had only one prior theft conviction. The other crimes of dishonesty were material to defendant's character, which he had placed at issue.

The second district subsequently characterized the inference created by the defendant's testimony on direct in Dodson as an attempt to mislead the jury, and further held that "One 'opens the door' to an otherwise proscribed area or topic by asking questions relating to that area." Payne v. State, 426 So.2d 1296, 1300 (Fla. 2d DCA 1983) (emphasis in original). In the instant case, defense counsel's repeated emphasis on the "other" murder and arson, without eliciting whether that other murder and arson occurred before or after Holton was incarcerated, clearly "related to" the question put to Detective Durkin, and clearly

misled the jury to suspect that another murder and arson may have occurred after Holton's arrest.

Regarding the state's mention of Detective Durkin's testimony during closing argument, the court noted the objection, yet appellant failed to request a curative instruction or move for mistrial, thereby waiving the issue. Lara v. State, **464** So.2d **1173, 1180** (Fla. **1985)** (prosecutorial comment during sentencing phase of death case); Clark v. State, **363** So.2d **331, 335** (Fla. **1978)** (failure to request mistrial after objection to impermissible comment on right to remain silent constitutes implied waiver). Even if deemed not waived, the comment constitutes fair comment on the evidence in the case. Defense counsel made the other murder/arson a prominent feature of her cross- and recross-examinations of Newsome. Detective Durkin's testimony clearly destroyed the inference she had been attempting to create. She could not raise the issue in her closing argument since Durkin's testimony so effectively dispelled the confusion she had attempted to create, but the state cannot be faulted for drawing the jury's attention one final time to the single fact which clears up that confusion.

## ISSUE IV

THE PROSECUTOR'S REMARKS IN CLOSING ARGUMENT DURING THE GUILT PHASE WERE FAIR COMMENT ON THE EVIDENCE.

The closing remarks of the prosecutor do not amount to fundamental error. Once again, appellant undertakes an ad hominem attack on the prosecutor which is unwarranted, unsupported by the record, and irrelevant. It matters not what the prosecutor's conduct was in trials before or after Holton's. What counts is what occurred within the confines of the four walls of the courtroom where Holton stood accused of murder in the first degree.

Appellant's failure to object and request curative instruction or mistrial during the closing argument constitutes waiver. Wasko v. State, 505 So.2d 1314, 1317 (Fla. 1987) (prosecutorial comments must "poison the minds of the jurors" into returning a more severe verdict; unobjected to "vouching" waived); Wilson v. State, 436 So.2d 908 (Fla. 1983); Ferguson v. State, 429 So.2d 691 (Fla. 1983); State v. Cumbie, 380 So.2d 1031 (Fla. 1980); Clark v. State, 363 So.2d 331 (Fla. 1978) (proper procedure is objection and motion for mistrial); Walker v. State, 473 So.2d 694 (Fla. 1st DCA 1985) (patently improper argument not reversible error where defendant's objections overruled but defendant failed to move for mistrial); Mabery v. State, 303 So.2d 369 (Fla. 3d DCA 1974), cert. denied, 312 So.2d 756 (Fla. 1975).

A review of the state's closing arguments fails to show any fundamental error. Defense counsel attempted to point out inconsistencies in the evidence and testimony and otherwise raise a reasonable doubt. The prosecutor's rebuttal amounted to no more

than fair comment on the evidence and testimony and rebuttal of appellant's closing argument.

> The rule is that considerable latitude is allowed in arguments on the merits of the case. Logical inferences from the evidence are permissible. Public prosecutors are allowed to advance to the jury all legitimate arguments within the limits of their forensic talents in order to effectuate their enforcement of the criminal laws. Their discussion of the evidence, so long as they remain within the limits of the record, is not to be condemned merely because they appeal to the jury to 'perform their public duty' by bringing in a verdict of guilty.

Spencer v. State, 133 So.2d 729, 731 (Fla. 1961), quoted at Thomas v. State, 326 So.2d 413, 415 Fla. 1975). ~~See also~~ Breedlove v. State, 413 So.2d 1, 8 (Fla.), cert. denied, 459 U.S. 882 (1982) (logical inferences and all legitimate argument permissible; control of closing argument within the trial court's discretion and reversible only on showing of abuse of said discretion).

The only objections raised by the defense were to the prosecutor's "twisted mind" comment regarding the drawing made by appellant during an interview, and the lack of murder/arsons since appellant's arrest, dealt with in Issue 111. R720. Both objections came almost at the close of the state's surrebuttal. R721. The remainder of the closing argument was not objected to, nor was there any objection, request for curative instruction, or motion for mistrial at the close of the closing argument. Id.

The reference to appellant's "twisted mind" is fair "florid argument and dramatic peroration" which did not cross the line from the dramatic to the inflammatory. Collins v. State, 180

So.2d 340, 342 (Fla. 1965) (references to rape defendant as "cruel human vulture,'' "vile creature," and "this beast just ripped her open" not reversible error). ~~See also~~ Breedlove at 8 (allegations of other criminal acts. "vituperative" characterization of defendant as an "animal", and appeal to community prejudice, "may have been improper, but . . . not . . . so prejudicial that a new trial is required); Wasko.

The remainder of the comments discussed by appellant simply do not reach the level of fundamental error. The prosecutor's argument about lack of evidence that everyone who graduated from Gibb's High School was black is not incorrect. While a detective testified that Gibbs was "an all black high school," he was not qualified as an expert or one with specialized knowledge about this fact. And "an all black high school" may have had one or more white students who, for one reason or another, attended the school during the 1960's, when schools were integrating. The reference to Red Clemmons' dog is a collatera matter, inconsequential and certainly not fundamental error.

Appellant's argument that the prosecutor's initial comments in surrebuttal amount to reversible error is unsupported by the cases cited by appellant.

- Adams v. State, 192 So.2d 762 (Fla. 1966) - No indication the error was not preserved, therefore no indication the error was fundamental, which would have been necessary to support reversal.

- Carter v. State, 356 So.2d 67 (Fla. 1st DCA 1978) - The defendant objected and moved for mistrial, preserving the

issue. The district court further noted that "no effective curative instruction" was given by the trial judge, implying that a proper curative instruction would have corrected the error. If a curative instruction would have worked, then the error, by definition, was not fundamental.

- Jackson v. State, 421 So.2d 15 (Fla. 3d DCA 1982) - Defense objection partially preserved the issue, and the court noted that instructions from the trial judge might have cured any prejudice, suggesting the error was not fundamental. The opinion makes clear that the closing argument was "utterly and grossly improper,'' and was conceded to have been so by the state on appeal. Id. at 15.

- Peterson v. State, 376 So.2d 1230 (Fla. 4th DCA 1979), cert. denied, 386 So.2d 642 (Fla. 1980) - A review of the opinion shows that Peterson's "mail order catalog of prosecutorial misconduct" constituted egregious misconduct, beside which the non-inflammatory argument sub judice pales.

The prosecutor's references to appellant's defense as false again merely amounts to permissible comment on the state's view of the case.

> It was for the jury to decide what evidence and testimony was worthy of belief and the prosecutor was merely submitting his view of the evidence to them for consideration. There was no impropriety.

Craig v. State, 510 So.2d 857, 865 (Fla. 1987). See also Reaves v. State, 324 So.2d 687 (Fla. 3d DCA 1976) (prosecution permitted to comment on the essential unbelieveability of a defendant's case). This likewise applies to the prosecutor's unobjected-to

scenario of the events the night of the murder, which constituted merely a consistent theory of the evidence supporting conviction.

Appellant complains that the prosecutor vouched for the credibility of Flemnie Birkins. However, the comments came within permissible bounds.

> "Attempts to bolster a witness by vouching for his credibility are normally improper and error." The test for improper vouching is whether the jury could reasonably believe that the prosecutor was indicating a personal belief in the witness' credibility. This test may be satisfied in two ways. First, the prosecution may place the prestige of the government behind the witness by making explicit personal assurances of the witness' veracity. Secondly, a prosecutor may implicitly vouch for the witness' veracity by indicating that information not presented to the jury supports the testimony.

United States v. Sims, 719 F.2d 375, 377 (11th Cir. 1983), cert. denied, 465 U.S. 1034 (1984) (citations deleted). No such explicit assurances were made, nor was there any implication by the prosecutor that information not presented to the jury supported Birkins' testimony. The portions of argument quoted by appellant in his discussion on this point merely constitute the state's explanation of why Birkins' testimony is believable, invited by defense counsel's attack on Birkins' credibility in her closing argument. Williamson v. State, 459 So.2d 1125, 1127 (Fla. 1984) (proper argument by defense does not preclude invitation for permissible response by the state). See also Wasko at 1317, a death case wherein alleged "vouching" was deemed waived by failure to object, citing to Clark.

Any alleged error in the prosecutor's explanation about circumstantial evidence was waived, and cured by the full and clear

instruction on circumstantial evidence given by the court in the charge to the jury. R733.

## ISSUE V

THE TRIAL COURT CORRECTLY LIMITED THE TESTIMONY OF ANNIE BALLENGER.

The trial court limited Ms. Ballenger's testimony, excluding her testimony to the fact that appellant had certain scars on his arms for a period of years. Appellant incorrectly asserts that the witness would have testified about the fresh wounds which the state relied on in its case.

During the state's case, the state introduced two photographs of the defendant, one apparently over-all picture and one showing scratch marks on his upper right chest. R240 (State Exhibits 26 A & B). Other photographs showed marks on appellant's left forearm (26C), a cut on a knuckle of appellant's left hand (26D), and marks on his right wrist (26E). The medical examiner testified that the scratches on appellant's chest were consistent with a scratch from a hand. R277. He further testified that the scratches on the chest were "consistent with early superficial healing of an abrasion" within 24-36 hours prior to the time of the photograph. R284-85. There was no testimony in the state's case about the marks in photographs 26C-E. State Exhibit 26D showed an open cut on appellant's knuckle, apparent from observing the picture. R411 (defense counsel notes this fact).

During the colloquy regarding sanctions for late notice of Ms. Ballenger, defense counsel stated:

> MS. MORGAN: . . . I decided to add her as a witness after I saw the blowups of the scratches on the defendant's chest. I had seen the small photographs of them before, but they didn't stand out really in any photographs that I had seen, and also some scars on the defendant's wrists and hands.

> Mr. Holton has had extensive scarring on his wrists and hands for a number of years, and that is what I would be using that witness to testify to, that these are old scars although there is an open cut on his hand that is obvious from the photographs.
>
> THE COURT: Why couldn't you have discovered that before yesterday?
>
> MS. MORGAN: Your Honor, I didn't have any blowups of the photographs of the defendant's hands and the scars in the photographs that I saw did not -- they were not particularly evident.
>
> MR. EPISCOPO: Your Honor, she told me she didn't know how she got them, Mrs. Ballenger. She doesn't know how he got the scratches . . .
>
> * * *
>
> MS. MORGAN: . . . But I needed her yesterday when I saw the blowups of the old scars on his wrists and arms. She can't testify at all as to the scratches. She doesn't know where they came from.
>
> THE COURT: She is going to testify as to what, the scratches on the what?
>
> MS. MORGAN: Scars on his wrists and arms that are shown in the State's blowups.

R410-12. Early in the trial, defense counsel objected to the use of the blown-up photographs because she had not seen them prior to trial. R185. The state replied that the photographs had been available for six months, and that copies had been made available to defense counsel. R186. She clearly knew the pictures showed scars and wounds, since she argued to the court not that she didn't know they were there, but that "they didn't stand out really in any photographs that I had seen." R410-11. In this light, the reason for the trial court's ruling, which went unobjected to by the defense, is obvious: "I will let her testify as to the business about the sister in the neighborhood but not about the scars because that should have been discovered way before this and notice given to the State." R413.

Ms. Ballenger could have testified only to the old scars on appellant's wrists and hands, which were wholly irrelevant to the case. The only evidence prejudicial to appellant at trial was the fresh cut on his hand, evident from the photograph, and the freshly healing wounds on appellant's chest. Ms. Ballenger could not testify to the origins of these wounds, as conceded by defense counsel in the colloquy. It was therefore not error for the trial judge to limit the testimony as a sanction for late discovery, where the testimony would have been only to a collateral, immaterial and irrelevant fact.

Appellant's only claim that prejudice could arise from the exclusion is the prosecutor's argument in closing that the scratches on appellant's chest and the cut on his hand were suffered during the fatal struggle with the victim. R718. The state clearly was referring to the hand and chest wounds, not the old scars on appellant's wrist and arm. There is simply no way prejudice could have arisen in the instant case. Appellant's assertion in his brief that Ballenger "could testify that Holton had these scars for a number of years," Appellant's Initial Brief at 57, constitutes a non sequitor arising either from a misreading of the record or an attempt to mislead this Court. In either case, the argument is meritless. The cases cited by appellant concern consequential sanctions, not the de minimus sanction imposed here. The trial court would have even been correct to have sustained a state objection for relevancy on this omitted testimony, had the state been properly noticed of the witness and had she taken the stand in the normal course of events.

## ISSUE VI

THE PHOTOGRAPHS WERE RELEVANT AND THEREFORE ADMISSIBLE.

Initially, the state notes that photograph #4 was ordered masked by the trial court. R193. Further, the state urges that all the objected-to photographs were examined by the trial judge and found to be relevant. The assistant state attorney explained the relevancy of each photograph during the colloquy on the defendant's initial objections, R185-95. At least two enlarged photographs were excluded, R194 (State's Exhibit 41) and R275 (State's Exhibit 42-B). The defense failed to move for mistrial as to State's Exhibit 19, waiving the issue. R247 (motion for mistrial re State's Exhibits 4, 5, 10-A&B); R275 (motion for mistrial re 142-A). Thus, only five enlarged photographs are at issue before this Court.

State's Exhibit 4 was used by Dr. Lardizabal to show the "spread eagle" positioning of the victim at the scene. R266. State's Exhibit 5 was used by the medical examiner to show the sexual battery, the bottle inserted in the victim's anus. Id. Exhibit 5 was also used to illustrate how firefighters found the victim when they arrived at the scene. R209. State's Exhibit 10-A was used in redirect with Dr. Lardizabal to illustrate how the ligature on the victim's wrist, shown in 10-A, left a grooving when removed as shown in State's Exhibit 42-A. R276. This was used to explain the doctor's conclusion that the left wrist, shown in State's Exhibit 4, which had no grooving, had not been tied. Id. This testimony was relevant to prove the state's point

that the victim's left hand was free to scratch Holton on his right front chest. R275. Exhibits 10-A&B (the victim's hands) were used in examination of the crimes scene technician who took fingerprints to identify the victim. R226. The photographs were not used in the remainder of the trial.

Appellant relies on Justice England's concurring opinion in Funchess V. State, 341 So.2d 762 (Fla. 1976), cert. denied, 434 U.S. 878 (1977). However, Justice England found only one of thirteen enlarged photographs to be worthy of comment, dismissing the remaining dozen as properly admitted. 341 So.2d at 764. The questionable photograph showed lacerations suggesting defensive wounds on the victim's arm, which were irrelevant to the victim's cause of death. The photograph was also showed "an extremely gruesome expression which was portrayed on the victim's face in death." Id. Justice England found little in the record relevant to the lacerations, but it was sufficient under the "relevancy" test in Florida.

In the instant case, the five photographs at issue were extremely relevant. They showed the bizarre positioning of the body, relevant to suggest a nonconsensual sexual encounter. They showed the insertion of the bottle, relevant to the sexual assault charge and further suggestive of a violent episode culminating in premeditated murder. They showed the condition of the victim's wrists, relevant to show the victim's left hand was free to inflict the scratches on appellant's chest, and therefore a key link in the circumstantial elements tying appellant to the victim.

Exhibit 28-C, a slide, was relevant to show some detail in the way the ligature encompassed the neck, not shown in any other photograph or slide. R252. Dr. Lardizabal used the slide to explain the details of the ligature around the victim's neck. R263-64.

## ISSUE VII

THE TRIAL JUDGE DID NOT ABUSE HIS DISCRETION IN REFUSING TO CONTINUE THE TRIAL.

The sole point which appellant may raise on this issue is whether it was error to refuse to continue the trial. Defense counsel suggested a stipuation to summarize the deposition testimony of the missing witness, and the trial judge immediately had the jury removed and proceeded to prepare the summary. R538. It is clear from the colloquy ensuing that defense counsel fully participated in the preparation of the statement, and cannot now complain of prejudice on this point. R538-84.

Defense counsel's willing cooperation with the preparation of the statement is not surprising since she had no right to present any testimony from the deposition. The state objected to use of the deposition on the ground that it was not a deposition to preserve testimony and the state had not cross-examined the witness. R531. The inadmissibility of the deposition is confirmed by the case law. Jackson v. State, 453 So.2d 456 (Fla. 4th DCA 1984) (defendant's discovery deposition of state's witness, in which witness recanted and exonerated defendant inadmissible when defendant sought to introduce deposition because taken under Florida Rule of Criminal Procedure 3.220(d) (discovery deposition) rather than Rule 3.190(j) (deposition to preserve testimony)); Barnett v. State, 444 So.2d 967 (Fla. 1st DCA 1984) (reversible error to allow state to read into record portions of deposition taken under Rule 3.220(d) where deposition witness, at trial, could not remember deposition testimony and deposition

failed to refresh--deposition impermissibly used as substantive evidence); Terrell v. State, 407 So.2d 1039 (Fla. 1st DCA 1981) (deposition taken pursuant to 3.220(d) cannot be used as substantive testimony, despite section 90.804(2)(a), Florida Statutes (1981)--only Rule 3.190(j) depositions admissible under the hearsay exception of 90.804(2)(a)). ~~See also~~ State v. James, 402 So.2d 1169 (Fla. 1981); State v. Bailiere, 353 So.2d 820 (Fla. 1978) (both cases holding 3.220(d) depositions admissible only for impeachment--decided prior to enactment of the evidence code (i.e. section 90.804), but held to control in Terrell).

Defense counsel did not draw the court's attention to her inability to secure the witness for trial until the morning of December 4, 1986, the day she presented her case. R487. The prosecutor also asserted that the state had been attempting to locate the witness. R534. At that time, the court instructed the defendant's investigator to retrieve the witness. R489. Defense counsel said she believed the witness was "hiding out," and that she had the address. She asked for bailiffs to get the witness. The judge said he could not have bailiffs storm the hideout. Defense counsel instructed her investigator to get the witness, and the court told the investigator to bring the witness in as an officer of the court. R490. Defense counsel then called three more witnesses. R491-530. Further argument ensued regarding the missing witness and the stipulated statement was prepared and read to the jury. R531-590. During preparation of the summary, the jurors were given lunch. R546. Lunch arrived sometime after 12:00 noon. R541.

It is abundantly clear that defense counsel had more than adequate time to retrieve the witness, if she were available, prior to the reading of the statement and the close of the defense case. Sometime during the morning the investigator was sent out to find the witness, and the preparation and reading of the summary delayed the trial until past lunch time. The witness never appeared until the following day. The witness had been served a reasonable time before trial, R487, the subpoena compelled her attendance during the entire trial, id., and defense counsel had gotten word to Woods the night before the defense presented its case that she was to be at the courtroom at 9:00 a.m. on December 4, id.

Defense counsel should have enlisted the aid of the court in securing the witness when she failed to appear the first day of trial, December 1, 1986. Counsel had three days prior to presenting her case to secure the witness, and failed. Under these circumstances, the judge cannot be found to have abused his discretion in refusing to continue the trial. This Court does not overturn the sound exercise of the trial court's discretion in granting or denying a continuance. Echols v. State, 484 So.2d 568 (Fla. 1985); Lusk v. State, 446 So.2d 1038 (Fla. 1984); Jent v. State, 408 So.2d 1024 (Fla. 1982); Ziegler v. State, 402 So.2d 365 (Fla. 1981), cert. denied, 455 U.S. 1035 (1982); Magill v. State, 386 So.2d 1188 (Fla. 1980).

Any conceivable error was cured by reading to the jury the summary requested by defense counsel, a summary of a deposition which was inadmissible and properly objected to by the state.

Appellant's constitutional rights were more than protected. In addition, because the state had not cross-examined the witness, her testimony had not been subjected to possible impeachment or other questioning which could have ameliorated whatever exculpatory effect her testimony had. Further, it is clear from the discussion during the preparation of the summary, and the summary itself, that the witness contradicted other defense witnesses and otherwise had little probative value. Error, if any, was harmless.

## ISSUE VIII

THE EVIDENCE IS SUFFICIENT TO SUPPORT A CONVICTION OF PREMEDITATED MURDER.

This Court has held:

> Premeditation can be shown by circumstantial evidence . . . Evidence from which premeditation may be inferred includes such matters as the nature of the weapon used, the presence or absence of adequate provocation, previous difficulties between the parties, the manner in which the homicide was committed and the nature and manner of the wounds inflicted. It must exist for such time before the homicide as will enable the accused to be conscious of the nature of the deed he is about to commit and the probable result to flow from it insofar as the life of his victim is concerned.

Sireci v. State, 399 So.2d 964, 967 (Fla. 1981), cert. denied, 456 U.S. 984 (1982). Among other circumstances which will support premeditation are: any "ex post facto indication of a desire to evade prosecution . . ." Blackwell v. State, 79 Fla. 709, —, 86 So. 224, 226 (1920); "evidence of flight or concealment of a crime . . ." Daniels v. State, 108 So.2d 755, 760 (Fla. 1959) (quoting Blackwell, which also found concealment to be evidence of premeditation); disposing of the body and making exculpatory statements to police, Herzog v. State, 439 So.2d 1372, 1378 (Fla. 1983) (victim strangled with telephone cord); "the manner in which the homicide was committed and the nature and manner of the wounds." Heiney v. State, 447 So.2d 210, 215 (Fla.), cert. denied, 469 U.S. 920 (1984); and "[t]he brutality of the homicide . . ." Larry v. State, 104 So.2d 352, 354 (Fla. 1958).

In the instant case, evidence supporting premeditation includes the nature and brutality of the wounds, i.e. "the strangulation. There is a hemorrhage of the thyroid gland associated with the construction produced by that ligature . . . [A] terrific type of ligature compression circumferentially around the neck." R268. (Dr. Lardizabal, the medical examiner). Although the heat from the fire tightened the ligature further, it was tight enough before the fire to have caused the hemorrhage in the thyroid, i.e. before or at death. R274. Another "wound" would be the insertion of the bottle into the victim's anus, which Dr. Lardizabal first testified had to have been while the victim was alive. He later agreed insertion could have occurred any time before the fire. Although Dr. Lardizabal testified the bottle broke from the heat from the blaze, he was not qualified as an expert in physical sciences, and the jury could have fairly inferred the bottle could have been broken from the brutality of the assault. The wounds to Holton's chest, inflicted by the victim with her free hand, and the cut on his hand (which could have been fron the broken bottle), support the inference the victim did not consent.

Obviously, appellant attempted to conceal his crime when he burned the body afterwards. He fled and did not go to the police. He made several different and inconsistent exculpatory statements during the investigation.

From these and the remainder of the circumstances, a jury could have reasonably inferred, beyond a reasonable doubt, that appellant killed the victim with premeditation. Daniels v. State

involves a similar situation, where the defendant struck the victim several times with a jack handle. She struck her head when she fell to the ground, but she was still breathing, according to the defendant. He drove her around, thinking the air would revive her, but she stopped breathing. He drove further into the country and disposed of the body. The defendant admitted to police he lost his head, but did not intend to kill her. This Court found that the evidence was sufficient to overcome the defendant's self-defense claim (he said he struck his wife to stop her attack on him). It further found that the jury "had the right to consider the actions of defendant in hiding the body of the victim." 108 So.2d at 760. This concealment, in conjunction with the rest of the evidence, was sufficient to support the jury's conclusion that the murder was premeditated.

Strangulation, in Florida, does not preclude a verdict of premeditation. Tompkins v. State, 502 So.2d 415 (Fla.), cert. denied, 107 S.Ct. 3277 (1987). In Tompkins, the victim's body was found with a ligature consisting of the cord from her bathrobe around her neck. She had been buried in a shallow grave beneath her house. The defendant confessed the crime to his cellmate, and his cellmate testified to the confession at trial. On appeal, the defendant argued the state had failed to establish sufficient independent evidence of the corpus delicti of the crime prior to introducing the jailhouse confession from the defendant's cellmate. This Court held the evidence that the victim was strangled and buried beneath her house was sufficient independent evidence. While the conclusion was only that strangula-

tion plus disposal was sufficient to establish the corpus delecti, since this Court has an independent duty to review the record of all death cases as to, inter alia, sufficiency of the evidence, it must be concluded that evidence of strangulation, disposal of the body, and a jailhouse confession, is sufficient to support a verdict of premeditated murder.

Assuming the Court finds the evidence of premeditation insufficient, there is sufficient evidence that the death occurred during the rape of the victim, and, thus, evidence sufficient to support a first degree murder conviction on felony murder grounds. See e.g., Heiney and Larry.

## ISSUE IX

APPELLANT FAILED TO PRESERVE THE QUESTION OF SUFFICIENCY OF THE EVIDENCE AS TO THE ARSON CONVICTION. THE EVIDENCE IS SUFFICIENT TO SUPPORT THE CONVICTION FOR FIRST DEGREE ARSON.

Appellant failed to preserve this issue for appeal. Defense counsel's motions for judgment of acquittal at the close of the state's case, R409, and at the close of the evidence, R630, were bare bones motions which failed to mention anything as to the arson charge, insufficiency of the evidence thereto, or any question now raised on appeal. This fails to comply with Florida Rule of Criminal Procedure 3.380, which requires that a motion for judgment of acquittal "must fully set forth the grounds upon which it is based." Johnson v. State, 478 So.2d 885 (Fla. 3d DCA 1985), cause dismissed, 488 So.2d 830 (Fla. 1986) ("boilerplate" motion insufficient); Jones v. State, 449 So.2d 313 (Fla. 5th DCA 1984) (failure to raise issue raised on appeal in motion for judgment precludes review); Patterson v. State, 391 So.2d 344 (Fla. 5th DCA 1980) ("bare bones" motion insufficient); Sanderson v. State, 390 So.2d 744 (Fla. 5th DCA 1980). ~~See also~~ G.E.G. v. State, 417 So.2d 978 (Fla. 1982) (challenge to sufficiency as to one aspect of case insufficient to preserve challenge to sufficiency as to another aspect--insufficiency therefore waivable for lack of specificity). As noted in G.E.G., raising the question of lack of sufficiency by objection or motion permits the trial court to reopen the case to allow the state to introduce evidence to cure any defect. Remaining silent when there is an alleged insufficiency allows a defendant to sandbag the state.

Appellant also failed to preserve this issue by failing to raise it with specificity in his motion for new trial, R867. Mancini v. State, 273 So.2d 371 (Fla. 1973); State v. Wright, 224 So.2d 300 (Fla. 1969).

In the event this Court reaches the merits, appellee urges that the evidence is more than sufficient. Johnny Lee Newsome testified that he had seen people shooting cocaine in the house. R354. Holton told officer Black he saw "Georgia Boy" at the house the last time he would admit to being in the house, the Saturday night before the murder. R431. From this, and the fact that three fires had been set in the house in 1986, R205, the jury could infer that the house was frequented by drug addicts, that appellant knew this, and that he therefore had reason to believe others might be in the house.

Appellant is not a physician or expert in determining whether the victim was alive the moment he set the fire. The jury could have inferred that appellant knew or had reason to believe that Katrina Graddy might have still been alive when he poured a flammable liquid in a circular pattern around her. While the fire may have been set to destroy evidence, it might also have been set to finish the job he, Holton, started when he sexually assaulted and strangled the victim. Dr. Lardizabal's testimony, that the victim was dead prior to the fire, is relevant only to the question of whether the victim might have died from the fire rather than the strangulation. Dr. Lardizabal did not testify as to how long before the fire the victim died. Ms. Graddy could have expired moments after appellant set fire to the flammable

liquid at some point distant from her mouth and nose, so that she would have been alive at the time the fire was started, and died before she could ingest enough fumes to produce a measurable level of carbon monoxide in her lungs.

Finally, the case law does not hold that a body is not a human being for purposes of the arson statute.

If this Court finds the evidence too tenuous to sustain the first degree arson conviction, such a conclusion only demonstrates the necessity for sustaining the conviction on the ground that defense counsel never preserved the issue for appeal. Had defense counsel properly objected or moved for acquittal with sufficient specificity to preserve the issue, the state would have been on notice of the necessity of producing more evidence on the point. G.E.G. v. State. Instead, the state was deprived of the opportunity to present evidence which would buttress the case it had already sufficiently made. Id.

## ISSUE X

APPELLANT FAILED TO PRESERVE THE QUESTION OF SUFFICIENCY OF THE EVIDENCE AS TO THE SEXUAL BATTERY CONVICTION. THE EVIDENCE IS SUFFICIENT TO SUPPORT THE CONVICTION.

As urged in the discussion of the preceeding issue, appellant failed to preserve this issue for appeal. Mancini v. State, 273 So.2d 371 (Fla. 1973); State v. Wright, 224 So.2d 300 (Fla. 1969); Johnson v. State, 478 So.2d 885 (Fla. 3d DCA 1985), cause dismissed, 488 So.2d 830 (Fla. 1986); Jones v. State, 449 So.2d 313 (Fla. 5th DCA 1984); Patterson v. State, 391 So.2d 344 (Fla. 5th DCA 1980); Sanderson v. State, 390 So.2d 744 (Fla. 5th DCA 1980). ~~See also~~ G.E.G. v. State, 417 So.2d 978 (Fla. 1982).

Great bodily harm was involved as evidenced by the fact the victim died from a violent strangulation sufficient to cause her thyroid gland to bleed. Appellant confessed he didn't think the victim was dead until after he finished having sex with her. R306. If the jury could conclude a man who would strangle a woman while having sex with her is less than normal in his sexual proclivities, they could have likewise concluded that Holton inserted the bottle as part of his sexual attack on the victim.

The lack of semen in the victim, R271-72, further suggests that Holton may have performed sexual acts on the victim while she was still alive other than "straight" intercourse. This is buttressed by the evidence that the hairs found in the victim's mouth, R312, could have come from Holton, and that they could have come from only three areas of his body, the nape of his neck or two areas surrounding his genitals. R322. That the victim did

not consent is borne out by the scratches on appellant's chest, inflicted by the victim, and the cut to his hand. The cut on his hand resulted from the bottle breaking during appellant's assault on the victim. Further, because the victim was a prostitute, the jury could have concluded that Ms. Graddy, although not consenting to the assault, acquiesced until the strangulation. Such acquiescence would explain why there was no trauma found on her badly burned body. The damage to the body from the fire would also have concealed traumatic injuries arising from the assault. R267, 273.

## ISSUE XI

ERROR IN FAILING TO GIVE THE INSTRUCTION ON UNNATURAL AND LASCIVIOUS ACTS, IF ANY, IS HARMLESS BECAUSE THE JURY WAS INSTRUCTED ON THE NECESSARILY INCLUDED LESSER OFFENSE OF SEXUAL BATTERY.

In relying on Wilcott v. State, 509 So.2d 261 (Fla. 1987), appellant overlooks the controlling case of State v. Abreau, 363 So.2d 1063 (Fla. 1978). In Abreau, this Court distinguished between cases where the trial court fails to instruct on a lesser included offense "one step" removed from the charged offense, and cases where the trial court

> gave instructions on the next immediate lesser-included offense but refused to instruct the jury on an offense ~~two~~ [emphasis in original] steps removed. The significance of that distinction is more than merely a matter of number or degree, since, in the latter situation, unlike the former, the jury is given a fair opportunity to exercise its inherent "pardon" power by returning a verdict of guilty as to the next lower crime. For example, if a defendant is charged with offense "A" of which "B" is the next immediate lesser-included offense (one step removed) and "C" is the next below "B" (two steps removed), then when the jury is instructed on "B" yet still convicts the accused of "A" it is logical to assume that the panel would not have found him guilty only of "C" (that is, would have passed over "B"), so that the failure to instruct on "C" is harmless.

363 So.2d at 1064 (emphasis added except were noted).

In the instant case, the judge instructed the jury on both sexual battery with physical force likely to cause serious personal injury (section 794.011(3), Florida Statutes (1985), a life felony), and with physical force not likely to cause serious personal injury (section 794.011(5), a second degree felony). Com-

mitting an unnatural and lascivious act is a second degree misdemeanor. Thus, the jury had the opportunity to consider exercising its "pardon" power by convicting on the lesser included offense on which it was instructed, but declined. It is therefore logical to conclude that it would not have convicted for an even less serious offense, assuming section 800.02 is a lesser included offense of section 794.011(3).

Wilcott is inapposite to the instant case because this Court expressly held in Wilcott that the lesser included offense upon which the defendant was denied an instruction "is also the next lower lesser included offense of the crime of which Wilcott was convicted, [therefore] the failure to instruct as to that offense constituted reversible error." 509 So.2d at 262.

Section 800.02 is not a lesser offense of sexual battery. Initially, appellee notes that consensual sexual intercourse is not unnatural and lascivious. Unconsented-to intercourse is sexual battery. Therefore, section 800.02 is not a necessarily lesser included offense of section 794.011. Arguably, consensual sodomy or fellatio falls within section 800.02. Franklin v. State, 257 So.2d 21 (Fla. 1971) (holding Florida's sodomy statute, section 800.01, unconstitutional and remanding for sentencing of appellants, two men caught committing a "crime against nature," to violation of section 800.02).

In Thomas v.State, 326 So.2d 413 (Fla. 1975), section 800.02 barely withstood constitutional challenge for vagueness, with a strong dissent by Justice England. In a footnote, he suggests that consensual "oral copulation" would be natural in today's so-

ciety, but conflicting evidence suggesting coercion of the fellatrix made it unnecessary to consider the point. 326 So.2d at 418 n.5 (England, J., dissenting). The case law suggests that prosecutions for violations of sections 800.01 and 800.02 have involved copulation between the parties, i.e. "sexual union [or] coitus," Webster's Third New International Dictionary 503 (1986), with "coitus" defined as "physical union of male and female genitalia . . . " Id. at 441. In other words, flesh-to-flesh contact is necessary to sustain a conviction in Florida under section 800.02.

This construction is further suggested by the fact that in section 794.011(1)(h), the legislature found it necessary to define "sexual battery" as including not only penetration by a sexual organ, but also penetration "by any other object." If the legislature deemed it necessary to specify "other objects" to bring such acts within the definition of sexual intercourse and in derogation of the common law, then, presumably, the common law did not deem penetration by other objects to be sexual battery. "Unnatural and lascivious acts" arises from a common law heritage, and it cannot be assumed that the common law included sexual acts with objects within the contemplation of what was an unnatural and lascivious act.

The fact that section 800.01 prohibited homosexual acts of sexual union and beastiality, Franklin, 257 So.2d at 23, further suggests that section 800.02 was enacted to prohibit unapproved heterosexual union. The requirement of flesh-to-flesh contact is further suggested by the discussion of sodomy laws in Rose v.

Locke, 423 U.S. 48, 96 S.Ct. 243, 46 L.Ed.2d 185 (1975), wherein there is no mention of non-coital acts.

This conclusion is further buttressed by the discussion of sodomy in 70A Am. Jur. 2d Sodomy §§21 and 23 (1987). Section 21 discusses the prohibition against the use of objects, the prohibition arising in statutory enactments wherein "objects" are specifically referenced. In section 23, discussing the necessity of penetration, the following note appears:

> Distinction: A distinction between the requirement for penetration or direct genital contact under a statute proscribing sodomy as deviate sexual intercourse, and a statute proscribing mere "sexual contact" (under which actual flesh-to-flesh contact is not an essential element), is that the latter is generally applied against conduct likely to be deemed offensive by the "victim." whereas the former designates conduct as criminal regardless of consent or negative reaction.

(Footnote deleted, emphasis added.) In other words, actual flesh-to-flesh contact is normally required for consensual but criminalized sexual activities, whereas nonconsensual acts may include those which do not involve flesh-to-flesh contact. Florida's statutory scheme bears this out. Criminalized nonconsensual acts, i.e. sexual battery, include penetration by objects, while consensual acts must be flesh-to-flesh.

In the instant case, appellant argues that the only distinction between sexual battery and an unnatural and lascivious act is the question of Ms. Graddy's consent vel non. If she fully consented, then flesh-to-flesh contact must have occurred before section 800.02 arguably would become relevant. The crime charged did not include flesh-to-flesh contact, and therefore the reques-

ted instruction was properly denied because, as the trial judge observed in denying the objection, the information, which alleged Holton placed a bottle in the victim's anus, did not allege an unnatural and lascivious act. R624.

The state would further argue on this appeal that private consensual insertion of an object in a bodily orifice "in today's society," Thomas, 326 So.2d at 418 n.5 (England, J., dissenting), is not unnatural and lascivious. However, the issue would appear to be academic since, as in Thomas, there is another basis for sustaining the conviction, i.e. the rule of Abreau.

## ISSUE XII

### THERE WAS NO PROSECUTORIAL MISCONDUCT IN THE QUESTIONING IN THE PENALTY PHASE.

Defense counsel did not object, move for mistrial, or raise the question of alleged improper examination of the victim's stepfather in the motion for new trial. The issue is unpreserved for review, and, alternatively, is not error or is not fundamental error. Prosecutorial misconduct rising to the level of a violation of a disciplinary rule does not require per se reversal when a defendant's constitutional rights have not been violated. Suarez v. State, 481 So.2d 1201 (Fla. 1985), cert. denied, ___ U.S. ___, 106 S.Ct. 2908, 90 L.Ed.2d 994 (1986).

As to the allegation of misconduct in questioning a witness about the victim's child, the jury already knew Katrina Graddy had a child. This fact was elicited twice by defense counsel in the guilt phase, when she asked victim's mother who was home with the victim the night of the murder before she went out. R524. The state inquired on cross-examination how old the baby was, and if she, the victim's mother, now took care of it. R525. Neither question was objected to. The jury therefore knew the victim had a baby because of direct questioning of a defense witness by defense counsel. Any error is irrefutably harmless.

As to the state's cross-examination of Holton, defense counsel did not object to the serial questioning regarding state witnesses lying. She did not formally object and did not request a curative instruction or move for mistrial when the state asked about the grand theft conviction. Appeal on thse issues was

waived. In Boatwright v. State, 452 So.2d 666 (Fla. 4th DCA 1984), relied upon by appellant vis-a-vis the serial questioning of appellant, defense counsel objected. Further, that case shows the state had established the differences between the defense witness' testimony and that of the state's witnesses. The prosecutor then began the impermissible questioning. In the instant case, Holton invited the questioning when he said state witness Birkins lied about the confession. R766. The state's cross-examination began almost immediately, continuing Holton's line of reasoning.

The questioning may reasonably be inferred to have related to whether the witnesses were lying about matters which directly involved Holton, i.e. was Newsome lying about seeing Holton outside the house the night of the murder, was Carrie Nelson lying about seeing Holton duck into the house, was Pamela Woods lying when she said Holton approached her and the victim and asked for money, were Detectives Durkin, Noblitt and Black lying about the things Holton said to them? The state here was not asking Holton to invade the province of the jury as to the credibility of the witnesses, but, rather, whether he disputed the matters those witnesses testified to of which Holton had personal knowledge. In a dramtatic way, the state was offering Holton the chance to refute the testimony of the state's witnesses, and this is not improper.

The witness in Boatwright was not the defendant, and the serial questioning about state witnesses in that case appears to have been directed to the witness' assessment of their credibi-

lity rather than direct factual conflicts between the personal knowledge of the witness and the testimony of state witnesses about the same matters.

## ISSUE XIII

THE PROSECUTOR'S PENALTY PHASE ARGUMENT WAS NOT PRESERVED FOR APPELLATE REVIEW. THE ALLEGED ERROR REGARDING PREMEDITATION IS NOT AN INCORRECT STATEMENT OF THE LAW. THE REMAINDER OF THE ARGUMENT WAS LIKEWISE PROPER.

Defense counsel did not object to any portion of the state's closing argument, nor did she move for mistrial on this ground after the jury was instructed. R783. Objection during the prosecutor's argument would have drawn the trial court's attention to the alleged error that the state misled the jury that it had already found the defendant guilty of a cold, calculated, premeditated murder without any pretense of moral or legal justification. However, it appears that the prosecutor was referring only to the single factor of premeditation. The defense counsel was in the courtroom and could observe the intonation and phrasing of the statement. Presumably, she had no problem understanding the state was referring only to the single element of premeditation, else she would have objected. This understanding could have come about from the body language of the prosecutor (e.g. gesturing in the air to indicate cold, calculated, and premeditated in three distinct positions, and then indicating the premeditated position when making the complained-of statement), from the phrasing and emphasis of the statement (e.g. "cold . . . calculated . . . <u>premeditated</u>! You've already found <u>that</u> beyond a reasonable doubt."), or from other nonverbal communication. Appellate counsel seeks a strained reading of the record to support the argument sub judice. Error, if any, was cured by the standard jury instruction on the aggravating factor. R780.

Nibert v. State, 508 So.2d 1 (Fla. 1987), simply reiterates the axiomatic principle that the phrase "cold, calculated and premeditated," in its entirety, delineates a heightened premeditation. The prosecutor sub judice was referring solely to the single element of premeditation, which retains its denotation as used both in the first degree premeditated murder instruction and the aggravating factor instruction.

The remainder of the complained-of elements of the state's penalty phase argument were well within the bounds of fair comment on the evidence and matters reasonably inferrable therefrom. Breedlove v. State, 413 So.2d 1, 8 (Fla.), cert. denied, 459 U.S. 882 (1982) (logical inferences and all legitimate argument permissible; control of closing argument within the trial court's discretion and reversible only on showing of abuse of said discretion); Thomas v. State, 326 So.2d 413, 415 (Fla. 1975); Spencer v. State, 133 So.2d 729, 731 (Fla. 1961). " [T]he complained-of comments were not of such a nature as to poison the minds of the jurors or to influence the jury to return a more severe verdict than otherwise warranted." Wasko v. State, 505 So.2d 1314, 1318 (Fla. 1987).

## ISSUE XIV

THE SENTENCING PROCEDURE WAS CORRECT.

The record fails to show that anyone other than Judge Coe prepared the sentencing order. In Patterson v. State, 513 So.2d 1257 (Fla. 1987), the record clearly showed the judge ordered the assistant state attorney to prepare the sentencing order. In the instant case, there is no such showing in the record.

The hearing on appellant's motion for new trial, held December 30, 1986, R985, shows that the sentencing order was completed as of that date. The record shows that the order was not filed until February 10, 1987, R976-77, only four days after the original portion of the record was certified to this Court by the county clerk, R975.[4] The sentencing order also shows that the original typed month for the signature of the trial judge was December, 1986, and that "December" was stricken and a handwritten "February" interlineated, further supporting the conclusion the order was prepared shortly after the oral imposition of sentence.

While one might speculate, based on the transcript of the December 30, 1986, hearing that the assistant state attorney prepared the sentencing order, it is not established by this or any other portion of the record. No objection on this ground was en-

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4/ The state is at a loss to explain the discrepancy between the filing date shown on the sentencing order, February 10, 1987, and the date shown as the date Judge Coe signed the order, February 12, 1987. The difference of two days is of no legal consequence, but the state urges that the date stamped on the order by the clerk in the normal course of business should presumptively be the correct date.

tered by defense counsel at the December 30, 1986, hearing, which would have allowed the trial judge to either correct any suggestion that the state attorney had prepared the order, or to order the state attorney to desist from preparing such order and to assume the responsibility himself.

Florida Rule of Appellate Procedure 9.140(d) provides for the clerk of the county court to prepare and transmit the record below within 50 days of the filing of the notice of appeal. In the instant case, notice of appeal was filed January 5, 1987, R894, the initial portion of the record was certified and transmitted February 6, 1987, R975, and the sentencing order added February 17, 1987, 43 days after the notice of appeal and one week within the fifty day period allowed for the clerk to prepare and transmit the record. One may infer the trial court did not anticipate the speed with which the clerk would transmit the record, and appropriately signed the order and added it to the record within the time limits provided for by Rule 9.140(d). There is no impropriety in this procedure, and appellant should not now be allowed to claim benefit from the inconsequential procedural irregularity.

What the record shows is a sentencing order, prepared by December 30, 1986, less than a month after the sentence was orally imposed, wherein the trial judge weighed the aggravating and mitigating factors pursuant to his obligation under section 921.141, Florida Statutes (1985). On its face, the record shows an entirely proper sentencing procedure.

In Van Royal v. State, 497 So.2d 628 (Fla. 1986), this Court found three factors compelled remand for entry of a life sentence. 497 So.2d at 628. First, the trial court's findings were not made until after jurisdiction was surrendered to this Court. The sentencing order in Van Royal was entered more than five months after the notice of appeal was filed, thus, well over the 50 days permitted by Rule 9.140(d) for preparation of the record. The order was entered five weeks after the county clerk certified the record. In the instant case, the order was entered within the 50 day period, while the circuit court still retained jurisdiction over the record, and only four days after the record was initially certified.

The second factor in Van Royal was that the record on appeal was devoid of specific findings. Once the record in Van Royal was transmitted to this Court, and after the 50 day period of Rule 9.140(d) had expired, the trial court was divested of jurisdiction. Its late sentencing order was therefore not a part of the record before this Court, and the record was therefore devoid of specific findings. In the instant case, the order was added to the record and certified within the 50-day period, while the trial court still had jurisdiction, and therefore properly a part of the record on appeal.

The third factor of Van Royal was this Court's disinclination to supplement the record with the late sentencing order because the record was inadequate, not merely incomplete. In the instant case, no supplementation is required as the clerk properly added the sentencing order to the record within the 50-day

period. Appellant did not object to this addition, nor would he have grounds to do so.

A further factor which may have influenced this Court in Van Royal is the fact that the death sentence was imposed over the jury's recommendation of life. In the instant case, the trial judge sentenced consistent with the jury recommendation of death.

While the record fails to show a sentencing guidelines scoresheet, the error, if any, is harmless. Appellant admitted to 13 prior felony convictions, R762 & R767. Even assuming all the prior felonies were of the third degree, appellant's scoresheet resulted, or would have resulted, in a score justifying the sentences imposed:

| | |
|---|---|
| 165 | (one count of primary offense); |
| 61 | (sexual battery, life felony conviction at conviction); |
| 29 | (arson, 1st degree felony at time of conviction); |
| 27 | (four prior third degree felonies); |
| 81 | (9 other prior third degree felonies X 9 points each); |
| 21 | (victim injury for the sexual battery, severe or death) |
| 384 | (recommended range of life). |

Thus, error, if any, by omission of the scoresheet from the record is harmless, giving appellant the assumption that the thirteen prior felony convictions were all third degree. It would be a waste of judicial labor to remand for preparation of a spreadsheet.

## ISSUE XV

THE SENTENCING ORDER IS CORRECT.

**A. Prior Conviction of Violent Felony**

Wasko v. State, 505 So.2d 1314 (Fla. 1987), holds that an attempted sexual assault on the murder victim before her death will not support this aggravating factor. Id. at 1317-18. This Court distinguished such a situation from earlier cases where violent felonies committed during the same incident or sometime thereafter against other victims were sufficient to support this factor. In the instant case, the rule of Wasko would prevent the sexual battery from being used to support the factor. However, the arson conviction, committed after appellant left the scene and then returned with a flammable liquid, was a violent crime separated in time from the murder. The arson was committed in an attempt to conceal the crime, and, thus, to evade capture. Compare Johnson v. State, 438 So.2d 774 (Fla. 1983), cert. denied, 465 U.S. 1051 (1984) (attempted murder to deputy during escape, thus, to evade capture): King v. State, 390 So.2d 315 (Fla. 1980), cert. denied, 450 U.S. 989 (1981) (attempted murder during escape).

Of greater import is the prior violent felony, the attempted robbery appellant testified to during the penalty phase. Appellant admitted a piece of pipe was used in the fight over a gambling debt. Regardless of who started the dispute, appellant admitted to a violent felony for which he was convicted. This conviction, alone, is sufficient to support his aggravating factor.

**B. Murder in the Course of Committing a Sexual Battery**

Even if appellant's challenge on the sexual battery with force likely to cause serious bodily injury is successful, the evidence is more than sufficient to support conviction for simple sexual battery. Under any view of the circumstances of the murder, section 921.141(5)(d) is sufficiently established.

**C. Heinous, Atrocious, or Cruel**

Appellant can point to no case which says the victim's age and sex cannot be used to support this factor. This Court found "the killing of a child is especially despicable" in Wasko v. State, 505 So.2d 1314, 1318 (Fla. 1987) (ten-year-old girl murdered after attempted sexual battery by defendant).

The method of killing the victim, strangulation, is sufficient to support this factor. As in Tompkins v. State, 502 So.2d 415 (Fla. 1986), "there is sufficient competent evidence in the record to support a finding that the victim was not only conscious but struggling and fighting to get away when appellant strangled her." Id. at 421. Appellant suffered a cut to his hand and scratches on his chest, the result, it may be concluded, of the victim's death struggle as appellant raped and strangled her. The remainder of the circumstances surrounding the death further support this factor.

**D. Cold, Calculated and Premeditated**

As urged in the discussion of issue VIII, premeditation is a word with a single denotation. Herzog v. State, 439 So.2d 1372, 1378 (Fla. 1983) (victim killed by strangling with telephone cord), was decided prior to Herring v. State, 446 So.2d 1049 (Fla.), cert. denied, 469 U.S. 989 (1984), wherein this Court

noted that, contrary to the observation in Herzog that this factor normally is reserved for contract and executiuon murder, witness-elimination murders were also appropriate for this factor. Both opinions also note this list is not exclusive.

In the instant case, the facts show appellant bound the victim around her neck and one wrist, arranged her clothes underneath her, sexually assaulted her with a bottle, and most likely also forced her to perform fellatio, as evidenced by the hairs found in her mouth. The evidence also showed no semen in the victim's bodily orifices, suggesting appellant's satisfaction with the rape was incomplete. In light of the victim's apparent refusal to cooperate, thereby depriving appellant of a certain amount of satisfaction from the assault, the murder may be viewed as appellant's attempt to evade capture and enbarassment by killing the only witness to his criminal assault and to his sexual inadequacy.

**E. Impaired Capacity**

Appellant's continuing refusal to admit to the crime, or to testify as to his mental capacity at the time he killed Ms. Graddy, left the record silent as to whether appellant's capacity was impaired at the time of the killing. His jailhouse confession did not include any indication of impaired capacity. The judge's order may be fairly read to be grounded on this reasoning.

## CONCLUSION

Based upon the foregoing reasons, arguments and citations of authority, the judgment and sentence of the trial court should be affirmed.

Respectfully submitted,

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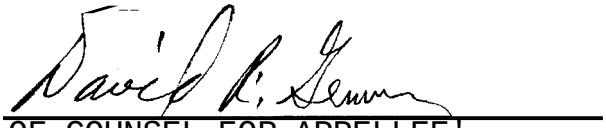
## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Douglas S. Connor, Assistant Public Defender, Polk County Courthouse, P. O. Box 9000-Drawer PD, Bartow, Florida 33830, this 21st day of January, 1988.



OF COUNSEL FOR APPELLEE