IN THE SUPREME COURT OF FLORIDA

TIMOTHY C. HUDSON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. 70,093

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

BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

TIMOTHY C. HUDSON 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 eight (8) volumes, will be referenced by the symbol "R" followed by the appropriate page number.

SUMMARY OF THE ARGUMENT

The issue of whether or not law enforcement used psychological coercion on the appellant is not properly before this Court since it has not been preserved for appeal. Tillman v. State, infra. The grounds to suppress the statements made before the trial court were there had been threats and promises. Since the present issue was never presented to the trial judge, it cannot be raised on appeal. Additionally, the totality of the circumstances indicates there was no coercion; appellant did and said what he wanted to do and say.

The egregious nature of the circumstances of this crime sets it apart from the norm of capital cases and makes death the appropriate penalty. The analysis of the appropriateness of a death sentence is to a counting of the aggravating weighing to determine what punishment fits the crime. No particular aggravation must be present to justify a sentence of death. Sub judice, despite some mitigating evidence, both the jury and the judge found death appropriate where a defendant with malice aforethought arms himself and goes to a dwelling in the middle of the night. This is a dwelling he knows is occupied only by females, and he has the express intent of having a confrontation with one of them.

The trial court considered all evidence presented by appellant in the penalty phase. Nevertheless, the trial court refused to find certain matters now asserted by appellant on appeal as mitigating factors. Inasmuch as the weight, if any, to be

accorded a mitigating circumstance is a matter of judicial discretion, the trial court did not err by finding that the factors offered by appellant were not of a kind capable of mitigating a death sentence.

Appellant's "Golden Rule" argument also has not been preserved for appellate review. At trial, defense cousel objected to the argument based on the court's ruling that the prosecution could not argue heinous, atrocious or cruel; that is not the issue now being presented to this Court.

The trial court correctly denied appellant's requested jury instructions. Each of the areas of the requested instructions is adequately covered by instructions given by the court.

ARGUMENT

ISSUE I

THE TRIAL COURT PROPERLY FOUND APPELLANT'S INCULPATORY STATEMENTS WERE VOLUNTARY.

The motion to suppress filed in this case alleged the defendant did not knowingly, voluntarily and intelligently waive his right to remain silent. There was also the allegation that the statements were the result of promises, threats and/or inducements. (R 801) At the hearing on the motion, defense counsel argued there had been threats and promises made. (R 696-700) On this appeal, appellant is arguing his confession was involuntary because the police used psychological coercion by giving a variation of the "christian burial" speech.

It was neither alleged nor argued that psychological coercion was used on appellant. Our courts have consistently held the specific legal argument or ground to be argued on appeal must have been presented to the lower court in order to preserve the issue for review. See, Tillman v. State, 471 So.2d 32 (Fla. 1985); Steinhorst v. State, 412 So.2d 332 (Fla. 1982) and Black v. State, 367 So.2d 656 (Fla. 3d DCA 1979). Since this issue was never presented to the trial court, appellant cannot raise it on this appeal.

Appellee is relying on the procedural default argument presented above and is only addressing the merits of this claim to aid the court in understanding the complete picture. As appellant correctly points out, the state has the burden of proving by

a preponderance of the evidence that a defendant's statements are voluntary. Nowlin v. State, 346 So.2d 1020 (Fla. 1977). A confession or statement is voluntary if it is the product of a free will, not influenced by hope, fear or undue influence. Brewer v. State, 386 So.2d 232 (Fla. 1980). The trial judge found appellant was neither threatened nor made promises, and the totality of the circumstances of this case supports the conclusion that the statements were voluntary. See, Frazier v. Cupp, 394 U.S. 731, 89 S.Ct. 1420, 22 L.Ed.2d 684 (1969) and Martin v. Wainwright, 770 F.2d 918 (11th Cir. 1985).

The argument is being made that appellant's statements and confession were involuntary because the police used psychological coercion by giving a variation of the "christian burial" speech. The record refutes such a claim. It is undisputed that appellant was given warnings pursuant to Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). While this is not dispositive of the issue of voluntariness it is certainly relevant to determining whether or not there was coercion. See, Beckwith v. United States, 425 U.S. 341, 96 S.Ct. 1612, 48 L.Ed.2d 1 (1976). Prior to giving any statements appellant again signed a consent to be interviewed form, a form which contained his rights and which had been explained to him. Appellant did not appear to be under the influence of any drugs or alcohol, and he did not exercise his rights. (R 655)

In fact appellant told the police his version of events. Hudson indicated he was given money to catch the bus to the

Rembrandt Apartments to visit his cousins. However, he met a guy named Peabody, who had a brown car, and they spent the afternoon getting high on rock cocaine. (R 656) After they ran out of money, appellant told Peabody of a Lackland Street address they could break into to get money. (R 656-657) Appellant stated he told Peabody the back door would be open and he told him which bedroom to go to. The defendant waited outside while Peabody went into the house. Peabody then drove up in Mollie Ewing's car with Mollie dead in the passenger seat. Appellant got in next to the body and they drove to a dumpster near Robinson High School. (R 657)

Appellant stated he exited Mollie's vehicle, got into Peabody's car and drove off leaving Peabody with Mollie's body. (R 657-658) The defendant indicated he had not seen Peabody since and further stated the police would not be able to find him. Detective Noblitt told appellant he did not believe that story. Noblitt left the room and appellant told other detectives he would show them where Peabody dumped the body. (R 658)

Thus, it is clear that appellant at no time exercised any of his constitutional rights. Additionally, it was appellant who initiated the move to go to the scene at Robinson High School, and this occurred prior to any talk with Sgt. Price. (R 690) It was only after a search of this area proved futile that Sergeant Price talked with appellant. But by this time, appellant had already exhibited a desire to get this matter off of his conscience. The mere fact that law enforcement had to remind him of

his own stated purpose does not equate to undue pressure. See, Roman v. State, 476 So.2d 1228, 1232-3 (Fla. 1985).

Appellant's reliance on Rickard v. State, 508 So.2d 736 (Fla. 2d DCA 1987) and DeConingh v. State, 433 So.2d 501 (Fla. 1983) is not well-founded and does not support a claim of involuntariness. In Rickard, eight police officers surrounded the defendant's home with weapons drawn and proceeded to search pursuant to a search warrant. While the search was going on, the defendant's baby and two other young children were clinging to her. She was crying and distraught and being kept separated from her husband. After giving Miranda warnings, the police told the defendant she and her husband would be arrested if drugs were found. During this time persons from HRS removed the children, and the husband was taken to jail. Additionally, the officers continually made references to the substantial assistance program. Under these circumstances the court found undue influence and implied promises to induce the defendant's admissions.

Likewise, in DeConingh v. State, supra., the situation was extreme. Shortly after the defendant had shot her husband, a doctor diagnosed her as having lost touch and gave her Thorazine and Valium. A deputy sheriff, who was her friend, visited her and asked her to sign an advice of rights form. An attorney arrived, and the deputy left to return later. Two days later the deputy returned and the defendant told him what had happened because the deputy was her friend and she did not want him to think badly of her. The court in finding the statement inadmissible said:

> The circumstances of this case--the deputy's giving DeConingh the advice of rights form without reading it to her and without making any effort to determine if she understood it, coming into her room with another deputy and prepared with a tape recorder, and DeConingh's obvious respect for the deputy personally and concern over what he thought of her, when coupled with her incapacity due to the administration of powerful tranquilizers and her distraught condition--add up to more than a mere admission to a disinterested party. The deputy here took impermissible advantage of the situation, resulting in psychological coercion.

(433 So.2d at 503) (footnotes omitted) The situation, sub judice, was not clouded by any of these special circumstances.

Appellant was given Miranda warnings which he indicated he understood; he in fact signed a consent to be interviewed. At all times the defendant evidenced a willingness to talk. There is no evidence that the desire to talk was induced by any actions by law enforcement. Appellee further submits Colorado v. Connelly, 479 U.S. ____, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986) does not help appellant. Despite psychological testimony in the record no claim was ever made that the defendant's mental condition affected the statements made to police officers. At the suppression hearing, appellant's testimony was limited to allegations of threats and accusations. (R 686, 691-692) Appellant even indicated there was nothing specific about these threats. (R 693) And when appellant made his confession to Detectives Noblitt and Dirkin, Sgt. Price was not there; appellant simply assumed they would threaten him. (R 694-695)

The issue of psychological coercion was never presented to the trial court. The argument in the written motion to suppress and at the suppression hearing was involuntariness based on threats and promises. The trial judge found no threats or promises. These findings, based on credibility of witnesses, etc., are entitled to a presumption of correctness in the proceeding. See, Williams v. State, 444 So.2d 653, 656 (Fla. 3d DCA (1983). Additionally, the totality of the circumstances demonstrates no coercion; appellant wanted to talk to the officers.

ISSUE II

IMPOSITION OF A SENTENCE OF DEATH IS PROPORTIONALLY WARRANTED UNDER THE FACTS AND CIRCUMSTANCES OF THIS CASE.

Upon conviction of murder in the first degree the only sentencing options are death and life imprisonment. A proper analysis of the appropriateness of a sentence of death in any given case must begin with whether there are aggravating circumstances present, without any aggravating circumstances death is never appropriate. See, Section 921.141, Florida Statutes. Sub judice, the trial court found and allowed the state to argue two aggravating circumstances, prior commission of a violent felony (sexual battery) and murder committed during the course of a burglary.

At the outset, it should be noted that the prosecutor wanted to argue that the facts and circumstances of this case demonstrates the murder was especially heinous, atrocious or cruel. The trial judge would not allow the argument; however, appellee submits the circumstances clearly show this case to be outside the range of a "normal" murder situation. Becky Lou Collins, the defendant's ex-girlfriend/fiance, testified at trial that after she broke off her relationship with him he would make contact with her via the telephone. Some of the calls were threatening and she became frightened. (R 248) On the night of June 16th, Ms. Collins spent the night with a girlfriend a few blocks away from her Lackland Street address. (R 249 - 50) Appellant called Collins at work on the 17th, but she hung up on him. (R 250)

Appellant called back and spoke with Susan O'Neil who passed a message to Becky. As a result of that message, Ms. Collins was scared and decided not to spend the night at home. (R 251) The message from defendant was he had something for Becky, and she would get it that night. (R 280)

Appellant stated he took the bus to the Rembrandt Apartments on the afternoon of June 17th. (R 346 - 7) He met with his cousins and obtained a kitchen style knife, which he put into a paper bag. Around midnight, appellant went to 4407 Lackland to confront Becky Collins. He entered through a back door, he knew this door was not locked. The defendant proceeded down the hallway with the knife in his hand. He saw Mollie Ewing, and she saw him. Ms. Ewing screamed and appellant stabbed her. He proceeded to stab her four times. (R 347)

Dr. Charles Diggs, deputy medical examiner for Hillsborough County, autopsied the body of Mollie Ewing. Dr. Diggs found four stab wounds on the body and closer examination revealed Ms. Ewing was alive when each wound was made. (R 291 - 292) Each wound in and of itself could have been lethal. (R 295, 301 - 302) A person would survive a couple of minutes after suffering such wounds. (R 295) Dr. Diggs found a defensive wound at the base of the fifth finger on the decedent's left hand. (R 298) This is the type of wound made when one is warding off a blow. (R 299) Dr. Diggs also stated one could infer from the location of the wounds that the victim was moving. (R 310 - 311)

Thus, the jury and the trial judge had before them a defendant who had nearly four years before this murder (August 30, 1982) been convicted of sexual battery of a female. They knew this murder was committed during the course of a burglary. Not a random burglary, but a place appellant was familiar with, a place he knew would have the backdoor unlocked. Appellant also knew this was a dwelling occupied by two females. Yet, appellant came to the dwelling in the middle of the night after having armed himself. Not only did he get a weapon before going to the Lackland address, but he also had the weapon in his hand as he proceeded down the hallway to the bedrooms. After encountering Mollie Ewing, he stabs her not once, but four times in a manner indicating she was fighting for her life. Appellee submits this evidence of defense wounds and multiple stab wounds takes this case out of the norm into the area of heinous, atrocious or cruel. Heiney v. State, 447 So.2d 210 (Fla. 1984) and Wilson v. State, 493 So.2d 1019 (Fla. 1986).

With this in mind, the jury was told the defendant had been a good boy and tried hard in his earlier years. The jury and judge were told a year before the murder he was employee of the month at Bennigans. Additionally, appellant has a mental illness which causes him to be impulsive and have difficulty in restraining the impulses. Appellant, because of the mental illness, according to Dr. Berland, would be unable to accept the loss of his relationship with Becky.

The jury heard all of this testimony and was properly instructed on the mitigating factors; a death recommendation was returned by a vote of 9 - 3. (R 625) The judge next had to determine which aggravating and mitigating factors were established and weigh them to determine the appropriate sentence. As has often been said by this Court, this is not a counting process, but a careful weighing of all of the circumstances involved in the case. See, State v. Dixon, 283 So.2d 1, 10 (Fla. 1973). This Court has never held any particular aggravating circumstance must be found in order to justify imposition of a sentence of death.

If the circumstances of a case warrants it, one or two aggravating circumstances can outweigh one or more mitigating circumstances. As appellant pointed out in his initial brief, there are no cases with the same set of circumstances, two aggravating circumstances with abundant evidence of a third factor and one mitigating circumstance with some little weight given to another. Appellant's comparison of this case to Wilson v. State, supra, does not hold up under closer analysis. For whatever reasons, this Court seems to have fashioned some type of domestic heat of passion killings. That was the situation the Court was faced with in Wilson; the son killed the father during a fight between the stepmother, father and son. It was the stepmother, at the father's request, who brought the gun into the fray.

Likewise, Peavy v. State, 442 So.2d 203 (Fla. 1983) does not help in this review. That case involved a situation where an

improper aggravating circumstance was argued, considered and found. Since there were mitigating circumstances present, the case was remanded for a new sentencing. When there are mitigating circumstances present and improper finding of an aggravating circumstance remand for resentencing has been held appropriate. Moody v. State, 418 So.2d 989 (Fla. 1982). Both Thompson v. State, 456 So.2d 444 (Fla. 1984) and Holsworth v. State, 13 F.L.W. 138 (Fla. Feb. 18, 1988) are cases involving a jury recommendation of life. In order to override that recommendation, the Tedder standard must be satisfied.

In Tedder v. State, 322 So.2d 908 (Fla. 1975), it was held to sustain a death sentence after a jury recommendation of life the facts suggesting death should be so clear and convincing virtually no reasonable person could differ. No such analysis is necessary here. Both the jury and the judge heard all of the pertinent evidence, nothing improper was thrown into the weighing process. And both concluded that despite some mitigating evidence, this was an aggravated murder deserving of a sentence of death.

That the number of aggravating and mitigating circumstances is not the determining factor is adequately demonstrated by this Court's recent decision of Remeta v. State, 13 F.L.W. 245 (Fla.

March 31, 1988).[1] The trial judge in Remeta found four (4) aggravating circumstances and four (4) mitigating circumstances, but determined death was appropriate because the aggravating outweighed the mitigating. The same principle is applicable here. The number of factors in aggravation and/or mitigation should not be the determining factor.

[1] The aggravating circumstances were previous violent felony, murder during a robbery, witness elimination and cold, calculated and premeditated. The mitigating circumstances were mental age of 13 years, deprived childhood and being abused, low intelligence and discrimination due to American Indian heritage and history of substance abuse.

ISSUE III

WHETHER THE TRIAL COURT ERRED BY REFUSING TO FIND CERTAIN STATUTORY NON-STATUTORY MITIGATING CIRCUMSTANCES AFTER CONSIDERATION OF SAME.

As his third point on appeal, appellant presents a two-fold argument concerning the failure of the trial court to find certain statutory and non-statutory mitigating circumstances. Inasmuch as the order of the trial court indicates that consideration was given to all mitigating factors proposed by appellant, the failure to find certain mitigating circumstances as established does not warrant appellate relief.

A. Extreme Mental or Emotional Disturbance

Appellant contends that the trial court erred by not finding the statutory mitigating circumstance of section 921.141(6)(b), to wit: that the crime for which the defendant is to be sentenced was committed while he was under the influence of extreme mental or emotional disturbance. In essence, appellant submits that because testimony was adduced from Dr. Robert Berland concerning the two mental mitigating factors, i.e., extreme mental or emotional disturbance and substantial impairment of the capacity of the defendant to conform his conduct to the requirements of law, the trial court erred by not finding both mental mitigating circumstances. Appellant opines that because the two statutory mental mitigating factors are directed to different aspects of a defendant's mental state, the record does not support the trial court giving "little or no weight" to the extreme mental or emo-

tional disturbance mitigating factor (R 884). Your appellee submits that appellant's contentions are not supported by the facts of this case or the law of this state.

In Toole v. State, 479 So.2d 731 (Fla. 1985), a case cited by appellant, this Court relied upon its decision in Mines v. State, 390 So.2d 332 (Fla. 1980), cert. denied, 451 U.S. 916, 101 S.Ct. 1994, 68 L.Ed.2d 308 (1981), wherein it was held that the two statutory mitigating circumstances relating to a capital defendant's mental condition should be considered when there is evidence presented of a defective mental condition. This Court held in Toole that the trial court erroneously refused to instruct the jury on section 921.141(6)(b), although the trial court did instruct the jury on subsection (6)(f). In the instant case, the trial court instructed the jury on both statutory mental mitigating circumstances. As in the instant case, Toole contended that the trial court failed to consider the (6)(b) mitigating factor. Here, however, as in Toole:

> . . . The trial court considered the evidence and found (6)(b) inapplicable. It is within the province of the trial court to decide whether a particular mitigating circumstance has been proven and the weight to be given it. **Daugherty v. State**, 419 So.2d 1067 (Fla. 1982), **cert. denied**, 459 U.S. 1228, 103 S.Ct. 1236, 75 L.Ed.2d 469 (1983). (text at 734)

In Daugherty v. State, 419 So.2d 1067 (Fla. 1982), cert. denied, 459 U.S. 1228, 103 S.Ct. 1236, 75 L.Ed.2d 469 (1983), this Court relied upon its previous decisions in Riley v. State, 413 So.2d 1173 (Fla. 1982); Smith v. State, 407 So.2d 894 (Fla. 1981); and Lucas v. State, 376 So.2d 1149 (Fla. 1979), for the well-

established proposition that it is a matter for the trial court to decide whether a particular mitigating circumstance has been proven and the weight to be given it. In the instant case, the trial court, after hearing all of the evidence and argument of counsel, concluded that the mitigating factor of subsection (6)(b) was to be accorded little or no weight. It is clear that the trial court considered the evidence presented as to this statutory mitigating factor but nevertheless concluded that this factor should be accorded little or no weight.

In Roberts v. State, 510 So.2d 885 (Fla. 1987), the defendant argued, as does appellant herein, that the trial court had erred by failing to find the statutory mitigating factor. In Roberts, there was "uncontradicted" testimony of three psychiatric witnesses that Roberts suffered from lesions of the brain causing "organic brain damage." Id at 894. In citing Daughtery v. State, supra, and Johnston v. State, 497 So.2d 863 (Fla. 1986), this Court recognized the broad discretion possessed by the trial court in determining the applicability of mitigating circumstances urged. This Court specifically held that, "In determining whether mitigating circumstances are applicable in a given case, the trial court may accept or reject the testimony of an expert witness just as he may accept or reject testimony of any other witness." Roberts, 510 So.2d at 894. This Court in Roberts noted that the trial judge's sentencing order indicated that he considered the testimony in support of the mental mitigating factors yet found the testimony unpersuasive. Id at

894. Similarly in the instant case, the trial court's written sentencing order reflects a reasoned consideration of the facts underlying the subsection (6)(b) mitigating factor, yet the trial court did not abuse its discretion by according little or no weight to this mitigating circumstance.

In his brief, appellant complains that the trial court gave "little or no weight" to the evidence concerning his mental illness "which was the driving force behind his burglarizing his girlfriend's residence in the first place" (Appellant's Brief at p.58). Assuming arguendo, that appellant's mental illness was a force behind his burglarizing his girlfriend's residence, his girlfriend was not the murder victim. The murder victim was the roommate of appellant's ex-girlfriend. It was the ex-girlfriend who rejected appellant and not the murder victim. On cross-examination, Dr. Berland agreed that generally a person in the kind of mental state described by the Dr. strikes out at the person who rejects them (R 551-552). Thus, although appellant's mental illness may have been a force behind his burglarizing his ex-girlfriend's residence, it was not a force behind the murder of the ex-girlfriend's roommate.

Inasmuch as the trial court considered the evidence presented concerning the statutory mitigating circumstance of (6)(b), there is no error in the trial court's accordance of little or no weight to this mitigating factor.

B. Non-Statutory Mitigating Circumstances

Appellant complains that the trial court found that there were "no other aspects of the defendant's character or record, and no other circumstances of the offense which could be used in mitigation of the Sentence to be pronounced by the Court" (R 884). Appellant basically contends that evidence was adduced at the penalty phase which shows good character traits which should have been considered in mitigation. Appellant's parents testified that he was a good son (R 516-520), that appellant was a good worker during the six months he worked at Bennigan's and at one time was employee of the month (R 560-561), that while at the Hillsborough Correctional Institution, appellant was an eager learner in his GED classes (R 522), and that at between 8 and 13 years of age appellant showed effort and dedication when playing in the South Palomino Baseball League (R 562-568). Your appellee submits that the trial court properly found these matters not of a kind capable of mitigating punishment.

In Woods v. State, 490 So.2d 24 (Fla. 1986), the defendant contended that the trial court failed to consider unrebutted non-statutory mitigating evidence concerning low intelligence and the defendant's past life. This Court held:

> . . . That the trial court did not articulate how he considered and analized the mitigating evidence is not necessarily an indication that he failed to do so. We do not require that trial courts use "magic words" when writing sentencing findings, and we recognize that some findings are inartfully drafted. **Davis v. State**, 461 So.2d 67 (Fla. 1984), **cert. denied**, ___ U.S. ___, 105 S.Ct. 3540, 87 L.Ed.2d 663 (1985). The trial court did not restrict the presentation of mitigating evidence, and we find no indication in the findings of fact

> that the court ignored that evidence. We find no error in the trial court's failure to find more in mitigation in this case. See **Stano v. State**, 473 So.2d 1282 (Fla. 1985). (text at 27-28)

Similarly, in Tompkins v. State, 502 So.2d 415 (Fla. 1986), the defendant therein contended that the trial court did not give adequate consideration to the evidence of non-statutory mitigating circumstances. In Tompkins, the trial court had stated that it found "NONE, notwithstanding testimony to the effect that the defendant was a good family member and good employee." This Court held that it was apparent the trial judge did consider the evidence but found that it did not rise to a sufficient level to be weighed as a mitigating circumstance. Id at 421. In the instant case, as in Tompkins, the trial court considered all evidence of non-statutory mitigating circumstances but found that the evidence presented was not of a sufficient level to be weighed as a mitigating factor. It is clear from the trial court's order that he did not believe that the evidence presented by the defendant in the penalty phase was of a kind capable of mitigating punishment.

Pursuant to the United States Supreme Court opinions in both Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), and Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982), appellant was allowed to present and argue any factor he felt was mitigating. The jury was instructed to consider any other aspect of appellant's character or record or any other circumstance of the offense (R 620). The jury in the in-

stant cause recommended a sentence of death by a vote of 9 - 3. The trial court, after hearing all the evidence and arguments, indicated that there were no other aspects of the defendant's character or record and no other circumstances of the offense which could be used in mitigation of a death sentence. In Smith v. State, 407 So.2d 894 (Fla. 1981), this Court relied on the decision in Lucas v. State, supra, wherein this Court determined:

> . . . The jury and the judge heard the testimony, and apparently concluded that the testimony should be given little or no weight in their decisions. We find nothing in the record which compells a different result.

Smith v. State, 407 So.2d at 902. There is no reason to believe that the trial court did not follow his own instructions and consider all evidence presented in mitigation. The trial court's failure to weigh the non-statutory mitigating circumstances proffered by appellant reflects only that such evidence was not of a kind capable of mitigating the crime committed by appellant.

Finally, it must be observed that a "trial court is not obliged to find mitigating circumstances." Suarez v. State, 481 So.2d 1201, 1210 (Fla. 1985), citing Porter v. State, 429 So.2d 293 (Fla.), cert. denied, 104 S.Ct. 202 (1983). There is no error present here.

ISSUE IV

WHETHER THE PROSECUTOR'S CLOSING ARGUMENT DEPRIVED APPELLANT OF A FAIR TRIAL.

Appellant contends that a new penalty trial is necessary because the prosecutor made a "Golden Rule" argument during the course of his closing remarks, and that other comments served to deprive him of a fair trial. For the reasons stated below, this contention is without merit.

It must be noted initially that this issue has not been preserved for appellate review. The only defense objection to the prosecutor's closing argument alleged a violation of the trial court's prior ruling that the prosecutor refrain from arguing that this murder was heinous, atrocious and cruel (R 603). Since no "Golden Rule" objection was presented to the trial court, appellant is precluded from raising the issue at this time. Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982); Castor v. State, 365 So.2d 701 (Fla. 1978).

Even if this alleged error is examined, appellant is not entitled to any relief. The prosecutor's argument did not invite the jurors to place themselves in the victim's shoes, as argued by appellant. The specific comments attacked herein involve the prosecutor's observations that most people hope to die a peaceful death and do not even think horrendous thoughts about being stabbed in their own house in the middle of the night. These comments "appear to reflect common knowledge and are probably the sentiments of a large number of people." Breedlove v. State, 413

So.2d 1 at 8, n.11 (Fla.), cert. denied, 459 U.S. 882, 103 S.Ct. 184, 74 L.Ed.2d 149 (1982). As such, the remarks were fair comments which did not fundamentally taint the proceedings. Miller v. State, 435 So.2d 258 (Fla. 3d DCA 1983).

Other comments challenged by appellant also do not warrant a new penalty trial. Although the comments are arguably similar to those found to be improper by this Court in Jackson v. State, 13 F.L.W. 146 (Fla., Feb. 18, 1988). That case held that such comments only warrant a curative instruction when requested by defense counsel, and do not necessitate a new trial. In the instant case, defense counsel did not even object to the challenged comments (R 605-607).

Of course, wide latitude is permitted in arguing to a jury, and an appellate court cannot interfere with a trial court's control of comments unless a clear abuse of discretion is shown. Breedlove, supra. Because no such abuse has been demonstrated in the instant case, appellant is not entitled to a new penalty trial.

ISSUE V

WHETHER THE LOWER COURT ERRED IN REFUSING TO GIVE APPELLANT'S REQUESTED INSTRUCTIONS NUMBERS 4, 5, 6, 7, 9 AND 11.

Appellant next complains that six of his proposed requests for jury instructions - numbered 4, 5, 6, 7, 9 and 11 - were erroneously denied (R 825-830; R 578-596). As to requested instruction 4, the trial court stated that it was not a part of the standard instruction and it would be inappropriate to give it (R 582-583). The trial court declined to strike the word "extreme" from the second statutory mitigating factor (R 583). The court declined to strike the word substantially from the sixth statutory mitigating factor (R 584). The court declined to give proposed instruction number 7 because it was covered previously and the jury had considered it in the earlier phase (R 585).

As to proposed instruction number 9, the court expressed a concern that appellant was requesting that mitigating circumstances had to be proved beyond a reasonable doubt (R 589). The defense conceded there was no case law on it (R 591). The court declined to give instruction number 11, pertaining to giving a life recommendation even if there were aggravating circumstances and no mitigating circumstances (R 591-592).

The trial court did instruct the jury that it was their responsibility to render an advisory sentence based on their determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty and whether sufficient mitigating circumstances exist to outweigh any aggravating

circumstances found to exist. The jury was instructed to base their recommendation on the evidence presented (R 618-619). The trial court recited two statutory aggravating factors and four mitigating factors. The court specifically instructed the jury that:

> 4, you may consider as a mitigating factor any aspect of a defendant's character or background or any of the circumstances of the offense that the defendant offers as a basis for a sentence less than death. The circumstances listed in the statute and these instructions merely indicate some of the factors to be considered.
>
> Each aggravating circumstance must be established beyond a reasonable doubt before it may be considered by you in arriving at your decision. If one or more aggravating circumstances are established, you should consider all of the evidence tending to establish one or more mitigating circumstances and give that evidence such weight as you feel it should receive in reaching your conclusion as to the sentence that should be imposed.
>
> It must be emphasized that the procedure to be followed by the jury is not merely a counting process of the number of aggravating circumstancs and the number of mitigating circumstances, but, rather, a reasoned judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances present.
>
> A mitigating circumstance need not be proved beyond a reasonable doubt by the defendant. If you are reasonably convinced that a mitigating circumstance exists, you may consider it as established. The sentence that you recommend to the Court must be based upon the facts as you find them from the evidence and the law. You should weigh the aggravating circumstances against the mitigating circumstances, and your advisory sentence must be based on these considerations.

(R 620-621).

Additionally the court instructed the jury that they should not be influenced to act hastily or without due regard to the gravity of these proceedings (R 621) and that they should bring to bear their best judgment in reaching their advisory sentence (R 621-622). Also,

> "The fact that your recommendation is advisory does not relieve you of your solemn responsibility. For the Court is required to, and will give, great weight and serious consideration to your verdict in imposing sentence."

(R 622).

In light of the instructions actually given to the jury, no reasonable person can seriously contend that the jury was not adequately apprised of their role or that their function was denigrated as in Caldwell v. Mississippi, 472 U.S. 320, 86 L.Ed.2d 231 (1985).

Appellant has cited Goodwin v. Balkcom, 684 F.2d 794 (11th Cir. 1982), but there the jury was not instructed what a mitigating circumstance was nor was there an explanation of its function in the jury deliberation process. Here, the jury was adequately apprised of its options. Cf. Collins v. Francis, 728 F.2d 1322, at 1342-1343 (11th Cir. 1984).

Moreover, in Grossman v. State, ___ So.2d ___, 13 F.L.W. 127 (Fla. Case No. 68,096, Feb. 18, 1988), this Honorable Court rejected a similar claim that the role of the jury is denigrated by the standard jury instructions. In a word, appellant's contention is meritless.

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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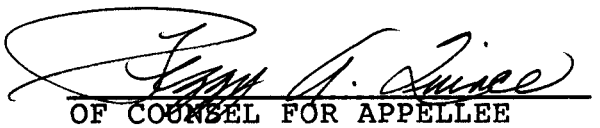
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Larry Helm Spalding, Capital Collateral Representative, 225 West Jefferson Street, Tallahassee, Florida 32301, this 13th day of May, 1988.



OF COUNSEL FOR APPELLEE