IN THE SUPREME COURT OF FLORIDA

MICHAEL T. RIVERA,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 70,563

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellee was the prosecution and appellant the defendant in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida.

In the brief, the parties will be referred to as they appear before this Honorable Court.

The following symbol will be used:

"R" Record on Appeal

All emphasis has been added by Appellee unless otherwise indicated.

STATEMENT OF THE CASE

Appellee accepts Appellant's Statement of the Case as found on page one of his initial brief.

STATEMENT OF THE FACTS

Appellee accepts the Statement of the Facts presented by Appellant to the extent it is non-argumentative and is relevant to the issues on appeal, and subject to the following additions and clarifications.

Patricia Henry worked at the Super-X drug store, and remembered checking out a skinny girl wearing sneakers, pants, and a windbreaker (R 795,798). She was by herself, and purchased posterboard (R 797-799).

Michael McDowell, a lawn supervisor for Petri's Positive Pest Control, took his lunchbreak in a field in Coral Springs (R 808-809). He took a walk in the field and noticed a strong odor like something had died (R 810-811). He saw a body faceup in a small ditch. The jeans were unzipped, and the jacket was up (R 811). He noticed that the hair was blond, and the body hard (R 812).

Dr. Wright performed the autopsy on the body (R 838). The body was of a female in the stage of early skeletonization. Dr. Wright testified that there was left mostly a skeleton of the upper part of the body (R 842-843). The girl was wearing a nylon jacket, a T-shirt and a pair of blue jeans which had a tear in the lower left leg and were unbuttoned at the waist. She was also wearing panties, socks and tennis shoes. The jacket was unzipped, and the jeans were halfway down (R 843). Dr. Wright testified that the body was on its back when he found it (R 847). It looked like it was carried there and dumped (R 848). The girl had a broken fingernail (R 849). She had a goose-egg bruise

three-quarters of an inch in diameter in the midportion of her forehead. Since her head and neck were exposed to the sun they were decomposed and in a state of mummification (R 850-851). The bruise on her forehead occurred during the girl's life (R 852). Dr. Wright could not determine the injuries to her brain because of the advanced state of decomposition. The girl was four feet, five inches tall (R 853). The lower part of the body did not decompose as much as the upper body, but Dr. Wright was unable to determine if there was a sexual assault because of the decomposition (R 854, 856). Dr. Wright detected an ether-like odor from the incision he made in her buttock region where the muscle was reasonable well-preserved (R 857). There were at least three different varieties of maggots and some small beetles in the body (R 860). The death was a homicide (R 868), and the death was caused by asphyziation, which could have been caused by choking or by using ether (R 869-870).

Robert Haarer worked for the Broward Sheriff's Office as a crime scene detective. He observed that the underpants were ripped at the top seam, and opined that this would not be caused merely by bloating (R 913-914). The crime scene included deteriorated pornographic magazines, a tube of ointment called "Maintain", eight pairs of pantyhose, and thirteen packages for queensize No-nonsense pantyhose (R 916-917). Some of the pantyhose packages were in close proximity to the body (R 916). In the right pocket of the windbreaker was "hot tamales" candy, $1.21, a receipt, and a school picture of Staci Jazvac (R 918). In the left pocket was two fingerless gloves, a small orange and red pen and a quartz watch (R 919).

A dentist, Dr. Steven Rifkin, identified the body found in the field as that of Staci Jazvac (R 1144-1148).

Starr Peck testified regarding receiving obscene phone calls at her home. The caller would call her by name (R 1083). The caller referred to himself as "Tony". Usually he was whiny, and would tell Starr that he was wearing a one piece body suit and pantyhose (R 1084). She had received twenty-five or thirty calls prior to the call of February 7, 1986 (R 1085-1087). In the last call, the voice was clear, and he was scared. He said, "Starr, I've done something very terrible,'' and "I killed [Staci] and I didn't me n to." (R 1087). "I had a notion to go out and expose myself. I saw this girl getting off her bike and I went up behind her." (R 1087-1088). He described how he used ether and dragged her into the van. He said, "I didn't mean to kill her." Starr believed that he was telling the truth (R 1088). Appellant said that Staci was pretty. He dragged her in the van and she was dead, but "[he] put it in her and she bled and then [he] put it in her anyway." He saw Staci at a small mall (R 1089). He said that he put her where no one would find her, and she was by a lake (R 1090). Starr felt that he tried to appease her when she asked him where the lake was, and he said Lake Okeechobee (R 1091). Starr was so upset by the phone call that she called the police (R 1092). Starr identified Appellant in court as the "Tony" who made the phone calls to her (R 1093).

Angela Greene was a manager of a Denny's restaurant. Over a two year period she received obscene phone calls at the various Denny's where she was working (R 1243). The calls were obscene

in nature, and the caller had a soft voice. The caller said that he was masturbating while wearing pantyhose or leotards. On the Friday night before the body was found, Angela received a call, and the caller said, "I had that Staci girl." (R 1244). He said that he was wearing his pantyhose, and that "she's gone." (R 1245). Angela testified that she never would have reported the call if it were not serious. She found the caller's reference to the ether rag to be specific. The caller's tone of voice was more serious and urgent than it usually was. He said his name was "Tony" (R 1246).

Gail Mastendo also worked for Denny's (R 1585). She had been receiving obscene phone calls since 1985. The caller would state that he was wearing pantyhose and a black bodysuit, and he would breathe heavily and masturbate while making the calls (R 1587-1588). The caller told her that he was masturbating, and she could hear that he was. He called himself "Tony" (R1588). He said that he did not want to be with a woman or a man, and that he liked children. He already "had" a child "north." Coral Springs is north of Tamarac, where Gail worked. He told her that he had grabbed a little girl and hurt her bad (R 1590). He said that he was going to "have" another child (R 1592). The caller described himself as looking like singer John Oates. Gail testified that Appellant looked like John Oates (R 1594).

Richard Scheff, with the Broward Sheriff's office investigated Staci's homicide (R 1000-1002). Appellant's name came up as a result of conversations he had with Starr Peck (R 1010). Appellant's residence was three miles from where Staci

was abducted (R 1011). After his Miranda rights were read to Appellant and acknowledged, Appellant gave a statement (R 1013-1014). Appellant said that he had a sexual problem with young girls. When Detective Scheff asked Appellant if he had any information regarding Staci's disappearance, Appellant replied: "why would you think I know anything about that?" The detective replied that someone had told him (R 1014). Appellant asked if the detective "would be truthful with him, and if he told me the name of the person that had spoke with us, would I acknowledge that was in fact the person that we had gotten the information from." (R 1014-1015). Detective Scheff replied that he "probably would". Appellant stated "Starr Peck". He admitted making the phone calls to Starr regarding Staci, and that "he found it sexually gratifying to fantasize about murdering, killing a young girl, and that this was all just part of this thing." Appellant was interested in girls who were eleven, twelve or thirteen (R 1015). Appellant stated that he had been fantasizing recently about raping young girls. He had gone prowling various neighborhoods in Broward County looking for a vulnerable victim. He did this in a van he borrowed from Mark Peters (R 1018). Appellant said that the girl would have to be unconscious, so he would knock them out with ether which he got from Mark Peters (R 1019). Appellant was asked if he knew if Staci's body was in Broward County or further away. Appellant stated that "whoever did this didn't have very much gas in a van, that he didn't have enough money to get more gas *so* he thought the body would probably be found locally in Broward County, and that the person

was afraid of running out of gas with the body in the van." Detective Scheff stated that when Appellant related this it "was said as a personal experience."

Staci's body was found the next day (R 1020). Appellant would not allow the statements to be tape recorded (R 1023). Detective Scheff noted that there was pantyhose at the scene because of Appellant's habit of wearing pantyhose, and because Appellant had pantyhose in his room (R 1025).

When Detective Philip Amabile went to Appellant's house to talk with him, the person who answered the door identified himself as Joseph Rivera. In fact, the person was Appellant's brother, Peter Rivera, and Joseph Rivera is dead (R 1511). They took Appellant to the station, and while en route, Appellant stated "if I talk to you guys, I'll be in jail for the next twenty years." (R 1512). At the station, Appellant said that he likes to expose himself to young girls, dress in women's clothing, and make obscene phone calls to ladies (R 1513). Appellant confessed to assaulting Jennifer Goetz, but stated that his original intent was to expose himself, but he became overwhelmed with an urge to rape her. After he was scared off, he made phone calls from a nearby payphone to have someone help her (R 1517). When asked to describe the person that the police should be looking for regarding Staci's disappearance, Appellant replied, "Phil, if I did that, I'd be describing myself to you." (R 1520). Appellant stated that the victim would have to be unconscious, and ether would do that (R 1521). Appellant's friend, Mark Peters, could get ether (R 1522). Appellant became

upset when they tried to show him a picture of Staci's body as it was found at the scene (R 1525). After Sargeant Carney told Appellant that it was possible that fingerprints could be gotten off a body, Appellant became nervous and interested in what they were saying for the first time. Before, Appellant had been casual (R 1526).

Detective Thomas Carney was also present during Appellant's statement to Detective Scheff. He noticed a difference in Appellant's tone after they told him that they had found Staci's body, and that it was possible that fingerprints could be taken off it (R 1266). He showed a definite concern after hearing about the fingerprints (R 1289). When told that his brother Peter's work records contradicted Appellant's claim that he was with Peter on the night of the abduction, Appellant stated that he blacked out sometimes, and did not know where he was that night. He stated, "I don't remember killing Staci", and asked to be left alone. The detectives let him rest in the room, which had a couch in it, for one and a half hours. When the detectives returned, Appellant stated that he was tired, and he was returned to the jail (R 1267-1269).

Tom Eastwood testified that when he and Appellant were talking about Staci Jazvac, Appellant began crying heavily (R 1337). It was a deep anguishing type of cry, like if he had lost a loved one (R 1362-1363).

A search of Appellant's bedroom was made pursuant to a warrant. They were looking for telephone numbers, women's clothing and a picture that Appellant asked them to pick up *so*

that his mother would not see it (R 1206). They collected bathing suits, pantyhose, leotards, bras, negligees and women's underwear from beneath Appellant's mattress (R 1185, 1208).

Jerry Asher, a detective with the Coral Springs police department investigated the attack on Jennifer Goetz (R 1371-1372). The attack occurred behind a gazebo near the pool of a condominium complex (R 1373). There was an open area nearby (R 1371). After the attack, Jennifer was visibly shaken, upset and disheveled. She had some abrasions on her forehead (R 1375). Jennifer was within a few seconds of death according to medical examiner Dr. Wright (R 1376). Appellant admitted that he was responsible for the attack on Jennifer Goetz. He stated that he grabbed her from behind and took her into the bushes off the path. He was frightened away by somebody in the area (R 1379). Appellant told Asher that he made telephone calls after the attack (R 1380). Appellant stated that when he was driving in certain areas he would get aroused, and he would make a mental note to return (R 1381). What Appellant told Asher was consistent with what Asher had discovered in his investigation (R 1380).

Jennifer Goetz testified regarding the attack on her. On July 10, 1985, a weekday, she was attending Pinecrest day camp (R 1452). She walked down the stairs from her condominium going to her bus stop. She noticed a man on a wooden bench. Jennifer walked up a concrete path to the pool area. A man came up behind her and grabbed her. He put his arm around her neck, and his other arm around her waist (R 1453). He dragged her into the

brush, and she yelled for help. The man said, "shut up", and "Don't move or I'11 kill you." He put Jennifer on her stomach, and then she passed out. It felt like she was falling asleep. The next thing she remembered was being flipped over on her back, and he laid a bag over her face (R 1454). He grabbed her hard and tried to choke her (R 1458). Then the assailant ran away, and a maintenance man picked her up, took her into his office, and called the police (R 1455). The person who grabbed her had dark curly hair, and was twenty-one or twenty-two (R 1456). She only got a glance at her assailant (R 1459).

Dr. Wright testified that Jennifer was "very close" to death. She was strangled until she was unconscious. This was evidenced by the petechial hemorrhages in her eyelids (R 1467). If Jennifer had died, the cause of death would have been asphyxiation by strangulation (R 1472).

Frank Zuccarello was a fellow inmate in the Broward County jail (R 1401). Appellant told him that it was the biggest mistake of his life trusting Starr and telling her he killed Staci. He also told Frank that he choked Staci to death when things got out of hand. Staci resisted after they got to the field. Appellant said his original intent was to molest Staci (R 1404). He told Frank that he was turned on by young girls. He was just driving around the neighborhood and saw Staci. He said that after he had choked Staci, he dumped her in a rockpit area which had water near it, two miles from a house in Coral Springs (R 1405,1412). Appellant's tone of voice was normal when he related this (R 1406). Appellant also told Frank that he tried

to kill Jennifer by choking her like he did Staci, but Jennifer was lucky because someone saw him, and scared him away (R 1408).

William Moyer was also incarcerated with Appellant. Moyer heard Appellant refer to himself as Tony when he was on the phone (R 1474). Appellant told Moyer regarding this murder that, "I didn't do it, but Tony did it." (R 1476). Appellant told him that he liked young girls with small chests (R 1477, 1479). He told Moyer that he was across the street in a coin shop when the bike was found in the field (R 1477). Prior to Moyer testifying, Appellant threatened to kill him if he did testify (R 1479).

Alan Krassner was the owner of "Bob's Coins" located across from the Super-X drug store where Staci was last seen (R 978-979). Krassner identified Appellant out of a photo line-up as a person who came into his store on Tuesday, Wednesday or Thursday, January 28, 29 or 30th (R 981). Appellant was with another person when he came into the store. Krassner again identified Appellant in court (R 983).

Appellant also discussed the murder with another inmate, Peter Salerno. He said, "I didn't mean to kill the little Staci girl." (R 1576). Salerno said to Appellant, "I heard that you were involved in an attempted murder of another little girl." Appellant replied, "Yes. There were witnesses there, but I'm not going to get convicted with the Staci girl because she's dead. There are no witnesses." (R 1578).

Howard Seiden performed an analysis on a hair found in the van, and testified that it could have come from Staci Jazvac. Hair comparison, unlike fingerprint comparison, does not yield a

definitive result (R 1305). He also testified that it would be unlikely that semen or blood would still be detectable in Staci because of the state of decomposition (R 1309).

A neighbor of Appellant, Dawn Soter, remembered that Appellant had a van on Friday January 31, 1986 (R 1254,1257).

SUMMARY OF THE ARGUMENT

I. The trial court properly allowed the admission of similar fact evidence, as the attack on Jennifer Goetz was relevant to show identity, intent, and absence of mistake or accident. Further, the evidence did not become a feature at trial, and an application of a harmless error analysis would show that any error would not have affected the verdict.

11. There was no error in the exclusion of reverse Williams rule evidence as there were no similarities between the proffered evidence and the instant crime. Since the evidence was not relevant, it was properly excluded. If a harmless error analysis was necessary, no reversible error would be demonstrated.

111. The trial court properly accepted the jury's unanimous recommendation of death. There was substantial competent evidence to support the findings that the murder was especially heinous, atrocious and cruel, and committed in a cold, calculated and premeditated manner. The trial court did not abuse its discretion by failing to find certain nonstatutory mitigating factors.

POINT I

THERE WAS NO REVERSIBLE ERROR CAUSED BY THE ADMISSION OF SIMILAR FACT EVIDENCE

ARGUMENT

Appellant argues that the trial court erred in admitting similar fact evidence of the attack on Jennifer Goetz. Appellee maintains that the admission of the evidence was proper as it was relevant to establish identity, and intent, and absence of mistake or accident, §90.404(2)(a), Fla. Stat. (1985). Further, the evidence did not become a "feature" of the trial, *so* no reversible error occurred. Randolph v. State, 463 So.2d 186 (Fla. 1984); Williams v. State, 117 So.2d 473 (Fla. 1960). The trial court instructed the jury on the limited purpose of the Williams' rule evidence (R 1335-1336). After the court's ruling allowing the admission of the evidence relating to the attack on Jennifer Goetz, the court admonished the attorneys not to allow it to become a main feature of the trial (R 118).

This court has recently reaffirmed the rule that the criteria for establishing whether or not collateral crime evidence is admissible is whether or not it is relevant. Bryan v. State, 533 So.2d 744 (Fla. 1988). Bryan also notes that Williams established a rule of admissibility and not a rule of exclusion.

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[1] Williams v. State, 110 So.2d 654 (Fla.), cert. denied, 361 U.S. 847 (1959).

Id. Of course, a harmless error analysis is also applicable. Id. Randolph v. State.

The evidence regarding Jennifer Goetz was properly admitted to establish identity and intent. Burr v. State, 466 So.2d 1051, 1053 (Fla. 1985); Holland v. State, 466 So.2d 207 (Fla. 1985). Appellant's theory of defense was that he was not the perpetrator of the charged crime. The evidence was also relevant to show an absence of mistake or accident. §90.404(2)(a), Fla.Stat. (1985). The testimony was not admitted to show Appellant's bad character. If evidence is sought to be admitted for "any other purpose" than to show bad character, it is properly admitted. Medina v. State, 466 So.2d 1046 (Fla. 1986); Williams v. State; Randolph v. State. The fact that evidence is prejudicial is irrelevant to the question of admissibility. Ashley v. State, 265 So.2d 685, 694 (Fla. 1972). By definition, all evidence against a defendant is prejudicial. Admissibility is proper even to rebut an anticipated defense. Williams v. State.

At the hearing on the motion to allow admission of Williams rule testimony, the similarities between the attack on Jennifer Goetz and the murder of Staci Jazvac were readily apparent. Both girls were eleven or twelve at the time of the attacks and were born in 1974 (R 729, 1452). Both girls were similar in stature; they were small and petite (R 100). Both girls were thin (R 110). They both were pretty, and had the same hair color. Both girls had small breasts (R 117). There were similarities in the manner of the abductions. Both abductions took place within a

three to four mile radius from Appellant's home. Both girls were alone and on their way to a specific location (R **102**). Both girls were abducted on a weekday. Staci died from asphyxiation, and if Jennifer had died it would have been by asphyxiation (R **103**). Both girls were attacked from behind (R **104-105**). Appellant confessed to his jailmates that he had killed both girls with his hands (R **104**). He stated he had molested both girls (R **107**), and that after he exposed himself to the girls he became overcome with the urge to molest them (R **108-109**). After both crimes, phone calls were made by someone identifying himself as Tony, and stating he was wearing pantyhose and a leotard (R **107, 109**). Of course, there were also dissimilarities between the two attacks, but the similarities were many and precise.

Moreover, even if the admission of this evidence was error, it would not have affected the verdict, and would necessarily be harmless. State v. DiGuilio, **491** So.2d **1129** (Fla. **1986**). In this case, Appellant's worst enemy was himself when it came to avoiding prosecution for this crime. Appellant confessed to the murders to Starr Peck (R **1087-1088**), Angela Greene (**R 1244**), and implicitly to Gail Mastendo (R **1590**). Appellant also confessed to the crime (or bragged about it, depending on one's perspective) to Frank Zuccarello (R **1404**), William Moyer (**R 1474, 1476**), and Peter Salerno (R **1576-1578**). Appellant asks this court to evaluate the credibility of these witnesses. This is not the task of an appellate court. These statements coupled with the circumstantial evidence against Appellant would have

been sufficient to convict Appellant regardless of the Williams rule testimony.

Therefore, Appellant's conviction must stand as there was no error in the admission of this Williams rule evidence.

POINT II

THERE WAS NO ERROR IN THE EXCLUSION OF ALLEGED "REVERSE WILLIAMS" RULE EVIDENCE

ARGUMENT

Appellant argues that the trial court erred in denying his request to admit into evidence alleged "reverse Williams rule" evidence regarding a murder which occurred after Appellant was incarcerated. Appellee asserts that the proferred evidence was not relevant to the instant case, and that even if there were error, it would have been harmless.

As discussed in Point I supra, evidence of a collateral crime is admissible only when it is relevant to the issues at trial. The question in the instant case was whether or not Appellant was responsible for Staci Jazvac's death. The murder of Linda Kalitan was unrelated to Staci's murder; there were few points of similarity and the evidence was properly excluded from consideration by the jury.

The following information was adduced during the defense proffer. Linda Kalitan was twenty-nine years old, was physically well-developed and had two children (R **1619**). She had consensual or nonconsensual anal sex prior to being killed (R **1619**, **1635**, **1637**). When Linda was found, she was nude except for a pair of socks (R **1620**). Her clothing was found in a canal weighed down by rocks. It appeared from the amount of rocks that the perpetrator had attempted to weigh the body down (R **1620-1621**). There were soiled loose pantyhose several hundred yards from

Linda's body which had appeared to be there for awhile (R **1623-1624**). Police officer Luther Riley's opinion was that the Kalitan murder was unrelated to Staci's murder (R **1626-1627**). Medical examiner Dr. Ongley's opinion was also that the two crimes were unrelated (R **1637**).

Broward Sheriff's officer Richard Scheff testified that it was common for women to be abducted while walking and bike riding because of their increased vulnerability (R **1644**). Thus, the fact that both Staci Jazvac and Linda Kalitan were riding bicycles prior to the attack does not establish a unique point of similarity. Moreover, the fact that the two bodies were found in the same location did not establish a point of similarity since after Staci's body was found the newspaper published a map with a large X indicating where Staci's body was found (R **1656**). The article practically gave directions to the canal (R **1657**). In Detective Scheff's opinion, the two crimes were unrelated. He outlined how dissimilar the two cases were.

Staci was eleven at the time of her murder, and had a childlike body. Linda was twenty-eight or twenty-nine and was a fully developed, large breasted woman (R **1640**). Staci was found with her clothes on; Linda was nude (R **1640-1641**). Linda was the subject of sodomy while she was alive. Staci was not the subject of sodomy, although there was possible post mortem sexual molestation (R **1641, 1655**). Staci's body was found under a bush in an open field face-up. Linda's body was found facedown in a canal (R **1641**). In Linda's case, there was an initial attempt to

dump her body in a canal near State Road 84 near where the clothes and bike were found. The clothes were tied together, and there were rocks in her pants (R 1642). Nothing similar occurred in Staci's case. Staci's bike was found at the place of her abduction, and was not hidden. Linda's bike was well-hidden (R 1642-1643). Staci was abducted in Northern Broward County, and Linda was abducted in Southwest Broward County (R 1643).

These facts do not show the pattern of similarity required to establish relevancy and hence admissibility. See Diaz v. State, 409 So.2d 68 (Fla. 3rd DCA 1982). As noted in footnote one in the Diaz opinion, any similarities were "both meager and commonplace". The points of similarity were that both victims were female, both were strangled, both were riding bikes prior to their abduction, and their bodies were found in arguably the same locale. Under Diaz, the only Florida law on the subject, this is not enough to establish relevancy and thus the evidence was inadmissible. Appellee would assert that this court should follow the Diaz court in not determining whether the liberal approach of the out of state courts should be adopted, since that question need not be reached because there has been no showing of an abuse of discretion by the trial court in determining there were no distinctive feature common to the two crimes. Id., 409 So.2d at 69.

Further, the exclusion of this evidence would have been harmless error at worst since there was overwhelming evidence of Appellant's guilt, including (but not limited to) his statements

regarding the crime, the evidence linking him to the van, the scene of the crime and motive, and the Williams rule evidence. No reversible error occurred.

POINT III

THE TRIAL COURT PROPERLY IMPOSED THE DEATH PENALTY ON APPELLANT

ARGUMENT

The trial court found the following aggravating circumstances to exist: 1) Appellant was previously convicted of another capital felony, or of a felony involving the use or threat of violence to the person, **2)** the murder was committed while Appellant was engaged in the attempt to commit, or the commission of kidnapping and sexual battery, **3)** the murder was especially heinous, atrocious and cruel, and 4) the murder was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification (R **2309-2311).** The trial court found that the statutory mitigating circumstance that Appellant committed the murder while under the influence of extreme mental or emotional disturbance was present (R **2311).** Upon balancing these factors, the trial court found that the death penalty was the appropriate penalty (R **2309-2313).** By a unanimous vote, the jury had recommended to the trial court that the death penalty be imposed (R **2139).**

Appellant does not challenge the first two aggravating factors. He challenges only the existence of the aggravating circumstances that the murder was especially heinous, atrocious and cruel, and that the murder was committed in a cold, calculated and premeditated manner. Appellee asserts that there was substantial competent evidence from which the trial court

could find the existence of these two factors beyond a reasonable doubt.

The trial court stated the following in finding the existence of the aggravating circumstance that the murder was especially heinous, atrocious and cruel:

> The capital felony was especially heinous, atrocious and cruel. Dr. Wright testified that the cause of death was asphyxiation. He testified that there was a bruise on her forehead caused while she was alive. A witness testified during the trial that you told him she started to scream and resisted you and it got out of hand and you choked her to death. It has previously been held that the fear and emotional strain preceding a victim's death may be considered as contributing to the heinous nature of the capital felony.
>
> **(R 2310).**

Medical examiner Dr. Wright testified that Staci Jazvac had a goose-egg bruise on her forehead which she had received while she was alive (R **850-852**). She had a broken fingernail (R **849**). Because of decomposition, Dr. Wright was unable to determine if there was injury to Staci's brain, and if she had been sexually assaulted (R **853-854, 856**). The cause of Staci's death was asphyxiation (R **869-870**). Appellant told Frank Zuccarello that he choked Staci to death when things got out of hand, and that Staci resisted after they got out to the field (R **1404**). There

was evidence of a sexual assault. These facts are sufficient to sustain a finding that the murder was especially heinous, atrocious and cruel.

Strangulation as a method of homicide meets the test that a murder be accompanied by additional acts which make the crime pitiless and unnecessarily torturous to the victim. See State v. Dixon, 283 So.2d 1, 9 (Fla. 1973); Hildwin v. State, 531 So.2d 124, 128 (Fla. 1988). The facts in the instant case are closely related to those in Hildwin. In Hildwin, this court noted that since the evidence showed that the defendant had abducted, raped and slowly killed his victim, h.a.c. had been established. Id. The fact that Staci resisted, was kidnapped and beaten shows that she most certainly suffered fear and emotional strain prior to her death. This supports a finding of h.a.c. Swafford v. State, 533 So.2d 270 (Fla. 1988); Adams v. State, 412 So.2d 850, 857 (Fla.), cert. denied, 459 U.S. 882 (1982). There was no error in the trial court's finding that Staci's murder was especially heinous, atrocious and cruel.

In finding that the murder was committed in a cold, calculated and premeditated manner, the trial court stated:

> The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. There certainly were no pretenses of moral or legal justifications shown by the evidence and your own statements made to the police

> officers and cell mates taken collectively show a cold, calculated and premeditated manner of homicide.
>
> **(R 2311).**

Appellant stated to Starr Peck the following regarding Staci's murder: "I had a notion to go out and expose myself. I saw this girl getting off her bike and went up behind her." (R **1087-1088).** He described how he used ether and dragged her into the van. He said, "I didn't mean to kill her." (R **1088).** Appellant said that Staci was pretty. He dragged her in the van and she was dead, but "[he] put it in her and she bled and then [he] put it in her anyway." He first saw Staci at a small mall (R **1089).**

Appellant stated to Detective Scheff that he had been fantasizing recently about raping young girls. He had gone prowling various neighborhoods in Broward County looking for a vulnerable victim. He did this in a van he borrowed from Mark Peters (R **1018).** Appellant said that the girl would have to be unconscious, so he would knock them out with ether which he got from Mark Peters (R **1019).**

Appellant told Frank Zuccarelli that he chocked Staci to death when things got out of hand. Staci resisted after they got to the field. Appellant said his original intent was to molest Staci (R **1404).** He told Frank that he was turned on by young girls. He was just driving around the neighborhood and saw Staci. He said that after he had choked Staci, he dumped her in

a rockpit area which had water near it, two miles from a house in Coral Springs (R 1405, 1412). Appellant's tone of voice was normal when he related this (R 1406). Appellant also told Frank that he tried to kill Jennifer by choking her like he did Staci, but Jennifer was lucky because someone saw him, and scared him away (R 1408).

Appellant also discussed the murder with Peter Salerno. He said, "I didn't mean to kill the little Staci girl." (R 1576). Salerno said to Appellant, "I heard that you were involved in an attempted murder of another little girl." Appellant replied, "Yes. There were witnesses there, but I'm not going to get convicted with the Staci girl because she's dead. There are no witnesses." (R 1578). This evidence shows that Staci was murdered in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

The trial court's findings are amply supported by the record, and the facts clearly show a substantial period of reflection and thought by Appellant, which rises to a level beyond that which is required for a first degree murder conviction. Card v. State, 453 So.2d 17 (Fla.), cert. denied, 469 U.S. 989 (1984); Jent v. State, 408 So.2d 1024 (Fla. 1981), cert. denied, 457 U.S. 1111 (1982). Staci was killed so that she could not identify Appellant. This shows c.c.p. Herring v. State, 446 So.2d 1049, 1057 (Fla.), cert. denied, 469 So.2d 989 (1984). This aggravating circumstance can also be found where there is a substantial period of thought and reflection by the

killer. Preston v. State, 444 So.2d 939, 946 (Fla. 1984); Jent v. State. Such was the case here.

Appellant also argues that the trial court erroneously failed to find non-statutory mitigating factors. Appellee maintains the correctness of the trial court's ruling.

As this court has pointed out in Bryan v. State, 533 So.2d 744 (Fla. 1988), "[a]s a matter of law, [f]inding or not finding that a mitigating circumstance has been established and determining the weight to be given such...is within the trial court's discretion and will not be disturbed if supported by competent substantial evidence" [citing & quoting Stano v. State, 460 So.2d 890 (Fla. 1984), cert. denied, 471 U.S. 1111 (1985)]. Failure to find a mitigating circumstance that a defendant is under extreme mental or emotional disturbance with diminished capacity is not an abuse of discretion if the trial court heard evidence and gave consideration to these factors. Smith v. State, 515 So.2d 182, 185 (Fla. 1987). See also, Jennings v. State, 512 So. 2d 169 (Fla. 1987). A trial judge is free to reject the testimony of an expert witness. even if it is uncontradicted. Roberts v. State, 510 So.2d 885, 894 (Fla. 1987). The trial court did not abuse its discretion. Kight v. State, 512 So.2d 922, 933 (Fla. 1987).

Further, even if one of the aggravating factors complained of was improperly found, the remaining aggravating factors, when weighed against the unsubstantial mitigating circumstance would still mandate a death sentence. See e.g., Peede v. State, 474

So.2d 808, 817-818 (Fla. 1985), cert. denied, 477 U.S. 909 (1986). Where there is no likelihood of a different sentence, any error in improperly finding an aggravating factor must be deemed harmless. Rogers v. State, 511 So.2d 526, 535 (Fla. 1986). See also, Zant v. Stephens, 462 U.S. 862 (1983); Wainwright v. Goode, 464 U.S. 78 (1983).

The death sentence imposed upon Appellant should be upheld by this court.

CONCLUSION

Based upon the foregoing reasons and citations of authority it is respectfully requeted that the lower court's decision be AFFIRMED.

Respectfully submitted,

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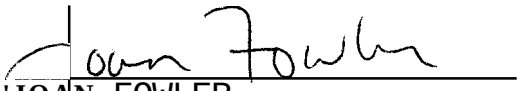

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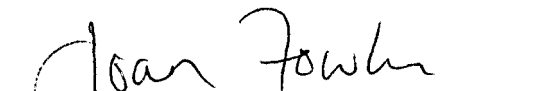
I] OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing "Answer Brief of Appellee" has been furnished by United States Mail to: H. DOHN WILLIAMS, JR., ESQUIRE, 524 South Andrews Avenue, Suite 303N, Fort Lauderdale, Florida 33301, this 9 day of May, 1989.



Of Counsel