IN THE SUPREME COURT OF FLORIDA

JOHN RUTHELL HENRY,

Appellant,

v.

Case No. 70,816

STATE OF FLORIDA,

Appellee.
_____/

APPEAL FROM THE CIRCUIT COURT
OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PASCO COUNTY

BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

The following is offered to supplement and/or clarify the appellant's statement of the case and facts:

At the hearing on the appellant's motion for a pretrial ruling as to the admissibility of the Williams Rule evidence, all of the parties agreed that any such ruling would be strictly advisory, and would not be binding as the ultimate determination of admissibility (R. 1042-1043). The trial court did not want to feel trapped or locked in to any particular ruling, and therefore denied the motion since the appellant could not present any authority requiring such a ruling (R. 1049).

The trial court did not directly restrict or limit the voir dire examination conducted by defense counsel. The panel was questioned generally as to their ability to follow the court's instructions, even if the jurors disagreed with the applicable law (R. 195, 197, 231, 303, 310, 357-358, 360, 388, 408-409, 424, 428). Some of the jurors indicated that they were aware of the facts concerning Eugene's kidnapping and murder, and one juror was accepted on the panel after admitting such knowledge (R. 98, 101, 108-110, 239-241, 249, 252, 264, 266-267, 269, 282).

At the pretrial hearing on the appellant's motion to suppress his statements and admissions, Detectives Wilber and McNulty testified that the appellant was alert, sober, conscious, did not appear to be under the influence of drugs or alcohol, and seemed to understand where he was and what he was doing (R. 1100, 1217, 1222). There was no alcohol, narcotics, or paraphernalia

observed on the appellant or in his motel room (R. 1218). Rosa Mae Thomas testified that after the appellant had slept, prior to the police arriving, he appeared to be just "tired" rather than "high" (R. 1138).

There was conflicting testimony as to whether Detective Wilber had made the statement that he would kill the appellant if the appellant had done anything to Eugene Christian. Wilber testified that he did not recall making the statement, and Rosa Mae Thomas testified that Wilber went to the car where the appellant was seated, opened the door, pointed his gun at the appellant's head, and threatened that he would kill the appellant personally if they did not find the boy (R. 1060, 1139, 1141, 1152). The trial court specifically found that Ms. Thomas was not a credible witness, noting that she changed her testimony, and at some point while on the stand, she mouthed "I love you," to the appellant (R. 1197-1198). The court found that Wilber's statement had been made, but under the circumstances described by Detective McNulty; that is, a casual remark directed to McNulty that Wilber did not intend the appellant to overhear (R. 1198). The court noted that the statement appeared to be an act of frustration, rather than a threat to the appellant, and, even assuming that the appellant heard the statement, the appellant would not perceive it as an actual threat (R. 1198-1200).

Testimony at the suppression hearing also indicated that, upon arriving at the Sheriff's Department, Detective McNulty was alone with the appellant in the interrogation room (R. 1095).

McNulty did not interrogate the appellant, but began talking to him, in order to establish a rapport (R. 1095). The appellant told McNulty that he didn't want to talk to him any more, adding that "you haven't read me anything" (R. 1096). At that point, Wilber returned and read the appellant his Miranda rights for the second time (R. 1221). McNulty left the room, and the appellant acknowledged his rights and affirmed that he wanted to talk to Wilber (R. 1221-1222). The appellant indicated that he didn't know anything about a stolen car, and had not seen Eugene Christian or Suzanne Henry (R. 1222). Wilber left the room from about 2:50 A.M. and returned about 4:30 or 4:40 A.M. (R. 1224-1226). At about 5:00 A.M., the appellant indicated that Eugene was in Plant City, and stated that the boy was not alive (R. 1226-1227).

Detective McNulty testified that he understood the appellant's statement to be directed at him personally, and he did not feel that the appellant was exercising his right to remain silent (R. 1097, 1121). The appellant and Wilber had known each other for some time, and were getting along well, but McNulty did not share this relationship with the appellant (R. 1098). The trial court found that the appellant had not, in any way, indicated that he was invoking his right to remain silent (R. 1195).

During the appellant's trial, the victim's sister, Bonnie Cangro, testified that the victim's purse and jewelry had been taken from her sister's house (R. 496). Although the victim's

purse was later returned by Sheriff's Deputies, none of the victim's jewelry was ever recovered (R. 496).

John Steven Mathis testified that he did not recall whether or not the appellant was smoking crack cocaine when he saw the appellant on Sunday, December 22, 1985 (R. 564, 565).

Deputy Ferguson testified that his photographs of the crime scene corroborate the medical examiner's testimony that there was bruising to the victim's neck and shoulders, and a fingernail mark on the victim's neck, but no defensive wounds (R. 528). Ferguson testified that this was consistent with the appellant holding the victim's head with one hand, placing his knees on her shoulders, and moving her head from side to side so that he could stab her in the throat (R. 529, 539). Another witness testified that the pattern of bloodstains indicated that the victim was killed in basically the same location and position as her body was found (R. 667).

Detective Fay Wilber testified that the appellant told him that he killed Eugene with the same knife he had used to murder the victim herein (R. 635).

Wilber also testified that he could not accurately or adequately describe to the jury the context of the investigation leading up to the appellant's arrest or the appellant's statements without discussing the murder of Eugene, because his discussion with the appellant involved and overlapped both crimes (R. 579-580). As an example, Wilber noted that he asked the appellant what time Eugene had been killed. The appellant didn't

remember, but knew that it had been dark for awhile, because the appellant saw lights, and thought it was the cops because he knew that the cops had found Suzanne's body by this time (R. 582-583). The appellant's guilty knowledge about Suzanne's murder came out in his statement that he had not wanted to kill Eugene, but he knew he had to because the cops had found Suzanne's body (R. 582-583, 634-635).

At the end of the guilt phase of the appellant's trial, both the trial judge and defense counsel instructed the jury that the appellant's identity was an element of the crime which the state was required to prove beyond any reasonable doubt (R. 707, 747). Defense counsel told the jury that they could properly consider the Williams Rule evidence to establish identity and noted that it may well prove that issue (R. 736).

During the penalty phase of the appellant's trial, Deborah Fuller testified that, at the time of Patricia Roddy's death, Roddy was trying to get a divorce from the appellant, and had seen an attorney and gotten a restraining order against the appellant (R. 797). Roddy had not been living with the appellant for several weeks (R. 797).

Dr. Daniel Sprehe testified that the appellant described his murder of Roddy by stating that Roddy had threatened him with a knife, and he had grabbed it away from her and killed her (R. 827). This description is inconsistent with the account related by Deobrah Fuller (R. 799-801). Dr. Sprehe also testified that when the appellant related his version of Suzanne's murder, he

stated that he had "freaked out", and by this he meant that he had gotten extremely angry with the victim (R. 826). In addition, the appellant's own expert witnesses testified that he would not have been totally out of control at the time of the murder, but would be able to appreciate the criminality of his conduct and recognize that his actions would bring about the victim's death (R. 927-928, 945, 954-956).

SUMMARY OF THE ARGUMENT

ISSUE I: The jury's finding of premeditation is supported by competent, substantial evidence. The physical evidence was inconsistent with the appellant's version that he "freaked out" after the victim cut him with a kitchen knife. The nature and manner in which the homicide was committed clearly demonstrates a finding of premeditation to support the conviction for first degree murder.

ISSUE II: The trial court did not abuse its discretion in allowing the state to introduce evidence of the appellant's abduction and murder of the victim's five year old son, Eugene Christian. The evidence was clearly relevant to establish the identity of the appellant as the perpetrator of the murder herein. It also established the general context in which the criminal action occurred. In addition, the evidence was relevant to keep the jury from speculating about what had happened to the only eyewitness to the crime, the murder weapon, and the car that was observed at the scene. The evidence did not become a feature of the trial, and was not so unfairly prejudicial so as to preclude its admission.

ISSUE III: The trial court did not abuse its discretion in refusing to make a pretrial ruling on the admissibility of the Williams Rule evidence. There is no authority to support the argument that such an advisory opinion was required. Defense

counsel's voir dire examination was not restricted, and the appellant has not asserted that any juror selected to sit on his jury was not fair or impartial.

ISSUE IV: The trial court did not abuse its discretion in denying the appellant's motion to suppress his statements and admissions. The trial court properly found that the statements were voluntary, and the court's factual findings to support the denial of the motion to suppress is supported by the record.

ISSUE V: The trial court did not abuse its discretion in denying the appellant's motion to discharge his court appointed attorney. The appellant was not interested in representing himself. His statements as to his dissatisfaction with his attorney did not challenge the competency of his attorney, but merely expressed a general loss of confidence and trust. In addition, the motion to discharge was untimely since it was not made prior to trial.

ISSUE VI: The trial court's finding that the homicide was cold, calculated and premeditated without pretense of moral or legal justification is supported by competent, substantial evidence. The manner in which the victim was killed demonstrates a heightened premeditation to support the finding of this aggravating circumstance.

ISSUE VII: The trial court's finding that the murder was heinous, atrocious or cruel is supported by competent, substantial evidence. This Court has previously upheld this finding on facts similar to the instant case. In addition, the United States Supreme Court's finding that a similar factor was unconstitutionally vague and overbroad in Oklahoma does not apply to this aggravating circumstance in Florida, because this Court has adopted a limiting construction in applying this factor.

ISSUE VIII: The appellant's sentence of death is not disproportionate when the facts of this case are compared to other capital cases. The sentencing judge herein found the existence of three aggravating circumstances and no mitigating circumstances. The appellant's mental state was properly rejected as a mitigating factor by the trial court. The appellant did not kill the victim during a heated domestic dispute, but planned the savage assault because the victim had thrown the appellant out of her house and was trying to end their relationship. On the facts of this case, death is the appropriate penalty.

ARGUMENT

ISSUE I

WHETHER THE JURY'S FINDING OF PREMEDITATION IS SUPPORTED BY COMPETENT, SUBSTANTIAL EVIDENCE.

The appellant contends that he was entitled to a judgment of acquittal on the first degree murder charge because the state allegedly failed to present sufficient evidence of premeditation. He argues that the evidence was not inconsistent with his reasonable hypothesis that he "freaked out" during a struggle with the victim, demonstrating a total absence of premeditation. However, a review of the record indicates that this contention is without merit.

The physical evidence presented was clearly inconsistent with the appellant's version of the stabbing. Detective Wilber testified that the appellant told him that he "freaked out" after the victim cut him three times with a kitchen knife (R. 629). Wilber examined the appellant's left arm, where he had allegedly been cut, and noted three small scratches (R. 629-631). Wilber testified that the scratches were not "clean cut" type wounds and could not have been made with a knife (R. 631, 648). He described the wounds as two to three inches each, very jagged and scabbed over, consistent with wounds one might receive from crawling around through briars and shrubs, such as the area where Eugene Christian's body had been found (R. 630-631, 647).

In addition, when the appellant stated that he "freaked out," he did not mean that he completely lost control, but only that he became "extremely angry" (R. 826). The appellant's own experts testified that he would not have been totally out of control at the time of the murder, but would be able to appreciate the criminality of his conduct and recognize that his actions would bring about the victim's death (R. 927-928, 945, 954-956).

The appellant also indicated that he and the victim had been "tussling" because the victim was angry that the appellant was living with another woman (R. 628). However, the victim had thrown the appellant out of her house prior to this time, and the room in which the murder occurred was neat and orderly, and showed no signs of a struggle (R. 480, 485-486, 632, 645-646).

The manner in which the victim died indicates that this was not a situation where the appellant was running through the house, wildly chasing her with a knife. The evidence demonstrates that the appellant got the victim on her back on the floor, sat on her with his knees on her shoulder so that she couldn't fight back, held her head with one hand, moving it side to side so that he could stab her repeatedly in the throat with his free hand (R. 501, 528-529, 539, 682-684, 692). The victim did not have any defensive wounds and was killed in basically the same location and position as her body was found (R. 528, 667, 692).

Although the appellant's actions after the murder may not be competent to establish premeditation, they are circumstances which may be taken into account in determining whether to accept or reject the appellant's version of events. His behavior after killing the victim is inconsistent with someone who has just stabbed their wife to death in an emotional outrage. Rather than calling for an ambulance or the police, the appellant covered the body; probably smoked a cigarette; stole the victim's purse and jewelry; kidnapped the only witness to the murder, the victim's five year old son, and took him and the murder weapon to another county before killing him in the same manner with the same knife. (R. 496, 514, 536-537, 605-607, 611, 622, 635-638).

Since the circumstances demonstrated the falsity of the appellant's version of events, the jury was entitled to disregard his hypothesis of innocence and properly found that the murder was premeditated. That finding cannot be disturbed if there is substantial, competent evidence to support it. Heiney v. State, 447 So.2d 210 (Fla.), cert. denied, 469 U.S. 920, 105 S.Ct. 303, 83 L.Ed.2d 237 (1984). The record herein clearly establishes sufficient evidence to support the jury's finding of premeditation. In Sireci v. State, 399 So.2d 964 (Fla. 1981), cert. denied, 456 U.S. 984, 102 S.Ct. 2257, 72 L.Ed.2d 862 (1982), this Court noted that premeditation may be inferred from such matters as the nature of the weapon used, the presence or absence of provocation, the previous relationship between the parties, the manner in which the homicide was committed, and the

nature and manner of the wounds inflicted. When these factors are applied to the instant case, the premeditation of the murder is obvious. Although the level of provocation cannot be ascertained because the only witness to the murder was subsequently killed by the appellant, every other factor clearly demonstrates premeditation. The appellant and the victim had a history of fighting, and the victim had apparently tried to end the relationship and had thrown the appellant out of her house at least a week before he killed her (R. 480, 485-486, 501. 608, 855).

Perhaps the strongest indicator of premeditation is the fact that the victim was stabbed in the neck and shoulders thirteen times with a four or five inch kitchen knife (R. 591, 682-684). In Preston v. State, 444 So.2d 939 (Fla. 1984), the defendant used a four to five inch knife to brutally inflict multiple stab wounds upon the victim. This Court noted that "such deliberate use of this type of weapon so as to nearly decapitate the victim clearly supports a finding of premeditation." 444 So.2d at 944. There is evidence in this case that the appellant pinned the victim down and forced her head from side to side so that he could stab her in the throat (R. 528-529, 539).

The appellant's reliance on cases discussing premeditation in other jurisdictions is not persuasive. In Austin v. State, 382 F.2d 129 (D.C. Cir. 1967), the court noted that deliberation which only lasted "seconds" was not sufficient to support a conviction for first degree murder. The court struck the trial

court's instruction to the jurors that deliberation could be in the nature of hours, minutes, or seconds, because in that jurisdiction, premeditation required minutes rather than seconds of deliberation. 382 F.2d at 139. In Florida, premeditation does not have to be contemplated for any particular period of time, and may occur a moment before the act. Sireci, supra.

Whether or not the evidence demonstrates a premeditated design to commit a murder is a question for the jury, and may be established by circumstantial evidence. Wilson v. State, 493 So.2d 1019 (Fla. 1986). The facts of the instant case clearly indicate sufficient premeditation, and the trial court properly denied the appellant's motion for judgment of acquittal.

ISSUE II

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING EVIDENCE OF A COLLATERAL CRIME.

The appellant also challenges the trial court's admission of evidence that the appellant killed the victim's son, Eugene Christian, after committing the murder for which he was being tried. The trial court allowed testimony of the subsequent murder as res gestae and under the rule of admissibility established by Williams v. State, 110 So.2d 654 (Fla.), cert. denied, 361 U.S. 847, 80 S.Ct. 102, 4 L.Ed.2d 86 (1959). Once again, a review of the record refutes the appellant's allegation of error.

Of course, evidentiary rulings of this nature are within the sound discretion of the trial judge, and cannot be disturbed absent a clear abuse of discretion. Stano v. State, 473 So.2d 1282 (Fla. 1985), cert. denied, 474 U.S. 1093, 106 S.Ct. 869, 88 L.Ed.2d 907 (1986). Evidence of a separate crime is clearly admissible if it is relevant for any purpose other than to show bad character of the accused or his propensity to commit crime. Medina v. State, 466 So.2d 1046 (Fla. 1985). Even if the evidence below prejudicial and established the appellant's bad character, it is not required to be excluded as long as it is relevant for any other purpose. §90.404, Fla. Stat.

The evidence of Eugene's murder was relevant to the instant case for several purposes. Most importantly, it was crucial in establishing that the appellant had killed Suzanne Henry, the

victim herein. The appellant's argument that the evidence of Eugene's murder was not sufficiently similar to the murder being tried because the common points were not so unusual as to establish the identification of the perpetrator ignores important aspects of both crimes. In addition to the similarities noted by the appellant -- that both victims were stabbed with a knife in the neck -- the crimes were unique in that an older model bluish-green Chevrolet with a small "space-saver" tire on the right rear wheel was observed at the scene of both crimes (R. 481-482, 560, 615). Both victims suffered repeated blows from the same knife in the same location on their bodies (R. 635, 656, 682-684, 1532).

The cases relied on by the appellant which find that collateral crime evidence should have been excluded because they were not sufficiently similar to the crimes being charged engage a weighing process to determine that significant, substantial dissimilarities exist to outnumber the common factual similarities. See, Drake v. State, 400 So.2d 1217 (Fla. 1981); Peek v. State, 488 So.2d 52 (Fla. 1986); Thompson v. State, 494 So.2d 203 (Fla. 1986). The appellant herein has conspicuously failed to identify any dissimilarities in the crimes at issue. Although the victim of the crime charged was an adult white woman, and the victim of the collateral crime was a young black boy, these dissimilarities are outweighed by the similarity that both victims shared a very close relationship with the appellant. Certainly the fact that Suzanne was killed in the home while

Eugene was kidnapped and taken to another county is not such a significant dissimilarity so as to outweigh the otherwise nearly identical nature of the crimes.

The appellant's argument that identity was never an issue in the case, because the theory of defense was the absence of premeditation, is not well-founded. The jury was properly instructed by both the trial judge and defense counsel that the appellant's identity was an element of the crime which the state was required to prove beyond any reasonable doubt (R. 707, 747). In addition, defense counsel indicated to the jury that they could properly consider the Williams Rule evidence to establish identity and noted that it may well prove that issue (R. 736). Nor was the evidence cumulative and unnecessary, because no witness was able to identify the appellant as being present at the victim's house, although witnesses did observe the same car, with Eugene in it, that was later found abandoned not far from Eugene's body (R. 481-482, 560, 615-616).

The testimony about Eugene's murder was relevant for other purposes as well. The testimony was properly presented in order to establish the general context in which the criminal action occurred. Smith v. State, 365 So.2d 704 (Fla. 1978), cert. denied, 444 U.S. 885, 100 S.Ct. 177, 62 L.Ed.2d 115 (1979). The fact that Eugene's murder occurred after the murder for which the appellant was being tried does not preclude its admissibility Smith, supra; Ashley v. State, 265 So.2d 685 (Fla. 1972); Hall v. State, 403 So.2d 1321 (Fla. 1981). Detective Wilber testified

that he could not accurately or adequately describe to the jury the context of the investigation leading up to the appellant's arrest or the appellant's statements without discussing the murder of Eugene, because his discussion with the appellant involved and overlapped both crimes (R. 579-580). As an example, Wilber noted that he asked the appellant what time Eugene was killed. The appellant didn't remember, but knew that it had been dark for awhile, because the appellant saw lights, and thought it was the cops because he knew that the cops had found Suzanne's body by this time (R. 582-583). The appellant's guilty knowledge about Suzanne's murder only came out in his statement that he had not wanted to kill Eugene but he knew he had to because the cops had found Suzanne's body (R. 582-583, 634-635).

The evidence of Eugene's murder was also relevant to the crime charged herein to keep the jury from speculating about what had happened to the only eyewitness to the crime, the murder weapon, and the car that was observed at the scene (R. 591-615, 638). In addition, the collateral crime evidence demonstrated circumstances that were clearly inconsistent with the appellant's hypothesis of innocence, as discussed in Issue I. Williams Rule evidence is properly admissible as rebuttal to a particular defense. Smith v. State, 464 So.2d 1340 (Fla. 1st DCA 1985).

The appellant's concern that testimony about Eugene's murder became the main feature in this trial is totally unwarranted. The appellant asserts that the jurors were kept in suspense as to whether the child was dead or alive, but there was less than a

page and a half of transcript between the time the child's disappearance is first discussed and the statement is made that the boy is dead (R. 609-611). Only two of the seventeen witnesses that testified even discussed Eugene's kidnapping and murder (R. 470-697). Although there were over 225 pages of testimony, less than 35 pages involved direct testimony about the crimes against Eugene (R. 609-638, 656-661). Also included in those 35 pages were significant facts relating to the crime charged, including all of the appellant's admissions and his confession.

In Townsend v. State, 420 So.2d 615 (Fla. 4th DCA 1982), the state admitted evidence of six additional homicides and two assaults when only three murders had been charged against the defendant. The court noted that although evidence as to the collateral crimes took over twice as many pages of transcript testimony and the majority of the exhibits admitted, the collateral crime evidence did not become a feature of the trial. The facts of the instant case clearly reject any notion that testimony regarding Eugene's kidnapping and murder was so disproportionate to that of the crime charged that the evidence improperly became a feature of the trial, precluding admission. Williams v. State, 117 So.2d 473 (Fla. 1960).

The appellant also argues that the collateral crime evidence was inadmissible because any probative value was substantially outweighed by the danger of unfair prejudice. This is not in fact a Williams Rule argument, but is independently predicated on

Section 90.403, Florida Statutes. It must be noted initially that this particular argument was never presented to the trial court, and therefore has not been preserved for appellate review (R.583-586, 1362). Castor v. State, 365 So.2d 701 (Fla. 1978).

Even if preserved, the appellant has not demonstrated that the probative value of the details of Eugene's murder is substantially outweighed by the danger of unfair prejudice, precluding admission. Such an argument underestimates the probative value of the evidence at issue, and overestimates the possibility of unfair prejudice. In Bryan v. State, 533 So.2d 744 (Fla. 1988), this court noted that a photograph of the defendant committing a bank robbery was only probative because it showed the gun used by the defendant to commit the murder being tried, and noted that there was a plethora of other evidence establishing that the defendant was in possession of the gun prior to the crime. In the instant case, there was no direct evidence linking the defendant to the car which was seen at the scene of the crime and later discovered near Eugene's body. In addition, none of the witnesses who observed the car at the scene could identify the appellant as the driver of the car (R. 476-478, 484).

Although the evidence regarding Eugene's murder was obviously prejudicial to the appellant, there is no indication that the testimony was unduly or unfairly prejudicial. This Court has previously noted that "[t]hose who create crimes of violence often must face the record of their deeds in court."

Halliwell v. State, 323 So.2d 557 (Fla. 1975). The appellant brutally murdered a small helpless child, and should not be entitled to escape the particular prejudice inherent in such a crime when the evidence was so obviously relevant to establish the identity of the appellant as the perpetrator of the murder for which he was being tried.

Even if erroneous, there is no reasonable possibility that the admission of the similar fact evidence affected the jury's verdict. The appellant made several incriminating admissions, and offered a detailed confession of the murder for which he was being tried (R. 611-633). While some of these statements were inconsistent with the physical evidence, the appellant's statements and the physical evidence of the crime would convince any reasonable jury to convict the appellant of first degree murder. Therefore, any error presented was clearly harmless beyond any reasonable doubt. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986).

This Court has repeatedly emphasized that the controlling question as to the admissibility of Williams Rule evidence is relevancy. Bryan, supra. Given the substantial relevancy of the similar fact evidence at issue in this case, the appellant has failed to demonstrate that he is entitled to a new trial in which such evidence is excluded.

ISSUE III

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN REFUSING TO MAKE A PRETRIAL RULING ON THE ADMISSIBILITY OF THE WILLIAMS RULE EVIDENCE.

The appellant argues that, even if the Williams Rule evidence was properly admitted, he is entitled to a new trial because the trial court refused to make a pretrial ruling on the admissibility of this evidence. However, the appellant has not cited any authority which requires such a ruling, and there is no indication that the trial court's failure to render an advisory opinion on the admissibility of evidence before trial amounts to an abuse of discretion.

At the hearing on the appellant's motion for a pretrial ruling, all of the parties agreed that any such ruling would be strictly advisory, and would not be binding on the ultimate determination of admissibility to be made during trial (R. 1042-1043). The trial court noted that it was reluctant to issue an advisory opinion, because it did not want to feel trapped or locked in to any particular ruling (R. 1049). Therefore, the trial court stated that it would deny the motion for a pretrial ruling unless the appellant could present some authority for such a ruling (R. 1049).

The appellant's argument that he was precluded from conducting meaningful voir dire examination in the absence of a pretrial ruling is without merit. Certainly, any attorney's job during voir dire and throughout the course of a trial would be

made easier if the attorney were able to know all of the evidentiary rulings in advance of trial. However, this does not mean that a defense attorney is entitled to the court's assistance in making difficult strategic decisions regarding voir dire and the presentation of their defense.

The cases relied on in the appellant's argument as to this issue involve situations where a trial court directly limited voir dire examination. No such direct restriction occurred in the instant case. Defense counsel was not precluded from asking the prospective jurors any question that he wanted to ask, he simply wanted the court's guidance in determining which questions he wanted to ask.

It is significant that the appellant has not asserted, and there is no indication in the record, that any of the jurors who were ultimately selected to sit on the appellant's jury was anything other than fair and impartial. Absent some indication of incompetency, the appellant has failed to demonstrate an abuse of discretion as to the direct (or indirect) restriction of voir dire by a trial court. Stano v. State, supra. In addition, no error regarding voir dire examination has been presented if the appellant's concerns were adequately covered by general questioning. Jones v. State, 378 So.2d 797 (Fla. 1st DCA 1979). The appellant's desire to have questioned prospective jurors concerning their ability to limit consideration of the collateral crime evidence to the purposes set out in the cautionary instruction was adequately addressed by questions concerning the

jurors ability to follow the court's instructions (R. 195, 197, 231, 303, 304, 310, 357-358, 360, 388, 408-409, 424, 428). Defense counsel's concerns about the prospective jurors knowledge of Eugene's murder and whether such knowledge would preclude a fair and impartial jury were also addressed. Some of the jurors in fact indicated that they were aware of this evidence already, and one juror was accepted on the panel despite this knowledge (R. 98, 101, 108-110, 239-241, 249, 252, 264, 266-267, 269, 282).

Absent some allegation that the appellant was denied a fair and impartial jury, he is not entitled to a new trial due to the trial court's refusal to make a pretrial ruling on the admissibility of the Williams Rule evidence.

ISSUE IV

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING THE APPELLANT'S MOTION TO SUPPRESS HIS STATEMENTS AND ADMISSIONS.

The appellant also argues that the trial court erred by denying his motion to suppress incriminating statements and admissions made subsequent to his arrest. Of course, a trial court's ruling on such a motion has a presumption of correctness, and this court cannot substitute its judgment for that of the trial court where the record support facts as found in the denial of his motion to suppress. DeConingh v. State, 433 So.2d 501 (Fla. 1983), cert. denied, 465 U.S. 1005, 104 S.Ct. 995, 79 L.Ed.2d 228 (1984). Since the record herein supports the trial court's factual findings, the appellant is not entitled to relief on this issue.

The appellant raises four grounds allegedly requiring suppression of his statements. The first ground contends that the appellant was under the influence of cocaine and could not knowingly waive his right to remain silent. However, there is no direct evidence in the record that the appellant was even under the influence of cocaine. Detectives Wilber and McNulty testified that the appellant was alert, sober, conscious, did not appear to be under the influence of drugs or alcohol, and seemed to understand where he was and what he was doing (R. 1100, 1217, 1222). There was no alcohol, narcotics, or paraphernalia observed in the appellant's motel room or on the appellant's

person (R. 1218). Although Rosa Mae Thomas testified that the appellant seemed to be under the influence of drugs and alcohol when he was with her, she noted that after the appellant had slept prior to the police arriving, he appeared to be just "tired" rather than "high" (R. 1138).

The appellant's reliance on his psychological, alcohol, and drug problems and his statements during the investigation that he had ingested crack cocaine at the time of the murders is not persuasive. There is no indication that the appellant was so impaired that he was unable to understand the meaning of his statements, as required to vitiate his Miranda[1] waiver. Cannady v. State, 427 So.2d 723 (Fla. 1983). The appellant had prior experience with law enforcement and was able to direct the officers to the area of Hillsborough County in which Eugene's body was found (R. 1077, 1208-1209). In addition, the appellant has not identified any coercive police activity in taking advantage of his alleged impairment as required for suppression pursuant to Colorado v. Connelly, 479 U.S. 157, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986). On these facts, the appellant's possible use of cocaine prior to his making incriminating statements cannot be construed to require suppression of such statements.

Next, the appellant argues that he was improperly induced to confess by Detective Wilber's statement that he would kill the appellant if the appellant had done anything to Eugene Christian.

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[1] Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

This statement was the subject of a great deal of conflicting testimony, with Wilber stating that he did not recall making the statement and Rosa Mae Thomas stating that Wilber went to the car where the appellant was seated, opened the door, pointed gun at the appellant's head, and threatened that he would kill the appellant personally if they did not find the boy (R. 1060, 1139, 1141, 1152). The trial court specifically found that Ms. Thomas was not a credible witness, noting that she changed her testimony and at some point while on the stand she mouthed to the appellant, "I love you," indicating some interest in the outcome of the proceeding (R. 1197-1198). The trial court did find that the statement was made by Detective Wilber, but under circumstances described by Detective McNulty's testimony (R. 1198). The court noted that this statement appeared to be an act of frustration rather than a threat to the appellant, and, assuming that the appellant heard this statement, the appellant did not perceive it as an actual threat (R. 1198-1200). The court noted that the appellant's actions after the statement are consistent with this conclusion, in that the appellant continued to relate to Detective Wilber, did not spontaneously incriminate himself at the time the statement was made, but began making inculpatory statements several hours later, and did not express any concern about any perceived threat although the appellant was alone with other officers after Wilber's statement was made but before the appellant incriminated himself (R. 1199). These factual findings are consistent with the circumstances as related

by Detective McNulty (R. 1091-1093, 1095, 1126, 1127).

The appellant's third ground for suppression claims that his statements were improperly induced by the officers' implication that they were only interested in locating Eugene Christian. The appellant does not explain how this implication rises to the level of an improper police tactic or psychological coercion. It is true that the law enforcement officers were initially primarily concerned with finding Eugene Christian (R. 1093, 1107, 1114). However, there is no indication that the officers implied that this was their only concern. The trial court specifically found that there was no evidence during any of the discussions with the appellant that would indicate that the police were not interested in the murder of Suzanne Henry (R. 1195). The court noted "[t]here was some talk about at that time their primary and immediate interest was the location of that boy, but that's not any kind of trickery or deceit that would immolate his statements or lead him to believe that they were not interested in that murder." (R. 1195). In addition, it is significant that the appellant continued to confess to both crimes after Eugene's body was found, when the police were obviously interested in and asking him about both murders (R. 626-630, 1240-1242).

The appellant's last contention for suppression claims that his statements were made after he had invoked his right to remain silent. The record indicates that upon arriving at the Sheriff's Department, Detective Wilber left the interrogation room to make coffee (R. 1095). Detective McNulty did not interrogate the

appellant, but began talking to him, in order to establish a rapport (R. 1095). The appellant told McNulty that he didn't want to talk to him any more, adding that "you haven't read me anything" (R. 1096). At that point, Detective Wilber returned and read the appellant his Miranda rights for the second time (R. 1221). McNulty left the room, and the appellant acknowledged his rights and affirmed that he wanted to talk to Wilber (R. 1221-1222). The appellant indicated that he didn't know anything about a stolen car, and had not seen Eugene Christian or the victim, Suzanne Henry (R. 1222). Wilber left the room from about 2:50 A.M. and returned about 4:30 or 4:40 A.M. (R. 1224-1226). At about 5:00 A.M., the appellant indicated that Eugene was in Plant City, and stated that the boy was not alive (R. 1226-1227).

Detective McNulty testified that he understood the appellant's statement to be directed at him personally, and he did not feel that the appellant was exercising his right to remain silent (R. 1097, 1121). McNulty knew that the appellant and Wilber had known each other for some time, and were getting along well, but McNulty did not share this same relationship with the appellant (R. 1098). The trial court found that the appellant did not, in any way, indicate that he wanted to remain silent (R. 1195). The court noted:

> "Communication between two people is not just a matter of grammatically diagraming the words in the sentences. It's a matter of a great many other dynamics that play in communication. And Detective McNulty read the communication. He was a party to the communication. He read that communication or

> the intent of Mr. Henry to be telling him not that he didn't want to make any more statements or that he wanted to remain silent, but that he didn't want to talk to Detective McNulty. He didn't want to talk to McNulty. 'You ain't read me anything, and I'm not going to talk to you.' And I think we've got to place great weight on Detective McNulty's reading of that. And I have no reason not to believe Detective McNulty in his testimony about his reading of that expression" (R. 1195-1196).

The appellant's argument as to this issue relies primarily on cases discussing the invocation of a right to counsel rather than an invocation of the right to remain silent. Certainly, there is not even an arguably equivocal request for an attorney on the record herein. The appellant never presented such an argument to the trial court. Even if the appellant's statement was characterized as an equivocal request to terminate an interrogation which had not yet begun, contrary to the trial court's finding, any such request was obviously clarified when Wilber readvised the appellant of his Miranda rights and asked the appellant if he wished to speak to Detective Wilber (R. 1221-1222).

It is widely recognized that an accused may exercise his option to terminate a custodial interrogation by controlling the time at which questioning occurs, the subjects discussed, and the duration of the interrogation. Martin v. Wainwright, 770 F.2d 918 (11th Cir. 1985), cert. denied, 479 U.S. 909, 107 S.Ct. 307, 93 L.Ed.2d 281 (1986). Certainly an accused may also control whether or not his interrogation is conducted by a particular

officer. An accused has the right to make a limited invocation of his Miranda rights and the police need only honor the request to the extent that it is invoked. Shriner v. State, 386 So.2d 525 (Fla. 1980), cert. denied, 449 U.S. 1103, 101 S.Ct. 899, 66 L.Ed.2d 829 (1981). Since the appellant's desire not to speak with Detective McNulty was honored by the police, he is not entitled to relief on these facts.

Even if it appears that the appellant indicated that he was exercising his right to remain silent and Detective Wilber should not have questioned the appellant, the admission of the appellant's subsequent statements were clearly harmless beyond any reasonable doubt. Testimony as to finding the car which the appellant abandoned near Eugene's body was admissible as a product of the initial statements, and his subsequent confession (following his third set of Miranda warnings (R. 627)) was admissible even if a Miranda violation is assumed, since the appellant's initial statements were voluntary. Martin v. Wainwright, supra at 928. The evidence is sufficient to identify the appellant as the perpetrator of the murder herein, and, when combined with the other evidence presented, is sufficient to establish the appellant's guilt without reliance on his initial incriminating post arrest statements.

The record clearly demonstrates the voluntariness of the appellant's post arrest statements, and supports the trial court's factual findings in denying his motion to suppress. Therefore, the appellant is not entitled to a new trial excluding his incriminating post arrest statements.

ISSUE V

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING THE APPELLANT'S MOTION TO DISCHARGE HIS COURT APPOINTED ATTORNEY.

During the penalty phase of the appellant's trial, the appellant advised the court that he was dissatisfied with his court appointed attorney, and that he wanted "to be recommended to another attorney" (R. 873-874). The appellant acknowledges that, by this statement, he was requesting the court to appoint another attorney to represent him (Appellant's Initial Brief, p. 64). The judge denied the appellant's request, noting that he had observed defense counsel's performance, and found no basis for any complaint (R. 874).

The appellant argues that the denial of his request was error, because the trial court failed to conduct an inquiry to determine whether the appellant was capable of representing himself. However, the appellant was not entitled to such an inquiry, because he was not interested in representing himself.[2] In Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975), the United States Supreme Court noted that a request for self-representation must be stated unequivocally. 422 U.S. at 835-836. The appellant's reliance on Hardwick v. State, 521 So.2d 1071 (Fla.), cert. denied, __ U.S. __, 109 S.Ct. 185, 102 L.Ed.2d 154 (1988), is misplaced because Hardwick had advised his

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[2] The appellant's motion for a new trial alleged that he was entitled to relief because the trial court denied his pro se, verbal request during trial for substitute counsel (R. 1406).

trial court that, although he felt unable to conduct his own trial, he would rather do so than to proceed with his court appointed counsel. 521 So.2d at 1073. In the instant case, nothing in the appellant's request to discharge his attorney can even arguably be read as a request to represent himself. Therefore, the appellant was not entitled to a Faretta inquiry.

The appellant's request is more appropriately characterized as a motion to discharge his court appointed attorney, and is governed by the procedures set forth in Nelson v. State, 274 So.2d 256 (Fla. 4th DCA 1973), and approved in Hardwick. Nelson mandates that, once the competency of counsel is sufficiently challenged, a trial judge should make an inquiry of the defendant and his attorney to determine whether or not there is reason to believe that the attorney is not rendering effective assistance to the defendant. However, the appellant herein did not challenge the competency of his attorney, he merely alleged his dissatisfaction and general loss of confidence and trust. Such statements do not trigger a Nelson inquiry because they do not "amount to an assertion of counsel incompetence requiring exploration or verification as a predicate for substitution." Smelley v. State, 486 So.2d 669 (Fla. 1st DCA 1986). See also, Johnston v. State, 497 So.2d 863 (Fla. 1986).

In addition, a Nelson inquiry is not required when a motion to discharge counsel is not made until after the jury has been impaneled. Dukes v. State, 503 So.2d 455 (Fla. 2d DCA 1987). It is significant that every case cited by the appellant as to this

issue concerns a motion to discharge made prior to trial, and the appellant does not address the untimeliness of his motion. It is often recognized that an indigent defendant has an absolute right to counsel, but does not have a right to have a particular lawyer represent him. Morris v. Slappy, 461 U.S. 1, 103 S.Ct. 1610, 75 L.Ed.2d 610 (1983); Koon v. State, 513 So.2d 1253 (Fla. 1987), cert. denied, __ U.S. __, 108 S.Ct. 1124, 99 L.Ed.2d 284 (1988). As in the Koon case, there is nothing in the instant record to indicate that the appellant could have been better served by other counsel. The appellant has not alleged that the denial of his motion to discharge was prejudicial, or deprived him of effective assistance of counsel. On these facts, the trial court did not err in denying his motion to discharge his court appointed counsel.

ISSUE VI

WHETHER THE TRIAL COURT'S FINDING THAT THE HOMICIDE WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION IS SUPPORTED BY COMPETENT, SUBSTANTIAL EVIDENCE.

The appellant asks this Court to reexamine the trial court's finding that the homicide was committed in a cold, calculated and premeditated manner without pretense of moral or legal justification. However, it must be noted initially that evaluating the evidence is the responsibility of the trial court judge, and when the trial judge finds that an aggravating circumstance has been established, such finding can not be overturned unless there is a lack of competent, substantial evidence to support it. Stano v. State, 460 So.2d 890 (Fla. 1984), cert. denied, 471 U.S. 1111, 105 S.Ct. 2347, 85 L.Ed.2d 863 (1985).

The appellant argues that the trial judge's factual conclusions to support this finding were not established by the evidence, but arose from rank speculation. This argument is soundly refuted by the record. The victim's sister testified that she had observed the appellant fighting with the victim on two occasions, and that the appellant would sit with his knees on the victim's shoulders so that she couldn't fight back (R. 501). A crime technician from the Pasco County Sheriff's Office testified that his pictures corroborate the medical examiner's testimony that there was bruising to the victim's neck and both

shoulders, and a fingernail mark on her neck, yet there was no evidence of defensive wounds (R. 528). The technician noted that this would be consistent with the theory that the appellant held the victim's head with one hand, placing his knees on her shoulders and moving her head from side to side so that he could deliberately stab her in the throat (R. 529, 539). Another witness testified that the pattern of bloodstains indicates that the victim was killed basically in the location and position where her body was found (R. 667). The medical examiner testified that she observed bruises as well as stab wounds on the victim's body, noted a fingernail mark on the victim's neck, and concluded that none of the knife wounds were defensive in nature (R. 682-684, 689). Certainly, this testimony and the photographs introduced during the trial provide ample evidence to support the trial court's description of the nature and manner of the homicide.

The factual conclusions that the appellant sat in the same room and smoked a cigarette after covering the victim's body, and that the victim's five year old son was able to hear, if not see, the vicious attack of his mother are logical conclusions which may be reasonably inferred from the evidence. There was testimony that the victim's head was covered with a rug, and a white towel was spread next to her hand (R. 536-537). Detective Fay Wilber testified that a brown rug covered parts of the victim's body, including her left leg (R. 606). On top of this rug was a glass ashtray with a More cigarette in it (R. 606-607).

The appellant smoked More cigarettes (R. 605). A video tape admitted into evidence demonstrates the proximity of the room where the victim's son was to the scene of the crime, and illustrates the size of the residence for the trial court to consider (R. 552, 555).

The appellant's reliance on his statements to Detective Wilber to characterize the homicide as "undoubtedly committed in the heat of passion aroused by the domestic altercation, and worsened by Henry's psychotic state and recent drug abuse" (Appellant's Initial Brief, p. 70), is an attempt to reweigh the facts and to convince this court to accept facts that were specifically rejected by the trial judge. Since the physical evidence conflicted with the appellant's statements, the trial judge was entitled to disregard the appellant's version of the murder.

Although this aggravating factor is usually reserved for execution or contract murders or witness elimination killings, Hansbrough v. State, 509 So.2d 1081 (Fla. 1987), that description does not provide an exclusive definition of the "cold, calculated and premeditated" aggravating circumstance. In Swafford v. State, 533 So.2d 270 (Fla. 1988), this Court recognized that the fact that Swafford had to reload his gun sufficiently demonstrated more time for reflection and therefore "heightened premeditation" to support this aggravating factor. The Swafford decision also noted that this aggravating factor can be established by such facts as advanced procurement of a weapon,

lack of resistance or provocation, and the appearance of a killing carried out as a matter of course. 533 So.2d at 277. The trial judge herein recognized that this finding requires heightened premeditation, and noted that such was proven by the evidence of the nature and manner of the homicide (R. 1411).

When considered in conjunction with the nature and circumstances of the appellant's killing of Patricia Roddy, the evidence suggests that this murder was committed pursuant to a prearranged design, also supporting a finding of this aggravating circumstance. In both murders, the appellant was married to the victims, although the victims were not living with the appellant at the time of their deaths and were apparently trying to end their relationship with the appellant (R. 474, 480, 485-486, 797). Patricia Roddy was trying to get a divorce from the appellant, and had seen an attorney and gotten a restraining order against the appellant (R. 797). The victim herein had likewise thrown the appellant out of her house (R. 480, 485-486). In both instances, the appellant claimed that the victims had threatened him with a knife and he had grabbed it from them and killed them (R. 627-630, 827), although the facts were inconsistent with the appellant's statements (R. 799-801, 804). Thus, the evidence demonstrates that the appellant is the type of person who would purposefully kill a woman before he allowed her to divorce him, indicating that the appellant had carefully planned this murder as well.

Since the trial court's finding that this homicide was committed in a cold, calculated and premeditated manner without pretense of moral or legal justification is amply supported by the record, the appellant is not entitled to relief on this issue.

ISSUE VII

WHETHER THE TRIAL COURT'S FINDING THAT THE HOMICIDE WAS HEINOUS, ATROCIOUS OR CRUEL IS SUPPORTED BY COMPETENT, SUBSTANTIAL EVIDENCE.

The appellant also argues that the "heinous, atrocious or cruel" aggravating circumstance does not apply to the facts of this case, despite the fact that the victim was stabbed at least thirteen times in the neck area and remained conscious for three to five minutes (R. 682-684, 691-692). The appellant is obviously asking this court to reweigh the evidence by arguing that the victim was the one to choose the murder weapon and that the lack of defensive wounds indicate only that the victim became unconscious and died quickly (Appellant's Initial Brief p. 74-75). Since the court's finding as to this issue is supported by competent, substantial evidence, the finding should not be overturned. Stano, 460 So.2d at 894.

Numerous cases support the heinous, atrocious or cruel finding on these facts. In Hildwin v. State, 531 So.2d 124 (Fla. 1988), the victim was strangled. Hildwin attacked the finding of heinous, atrocious or cruel based on the facts that the victim took several minutes to lose consciousness and that the victim was brutally attacked, as evidenced by her torn bra and by Hildwin's statement that the victim screamed and begged for help while she was strangled. Similar to the appellant herein, Hildwin argued that because there were no defensive wounds on the body and because the time that it took the victim to die was not

conclusively established, the judge engaged in mere speculation. This Court rejected those arguments, noting that the killing was accompanying by additional acts which made the crime pitiless and unnecessarily tortuous to the victim, especially in light of the fact that the victim was acutely aware of her impending death. 531 So.2d at 128. In the instant case, the appellant was not only aware of her impending death, but also knew that her five year old son was in the house and would be at the mercy of her assassin.

This Court has previously upheld a finding of heinous, atrocious or cruel on facts similar to the instant case, when the victim lived a few minutes before dying of multiple stab wounds. Morgan v. State, 415 So.2d 6 (Fla.), cert. denied, 459 U.S. 1055, 103 S.Ct. 473, 74 L.Ed.2d 621 (1982); Duest v. State, 462 So.2d 446 (Fla. 1985). This factor is equally applicable on the facts of the instant case.

The appellant's attack on the constitutionality of the "heinous, atrocious or cruel" aggravating circumstance is also without merit. The appellant relies on Maynard v. Cartwright, 486 U.S. ___, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988), which found a similar factor to be unconstitutionally vague and overbroad as applied by the state of Oklahoma. The finding of unconstitutionality in Maynard was based on the Oklahoma court's failure to define the terms heinous, atrocious, and cruel. However, these terms have been defined in Florida. See, State v. Dixon, 283 So.2d 1 (Fla. 1973), cert. denied sub nom., Hunter v.

Florida, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974). In addition, the United States Supreme Court has upheld this aggravating circumstance in Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976), against a vagueness attack and this was expressly noted in Maynard where the court compared Proffitt with Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980). The Court in Maynard was not concerned with the jury's ability to apply the aggravating circumstance, but considered whether a reviewing court had adopted a limiting construction which would channel the jury's discretion to apply this factor. Since this Court has adopted such a limiting construction, Maynard can not apply to invalidate the "heinous, atrocious or cruel" aggravating circumstance in Florida.

Since the "heinous, atrocious or cruel" aggravating circumstance is constitutional and the trial court's finding of this factor in this case is supported by the record, the appellant is not entitled to relief on this issue.

ISSUE VIII

WHETHER THE APPELLANT'S SENTENCE OF DEATH IS DISPROPORTIONATE ON THE FACTS OF THIS CASE.

The appellant's final argument concerns the proportionality of his sentence in light of other decisions examining the propriety of a death sentence on comparable facts. However, a review of the facts in this case indicate that it is one of the most aggravated and unmitigated of first degree murder cases, for which the death penalty is appropriate. State v. Dixon, supra. The sentencing judge found three aggravating circumstances and no mitigating circumstances (R. 1409-1414). In addition, the judge noted that even if he were to assume the existence of mitigating circumstances, the arguably mitigating circumstances herein are insufficient to outweigh the single aggravating circumstance that this is the third murder committed by the appellant in ten years, particularly since the appellant was in prison for seven of those ten years (R. 1410-1413). Therefore, even if the two aggravating circumstances challenged by the appellant are found to be improper, the death sentence herein should not be disturbed.

The appellant's reliance on "mental mitigators" is not persuasive. Two of the psychiatric experts testified that the appellant did not suffer from any ongoing mental disease or emotional dysfunction, and was not under the influence of extreme mental or emotional disturbance at the time of the murder (R. 780, 782, 829-830, 831). Doctor Daniel Sprehe testified that

there was no indication of any schizophrenia and Dr. James Fessler noted that any schizophrenic tendencies would be low-grade (R. 777-778, 831). In rejecting the "mental mitigators" the trial court specifically noted,

> "The evidence presented during the course of the first phase of the trial was contradictory as it related to the amount of cocaine ingested by the defendant prior to the murder of Suzanne Henry. This court in considering the evidence and the credibility of the witnesses who testified concerning the defendant's ingestion of cocaine prior to the murder, has concluded that the amount of cocaine, if any was ingested by the defendant prior to the murder, was a small amount. The medical experts who testified, including Dr. Joan Wood, were unanimous in their opinion that the effects of cocaine are quickly felt and quickly dissipated. Considering the time periods established by the evidence at which the defendant may have ingested cocaine and the time of the murder, whatever effect the cocaine may have had upon the mental or emotional faculties of the defendant would surely have been minimal at the time of the murder of Suzanne Henry" (R. 1412).

The court further noted that in light of the split of opinion between the four medical experts and the credibility of the evidence presented concerning the quantity of cocaine ingested by the defendant, "it does not appear to this court that the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired let alone substantially impaired" (R. 1413).

A death sentence is not precluded simply because the appellant knew the victim. This is particularly true when, as in

this case, the appellant has a significant history of violent crime. In Lemon v. State, 456 So.2d 885 (Fla. 1984), cert. denied, 469 U.S. 1230, 105 S.Ct. 1233, 84 L.Ed.2d 370 (1985) this Court upheld a sentence of death despite the fact that the defendant had killed a woman with whom he had a previous relationship, and despite an established mitigating factor that the defendant was acutely emotionally disturbed at the time of the offense. This Court noted that the crime was heinous, atrocious and cruel, in addition to the fact that the appellant had a previous conviction for a similar violent offense. Similarly, in King v. State, 436 So.2d 50 (Fla. 1983), cert. denied, 466 U.S. 909, 104 S.Ct. 1690, 80 L.Ed.2d 163 (1984), this Court affirmed the death penalty, despite rejecting the trial court's finding of a cold and calculated murder. Two remaining aggravating circumstances, including the fact that the appellant had previously been convicted of a similar violent offense, required imposition of the death penalty.

It is significant to note that most of the cases cited by the appellant as to this issue involve situations where a jury recommended that the defendant be sentenced to life imprisonment, but the trial court overrode this recommendation and imposed death as a sentence. In stark contrast in the instant case, the jury's recommendation of death was unanimous (R. 995).

The appellant's attempt to characterize this case as a "heated domestic dispute" is sufficiently rebutted by the evidence, as discussed in Issue VI, supra. Since this case did

not involve a heated domestic confrontation, and there were no mitigating circumstances established by the appellant, the three aggravating circumstances found by the trial court clearly require the imposition of death on these facts.

CONCLUSION

Based on the foregoing arguments and citations of authority, the appellee respectfully requests this Honorable Court to affirm the judgment and sentence of the trial court.

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 A. ANNE OWENS, Assistant Public Defender, Polk County Courthouse, P. O. Box 9000 - Drawer PD, Bartow, Florida 33830, this 2d day of May, 1989.

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