IN THE SUPREME COURT OF FLORIDA

ARTHUR LYNN SCHAFER,

Appellant,

v.

STATE OF FLORIDA,

Appellee,

CASE NO. 70, 834

ANSWER BRIEF OF APPELLEE

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

ALFONSO M. SALDANA
Assistant Attorney General
111 Georgia Avenue, Suite 204
West Palm Beach, Florida, 33401
(305)837-5062

Counsel for Appellee

TABLE OF CONTENTS

TABLE OF CITATIONS

PRELIMINARY STATEMENT

Appellant was the Defendant and Appellee was the Prosecution in the Criminal Division of the Seventeenth Judical Circuit, in and for Broward County, Florida. Hon. Russell E. Seay, Presiding. In this brief, the parties will be referred to as they appear before this Honorable Court.

The following symbols will be used:

"R" Record on Appeal

STATEMENT OF THE CASE

Appellee, the State of Florida, hereby accepts the Statement of The Case as set forth in the Initial Brief of Appellant.

STATEMENT OF THE FACTS

Appellee, the State of Florida, hereby accepts the Statement of The Facts as set forth in the Initial Brief of Appellant. These facts are the basic relevant facts and further discussion, explanation, and amplification of these facts will be achieved in the body of this brief.

SUMMARY OF THE ARGUMENT

POINT I

Appellant was free to go up to the point that he admitted his acts. It was at this point that Appellant had to be given his rights pursuant to Miranda and in fact was given these rights. A reasonable person would not have felt a restraint under of his freedom of movement that could fairly be characterized as that associatied with a formal arrest.

As for the voluntariness of this confession, there is no question that it was voluntary. Appellant appeared understanding and did not appear to be on medication or intoxicated.

POINT II

The Williams rule violations that Appellant claims to have occurred were not properly reserved for appeal. Even if this issue had been preserved, it is clear that the questioning by the state was proper.

As for the photographs, all of these were relevant to show at the circumstances surrounding the victim's death as well as the premiditated and cold blooded intent of Appellant.

Additionally, the victim's daughter had relevant information not available from any other witness, thus she was uniquely qualified to testify.

Appellant's complaint with the phrasing of the questions by the prosecuting attorney during the cross-examination of Appellant is baseless. As for the state's closing argument, no

objections were made, thus no preservation for Appellate review occurred.

POINT III

It is well settled that it is within the discretion of the trial judge to conclude that outbursts are not prejudicial to the point of ordering a mistrial. The present ruling was well within its discretion.

As for the jury instructions, the instruction given adequately covered the elements of a robbery. In addition, trial judges should be able to rely on the standard jury instructions as being a correct statement of the law.

As for the flight instruction, the evidence is clear that Appellant fled from the scene.

POINT IV

It appears that a comtemporaneous conviction perpetrated upon the same victim is no longer a valid basis for finding the aggravating circumstance of prior conviction of another violent felony and the trial court/s finding thereon was in error. However, this error is harmless.

The second aggravating circumstance found by the court was that the capital felony was committed while Appellant was engaged in the commission of a robbery, burglary, and kidnapping. This finding is amply supported by the record.

The third aggravating circumstance cited by the trial court was that the present capital felony was committed for the purpose of avoiding or preventing a lawful arrest. There is clear proof beyond a reasonable doubt that the killing's dominant or only motive was the elimination of the witness.

The fourth aggravating circumstance found by the trial court was that the capitol felony was especially heinious, atrocious, or cruel. This finding was proper because the victim was murdered by means of strangulation.

The fifth and final aggravating circumstance found by the trial court was that the capital felony was committed in a cold, calculated, and premiditated manner without any pretense of moral or legal justification at bar, there was sufficent evidence of both heightened premeditation and execution style killing.

A comparison of the facts in this case with cases where the death penalty has been upheld on similar facts shows that the present death sentence is consistent with those cases.

Finally, the trial court considered Appellant's evidence of mitigating factors and concluded that it failed to rise to a sufficient level to be weighed as mitigating circumstances.

ARGUMENT

POINT I

THE MOTION TO SUPPRESS STATEMENTS BY APPELLANT WAS PROPERLY DENIED.

Under the dictates of Miranda v. Arizona, 384 U.S. 436 (1966), a suspect involved in a custodial interrogation by law enforcement officials is entitled to the procedural safeguard of the Miranda warnings, the key being that the suspect must be in custody.

The ultimate inquiry in determining whether a suspect is in custody is whether there is a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest.Correll v. State, 13 F.L.W. 34 (Fla. Jan. 14, 1988) (quoting California v. Beheler, 463 U.S. 1121 (1981).

The testimony elicited at the suppression hearing showed that prior to Appellant's coming to the police station there had been no attempts at watching Appellant or performing any surveillance on him (R. 12). The police thought that Appellant could have been at Century Village doing side work for tenants on the day in question (R. 13). When Appellant came into the station at approximatley 10:15 A.M. he was joking, laughing, and cooperative (R. 13,82). (Appellant was brought to the station by a city employee at the request of the police (R. 10, 82).

Detective Murray testified that at this point Miranda rights were not given to Appellant because he felt that Appellant

could be innocent (R. 14). After informing him of the investigation, the officers told Appellant that he didn't have to talk and was free to leave (R. 14, 82). Appellant said he understood that he was free to leave (R. 82) and declined to do so (R. 14)

Not only did Appellant decline to leave after being told five times that he could leave but he stated that he would rather be inside the air conditioned station office with the officers rather than outside working in the hot sun (R. 83). Appellant himself admitted that he stated "it sure feels good in here, better than outside" (R. 134).

Before giving his exculpatory taped statement at 12:32 P.M., Appellant was advised that two persons had tentatively identified him as being inside the Century Village complex on the day of the homicide (R. 92). Appellant stated that he was willing to take a lie detector test to prove that he was not at Century Village on that day (R. 15, 91, 92). It was Appellant's idea to take the test; he was told that he didn't have to (R. 15).

While checking out Appellant's exculpatory statements, Appellant was left alone in the interviewing room with the door open and a glass of water (R.17). Appellant would not have been stopped if he had attempted to leave (R. 36). As lunch time came around, Det. Null asked Appellant if he wanted to eat anything

and also stated that he would call his boss so there would be no problem at work (R. 16). Appellant stated that he was not hungry (R.36).

The two hours of questioning Appellant consisted of questioning him concerning his whereabouts on the day of the homicide (R. 29). Based on Appellant's answers Det. Murray felt that witnesses Caputo or Oberrender could be mistaken as to their identifications of that someone was lying (R. 29). Witness Caputo could not be eliminated as a possible suspect at this time because of his confusing statements to the police (R. 30). The officers did feel that Appellant could be the responsible party because of the description of the clothing and red bandana, even though it was not positively identified (R. 31).

During this time Appellant was alert and in control of his emotional faculties (R. 34). He did not appear to be on medication or intoxicated (R. 121).

Appellant, along with Detectives Null and Murray,left to take the polygraph test at the Broward County Sheriff Office at approximately 1:10 to 1:20 P.M. (R. 15, 37, 91). Appellant voiced no displeasure to this plan (R. 37). Testimony showed that the two officers were seated in the front of the car and Appellant was alone in the back seat (R. 38). Appellant offered no resistance and was not handcuffed (Id). Appellant never expressed a desire to leave because of hunger, headaches or other physical problems (R. 116). Once they arrived at the sheriff's

station Det. Eastwood handled everything. At this time Appellant was still free to leave because there was no evidence of any wrongdoing (R. 39).

Detective Eastwood read Appellant a form making sure he understood that Appellant's statements were being given freely and voluntarily (R. 51). As far as Det. Eastwood knew, Appellant was not a suspect in this case and was free to go (R. 52). Appellant was calm and open (R. 53). Appellant never told Det. Eastwood that he was taking any medicine (R. 148).

Det. Eastwood noticed negative reactions to certain investigative questions and told so to Appellant (R. 54). Using his investigative techniques Eastwood told Appellant that he had not cleared the test and if he was the person it was just a matter of time before the truth was known (R. 71). At this time, the test was concluded and Appellant could have walked out of the office but for his confession (R. 71).

At this point Appellant stated that he might as well get it off his chest. He had done it but he didn't mean to kill her (R. 54). At that point, Det. Eastwood stopped him and read him his constitutional rights from a prepared form (R. 55) because from this point on Appellant was no longer free to go (R. 60).

The rights that were read to Appellant consisted of the following:

1. he had the right to remain silent. He need not talk to me (Eastwood) or answer any questions if he did not wish to do so;

2. should he talk to me (Eastwood), anything which he would say could and would be introduced into evidence against him;

3. If he wanted an attorney to represent him at this time or at any time during questioning he was entitled to such counsel;

4. if he could not afford an attorney and so desired, one would be provided without charge.

(R. 56 - 57)

Each right was read to Appellant and Appellant was aksed if he understood each right (R. 55). Appellant stated that he did. Appellant was then given the form to read and to initial each right (R. 56). Finally, when asked if he wanted to continue Appellant stated that he did (R. 55).

Appellant then confessed to killing Mrs. Katzman, removing jewelry from her apartment and taking it to his locker at work (R. 59). Appellant also stated that he pulled down the victim's clothing to make it look like a rape (Id).

Det. Null subsequently came in and asked Appellant if he understood the rights that Det. Eastwood had explained to him.. Appellant was told that he didn't have to talk if he didn't want to, and didn't have to talk without an attorney present. Appellant stated that he understood this and was willing to talk (R. 94). Det. Null also went over the Miranda rights with

Appellant. This was done orally after Det. Eastwood had already done it once (R. 95).

Finally, on the taped confession subsequently given, Appellant again stated that he understood the Miranda rights and also stated that the taped statement was free and voluntary (R. 99).

Appellant subsequently gave a taped confession inculpating himself in this crime (R. 97 - 107). At this time, Appellant did not admit to killing the victim. Appellant was formally arrested after this interview (R. 108).

After Appellant's testimony the trial court ruled that Appellant was interrogated but this was not a custodial interrogation (R. 167). Appellant came in voluntarily and was responsive to the questions. The statements were found to have been given freely and voluntarily and hence admissible at trial (R. 167).

Well settled is the principle that a trial court's ruling comes to a reviewing court with the same presumption of correctness that attaches to jury verdicts and final judgements. De Coningh v. State, 433 So.2d 501 (Fla. 1983), cert denied, 465 U.S. 1005 (1983). The question of the admissibility in evidence of an extra - judicial confession is for the court to decide, based on all the circumstances of the confession. A reviewing court should defer to the fact-finding authority of the trial court and should not substitute its judgment for that of

the trial court. Id, at 504. With these principles in mind it is clear that the trial court's ruling must be affirmed.

The evidence is clear that Appellant was free to go up to the point that he admitted his act to Det. Eastwood (R. 60). Only after he stated to Det. Eastwood that he had killed Mrs. Katzman was he no longer free to go. It was at this point that Appellant had to be given his rights pursuant to Miranda, supra, and in fact was given these rights (R. 56 - 57).

A noncustodial situaton such as the present one is not converted to one in which Miranda applies simply because a reviewing court concludes that, even in the absence of any formal arrest or restraint or freedom of movement, the questioning took place in a coercive environment. Oregon v. Mathiason, 429 U.S. 492, 97 S.Ct. 711, 50. L.Ed.2d 714 (1977). Any interview of one suspected of a crime by a police officer will have coercive aspects to it simply by virtue of the fact that the police officer is part of a law enforcement system which may ultimately cause the suspect to be charged with a crime. But police officers are not required to administer Miranda warnings to everyone whom they question. Nor is the requirement of warnings to be imposed simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect. Id, at U.S. 495.

This case is controlled by this Honorable Court's recent decision of Correll v. State, 13 F.L.W. 34 (Fla. Jan. 14,

1988). In Correll, a police investigator asked Correll to go to the sheriff's office for fingerprinting. Correll agreed and was taken to the station by family members. At the station he was interviewed for approximately half an hour to one hour. Correll was not under arrest and was free to leave at any time. He never objected to any of the questions and did not refuse to talk. When the interview was over, Correll left the station the same way he came. This Court held that Correll was not in custody for purposes of Miranda and the police were not required to advise him of his constitutional rights. Id, at 35.

In the case at bar we have an obvious time difference with regards to the questioning of Appellant. However, it is crucial to note that it was Appellant who requested to take the lie detector test prior to his giving the initial taped statement at 12:32 P.M. (R. 15, 91, 92).

Appellant had come into the station at approximately 10:15 A.M. (R. 13). Thus actual police questioning lasted only about two hours. After concluding the taped statement Appellant was told that he didn't have to take the test and was free to leave if he so wished (R. 15). Appellant stated that he wanted to stay to prove that he wasn't at Century Village on the day of the homicide (Id)

Like Correll, Appellant was not under arrest and was free to leave the station at anytime (up to his confession). Like Correll, Appellant did not refuse to answer the questions asked of him.

Furthermore, United States v. Phillips, 812 F.2d 1355 (11th Cir. 1987) is also applicable and further solidifies the correctness of the trial court's ruling.

Phillips involved a police-citizen encounter quite similar to ours in which the Court of Appeals reiterated United States Supreme Court cases adopting an objective, reasonable person standard as the appropriate test in cases involving custody issues. Id, at 1359-1360. Although Phillips involved a brief conversation (Id, at 1358), it is still applicable to our case.

As in Phillips, a reasonable person in Appellant's position would not have felt a restraint on their freedom of movement that could fairly be characterized as that associated with a formal arrest.

Appellant's claims that he was called a "suspect" by Det. Null and was a focus of the investigation are groundless. The police were merely investigating leads given to them (R.13) and Det. Null stated that he used that word only for lack of a better word because he was neither a witness nor a victim (R. 119). Appellant's claim that the Miranda rights given were not adequately and completely given because Appellant was not told

that he could terminate questioning at any time is equally groundless.

Appellant was clearly told that he had the right to remain silent, that he did not have to talk to anybody or answer any questions if he did not want to (R. 56). Appellant was told he was entitled to free counsel at this time or at any time during questioning (R. 57). Just because he was not told that he could terminate questioning at any time is clearly no reason to hold that the Miranda rights given were improper, especially in light of the fact that he was explicitly told that he had the right to remain silent and didn't have to answer any questions. Appellant's argument would create a constitutional straightjacket contrary to Michigan v. Tucker, 417 U.S. 433, 94 S.Ct. 2357, 41 L.Ed.2d 182 (1974) and Alvord v. State, 322 So.2d 533 (Fla. 1975).

The principal cases cited by Appellant are also inapplicable to the case at bar. Mosely v. State, 503 So.2d 1356 (Fla. 1st DCA 1987) dealt with a situation where law enforcement had focused on the defendant as his prime and only suspect. Id, at 1358. At bar, prior to Appellant's coming to the police station, there had been no attempts at watching or performing surveillance on him (R. 12). Furthermore, Det. Murray testified that witness Caputo could not be eliminated as a suspect at the time because

of Caputo's confusing statements to the police (R. 30). Thus Appellant was not the "focus" of the investigation that Mosely was.

Shriner v. State, 386 So.2d 525 (Fla. 1980) dealt with a situation where the defendant wanted to terminate the questioning but was nevetheless still questioned. No such situation is presented in this case. At no point prior to the confession did Appellant express a willingness to close questioning. The record is clear that he was free to go yet he remained and answered the questions.

Appellant's constitutional rights enunciated in Miranda v. Arizona were clearly honored in this instance.

As for the voluntariness of this confession, the state has the burden to show by a preponderance of the evidence that the confession was voluntary. Roman v. State, 475 So.2d 1228 (Fla. 1985), cert. denied, ____U.S.____, 106 S.Ct. 1480 (1985). The trial court's ruling must be reviewed by viewing the totality of the circumstances. Id, at 1232. A reviewing court should defer to the fact-finding authority of the trial court and should not substitute its judgment for that of the trial court. De Coningh v. State, 433 So.2d 501 (Fla. 1983). cert. denied, 465 U.S. 1005 (1983). There is no question that this confession was voluntary.

The present case is controlled by this Court's recent ruling in Patterson v. State, 513 So.2d 1257 (Fla. 1987).

Patterson was interviwed by the police on three separate occasions within a one day period. Discrepancies between the first two interviews necessitated a third interview. During the third interview, Pattersons' story changed substantially.

Confronted with these discrepancies, Patterson confessed to the murder at issue. After Patterson's oral admission of guilt the law enforcement officer gave Patterson his rights pursuant to Miranda and Patterson gave a taped account of the murder. The confession was held to be voluntary and admissible. Id, at 1260.

The case at bar is analogous to Patterson in that when confronted with discrepancies during the polygraph examination Appellant also confessed to the murder at issue.

As for Appellant's claim of pocessing a deficient mental condition at the time of the questioning due to a variety of mental and physical problems Appellee responds that as in Patterson, there were no threats of violence or direct or implied promises. As in Roman v. State, supra, Appellant was read Miranda warnings and he indicated verbally (and by initialing the form) that he understood them.

Also as in Roman, Appellant appeared understanding and did not appear to be on medication or intoxicated (R. 121). As lunch time came around Appellant was also asked if he wanted to eat anything. Appellant stated that he was not hungry (R. 16,36).

The only apprehension suffered by Appellant was due to the situation in which he found himself in and not due to extraneous pressure. This does not justify a finding that the statements were involuntary. Patterson,supra, approving State v. Williams, 386 So.2d 27 (Fla. 2d DCA 1980).

The cases relied on by Appellant are distinguishable and inapplicable. DeConingh v. State, 433 So.2d 501 (Fla. 1983) dealt with the questioning of a hospital patient under the influence of powerful tranquilizers and in a distraught situation. Id, at 503. Breedlove v. State, 364 So.2d 495 (Fla. 4th DCA 1978), dealt with the issue of a waiver of Miranda rights and is inapplicable to a voluntariness analysis. However, should this Court consider Breedlove then Appellee submits that the case dealt with an accused who was hysterical, crying, and had to be calmed down. Id, at 497. At bar, we deal with an accused who was calm and in control of himself. The crying and sobbing referred to by Appellant (Appellant's brief p. 19) was during the actual confession and not prior to confessing (R. 852) This occurred after Appellant had voluntarily decided to confess to his deeds.

At bar, the trial court complied with the United States and Florida Constitutional standards pertaining to admissions of confessions by an accused. The ruling admitting the statements and the resulting physical evidence obtained therefrom must be affirmed.

ARGUMENT

POINT II

APPELLANT RECEIVED A FAIR TRIAL IN ALL RESPECTS AND ANY CLAIM OF PROSECUTORIAL MISCONDUCT IS UTTERLY GROUNDLESS (Restated).

When evaluating any claim of prosecutorial misconduct, the relevant question is whether the prosecutor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process. Darden v. Wainwright, 477 U.S. ___, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986). Based on this standard and the record in this case, it is convincingly clear that appellant received a just and fair trial. The myriad of argument advanced by appellant must be summarily rejected.

Appellant argues that the "relentless character attack" conducted by the prosecutor, for which there were no objections, warrants reversal in this case.

On cross examination of state witness, Betty Boronson Appellant's trial counsel asked her the following questions:

> Q: In fact, wouldn't it be fair to say that when Art drank that he became almost a different person?
>
> A: Yes.
>
> Q: How was that?
>
> A: He became violent.
>
> Q: And when he was not drinking?

A: He was okay.

Q: He was a different person?

A: Exactly.

(R. 871-872).

On redirect examination the prosecuting attorney asked the following questions:

Q: (By Mr. Hancock) You said when he drank he became a different person?

A: Yes.

Q: How did he become different?

A: Violent.

Q: You have to speak up.

A: Violent.

Q: Mr. Baron asked you about certain incidents, and you mentioned a couple of times when he became violent. What would he do?

A: A couple of times he beat me up. one time he put a knife to my throat.

Q: What did he say when he was doing that?

A: "Let's see if Betty bleeds."

Q: Did you have to go to the hospital because of that?

A: The emergency room, yes.

Q: Did you have any broken bones?

A: Ribs.

Q: Besides this knife incident, any other incidents where he put an object to --

A: A gun to my head.

Q: What did he do on that occasion, Betty?

A: He said, "Let's scare Betty to death."

Q: Now, did there come a time he grabbed you in any way?

A: Yes.

Q: Where would he grab you?

A: Around the neck and he came after me with a telephone cord.

Q: What happened when he grabbed you around the neck and came at you with this telephone cord?

A: He tried to hurt me severly.

Q: Now, was there a difference in Mr. Schafer when he was on cocaine or when he was on alcohol?

A: Yes.

Q: Please tell the ladies and gentlemen what the different was when he was on cocaine or was doing alcohol.

(R. 885-886).

No objection was made at this time. Since there was no objection interposed at this time, consideration of this point on appeal is precluded. Davis v. State, 461 So.2d 67 (Fla. 1984). Any attempt to argue that these questions constituted fundamental errors is pointless.

It is well settled that a party may re-examine a witness about any matter brought up on cross examination. Johnston v. State, 497 So.2d 863 (Fla. 1986). Likewise, the trial court has broad discretion in determining the proper scope of the examination of witnesses. Id, at 869.

The present situation fits squarely into this legal principle. It was Appellant who during cross examination brought up the matter of Appellant becoming a violent person when he drank (R. 871-872). On redirect examination the State re-examined the witness about a matter brought up on cross examination i.e. how did appellant change when he drank (R. 885).

This is so palpably clear that Appellant himself did not object and the trial court was never even called upon to exercise its broad discretion in determining whether this question was within the scope of cross-examination.Indeed, the lack of objections by appellant show that this was part of Appellant's strategy. This strategy did not work and now Appellant seeks a second bite at the apple by arguing that error occurred.It is thus clear that the redirect examination of Betty Boronson was completely within the scope of the questions asked on cross examination and no error would exist even if an objection had been made.

In addition, Appellant clearly "opened the door" for this testimony and the state was entitled on redirect examination to have Ms. Boronson explain to the jury in what way did Appellant

become violent when he drank. Dragovich v. State, 492 So.2d 350 (Fla. 1986).

During the State's cross examination of Dr. Enrique Del Campo, a defense witness, the following occurred:

> Q: Correct. Now there were other occasions in here [Appellant's records] where he indicated he was very violent, is that correct?
>
> A: There was indications here in the record (emphasis added) he had been having feelings of violence
>
> Q: Well, in 1982 he physically hurt his girlfriend, is that correct?
>
> A: Let me read it.
>
> Q: Sure. Go ahead.
>
> A: He said he hit her...

(R. 960-961).

* * * * * * *

> Q: Now here I see an indication from 2/25/82 -- let me ask you from here -- you found his problem was he had a temper and he became angry; is that correct?
>
> A: Anger and temper.
>
> Q: In fact he was throwing things it indicates?
>
> A: Yes.
>
> Q: Down her it indicates (indicating) that he almost killed his ex-wife?
>
> A: I'm sorry? I can't answer that. The reason why is Dr. May was there.
>
> Q: In here (indicating) you indicated

he was quick-tempered? Is that your writing?

A: Correct.

(R. 962-963).

It is important to note that during Appellant's direct examination of Dr. Del Campo it was elicted that Appellant told Dr. Del Campo that he (Appellant) was "about to explode "(R. 927). Dr. Del Campo also stated that he diagnosed Appellant as being having difficulty controlling his temper and as irritable (R. 932). Appellant was also concerned with his having dreams in which he killed somebody (R. 932).

Once again, no objection was made at this time. Since there was no objection interposed at this time, consideration of this point on appeal is precluded. Davis v. State, supra. Any attempt to argue that fundamental error occurred is also pointless.

It is well settled that when direct examination opens a general subject (i.e. Appellant's feelings of violence), the cross examination may go into any phase, and may not be restricted to mere parts which constitute a unity, or to the specific facts developed by the direct examination. Roberts v. State, 510 So.2d 885 (Fla. 1987) (citing Coco v. State, 62 So.2d 892 (Fla. 1953))

Cross examination is not confined to the identical details testified to in chief, but extends to its entire subject matter, and to all matters that may modify, supplement,

contradict, rebut, or make clearer the facts testified to in chief by the witness on cross examination. Id., at 893.

At bar, the State's questioning pertained to matters which met the above mentioned requirements of permissible cross examination and was so proper and fair that Appellant himself did not object to it. The scope and limitation of cross examination lies within the sound discretion of the trial court. Tompkins v. State, 502 So.2d 415 (Fla.1986). The cross examination in this case was so appropriate that the trial court's discretion was not even needed.

Appellant also claims errors in that during the cross examination of Dr. Del Campo, the State elicited from Dr. Del Campo the fact that the records of Appellant on which he was basing his testimony had not been studied by him prior to that day in court (R. 943). The doctor was not able to find Appellant's records when he looked for them and it was possible that they could have been stolen (R. 947). The evidence did indeed show that Appellant had walked of of the V.A. Hospital with his records without anyone's permission (R 1017-1018).

Appellant objected on the grounds that the witness was being asked to speculate (R 947). This objection was sustained.

Appellee would first submit that this issue has not been preserved for appellate review. Appellant objected on the grounds of speculation and he now seeks to bootstrap this

objection into something more serious such as commenting on facts not in evidence or a similar type of objection.

The objection was never made on the grounds that are now claimed. If the proper objection is not interposed at the time the evidence is presented, the appellant will be deemed to have waived that objection. Roban v. State, 384 So.2d 683 (Fla. 4th DCA 1980), pet. for review denied, 392 So.2d 1378 (Fla. 1980) (defendants who relied on different ground for objection at trial to introduction of evidence than on motion to suppress waived previous grounds relied upon). Thus, Appellant not having made the specific objection at trial is barred from raising new and different grounds on appeal.

Even if this issue had been preserved, it is clear that a large part of the doctor's direct testimony was based on these records (R. 930). Therefore, the Source of this information is a proper subject for inquiry on cross examination under Roberts v. State, supra.

During direct examination of appellant the following transpired:

> Q: Tell the jury the reason you initially went there [the Veteran's Administration Hospital].
>
> A: I went there because I had gotten married and was having problems with ny drinking and drugs, taking things out on my fiancee, on my first wife due to alcohol. Sometimes it was uncontrollable...

(R 981).

* * * * * * *

Q: She [Betty Boronson] indicated at some time you actually had pushed her?

A: Yes. She was constantly nagging me about my alcohol problem. I would argue with her about her drug problem. Then it would turn into a feud and I would just literally tear up my apartment, break everything and smash everything. Then she was always trying to call the cops and one time I took the telephone, busted it into a million pieces. In another incident she went into the kitchen and grabbed a butcher knife and came at me and I said, "If you're goint to do it just go ahead and stab me. Go ahead and kill me right now." She couldn't do it.

So I took the knife from her and that's when I put it to her throat and said, "Now let's scare you to death. Are you going to pull a knife on me or am I going to scare you to death?"

(R 989-990).

On cross examination of appellant, the prosecutor asked the following:

Q: You indicated your wife or Betty, you almost killed her?

A: That's right.

Q: How did you almost kill her?

A: I was drunk.

Q: What did you do to her?

A: Beat her up.

Q: As a result of that she had to to to the hospital.

A: That's correct. I took her to the hospital?

Q: So there's no question that you have the ability to become very violent, is that correct?

A: That's correct.

Q: In fact, many instances in your past indicate you became very violent; is that correct?

A: That's correct.

Q: In fact there was one time you took a shotgun and held it to Betty's head; did you not?

A: I don't remember that incident.

Q: But you remember the incident when you took a knife and put it to her throat like she said?

A: I said, "Let's see if Betty bleeds."

Q: So you're saying the exact same words she used; is that correct?

A: No. I read it through a deposition.

Q: You remember the incident, right?

A: I remember the incident.

Q: So you were not so far out of it on cocaine or alcohol, or whatever you were doing, that you remember this happening; is that a fair statement?

A: Actually I didn't remember what I had done until I read it in the deposition.

Q: Then you cannot tell us anything about holding a knife to Betty's throat or taking a butcher knife away from Betty"

A: She was the one who took the knife and pulled it on me.

Q: So you do remember that?

A: Yes, I remember it.

Q: So you do remember the incident when you just said you don't?

A: More or less, yeah, I remember it.

Q: In fact you said you lost your temper and proceeded to break everything up; is that correct?

A: That's correct.

(R. 1019-1020).

Once again, no objection was made to any of this questioning so Appellant's claim that this questioning by the state constituted error has not been preserved for appellate review.

The facts being challenged now were voluntarily elicited from Appellant himself by the defense counsel on direct examinatin when Appellant took the stand in his defense. It is obvious that this was a tactical move of the defense to show Appellant's incapacity to form the necessary intent to kill due to his alcohol and drug dependency. As the facts challenged on appeal were not objected to below, as defense counsel wanted these facts to be heard by the jury as they supported his

defense. Appellant cannot now reverse tactics and claim prejudice by something created by his own defense.

Even if this issue had been preserved for review it is clear that no error occurred. Appellant's direct examination opened the subject of Appellant's violent tendencies towards his first wife and about the time that Appellant put the knife to Betty Boronson's throat. Cross examination is not confined to the indentical details testified to in chief, but extends to its entire subject matter. Roberts v. State, supra. Inpresenting his version of there incidents Appellant opened the door to the remainder. Rogers v. State, 511 So.2d 526 (Fla. 1987).

The above logic also applies to Appellant's claim that error was committed when the prosecuting attorney "implied" that Appellant had done other burglaries in the area. On direct examination the following question was placed to Appellant:

> Q: What made you go there?
>
> A: I was going to probably do a robbery, people are known there for leaving their doors open, letting their doors opened and I figured no one would be home. I would just go in someone's apartment and get something. If I knocked on the door and nobody was home, I would try and go in.
>
> Q: Were there places that nobody was home?
>
> A: No. I had no intention, you know, that was the only easy way. I had known people left their doors open and there was known robberies in there, usually at the pool when people left the doors open.

(R 997).

On cross examination the following was asked:

> Q: You testified earlier you knew people in Century Village kept their doors open; right?
>
> A: Yes.
>
> Q: How did you know that?
>
> A: I read the newspapers. One time they caught one guy in Deerfield's Century Village lady's apartment, she lived in there and there was all kinds of burglaries going on in the residences out there.
>
> Q: Did the newspaper say thay kept their doors open?
>
> A: That's right.
>
> Q: So you assumed the residences were being burglarized continuously and people continued to keep their doors open? It that your testimony?
>
> A: Of course.

(R. 1043-1044).

No objection was made at this time. A subsequent objection was only as to the form of the question. This issue has not been preserved for appeal. Even if it had been, no error occurred.

The extent ofthis cross examination was clearly proper. Roberts, supra. In addition, by presenting his knowledge as to the doors being left open, Appellant opened the door to having to explain how he knew this information. Rogers, supra,

The state was not obligated to stipulate to the cause of death. Obviously, Appellant was not prepared to stipulate to premeditation, so the state was not relieved of its burden of proof as to that effect. Zamora v. State, 361 So.2d 776 (Fla. 3d DCA 1978) cert. denied, 372 So.2d 472 (Fla. 1979). A defendant cannot, by stipulating as to the identity of a victim and the cause of death, relieve the state of its burden of proof of beyond a reasonable doubt. Foster v. State, 369 So.2d 928 (Fla. 1979).

As far as the photographs go, the test of admissibility of photographs is relevancy and not necessity. Bush v. State, 461 So.2d 936 (Fla. 1984), cert. denied, 106 S.Ct. 1237 (1985). First of all, as in Jennings v. State, 512 So.2d 169 (Fla. 1987), the present photographs were not so shocking in nature as to defeat the value of their relevancy.

Those whose work products are murdered human beings should expect to be confronted by photographs of their accomplishments. These photographs were relevant to show the manner in which the victim was partially undressed, bound, and gagged. Henderson v. State, 463 So.2d 196 (Fla. 1985).

In Bush, the photographs assisted the medical examiner in explaining to the jury the nature and manner in which the injuries were inflicted. See also, Adams v. State, 412 So.2d 850 (Fla. 1982). Indeed, the photogrpahs admitted in Bush were much more offensive than the present photographs.

Appellant's heavy reliance on Young v. State, 234 So.2d 341 (Fla 1970) is misplaced. The pictures in Young consisted of the victim's putrified body after having been in a lake for three days. It is ludicruous to suggest that the pictures in our case are anything like that.

In Young, although ruling that admitting these pictures was error, this Court also stated that the same information could have been presented to the jury by use of the less offensive photographs whenever possible, and by careful selection and use of a limited number of the more gruesome ones relevant to issues before the jury. Id, at 348.

This "careful selection" did occur in our case. The prosecuting attorney worked along with the defense attorney in the course of having to deal with the photographs (R. 549, 560, *569, *570, 571, *617, *618) and went out of his way to admit only the most relevant ones. All the pictures were relevant to show identity and the circumstances surrounding the victim's death. See, e.g., Brumley v. State, 453 So.2d 381, 386 (Fla. 1984); Wilson v. State, 436 So.2d 908, 910 (Fla. 1983), as well as the premeditated and cold blooded intent of Appellant. See

e.g. Adams v. State, 412 So.2d 850, 853-854 (Fla. 1982), Booker v. State, 397 So.2d 910, 914 (Fla. 1981). No reversible error has been shown by the admission of the photographs. Henderson, supra, at 200.

Appellant's sheer speculation that the victim's daughter was brought in not to identify her mother's stolen jewely but rather to emotionally charge the jury is groundless. This testimony was simply relevant since this evidence was enunciated in Count II of the indictment i.e.robbery (R. 1230). Additional considerations further buttress this testimony.

In Justus v. State, 438 So.2d 358 (Fla. 1983), the victim's grandmother was called to testify as to relevant information not available from any other witness which was not identification of the deceased prohibited by Lewis v. State, 377 So.2d 640 (Fla. 1979) (where a nonrelated witness is available to provide such identification).

At bar, the victim's daughter had relevant information not available from any other witness. Ms. Knobel had given her mother most of the jewelry which had been taken in the course of this homicide (R. 898-901) thus she was uniquely qualified to identify this jewelry.

Furthermore, in Justus, supra, the family witness broke down and wept. Id, at 366. This Court deferred to the trial court's judgment in not granting a mistrial since the trial judge

was present and because Appellant did not show from the record that the trial court's determination was clearly erroneous. Id.

Likewise in our case, the trial court found that although the witness was in a panic, her testimony was not that prejudicial and hence denied the motion for mistrial (R. 897, 905). As in Justus, Appellant has not shown from the record that the trial court's determination was clearly erroneous. Therefore, the trial court's denial of the motion for mistrial must be affirmed.

If the state attorney did act improperly, which Appellee certainly does not concede, this claimed error would have to be treated as harmless at best. The testimony of the witness was necessary and the trial court's ruling was proper. Justus, supra. Scott v. State, 256 So.2d 19 (Fla. 4th DCA 1971).

Appellant's complaint with the phrasing of the questions by the prosecuting attorney during the cross examination of Appellant is baseless. The victim was an 86 year old lady and the law is well settled that wide latitude should be permitted in cross examining a witness. Louette v. State, 12 So.2d 168 (Fla. 1943). See also Stano v. State, 473 So.2d 1282 (Fla. 1985), cert. denied, 106 S.Ct. 869 (1986).

As for the prosecuting attorney's closing arguments, no objections were made with respect to the comments Appellant now complains about so this point has not been properly preserved for appeal. Burr v. State, 466 So.2d 1051 (Fla. 1985).

Even if this point had been properly preserved it is clear that wide latitude is permitted in arguing to a jury. Davis v. State, 461 So.2d 67 (Fla. 1984). The comments were fair comments upon the evidence. Burr, supra. It should be noted that it was argued that it was the victim's neighbors and not the victim herself (as Appellant argues) who moved into Century Village for peace and security (R. 1068).

Finally, during closing argument, the prosecuting attorney stated that Appellant's story was a big lie (R. 1104). In Craig v. State, 510 So.2d 857 (Fla.1987) the prosecutor made repeated references to the defendant's testimony as being untruthful and to the defendant himself as a "liar."

In ruling that this argument was proper, this Court stated that when counsel refers to a defendant as being a liar and it is understood from the context that the charge is made with reference to testimony given by the person thus characterized, the prosecutor is merely submitting to the jury a conclusion that he is arguing can be drawn from the evidence. Id, at 865.

This Craig principle is applicable here to make it clear that there was no impropriety in the prosecutor's argument.

Appellee would further submit that if error occurred at any time, which Appellee does in no way concede, it would have to be characterized as being harmless. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). The overwhelming evidence of guilt, including

Appellant's own confessions to this crime, makes it clear beyond a reasonable doubt that any error which conceivably could have occurred did not affect the verdict.

The primary cases relied upon by Appellant are inapplicable to our case. The cases cited in support of the alleged Williams rule violation all deal with instances where it was the state which introduced this evidence as part of its case in chief as was done in Williams v. State, 110 So.2d 654 (Fla. 1959) cert. denied, 361 U.S. 847, 80 S.Ct. 102, 4 L.Ed.2d 86 (1959).

Furthermore, the cases dealing with prosecutorial misconduct consisted of arguments far more grievous than the one in our case which were properly preserved for appellate review. The judgment and sentence are proper and must be affirmed.

POINT III

APPELLANT'S RIGHT TO A FAIR TRIAL WAS SCRUPUOUSLY HONORED IN THIS CASE (Restated)

Appellant's initial argument regarding the photographs which were admitted into evidence has already been discussed in Point II, supra. Appellee will incorporate by reference that prior discussion into the present discussion.

During the course of the trial, Appellant voiced concern about certain individuals crying in the audience (R. 544). Appellant thought that they might prejudice the jury. The prosecuting attorney agreed and stated that he would step out into the hall and talk to those people.

Later in the trial the daughter of the victim was called to testify. Appellant objected to the emotional nature of her testimony and moved for a mistrial (R. 904). The trial court stated that the jury understood her emotional condition and her testimony wasn't that prejudicial, i.e. the motion for mistrial ws denied (R. 905).

It is well settled that it is within the discretion of the trial judge to conclude that outbursts are not predudicial to the point of ordering a mistrial Chaney v. State, 267 So.2d 65 (Fla. 1972).

This situation is certainly not like the situation in Rodriguez v. State, 433 So.2d 1273 (Fla. 3d DCA 1983) Where the witness shouted epithets and interspersed her testimony with impassioned statements evidencing her hostility towards the

defendant. This conduct in Rodriguez did deprive the defendant of a fair trial. Id, at 1276.

The trial court's ruling was well within it's discretion in that this testimony was nothing like the prejudicial conduct evidenced in Rodriguez.

Florida law is quite clear that a motion for a declaration of a mistrial is addressed to the sound discretion of the trial judge. Salvatore v. State, 366 So.2d 745 (Fla. 1979). The power to declare a mistrial and discharge the jury should be exercised with great care and caution and should be done only in cases of absolute necessity. Id, at 750. There was absolutely no need to declare a mistrial in this case.

In our case, after the jury returned for the sentencing portion of the trial, the court inquired as to whether anyone had seen or read anything about this trial (R. 1146). Three jurors stated that they had come into contact with some news about the trial but they did not pay any attention to it (R. 1146-1150). The Court conducted a full inquiry into this matter(Id.).

One juror stated that there was a newspaper in the jury room but that she saw no one read it (R. 1149). The remainder of the jury stated that they had not seen or read anything (R. 1150). Appellant did not deem it necessary to move for a mistrial answering "No, Your Honor" when asked if there was anything else (R. 1150).

Since Appellant did not move for a mistrial it is clear that this issue cannot be raised for the first time on appeal.

Even if a mistrial had been requested, it is clear that it was not necessary to declare one. In Coleman v. State , 484 So.2d 624 (Fla. 1st DCA 1986), two members of the jury saw a newspaper article which stated that the defendant had previously been convicted of sexual battery. These jurors were extensively questioned by the trial court and its detemination to deny a mistrial and to allow the jurors to remain was proper. Id, at 627. As in Coleman, the present trial court acted properly.

In Perkins v. State, 463 So.2d 481 (Fla. 2d DCA 1985), that Court stated that the trial court's refusing to give the defendant's requested instruction on the defense of authorization was proper because the standard jury instructions were designed to cover all aspects and elements of the statutory offense, and to avoid unnecessary comment on the evidence. Id, at 483.

This Perkins principle is applicable to our case. The instruction given by the trial court adequately covered the elements of a robbery (R. 1122 - 1123). This situation was discussed at the time that Appellant requested this instruction (R. 1056). In addition, trial judges should be able to rely on the standard jury instructions as being a correct statement of the law. Holley v State, 464 So.2d 578 (Fla. 1st DCA 1984) aff'd on other grounds, State v. Holley, 480 So.2d 94 (Fla.1985).

As for the flight instruction, the law is clear that flight is considered to exist when an accused departs from the vicinity of the crime under circumstances such as to indicate a sense of fear, or of guilt, or to avoid arrest, even before the defendant has been suspected of the crime. Williams v. State, 268 So.2d 566 (Fla. 3d DCA 1972). A jury can be instructed on flight when the evidence clearly establishes that an accused fled the vicinity of a crime or did anything indicating an intent to avoid detection or capture. Shively v. State, 474 So.2d 352 (Fla. 5th DCA 1985).

The evidence was clear that after Appellant completed taking the victim's property he pulled the victim's pants down to make it look like a rape and then ran out the back door. He himself testified to this (R. 1004). In addition, Appellant himself admitted that he didn't go to the police until he was first called in by them and at first he even denied his involvement in this crime (R.1023).

Appellant also admitted that before he left the apartment he put white socks (he remembered the color of the socks) on his hands and went through the apartment cleaning fingerprints (R. 1046). Appellant himself admitted that this was done so he would not get caught (Id).

The evidence is clear that Appellant fled from the scene and the trial court's actions in giving the instruction on flight was proper.

Finally, as for Appellant's claim that the trial court erred when it re-read jury instructions at the request of the jury, Appellee has been unable to find any such occurrence in the record.

During the guilt phase of the trial the court instructed the jury as to the applicable law (R. 1115 - 1136). The jury subsequently returned with its verdicts (R. 1137 - 1138). During the sentencing phase, the trial court instructed the jury as to the applicable law (R. 1183 - 1187). The jury subsequently returned with its advisory sentence (R. 1188 - 1189). No incident occurred where the jury was reinstructed as to any instructions given to them thus this is not an issue before us.

Since the individual elements herein discussed were proper when standing alone, their cumulative result is also proper and thus leads to affirmal of the verdict and the sentence

POINT IV

THE DEATH SENTENCE WAS PROPERLY IMPOSED ON APPELLANT.

The first aggravating circumstance found by the trial court was that Appellant was previously convicted of a felony involving the use of threat of violence to the person (R. 1353). The court found this factor to exist based upon Appellant's contemporaneous conviction of robbery perpetrated on the present victim.

The trial court's primary reliance was on Hardwick v. State, 461 So.2d 79 (Fla. 1984) which held that contemporaneous convictions committed against the same victim may be used in satisfaction of the aggravating circumstance of previous conviction of a felony involving violence Id, at 81.

In Patterson v. State, 513 So. 2d 1257 (Fla. 1987) this Court reitereated Wasko v. State, 505 So.2d 1314 (Fla. 1987) wherein this Court held that it was improper to use a contemporaneous conviction of attempted sexual battery upon the same victim as the basis for the aggravating circumstance of prior conviction of another violent felony. Id, at 1317 - 1318. In Paterson, supra, this Court also receded from Hardwick to the extent that it conflicts with Wasko. Id, at 1263.

Therefore, it appears that a contemporaneous conviction perpetrated upon the same victim is no longer a valid basis for finding the aggravating circumstance of prior conviction of another violent felony and the trial court's finding thereon was

in erro. However, this error is harmless because as it will be shown, there are still four valid aggravating circumstances thus still preserving the correctness of the sentence of death. Elledge v. State 346 So.2d 998 (Fla. 1977)

The second aggravating circumstance found by the court was that the capital felony was committed while Appellant was engaged in the commission of a robbery, burglary, and kidnapping (R. 1354). This finding is amply supported by the record.

Appellant admitted that he went to the victim's apartment in order to "get something"(R. 997). Appellant wanted to steal something so he could obtain some cocaine (R. 1003). Appellant entered the victim's apartment while the victim was talking with one of her neighbors (R. 1000, 1003).

Appellant testified that the victim came in and surprised him (R. 1003). He put a choke hold on her, dragged her into the bedroom, tied her hands and feet and gagged her Id. Appellant subsequently went through the apartment stealing the victim's possessions (R. 1004).

In Routly v. State, 440 So.2d 1257 (Fla. 1983), the defendant feigned a departure out the back door but converged on the victim with a gun. Defendant had the victim lie on the bed, tied the victim's hands and feet and gagged him. The defendant subsequently ransacked the home looking for valuables. Finally, the victim was taken to a field and killed. Id, at 1260.

This Court held that a burglary, a robbery, and a kidnaping were committed by the defendant.

In Scott v. State, 411 So.2d 866 (Fla. 1982), the victim's hands and feet were found bound. The victim's death was caused by severe head injuries. There were signs of a struggle. After killing the victim, the defendant rummaged through the house searching and stealing valuables. Id, at 867.

This Court held that the capital felony was committed while the defendant was engaged in or was an accomplice in the commission of, or an attempt to commit robbery and/or burglary. Id, at 869.

In Brown v. State, 473 So.2d 1260 (Fla. 1985), the defendant was found guilty of the murder of an eighty one year old lady. The victim had been bound and sexually battered before being strangled to death. Her home had been ransacked and a television taken Id, at 1263.

This Court held that the evidence adequately showed that the murder was committed in the course of a burglary. Id, at 1267.

As these cases show, the trial court's finding of this second aggravating circumstance is abundantly supported by the record and must be affirmed.

The third aggravating circumstance cited by the trial court was that present capital felony was committed for the purpose of avoiding or preventing a lawful arrest (R. 1354)

The record shows that prior to Appellant's final entry into the victim's apartment he had entered her apartment under the guise of being a telephone repairman (R. 1000). He left without taking anything(Id).

Appellant returned and entered the apartment a second time when he saw that the victim was talking to one of her neighbors (Id). After the victim returned he dragged her into the bedroom, tied her and gagged her (R. 1003). Appellant ran around the apartment taking things and prior to leaving he pulled the victim's pants down to make it look like a rape (R. 1004). In addition, prior to fleeing, Appellant put white socks on his hands (he remembered the color) and went through the apartment cleaning any fingerprints he may have left behind (R. 1046)

Appellant agreed that he did not want to be caught so that was the reason that he wiped the apartment with the socks (Id). It is important to note that Appellant agreed that he could have gone out the back door if he had wanted to when the victim returned to her apartment (R. 1032).

By killing the victim, Appellant eliminated the only witness who could testify against him as to the burglary, robbery kidnapping, and theft that he had just perpetrated. In analyzing this aggravating circumstance there must be clear proof beyond a reasonable doubt that the killing's dominant or only motive was the elimination of a witness. Menendez v. State, 368 So.2d 1278 (Fla. 1979).

In Routly v. State, 440 So. 2d 1257 (Fla. 1983) the victim was bound and gagged while his home was ransacked. He was then taken to a field and shot. Id, at 1260.

This Court held that these facts complied with the requirements for compliance with this aggravating circumstance because the defendant knew that the victim knew him and could later provide the police with his identity. Furthermore, the defendant had no logical reason for binding the victim, kidnapping him and driving him to a secluded area except for the purpose of murdering him to prevent detection. Id, at 1264.

This Routly principle is well applicable to our case. Once the victim saw Appellant in her apartment he knew she could identify him because the victim had previously admitted him in. After tying and gagging her he could have taken what he wanted and just left. Instead of doing that, he beat and strangled the already helpless victim who would with no doubt be able to identify him.

As in Routly, Appellant knew that the victim knew him and could provide the police with his identity. Furthermore, Appellant had no logical reason for binding the victim and strangling her except for the purpose of murdering her to prevent his detection. It was shown during the course of the trial that Appellant had the ability to become very violent (R. 1019). This violence was parlayed into the killing of the only person who witnessed Appellant's acts.

In Adams v. State, 412 So.2d 850 (Fla. 1982), the defendant knew the young victim and offered her a ride home. Id, at 854. The defendant drove away with the child. The victim died by strangulation or manual suffocation and her bound body was found in a garbage bag. Id, at 851, 856.

This Court stated that the victim knew and could have identified the defendant; that the defendant placed the body in a white garbage bag and tied it with a rope; that the defendant disposed of the body in a desolate area and effectively concealed the crime.Id, at 856.

These acts were held to constitute sufficient competent evidence that the defendant committed the murder in an effort to avoid or prevent a lawful arrest. Id. This Adams principle is also applicable to our case.

As in Adams, the present victim already knew and could identify Appellant; Appelant also effectivly concealed the crime by wiping off fingerprints from the apartment with the white socks which he found. Appellant also attempted to conceal the crime by pulling down the victim's pants and making it look like a rape.

The facts and the foregoing cases make it clear that there was sufficient competent evidence from which the trial court could find that Appellant committed this capital felony in an effort to avoid or prevent a lawful arrest. It is abundantly evident that there is clear proof beyond a reasonable doubt that

the killing's dominant or only motive was the elimination of a witness. Menendez, supra. The primary cases relied upon by Appellant involve substantial factual distinctions in which this aggravating circumstance was inapplicable. In our case, this aggravating circumstance was properly established and must be upheld.

The trial court also found that the aggravating circumstance of the capital felony being committed for pecuniary gain also applied to this case. (R. 1355). However, this aggravating circumstance was considered in conjunction with the second aggravating circumstance i.e. the capital felony was committed while Appellant was engaged in the commission of robbery, burglary, and kidnapping.

The fourth aggravating circumstance found by the trial court was that the capital felony was especially heinous, atrocious, or cruel (R. 1355).

The victim, Mrs. Yetta Katzman, was an 86 year old lady who lived by herself (R. 892). She was found in her bedroom lying just inside the doorway face down (R. 611). Her hands had been tied behind her back with a red bandana, her feet had been tied with a pink scarf, and another scarf had been used as a gag (Id)

The victim had sustained bruising on her forehead, right eye, nose, and around her mouth from the tight applicaton of the gag (R. 616). The base of the neck on the right side was the focal area of the bruising in addition to the fresh bruises found

around the collar bone (Id). She had also sustained bruising on an arm and on her thighs (R. 616 - 617) in addition to bruising inside the eyes themselves as a result of the application of blunt force (R.612 - 613).

The multiple bruising had been sustained while the victim was alive (R. 622). The victim was also alive at the time of being gagged (R. 627). The thyroid cartilage surrounding the voice box had been snapped and had bled heavily as a result of the application of blunt force. (R. 623 - 624). The cause of death was determined to be asphyxiation due to manual strangulation (R. 626). After the victim's breath was cut off, death would have occurred in about two minutes (R. 627). A substantial amount of force would have been required to cause the inflicted injuries. When the victim had been initially tied, she was wiggling and moaning (R. 1003).

This finding that the murder was especially heinous, atrocious, or curel was proper. The victim was murdered by means of strangulation, a method of killing to which this Court has held the factor of heinousness applicable. Alvord v. State, 322 So.2d 533 (Fla. 1975), cert. denied, 428 U.S. 923, 96 S.Ct. 3234, 49 L.Ed.2d 1226 (1976). It is permissible to infer that when perpetrated upon a conscious victim, as was done in our case, strangulation involves foreknowledge of death, extreme anxiety, and pain. Johnson v. State, 465 So.2d 499 (Fla. 1985).

In Brown v. State, 473 So. 2d 1260 (Fla. 1985), the eighty one year old female victim had been bound, gagged,and sexually battered before dying of asphyxiation. Id, at 1263, 1268. It was held that the aggravating factor of the murder being especially heinous, atrocious, or cruel was properly found. Id, at 1271. See also Quince v. State, 414 So.2d 185 (Fla. 1982)(severe beating, wounding, raping, and manual strangulation of an eighty-two year old frail woman easily qualified as heinous. Id, at 187).

In Muehleman v. State, 503 So.2d 310 (Fla. 1987), the elderly victim was strangled and suffocated to death while he pleaded for mercy. Id, at 311, 312. The present aggravating factor was properly found to exist. Id, at 317.

In Hooper v. State, 476 So. 2d 1253 (Fla. 1985), one of the victims was a nine year old child who had died from strangulation as a result of a ligature being applied to her neck. Id, at 1260. This aggravating factor was found and not even challenged. Id, at 1261.

Finally, in Adams v. State, 412 So.2d 850 (Fla. 1982), the eight year old victim was murdered through strangulation or manual suffocation. Her hands were taped behind her back prior to death (as in our case). Id, at 851, 856. The victim was screaming prior to her death. Id, at 857. This Court held that

a frightened eight year old girl being strangled by an adult man should certainly be described as heinous, atrocious, and cruel. Id.

In Adams, the victim was screaming prior to her death. In our case, the victim was moaning (she could not scream since she was gagged) and resisting her assailant as was evidenced by the terrible beating which was inflicted on her. In Adams, a frightened eight year old child being strangled by an adult man was certainly held to be heinous, atrocious, and cruel.

The same logic applies to our case. Here we had a frightened eighty six year old lady who was helplessly lying bound and gagged. She was no different as if she was a child. She was at the total mercy of an adult male who not only had been a high school wrestler (R. 973) but had also been a security policeman in the military and was well trained in combat security (R. 975).

The fear and emotional strain preceeding a victim's almost instantaneaous death may be considered as contributing to the heinous nature of the capital felony. Knight v. State, 338 So.2d 201 (Fla. 1976). The victim in our case was tied, gagged, and beaten while she was still alive.

After Appellant commenced the strangulation of the victim she had about two minutes of suffering to endure before she finally died. The heinousness and atrociousness of this crime can not be overemphasized. The foregoing case law and discussion

makes it evident that this aggravating circumstance was properly found.

Appellant argues that although the finding of heinous and atrocious has been upheld in strangulaton deaths, each case must be examined upon the individual facts present (Appellant's Brief, p. 40). Appellant then cites a multitude of cases in which the form of the killings was not through strangulation but rather by shooting or stabbing of the victim.

This argument is nothing more than a smokescreen created by Appellant in order to cloud what is painfully clear. As shown in Appellee's argument, the law with respect to death by strangulaton is clear, it was properly applied in this case, and this aggravating circumstance must be affirmed.

The fifth aggravating circumstance found by the trial court was that the capital felony was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification (R. 1355).

Appellant testified that he had entered the victim's apartment to steal a few things for cocaine (R. 1003). The victim came back into the apartment (she had been out in the hallway speaking with a neighbor) and surprised him (Id). Appellant put a choke hold on her, dragged her into the bedroom, put her on the bed, tied and gagged her, and commenced to ransack the apartment (R. 1003-1004). The victim was wiggling around the bed and moaning (R. 1003).

The victim died as a result of asphyxiation due to manual strangulation (R. 626). Heavy force was applied tro the victim's neck resulting in the snapping of the thyroid cartilage surrounding the voice box (R. 623). The victim was alive when tied and gagged (R. 627) and heavy bruising was also suffered while she was alive (R. 622).

Prior to leaving the apartment, Appellant pulled down the victim's pants to make it look like a rape (R. 1004) and went through the apartment with white socks (Appellant remembered the color of the socks that he used) cleaning for fingerprints so he would not get caught (R. 1046). Appellant admitted that if he had wanted to, he could have gone out the back door when the victim first returned to her apartment (R. 1032)

For the level of premeditation to rise to the level needed to support the aggravating circumstance of cold, calculated, and premeditated, the premeditation must be a heightened premeditation or there must be evidence of reflective calculation. Bates v. State, 465 So.2d 490 (Fla. 1985)

This aggravating factor is reserved primarily (not exclusively) for execution or contract murders or witness elimination murders. Id, at 493. Moreover, this circumstance goes to the state of mind, intent, and motivation of the perpetrator. Hansbrough v. State, 509 So.2d 1081 (Fla. 1987).

In Mills v. State, 462 So.2d 1075 (Fla. 1985), Appellant entered the victim's trailer by requesting to use the

telephone. Appellant was looking for a place to burglarize. Id, at 1077. The victim was placed in Appellant's car and was implictly told that he would be killed upon reaching their destination. Upon stopping, the victim's hands were tied behind his back. Id, at 1078. The victim attempted to flee, was chased down, and killed with a shotgun blast. Id,

This Court held that the evidence established the present aggravating circumstance. Not content to permit he bound (and injured) victim to escape, Appellant stalked him and executed him. Id, at 1081. These actions demonstrate the kind of heightened premeditation necessary to qualfy for this circumstance Id. In the present case, Appellant was not content to just leave the bound and gagged victim lying there. Appellant went up to her, put his hands around her neck, and also executed her. This heightened premeditation is just like the kind found to exist in Mills.

In Cooper v. State, 492 So. 2d 1060 (Fla. 1986), Appellant (among others) broke into a house, forced the victims to lie on the floor with their hands taped behind their backs, ransacked the house, and shot the victims. One of the victims had recognized one of the assailants. Id, at 1060. This Court held that there was sufficient evidence of both heightened premeditation and execution style killing. In addition, this case was a clear example of witness elimination.

The present case also meets the finding enunciated in Cooper. The victim was immobilized pursuant to a robbery. The victim had previously seen the assailant. The victim was killed. The present case is a clear exmaple of witness elimination.

Moreover, as in Cooper, there was sufficient evidence of both heightened premeditation and execution style killing. This is so due to Appellant's forcing the victim into the bedroom (instead of his fleeing), tying and gagging her, beating and strangling her, and finally trying to conceal his actions.

Execution style killings are not limited solely to shootings but should include other forms of killings such as strangulation. See also Henderson v. State, 463 So.2d 96 (Fla. 1985) (victims bound, gagged, and shot. Murders cold, calculated, and premeditated). Hooper v. State, 476 So.2d 1253 (Fla 1985)(victim strangled with ligature. Murder found committed in cold, calculated, and premeditated manner). But see contra, Brown v. State, 473 So.2d 1260 (Fla. 1985)(elderly lady bound, sexually battered, asphyxiated, and her home ransacked. No finding of cold, calculated, and premeditated. Appellee submits that this killing was a product of the robbery and was not thorough and methodical as the killing in the present case).

Finally, the recent case of Jackson v. State, 13 F.L.W. 146 (Fla. Feb. 18, 1988) clearly shows that this aggravating circumstance was properly found. Although the murder method was

different, this Court stated that the fact that Appellant had ample time during the series of events leading up to the murder to reflect on his actions and their consequences was sufficient to establish a heightened level of premeditation. Id, at 150.

Likewise, the present Appellant had ample time to reflect on his actions. He admitted he could have gone out the back door if he had wanted to. Instead he dragged the victim into the bedroom, tied and gagged her, and stangled her. He then wiped the apartment for fingerprints and pulled her pants down to make it look like a rape.

Since death took about two minutes to occur(R. 627), plus the time used during Appellant's actions prior to the strangulations, it is clear that Appellant had ample time to reflect on his actions and their consequences. Jackson. Therefore, heightened premeditation was present and this aggravating circumstance was properly found. Four aggravating reasons were properly found in this case.

The cases cited by Appellant are inapplicable to our case. These cases don't show the reflection and contemplation leading up to the murder that is necessary for this aggravating circumstance to apply.

Furthermore, a comparison of the facts in this case with cases where the death penalty has been upheld on similar facts shows that the present death sentence is consistent with those cases.

The following cases illustrate this proportionality: Brown v. State, 473 So.2d 1260 (Fla. 1985)(eighty one year old woman bound, sexually battered, and asphyxiated. Victim's house ransacked. Death sentence affirmed);Muehleman v. State, 503 So.2d 310 (Fla. 1987)(97 year old victim strangled and suffocated pursuant to a planned robbery and killing. Death sentence affirmed); Peek v. State 395 So.2d 492 (Fla. 1980) (Peek I)(sixty five year old woman beaten, raped, and strangled (Death sentence affirmed) Routly v. State, 440 So.2d 1257 (Fla. 1983)(victim's hands and feet bound in addition to victim being gagged. Victim's home ransacked and victim driven to a field and shot. Death sentence affirmed).

Additional cases showing proportionality are as follows:Adams v. State, 412 So.2d 850 (Fla. 1982)(Eight year old girl strangled to death while her hands taped behind her back. Death sentence affirmed); Witt v. State, 342 So.2d 497 (Fla. 1977)(eleven year old boy bound and gagged, died as a result of strangulation by the gag. Death sentence affirmed). The present case clearly meets the requirement of proportionality.

Appellee's final claim is that the trial court erred in not finding certain mitigating circumstances.

A trial court must allow the presentation of relevant metigating evidence. Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed. 2d 973 (1973), and if introduced, it must consider

such evidence. Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869 71 L.Ed.2d 1 (1982).

Finding or not finding that a mitigating circumstance has been established and determining the weight to be given such circumstance is within the trial court's discretion and will not be disturbed if supported by competent substantial evidence. 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 trail court is not obligated to find mitigating circumstances but rather to consider them. Lockett, supra, at 608.

The mitigating circumstances supposedly existing are that Appellant suffered from cocaine and alcohol use which resulted in diminished mental capacity and that Appellant had a bad childhood (Appellant's Brief at pgs. 46-48). The record clearly reveals that the trial court considered this evidence as mitigating factors and concluded that it failed to rise to a sufficient level to be weighed as mitigating circumstances (R. 1216) This sentence can not be disturbed simply because Appellant disagrees with the conclusions reached. Rose v. State, 472 So.2d 1155 (Fla. 1985)

In Buford v. State, 403 So.2d 943 (Fla. 1981), it was held that the ability of a defendant to give a detailed account of the crime was inconsistent with the contention that he had a diminished or impaired mental capacity because of excessive consumption of alcohol, drugs, and marijuana. Id, at 953.

In the present case, Appellant gave a detailed account of the crime starting with the manner in which he got past the security guard and gained access to the victim's apartment (R. 832-833, 842-845) (elicited from the taped confession) and also from Appellant's detailed testimony at trial.

Nothing suggests that Appellant's use of intoxicants had reached the level of a continuing impairment to any degree or that he actually was impaired at the time of the killing. Appellant's testimony actually shows the opposite to be true. Hardwick v. State, 13 F.L.W. 83 (Fla. Feb. 4, 1988).

As for Appellant's childhood problems, this being a non-statutory mitigating circumstance, the sentencing order and the colloquy prior to the imposition of the sentence show that such non statutory mitigating evidence as duly considered by the trial court (R. 1204, 1216).

It is not this Court's function to engage in a general de novo reweighing of the circumstances. Rather, the Court is to examine the record to ensure that the findings relied upon by the trial court are supported by the evidence. Atkins v. State, 497 So. 2d 1200 (Fla. 1986).

It is clear from the trial court's sentencing order that all the evidence presented and all the mitigating circumstances urged by Appellant were duly considered. There is competent substantial evidence to support the trial court's rejection of these mitigating circumstances.

We are left, therefore, with four valid aggravating circumstances and one invalid aggravating circumstance. If there are no established mitigating circumstances, striking invalid aggravating circumstances does not necessarily mean that resentencing is required. James v. State, 453 So.2d 786 (Fla. 1984).

The trial court found that no mitigating circumstances existed. Finding the evidence insufficient to support one aggravating circumstance when there are four valid aggravating circumstances and no mitigating circumstances does not warrant a reversal of this sentence. Elledge v. State, 346 So.2d 998 (Fla. 1977).

When one or more of the aggravating circumstances is found, death is presumed to be the proper sentence unless overriden by mitigating circumstances. Alford v. State, 307 So.2d 433 (Fla. 1975).

The state cases cited by Appellant are inapplicable to this case. Mines v. State, 390 So.2d 332 (Fla. 1980) dealt with an individual who suffered from paranoid schizophrenia which was severe enough to render him incompetent to stand trial until he could be treated at a mental hospital. Id, at 337. To suggest that the present Appellant's case is analogous to this is truly farfetched.

Appellant's remaining cases deal with jury overrides. This is a unique issue which is not present in our case.

Furthermore any suggestion that Appellant is a Vietnam veteran is unsupported by the record. Indeed, nowhere in Appellant's military records does it indicate that Appellant was ever overseas, much less in Vietnam (R. 1072)

Finally, the trial court did not use the standard for the legal defense of insanity when considering mitigating factors as Appellant suggests (Appellant's Brief, p. 44) The trial court was well informed as to this distinction (R.1202-1203). The trial court was merely reciting its findings that this mitigating circumstance did not apply. The language concerning Appellant's intelligence shows due consideration by the court prior to finding that this mitigating circumstance did not exist.

The death sentence was properly imposed and must be affirmed.