IN THE SUPREME COURT OF FLORIDA

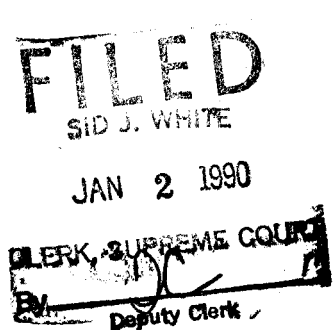
JAMES DAILEY,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.



Case No. 71,164

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

BRIEF OF APPELLEE

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

JOSEPH R. BRYANT
Assistant Attorney General
Florida Bar #: 0561444
1313 Tampa Street, Suite 804
Park Trammell Building
Tampa, Florida 33602

COUNSEL FOR APPELLEE

/sas

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SUMMARY OF THE ARGUMENT

Guilt Phase

As to Issue I, evidence that appellant resisted extradition back to Florida was properly admitted as relevant to flight and consciousness of guilt.

As to Issue II, appellant abandoned his objection where he did not press for a *Richardson* hearing after being offered a special *voir dire* out of the jury's presence. Also, appellant had knowledge of and equal access to the photo complained of, thus no prejudice can be shown.

As to Issue III, the detective's testimony did not violate appellant's sixth amendment rights as an officer is allowed to relate what he did pursuant to information from others, but he may not relate the information itself. **Collins v. State**, *infra.* The other statements complained of were properly admitted as adoptive admissions by a party-opponent.

As to Issue IV, evidence and testimony concerning the discovery of a knife sheath was properly admitted as being relevant to corroborate appellant's story that he stabbed the girl and discarded the knife.

As to Issue V, the prior consistent statements complained of were offered to rebut appellant's dual charges of improper motive and improper influence. Also, the detective did not relate appellant's actual incriminating statements, but only the reasons for the inmates coming forward.

As to Issue VI, appellant's claim that he should have been able to inquiry into the facts underlying Paul Skalnick's prior conviction is without merit. *See* **Jackson v. State**, *infra*.

As to Issue VII, appellant fails to demonstrate any abuse of discretion or prejudice resulting from the trial judge's giving the complete jury instruction on the law of principals which was adopted by this Court as an accurate statement of Florida law.

As to Issue VIII, the comments complained of were either procedurally barred, or were proper rebuttal to appellant's argument during closing.

Penalty Phase

As to Issue IX, the trial court did not abuse its discretion in allowing Detective Halliday to testify as an expert, and the testimony provided a sufficient basis of knowledge from which the jury could conclude that a rape had occurred.

As to Issue X, the trial court properly instructed the jury on the aggravating factor of during the course of a sexual battery where the evidence supported this instruction despite the fact that the state chose to pursue a theory of premeditation.

The evidence supported, and this Court has upheld arrest avoidance as an aggravating factor in cases such as this. The same also applies to cold, calculated and premeditated as an aggravator in this case.

Also, the trial court merely recited appellant's life history during his discussion of mitigation, and the court did not consider the fact that appellant was a drifter as an aggravating factor.

As to Issue XI, the notation on the prior conviction that another charge was dismissed in no way prejudiced appellant.

As to Issue XII, the trial court considered but rejected evidence of substantial impairment where the testimony indicated no such impairment. Also, the mere fact that a trial court does not specifically list every nonstatutory mitigator upon which appellant relies does not mean he did not consider it.

As to Issue XIII, the trial court properly considered the evidence in the codefendant's trial as it was relevant to rebut an eighth amendment claim that appellant's sentence is disproportionate to his codefendant's. Also, the fact that the prosecutor's memorandum alluded to the codefendant's statement implicating appellant is insignificant as the trial court already knew this when he ruled similar evidence inadmissible against appellant. Lastly, any victim impact statement in the presentence investigation was unobjected to, and not preserved for review on appeal.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED IN ALLOWING THE STATE TO INTRODUCE EVIDENCE THAT APPELLANT RESISTED EXTRADITION?

Appellant contends that the trial court erred in allowing the prosecutor to introduce evidence of, and comment on the fact that he fought extradition. The state disagrees.

Although this issue appears to be one of first impression in Florida, other jurisdictions are split on the propriety of admitting this evidence. *See* **22A C.J.S. §746.** The state submits that the better view is where, as here, evidence of flight is relevant to an accused's consciousness of guilt, then it follows that his resistance to extradition is also relevant.

In this case, evidence of appellant's flight was relevant, for the jury could reasonably infer appellant's consciousness of guilt from his flight to Miami under an assumed name the day after the murder and, thereafter, to California. *See* **Bundy v. State**, 471 So.2d 9 (Fla. 1985). Since appellant's flight from Florida was relevant, then his resistance to being returned to Florida after his apprehension in California is also relevant.

As for appellant's contention that admission of this evidence violates due process, the state asserts that the rights afforded protection under **Doyle v. Ohio**, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976), and its progeny, are only those of constitutional dimension, and not those securing a mere

entitlement. *See* **South Dakota v. Neville**, 459 U.S. 553, 565, 103 S.Ct. 916, 74 L.Ed.2d 748 (1983) (distinction between the right to refuse to take a blood-alcohol test versus the right to silence after *Miranda* warnings is of constitutional dimension); *see also* **Brannin v. State**, 496 So.2d 124 (Fla. 1986) (citing **State v. Burwick**, 442 So.2d 944 (Fla. 1983), and holding that testimony about an accused's exercise of constitutional rights, regardless of the nature of the defense raised, is error).

As for appellant's reliance on **Cuyler v. Adams**, 449 U.S. 433, 101 S.Ct. 703, 66 L.Ed.2d 641 (1981), to elevate of the right to fight extradition to constitutional magnitude, the state responds that **Cuyler** merely stands for the proposition that once a state accords certain rights, then the state must give both notice and hearing in order to take away those rights.

Should this Court determine, however, that the trial court erred in receiving this evidence, then the state contends that the error is harmless. *See* **State v. Henson**, 462 P.2d 51 (Kan. 1977). For the record reflects that there were only two comments on appellant's resistance to extradition which, by no means became a feature of the trial. With the plethora of inculpatory evidence adduced against appellant along with the complete lack of prejudicial error, then it cannot be said that the results below would probably have been different.

Appellant's conviction must, therefore, be affirmed.

ISSUE II

WHETHER THE TRIAL COURT ERRED IN FAILING TO CONDUCT A *RICHARDSON* HEARING BEFORE ALLOWING ADMISSION OF A BOOKING PHOTOGRAPH TAKEN OF APPELLANT AT THE TIME OF HIS ARREST?

When Detective Halliday was recalled by the state, the prosecutor attempted to have him identify a book-in photograph taken of appellant after he was extradited from California. The following transpired:

> MR. ANDRINGA: Judge, May Mr. Heyman and I approach the bench?
>
> BENCH CONFERENCE.
>
> MR. HEYMAN: That's going to be evidence in issue.
>
> MR. ANDRINGA: Never been provided before.
>
> MR. HEYMAN: Discovery violation being alleged? Pretty common practice. Mr. Andringa practices criminal law in Pinellas County. He knows there is a booking photograph taken of everyone booked into Pinellas County Jail.
>
> MR. ANDRINGA: I can't remember very many times they have been placed into evidence.
>
> THE COURT: Here's what I am going to do. I will ask the jury to step out. If you desire special voir dire of this witness, you may have it.
>
> MR. ANDRINGA: I don't desire a special voir dire. I don't doubt for a second that was the booking photograph.
>
> THE COURT: Your objection is noted for the record and I am overruling it.

(R 1170-1171).

Appellant contends that the trial court committed *per se* reversible error by failing to conduct a *Richardson* hearing before allowing admission of the photograph into evidence. Appellant's contention is unavailing.

First, it is clear from the record that appellant abandoned any objection or request for a hearing by declining the trial court's offer of a special *voir dire* away from the jury. Since appellant did not press for a *Richardson* hearing as opposed to a special *voir dire*, then it cannot be presumed that the trial court would have denied a hearing if there had been a specific request.

Second, appellant had actual knowledge that a booking photograph was taken, thus, the state did not violate due process by denying discovery especially where appellant had knowledge of and equal access to the photograph complained of. *See* **James v. State**, 453 So.2d 786 (Fla. 1984).

Third, appellant's suggestion that the photograph prejudicially depicted him as a derelict is meritless as the jury had another photograph of appellant which was taken shortly before the homicide (R 1473), which depicted him no differently than the photo complained of. Since appellant fails to demonstrate prejudice resulting from admission of the photograph, then his claim should fail. *See* Justice Grimes' specially concurring opinion in **Brown v. State**, 515 So.2d 211, 213 (Fla. 1987).

Appellant's conviction must be affirmed.

ISSUE III

WHETHER THE TRIAL COURT VIOLATED APPELLANT'S RIGHT TO CONFRONTATION BY ADMITTING TESTIMONY OF OUT-OF-COURT STATEMENTS MADE BY A NON-TESTIFYING CODEFENDANT?

Appellant claims that the trial court violated his right to confrontation by allowing the state to elicit testimony from which the jury could infer that the codefendant, Jack Pearcy, furnished information inculpating appellant.

Appellant predicates his claim herein on three objected to statements made by two state witnesses. The first witness, Detective Halliday, testified that after Pearcy was extradited from Kansas, he collected some shoes and "found a [knife] sheath at the Walsingham Reservoir." (R 915).

The second witness was James Leitner who was a trustee in the law library at the Pinellas County Jail. Leitner knew both Pearcy and appellant and, pursuant to their request, began passing notes between the two. Leitner read and copied the notes, and later informed on Pearcy and Dailey because "[he] didn't particularly enjoy having anything to do with inmates that were discussing a crime like that where someone was killed, especially a 14 year old." (R 1026).

Leitner also testified that Pearcy wanted him to relay a message to Dailey. Specifically, Leitner stated, "Jack wanted me to explain to you what happened in his trial and he wanted me to explain to you what you need to do in his trial." (R 1060-1061).

Appellant, cites Postell v. State, 398 So.2d 851 (Fla. 3d DCA 1981), and its progeny, for the proposition that this testimony left the jury with the "inescapable inference" that Pearcy, who invoked his Fifth Amendment right not to testify, furnished evidence of appellant's guilt, thereby violating his right to confrontation.

In **Postell**, the Third District reversed the defendant's conviction where the state elicited testimony from a police officer that a mystery women was an eyewitness to the crime and that she identified the defendant as one of the perpetrators. The District Court held:

> Where, as in the present case, the inescapable inference from the testimony is that a non-testifying witness has furnished the police with evidence of the defendant's guilt, the testimony is hearsay, and the defendant's right of confrontation is defeated, notwithstanding that the actual statements made by the non-testifying witness are not repeated.

Thereafter, in **Molina v. State**, 406 So.2d 57 (Fla. 3d DCA 1981), the Third District cited **Postell** and held that Molina's right of confrontation was violated where the arresting officer testified that, after interviewing two codefendants who did not themselves testify, he arrested Molina and placed his picture in a photo lineup for identification by the victim.

Appellant's reliance on **Postell** and **Molina** is unavailing as the two are distinguishable from the instant case.

The state contends that Detective Halliday's statement about recovering a knife sheath is not inadmissible hearsay, for a police officer may testify to what he did pursuant to information learned from others, but he may not relate the information itself. **Collins v. State**, 65 So.2d 61 (Fla. 1953); *see also* **Johnson v. State**, 456 So.2d 529, 530 (Fla. 4th DCA 1984). Should this Court hold otherwise, then the state urges that the error be deemed harmless because the statement at most inculpated Pearcy without seriously inculpating appellant. *See* **Hernandez v. State**, 547 So.2d 138 (Fla. 3d DCA 1989) (holding that if it was technical error to admit testimony of police officer, then error is harmless given the vague nature of the testimony acted upon, along with other evidence of guilt). Note that the court in **Postell** and **Molina** did not find harmless error because the only other evidence adduced was "severely challengeable eyewitness identification." **Molina** at 58.

As for Leitner's testimony that "he didn't particularly enjoy having anything to do with inmates that were discussing a crime like that", the state contends that this statement was properly admitted as an exception to the hearsay rule. Namely, that appellant's acquiescence to the inculpatory nature of Pearcy's statement was an adoptive admission by a party-opponent under **§90.803(18)(b), Fla. Stat. (1987)**. Moreover, the statement complained of was not offered to prove the truth of the matter asserted, but to show the witness' motive or state of mind for his turning over the information to the authorities. Indeed,

defense counsel vigorously attacked the credibility of the jailhouse informants and their motive for testifying during opening argument (R 757-758). Therefore, it is difficult for the undersigned to fathom how appellant was prejudiced by testimony that he already admitted would be produced. *See* **McGriff v. State**, 497 So.2d 1296, 1298 (Fla. 3d DCA 1986).

As for the third statement complained of, the trial court agreed with appellant that the statement was hearsay, and he instructed the jury to disregard it (R 1063-1065). Certainly, appellant would have to "dig deep" to demonstrate the inculpatory and prejudicial nature of the statement, for at worst the statement implicated Pearcy, not Dailey. If however, the real nature of appellant's complaint is that the witness was allowed to testify to the plan between the two codefendants, that Dailey would testify after his acquittal that he murdered the girl thereby freeing Pearcy, then appellant is sadly mistaken as these statements were properly admitted either as adoptive admissions of a party-opponent or under the coconspirator exception to the hearsay rule. *See* **United States v. Coppola**, 526 F.2d 764 (10th Cir. 1975).

Since appellant's Sixth Amendment rights were not violated by the testimony complained of, then his conviction must be affirmed.

ISSUE IV

WHETHER THE TRIAL COURT ERRED IN ADMITTING A KNIFE SHEATH INTO EVIDENCE AND IN ALLOWING TESTIMONY CONCERNING ITS DISCOVERY WHERE THE STATE ALLEGEDLY FAILED TO CONNECT THE SHEATH EITHER TO APPELLANT OR TO THE CRIME?

Appellant contends that evidence and testimony concerning the discovery of a knife sheath should have been excluded by the trial court on relevancy grounds as the state failed to connect the sheath either to appellant or to the crime. The state disagrees and contends that this evidence tended to prove, or corroborate appellant's story that he stabbed the victim and discarded the knife.

Detective Halliday testified, over defense objection, that after Pearcy was returned to Florida, police discovered a knife sheath at the Walsingham Reservoir (R 915). Halliday went on to explain that the reservoir is on a direct route, and halfway between the *situs* of the murder and the codefendant's home (R 919).

Paul Skalnick, an inmate at the Pinellas County Jail, testified that appellant told him that Pearcy had actually held the young girl under [a]nd he [Dailey] stabbed her and threw the knife away (R 1116).

Although the evidence linking the sheath to appellant's participation in the murder is somewhat tenuous, the state again asserts that it was corroborative of appellant's admission to Skalnick. Indeed, this Court has held that two pistols found in

a defendant's car were properly admitted into evidence as having "some probative value" even though the pistols could not have been used in the murder for which the defendant was standing trial. See **Harris v. State**, 129 Fla. 733, 177 So. 187 (1937); *see also* **Rayburn v. State**, 188 So.2d 374 (Fla. 2d DCA 1966) (holding the admission of a tear gas pencil into evidence was proper even though there was no evidence that a tear gas pencil was used in the robbery). It cannot be said that the trial court abused its discretion in admitting the knife sheath into evidence. **Jent v. State**, 408 So.2d 1024 (Fla. 1982).

Moreover, if admission of sheath was error, then the error must be deemed harmless as appellant argued to the jury in closing that the sheath only incriminated Pearcy, and in no way connected Dailey to the crime (R 1234). Since appellant was able to argue the relative weakness or strength of this evidence to the jury, then it cannot be said that the admission of the sheath prejudiced appellant's cause.

ISSUE V

WHETHER THE TRIAL COURT ERRED IN ALLOWING DETECTIVE HALLIDAY TO TESTIFY TO PRIOR CONSISTENT STATEMENTS MADE BY THREE INMATE WITNESSES?

Appellant, citing **Jackson v. State**, 498 So.2d 906 (Fla. 1986), contends that the trial court erred in allowing Detective Halliday to testify to prior consistent statements made by three inmate witnesses. Appellant's contention is unavailing.

It is well-settled that a witness's prior consistents are generally inadmissible to corroborate that witness's testimony, **Van Gallon v. State**, 50 So.2d 882 (Fla. 1951), but are admissible when they are offered to rebut an express or implied charge of improper influence, motive, or recent fabrication. **§90.801(2)(b), Fla. Stat. (1987).**

In **Jackson**, this court held that it was error to allow testimony of an inmate's prior consistent statement where the statement was made after the witness had a motive to falsify. Appellant relies on **Jackson** for his argument that since the inmates had a reason to falsely testify before they ever contacted law enforcement, then it was error to allow Detective Halliday to recount the inmates' prior consistent statements. Appellant's reliance on **Jackson** is misplaced, however, as **Jackson** is distinguishable from the instant case.

First, it is apparent from the record that defense counsel sought not only to attack the inmates' motives to testify, but he also implied that the state used improper influence to gain said

testimony. Indeed, defense counsel stated during opening argument that the police had no evidence of appellant's guilt until they went to Pinellas County Jail with "a pocket full of get-out-of-jail free tickets." (R 758). Thereafter, during cross-examination of James Leitner and Pablo DeJesus, defense counsel implied the charge improper influence by intimating that jail officials knew who the codefendants were talking to by looking at the log sheets at the jail's library (R 1075, 1100-1102). Later, during cross-examination of Paul Skalnik, defense again implied improper influence when he asked whether Detective Halliday talked to the inmate about appellant's involvement in the crime before the inmate actually talked to appellant (R 1146). Since appellant chose to attack the inmates testimony by implying improper influence by the police, then the state was properly allowed to rebut this sinister implication with Detective Halliday's testimony that the inmates came forward for non-sinister reasons.

Second, the holding in **Jackson** does not apply herein because Halliday did not testify to the actual incriminating statements made by appellant to the inmates; rather, he only reiterated the reasons the inmates gave in coming forward (R 1177, 1179, 1188).

Since the purpose of Halliday's testimony was not to bolster the incriminating testimony given by the inmates, but to counter appellant's dual charges of improper influence and motive, then it cannot be said that the trial court erred in admitting this testimony in rebuttal to appellant's charges.

Appellant's conviction must, therefore, be affirmed.

ISSUE VI

WHETHER THE TRIAL COURT ERRED IN PROHIBITING DEFENSE COUNSEL FROM INQUIRING INTO THE DETAILS OF PAUL SKALNIK'S PAST AND PENDING FELONY CHARGES.

Appellant next contends that the trial court erred in restricting defense counsel from inquiring into the facts of inmate Paul Skalnik's prior and pending felony charges. Appellant's contention is without merit. *See* **Jackson v. State**, 498 So.2d 906, 909 (Fla. 1986) (holding that the underlying specifics of a witness's prior conviction may not be presented to the jury).

Appellant's conviction must be affirmed.

ISSUE VII

WHETHER THE TRIAL COURT ERRED IN GIVING THE STANDARD JURY INSTRUCTIONS BY STATING THAT APPELLANT DID NOT HAVE TO BE PRESENT WHEN THE CRIME WAS COMMITTED TO BE GUILTY OF FIRST-DEGREE MURDER?

Sub judice, the trial court instructed the jury on the law of principals by giving the complete Florida Standard Jury Instructions (R 1305-1306). The instruction provides that unless felony murder is charged, the jury should be instructed that [t]o be a principal, the defendant does not have to be present when the crime is committed. *See*, **Fla. Std. Jury Instr. (Crim.) 3.01.** Although the prosecutor stated that she would not be arguing that appellant was not present during the commission of the murder, the trial court, in an abundance of caution and over defense objection, stated that he would include the last sentence on a defendant not being present (R 1214).

Appellant contends that the trial court erred in giving the complete instruction on the bases that there was no evidence to support it, that it was confusing or misleading, and that the jury probably employed it was an avenue to convict. The state disagrees.

First, appellant fails to demonstrate any palpable abuse of discretion by the trial court's refusal to delete the sentence complained of. **Phillips v. State**, 476 So.2d 194, 196 (Fla. 1985); **Williams v. State**, 437 So.2d 133 (Fla. 1983).

Second, the trial court should not be disparaged for his relying on the Standard Jury Instructions which were adopted by this Court as an accurate statement on the law in Florida.

Third, if appellant's real claim is that the court should not have instructed the jury on the principal theory, then appellant ignores the plethora of evidence which supports the conclusion, and hence a proper instruction, that the defendants acted in concert in stabbing, choking and drowning the victim to her death. *See*, **Hall v. State**, 403 So.2d 1321, 1323 (Fla. 1981).

Lastly, should this Court somehow determine that the giving of the complete instruction was error, then the state submits that such error must be deemed harmless, for, as appellant concedes, neither side argued that appellant would be guilty even if he was not there.

Appellant's conviction must be affirmed.

ISSUE VIII

WHETHER THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTIONS FOR MISTRIAL BASED UPON ALLEGED COMMENTS BY THE PROSECUTOR ON APPELLANT'S FAILURE TO TESTIFY OR TO PRESENT A DEFENSE?

During closing argument, the prosecutor made the following comments:

> Now, there are only three people who know exactly what happened on that loop area north of Indian Rocks Beach the night of May 5th, early morning hours of May 6th, 1985. Shelly Boggio and she is dead; Jack Pearcy and he is not available to testify; and the defendant. So, when the defense stands up here, as they have already. . . and says where's the evidence, where's the eyewitnesses, use your common sense. Murderers of young girls don't commit . . . murder with an audience.

(R 1260-1261).

* * *

> Fingernails. You don't hear about the length of Mr. Dailey's fingernails. No, because he left Pinellas County, went to Miami, where he stayed less than 24 hours and we arrest him months later in the State of California . . . Only he knows the length of his fingernails.

Appellant objected to the second comment, and moved for a mistrial "based upon the ground apparent to the [c]ourt." (R 1270). Appellant, however, waited until after the prosecutor finished her closing argument before moving for mistrial on the first comment (R 1287).

Appellant, citing **State v. Cumbie**, 380 So.2d 1031 (Fla. 1980), contends that his motion for mistrial on the first comment

was timely, and he urges this Court to find that he was denied a fair trial as the two comments impinged upon his constitutional right to not testify. Appellant's contention is unavailing.

Although it recognizes this Court's decision in **Cumbie**, the state asserts that even though appellant's motion for mistrial on the first comment may have been timely, it certainly was not procedurally sufficient, as the proper course of action was for defense counsel to first request a curative instruction; failing that, he should have thereafter moved for a mistrial. *See*, **Cumbie**, at 1034; *accord*, **Mabery v. State**, 303 So.2d 369, 370 (Fla. 3d DCA 1974) (holding that proper procedure to follow where improper remarks are made that are not by their very existence of such inflammatory nature as to deny a fair trial is to object and move for curative instruction. A mistrial is the remedy when the corrective instruction is denied or is inadequate or when the offense of repeated).

Should this Court ignore the procedural bar to the first comment, then the state asserts that the comment was proper to rebut appellant's preceding argument that the state's case was weak because it could produce no witnesses to the homicide. If this court determines, however, that the comment complained of is "fairly susceptible" of being one on appellant's right not to testify, then the state asserts that the comment was not so egregious so to deprive appellant of a fair trial. The error must be deemed harmless. **State v. Marshall**, 476 So.2d 150 (Fla. 1985); **State v. Kinchen**, 490 So.2d 21, 22 (Fla. 1985).

As for the second comment complained of, namely, that only [appellant] knows the length of his fingernails, the state asserts that the comment was fair rebuttal to appellant's argument that the state could produce "no testimony whatsoever as far as [appellant] having fingernails . . . that would scratch the victim." (R 1233). Again, should this Court determine otherwise, then any error shown herein is clearly harmless. **Marshall**.

Since appellant cannot demonstrate prejudicial error, then his conviction must be affirmed.

ISSUE IX

WHETHER THE TRIAL COURT ERRED IN QUALIFYING DETECTIVE HALLIDAY AS AN EXPERT IN HOMICIDE AND SEXUAL BATTERY INVESTIGATIONS WHERE HIS OPINION WAS BASED ON NOTHING MORE THAN COMMON INTELLIGENCE AND SPECULATION?

Sub judice, the state offered Detective Halliday as an expert in homicide/sexual battery investigations. Appellant objected on the basis that there was no evidence of sexual battery in this case (R 1345). The state was allowed to proffer Halliday as an expert, and he testified to his qualifications. They included, six years experience in crimes against the persons, training in two homicide injury/death schools, along with schooling for sex crimes and blood splatter analysis. Halliday testified that he had investigated over 100 homicides, and over 100 sexual battery cases (R 1343). Also, he was previously qualified as an expert in Pearcy's trial.

As for his opinion on proffer as to whether a sexual battery or attempt thereof occurred in this case, Halliday testified that he had no doubt that the perpetrator either intended to, or did commit a sexual battery upon Shelley Boggio (R 1347). Halliday based his opinion on the following: the victim's untorn underwear were located 140 feet from the location of the body. Her jeans and shirt were found at another spot with a trail of blood leading back to the underwear (R 1348). This evidence negated to him the possibility of consensual sex (R 1351). Halliday also based his opinion on his experience that a nude body "almost

always" indicates a sexual battery (R 1351). Lastly, the fact that the situation involved two 30 year old men versus one 14 year old girl indicated that the intent was sexual (R 1348).

Appellant again objected to Halliday's potential testimony as an expert because his testimony was based on no more than speculation and common sense (R 1352). The trial court overruled appellant's objection, and received Detective Halliday as an expert in the field of homicide/sexual battery investigations (R 1353).

Appellant contends that the trial court erred in qualifying Halliday as an expert because his opinion was based on speculation. The state disagrees, and contends that appellant's difference of opinion with the weight accorded the testimony of an expert is not a matter properly reviewed on appeal; rather, it is a matter refutable through cross-examination or contrary evidence at trial. *See* **Dragon v. Grant**, 429 So.2d 1329, 1330 (Fla. 1st DCA 1983). Admissibility of an expert's opinion, on the other hand, is a matter solely within the discretion of the trial court. **Dragon**. And "while in many cases a lay jury is competent to conclude from common experience that an event does not usually occur absent [criminal activity] on a particular defendant's part, in some cases such a basis of knowledge is lacking. In such cases, expert testimony may be necessary to provide a sufficient foundation." **Bardy v. Sears, Roebuck and Co.**, 443 So.2d 212, 215 (Fla. 2d DCA 1983).

Since Detective Halliday utilized his expertise to provide the jury with a sufficient foundation from which they could conclude that a sexual battery had occurred, then it cannot be said that the court below abused its discretion in admitting Halliday as an expert.

Appellant's sentence of death must be affirmed.

ISSUE X

WHETHER THE TRIAL COURT ERRED IN FINDING THREE AGGRAVATING FACTORS NOT SUPPORTED BY THE EVIDENCE AND IN CONSIDERING A NONSTATUTORY AGGRAVATING FACTOR DURING HIS DISCUSSION OF POSSIBLE NONSTATUTORY MITIGATORS?

Appellant challenges the propriety of his death sentence and specifically attacks the trial court's finding of three factors in aggravation, and in considering a nonstatutory aggravator during his consideration of nonstatutory mitigators. The state will address each claim in the order in which they are presented.

Appellant, citing **Atkins v. State**, 452 So.2d 529 (Fla. 1984), first contends that the trial court erred in finding that the capital homicide was committed during the course of a sexual battery or an attempt thereof, where the court previously denied instructing the jury on a felony murder theory during guilt phase.

In **Atkins**, the defendant was charged with first-degree murder, kidnapping and two counts of sexual battery. The trial court entered a judgment of acquittal on the sexual battery counts as there was no evidence to corroborate the acts other than the defendant's confession. During penalty phase, the trial court found that Atkins' confession was sufficient to support a finding that the homicide was committed during the course of a sexual battery. This Court reversed and held that evidence was as lacking on the second count of [oral] sexual battery as it was on the anal sexual battery count for which Atkins was acquitted;

thus, the aggravating circumstance was not proven beyond a reasonable doubt. The state submits that **Atkins** is distinguishable from the present case.

First, the state is free to charge first-degree murder by a premeditated design and prove the same without resort to proof of felony murder. This is true despite the fact that the state could have charged premeditation and proved the same in this case under a felony murder theory. *See* **Garcia v. State**, 492 So.2d 360, 366 (Fla. 1986). Likewise, where the state charges and convicts on a premeditation theory, but introduces evidence of felony murder, then the state should be free to offer evidence of felony murder during penalty phase if there is evidence that the defendant was engaged in the commission of a felony. Indeed, the fact that a defendant was engaged in the commission of an enumerated felony when the murder was committed is a matter relevant to the nature of the crime and the character of the defendant. **§921.141(1), Florida Statutes (1987).**

Dr. Wood, the medical examiner, testified that because the victim in this case was nude and floating in the water, she would not expect to find sperm in the vagina even though the victim could have been sexually assaulted (R 871). Dr. Wood also testified that she would not expect to find vaginal trauma to a teenager who is sexually active or using tampons (R 892).

Mary Cortiz, a serologist with FDLE, testified that she would not expect to find semen in a body which had been floating in water for a period of time (R 944).

Detective Halliday, who was qualified as an expert in homicide/sexual battery investigations, opined that the crime scene indicated that a sexual battery or an attempt thereof occurred in this case.

Since the state adduced substantial, competent evidence to support a finding that appellant attempted to or raped Shelley Boggio, then it should not be precluded from introducing that evidence in aggravation despite the fact it chose to pursue a theory of premeditation in guilt phase. Should this Court determine otherwise and vacate this as an aggravating factor, then the state asserts that the sentence of death must be affirmed in light of the numerous factors in aggravation versus none in mitigation. Hill v. State, 515 So.2d 176 (Fla. 1987); Brown v. State, 473 So.2d 1260 (Fla. 1985).

Appellant next challenges the trial court's finding that the murder was committed to avoid or prevent a lawful arrest. The state disagrees.

The trial court stated in his written findings that in order to establish this aggravating circumstance, the state had to prove more than the mere fact that the victim knew her assailants (R 234-235). The court, citing Cooper v. State, 492 So.2d 1059 (Fla. 1986), found that the state met its burden. In articulating his finding, the trial judge stated that the victim knew appellant and could accuse him of sexual battery and attempted sexual battery. To silence her, appellant repeatedly stabbed her, beat her, and choked her. When "she would not die,"

he held her under water until she drowned. Appellant left the body in the Intercoastal Waterway to sink or float away, and he discarded her clothes in the water to delay discovery of the crime. Appellant thereupon fled the jurisdiction.

This court has held that circumstances similar to that presented in the instant case justified a finding of arrest avoidance. *See* **Adkins v. State**, 497 So.2d 1200, 1201 (Fla. 1986) (holding that murder was committed to prevent the victim from disclosing the defendant's act to victim's parents which would have led to the defendant's arrest); **Kokal v. State**, 492 So.2d 1317, 1319 (Fla. 1986) (victim killed because a threat to later identify the robbers); **Garcia v. State**, 492 So.2d 360, 367 (Fla. 1986) (where one of the accomplices was known to the victim, there was no error in instructing jury on witness elimination where murder committed to prevent witness from identifying robber).

Appellant next challenges the trial court's finding that the murder was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. The state contends that this aggravating factor is supported by the record.

The trial court found, and the record reflects that the victim was initially tortured when she had her clothes on by the infliction of "prickling wound" caused by a knife. The victim apparently disrobed and she was taken to a distant spot where her underwear was found. After appellant raped her, or attempted to

rape her, appellant carried out his savage attack by beating, choking, and stabbing the victim. When "the victim would not die," appellant dragged her into the water where she was drowned.

The trial court distinguished the instant case from **Nibert v. State**, 508 So.2d 1 (Fla. 1987), wherein this court held that a "stabbing frenzy" does not establish cold, calculated, and premeditated as an aggravating factor. Here, the medical examiner testified that the stab wounds themselves would have taken several minutes to complete (R 876). This fact coupled with the facts that appellant tortured the victim before attempting the rape, along with the subsequent drowning refutes appellant's contention. Moreover, this court has held that the series of events leading up to the murder can evince a heightened degree of premeditation especially "when appellant had ample time during the series of events to reflect on his actions and their attendant consequences." Scott v. State, 494 So.2d 1134, 1138 (Fla. 1986).

Since this aggravating circumstance was properly found and is supported by the record, then this court must so affirm.

Appellant's last contention in this issue is that the trial court improperly considered a nonstatutory aggravating factor during his consideration of any nonstatutory mitigating evidence. Appellant's contention is without merit.

The trial court stated, during his recital of the nonstatutory mitigating evidence presented, that after appellant's wife remarried his former Air Force friend and he

allowed his friend to adopt his daughter, appellant "became a drifter going from city to city and job to job." (R 238). The state asserts that the trial court merely recited appellant's life history during his discussion of other mitigating factors. Certainly the trial court did not consider this as an aggravating factor or he would have included it as such. This is especially true where evidence of appellant's being a drifter was presented through the testimony of defense witnesses. Therefore, it cannot be said that this was considered in determining the propriety of the death penalty. Appellant's claim to the contrary fails, and his sentence must be affirmed.

ISSUE XI

WHETHER THE TRIAL COURT ERRED IN ADMITTING INTO EVIDENCE A CERTIFIED COPY OF APPELLANT'S PRIOR CONVICTION FOR AGGRAVATED BATTERY WHICH CONTAINED A NOTATION AT THE BOTTOM STATING THAT PURSUANT TO THE PLEA AGREEMENT, ANOTHER CHARGE HAD BEEN DROPPED?

Appellant claims that the trial court's failure to delete any reference to another charge could have caused the jury to speculate that he pled to a lesser charge in exchange for Arizona's dismissal of a more serious charge. Appellant's claim here is without merit.

First, the reference to the other charge is inconspicuous, hence innocuous (R 1479). Second, defense counsel brought out during examination of appellant's mitigating witness that the aggravated battery involved a bar fight where appellant had to defend himself. Thus any damage resulting from the judgment's reference to the other charge was avoided through this testimony. Third, the evidence supporting the prior conviction itself as an aggravating factor was the sole thrust of the trial court's instruction, and we cannot presume that the jury failed to follow the instructions given.

Appellant's claim herein fails, and his sentence of death must be affirmed.

ISSUE XII

WHETHER THE TRIAL COURT ERRED IN FAILING TO CONSIDER STATUTORY AND NONSTATUTORY EVIDENCE IN MITIGATION?

Appellant contends that the trial court failed to consider evidence presented in mitigation; the state contends otherwise.

Appellant's first claim is that the court below "completely disregarded" evidence that appellant was substantially impaired[1] during the commission of the capital felony. Appellant's claim is belied by the record which indicates that the trial court found evidence that appellant drank alcohol and smoked marijuana on the night of the murder; however, he found no evidence that [appellant] was under the influence of anything to the extent that he was so substantially impaired that he could not appreciate the criminality of his conduct. The court based its finding on the testimony of Gayle Bailey and Oza Shaw who saw appellant both before and after the murder, where neither indicated that he was under the influence of alcohol or drugs to the point where he was unable to control his conduct. The court also based its finding on the fact that appellant clearly and specifically related the events surrounding the murder to inmates at the county jail (R 238). Where a trial court considers, but does not find significant evidence of substantial impairment to support this factor in mitigation, then the trial courts finding is proper and it must be accorded deference on appeal. *See*

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[1] §921.141(6)(f), Fla. Stat. (1987).

Jennings v. State, 512 So.2d 169 (Fla. 1987); Johnson v. State, 497 So.2d 863 (Fla. 1986); Kokal v. State, 492 So.2d 1317 (Fla. 1986).

Appellant next contends that the trial court erred in failing to consider all the nonstatutory evidence presented in mitigation. The state disagrees and contends that a trial court does not fail to consider all evidence offered in mitigation merely because he does not specifically enumerate and reject everything that is presented. For mere disagreement with the force to be accorded such evidence is not a sufficient basis to challenge a death sentence. Rose v. State, 472 So.2d 1155, 1158 (Fla. 1985). *Sub judice,* the trial court heard and adequately considered the mitigating evidence presented by appellant, but concluded that the evidence did not rise to a sufficient level to be weighed as a mitigating circumstance. Thus, no error can be shown or complained of. Straight v. Wainwright, 772 F.2d 674 (11th Cir. 1985); Tompkins v. State, 502 So.2d 415 (Fla. 1986).

Appellant's sentence of death must be affirmed.

ISSUE XIII

WHETHER THE TRIAL COURT VIOLATED APPELLANT'S CONFRONTATION RIGHTS BY BASING HIS SENTENCE, IN PART, ON EXTRA RECORD INFORMATION GAINED FROM THE CODEFENDANT'S TRIAL, THE CODEFENDANT'S PRESENTENCE INVESTIGATION AND THE PROSECUTOR'S SENTENCING MEMORANDUM?

Appellant's last contention is that the trial court violated appellant's rights as secured by the confrontation clause of the sixth amendment by considering during sentencing evidence gained in the codefendant's trial, evidence in the prosecutor's sentencing memorandum which stated that Pearcy made statements implicating Dailey, and in considering appellant's P.S.I. which include a victim impact statement. Appellant's contention is unavailing.

First, evidence relating to the codefendant's trial was properly relevant to appellant's sentence where there is a potential eighth amendment claim that appellant's death sentence is disproportionate to his codefendant's life sentence. Where, as here, evidence supports the trial court's finding that appellant was the "dominating force" behind the commission of the capital murder, then appellant's sentence of death is not disproportionate. **Marek v. State**, 492 So.2d 1055, 1058 (Fla. 1986); **Williamson v. State**, 511 So.2d 289 (Fla. 1987); **Diaz v. State**, 513 So.2d 1045 (Fla. 1987).

As for appellant's claim that the lower court improperly considered the prosecutor's sentencing memorandum where it revealed that appellant's codefendant made a statement

implicating appellant, the state would remind this Court that the trial judge was already well aware of Pearcy's incriminating statement as the court had previously ruled that Pearcy's letters incriminating Dailey were inadmissible. Moreover, where the trial judge indicated in his sentencing order that he limited his consideration to only those aggravating factors presented by the evidence, then this Court must presume that the lower court followed the law. **Ford v. Strickland**, 696 F.2d 804, 811 (11th Cir. 1983).

Lastly, appellant's claim that the trial court may have improperly considered the victim impact statement contained in the P.S.I. is unavailing as defense counsel had a copy of the report and failed to object to any part of it. Appellant's failure to object bars subsequent review of this claim on appeal. **Grossman v. State**, 525 So.2d 833 (Fla. 1988). Also, the state would again assert that trial judges are presumed to follow the law and ignore irrelevant material. **Ford**.

Appellant's sentence of death must be affirmed.

CONCLUSION

The record before this Court reflects that appellant was not denied a fair trial; thus, his claims challenging his conviction must fail.

As for appellant's sentence, the jury unanimously recommended death and the trial court agreed, finding five aggravating circumstances versus no mitigating circumstances. The evidence adduced below indicates that appellant was the dominating force behind the homicide. Should this Court determine that one or more of the aggravators are not supported by the record, then death is still appropriate as there are no mitigators. **Hill v. State**, and **Brown v. State**, *ante.*

Lastly, this homicide can be considered as one of the most wicked, cruel and vile murders ever committed in this state. As such, this Court must uphold the sentence if no prejudicial error occurred below. Should this Court choose top vacate the penalty imposed, there can be little doubt that the death penalty rings hollow in Florida.

Appellant's conviction and sentence must be affirmed.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

JOSEPH R. BRYANT
Assistant Attorney General
Florida Bar #: 0561444
1313 Tampa Street, Suite 804
Park Trammell Building
Tampa, Florida 33602
(813) 272-2670

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail to A. ANNE OWENS, ESQUIRE, Assistant Public Defender, Polk County Courthouse, P. O. Box 9000 - Drawer PD, Bartow, Florida 33830, on this 29th day of December, 1989.

JOSEPH R. BRYANT
OF COUNSEL FOR APPELLEE