IN THE SUPREME COURT OF FLORIDA

CASE NO. 71,407

DENNIS SOCHOR,

Appellant,

vs.

STATE OF FLORIDA

Appellee.

****

ON APPEAL FROM THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT IN AND FOR BROWARD COUNTY, FLORIDA CRIMINAL DIVISION

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ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

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

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

The following symbol(s) will be used:

"R" Record on Appeal

STATEMENT OF THE CASE

Appellee accepts Appellant's Statement of the Case.

STATEMENT OF THE FACTS

Appellee accepts Appellant's Statement of the Facts to the extent they present a non argumentative unbiased account of the factual development below. Appellee would however add the following clarifications:

1. Michael Hickey did not receive any favorable treatment in exchange for his testimony (R. 583).

2. Appellant's brother Gary Sochor testified that Ms. Gifford begged for her life (R. 377).

3. The clothes found in the truck matched the description of clothes worn by the victim (R. 109-110, 324).

4. Gary Sokchor noticed three gouges on Appellant's face the morning after the murder (R. 326). Appellant told Gary he received them the night before while in a fight with a "guy and a girl" jail. The guy and girl were "monkeying around the truck" Gary Sochor was with Appellant the entire night and never saw the guy and girl (R. 326).

5. Dr. Zager testified that Appellant would be extremely dangerous if released (R. 676, 689) Appellant exhibited anti-social behavior prior to drinking (R. 679). Dr. Zager stated that even if Appellant was in fact drunk that evening he still would have known that killing Ms. Gifford was wrong (R. 688).

6. Dr. Livingston testified that she didn't know if Appellant ws drunk the night of the murder (R. 720). If he gave any detaled account of the evening that would demonstrate that he didn't blackout (R. 736).

7. Patricia Neal testified that Appellant's violent behavior was usually not triggered by alcohol (R. 955).

8. The medical examiner testified that there would be no pain associated with strangulation once the victim was rendered unconscious (R. 972,973). If a victim is already experiencing shortness of breath unconsciousness would occur in a minute (R. 973). If the victim resists and struggles unconsciousness would occur after four minutes (R. 974).

SUMMARY OF THE ARGUMENT

I. GUILT ISSUES

There was sufficient evidence of premeditation to sustain a conviction for first degree murder. In any event this issue is not properly before this Court as it is not preserved for appeal. There is ample evidence to sustain a conviction of first degree murder under felony murder as well.

There was sufficient evidence of venue, Corpus Delicti and no evidence to establish insanity.

Appellant attacks the admissibility of certain prosecutorial arguments, comments and evidence. None of the statements wer objected to and are not properly preserved for appeal. None of the evidence or remarks were improper. In any event any error is harmless.

Appellant makes several claim regarding the applicability and correctness or various jury instructions. None of these issues were preserved for appeal. All the instructions were proper.

Any error in failing to give certain jury instructions is also not preserved as no request was made for any of the instructions. No error can be demonstrated as the evidence did not warrant a reading of the requested instructions.

II. PENALTY ISSUES

There was no evidence presented concerning nonstatutory aggravating factors of lack of remorse and victim impact. These issues are not preserved for appeal.

No collateral bad acts were admitted during penalty phase of trial for the sole purpose of demonstrating Appellant's bad character. All the testimony was relevant to either establish an aggravating factor or rebut a claim of mitigation. No objection was made upon admission of any of the testimony.

Various challenges are made to the jury instructions on both aggravating and mitigating factors. None of these instructions were objected to therefore they are not properly before this Court. In any event all the instructions were proper.

The trial court properly found the existence of several aggravating factors; the murder was heinous, atrocious and cruel; the murder was cold and calculated and premeditated; the capital crime was committed during the commission of or an attempt to commit a kidnapping or sexual battery and; the Appellant has been previously convicted of a prior violent felony.

The trial court properly found that none of statutory mitigating factors applied. The trial court correctly determined that the aggravating factors outweighed the nonstatutory mitigating evidence presented.

Florida's capital sentencing procedure has passed constitutional scrutiny. Furthermore, general attacks on the system are irrelevant to the fact of the case sub judice.

Appellant's sentence for the underlying felony of kidnapping is appropriate.

ARGUMENT

I. GUILT ISSUES

A. SUFFICIENCY OF THE EVIDENCE
a. Premeditated Murder

1. First Degree Murder

Appellant claims that there was insufficient evidence of premeditation to sustain his conviction for first degree murder. The basis for this claim is that the killing occurred during the heat of passion rather than emanating from a premeditated design.

Initially it must be pointed out that this issue has not been preserved for appeal. At the close of the State's case, Appellant moved for a directed verdict on the basis that he was too drunk to form the premeditated design to kill (R. 633-634). No where does he claim that a premeditated design is precluded because of heat of passion. As such this issue is not properly before this Court. Estrada v. State, 400 So.2d 562 (Fla. 1981); Patterson v. State, 391 So.2d 344 (Fla. 1980).

Secondly, a judgment of conviction comes to this Court clothed with a presumption of correctness Spinkellink v. State, 313 So.2d 666 (Fla. 1975). If there exists substantial and competent evidence to support the verdict and judgement, a claim of insufficiency of evidence will not prevail. Id.

Thirdly, Appellant's theory that the killing was committed in a heat of passion is inapplicable in the instant case. In order to rely on a theory of heat of passion to reduce a first degree murder charge, Appellant must show adequate provocation. Forehand v. State, 171 So.2d 241, 243 (Fla. 1936); Wilson v. State, 493 So.2d 1019, 1022 (Fla. 1986). Appellant confessed to

choking Ms. Gifford because she hit and scratched him in response to his sexual advances (R. 500). The fact that Appellant became angry at Ms. Gifford because she resisted (R. 500) and the fact that he experienced uncontrollable sexual urges (R. 480-480) does not minimize his responsibility for killing Ms. Gifford. Appellant was not acting in response to any unwarranted intervention or action. Appellant instigated the situation by attempting a sexual battery and now seeks to diminish his culpability by characterizing Ms. Gifford's futile attempts to fight him off as adequate provocation for his fatal actions. Such a grotesque scenario was not envisioned by the case law. Wilson, supra; Forehand, supra; Roberts v. State, 510 So.2d 885 (Fla. 1987).

Lastly there was sufficient evidence upon which to sustain a conviction for premeditated murder. Premeditation need not exist for a particular period of time. Sireci v. State, 399 So.2d 964 (Fla. 1981). Relevant evidence upon which premeditation may be inferred includes the presence or absence of adequate provocation and manner in which the homicide was committed. Sireci 399 So.2d at 967. The evidence must establish that Appellant was conscience of the nature of the act as well as the probable results to flow from it, Id.

Appellant stated that he became angry at the victim because she fought off his sexual advances (R. 500). This caused him to choke her (R. 500). While Appellant was choking her, Ms. Gifford kept fighting (R. 500). She screamed to Appellant's brother for help and begged the Appellant for her life (R. 316-317, 377).

Gary Sochor attempted to stop his brother during the killing by yelling at him and throwing a rock at him (R. 317). Appellant admitted this to Hickey (R. 580). Appellee submits that these facts illustrate that Appellant had sufficient time to form his intent as well as realize the consequence of his act. Buford v. State, 403 So.2d 943 (Fla. 1981); Sireci supra. Furthermore the manner of killing also illustrates that lethal force was applied, and intent to kill can be presumed. Thomas v. State, 456 So.2d 454 (Fla. 1984). The fact that strangulation can occur in as little as thirteen seconds does not negate that fact that such is sufficient time in which to formulate an intent. Sireci, supra. Since Appellant's theory that the killing occurred in the heat of passion is clearly rebutted by the evidence, the evidence was sufficient to sustain the murder conviction. Heiney v. State, 447 So.2d 210 (Fla. 1984); State v. Law, 14 F.L.W. 387 (Fla. July 27, 1989).

b. Felony Murder

Appellant further contends that there is insufficient evidence to sustain his conviction for kidnapping. This claim is based on the allegations that the confinement of the victim was incidental to the killing Faison v. State, 426 So.2d 963 (Fla. 1983). Appellant relies heavily on the fact that the victim may have entered the truck willingly. Hrindich v. State, 427 So.2d 212 (Fla. 5th DCA 1983). Appellee asserts that although Ms. Gifford may have entered the truck voluntarily, there was sufficient evidence of subsequent movement done to facilitate the attempted sexual battery. Gilley v. State, 412 So.2d 68 (Fla.

1st DCA 1982); Faison v. State, 426 So.2d 963 (Fla. 1983); Rose v. State, 425 So.2d 321 (Fla. 1982).

Gary Sochor testified that Ms. Gifford got in the car assuming that they were all going to eat (R. 315, 316, 359). Appellant ended up driving after arguing with Gary Sochor about who would drive (R. 315). Several minutes after leaving Appellant stopped the vehicle and had the victim out of the truck while she was screaming for help asking what was going on (R. 316-317). Gary Sochor then exited the car and saw Appellant on the ground on top of Ms. Gifford (R. 317). Ms. Gifford continued to yell for help (R. 317). Appellee contends that the overall movement of the truck from the Banana Boat parking lot to a secluded area, as well as the removal of Ms. Gifford from the truck was done to avoid detection and facilitate the attempted sexual battery. Dowdell v. State, 415 So.2d 144 (Fla. 1st DCA 1980); Lamanin v. State, 515 So.2d 309 (Fla. 3d DCA 1987). Alternatively, even if there is insufficient evidence of physical force there was sufficient evidence that Appellant secretly isolated or insulated the intended victim from meaningful contact with the public. Robinson v. State, 462 So.2d 471, 476 (Fla. 1st DCA 1985). There was also evidence that a struggle took place in the truck where evidence of blood and scratch marks were found on the passenger side of the vehicle (R. 135-136).

There was also sufficient evidence of attempted sexual battery. Contrary to Appellant's assertion otherwise, there was more than just Ms. Gifford's negative response to his request for sex. Through Appellant's own admission, Appellant had an

uncontrollable urge for sex that evening (R. 474-476) He thought he ended up raping Ms. Gifford that night (R. 477, 476). He also admitted that his uncontrollable sexual feeling took over. When Ms. Gifford refused his sexual advances, Appellant grabbed her. Ms. Gifford then screamed and hit Appellant, scratching his face (R. 500). The struggle culminated in Ms. Gifford's strangulation (R. 500). Gary Sochor testified that Appellant had Ms. Gifford pinned down on the ground as she pleaded for help and her life (R. 317,377). Furthermore, various articles of clothing of Ms. Gifford's were found in Appellant's truck including a shoe and a sweater (R. 109, 324, 480). Appellant admitted to killing Ms. Gifford during her resistance of his sexual advances (R. 461, 502). Appellant's overt acts went beyond mere preparation. Mercer v. State, 347 So.2d 733 (Fla. 4th DCA 1977). This evidence was more than enough to sustain his conviction for attempted sexual battery. Monarca v. State, 412 So.2d 443 (Fla. 5th DCA 1982).

c. Corpus Delicti

Appellant alleges that his confession is inadmissible because the State failed to independently prove the corpus delicti of the crime. The State's burden of proving corpus delicti is by substantial evidence and not reasonable doubt. State v. Allen, 335 So.2d 823 (Fla. 1976) Circumstantial evidence is all that is required. Buenoano v. State, 527 So.2d 194 (Fla. 1988).

In the case sub judice there was sufficient evidence to established death and criminal agency. Schneble v. State, 201

So.2d 881 on remand 215 So.2d 611, cert. granted 91 S.Ct 2279, 403 U.S. 952, 29 LEd 2d 863, aff. 92 S.Ct 1056, 405 U.S. 427, 31 LEd 2d 340. Ms. Gifford's last words to her friend Delta were that she would be right back to sit with her (Delta) once she paid her bar tab (R. 88-89). Appellant had been with Ms. Gifford most of that night and was with her when she said this to Delta (R. 89). Ms. Gifford did in fact go pay the bar tab and has not been seen by her friend since (R. 44). Ms. Gifford had a good relationship with her boyfriend and her family and it was very uncharacteristic of her not to come home (R. 100-104,106,109,625). None of her belongings were missing from her apartment (R. 110). Appellant's brother, Gary Sochor, testified that he saw his brother on top of Ms. Gifford as she was laying on the ground screaming for help (R. 317) Appellant and Ms. Gifford has a struggle outside of the truck, and Ms. Gifford was left there on the ground (R. 319, 360). Ms. Gifford begged for her life (R. 377). Ms. Gifford has not been seen since. This evidence sufficiently establishes the corpus delicti of homicide Schneble, supra. This evidence is also sufficient to establish the corpus delicti of kidnapping. Justus v. State, 438 So.2d 358 (Fla. 1983).

3. Venue

Appellant claims that there was insufficient proof of venue. The State disagrees. Venue need not be proved beyond a reasonable doubt. Pennick v. State, 453 So.2d 542 (Fla. 3rd DCA 1984). As long as a jury can reasonably infer from the evidence that the crime was committed in the alleged jurisdiction, venue is satisfied. Pennick, 453 So.2d at 543.

At trial Broward Sheriff Officer, Mark Schelien, testified that when trying to locate the victim's body Appellant stated that the murder occurred in Southwest Broward County (R. 508). Appellant also described the area, including well known landmarks in the area (R.508). This was sufficient evidence to establish venue Pennick, supra.

4. Sanity

Appellant claims that there was sufficient evidence of insanity which requires a reversal of his first degree murder conviction. This claim is based entirely on Gary Sochor's testimony that he [Appellant] was berserk at the time of the offense. This issue lacks merit both procedurally and substantially.

As conceded by Appellant there was no notice of intent to rely on the insanity defense under rule 3.216(b) Fla.R.Crim.Pro. Appellant submits that the very fact that no such defense was raised strongly indicates that no evidence existed to pursue such a line of defense. Brumit v. State, 220 So.2d 659 (Fla. 1969). The fact that the defense was not raised at trial precludes Appellant from raising it as a defense on appeal. Brumit, supra.

In any event the record totally refutes Appellant's claim. Appellant's own mental health experts concluded that he was neither incompetent or insane at the time of the offense (R. 658, 717). This testimony sufficiently rebuts any eleventh hour claim that Appellant was insane at the time of the offense. Byrd v. State, 297 So.2d 22 (Fla. 1974); Fisher v. State, 506 So.2d 1052 (Fla. 1987).

B. UNFAIRNESS OF THE GUILT PHASE OF THE TRIAL

Appellant alleges that various improper comments and statements were made during the course of his trial by the prosecutor and state and defense witnesses. As conceded by Appellant, none of the remarks were objected to. Appellant asks this Court to ignore this lack of preservation since this is a capital case. That argument has been rejected by this Court on numerous occasions. Pope v. Wainwright, 496 So.2d 798 (Fla. 1986); Rose v. State, 461 So.2d 84 (Fla. 1985); Jones v. Wainwright, 473 So.2d 1244 (Fla. 1985). Absent fundamental error, this Court will not review unpreserved claims. Pope v. Wainwright, 496 So.2d at 803.

1. Comments on Facts Outside the Evidence

No objection was made at trial to any of the prosecutors remarks therefore appellate review is precluded. Castor v. State, 365 So.2d 701 (Fla. 1978).

The prosecutor's comments concerning Appellant's dragging of the victim is supported by the evidence produced at trial. Wide latitude is permitted when arguing to a jury. Logical inferences may be drawn and counsel is allowed to advance all legitimate arguments. Breedlove v. State, 413 So.2d 1 (Fla. 1982).

Gary Sochor testified that Appellant got out of the truck and the victim was hollering for help and asking what was going on (R. 317). She was pinned on the ground by Appellant and screamed for help (R.317). There was evidence of a struggle in the truck as blood and scratch marks were found on the passenger

side of the truck (R. 131, 136, 141, 143). Appellant received scratches during the struggle (R. 269, 326). This physical evidence, in conjunction with the victim's mistaken belief that they were just going to eat breakfast, is sufficient evidence to warrant the prosecutor's comments (R. 316).

If error however, it cannot be considered harmful due to the overwhelming evidence. Pope v. Wainwright, 496 So.2d at 802; Jones v. Wainwright, 473 So.2d at 1245; State v. DiGuilio, 491 So.2d 11 (Fla. 1987).

Appellee relies on the above stated principals as argument for Appellant's similar complaint concerning Ms. Harville. Specifically, Appellant complains that the prosecutor impermissibly insinuated that Ms. Harville was drugged. Mr. Hancock stated that Ms. Harville thought she was drugged (R. 22).

At trial Ms. Harville testified that she felt fine until she had a drink which made her very sick and dizzy (R. 86). Her physical condition was not the result of intoxication (R. 86-88). Mr. Hancock's brief remark was proper. Breedlove, supra.

2. Opinions of Government Witnesses

Appellant further complains that State witnesses impermissibly stated their personal opinions with respect to his guilt. Appellant's reliance on Gibson v. State, 193 So.2d 460 (Fla. 2d DCA 1967); Ryan v. State, 457 So.2d 1084 (Fla. 4th DCA 1984) and the like are factually distinguishable from the case sub judice. Furthermore, there was no objection at trial to any of the challenged statements, consequently this Court is precluded from reviewing this claim. Rose v. State 461 So.2d at 86.

Captain Schelein's statements were made in direct response to questions [from State and Defense counsel] concerning the circumstances of Appellant's three confessions (R. 490). At no time did the State attempt to introduce impermissible hearsay or prior consistent statements. Appellant's first statement included inculpatory statements, however, no details of the crime were given (R. 486-487). A second confession was elicited due to the incompleteness of the first confession (R. 491-492). The comments were made to explain why three statements were taken, and not to bolster or comment on any witnesses credibility. Schelein's voluntariness of a confession is determined by all the surrounding circumstances. King v. State, 436 So.2d 50 (Fla. 1983) citing to Edwards v. Arizona, 451 U.S. 477 (1981). Taken in their proper context, these remarks were permissible.

Lastly, the statements at best were harmless error. Pope v. Wainwright, 496 So.2d 798, 802 (Fla. 1983). On recross defense counsel was able to elicit from Schelein that his statement were based simply on his gut feelings and not the evidence (R. 561).

3. Another Ted Bundy

Appellant further claims that an investigator from the State Attorney's Office referred to Appellant as another Ted Bundy. As with all the other challenged remarks, this is not preserved by appeal. This Court is precluded from reviewing this claim. Jones v. Wainwright, supra; Rose v. State, supra; Jones v. State, 449 So.2d 253, 263 (Fla. 1984).

On the merits Appellant takes the statement out of context. A defense witness testified that Appellant told her that he did not commit any murder (R. 781). A State investigator attempted to get the witness to change her mind and testify that Appellant confessed to her (R. 781-782). He did this by referring to Appellant as another Ted Bundy (R. 782). The witness gratuitously stated this again during cross examination (R 786-787). Defense counsel repeated this statement during closing argument to emphasize the State's over zealousness in this case (R. 898-899). The statements were not elicited by the State in anyway. They were made to bolster the credibility of defense witness Hardwich, as well as to bolster the defense that Gary Sochor was the actual killer (R. 865-868, 869-870). Hooper v. State, 476 So.2d 1253, 1257 (Fla. 1985).

4. Other Improper Argument

Likewise, Appellant's challenge to the prosecutor's comments that the State gets only one opportunity to try him is not preserved for appeal, consequently, review is precluded. Rose supra; Jones, supra. Furthermore the remarks are harmless. State v. Murray, 443 So.2d 955 (Fla. 1984).

As for the prosecutors statement concerning lesser included offenses, Appellee strongly asserts that the statement can in no way be construed as a denigration of the jury's responsibility (R. 917). The prosecutor was simply commenting on the evidence.

5. Other Evidence of Mr. Sochor's Bad Character and Ms. Giffords Good Character.

Next Appellant lists numerous comments made by various State and Defense witnesses which amount to improper Williams Rule evidence. None of the evidence was objected to; consequently this issue has not been preserved for appeal. German v. State, 379 So.2d 1013 (Fla. 4th DCA 1980). Again Appellant has taken various comment out of context. Statements made by Ms. Berman, Dr. Oscar Zeil, and Detective Ward were all relevant and were not evidence of Appellant's bad character (R. 39, 243, 252, 255). Bryan v. State, 533 So.2d 744 (Fla. 1988).

Appellant also complains that various statements made by him in his confession amount to inadmissible improper collateral acts. Appellee disagrees.

Appellant's theory of defense was that his brother Gary actually murdered Ms. Gifford (R. 865,869-870,882,900). The police "mistakenly" focused on Appellant rather than his brother because of his prior record (R. 867, 898-899). Appellant claims that he left Fort Lauderdale immediately, not because of any guilt over this murder, but because of his probationary status involving another sexual battery (R. 888). In order to overcome the State's strong case against Appellant [including three taped confessions and his brother's testimony] he had to attack the credibility of the police investigation. Since the case came down to either Appellant or Gary as the actual murderer, it was necessary to illustrate how the police "missed the boat" by focusing in on Appellant rather than the other logical suspect, Gary Sochor.

Furthermore, the references to other prior sexual attacks and Appellant's uncontrollable sexual urges when he drinks was relevant for both guilt and penalty phase defenses. Defense witnesses Dr. Zager and Dr. Livingston testified to Appellant's sexual inadequacies which were exacerbated when drinking (R. 650,657,658,687,705). Since the evidence indicated that Appellant was sane at the time of the crime, the defense was that he couldn't control himself that night due to his prior problems and alcohol abuse. The defense was one of voluntary intoxication (R. 934-935). To establish that Appellant was somehow less responsible for his actions it was necessary to identify his past sexual inadequacies and alcohol abuse. This evidence of mitigation was relevant and not used to show Appellant's bad character. Bryan, supra.

The remaining challenged remarks concerning Appellant's statements to Paul Jones and Michael Hickey were obviously relevant, admissible, inculpatory statements and not evidence of prior pad acts. They were properly admitted under either Section 90.803(18), Florida Statutes; Moore v. State, 530 So.2d 61 (Fla. 1st DCA 1988) or §90.804(2)(c); Hampton v. State, 308 So.2d 560 (Fla. 3rd DCA 1975), cert. denied, 317 So.2d 78 (Fla. 1975).

6. Perjured Testimony

Appellant alleges that the State relied on perjured testimony concerning a State's witness' alleged favorable treatment in another case. Before discussing the merits, Appellee asserts that this is totally irrelevant to the facts of the case sub judice. Mr. Hickey testified in this case and did

not receive any favorable treatment for that testimony (R. 583, 587). Whatever deal he may have made in a totally unrelated case has no bearing on this case. McCleskey v. Kemp, 753 F.2d 877, 884 affirmed on other grounds 481 U.S. 279 (1987).

Mr. Hickey stated he was not given favorable treatment to testify in the prosecution of Michael Keen (R. 588). Appellant has not rebutted this statement. Mr. Dimitrioleas, the persecutor in the Keen case, did not promise Hickey anything (AB pg.52). He anticipated that he might. Herman v. State, 396 So.2d 220 (Fla. 1981). Appellant has not shown that Hickey did in fact get favorable treatment from his participation in the Keen case.

On cross-exam, Appellant's attorney attacked Mr. Hickey's credibility by pointing out he used various aliases, that he had been in and out of prison for the past seven years, and that he had five prior felonies (R. 584-586). The fact that one was for a violent felony, and Hickey testified otherwise, can in no way be considered harmful error given the effective cross of Hickey. Aldrige v. State, 503 So.2d 1257 (Fla. 1987).

In summation, Hickey's involvement in the Keen case is totally irrelevant to this case. As such Napu v. Illinois, 360 U.S 264 (Fla. 1959) is distinguishable. In that case the defendant's codefendant testified in exchange for leniency. Hickey was not promised any favorable treatment nor was his testimony the basis of the State's evidence against Appellant. Napu v. Illinois, U.S. 360 at 266. Any inconsistency in Hickey's testimony is at best harmless error. Aldridge, supra.

C. JURY INSTRUCTIONS

1. Kidnapping and Felony Murder

a. Voluntary Intoxication

Appellant claims that fundamental error occurred due to the trial court's instruction concerning voluntary intoxication and its applicability to kidnapping. (R. 434-435). Appellee submits that this issue is not properly before this Court as their was no request for an instruction on voluntary intoxication applicable to kidnapping, nor was there an objection to the charge actually given (R. 818-829, 935) Jones v. State, 411 So.2d 165 (Fla. 1982); Foster v. State, 436 So.2d 56 (Fla. 1983); Castor v. State, 365 So.2d 701 (Fla. 1978). Appellant must demonstrate fundamental error to overcome this procedural default. Such a rule is aimed at preventing criminal defense attorneys from silently permitting the unwitting commission of known errors by trial judges, only to raise such on appeal in the event the defendant is not acquitted. State v. Jones, 204 So.2d 515, 518 (Fla. 1967). This unpreserved error should not be regarded as fundamental such that it could be reached on appeal absent proper preservation insofar as it definitely would not "reach... down into the very legality of the trial itself to the extent that a verdict could not have been obtained without its assistance." State v. Smith, 240 So.2d 807, 810 (Fla. 1970) quoting Gibson v. State, 194 So.2d 19 (Fla. 2nd DCA 1967).

In the instant case the jury was instructed on the defense of voluntary intoxication as applicable to first degree murder (R. 434-435). Obviously the jury did not find that

defense persuasive as Appellant was convicted of first degree murder (R. 944). Logic dictates that a similar instruction with respect to kidnapping would also not have been accepted by the jury; consequently Appellant cannot demonstrate fundamental error. State v. Smith, 240 So.2d at 810. Further articulation by this Court as to what constitutes fundamental error is illustrated in Knight v. State, 394 So.2d 997, 1002 (Fla. 1981). In Knight there was an insufficient instruction on the elements of an underlying felony of kidnapping and robbery. There was no request or objection to these instructions. This Court refused to consider the merits since there was sufficient evidence to establish premeditation, as such no prejudice existed. Id. at 1002.

In the case sub judice there was sufficient evidence of premeditated murder [See pages 7-9 of this brief], as well as sufficient evidence of felony murder with sexual battery as the underlying felony (R. 923, 826-827). [See pages 10-11] No special verdict form was requested, nor was Appellant entitled to one. Brown v. State, 473 So.2d 1265 (Fla. 1985); Buford v. State, 492 So.2d 355 (Fla. 1986). Appellant cannot demonstrate the existence of fundamental error to overcome his procedural default. Knight; Smith; Buford v. State, 492 So.2d at 359.

b. Kidnapping to Inflict Bodily Harm or Terrorism

Appellant claims that the trial court erred in its instruction to the jury on kidnapping. The information charged kidnapping under §787.01 (1)(a)(2), Florida Statutes. (R. 1143) The instruction however encompasses §787.01(1)(A)(2) and (3) (R.

928). Appellee submits that this issue has not been preserved for appeal as no objection was made at trial. Appellant must demonstrate that fundamental error has occurred to overcome his procedural default. Jones v. State, 411 So.2d 165 (1982); Castor v. State, 365 So.2d 701 (Fla. 1978).

In the case sub judice there is no showing that without the faulty instruction the verdict could not have been obtained State v. Smith, 240 So.2d at 810. There was ample evidence that Appellant's intent was to commit a sexual battery upon Ms. Gifford (See page 10-11 of this brief). All the evidence presented and argument made by the prosecutor demonstrated that the State was relying on that single theory (R. 833-834), 854) Appellant's argument that the jury may convict him under §787.01(1)(a)(3) is mere speculation without any record support. Washington v. State, 432 So.2d 44, 47-48 (Fla. 1983).

Similarly without merit is Appellant's claim that the trial court did not define the word terrorize. There was no request for such a definition nor an objection when one was not provided, consequently, this is not preserved for appeal. Castor, supra. In any event, the trial court is not required to "define words that are understandable to persons possessed of the qualification required of jurors. Wester v. State, 193 So.2d 303 (Fla. 1940).

C. Statute of Limitations

Appellant claims that the statute of limitations had expired for the kidnapping count since he was not indicted on that charge for four and one half years. He further alleges that

not only does the statute of limitation preclude of a conviction for kidnapping, but it also acts as a bar to the murder conviction. Appellant is mistaken on all counts.

Section 775.15(1), Florida Statutes states that a capital crime is not subject to the statute of limitations. Similarly the period of limitation does not run if the defendant is continuously absent from the state §775.15(6). Appellant fled the area once he saw his picture in the paper (R. 478-479). He was arrested in Georgia in May of 1986 (R. 456). Appellant's fleeing from the jurisdiction tolls the statute of limitations on the kidnapping charge for an additional three years. He was indicted well within that time (R. 1143). Furthermore, even if this Court determines that the statute had run on the underlying felony, it in no way effects the conviction for felony murder Jackson v. State, 513 So.2d 1093 (Fla. 1st DCA 1987).

2. Non-Death Lessers

Appellant claims that the trial court erred when it did not give instructions various non death lessers. The trial court did instruct on sexual battery, kidnapping and attempted sexual battery (R. 923, 924, 928-929). No instruction was requested for attempted first degree murder or aggravated battery (R. 824); neither are category one offenses to the offense charged. In any event, neither was applicable to the evidence presented. There was no evidence that Appellant attempted to kill Ms. Gifford and then abandoned his intent. He himself confessed to choking her to death. Henry v. State, 445 So.2d 707 (Fla. 4th DCA 1984). Likewise there was no evidence to support a jury instruction for

aggravated battery since there was no issue concerning who actually administered the fatal blow. Drotan v. State, 433 So.2d 1005 (Fla. 3rd DCA 1983).

3. Homicide Instructions

a. Theories not Supported by the Evidence

The Jury was properly instructed that Appellant killed Ms. Gifford either through a premeditated design or during the commission of or an attempt to commit a kidnapping/sexual battery (R. 920-930). The jury was instructed that in order to convict under felony murder, the killing must have occurred either during the commission of or attempt to commit a kidnapping or sexual battery (R. 923). The jury was also instructed that in order to be convicted of kidnapping Appellant must have confined or abducted Ms. Gifford with the intent to commit a sexual battery (R. 928-929). None of these instructions were objected to. The evidence clearly supports the instruction for murder, sexual battery and kidnapping as articulated in an earlier section of this brief. The actual sexual battery need not be committed for purposes of felony murder Gurganus v. State, 451 So.2d 817 (Fla. 1984). All that is required is the intent to commit the underlying felony. Gurganus v. State, 451 So.2d at 822.

b. Excusable Homicide and Manslaughter

Relying on Kingery v. State, 523 So.2d 1199 (Fla. 1st DCA 1988), Appellant claims that the trial court erred in its instruction on excusable homicide and manslaughter. (R. 921-922). Appellee submits that this has not been preserved for appeal as

no objection was made to the instruction given. Squires v. State, 450 So.2d 208, 211 (Fla.), cert. denied 469 U.S. 892 (1984); Banda v. State, 536 So.2d 221, 223 (Fla. 1988). In any event, Appellant's reliance on Kingery is misplaced as the issue there involved whether or not the jury instruction improperly suggested that excusable homicide is unavailable if a dangerous weapon was used Id. at 1205-1206. In the instant case there was no dangerous weapon used to kill Ms. Gifford, consequently the concern presented in Kingery is totally irrelevant.

c. Third Degree Murder

Appellant claims that the trial court improperly instructed the jury on third degree murder by failing to charge which underlying felony was applicable. This issue is not preserved for appeal as no request for any particular underlying felony was made, nor was their an objection to the charge actually given (R. 925,824). Squires, supra.

Appellant was charged and convicted of first degree murder. Third degree murder is a category two offense to first degree murder; consequently any error would be harmless. State v. Abreau, 363 So.2d 1063 (Fla. 1978); Rojas v. State, 14 F.L.W. 577 f.n.1 (Fla. November 22, 1989); Perry v. State, 522 So.2d 817, 819 (Fla. 1988).

It appears Appellant is arguing that false imprisonment and aggravated battery were the applicable underlying felonies of third degree murder. False imprisonment was defined (R. 930), and as stated elsewhere, aggravated battery is not applicable to the facts of the instant case. Drotan v. State, 433 So.2d 1005 (Fla. 3rd DCA 1983).

D. OTHER GUILT ISSUES

1. Kidnapping

a. Statute of Limitations

This issue has been discussed on pages 23-24 of this brief.

b. Amending the indictment

This issue was not preserved, and is deemed waived as no objection was made at the proper time. Williams v. State, 547 So.2d 710 (Fla. 2d DCA 1989). Appellee could rely on the argument already presented at pages 22-23 of this brief.

2. Murder

a. Statute of Limitations for Underlying Felonies

This issue has been addressed in an earlier section of this brief (page 23-24). Briefly to reiterate, even if the underlying felonies are barred due to the statute of limitations, this in no way affects the murder conviction. Jackson, 513 So.2d 1093 (Fla. 1st DCA 1987).

b. Alternative Theories of First Degree Murder

There was sufficient evidence to sustain a conviction of felony murder with attempted sexual battery or kidnapping as the underlying felony. [See pagesd 9-11 of this brief.]

Jury Unanimity

As conceded by Appellant, this Court has held contrary to his position. Special verdict forms are not required to determine under which theory a murder conviction has been sustained. Brown v. State, 473 So.2d 1260 (Fla. 1985); Buford v. State, 492 So.2d 355 (Fla. 1986).

Lastly, Appellant claims that the State failed to charge felony murder, hence he was unfairly prejudiced in preparing his defense. This issue has not been preserved for appeal as no objection was made to any of the jury instructions or to the indictment. Williams, supra, Castor, supra. As conceded by Appellant, this Court has explicitly rejected such a claim. Knight v. State, 338 So.2d 201 (Fla. 1976). Appellant's argument is not made more compelling by relying on Givens v. Housewright, 786 F.2d 1380, 1381 (9th Cir. 1986).

II. PENALTY ISSUES CLAIMS

A. Presentation and Argument of Nonstatutory Aggravating Circumstances.

1. Victim Impact Information

Appellant claims that the prosecutor relied on improper victim impact evidence in violation of Booth v. Maryland, 482 U.S. 496 (1987). This issue is not properly before this Court since no objection was made to any of these challenged remarks. Jackson v. Dugger, 547 So.2d 1197, 1199 (1989). Parker v. Dugger, 550 So.2d 459, 460 (Fla. 1989). In any event, the statements complained of do not amount to improper victim impact evidence as they have been taken out of context. The prosecutor's remarks made during closing argument at the penalty phase were made in reference to the aggravating factor of heinous atrocious and cruel (R. 1082). During opening argument the prosecutor made reference to Ms. Gifford's familial relationship in order to establish that, even though no body was found, she was in fact deceased (R. 25, 30-31, 106).

None of the challenged remarks were of the character and magnitude of those complained of in Booth. There was no attempt to compare the worth of the victim to that of the Appellant or other victims as in Booth, 482 U.S. at 506-508. Nor was there any testimony from Ms. Gifford's family articulating their grief or their perception of the crime Id. Any statements made were relevant and reflected very minimal victim impact Duest v. Dugger, 15 F.L.W. 41 (Fla. January 18, 1990).

2. Lack of Remorse

Appellant claims that certain statements made by the prosecutor during various stages of the trial amounted to impermissible aggravating factors. None of the remarks were even objected to therefore they are not properly before this Court. Clark v. State, 363 So.2d 331 (Fla. 1978).

To the extent that the prosecutor's remarks can be inferred as "lack of remorse", this Court has characterized such evidence as redundant and unnecessary when arguing the existence of especially heinous, atrocious and cruel. Pope v. State, 441 So.2d 1073, 1078 (Fla. 1983). This Court further stated that in an extreme case this may result in resentencing. In the instant case there was sufficient evidence of this aggravating factor absent any thought of Appellant's remorse. Id. at 1078; Phillips v. State, 476 So.2d 194, 196-197 (Fla. 1985); Doyle v. State, 460 So.2d 353, 357 (Fla. 1984). (See Appellee's argument at page 35)

3. Prior Criminal on Anti-Social Behavior

Appellant claims that the State presented impermissible evidence concerning prior bad acts committed during his marriage

to Patricia Neal. None of the testimony was objected to, consequently it is not properly preserved. German v. State, 379 So.2d 1013, 1014 (Fla. 4th DCA 1980).

In any event, Mrs. Neal's testimony was not elicited to portray Appellant's bad character, but to rebut his defense of voluntary intoxication. Appellant claimed that he became violent during sexual encounters because of his drinking. Mrs. Neal's testimony was a rebuttal to that defense, and therefore relevant Bryan v. State, 533 So.2d 744, 746 (Fla. 1988); Muehleman v. State, 503 So.2d 310, 316 (Fla. 1987) (R. 954-955, 1085-86) Much of the testimony was elicited by defense counsel (R. 957,958,960,961). Consequently, Appellant cannot now claim error. Clark v. State, 363 So.2d 331, 334 (Fla. 1978)

During the penalty phase the jury heard a tape recording of Appellant's confession (R. 977-985). Appellant, relying on Rhodes v. State, 547 So.2d 1201 (Fla. 1989), claims that such evidence was inadmissible hearsay. Appellant's claim is both procedurally and substantively without merit as no objection was made at trial. Clark. In Rhodes the victim's account of her traumatic experience was played for the jury. In the instant case Appellant's inculpatory statements were heard by the jury. His statement against interest was admissible. Sections 90.803(18) and 90.804(2)(c), Florida Statutes.

Appellant's statement and Captain Schelein's testimony were relevant to illustrate the inapplicability of the mitigating factor of no significant history of prior criminal activity. (R. 1083-1084). Appellant never expressly waived this factor.

Muehleman v. State, 503 So.2d at 315; Maggard v. State, 399 So.2d 973 (Fla.), cert. denied 454 U.S. 1059 (1981). In any event any error must be considered harmless for the following reasons: 1) The negative impact attached to the Michigan rape was not so prejudicial as the jury was already aware of Appellant's past sexual behavior through his prior rape conviction in Fort Lauderdale. At best this other testimony was cumulative. 2) Also and more importantly Appellant's prior sexual batteries all involved alcohol and his uncontrollable sexual urges (R. 986). This testimony corroborated Appellant's defense (R. 1099-1100).

The prosecutor's statement concerning Appellant's resistance to help was used to rebut Appellant's mitigating evidence concerning his deprived childhood (R. 1088). No objection was made to any one of these statements, therefore this claim is unpreserved. Jones, supra. Appellant's parents tried to take responsibility for their son's actions (R. 1086). The prosecutor was simply commenting on Appellant's own responsibility (R. 1088). This is especially relevant considering the defense attorney's argument that the system failed Appellant since he didn't receive the help he needed for his psychological problems (R. 1095-1096).

4. Other Improper Argument

Lastly, the prosecutor's unobjected to statement concerning the appropriateness of the death penalty has been challenged. As stated by this Court on numerous occasions, prosecutorial error does not warrant reversal unless the error is so egregious that it could never be considered harmless Rhodes v.

State, 547 So.2d at 1203. The prosecutor's statement was proper argument concerning the jury's duty to weigh the evidence. Bertolotti v. State, 476 So.2d 130, 134 (Fla. 1985). In light of the overwhelming evidence in favor of aggravation weighed against little mitigation, along with the fact that there was no proper objection, any error is harmless Bertolotti v. State, 476 So.2d at 133; Jones, supra.

B. JURY INSTRUCTIONS

1. Aggravating Circumstances

a. Felony Murder

Appellant complains that the jury instruction applicable to the aggravating circumstance involving felony murder was insufficient. This issue has not been preserved for appeal as no objection was made at trial. Vaught v. State, 410 So.2d 147, 150 (Fla. 1982).

In any event, the jury had been previously instructed as to the elements of sexual battery and kidnapping (R. 923,928-929). There was no error in not instructing that this aggravating circumstance is only applicable for premeditated murder. White v. State, 403 So.2d 331, 336 (Fla. 1981).

b. Heinous Atrocious and Cruel

Appellant's amorphous attack on this instruction was not objected to and is therefore barred from review. Vaught, supra. In any event the instruction was proper and is constitutional. Dobbert v. State, 409 So.2d 2d 1053, 1058 (Fla. 1982); Proffitt v. Florida, 428 U.S. 242 (1976). Smalley v. State, 546 So.2d 720, 722 (Fla. 1989).

c. Cold Calculated and Premeditated

Appellant's attack on the instruction of cold calculated and premeditated factors is also not preserved for appeal Vaught, supra. However, the instruction was proper. Hamblen v. State, 527 So.2d 800, 805 (Fla. 1988).

2. Mitigating Circumstances

a. Nonstatutory Mitigating Evidence

Appellant's challenge to the jury instruction on nonstatutory mitigating evidence is not properly before this Court to as no objection was made at trial. Vaught, supra. In any event, Florida's standard jury instruction is in keeping with constitutional principles. Jackson v. State, 530 So.2d 269, 273 (Fla. 1988).

b. Other Mitigating Circumstances

Appellant attacks the constitutionality of the jury instruction on statutory mitigating circumstances. This claim is procedurally barred as it is not preserved. Vaught, supra. Furthermore, this claim lacks merit Lemon v. State, 456 So.2d 885 (1984) cert. denied 105 S.Ct. 1233.

c. Burden and Standard or Proof

Appellant's attack on the jury instructions concerning the existence of mitigating circumstances included the following:

> Among the mitigating circumstances you may consider if established by the evidence, are:

(R. 1113).

There was no proper objection to the trial court's instruction; consequently this issue is procedurally barred.

Vaught, supra. In any event, there is no merit to Appellant's claim that there was any restriction on consideration of relevant mitigating evidence. Lockett v. Ohio, 438 U.S. 586 (1978).

3. Presumption of Death

This issue is not preserved for appeal Vaught, supra. The trial court's instruction properly set forth Florida's sentencing scheme with respect to the balancing of aggravating and mitigating factors (R. 1113). No improper burden shifting can be attributed to this instruction. Proffitt v. Florida, 428 U.S. 242, 248-251 (1976); Bertolotti v. Dugger, 883 F.2d 1503, 1525 (1989).

C. JURY'S ROLE

Appellant claims that the jury was improperly instructed on the nature of their role in the sentencing scheme in violation of Caldwell v. Mississippi, 472 U.S. 320 (1985). This issue was not preserved for appeal, and is therefore procedurally barred. Vaught, supra. In any event, this Court has consistently held this claim to be inapplicable in Florida. Combs v. State, 533 So.2d 287 (Fla. 1988); Grossman v. State, 525 So.2d 833, 839 (Fla. 1988). The jury was properly instructed as to their role in determining Appellant's sentence. (R. 1111); Carter v. State, 14 FLW 525 (Fla. October 19, 1989).

D. AGGRAVATING AND MITIGATING CIRCUMSTANCES

1. Felony Murder

Appellant repeats an earlier claim that there was insufficient evidence of kidnapping. Appellee will rely on earlier argument presented in this brief on that issue. [See

pages 9-10] See also, Robinson v. State, 462 So.2d 471 (Fla. 1st DCA 1985).

Similarly, Appellant again attacks the sufficiency of the evidence used to establish attempted sexual battery. Appellee relies on earlier argument and supplements with the following information: the attempted sexual battery was based, on not only on Appellant's statement but that of his brother Gary Sochor as well. Gary testified that the victim struggled with Appellant and pleaded for help while Appellant lay on top of her (R. 317). Appellant had three scratch marks on his face the next morning. (R. 326) This is sufficient evidence of attempted sexual battery. Tompkins v. State, 502 So.2d 415, 420 (Fla. 1987).

2. Heinous Atrocious or Cruel

Appellee asserts that there was sufficient evidence of the aggravating factor of heinous, atrocious or cruel. Ms. Gifford struggled to fight off Appellant while resisting his sexual advances. (R. 317,499,500). This angered Appellant, so he choked her (R. 500). She screamed for help during the struggle and begged for her life (R. 317,377). Dr. Wright, the medical examiner, testified that death by strangulation is a slow death (R. 968). When the victim resists and struggles, unconsciousness takes longer to achieve (R. 974). The absolute minimum amount of time required for unconsciousness is thirteen seconds; however when there's a struggle, it's much longer (R. 973,974). There is evidence to support the fact that Ms. Gifford screamed for help and for her life and struggled during the attack and murder (R. 317,377,499,500). This is sufficient evidence to establish that

she was aware of her impending demise and therefore established that this murder was heinous atrocious and cruel. Lemon v. State, 456 So.2d 885, 887 (Fla. 1984); Simmons v. State, 419 So.2d 316, 318 (Fla. 1982).

3. Cold, Calculated and Premeditated

Appellant challenges the sufficiency of the evidence used to establish that this murder was cold, calculated and premeditated. Appellant claim that there was evidence of a pretense of moral or legal justification which negates this aggravating circumstance. Appellant further claims that the killing was done in a fit of anger and panic.

Appellee submits that there was sufficient evidence to sustain this aggravating factor. Contrary to Appellant's assertions in another section of his brief there is absolutely no showing that a pretense of moral or legal justification existed. (See Appellee's argument pg 7-8). The victim was tricked into getting into the truck under the pretense that there were going to eat. Rather than going to eat, Appellant drove to a secluded area. Whether she the victim was dragged from the car or not there's no question that she always resisted. Appellant strangled the victim as she plead for help. Her struggle prolonged the amount of time necessary to kill her. Appellant had ample time to reflect upon his actions. Jackson v. State, 522 So.2d 802 (Fla. 1988); Koon v. State, 513 So.2d 1253, 1257 (Fla. 1987).

This was not a spontaneous act done without reflection as in Hamblen v. State, 527 So.2d 860 (Fla. 1988). Nor was there

of a pretense of moral or legal justification. Banda v. State, 536 So.2d 221, 225 (Fla. 1988).

Given the manner of the killing, the transportation of the victim to a secluded place and her removal from the truck are sufficient to establish a cold, calculated and premeditated design. Hamblen, supra; Rutherford v. State, 545 So.2d 853 (Fla. 1989).

Appellant's claim that this aggravating factor is unconstitutionally vague is also without merit as this Court has restricted the applicability of this claim to heightened premeditation and calculation. Hamblen, 527 So.2d at 805. The narrowing construction of this factor by this Court is what insures that the death sentence will not be applied in a discriminatory manner. Smalley v. State, 546 So.2d 720, 722 (Fla. 1989).

2. Statutory Mental Mitigating Circumstances

Appellant claims there was sufficient evidence of the statutory mitigating factors; §921.141(6)(b)and (f). He claim that the trial court and prosecutor used the wrong standard in determining that mental mitigation was not present. Appellee asserts that even though sanity does not necessarily negate the existence of mental mitigating evidence their the trial court properly concluded their was insufficient evidence to establish those factors.

A decision as to whether a particular mitigating circumstances is proven rests with judge and jury. Lemon v. State, 456 So.2d 885 (Fla. 1984). Just because Appellant draws a

A decision as to whether a particular mitigating circumstances is proven rests with judge and jury. Lemon v. State, 456 So.2d 885 (Fla. 1984). Just because Appellant draws a different conclusion does not warrant reversal. Cook v. State, 542 So.2d 764 (Fla. 1989).

In his sentencing order the trial court determined that there was insufficient evidence to establish that Appellant's ability to appreciate the criminality of his conduct or to conform his conduct to the requirement of law was substantially impaired. (R. 1234-1235). The Appellant claimed that he was under extreme mental emotional disturbance based on his environment (R. 1099). He further stated that he was unable to appreciate the criminality of his conduct or conform his conduct the requirements of law due to the influence of alcohol (R. 1100-1101). The trial court found evidence to rebut that. There was evidence from other witnesses that Appellant was not drunk (R. 59,89). Dr. Zager testified that even if drunk on the night of the murder Apellant would know that what he was doing was wrong (R. 688). Dr. Livingston was unable to determine if Appellant was intoxicated at the time of the crime (R. 739). Appellant admitted to other's that he in fact did kill Ms. Gifford on the night in question. Dr. Livingston further found evidence that Appellant was not truthful during the testing (R. 718, 734). If Appellant was able to give a detailed account of tht night this would negate his claim of an alcoholic blackout (R. 736). Appellant did give details of the murder (R. 580,579,564-566). Dr. Costillio stated that Appellant had

selective amnesia concerning the details of that night. Appellant was not so drunk that evening that he couldn't drive (R. 315). Appellant's ex-wife testified that Appellant had a violent temper during sexual encounters. Most of these occured when he was sober (R. 955). There was sufficient evidence to sustain the trial court's finding that there was insufficient evidence of statutory mitigation. Hall v. State, 403 So.2d 1321 (Fla. 1981); Simmons v. State, 419 So.2d 316 (Fla. 1982); Cooper v. State, 492 So.2d 1059 (Fla. 1986); Thompson v. State, 14 FLW 527 (Fla. October 19, 1989); Kokal v. State, 492 So.2d 1317, 1318 (Fla. 1986).

5. Nonstatutory Mitigating Circumstances

Appellant claims that the trial court erred in giving little or no weight to the nonstatutory evidence presented. Appellant claims that his alcohol consumption that evening, his long term use of alcohol, his abused childhood, his emotional and mental instability and the heat of passion that controlled him the night of the murder is sufficient nonstatutory mitigation which outweigh the aggravating factors.

As stated by this court on numerous occasions disagreement or complaints about the weight accorded the evidence by the trial court is not a sufficient basis for challenging a sentence. Echols v. State, 484 So.2d 568 (Fla.) cert. denied 479 U.S. 871 (1985) citing to Porter v. State, 429 So.2d 293 (Fla.) cert. denied 464 U.S. 865 (1983). The trial court has broad discretion in determining the applicability of mitigating evidence. Knight v. State, 512 So.2d 922 (Fla. 1987).

The trial court's instructions to the jury in conjunction with the sentencing order indicate that the judge followed his own instructions to the jury and considered all the evidence presented at both phases of the trial. (R. 1112-1116). Johnson v. Dugger, 520 So.2d 565, 566 (Fla. 1988); Jackson v. State, 530 So.2d 269, 273 (Fla. 1988).

Furthermore, there was no objection to any of the instructions consequently this issue is not preserved for appeal. Vaught, supra.

The Appellant's use of alcohol that evening has already been discussed elsewhere in this brief. (See Appellee's brief pg. 38-39) To briefly reiterate there was evidence to rebut Appellant's claim of alcohol abuse and the jury already rejected his voluntary intoxication defense at the guilt phase. There was also evidence that Appellant's violent behavior was exhibited without the influence of alcohol. (R. 955,1235).

Appellant's reliance on heat of passion has also been addressed elsewhere in this brief.(See Appellee's argument at page 7-8) Appellant's reliance or Ross v. State, 474 So.2d 1170, 1174 (Fla. 1985) is of no consequence as that killing involved an angry domestic dispute between husband and wife. The wife [the victim] knew of her husbands uncontrollable rage. The facts of this case are distinguishable.

Lastly, Appellant's long term alcohol abuse and mental instability are weak mitigation compared to the aggravating circumstances. Knight v. State, 512 So.2d at 933; Kokal, supra.

E. PROPORTIONALITY

Appellant again claims there was sufficient nonstatutory mitigating evidence present to sustain a life sentence. All of Appellant's mitigating evidence is rebutted by other evidence. Although Appellant told the police he was very drunk that night he told other witnesses that he killed the slut bitch (R. 579). He told another witness that he choked a girl, hide her body in a drainage pipe, and that he'd do it again (R. 564-566). He also told a witness that he got rid of all the evidence (R. 565). This clearly rebuts his claim of an alcohol blackout. Kokal, supra.

Likewise, the "mental illness" which contributed to this incident was not sufficiently established. At best Appellant's mental health experts testified tht Appellant has a history of alcohol abuse. One expert could not even confirm if Appellant was intoxicated the night of the crime (R. 720). The weakness of the mitigating evidence in the case sub judice distinguishes this case from Fitzpatrick v. State, 527 So.2d 809, 811-812 (Fla. 1988). Given the strength of the aggravating factors of §921.141(5)(b), (d),(h) and (i) balanced against no statutory mitigating evidence and very little nonstatutory mitigating evidence the sentence imposed was proper. (R. 1231-1236). Knight, supra; Hill, supra; Songer v. Wainwright, 571 F.Supp. 1384 (1983) affirmed 733 F.2d 7788 rehearing denied 738 F.2d 451; Armstrong v. State, 429 So.2d 287 (1983) cert. denied 104 S.Ct 203.

F. CONSTITUTIONALITY OF THE FLORIDA DEATH PENALTY STATUTE

1. The Jury

Appellant's constitutional attack on the jury instructions for heinous, atrocious or cruel, cold, calculated and premeditated; and nonstatutory mitigating evidence has been addressed elsewhere in this brief and will not be repeated here. None of the instructions were objected to at trial therefore this issue is not proper before this court Vaught, supra.

2. Counsel

Appellant's complaint against trial counsel in capital cases in general is irrelevant to the case sub judice. Any claim of ineffective assistance of counsel in this case must follow the standard set in Strickland v. Washington, 466 U.S. 668 (1984) and should not be raised on direct appeal.

3. The Trial Judges

Likewise, Appellant's complaint against trial judges in general is irrelevant to the case sub judice.

4. Appellate Review

Florida's death penalty statute is constitutional. Mendez v. State, 419 So.2d 312 (1980); Thomas v. State, 456 So.2d 454 (1984); This Court appreciates it's role in ensuring nonarbitrary and noncapricious results. Smalley v. State, 546 So.2d 720, 722 (Fla. 1989).

Florida's contemporaneous objection rule and its application in death cases is both valid and legitimate. Dugger v. Adams, 489 U.S. _____, 103 L.Ed. 2d 435 (1989).

5. Other Problems With the Statute

a. Lack of Special Verdicts

This claim is totally without merit and as conceded by Appellant has been adversely decided Hildwin v. Florida, 109 S.Ct 2055 (1989).

b. No Power to Mitigate

Florida's sentencing scheme provides substantial safeguards to ensure that a death sentence is imposed in only these cases which warrant it. Proffitt v. Florida, 428 U.S. 242 (1976); Smalley, supra.

c. Presumption of Death

This issue has been addressed in an earlier section of this brief. (See Appellee's brief page 28).

G. THE KIDNAPPING SENTENCE

Appellant states that he cannot be sentenced for the underlying felon of kidnapping based on State v. Hegstrom, 401 So.2d 1343 (Fla. 1981). Hegstrom, supra has been overruled in State v. Enmund, 476 So.2d 1165 (Fla. 1985).

CONCLUSION

WHEREFORE, based on the foregoing authorities and facts Appellee respectfully requests tht this Court AFFIRM both the conviction and sentence imposed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Anser Brief of Appellee" has been forwarded by Courier to: GARY CALDWELL, Assistant Public Defender, 15th Judicial Circuit of Florida, The Governmental Center/9th Floor, 301 North Olive Avenue, West Palm Beach, Florida 33401, this 20th day of February, 1990.

Of Counsel