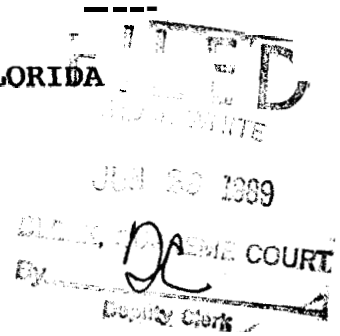
IN THE SUPREME COURT OF FLORIDA



ALPHONSO GREEN,

Appellant,

v. CASE NO. 71,540

STATE OF FLORIDA,

Appellee.

_____/

APPEAL FROM THE CIRCUIT COURT
OF THE THIRTEENTH JUDICIAL CIRCUIT
IN AND FOR HILLSBOROUGH COUNTY

BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

The symbol "R" will denote the record on appeal which consists of twenty volumes.

Alphonso Green will be referred to as appellant or by his given name while the State of Florida will be referred to as appellee or the State.

STATEMENT OF THE CASE AND FACTS

Appellee offers the following to supplement appellant's statement of the case and facts.

A. JURY SELECTION

On August 25, 1987 jury selection was started. (R. 19). During the conference on jury selection, it was noted by the defense that the jury venire was composed of thirteen blacks out of sixty individuals. (R. 327). Additionally, the defense counsel noticed that there was only one black man on the panel and he objected to that person being stricken. (R. 327). The trial judge noted that according to Neil, there is cause on the one black man on the panel. (R. 327).

The trial judge announced he would read the prospective jurors the names of possible witnesses in the case (R 93). The possible witnesses included state and defense witnesses (R 92).

Mr. Klein, juror no. 21, a white man, stated he knew John Fairbanks and Art Perry, Sr., both potential witnesses in the case. (R. 95). Mr. Klein also stated he knew two other possible witnesses, Dr. John Feegel and attorney Mike Foster. (R. 98). He stated his acquaintance with these witnesses would not affect him. (R. 98).

Mr. Richmond, juror no. 31, a white man, stated that he had met the potential witness Tony Cunningham on several occasions. (R. 44, 104). He further stated that his acquaintance would not

cause him to give greater or Lesser weight to Mr. Cunningham's testimony. (R. 104).

Juror no. 23, Ms. Wessie Brown, a black woman, stated she is single with one child 4 1/2 years old. She had been employed by General Telephone Company for 16 years as a general clerk. (R. 118-119; 312). Ms. Brown stated she believed that under appropriate circumstances she could recommend the death penalty be imposed. (R. 225). She stated she knew a Fred Sallye, Jr. and Dorothy Grooms (R. 105). Mr. Sallye was listed as a potential witness (R. 101). Ms. Brown stated that the acquaintance would not tend to make her give any greater or lesser weight to his testimony. (R. 105).

Deborah Rollins, juror no. 18, a black woman, stated that she did not feel she would want to serve on this particular jury because she was not sure if she was for or against the death penalty. (R. 221; 344). Ms. Rollins said she could see both sides of it but she didn't see the death penalty as a deterrent. (R. 221). She further stated that if this case did not involve the death penalty she would want. to sit as a juror. (R. 221-222). Ms. Rollins is a single person and has lived in Tampa for four years. (R. 222). She is a student at Hillsborough Community College. (R. 222).

The state attorney excused Deborah Rollins as a prospective juror. (R. 344). Defense counsel again made a Neil objection as

to Deborah Rollins' being excused. (R. 344). Defense counsel then noted that two other black females had been stricken for cause. (R. 344). The trial judge stated that he had found there was cause on those two. (R. 344). Mr. James, the State Attorney, argued that Ms. Rollins stated she was opposed to the death penalty and that she had stated it bothered her very much. She felt the death penalty had no deterrence. He also stated he observed that she had frequently fallen asleep during the course of the questioning. (R. 345). The trial court, however, disagreed that she had fallen asleep (R. 345). The trial court acknowledged that Ms. Rollins had made a comment about the death penalty and that was a valid reason for the state to excuse her on a preemptory challenge. (R. 347).

Mr. Page, the assistant state attorney, advised that Neil requires that (1) the challenged person be a member of a distinct racial group, and (2) that there is a strong likelihood that the person be challenged solely because of their race. (R. 345). The court noted that the state had only excused one black juror. (R. 346). Defense counsel noted that three blacks had been excused for cause, that being Ms. Williams, Ms. Wooden, and Ms. Coates. (R. 346).

The state next excused juror No. 23, Wessie Brown. (R. 348, 349). Defense counsel renewed his Neil objection. (R. 349). Defense counsel then stated there would be an all white jury. (R. 349).

Mr. Page noted that Ms. Brown had mentioned she knew Dorothy Grooms and Fred Sallye, Jr., two potential witnesses and that she also did not follow directions in her juror questionnaire. (R. 349-351). The trial court noted that as a matter of fact, he did have difficulty reading her juror questionnaire because it looked like carbon. (R. 349-350). Mr. Page stated it looked like pencil to him and that is why he made the note that the form was incorrectly completed. (R. 350). The trial court stated Ms. Brown had signed both copies hut apparently utilized a carbon because it was difficult to read the white copy; he noted that he himself had said "My goodness, I can't read it". (R. 350). The court then concluded that, the questionnaire had been correctly filled out. (R. 350). Mr. Page stated he still wanted to excuse her. (R 350) Mr. James also noted that Ms. Brown had been employed by General Telephone Company for sixteen years in an entry level position all this tine, which indicates that she is at very best minimally qualified. (R. 350, 351). Mr. James was further concerned that she probably would have a great deal of difficulty following court instructions and following the evidence. (R. 351). Ms. Brown acknowledged knowing Frederick Sallye, a character witness fur the defendant for the penalty phase of the trial; Ms. Grooms was not going to be called as a witness. (R. 352). The trial judge then noted that he could see where the state could have some concerns since Ms. Brown

indicated that she knows this witness. (R. 352). For that reason, the trial court did not feel Ms. Brown could be challenged for cause but did think it was proper for a preemptory challenge. (R. 352). The trial court found no legal Neil objection had been established and the objection was overruled. (R. 352).

After the jury had been selected, defense counsel objected to the composition of the jury and the strikes made. (R. 355). It was noted that no blacks were on the jury. (R. 356). The trial court noted that the state had utilized preemptory challenges and that he had heard reasons from the state and found the reasons to be valid and that they did not appear to be racially motivated. (R. 356). Defense counsel's objections were overruled. (R. 356).

B. GUILT PHASE

Appellant, Alphonso Green, was indicted by a grand jury in Hillsborough County for two counts of first degree murder in the deaths of Robert J. Nichols and Dora Virginia Nichols on October 10, 1986. (R. 2240).

Appellant's trial began August 25, 1987 and was concluded on September 16, 1987.

At trial, Detective Noblitt testified that on October 11, 1986 he arrived at the Nichols' home a little after midnight and that uniformed officers were already there. (R. 1145). Detective Noblitt spent approximately 6 to 8 hours in the Nichols'

residence during his investigation. (R. 1146). As he entered the entrance way of the home he observed blood smears on the wrought iron railing; he also observed that the door was not locked even though it had several locks on it. There did not appear to be a forced entry. (R. 1148). As the detective proceeded into the foyer-TV room area, he observed a pair of lady's eyeglasses and a peach colored lady's sleep cap. He also observed blood splattered on the south wall. (R. 1148). Detective Noblitt also saw a green button approximately eight inches inside the door and then he observed another button maybe 3 feet west of that first button. (R. 1148-1149). The second button appeared to be the same type as the first button. (R. 1149). Mrs. Nichols was found lying inside the front part of the house near the foyer-TV area. (R. 1153). Detective Noblitt also noticed a black cane and a blue and white woman's blouse lying near the couch. (R. 1151).

There was blood smeared throughout the house and outside the house on the walls, door facings, door handles, on the fence, and on the gate. (R. 1151-1155).

The detective then went to the back bedroom of the house; the door was closed. (R. 1161). As he looked inside the bedroom he found a green work shirt lying there. (R. 1161). The detective noticed the laundry markings on the inside of the green shirt. (R. 1161). Appellant later testified this green shirt was his and the buttons were not missing when he put on the shirt on

October 10, 1986 (R 1676-1677). The dresser drawers in the bedroom were pulled out approximately two to three inches. (R. 1162). Detective Noblitt observed a white man lying between the dresser and the bed. (R. J.162). He was approximately sixty to seventy years old and his head was partially covered with bed and mattress covers. (R. 1163). Some bed covers had been stuffed into the man's mouth and he was lying in the fetal position. (R. 1163). The victim had been stabbed and he had defense wounds on his hands. (R. 1163). This man was Mr. Nichols; after he was removed his hearing aid was found lying under where his head had been. (R. 1167-1168).

Under where Mrs. Nichols had been lying, her denture plate was found. (R. 1170). There were blood smears around Mrs. Nichols' biceps as if someone with bloody hands had touched her on both arms. (R. 1173).

Sergeant Pennington had video taped the residence crime scene. (R. 1175).

Detective Noblitt also testified that On October 11, 1986 the detectives spoke with Cassandra Jones at the Tampa Police Department at approximately 1:00 p.m. (R. 1176). Ms. Jones had been with the appellant in a boyfriend and girlfriend relationship for approximately four years and they were living together in a duplex they rented from the victims, Mr. and Mrs. Nichols. (R. 692). Ms. Jones had been picked up at the Hyatt in

downtown Tampa where she worked. (R. 1177). She was interviewed about. Mr. Green, the appellant, and she later assisted in the attempt to locate him. (R. 1177). Ms. Jones was interviewed approximately one and half hours (R. 1184).

On October 13, 1986 Ms. Jones was again picked up at the Hyatt. (R. 1184). The detectives took her to the duplex where she had lived with the appellant. (R. 1185). The duplex had been sealed on October 11, 1986. (R. 1185). They were looking for a butcher knife that was within that duplex. (R. 1185). Ms. Jones had signed a consent and waiver of search warrant form before going to the duplex on October 13, 1986. (R. 1186). The detective had Ms. Jones sign the form because through his investigation and interviews he had learned that a knife was missing from her kitchen on Friday night and he wanted to go back with her to be allowed into the duplex to see if the knife could be found (R. 1186). No objection was made to this testimony (R 1186). Knives and a butcher block were seized from the duplex. (R. 1189). One of the knives had a broken handle. (R. 1189). The detective did not take the knives on October 11, 1986 pursuant to the search warrant because at that time they had no reason to suspect the knives in the duplex. (R. 1191).

Detective Noblitt further testified without objection that through his investigation and interviews he had formed a reason to believe and had a suspicion that that knife had been utilized

in this crime. (R. 1191). When Detective Noblitt was asked what prompted him to get that butcher knife, he attempted to respond that Cassandra had identified that knife. (R. 1192). Defense counsel made a hearsay objection and that objection was sustained. (R. 1192). The court noted that it had made a ruling on hearsay and if the detective continued to tell the court what Ms. Jones had told him, then he would declare a mistrial if a motion was made for it. (R. 1192-1193). Defense counsel then made a motion for a mistrial and the state, in response to the motion, advised the court it was relying on case law. (R. 1193). The court sustained the hearsay objection but denied the motion for mistrial. (R. 1193).

On October 20, 1986, after receiving a telephone call from the Ft. Lauderdale Police Department, Detective Noblitt and Sergeant Price went to the Ft. Lauderdale Police Department. (R. 1193-1194). They saw appellant there. (R. 1194) They spoke with him at about 1:50 p.m. on October 20, 1986. (R. 1195). They had an arrest warrant for the appellant. (R. 1195). They talked with him regarding the events of October 10 and 11, 1986 and advised him of the reasons for them being there. (R. 1196). Appellant advised that he wanted to tell them something; the detective advised the appellant that they wanted him to wait until after Miranda. (R. 1196). Appellant asked about an attorney; the consent form was read to defendant and Miranda was explained. (R.

1197). Appellant advised that he had one year of college and he appeared to be sober; appellant acknowledged that he was sober. (R. 1197). Defendant also acknowledged he understood Miranda and he initialed and signed the consent form. (R. 1197).

The interview lasted approximately two hours and Detective Noblitt took hand written notes. (R. 1201). Appellant advised the detectives that on Friday, October 10, 1986 he requested an advance from his employer, Wes-Flo; he received an advance of $250.00 to pay his back rent to the Nichols. (R. 1202). He then went home and met with Cassandra and they went to the Nichols' home around 7:00 or 7:30 p.m.. (R. 1202). They paid the Nichols' and Mr. Nichols advised there would be no problem with the eviction. (R. 1202).

Appellant said he had told Cassandra that he was going with Ernie, a friend, to move appliances. (R. 1202). He and Ernie then went to buy $20 worth of cocaine and they smoked it. (R. 1202). They later went to the Honky-Tonk bar and bought another $20.00 worth of cocaine and smoked that. (R. 1202). They then went to the Highland Pines area and picked up two black women. (R. 1203). Appellant did not know who they were but they took the women to a house near Buffalo Avenue and 34th Street and they had a party smoking cocaine. (R. 1203). They then went back to Highland Pines and put the women out; appellant advised he also left Ernie at this location. (R. 1203).

Appellant stated he caught a ride with someone he did not know and he rode to the Boston Bar at 22nd Street and Columbus Drive. (R. 1203). Appellant advised he did not have much money with him then, only about $10.00 or $15.00. (R. 1203). He said he had earned $109.00 on Friday and most of that was gone. (R. 1203). Appellant then met up with Bobby whom he had not known very long. (R. 1203). Appellant advised he had met Bobby while he did temporary work with Tracy Labor. (R. 1204). Appellant described Bobby as about 5'10 inches, 160 pounds, with a short afro and a receding hair line with a mole on his left cheek (R. 1204). Bobby and appellant put their money together and bought a dime piece of cocaine and smoked it behind the Boston Bar. (R. 1204). They then decided they wanted more cocaine but they did not have any money. (R. 1204). Appellant knew where he could get a $250.00 check. (R. 1204). He and Bobby walked to the alley at the rear of appellant's duplex and Eohby waited in the alley. (R. 1204). Appellant went in the back door, pushing it in. (R. 1204). Cassandra was startled and yelled at him because he had pushed the door in (K. 1204). Appellant then went next door with Bobby and knocked on the door. (R. 1204). Mr. Nichols came to the door and he allowed both of them to step into the house. (R. 1204). Appellant asked for the check back but Mrs. Nichols did not want to give it back to him: then Bobby pulled out a knife and started stabbing Ms. Nichols. (R. 1204-1205). Mr. Nichols

ran back to the bedroom. (R. 1205). The knife was a large butcher knife. (R. 1205). They both then left the Nichols' and appellant advised he never saw Bobby again. (R. 1205). Detective Noblitt advised appellant that he did not believe that was the way it happened based upon his investigation; his investigation indicated only one person committed the offense. (R. 1205). Appellant said no, Bobby did it. (R. 1206). Appellant finally said there was no Bobby and admitted that he was by himself and started apologizing and declared that he could not believe what he had done (R. 1206). Appellant then said everything that he had said before was true except that there was no Bobby and that he had spent all his money on cocaine and he wanted more. (R. 1207).

Appellant then advised that when he came home earlier he had pushed the door in and Cassandra was yelling at him. (H. 1207). He further said he did have a shirt on when he came home but he threw the shirt in the dirty clothes and got a clean work shirt. (R. 1207). Appellant then said he had taken the largest butcher knife from the house and stuck it in the back of his pants under his shirt. (R. 1207). He then went next door to the Nichols. (R. 3207). Appellant said he knocked on the door and then went around the back and knocked on that door. (R. 1208). Mr. Nichols came to the door and allowed him in and he thought Mr. Nichols was going to give him the check back. (R. 1208). He said his

excuse for needing the check was that Cassandra had been arrested and that he needed the money to get her out of jail. (R. 1208). Mrs. Nichols then came out and she was adamant about not giving the check back and appellant said the next thing he knew Mrs. Nichols was on the floor, she had been stabbed, and was bleeding. (R. 1208). Appellant then stated that Mr. Nichols had gone to the back bedroom and he went back there also; he found Mr. Nichols trying to get out the back door. (R. 1208). The next thing he knew Mr. Nichols was on the floor, having been stabbed, bleeding, and moaning. (R. 1208). That is when appellant said he stuffed the covers in Mr. Nichols' mouth. (R. 1208). Appellant then replied he had blood on his hands *so* he took his shirt off and wiped his hands on it. (R. 1208). That work shirt was a green work shirt. (R. 1208). Appellant then stuck the shirt in his back pants pocket. (R. 1208).

Appellant said that as he started to go out the door he saw a neighbor, a white man, who lived next door and also rented from the Nichols. (R. 1209). Appellant jumped over a couple of fences and went into his backyard. (R. 1209). Appellant advised he went into his house, changed his clot-hes, went out the back alley, and walked west toward the Boston Ear. (R. 1209). While walking, he heard sirens and a helicopter overhead and he realized he had to leave. (R. 1209).

He subsequently hitched a ride to St. Petersburg for a day or so, then went to Bradenton and then Ft. Myers where he met with Cassandra's cousin. (H. 1209). Appellant said he told this cousin what he had done. (R. 1209). This was the first time he had been able to talk about what had occurred and he cried. (R. 3210).

Appellant then advised he hitched a ride to Ft. Lauderdale and met with his cousin and stayed there for one night. (R. 1210). On Sunday night he went to the Ft. Lauderdale Police and wanted to turn himself in. (R. 1210). Appellant did not feel right about turning himself in then and so he left and slept, underneath a tree approximately one block away from the Police Department. (R. 1210). On Monday morning he decided to turn himself in and went back to the Police Department. (R. 1210). During the interview when appellant advised that he had taken the butcher knife and he also took the butcher knife back to the duplex afterwards, he was shown a photograph to clarify which knife he was talking about. (R. 1211). Detective Noblitt noticed that appellant had a big scar on the palm of his right hand. (R. 1211). Appellant advised he had injured his hand on the rivet of the knife while grabbing the knife and thrusting it (R. 1211). Detective Noblitt believed what appellant was saying because it was consistent with what his investigation had revealed. (R. 1212). Appellant said he had gotten the knife from his apartment

and he thought he had put it back in his apartment but then he was not positive what he did with it afterward. (R. 1212).

On April 30, 1987, a Motion to Suppress the confession was served. (R. 2500, 2501). After the motion was heard, it was denied on May 29, 1987 (R 2500).

Leon Ralph James, Cassandra's cousin, testified (R 552-553). Mr. James lives in Ft. Myers (R 552). Mr. James testified that appellant told him he had killed his landlords (R 559).

Appellant testified Detective Noblitt had lied, fabricating his testimony and also that Mr. James had lied (R 1784, 1804, 1806).

SUMMARY OF THE ARGUMENT

ISSUE I: The trial court properly allowed the use of peremptory challenges against two black prospective jurors. The challenges were racially neutral, reasonable and not pretextual.

ISSUE II-A: Detective Noblitt's testimony was not hearsay. A police officer may properly testify that certain action was taken because of his investigation and interviews.

ISSUE II-B: Jack Britt Nichols' testimony was properly admitted as an excited *utterance* under §90.803(2), Fla. Stat. Under the facts of this case, there was a startling event that caused the victims to be excited, the victims were in their seventies, there was no possibility of misrepresentation as the victims called their son while under stress caused by the event. In addition, the state did lay a proper foundation to justify the admission.

As to both Issue II-A and II-B, even if the testimony was impermissibly allowed, it was harmless because there is no reasonable possibility that the testimony affected the trier of fact..

ISSUE III: This issue was not preserved for appeal. Defense counsel did not object to the questioning of Mr. Green as to his difficulty in deciding a defense. Defense counsel did not object to the entry of Defendant's Motion for Reappointment of Counsel. This was not. fundamental error and there was no

prejudice by this line of questioning. Based on the overwhelming evidence against appellant, even if the questioning was improper, it is inconceivable that the questioning affected the verdict.

ISSUE IV-A(**1**): The trial court's finding that the murders were committed for the purpose of avoiding or preventing a lawful arrest; is supported by the record. The victims knew appellant and had either victim survived the savage attack by appellant, they would have been able to identify him.

ISSUE IV-A(2): The trial court properly doubled the aggravating circumstances that the murders were committed in the commission of a robbery or burglary and for pecuniary gain. Appellant went to the victims' residence to retrieve a check for back rent he had previously given them. However, the burglary here had a much broader connotation than simply a theft. Appellant went to the Nichols to retrieve the check and to kill. These are two separate characteristics demanding separate consideration.

ISSUE IV-A(3): The trial court properly found that the murders were committed in a cold, calculated and premeditated manner. Just prior to the brutal slayings, appellant entered his apartment and retrieved a large butcher knife, concealed it, walked to the victims' residence and entered the residence, attacking Mrs. Nichols by stabbing her fifteen times and by stabbing Mr. Nichols twenty-eight. times.

ISSUE IV-B(1): The instruction on whether the murders were especially heinous atrocious or cruel was not unconstitutionally vague. These terms have been defined in Florida and thus are not subject to a vagueness attack.

ISSUE IV-B(2): Appellant's significant history of prior criminal activity did not present a jury question. Appellant had a prior conviction for a violent crime. The jury had the opportunity to hear arguments on appellant's prior felony and thus the jury was not deprived of any information. Moreover, the jury was advised they could consider "any other aspect of the defendant's character or record and any other circumstances of the offense." There is no reasonable probability the requested instruction would have affected the trier of fact.

ISSUE IV-C: The prosecutor's closing argument was proper during the penalty phase in light of no defense objection, motion for mistrial or request for curative instruction. Fundamental error was not made. Thus, the issue was not preserved for appeal. Moreover, there is no reasonable possibility that any of the complained of comments affected the trier of fact.

ISSUE IV-D: The jury's role was not denigrated by comments by the trial court and prosecutor. Moreover, no objection or complaint was interjected at the trial court level. Therefore, no attack may be initiated on appeal in light of the clear procedural default.

Based on the facts, arguments and citations of authority, appellee submits appellant's judgment and sentence should be affirmed.

ARGUMENT

TSSTJE I

WHETHER THE TRIAL COURT PROPERLY ALLOWED THE EXCLUSION OF CERTAIN PROSPECTIVE BLACK JURORS.

The trial judge is in the best position to determine if actual bias existed during jury selection. State v. Williams, 465 So.2d 1229, 1231 (Fla. 3.385). The trial judge sees and hears the prospective jurors and thus has the unique ability to assess the candor and the probable certainty of answers given to questions presented. Id. at 1231. Therefore, the trial judge has broad discretion in determining juror bias and unless there is an apparent error, the trial judge's finding will not be disturbed. Id. (citations omitted).

When the defense objects to a peremptory challenge on racial grounds, the judge finding such an objection proper, the burden of proof then shifts to the prosecution to rebut the objection by a "clear and reasonably specific" racially neutral legitimate reason. State v. Slappy, 522 So.2d 18, 22 (Fla. 1988), cert. denied, 108 S.Ct. 2873, 101 L.Ed.2d 909 (1988). These racially neutral reasons need not rise to the level justifying a challenge for cause. Id. at 22. However, the reasons need to be more than a mere assumption that the prospective juror would be impartial to a defendant of the same race. Id. (citations omitted) The trial judge is to evaluate the credibility of the person giving

the explanation in addition to the credibility of the reasons asserted. Id. These reasons must be weighed in light of the circumstances of the case and voir dire. Id. The reasons asserted must be neutral, reasonable and not pretextual. Id. It is the trial court's job to decide if reasonable persons would tend to agree with the reasons asserted by the state and to decide the reasons are not pcetextual. Id. at 23.

In the case at bar, appellant concedes the challenge of Mr. Atkins meets the test of reasonableness and absence of pretext as set out in Slappy. (Appellant's brief, p. 28).

Appellant's counsel, however, con ends that the peremptory challenge of prospective juror no. 18, Ms. Deborah Rollins, and prospective juror no. 23, Ms. Wessie Brown, smacked of pretext and was frivolous in violation of Slappy. (Appellant's Brief, p. 30). Both of these individuals were black and defense noted that they were left with an all white jury (R 349).

Appellant's counsel did concede that Ms. Brown knew at least one defense witness (Appellant's brief, p. 30) In addition, the assistant state attorney stated Ms. Brown did not fully follow directions on her jury questionnaire (R 349-350). The trial judge noted that he did have difficulty reading the questionnaire because it looked like carbon was utilized instead of pen. (R. 349-350). The trial judge further noted that he had said "My goodness, I can't read it" when he looked at her questionnaire.

(R. 350). The state attorney, Bill James, stated he felt Ms. Brown s entry level position with General Telephone for 16 years, in addition to not following instructions on the questionnaire, would indicate Ms. Brown probably would have great difficulty in following the instructions of the court and in following the evidence (R. 351).

Moreover, as appellant's counsel concedes, Ms. Brown stated she knew Mr. Sallye, a defense character witness for the penalty phase of the trial. (R. 352). The trial judge stated he could see where the state would have some concern and felt Ms. Brown might be proper for a peremptory challenge and further found no legal ~~Neil~~ objection had been established by the defense. (R. 352). Based on the foregoing, the record supports the absence of pretext of Ms. Brown's challenge and meets the test of reasonableness. The peremptory challenge of Ms. Brown was reasonable and in accord with Slappy.

As to the state's peremptory challenge of Ms. Rollins, she had initially advised that she did not feel like she would want to serve on this particular jury because she was not sure whether she was for or against the death penalty. (R. 221). She had further advised that if this case did not involve the death penalty she would want to sit as a juror. (R. 221-222) However, she did state that under the appropriate circumstances she could impose or recommend the death penalty. (R. 223, 238). The state

excused Ms. Rollins. (R. 344). Defense made a Neil objection. (R. 344). The state argued that Ms. Rollins had stated she was opposed to the death penalty and that she felt it had no deterrent effect. (R. 345). The state attorney also noted that he had observed. Ms. Rollins frequently fall asleep during the course of questioning but the trial judge did not agree that she had fallen asleep. (H. 345). However, The trial court acknowledged Ms. Rollins had made the comment about the death penalty and that is a valid reason for her to be peremptorily excused. (R. 347). There was no pretext involved in this challenge and a challenge based on this reason is reasonable, neutral and non-racial.

The trial judge noted for the record that he had heard reasons from the state on the peremptory challenges of Ms. Brown and Ms. Rollins and found the challenges to be valid and not racially motivated. (K. 356). Indeed, the challenges met the reasonableness test of Slappy, were not pretextual, nor were they racially motivated. Thus the peremptory challenges were valid. Slappy at 22.

Appellant's counsel has also argued that the trial court. made a determination that two white men that had been selected for the jury also knew defense witnesses, as did Ms. Brown. (Appellant's brief, pp. 30-31) However, this is not entirely correct.

The trial court announced to the prospective jurors that the names of individuals that may be testifying would be called out and if any of the names seemed familiar to them to please raise their hands. (R. 93). The possible witnesses included state and defense witnesses (R 32). Thereafter, Mr. Klein and Mr. Richmond, both white, raised their hands. (R. *95, 98, 99,* 104). The trial court did not determine Mr. Klein and Mr. Richmond knew defense witnesses. In fact, a review of the record reveals that Mr. Klein asked if John Fairbanks (a name called out by the trial judge) was with the Tampa Police Department to which the response was he "was apparently with them." (R. *95).* Mr. Klein then stated he knew Art Perry, Sr. casually (R. *95)* and also knew Dr. John Feegel and attorney Mike Foster. (R. *98).* Mr. Klein advised that his knowledge of these individuals would not lead him to give their testimony any greater or lesser weight than other witnesses. (R. *95-96, 98).*

As to Mr. Richmond, he stated he had met Dr. Afield several times socially but he probably would not recognize him if he saw him and nothing in that relationship would have a bearing on his testimony. (R. 99). Mr. Richmond also had met attorney Tony Cunningham on several occasions but. he would not give any greater or lesser weight to his testimony than other witnesses due to their acquaintance. (R. 104).

A review of the record further reveals that Dr. Feegel did testify for the defense as an expert witness. (R. 1813-1879). Mr. Perry testified for the state. (R. 429-438). Attorney Mike Foster testified for the state during the penalty phase. (R. 2111-2137). It does not appear that Mr. Fairbanks testified nor does it appear that he would have been a defense witness. Likewise, the record does not reflect attorney Cunningham testified or in what capacity he would have testified. Dr. Afield interviewed appellant and had performed some tests on him but it does not appear he testified (R 1684; 1702; 1703).

Based on the above, it is clear that the exclusions of Ms. Brown and Ms. Rollins were supported by neutral reasons based on answers provided in voir dire and thus there is record support for the state's proper use of the peremptory challenyes. The reasons given by the state have been shown to be reasonable, non-pretextual, and neutral. The trial judge evaluated the reasons given and found they were sufficient to support the peremptory challenges. Thus, Slappy has not been violated and the judgment should be affirmed. Moreover, it is proper to exclude prospective jurors upon determining that those jurors hold views that would substantially impair the performance of their duties as jurors. People v. Johnson, '167 P.2d 1047, 1059 (Cal. 1989).

ISSUE II

WHETHER THE TRIAL COURT PROPERLY ALLOWED CERTAIN TESTIMONY.

A.

STATEMENT ATTRIBUTED TO MS. JONES

Most of the statements appellant's counsel complains of were during proffered testimony. (Appellant's Brief, pp. 32-33; R. 792-802; 1179-1183; 1560-1561). What the jury had the benefit of hearing was Ms. Jones' testimony wherein she testified that she did not tell her uncle, Mr. Battles, that she saw the appellant take a large knife off the table and leave with it on the night of the murders. (R. 782-783). Ms. Jones also testified that she did not tell Detective Noblitt on October 11 or October 13, 1986 that she saw appellant take a large butcher knife and leave with it. (R. 783). This was not hearsay testimony. Objections made to this line of questioning were objections that the questions were leading and that counsel was trying to impeach his own witness. (R. 782-783). The trial judge overruled those objections. (R. 782-783). Additionally, defense counsel acknowledged that counsel for the state could ask Ms. Jones if she made such a statement and what *the* statement was. (R. 782).

The next testimony complained of that reached the jury was that of Detective Noblitt. (R. 1191-1193). Detective Noblitt testified, without objection, that through his investigation and interviews, including interviews with Cassandra Jones, he had

formed a reason to believe and a suspicion that that knife had been utilized in the crime. (R. 1191). That knife referred to had been testified about previously. (R. 1186-1190). Detective Noblitt had previously testified without objection that on October 13, 1986 Ms. Jones was interviewed and she executed a consent and waiver of search warrant before going back to the apartment she had shared with appellant. (R. 1185-1186). Detective Noblitt had also previously testified, without objection, that they were looking for a butcher knife that was within that residence. (R. 1185). Through his investigation and interviews the detective stated he had learned a knife was missing from Ms. Jones' kitchen and he wanted to go back with her so they could see if the knife that had been missing on Friday night could be found. (R. 1186). No objection was made to this previous testimony. (R. 1186).

The detective also testified that the knives were not seized on October 11, 1986 pursuant to the search warrant because they did not have a reason to suspect those knives at that time. (R. 1191). The knives were seized on October 13, 1986. (R. 1188).

Detective Noblitt was subsequently asked what prompted him to get the butcher knife that he got and he responded that Cassandra Jones had identified the knife as the one. (R. 1192). At this time defense counsel made a hearsay objection that was sustained. (R. 1192). The detective then attempted to testify

that he went to the apartment on October 13, 1986 based on information learned. (R. 1192). Defense counsel again objected and the objection was sustained. (R. 1192-1193). A motion for mistrial was also made and the motion was denied. (R. 1193). Defense counsel did not request a curative instruction as to any purported hearsay testimony.

Detective Noblitt's testimony was not hearsay. Testimony of police officers that certain action was taken because of a conversation with an informant is properly admitted while the contents of the information constitute hearsay. Freeman v. State, 494 So.2d 270, 272 (Fla. 4th DCA 1986), citing Johnson v. State, 456 So.2d 529 (Fla. 4th DCA 1985). In ~~Johnson~~ the district court explained that

> ...the officers' testimony...was allowed to establish that the statements were made, not that they were true. It is a common sense way to explain why the officers were at the particular place at the particular time, their purpose in being there and what they did as a result...[J]urors have the right to expect to hear a logical sequence, which begins at the beginning. ~~Id~~. at 530.

The appellant in Freeman argued that the trial court erred in allowing the police officers to testify regarding information received from an informant. Id. at 271. This information caused the police officers to investigate an apartment in which drugs and paraphernalia were found. Id. The appellant in Freemen argued that this testimony constituted hearsay and effectively

deprived him of the opportunity to cross examine the informant. Id. The state in Freeman argued that the testimony only explained why the police officers went to the apartment and it was not offered to prove the truth of the statement. Id.

In the instant case, as in Freeman, Detective Noblitt's testimony was that certain action was taken because of his investigation and interviews. (R. 1186, 1191-1193). Through his investigation and interviews he had formed a suspicion and had reason to suspect a knife in appellant and Ms. Jones' apartment was used in the murders (R 1186, 1190). He went to the apartment on October 13, 1986 to look for the knife (R 1185). The testimony was not offered to prove the truth of the matter asserted but was to explain why the officers took this action. Based on the foregoing, the testimony of Detective Noblitt was properly admitted in the instant case, as was the officer's testimony in Freeman.

Defense counsel's objections were sustained on a hearsay objection. No request for a cruative instruction was made by defense counsel. Moreover, the detective had previously testified about looking for the knife in appellant's apartment and no objection was made (R 1185-1186).

In addition, appellant took the stand and during his cross examination appellant testified that the knife did not come out of his apartment, that it did not kill the Nichols, and the knife

did not leave his apartment. (R. 1791). Appellant was then asked "[w]hy would Cassandra tell Detective Noblitt that, then?" (R. 1791). Appellant testified that Cassandra did not tell the detective that. (R. 1791). Defense counsel objected stating that "[t]here isn't any statement in here to that effect." (R. 1791). The trial court sustained the objection. (R. 1791). Defense counsel apparently did not think this testimony to be so damaging and prejudicial because he did not ask for a curative instruction and did not timely ask for a mistrial. Defense counsel did, however, subsequently renew his motion for mistrial stating the statement made on cross examination was prejudicial. (R. 1886). The trial judge denied the motion. (R. 1886).

A motion for mistrial is addressed to the trial judge's sound discretion. Salvatore v. State, 366 So.2d 745, 750 (Fla. 1978), cert. denied, 444 U.S. 885, 100 S.Ct. 177, 62 L.Ed.2d 115 (1979), reh. denied, 444 U.S. 975, 100 S.Ct. 474, 62 L.Ed.2d 393 (1979) (citations omitted). The rule in declaring a mistrial in Florida is that the trial judge should exercise great care and caution and should only declare a mistrial in cases of absolute necessity. Id. (citations omitted)

In the case sub judice there was no abuse of judicial discretion and there was no absolute necessity. As hereinabove stated, Detective Noblitt's testimony was admissible, was proper, and was not hearsay. Additionally, he had previously testified

about this knife without objection. As to the complained of cross examination of appellant, when he was asked why Ms. Jones would "tell Detective Noblitt that, then" appellant answered that "she didn't." (R. 1791). Appellant's answer was non-prejudicial and it conformed with Ms. Jones' earlier testimony. (R. 782-783). Thus, there was no impact by the testimony.

Moreover, if any of the complained of testimony was erroneously allowed, under the facts of this case the error was harmless because there is no reasonable possibility that this testimony would have affected the trier of fact. State v. DiGuilio, 491 So.2d 1129, 1135 (Fla. 1986). The harmless error test is not a device to allow the appellate court to substitute itself for the trier of fact by weighing the evidence but rather the focal point is on the effect the error may have had on the trier of fact. Id. at 1139. In the instant case, there was no effect on the trier of fact. The jury heard Detective Noblitt previously testify as to the knife and as to appellant's confession wherein it was testified that appellant had stated he had taken the largest butcher knife from his house and stuck it in his pants and that he then went to the Nichols' home. (R. 1207). Appellant denied he made the confession and further indicated Detective Noblitt fabricated this confession. (R. 1648, 1751; 1804).

In addition, Ralph Leon James testified that appellant had told him that he had some problems with his landlords. (R. 558). He further testified that appellant said he had killed his landlords. (R. 559). Mc. James stated that there was no doubt that appellant had told him he had killed his landlords. (R. 564).

The jury had the benefit of hearing all the testimony and weighing the credibility of the witnesses. The Supreme Court cannot substitute its judgment for the judgment of the jury as to the credibility of these witnesses. Land v. State, 59 So.2d 370 (Fla. 1952).

Therefore, based on the foregoing, the trial court properly denied the motions for mistrial and appellant was not deprived of a fair trial.

B.

TESTIMONY AS TO ALLEGED THREAT BY APPELLANT

After hearing the proffered testimony of Jack Britt Nichols, the son of the victims, and after hearing arguments on the statements made to Jack Nichols from his parents about a threat appellant had made toward Mrs. Nichols, the trial court found the testimony admissible as an excited utterance under §90.803(2), Fla. Stat. (R. 476).

Jack Nichols testified that he spoke with his parents on Thursday, October 9, 1986 in the evening. (R. 500). He spoke with both his parents and Jack had the impression they were agitated because they were speaking faster than ordinary and they were relating to him an event that had recently occurred. (R. 501). The victims had called their son and advised that they had been over to appellant's apartment trying to resolve a rental dispute. (R. 502). Appellant had told Mr. Nichols, the victim, to get Mrs. Nichols out of his sight and he did not want to see her again. (R. 502). Appellant further told them that if Mrs. Nichols ever comes over there again he would not be responsible for what he would do to her. (R. 502j. Defense counsel objected to this testimony as hearsay. (R. 502). The trial court overruled the objection. (R. 502).

On cross examination appellant testified he never threatened the Nichols. (R. 1709) He further testified that perhaps the son, Jack Nichols, was mistaken about what the victims said about a threat. (R. 1711).

The trial court properly admitted the testimony- of Jack Britt Nichols as to the serious threat appellant had made to the victims. **Section** 90.803(2), Fla. **Stat.** provides that an excited utterance is

> A statement or excited utterance relating to a startling event or condition made while the declarant was under stress of excitement caused by the event or condition.

For an excited utterance to be admissible,

> (1) there must be an event startling enough to cause nervous excitement; (2) the statement must have been made before there was time to contrive or misrepresent; and (3) the statement must be made while the person is under the stress of excitement caused by the event.

State v. Jano, 524 So.2d 660, 661 (Fla. 1988). Under certain circumstances the age of the declarant may justify the admission of a statement. Id. at 663. The length of time between the statement is important. Id. at 662. However, while relevant and important, the length of time is not dispositive. United States v. Moore, 791 F.2d 566, 572 (7th Cir. **1986).**

Under the facts stated above, there clearly was a startling event that caused the victims to be excited; appellant had threatened Mrs. Nichols. (R. 502). The statement was made before there was time to contrive or misrepresent. Indeed, in the instant case there was no possibility of misrepresentation. The victims called their son. They were excited, agitated and talking very fast about an event that had occurred prior to the phone call. (R. 501). This elderly couple in their seventies called their son regarding a threat. They seemed upset and were concerned about their predicament so they called their son for help while under the stress of the event (R. 439).

Although there is no direct evidence of the length of time between appellant's threats of violence and the telephone conversation between the Nichols and their son on the evening of October 9, 1986, Jack Nichols' testimony indicates that it is unlikely that a significant amount of time elapsed. (R. 501) It appears that the Nichols called their son immediately following the confrontation with appellant. Based on the foregoing, the trial court properly admitted the testimony of Jack Nichols.

Appellant's counsel also argues that the state failed to lay a proper predicate to justify admission of this testimony, citing Hargrove v. State, 530 So.2d 441 (Fla. 4th DCA 1988). However, appellant's argument must fail because Hargrove is factually distinguishable from the facts sub judice. In Hargrove the record did not support a sufficient foundation for the admission of an excited utterance because the alleged statement came out of a crowd and there was no showing that the declarant had witnessed earlier altercations, and the statement was not attributed to anyone in particular. Id. at 442. Hargrove also acknowledged that the age, physical, and mental condition of the declarant are factors to be considered. Id. Additionally, in Hargrove there was no showing that the statement was made while the declarant was still under the stress of excitement caused by the event. Id.

In the instant case the state did lay a proper foundation to justify the admission. There was no crowd here. There was only Mr. and Mrs. Nichols, a couple in their seventies, who had just received a threat and who then called their son. The declarant in this case had witnessed earlier events with appellant while they were attempting to work out rental problems. Appellant intimidated the Nichols. (R. 497). Their fears led them to contact the sheriff to be an intermediary in eviction proceedings. (R. 497). The Sheriff posted the eviction notice as to appellant on October 1, 1986. (R. 498). During the week of their deaths, Jack Nichols had talked with his parents several times concerning appellant and the eviction proceedings (R. 499-500). When the Nichols called their son after receiving the threat, they were excited, agitated and talking very fast. (R. 501). The testimony indicated that it was unlikely that a significant amount of time had elapsed between the threat and the utterance. Thus, the state did lay a proper predicate.

However, in the event this Honorable Court finds this testimony was impermissibly allowed, it does not require reversal because of the overwhelming evidence in this case, including the confession. There is no reasonable possibility that this testimony affected the trier of €act. DiGuilio at 1135. Moreover, the jury had the benefit of appellant's testimony to weigh against Mr. Nichols' testimony. Appellant testified he never threatened the Nichols. (R. 1709).

ISSUE III

WHETHER THE TRIAL COIJRT PROPERLY ALLOWED CROSS-EXAMINATION OF APPELLANT.

On cross-examination appellant was asked if he had difficulty deciding what defense to take (R 1653). Appellant said he did not (R 1653). Appellant was asked if he had some difficulty in deciding whether to say he "was too intoxicated because of cocaine" versus "I did it or not." (R 1653). Appellant said he did not (R 1653). He was then asked if he had any problems agreeing to a line of defense and appellant said he was positive he did not (R 1653). The state then introduced state's exhibit no. 64, "Defendant's Motion for Reappointment of Counsel." (R 1654-1656). Appellant handwrote the motion (R 1654). The motion provided "[t]hat the defendant and the defense attorney have not been able to agree to a line of defense." (R 1657). No objection was made as to this line of questioning (R 1653-1656). Moreover, no objection was made to this document being entered into evidence (R 1656). Appellant's counsel asserts this to be fundamental error and that no objection or curative instruction would have cured the prejudice caused by the questioning. (Appellant's Brief, pp. 39, 42). However, it is difficult to see any prejudice since testimony had previously been received into evidence as to appellant being high on cocaine when the offense was committed and also that someone other than appellant committed the murders.

In both versions of appellant's confession, he stated cocaine had been purchased that evening and more was desired (R **1202-1204,** 1207). In the first version of his confession he stated Bobby stabbed the victims and not him (R **1204-1206).** Then appellant finally said there was no Bobby; he admitted he was by himself, he apologized and stated he could not believe what he did (R **1206-1207).** Appellant then, on direct examination, testified that Bobby came into the Nichols' home with the knife and stabbed them (R 1608-1609). Appellant said he was innocent (R **1618).** Appellant also admitted to using cocaine the night of the murders (R **1585,** 3594). Appellant admitted on direct examination that he was high at the time he went to the Nichols' home that fateful night (R 1604). This was all before the jury before the state asked appellant, if he had difficulty deciding what defense he would take -- intoxication or whether he did it or not. Thus, there was no prejudice and objections were not made.

Appellant suggests Straight v. State, **397** So.2d **903, 909** (Fla. 1981), cert. denied, 454 U.S. **1022, 102** S.Ct. **556, 70** L.Ed.2d **418** (1981), reh. denied, **454** U.S. **1165, 102** S.Ct. **1043, 71** L.Ed.2d **323** (1982), **finds** this line of questioning to be improper. In Straight, the questioning suggested defendant was involved in an unrelated criminal activity. Id. at **908-909.** The Straight court went on to find that this was improper but that it

was insufficient to grant a mistrial. Id. at 909. Appellant in Straight, denied involvement in the unrelated criminal activity and in addition, the improper comment did not tend to discredit appellant's account of his activities, nor did it undermine his defense theory. Id. Moreover, the Straight court found it inconceivable that the improper question affected the verdict in light of the overwhelming evidence against the appellant. Id.

As in Straight, in light of the overwhelming evidence in the instant case against appellant, even if the questioning was improper, it is inconceivable that the questioning affected the verdict. Additionally, the questioning did not relate to unrelated matters but rather related to matters that were already before the jury. Under the facts here, appellant's defense theory was never undermined.

Moreover, this was not fundamental and an objection was required. Except in cases of fundamental error, an appellate court will not consider an issue unless it was presented to the lower court. Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982) (citation omitted). Furthermore, for an argument to be cognizable on appeal, it must be the specific contention asserted as legal ground for the objection. Id. Under the doctrine of fundamental fairness, the appellate court should exercise its discretion very guardedly. Sanford v. Rubin, 237 So.2d 134 (Fla. 1970). In Smith v. State, 414 So.2d 7 (Fla. 3d DCA 1982), the

district court found that without an objection an alleged error in a prosecutor's impeachment. questions by insinuating facts, the alleged error is waived.

Contrary to appellant's assertion that the opinion in Dukes v. State, 356 So.2d 873, 875 (Fla. 4th DCA 1978), did not specify whether an objection was made, the opinion provides that "[a]ppellant's counsel finally objected." Thus, Dukes is factually different than the case at bar.

There was no cumulative effect here because hearsay was not impermissibly admitted as demonstrated in Issue II and since the defense counsel did not object to the questioning or to the entry of the motion, this issue was not preserved for appeal. If this Honorable Court should find error, the error was harmless since there is no reasonable possibility that this testimony affected the trier of fact. DiGuilio, at 1135.

ISSUE IV

WHETHER THE APPELLANT RECEIVED A FAIR PENALTY PHASE.

A.

THE TRIAL COURT'S FINDINGS OF AGGRAVATING FACTORS ARE SUPPORTED BY THE RECORD.

1. The Trial Court's Finding That The Murders Were Committed For The Purpose Of Avoiding Or Preventing A Lawful Arrest Is Supported By The Record.

An aggravating factor found by the trial court is that the capital felonies were committed in order to avoid a lawful arrest, section 921.141(5)(e), Florida Statutes *(1985).* The trial court properly applied this aggravating factor. The trial court stated that Robert and Dora Nichols knew appellant, having rented an apartment to him at 3104 East 14th Avenue, Tampa, Florida. Had either Robert or Dora Nichols survived appellant's brutal attack they could have easily identified him. In addition, both Robert and Dora Nichols were over seventy years of age and the robbery could have easily been accomplished without killing them.

Appellee presented sufficient evidence at trial to support the trial court's finding that, the capital felonies were committed in order to avoid a lawful arrest. In Harmon V. State, 527 So.2d 182 (Fla. 1988), the Florida Supreme Court found the aggravating circumstance that the capital felony was committed in

order to avoid a lawful arrest applied. In Harmon, the defendant shot a 69 year old man in poor health during the course of a robbery. Id. at 188. The victim knew the defendant and could easily have identified him. Id. Finally, in Harmon, the defendant told a cellmate that he shot the victim after an accomplice spoke his name. Id.

The evidence in Harmon, was sufficient to establish that the murder was committed in order to avoid a lawful arrest. Moreover, the instant offense actually presents a stronger case for the imposition of this aggravating factor. Evidence that appellant inflicted multiple lethal stab wounds during the course of the robbery on the elderly couple whom he knew could recognize him is sufficient to establish that the murders were committed in order to avoid a lawful arrest:. Thus, this was a proper aggravating factor at the sentencing phase of appellant's trial.

2. The Trial Court Properly Doubled The Aggravating Circumstances That The Murders Were Committed In The Commission Of A Robbery Or Burglary With It Being Committed For Pecuniary Gain.

Appellant argues that the trial court unlawfully gave double consideration to a single feature of the instant offense in finding the aggravating factors that the murders were committed in the course of a burglary and were committed for pecuniary

gain. Appellant relies on Mills v. State, 476 So.2d 172 (Fla. 1985), cert. denied, 475 U.S. 1031, 106 S.Ct. 1241, 89 L.Ed.2d 349 (1986). In Mills, the burglary and pecuniary gain aggravating factors were found to have been improperly doubled based upon the specific facts of the case. Id. at 178.

The instant case is arguably different. On October 10, 1986, appellant gave Robert and Dora Nichols a $250.00 check for back rent. Later that evening appellant returned to the Nichols' home to retrieve the check, thus establishing the factor of pecuniary gain.

The evidence demcnstrated that the offense of burglary had a much broader significance than simply being the vehicle for a theft. Appellant entered the Nichols' residence on October 10, 1986, to retrieve the $250.00 check and to remove a painful thorn from his side. As long as the Nichols were alive, appellant would not be free of his debt. During the course of the fatal attack, Robert and Dora Nichols received multiple stab wounds. After appellant had killed them both, he exited the Nichols' residence without the $250.00 check. The check was later found in Robert Nichols' wallet. The burglary had a broader purpose than a burglary only as opportunity for theft. See Brown v. State, 473 So.2d 1260 (Fla. 1985), cert. denied, 474 U.S. 1038, 106 S.Ct. 607, 88 L.Ed.2d 585 (1985). In Brown, the victim was beaten, raped and strangled. During the attack, Brown ransacked

her home. Under the facts of Brown, the Florida Supreme Court found the two aggravating factors to be separate characteristics and thus, properly received separate consideration.

The Florida Supreme Court recently discussed this issue in Cherry v. State, 14 F.L.W. 225 (Fla. Apr. 28, 1989). In Cherry, the Court found that the aggravating factor of murder for pecuniary gain was erroneously doubled. 14 F.L.W. 226. However, Cherry can easily be distinguished from Brown and the instant case. In Cherry, the sole purpose of the burglary was for pecuniary gain. In the instant case, appellant went to the Nichols' residence to retrieve the $250.00 check and to kill the Nichols. Two separate Characteristics which demand separate consideration.

According to these facts, the aggravating burglary factor and the aggravating pecuniary gain factor are separate characteristics of appellant's capital offense and were properly given separate consideration.

3. The Trial Court Properly Found That The Murders Were Committed In A Cold, Calculated And Premeditated Manner.

The record supports the trial court's finding that the murders of Robert and Dora Nichols occurred in a cold, ca culated and premeditated manner. Paragraph (i) to section 921 141(5), Florida Statutes (1985), reiterates in part what is already

present in the elements of premeditated murder, with which appellant was charged, convicted and which the evidence clearly supports. See Combs v. State, **403** So.2d **418, 421** (Fla. 1981), cert. denied, 456 U.S. **984, 102** S.Ct. **2258, 72** L.Ed.2d **862 (1982).**

In the instant case, just prior to the brutal slayings, appellant entered his apartment and retrieved a large butcher knife (R **1207).** Appellant then proceeded to conceal the weapon before entering the Nichols' residence (R **1207).** After a brief discussion with the Nichols, appellant took out the knife and attacked Mrs. Nichols, a defenseless woman in her seventies. Appellant stabbed Dora Nichols fifteen times, three of which were lethal (R 1056).

At this point, Robert Nichols attempted to escape out. of a rear door. Robert Nichols made it as far as his bedroom. Appellant caught up with him there and proceeded to stab him twenty-eight times, five of which were lethal (R **1072).** Appellant had sufficient time to contemplate his actions and chose to kill Robert and Dora Nichols. Appellant walked with a butcher knife from his apartment to the Nichols' residence. Additionally, between every thrust of the butcher knife there is a period of conscious reflection in which appellant had sufficient time to contemplate his actions and he chose to kill Robert and Dora Nichols.

Appellee introduced sufficient evidence to satisfy the requisite premeditation for impcsition of this aggravating factor. See Phillips v. State, 446 So.2d 194, 197 (Fla. 1985); Herring v. State, 446 So.2d 1049 (Fla. 1984), cert. denied, 469 U.S. 989, 105 S.Ct. 396, 83 L.Ed.2d 330 (1984). In Phillips, the defendant waited for the victim to leave work, went up to him in the parking lot and then shot him twice. 476 So.2d at 197. The victim attempted to escape. The victim ran about one hundred (100) yards before being gunned down. Id. In Herring, the defendant shot a store clerk in response to what he believed was a threatening movement by the clerk and then shot him a second time after the clerk had fallen to the floor. 446 So.2d at 1057. The Florida Supreme Court. stated that the facts in Herring were sufficient to show the premeditation required for the application of this aggravating factor. Id.

The instant offense is similar to both Phillips and Herring in that appellant had an opportunity for conscious reflection. Appellant pursued one of the victims from the hallway to the bedroom and appellant inflicted multiple stab wounds into both Robert and Dora Nichols. Therefore, the trial court's finding that the capital felony was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification was proper.

It is important to note that no mitigating circumstances were found (R 2796-2801). In addition, other unchallenged aggravating circumstances remain (R 2796-2801). Therefore, even if this Court should find these challenged circumstances were improperly found, sufficient aggravating circumstances remain that are properly supported by the record.

B.

WHETHER THE TRIAL COURT'S INSTRUCTIONS TO THE JURY DEPRIVED APPELLANT OF A FAIR AND REASONED PENALTY PHASE PROCEEDING.

1. The Instruction On Whether The Murders Were "Especially Heinous, Atrocious Or Cruel" Was Not Unconstitutionally Vague. (R 2195)

Appellant's counsel takes issue with the instruction as to the murders being committed in an especially heinous, atrocious or cruel manner (R 2149; 2195). Appellant's counsel asserts that this instruction failed to satisfy the Eighth Amendment as required in Maynard v. Cartwright, 108 S.Ct. 1853 (1988). Appellant's argument on this point must fail. In Maynard, the United States Supreme Court considered only the narrow question of whether Oklahoma's "especially heinous, atrocious, or cruel'' aggravating factor has been interpreted by the Oklahoma Court of Criminal Appeals in an unconstitutionally broad manner. Also, in Magill v. State, 428 So.2d 649 (Fla. 1983), cert. denied, 464 U.S. 865, 104 S.Ct. 198, 78 L.Ed.2d 173 (1983), the court observed that our "especially heinous, atrocious or cruel" aggravating circumstance has been upheld against constitutional attacks. The court specifically noted:

> [3-6] We have provided guidance for determining whether section 921.141(5)(h) is applicable. As was noted in *State v. Dixon*, 283 So.2d 1 (Fla. 1973), *cert. denied*, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974):

> It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and, that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies -- the conscienceless or pitiless crime which is unnecessarily torturous to the victim.
>
> 283 So.2d at. 9. Since *Proffitt*, our application of the above reasoning has not rendered the statute unconstitutionally vague and overbroad.

The United States Supreme Court's granting of relief in Maynard v. Cartwright, supra, does not affect the Florida decisions. Relief in Maynard was based on the Oklahoma court's failure to define the terms heinous, atrocious and cruel. These terms have been defined in Florida. See State v. Dixon, supra. Moreover, the United States Supreme Court in Proffitt v. Florida, 428 U.S. 242, 254-256, 96 S.Ct. 2960, 49 L.Ed.2d 913, reh. denied, 429 U.S. 875, 97 S.Ct. 197, 198, 50 L.Ed.2d 158 (1976) upheld this aggravating circumstance in Florida against a vagueness attack and this was expressly noted in Maynard where the court compared Proffitt with Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980). Thus, appellant's claim must fail

2. Whether Appellant's Significant History Of Prior Criminal Activity Presented A Jury Question. (R 2150-2151)

Appellant has a prior conviction for a violent crime. (Appellant's Brief, p. 47) The state established beyond a reasonable doubt that appellant had a prior conviction for assault with intent to commit rape (R 2125; 2151; 2761).

Defense counsel requested an instruction "[t]hat the defendant has no significant history of prior criminal activity." (R 2150). The trial court denied the request based on prior convictions (R 2151).

The trial court gave the following instruction on mitigating circumstances:

> Among the mitigating circumstances you may consider, if established -- if established by the evidence are:
>
> The crime for which the defendant is to be sentenced was committed while he was under the influence of mental or emotional disturbance;
>
> Two, the defendant was an accomplice in the offense for which he is to be sentenced, but the offense was committed by another person, and the defendant's participation was relatively minor;
>
> Three, the defendant acted under extreme duress and under the substantial domination of another person;

> Four, the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired;
>
> Five, any other aspect of the defendant's character or record and any other circumstances of the offense. (R 2196).

Appellant's counsel asserts that the jury should have been given the opportunity to determine whether appellant's prior criminal record was insignificant enough to be considered in mitigation (R 2196). The jury had the opportunity to hear the arguments on appellant's prior felony (R 2113-2132). Appellant's counsel pointed out to the jury during his closing argument that appellant had been wrongfully charged in a rape case and that he ultimately entered a no contest plea to avoid another trial. in which he might have also been wrongfully convicted (R 2189-2190). The jury was not deprived of any information and the jury was advised they could consider "any other aspect of the defendant's character or record and any other circumstances of the offense." (R 2196).

If it was error for the trial court to not give the requested instruction, under the facts of the instant case such an error was harmless because there is no reasonable probability that this instruction would have affected the trier of fact. DiGuilio, at 1135,[1] No mitigating circumstances were found (R

[1] Even if the jury had recommended life based on this requested

2799-2801). Numerous unchallenged aggravating circumstances were found (R 2797-2799). The jury voted twelve to zero to advise and recommend the death penalty be imposed (R 2203-2204).

C.

WHETHER THE PROSECUTOR'S CLOSING ARGUMENT DURING THE PENALTY PHASE WAS PROPER IN LIGHT OF NO DEFENSE OBJECTION, MOTION FOR MISTRIAL OR REQUEST FOR CURATIVE INSTRUCTION.

As to appellant's argument regarding improper comments during closing arguments of the penalty phase, appellant candidly admits that no objection, no motion for mistrial or request for curative instruction was made. (Appellant's Brief, p. 48) Then appellant urges that fundamental error was made and, therefore, no objection or other motions were required. However, when alleged improper comments are made during closing and where no objection or motion for mistrial is made, the issue is not preserved for appeal. State v. Cumbie, 380 So.2d 1031, 1033 (Fla. 1980); Clark v. State, 363 So.2d 331, 335 (Fla. 1978). The comments now complained of do not rise to the level of fundamental error. Under the doctrine of fundamental fairness, the appellate court should exercise its discretion very guardedly. Sanford, supra. Fundamental error is present only

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instruction, the facts of this case could have justified an override. Torres-Arboledo v. State, 524 So.2d 403 (Fla. 1988), cert. denied, 488 U.S. __, 109 S.Ct. 250, 102 L.Ed.2d 239 (1988).

when an error goes to the foundation or merits of the case. Id. Not every constitutional issue complained of amounts to fundamental error. Id.

In Darden v. State, 329 So.2d 287, 289 (Fla. 1976), cert. denied, 430 U.S. 704, 97 S.Ct. 1671, 51 L.Ed.2d 751 (1976), this Court held that improper remarks require a new trial in cases where it is reasonably evident that the remarks may have actually influenced the jury to reach a more severe verdict than would have been reached without the remarks. In Darden, the remark complained of was one referencing the accused was like an animal. Id. at 289. A reversal was not granted in Darden and the Court also noted that defense counsel had utilized the animal characterization. Id. at 290.

Appellant's counsel complains about a question made in closing as to appellant's future dangerousness and who would be next (R 2185-2186). Appellant cites Teffeteller v. State, 439 So.2d 840 (Fla. 1983), cert. denied, 465 U.S. 1074, 104 S.Ct. 1430, 79 L.Ed.2d 754 (1984), in support of his argument for reversal. In Teffeteller, a motion for mistrial was made as well as a request for a curative instruction. Id. at 845. This Honorable Court found it was improper for the trial court to deny the motion for mistrial or for cautionary instruction. Id. As above stated and as appellant's counsel admits, no objection, motion for mistrial or curative instruction was made in the

instant case. Moreover, appellant sub judice complains of one lone comment of "who will be next." In addition to the motion for mistrial, Teffeteller is factually different from the case at bar because of the repeated specific references in Teffeteller of who the accused would next kill. Id. at 844-845.

As to the comment of appellant's belief in the death penalty and about the score of two, these comments are truisms and are supported by the record. Appellant was found guilty of two murders. He was found guitly of killing Mr. and Mrs. Nichols (R 2097).

Even if any of the alleged comments had been properly preserved, none of the three complained of constitutes reversible error. Taking the totality of circumstances of the case sub judice, there is no reasonable possibility that these comments affected the trier of fact, thus any improper comment was harmless. DiGuilio, at 1135.

D.

WHETHER ALLEGEDLY MISLEADING COMMENTS OF THE TRIAL COURT AND PROSECUTOR DENIGRATED THE JURY'S ROLE IN LIGHT' OF CALDWELL V. MISSISSIPPI, 472 U.S. 320, 86 L.ED.2D 231, 105 S.CT. 2633 (1985).

Appellant next complains that; the trial court impermissibly informed the jury voir dire that their recommendation was advisory and not binding. The text recites:

> The trial of this case will occur in two distinct phases. One is addressed solely to the determination of whether the State has proved beyond and to the exclusion of every reasonable doubt the guilt of the accused. Should the accused be found guilty of the offense of murder in the first degree, a second phase would be addressed to what type of penalty the iury will recommend to the Court, and at. that. time the second phase will commence.
>
> Although the verdict of the penalty is only advisory in nature and not binding upon the Court, the jury's recommendation is given great weight and deference when the Court determines what punishment is appropriate. Because your verdict could lead to the imposition of the death penalty, your attitude towards the death penalty is a proper subject of inquiry by the Court and the attorneys. The fact that you may have reservations about or conscientious or religious objections to capital punishment does not automatically disqualify you as a juror in a capital case.

(R 86-87).

He also complains about the prosecutor's remark during the voir dire colloquy:

> A. I don't have any problems with the death penalty, but I would have to be -- look close at the circumstances.
>
> Q. Well, we would want you to do that. But, again, this tension is your personal views as to what the law says.
>
> A. Right. Whenever I say that, I say that I could recommend the death penalty, but I wouldn't want it to be automatic.
>
> Q. Oh, we understand. And you have to understand that just because you recommend it doesn't mean it's going to be imposed by the

> Judge. You see, the Judge, Judge Menendez, is the ultimate sentencer, but he's entitled and he must yive your recommendation great weight. Do you understand that?
>
> A. Yes.

(R 235-236).

Appellant acknowledges that no objection or complaint was interjected below in the trial court and accordingly, no attack may be initiated on appeal. Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982).

In light of the clear procedural default by appellant, the state need not and will not address the substance of the claim and urges this Court to declare in its opinion that appellant's failure to complain at trial precludes appellate review. If this Court chooses to address the merits of claims which have been defaulted, the federal courts on habeas review will feel free to substitute their judgment for that of this Court and may find a violation where this Court has found none as in Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1938). See, County Court of Ulster County v. Allen, 442 U.S. 140, 99 S.Ct. 2213, 60 L.Ed.2d 777 (1979); Harris v. Reed, 489 U.S. 109 S.Ct. 1083, 103 L.Ed.2d 308 (1989).

As explained in Harris, supra, at 319, fn. 12:

> . . . a state court that wishes to rely on a procedural bar rule in a one-line pro forma order easily can write that "relief is denied for reasons of procedural default".

This claim should not be considered.

CONCLUSION

Based upon the foregoing facts, arguments and citations of authorities, appellee respectfully requests this Honorable Court to affirm the judgment and sentence of the lower court.

Respectfully submitted

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to: Robert Fraser, Esquire, 412 Madison Street, Suite 1103, Tampa, Florida, 33602, on this 27th day June, 1989.

OF COUNSEL FOR APPELLEE