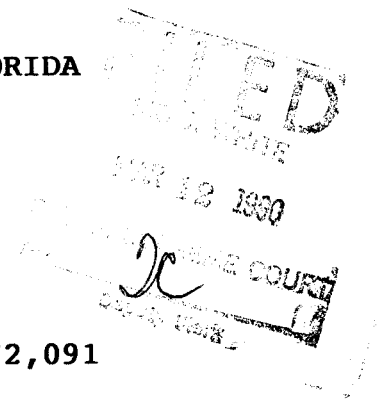
Corrected

IN THE SUPREME COURT OF FLORIDA



BRADLEY P. SCOTT,

Appellant,

v. CASE NO. 72,091

STATE OF FLORIDA,

Appellee.

_____/

APPEAL FROM THE CIRCUIT COURT
IN AND FOR CHARLOTTE COUNTY
STATE OF FLORIDA

BRIEF OF APPELLEE

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

DAVIS G. ANDERSON, JR.
Assistant Attorney General
Florida Bar No. 160260
1313 Tampa Street, Suite 804
Park Trammell Building
Tampa, Florida 33602
(813) 272-2670

COUNSEL FOR APPELLEE

/jmw

TABLE OF CONTENTS

PAGE NO.

TABLE OF CITATIONS

CASES — PAGE NO.

OTHER AUTHORITIES

STATEMENT OF THE CASE AND FACTS

The statement of fact furnished with the brief of appellant is generally sufficient in setting out the state's case against him. Where additional facts are needed to show the strength of the state's case or the context that illuminates some claim advanced by the appellant, they are supplied in the body of this brief.

Of most obvious import, the state does not agree, for reasons stated at length in connection with Issue VIII, that the record supports appellant's factual claim that the state had granted Phil Drake transactional immunity for this murder. Likewise, it is only counsel's representation that supports the factual claim that Kelly remembered under hypnosis a tag number inconsistent with the tag number that was actually on appellant's auto at the time of the murder. Nor, does the state agree that the court instructed a juror that the hat belonged to the victim. He answered a juror's question about what a witness had said.

Appellee does not agree with much of the statement about what the pre-indictment delay hearing established. But, because most of the matters about which there is disagreement is not material to the issues presented for review the state will not dispute it at this state of the proceedings in the interest of keeping an already long brief from getting even longer.

Where there are material disagreements about the facts, they are with the issues and are clearly identified and citations to the record are supplied.

SUMMARY OF THE ARGUMENT

As to Issue I: The trial court did not err in preventing appellant from offering the statement of A, Shelton, that B, Kane, had told him, A, that he, B, had been present when C, Drake, had murdered the victim. It was hearsay. And, it was not corroborated because everything Shelton alleged that Kane had told him could be traced to an origin, the police or news accounts of the crime, other than a truthful account. And, the account of the crime itself was inconsistent with the physical evidence.

Appellant did not present it as a constitutional claim to the trial court and the constitutional dimension of the claim has been procedurally defaulted. The other theories of admissibility not offered to the trial court have, in addition to the fact that they would not have permitted the use of the Shelton statement as substantive evidence, been procedurally defaulted as well.

As to Issue II: The judge did not comment on the evidence during the individual voir dire he conducted. The context shows he was attempting to determine what the prospective jurors might have heard about the case in the media. Nor, did he instruct the jury that the hat belonged to the victim. He answered a juror's question about what a witness had said.

There was no objection and there was no fundamental error. What the judge had talked with the jurors about were not issues crucial to the defense. They were non-issues as the defense was not disputing that the victim had been burned to death and that

she was Linda Pikuritz. The defense was focused around questioning the state's proof of who had committed the crime.

As to Issue III: This court has clearly ruled that witnesses other than the defendant will not be permitted to testify to events recalled under hypnosis which were not demonstrably recalled prior to hypnosis. The court did not error in precluding appellant from asking Kelly what he had recalled under hypnosis. And, even if he could have been asked, it was his testimony he did not recall and had not been told what he had recalled under hypnosis.

As to Issue IV: Despite an extensive evidentiary hearing, appellant failed to demonstrate that he was prejudiced by pre-indictment delay in this case. He did not offer his alibi witness to show that her memory had been dimmed by the passage of time. Nor, did he demonstrate that the records he claimed were lost from Foxmoor Casuals would have corroborated an alibi. The evidence that was offered on whether he had been at Foxmoor Casuals on the night of the murder showed that the alibi story given by his wife was inconsistent with the recollection of the people working there and that they would have remembered something as unusual as she described.

The record does not demonstrate that the police simply waited until his alibi evaporated to push for prosecution. There was an ongoing investigation. And, there were differences of opinion over how it should have been investigated. This case did not break until a reevaluation of the evidence that accumulated

around the time of the initial investigation showed that it had ignored two witness, Kelly and Zwilling, who could link appellant and the victim just prior to the death and who had not previously been interviewed.

As to Issue V: There was substantial competent evidence from which the jury could conclude beyond a reasonable doubt that appellant was guilty as charged. She was seen in appellant's company in the hours before she disappeared. Appellant had been angry with her. Her bicycle was found thrown over and hidden in bushes in the location where appellant's car had been seen stopped and its occupant in conversation with a little girl who fit the victim's description. Appellant lied about how he had come to know of the victim's murder. And, physical evidence, the shell and the hair, linked the victim to appellant's car.

The hypotheses of innocence that appellant now urges, hypotheses he did not advance at the motion for judgment of acquittal, are not reasonable in light of the evidence. Among the problems with appellant's hypothesis of innocence are that; it does not account for his lies; the hiding of the bicycle; the fit between the shell in his car and the broken necklace; why she would have voluntarily entered his car and left; or, why a forcibly removed hair was in it.

The evidence on identity went beyond the prima facia showing of identity that is necessary for establishing the corpus delicti. Considering the circumstances of the case, the evidence was the most convincing available. There were the personal items

found in proximity to the body. And, there was the disappearance of the victim followed shortly thereafter by the appearance of the victim's body which matched the victim's in all respects.

As to Issue VI: This court had authoritatively disposed of the Maynard v. Cartwright challenge to the heinous, atrocious or cruel aggravating factor adversely to the position appellant's argument takes.

As to Issue VII: Appellant did not object to any of the closing argument he now contends was improper. In the absence of fundament error, this works a procedural default of the claim. And, appellant has failed to demonstrate any fundamental error in what was said to the jury. His evidence or argument invited and justified most of it. The remainder of appellant's claims either are not supported by the record or are his conclusions that the record does not support.

As to Issue VIII: The record fully supports the trial court's finding of the existence of each of the four aggravating factors present in this case.

All the elements of a kidnapping are present and the hypothesis that a kidnapping was not established because the victim might have voluntarily accompanied appellant to the vicinity of the burn site is inconsistent with the physical evidence in the case.

The evidence leaves no doubt but that this killing was done to avoid lawful arrest. Avoidance of arrest is the only logical inference that flows from the evidence: the victim's knowledge of

her captor; the crime against her that resulted in her unconsciousness; her abduction; the transport to a remote location; the extreme mutilation of her body; and, the scattering of her belongings. The proof was very strong that the dominant motive for this killing was to eliminate a witness.

Appellant's suggestion that the killing may have been motivated by a deviant sexual preference or sadistic drive on his part does not account for the scattering of the victim's belongings or the pattern of the fire.

This killing was heinous, atrocious or cruel because it involved an abduction and transportation of the victim away from sources of assistance of detection. Common-sense inference establishes the fear and emotional strain which bring this case within the ambit of this aggravating factor and set it apart from the norm. That she was unconscious at the time death came does not rule out this aggravating factor in an abduction situation.

The planning that went into this victim's burning death shows that this crime bears the indicia of calculation and careful planning. Those features establish the existence of the heightened premeditation and calculation of the killing which serve to establish that this was a killing done in a cold, calculated and premeditated fashion without pretense of moral or legal justification. And, common-sense inference rules out the possibility that appellant may have thought his victim already dead at the time he burned her. He could not have failed to notice that it was a warm, living, breathing person whom he

dragged through the woods and from whom he removed clothing and then tied it to her still breathing body before he set it and the surroundings aflame.

The trial court did not abuse his discretion in determining that no mitigating factors were established by the evidence. The comments he urges the court to conclude were nonstatutory aggravating circumstances were in the nature of answers to arguments advanced by appellant's counsel.

The court did not overlook the evidence just because he looked at it under one heading instead of the several proposed by appellant. And, there was no error in the instruction on mitigation. It covered the mitigating evidence presented and appellant had no objection to the instructions at the time they were given. The absence of an objection works a procedural default of the claim.

The trial court discharged his duty to consider the evidence proffered in mitigation. He did not abuse his discretion in finding that there were no mitigating factors established by the evidence.

As to Issue IX: The record supports that trial judge's factual determination that Grace Gostyla's beliefs about capital punishment would have prevented or substantially impaired her ability to discharge her duties as a juror in keeping with her oath. Her answers to the relevant questions vacillated with who was doing the questioning. And, under questioning by the court she was not sure on whether she could follow her oath. The trial

judge did not abuse his discretion in determining that she should be excused for cause.

ARGUMENTS

Issue I

WHETHER THE CIRCUIT COURT ERRED IN SUSTAINING THE STATE'S OBJECTION TO SHELTON'S TESTIMONY ABOUT WHAT HE, SHELTON, CLAIMED KANE HAD TOLD HIM, SHELTON, ABOUT DRAKE'S KILLING OF THE VICTIM?

Following an extensive proffer, the court sustained the state's objection to appellant's putting Virgil Shelton on the stand to recount what Brian Kane had allegedly told him, Shelton, about Phil Drake's alleged killing of the victim. (R. 2918-19) The court first found that admissibility of the statement was governed by the law in effect prior to the enactment of the evidence code because the crime happened before July 1, 1979.[1] The argument over admissibility of the evidence had been in terms of the law of hearsay. Appellant did not advance a Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973) type argument in support of the admission of the evidence.[2] After stating his understanding of the predicate requirements, unavailability of the declarant and that the statement be against declarant's penal interest, the court ruled:

> The statement of Virgil Shelton relaying the statement or alleged statement of Brian Kane is inadmissable because it fails to meet

---

[1] In re Florida Evidence Code, 376 So.2d 1161 (Fla. 1979); Brinson v. State, 382 So.2d 322 (Fla. 2d DCA 1979)

[2] Appellant cited the court to two cases, Seaboard Coastline R.R. Co. v. Nieuweendall, 253 So.2d 451 and a State v. Palmer or Palmer v. State, that the state has not been readily able to identify. (R. 2912)

> either test. The declarant Brian Kane is available to testify, and, further, the statement considered as a whole is not contrary to Brian Kane's penal interests. He does not admit to any participation in the crime other than waking up and finding that it had been committed.
>
> (R. 2119)

The court then added that even if section 90.804(2)(c) applied, corroborating circumstances indicating the truthfulness of the statement were totally lacking.[3] (R. 2119) He found that Shelton had every reason to fabricate a statement by Kane to secure his own release. And, he found that the details of the offense given by Shelton as coming from Kane had been supplied to Kane by the police and that is how they could have been learned from Kane by Shelton. (R. 2119)

The record fully supports the circuit court's determination of these issues against appellant. Kane testified during the proffer. (R. 2827-2846) Plainly, he was not unavailable. And, the state does not understand appellant's argument to contend otherwise. Nor, does Shelton's account of what he, Shelton, claimed Kane told him, Shelton, amount to a statement against Kane's penal interest. When appellant's counsel asked a question that included Kane as a culpable party, Shelton replied, "He [Kane] said Phillip [Drake] did it." (R. 2894) Following an

---

[3] Section 90.804 (2)(c), Florida Statutes (1989) added this requirement. It provides, in material part, that "A statement [by an unavailable declarant] tending to expose the declarant to criminal liability and offered to exculpate the accused is inadmissible, unless corroborating circumstances show the trustworthiness of the statement."

opportunity to refresh his recollection with a copy of the statement he gave to Charlotte County Sheriff's deputies, Shelton recounted what he claimed Kane told him. (R. 2851) Shelton testified that Kane told him that they, Kane and Drake, had been doing PCP, that he, Shelton, had gone into a store to get some boxes and saw a girl get into the car. (R. 2851) He testified that the next thing he, Shelton, remembered was coming to in the woods. (R. 2851)[4] And, he, Shelton, testified, "Phil [Drake] had burned the girl and raped her and broke her arms and stuff." (R. 2851)

Appellant's characterization of what Shelton claimed that Kane had told him, Shelton, as a confession is directly contrary to the court's finding. And, it is contrary to the record. The argument appellant advances fails to explain why the trial court's determination to the contrary should not be honored. There is certainly no argument trying to establish it, just appellant's conclusory assertion. This court should reject this backhanded attack on the trial court's determination of this question.

Shelton was being held in jail on a "murder" [vehicular homicide/manslaughter] charge in Sarasota County at the time he claimed the statements had been made. (R. 2846) He had talked

---

[4] There is an apparent verbatim quotation of the statement at (R. 3521) by appellant's trial counsel. It mentions breaking both arms and legs. And, it is followed by an explanation as to why Investigator Barton did not believe it was trustworthy. (R. 3522-23, 3525)

with police before talking to Kane. (R. 2853) Shelton had initiated contact with the Charlotte County deputies. (R. 2896) The first time he, Shelton, talked with the deputies he had no knowledge of the crime. (R. 2897, 2901) They asked him to probe Kane. (R. 2896) And, they told him that Kane was a suspect in a murder in Charlotte County. (R. 2900) It was Shelton's testimony that they, the deputies, told him "if he talked to Mr. Kane and found out some evidence they'd drop the charges . . . ." (R. 2854) Tom Burns, one of the investigators who talked with Shelton, did not recall making such a promise. (R. 2886) Mr. LaVallee, the other deputy, did not have an independent recollection of such a promise. But, he testified, "I don't believe that I would have ever have told any prisoner, whether he was in the Charlotte County Jail or the Sarasota County Jail, that I could get him out or that I could have the charges dropped." (R. 2906)

Prior to the interviews with Shelton, the Charlotte County deputies had interviewed Kane and shown him pictures of the crime scene and the victim's body. (R. 2886, 2902) The pictures revealed a broken arm and the bare leg bone. (R. 2888) And, the interview covered Phil Drake and Phil Drake's car. (R. 2888) Following this interview, Shelton gave them the statement in which he claimed Kane had told him, Shelton, that he, Kane, had recounted knowing Drake had broken a girl's arms, raped and burned her. (R. 2890) Kane testified during the proffer that following his interview with the Charlotte County deputies, he

was upset and was telling everyone he knew what was going on. (R. 2838) The deputies discounted Shelton's statement because he could have learned the details he gave from sources other than someone telling the truth about what had happened. (R. 2892)

Plainly, the surrounding circumstances did not corroborate that Shelton was telling the truth. Appellee notes that the circumstances urged on this court, Brief for Appellant at 25-26, as supporting the admission of Shelton's account of what he claimed Kane told him about Drake as substantive evidence differ materially from those offered to the circuit court.[5] See (R. 2910) This change shows the weakness of both positions. The ground urged below is not strong enough to be renewed here. And, the ground urged here was not apparent at the time of the argument but is an artificial construction.

The corroborating circumstances urged on this court do not even tend to establish the reliability of the statement. They are, rather, appellant's view of the facts as to why his case inculpates Drake. Whether the victim was a drug user or purchased drugs and whether Drake was drug dealer and may have lied about his car's presence in the area and like assertions do not make Shelton's account of what he claimed Kane told him about Drake any more or less likely. Appellant's argument offers no

---

[5] Appellant has changed his grounds on appeal and because the grounds advanced here were not presented to the circuit court they have arguably been procedurally defaulted. See Hill v. State, 549 So.2d 179, 182 (Fla. 1989)(legal ground for objection which was not presented to lower court but urged on appeal found to have been procedurally defaulted)(collecting cases).

basis for this court to reject the circuit court's factual determination to the contrary.

This court's decision in Hill v. State, 549 So.2d at 182 conclusively resolves both appellant's hearsay and his Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973) claims under this point against him. The evidence he sought to introduce, Shelton's testimony about what Kane had told him about Drake, can not be meaningfully distinguished, for the purposes of exclusion, from the evidence Hill sought to introduce and which the Hill trial court, like the trial court in this case, correctly rejected. The evidence appellant sought to introduce is just as remote as that at issue in Hill. In Hill, this court affirmed the exclusion of testimony by one of his coworkers (A) that a second coworker (B) had reported that a third coworker (C) had admitted to the crime.

Hill is also dispositive of the constitutional claim on two grounds as well. Just as in this case, Hill had not presented his Chambers v. Mississippi to the trial court. This court found that it worked a procedural default of the claim on account of the long standing rule prohibiting the changing of grounds on appeal. Appellee asks the court to make a "plain statement" rejecting the Chambers v. Mississippi claim solely on the basis of the procedural bar just as it did in Hill. Id. at 182

The state is concerned that in the absence of a "plain statement" rejecting the Chambers v. Mississippi claim solely on the basis of the procedural default some subsequent federal

habeas court reviewing the conviction may read Harris v. Reed, 489 U.S. ___, 109 S.Ct. 1083, 103 L.Ed.2d 308 (1989) as authorizing it to conclude that this court reached and decided the merits of the claim if the decision is silent on the basis for its decision. The state does not read Harris v. Reed this broadly but can readily see how this interpretation might be adopted until the United States Supreme Court makes clear the extremely limited nature of its holding.

Even if the court reached the merits of the constitutional dimension of the claim, it would have to find it to be without merit. As the court correctly found in Hill, Chambers v. Mississippi does not open the way for an accused to present unreliable evidence. As this court observed in Hill, 549 So.2d at 182

> . . . [T]here is no due process right to present uncorroborated and untrustworthy evidence from witnesses who can not be cross-examined because they have no knowledge of the substantive truth of their testimony.

The evidence offered below is just as remote and unreliable as that found to have been properly excluded in Hill.

Appellant also contends that the Kane statement was admissible as a prior inconsistent statement pursuant to section 90.614, Florida Statutes (1989). But, appellant never suggested to the trial court that the statement should come in as a prior inconsistent statement and that he should have been allowed to establish a predicate for it in front of the jury. And, for this reason the claim must be found to have been procedurally defaulted. See Hill

It is not surprising that this was not suggested to the trial court. It would not have been admitted as substantive evidence but only as impeachment. And, it was not even proper impeachment of Shelton. Even if appellant had been allowed to elicit a denial of the statement Kane had allegedly made to Shelton, he could not have been impeached on it because it was collateral and the answer was conclusive on the questioner. It would not have worked to his advantage in any event as prior inconsistent statements are not, at least under the circumstances of this case[6], admissible as substantive evidence. They are admissible only for the purpose of impeachment. The theory is that since one or the other of the statements is false neither should be believed. Wingate v. New Deal Cab Co., 217 So.2d 612, 614 (Fla. 1st DCA 1969). Surely appellant did not want the jury to disbelieve both Kane's denial of making the claimed statement to Shelton and what Shelton claimed he had told him.

Appellant relies on Irons v. State, 498 So.2d 958 (Fla. 1968) in support of this theory of admissibility. But, as the analysis of Irons set forth in appellant's argument shows, it is plainly distinguishable. To the extent that the statements at issue in Irons were admissible, they were admissible to impeach state witnesses. But, this appellant did not want to use the

---

[6] Under specified circumstances not present in this case, a prior inconsistent statement can be allowed as substantive evidence pursuant to section 90.804(2)(a), Florida Statutes (1989).

evidence for impeachment of a state witness. He wanted to use it as substantive evidence.

Aside from the fact that appellant never suggested to the court that he should call Shelton as court witness and the claim has been procedurally defaulted, it is without merit. There was no basis for calling Shelton as a court witness. He was not an eyewitness unlike the witness at issue in Jackson v. State, 498 So.2d 906 (Fla. 1986). And, he did not have any admissible evidence regardless of how he could have been impeached by either side.

There was no error in the trial court's handling of the Shelton testimony either as it was presented to him at the time or under the novel theories suggested for the first time in this action. The court should, accordingly reject this attack on appellant's conviction. It should find no error in the claims presented below and it should find the claims presented for the first time on appeal to have been procedurally defaulted and rests its decision on these claims solely on the basis of the procedural defaults.

Issue II

WHETHER THERE IS FUNDAMENTAL ERROR IN THE WAY THE COURT CONDUCTED VOIR DIRE SO AS TO AMOUNT TO COMMENTING ON THE EVIDENCE AND IN ANSWERING A JUROR'S QUESTION ABOUT WHAT A WITNESS HAD SAID?

There can be no doubt that it is improper for a Florida trial judge to comment on the evidence in a criminal case. Raulerson v. State, 102 So.2d 281 (Fla. 1958). It is improper for a trial judge to "convey to a jury any intimation as to the court's opinion of the case." Stewart v. State, 420 So.2d 862, 863 (Fla. 1982), cert. denied, 460 U.S. 1103, 103 S.Ct. 1802, 76 L.Ed.2d 366 (1983). In determining whether a challenged comment amounts to an improper comment on the evidence, the reviewing court looks to the context in which the challenged remark or statement occurs. Provence v. State, 337 So.2d 783 (Fla. 1976), cert. denied, 431 U.S. 969, 97 S.Ct. 2929, 53 L.Ed.2d 1065 (1977); Ross v. State, 386 So.2d 1191 (Fla. 1980). An improper remark by a trial judge can amount to fundamental error, Flicker v. State, 374 So.2d 1141 (Fla. 1st DCA 1979); Beckham v. State, 209 So.2d 687 (Fla. 2d DCA 1968), but, if the remark is just an improper comment, an appropriate contemporaneous objection is necessary to preserve the issue for review. Stewart 420 So.2d at 863 n. 2; Ross, 386 So.2d at 1195.

Appellant asks the court to find that there is fundamental error in this case in the way the trial court handled voir dire and in the way he answered a question from juror Dolan. It is therefore important to put what is claimed to be fundamental

error in its proper perspective. This is not a case where corpus delicti was in dispute.[7] The heart of the defense was that there was a reasonable doubt as to whether appellant was the perpetrator. Counsel's opening statement shows as much. In it he cast this case as a "Who done it." (R. 835) He did not question the existence of the corpus delicti. He said:

> There is no question that Linda Pikuritz was found on the night of October 12, 1978, in the woods and the she was burned by somebody. There, the big question is, "Who"?
>
> The state has told you that they will prove to you that my client is the one who did that. Ladies and gentlemen of the jury, they can't do it because nobody knows who burned Linda Pikuritz on the night of October 12, 1978. (R. 835)
>
> * * *
>
> As I said, Ladies and gentlemen, there's no question that Linda Pikuritz was murdered on the night of October 12, 1978. (R. 841)

During closing argument counsel told the jury the biggest question they would face was,

> . . . are you sure as you sit here that you know who killed Linda Pikruitz? Each and everyone of you convinced beyond and to the exclusion of every reasonable doubt that you know who killed Linda Pikuritz and that the person that you know did it is Brad Scott? Because that's the question you are going to have to ask yourselves in a couple of hours when you are given this case for your

---

[7] Appellant did not question proof of the corpus delicti at the time of his first motion for judgment of acquittal. (R. 2646-56) When arguing his motion for judgment of acquittal at the close of all the evidence, he attacked proof of the victim's identify on the ground that there had been no death certificate, (R. 3020) See Issue V B. of this brief.

deliberations and you go back to the jury room." (R. 3102-03)

The identity of the victim was not in issue. That she had been deliberately burned was not in issue. During closing argument, appellant attempted to lay the blame for the burning on Phil Drake. (R. 3116) It was his position that the accelerant had come from James Brown's can of paint thinner and that it had been poured into a gas can of Drake's (R. 3113) Venue was never a subject of question. It appears that it was undisputed.[8]

Appellant's facts and argument also take the position that the court instructed the jury that the cap belonged to Linda. As appellee reads the record, this is more that it will bear. While the victim's mother was testifying about turning the hat over to the police, the court interrupted the proceeding saying, "Yes, Ms. Dolan [a juror]." She then replied, I did not hear what she said who the hat belonged to." The court replied, "The cap was Linda's." (R. 1818) The testimony then resumed without objection. Appellant did not challenge whether the cap belonged to the victim.

Appellant gives a multitude of record citations to support his contention that the trial court "made repeated comments regarding the identity of the victim." Brief for Appellant at 32 All but one of these record citations, (R. 406), are to passages of the record where the court is inquiring of prospective jurors

---

[8] Venue was not mentioned during the motions for judgment of acquittal.

whether they recall anything about the case. The court was making individual inquiry at this point, (R. 59), and only one of the record references is to a prospective juror who actually served, (R. 275), Florence Kramitz.[9] (R. 4100) The comments to which appellant's argument points were made during the court's inquiry about their knowledge of the case. (R. 59) They were made to see if they would trigger a memory of something they had heard about the case. The final reference, (R. 406), comes as the court is inquiring of the prospective jurors whether they knew any one connected with the case. There was no objection to the court's procedure.

Appellant give three citations to the record in support of his assertions that the court told prospective jurors that the fire was not an accident and that venue was satisfied. Again only one record reference, (R. 275), is to a juror who actually served, Florence Kramitz. The following exchange is the basis for appellant's claim:

> Q. See, the facts, the general facts about the case are that in October of 1978,

---

[9] Lester v. State, 458 So.2d 1194 (Fla. 1st DCA 1984) a case cited by appellant for the proposition that the fact that the comment came during vior dire and that it was to a juror that was excused for cause are immaterial is only of limited relevance to the case. The state concedes that a court can make a comment during voir dire that might be fundamental error although that did not happen in this case. But, Lester is not applicable on the question of an improper comment to a person who is later excused when there is individual voir dire. The juror in Lester, unlike the situation presented here, was part of a panel that was subject to voir dire collectively.

> at about 11:00 p.m. in the evening a fire occurred -- and, I'm sorry, the road is?
>
> MR. JOHNSON: Off of Toledo Blade Boulevard.
>
> BY THE COURT:
>
> Q.--Toledo Blade Boulevard in Port Charlotte where there was a fire in a wooded area, and when firemen went to put out the fire the found the body of a 12 year old girl, Linda Pikuritz, and the investigation, the people investigating concluded that it was set deliberately and she was deliberately burned. It wasn't, I guess, until 1986. You were here then? (R. 275)

The court did not actually tell her that the fire had been deliberately set. Nor, did he establish venue. To the extent that the reference to Toledo Blade can be taken as a reference to venue, appellant's counsel's supplying the name of the street shows that it was not in issue. Nor, of course, was the victim's name or whether the fire had been deliberately set.

The context in which the matters to which appellant now takes exception shows that they were not comments on the evidence. Appellant is asking for a rule that would prohibit courts from the kind of general voir dire designed to discover what prospective jurors know about a case. And, he offers no cases that extend the general principles on which his argument rests this far.

Even if the judge's question to Florence Kramitz and his mention of the victim's name to the larger panel could be construed as comments on the evidence, they certainly are not the kind of comments which would cause fundamental error given the

context of the trial in which they happened. The cases to which appellant seeks to analogize his facts really have no bearing on the issues presented by this record.

Beckham has no application to the resolution of this case. The reference to a crime scene in that case was prejudicial in the context in which it occurred. Although the context is not disclosed in the opinion, the opinion makes it clear that the context made it prejudicial. What are claimed to be improper comments in this case were about non issues in the case.

The comment in Flicker told the jurors that the defendant was guilty of a crime, conspiracy. And, that conspiracy was at the heart of the murder charge he was defending. The matters about which appellant complains certainly do not make him out to be a criminal. He did not dispute either the victim's identity or that she had died by the criminal agency of another. He was just trying to establish a reasonable doubt by trying to point the finger at someone else.

Whether there had even been a murder was the key issue at stake in Hamilton v. State, 109 So.2d 422 (Fla. 3d DCA 1959). That is why the judge's question to a witness which assumed that there had been a murder was so prejudicial in that case. And, the court made it clear in this case as in the others cited by appellant's argument that it is context which makes a comment prejudicial or not. Nothing the judge in this case did that appellant now complains about when viewed in context did any harm.

There certainly was no fundamental error in the way the trial judge spoke with the jurors in this case. Accordingly, appellee asks the court to affirm over appellant's claim for relief under this point in his brief solely on the basis of procedural default because he made no objection to the matters he now deems harmful.

Issue III

WHETHER THE COURT ERRED IN SUSTAINING THE STATE'S OBJECTION TO APPELLANT'S CROSS EXAMINING THE WITNESS KELLY REGARDING WHAT HE RECALLED UNDER HYPNOSIS?

Appellant's argument takes the position that the court erred in not allowing him to present evidence, recalled during hypnosis that he claims is favorable to him, a tag number. Appellant's point is without merit for two reasons. The witness did not recall having supplied a tag number. There was no evidence for appellant to present. And, even if there had been, this court has authoritatively rejected testimony of events recalled under hypnosis.

Kelly has testified, on direct, to observing a little girl on a bicycle talking to the driver of large white car that was blocking one lane of traffic on Midway near the intersection of Lakeview around 6:00 or 6:30 P.M. on October 12, 1978 (R. 1178-79), a place along the route Linda Pikuritz followed to the convenience store and toward home. He had been stuck behind them while waiting for a car to pass in the other lane. (R. 1178) He made eye contact with the man in the car. Working from photo packs in 1985, he identified appellant as that man, (R. 1194), and the car as appellant's car. (R. 1190) Although shown a picture of Linda he could not identify her as the girl. (1195) He was, however, positive that appellant was the man he had seen. (R. 1268-69).

During cross-examination, counsel asked him whether he had ever recalled the tag number of the car that had been in front of him on that evening. (R. 1271) The state interposed an objection and secured a bench conference. The court asked for a proffer of the expected cross. (R. 1271)

During the proffer, the witness denied ever recalling the tag number. (R. 1272) Although he recalled being hypnotized the week following his providing identifications of the appellant and his car, he denied he had ever been given a report. (R. 1273) Appellant then tried to call the person he alleged had hypnotized appellant (R. 1273-74), but the court disallowed this and appellant does not question that ruling.

Following appellant's proffer, the court ruled:

> My -- until something is presented to me to indicate the reliability of statements people make under "hypnosis" as far as I'm concerned it's not -- the response is made under hypnosis that a person can not consciously recall, are not admissible in this court.
>
> (R. 1274)

The prosecutor then examined appellant and established that everything he had testified to had been recalled prior to his having been placed under hypnosis. (R. 1275) He had recalled the encounter near the intersection, had picked appellant's auto out of a photo array, and had picked appellant's picture out of a forty photograph array all prior to having been hypnotized. (R. 1275).

Appellant did not have any evidence to present by way of cross examination of this witness. The court's ruling did not stop him from showing that Kelly had recalled a number other than that on appellant's car tag at the time. Factually, he has nothing to complain about.

Even if the witness had testified he had recalled a tag number under hypnosis and it was inconsistent with the tag on appellant's car at the time, he still has no claim for relief. This court has just conclusively ruled that such testimony is so unreliable that it is not admissible. Stokes v. State, 548 So.2d 188 (Fla. 1989). The court reversed a conviction predicated in part on testimony from a state witness which included material details about a car observed at the crime scene which the state could not demonstrate had been recalled prior to hypnosis.

Reasoning from Rock v. Arkansas, 483 U.S. 44, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987) and Morgan v. State, 537 So.2d 973 (Fla. 1989), appellant contends that there is an anomaly in the law in this area. He contends that Morgan is a retreat from the strict rule of inadmissibility of Bundy v. State, 471 So.2d 9 (Fla. 1985). Aside for the fact that this proposition can not stand in light of Stokes very strong position on per se inadmissibility, appellant's argument is also fatally flawed. The argument advanced, reasons, "[i]t is impossible to reconcile the admissibility of corroborative hypnosis testimony with the exclusion of impeachment materials developed during the course of hypnosis since both arguably enjoy the status." Brief for Appellant at 39.

The flaw in appellant's reasoning is readily apparent. He equates "hypnosis testimony" with the corroborative evidence mentioned in Morgan. To read Morgan as appellant's argument would have this court do, puts it at war with itself. And, such a construction of the language would be fundamentally inconsistent with Stokes. As this court clearly found in Stokes, hypnotically induced testimony is just too unreliable to be admitted. The "corroborative evidence" mentioned in Morgan as a possible fruit of hypnosis must be read to mean physical evidence or the existence of previously unknown witnesses.

The court should reject appellant's attack on his conviction under this point in his brief. Factually, he has no injury about which to complain. And, his legal position is contrary to the court's most recent ruling in this area of the law, Stokes.

Issue IV

WHETHER THE COURT ERRED IN DENYING APPELLANT'S MOTION TO DISMISS PREDICATED ON PRE-INDICTMENT DELAY?

Appellant urges the court to conclude that the trial court erred denying his motion to dismiss the indictment on account of pre indictment delay in this case. The circuit court did not error. He conducted an extensive evidentiary hearing, (R. 3330-3608), had counsel submit memoranda on the issue, (R. 3608, 3612)[10] and made his decision only following oral argument, (R. 3772) on the matter. His oral ruling is at R. 3772. The written order he indicated would be forth coming is not a part of this record. Study of the evidence presented on the issue shows that appellant failed to establish his case for dismissal.

Appellant's brief is written in such a way as to leave several erroneous inferences for the reader to draw. It first leaves the inference that appellant had a viable alibi defense in the months immediately following the discovery of the murder of Linda Pikuritz and that the State Attorney declined to prosecute him solely on the basis of the strength of this alibi. It leaves the inference that the state decided to prosecute appellant only after learning that he no longer had a viable alibi defense. It leaves the inference that he lost evidence that would have supported an alibi defense. And, it leaves the inference that little or no new evidence came to light in the time between he

---

[10] The memoranda submitted to the trial court on the issue are not a part of the record.

was first identified as a suspect in the period following the discovery of the murder. Not only does the record not support these inferences it is to the contrary.

There have been three principle investigators for the Sheriff's office who have worked on this case over the years. Jim Jones was the initial investigator. (R. 3562) He worked the case until 1981 when Mike Gandy joined the Sheriff's Office and was asked to take over the investigation. (R. 3482-83) After McDougall became Sheriff in 1983 and asked him to proceed with the investigation, he declined to do so because of differences over how the case was to be investigated. (R. 3483-84) At that point, he was waiting for an psychological profile of the crime scene from the FBI. (R. 3493) Ken Barton eventually took over the investigation. (R. 3512)

The Sheriff's office identified appellant as a suspect in the early phases of the investigation. But, he had an alibi. And, they did not have much evidence. After Jones submitted the case to the sheriff's office for prosecution in 1979, D'Alessandro wrote him a letter telling him that he did not feel that there was sufficient evidence and asking him to hold off and develop further evidence. (R. 3573) At that point, appellant's car had not been identified. And, he could not be connected with the victim. All the Sheriff's office had at that time was evidence discovered at the burn site and the bicycle site.

While Gandy was responsible for the case, Patty Flynn picked appellant's car out of a line up and identified it as the car she

had seen with the man talking to the girl on the bicycle in front of her house on the night of the murder. (R. 3489-90) They did not resubmit the case to the state attorney's office at that time because they could only identify the car and there was not identification of appellant. (R. 3495)

When Barton took over the investigation of the case, he followed up on open leads. He traveled to many states and interviewed hundreds of witnesses. (R. 3533) He discovered that both Lou Kelly and Ann Zwilling could put appellant and his victim together on the day of the crime. (R. 3534, 3548-50) He had additional analysis performed on the soil sample from the burn site which showed gasoline in the sample. (R. 3535) He discovered that Lisa Carver and Angela Byrd could establish that appellant knew the victim and had seen them together on previous occasions. (R. 3535) He resubmitted the necklace found at the burn site and the shell from the back seat of appellant's car for the analysis that eventually showed that they would fit together. (R. 3536, 3550-51) He established that appellant had installed a sprinkler system only a few houses away from the victim's house only a month or two before the murder. (R. 3537) And, he rechecked the alibi.

Jim Jones testified that he had checked the alibi with the wife and that his investigation revealed nothing. He said, "Nobody knew anything about it." (R. 3565) He did not recall whether his investigation ever went as far as obtaining the work records on Kathy [Stetcher] Scott. (R. 3575-76) Nor, could Gandy

recall whether they had checked her work records a Sambo's or the records at Foxmoor Casuals. (R. 3487)

Margaret Kleimant, an employee from Sambo's testified that only the work records covering the month in which the murder had happened were missing from their pay records. (R. 3461-63) She discovered this when Barton had asked for the old pay records. (R. 3461-63) Appellant had made a statement that his wife had worked at Sambo's on the evening of the murder. (R. 3545-46) He was relying on his wife's recollection of where he had been that evening. (R. 3544, 3552-53)

Barton testified that the Kathy Stetcher alibi story about their being at the Foxmoor Casuals in Sarasota on the night in question had been checked to a point. (R. 3553) He checked it further. The alibi had alleged that an employee of Foxmoor Casuals had a particular style jacket on layaway for their own use. It had appellant and his wife looking for a jacket of that nature. It alleged an employee had said, "Well, you're in luck. I happen to have one of those in layaway. And, I will take it out of layaway and sell it to you." (R. 3554)

Barton testified that he had checked with all the employees involved there at the time. He said that none of them had ever had a jacket of that description on layaway. And, he said none ever took a jacket out of layaway to sell to a customer due to the difficulty of the paperwork such a transaction would generate. (R. 3554) All felt that such a transaction would have stuck in their minds. (R. 3554)

Appellant offered no direct testimony to establish his alibi. Kathy Stetcher did not testify at all.[11] Nor, did appellant. He offered no direct proof either that he had an alibi and lost it or that the transaction which had been investigated had ever happened.[12] The inference the state draws from the record is that the alibi about which there was so much second hand testimony evaporated not because of delay but because of a more thorough investigation of it. Nor, did he offer any evidence from any representative of Foxmoor Casuals about what records would have existed or what, if anything was missing.

With its decision in Rogers v. State, 511 So.2d 526 (Fla. 1987), cert. denied, 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988) Florida joined the Fifth, United States v. Townley, 665 F.2d 579 (5th Cir. 1982)(showing that government not motivated by bad intentions will not excuse prejudicial delay cause in part by low priority assigned to case and manpower shortages), cert. denied, 456 U.S. 1010, 102 S.Ct. 2305, 73 L.Ed.2d 1307 (1982), Ninth, United States v. Moran, 759 F.2d 777, 783 (9th Cir. 1985)(defendant need not show intentional or reckless delay but

---

[11] Argument on the motion indicated that she had given three statements including a deposition. The court below noted that she had not testified at the evidentiary hearing. (R. 3648)

[12] During argument on this question, the state made reference to a handwritten statement that Kathy Stetcher had given to Jim Jones about appellant's whereabouts on the evening of the murder. Although the transcript of the argument speaks of it having been introduced into evidence, your undersigned did not find where that might have happened during the evidentiary hearing. In any event, it is not a part of the record on appeal.

some culpability in addition to prejudice to establish due process claim), cert. denied, 474 U.S. 1102, 106 S.Ct. 885, 88 L.Ed.2d 920 (1986) and some panels of the Seventh Circuit, see United States v. Williams, 738 F.2d 172, 175 n. 1 (7th Cir. 1984)(noting split of authority in circuit on issue) in finding that once a criminal defendant has shown that he has been actually prejudiced by pre-indictment delay he need not show that the delay was either to gain tactical advantage or to harass the defendant before he can invoke the balancing of the prejudice against the reasons for the delay test.

Appellant failed to show that he was actually prejudiced by the delay in this case. For his specific claims of prejudice appellant contends: 1) the records for Foxmoor Casuals for October 12, 1978 are now missing; 2) work records for Kathy Stetcher were no longer available by 1985; and, 3) faded memories. See Brief for Appellant at 45. Appellant's notice of alibi, (R.4059), claimed that he had been shopping with his wife, Kathy Stetcher Scott, at the Foxmoor Casuals store in Sarasota and purchased a coat the evening of the crime.

While appellant did show that work records for Kathy Stetcher were missing, he fails to explain how this prejudiced an alibi defense. And, as mentioned earlier he never directly established that he had lost an alibi. If the employment record showed she had worked that night they certainly would not have helped. He offered no testimony that they would have showed that she either did not work or that she had left work early enough to have gone shopping in Sarasota.

As mentioned earlier, appellant offered no direct evidence that the records from Foxmoor Casuals would have contained evidence of the transaction that would have allegedly corroborated the earliest Kathy Stetcher statement about his whereabouts on the night in question. The evidence before the circuit court was that the transaction had not happened. Even if he had, that would not have made a showing of actual prejudice because he had failed to even demonstrate that he had lost an alibi defense because of delay. Significantly, appellant did not orally argue to the trial court that he had been prejudiced by the absence of records from Foxmoor Casuals. Apparently, that was point sixteen in his memorandum to the trial court. See (R. 3652-53) (argument of prosecutor discussing this point in appellant's trial memorandum).

Even if appellant had shown prejudice and the court had to balance prejudice against the reasons for the delay, it would have to find that the balance falls in favor of the state. It is very clear that the delay in this case arose over differing police approaches as to how the case should have been investigated and how much manpower should have been devoted to it. That is a very good reason for delay. See Stoner v. Graddick, 751 F.2d 1535, 1543 (11th Cir. 1985)(per curiam)(19-year delay resulting from differing prosecutorial assessments of chances for conviction presumed proper in the absence of a showing to the contrary).

Issue V

WHETHER THE CIRCUIT COURT ERRED IN DENYING APPELLANT'S MOTIONS FOR JUDGMENT OF ACQUITTAL?

A motion for a judgment of acquittal admits all the facts in evidence and every inference and conclusion the jury might reasonably reach from it that is favorable to the state. Codie v. State, 313 So.2d 754 (Fla. 1975); Lynch v. State, 293 So.2d 44 (Fla. 1974); Smith v. State, 66 Fla. 35, 63 So. 138 (Fla. 1913).

When the state's case is based on circumstantial evidence, it must not only be consistent with guilt but inconsistent with any reasonable hypothesis of innocence. Cox v. State, No. 73,150 (Fla. Dec. 22, 1989)[14 F.L.W. 600]. Where there is substantial competent evidence of guilt in a criminal case, the reasonableness of a hypothesis of innocence is for the jury. Cochran v. State, 547 So.2d 928, 930 (Fla. 1989); Heiney v. State, 447 So.2d 210 (Fla.), cert. denied, 469 U.S. 920, 105 S.Ct. 303, 83 L.Ed.2d 237 (1984). The basic principles governing review of the claims are simple and straight forward, even if sometimes controversial in application, and they mandate affirmance because the state presented substantial competent evidence of appellant's guilt. The jury could have reasonably concluded beyond a reasonable doubt that it excluded every reasonable hypothesis of innocence and that the corpus delicti had been established.

A: Proof of Guilt

Lou Kelly clearly linked appellant and his car (R. 1106 [witness' testimony about picking out car for photo pack] 1117-18 [witness' testimony about picking appellant's photo out of photo pack and in court identification of appellant]) not just a car the similar to appellant's, with a girl consistent with the victim (R. 1102 [description of girl]) on the evening of her death along the route she would have traveled between her neighborhood and the little general store where Daniel Lurtz sold her the Bubbilicious gum (R. 1322) like that found at the burn site. (R. 1690, 2542-43) Ann Zwilling Tagliaferri saw both appellant and the victim engaged in conversation at the convenience store that evening. She described appellant as looking upset and glaring. (R. 1987) Patty Flynn Radford saw a girl on a bicycle who fit Linda's description (R.1381-82, 1386-87, 1409-10) along that same route near her house engaged in an extended conversation with someone in a car. (R. 1383) She later identified appellant's car as the car she had seen that night. (R. 1393) The next day Mr. and Mrs. Nave discovered Linda's bicycle hidden back in the bushes and thrown over close to where Patty Flynn Radford had seen appellant's car the evening before. (R. 1758-61 [Mrs. Nave] 1776- 77 [Mr. Nave]).

The morning following the murder, a Friday, appellant called the Boule household around 7:30 or a quarter to eight to make sure that his paycheck would be next door. (R. 2059-60) During the conversation, he asked Mrs. Boule whether she had heard about the little girl who had been murdered near her house. She

replied, "No." And, then she asked him how he had heard such a thing. (R. 2060) He replied that he had been stopped at a road block the night before. She told her husband about it and they listened to the radio on their trip from Port Charlotte to Ft. Myers to hear about it but did not. (R. 2102-03) The following Monday he told Mr. Boule that he had been stopped at a road block on his way to pick up his paycheck. (R. 2104) He said that a policeman had stopped him an told him that they were looking for suspects because a little girl had been murdered. (R. 2106) He said that he had asked the policeman what had happened and that the policeman told him about a little girl being burned. (R. 2106) Appellant offered to show him where he had been stopped. (R. 2104) Mr. Boule drove him and Dennis Anderson to the location following appellant's directions. (R. 2105-06)

Among the items of physical evidence introduced in this case, there is a hair recovered from appellant's vehicle (R. 2438), a seashell recovered from his vehicle (R. 2437-38) and a seashell necklace she had been wearing that day (R. 891, 1425-26) found in the drag marks (R. 1514, 1681-86) in the sugar sand leading to Linda Pikuritz's body. The hair recovered from appellant's vehicle matched the victim's in all respects. (R. 2613)[13] In the expert's experience with some 10,000 cases he had found only two occasions where hairs from different people were indistinguishable. (R. 2614-15) And, because of damage to the

---

[13] Appellant's expert agreed. (R. 2680)

basal end of the hair he concluded that it had been forcibly removed. (R. 2616-17) The break in the necklace was such that the micro-analyst concluded that the exposed ends had once been joined to each other. (R. 2487) And, the line contained just enough room for one more shell the size of the shell found in appellant's car. (R. 2486, 2526)

Appellant's argument at the motion for judgment for acquittal, (R. 2646-56), took the position that even if the evidence did link him and the victim up till 6:30 or 7:00 o'clock on the evening of the murder it still did not prove that he murdered her later that evening. (R. 2652-53) He took the position that the shell was common and could have come from another source given that a multitude of such necklaces had been imported and sold in the area of Ft. Myers. (R. 2654) And, he took the position that since they were only working with a hair from Linda's hat and since hair comparison is not conclusive, the hair could have come from some other source. (R. 2655)[14]

The circuit court denied the motion after considering it over the luncheon recess and reviewing the cases counsel submitted on review of circumstantial evidence. He ruled:

> And the jury could take the view of this evidence in my opinion, that every reasonable hypothesis of innocence has been excluded, if

---

[14] Appellant made essentially the same argument when he renewed his motion for judgment of acquittal at the close of all the evidence. (R. 3019-24) He added only that the state had failed to prove either the identity of the victim or her death because the state had not introduced a death certificate. (R. 3020)

> they believe that the hair found in the car was that of Linda Pikuritz. And if they believe the shell found in the car came from the particular necklace that she wore the day she died.
>
> So the Court is denying the motion for judgment of acquittal. (R. 2656)

In reviewing the evidence at the motion for judgment of acquittal stage, the evidence must be viewed in the light most favorable to the state. Spinkellink v. State, 313 So.2d 666, 670 (Fla. 1975), cert. denied, 428 U.S. 911, 96 S.Ct. 3227, 49 L.Ed.2d 1221 (1976). Appellee submits that in the light most favorable to the state, the reasonable inferences and deductions from the evidence show that appellant was angry with the victim, kidnapped her, hid her bicycle in the bushes, pulled her hair and broke her necklace while in his car, eventually transporting her to the burn site where he set her still living body afire with gasoline, scattered her belongings and that he had lied to the Boule's about how he came to know about the murder and burning.

Any one of the circumstances alone might leave room for the conclusion that there was not substantial competent evidence for the jury. See Horstman v. State, 530 So.2d 368 (Fla. 2d DCA 1988)(pubic hair found on victim's body which matched defendant's and other inconclusive evidence insufficient to go the jury). The combination of circumstances here can only be explained by appellant's guilt. See Wilson v. State, 493 So.2d 1019, 1022 (Fla. 1986)(looking to totality of the circumstances to establish the existence of competent substantial evidence for the jury in

circumstantial evidence case); cf. Benson v. State, 526 So.2d 948, 952-56 (Fla. 2d DCA), review denied, 536 So.2d 243 (Fla. 1988), cert. denied, ___ U.S. ___, 109 S.Ct. 1349, 103 L.Ed.2d 817 (1989)(discussing effect of accumulation of inferences and discussing rule on pyramiding of inferences).

There are the lies to Boules which are in the nature of false exculpatory statements.[15] Appellant had no reason to lie to them about how he knew about the victim's murder except that he did it. The arguments advanced below did not even address this evidence. And, this evidence was inconsistent with the hypothesis of innocence advanced below. This alone is sufficient to rebut the hypothesis of innocence advanced below. And, that is sufficient for affirmance as the state need not introduce evidence which is inconsistent with every conceivable hypothesis of innocence, just that advanced at the motion for judgment of acquittal argument. See Toole v. State, 472 So.2d 1174, 1176 (Fla. 1985)(state's evidence in circumstantial evidence case need not rebut every possible variation). But, this evidence goes beyond just refuting what was offered below. It is inconsistent with the explanation offered to this court. Appellant contends that he might have been confused and was describing a road block of a few days earlier set up to capture Raleigh Porter. But,

---

[15] False exculpatory statements are a species of confession. They are a kind of guilty knowledge evidence which is substantial competent evidence of guilt. Brown v. State, 391 So.2d 729 (Fla. 3d DCA 1980) (collecting cases)(false statement tending to establish alibi treated as substantive evidence of guilt).

that is inconsistent with the evidence. The statements the Boules report have him being very specific and tying the account of the roadblock to the murder in this case.

The explanations offered below and to this court do not account for the victim's bicycle being hidden back in the bushes near the place she was last seen in conversation with appellant. It is just not reasonable to believe that a little girl would throw over her bicycle in a hiding place so far off the road. They do not account for the fit between the shell from the back seat of appellant's car and the remainder of the victim's necklace found at the burn site. And, they do not explain why there was a hair from appellant's head in appellant's car or why it had been forcibly removed. They do not account for her even being in appellant's car. The witnesses who were her childhood friends did not describe ever going for a ride with appellant. It is one thing for a twelve year old girl to flirt with a grown man or even smoke marijuana with him. But, it is quite another for such a child to get in his car. It is particularly farfetched to conclude that Linda Pikuritz would have voluntarily entered appellant's car on the day of her death. Why the prolonged conversation that Patty Flynn Radford witnessed before she disappeared? And, why would she voluntarily get into a car with a grown man who had been angry with her?

There was substantial competent evidence of appellant's guilt and it is inconsistent with any hypothesis of innocence he has yet been capable of advancing. The circuit court did not

error in ruling on his motions for judgment of acquittal. This court should, accordingly, affirm his judgments of guilt.

B: Proof of the Identity of the Victim

The state did not have direct proof of the victim's identity because of the extensive burning of her body and had to resort to circumstantial evidence to prove her identity. (R. 1488) As trial counsel correctly understood when he admitted her identity in both opening and closing argument, those circumstances left no doubt that the burned body was Linda Pikuritz's. There was the body. There were the artifacts found around it. And, there was the appearance of the body coinciding with the victim's disappearance all in the same local area.

The missing persons report that Ellis Buckle took that evening contains the description. (R. 1438-41) She was approximately 4'6", weighed 86 pounds, had blue eyes, shoulder length blond hair and a fair complexion without marks, birth marks scars or deformities. She had a small nose, even teeth straight eyebrows arched upwards, thin lips, small ears and a small square chin. She was wearing a shell necklace given to her by her mother the previous weekend (R. 1425-26), blue jeans, a yellow Hardy Boys t-shirt and red sneakers. Her brother also testified that this was what she had been wearing at the time she disappeared. (R. 890-91)

Investigators at the fire site recovered the shell necklace, (R. 1578) 26'10" away from her body in the 4:00 o'clock direction from her head, girls panties (R. 1578) 14'10" away in the 2:00

o'clock direction (R. 1587), Bubbilicious bubble gum (R. 1579) a visor with the name Pikuritz on it 18'9" from her body in the eleven o'clock direction (R. 1586) her shoe 20'8" away in the 12:00 o'clock direction from her head (R. 1588)

The autopsy revealed the victim was a white female appearing to be 12 years old 4'6" in length and weighing 90 pounds. (R. 1709) She had blond hair. (R. 1712) The face was severely burned. (R. 1715) There were four metal buttons and a zipper as well as charred clothing that had adhered to the victim's chest. (R. 1710-11)

Linda's mother identified the sneaker as Linda's because of her name written in it. (R. 1800) She identified the panties as being consistent with a pair missing from a group she had purchased for the victim just before the school year. (R. 1805-07) She identified the necklace. (R. 1808-10) She testified that the brass buttons found on the body were consistent with the brass buttons on pair of jeans missing from Linda's things after her death. (R. 1810) And, she testified that the gum found at the burn site was the type Linda liked, Bubbilicious. (R. 1814).

"In homicide cases, where proof of the corpus delicti rests upon circumstances not upon direct proof, it must be established by the most convincing, satisfactory, and unequivocal proof compatible with the nature of the case, excluding all uncertainty or doubt." Lee v. State, 95 Fla. 608, 117 So. 699, 702 (1928)(emphasis supplied). That the nature of the proof the state must offer is circumscribed by the nature of the case

remains the law today. Jent v. State, 408 So.2d 1024, 1030 (Fla.)(proof that burned body found at crime scene was same as body autopsied sufficient on issue of identity), cert. denied, 457 U.S. 1111, 102 S.Ct. 2916, 73 L.Ed.2d 1322 (1982); see also Raulerson v. State, 358 So.2d 826, 829 (Fla.)(repeating the rule with the caveat), cert. denied, 439 U.S. 959, 99 S.Ct. 264, 58 L.Ed.2d 352 (1978). Even appellant's principle case on this issue, Trowell v. State, 288 So.2d 506, 507 (Fla. 1st DCA 1974), recognizes that identity in a mutilated body situation would not be susceptible to the kind of proof that might be expected in a case not involving such an extreme circumstance. It specifically distinguished this type of situation.

The circumstances the state's case put forth on the issue of identity left no room for doubt. They certainly made the prima facia showing of identity that proof of corpus delicti requires. Bryan v. State, 533 So.2d 744, 750 (Fla. 1988), cert denied, ___ U.S. ___, 109 S.Ct. 1765, 104 L.Ed.2d 200 (1989). Appellant suggested no alternative hypothesis at the time and suggests none now. The body of the burn victim was consistent with Linda Pikuritz's body. The items found in the immediate vicinity were indisputably hers. There is just no chance that that particular combination of items could have belonged to any one else. That appellant's counsel chose not to dispute the identity of the victim in closing argument is powerful evidence that there was no doubt as to the proof of her identity during the trial. The proof of this victim's identity is at least as compelling as that

found sufficient in Stano v. State, 473 So.2d 1282 (Fla. 1985), cert. denied, 447 U.S. 1093, 106 S.Ct. 869, 88 L.Ed.2d 907 (1986).

The body in Stano was in an advanced state of decomposition. Her former dentist identified the body. Although a number of years had passed and his last chart on her still showed twelve baby teeth, some of the restorations in her mouth matched restorations his charts showed that he had placed. The state submits that the proof offered here was far better than just old dental records which were consistent with what was found in the victim's mouth in Stano. To follow appellant's argument on this point and require that when personal items are resorted to they must be intimately attached to the body would make escape for murder all too easy requiring only mutilation of the body and removal of personal items from intimate association with it.

Appellant's argument takes the position that dental records were available for identification of the victim citing to (R. 1738-39). Brief for Appellant at 59. Appellee can not accept that the record supports the assertion that dental records were available. Appellant's citation is to the testimony of the associate medical examiner who did the autopsy on the victim's body. In answer to a question on cross-examination, he had indicated that a Dr. Marshall had examined the jaw and compared it with dental records. He did not finish the answer or specify whose dental records. And, he was not present for any such identification. During argument earlier in the case, the

prosecutor represented to the court that the state had never had any dental records on the victim. (R. 1488) He explained that a self styled dentist had attended the autopsy, removed some teeth and then had a telephone conversation with some one in New York.[16]

---

[16] The victim and her family had moved to the area from New York only a few months before her death. (R. 2029-30)

Issue VI

WHETHER THE HEINOUS, ATROCIOUS OR CRUEL AGGRAVATING FACTOR IS UNCONSTITUTIONAL AND WHETHER APPELLANT HAS PROCEDURALLY DEFAULTED THIS CLAIM BECAUSE HE DID NOT PRESENT IT TO THE TRIAL COURT?

Appellant contends that the heinous, atrocious or cruel aggravating factor embodied in section 921.141(5)(h), Florida Statutes (1989) is unconstitutional citing Maynard v. Cartwright, ___ U.S. ___, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988). The point has been procedurally defaulted and is without merit on the merits.

This court disposed of the Maynard v. Cartwright challenge to the heinous, atrocious or cruel aggravating factor in Smally v. State, 546 So.2d 720, 722 (Fla. 1989). Appellant's argument fails to suggest any basis for reconsideration of the issue.

While appellant did object to the giving of an instruction on this aggravating factor (R. 3217-19), he did not rest his objection on the ground asserted to this court. His closest attack on this aggravating factor like that argued here is in one of his motions to dismiss where he attacked it as unconstitutionally vague. (R. 3849) Because he did not object to the giving of the jury instruction on this ground, it has been procedurally defaulted. See Clark v. Dugger, No. 74,468 (Fla. Feb. 1, 1990)[15 F.L.W. S50, S51](counsel not ineffective for not raising Maynard v. Cartwright argument on appeal where no objection to instruction made in trial court). Appellee asks the court to reject this argument in appellant's brief solely on the basis of the procedural default in light of Harris v. Reed.

Issue VII

WHETHER THE STATE'S CLOSING ARGUMENTS TO THE JURY IN THE GUILT PHASE AMOUNTED TO FUNDAMENTAL ERROR?

Although appellant interposed no objections to the matters he now contends were improper in the state's closing arguments and did not identify anything as improper in the closing arguments of the state in his motion for new trial, (R.4210-12), he, nevertheless now takes the position that there were numerous improprieties in the state's arguments and that there is fundamental error in the record demanding a new trial. All the claims advanced under this point in appellant's brief have been procedurally defaulted. Analysis shows that the matters about which he now complains were either invited or justified by the evidence or appellant's counsel's arguments, do not fit the labels he wishes to attach to them or are not supported by the record.

Subject to the sound discretion of the trial court, counsel are afforded wide latitude in making arguments to the jury. Breedlove v. State, 413 So.2d 1, 8 (Fla.), cert. denied, 459 U.S. 882, 103 S.Ct. 184, 74 L.Ed.2d 149 (1982). A prosecutor is entitled to review the evidence and explicate the inferences that flow from it. Bertolotti v. State, 476 So.2d 130 (Fla. 1985). If the evidence justifies a comment, it is not error for the prosecutor to make it. Washington v. State, 86 Fla. 533, 98 So. 605 (1924)(not error to call defendant a murderer where evidence justified comment). Nor, is it improper for a prosecutor to make

a response that is invited by the argument that a defendant has made. Williamson v. State, 511 So.2d 289 (Fla. 1987); State v. Mathis, 278 So.2d 280 (Fla. 1973).

In the absence of fundamental error, it is necessary for there to be a sufficient objection to preserve the issue for review. Clark v. State, 363 So.2d 331 (Fla. 1978)(comment on defendant's exercise of right to remain silent constitutional but not fundamental error). Even case law on which appellant rests some of his claim for relief, Ryan v. State, 457 So.2d 1084 (Fla. 2d DCA 1984), recognizes the necessity for an appropriate objection to preserve the claim. Fundamental error is error which goes to the foundation of the case. Clark, 336 So.2d at 333. For a prosecutor's comments during closing argument to amount to fundament error, they must "be of such a nature as to poison the minds of the jurors or to influence the jury to return a more severe verdict than otherwise warranted." Wasko v. State, 505 So.2d 1314, 1317 (Fla. 1987)(citation omitted).

In light of these principles of review, it is clear that there was no error preserved for review. And, for the majority of the matters about which appellant complains there was no error at all and no objection would have been proper. Before turning to those matters that have a basis in the record, the state notes that (R. 3065) does not support the supposed quotation from the prosecutors argument, "that was the damn girl on the bicycle that Mr. Johnson told you about." Brief for Appellant at 65 purporting to quote record at (R. 3065).

Both at trial and on appeal, counsel for appellant takes the position that Assistant State Attorney Eugene Berry granted Phillip Drake transactional immunity for the murder of Linda Pikuritz. And, he predicates part of his attack on the closing argument on this assertion. But, he never established this in the record. Appellant gives three citations to the record that allegedly support his conclusion that the state had conferred transactional immunity on Drake for this murder, (R. 2752, 2824, 3401). Brief for Appellant at 71. The reference to (R. 2752) is to counsel's representation that this was the fact during a defense proffer. The reference to (R. 2842) is in the proffered testimony of Brian Kane and just mentions that detectives brought up Drake's name. The reference to (R. 3401) is to a passage in the hearing on pre-indictment delay and does not address immunity of any kind. And, it is highly doubtful that he could have.

At the time Drake gave his interview to Berry, 1978, Florida law provided for both transactional and use immunity. The law did not change until after the crime. State v. Williams, 487 So.2d 1092 (Fla. 1st DCA 1986)(recounting history of transactional immunity in Florida); Novo v. Scott, 438 So.2d 477, (Fla. 3d DCA 1983)(including history of change), review denied, 466 So.2d 100 (Fla. 1984).

For testimony given to a grand jury or a state attorney's investigation to result in transaction immunity it had to be compelled, State v. Toogood, 349 So.2d 1203 (Fla. 2d DCA 1977)(subpoena to testify about worthless checks and testimony

compelled about those checks resulted in transaction immunity); Tsavaris v. Scruggs, 360 So.2d 745 (Fla. 1978)(where witness subpoenaed to testify before grand jury and invoked Fifth Amendment right not to testify and not required to testify no immunity resulted), and the compelled testimony had to be about the matter to which the question related. Toogood (where Toogood subpoenaed to testify about worthless checks and gave information about another offense he received only use immunity as to the other offense).

Appellant never demonstrated that Drake was ever compelled to give testimony or that the statement he did give was sufficiently related to the murder at issue here that, if compelled, would have resulted in transactional immunity. All appellant established was that he guessed that had been questioned in the State Attorney's Office on November 3, 1978 and that he was in counsel's words "granted immunity from prosecution by Eugene Barry." (R. 2960) He did not specify what type of immunity may have been granted or what type of immunity he was told he was granted.

Cross-examination made it clear that while he was being question he was not accused of this crime. (R. 2960) Appellant made no showing that the testimony was compelled or of the other requisites. An assistant state attorney can not just confer immunity. Novo v. Scott (immunity is creature of statute and assistant state attorney's intent to confer immunity not controlling).

Given that appellant had made the claim that Drake had been given transactional immunity during his closing argument, (R.3117, 3118), the state's comments about which he complains was an appropriate comment invited by appellant's argument. And, it is clear that it was made in good faith as the prosecutor followed his "it didn't happen" comment with observation about Drake's testimony that he had not been accused of committing the murder of Linda Pikuritz.

Nor, is it fair to say that the comment was improper on the ground that it created an implication about what an absent witness might have said. The context makes it clear that when the prosecutor was referring to Drake's testimony when he said that Berry had not accused him of the crime. It is:

> Phil Drake told us, and he should know. He testified that he was only questioned about the location of the car. That's all. Gene Berry did not accuse Phil Drake of committing this crime; only Mr. Johnson did.
>
> (R. 3131)

There was no implication as to what Berry might have said. The link was specifically to Drake's testimony.

Appellant also complains that the state commented on his not testifying. The claim is based on the following:

> A trial is about <u>testimony</u>. A trial is about evidence. A trial is about the credibility <u>of all parties</u> in the case . . . . (emphasis supplied)
>
> (R. 3126)

This court applies the "fairly susceptible" test to determine whether a comment amounts to a comment on an accused exercise of this right to remain silent. State v. DiGuilino, 491 So.2d 1129 (Fla. 1985); State v. Kinchen, 490 So.2d 21 (Fla. 1985); David v. State, 369 So.2d 943 (Fla. 1979). The context in which this comment came shows that it was not fairly susceptible to understanding by the jury as a comment on appellant's decision not to testify. It was part of the second paragraph of the prosecutor's rebuttal argument. And, it was linked with a statement about "the facts and the testimony that we have presented to you . . . ." (R. 3126) That appellant's counsel did not object at the time and on this ground is highly persuasive evidence that this statement was not "fairly susceptible" to interpretation as a comment on appellant's exercise of his right to remain silent. Wainwright v. Witt, 469 U.S. 412, 437 n. 4 105 S.Ct. 844, 83 L.Ed.2d 841 (1985)(Stevens, J. concurring)(absence of objection persuasive that counsel did not perceive constitutional violation).

The absence of an objection also works a procedural default of the claim. Clark. Appellant's argument has failed to furnish a case where a comment like the one he now attacks has been determined to be "fairly susceptible" to understanding as a comment on an accused exercise of his right to remain silent. Ryan, the case cited as controlling on this point in appellant's brief, made specific reference to the defendant and used a personal pronoun. It included the statement, "She's lying." 457 So.2d at 1090. There is just nothing like that in this case.

A number of the matters about which appellant complains were fair comments on the evidence. First, appellant urges the court to conclude that the prosecutor's mentioning of appellant smoking marijuana and sharing it with twelve year old girls was an argument demonstrating criminal propensity on his part. The record is to the contrary. The context shows that this comment was inextricably linked with the state's argument that the victim knew appellant.

After pointing out that appellant's cross-examination of the victim's friends Linda Rizzo Carver and Angela Bolus had established that she and they had smoked marijuana together, the prosecutor clearly stated that the import of the evidence was the victim knew the appellant and had seen him on many occasions. (R. 3075) There was not the slightest implication that he brought this to the attention of the jury for the purpose of creating the propensity inference that appellant's argument contends.

This was a case in which, after all, appellant sought to portray the victim as a druggie who had been murdered by a drug seller with whom she had done business. It was appellant's strategy to depict the victim as a drug user in any way possible. He wanted the jury to conclude that Phil Drake and his druggie friends had killed her. To that end, among other things, he suggested that the gasoline found by the state's forensic expert had come from a gas can and that the paint thinner had been poured into it. (R. 3116) No objection was proper.

Appellant also now objects to a number of comments which were invited by the argument he advanced below. He contends that characterization of the defense as a drug pusher defense and reference to as "drug pusher gents" and related comments was improper. This was a fair characterization of the evidence and a fair reply to appellant's argument. Appellant's counsel had suggested during his closing argument that the drag marks were inconsistent with his client's strength and more consistent with "a skinny young drug dealer." (R. 3099) Appellant had offered evidence that Drake sold drugs. (R. 2948, 2950) And, one of his witnesses admitted that he sold drugs. (R. 2954) Immediately following that remark, he tried to suggest that the accelerant was paint thinner missing from an area that Phil Drake had had access to. (R. 3099)

Appellant also complains that the opening remarks of the prosecutor's rebuttal argument characterizing the defense argument as innuendo, speculation, possibilities, game show or fairy tale, (R. 3126), was improper. Appellant's argument had invited this comment. During his closing argument to the jury, appellant's counsel had characterized the case as a game show for the prosecution. He argued:

> State wants to infer that I believe this case to be a farce or game show. Well, I think its a farce anytime a man is arrested prosecuted when there's no evidence. And no, this isn't a game show, but its much like one for people; for Kenny Barton and Sheriff McDougall, It's Wheel of Fortune; for the prosecution, Its Truth or Consequences for my client, its Jeopardy. (R. 3090)

There was no basis for an objection given the argument advanced by appellant.

Appellant complains about the state's reference to the oath of the grand jurors who indicted him. This comment too was invited by the argument, appellant had advanced. During his closing argument appellant's counsel posed the question to the jury as to why the state had waited seven years to initiate this prosecution. (R. 3100) He suggested that investigators and prosecutors responsible for the case at the time had concluded that he was not guilty. And, his argument went on to suggest that the present Sheriff had decided to pursue the case against appellant for political reasons before the state objected that there was no evidence to that effect. (R. 3101) Following the sustaining of the objection, appellant's counsel continued:

> I submit to you that Ken Barton took hammer and nail and set out to do nothing but build a case against Bradley Phillip Scott. That's all he did. He did not investigate anyone else. He simply set out to hang Bradley Scott. And with his hammer of authority and nails of political ambition, that's exactly what he did. He built himself a framework and said to the State Attorney, "Behold, my house." (R. 3102)

He then concluded that section of his argument by contending that it was all because the Sheriff's Office was looking for a conviction that they sold the case to the State Attorney's Office. And, he had included a story about the fabrication of evidence by a child to implicate his cat in the eating of a pie which had resulted in the death of the cat. (R. 3112-3113) This

extensive attack on the integrity of the investigators and prosecutors demanded the strong response about which appellant now complains. Because his argument invited it, there was no basis for an objection to any of this rebuttal.

Finally, appellant complains that the state misstated the law when he told the jury, "The court will inform you that possibilities are not reasonable constructions to be considered by you in judging the evidence." (R. 3081) To make this seem improper, appellant's argument characterizes what the prosecutor said as urging "the jury to ignore reasonable 'possibilities.'" Brief for Appellant at 66. (emphasis supplied) As appellant's use of quotation marks concedes, the prosecutor did not say reasonable possibilities.

What the prosecutor said was in keeping with the standard reasonable doubt instruction we use in this state. It provides, in material part, "A reasonable doubt is not a possible doubt, a speculative, imaginary or forced doubt. Such doubt must not influence you to return a verdict of not guilty if you have an abiding conviction of guilt." Fla. Std. Jury Instr. (Crim.) 2.03 (emphasis supplied). Nor, is there any thing wrong with telling the jury not to speculate. Speculation, too, is specifically excluded from the definition of reasonable doubt.

Not even the sufficiency of the evidence cases on circumstantial evidence require the exclusion of some theoretically possible or speculative hypothesis of innocence. See Toole v. State, 472 So.2d at 1176 ("The state is not

obligated to rebut conclusively every possible variation, however, or to explain every possible construction [of the circumstances] in a way which is consistent only with the allegations against the defendant.") The prosecutor did not misstate the law. And, there was no basis for an objection.

When the comments which appellant's argument contends, either separately or in conjunction, constitute fundament error are considered in the context in which they happened, it is clear that there was no error. There certainly was no fundamental error. The prosecutor's argument correctly stated the law, the evidence and the reasonable inferences that flowed from it. It fairly met the evidence and arguments advanced by the appellant addressing that which invited rebuttal. It avoided trampling on appellant's rights. It certainly did nothing "to poison the minds of the jurors or to influence the jury to return a more severe verdict than otherwise warranted." Wasko, 505 So.2d at 1317. Because there was no fundamental error and because there were no objections, the state asks the court to find all claims presented under this point to have been procedurally defaulted. This will be in keeping with the settled case law requiring an objection to comments made during closing argument to preserve the claim for appeal. And, the state asks the court to rest its decision solely on the basis of the procedural default.

Issue VIII

WHETHER THE COURT ERRED IN HIS ANALYSIS OF THE AGGRAVATING AND MITIGATING EVIDENCE?

Appellant's argument takes the position that the trial court erred in its treatment of the aggravating and mitigating evidence. He found four aggravating factors present; (1) that it was committed while he was engaged in a kidnapping (section 921.141(5)(d), Florida Statutes (1989)); (2) that the killing had been done to avoid or prevent his lawful arrest (section 921.141(5)(e)); (3) that the murder was especially heinous, atrocious or cruel (section 921.141(5)(h)); and, (4) that it had been carried out in a cold, calculated or premeditated manner (section 921.141)(5)(i)). He found no mitigating circumstances present. (R. 3278-83 [spoken sentence] 4235-37 [written order]). He imposed the death sentence in accordance with the jury's eight to four death recommendation, (R. 4208). The evidence fully supports the circuit court's finding of each of the aggravating circumstances he found and those findings are in keeping with previous precedent from this court. The jury and the trial court considered the evidence offered in mitigation and there was no abuse of discretion in the trial court's determination of a lack of mitigation.

IN THE COMMISSION OF A KIDNAPPING

The trial court determined that this aggravating factor was present finding that the evidence showed:

> (1)Linda Carol Pikuritz was under the age of 13 years; (2) she was confined by the

> defendant without the consent of her parent or legal guardian; (3) the defendant intended and actually inflicted bodily harm upon Linda Carol Pikuritz during her confinement. In determining the presence of the third element of kidnapping the court considered: (a) the deceased unconscious state at the time of the burning indicating prior trauma to her body sufficient to cause unconsciousness; (b) the deceased broken head hair and part of her broken necklace found in the defendant's car; (c) the drag marks leading to the location of the deceased's body; and, (d) the remaining portion of her shell necklace found in those drag marks. Stated simply, the Court finds that there is no other reasonable construction of the evidence which would preclude the commission of the crime of kidnapping in this case. (R. 4235)

There can be no doubt that the court's finding are sufficient to establish all the elements of the crime of kidnapping. Section 787.01 Florida Statutes (1989).

The only challenge appellant's argument offers to the factual predicate for this finding is the assertion that the evidence did not rule out that moving of the victim might only have been an insignificant distance in a short period of time. Accordingly, he reasons that under Fitzpatrick v. State, 437 So.2d 1072 (Fla. 1983) there could be no kidnapping. Appellant reasons that the circumstances do not rule out the possibility that she voluntarily accompanied appellant to a place close to the burn site and that he attacked her there. As explained under Issue V A in this brief, such an assertion can not be squared with what Patty Flynn Radford saw, the way the bicycle had been hidden, or why she would even have entered appellant's car voluntarily. She was certainly not accompanying him with the consent of her parents or legal guardian.

Appellant also attacks the finding of this aggravating factor on the ground that the jury was not instructed on it. Appellant did not object to this finding on the ground that it had not been presented to the jury. But, even if he had, the claim would have to be found to be without merit. Hoffman v. State, 474 So.2d 1178, 1182 (Fla. 1985). Hoffman rejected a similar claim where the court had found the heinous, atrocious or cruel aggravating factor despite the fact that the jury had not been instructed on it. It ruled that there was no prejudice.

TO AVOID LAWFUL ARREST

When as here, the victim is not a law enforcement officer, this factor may be found to exist on the basis of witness elimination if proof of intent to avoid arrest and detection is very strong. Oats v. State, 446 So.2d 90, 95 (Fla. 1984); Riley v. State, 366 So.2d 19, 22 (Fla. 1978). "The test is whether the dominant motive behind the murders is to eliminate witnesses who can testify against the defendant." Harvey v. State, 529 So.2d 1083, 1087 (Fla. 1988), cert. denied, ___ U.S. ___, 109 S.Ct. 1175, 103 L.Ed.2d 237 (1989).

In finding that the evidence established this aggravating factor the trial court found that the victim knew her assailant and that appellant "took great pains to eliminate and destroy Linda and her belongings." (R. 4235) Appellee does not understand appellant's argument to dispute these finding. These finding are sufficient to support the existence of this aggravating factor. While the fact that the victim knew her

killer would not be sufficient in and of itself, Floyd v. State, 497 So.2d 1211 (Fla. 1986), when coupled with the transportation of the body away from the kidnapping site, the extreme mutilation of the body by burning and the destruction and scattering her belongings there can be no doubt that of the proof of the intent to avoid detection and arrest was very strong. This aggravating factor can be established by circumstantial evidence like that present here. Swafford v. State, 533 So.2d 270, 276 (Fla. 1988)(collecting cases showing circumstances establishing this aggravating factor). Transportation of the victim away from the scene of a crime and then killing her has been ruled sufficient proof of this aggravating factor. Cave v. State, 476 So.2d 180, 188 (Fla. 1985), cert. denied, 476 U.S. 1178, 106 S.Ct. 2907, 90 L.Ed.2d 993 (1986). Indeed, because of his actions, appellant was successful in avoiding arrest and detection for a substantial period of time.

In the challenge posed to the finding of this aggravating factor, appellant suggests that there were other possible explanations. Appellant suggests that the killing may have been motivated by a "deviant sexual preference or sadistic drive on the part of the perpetrator." Brief for Appellant at 76. Alternatively, the argument suggests that the victim might have been dead at the time of the burning. Brief for Appellant at 76. Such suggestions do not account for the scattering of the victim's belongings or the pattern of the fire. It was clearly an attempt to obliterate recognition of the victim.

HEINOUS, ATROCIOUS OR CRUEL

Appellant attacks the finding of this aggravating factor citing Scott v. State, 494 So.2d 1134 (Fla. 1986); Jackson v. State, 451 So.2d 458, 463 (Fla. 1984) and Herzog v. State, 439 So.2d 1372 (Fla. 1983) for the proposition that the heinous, atrocious or cruel aggravating factor can never apply if "the victim is semi-conscious or unconscious and unable to appreciate the nature of his or her own death at the time of the occurrence." Brief for Appellant at 73.

It is true that this court has said that what happens after a victim is dead or rendered unconscious does not play a role in determining whether this aggravating factor applies. And, the court continues to do so. Smally v. State, 546 So.2d at 722 But, that does not end the inquiry. This is an abduction case. Just because the victim is unconscious at the time death comes, does not mean that what preceded unconsciousness can not be considered in determining the existence of this aggravating factor. Forcibly abducting the victim and transporting her away from sources of assistance or detection, factors present in this case, are classic circumstances which support a finding of the existence of this aggravating factor. Swafford v. State, 533 So.2d at 277 (Fla. 1988)(collecting cases). The fear and emotional strain which inhere in such situations can be considered in evaluating the existence of this aggravating factor. Id. And, common sense may be used in determining its existence. Id.

While this is not the basis on which the circuit court relied in finding that this aggravating factor existed, it is still established by the record. In determining whether to uphold an aggravating factor, this court has looked to the evidence to determine if it can be supported. Suarez v. State, 481 So.2d 1201 (Fla. 1985), cert. denied, 476 U.S. 1178, 106 S.Ct. 2908, 90 L.Ed.2d 994 (1986).

In all fairness to the trial court, the state asks the court to rethink its position ruling out the finding that just because a killing is not cruel it does not qualify for this aggravating factor. The burning of a living person is certainly heinous and atrocious as those terms are defined by 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). The burning of a living person is in the words of Dixon as it defines heinous "extremely wicked or shockingly evil." And, again in the words Dixon as it defines atrocious the burning of a living person is certainly "outrageously wicked or vile." Appellant's actions toward his victim set this crime apart from the norm.

COLD CALCULATED AND PREMEDITATED

WITHOUT PRETENSE OF LEGAL OR MORAL JUSTIFICATION.

To support a finding of this aggravating factor, the evidence must show the indicia of calculation; that the killing was thought out before hand, carefully planned or that it was part of a prearranged design. Rogers v. State, 511 So.2d at 533. The trial court found the heightened premeditation contemplated

by this aggravating factor, pointing specifically to the indicia of calculation revealed by the evidence. In support of this aggravating factor, he found:

> The evidence in this case shows a substantial period of reflection and thought by Bradley Scott evincing [sic] the highest degree of calculation and premeditation. Linda Pikuritz was taken by this defendant to a remote area of the county where he removed her unconscious body from his car and dragged her into the woods. He then scattered her visor, her shoe, her panties and her gum throughout those woods. And, then, while she was lying naked and helpless at his feet he soaked her blue jeans tied around her neck with gasoline, splashed the surrounding area with gasoline and set her ablaze. (R. 4236)

This court has already found that the planning involved in a burning death is sufficient to demonstrate the heightened premeditation and calculation that are the gravamen of this aggravating factor. Way v. State, 496 So.2d 126 (Fla. 1986); see also Jent, 408 So.2d at 1032 (affirming finding of cold calculated and premeditation feature in burning death case without discussion of case law). This appellant may not have called the victim to the scene of her burning like Way did. But, he carried her there. And, he carried the gasoline he needed to burn her with him. Then, going a step further than Way, he tied her jeans around her and went about setting both her and the surrounding area ablaze.

Appellant does not dispute that the circumstances of the burning show the indicia of careful planning and heightened premeditation contemplated by this aggravating factor and found

to exist by the trial court. Rather, the attack on the finding of this aggravating factor is predicated on the assertion that the evidence did not rule out that he may have thought that she was dead. Brief for Appellant at 77.

Common-sense says that appellant can not have failed to recognize that he was dealing with a live, warm and breathing, human being as he disrobed her and tied the jeans that were to be the wick for his fire to her. Just as common-sense inference may be resorted to in assessing a victim's mental state for the purposes of determining the presence of the heinous, atrocious or cruel aggravating factor, Swafford, 533 So.2d at 277, it may be resorted to in this situation as well. Appellant offers no basis for the court to reject the finding of this aggravating factor by the circuit court.

MITIGATING EVIDENCE

After finding that appellant had presented evidence of his good character in mitigation and reflecting that he had been presented with the argument that the man who stood before him for sentencing was not the same person who had committed the crime of nine years earlier, the court turned his attention to the fact that the victim would have been twenty-one and that appellant had enjoyed six years of undeserved freedom. He then went on to find there were no mitigating factors established by the evidence.

Appellant contends that the order shows that the court weighed the migtigating evidence against a nonstatutory aggravating circumstance. As the state reads the order, it is

clear that the trial court was simply placing the evidence and argument offered in mitigation in its proper perspective to determine whether it would establish a mitigating factor. What this trial judge did was simply explain why he was making the finding he did on mitigation in response to an argument advanced by appellant's counsel. Such explanations justifying a weighing and responding to counsel's arguments are not considered nonstatutory aggravating factors. Goode v. State, 410 So.2d 506, 509 (Fla. 1982). As in Goode, the comments the appellant asks the court to treat as nonstatutory aggravating factors were replies to argument advanced by the defendant's counsel in support of a lesser sentence.

Appellant contends that the court failed to recognize that there were a multitude of mitigators present when he characterized the evidence he presented as evidence of good character. Whether the trial judge used a number of headings or just one that subsumed all, is not important. What is important is that the trial judge considered what was offered. The evaluation and weighing process is not about numbers. Hargrave v. State 366 So.2d 1 (Fla. 1978)(counting improper), cert. denied, 444 U.S. 919, 100 S.Ct. 239, 62 L.Ed.2d 176 (1979). The trial court did not error because he did not use the labels appellant now proffers to describe the evidence he presented in mitigation.

Citing Floyd, appellant also contends that the trial court erred in instructing the jury on what it could consider in mitigation. The contention is that they were limited to

consideration of character in determining mitigation. While the instruction did tell the jury that it could consider appellant's character in mitigation, it prefaced this with the words "among the mitigating circumstances you may consider." (R. 3255) The context placed no limitation on what they could consider in mitigation.

Floyd is not controlling on this issue because it involved a total lack of instruction on what could be considered in mitigation. Here appellant had the instruction that covered the presentation he had made in mitigation. And, here he did not object to the instruction as given. (R. 3257) The absence of an objection on this claim works a procedural default of it. See Bottoson v. State 443 So.2d 962, 966 (Fla. 1983)(claim that it was error not to instruct jury that it could impose life even if it found aggravating circumstances existed and no mitigating circumstances present), cert. denied, 467 U.S. 873, 105 S.Ct. 223, 83 L.Ed.2d 153 (1984). Appellee asks the court to reject this claim solely on the basis of the procedural default.

"So long as all the evidence is considered, the trial judge's determination of lack of mitigation will stand absent a palpable abuse of discretion." Hill, 549 So.2d at 183. The trial court was faithful to this court's command. The judge and jury heard and considered the evidence appellant presented. It was not sufficient to warrant a life sentence in the eyes of either. It is not the function of this court to substitute its sentencing judgment for that of the trial court. Bryan v. State, 533 So.2d

at 749. That is really what appellant is asking for in this attack on his sentence. The court should refuse appellant's invitation to depart from its proper place in the administration of the death penalty. It should affirm the sentence because appellant has demonstrated no basis for setting it aside.

Issue IX

WHETHER THE COURT ERRED IN EXCUSING PROSPECTIVE JUROR GOSTYLA FOR CAUSE BECAUSE HER BELIEFS WOULD PREVENT OR SUBSTANTIALLY IMPAIR HER ABILITY TO PERFORM HER DUTIES AS A JUROR?

Appellant complains that the court erred in excusing prospective juror Grace Gostyla for cause. His argument provides no basis for second guessing the trial court on this fact intensive question.

When a prospective juror's views on capital punishment "would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath," the state may excuse him for cause. Adams v. Texas, 448 U.S. 38, 45, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980) quoted in Wainwright v. Witt, 469 U.S. at, 420, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985). Florida applies the test in determining whether jurors opposed to capital punishment can be excused for cause. Mitchell v. State, 527 So.2d 179 (Fla.), cert. denied, ___ U.S. ___, 109 S.Ct. 404, 102 L.Ed.2d 392 (1988). The determination is one of fact as the High Court found in Witt, affording the state trial court's determination on the issue the presumption of correctness provided by 28 U.S.C. 2254(d). And, this court treats the determination as one of fact. Valle v. State, 474 So.2d 796 (Fla. 1985), vacated on other grounds, 476 U.S. 1102, 106 S.Ct. 1943, 90 L.Ed.2d 353 (1986). The circuit court made a factual determination that this was the case, (R. 135), and the record fully supports that determination.

Appellant's argument takes the position that she ultimately affirmed that she could follow the law and asserts that because she did so she should not have been excused for cause. And, the argument claims that she repeatedly affirmed she could do so. Even if she had, that is not the test. When the entirety of her voir dire is considered, (R. 120-35), she vacillated depending on who was doing the questioning.

First, she told the court that she would not consider the death penalty under any circumstances. (R. 122) Regardless of the evidence, she would recommend life. (R. 122)

Then, after appellant's counsel voiced his opposition to capital punishment and spoke of heinous surrounding circumstances, she told him that she might be able to follow the court's instruction but that it was hard for her to say. (R. 123) Following another lengthy question by appellant's counsel emphasizing her removal for the actual decision making on sentence, she said that she guessed she could follow the court's instructions on the law. (R. 124) She then answered the question quoted in appellant's argument.

She told the prosecutor she would have great difficulty recommending a death sentence. (R. 125) She told the prosecutor that she could possibly consider the death penalty but only in an extreme case.

On a follow up question by the court emphasizing their need to know whether she could follow the law, her response was, "I'm not sure." (R. 127-28)

Following argument over whether she should be excused for cause, the court noted that she was saying inconsistent things. (R. 133) And, he pointed out that she had exhibited a disturbing tendency to "go along", following appellant's counsel when he had expressed his personal preferences and included them in a question which assumed that they were the same as hers. (R. 134) He first phrased the issue as, ". . . whether or not that she is of such a mind that she could not follow the law with respect to the death penalty as a sentencing option under any circumstances." (R. 134) Then following a review of this court's decision in Lambrix v. State, 494 So.2d 1143 (Fla. 1986), he ruled, "Well, this court has the definite impression that Mrs. Gostyla and her views were that -- were substantially impaired in accordance with her duties and instructions." (R. 135)

Appellant's argument offers no basis for this court to conclude that the court below erred in making this determination. As this court found in Lambrix, given the position of the trial judge and his advantage in observing the juror's credibility and demeanor, when a record shows wavering of the type present in this record a determination that a juror should be excused for cause should not be disturbed. Because the record supports the trial court's determination on this factual issue, this court should defer to that factual finding and affirm over appellant's claim for relief under this point.

CONCLUSION

Based upon the foregoing reasons, arguments and citations of authority appellee asks the court to enter a decision affirming the judgment of guilt, the sentence of death and making a "plain statement" rejecting all arguments advanced by appellant which have been procedurally defaulted resting the court's decision on those issues found to have been procedurally defaulted solely on the procedural bar found to exist.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

DAVIS G. ANDERSON, JR.
Assistant Attorney General
Florida Bar No. 160260
1313 Tampa Street, Suite 804
Park Trammell Building
Tampa, Florida 33602
(813) 272-2670

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail, postage prepaid, to Dennis J. Rehak, Attorney for Appellant, Post Office Drawer 660, Fort Meyers, FL 33902, on this 27th day of February, 1990.

OF COUNSEL FOR APPELLEE