IN THE SUPREME COURT OF FLORIDA

WALTER DANIEL CZUBAK,

Appellant,

v. Case No. 72,363

STATE OF FLORIDA,

Appellee.

BRIEF OF THE APPELLEE

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TABLE OF CONTENTS

TABLE OF CITATIONS

PAGE NO.

OTHER AUTHORITIES CITED

FLORIDA STATUTES:

FLORIDA RULES OF CRIMINAL PROCEDURE:

SUMMARY OF THE ARGUMENT

As to Issue I - A motion for mistrial is addressed to the sound discretion of the trial judge and should only be granted in the case of absolute necessity.

The court below found that the challenged statement was invited by defense counsel's questioning. The court's ruling that the statement was invited and responsive to defense counsel's question was within the trial court's discretion and appellant has failed to show an abuse of that discretion.

Assuming, arquendo, that the remark was not invited, the motion for mistrial was properly denied as the statement was harmless. The evidence in the instant case supports the verdict. With or without the admission of the Schultz comment, the jury could have reached no conclusion other than that Czubak murdered the elderly victim.

As to Issue II - The photographs in the instant case were relevant to establish the manner in which the murder had been committed. While it is true, that most, if not all of the evidence presented by way of the photographs could have been established by other means, this is not the test of admissibility. The photographs were relevant, they were not unduly prejudicial and therefore, the trial court did not err in admitting them into evidence.

As to Issue III - The admission of evidence rests within the sound discretion of the trial court, and, absent a showing of abuse of discretion, will not be disturbed on appeal. Each of

the challenged rulings were within the court's discretion and appellant has failed to show an abuse of that discretion.

The first statement challenged in the instant case was not hearsay because it was not offered to prove the truth of the matter asserted. Further, even if the statement did constitute hearsay, it was admissible under §*90.803(3)(a)* which provides for the admission of hearsay statements to show the existing mental or emotional physical condition of the claimant.

The second challenge appellant makes to the admission of alleged hearsay statements concerns a statement made by Detective Gary Pierce. Appellant admits, however, that no objection was made to the admission of the statement. Therefore, the claim was procedurally barred.

The last challenged statement was made by Detective Pierce over defense objection. Detective Pierce testified that as a result of talking to the people in the neighborhood that he started looking for Daniel Walter or Walter Daniel. The evidence was admissible to explain the officer's actions and does not constitute error.

As to Issue IV - Appellant's contention that the trial court erred in failing to conduct a Richardson hearing on the state's failure to provide Bill McNulty's name on the witness list overlooks the obvious. A Richardson hearing is only required when there has been a violation of ***Florida Rules of Criminal Procedure 3.220.*** Where there is no duty to disclose, there is no need for a Richardson hearing. The state is not required to disclose the

names of persons who have no information about the offense or defense. Hence, the prosecutor was not required to put Bill McNulty on the witness list because Bill McNulty did not have any information relevant to the offense or the defense and the state did not plan to call him as a witness.

Appellant also contends that Bill McNulty's presence in the courtroom violated the sequestration rule. Before a court excludes testimony on the ground that the sequestration rule was violated, the trial court must determine that the witness' testimony was affected by the other witness' testimony to the extent that it substantially differed from what it would have been had the witness not heard the testimony. It is hard to imagine how McNulty's testimony could have been substantially different from what it would have been if he had not heard LaFlamboy's limited testimony.

Appellant also contends that the testimony was improper as it impeached the witness on a collateral matter. There was no objection on the basis now being asserted by appellant. Accordingly, this issue has not been properly preserved for appellate review.

Further, the impeachment testimony was proper rebuttal testimony. These were not collateral matters. If left standing unchallenged, LaFlamboy's testimony could have left the jury to speculate that there was atleast sloppy police work and at worst a police cover-up. The testimony was properly admitted to rebut these material facts.

As to Issue V - The question of whether the evidence fails to exclude all reasonable hypotheses of innocence is for the jury to determine, and where there is substantial competent evidence to support the jury's verdict, the verdict will not be reversed on appeal. Cochran v. State, 547 So.2d 928 (Fla. 1989). The circumstantial evidence standard does not require the jury to believe the defense version of the facts on which the state has produced conflicting evidence, and the state is entitled to a review of any conflicting evidence in the light most favorable to the jury's verdict. Id. at 930.

Premeditation may be shown by circumstantial evidence.

There was sufficient competent evidence for the jury to conclude that Czubak had the requisite premediated intent to kill

As to Issue VI - Even if this issue has arguably been preserved for appeal, no error has been presented. Clearly, a defendant is entitled to a jury instruction on *his* theory of defense when there is evidence to support such a defense. However, appellant's theory of defense in this case was that someone else committed the murder. Defense counsel never once suggested to the jury below that appellant had killed the victim under circumstances which should be considered legally excusable.

Finally, it must be noted that any error presented on these facts would clearly be harmless beyond any reasonable doubt. Not only was excusable homicide inconsistent with appellant's theory of defense, but the jury was instructed on excusable homicide in conjunction with the general introductory instructions on

manslaughter. Since the victim in this case was killed by strangulation, a dangerous weapon was not involved and the short form excusable homicide instruction was adequate.

As to Issue VII - To give an instruction requires only that there be sufficient evidence before the jury; to find an aggravating factor, however, there must be proof beyond a reasonable doubt. If the trial court had refused to give the instruction where there was evidence to support it, he would have been usurping the jury's role in the decision making process.

To the extent that appellant is now arguing that the aggravating factor is unconstitutionally vague this point has not been preserved for appellate review. Even if the merits of the argument could be reached it has been rejected.

As to Issue VIII - Appellant did not ask the court for the opportunity to hire counsel of his choice, he merely asked that the state be required to furnish him with two separate lawyers. There is absolutely no requirement that the state furnish defendants with a separate lawyer for the penalty phase when the defendant maintains his innocence during the guilt phase.

As to Issue IX - The record in the instant case shows that the trial court considered all of the relevant mitigating evidence. Deciding whether mitigating circumstances have been established is within the trial court's discretion. The presentation of a few drawings and carvings did not require the trial court below to find that it constituted an aspect of the defendant's character which served as a basis for reducing the sentence from death.

As to Issue X - The aggravating factors established below set Czubak and this crime apart from the average defendant and murder. The imposition of the death sentence was proportionate to other capital cases where the sentence has been upheld.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED BY FAILING TO GRANT DEFENSE COUNSEL'S MOTION FOR MISTRIAL WHEN STATE WITNESS DOROTHY SCHULTZ BLURTED OUT THAT DANNY CZUBAK WAS *AN* ESCAPED CONVICT, IN VIOLATION OF SECTION 90.404, FLORIDA STATUTES.

State witness Dorothy Schultz testified on cross examination that she declined an offer from her uncle to have Czubak investigated because she was afraid she would be hurt by what she discovered. (R 572) Subsequently, in response to repeated questioning by defense counsel about when and why she became suspicious of Czubak, Schultz responded that Detective Pierce had nothing to do with her suspicions and that if she had opened her eyes she would have found out that Czubak was an escaped convict. Appellant objected and made a motion for mistrial. It was denied. Now on appeal, Czubak asserts that the trial court erred in denying his motion for mistrial because the statement constituted inadmissible Williams[1] rule evidence. The state does not agree.

A motion for mistrial is addressed to the sound discretion of the trial judge and should only be granted in the case of absolute necessity. Salvatore v. State, 366 So.2d 745 (Fla. 1978). In Ferguson v. State, 417 So.2d 639 (Fla. 1982), this

[1] Williams v. State, 110 So.2d 654 (Fla.), cert. denied, 361 U.S. 847 (1959).

Court held that the trial court did not abuse its discretion in denying a motion for mistrial made immediately after a witness testified that he met Ferguson in prison. Similarly, in Johnston v. State, 497 So.2d 863 (Fla. 1986), this Court concluded that any alleged prejudice, which may have resulted from an investigating officer's testimony about a phone call he had received from Johnston in which Johnston indicated he wanted to make a deal with the judge, because he had already gone to jail for two years for something else, was fully alleviated by curative instruction. While a curative instruction was not given in the instant case, it was not requested by defense counsel. Similarly, in Rhodes v. State, 547 So.2d 1201 (Fla. 1989), this Court held that it was not reversible error for the trial court to admit a statement referring to Rhodes prior incarceration.

> "And I believe on your motion for mistrial that Ms. Schultz was simply doing her best to answer your questions when she talked about it. Because before that came up, before she mentioned the escape, you'd been talking about investigations of the defendant. And you elicited the question about that. And that's what she was trying to do. She was trying to answer your question. So I think I have to deny your motion."

(R 1072)

The court's ruling that the statement was invited and responsive to defense counsel's question was within the trial court's discretion and appellant has failed to show an abuse of that discretion. The invited error rule stands for the proposition that a defendant may not take advantage on appeal of

an error which he himself induced at trial. Stanley v. State, 357 So.2d 1031 (Fla. 3d DCA 1978), citing, Sullivan v. State, 303 So.2d 632 (Fla.), cert. denied, 428 U.S. 911, 96 S.Ct. 3226, 49 L.Ed.2d 1224 (1974); Castle v. State, 305 So.2d 794, 797 (Fla. 4th DCA 1974) affirmed, 330 So.2d 10; Ellison v. State, 349 So.2d 731 (Fla. 3d DCA 1977). See, also, Meek v. State, 474 So.2d 340 (Fla. 4th DCA 1985), (not reversible error where response is elicited by appellant's counsel on cross examination).

Assuming, arquendo, that the remark was not invited, the motion for mistrial was properly denied as the statement was harmless. In Castro v. State, 547 So.2d 111 (Fla. 1989), this Court held that the improper admission of irrelevant collateral crimes evidence is presumptively harmful. This Court stated that it is not enough to show that the evidence against a defendant was overwhelming. Error is harmless only "if it can be said beyond a reasonable doubt that the verdict could not have been affected by the error." Ciccarelli v. State, 531 So.2d 129, 132 (Fla. 1988). This Court found, however, that in light of the totality of the evidence against Castro, including Castro's own confession, the admission of the erroneous admission of the testimony could not have effected the outcome of the guilt phase. With or without the error, the jury could have reached no conclusion other than that Castro was guilty. Thus, this Court found that the presumption of harmfulness that accompanies a Williams Rule error of this type can be rebutted by the state.

It is the state's position that, light of the evidence before the jury below, the inadvertent comment made by Dorothy Schultz could not have effected the outcome of the guilt phase.

In Robinson v. State, 520 So.2d 1 (Fla. 1988), this Court upheld the trial court's denial of a motion for mistrial based upon a finding that a detective's statement had "gone right over the jury's head" and had been invited by defense counsel.

> "Having considered the nature and the context of the comment, appellant's stipulation, and the totality of the evidence we must agree with the trial judge that the detective's inadvertent remark was harmless beyond a reasonable doubt."

The comments by the trial court immediately after the comment by Dorothy Schultz suggests that the statements had little, if any, impact.

> "Mr. Sestak: I didn't solicit that comment about the escaped convict, you know, and I am in a posture of asking --
>
> THE COURT: She said escaped?

(R 572)

Nevertheless, appellant argues that there was evidence that Schultz's statement did impact the jury. At the second amended motion for new trial hearing on April 29, 1988, counsel alleged that one of the jurors had told a reporter that he put "two and two" together after he heard Czubak was an escapee.

Of course the jury knew Czubak was an escapee. This evidence was presented to the jury during the penalty phase. And, of course, it affected his sentence because it is one of the

aggravating factors found by the trial court. The state does not agree, however, that the slight and inadvertent comment impacted the jury any more than it did the trial judge.

The evidence in the instant case supports the verdict. With or without the admission of the Schultz comment, the jury could have reached no conclusion other than that Czubak murdered the elderly victim.

ISSUE II

WHETHER THE TRIAL COURT ERRED BY ALLOWING THE PROSECUTOR TO INTRODUCE INTO EVIDENCE PHOTOGRAPHS OF THE VICTIM'S PARTIALLY DECOMPOSED AND DOG-EATEN BODY BECAUSE THE PHOTOGRAPHS WERE NOT RELEVANT AND ANY PROBATIVE VALUE WAS OUTWEIGHED BY UNFAIR PREJUDICE.

Appellant contends that, even though photographs of the victim were relevant to prove identity and cause of death they should have not have been admitted because each of these factors was susceptible of proof by other means. He also argues that any relevancy was outweighed by the prejudice of showing the jury photographs of the victim's partially decomposed and dog-eaten body.

The test of admissibility of photographs in a situation such as this is relevancy and not necessity. This Court has repeatedly stated:

> "The current position of this court is that allegedly gruesome and inflammatory photographs are admissible into evidence if relevant to any issue required to be proven in the case. Relevancy is to be determined in a normal manner, that is, without regard to any special characterization of proffered evidence. Under this conception, the issues of 'whether cumulative', or 'whether photographed away from the scene,' are routine issues basic to a determination of relevancy, and not issues arising from any 'exceptional nature' of the proffered evidence."

State v. Wright, 265 So.2d 361, 362 (Fla. 1972). See also Henninger v. State, 251 So.2d 862, 864 (Fla. 1971); Meeks v. State, 339 So.2d 186 (Fla. 1976).

In Williams v. State, 228 So.2d 377 (Fla. 1969), this Court noted that similarly gruesome photographs depicted a view which was "neither gory nor inflammatory beyond the simple fact that no photograph of a dead body is pleasant.'' Id. at 379. And, in Henderson v. State, 463 So.2d 196 (Fla. 1985), Henderson argued that the trial court erred by allowing into evidence gruesome photographs which he claimed were irrelevant and repetitive. This Court found that the photographs, which were of the victim's partially decomposed body, were relevant.

> "Persons accused of crimes can generally expect that any relevant evidence against them will be presented in court. The test of admissibility is relevancy. Those whose work products are murder of human beings should expect to be confronted by photographs of their accomplishments. The photographs are relevant to show the location of the victims' bodies, the amount of time that had passed from when the victims were murdered to when the bodies were found, and the manner in which they were clothed, bound and gagged.''

Id. at 20

This Court further held that it is not to be presumed that gruesome photographs so inflamed the jury that they will find the accused guilty in the absence of evidence of guilt. This Court presumed that jurors are guided by logic and thus, that pictures of the murder victims do not alone prove the guilt of the accused. Id. at 200.

In Gore v. State, 475 So.2d 1205 (Fla.) cert. denied, 475 U.S. 1031, 106 S.Ct. 1240, 88 L.Ed.2d 348 (1985), this Court disagreed with Gore's contention that the trial court reversibly

erred in allowing into evidence two prejudicial photographs, one depicting the victim in the trunk of Gore's mother's car and the other showing the hands of the victim behind her back. This Court held that the photographs placed the victim in Gore's mother's car, showed the condition of the body when first discovered by police, and showed the considerable pain inflicted by Gore binding the victim and, met the test of relevancy and were not so shocking in nature as to defeat their relevancy. Id. at 1208. The law is well established that the admission of photographic evidence is within the trial court's discretion and that a court's ruling will not be disturbed on appeal unless there is a clear showing of abuse. Wilson v. State, 436 So.2d 908 (Fla. 1983). Appellant has failed to show an abuse of that discretion.

The photographs in the instant case were relevant to establish the manner in which the murder had been committed. The photographs showed that Thelma Peterson's body was draped over the sofa, her legs spread wide, her clothing torn from her, a wine bottle smashed over her head. While it is true, that most, if not all of the evidence presented by way of the photographs could have been established by other means, this is not the test of admissibility. The photographs were relevant, they were not unduly prejudicial and therefore, the trial court did not err in admitting them into evidence.

ISSUE III

WHETHER THE ADMISSION OF HEARSAY EVIDENCE ON THREE SEPARATE OCCASIONS REQUIRES A NEW TRIAL.

The admission of evidence rests within the sound discretion of the trial court, and, absent a showing of abuse of discretion, will not be disturbed on appeal. Jent v. State, **408** So.2d **1504** (Fla.) cert. denied, 457 U.S. 111, **102** S.Ct. **2916, 73** L.Ed.2d **1322 (1985).** Each of the challenged rulings were within the court's discretion and appellant has failed to show an abuse of that discretion.

First, Appellant contends that it was error to elicit a statement from Dorothy Schultz that she had spoken to Thelma Peterson on the day of the murder and that Thelma Peterson had told her Danny did not live there anymore. He alleges this was impermissible because the statement was obviously introduced to prove the truth of the matter and that its only relevancy was the potential motive for murder.

Hearsay is a statement other than one made by a declarant while testifying offered to prove the truth of the matter asserted in the statement. ***Section 90.801(1)(c), Florida Statutes.*** Where an out-of-court statement is not offered to prove the truth of the matter asserted, it is not hearsay. The test for admission of such statement is merely one of relevancy. This evidence was admissible because it was relevant to the existence of a possible motive. In Koon v. State, **513** So.2d **1253** (Fla) cert denied, __ U.S. ___, **108** S.Ct. 1124, **99** L.Ed.2d **284 (1987 ,** this Court held

that an out-of-court statement is admissible where it is not offered to prove the truth of the matter asserted, but rather to show that having heard the statement, a defendant could have formed the motive for eliminating one of the two prosecuting witnesses.

The first statement challenged in the instant case was not hearsay because it was not offered to prove the truth of the matter asserted. In context, it was enough for the state to show that on the day of the murder, Czubak's girlfriend, Dorothy, called Thelma, asking for Czubak and that Thelma made the statement. Whether Czubak was no longer living with Thelma Peterson or whether Peterson simply didn't want Dorothy Schultz talking to him, the fact remains that the making of the statement was evidence that some conflict existed between Czubak and Peterson.

Further, even if the statement did constitute hearsay, it was admissible under §*90.803(3)(a)* which provides for the admission of hearsay statements to show the existing mental or emotional physical condition of the claimant. Thelma Peterson's state of mind was relevant to show that she was unhappy with her relationship with Danny Czubak. This unhappiness could extend from the receipt of a phone call from Czubak's girlfriend Dorothy Schultz alone. The existence of the conflict was at issue in the instant case, therefore, the evidence was relevant and admissible. See Peede v. State, 474 So.2d 808 (Fla.) cert. denied, 477 U.S. 909, 106 S.Ct. 3286, 91 L.Ed.2d 575 (1987); Jenkins v. State, 422 So.2d 1007 (Fla. 1st DCA 1982).

The second challenge appellant makes to the admission of alleged hearsay statements concerns a statement made by Detective Gary Pierce. Detective Pierce testified that his investigation revealed that Thelma Peterson was afraid of Czubak. Appellant admits, however, that no objection was made to the admission of the statement. This Court's decision in Peede v. State, supra, is exactly on point with the instant claim. Peede argued that the court committed reversible error in allowing the victim's daughter to testify that her mother told her that she was going to pick up Peede at the airport, that she was nervous and scared that she might be in danger, that her daughter should call the police if she was not back by midnight, that she was afraid of being with the other people he had threatened to kill, and that he would kill them all on Easter. This Court found that two of the statements (relating to the victim's telling the daughter to call the police if she did not return and that Peede had threatened to kill others in North Carolina) were given at trial without any hearsay objection. Therefore this Court found that the claim was procedurally barred. Id. at 816. See also Castor v. State, 365 So.2d 701 (Fla. 1978); Steinhorst v. State, 412 So.2d 332 (Fla. 1982); Lucas v. State, 376 So.2d 1149 (Fla. 1979).

The last challenged statement was made by Detective Pierce over defense objection. Detective Pierce testified that as a result of talking to the people in the neighborhood that he started looking for Daniel Walter or Walter Daniel. (R 618 -

619) Statements made by non-testifying witnesses who were not eyewitnesses to a crime are admissible to explain why the officers were at the particular place at a particular time, their purpose in being there and what they did as a result. Hernandez v. State, 547 So.2d 139 (Fla. 1st DCA 1989); Johnson v. State, 456 So.2d 529 (Fla. 4th DCA 1984). The statement in the instant case was particularly harmless in that it did not in any way imply that the defendant had committed a crime but only would have led the jury to the conclusion that the officer had discovered that Czubak had been Thelma Peterson's roommate for a period of time. The evidence was admissible to explain the officer's actions and does not constitute error.

ISSUE IV

WHETHER THE COURT COMMITTED PER SE REVERSIBLE ERROR BY ALLOWING DETECTIVE McNULTY TO TESTIFY ON REBUTTAL, OVER DEFENSE OBJECTION AND WITHOUT A RICHARDSON HEARING, BECAUSE THE STATE DID NOT PROVIDE HIS NAME IN DISCOVERY.

Appellant's contention that the trial court erred in failing to conduct a Richardson hearing on the state's failure to provide Bill McNulty's name on the witness list overlooks the obvious. A Richardson hearing is only required when there has been a violation of ***Florida Rules of Criminal Procedure 3.220.*** Smith v. State, 500 So.2d 125, 126 (Fla. 1986). Where there is no duty to disclose, there is no need for a Richardson hearing. Johnson v. State, 545 So.2d 411 (Fla. 3d DCA 1989); Whitfield v. State, 479 So.2d 208 (Fla. 4th DCA 1985).

The only obligation imposed by the discovery rules that are relevant to the instant case are set forth in ***Rule 3.220(a)(1)(i)(iii)***. This rule requires the prosecutor to disclose to defense counsel the names and addresses of all persons known to the prosecutor to have information which may be relevant to the offense charged, and to any defense with respect thereto. It also requires the prosecutor to disclose any written or reported statements and the substance of any oral statements made by the accused, including a copy of any statements contained in police reports or report summaries, together with the name and address of each witness to the statements. *Rule 3.220(f)* makes the duty to disclose a continuing one. If subsequent to the compliance to the rules a party discovers additional witnesses or material which he would

have been under duty to disclose or produce at the time of such previous compliance, he is required to promptly disclose or produce such witnesses in the same manner required under the rules for initial discovery. The state is not required to disclose the names of persons who have no information about the offense or defense.

Hence, the prosecutor was not required to put Bill McNulty on the witness list because Bill McNulty did not have any information relevant to the offense or the defense and the state did not plan to call him as a witness. McNulty's involvement with Czubak's prosecution was only tangential. McNulty was involved only because he was investigating Edward Ragsdale for the murder of Ernie Mays.[2] (R 762) McNulty did not have any information relevant to the instant crime; he testified only that he didn't call Ragsdale and that he didn't have Cindy LaFlamboy call Ragsdale. His testimony that he had no knowledge of a call only became relevant when LaFlamboy testified that McNulty had called Ragsdale in Alabama.

Further, contrary to appellant's assertion, it is apparent from the record that neither party knew that defense witness Cindy LaFlamboy was going to say Bill McNulty had made the call.

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[2] The defense presented by appellant alleged that Edward Ragsdale had murdered Thelma Peterson.

During redirect examination, defense counsel elicited the following:

> "Q. [Sestak] Did you ever, at the insistence of the police, call Mr. Ragsdale from a phone at the Sheriff's Office?
>
> A. [LaFlamboy] They did.
>
> Q. They did?
>
> A. Bill McNulty.
>
> Q. Okay. Bill McNulty? Who is Bill McNulty?
>
> MR. VAN ALLEN: Your Honor, excuse me. Can we approach the bench?
>
> THE COURT: Yes, sir.
>
> (Bench conference)
>
> MR. ALLEN: Mr. McNulty is in the courtroom and I would like to ask that he leave. This is the first time I have ever heard this and he may be a witness now.

(R 743 - **44**)

Neither the discovery rules or Richardson and its progeny are intended to protect defendants from all surprise. As the court said in Whitfield v. State, supra, one can never predict with certainty what any witness -- one's own or the adverse party's -- will say. This type of surprise is not what the discovery rules are intended to protect against. Neither side is required to alert the opposing party to the content of a witness' testimony, except to the extent of a written or recorded, oral statement of the witness or an expert witness' report which may foreshadow what he will say on the stand. The purpose of the

discovery rule is not to displace the adversary system as the primary means of uncovering the truth; rather, the paramount goal is to guard against miscarriages of justice. United States v. Bagley, 473 U.S. 667, **105** S.Ct. **3375, 87** L.Ed.2d **481 (1985).**

The state urges this Court to find that there was no discovery violation and, hence, there was no need for a Richardson hearing.

Appellant also contends that Bill McNulty's presence in the courtroom violated the sequestration rule. This Court has frequently pointed out that the rule of sequestration is intended to prevent a witness' testimony from being influenced by the testimony of other witnesses in the proceeding. See Wright v. State, 473 So.2d 1277 (Fla. 1985). Before a court excludes testimony on the ground that the sequestration rule was violated, the trial court must determine that the witness' testimony was affected by the other witness' testimony to the extent that it substantially differed from what it would have been had the witness not heard the testimony. Id. at **1280.**

It is hard to imagine how McNulty's testimony could have been substantially different from what it would have been if he had not heard LaFlamboy's limited testimony. This is especially true in light of the fact that the only thing McNulty testified to was that he did not make a phone call and that he did not have LaFlamboy make a phone call. This was not an elaborate alibi story requiring details that could be altered after hearing LaFlamboy's testimony.

Appellant also contends that the testimony was improper as it impeached the witness on a collateral matter. Prior to McNulty's testimony, defense counsel entered the following objection:

> "MR. SESTAK: Judge, first of all, there is a discovery violation. He hasn't been listed as a witness. Second of all, there is a sequestration violation. He has been sitting here and was sitting here through some of Ms. LaFlamboy's testimony and I think you have -- the only thing that he could possibly come in as perhaps impeachment to her testimony.''
>
> **(R 749)**

There was no objection on the basis now being asserted by appellant. Accordingly, this issue has not been properly preserved for appellate review. Steinhorst v. State, supra; Lucas v. State, 376 So.2d 1149 (Fla. 1987).

Further, the impeachment testimony was proper rebuttal testimony. *Section 90.608(1)(e)* allows for impeachment by proof by other witnesses that material facts are not as testified to by the witness being impeached. LaFlamboy's entire testimony made it appear that Ragsdale had committed the murder, that Detectives Wilbur, Pierce and McNulty were aware that Ragsdale had committed the murder and that the detectives had failed to investigate Ragsdale's part in the murder. On rebuttal each of the detectives testified and contradicted LaFlamboy's testimony on the entire matter. In rebuttal, both Wilbur and Pierce denied that Cindy told them Ragsdale killed Thelma Peterson. Wilbur said that Cindy told him Ragsdale burglarized Peterson's home but

that she did not mention Ragsdale's alleged confession about the murder. (R **754, 766)** Detective McNulty testified that he had never called Ragsdale in Alabama as Cindy LaFlamboy claimed.

These were not collateral matters. If left standing unchallenged, LaFlamboy's testimony could have left the jury to speculate that there was at least sloppy police work and at worst a police cover-up. The testimony was properly admitted to rebut these material facts. Cf. United States v. Dixon, **593** F.2d **626** (5th Cir. **1979).**

When considered in the light most favorable to the jury's verdict, the circumstances of the victim's death, the burglary, and subsequent inculpatory statements, coupled with the fact that death by manual strangulation is a slow, deliberate method of killing, the evidence was sufficient to support the jury's verdict.

ISSUE V

WHETHER THE COURT ERRED BY DENYING DEFENSE COUNSEL'S MOTION FOR JUDGMENT OF ACQUITTAL.

First, the question of whether the evidence fails to exclude all reasonable hypotheses of innocence is for the jury to determine, and where there is substantial competent evidence to support the jury's verdict, the verdict will not be reversed on appeal. Cochran v. State, 547 So.2d 928 (Fla. 1989). The circumstantial evidence standard does not require the jury to believe the defense version of the facts on which the state has produced conflicting evidence, and the state is entitled to a review of any conflicting evidence in the light most favorable to the jury's verdict. Id. at 930.

Premeditation may be shown by circumstantial evidence. Hill v. State, 133 So.2d 68 (Fla. 1961); Larry v. State, 104 So.2d 352 (Fla. 1958). In Brown v. State, 473 So.2d 1260 (Fla.) cert. denied, 474 U.S. 1038, 106 S.Ct. 607, 88 L.Ed.2d 585 (1985):

> "'If one person strikes another across the neck with a sharp knife or a razor, and thereby inflicts a mortal wound, the very act of striking such person with such weapon in such manner is sufficient to warrant a jury in finding that the person striking the blow intended the result which followed.'
>
> Rhodes v. State, 104 Fla. 520, 523, 140 So. 309, 310 (1932). The same principle applies to one who tightens a garrote around the neck of another thereby causing asphyxiation. We therefore conclude again that the evidence was sufficient to show premeditation.

Id. at **1270**

Brown's victim was **81** years old, a semi-invalid, and was beaten, raped and killed by asphyxiation. Id. at **1268.**

The victim in the instant case was an **81** year old woman with a pacemaker. (R **442, 474)** She was infirmed and palsied. At the age of **81,** her strength could not be anywhere near the strength of Mr. Czubak who was at least half her age. The evidence shows that she was manually strangled, that she fought for her life, and that her clothes were ripped violently from her body. Her body was covered in blood and there was a broken glass bottle surrounding her head. (R **397, 412 - 414, 433 - 436, 440 - 441)** The evidence showed that it was a violent death and that the victim suffered at the hands of the defendant.

The evidence of premeditation also included the statements by Czubak at the time of the murder and immediately thereafter. Dorothy Schultz testified that Czubak called her late the evening of the murder and asked her for directions to her house. He told her he would be there in a few minutes. When he did not arrive, she called Peterson again. It was approximately **7:15** p.m.. Czubak answered the phone and said, "Babe, you couldn't have called at a better time." (R **540 - 541)** When he arrived several hours later, he was very sweaty, his clothes were stained and he had fingernail scratch marks on the side of his face. He told her then, "Babe, you don't know what its like to live in hell with that old bitch, we don't have to worry about it anymore." (R **543)** Czubak gave her Peterson's jewelry, old coins,

television, police scanner and mink stole. (R 544) He also brought a half full bag of potatoes, vegetables and frozen meat wrapped in aluminum foil. (R 541) He also had Peterson's car. (R 544) Based on the circumstances of the murder, the series of phone calls and their content, the jury could reasonably have found that Czubak had the requisite premeditated intent.

There was absolutely no evidence to support appellant's contention that the strangulation may have taken less than an average of three to five minutes, The medical examiner testified that Peterson's hyoid bone was fractured on both sides, her Adam's apple was fractured longitudinally and two other projections at the top of the hyoid cartilage were both fractured at the base. (R 437) Strangulation was manual and was not caused by a blow to the throat. (R 440 - 446) It was the medical examiner's opinion that somebody using one or two hands held Mrs. Peterson's neck until she died. (R 447) Further, death was not caused by the fractures but by the strangulation.

Further, this is a question of weight of evidence not sufficiency. This Court has repeatedly recognized that appellate courts should not sit as a second jury and re-weigh the evidence. The question before this Court is limited to whether there was sufficient competent evidence to support the finding of premeditation. Benson v. State, 526 So.2d 948 (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).

ISSUE VI

WHETHER THE TRIAL COURT ERRED IN REFUSING TO GIVE THE LONG FORM EXCUSABLE HOMICIDE JURY INSTRUCTION.

Appellant claims that he should have a new trial because the court below denied his request to give the long form of the excusable homicide standard jury instruction. As appellant notes, this instruction may be required as part of the definition of manslaughter, or may be given as an instruction in itself on the defense of excusable homicide. Appellant argues on appeal that the trial court should have given the instruction as a defense instruction because there was evidence presented at trial which allegedly supported excusable homicide as a defense. However, a review of the record demonstrates that defense counsel below did not request that the instruction be given as a defense instruction, and, even if such a request may be arguably inferred from the record, there was not any evidence presented to support a defense of excusable homicide, and therefore no error has been presented in this issue.

At the charge conference, defense counsel apparently spontaneously decided to request that the long form excusable homicide instruction be given to the jury (R. 785). When asked by the court what the basis was for such a request, defense counsel did not specify if he was relying on an excusable homicide theory of defense or simply wanted the longer definition of excusable homicide as part of the manslaughter instruction (R.

785). Instead, he noted that the state had introduced evidence that there had been a struggle with the victim, and that, since the cause of the struggle had not been established, there could be a "heat of passion" argument since the victim and appellant knew each other and had been living together as lovers (R. 785). The fact that there may have been evidence consistent with a "heat of passion" argument which was never made to the jury would be a relevant consideration in giving the instruction as either a defense instruction or as part of the manslaughter instruction, so this reasoning doesn't explain why defense counsel was requesting the long definition. *See,* Banda v. State, 536 So.2d 221 (Fla. 1988), cert. denied, ___ U.S. ___, 109 S.Ct. 1548, 103 L.Ed.2d 852 (1989)(finding no prejudice in an erroneous manslaughter instruction which did not define excusable homicide when there was no evidence of such a defense).

However, at the hearing on appellant's second amended motion for a new trial, defense counsel clarified that he had requested the long version of the excusable homicide instruction as part of the manslaughter instruction (R. 1060-1063). He argued that case law required the long form be given as part of the manslaughter instruction. This is also consistent with the fact that the theory of defense presented to appellant's jury was that another person had committed the murder, and not that appellant's killing of the victim was legally excusable (R. 824 - 825). The trial court noted that there had not been any objection to the manslaughter instruction as given, although the long form

excusable homicide instruction was requested, and therefore the argument had not been preserved for review (R. **1070-1071).** In addition, the court noted that any error in the failure to give the long form definition was harmless because the jurors were provided all of the instructions in writing and could have referred to the definition of excusable homicide in the manslaughter instruction if there was any question about the definition (R. **1071).**

On these facts, the argument now presented on appeal has not been preserved for review. Castor v. State, **365** So.2d **701 (Fla. 1978).** Although the request for the instruction was made, the reason given for the request did not apprise the judge that appellant was adopting this theory of defense so the judge was obligated to give the instruction if any evidence arguably supported it. When the court asked if defense counsel was going to argue excusable homicide to the jury, defense counsel stated that he wasn't sure, but knew he was going to argue that appellant was not guilty (R. **785).** Given defense counsel's ambiguity in expressing his reason for requesting the instruction, the requirements of the contemporaneous objection rule have not been met in this case, and this Court should decline to review the argument that the long form excusable homicide definition should have been given as a defense instruction.[3] *Compare,* State v. Heathcoat, 442 So.2d **955** (Fla. **1983).**

Even if this issue has arguably been preserved for appeal, no error has been presented. Clearly, a defendant is entitled to a jury instruction on *his* theory of defense when there is evidence to support such a defense. Gardner v. State, 480 So.2d 91 (Fla. 1985). However, appellant's theory of defense in this case was that someone else committed the murder. Defense counsel never once suggested to the jury below that appellant had killed the victim under circumstances which should be considered legally excusable. In fact, such an argument would have severely undermined the theory of mistaken identity that was advanced. Appellant has not cited to this Court any cases requiring that a jury instruction be given if there is evidence to support any defense which can later be gleaned from the record by an appellate attorney when that defense was not argued to the jury at the time of trial.

In addition, the evidence which has been cited herein to support an excusable homicide defense was not sufficient to require the long form excusable homicide instruction. Appellant relies on the following facts in arguing that the instruction should have been given: appellant and the victim had lived together as lovers and got along well prior to the day of the homicide; there were signs of a struggle when the victim died,

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[3] Appellant's brief concedes that there is no reversible error presented by the trial court's giving the short form excusable homicide instruction in conjunction with the definition of manslaughter, the argument advanced by defense counsel below (Appellant's Initial Brief, p. 66).

including portions of a bottle found near the victim's head; the victim's larynx could have been fractured by a blow to the head; and a witness had been told by the victim prior to the homicide that "Danny" did not live with her anymore and when the witness saw him that night he was sweaty and had scratches on his neck (Appellant's Initial Brief, pp. **68-69).** Conspicuously missing from this evidence is any sign of provocation, which is required by the excusable homicide "heat of passion" defense. **8782.03,** Fla. Stat. While appellant now theorizes that there may have been a sudden and violent struggle because Peterson might have brought another lover home or asked appellant to move out, this is clearly speculation, and absolutely no evidence of provocation was presented at trial.

In Jacobs v. State, **396** So.2d **1113** (Fla.), cert. denied, **454** U.S. **933,** 102 S.Ct. **430, 70** L.Ed.2d 239 **(1981),** this Court held that a voluntary intoxication jury instruction is not required in every case in which evidence is presented that the defendant had been drinking. Rather, there must be some evidence as to the amount of alcohol consumed prior to the crime and some evidence that the defendant was intoxicated to necessitate the giving of the instruction. Even though the facts in Jacobs may have been consistent with a voluntary intoxication argument, they did not establish intoxication so as to require the instruction.

Similarly, in the instant case, the facts may have been consistent with a heat of passion argument, but they did not establish provocation *so* as to require the giving of an excusable

homicide instruction. The excusable homicide instruction is not required in every murder case in which evidence is presented that the defendant and victim were lovers who had a struggle prior to the victim's death.

Finally, it must be noted that any error presented on these facts would clearly be harmless beyond any reasonable doubt. Not only was excusable homicide inconsistent with appellant's theory of defense, but the jury was instructed on excusable homicide in conjunction with the general introductory instructions on manslaughter (R. **858-859**). Although this short form introductory definition has been found to be misleading **in some** situations, the problem identified with the short form definition is that it appears "to inaccurately suggest that a killing can never be excusable if committed with a dangerous weapon." Blitch v. State, **427** So.2d **785** (Fla. 2d DCA **1983**). Since the victim in this case was killed by strangulation, a dangerous weapon was not involved and the short form excusable homicide instruction **was** adequate (R. **447 -448**).

The jury in this case was instructed that "The killing of a human being is excusable and therefore lawful when committed by **...** accident or misfortune **in** the **heat** of passion, **upon** any sudden and sufficient provocation." (R. **858**). They took this written definition with them when **they** retired to deliberate. The appellant did not claim that he had strangled the victim in the heat of passion, but denied that he was the one responsible for her death. On these facts, the trial court **did** not err **in**

denying appellant's request for the long form excusable homicide definition be read to the jury, and appellant is not entitled to a new trial on this issue.

ISSUE VII

WHETHER THE TRIAL COURT ERRED BY REFUSING TO APPOINT SEPARATE COUNSEL FOR PENALTY PHASE.

This issue is clearly meritless; it rests on a premise that counsel has an obligation or duty or permission to lie by presenting a false defense and there is no such duty. Scott v. Dugger, 891 F.2d 800 (11th Cir. 1989). Moreover, the "credibility" dilemma posited by appellant would remain unsatisfied by the granting of the request for the appointment of separate counsel at penalty phase. (Does new counsel at sentencing explain to the jury that he is there and guilt phase counsel is not because the defense wants to present an inconsistent version?)

The trial judge was eminently correct in ruling that the jury could understand the different arguments. (R 978)

Appellee is reluctant to engage in any discourse on why trial counsel did or did not do any particular thing at sentencing. The appropriate vehicle for resolving ineffective assistance of counsel claims is via *Rule* 3.850 where the appropriate witnesses can be examined under oath subject to cross examination. Upon appropriate review, it may well be that counsel's actions will be sustained as reasonable trial tactics as in Jones v. State, 528 So.2d 1171, 1175 (Fla. 1988).

We do know from the instant record what trial counsel did do at penalty phase was to put on two witnesses who testified regarding Czubak's artistic ability and one witness concerning

appellant's behavior in prison. (R 910 - 912, 918 - 919, 923 - 924)

Appellate counsel now criticizes trial counsel for not presenting childhood evidence; the theory apparently is that having *any* childhood is mitigating per se: if it was a happy one the family could attest to it and if not a hired gun psychiatrist could attest to that. There is, of course, a third alternative, that his early childhood was uneventful and that those who could so testify were unwilling to testify or to commit perjury about it. Appellee will not engage in second-guessing counsel at this point; ***Rule 3.850*** remains available.

Further, while criminal defendants have the right to counsel of choice, that right is not absolute. Birt v. Montgomery, 725 F.2d 587 (11th Cir. 1984). Appellant did not ask the court for the opportunity to hire counsel of his choice, he merely asked that the state be required to furnish him with two separate lawyers. There is absolutely no requirement that the state furnish defendants with a separate lawyer for the penalty phase when the defendant maintains his innocence during the guilt phase.

ISSUE VIII

WHETHER THE TRIAL COURT ERRED BY INSTRUCTING THE JUDGES ON THE HEINOUS, ATROCIOUS OR CRUEL AGGRAVATING FACTOR.

During the instruction conference, defense counsel objected to the instruction of heinous, atrocious and cruel because there was no evidence that the victim was tortured or suffered. (R 930) The court denied the objection, finding that there was sufficient evidence to warrant giving the instruction. (R 933) After receiving a nine to three jury recommendation of death, the court sentenced appellant to death. The court, however, did not find heinous, atrocious and cruel as one of the aggravating factors.

Appellant now urges this Court to reverse the death sentence, alleging that the trial court should not have given the instruction because it did not ultimately find heinous, atrocious and cruel as applicable. This argument ignores the distinction between giving an instruction and finding the existence of an aggravating factor. To give an instruction requires only that there be sufficient evidence before the jury; to find an aggravating factor, however, there must be proof beyond a reasonable doubt. Atkins v. State, 452 So.2d 529, 532 (Fla. 1984).

Recently, in Stewart v. State, Case No. 70,245, (Fla. March 15, 1990), this Court found that it was error for a trial court to refuse a requested instruction where the evidence showed impairment but not substantial impairment as a mitigating factor.

Quoting Floyd v. State, 497 So.2d 1211, 1215 (Fla. 1986), this Court stated:

> "'The legislature intended that the trial judge determine the sentence with advice and guidance provided by a jury, the one institution in the system of Anglo-American jurisprudence most honored for fair determinations of questions decided by bouncing opposing factors.' If the advisory function were to be limited initially because the jury could only consider those mitigating and aggravating circumstances which the trial judge decided to be appropriate in a particular case, the statutory scheme would be distorted. The jury's advice would be preconditioned by the judge's view of what they were allowed to know.''

Thus, if the trial court had refused to give the instruction where there was evidence to support it, he would have been usurping the jury's role in the decision making process.

It is unquestionable that there was sufficient evidence before the jury to support the giving of the instruction of heinous, atrocious and cruel. The victim in the instant case was an 81 year old woman with a pacemaker. She was infirmed and palsied. At the age of 81, her strength could not be anywhere near the strength of Mr. Czubak who was at least half her age. The evidence shows that she was manually strangled, that she fought for her life, and that her clothes were ripped violently from her body. Her body was covered in blood and there was a broken glass bottle surrounding her head. The evidence showed that it was a violent death and that the victim suffered at the hands of the defendant. Thus, while the trial court may not have found this established heinous, atrocious and cruel beyond a

reasonable doubt, there was sufficient evidence before the jury to warrant giving the instruction.

In a similar case, Brown v. State, 413 So.2d 1260 (Fla. 1985), this Court upheld the heinous, atrocious and cruel aggravating factor where the victim was 81 years old, a semi-invalid, she was beaten, raped, and killed by asphyxiation; and her hands had been tied behind her back, a gag placed in her mouth and either a gag or a garret placed around the victim's neck caused death. Id. at 1268.

> "Based upon the foregoing it cannot be said that the trial court erred in instructing the jury on the aggravating factor of heinous, atrocious and cruel where there was sufficient evidence to warrant giving the instruction."

To the extent that appellant is now arguing that the aggravating factor is unconstitutionally vague under Maynard v. Cartwright, 486 U.S. ___, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988), this point has not been preserved for appellate review. Appellant objected below on the basis that the factor was inapplicable, not that it was unconstitutionally vague. (R 931) Appellant may not change the basis for an objection at the appellate level. Steinhorst v. State, 412 So.2d 332 (Fla. 1982).

Even if the merits of the argument could be reached it has been rejected. Smalley v. State, 546 So.2d 720 (Fla. 1989); Bertolotti v. Dugger, 883 F.2d 1503 (11th Cir. 1989). Further, appellant cannot complain about this aggravating factor since the trial court did not find it. See Daughtery v. Dugger, 533 So.2d 287 (Fla. 1988).

ISSUE IX

WHETHER THE TRIAL COURT ERRED BY FAILING TO CONSIDER THE MITIGATION EVIDENCE.

The only evidence presented in mitigation was appellant's artistic ability and the fact that he was not a problem prisoner. Beyond a hearsay statement made by Art Young during the guilt phase, there was no evidence that appellant had an alcohol problem or that he was under the influence of alcohol at the time of the crime. (R 938) Cf. Rogers v. State, 511 So.2d 526 (Fla. 1987). In Rogers v. State, supra this Court held that it was not an error for the trial court to refuse to find a mitigating factor of the defendant's childhood traumas where there was little to no support in the record to support a finding that the traumas produced any effect upon him relevant to his character, record, or the circumstances of the offense so as to afford some basis for reducing a sentence of death.

The record in the instant case shows that the trial court considered all of the relevant mitigating evidence. Deciding whether mitigating circumstances have been established is within the trial court's discretion. Stano v. State, 473 So.2d 1282 (Fla. 1985), cert. denied, 474 U.S. 1093 (1986). The presentation of a few drawings and carvings did not require the trial court below to find that it constituted an aspect of the defendant's character which served as a basis for reducing the sentence from death. King v. State, 514 So.2d 309 (Fla. 1990). The trial court is not obligated to find mitigating

circumstances. Suarez v. State, 481 So.2d 1201 (Fla. 1985), cert. denied, 476 U.S. 1178 (1986). Disagreement with the force to be given such evidence is not a sufficient basis for challenging a death sentence. Rose v. State, 472 So.2d 1155 (Fla. 1985).

Even if the trial court erred in finding no mitigating circumstances, reversal of the sentence is permitted only if this court can say that the errors in weighing aggravating and mitigating factors, if corrected, reasonably could have resulted in a lesser sentence. Under these circumstances, there is no reasonable likelihood that the trial court would have concluded that the aggravating circumstances were outweighed by the single mitigating factor of Czubak's artistic ability.

ISSUE X

WHETHER A SENTENCE OF DEATH IS DISPROPORTIONATE IN THIS CASE WHEN COMPARED TO OTHER CAPITAL CASES WHERE THE COURT HAS REDUCED THE PENALTY TO LIFE.

Appellant argues that the sentence imposed in the instant case was not proportionate to other death cases because the aggravating factors found by the trial court did not relate to the offense, but rather to Czubak's prior record and because the death penalty is not generally considered appropriate in the case of a homicide resulting from a heated domestic dispute.

There is absolutely no support in the law for appellant's position that the existence of aggravating factors relating to the perpetrator's prior record alone cannot support the imposition of the death sentence. Further, there is no support in the record for appellant's position that this homicide resulted from a heated domestic dispute. There is no evidence that Mr. Czubak was in a love-relationship with Thelma Peterson and that the homicide resulted from a disruption of that relationship. The facts are Mr. Czubak was half of Thelma Peterson's age, that he was supported and cared for by her while at the same time maintaining a separate love-relationship with Dorothy Schultz. Further, statements made by Czubak immediately after the murder do not support any claim that this homicide was a result of a heat of passion. Czubak's statements to Dorothy Schultz were very cold and only expressed happiness at being rid of Thelma Peterson. This Court has repeatedly recognized that

where there are aggravating circumstances, making death the appropriate penalty and no valid mitigating factors are discernible from the record, a sentence of death will be upheld.

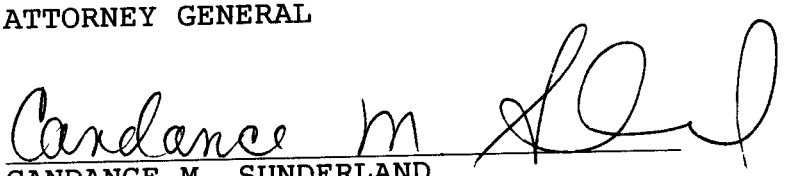
The aggravating factors established below set Czubak and this crime apart from the average defendant and murder and the imposition of the death sentence was proportionate to other capital cases where the sentence has been upheld. Cf. Brown v. State, 413 So.2d 1260 (Fla. 1985).

CONCLUSION

Based on the above stated facts arguments and citations of law the judgment and sentence of the lower court should be affirmed.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to A. Anne Owens, Assistant Public Defender, Polk County Courthouse, P.O. Box 9000, Drawer PD, Bartow, Florida 33830, this 22 day of March, 1990.

OF COUNSEL FOR APPELLEE.