IN THE SUPREME COURT OF FLORIDA

JAMES AREN DUCKETT,

Appellant,

v. CASE NO. 72,711

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
FROM THE FIFTH JUDICIAL CIRCUIT
IN AND FOR LAKE COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

Appellee accepts appellant's statement of facts regarding the penalty phase, but rejects appellant's statement of facts regarding the guild phase, and for purposes of this appeal sets forth the following.

Some time between 10:00 and 10:30 p.m. on May 11, 1987, the eleven-year-old victim, Teresa McAbee, left her home and walked approximately 400 feet to a convenience store to purchase a pencil (R 513, 896). After purchasing the pencil, Teresa left the store with Salvador Calisto, who was doing laundry at the laundromat next door, and knew Teresa from previous trips to the store (R 556, 605). The went over by the dumpster, where they talked for about twenty minutes before they encountered appellant (R 619).

Salvador first saw appellant's police car parked on the corner, and appellant drove by twice over a period of five to ten minutes before pulling into the lot and parking (R 610-12). Appellant entered the store and asked the clerk the little girl's name and age (R 557). The clerk told appellant that the girl's name was Teresa, and that she was around ten to thirteen years old (R 557). Appellant stated he would go check on her, left the store and walked toward the dumpster (R 557-58, 570).

Appellant asked Salvador his age and what he was doing there (R 613). Salvador told appellant that he was sixteen, and Teresa stated that she was eleven (R 613). Appellant told Salvador that he was too old to be talking to such a young girl

at that time of night (R 613). Salvador told Teresa to go home, but appellant said he needed to speak to her, *so* they all walked over to appellant's car (R 613). The clerk at the store saw the three walk back past the window (R 559). After seeing them, she rented a movie to two customers, and the receipt reflected the time as 10:45 p.m. (R 562).

After answering a few questions, Salvador went and sat in front of the laundromat to wait for his uncle to pick him up (R 614). Salvador's uncle, Maximo Rubio, arrived and parked next to appellant's car, on the passenger side (R 635). Appellant and Teresa were standing on the driver's side, toward the front of the car (R 636). Mr. Rubio was putting laundry in the car, and appellant asked him Salvador's age (R 637-38). Mr. Rubio asked Salvador his age, but appellant stated that he wanted to hear it from Mr. Rubio, so Mr. Rubio told him Salvador was sixteen (R 615, 637).

Appellant told Mr. Rubio to talk to Salvador, as Salvador was a minor and Teresa was so young (R 638). Appellant told Mr. Rubio that he would talk to Teresa, and winked at Mr. Rubio (R 615, 638). Appellant took Teresa by the arm, put her in the passenger side of the patrol car and shut the door (R 616, 639). Mr. Rubio and Salvador saw appellant walk around to the driver's side, and he was standing at the door when they left (R 616, 639). Neither Salvador nor Mr. Rubio saw Teresa touch the hood of appellant's car (R 617, 640).

Around 11:00 p.m., Teresa's mother walked to the store looking for her (R 513). A clerk at the store, Joyce Reitz, told

Mrs. McAbee to go to the police station because maybe appellant had taken Teresa there (R 561). Mrs. McAbee went home, got the car, and she and her sister drove around for about an hour looking for Teresa (R 514-15). They saw no police cars while they were driving around (R 515). Mrs. McAbee went to the Mascotte Police Department, but nobody was there **so** she drove to the Groveland Police Department, which is approximately 1.5 miles east of Mascotte (R 515, 593).

Mrs. McAbee arrived at the Groveland Police Department around midnight, and told Officer Don Campbell that her daughter was missing, and that there was nobody at the Mascotte Police Department (R 589-90). Officer Campbell told her that he would contact an officer to meet her back there to take a report, so she returned to Mascotte (R 515, 590). It took appellant fourteen seconds to respond to the call (R 1956). Mrs. McAbee waited at the Mascotte Police Department 15-20 minutes before appellant arrived out of the east (R 518-19). He told Mrs. McAbee that he had talked to Teresa at the store, he had her in his police car, and he had told her to go home (R 535). Mrs. McAbee filed a missing person report and returned home (R 520).

Appellant went to Mrs. McAbee's house 15-20 minutes later to get a picture of Teresa (R 535). Shortly after 1:00 a.m., he called Michael Brady, the Mascotte Police Chief, to inform him he had gotten a missing person report (R 741). Appellant stated that he had already made a flyer and did not need any assistance (R 741). Chief Brady instructed him to continue to tear up the streets looking for the girl for the remainder of his shift (R 741).

Appellant returned to the Circle K with the flyer, and the clerk asked him where she should put it (R 721). Appellant told her not to put it up since it was not a very good picture, but to leave it on the counter and ask people about it (R 722). He said he would bring a better one by later, but never did (R 722). Appellant also took flyers to the Presto and Jiffy Stores (R 673, 678). Ed Crumbley, the clerk at the Presto Store, testified that the police usually drive by every 45 minutes to an hour, and flash the lights or hit the siren (R 680, 687). Appellant had been by around 9:30 p.m., and did not return until he came in with the flyer (R 680). He never returned after that (R 679).

Appellant went to Mr. Rubio's house around 1:00 -1:15 a.m., and asked to speak to Salvador (R 641). He asked if Salvador knew where Teresa was, as she had not returned home (R 642). Mr. Rubio told appellant he could look through the house, but he did not and left (R 642). Appellant returned to Mrs. McAbee's only once more that evening, around 3:00 a.m., and spoke with Mrs. McAbee and her sister (R 544). Around 6:00 - 6:30 a.m., Mrs. McAbee's sister walked down by the lake looking for Teresa (R 1080). The only other documented action of appellant during his shift that night is that he issued several speeding tickets around 5:40 a.m. (R 708-9, 711-12). Appellant did not enter his ending mileage in the log book when he completed his shift (R 763). A tape of the radio calls that evening revealed none from appellant between 10:50 p.m. and 12:10 a.m. (R 1830).

Jim Clark was fishing in the lake by the pumphouse the next morning, when he saw what he believed was a body or mannequin,

and went to find Chief Brady (R 733). Chief Brady followed Mr. Clark back to the scene, determined that it was the missing girl, and notified the Sheriff's Department at approximately 8:40 a.m. (R 758, 775). Deputy John North responded, entered the scene leaving instructions not to let anyone else in, and set up a perimeter (R 776-78). None of the vehicles that entered the area went past the pumphouse, and none of the Mascotte Police cars entered the ribboned area (R 762, 776, 791). The pumphouse is approximately 3200 feet from the Circle K (R 897).

The medical examiner, Dr. Shutze, had arrived at the scene, and the body was removed from the water (R 790, 803). Foam was coming from the nose and mouth, which is commonly seen as a result of drowning (R 804). An autopsy was performed the same day (R 805). The victim was 58 inches tall and weighed 83 pounds (R 815-16). An external examination revealed abrasion and contusion of the skin of the lower neck and a prominent contusion of the skin on the right side of the neck (R 807). An internal examination revealed hemorrhage into the muscles of the neck and a fractured highway bone, which is located between the tongue and the voicebox, and is commonly fractured in strangulation (R 808). However, the highway bone is very flexible in young persons and difficult to fracture (R 809). The use of a lot of force was consistent with bleeding (R 809). The victim was most likely strangled by hands, and the scrapes that were also found on her neck were caused by fingernails, a watch or some other sharp object (R 812).

The victim also had a contusion on her right arm and on the inner surface of her left arm (R 807). The contusion on the inner surface of the left arm and abrasions on the side were consistent with a sexual assault, such that her arms were held to hold her on her back (R 815). There was fresh laceration of the victim's hymen, consistent with sexual assault and penetration (R 816). This would have been a painful injury, as the victim had no sexual activity previously (R 816). There was blood in her underpants, *but* none on her jeans (R 806, 829). There was evidence of semen on the jeans (R 1262, 1264).

The victim was still alive when she was sexually assaulted (R 817). The cause of death was strangulation and drowning, with the ultimate cause being consistent with drowning (R 820). Both occurred at approximately the same time, and Dr. Shutze could not express an opinion as to whether the victim was conscious when put in the lake (R 820).

Gary Nelson is the supervisor of the Technical Services Unit of the Lake County Sheriff's Department (R 1056). He arrived at the crime scene around 11:30 a.m., and examined the tire tracks that ran past the pumphouse and out to the south end of the area (R 1061). There had been moderate to heavy showers the previous evening (R 1054). The pattern was very unique to him (R 1062). He was asked to go to another area to examine some tracks similar to those at the scene, and as he was driving out, he pulled past a Mascotte police car, and noticed the tire impressions it left (R 1063). He got out and measured them, and the track width and impression width were consistent with those

at the scene, so he returned and made plaster casts of the tracks at the scene (R 1063-64).

Terrell Kingery, an analyst at the Orlando Regional Crime Lab, compared the unknown impressions left at the crime scene with known impressions taken from the police car appellant was driving that night. He compared the class characteristics, which are ribs, grooves, slots, notches and sights, and individual characteristics, which are wear, nicks and cuts, and foreign objects (R 1093-96). In Mr. Kingery's opinion, the known impressions from the police car were consistent with the unknown impressions from the scene (R 1097-98, 1112). The impressions had been made by Goodyear Eagle Mud and Snow Tires (R 1109-10). These are high performance tires designed for northern driving and are not recommended for southern driving (R 1110-11, 1124).

The tires had been purchased at Ekiert Tire Center in Clermont in February 1987 (R 1125). Mr. Ekiert has not sold any other Goodyear Eagle Mud and Snow tires in nine years, and the ones that ended up on the Mascotte police cars had been ordered by mistake (R 1124-25, 1128).

The processing of appellant's patrol car also revealed a large area of fingerprints on the hood which were very dark, indicating that they were fresh (R 882). There were six palm prints that matched the victim's right palm, and four fingerprints that matched the victim's right index, middle and ring fingers (R 1180, 1190). There were three palm prints that matched the victim's left palm and five fingerprints that matched the victim's left ring, middle and index fingers (R 1180, 1190).

There was an additional palm print that matched appellant's right palm, and fingerprints that matched appellant's left index, right ring, right middle, and right index fingers (R 1180, 1190). There was another print identified as appellant's left thumb (R 1181, 1191). The victim's left thumbprint was found inside the car and another of her prints was on the door (R 1181, 1190). Appellant's prints were co-mingled with the victim's (R 1196). The victim's prints were placed on the car from a position of sitting backwards on the hood, and they proceeded in a "scooting motion" up the car (R 1194-95).

Witt Graves, and FDLE Crime Lab technician, swept the victim's panties and found a pubic hair in the crotch area (R 973-75). The hair was originally sent to the FDLE Crime Lab in Sanford for comparison with appellant's pubic hair (R 1614). The analyst, Deborah Steger, was unable to reach a conclusion based on the examination she made, but was also unable to eliminate appellant, and requested additional standards (R 1615, 1636). Ms. Steger was told to return the hairs, as they were going to be sent to Lifecodes for DNA analysis (R 1616). Lifecodes was unable to analyze the hair, and it was sent to the FBI for further comparisons.

The hair was analyzed by Michael Malone, a special agent with the hair and fibers unit of the Federal Bureau of Investigation (R 978). Mr. Malone holds a Master's Degree in Biology, and has been with the FBI for seventeen years (R 978). He was assigned to the lab in 1974, and spent his first year in training at the hair and fiber school at the FBI Academy, which

involved attending lectures and seminars, reading available literature, and comparing thousands of hours (R 979). He now teaches other investigators and crime lab analysts from all over the country, lectures, and was a contributing author to an investigative manual that was distributed to all local law enforcement agencies (R 980).

Mr. Malone has been qualified as an expert in hairs and fibers over 300 times in 42 states (R 981). The trial court accepted Mr. Malone as an expert in examination of hairs and fibers, including comparative examination, after defense counsel stated he had an objection, but none that he would voice for the record (R 987). Mr. Malone explained the comparison process to the jury, and concluded that there was a high degree of probability that the pubic hair came from appellant (R 989-93, 1011). Fifteen characteristics are needed for a match, and he found twenty (R 1034). He had also compared the unknown hair with hairs taken from Armando Morales, Antonio Morales, Tammy Zavala, Salvador Calisto, Dorothy McAbee, Pedro Zavala, Max Rubio, and the victim (R 1002).

Appellant gave a statement to Gerard King, an investigator with the State Attorney's Office, on June 15, 1987, which the parties stipulated was freely and voluntarily given (R 1279). Appellant denied that he had driven his vehicle to the area on the night of the murder, though he had done so three months previously (R 1280). He stated that there was a policy not to transport people in the police car, and he had transported a juvenile on only one prior occasion (R 1309, 1319). Appellant

stated that the victim had not been on the hood of his patrol car, and that he had stopped at the Jiffy Store for coffee after he saw her go home (R 1280, 1311).

Near the close of its case, the state proffered the testimony of three Williams Rule[1] witnesses. After argument from both sides, the trial court ruled that the testimony was admissible, as it was material and relevant to the issues of identification, motive, opportunity, and common scheme or plan (R 1402). The trial court found the similarities to be an officer, in uniform, in a patrol car, on duty, at night, close to the Circle K, close in time proximity, driving to an isolated area to attempt sex with young girls (R 1402-3). As to this last similarity, the trial court later noted that there was evidence from which the jury could conclude that the victim looked older than eleven (R 1464). Prior to each witness testifying, the trial court instructed the jury that the testimony was for the limited purpose of showing motive, opportunity, plan, and identification and only as it related to the sexual battery (R 1408, 1428-29, 1461, 1465).

Shelby Dow was nineteen years old, 5'1" tall and weighed 92 pounds when she came in contact with appellant in February, 1987 (R 1411, 1417). It was around 3:00 a.m., and she was walking back to her boyfriend's sister's house, where she was staying, from the house next door (R 1410). Appellant pulled up in his patrol car, stopped, and called her by name (R 1411). He asked her if she had seen her boyfriend Rafael, as he wanted to talk to

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[1] Williams v. State, 110 So.2d 654 (Fla. 1959).

him, and she replied that she had not and was also looking for him (R 1412). Appellant offered to take her to look for him, so she got Rafael's sister, they got in the police car and drove around (R 1413).

They could not find Rafael, *so* he took the girls back, said he had rounds to do, but that he would be back (R 1414). He returned, and Ms. Dow went alone with him, and they drove all around Mascotte (R 1414). Appellant told her that Rafael was not good for her, and that she could talk to him if she ever needed someone to talk to (R 1416). Appellant put his hand on her shoulder, and she asked him to take her home (R 1416). He was telling her he liked small, petite girls and that was why he noticed her, and that he would like to see her, and tried to kiss her (R 1416). She pushed him away and got out of the car (R 1416).

Linda Upshaw was seventeen years old when she came in contact with appellant on May 1, 1987 (R 1431-32). It was around 1:00 a.m., and she was out walking because she was upset (R 1432-33). Appellant pulled in a driveway and waited for her to walk to his patrol car (R 1434). He asked her her age and what she was doing out at that time, invited her to go riding around, and told her it helps to talk about your problems (R 1435). She told him she wanted to keep walking, and he encouraged her to come along and talk while he made his rounds, so she got in (R 1436).

Ms. Upshaw began to get scared, as she felt they were driving outside the city limits and not heading towards town (R 1437). They ended up in a deserted orange grove, where appellant

parked and told her to slide over next to him (R 1437-40). She was scared, so she did it, and he put his arm around her, his hand on her breast and tried to kiss her (R 1440). She turned her face, and told him she had to go to the bathroom (R 1442). He asked her what was the matter, she said she had to go to the bathroom, and after about two or three minutes they left (R 1443). She told him to take her to the Jiffy Store so she could use the bathroom, because she knew her friends hang out there (R 1443). They got to the Jiffy Store and he asked her if she would go riding again, and she told him she would, because she was scared (R 1444). She went in and found her friends, and he got coffee (R 1444). She was in the police car approximately 35 minutes (R 1451).

Kimberly Ruetz was sixteen years old when she first came in contact with appellant (R 1467). She originally met him in December, 1986, when she and her boyfriend had a fight and her mother called the police, and saw him again one night when she was driving around with her friend (R 1468-69). He told her to meet him at the clay pits after she took her friend home and talk to him for a while (R 1470). She went there, got in his car, and the conversation turned to sex (R 1475). She eventually performed oral sex on him (R 1481). He told her he had worked too hard to get where he was, and if she did not say anything to anybody he would not either (R 1482-83).

Ms. Ruetz saw appellant again at the end of April or beginning of May, as he was sitting beside the Circle K, and made arrangements to meet him at the county barn (R 1483). It was

around 11:00 - 11:30 p.m. (R 1484). He was there when she arrived, and she got in his car (R 1485). He seemed upset, and told her that the Chief had gotten on him because he was talking to too many girls (R 1486). Things progressed pretty much the way they had at the clay pits (R 1487).

Appellant testified as follows:

He stated that he had no sexual contact with Ms. Ruetz or Ms. Dow (R 1675). He remembered Ms. Dow from having responded to a call at her apartment complex, as he had run a check on her after asking somebody else her name, because she looked awfully young (R 1676). He never drove her around in his patrol car (R 1677). He has never seen Ms. Upshaw before, and she has never been in his patrol car (R 1677).

On the night of the murder, appellant stated he was running stationary radar just east of the Circle K, and noticed a little girl talking to three Mexicans at the laundromat, and two of them left (R 1682). The girl and the other "little boy" went around by the ice machine, and he could not see the girl but could see the "little boy" from the shoulders up, so he moved his car for a better look (R 1682). As they got behind the dumpster, he could just see their heads, so he pulled up in front of the laundromat, went in the store and asked the clerk who the little girl was (R 1683). He was curious as to what they were up to, so he went out and asked the children "What the hell is going on?" (R 1683).

Teresa said they were just talking, and after they told him their ages, it did not sit well with him so he asked them to walk to his car (R 1684). Salvador could not answer his questions, so

he asked one of the other Mexican boys who came back to translate (R 1684-85). Salvador's uncle pulled up with quite a few other Mexicans, and appellant recognized him from having done an accident report on him (R 1685). Teresa was standing next to the car then, behind him, and he walked over and started talking to Mr. Rubio (R 1685). People started getting out of the car, so he decided to put the little girl in the front seat of his car (R 1485-86).

Appellant asked Mr. Rubio Salvador's age, and said that he wanted to hear it from Mr. Rubio, because the boy looked older than sixteen to him (R 1686). Appellant filled him in on the situation, and said he did not like it, and the Mexicans all piled in the car and left (R 1686). Appellant got in his car, and obtained more information from Teresa (R 1687). He chewed her out a little for being back there in the dark, said that it did not look good and told her to go home (R 1687). She got out, walked in front of the store, and he lost contact with her (R 1687).

Appellant headed back to the station, used the bathroom, went to the Jiffy Store for coffee, and went back on patrol (R 1690-91). He got the call from the Groveland Police Department, and went back to the station (R 1693). He walked up to the front door, and as he started to unlock the door to City Hall, Deputy Pahaley arrived to get information on an incident that had occurred earlier in the evening, and told him Mrs. McAbee was right behind him (R 1693). Deputy Pahaley copied the information, and Mrs. McAbee arrived and filled out the missing

person report (R 1693-94). Appellant went to Mr. Rubio's, they told him they knew nothing, then he went to Mrs. McAbee's for a picture (R 1696-97). Appellant went back to City Hall, called the Chief and told him he was going to make a poster and contact all the stores (R 1697). Appellant made the poster, had to drive to Groveland to copy it, then distributed it to the stores (R 1697-99).

Appellant figured that Teresa must have jumped up on the hood of his car when he was talking to the Mexicans, though in several prior statements he said she never touched the hood of his car (R 1750). He also said in prior statements that he took her from behind the dumpster and put her directly in the car (R 1722). Appellant mainly searched behind and around the Circle K area, and never went to the lake area, though he had been there before, and could not recall Mrs. McAbee's sister telling him to go look by the lake (R 1701, 1747, 1749).

SUMMARY OF ARGUMENT

I. There was sufficient evidence from which the jury could conclude that appellant sexually battered and murdered Teresa Mae McAbee, and as such, the trial court properly denied his motion for judgment of acquittal. That evidence was also sufficient for the jury to determine that it excluded appellant's hypothesis of innocence. Appellee further submits that appellant never presented a reasonable hypothesis of innocence, and his blanket denial of committing the offenses was inconsistent with the evidence.

11. Appellant has failed to demonstrate that the trial court abused its discretion in admitting the testimony of Shelby Ann Dow, Linda Upshaw, and Kimberly Fowler Ruetz. The testimony was relevant to the disputed issues of identity, opportunity, motive and plan, and did not merely demonstrate propensity or bad character. The testimony was not a feature of the trial, as it was brief, incidental, and came after the state had presented all of its other evidence. Further, the trial. court's cautionary instruction sufficiently distinguished the permissible/impermissible uses of the similar fact evidence. Error, if any, is harmless at worst, as the evidence, though circumstantial, was overwhelming.

111. The trial court properly determined that Agent Malone qualified as an expert in the field of hair analysis and comparison, particularly in the absence of any specific objection by appellant. The record demonstrates that Agent Malone has

extensive experience in this field, and also refutes appellant's allegation that Agent Malone lied. Appellant has failed to demonstrate that the trial court abused its discretion, so its ruling should not be disturbed.

IV. The trial court properly imposed the death penalty. The advisory verdict is entitled to full credit, and the trial court's findings that appellant was an adult male, larger than the victim, and an on-duty police officer were relevant factors to consider in imposing the sentence for this crime. There is nothing in the record to demonstrate that the trial court placed undue emphasis on these factors.

POINT I

THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL WHERE THE STATE PRESENTED SUBSTANTIAL COMPETENT EVIDENCE FROM WHICH THE JURY COULD CONCLUDE THAT APPELLANT SEXUALLY BATTERED AND MURDERED TERESA MAE MCABEE.

Appellant contends that the trial court erred in denying his motion for judgment of acquittal. He essentially argues that the circumstantial evidence was subject to two interpretations, one consistent with guilt and one consistent with innocence, and since the state did not exclude a hypothesis of innocence, the trial court should have directed a judgment of acquittal. Appellee submits that the trial court properly denied appellant's motion for judgment of acquittal, and appellant's conviction is supported by sufficient, competent evidence.

In moving for a judgment of acquittal, a defendant admits all of the facts stated in the evidence adduced as well as every conclusion favorable to the adverse party that a jury might fairly and reasonably infer from it. Lynch v. State, 293 So.2d 44 (Fla. 1974). A trial court should not grant a motion for judgment of acquittal unless the evidence is such that no view the jury may lawfully take of it favorable to the adverse party can be sustained under law. Id. at 45. At the close of the state's case, defense counsel moved for a judgment of acquittal, stating that there were two theories, one consistent with guilt and one with innocence, and if the court found two theories, it

was bound to follow the innocent one (R 1414-15). The trial court denied the motion stating that there was no reasonable hypothesis of innocence and finding that it was a question for the jury (R 1934). At the close of all the evidence, defense counsel renewed his "motion in toto," and it was again denied (R 1834). By this time, the trial court and jury had heard appellant's version of events, which amounted to a denial of committing the offenses, and it was for the jury to weigh the evidence and resolve any conflicts.

Appellee acknowledges that when a case is based on circumstantial evidence, this court has applied a special standard of sufficiency of the evidence. Jaramillo v. State, 417 So.2d 257 (Fla. 1982). This standard is:

> Where the only proof of guilt is circumstantial, no matter how strongly the evidence may suggest guilt a conviction cannot be sustained unless the evidence is inconsistent with any reasonably hypothesis of innocence.

McArthur v. State, 351 So.2d 972, 976 n.12 (Fla. 1977). At the same time, 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 verdict, this court will not reverse a judgment based upon a verdict returned by a jury. Smith v. State, 515 So.2d 182 (Fla. 1987); Heiney v. State, 447 So.2d 210 (Fla. 1984); Rose v. State, 425 So.2d 521 (Fla. 1982). Review by this court is limited to determining the sufficiency of the evidence,

Tibbs v. State, 397 So.2d 1120 (Fla. 1981), and appellee is entitled on appeal to a view of any conflicting evidence in the light most favorable to the jury's verdict. Buenoano v. State, 478 So.2d 387 (Fla. 1st DCA 1985). Circumstantial evidence alone is sufficient to convict in a cpatial case in the absence of a reasonable alternative theory. Huff v. State, 495 So.2d 145 (1986).

Appellee submits that there was sufficient evidence from which the jury could conclude that appellant sexually battered and murdered Teresa Mae McAbee, and as such, the trial court properly denied his motion for judgment of acquittal. That evidence was also sufficient for the jury to determine that it excluded appellant's hypothesis of innocence. Appellee further submits that appellant never presented a reasonable hypothesis of innocence, and his blanket denial of committing the offenses was inconsistent with the evidence.

The victim was last seen seated in appellant's patrol car. Tire tracks consistent with the tires on appellant's patrol car were found leading to the location where the victim's body was found. It had rained quite heavily the previous evening, ***so*** the tracks were fresh. The type of tire which left those tracks is not sold in the south, and the only reason the tires ended up on the Mascotte patrol car was because they had been ordered by mistake. The distributorship where the tires were purchased has sold no other tires of that type in the nine years it has been in business.

The victim's fingerprints were found on the hood of appellant's patrol car, denoting an upward scooting motion. They were very dark, indicating that they were recently placed there. Appellant's fingerprints were intermingled with those of the victim. A pubic hair was found in the victim's panties, which was consistent with appellant's pubic hair. The testimony of three other young girls showed that appellant had previously picked up young girls in his patrol car and transported them, though it violated departmental policy, made sexual advances at them, and even had two sexual encounters with one of them, thus demonstrating a sexual motive, a common plan, the opportunity to commit the offenses, and consequently identification.

Just as important as what the evidence showed to happen is what the evidence showed did not happen. Appellant was not seen by anyone from the time he was last seen with the victim until he met the victim's mother at the police station over an hour-and-a-half later, though a convenience store clerk testified that the police usually check on the stores every hour, and let the clerk know they are there by flashing the lights or hitting the siren. Additionally, the victim's mother was driving around looking for her almost that entire time, and never saw a police car, and actually had to go to the next town to report her daughter missing, where she was told to go back to Mascotte and someone would meet her.

The police in the next town then radioed appellant, and there was a fourteen second delay before he responded, and said he would meet the mother back at the Mascotte police station.

The victim's mother drove from the next town back to Mascotte, and waited an additional fifteen minutes for appellant to arrive. A deputy who was in the next town when the victim's mother arrived needed to talk to appellant, so he waited about five minutes after the mother left, drove to Mascotte, and also had to wait for appellant to arrive. There were no radio communications between 10:50 p.m. and 12:10 a.m., and appellant failed to log his mileage at the end of his shift.

Appellant never drove back by the lake looking for the victim, although it was close to the store where she was last seen, he had been there before, and was even specifically asked by the victim's aunt if he had looked there. The aunt eventually walked down there herself. Appellant never checked back with the victim's mother after 3:00 a.m. to see if she had returned, and instead ran stationary radar and issued parking tickets. Appellee submits that this was substantial, competent evidence from which the jury could conclude that appellant committed these crimes, and also for the jury to exclude appellant's denial of committing the offenses.

While this court has held that the question of whether the evidence fails to exclude all reasonable hypotheses of innocence is for the jury to determine, Heiney, supra, it has, as well, examined a defendants hypothesis of innocence in light of that evidence. McArthur, supra: Jaramillo, supra. Consequently, out of an abundance of caution, appellee will demonstrate that appellant has no reasonable hypothesis of evidence that is consistent with the evidence, as was the case in Jaramillo and

McArthur. Appellant has merely taken several individual pieces of evidence, attempted to subject them to two conclusions, and concluded that since there has not been an exclusion of a hypothesis of innocence, a judgment of acquittal should have been directed. Appellee submits that this is an improper standard, and that appellant has omitted and mischaracterized some of the facts as well.

This court has long recognized that the state is not required to disprove every possible hypothesis of innocence. Over a decade ago, it stated:

> We are well aware that varying interpretations of circumstantial evidence are always possible in a case which involves no eyewitnesses. Circumstantial evidence, by its very nature, is not free from alternate interpretations. The state is not obligated to rebut conclusively every possible variation, however, or to explain every possible construction in a way which is consistent only with the allegations against the defendant. Were those requirements placed on the state for these purposes, circumstantial evidence would always be inadequate to establish a preliminary showing of the necessary elements of a crime.

State v. Allen, *335* So.2d *823* (Fla. 1976); See also, Lincoln v. State, *459* So.2d 1030 (Fla. 1984).

Appellant offers several explanations as to how his fingerprints came to be intermingled with the victim's on the hood of his patrol car. This does not change the fact that they

were there, and that two witnesses who saw appellant and the victim at the store testified that she never sat on the hood of the car, and that appellant himself in several statements said she was never on the hood of the car. When appellant finally testified that she may have sat on the hood, though still stating he never saw it, he said it must have happened when he was talking to Mr. Rubio and the Mexicans, but as noted, they testified it never happened.

Appellant also notes that there was only one of his fingerprints intermingled with the victim's. Appellee would note that there was more than one of appellant's fingerprints lifted from the hood, and further, the victim's arms were bruised in a manner consistent with being held while she was sexually battered, which would account for the absence of more fingerprints among the victim's. Appellee could agree with appellant's hypothesis that the victim's fingers and palms "extended" more oil than appellant's, as this was no doubt the case as she was being sexually battered on the hood of his car. Finally, appellee submits that it is just not reasonable that the victim would have left so many prints, in a scooting motion, had she just hopped up on the hood of the car at the store for such a short time that nobody saw it.

Appellant also states that the pubic hair found in the victim's panties was found to contain "several" similarities to appellant's pubic hair by Agent Malone, called by the state, and this was contradicted by FDLE Agent Steger, called by the defense. First, Agent Malone found twenty similarities, and

fifteen is needed for a match. Second, Ms. Steger never contradicted Mr. Malone's testimony; rather, she never did eliminate the unknown hair as coming from appellant, and requested more samples for further comparison. In fact, nobody contradicted Agent Malone's testimony, although appellant had sent the hairs to an independent expert for comparison (R 962).

Appellant also notes that the tire tracks were consistent with the tires on his patrol car, but showed no distinct characteristics to demonstrate an exact match. Although there was not an exact match based on distinct characteristics, they were the same type of tires, equally unworn. Further, the only testimony as to that type of tire demonstrated that it is not recommended for southern driving and is not even sold in the south. Further, while no mud adhered to the fenderwells, appellee would note that the area is essentially sandy, and also it had rained heavily prior to the murder, so there were no doubt other puddles around that appellant may have driven through which would have washed the dirt away. Appellee would also point out that appellant also drove that car out to the scene the next day, so apparently no dirt adhered at that time either.

Appellant also states that it seemed conceded that the sexual battery and murder took place at some other place than where the body was found. To the contrary, the state's position was that both offenses took place out at the lake, and all of the evidence indicated such. The victim was still alive when she was thrown into the lake, and the medical examiner testified that the strangulation and drowning occurred at approximately the same

time. Also, the sexual battery had taken place in very close proximity to the strangulation.

Appellant also states that the pathologist testified there was considerable bleeding, yet there was no blood in or on the patrol car. The record demonstrates that the bleeding was not nearly as profuse as appellant would lead this court to believe. The pathologist actually testified that there was a moderate amount of blood in the crotch of the victim's underpants. While defense counsel attempted to play semantic games with the pathologist on cross-examination, interchanging the words considerable, moderate and substantial, the doctor testified that what he meant was there was a sufficient amount of blood to be present in the underpants, but not in the jeans. This was consistent with the testimony of the forensic serologist who examined the victim's clothes, which was that there was blood in the crotch of the panties, but none on the jeans, although there was evidence of semen. Further, as noted, there is nothing in the record to indicate that the body was transported in the car.

Appellant next states that everyone who observed him after the murder found him to be as neat and clean as if he had just come on duty, so he either stripped to his bare skin or had no contact with the victim. This is not necessarily so, especially where the state presented testimony regarding appellant's previous on-duty sexual encounters, during which he had contact yet was not stripped to his bare skin. It must also be remembered that appellant was six feet tall and weighed 225 pounds, while the eleven-year-old victim was a slight eighty

pounds and unfortunately, would not have been able to put up much of a struggle.

Appellant next refers to a "very suspect witness" who testified that she saw the patrol car leave the convenience store with a small person in the front seat. Whether or not this witness was "suspect" was for the jury and the jury alone to determine, as was the credibility of the clerk, whom appellant did not even remember seeing in the parking lot that night (R 1688).

While appellant has attempted to explain away individual pieces of evidence, he has not and cannot explain away the evidence as a whole. A hypothesis of innocence, to be inconsistent with all of the evidence, would have to go something like the following: The victim, with three eyewitnesses present, hops up on the patrol car, unnoticed, and leaves a series of heavy-duty finger and palm prints progressing up the hood, and gets off again before anyone sees her. After talking to appellant, the victim begins walking home, which is only 400 feet from the store, and in that short distance she either gets into or is forced into a car that has tires exactly like those on the patrol car, which are not sold in the south and which do not exhibit any distinct wear pattern. The assailant has either obtained one of appellant's pubic hairs or has pubic hair just like appellant's, and leaves it behind in the victim's panties. While all of this is happening, appellant is out on patrol in the small town of Mascotte, though the victim's mother, who is tearing up the town looking for her daughter, never sees him.

Appellee cannot think of anything, even unreasonable, to explain why it took appellant, who was in Mascotte, fifteen minutes longer to get to the police station than the mother, who was in the next town.

In sum, there is no reasonable hypothesis of innocence that is consistent with all of the evidence. The record contains sufficient evidence from which the jury could conclude that appellant sexually battered and murdered Teresa Mae McAbee, and for the jury to determine that it excluded appellant's denial as well. Appellant's convictions must be affirmed.

POINT II

THE TRIAL COURT PROPERLY ADMITTED THE TESTIMONY OF SHELBY ANN DOW, LINDA UPSHAW AND KIMBERLY RUETZ.

At the time the instant offenses occurred, appellant was a police officer who was in uniform and on duty. The victim was eleven years old, though there was testimony that she looked older than that (R 557, 1464). She was approximately 58 inches tall and weighed 83 pounds (R 815-16). She was last seen on May 11, 1987, around 10:30 p.m., seated in appellant's patrol car, which was parked at a Circle K store in Mascotte, Florida (R 616, 709). Appellant was in uniform and on duty, and was going to "talk" to the victim about her being out so late and standing behind the dumpster talking with a young Mexican male (R 709). The victim's body was found the next morning floating in a lake, which is located in an isolated area by an infrequently travelled dirt road (R 733). She had been sexually battered and strangled (R 816, 820).

Appellant's theory, presented in his opening statement, was that someone else had committed the offenses, and the state proffered the testimony of Shelby Ann Dow, Linda Upshaw, and Kimberly Fowler Ruetz, to show identity, opportunity, motive and plan. Ms. Dow had encountered appellant in January or February, 1987 (R 1222). She had gone to the house next door to look for her boyfriend, Rafael, and as she was walking back, appellant called her by name (R 1223). He asked her if she was looking for Rafael, stated that he was too and knew where he was and that he

would take her there (R 1223). Rafael's sister went with them, and after they were unable to locate him, appellant took the girls home (R 1224). Appellant returned about a half-hour later and Ms. Dow went alone with him to continue to look for Rafael (R 1424).

They drove all around Mascotte, and appellant told her she should not be living with Rafael, and if she needed someone to talk to tell him (R 1225). They rode around Mascotte again, and appellant started rubbing her shoulder, telling her he liked small petite girls (R 1226). He tried to kiss her before she got out of the car, and told her he would like to see her (R 1227). Ms. Dow was nineteen years old, though even according to appellant, she looks much younger than that (R 1676). She is 5'1" tall and weighs 92 pounds (R 1232).

Ms. Upshaw, who lived a block from the Circle K, encountered appellant on May 1, 1987, at approximately 1:00 a.m., as she was walking down Highway 50 (R 1236). She had been crying, and appellant invited her into his patrol car, saying it would make her feel better if she talked about it (R 1238). They drove around, and eventually ended up in a deserted area, where appellant parked (R 1243). Appellant told her to scoot over put his arm around her and his hand on her breast and attempted to kiss her (R 1244). She kept telling him she had to go to the bathroom, and he eventually returned her to the Jiffy Store (R 1245-46). She had been with him approximately 35 minutes (R 1451). He asked her if she would go riding with him again, and she said yes because she was still scared (R 1247). Ms. Upshaw was seventeen years old, and 5'3" tall (R 1432).

Ms. Ruetz encountered appellant in February, 1987, around 11:00 p.m., when she was riding around with her friend (R 1331-32). He asked her if she would meet him at the clay pits after she took her friend home, which she did (R 1334). He invited her into his patrol car, where they were just talking, and he started talking about sex (R 1338). He pulled her next to him, she did not object, and she eventually performed oral sex on him (R 1340-45). They were together about an hour (R 1345). She saw him again in late April or early May, 1987, and went to meet him at the county barn around 11:00 p.m. (R 1350). He was again on duty, in uniform, in his patrol car, and they engaged in the same activities as they had at the clay pits (R 1351-53). Appellant told her not to say anything about it (R 1348). He told Ms. Ruetz that he had worked to hard to get where he was, and that if she did not say anything to anybody he would not either (R 1482-3). Ms. Ruetz was sixteen years old and 5'1" tall (R 1336).

Following the proffer by the state and argument by counsel, the trial court determined that the testimony was admissible for the limited purpose of showing motive, opportunity, plan and identification as to the sexual battery. The jury was instructed accordingly prior to each girl's testimony, and again at the close of the evidence (R 1408, 1428-29, 1461, 1465, 1980). Appellant contends that the trial court erred in admitting the similar fact evidence. He argues that the testimony did not reveal facts significantly similar to the crime charged, was not material to any fact in issue, and consequently, showed only bad character or propensity.

Evidence showing collateral crimes or wrongful acts is admissible if it is relevant for any purpose other than to show bad character or propensity. Williams v. State, 110 So.2d 654 (Fla. 1959). In Drake v. State, 400 So.2d 1217, 1219 (Fla. 1981) this court explained what is required for similar facts to be admissible to show method of operation , and thus identity:

> The mode of operating theory of proving identity is based on both the similarity of and the unusual nature of the factual situation being compared. A mere general similarity will not render the facts legally relevant to show identity. There must be identifiable points of similarity which pervade the compared factual situations. Given sufficient similarity, in order for the similar facts to be relevant the points of similarity must have some special character or be so unusual as to point to the defendant.

The common points must be considered as a whole when determining similarity. Chandler v. State, 442 So.2d 171 (Fla. 1983). This court has also recognized that the introduction of evidence of other crimes which are factually dissimilar to the charged crime is not barred so long as the evidence is relevant. Bryan v. State, 533 So.2d 744 (Fla. 1988).

The defense theory of the case was that somebody else had committed these crimes. Consequently, the girls' testimony was relevant to several disputed material issues of fact, particularly identity and opportunity. As to identity, appellee submits that there were enough points of similarity and they were

unusual enough that the trial court was warranted in admitting the evidence. Further, as appellant was on duty as a police officer at the time the crime was committed, the testimony was also relevant to show opportunity. Finally, the testimony was relevant to prove motive.

There is more than a mere general similarity between the facts of the incidents involving Ms. Dow, Ms. Upshaw, Ms. Ruetz and the instant offense. The details are strikingly similar.

Appellant:

1. Was on duty
2. Was in uniform
3. Was in a marked patrol car
4. Wanted to "talk" to the girls, and in the instances of Dow, Upshaw and the instant case, about what he perceived to be "problems".

The girls:

1. Were young
2. Were petite
3. Were alone
4. Got into the police car to talk.

The incidents:

1. Occurred at night.
2. Began close to or at the Circle K
3. Proceeded to deserted areas
4. Involved talk turning to sexual contact
5. Took place within three months of the instant crime, with one being only ten days prior to it, and another being very close, since it occurred late April or early May.
6. Involved transportation of

people in the police car, which violated departmental policy.

Appellee submits that these points of similarity "pervade the compared factual situations" and when taken as a whole are "so unusual as to point to the defendant." Drake, supra at 1219.

The major dissimilarity is the fact that deadly force was used against the victim in the instant case, while in the other incidents, the girls were not harmed after rebuffing or acquiescing to appellant's sexual advances. The fact that the instant case resulted in a murder while the other incidents did not is not dispositive, particularly where the evidence is relevant to issues other than identity. Chandler, supra; Kight v. State, 512 So.2d 922 (Fla. 1987); Randolph v. State, 463 So.2d 186 (Fla. 1984); Mason v. State, 438 So.2d 374 (Fla. 1983).

In Chandler, the similar fact evidence was admitted solely to establish identity, and consisted of a Texas conviction seven years prior to the murder in Florida, where the victim had been abducted, tied, beaten and robbed, but not killed. This court determined that the similarities, considered one against the other, established a sufficiently unique pattern of criminal activity to justify admission of the evidence, and that the dissimilarities only suggested differences in opportunity rather than significant differences in method of operation. Id. at 173. Similarly, in the instant case, the similarities establish a sufficiently unique pattern of activity, and the one dissimilarity only suggests a difference in opportunity or state of mind.

In this respect, appellee would also submit that the similar fact evidence was relevant to prove motive for the murder. Ms. Ruetz testified that shortly before the instant offenses appellant told her the chief had "gotten on him" for talking to too many girls. Appellant told her that he had worked to hard to get where he was, and if she did not tell, he would not either. After several months of inviting young girls into his patrol car and making sexual advances, appellant may well have come across a girl who threatened to tell on him, and seeing his whole world that he had worked so hard for about to collapse, he killed that young girl, figuring the last suspect in the world would be the police officer who was on duty that night.

Mason, supra, also involved similar fact evidence which was used solely to establish identity. This court noted there were several dissimilarities, including the fact that one of the crimes was a homicide and the other a rape. This court went on to acknowledge that there were many similarities between the crimes, including: the attacker entering the home through the window, arming himself with a knife, and assaulting the woman in her bedroom. It held that there were enough identifiable points of similarity and that they were unusual enough to warrant the admission into evidence. Id. at *376-77.* Again, in the instant case, there are numerous points of similarity, as previously listed. Further, the fact that an on duty police officer invites young girls into his patrol car to make sexual advances is most certainly unusual enough to point to appellant: any other finding would be positively frightening.

In Kight, supra, the two offenses occurred on the same day, both victims were black cab drivers, they were taken to the same general area of town, a knife was used in both incidents, both victims were robbed, and the defendant was picked up outside a Main Street bar. This court acknowledged the major dissimilarity that one of the victims fortuitously escaped with his life, but further noted that under the facts, the evidence was relevant not only to identification, but also to show motive and intent, and was therefore admissible. Id. at 928.

In the instant case, the similar fact evidence was also relevant to show motive and opportunity as well as identity. The fact that appellant had previously made sexual advances at young, petite girls while on duty, in uniform and in his patrol car evidences a sexual motive and was probative on the issue of intent. Further, the fact that appellant previously found time for such activities while on duty, yet remain undetected, was probative on the issue of opportunity. The fact that appellant had previously transported young girls in his police car, where there was a departmental policy against it, was also probative on the issue of opportunity, particularly where tire tracks consistent with the tires on appellant's patrol car were found leading to the crime scene.

While appellant argues that Ms. Ruetz's testimony was particularly devastating, appellee submits that in terms of demonstrating opportunity, it was the most relevant. Part of appellant's theory of defense was that everyone who saw him after the murder found him to be as neat and clean as if he had just

come on duty, as was his usual appearance: and also the time factor involved, which was about an hour and twenty minutes. The fact that appellant had previously engaged in sexual activity, albeit oral sex as opposed to intercourse, yet still appeared neat as a pin at all times, is very significant in rebutting this defense. The fact that in the instant case he also murdered the young girl does not provide a significant difference. The unfortunate reality is that it really would not require much additional time or exertion for a 225 pound man to strangle an 80 pound girl and throw her into a lake.

In Randolph, supra, the state introduced evidence that several days prior to the murder and robbery for which the defendant was being tried, he had robbed two people who had picked up his girlfriend, a prostitute, as they left the rooming house where she conducted business. The defendant had used a .25 caliber gun and was heard to say that he could have killed one of the men because he did not have any money. This court determined that the incidents took place in the same general area within days of each other, and involved the same participants, same weapon, same type of modus operandi, same type of victim and same type of offense. This court held that the collateral crime evidence was clearly relevant and admissible as it demonstrated Randolph's motive, intent and state of mind in approaching the victim's truck and eventually killing the victim. Id. at 189.

Similarly, the incidents in the instant case took place in the same general area, were close in time, with the most recent being within days of the instant offense, and involved the same

type of modus operandi, same type of victim and same type of activity. As in Randolph, the similar fact evidence was clearly relevant and admissible as it demonstrated appellant's motive and intent in approaching the victim and placing her in his patrol car and eventually sexually battering her.

The instant case is readily distinguishable from Drake, supra, where this court found that the similar fact evidence was inadmissible. In that case, the only similarity between the two incidents was that the victims' hands were tied behind their backs and both had left a bar with the defendant. The court found that the similar facts offered failed the "unusual" branch of the test, in that binding hands occurs in many crimes involving many defendants, and was not sufficiently unusual to point to the defendant. Id. at 1219. The similar facts in the instant case involve an on duty police officer, who is in uniform and invites young petite girls into his patrol car and makes sexual advances. As already noted, a finding that this is not unusual would be positively frightening.

This court also noted the many dissimilarities in Drake, not the least of which was that the collateral incidents involved only sexual assaults while the case before it involved murder with little, if any, evidence of sexual abuse. While the instant case does involve a murder and the collateral incidents did not, all involved sexual advances or sexual battery, and as already discussed, this one dissimilarity is not dispositive. The similar fact evidence was clearly relevant to issues in dispute, and thus did not prove only bad character or propensity.

Appellee further submits that a review of the testimony of the three girls fails to show that it was a feature of the trial. The testimony was brief, covering less than 100 pages of a 2000 page trial transcript. Further, the state presented the testimony of **34** other witnesses prior to the three girls' testimony. This order of proof is significant because the jury heard all of the other proof prior to the girls' testimony, thus, any other effect the testimony may have had was greatly minimized in terms of jurors viewing the rest of the evidence as it was presented. Further, the trial court read cautionary instructions to the jury prior to each girl's testimony concerning the similar fact evidence and again at the close of all the evidence. Appellee submits that these instructions sufficiently distinguished the permissible/impermissible uses of the similar evidence and thus were more than corrective. See, Oates v. State, **446** So.2d **90, 94** (Fla. **1984).**

Appellant has failed to demonstrate that the trial court abused its discretion in admitting the testimony of Shelby Ann Dow, Linda Upshaw, and Kimberly Fowler Ruetz. The testimony was relevant to the disputed issues of identity, opportunity, motive and plan, and did not merely demonstrate propensity or bad character. The testimony was not a feature of the trial, as it was brief, incidental, and came after the state had presented all of its other evidence. Further, the trial court's cautionary instruction sufficiently distinguished the permissible/impermissible uses of the similar fact evidence.

Even if this court determines that the trial court erred in admitting the testimony, it was harmless at worst. State v. DuGuilio, 491 So.2d 1129 (Fla. 1986). The evidence, though circumstantial, was overwhelming. Appellant's pubic hair was found in the victim's panties. The victim's fingerprints were all over the hood of appellant's patrol car. Tire tracks leading out to the scene were consistent with the tires on appellant's patrol car, and that type of tire is not sold in the south. The victim was last seen with appellant, shortly before the murder occurred. Appellant was not seen or heard from during the period when the murder occurred. It took him at least fifteen minutes to get to the police station after he was contacted on the radio and told to meet the victim's mother there. The instant conviction should be affirmed in any event.

POINT III

THE TRIAL COURT PROPERLY DETERMINED THAT MICHAEL MALONE QUALIFIED AS AN EXPERT IN THE FIELD OF HAIR ANALYSIS AND COMPARISON.

The state called as a witness Agent Michael Malone, who had examined and compared the pubic hair found in the victim's panties and appellant's pubic hair. Following testimony as to his qualifications, the trial court accepted Agent Malone as an expert in the examination of hairs and fibers, including comparative examination. Appellant now contends that the trial court erred in qualifying Agent Malone as an expert, claiming that he lied about his qualifications, specifically the number of hair comparisons he has done. Appellant argues that this misstatement must go to all of Agent Malone's qualifications and result in his rejection as a witness.

Appellee first submits that appellant has waived appellate review of this issue. Prior to accepting Agent Malone as an expert, the trial court asked if there were any objections, and defense counsel replied "yes, Your Honor, but none that I will voice for the record" (R 987). This issue was not raised in appellant's motion for new trial (R 2450). An argument is not cognizable on appeal unless it is the specific contention asserted as legal ground for an objection below. Steinhorst v. State, 412 So.2d 332 (Fla. 1982). As this court has stated, it will not indulge in the presumption that a trial judge would have made an erroneous ruling had an objection been made and

authorities cited contrary to his understanding of the law. Lucas v. State, 376 So.2d 1149 (Fla. 1979). Consequently, the instant argument has been waived due to failure to raise it below.

Even if this court determines that appellant has not waived this issue, appellee submits it is without merit.[2] A trial court has wide discretion concerning the admissibility of evidence, and its ruling will not be disturbed in the absence of an abuse of discretion. Jent v. State, 408 So.2d 1024 (Fla. 1982). Likewise, decisions as to an expert witness's qualifications are left to the trial court's discretion, reviewable only for abuse. A.A. v. State, 461 So.2d 165 (Fla. 3rd DCA 1984). Appellant has failed to demonstrate that the trial court abused its discretion.

Michael Malone is a special agent with the Federal Bureau of Investigation (FBI), where he has worked for seventeen years. He holds a B.S. and M.S. degree in biology, and has been assigned to the FBI's Hair and Fiber Unit since 1974. He has taught classes and lectured in this field, and was a contributing author to a publication on the investigation of serial murders. He has examined known hairs from approximately 10,000 people, and hundreds of thousands of unknown hairs. He has been qualified as an expert over 300 times in 42 states, Washington, D.C., Saipan, and the Virgin Islands (R 978-81). In sum, Michael Malone is eminently qualified in the examination and comparison of hairs.

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[2] Based on the recent Supreme Court decision in Harris v. Reed, 109 S.Ct. 1038 (1989), appellee would ask this court to expressly apply the procedural bar to this claim.

Appellee submits that any perceived dispute over the actual number of hair comparisons Agent Malone has done goes to the credibility of the witness and weight to be given his testimony, not to his qualifications. It is an issue that should be, as it was in the instant case, brought out on cross-examination. Appellee would further point out that Agent Malone never did testify that he has made hundreds of thousands of hair comparisons, as appellant states. See, Initial Brief of Appellant, p.18. Rather, he testified that he has examined hundreds of thousands of unknown hairs, and as he later explained, an instant assessment can often be made that certain hairs are not suitable for comparison (R 981, 987-88).

The trial court properly determined that Agent Malone qualified as an expert in the field of hair analysis and comparison, particularly in the absence of any specific objection by appellant. The record demonstrates that Agent Malone has extensive experience in this field, and also refutes appellant's allegation that Agent Malone lied. Appellant has failed to demonstrate that the trial court abused its discretion, so its ruling should not be disturbed.

POINT IV

THE TRIAL COURT PROPERLY IMPOSED THE DEATH PENALTY.

Following appellant's convictions for sexual battery and first degree murder, a penalty phase was conducted, and the jury recommended the death penalty 8-4 (R 2442). The trial court followed the jury recommendation and imposed a sentence of death. Pursuant to section 921.141, Florida Statutes (1985), the trial court entered a written order setting forth its findings in support of the death penalty. It found two aggravating factors: 1) the murder was committed during the course of or immediately after a sexual battery: and 2) the murder was especially heinous, atrocious or cruel. § 921.141(5)(d) and (h). In mitigation, the trial court found that appellant has no significant history of prior criminal activity, and that his family background and educational efforts gave rise to non-statutory mitigating circumstances.

Appellant contends that the trial court erred in imposing the death penalty. Appellant states that the trial court seemed to place undue emphasis on the fact that he was a police officer, in uniform, in a marked patrol car, and made the unnecessary finding concerning the relative sizes of the victim and appellant. Appellant argues that this had an obvious effect on the trial court's decision to follow the non-unanimous recommendation of the jury. Appellee submits that appellant's contentions are without merit.

Appellee would first point out that neither this court nor the United States Supreme Court has found that jury unanimity in recommending the death penalty is required. See, James v. State, 453 So.2d 786 (Fla. 1986). Further, appellant has set forth no facts or argument to demonstrate that the advisory verdict in the instant case was influenced by improper considerations or was in any other way tainted. Consequently, the advisory verdict is entitled to full credit.

Appellant has failed to demonstrate that the trial court failed to follow the law or that his sentence of death was improperly imposed. Appellee submits that the trial court's factual findings that appellant was an adult male, larger than the victim, as well as an on duty police officer, were clearly relevant factors to be considered when imposing the sentence for this crime. To determine whether a murder is especially heinous, atrocious or cruel, this court has stated:

> What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies - the conscienceless or pitiless crime which is unnecessarily torturous to the victim.

State v. Dixon, 283 So.2d 1, 9 (Fla. 1973). It is the totality of the circumstances that must be considered. Jennings v. State, 453 So.2d 1109 (Fla. 1984).

Appellee submits that the fact that appellant was an on-duty police officer and while acting in that capacity approached the victim and placed her in his patrol car, yet eventually sexually battered and murdered her is one of those circumstances that sets this murder apart from others. The young victim did not accept a ride with a stranger: rather, she got into a police car, as she was directed to do, by a person with a badge of authority and in a position of trust. This is but one factor that demonstrates the conscienceless ness of this crime, and there is nothing in the record to demonstrate that the trial court placed undue emphasis on it.

Further, the relative sizes of appellant and the victim is another factor to be considered under the totality of the circumstances. This court has previously recognized that the type of victim is also one of those factors that may set a crime apart from the norm of capital felonies. See, e.g., Adams v. State, 412 So.2d 850 (Fla. 1982) ("A frightened eight-year-old girl being strangled by an adult man should certainly be described as heinous, atrocious or cruel."); Johnston v. State, 497 So.2d 863 (Fla. 1986), and cases cited therein, all involving elderly women.

Appellant's sentence is not based on human emotion. It is based on facts, and it is those facts which set this crime apart from the norm of capital felonies and make it especially heinous, atrocious or cruel. In addition to the foregoing facts, the victim was sexually battered, strangled, and thrown into a lake while she was still breathing. The trial court properly found

this aggravating factor based on all of these facts, see, Tompkins v. State, 502 So.2d 415 (Fla. 1986), and properly found that this factor coupled with the additional aggravating factor that the crime was committed after a sexual battery outweighed the mitigating circumstances. Death is the appropriate penalty.

CONCLUSION

Based on the arguments and authorities presented herein, the appellee respectfully requests that this honorable court affirm the judgment and sentence of the trial court in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Answer Brief of Appellee has been furnished by U.S. Mail, to Jack T. Edmund, Esquire, Counsel for Appellant, at 423 Pool Branch Road, Fort Mead, FL 33841, this 29th day of June,, 1989.

Kellie A. Nielan
Of Counsel