IN THE SUPREME COURT OF FLORIDA

RICHARD BARRY RANDOLPH,

Appellant,

v. CASE NO. 74,083

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR PUTNAM COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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SUMMARY OF ARGUMENT

POINT I: The trial court did not abuse its discretion in excusing, for cause, a juror whose ability to impose the death penalty in accordance with the law was substantially impaired. The trial judge's decision after evaluating the demeanor and credibility of the juror was proper.

POINT 11: The trial court did not abuse it discretion in denying Randolph's motion for individual and sequestered voir dire. The appellant's challenge to the trial court's denial of his mistrial motion with reference to an allegedly prejudicial juror comment at voir dire was untimely and did not preserve the issue. In any event the court was not prejudicial and no error so prejudicial as to irritate the entire trial has been shown. No abuse of discretion has been demonstrated.

POINT 111: Randolph's sufficiency of the evidence challenge to this non-capital sexual battery count has not been preserved for review. The evidence addressed was sufficient to prove the sexual battery charge, pursuant to clear legislative intent.

POINT IV: The trial court did not abuse its discretion in denying a mistrial motion based upon proper prosecutorial argument in response to improper defense argument. Specifically as to the cause of the victim's death. Even if the argument was improper it was clearly harmless under the circumstances of this case.

POINT V: The prosecutor's fleeting reference to the defendant's lack of remorse in questioning was proper response to defense counsel's cross-examination. Even assuming

impropriety the error was harmless under the circumstances of this case.

POINT VI: Randolph's challenge to the admission of photographic evidence in the penalty phase has not been preserved for review. Alternately, no abuse of discretion or reversible error has been demonstrated in the use of the photographs or the introduction of expert medical testimony refuting previous improper argument by defenses counsel.

POINT VII: The trial court did not err in rejecting Randolph's requested jury instruction listing alleged non-statutory mitigating factors in favor of the standard jury instruction.

POINT VIII: Randolph's challenge to the alleged non-statutorial appellate review procedures applied by this Court in death cases has not been preserved for review and is, in any event, meritless.

POINT IX: This court has already rejected appellant's vagueness challenge to the heinous, atrocious or cruel aggravating factor.

POINT X: The trial court properly applied Florida's capital sentencing statute in finding from aggravating factors; rejecting the statutory mitigating factors argued, and in weighing the aggravating factors against the non-statutory mitigating factors argued in determined that death was the appropriate penalty. The sentencing court considered all mitigating evidence, statutory and non-statutory, and properly determined that a number of non-statutory mitigating factors

existed in that they were of little weight and that any single one of the aggravating factors outweighed all the mitigating. The sentence imposed is not disproportionate under the circumstances.

POINT X: Randolph's time worn constitutional challenges to the death penalty statutes were not preserved for appellate review, and are without merit.

ARGUMENT

POINT I

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN EXCUSING A PROSPECTIVE JUROR FOR CAUSE BASED UPON THE COURT'S DETERMINATION, AFTER ANALYSIS OF RESPONSES AND DEMEANOR, THAT THE JUROR'S ABILITY TO IMPOSE THE DEATH PENALTY UNDER THE LAW WAS SUBSTANTIALLY IMPAIRED.

Randolph's assertion that prospective juror Hampton "stated clearly" that she could consider and vote to impose the death penalty is simply unsupported by the record and contrary to the factual determination made by the trial court judge after evaluating Ms. Hampton's demeanor and responses.

The trial judge clearly indicated that his decision to excuse the prospective juror for cause was based upon her specific responses and his factual conclusion, after noting that she "vaccilated badly", that she "couldn't do it" if asked to impose the death penalty. (R 974-975) This factual determination is supported by competent substantial evidence of record and was clearly based, at least in part, upon an evaluation by the trial court of the demeanor and forthrightness of the victim in her responses (an evaluation that can clearly be made only by the on-the-scene fact-finder) and that factual determination should not now be second-guessed by this appellate tribunal. This court has held that it will pay great deference to a trial judge's finding as to juror impartiality because he, unlike a reviewing court, is in a position to observe this juror's demeanor and credibility. Lambrix v. State, 494 So.2d

1143, 1146 (Fla. 1986); Valle v. State, 474 So.2d 796, 804 (Fla. 1985).

In Wainwright v. Witt, 469 U.S. 412, 423-426, 105 S.Ct. 844, 852-853, 83 L.Ed.2d 841 (1985), the Supreme Court stated that determinations of jury bias "cannot be reduced to question-and-answer sessions" and that because of the variability in factors "there will be situations where the trial judge is left with a definite impression that a prospective juror would be unable to faithfully and impartially apply the law...this is why deference must be paid to the trial judge who sees and hears the juror." The Witt Court affirmed a cause excusal upon a Witherspoon[1] basis that was far less clear than that which existed in this case, finding substantial impairment upon a prospective juror's simple assertion that she thought it would impair her judgment in part because the trial court in its assesment of bias "aided as it undoubtedly was by its assessment of Colby's demeanor was entitled to resolve [the ambiguity in the juror's responses) in favor of the State". 105 S.Ct. at 857, 469 U.S. at 434. Analyzing the cause excusal in this case in light of Witt, the trial judge had ample basis for his conclusion that Ms. Hampton's opposition to the death penalty constituted a substantial impairment, i.e., created a substantial interference or obstacle with the ability to follow the law and impose that penalty under appropriate circumstances.

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[1] Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968).

As this Court has repeatedly noted, the determination of juror impartiality and the propriety of excusal of prospective jurors for cause is a matter particularly within the trial court's broad discretion and it is only where manifest error is demonstrated by the complainant that the judge's decision will be disturbed on appeal. Jennings v. State, 512 So.2d 169 (Fla. 1987); Hooper v. State, 476 So.2d 1253 (Fla. 1985); Davis v. State, 461 So.2d 61 (Fla. 1984); Christopher v. State, 407 So.2d 198 (F a. 1981). Indeed, as this Court noted in Cook v. State, 542 So.2d 964, 969 (Fla. 1989):

> There is hardly any area of the law in which the trial judge is given more discretion than in ruling on challenges of jurors for cause. Appellate courts consistently recognize that the trial judge who is present during voir dire is in a far superior position to properly evaluate the responses to the questions propounded to the jurors....

Applying that abuse of discretion standard to this case, it cannot be said that no reasonable person/judge would have accepted the cause challenge after evaluating the juror's demeanor and the substance of her responses in the context in which they were made. See, Canakaris v. Canakaris, 382 so.2d 1197, 1202-1203, (Fla. 1980). This is expecially true given this Court's indication that if there is a basis for any reasonable doubt as to any juror possessing the state of mind which will enable him to reach an impartial verdict based solely on the law and evidence than he should be excused on motion of a party. Hamilton v. State, 547 So.2d 630, 632 (Fla. 1989); Singer v. State, 109 So.2d 7, 23-24 (Fla. 1959).

The prosecutor after preliminary questioning of the prospective jury with reference to their death penalty views asked the jurors if there was anything that they wished to say with reference to the issue, at which point jurors Trevora and Hampton voluntarily singled themselves out from the rest of the venire in indicating their opposition to the death penalty:

> MR. TANNER: Would any of you like to -- to say anything?
> Miss Trevora, I appreciate your courage. Please don't be shy to speak up.
> Now, what would you like to say, or ask me?
>
> A VENIREMAN: I don't have good feelings about the death penalty at all, and I'm not sure that I could do that.
>
> MR. TANNER: Okay. And there are a significant number of citizens who have those same reservations. Nothing to be embarrassed about or ashamed of at all.
> Could you set aside any reservations you might have during the guilt or innocence phase of the trial, where you're simply deciding guilt or innocence, knowing that if you -- if you found the Defendant guilty of murder in the first degree you might have to get to the death penalty issue later?
>
> A VENIREMAN: Yeah. I'm an honest person, and I could put it -- I could put it away long enough to get through that part. It's the second part I don't know if I could cope with or not.
>
> MR. TANNER: Okay. Well, you know, both sides are entitled to jurors from the community, not people that all just think alike. So nothing to be embarrassed about. We want a cross section of all the people, not just a few.

Would you refuse to vote in favor of the death penalty in every case, in every circumstance?

A VENIREMAN: I think so.

MR. TANNER: Okay. In other words, you would -- you don't believe that you would ever be able to vote in favor of the death penalty?

A VENIREMAN: I don't think so.

MR. TANNER: Do any of the other jurors feel that way?

A VENIREMAN: Yes.

THE VENIRE: No.

MR. TANNER: Mrs. Hampton, I saw kind of a yes. Do you feel that way?

A VENIREMAN: Yes.

MR. TANNER: Let me just ask you some questions to be sure I understand what you've said, and His Honor and Mr. Pearl also understand you.

Are you saying, Mrs. Hampton, that really you could never vote for the death penalty in any case; is that what you're saying?

A VENIREMAN: It would really be against my will.

MR. TANNER: It would be against your personal -- personal standards?

A VENIREMAN: Yes.

MR. TANNER: Does anyone else feel that way among the remaining jurors?

A VENIREMAN: No.

THE VENIRE: No.

MR. TANNER: Thank you. Thank you very much, Miss Trevora.

(R **941-944**). In the exchange Mrs. Hampton revealed her true feelings about the death penalty noting that it would be against her will and her "personal standards" to ever impose the death penalty in any case. She clearly answered "yes" when the jury was questioned as to whether she believed she would never be able to vote in favor of the death penalty. (R **94**). Despite defense counsel's later fierce efforts at rehabilitation, even after considering a multitude of worst case scenarios advanced by defense counsel in support of a possible death penalty vote, Mrs. Hampton at first again confirmed that she could not vote for the death penalty even in an "extreme case" (R *957*). Indeed, only after vigorous and continued efforts by defense counsel to have the prospective juror re-think her earlier stated position that Mrs. Hampton finally capitulated and provided defense counsel with the answer he sought, an equivocal and obviously half- hearted "I guess *so*":

> MR. PEARL: Now, Miss Trevora, it's necessary to ask you -- and you, Miss Hampton, in turn -- whether your feelings about the death penalty, your reluctance, let us say, to vote for the death penalty is absolute in every case, or isn't it really a matter of degree rather than absolute, something that is absolute in your mind?
>
> Let me give you an example, and let me ask you. Suppose that instead of Richard Randolph over here that you had already found a person guilty, as a member of the jury, and as you said you could do that if you had to regardless of what might follow, and it turned out that it was a Manson who had committed a -- many brutal murders

in California, or a Bundy, who it is said has killed perhaps a hundred women, or a Stano -- I represented -- who I'm sure killed at least forty people.

I'm talking about vicious, malicious, serial killers who can never be rehabilitated, they will be like a wolf loose amongst the sheep if they live.

Now, if you were faced with having to decide sitting on a jury that those people -- or Adolph Hitler who is responsible for twenty million deaths -- could you then under the circumstances that that was so heinous, so evil, so wicked, that the person involved was so little of a human being, that could you then vote for the death penalty in such an extreme case?

A VENIREMAN: No.

MR. PEARL: Miss Hampton?

A VENIREMAN: I hated mighty bad to hear of even Bundy being electrocuted. It made me sick. I didn't feel good.

MR. PEARL: Well, maybe you were thinking about all those people who were running around there with flags, drinking beer, and shouting, and otherwise cutting the fool, and acting like a bunch of damn fools out there. Is that what you mean?

A VENIREMAN: No, I just couldn't rejoice in somebody being electrocuted.

MR. PEARL: Yes, ma'am. Of course, no one -- I guess you understand that no one expects you, or any person, any civilized person, any feeling person, to rejoice over the taking of a life, no matter how well-deserved. That is not --

What you saw or heard about out there in connection with this fellow Ted Bundy was certainly not

something that 99 percent of us could approve of. I'm not talking about that.

I'm talking about the necessity, perhaps, in certain cases, and limited numbers of cases, where that State must judicially, even if sadly, take a man's life because it is felt that that is the only appropriate response to what that person had done.

Now, I'm not talking about enjoying it. I'm not talking about getting out and celebrating when it happens. I'm sure that you, like most people, feel life has value, that any life has value, and that none should be wasted.

But still the question we come back to, that we must revisit, is the question whether in extreme circumstances could you then vote for the death penalty simply because no other punishment, no other response to the activities of the defendant would be appropriate?

A VENIREMAN: I guess so.

MR. PEARL: You say -- your answer was, ma'am, you guess *so?*

A VENIREMAN: Right.

MR. PEARL: Did I -- did I quote you correctly?

A VENIREMAN: Yes.

MR. PEARL: Thank you, ma'am.

(R *956-959).*

Given Mrs. Hampton's at best equivocal acknowledgment that she could impose the death penalty only in the most extreme case and her clearly contrary earlier responses, it cannot be said that the trial court abused its discretion in reaching the factual conclusion that her ability to perform as a juror, in the

penalty phase of the trial, would be substantially impaired. That determination should be given due deference by this appellate court. Wainwright v. Witt, supra; Lambrix v. State, supra. From the conflicting evidence presented the trial court could properly determine that Mrs. Hampton "could not or possibly might not be able to impose the death penalty" such that no abuse of discretion has been demonstrated. Masterson v. State, 516 So.2d 256, 258 (Fla. 1987). This case is clearly distinguishable from Chandler v. State, 442 So.2d 171, 173-175 (Fla. 1983), relied upon by the appellant, where this Court noted that it was not enough to justify a cause challenge where a prospective juror indicated that she "might go towards" life imprisonment rather than death or "probably would lean towards life rather than death if [the aggravating and mitigating circumstances] were equal." Id., at 174. The circumstances of this case are, instead, comparable to those in Robinson v. State, 487 So.2d 1040, 1042 (Fla. 1986) and Valle v. State, 474 So.2d 796, 801-804 (Fla. 1985). In Valle the prospective juror's in response to questioning on her ability to apply the death penalty included in her response that while she could not rule out the possibility she might vote for death she couldn't think of circumstances where she would. Id., at 803. In Robinson, two jurors equivocated about their ability to impose the penalty but clearly allied themselves with death penalty opponents. In both cases this Court affirmed the cause excusals noting that unequivocal rejection of the death penalty is not required under Witt. See also, Mitchell v. State, 527 So.2d 179, 180-181 (Fla. 1988); Lara v. State, 464 So.2d 1173, 1178-1179 (Fla. 1985).

Here there is competent substantial evidence of record indicating that the juror simply would not vote under any circumstances to impose death and the trial court's conclusion as to that juror's actual frame of mind, supported as it is by competent substantial evidence of record, clearly justified excusal. No abuse of discretion justifying invalidation of the death penalty in this cause has been demonstrated.

POINT II

THE APPELLANT HAS FAILED TO DEMONSTRATE *AN* ABUSE OF DISCRETION IN THE TRIAL COURT'S DENIAL OF HIS PRE-TRIAL MOTION FOR INDIVIDUAL VOIR DIRE BASED ON PRE-TRIAL PUBLICITY; DENIAL OF HIS UNTIMELY MOTION FOR MISTRIAL BASED ON *AN* ALLEGED LACK OF JURY IMPARTIALITY BECAUSE OF *AN* ISOLATED COMMENT BY A PROSPECTIVE JUROR WHO DID NOT SIT AS A MEMBER OF THE JURY IN THIS CASE DOES NOT JUSTIFY REVERSAL.

The appellant has failed to carry his burden of demonstrating an abuse of discretion in the actions of the trial court vis-a-vis his motion for individual voir dire and the motion for mistrial at issue.

As previously noted in Point I there is virtually no area of the law in which the trial judge is given more discretion than in ruling on jury challenges; i.e., absent a demonstration of manifest error the trial court's decision will not be disturbed on appeal. Cook v. State, 542 So.2d 964 (Fla. 1989); Jennings v. State, 512 So.2d 169 (Fla. 1987); Christopher v. State, 407 So.2d 198 (Fla. 1981).

The granting of individual and sequestered voir dire is within the trial court's sound discretion. Davis v. State, 461 So.2d 67, 69 (Fla. 1984); Stone v. State, 378 So.2d 765 (Fla. 1979). Absent a demonstration by the appellant of partiality of his jury and an abuse of discretion by the trial court no basis for reversal is demonstrated. Davis v. State, 461 So.2d at 69-70. See also, Cummings v. Dugger, 862 F.2d 1504, 1507 (11th Cir. 1989); United States v. Holman, 680 F.2d 1340, 1344 (11th Cir. 1982).

The trial court in ruling on the pretrial motion for individual voir dire indicated that while he was, at that point in time, denying any requested individualized voir dire, he would reconsider the issue if he became convinced that there was a need to do so based upon pre-trial publicity and knowledge of the case exhibited by the jurors. (R 782-785) There was no error in this ruling especially given the total lack of any factual support (e.g., newpaper articles, press reports, etc.) demonstrating even the remote possibility that jurors might have been in any way tainted by pre-trial publicity in this matter. Certainly, the standard "boiler-plate" motion submitted by the appellant contained neither supporting affidavits nor pretrial publicity in support of the requested individualized voir dire. (R 129-132). Under these circumstances it cannot be said that the trial court abused its discretion in denying that motion.

Nor has the appellant demonstrated an abuse of discretion in the denial of his mistrial motion raised with reference to alleged jury impartiality caused by a single isolated comment during voir dire by a prospective juror who was ultimately excused and did not sit on the jury in this case. The abuse of discretion standard utilized in evaluating a trial court's determination as to juror impartiality is comparable to the standard utilized by an appellate court in reviewing a trial court's denial of a mistrial motion. A mistrial motion should be evaluated with great care and caution and such motions should be granted only in cases of absolute necessity where the alleged error is *so* prejudical as to vitiate the entire trial. Johnston

v. State, 497 So.2d 863, 869 (Fla. 1986); State v. Murray, 443 So.2d 955, 956 (Fla. 1984); Cobb v. State, 376 So.2d 230, 232 (Fla. 1979); Salvatore v. State, 366 So.2d 745, 750 (Fla. 1979).

There was no showing of prejudicial publicity in this case by the appellant; to the contrary, those few prospective jurors who indicated that they had any knowledge with reference to the incident recounted only oblique factual details and absolutely nothing that was in any way prejudical to this particular defendant. The isolated statement by prospective juror Trevora to the effect that someone had told her husband that the victim in this case has been "brutally murdered" which information upset her husband did not create any actual prejudice in that prospective juror or in any of the other members of the voir dire panel. Juror Trevora, noted that her information would not impact upon her ability to render a decision as to guilt or innocence and that she would base her determination in the case upon the evidence she heard from the witness stand. (R 893). Obviously, defense counsel did not preceive any real prejudice from juror Trevora's statement in that he did not make a contemporaneous objection/mistrial motion based upon that statement when it was made; rather it was only after further voir dire interrogation by the court of another potential juror that defense counsel finally voiced an objection with reference to Mrs. Trevora's "brutally murdered" statement claiming that it had tainted and "may prejudice the rest of the jury panel" (R 895-896). The state submits that this failure to raise a timely and contemporaneous objection to the response necessarily bars

appellate review and urges this Court to specifically note that finding in its opinion denying relief. See, Harris v. Reed, ____ U.S. ____, 109 S.Ct. 1038, 1043, ____ L.Ed.2d ____ (1989).

In any event, there has been no showing that this isolated statement by a prospective juror tainted the entire jury panel. Mrs. Trevora made clear that the statement was nothing more than the result of hearsay communicated to her husband; furthermore, the statement did nothing to prejudice Randolph in that it did not point the finger at him as the perpetrator of the "brutal murder". Furthermore, the members of Randolph's eventual jury trial panel indicated that they would decide the case solely upon the evidence presented at trial. What potential prejudice could arise from a statement that was ultimately and unequivocolly confirmed by the evidence submitted at trial, i.e., that the victim in this case was brutally murdered. Indeed, defense counsel himself conceded in closing argument that the attack was "brutal." (R 1535).

Even if there was error in the statement it was necessarily harmless given the facts of this case, i.e., the brutal beating, knifing and strangulation of the victim which resulted in her death. The only even conceivable claim of prejudice from the isolated statement at issue that can be gleaned from defense counsel's untimely mistrial motion and his ultimate argument to the jury in this case is that the victim was not, in fact, "murdered" because intervening medical malpractice in the transfusion of her blood actually caused her death; however, as noted in the argument in Points 11, IV and VI of this brief there

was no expert medical testimony to support this claim and in any event such an argument is not a recognized legal defense in this state under the facts in this case. See, Holman v. State, 371 So.2d 482, 485-486 (Fla. 1979); Johnson v. State, 64 Fla. 321, 59 So. 894, 895 (Fla. 1912); Hampton v. State, 542 So.2d 458 (Fla. 4th DCA 1989); State v. Smith, 496 So.2d 195, 196 (Fla. 3d DCA 1986)(when the wound is itself dangerous to life mere erroneous treatment of that wound or of the wounded man suffereing from it, will afford the defendant no defense to a homicide prosecution.)

The appellant has failed to demonstrate an abuse of descretion in the trial court's rulings denying his motion for individual voir dire and his motion for mistrial and has likewise failed to demonstrate an abuse of discretion in the rejection of Randolph's factually and legally unsupported assertion of a lack of impartiality in the jury panel.

POINT III

THE APPELLANT HAS FAILED TO PRESERVE FOR APPELLATE REVIEW HIS SUFFICIENCY OF THE EVIDENCE CHALLENGE TO THE SEXUAL BATTERY OFFENSE AT ISSUE; NO REVERSIBLE ERROR HAS BEEN DEMONSTRATED IN THE APPELLANT'S CONVICTION AND SENTENCING FOR THE SEXUAL BATTERY OFFENSE.

The appellant's challenge to the sufficiency of the evidence to support his sexual battery with force likely to cause serious personal injury conviction has not been preserved for appellate review by timely and specific motion for judgment of acquittal. Defense counsel's "bare bones'' motions for judgment of acquittal addressed to the non-capital sexual battery charged in Count III of the indictment were clearly insufficient to preserve his sufficiency of the evidence objection for appellate review. Fla.R.Crim.P. 3.380(b); State v. Barber, 301 So.2d 7 (Fla. 1974); Wells v. State, 417 So.2d 772 (Fla. 3d DCA 1982); Patterson v. State, 391 So.2d 344 (Fla. 5th DCA 1980). (R 1485-1487, 1620-1621). This procedural default should be specifically noted as the basis for denying relief. See, Harris v. Reed, ____ U.S. ____, 109 S.Ct. 1038, 1043, ____ L.Ed.2d ____ (1989).

In any event, Randolph's conviction for sexual battery with force likely to cause serious personal injury based upon the jury's verdict after instruction was not improper. The jury was specifically instructed on sexual battery with force likely to cause serious personal injury and on the lesser charge of sexual battery where the victim was physically helpless to resist and determined under the facts that Randolph was "in the process'' of

committing the sexual battery when he used or threatened to use a deadly weapon or used actual physical force likely to cause serious personal injury. (R 1592-1593, 1596-1597, 1601-1602)

This finding comports with the common definition for "process" which is a series of actions; a progressive forward movement from one point to another on the way to completion: in the action of passing through continuing development from a beginning to a contemplated end; the action of continuously going along through each of a succession of acts, events, or developmental stages. Webster's Third New International Dictionary, (1986). Here, the beating, stabbing and strangulation of the victim were part of a series of actions that facilitated and culminated in the defendant's sexual union with the victim such that those early actions were part of the sexual battery "process".

Even if we accept the defendant's self serving and inherently incredible tale of masturbation and ejaculation into the victim as an after-thought of the robbery simply to "make it look like something a maniac would do",[2] it is nevertheless clear that even assuming the victim to have been physically helpless at that point in time it was Randolph who had rendered her helpless through the brutal beating, stabbing, and strangulation inflicted upon her in one contemporaneous series of actions. Simply put, his violent attack upon the victim rendered her susceptible to his sexual battery. Under this fact pattern the jury and trial

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[2] [The trial judge, of course, rejected the defendant's version of the sexual battery in his sentencing order. (R 641-642).] See, argument on Point X, herein.

judge could properly determine that Randolph's brutal attacks upon the victim were all part of the "process" of the sexual battery in that those events facilitated his eventual sexual union with and ejaculation into the victim.

Certainly it was not the intent of the legislature to allow a violent criminal defendant to reap a windfall. i.e., lessening the severity of his offense from a life felony to a first degree felony, by beating his intended sexual battery victim senseless ("physically helpless") prior to the offense. To the contrary, it has always been the legislature's intent to enhance the seriousness of an offense and the degree of punishment when a defendant carries or uses any weapon or firearm or commits an aggravated battery during the commission of any felony. See §775.087(1), Fla. Stat. (1987). In fact, even if it is assumed that the proper conviction in this case should have been for sexual battery of one physically helpless to resist-a first degree felony-any error is necessarily harmless since it is clear that during the commission of that felony Randolph carried, displayed, used, threatened to use or attempted to use a weapon or committed an aggravated battery so as to support reclassification to a life felony under section 775.087(1)(a). None of the caselaw cited by the appellant supports the conclusion that the legislature's intent in creating the "physically helpless" sexual battery provision was to provide lower culpability in punishment for those defendant's who render their victim's physically helpless/unconscious; rather, a more reasonable analysis, especially in light of the provisions of

section 775.087(1), is that the legislature intended lesser culpability/punishment for those who take advantage of victims who were already physically helpless not those who are rendered unconscious or helpless by the defendant.

POINT IV

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE APPELLANT'S MISTRIAL MOTION WHERE THE PROSECUTOR'S ARGUMENT WAS FAIR REBUTTAL TO DEFENSE COUNSEL'S ARGUMENT AND DID NOT IMPROPERLY MISLEAD THE JURY; ALTERNATIVELY, NO REVERSIBLE ERROR HAS BEEN DEMONSTRATED IN THE LIMITED ARGUMENT AT ISSUE.

Initially, there is no record support for appellant's claim that the prosecutor argued that the infusion of *o* negative blood would not cause the victim any ill effects since *o* negative blood was a universal blood donor type; to the contrary, although the prosecutor did use the term "universal donor blood" in his closing argument that phrase was never defined nor explained to the jury nor was any argument made to the jury to that effect by the prosecutor. Indeed, when taken in context, it is clear that the prosecutor's argument was nothing more than a response to the improper assertion by defense counsel during his closing argument that transfusion of the victim with *o* negative blood by emergency medical personnel immediately after the attack and prior to the victim's transfer to a hospital "may have poisoned her system" such that "certainly her death was assured." (R **1540-1553, 1547)**. Specifically defense counsel argued that the emergency technicians replaced "almost her entire blood supply" with *o* negative blood and then specifically opined that:

> And I say that the reason why her blood wouldn't clot, the reason they couldn't control the pressure on her brain, the reason why she died instead of recovering was because the Putnam Community Hospital, and

> followed by the Air Care Team, gave her a total of ten units of *o* negative blood, which was the wrong blood, because they should have given her B blood.
>
> And if they had tested her blood and typed it they could have given her B blood, and they didn't.
>
> And that, ladies and gentlemen, I suggest to you is intervening medical negligence that caused or contributed to the death of poor Mrs. McCollum.

(R 1549-1550). In response during his closing argument the prosecutor correctly noted that there was not one shred of evidence brought forth at trial that the use of *o* negative blood during transfusion by emergency personnel in any way contributed to the death of the victim and in this context made his "universal donor blood" statement.

It was defense counsel, not the prosecutor, who journeyed outside the realm of trial evidence in making his argument to the jury, for, as noted by the prosecutor, despite the presence of a number of medical experts who testified at trial there was never any attempt by the defense to demonstrate that the infusion of *o* negative blood was erroneous medical procedure or in any way negatively affected the victim or contributed to her death. (R **1565-1566)** There was absolutely no evidence, expert or otherwise, adduced at trial to support defense counsel's assertions that the victim's blood supply was almost entirely replaced with *o* negative blood and more importantly that any transfusion with *o* negative blood by medical personnel was improper, would have detrimentally affected the victim; or in

any way contributed to her death or as he put it formed "the reason why she died instead of recovering...." (R 1549)

The prosecutor's response to defense counsel's "red herring'' does not justify reversal in this case. In fact, defense counsel's argument of an intervening cause of death was not only factually unsupported, but improperly attempted to advance a defense that is not recognized in this state under the circumstances of this case. (See, Point II herein); Holman v. State, 371 So.3d 482, 485-486 (Fla. 1979)(when wound inflicted is itself dangerous to life mere erroneous treatment will afford no defense to homicide prosecution.) Absent the legality of the argued defense how could the prosectuor's argument be viewed as improper or prejudical? The lack of prejudice is further evinced by the expert testimony of Dr. McConaghie at the penalty phase that the transfusion was not, and did not contribute to, the cause of death. (R 1685)

In any event, the trial counsel's sustaining of defense counsel's objection in the presence of the jury was sufficient to rectify any impropriety in the statement. The jury had been specifically instructed prior to arguments (and again immediately afterward) that they were to rely only on the evidence developed through witnesses at trial and not upon the argument of counsel (R 1521-1524, 1605, 1608). The jury is presumed to have followed the instructions and given the circumstances of this case and the unequivocal testimony of the medical experts there is no likelihood that the jury verdict was improperly tainted by the fleeting comment by the prosecutor.

Even assuming error in the prosecutor's response to defense counsel argument there is no reasonable possibility that that error improperly affected the verdict in this cause. State v. DiGuilio, 491 So.2d 1129, 1139 (Fla. 1986); 8924.33, Fla. Stat. (1987). The testimony of Drs. Brown, Bland, and Rhoten made clear that the victim's injuries were massive. The nature of the swelling and internal bleeding suffered from the blows, stab wounds, and strangulation inflicted upon her were such that despite immediate and multiple transfusions of blood (even after typing and crossing had been performed at Shands Hospital such that type O negative blood was apparently not thereafter utilized), she suffered major hemorrhaging and continued bleeding into her soft tissues such that her condition simply worsened and worsened until her death.

All three doctors made clear that none of the medical treatment she received was below the standard of medical care expected under the circumstances and that there was nothing done or that could have been done but was not that contributed to or increased the injuries of the victim; no different treatment could have saved her. (R 1356-1357, 1461, 1477). The victim died from the severe brain injury caused by the multiple blows, with the knife wounds and strangulation inflicted serving as contributing causes (R 1476-1477). The egregiousness of the beating suffered caused the victim's head to be "massively swollen" and "grossly filled with blood" (R 1440) and Dr. Rhoten noted that the amount of swelling within the brain was as bad as he had seen in twenty (20) years of neurosurgery (R 1472).

Simply put, despite the best medical treatment during the intervening six days between the August 15, 1988 attack and the victim's eventual death on August 21, 1988, the egregiousness of the injures inflicted upon her by the defendant could not be overcome.

Under these accusations and inasmuch as a mistrial motion should be granted only in cases of absolute necessity and where the error asserted is *so* egregious as to vitiate the entire trial it cannot be said that the trial court abused its discretion in denying the motion for mistrial. Johnston v. State, 497 So.2d 863, 869 (Fla. 1986); State v. Murray, 443 So.2d 955, 956 (Fla. 1984); Cobb v. State, 376 So.2d 230, 232 (Fla. 1979); Salvatore v. State, 366 So.2d 745, 750 (Fla. 1979).

Finally, the appellant's apparent argument that the prosecutor also erred in noting that his argument was in response to defense counsel's closing argument (which was itself not based upon evidence of record) is not only legally baseless but is unpreserved for appellate review. Certainly, trial counsel did not raise any objection to that statement at trial *so* as to preserve the issue for appellate review. Tillman v. State, 471 So.2d 32, 34-35 (Fla. 1985); Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982). This procedural default should be specifically noted. Harris v. Reed, ____ U.S. ____, 109 S.Ct. 1037, 1043, ____ L.Ed.2d ____ (1989). In any event, as previously noted, there was nothing improper about the prosecutor's response to argument of defense counsel in support of an unrecognized defense which was itself unsupported by any

testimony at trial. In the particular context of this case and given the overwhelming and uncontroverted evidence that the victim died as a result of injuries inflicted by the defendant no basis for reversal is presented. State v. DiGuilio, supra; 8924.33, Fla. Stat. (1987).

POINT V

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE DEFENDANT'S MISTRIAL MOTION AFTER THE PROSECUTOR'S LIMITED QUESTION REFERENCING THE DEFENDANT'S REMORSE OR LACK THEREOF DURING THE GUILT PHASE OF THE TRIAL; NO REVERSIBLE ERROR HAS BEEN DEMONSTRATED.

Initially, the state submits that the prosecutor's question on redirect examination of the appellant's girlfriend as to whether Randolph acted remorseful, ashamed, or sad after the brutal murder at issue was not in fact erroneous given the previous cross-examination of that witness by defense counsel. On cross-examination Randolph's attorney elicited a number of responses that were totally irrelevant to the direct examination by the prosecutor which was limited to explanation of the factual circumstances and statements occurring between Ms. Betts and the appellant immediately before and after the murder. (R 1130-1142). Cross-examination instead focused upon whether Randolph was really a "nice person" (R 1146) who only went bad and became violent and angry because of crack cocaine use. (R 1146-1148) It was only after defense counsel attempted to interject Randolph's totally irrelevant alleged "nice person" status into the guilt phase of the trial that the prosecutor attempted to counter Randolph's "nice guy" claim by demonstrating that he was neither sad, nor ashamed, after perpetrating the brutal murder at issue. (R 1151).

Defense counsel opened the door and the context of the prosecutor's questioning clearly reveals that it was nothing more

than rebuttal to the defense's apparent assertion that Randolph suffered from a Dr. Jekyll/Mr. Hyde complex in which cocaine use would transform him from a "nice guy" to an angry and violent individual. The context of the prosecutor's redirect examination demonstrates that he was doing noting more than trying to rebut that defense claim by showing that Randolph was neither a "nice person" nor under the influence of cocaine use on the morning of the murder, to wit:

> Q. All right. When you saw him that morning at about 7:15 on August the 15th did he appear to be under the influence of crack at that time?
>
> MR. PEARL: Objection.
>
> THE COURT: Legal grounds.
>
> MR. PEARL: Perhaps the question is wrongly put, but she is not an expert in the field of substance abuse and its effects.
>
> THE COURT: The objection is overruled. I'll allow the question. She can say what she saw.
>
> BY MR. TANNER:
>
> Q. Did he act or look like he was under the influence of crack that morning?
>
> A. No.
>
> Q. Did he act remorseful or ashamed, or anything, sad for what he had done?
>
> A. No.

(R 1150-1151)

The trial court judge never specifically indicated that the prosecutor's question with reference to remorse was improper

given the context in which it was made; however, the court did indicate that it was a "very, very touchy subject" and that remorse was not usually an issue to be addressed in the guilt stage of the trial. (R 1153) For that reason he cautioned the prosecutor to stay away from that issue while at the same time denying defense counsel's mistrial motion. Defense counsel never asked for a curative instruction; rather, the judge simply indicated that he thouqht that in this case a cautionary instruction would not be appropriate "because it would merely emphasize the question or emphasize the matter in the minds of the jury again." (R 1153) Defense counsel raised no objection to the trial court's statement nor did he ever specifically seek a curative instruction, thus indicating by acquiescence his agreement with the trial court that no curative instruction would be appropriate.

The trial court did not abuse it discretion in denying the mistrial motion at issue. A motion for mistrial is addressed to the sound discretion of the trial judge and should be exercised with great care and caution such that the motion should be granted only in cases of absolute necessity. Johnston v. State, 497 So.2d 863, 869 (Fla. 1986); Salvatore v. State, 366 So.2d 745 ,750 (Fla. 1979). Otherwise stated the standard of review is whether the error committed was so prejudicial as to vitiate the entire trial. State v. Murray, 443 So.2d 955, 956 (Fla. 1984); Cobb v. State, 376 So.2d 230, 232 (Fla. 1979).

Given the context in which the question was raised and the overwhelming direct and circumstantial evidence of Randolph's

guilt - including his own specific and uncontradicted confession to the murder - the trial court did not abuse its discretion in denying the mistrial motion at issue. See, Canakaris v. Canakaris, 382 So.2d 1197, 1202-1203 (Fla. 1980)(discretion is abused when the judicial action is arbitrary, fanciful, or unreasonable, i.e., only where no reasonable man would take the view adopted by the trial court). Further, it is clear that even if there was error in denial of the mistrial motion by the trial court there is no reasonable possibility that that error affected the verdict in this case. State v. DiGuilio, 491 So.2d 1129, 1139 (Fla. 1986); § 924.33, Fla. Stat. (1987).

Finally, despite the appellant's assertion to the contrary, evidence of lack of remorse is not irrelevant and inadmissible at the penalty phase of a capital trial where the defendant's alleged remorse is placed in issue by the defense. Walton v. State, 547 So.2d 622, 625 (Fla. 1989). It is clear that the defense always intended at both the guilt and penalty phases to inject Randolph's alleged shame and remorse for his conduct as an issue. Defense counsel emphasized the remorse noted in defendant's confession during the guilt phase. The defense, not the prosecution, made it an issue at the penalty phase where defense counsel elicited testimony that Randolph had, in a psychological examination after the offense, indicated that he was very ashamed, embarrassed, and remorseful for his conduct. (R 1740-1742). In fact, Randolph's alleged "shame" was incorporated into the defense's special requested jury instruction on non-statutory mitigating factors (ultimately

denied by the trial court) and was argued by defense counsel in closing argument at the penalty phase. (R 592, 1834) In contrast the prosecutor, in an apparent abundance of caution, did not raise lack of remorse at the penalty phase through either testimony or argument despite the fact that he was clearly free to do so given the defense's clear reliance upon that assertion in mitigation.

Since the question at issue would have been proper in the penalty phase given the defense's reliance upon Randolph's alleged remorse in mitigation, the appellant's contention that such evidence was irrelevant and inadmissible at the penalty phase is baseless and should be rejected. In any event, any alleged error in the denial of the motion for mistrial vis-a-vis the penalty phase is clearly harmless and could not have improperly affected the outcome of the penalty proceeding in light of the numerous and substantial aggravating circumstances established by the state. Indeed, the sentencing court after accepting the "remorse" mitigating factor nevertheless determined that any single aggravating circumstance would outweigh the nonstatutory mitigating "remorse" factor even when viewed in conjunction with all other mitigating factors. (R 646). See, State v. DiGuilio, supra; §924.33, Fla. Stat. (1987).

POINT VI

THE APPELLANT HAS FAILED TO PRESERVE FOR APPELLATE REVIEW HIS CHALLENGE TO THE ADMISSION OF CERTAIN PHOTOGRAPHS DURING THE PENALTY PHASE; ALTERNATIVELY, SAID PHOTOGRAPHS WERE RELEVANT AND ADMISSIBLE AND EVEN IF ERRONEOUSLY ADMITTED WOULD NOT CONSTITUTE A BASIS FOR REVERSAL; SIMILARLY, NO REVERSIBLE ERROR HAS BEEN DEMONSTRATED IN THE INTRODUCTION OF EXPERT MEDICAL TESTIMONY TO THE EFFECT THAT A PRIOR BLOOD TRANSFUSION WAS NOT A CONTRIBUTORY CAUSE OF THE VICTIM'S DEATH.

The appellant challenges the introduction of a limited number of photographs of the victim presented at the penalty phase to demonstrate the full extent of injury suffered by the deceased.

Initially, the state submits that the appellant has not preserved the appellate argument he now raises for appellate review. Certainly, there was never any specific constitutional challenge to the introduction of the photographs at issue such that Randolph's lofty claims of violations of various sections of the state and federal constitutions are necessarily barred from appellate consideration. While defense counsel did initially challenge the admission of the photographs as inflammatory and prejudicial (R 1653) this claim was not raised in any federal constitutional context and was at best voiced in the context of a state evidentiary challenge. Absolutely no motion for mistrial addressed to the admission of the photographs was ever raised by defense counsel. As noted by the prosecutor the photographs were to be introduced, in part, to give the jury a full picture of the

brutal nature of the beating inflicted not only upon the victim's head and neck (which injuries were detailed and explained through photos admitted during the guilt phase) but also on her chest, back, buttocks, and legs. (R **585-591, 1639-1640)** Notwithstanding the ultimate decision of the trial court judge to limit consideration of the photos by the jury, it is nevertheless clear that the photographs did exhibit wounds inflicted by the appellant during the violent attack at issue and were, therefore, relevant to the offense and properly admitted during the penalty phase to demonstrate, inter alia, the heinous, atrocious and cruel nature of the killing.

It is well established that the introduction of photographic evidence is within the sound discretion of the trial court such that absent a showing of a clear abuse of that broad discretion no relief is warranted. Jackson v. State, **545** So.2d **260, 265** (Fla. **1989);** Patterson v. State, **513** So.2d **1257** (Fla. **1987);** Wilson v. State, **436 So.2d 908, 910** (Fla. **1983).** This Court has repeatedly held photographs admissible if relevant to any issue involved in the case. Henderson v. State, **463** So.2d **196, 200** (Fla. **1985);** Wilson v. State, supra; Adams v. State, **412** So.2d **850, 853-854** (Fla. **1982).**

Here, as noted by the prosecutor the few photographs admitted were chosen from many more photos which might in fact be deemed gory or gruesome or of a truely inflammatory nature but which would, nevertheless, have been relevant to the cause in that they would have more completely demonstrated the "severity of the beating" suffered by the victim in support of the heinous,

atrocious and cruel aggravating factor. (R **1639-1640)** For example, the prosecutor noted that one of the available photographs not utilized portrayed the victim's skull with the skin flap pulled back to expose the damaged interior caused by the brutal beating inflicted by the appellant; however, the state specifically deferred presenting this otherwise relevant and admissible evidence in favor of the photographs at issue.

Indeed, the state submits that the prosecutor's self-imposed restriction of photographic evidence resulted in the presention of exhibits which are not in fact gory or gruesome, especially in the general context of murder cases and under the specific circumstances of this case and otherwise available photographs. The particular photographs exhibit, in a limited fashion, only portions of the unclothed body of the deceased and only to the extent necessary to show the complete pattern of injuries (bruising) suffered as a result of the attack. (R **585-591)** The photographs focus on specific areas of the body (in effect dehumanizing them and limiting any potential inflammatory impact) so as to focus in on the extent of the wounds in that limited area. They were taken and presented in a manner which limited the impact on the jurors by not providing cumulative exposure to head area injuries (where the greatest damage was obvious). The medical examiner utilized the photos in explaining his testimony vis-a-vis the injuries suffered by the victim and to differentiate non-medical from medical trauma. **(R 1674-1678)** The doctor further noted the scattering of the bruises indicated that the victim was moving or had been moved in order to inflict them. (R **1680)**

Under these circumstances the pictures were clearly relevant in that they detailed "the nature and extent of the victim's injuries, the manner of death, [and] the nature of the force and violence used..'' Wilson v. State, 436 So.2d 908, 910 (Fla. 1983). Such factors are probative in evaluation of the aggravating factors, most specifically, the determination of whether the murder perpetrated was heinous, atrocious, or cruel.

As this court noted in Henderson v. State, 463 So.2d 196, 200 (Fla. 1985):

> ...Persons accused of crimes can generally expect that any relevant evidence against them will be presented in court. The test of admissibility is relevancy. Adams v. State, 412 So.2d 850 (Fla.), cert. denied, 459 U.S. 882, 103 S.Ct. 182, 74 L.Ed.2d 148 (1982); Straiant v. State, 397 So.2d 903 (Fla.), cert. denied, 454 U.S. 1022, 102 S.Ct. 556, 70 L.Ed.2d 417 (1981). Those whose work products are murdered human beings should expect to be confronted by photographs of their accomplish-ments. The photographs were relevant to show the location of the victims' bodies, the amount of time that had passed from when the victims were murdered to when their bodies were found, and the manner in which they were clothed, bound and gagged. It is not to be presumed that gruesome photographs will *so* imflame the jury that they will find the accused guilty in the absence of evidence of guilt. Rather, we presume that jurors are guided by logic and thus are aware that pictures of the murdered victims do not alone prove the guilt of the accused. We therefore conclude there was no error in allowing the photophraphs into evidence. Aldridge v. State, 351 So.2d 942

(Fla. 1977), cert. denied, 439 U.S. 882, 99 S.Ct 220, 58 L.Ed.2d 194 (1978); Jackson v. State, 359 So.2d 1190 (Fla. 1978), cert. denied, 439 U.S. 1102, 99 S.Ct. 881, 59 L.Ed.2d 63 (1979); Swan v. State, 322 So.2d 485 (Fla. 1975).

Given the obvious relevance of the photographs to an issue to be resolved at the penalty proceeding and their hand picked less than gory, gruesome and inflammatory nature, no reversible error has been demonstrated in their admission

Furthermore, although an initial objection to the photographs was voiced by defense counsel, the trial court ultimately backed off his position with reference to the utilization of those photographs by the prosecution and did not allow the photos into the jury room. After considerable discussion with counsel the trial court indicated that it was a close call and decided to err "on the side of conservativism" and in effect struck from the jury's consideration the photographs at issue. (R 1687-1696) The trial court's remedial action was taken in partial response and was clearly in line with defense counsel's earlier request that the photos not be utilized as evidence which resolution "might very well settle the issue." (R 1689) When the trial judge reversed his position in part in response to that argument defense counsel raised no objection to the trial judge's decision. Indeed, that defense counsel considered the trail judge's resolution acceptable and adequate to "settle the issue" is clearly evidenced by his lack of objection to the court's ruling; the lack of request for any type of curative instrution; and the absence of any contemporaneous

mistrial motion addressed to that issue. (R 1698-1699). Defense counsel's obvious acquiesence in the ultimate ruling by the trial court vis-a-vis the photographs necessarily undermines his claim of reversible error. Absent a specific and timely objection to the trial court's ruling the claim is not preserved for appellate review. Tillman v. State, 471 So.2d 32, 34-35 (Fla. 1985); Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982); Bertolotti v. Dugger, 514 So.2d 1095, 1096 (Fla. 1987).

Finally, even if the photographs were improperly initially admitted by the trial court they were necessarily harmless in light of the other evidence adduced and the uncontroverted nature of the testimony vis-a-vis the violent attacks on the victim perpetrated by the appellant. The nature and significance of the violent beating, knifing, strangulation, and sexual battery and the massive nature of the injuries sustained were amply detailed through medical testimony and other photographs properly admitted in conjunction with the appellant's own confessions as to the torturous and prolonged nature of the attack such that the photographs at issue, (which, as previously noted, were not particularly gory or gruesome and which exhibited only bruising on certain limited areas of the body) did not improperly affect the outcome of the proceeding. See, State v. DiGuilio, 491 So.2d 1129, 1139 (Fla. 1986); §924.33, Fla. Stat. (1987). Even had a timely mistrial motion been made the alleged error was not so egregious as to vitiate the entire advisory penalty phase so as to justify relief. Johnston v. State, 497 So.2d 863, 869 (Fla. 1986); State v. Murray, 443 So.2d 955, 956 (Fla. 1984); see also,

Bertolotti v. State, 476 So.2d 130, 133 (Fla. 1985)(given advisory nature of penalty proceedings claimed impropriety must be "egregious indeed" to warrant reversal.)

ADMISSION OF PENALTY PHASE TESTIMONY REFUTING DEFENSE COUNSEL'S PRIOR IMPROPER ARGUMENT THAT DEATH CAUSED BY BLOOD TRANSFUSION ERROR DOES NOT JUSTIFY REVERSAL.

The appellant's claim that the introduction of expert medical testimony to the effect that an *o* negative blood transfusion would not have been a contributory cause of the vicitm's death in this case, was so prejudicial as to justify reversal is baseless. The prosecutor clearly introduced the testimony solely to counter the improper, i.e. factually and legally unsupported argument of defense counsel during the guilty phase that Randolph had not in fact caused the death of the victim which was instead the result of the allegedly dangerous and improper blood transfusion. (See, Point II herein) Obviously, the prosecutor did not want to take the chance that jurors might harbor a lingering doubt as to the guilt of the appellant on that issue, an issue which had been improperly injected by defense counsel into the proceeding. The defense should not now be heard to complain about the impropriety of that evidence.

In any event, the appellant has clearly failed to demonstrate any prejudical impact from that testimony which at worst did nothing but corroborate the jury verdict already rendered as to guilt. The admissibility of evidence is a matter vested within the sound descretion of the trial court and absent a clear showing of an abuse of that descretion the ruling will

not be distrubed on appeal. King v. State, 514 So.2d 354, 358 (Fla. 1987); Blanco v. State, 452 So.2d 520, 523 (Fla. 1984); Jones v. State, 440 So.2d 570, 574 (Fla. 1983). Under the facts of this case no abuse of descretion has been demonstrated in the admission of that testimony, i.e., in allowing the prosecutor to close the door opened by defense counsel. Certainly, no error so prejudical as to vitiate the entire sentencing proceeding and no case of absolute necessity justifying a mistrial has been presented by the appellant. Johnston v. State, supra; State v. Murray, supra; Bertolotti v. State, supra.

POINT VII

THE TRIAL COURT DID NOT ERR IN REFUSING TO INSTRUCT THE JURY SEPARATELY ON THE NONSTATUTORY MITIGATING CIRCUMSTANCES ALLEGED.

The trial court properly held that the standard jury instructions adequately addressed the issue of nonstatutory mitigating circumstances and therefore refused to give the appellant's requested instruction (as amended by defense counsel at the sentencing hearing) listing nonstatutory mitigating circumstances for which the defendant had allegedly "submitted evidence establishing that the following nonstatutory mitigating circumstances exist for your consideration:" (R 592, 1792-1793). After noting that the standard jury instructions adequately addressed the issue the trial court went on to further note that defense counsel was free to argue all such matters to the jury as basis for mitigating any potential sentence. (R 1793).

Initially, the state notes that the instruction was properly rejected as misleading in that it improperly instructed the jury that the alleged nonstatutory mitigating circumstances had already been established by the evidence submitted suggesting that they were bound to find those mitigating circumstances notwithstanding their possible determination that the evidence presented did not in fact support such a conclusion. An erroneous or misleading jury instruction should not be given by a trial court.

A trial court should use the standard jury instructions where appropriate for "a trial judge walks a fine line indeed

upon deciding to depart." Kelley v. State, 486 So.2d 578, 584 (Fla. 1986); State v. Bryan, 297 So.2d 482 (Fla. 1974).

In Jackson v. State, 530 So.2d 269, 273 (Fla. 1988), this Court held that the standard jury instruction on mitigating circumstances complies with constitutional principles and that it was not error "for the trial court to refuse to instruct the jury according the a written list of nonstatutory mitigating circumstances prepared by appellant." Accordingly, the trial court properly deferred to the standard jury instruction on nonstatutory mitigating evidence which was given at trial and which specifically informed the jurors that they could consider any other aspect of the defendant's character or record in any other circumstance of the offense as mitigating factors in reaching their judgment. (R 596-1843). Puiatti v. State, 495 So.2d 128, 132 (Fla. 1986); See also, Carter v. State, 14 F.L.W. 525, 526 (Fla. October 19, 1989)(standard instruction adequate to cover alleged non-statutory mitigating circumstance of mental deficiency); Mendyk v. State, 545 So.2d 846, 849-850 (Fla. 1989)(standard instruction adequately informed jury they could consider any aspect of character or circumstances such that no need to specifically instruct on consideration of co-defendant's sentence.)

POINT VIII

THE APPELLANT'S ALLEGATION THAT APPELLATE REVIEW BY THE FLORIDA SUPREME COURT RESULTS IN ARBITRARY AND CAPRICIOUS IMPOSITION OF THE DEATH PENALTY HAS NOT BEEN PRESERVED FOR APPELLATE REVIEW: ALTERNATIVELY THE CLAIM IS WITHOUT MERIT.

Initially, the state notes that the specific constitutional challenge now raised for the first time by the appellant was never presented to nor determined by the trial court so as to preserve it for appellate consideration. The only motion or argument challenging the constitutionality of the statute presented to and ruled upon by the trial court alleged only that two specific aggravating circumstances set forth within section 921.141(5)(h)(i), were unconstitutionally vague and overbroad on their face and as applied (R 105-124).

Although the appellant did include in his pretrial packet of motions a request for a special verdict form to allow for "unanimous jury determination of statutory aggravating circumstances" no Eighth Amendment challenge to the Florida Supreme Court's application of Florida's death penalty statute was ever specifically raised before or determined by the trial court judge in this case. (R 125-126, 776-792). Further, while defense counsel, in his argument on the motion for use of special verdict form, did specifically rely upon the dissenting opinions in Burch v. State, 522 So.2d 810 (Fla. 1988)(also noted in his argument before this Court) there was no challenge to the constitutionality of the statute made to the trial court, only an argument that specific fact findings should be made by the jury

as part of their advisory sentencing process. (R 790-791). That argument was rejected by this Court and ultimately by the United States Supreme Court in Hildwin v. Florida, 490 U.S. _____, 109 S.Ct. 2055, 104 L.Ed.2d 728 (1989).

In apparent recognition that the argument that he actually presented to the trial court in February, 1989, was specifically rejected by the Hildwin Court in May, 1989, the appellant now improperly transforms his original argument into a new and improved version raised for the first time before this Court. The appellant's clear procedural default in failing to contemporaneously raise before and have determined by the trial court the same issue now presented should be noted and this claim should be specifically rejected for failure to preserve the issue below. Swafford v. State, 533 So.2d 270, 278 (Fla. 1988); Eutzy v. State, 458 So.2d 755, 757 (Fla. 1984); see also, Tillman v. State, 471 So.2d 32, 35 (Fla. 1985); Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982) Inclusion of a plain statement in the opinion noting rejection of this claim due to the appellant's procedural default is necessary to avoid relitigation of this issue in later federal proceedings. See, Harris v. Reed, ____ U.S. ____, 109 S.Ct. 1038, 1043, ____ L.Ed.2d ____ (1989).

Alternatively, even assuming that the issue has been preserved for appellate review, the appellant presents no basis for invalidating Florida's death penalty statute on Eighth Amendment grounds where that statute has repeatedly survived constitutional challenge before this Court and the United States Supreme Court. Barclay v. Florida, 463 U.S. 939, 103 S.Ct. 3418,

77 L.Ed.2d 1134 (1983); Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976); Dixon v. State, 283 So.2d 1 (Fla. 1973). (See cases cited in Point XI herein.) The United States Supreme Court in Spaziano v. Florida, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984), again specifically validated Florida's death penalty procedure including the jury override process and the standard of review applied by this Court under Tedder v. State, 322 So.2d 908, 910 (Fla. 1975). The Spaziano Court stated:

> We see nothing that suggests that the application of the jury-override procedure has resulted in arbitrary or discriminatory application of the death penalty, either in general or in this particular case. Regardless of the jury's recommendation, the trial judge is required to conduct an independant review of the evidence and to make his own findings regarding aggravating and mitigating circumstances. If the judge imposes a sentence of death, he must set forth in writing the findings on which the sentence is based. Fla.Stat. §921.141(3) (1983). The Florida Supreme Court must review every capital sentence to insure that the penalty has not been imposed arbitrarily or capriciously. §921.141(4). As Justice STEVENS noted in *Barclay,* there is no evidence that the Florida Supreme Court has failed in its responsibility to perform meaningful appellate review of each death sentence, either in cases in which both the jury and the trial court have concluded that death is the appropriate penalty or in cases when the jury has recommended life and the trial court has overridden the jury's recommendation and sentenced the defendant to death. See *Barclay v. Florida,* 463 U.S., at

971-972, and n. 23, 103 S.Ct., at 3436, and n. 23 (opinion concurring in judgment).

Appellant's reliance upon the dissenting opinions in Burch is clearly misplaced for the import of Justice Shaw's dissenting opinion is not that Florida's death penalty statute is unconstitutional because it does not require fact-findings in the advisory jury recommendation, as urged by the appellant, but that the Court should recede from the standard of review adopted in Tedder v. State, supra, because it makes the jury recommendation "virtually determinative" and allows for "largely unfettered jury discretion" contrary to the intent of Florida's death penalty statute. Id. at 815. As noted by Justice Shaw and as well established by the death penalty statute itself and caselaw, it is the trial court judge that makes findings of fact and is the ultimate sentencer under Florida's death penalty scheme. For that reason the dissenters in Burch noted that the trial judge's fact findings, which were supported by competent substantial evidence of record, should not have been second-guessed by the majority of the Court under the erroneously adopted Tedder standard. That minority opinion (shared by two justices) does not justify invalidation of Florida's death penalty statute based upon the appellant's contrived analysis.

The appellant conveniently overlooks the fact that the jury's recommendation is advisory only; that the sentencing determination is made by the trial court after he determines the facts, considers the legal sentencing parameters established by this Court; and incorporates into his analysis with appropriate

weight the jury recommendation, whether it be for death or for life imprisonment. See, Grossman v. State, 525 So.2d 833, 839-840 (Fla. 1988). This Court then supplies yet another level of review analyzing the appropriateness of the Sentencing judge's determination in light of the factual evidence presented, the established law, and an independent proportionality analysis. This Court's Tedder decision does nothing to invalidate an otherwise constitutional death penalty statute; to the contrary, at worst the Tedder standard of review provides an additional protection to defendants above and beyond that required by our constitutionally approved statute, in part to prevent potential arbitrariness or capriciousness in the imposition of the death penalty by sentencing judges. This Court and the United States Supreme Court have made clear that the various levels of review in our sentencing statute adequately serve to weed out arbitrariness and capriciousness in our death penalty system and the appellant's attempt to invalidate that scheme based upon yet another level of protection created by this Court in Tedder should be rejected.

POINT IX

SECTION 921.141(5)(h), FLORIDA STATUTES (1987) IS NOT UNCONSTITUTIONALLY VAGUE AND THE TRIAL COURT DID NOT ERR WHEN INSTRUCTING THE JURY ON THAT AGGRAVATING FACTOR.

The appellant correctly and candidly concedes that his vagueness challenge to the "especially heinous, atrocious, and cruel" aggravating factor set forth in section 921.141(5)(h), Florida Statutes (1987), has been specifically rejected by this Court in Smalley v. State, 546 So.2d 720 (Fla. 1989). The Smalley Court held that the "especially heinous, atrocious, or cruel" aggravating factor was given a more precise meaning in State v. Dixon, 283 So.2d 1, 9 (Fla. 1973), and with this narrowed construction was upheld against a specific Eighth Amendment vagueness challenge in Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976).

As also conceded by the appellant, and in an abundance of caution, the trial court in this case specifically defined the heinous atrocious and cruel aggravating factor utilizing the Dixon language. (R 1773-1784, 1842). Both the advisory sentencing jury and the sentencing judge were well apprised of the precise Dixon definition approved in Proffitt such that the appellant's vagueness argument is clearly meritless.

In any event, there is no basis for vacating the death sentence in this case even assuming invalidation of the heinous, atrocious and cruel aggravating factor since the sentencing judge made clear in his sentencing order that after conducting the sentencing analysis required by the statute "any of the

aggravating factors found to exist would outweigh all mitigating factors; statutory and non-statutory.'' (R **646)** Inasmuch as the sentencing judge's analysis and factual determinations vis-a-vis the aggravating and mitigating factors are supported by competent substantial evidence of record and given the number and weight of the remaining aggravating factors (assuming invalidation of the heinous, atrocious and cruel determination); the insubstantial weight afforded the mitigating circumstances determined by the trial court; and the sentencing judge's clear and unequivocal indication that death would be the appropriate penalty even if only one of the aggravating factors were found to exist there is no basis for reversal of the sentencing order. See, Lusk v. State, **446** So.2d **1038, 1043** (Fla. **1984).**

POINT X

THE TRIAL COURT DID NOT ERR IN IMPOSING THE DEATH SENTENCE IN THIS CASE WHERE HE PROPERLY DETERMINED AGGRAVATING AND MITIGATING CIRCUMSTANCES BASED UPON THE EVIDENCE PRESENTED AND WEIGHED THOSE FACTORS PURSUANT TO THE STATUTE IN DETERMINING THAT ANY ONE OF THE FOUR AGGRAVATING CIRCUMSTANCES PRESENTED OUTWEIGHED THE TOTALITY OF THE MITIGATING CIRCUMSTANCES.

THE TRIAL JUDGE PROPERLY FOUND FOUR AGGRAVATING CIRCUMSTANCES.

The appellant challenges the trial court's imposition of the death penalty claiming, inter alia, that three of the four aggravating circumstances are invalid and that the trial court erred in determining that the aggravating circumstances outweighed the mitigating so as to support the penalty of death. These arguments are factually and legally unsupported.

THE CAPITAL FELONY WAS COMMITTED FOR PECUNIARY GAIN-SECTION 921.141(5)(f) FLA. STAT. (1987).

Initially, the state notes that the appellant concedes the propriety of at least one of the four aggravating factors outlined in the trial court's well reasoned sentencing order, i.e., that the capital felony was committed for pecuniary gain. **(R 641-647, 643)** (Appellant's brief, p. **61).** This factor was amply established, as noted by the sentencing judge, through circumstantial and direct evidence adduced at trial. Id. Indeed, the appellant's own confession, the physical evidence admitted, the identification of the appellant at the scene of the murder, and a wealth of other circumstantial evidence all came

together in an ironclad case against Randolph that clearly demonstrated his pecuniary gain purpose and the killing of the victim to, in part, accomplish that purpose. In fact, the defense virtually conceded the robbery, attack on the victim, and sexual battery of the victim in closing argument at both the guilt and penalty phases. (R 1532-1536, 1582, 1816, 1823-1825, 1837) While aggravating factors must be proven beyond a reasonable doubt, evaluating the evidence and resolving factual conflicts are the trial judge's responsibility: when a trial judge, mindful of the applicable standard of proof, finds that an aggravating circumstance has been established the finding should not be overturned unless there is a lack of competent substantial evidence to support it. Bryan v. State, 533 So.2d 744 (Fla. 1988); Swafford v. State, 533 So.2d 270, 277 (Fla. 1988). There is no doubt, reasonable or otherwise, that the capital felony was committed for pecuniary gain. §921.141(5)(f), Fla. Stat. (1987).

Accordingly, since the lower court at sentencing and in its sentencing order specifically noted that any one of the four aggravating factors standing along would outweigh the mitigating factors considered together, it is clear that even if all three of the other aggravating factors were invalidated the trial court would still impose death. (R 646, 1901). See, Lusk v. State, 446 So.2d 1038, 1043 (Fla. 1984)(remand for resentencing unnecessary given trial court's express conclusion that certain aggravating factors, in and of themselves "outweighed any mitigating circumstances.) Thus, even if this Court were to invalidate one or more aggravating factors the error should be

deemed harmless and the sentence affirmed since there is no likelihood of a different sentence. See, State v. DiGuilio, 491 So.2d 1129, 1138 (Fla. 1986). As this Court stated in Rogers v. State, 511 So.2d 526, 535 (Fla. 1987): "Reversal of [a] 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."

THE TRIAL COURT PROPERLY DETERMINED THAT THE CAPITAL FELONY WAS COMMITTED WHILE THE DEFENDANT WAS ENGAGED IN THE COMMISSION OF, OR *AN* ATTEMPT TO COMMIT, OR FLIGHT AFTER COMMITTING OR ATTEMPTING TO COMMIT A SEXUAL BATTERY-SECTION 924.141(5)(d), FLA. STAT. (1987).

As previously noted section 921.141(5)(d) specifies that it should be considered a factor in aggravation for purposes of imposing the death penalty if the capital felony was committed while the defendant was engaged in the commission of, or an attempt to commit, or flight after committing or attempting to commit any of a number of enumerated felonies including sexual battery. The appellant's newfound argument that this aggravating factor can be applied "only if the dominant motive for the killing was the sexual battery,''was never presented to nor ruled upon by the trial court, nor is it supported by a logical or common sense reading of the statute or case law. For example, Randolph relies in part upon the analysis performed by this Court with reference to the aggravating factors set forth in sections 921.141(e) and (f) despite the fundamental difference in statutory language between those sections and the aggravating factor at issue.

Unlike section 921.141(e), which requires proof that the capital felony "was committed for ~~the~~ purpose of avoiding or preventing lawful arrest..." and section 921.141(f), which requires that it be shown that the capital felony "was committed for pecuniary gain" the clear and unequivocal language of (d) of the statute requires only that it be shown that the defendant was engaged in the commission of, attempt to commit, or flight after committing or attempting to commit one of the enumerated felonies including sexual battery when the murder was committed. (Underscoring supplied). Mere proof that one of these other violent/dangerous felonies was committed or attempted in conjunction with the capital felony is enough to make the defendant's actions more culpable, reprehensible, and more deserving of the death penalty. Nothing in the statutes supports the appellant's assertion that the dominant motive for the killing must be the perpetration of one or more of these violent felonies. To the contrary, it is sufficient that the murder occur during the same "criminal episode" as the emunerated felony. *Way* v. State, 496 So.2d 126, 128 (Fla. 1986); Adams v. State, 412 So.2d 850, 854-855 (Fla. 1982); Scott v. State, 411 So.2d 866, 867 (Fla. 1982). Randolph's efforts to rewrite the statute without benefit of legislative enactment should be rejected.

Here it was virtually conceded by defense counsel at the guilt and penalty phase that a sexual battery was perpetrated by Randolph during the course of the robbery and brutal assault which culminated in the victim's death. As such this case is clearly distinguishable from those relied upon by the appellant.

For example, here the victim was not already dead when the sexual battery took place as was the case in Moody v. State, 418 So.2d 989, 995 (Fla. 1982), where this Court rejected this aggravating factor finding that the underlying arson "was committed after Bell was killed.'' Similarly, in Parker v. State, 458 So.2d 750, 754 (Fla. 1984), this Court rejected the finding that the murder was committed during the robbery because the victim was already dead when Parker removed a necklace and ring from her body and there was no evidence to show that he had the intent to remove those items prior to the killing, i.e., it may have been nothing more than an afterthought rather than a motive for the murder. From the circumstances of that case it must be presumed that the rationale for the Court's rejection of that aggravating factor was that there was in fact no evidence to support the robbery finding beyond a reasonable doubt because the victim was already dead before the intent to steal was formulated by the defendant such that an element was lacking from the offense. Given the unequivocal language of the statute, there is no other proper and reasoned basis for rejecting that aggravating factor. There could be no other rationale since the legislature has made clear that if a murder occurs while the defendant is committing, attempting to commit, or fleeing after the commission or attempt to commit a robbery the aggravating factor is established; however, since the victim was already dead in Parker then the intent to steal did not arise until after the victim's death and the aggravating factor was inappropriate as it was it Moody.

Here, of course, the victim was not dead when the sexual battery was perpetrated and this Court has made clear that if a sexual battery occurs contemporaneously with the capital felony factual scenario then this aggravating factor is properly applied. For example, the evidence is this case is no less compelling than in Lightbourne v. State, 438 So.2d 380, 390-391 (Fla. 1983), where this Court affirmed this aggravating factor and also rejected a claim that the trial court improperly "doubled" the pecuniary gain and murder while engaged in a burglary aggravating circumstances finding that there is no improper "doubling" of even robbery and pecuniary gain aggravating circumstances where the defendant commits a sexual battery "in conjunction with the murder." Here there was certainly adequate proof of the sexual battery upon a live victim "in conjunction with the murder" so as to support this aggravating circumstance.

Finally, it should be noted that the appellant's argument is necessarily based upon the acceptance of his self-serving confession to the effect that his sexual battery of the victim was really nothing more than an "after-thought''in order to cover up the real motive for the crime and that to perpetrate this ploy and make it look like a "maniac" had committed the crime Randolph masturbated himself until a point in time when he could ejaculate into the victim. The state submits that under the facts of this case it was not unreasonable for the sentencer as fact-finder to reject as implausible and incredible Randolph's obviously self-serving recantation of the events relative to the sexual battery. (R 641-642, 1896)

It is within the provence of the trial court to determine what weight is to be given the statement of a defendant. Scott v. State, 494 So.2d 1134, 1138 (Fla. 1986). As noted by the sentencing court the victim had been stripped of her lower clothing and photographic evidence revealed massive bruising and trauma between the thighs and general vaginal area consistent with a violent rape. Id. Why was the victim virtually naked from the waist down with her pants found wrapped around her right ankle? (R 1052-1053) Would this level of undress have been necessary for the appellant to accomplish his "ingenious" scheme to make it look like a maniac did it? Why did he not simply unbutton or unzip the victim's pants or pull them down slightly and deposit his semen on their exterior or in the victim's undergarments? Would not this have been enough to have accomplished his plan? Is it even reasonable to believe that an individual whose alleged plan to sneak in and steal from the store unnoticed had gone so badly awry and who was obviously under a great deal of pressure from: his repeated failures to obtain entry into the safe and the money he sought; the activities and cries of the victim in the back room to whom he had to repeatedly return in an attempt to silence her; and the passing of time which would and ~~did~~ lead to the arrival of customers at the store who might discover him; to have concocted and then implemented such a preposterous scheme merely to convince the police that he couldn't have done this and that some "maniac" did? Under these circumstances, and the apparent ill will felt by Randolph towards the victim is it not more

reasonable, in fact, to reject the appellant's account as nothing more than a self-serving attempt to placate everyone, including his girlfriend, and convince them that he did not rape the elderly victim?

In any event, the evidence adduced demonstrated beyond a reasonable doubt that a sexual battery was perpetrated by the appellant contemporaneous with the capital felony such that this aggravating factor was properly applied. Of course, even if this factor were invalidated, the sentencing judge's unequivocal statement that he would have still imposed the death penalty since any one of the other aggravating factors would outweigh the mitigating and justify death, necessarily undermines any claim that the death sentence in this case should be invalidated. See, Lusk v. State, 446 So.2d 1038, 1043 (Fla. 1984); Rogers v. State, 511 So.2d 526, 535 (Fla. 1987).

THE CAPITAL FELONY WAS COMMITTED FOR THE PURPOSE OF AVOIDING OR PREVENTING A LAWFUL ARREST-SECTION 921.141(5)(e), FLA. STAT. (1987)

The trial court properly found that Randolph's separate and distinct violent assaults upon the victim culminating in her death were perpetrated for the purpose of avoiding or preventing his arrest for robbery and/or sexual battery. **(R 642, 1897-1898)** As correctly noted by the sentencing judge, Randolph's own confession amply demonstrates that he beat, knifed and strangled the victim to avoid or prevent arrest. (Id.) Specifically, Randolph stated that when he entered the store the victim saw him there and that "she knew him." (R **1198)** He noted that "she was

a lot tougher than he had expected" and that when he got her in the back room of the store and was holding her down he saw a knife and stabbed her because "she saw him and he really had no choice". Id. Indeed, Randolph's confessions and the circumstances of the offense make it abundantly clear that the dominant motive of the attack was to avoid Randolph's arrest both at the scene and later.

As the appellant correctly notes to support this aggravating factor there must be strong proof of the defendant's motive to avoid detection. Lopez v. State, 536 So.2d 226, 230 (Fla. 1988); Riley v. State, 366 So.2d 19 (Fla. 1978). While, as noted by the appellant, the mere fact that the victim knew and could have identified his assailant is insufficient in and of itself to prove this aggravating factor, that knowledge is an important evidentiary component, and where as in this case, the defendant's own statements and the other circumstances surrounding the offense demonstrate the intent to avoid arrest and/or eliminate a witness the factor is properly applied. The finding has often been based on admissions by a defendant as to his motive to eliminate a witness but the factor has also been approved on the basis of circumstantial evidence without any such direct statements. Swafford v. State, 533 So.2d 270, 276 (Fla. 1988); Routly v. State, 447 So.2d 1257, 1263 (Fla. 1983).

There is no doubt that the victim knew the appellant and would have identified him as the perpetrator of the robbery. A motive to eliminate potential witnesses to "an antecedent crime" can provide a basis for this aggravating circumstance. Swafford

v. State, supra; Menendez v. State, 419 So.2d 312, 315 n.2 (Fla. 1987) And while it is not necessary that an arrest be imminent at the time of the murder, Swafford, supra, it is clear that from the appellant's confessions and from the other evidence that the appellant perpetrated his series of assaults (beating, knifing, and strangulation) upon the victim both to prevent a contemporaneous alerting of those outside the store and the police and to assure that the victim would not eventually identify him as the perpetrator of the robbery. Randolph beat the victim into submission to quiet her down, then strangled her as she attempted to later get to her feet, then finally kicked and beat her again to stop her from screaming and alerting people outside the store. When that failed and she continued to make noise he stabbed her and again strangled her as she struggled with him. (R 533-536, 1233-1236) It is interesting to note that as part of his robbery plan Randolph took the time to remove from its vantage point a store surveillance camera in a clear effort to avoid detection and arrest. Furthermore, in a significant and telling portion of his confession, Randolph admitted that as he left the store after putting on a Handy-Way uniform to further avoid the possibility of detection, he looked in the back room of the store at the victim and confirmed that "she was not moving." (R 534, 1236) He then locked the store door behind him and fled in the victim's car. (R 534-535, 1236)

The central theme of Randolph's actions throughout the robbery and attack on the victim was avoidance of detection and arrest. He made repeated assaults upon the victim attempting to

silence and kill her with any and all available means. Why bother to remove the store surveillance camera if you plan on leaving a live victim whom you are sure can identify you? Why did he check on the victim in the rear of the store before leaving and determine that "she was not moving" after the violent beating, knifing, and strangulation inflicted if not to assure himself that she was dead? And what of Randolph's stated intent to make it appear as if some "maniac" had done the crime and thereby avoid the possibility that he might become a suspect, unless he intended to and thought he had killed the victim so that she could not identify him? Certainly, there would have been no need to create an inference that some fictional "maniac" had perpetrated the offense if the victim were to live since the appellant knew that she could identify him.

From the evidence presented the court as fact-finder could properly determine beyond a reasonable doubt that the defendant's dominant motive in attacking and killing the victim was to avoid arrest. That the victim knew Randolph is undisputed and the appellant's planning and efforts to avoid detection both during and after the offense are obvious. Here, as in Lightbourne v. State, 438 So.2d 380, 391 (Fla. 1983) the "proof of the requisite intent to avoid detection is strong". The defendant's own statements including his admission that he "had no choice" and the inferences to be drawn from those statements in light of the other evidence, including his other purposeful acts to avoid detection, amply support the finding of this aggravating factor. See, Lightbourne v. State, supra; Harvey v. State, 529 So.2d

1083, 1087 (Fla. 1988); Harmon v. State, 527 So.2d 187, 188 (Fla. 1988); Swafford v. State, supra; Correll v. State, 523 So.2d 562, 567-568 (Fla. 1988). Unlike the situation in Rembert v. State, 445 So.2d 337, 340 (Fla. 1984), relied upon by Randolph, in this case the appellant did take time before locking the store door and fleeing to assure himself that the victim was not moving and certainly and reasonably inferred that after his repeated and violent attacks upon her she had finally succumbed, was dead, and would not be a witness against him.

Again, however, even if this Court were to invalidate this aggravating factor notwithstanding the reasoned factual determination and legal conclusion by the trial court common, no basis for vacating the death sentence exists since even one of the other aggravating factors (including the one conceded by the appellant on appeal) outweighs the mitigating circumstances as already determined by the sentencing judge and justifies imposition of the death penalty. See, Lusk v. State, 446 So.2d 1038, 1043 (Fla. 1984); Rogers v. State, 511 So.2d 526, 535 (Fla. 1987).

THE CAPITAL FELONY WAS ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL– SECTION 921.141(5)(h), FLA. STAT. (1987).

The trial court's well-reasoned sentencing order finding that the capital felony was especially heinous, atrocious, or cruel is amply supported by the evidence adduced. There was medical testimony as to the violent and massive nature of the injuries inflicted from the beating, knifing, and strangulation perpetrated by the appellant. Furthermore, Randolph's own

admissions detailed the torture he inflicted upon the victim as she struggled to defend herself against his vicious beating and kicking; succumbed to an attempt at strangulation through a ligature around her neck; revived herself and screaming again suffered beating and kicking from Randolph who then stabbed her in the head and neck because "she was still making noise"; and finally again applied the ligature to "stop her from struggling". (R 534, 1234-1236) Despite the appellant's assertion to the contrary, Randolph's own written statement indicates that Randolph entered the back room of the store and attacked the victim on at least three and possibly four different occasions including the sexual battery upon the victim. (R 534) Any discrepancy over whether Randolph's violent assaults were perpetrated in three, four, or five incidents is of little consequence in light of the vicious and massive nature and manner of the attacks and injuries inflicted through the beating, strangulation and stabbing a struggling elderly woman and the clear suffering of the victim at the hands of Randolph.

This court has approved this aggravating factor where less vicious and torturous assaults were inflicted upon a victim. In Perry v. State, 522 So.2d 817, 820-821 (Fla. 1988) this Court approved a finding that a killing was heinous, atrocious, and cruel where the victim was brutally beaten in the head and face, choked, and stabbed. The Court noted that in other cases evidence that a victim was severely beaten while warding off blows prior to being fatally shot had been held sufficient to support this factor. Wilson v. State, 493 So.2d 1019 (Fla.

1996); see also, Dudley v. State, 545 So.2d 857, 860 (Fla. 1989)(victim's death by strangulation and having throat cut and apparent struggle for life sufficient to support heinous, atrocious, or cruel finding); Cherry v. State, 544 So.2d 184, 187 (Fla. 1989)(victim beaten to death with blows struck with fist and foot).

The trial court did not abuse its discretion in finding that this killing was henious, atrocious, or cruel, i.e., that the murder was accompanied by additional acts of a ptiless cirme, unnecessararily torturous to the citim. Hildwin v. State, 531 So.2d 124, 128 (Fla. 1988); State v. Dixon, 283 So.2d 1, 9 (Fla. 1973).

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REJECTING THE NON-STATUTORY MITIGATING CIRCUMSTANCE OF NO SIGNIFICANT HISTORY OF PRIOR CRIMINAL ACTIVITY-SECTION 921.141(6)(a), FLA. STAT. (1987).

It is well established that it is up to the trial court to decide if any particular mitigating circumstance has been established and the weight to be given it. Hudson v. State, 538 So.2d 829, 831 (Fla. 1989); Scull v. State, 533 So.2d 1137, 1143 (Fla. 1988); Toole v. State, 479 So.2d 731 (Fla. 1985). So long as all of the evidence is considered the trial judge's determination of a lack of mitigation will stand absent a palpable abuse of discretion. Provenzano v. State, 497 So.2d 1177, 1184 (Fla. 1986); Pope v. State, 441 So.2d 1073, 1076 (Fla. 1983). "It is not the function of this Court to substitute its sentencing judgment for that of the trial judge", Bryan v. State, 533 So.2d 744, 749 (Fla. 1988), and reversal of a trial

court's considered determination with reference to the existence of mitigating factors will not be reversed simply because an appellant draws a different conclusion from the facts. Lopez v. State, 536 So.2d 226, 231 (Fla. 1988); Hansbrough v. State, 509 So.2d 1081, 1086 (Fla. 1987); Stano v. State, 460 So.2d 890, 894 (Fla. 1984).

Initially, it must be noted that Randolph failed to carry his burden of proof with reference to this mitigating factor; i.e., no evidence was presented to demonstrate a lack of a significant prior criminal history. See, Lara v. State, 464 So.2d 1173, 1179 (Fla. 1985).

The appellant's lengthy criminal history, noted by the sentencing judge, is documented in the pre-sentence investigation and encompasses various offenses from 1983 to the date of the offense at issue including non-violent offenses (e.g., trespass, disorderly conduct, and two theft related offenses) as well as two convictions for "assault on a female by male over 18". (R 621-622, 644) Randolph did not challenge the accuracy of the PSI information referencing his prior record. Furthermore, and, as again noted by the trial court, there was other discussion and testimony by the defense regarding the Defendant's criminal history". Randolph made clear through evidence presented at both the guilt and penalty phases that he had been a consistent illegal drug user for some years prior to this offense and that allegation was again affirmed by the appellant in his PSI. (R 625, 644, 1734-1737) Direct evidence of "criminal activity" even without evidence of conviction may rebut a defendant's claim of

no significant history of prior criminal activity. Walton v. State, 547 So.2d 622, 625 (Fla. 1989) In Walton this Court held that evidence of Walton's drug activity could rebut a claim of this mitigating factor. ~~See also~~, Washington v. State, 362 So.2d 658, 666-667 (Fla. 1978)(defendant's admission that he had carried on a course of criminal activity including burglaries and possession of stolen property for a significant period of time was properly considered by the sentencing judge and determined sufficient to reject this mitigating factor).

No abuse of discretion has been demonstrated. Furthermore, even if this court were to determine that this mitigating circumstance should have been applied any such error was necessarily harmless and would not justify reversal inasmuch as a review of the sentencing order makes it clear that the trial judge would have afforded it little weight in light of the aggravating circumstances presented and would still impose death. See, Rogers v. State, 511 So.2d 526, 535 (Fla. 1987); State v. DiGuilio, 491 So.2d 1129, 1138 (Fla. 1986).

THE SENTENCING JUDGE DID NOT ABUSE HIS DESCRETION IN REJECTING THE APPELLANT'S CLAIM THAT HE WAS UNDER THE INFLUENCE OF EXTREME ~~MENTAL~~ OR EMOTIONAL DISTURBANCE-SECTION 921.141(6)(b), FLA. STAT. (1987).

As candidly conceded by the appellant on appeal, there was no evidence adduced to support the finding of the statutory mitigating circumstance that he was under the influence of extreme mental or emotional disturbance at the time of the offense. In fact, Dr. Krop, an expert witness for the defense, specifically opined that in the psychological context, none of

the statutory aggravating factors applied to ~~the~~ appellant, and that Randolph did not suffer from extreme mental or emotional disturbance at the time of the commission of the capital felony. (R 1724-1725, 1751, 1754) Given the testimony of the defendant's own witness it cannot be said that the trial court abused it discretion in rejecting the statutory aggravating factor.

The sentencing judge did find that, in accordance with Dr. Krop's testimony, Randolph suffered from something called an "A-typical personality disorder" (R 644, 646) The court noted that this disorder was "a recognized anti-social disorder" placed in a "catch-all" category for disorders that did not otherwise fit established categories. (R 644) The court properly exercised its discretion in determining that Randolph's personality disorder was "of such a weak nature" that it, together with the other non-statutory mitigating factors established, would not outweigh the statutory aggravating factors. Indeed, as previously noted, the court determined that any single aggravating factor would outweigh all of the mitigating. (R 646) It should be noted that a trial court is free to reject even allegedly "uncontradicted" expert psychiatric testimony in determining the applicability of mental health mitigating circumstances. Roberts v. State, 510 So.2d 885, 894 (Fla. 1987); Bates v. State, 506 So.2d 1033 (Fla. 1987). This Court will not substitute its judgment for that of the trial court with reference to the weight given mitigating factors. Bryan v. State, 533 So.2d 744, 749 (Fla. 1988). Inasmuch as it is clear that the trial court considered the evidence surrounding these

alleged mitigating factors no abuse of discretion has been demonstrated with reference to his determinations as to their applicability and weight. Hudson v. State, 538 So.2d 829, 831 (Fla. 1989); Daugherty v. State, 419 So.2d 1067 (Fla. 1982); Pope v. State, 441 So.2d 1073, 1076 (Fla. 1983).

The trial court's determination, after consideration of all the evidence, that Randolph's alleged personality disorder was of little weight as an aggravating factor was in no way undermined by Randolph's self-serving claims that he was a crack cocaine addict or by evidence that "the defendant did not perceive any love from his family." (Appellant's brief, p. 70) It is clear that these factors as well as the other mitigating factors were considered by the trial court and weighed against the statutory aggravating factors. The court accepted the fact that Randolph was a crack cocaine addict and that he "never had a loving relationship with his Mother" but after considering these factors in concert with all of the other allegedly mitigating evidence presented determined it to be of little weight such that any one of the statutory aggravating factors would outweigh all mitigating. (R 645-646)

The court's determination that there was no evidence to demonstrate that Randolph was under the influence of any intoxicating drug or substance, as outlined in his sentencing order, is supported by the record and most specifically the purposeful manner in which Randolph committed the offenses at issue and the testing of those who saw him contemporaneous with the offense. (R 645) Again, since the trial court has clearly

considered all of the evidence presented and performed the statutorily mandated weighing process this Court should not substitute its sentencing judgment for that of the trial judge merely because the appellant feels that the circumstances warrant a different conclusion. Bryan v. State, supra; Lopez v. State, 536 So.2d 226, 231 (Fla. 1988); Stano v. State, 460 So.2d 890, 894 (Fla. 1984). It is within the province of the trial court to determine what weight is to be given a statement by the defendant. Scott v. State, 494 So.2d 1134, 1138 (Fla. 1986). Certainly, the specificity with which Randolph recalled the details of his robbery, sexual battery, and murder, contradicts any claim that continual drug abuse impaired his capacity to understand or conform his conduct or any other compelling mental health mitigator. See, Kokal v. State, 492 So.2d 1317, 1319 (Fla. 1986); Cooper v. State, 492 So.2d 1059, 1062 (Fla. 1986); Simmons v. State, 419 So.2d 316 (Fla. 1982); Buford v. State, 403 So.2d 943 (Fla. 1981).

Randolph has failed to demonstrate that the trial court afforded inadequate weight to his alleged cocaine based mental health problem. Nor can the appellant's reliance upon cases involving reversal of jury overrides where mental health factors may have been the basis for the jury's recommendation of life serve to undermine the sentencing court's exercise of discretion in this case where the jury clearly rejected Randolph's mental impairment "impulsive killing" claims and recommended death. Furthermore, Randolph's claim that this killing was "impulsive" in nature necessarily overlooks the extended time period involved

and Randolph's separate and distinct assaults upon the victim with any violent means available with the clear intent to dispatch her so as to avoid detection and apprehension and facilitate the robbery.

The various opinions cited by the appellant in support of his apparent claim that his alleged mental health problem and the claimed "impulsive" nature of his killing mandated a life sentence are clearly distinguishable and inapposite to the factual and legal circumstances of this case. The majority of decisions relied upon by the appellant are jury overrides where this Court, applying the elevated Tedder standard utilized in those cases, determined that the sentencing courts overlooked potentially reasonable bases upon which the jury might have recommended life. See, e.g., Holsworth v. State, 522 So.2d 347 (Fla. 1988); Amazon v. State, 487 So.2d 8 (Fla. 1986). In other cases this Court rejected sentencing decisions because of the trial court's improper consideration of non-statutory aggravating factors and on proportionality analyses not relevant to this cases. See, Miller v. State, 373 So.2d 882 (Fla. 1979); Proffitt v. State, 510 So.2d 896 (Fla. 1987); Caruthers v. State, 465 So.2d 496 (Fla. 1985); Rembert v. State, 445 So.2d 337 (Fla. 1984). None of the cases cited by the appellant is comparable to the situation at bar where a number of statutory aggravating factors were properly found by the sentencing judge, which when weighed against the mitigating factors were determined to out-weigh those factors and justify death.

The death sentence imposed is not disproportionate to others affirmed by this Court and is clearly justified by the number of aggravating factors present; the lack of any statutory mitigating factors or weighty non-statutory mitigating factors; and the brutality of the murder perpetrated in conjunction with the other violent felonies of robbery and sexual battery. See, e.g., Carter v. State, 14 F.L.W. 525, 526 (Fla. October 19, 1989)(death sentence affirmed despite "robbery gone bad" argument where three aggravating circumstances far outweighed non-statutory mitigating); Remeta v. State, 522 So.2d 825 (Fla. 1988)(defendant's sentence of death affirmed in robbery/murder context with four aggravating and four mitigating circumstances); Hill v. State, 515 So.2d 176 (Fla. 1987)(death sentence affirmed in robbery context where four aggravating factors and one mitigating), Rogers v. State, 511 So.2d 526 (Fla. 1987)(death sentence affirmed in robbery situation where, after review, there were only two aggravating factors and non-statutory mitigating circumstances); Lightbourne v. State, 438 So.2d 380 (Fla. 1983)(five statutory aggravating circumstances versus two statutory mitigating factors in a burglary/sexual battery context was sufficient).

THE TRIAL COURT DID PROPERLY CONSIDER ALL MITIGATING EVIDENCE IN REACHING ITS SENTENCING DECISION.

Randolph's apparent assertion that the trial court did not consider all of the factors in mitigation in reaching his sentencing decision is spurious. It is presumed that the judge followed his own instructions and considered all mitigating

evidence and there is nothing in the record to indicate he did not. Johnson v. Dugger, 520 So.2d 565, 566 (Fla. 1988). The failure of the trial judge to specifically address every conceivable mitigating circumstance in his sentencing order does not demonstrate that such evidence was not considered. Brown v. State, 473 So.2d 1260, 1268 (Fla. 1985); Mason v. State, 438 So.2d 374, 379-380 (Fla. 1983). The sentencing judge made clear that he had in fact considered all of the evidence presented with reference to non-statutory mitigating circumstances "including, but not limited to" those specifically addressed in his sentencing order. (R 645, 1901) Furthermore, Randolph's claim that the court did not consider the remorse that he expressed for his actions in mitigation in patently untrue, in that the sentencing order specifically addresses that factor and determines it to be of "very little weight given the circumstances of this offense." (R 646) (Appellant's brief, p. 73)

The sentencing court clearly did evaluate "all the evidence presented with reference to...non-statutory mitigating circumstances" and determined that those factors when considered in concert with the other mitigating circumstances specifically addressed in the sentencing order, those factors were insufficient to outweigh even one of the aggravating factors. Id. The trial court stated that the other unspecified non-statutory mitigating factors "even if proven" would not, in conjunction with the other mitigating factors specifically discussed, outweigh even one of the statutory aggravating

factors. In reaching this conclusion he necessarily found that the unnamed "other" mitigating factors would be deemed adequately established but were simply of little weight. No abuse of discretion has been demonstrated and this court should defer to the sentencing judge's determination.

Certainly, Randolph's alleged cooperation with the police can be viewed as of little weight given his previous murder of the victim and other actions in order to avoid detection and arrest. He did not turn himself in; rather the police captured him after he fled. Similarly, despite the fact that Randolph was not originally armed before the offense he wasted no time in taking advantage of every violent means available to him to dispatch the victim and did ultimately arm himself with, at least, a knife and a ligature in attacking her. Finally, the speculative assertion that Randolph was "a good person" prior to his alleged crack cocaine addiction is questionable given his criminal record and his assertion of good prospects for rehabilitation because he did "relatively well" in the Army is clearly undermined by his record of disciplinary proceedings in that context. (R 621-622, 624) Bryan v. State, supra; Lopez v. State, supra; Stano v. State, supra.

Given the trial court's clear indication that it considered and applied all of the non-statutory mitigating factor evidence and weighed that evidence against the aggravating factors established no abuse of discretion has been demonstrated in imposition of the death penalty at issue. (R 645)

Finally, even if it could be said that the trial court erred in rejecting or overlooking these other claimed non-statutory mitigating factors, no reversal is justified given the obvious lack of weight to be afforded such factors and the great weight of the aggravating factors noted by the sentencing court. See, Rogers v. State, 511 So.2d 526, 535 (Fla. 1987); State v. DiGuilio, 491 So.2d 1129, 1138 (Fla. 1986). "The strength of the aggravating circumstances in this case would have supported the death penalty "even if these additional mitigating factors were applied." Lightbourne v. State, 438 So.2d 380, 390 (Fla. 1983).

POINT XI

AS THIS COURT HAS REPEATEDLY HELD THAT THE FLORIDA CAPITAL SENTENCING STATUTE IS NOT UNCONSTITUTIONAL ON ITS FACE OR AS APPLIED; THIS CLAIM HAS NOT BEEN PRESERVED FOR APPEAL.

As the appellant candidly concedes this argument is nothing more than a regurgitation, virtually verbatim, of the standard boilerplate list of constitutional challenges characteristically raised and repeatedly and specifically rejected by this Court and the United States Supreme Court. Mendyk v. State, 545 So.2d 846 (Fla. 1989); Stano v. State, 467 So.2d 890 (Fla. 1984); Remeta v. State, 522 So.2d 825, 829 (Fla. 1988); Lightbourne v. State, 438 So.2d 380, 385-386 (Fla. 1983); Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976).

Initially, it must be noted that the specific constitutional challenges raised in the appellee's "grab-bag" constitutional arguments were never presented to nor determined by the trial court below such that this issue has not been preserved for appellate review. Swafford v. State, 533 So.2d 270 (Fla. 1988); Eutzy v. State, 458 So.2d 755, 757 (Fla. 1984); Tillman v. State, 471 So.2d 32, 35 (Fla. 1985); Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982). The hodge-podge of legal arguments, despite its standardized nature, was never presented by a motion to dismiss to the trial court nor was it ruled upon at the hearing wherein those specific constitutional arguments raised by motion were addressed by the lower court (R 105-124, 775-792). The state urges this court to specifically note this procedural default in its opinion denying relief upon this claim. See, Harris v.

~~Reed~~, ____ U.S. ____, 109 S.Ct. 1038, 1043, ____ L.Ed.2d ____ (1989).

CONCLUSION

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

Respectfully submitted,

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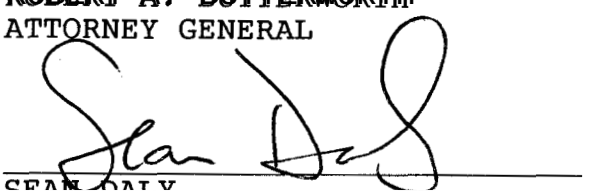

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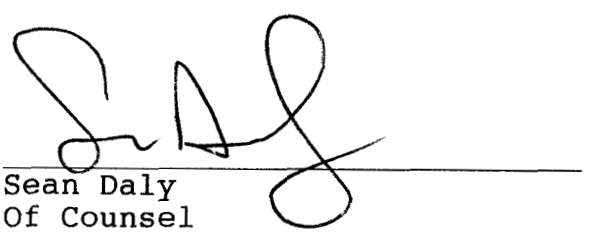
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Answer Brief of Appellee has been furnished by delivery to James R. Wulchak, Assistant Public Defender to 112 Orange Avenue, Suite A, Daytona Beach, Florida 32114, this 18th day of December, 1989.



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