IN THE SUPREME COURT OF FLORIDA

GREGORY CAPEHART,

Appellant,

v. CASE NO. 74,231

STATE OF FLORIDA,

Appellee.

_____/

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

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant, Gregory Capehart, was the defendant before the trial court and the Appellee, the State of Florida was the prosecution. The parties will be referred to by their proper names or as they appeared before the trial court. The record on appeal consists of a total of six (6) volumes and will be referred to by the letter "R" followed by the appropriate page number.

SUMMARY OF THE ARGUMENT

Issue I: A confession of committing a crime is direct, not circumstantial, evidence of that crime. In the instant case, the defendant's palm print was wrapped around the window screen to Marlene Reeves' apartment. Diane Harris saw the defendant, wearing a black trench coat and hat, coming from the area of the victim's apartment between 6:30 and 7:00 a.m. on the morning of the homicide. Victim Marlene Reeves' neighbor, Rebecca Henry, was attacked by a black man in her apartment on the morning of the murder. Robert Caruthers observed an individual wearing a trench coat and hat walking toward the victim's apartment on the morning of the murder. In addition, the defendant advised Carol McPhail, "Well, they ain't going to catch me." Capehart told Walter Harrison that he broke into the house through a window to get money without meaning to hurt the lady, but she woke up. The defendant told Harrison that he tried to knock her out with a pillow over her face, but he accidently killed her. Further, the defendant's unsolicited statement to Officer Tom Muck that he "just wanted the girl's pussy" was consistent with the sexual assault on victim Marlene Reeves.

Issue II: During redirect, a witness may be questioned about matters brought up during cross-examination, and the trial court has broad discretion to determine the proper scope of the examination of the witness. *Sub judice*, the trial court properly found the testimony admissible inasmuch as the defense clearly "opened the door" to this line of inquiry.

Issue III: The defense did not object, move to strike, or request a curative instruction directed to the response by Officer Muck. Therefore, this issue has not been preserved for appeal. Furthermore, it was not error for the prosecutor to inquire of the investigating officer whether he found any corroboration for the defendant's self-serving statements.

Issue IV: This issue has not been preserved for appellate review, since the defendant did not proffer the excluded testimony for the record. Even if the argument is considered, the trial court properly sustained objections to the defense attorney's attempt to get a state witness to admit that prior statements from her deposition were inconsistent with her in-court testimony, since such testimony would have invaded the province of the jury.

Issue V: In general, whether the facts and data relied upon by the experts are in evidence, or even could be in evidence, are not relevant; the only relevant inquiry is whether the facts or data are of a type reasonably relied upon by the experts in the subject to support the opinion expressed.

Issue VI: The defendant now complains that the jury's verdict form is ambiguous and will not support a conviction for burglary. There was no objection at trial to either the verdict form or the instructions to the jury on this count; and, therefore, this issue has not been preserved for appeal.

Issue VII: In the instant case, where the defendant made no objection at any stage of trial as to purportedly improper materials under Booth and Gathers, appellate relief is precluded.

Issue VIII: In the instant case, the defendant was not entitled to an inquiry under Faretta because he clearly was not interested in representing himself. The defendant herein merely alleged his dissatisfaction and general loss of confidence and trust. Such statements do not trigger a Nelson inquiry because they do not "amount to an assertion of counsel's incompetence requiring exploration or verification as a predicate for substitution" Furthermore, a Nelson inquiry is not required when a motion to discharge counsel is not made until after the jury has been empaneled.

Issue IX: The defendant's failure to object at the time of the testimony of Dr. Sprehe and Dr. Merin precludes any subsequent complaint about their testimony. Furthermore, the now-challenged testimony at bar was admissible to rebut the testimony of defense expert Dr. Epstein.

Issue X: It is clear from the record of this case and, indeed, the defendant does not contend otherwise, that no objection based upon Caldwell was offered at trial. Thus, this claim is procedurally barred where not objected to at trial. Absent fundamental error, the failure to object to the jury instruction at trial precludes appellate review.

Issue XI: The trial court's error in referring to appellant's prior conviction as armed robbery is harmless as the aggravating factor was proven beyond a reasonable doubt and inasmuch as no objection was made to the jury instruction. Further, the jury's verdict on the burglary charge does not

undermine the court's finding that the Defendant was engaged in a sexual battery or burglary when he committed the homicide. Both crimes were sufficiently established by the evidence. The evidence also supported the court's finding of heinous, atrocious or cruel and cold, calculated, and premeditated aggravating circumstances and no objection was made to the form of the instruction on these factors.

The trial judge's finding that no mitigating circumstances existed is also well-supported by the record and the law. The defendant only challenges the court's failure to find certain non-statutory mitigators. Counsel below did not identify these same factors to the trial court. The non-statutory evidence that was identified by the defendant was not supported by the record. Based on the foregoing, the trial court's analysis and findings are sufficient to support the sentence of death.

Issue XII: Remand for preparation of a scoresheet is unwarranted because the trial court could have, and undoubtedly would have, departed upward to the statutory maximum for the non-capital felony on the basis of the unscored conviction for first-degree murder.

Cross-Appeal: The perfunctory, routine appointment of the Public Defender at the defendant's first appearance proceeding did not preclude the transporting officers from advising the defendant of his Miranda rights and obtaining statements from the defendant following his voluntary waiver of Miranda.

ARGUMENT

ISSUE I

SUFFICIENT EVIDENCE WAS PRESENTED AT TRIAL TO ESTABLISH THAT IT WAS THE DEFENDANT, GREGORY CAPEHART, WHO KILLED MARLENE REEVES.

The purpose of a motion for judgment of acquittal is to challenge the legal sufficiency of the evidence. In moving for a judgment of acquittal, the defendant admits all facts adduced from the evidence and every conclusion favorable to the State that fairly can be inferred therefrom. A trial court should not grant a motion for judgment of acquittal unless the evidence is such that no lawful view of the evidence would sustain the charge and neither credibility determinations nor the probative force of the evidence should be determined in a motion for judgment of acquittal. Spinkellink v. State, 313 So.2d 666 (Fla. 1975); Lynch v. State, 293 So.2d 44, 45 (Fla. 1974).

The defendant claims that the evidence presented against him was purely circumstantial. Although the defendant's confession to law enforcement was suppressed, on the basis of an alleged Miranda[1] violation,[2] the remaining evidence against the defendant included, *inter alia*, not only the defendant's palm print, but also the defendant's confession to Walter Harrison and incriminating statements to Carol McPhail, David McKinnon, and

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[1] Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

[2] See, Cross-Appeal, *infra*.

Tom Muck. A confession of committing a crime is direct, not circumstantial, evidence of that crime. Hardwick v. State, 521 So.2d 1071, 1075 (Fla. 1988).

The question of whether the evidence fails to exclude all reasonable hypotheses of innocence is for the jury to determine and where there is substantial, competent evidence to support the jury's verdict, the verdict will not be reversed on appeal. Cochran v. State, 547 So.2d 928 (Fla. 1989). Even in a circumstantial evidence case, the jury is not required to believe the defense version of facts on which the State has produced conflicting evidence, and the State, as Appellee, is entitled to a view of any conflicting evidence in the light most favorable to the jury's verdict. Id., at 930 citing Buenoano v. State, 478 So.2d 387 (Fla. 1st DCA 1985), review dismissed, 504 So.2d 762 (Fla. 1987).

In the instant case, the fingerprint expert confirmed that the defendant's right palm print was recovered from the victim's window screen. The palm print was a "wrap-around" print, left by grabbing the window screen and cupping his palm around it. (See R. 482-483; 485). The defendant's reliance on the fact that his prints were not recovered from inside the victim's apartment is unpersuasive. The victim lived in the apartment and yet none of her prints were recovered from inside the residence. (R. 484). Diane Harris saw the defendant, who was wearing a black trench coat and a hat, coming from the area where the victim's apartment was located between 6:30 and 7:00 a.m. on the morning of the

homicide. (R. 422-424). Robert Caruthers observed an individual wearing a trench coat and hat walking toward the victim's apartment on the morning of the murder. (R. 305). Victim Marlene Reeves' neighbor, Rebecca Henry, was attacked by a black male on the morning of the murder. (R. 290). In addition, the defendant advised Carol McPhail, "Well, they ain't going to catch me." Capehart told Walter Harrison that he broke into the house through a window in order to get money, but the lady woke up. (R. 446-447). The defendant told Harrison that he tried to knock out the victim by holding a pillow over her face, but he accidently killed her. (R. 446).

When arrested in Orlando by Officer McKinnon, Capehart volunteered that he was with some "dudes" who were going to rob this old lady. (R. 446). The defendant claimed to be waiting on the porch, but when the others did not come outside, Capehart went inside and saw ". . . dude sitting on top of the lady, strangling her" (R. 446). The defendant said he didn't know how they got him, he must have left his fingerprints on the bedroom door. Capehart also said words to the effect of "Man, I didn't know they were going to kill her." (R. 468). On April 12, Officer Tom Muck and Officer Gene Caruso of the Pasco County Sheriff's Office transported Capehart from Orlando to the Pasco County Jail. (R. 461-462, 498). Six months later, on October 7, 1988, Officer Muck was at the Pasco County Detention Facility when Capehart told him ". . . You messed me up." (R. 500). When Muck said, "I don't know what you are talking about", Capehart

relied, "You know, I just wanted that girl's pussy." (R. 500). Capehart's voluntary exclamation was confirmed by the physical evidence of sexual assault against the victim, Marlene Reeves, and was inconsistent with the Rebecca Henry burglary. Where the State has brought forth competent evidence to support every element of the crime, a judgment of acquittal is not proper. *Sub judice*, the evidence presented in the instant case was sufficient to withstand a motion for judgment of acquittal and to support the jury's verdict of first degree murder.

ISSUE II

THE TRIAL COURT DID NOT ERR IN ALLOWING THE STATE'S EXPERT WITNESS ON FINGERPRINT IDENTIFICATION TO ACKNOWLEDGE THAT HIS FINGERPRINT IDENTIFICATION WAS CONFIRMED BY THE FLORIDA DEPARTMENT OF LAW ENFORCEMENT.

The final question asked by the defense on cross-examination of the state's expert witness, Officer William Ferguson, was whether any of the fingerprints recovered from the scene were sent to the Florida Department of Law Enforcement. Therefore, on redirect examination, the prosecutor inquired about the subject initiated by the defense:

> MR. JORDAN [PROSECUTOR]:
>
> Q. Deputy Ferguson, Mr. Ivie [Defense Counsel] just asked you whether or not the prints had been sent down to the Florida Department of Law Enforcement for examination.
>
> A. Yes, sir. They were.
>
> Q. Would the known prints of this defendant be sent down there?
>
> Yes, sir.
>
> Q. And was the print you took off that screen sent down there?
>
> A. Yes, sir.
>
> Q. And isn't it a fact they told you it was a match? Didn't they?
>
> MR. IVIE: Objection.
>
> A. They confirmed it was a positive match.
>
> MR. IVIE: Objection, Your Honor.

THE COURT: I'm sorry?

MR. IVIE: Move to strike question and answer.

MR. JORDAN: He opened the door, Judge, about other people examining it and I'm just going forward with it.

THE COURT: I'll deny the objection for that reason.

(R. 490-491).

Now on appeal, the defense claims that Detective Ferguson's testimony should have been excluded as hearsay. As evidenced by the foregoing excerpt, the defendant's hearsay-based argument was never presented to the trial court, and, therefore, this issue has not been preserved for appeal. See e.g., Bertolotti v. Dugger, 514 So.2d 1095 (Fla. 1987) [In order to preserve an issue for appellate review, the specific legal argument or ground upon which it is based must be presented to the trial court. Id., at 1096 citing Tillman v. State, 471 So.2d 32 (Fla. 1984)]

During redirect, a witness may be questioned about matters brought up during cross-examination, and the trial court has broad discretion to determine the proper scope of the examination of the witness. Harmon v. State, 527 So.2d 182 (Fla. 1988). *Sub judice*, the trial court properly found the testimony admissible inasmuch as the defense clearly "opened the door" to this line of inquiry. *See, e.g.* Tompkins v. State, 502 So.2d 412 (Fla. 1987) [Defense opened the door to inquiry; therefore, on redirect,

state allowed to elicit testimony to qualify, limit, or explain testimony elicited on cross.]; Jackson v. State, 359 So.2d 1190 (Fla. 1978) [Appellant cannot initiate error and then seek reversal based on that error.] Copeland v. State, 457 So.2d 1012 (Fla. 1984). [Since the defendant's counsel opened the door to the damaging but objectionable reference by asking the question, Appellant may not now seek reversal on the basis of that error. Id. at 1018].

In the instant case, the defense sought to characterize the fingerprint expert as an inexperienced "rookie". The defense established that this was Officer Ferguson's first 1st degree murder case (R. 479) and the defense initiated the topic about which the defendant now complains. Therefore, the State was properly allowed to pursue questioning on redirect to respond to the defense-initiated topic and to rebut the defense attack on the witness' competence. *See, e.g.* Tompkins, 502 So.2d at 419, citing McCrae v. State, 395 So.2d 1145, 1151-52 (Fla. 1980) (State properly entitled to transcend normal bounds of cross-examination in order to negate delusive innuendoes of defense counsel), cert. denied 454 U.S. 1041, 012 S.Ct. 583, 70 L.Ed.2d 486 (1981).

Lastly, the prosecutor's comment's during closing argument, noting that the FDLE confirmed Officer Ferguson's print match, was not objected to at trial and, therefore, has not been preserved for appeal. Wide latitude is accorded a prosecutor during closing argument and the control of the comments is within

the discretion of the trial court. Breedlove v. State, 413 So.2d 1 (FLA. 1982), *cert. denied*, 459 U.S. 882, 103 S.Ct. 1084, 74 L.Ed.2d 149 (Fla. 1982). The comments about which the defendant now complains were either based on evidence received during the trial, Gibson v. State, 475 So.2d 1346 (Fla. 1st DCA 1985), and were either fair rebuttal or invited response to arguments presented by the defense, DuFour v. State, 495 So.2d 154 (Fla. 1986).

ISSUE III

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING OFFICER TOM MUCK TO INFORM THE JURORS THAT THERE WAS NO CORROBORATION OF THE DEFENDANT'S SELF-SERVING STATEMENTS THAT SOMEONE ELSE WAS WITH THE DEFENDANT WHEN THE VICTIM WAS RAPED, ROBBED, AND KILLED.

The testimony about which the defendant now complains was elicited during the direct examination of Officer Tom Muck:

[PROSECUTOR]:

Q. Okay. You've read the book, been deposed, you have looked at the pictures, you arrested Capehart. Among the things that are contained within the reports that you have reviewed, is there a report form an Officer McKinnon of the Orlando Police Department?

[OFFICER MUCK]

A. Yes, sir.

Q. And are you familiar with the statements McKinnon says Mr. Capehart made to McKinnon at the time he was arrested in Orlando?

A. I like to think I am. Yes, sir.

Q. Based upon your investigation, your review of the investigation and your knowledge of this case, is there any reason to believe that Mr. Capehart told McKinnon the truth about there being someone else besides Capehart involved in killing, raping and robbing Marlene Reeves?

A. Are you saying that I know or what I have read? What I know, what I have read?

Q. Everything that you have read, everything you know about the investigation.

[DEFENSE COUNSEL]:

MR. IVIE: Your Honor, I am going to object to that question. I think it's improper.

[PROSECUTOR]

MR. VAN ALLEN: Your Honor, he can testify to the results of his investigation.

MR. IVIE: May we approach the bench, Your Honor?

THE COURT: Approach the bench.

(Bench Conference)

MR. IVIE: The attempt is clear that the question when answered would invade the province of the jury. He's basically asking this man to make a determination from the witness stand about what he said was an admission to the killing of Marlene Reeves, that's not clear form the statement at all. That's an interpretation from a file which is grossly hearsay and prejudicial to the defendant.

THE COURT: I'll deny the objection. I'll allow the witness to testify as to any other evidence which he has knowledge, which he feels is relevant to this inquiry.

MR. VAN ALLEN: Thank you.

(Open Court)

(By Mr. Van Allen) All right. Once again, Detective Muck, let me ask you the question, based upon your review of the file which includes the statements to Officer McKinnon, the review of the physical evidence, your knowledge of this case, overall, is there any corroboration in your investigation or the sheriff's office investigation that would tend to corroborate Capehart's statements that there was somebody else with him at the Reeves' residence when she was raped, robbed and killed?

A. Absolutely none. As a matter of fact, he flat out lied to the officer from Orlando.

MR. VAN ALLEN: Thank you.

That's all I have, Judge.

THE COURT: Cross.

(R. 501-503).

As evidenced by the foregoing excerpt from the record, although the defense objected to the prosecutor's question, the defense did not object, move to strike, or request a curative instruction directed to the editorial response by Officer Muck. Therefore, this issue has not been preserved for appeal. Castor v. State, 365 So.2d 701 (Fla. 1978). Furthermore, it was not improper to allow the prosecutor to inquire of the investigating officer whether any evidence was found to corroborate Capehart's self-serving remarks. Officer Ferguson's isolated statement was entirely consistent with the unobjected-to evidence presented at trial and did not deprive the defendant of a fair trial. The principle is well-settled that the trial court is vested with wide discretion with respect to the admissibility of evidence and, in the absence of an abuse of discretion, the trial court's ruling will not be disturbed on appeal. Booker v. State, 397 So.2d 910 (Fla. 1981), *cert. denied*, 454 U.S. 975, 70 L.Ed.2d 261, 102 S.Ct. 493. The defense has not demonstrated any abuse of discretion in the instant case.

Finally, the prosecutor's two references during closing to the defendant having lied to Officer McKinnon was not error. In Craig v. State, 510 So.2d 857 (Fla. 1987), this Court found no impropriety when the prosecutor referred to the defendant as a "liar" and concluded that it was for the jury to decide what evidence and testimony was worthy of believe and the prosecutor was merely submitting his view of the evidence for their consideration. Here, as in Craig, the evidence presented at trial contradicted the defendant's self-serving statements to Officer McKinnon and it was not error for the prosecutor to argue that the defendant lied.

ISSUE IV

THE TRIAL COURT DID NOT IMPROPERLY RESTRICT THE DEFENDANT'S CROSS-EXAMINATION OF STATE WITNESS DIANE HARRISON.

The defendant also challenges the trial court's sustaining the prosecutor's objections to questions addressed to state witness Diane Harrison as the defense attorney was trying to impeach Harrison on cross-examination. Defense counsel recited allegedly prior inconsistent statements from the witness' deposition, and the witness admitted having made the prior statements. Defense counsel then tried to get the witness to admit that the statements were in fact inconsistent (R. 431). When the prosecutor objected, the court agreed the questions were improper and stated that it was up to the jury to determine if the witness had been impeached (R. 432). Defense counsel did not indicate why he believed the testimony to be admissible and did not request the opportunity to proffer the witness' responses for the record.

It must be noted initially that this issue has not been preserved for appellate review, since there was no proffer as to how Harrison would have testified. The defendant now asserts that "Had Harrison testified ... that she did wish to change her in-court testimony ... or that her deposition testimony ... was the truth, or had Harrison acknowledged that her in-court answers ... were indeed different ... this could have gone a long way toward discrediting the witness in the eyes of the jury."

(Appellant's Initial Brief, p. 43). However, this argument is mere speculation which is not supported by the record, since no proffer was made. It is just as easy to speculate that Harrison would have said "No, my answers are not inconsistent, since you were asking me different things" just as the trial judge noted that the question being asked in court was different than that in the deposition (R. 432). The failure to proffer Harrison's answers for the record precludes this Court from considering the argument presented in this issue, since reversible error cannot be predicated on speculation. §90.104(1)(b), Fla. Stat.; Nava v. State, 450 So.2d 606 (Fla. 4th DCA 1984), cause dismissed, 508 So.2d 14 (Fla. 1987); A. McD. v. State, 422 So.2d 336 (Fla. 3d DCA 1982).

Even if this issue is considered, the defendant has not demonstrated that he is entitled to relief. His argument does not specify why this particular testimony was admissible, he simply asserts broad propositions relating to his constitutional right to full and fair cross-examination. Defense counsel below was allowed to place the witness' prior statements before the jury; thus, he was not deprived of any attempt to impeach Harrison from her deposition. It was within the province of the jury to determine the effect of the impeachment evidence. In A. McD., *supra*, the defendant challenged the trial court's refusal to allow testimony as to the substance of conversations which some of the state witnesses had with the prosecutor in the presence of each other. The court noted that the credibility of the

witnesses was affected, if at all, by the fact of the conversations and not the substance. Once the fact that the witnesses were interviewed in the presence of each other became known, the trier of fact was in a position to determine the credibility of the witnesses.

Similarly, in the instant case, once the prior statements were presented to the jury, the jurors were in a position to determine Harrison's credibility. Harrison's opinion as to whether the prior statements were inconsistent was not relevant, and would have invaded the province of the jury. Therefore, the trial court did not err in restricting the defendant's cross-examination of Harrison.

ISSUE V

THE TRIAL COURT DID NOT ERR IN ALLOWING STATE WITNESS, MEDICAL EXAMINER DR. JOAN WOOD TO TESTIFY REGARDING THE RESULTS OF THE AUTOPSY THAT DR. JOHN GALLAGHER PERFORMED ON VICTIM MARLENE REEVES WITHOUT THE AUTOPSY REPORT BEING ADMITTED INTO EVIDENCE.

The defendant claims that the testimony of Dr. Joan Wood, the Chief Medical Examiner for the Sixth Judicial Circuit, should have been excluded because the autopsy report was never offered into evidence. The defendant is incorrect in suggesting that it was necessary to admit the autopsy report into evidence in order to admit Dr. Wood's testimony and, for the following reasons, the defendant's claim must fail.

The determination of a witness' qualifications to express an expert opinion is particularly within the discretion of the trial judge, and his decision will not be reversed absent a clear showing of error. Ramirez v. State, 542 So.2d 352 (Fla. 1989), Johnson v. State, 393 So.2d 1069, 1072 (Fla. 1980), cert. denied, 454 U.S. 882, 102 S.Ct. 364, 70 L.Ed.2d 191 (1981); Endress v. State, 462 So.2d 872, 873 (Fla. 2d DCA 1985). Section 90.704, Florida Statutes, specifically provides that an expert witness may rely on facts or data that have not been admitted, or are even admissible, when those underlying facts are of "a type reasonably relied upon by experts in the subject to support the opinions expressed, . . ." Furthermore, under §90.705(1), Florida Statutes, an expert witness may testify without

disclosing the facts or data upon which his opinion is based. For an expert to rely upon data which has not been introduced at trial, it is only necessary to establish that experts in the witness' subject matter customarily rely upon this kind of data in forming their opinion, see, e.g. Ehrhardt Evidence, §704.1 (2d.Ed. 1984), p. 413. In general, whether the facts relied upon by the experts are in evidence, or even could be in evidence, is not relevant; the only relevant inquiry is whether the facts or data are of a type reasonably relied upon by the experts in the subject to support the opinion expressed.

In City of Hialeah v. Weatherford, 466 So.2d 1127 (Fla. 3d DCA 1985), the Court noted that §90.705 eliminates the requirement previously placed on the party calling an expert to present the underlying data and factual support for the expert's testimony. In Bender v. State, 472 So.2d 1370 (Fla. 3d DCA 1985) the court, discussing §90.704, found that the hearsay rule poses no obstacle to expert testimony based, in part, upon tests, records, data, or opinions of another, where such information is of type reasonably relied upon by experts in the field. Id. at 1371, citations omitted. The Court in Bender concluded, "While the reports and tests, if offered alone may be inadmissible, testimony regarding diagnoses and opinions formulated in part in reliance upon this data is to be admitted." Id. at 1372, citations omitted. Accord, Burnham v. State, 497 So.2d 904 (Fla. 2d DCA 1986).

In Robinson v. Hunter, 506 So.2d 1106 (Fla. 4th DCA 1987) during the medical testimony of an auto accident case, an orthopaedic surgeon gave his opinion on permanent injury based, in part, on a thermogram report prepared by another expert. Neither the report nor the thermography were admitted into evidence nor shown to the jury. On appeal, the court found that there was a sufficient predicate for the opinion of the orthopedic surgeon based, in part, on the report of another expert, though neither the report nor the thermography were admitted into evidence.

In the case at bar, Dr. Wood testified that she was the Chief Medical Examiner for the Sixth Judicial Circuit. (R. 376). Dr. Wood was qualified as an expert in the field of forensic pathology and qualified to render an opinion in that field without objection. (R. 383). Dr. Wood confirmed that the autopsy report was prepared by Dr. Gallagher, who died prior to the instant trial. Dr. Wood authorized Dr. Gallagher's autopsy examinations and she characterized Dr. Gallagher's reports as very detailed, carefully written and excellent. (R. 382). In addition to the autopsy report, Dr. Wood reviewed the toxicology report, the evidence receipts, the photographs of the body taken at the scene of the crime and at the medical examiner's office and all of the ancillary paper work contained in the file. (R. 383). Based upon the report of Dr. Gallagher, the photographs and other evidence reviewed by Dr. Wood, she was able to form an opinion concerning the death of victim Marlene Reeves. (R. 383).

The findings made by Dr. Gallagher were also confirmed by the photographs of the body. (R. 386-387). Based upon Dr. Wood's observations of the photographs at the scene of the crime, the location of the pillow at the time the body was discovered, and the condition of the victim's face which was consistent with the proposition that the pillow was forcefully held over Marlene Reeves face, Dr. Wood was able to reach an independent conclusion in this case:

> [PROSECUTOR]: Q. Based upon your examination of Dr. Gallagher's report, examination of the photographs and the ancillary paper work contained within the file, were you able to come to a conclusion as to the cause of death independent of Dr. Gallagher's conclusion?
>
> [DR. WOOD]: A. Yes.
>
> Q. And what was your conclusion as to the cause of death of Marlene Reeves?
>
> A. The cause of death of Marlene Reeves was asphyxiation due to smothering.
>
> (R. 394).
>
> * * *
>
> Q. Okay. And during the period of time prior to death, is there a period of time before unconsciousness sets in?
>
> A. Yes.
>
> Q. And contrary to strangulation deaths, would that period be longer in an asphyxiation?

A. In a smothering death, I would expect the period of consciousness to be longer, yes.

(R. 396).

An expert witness may properly render an opinion by virtue of his independent review of the evidence without treating a patient, Santos Wrestling Enterprises, Inc. v. Perez, 367 So.2d 685 (Fla. 3d DCA) cert. denied 372 So.2d 470 (Fla. 1979). In the instant case, the state offered the expert's opinion based upon her independent review of the evidence. The data reviewed by Dr. Wood comported substantially with the independent evidence adduced at trial and did not render Dr. Wood's testimony inadmissible. The defense did not refute the accuracy of the data underlying Dr. Wood's opinion at trial and any purposed deficiency, even if one had been alleged, would relate solely to the weight and not the admissibility of her testimony.

ISSUE VI

THE JURY'S VERDICT FORM FINDING THE DEFENDANT GUILTY OF BURGLARY FAIRLY SUPPORTS THE DEFENDANT'S CONVICTION AND SENTENCE.

The defendant now complains that the jury's verdict form is ambiguous and will not support a conviction for burglary. There was no objection at trial to the verdict form nor instructions to the jury on this count; and, therefore, this issue has not been preserved for appeal. Simpkin v. State, 363 So.2d 45 (Fla. 3rd DCA 1978) [In burglary prosecution, the trial court's failure to define a "dwelling" as distinguished from a "structure" was not fundamental error and the defendant waived any claim of error by failing to raise this issue at trial.]

Assuming, *arguendo*, that this Court should address this claim, the defendant's argument nevertheless must fail. §810.02, Florida Statutes, defines burglary and provides, *inter alia*,

> (1) "Burglary" means entering or remaining in a structure or a conveyance with the intent to commit an offense therein, unless the premises are at the time open to the public or the defendant is licensed or invited to enter or remain.
>
> (2) Burglary is a felony of the first degree, punishable by imprisonment for a term of years not exceeding life imprisonment,... if, in the course of committing the offense, the offender:
>
> (a) Makes an assault or battery upon any person.
>
> (b) Is armed, or arms himself with such structure or conveyance, with explosives or a dangerous weapon.

> (3) If the offender does not make an assault or battery or is not armed, or does not arm himself, with a dangerous weapon or explosive as aforesaid during the course of committing the offense and the structure or conveyance entered is a dwelling or there is a human being in the structure or conveyance at the time the offender entered or remained in the structure or conveyance, the burglary is a felony of the second degree... Otherwise, burglary is a felony of the third degree...

In the instant case, the defendant had fair notice of the burglary charge filed against him, the unrebutted evidence established a burglary of the victim's apartment, no objection was made and no issue was raised at trial on this point, no contrary evidence was offered, the offense of burglary of a structure was defined for the jury; and, although proof that the burglar committed an assault or was armed with a dangerous weapon is sufficient to convict a defendant of a first degree felony, Peoples v. State, 436 So.2d 972 (Fla. 2d DCA 1983), the jury exercised its inherent pardon power in finding the defendant guilty of a less serious offense in this case.

ISSUE VII

WHETHER REVERSIBLE ERROR OCCURRED BASED UPON THE DOCTRINE OF BOOTH V. MARYLAND AND SOUTH CAROLINA V. GATHERS.

As the seventh point on appeal, the defendant contends that certain evidence concerning the personal characteristics of the victim should not have been heard by the jury, argued by the prosecutor or relied upon by the trial court in his sentencing order. For the reasons expressed below, the defendant's point must fail.

In his brief at page 61, the defendant concedes that a purported violation of Booth v. Maryland, 42 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987), must be objected to in order to obtain appellate relief. Indeed, this Honorable Court has consistently held, both on direct appeals and in its collateral review of death sentences, that a specific objection must be interposed to the material which is alleged to constitute victim impact evidence. Grossman v. State, 525 So.2d 833 (Fla. 1988); Squires v. Dugger, 564 So.2d 1074 (Fla. 1990); Reed v. State, 560 So.2d 203 (Fla. 1990); Daugherty v. State, 533 So.2d 287 (Fla. 1988). In the instant case, where the defendant made no objection at any stage of trial as to purportedly improper materials under Booth and South Carolina v. Gathers, 490 U.S.___, 109 S.Ct. 2207, 104 L.Ed.2d 876 (1989), appellate relief is precluded. Moreover, this Court has specifically held with respect to a Booth claim that objection must be made and a motion

for mistrial must be made in order to preserve the issue. Provenzano v. Dugger, 561 So.2d 541 (Fla. 1990), citing Clark v. State, 363 So.2d 331 (Fla. 1978), receded from on other grounds, State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). No objection or motion for mistrial was offered here.

Even had an objection been made, it should be noted that many of the complaints now asserted by the defendant deal with testimony and prosecutorial argument which occurred during the guilt phase of the trial and not in the sentencing phase. Booth and its progeny require that a sentence of death be imposed based upon permissible aggravating factors, and victim impact statements are not valid aggravating factors. There is simply no way to find that these matters now complained-of had any bearing on the weighing of the aggravating and mitigating circumstances as instructed by the trial court at the penalty phase. Cf. Smith v. Dugger, 15 F.L.W. S481 (Fla. September 6, 1990) (On motion for rehearing) ("We note that the testimony of the mother and statements by the prosecutor took place during the guilt, not sentencing, phase of the trial.").

The defendant also complains that in its sentencing order the trial court made mention of some of the personal characteristics of the murder victim (Appellant's brief at page 60). Even had objection been made, these matters set forth by the trial court would not support a reversal of this cause. Booth and Gathers proscribed the injection of irrelevant elements into the trial which might increase the risk that a sentence is

arbitrarily imposed. The comments by the trial court in the instant case, however, do not fall within this proscription. Rather, these observations of the Court are relevant with respect to the finding of the especially heinous, atrocious, or cruel aggravating circumstances.

Appellant's seventh claim must be denied by this Honorable Court where there was no objection below to matters which purportedly violated the precepts of Booth and Gathers.

ISSUE VIII

THE TRIAL COURT DID NOT ERR IN DENYING THE DEFENDANT'S REQUEST TO DISCHARGE COURT-APPOINTED COUNSEL AND SUBSTITUTE A NEW COUNSEL FOR SENTENCING.

The defendant argues that reversal is required in this case because the trial court allegedly failed to conduct an adequate inquiry to determine the basis for the defendant's request to halt the trial and substitute new counsel for sentencing. The right to self-representation or right to appointed counsel cannot be used to abuse the dignity of the court or frustrate orderly judicial proceedings. Jones v. State, 449 So.2d 253 (Fla. 1984). In the instant case, the defendant was not entitled to an inquiry under Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975), because he clearly was not interested in representing himself; Cf. Daniels v. State, 449 So.2d (Fla. 2d DCA 1984) [By refusing to accept P.D., defendant was attempting to exercise right to self-representation.] A Faretta inquiry is only appropriate when a defendant invokes the right to act as his own counsel. Hill v. State, 549 So.2d 179 (Fla. 1989). In this case, the defendant wanted substitute counsel appointed for him at the 11th hour.

The defendant's request to discharge his court-appointed attorney is governed by the procedures set forth in Nelson v. State, 274 So.2d 256 (Fla. 4th DCA 1973), and approved in Hardwick v. State, 521 So.2d 1071 (Fla.), *cert. denied*, 102 L.Ed.2d

154 (1988). Nelson mandates that, once the competency of counsel is sufficiently challenged, a trial judge should make an inquiry of the defendant and his attorney to determine whether or not there is reason to believe that the attorney is not rendering effective assistance to the defendant. The defendant herein merely alleged his dissatisfaction and general loss of confidence and trust. Such statements do not trigger a Nelson inquiry because they do not "amount to an assertion of counsel's incompetence requiring exploration or verification as a predicate for substitution" Smelley v. State, 486 So.2d 669 (Fla. 1st DCA 1986). See also, Johnston v. State, 497 So.2d 863 (Fla. 1986).

In addition, a Nelson inquiry is not required when a motion to discharge counsel is not made until after the jury has been empaneled. Dukes v. State, 503 So.2d 455 (Fla. 2d DCA 1987). It is often recognized that an indigent defendant has an absolute right to counsel, but he does not have a right to have a particular lawyer represent him. Morris v. Slappy, 461 U.S. 1, 103 S.Ct. 1610, 75 L.Ed.2d 610 (1983); Koon v. State, 513 So.2d 1253 (Fla. 1987), cert. denied ___ U.S. ____, 108 S.Ct. 1124, 99 L.Ed.2d 284 (1988). Here, the trial court reviewed the complaints lodged by this defendant prior to sentencing and found no basis to grant the defendant's request for new counsel. Unlike Brooks v. State, 555 So.2d 929 (Fla. 3d DCA 1990) in which the defendant filed numerous pre-trial motions to discharge counsel, Capehart raised his self-serving claim after the guilty verdict was returned and he became dissatisfied with the outcome of the proceedings against him.

On these facts, the trial court did not err in denying the defendant's motion to discharge his court-appointed counsel. Furthermore, a claim of ineffective assistance of counsel is not generally subject to review on direct appeal, but is one which is properly raised in the trial court via a Rule 3.850 Motion for Post-Conviction Relief. Ogden v. State, 494 So.2d 280 (Fla. 2d DCA 1986); Jones v. State, 510 So.2d 1246 (Fla. 1st DCA 1987).

ISSUE IX

WHETHER THE DEFENDANT'S CONSTITUTIONAL RIGHTS WERE VIOLATED BY THE PROSECUTOR'S FURNISHING APPELLANT'S CONFESSION TO MENTAL HEALTH EXPERTS WHO TESTIFIED AT PENALTY PHASE

The record reflects that Dr. Sidney Merin and Dr. David Sprehe testified without any defense objection or complaint at the penalty phase of trial. (R. 711-746). Merin testified that he conducted a clinical interview at which time Capehart gave a history regarding the events that led to his predicament. Capehart said he met someone whom he referred to as B.A., his partner. B.A. indicated he needed some money and when they got to the apartment, B.A. feigned looking in his pockets for a key, and indicated that he must have lost it and it was necessary to break in. (R. 717-18). Capehart said he stayed outside and B.A. went inside; Capehart heard someone scream, and it sounded like a female voice. Capehart looked inside and saw B.A. sitting on the woman's abdomen with a pillow down over her face. (R. 718). Capehart also indicated he thought that the woman was raped. (R. 720). Merin believed that when Capehart talked of B.A. he was talking about himself. (R. 721). Merin gave him a number of tests and had doubts about some of the things Capehart told him. (R. 727). Merin also had information from the state attorney's office outlining some of the considerations that had occurred surrounding the crime. (R. 728). Merin concluded that Capehart was malingering, making up stories to fit whatever he wanted

Merin to know. (R. 728). Capehart was described as an anti-social personality, a psychopath not a psychotic. (R. 728-729). On cross-examination Merin acknowledged that the state attorney had indicated that Capehart had presented a number of different versions and Merin got another version. (R. 732).

Dr. Sprehe testified that Capehart told him several stories about the offense; the defendant kept changing his story when confronted with information Sprehe had on record. (R. 740). Dr. Sprehe concluded that Capehart has an anti-social personality disorder but is not suffering from mental illness. (R. 742). Dr. Sprehe had been given information from the state attorney's office. (R. 743). The defendant gave several versions of the incident. (R. 745). Dr. Sprehe knew the defendant was telling lies. (R. 746).

At the motion for new trial hearing, the defense complained that the reports of Dr. Sprehe and Dr. Merin made reference to statements the defendant had made to the police. (R 813). The defendant had not objected or sought any relief at the time of their testimony at trial. The prosecutor responded at the motion for new trial hearing that the information given to Dr. Merin and Dr. Sprehe included not only statements given to the police but it included everything else that Capehart ever said to anybody. The jury did not hear that Capehart admitted going into the house or that Capehart admitted killing Marlene Reeves or that he ransacked her house looking for money. The prosecutor added that Dr. Merin and Dr. Sprehe were specifically told not to mention

that Capehart had admitted he brutally murdered Marlene Reeves and they did not. (R. 814-815).

The court articulated no belief that there had been a violation of its order granting the motion to suppress, did not opine that there was any impropriety and denied the motion for new trial (R. 818-819).

The defendant's failure to object at the time of the testimony of Dr. Sprehe and Dr. Merin precludes any subsequent complaint about their testimony. See, Castor v. State, 365 So.2d 701 (Fla. 1979); Clark v. State, 363 So.2d 331 (Fla. 1978).

Furthermore, the trial court did not err in finding that there had not been a violation of the order granting the motion to suppress his confession. See Booker v. Wainwright, 703 F.2d 1251, 1258 (11th Cir. 1983) (no constitutional prohibition against using information gained from a psychiatric examination for impeachment purposes).[3] The now-challenged testimony at bar was admissible to rebut the testimony of defense expert Dr. Epstein.

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[3] See also Isley v. Dugger, 877 F.2d 87 (11th Cir. 1989); Williams v. Lynaugh, 809 F.2d 1063 (5th Cir. 1987).

ISSUE X

WHETHER THE TRIAL COURT ERRED IN ITS INSTRUCTIONS TO THE JURY BY DIMINISHING THE JURORS' RESPONSIBILITY OR BY SUGGESTING THAT DEATH IS PENALTY FAVORED BY THE COURT.

The defendant next contends that the trial judge erred in his instruction to the jury in that those instructions purportedly diminished the jurors' responsibility and also suggested that death is the penalty favored by the court. For the reasons expressed below, the defendant's claim must fail.

In this point on appeal, the defendant makes two separate arguments. The first relates to the purported denigration of the jury's role in contravention of Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985). It is clear from the record of this case and, indeed, the defendant does not contend otherwise that no objection based upon Caldwell was offered at trial. Thus, this claim is procedurally barred where not objected to at trial. See, e.g., Bertolotti v. State, 534 So.2d 386, 387 n.2 (Fla. 1988); Jones v. Dugger, 533 So.2d 290, 292 (Fla. 1988); Preston v. State, 528 So.2d 896, 899 (Fla. 1988); Doyle v. State, 526 So.2d 909, 910 (Fla. 1988); Demps v. State, 515 So.2d 196 (Fla. 1987). Assuming, *arguendo*, that this Court could reach the Caldwell claim on its merits, this issue has been resolved contrary to the defendant's position. It is of no moment that the defendant attempts to distinguish the instant case from Combs v. State, 525 So.2d 853 (Fla. 1988), on the basis

that the trial judge gave non-standard instructions which purportedly went further in de-emphasizing the jury's participation in the sentencing process. The defendant apparently miscomprehends this Court's position as set forth in Combs and Grossman v. State, 525 So.2d 833 (Fla. 1988), cert. denied, ____ U.S. ____, 109 S.Ct. 1354, 103 L.Ed.2d 822 (1989). In Combs, this Honorable Court held that Caldwell is not applicable in Florida. Unlike Mississippi, in Florida the judge, rather than the jury, is the ultimate sentencing authority. Ford v. State, 522 So.2d 345, 346 (Fla. 1988). The Mississippi scheme, and hence Caldwell, is distinguishable from the Florida procedure which treats the jury's recommendation as advisory only and places the responsibility for sentencing on the trial judge. Advising the jury that its sentencing recommendation is advisory only and that the ultimate decision rests with the trial judge is an accurate statement of Florida law and does not improperly minimize the sentencing jury's role or misstate Florida law. Grossman v. State, supra; Combs v. State, supra at 857-858. Accord, Harich v. Dugger, 844 F.2d 1464 (11th Cir. 1988) (*en banc*). Thus, because The defendant failed to object to the purported Caldwell statements and instruction, this claim is procedurally barred. Also, even if the merits were reachable by this Court, this claim would fail.

As his second sub-issue, the defendant contends that the trial court deviated from the standard jury instructions and implied that only a death recommendation would be given great

weight. The defendant extrapolates and contends that the court was thereby suggesting that death is the punishment preferred by the Courts. This claim must also fail where no objection was made below. Absent fundamental error, the failure to object to the jury instruction at trial precludes appellate review. Walton v. State, 547 So.2d 622, 625 (Fla. 1989). See also, Florida Rule of Criminal Procedure 3.390(b). In his brief, the defendant concedes that no objection to the jury instruction was made below and, therefore, appellate review is precluded. However, the defendant notes in his footnote 11 that defense counsel did request the Court to re-advise the jury that nothing the court said should be interpreted as expressing an opinion by the Court. In an effort to create a claim where none exists, the defendant focuses his issue raised in this Court to the fleeting comment by defense counsel which had nothing to do with any specific objection. Rather, defense counsel wanted a general re-advisement of matters which are instructed upon at the close of guilt phase (as noted by the prosecutor at R. 782). In any event, as the defendant candidly concedes, no objection as to the jury instructions obviates the possibility of appellate review.

Inasmuch as the defendant failed to object to any of the matters asserted under this point, this claim must fail.

ISSUE XI

THE TRIAL COURT PROPERLY IMPOSED THE SENTENCE OF DEATH AFTER PROPERLY WEIGHING THE AGGRAVATING AND MITIGATING CIRCUMSTANCES.

Following a jury recommendation of death, the trial court below imposed a sentence of death. The judge found no mitigating factors and the following four aggravating factors:

> (1) The defendant was previously convicted of another capital felony or of a felony involving the use or a threat of violence to a person.
>
> (2) The defendant was engaged in a sexual battery or burglary during the commission of the murder.
>
> (3) The murder was especially heinous, atrocious or cruel.
>
> (4) The murder was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.
>
> (R. 912-916).

The defendant Appellant now argues that none of the aggravating factors found by the trial court were correctly applied and that the trial court erred in excluding existing mitigating circumstances. Based on the following arguments, the State asserts that the death sentence was properly imposed.

AGGRAVATING CIRCUMSTANCES

First, the defendant claims that the trial court erroneously found that the defendant had previously been convicted of armed robbery and that he relied upon the PSI for this finding.

Through the testimony of Deputy Sheriff William Ferguson, the State put into evidence a judgment and sentence showing the defendant's conviction for the lesser included offense of robbery, aggravated assault with a deadly weapon, and grand theft in 1986 and a photograph of the victim as she was found. (R. 664-666, 939-951). The trial court's findings with regard to the aggravating circumstances erroneously refers to this as aggravated assault and armed robbery. Despite this oversight by the trial court, the evidence clearly supports the aggravating factor of "previously convicted of another capital felony or of a felony involving the use or threat of violence to a person." "Because there was a valid ground to support this, aggravating factor, the error on this point is harmless." Holton v. State, No. 69,861 (Fla. Sept. 27, 1990).

Further, it was not improper for the trial court to rely on the PSI for some of the facts, as long as the information was not solely obtained from the PSI. Barclay v. State, 470 So.2d 691 (Fla. 1985); Williams v. State, 386 So.2d 538 (Fla. 1980).

The instruction given to the jury in the instant case included the statement that armed robbery and aggravated assault are felonies involving the use of violence to another person. (R. 777). No objection was made to this instruction at the jury charge conference nor when the court rendered the actual instruction. (R. 748, 750). Accordingly, not only was there no objection to this instruction but further there was no prejudice to the defendant as the aggravating circumstance was clearly established beyond a reasonable doubt.

Second, the defendant contends that the jury's burglary verdict calls into question the accuracy of the trial court's findings that the defendant was engaged in a sexual battery or burglary when he committed the homicide. The conviction of burglary of a residence without intent to commit assault does not negate the fact that the defendant was convicted of the burglary. Further, it is beyond a reasonable doubt that the victim in the instant case, Marlene Reeves, was sexually assaulted. When victim Marlene Reeves' body victim in the was discovered, her face was covered with a pillow, and her underwear had been pulled half way down her right leg and completely off her left leg. She was wearing a nightgown and a brassiere that had been pushed up over her breasts. (R. 317-318, 343, 353, 388). Human blood was found on her panties. (R. 369-371). The autopsy confirmed that the victim had injuries to her sexual organs and that the cause of these injuries to her genitalia was a sexual assault that occurred a few minutes before her death. (R. 390-391, 397). The blood on Reeves underwear probably resulted from a finger or hand being inserted into her vaginal area before the underwear was removed. (R. 401-403). This aggravating factor was well-supported by the evidence and is not undermined by the jury's verdict.

Third, the defendant challenges the trial court's finding of heinous, atrocious, or cruel. This court has previously held that it is permissible to infer that strangulation, when perpetrated upon a conscious victim, involves foreknowledge of

death, extreme anxiety and fear, and that this method of killing is one to which the factor of heinousness is applicable. Tompkins v. State, 502 So.2d 415 (Fla. 1986); Johnson v. State, 465 So.2d 499, 507 (Fla.), cert. denied, 474 U.S. 865, 106 S.Ct. 186, 88 L.Ed.2d 155 (1985); Adams v. State, 412 So.2d 850, at 857; Alvord v. State, 322 So.2d 533, 541 (Fla. 1975), cert. denied, 428 U.S. 923, 96 S.Ct. 3234, 49 L.Ed.2d 1226 (1976). The trial court's finding that the victim in the instant case was conscious for approximately two minutes after the defendant placed the pillow over her face was well-supported by the evidence. (R. 396-397, 400). Dr. Wood confirmed that, contrary to strangulation deaths, the victim in a smothering death would remain conscious for a longer period of time. (R. 396). Further the evidence shows that there were hemorrhages on the victim's left upper eyelid and the lining of her left eye and that her right nostril was flattened. (R. 385-386). Based on the amount of pressure that was applied by the defendant in holding the pillow over the victim's face, it is unquestionable that the victim suffered at the hands of the defendant and knew that death was impending. Accordingly, this aggravating factor was properly found.

As the defendant concedes, with regard to the defendant's claim that the trial court's instruction with regard to heinous, atrocious, or cruel was insufficient, this argument as been rejected by this Honorable Court in Smalley v. State, 546 So.2d 720 (Fla. 1989).

Further, this argument was not preserved for appellate review because counsel did not object to the instructions. The last aggravating factor found by the trial court was that homicide was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. The defendant again asserts that the instruction was insufficient as the court did not give the jury the limiting construction this Honorable Court has given to this aggravating factor. Again, as the defendant concedes, this Court has rejected this argument in Brown v. State, 15 F.L.W. S165 (Fla. March 22, 1990). And, again, there was no objection to the instruction as given.

The defendant also contends that the facts in the instant case do not support a finding of cold, calculated, and premeditated. The findings of the trial judge on aggravating and mitigating circumstances are factual findings which should not be disturbed unless there is a lack of competent evidence to support such findings. Sireci v. State, 399 So.2d 964 (Fla. 1981); Lucas v. State, 376 So.2d 1149 (Fla. 1979). The aggravating factor of cold, calculated and premeditated, §921.141(5)(i), Florida Statutes, relates to the intent and state of mind of the killer at the time the murder is committed. Combs v. State, 403 So.2d 418 (Fla. 1981).

The trial court found that the victim was unconscious after three minutes, so for at least two minutes the defendant was pressing the pillow down in the face of an unconscious woman. For two minutes the defendant's act could have had no other

purpose than to kill and two minutes is ample time to form the intention to kill. This finding was supported by Capehart's statements that when "B.A." was holding the pillow over her face, she kicked her legs for awhile and then stopped. (R. 466, 718-720).

The circumstances of the victim's death, coupled with the fact that her death by asphyxiation would have taken over five minutes, supports a conclusion that Capehart acted to effect the death of Marlene Reeves in a very deliberate, cold and calculated manner. Indeed, the State admittedly contends that the instant murder does, *per se*, support a finding that the victim's death was effected in a cold, calculated and premeditated manner.[4] For when a murderer smothers the life out of his victim using his bare hands and a pillow, sitting astride the victim's body, and that intense, deliberate act takes several minutes to complete, such an act defines the word "cold" and vitiates any claim of heated spontaneity without a cooling-off period as opposed to murder by a single gunshot. (R. 394, 396-397, 400).

Two psychologists testified for the state, Dr. Sidney Merin and Dr. Daniel J. Sprehe. Dr. Merin testified that Capehart was competent to stand trial and that he was sane at the time of the crime. (R. 728-729). Dr. Merin's opinion was that at the time of the murder, the defendant was not under the influence of a

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[4] Just as this court as held that the act of striking with a deadly weapon is sufficient to warrant a jury in finding premeditation. See, Rowe v. State, 104 Fla. 420, 140 So. 309, 310 (1932) and Bufford v. State, 403 So.2d 943 (1981).

mental or emotional disturbance, nor was his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law impaired. Dr. Sprehe agreed with Dr. Merin's analysis. Dr. Sprehe opined that at the time of the offense Capehart was not under the influence of a mental or emotional disturbance of any kind and his capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of the law was not impaired in any way. (R. 742-743).

The psychologists' testimony supports the conclusion that the defendant's acts were done with a heightened degree of premeditation or deliberation, and that they were done without any pretense of moral or legal justification. Therefore, it cannot be said that the trial court erred in finding this aggravating circumstances supported by the evidence.

MITIGATING CIRCUMSTANCES

After analyzing the evidence presented by the defense in mitigation of his crime, the trial court found that no mitigating circumstances existed. In his discussion of the mitigating circumstances, the trial judge listed and rejected all the statutory mitigating factors. (R. 914-915). Then, in section H of his discussion, the trial court dealt with all other potential mitigation. (R. 915, 916).

The defendant does not appear to contest the trial court's findings with regard to the statutory mitigating circumstances. The defendant does however appear to suggest that approximately

seven nonstatutory mitigating factors existed; i.e., race, I.Q., illiteracy, learning disability, alcoholism, mental or emotional disorder, and abused childhood.

Recently, this Honorable Court in Lucas v. State, 15 F.L.W. S473 (Fla. September 20, 1990), held that because nonstatutory mitigating evidence is so individualized, the defense must share the burden and identify for the court the specific nonstatutory mitigating circumstances it is attempting to establish. This Court further noted that, "This is not to little too ask if the trial court is to perform the meaningful analysis required in considering all the applicable aggravating and mitigating circumstances." Id. at S475.

At the close of the penalty phase, the defense counsel argued to the sentencing jury the following mitigating evidence:

> (1) The defendant was an accomplice in the offense for which he is to be sentenced but that the offense was committed by another person and the defendant's participation was relatively minor. (R. 770).
>
> (2) The defendant had no significant history of prior criminal activity.
>
> (3) The crime for which the defendant is to be sentenced was committed while he was under the influence of extreme mental or emotional disturbance.
>
> (4) The defendant acted under extreme duress or under the substantial domination of another person. (R. 773).

> (5) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirement of the law was substantially impaired. (R. 774).

As to the nonstatutory mitigating evidence, the defense counsel argued that the jury should consider the fact that another victim, Rebecca Henry, was not murdered. (R. 775). Defense counsel also argued that based upon what the jury had heard that Gregory Capehart did not deserve to die. And, finally, defense counsel again argued that the defendant should not be given a death sentence because he was merely the accomplice to another person who actually killed this victim. (R. 776). Nowhere in this record does defense counsel delineate the nonstatutory mitigating evidence that is now presented to this Court in Appellant's Initial Brief. In accordance with this Court's decision in Lucas, the defendant cannot now complain because the trial court did not find those mitigating factors. Even if these factors had been suggested to the trial court, the court's conclusion that no mitigating factors existed was not erroneous. The trial court thoroughly analyzed the evidence before it, reviewing both the evidence presented by the defense and the state's evidence in rebuttal. The analysis of this rebuttal testimony is not tantamount to nonstatutory aggravating circumstances, as Appellant argues, but rather is the proper and necessary analysis demanded of the trial court by this Court in Nibert v. State, 15 F.L.W. S415 (Fla. July 26, 1990).

> "When a reasonable quantum of competent, uncontroverted evidence of a mitigating circumstances presented, the trial court must find that mitigating circumstance has been proved."
>
> Id, at S416.

The analysis by the trial court in the instant case merely covers the evidence presented by both sides and concludes that there was no uncontroverted evidence that established valid mitigating circumstance.

ISSUE XII

WHETHER THE TRIAL COURT ERRED IN FAILING TO USE A GUIDELINES SCORESHEET TO SENTENCE THE DEFENDANT FOR THE NON-CAPITAL FELONY OF BURGLARY.

The State recognizes this Court's decision in Rutherford v. State, 545 So.2d 853, 857 (Fla. 1989), cert. denied, ___ U.S. ____, 110 S.Ct. 353, 107 L.Ed.2d 341, holding that the trial court should prepare a guidelines scoresheet when sentencing a defendant for non-capital felonies. However, in this and similar cases, remand for preparation of a scoresheet is unwarranted because the trial court could have, and undoubtedly would have, departed upward to the statutory maximum for the noncapital felony on the basis of the unscored conviction for first-degree murder. Id. Hansbrough v. State, 509 So.2d 1081 (Fla. 1987).

CROSS-APPEAL

THE TRIAL COURT ERRED IN GRANTING THE DEFENDANT'S MOTION TO SUPPRESS HIS CONFESSION.

The trial court granted the defendant's motion to suppress his confession on the grounds that "the confession given to Tom Muck and Detective Gene Caruso on April 12, 1988 was obtained after the defendant, Gregory Keith Capehart, had been appointed an attorney at his initial appearance in Orange County, Florida." (R. 935).

The defendant was arrested in Orange County on the Pasco County murder charge and he was appointed counsel at his first appearance hearing in Orange County. When Officers Tom Muck and Gene Caruso, detectives with the Pasco County Sheriff's Office, arrived at the Orange County Detention Center, they requested to speak with the defendant prior to transporting him to Pasco County. The defendant was brought from his place of confinement in the Orange County Detention Center to be interviewed by Officers Tom Muck and Gene Caruso. The defendant was read his "Miranda rights" from a card by Officer Tom Muck, questioned about the murder charge pending against him, and he gave a confession to the crime. After returning the defendant to Pasco County, the Defendant was taken to the Land-O-Lakes substation of the Pasco County Sheriff's Office and, after being asked if he understood his "rights" that were read to him earlier, he was requested to make his confession again into a tape-recorder. The

defendant then restated his confession question and answer form. (R. 932-933).

For the following reasons, the trial court erred in finding that the routine appointment of counsel at the defendant's first appearance hearing in Orange County barred the Pasco County officers from interviewing the defendant after first obtaining a valid waiver of the defendant's Miranda rights.

The defendant in the instant case did not invoke his right to counsel with regard to custodial interrogation. Instead, he accepted the routine, perfunctory appointment of counsel which is offered in Florida with every first appearance hearing. A first appearance hearing is simply to satisfy the Fourth Amendment requirement that a probable cause determination be made as a predicate to any significate restraint of pretrial liberty. See, Rule 3.130, Florida Rule of Criminal Procedure. It is not a critical stage that requires the appointment of counsel, see, Gerstein v. Pugh, 420 U.S. 103, 43 L.Ed.2d 54 (1974).

In Miranda, the Supreme Court established procedural safeguards to protect the exercise of the privilege against self-incrimination during the coercive of atmosphere of custodial interrogation. Before law enforcement officers may question a suspect in custody, Miranda requires that the officers inform the suspect that he has the right to remain silent, that his statements may be used against him, that he has the right to the presence of an attorney, and that if he cannot afford an attorney, one will be appointed for him. When a defendant makes

an indication prior to the commencement of the interrogation or during the interrogation that he wishes to remain silent, the police must cease questioning. Further questioning is permitted only if law enforcement officers "scrupulously" honor the defendant's assertion of the right to remain silent. See, e.g. Michigan v. Mosley, 423 U.S. 96 (1975) [Miranda does not create a *per se* prohibition against further interrogation once the accused indicates a desire to remain silent.]; Jackson v. Dugger, 837 F.2d. 1469, 1472 (11th Cir. 1988) [Invocation of right to remain silent "scrupulously" honored when police terminated questioning after each invocation of right, more than six hours elapsed and fresh Miranda warnings were given between the invocation of right and the confession, and no allegation that police conduct overbore the defendant's will].

The Miranda right to counsel during questioning attaches when a suspect invokes his right during custodial interrogation. In Edwards v. Arizona, 451 U.S. 477 (1981) the Supreme Court reaffirmed the principle that once a suspect asserts his right to counsel, all questioning by law enforcement officials must cease until counsel is provided or waived subsequent to the invocation. In Edwards, the court also held that if a suspect initiates a conversation after invoking his Miranda rights, the police may proceed with the interrogation. In the instant case, the defendant did not invoke his Miranda right to counsel during custodial interrogation. Instead, he accepted the routine appointment of counsel offered by the court in Orange County at

his first appearance hearing. The state maintains that the acceptance of appointed counsel at the defendant's first appearance hearing did not constitute a *per se* bar to the Pasco County officers' inquiry following a valid waiver of Miranda. See e.g., Patterson v. Illinois, 487 U.S. 285, 101 L.Ed.2d 261, 108 S.Ct. 2389 (1988) [Accused who was given Miranda warnings by police during post-indictment questioning held to have made knowing and intelligent waiver of Sixth Amendment right to counsel.]

CONCLUSION

Based upon the foregoing facts, arguments and authorities, the judgment and sentence should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to The Office of the Public Defender, P.O. Box 9000-Drawer PD, Bartow, Florida 33830, on this 9th day of October, 1990.

K Blanco
OF COUNSEL FOR APPELLEE