IN THE SUPREME COURT OF FLORIDA

PERRY ALEXANDER TAYLOR,

Appellant,

v. Case No. 74,260

STATE OF FLORIDA,

Appellee.

BRIEF OF THE APPELLEE

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SUMMARY OF THE ARGUMENT

In the instant case, as in Smith, the recognition that a prospective juror was black was insufficient to require the State to explain its reasons for excusal. Furthermore, the defendant wholly failed to allege or demonstrate at trial that there was a strong likelihood that the one potential juror was challenged solely because of race. The trial judge necessarily is vested with broad discretion in determining whether peremptory challenges are racially intended. The trial judge was well satisfied that no Neil violation occurred and his determination is fairly supported by the record.

The trial court did not err in excluding testimony proffered by the defense that the victim had previously used crack cocaine. The evidence was remote and irrelevant to the issue of whether the victim consented to sexual activity with the appellant on the night of the murder.

The trial court correctly denied the motions for judgment of acquittal. There was substantial competent evidence, including the nature of injuries and the fact that appellant dragged the body to a different place, on which the jury could find premeditation. Likewise the circumstances of the crime and the incredulity of appellant's statements lead to the inescapable conclusion that a sexual battery occurred. Consequently, the aggravating circumstance that the murder was committed during the course of a sexual battery was proper.

While the prosecutor's comments concerning life imprisonment were improper, they did not, under the circumstances of this case, rise to the level of reversible error. Additionally, the argument was in anticipation of defense counsel's argument.

It is clear from the trial court's order that all mitigating evidence presented was considered. This Court should not remand based on Campbell v. State, infra, since that opinion was not available at the time of sentencing.

ARGUMENT

ISSUE I

THE PROSECUTOR'S USE OF ONE PEREMPTORY CHALLENGE TO EXCLUDE A BLACK POTENTIAL JUROR DID NOT VIOLATE APPELLANT'S RIGHTS UNDER ARTICLE I, SECTIONS 16 OF THE FLORIDA CONSTITUTION OR THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

There were four black prospective jurors in the instant case. The defense exercised a peremptory strike against one black juror [Marineese Mitchell], the state exercised a peremptory challenge against William Farragut, there was one Witherspoon[1] excludable black juror [Robinson], and one black juror served on the panel [Boyd].

Appellant/Defendant, Perry Taylor argues that the prosecutor's use of one peremptory challenge to exclude prospective juror Farragut violated State v. Neil, 457 So.2d 481 (Fla. 1984) and its progeny. For the following reasons, the Appellant's claim must fail.

First of all, this issue has not been fairly preserved for appeal. The transcript of the *voir dire* shows the following record dialogue with respect to the allegedly improper challenge against prospective juror Farragut:

THE COURT: What says the State to the box?

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[1] Witherspoon v. Illinois, 391 U.S. 510, 20 L.Ed.2d 776, 88 S.Ct. 1770 (1968). Black juror Charlie Robinson would never recommend death under any circumstances, not even for Ted Bundy. (R 982, 1004).

MR. BENITO: [Prosecutor] State would challenge William Farragut, I forgot his number.

THE CLERK: 9

MR. BENITO: No. 9.

MR. SINARDI: [Defense counsel] Judge, Mr. Farragut is my understanding at this point in time the only black that is on the panel, and I would submit that he is striking -- has struck him simply because of his race, and not for any legitimate reasons for his ability to render a fair and impartial trial.

MR. BENITO: If the Court is aware of the threshhold in that line of cases, the Court would note that I am not systematically excusing blacks.

It's obvious that I am not by striking Mr. Farragut, Ms. Marneese Mitchell is now one of the 12 members of the jury, and Ms. Marneese Mitchell is also black. So, there is no showing of a systematic exclusion on the part of the State.

THE COURT: The state's position is that if you excuse peremptorily William Farragut that the very next juror is also a black?

MR. BENITO: That's correct.

THE COURT: The Court cannot make a finding the State is at this time systematically excluding blacks from this jury. Juror No. 30, Marneese Mitchell, becomes Juror No. 9 in the box. What says the Defense to the box?

MR. SINARDI: One moment, Your Honor.

THE COURT: Yes.

MR. SINARDI: Your Honor, can we check, It's my understanding that the Defense has used seven challenges. It's my understanding, is that correct?

(R 1000 - 1001)

In State v. Neil, 457 So.2d 481, 486 (Fla. 1984), clarified *sub nom*, State v. Castillo, 486 So.2d 565 (Fla. 1986), and State v. Slappy, 522 So.2d 18 22 (Fla.), cert. denied, ____ U.S. ____, 108 S.Ct. 2873, 101 L.Ed.2d 909 (1988), this Court established the procedure to be followed when a party seeks to challenge the opposing party's peremptory excusals in order to fairly preserve this issue for appellate review. In Neil, this Court established the following test:

> The initial presumption is that peremptories will be exercised in a nondiscriminatory manner. A party concerned about the other side's use of peremptory challenges must make a timely objection and demonstrate on the record that the challenged persons are members of a distinct racial group *and that there is a strong likelihood that they have been challenged solely because of their race.* If a party accomplishes this, then the trial court must decide if there is a substantial likelihood that the peremptory challenges are being exercised solely on the basis of race. *If the court finds no such likelihood, no inquiry may be made of the person exercising the questioned peremptories.* On the other hand, if the court decides that such a likelihood has been shown to exist, the burden shifts to the complained-about party to show that the questioned challenges were not exercised solely because of the prospective jurors' race.
>
> *Id. at* 486 - 87 (emphasis supplied; footnotes omitted).

Therefore, the first question to be addressed is whether the defense properly objected to the state's exercise of its peremptory challenge. In Smith v. State, 15 F.L.W. 1509 (Fla. 1st DCA, Opinion filed May 29, 1990), the First District Court found that defense counsel's request to have "the record show" an excusal of black jurors was insufficient to constitute a timely objection under Neil and Slappy, and stated:

> After the state had exercised several peremptory challenges against black venire person, the defense counsel for Smith asked "the record show" that the number two juror was a black male and that every person the state had stricken from the panel was black except one. No objection was made by either defense counsel nor was a Neil inquiry requested. Based on the statement by defense counsel, the trial judge announced that he would ask the state to explain its reasons for the challenges. The state contended no preliminary showing had been established by the defense to require the state to explain its reasons but agreed to go ahead "voluntarily." At this point in the proceedings, defense counsel had given no reason or basis for a Neil inquiry other than stating for the record that a number of black jurors were peremptory challenged.
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> * * *
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> . . . No timely objection was made here, and no argument was made showing a likelihood that the potential jurors had been challenged solely because of their race. Slappy holds that the spirit and intent of Neil was not to obscure the issue in procedural rules governing the shifting burdens of proof but to provide broad leeway in allowing parties to make a *prima facie* showing that a "likelihood" of discrimination exists. As the state agreed voluntarily to proceed with the Neil inquiry, we will pass upon the merits of the alleged discrimination. However, defense counsel should be aware that the Neil and Slappy procedures should be complied with in order to properly preserve the issue of appeal.

A defendant fails to meet his initial burden under Neil and Slappy by merely objecting to the striking of a black juror. In the instant case, as in Smith, the recognition that a prospective juror was black was insufficient to require the State to explain its reasons for excusal. Furthermore, the defendant wholly failed to allege or demonstrate at trial that there was a strong

likelihood that the one potential juror was challenged solely because of race. "Eliminating one juror in order to reach another is a legitimate basis for exercising a peremptory challenge." Kibler v State, 546 So.2d 710, 714 (Fla. 1989). Here, the excusal of juror Farragut resulted in the immediate placement of another black juror on the panel. The defendant relies, in part, upon the excerpt from this Court's decision in State v. Slappy, 522 So.2d 18 (Fla. 1988), providing that the racially discriminatory excusal of even one prospective juror taints the jury selection process. Id. at 21. The above reference in Slappy assumes that the objecting party first satisfied the initial burden of demonstrating on the record a strong likelihood that the state struck the subject juror solely because of race. If such demonstration is made, then Slappy indicates that the discriminatory excusal of even a single prospective juror taints the selection process. The mere fact that the state excused one black prospective juror out of four does not mean that this excusal demonstrates "a strong likelihood" that he was excused "solely because of [his] race." Slappy at p. 21 (quoting Neil). In addition, the fact that the state or court may have remarked that the defense was required to show a "systematic exclusion" of blacks will not cure the defendant's failure to satisfy his initial burden under Neil.

In Adams v. State, 559 So.2d 1293 (Fla. 3d DCA 1990), the Third District Court found no error on the part of the trial court in failing to conduct a Neil inquiry into the state's reasons for peremptorily excluding the first black juror on the

panel where the defense failed to show a strong likelihood that the juror was rejected on racial grounds. In Adams, the court stated:

> The trial judge is in the best position to determine whether there is a need for an explanation of challenges on the basis that they are racially motivated. Thomas v. State, 502 So.2d 994, 996 (Fla. 4th DCA), review denied, 509 So.2d 1119 (Fla. 1987), See Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). In the present case, by the time Ms. Arlington was challenged, the trial judge had already heard the answers she had given during questioning. He had heard the tone of her voice. The judge was satisfied that the questioned challenges were not exercised solely because of the juror's race. Adams failed to demonstrate that there was a strong likelihood that black prospective jurors were challenged solely on the basis of their race. See Woods v. State, 490 So.2d 24 (Fla.), cert. denied, 479 U.S. 954, 107 S.Ct. 446, 93 L.Ed.2d 394 (1986). The record does not reveal the requisite likelihood of discrimination to require an inquiry by the trial court. In fact, we find, just as the court did in Parker v. State, 476 So.2d 134 (Fla. 1985), that this record reflects nothing more than a normal jury selection process. For these reasons, the trial court did not err in failing to inquire into the state's motives for excluding Ms. Arlington.

Similarly, in Verdeletti v. State, 560 So.2d 1328 (Fla. 2nd DCA 1990), the Court found that the defendant did not carry his burden of showing that the prospective juror was challenged solely because of race. See also, Reed v. State, 560 So.2d 203 (Fla. 1990) ["In trying to achieve the delicate balance between eliminating racial prejudice and the right to exercise peremptory challenges, we must necessarily rely on the inherent fairness and color blindness of our trial judges who are on the scene and who

themselves get a 'feel' for what is going on in the jury selection process."]

Here, the defendant failed to satisfy the third Neil requirement and the trial court did not err in finding that the defendant did not demonstrate any Neil violation. See also, Casimiro v. State, 557 So.2d 223 (Fla. 3rd DCA 1990) [". . . Moreover, the challenge of the four black jurors, by itself, was insufficient to require an inquiry where the record clearly established why the challenged persons were unacceptable state jurors."] Woods v. State, 490 So.2d 24 (Fla.), cert. denied, 479 U.S. 954, 107 S.Ct. 446, 936 L.Ed.2d 394 (1986); Thomas v. State 502 So.2d 994 (Fla. 4th DCA), review denied, 509 So.2d 1119 (Fla. 1987). In Lennon v. State, 560 So.2d 308 (Fla. 1st DCA 1990), the court noted, "to the extent the record is susceptible to differing interpretations, we are required to accord the trial court great deference in matters of this kind." Id., citing Reed v. State, 560 So.2d 203 (Fla. 1990). See, e.g., Stephens v. State, 559 So.2d 687 (Fla. 1st DCA 1990). As recognized in Stephens, "If a trial court believes that there is a 'likelihood' that peremptory challenges were improperly used, then the burden shifts to the party exercising its peremptories to demonstrate that the challenged veniremen were excused for a reason besides race. (e.s., citing Neil, at 486-487). In the instant case, the burden never shifted to the state under Neil. "Within the limitations imposed by State v. Neil, the trial judge necessarily is vested with broad discretion in determining whether peremptory challenges are racially intended." Reed, supra. In the instant

case the defendant failed to demonstrate a substantial likelihood that the one prospective juror was challenged solely on the basis of his race. The trial judge was well satisfied that no Neil violation occurred and his determination is fairly supported by the record.

ISSUE II

WHETHER THE TRIAL COURT ERRED IN EXCLUDING TESTIMONY PROFFERED BY THE DEFENSE.

The appellant also challenges the exclusion of defense evidence proffered to corroborate the assertion that the victim consented to sexual activity with the appellant. Specifically, the defense proffered the testimony of three sisters of the victim to the effect that they had seen the victim buy or use crack cocaine in the past.

The court below excluded as irrelevant and remote testimony by Joyce Robinson that she had seen the victim buy crack cocaine about a year before the trial; testimony by Alice Rose that she had seen the victim use cocaine about ten months before the trial; and testimony by Yvonne Robinson that she had seen the victim use crack on two or three occasions, most recently about a month before she was killed (R. 372-373, 377-378, 380-383, 385). All three witnesses denied that they had ever observed the victim offer her body in exchange for crack (R. 373, 378, 383). The defense alleged that the victim's prior use of crack cocaine was relevant to corroborate other defense testimony that the victim had approached the appellant on the night of her murder and offered to have sex in exchange for money or crack cocaine.

Not all evidence which may be said to remotely corroborate a theory of defense is necessarily relevant to the material issues being tried. In Hitchcock v. State, 413 So.2d 741 (Fla.), *cert. denied,* 459 U.S. 960, 103 S.Ct. 274, 74 L.Ed.2d 213 (1982), the defendant claimed that the victim was killed by the defendant's

brother, who was the victim's stepfather. This Court upheld the trial court's exclusion of proffered testimony relating to the brother's violent propensities and prior bad acts, noting that such testimony did not tend to prove that the brother had committed the crime for which Hitchcock was being tried.

The appellant relies on Roberts v. State, 510 So.2d 885 (Fla. 1987), *cert. denied,* 485 U.S. 943, 108 S.Ct. 1123, 99 L.Ed.2d 284 (1988), for the proposition that evidence otherwise excludable under the Rape Shield Law, if relevant, may be required to be admitted in order to protect a defendant's constitutional rights. Roberts involved the exclusion of testimony by the defendant that the victim of the charged sexual battery had told the defendant that she was a prostitute. This Court noted that such evidence may be relevant to a defense of consent, but would not be relevant in that case since Roberts had denied having any sexual relations with the victim. In the instant case, however, the defense did not attempt to admit any testimony relating to the victim's prior sexual activity, since the proffered witnesses all denied having ever known the victim to offer her body in exchange for cocaine (R. 373, 378, 383). The mere fact that the victim had previously purchased or used cocaine does not suggest that she would have been willing to barter her body on the night she was killed. Absent some established link between the prior cocaine use and sexual activity by the victim, the testimony that she had used cocaine months before her death was not relevant to the issue of her alleged consent to sexual activity before being fatally beaten.

In addition, even if any impropriety exists by the court's exclusion of the proffered testimony, it is apparent that any possible error was clearly harmless beyond any reasonable doubt. The admitted picture of the victim's body and the medical examiner's testimony as to the trauma to the victim's vagina refute the appellant's contention that the victim in this case consented to sexual activity prior to her death. The appellant's theory that he killed the victim in a rage after the victim bit his penis is also inconsistent with consensual sexual activity, since a person voluntarily performing oral sex is not going to purposefully bite their partner's sexual organ. Given the strength of the evidence that the sexual activity was not consensual, any error by the trial court in perceiving the testimony as to the victim's prior use of crack cocaine to be irrelevant to the issue of consent was clearly harmless.

The trial court's exclusion of the testimony proffered by the defense was clearly proper. The victim's purchase or use of cocaine months before her death does not tend to prove or disprove the appellant's assertion that the victim offered her body for sex in exchange for money or drugs on the night that the appellant killed her. Of course, a trial court's evidentiary rulings are presumptively correct, and should not be disturbed absent a clear abuse of discretion. Stano v. State, 473 So.2d 1282 (Fla. 1985), *cert. denied,* 474 U.S. 1093, 106 S.Ct. 869, 88 L.Ed.2d 907 (1986). Since no such abuse has been demonstrated in the instant case, the appellant is not entitled to relief.

ISSUE III

THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL SINCE THE EVIDENCE WAS SUFFICIENT TO DEMONSTRATE BOTH PREMEDITATION AND THE FELONY OF SEXUAL BATTERY.

The appellant argues that his motions for judgment of acquittal should have been granted on two theories; one, that there was insufficient evidence of premeditation on which to base a verdict of premeditated first degree murder, and two, there was no evidence of lack of consent on which to base sexual battery, thus there could be no first degree felony murder. Appellee submits there is sufficient evidence on which the trier of fact could find either premeditated murder of first degree felony murder.

A party moving for a judgment of acquittal admits all facts in evidence adduced and every conclusion favorable to appellee which is fairly and reasonably inferable therefrom. Victor v. State, 193 So.2d 762 (Fla. 1940); Lynch v. State, 293 So.2d 44 (Fla. 1974) and Spinkellink v. State, 313 So.2d 666 (Fla. 1975). The test to be applied to said motion and on review of the denial of such a motion is not simply whether in the opinion of the trial judge or the appellate court that the evidence fails to exclude every reasonable hypothesis but that of guilt, but rather whether a jury might reasonably so conclude. Amato v. State, 296 So.2d 609 (Fla. 3d DCA 1974) and Tillman v. State, 353 So.2d 948 (Fla. 1st DCA 1978). *See, also,* Holland v. United States, 348 U.S. 121, 75 S.Ct. 127, 99 L.Ed. 150 (1954) and Roberts v. United States, 416 F.2d 1216 (5th Cir. 1969).

The evidence before the jury in this case, plus all reasonable inferences therefrom, indicates the death of Geraldine Birch was committed by appellant with a premeditated intent to cause that death. Under Florida law premeditation is the fully formed and conscious desire to take a human life, which must be formed after reflection and deliberation. Such premeditation may exist for only a few moments before the offense. McCutchen v. State, 96 So.2d 152 (Fla. 1957). It may be inferred from the circumstances surrounding the homicide and may be established by circumstantial evidence. Hill v. State, 133 So.2d 68 (Fla. 1961); Larry v. State, 104 So.2d 352 (Fla. 1958); Weaver v. State, 220 So.2d 52 (Fla. 2d DCA 1969) and Polk v. State, 179 So.2d 236 (Fla. 2d DCA 1965).

The circumstances of this case indicate appellant had a fully formed intent to effectuate the death of Geraldine Birch. Even if we accept the defense theory that the encounter between appellant and the decedent was consensual in terms of the initial sexual contact, it is clear from the evidence that at some point in the "relationship" the parties were not satisfied with what was occurring. If as appellant suggests, he became upset with Ms. Birch during oral sex because she was irritating his penis, her actions thereafter went far beyond what was necessary to stop the act of fellatio. By appellant's own admission, he succeeded in getting the victim to release his penis by choking her around her neck. (R164, 457)

However, getting Ms. Birch to release his penis was not where it ended. Once she had released it, he continued to choke

her with one hand and striking her with his other hand, with his fist. She then fell to the ground. (R165, 457-459) Appellant then took the time to drag the victim to the other end of the dugout, there he dropped her. (R165) There he kicked and stomped her several times. (R165,, 460-461) The medical examiner testified that the cause of death of Geraldine Birch was massive blunt injuries to the head, neck, chest and internal organs. The examiner indicated there was extensive damage to the brain and internal organs. (R58-64)

Premeditation, being a state of mind, can be demonstrated through circumstantial evidence, such as the weapon used, the manner in which the murder was committed and the nature and manner of the wounds inflicted. O'Bryan v. State, 300 So.2d 323 (Fla. 1st DCA 1974). The determination of the defendant's mental state is a question of fact for the jury. State v. McMahon, 485 So.2d 884 (Fla. 2d DCA 1986). When there is competent evidence to support the jury verdict, it should not be disturbed on appeal. Heiney v. State, 447 So.2d 210 (Fla. 1984). *Sub judice,* there is substantial competent evidence to support the premeditated nature of this killing.

The view of this evidence must be taken in the light most favorable to the State. Spinkellink v. State, *supra.* The State need not rebut conclusively every possible variation which could be inferred from the evidence, but must introduce evidence which is inconsistent with the defendant's theory of what happened. Toole v. State, 472 So.2d 1174 (Fla. 1985). Appellant's theory of events was that the decedent hurt his penis and he killed her

in a rage. An examination of appellant's penis did not show any abrasions or lacerations, only one small white mark, although appellant had stated it was so sore he could not wash it for several days. (R203-204, 214-216) And although appellant indicated he choked the victim because she bit his penis and would not let go, after he had sufficiently incapacitated her enough so that she released his penis and fell to the ground , he continued his beating.

Additionally, appellant had to time to reflect on what he was doing. Even after she released his penis, he continued to choke her and hit her with his fist. This beating made her fall to the ground. Appellant took the time at this point to drag the victim to the other end of the dugout where he then dropped her. There was evidence presented by the State which indicated the victim had been dragged. (R140) These actions were still not enough. Once she had been removed to the other area of the dugout, appellant kicked and stomped on Ms. Birch in her chest.

This case is similar to the situation addressed by this Court in Cochran v. State, 547 So.2d 928, 930 (Fla. 1989). In Cochran the defendant raised on appeal the sufficiency of the circumstantial evidence. Appellant stated he had accidentally shoot the victim, and he let her out of the car after he panicked. However, there was evidence which pointed to the fact that the victim's body had been dragged for seventeen feet. In the instant case, appellant claimed he began beating the victim because she injured his penis. Other evidence, however, indicates after the initial beating, appellant dragged the body

to another location and stomped and kicked her some more. As this Court said in Cochran, "Given this conflict in the physical evidence, the jury properly could have concluded that appellant's version of events was untruthful." *Ibid.* at 930.

The trial court properly denied the motion for judgment of acquittal based on insufficient evidence of premeditation. There is substantial, competent evidence to support a jury verdict of premeditated murder, and that verdict should not be disturbed on appeal. Williams v. State, 437 So.2d 133 (Fla. 1983), *cert. denied,* 466 U.S. 909, 104 S.Ct. 1690, 80 L.Ed.2d 164 (1984).

Appellee also submits the jury verdict of first degree murder could have been based on felony murder, with the underlying felony of sexual battery. Although appellant's version of events was that Ms. Birch consented to have sex with him, the condition of the victim's body as well as the incredulity of appellant's version leads to the inescapable conclusion that a sexual battery occurred. The defendant testified that Ms. Birch approached him with the proposition of having sex in exchange for drugs or money. He goes on to say that after only a few seconds of vaginal intercourse, the victim decided to perform oral sex on him. Furthermore, without any provocation on appellant's part, Ms. Birch began to irritate and bite his penis.

In contrast to this story, the medical examiner testified that there were several lacerations and tears on the exterior of the vagina and a number of smaller injuries on the interior of the vagina. (R79-81) The medical examiner opined these injuries

were probably made by an object other than a penis. (R82, 119-120) Such injuries seem inconsistent with a "few seconds" of vaginal sex. Still more incredulous is the idea that a person who offers to engage in sex for money would then, without more, simply turn on her partner and attempt to injury him. Finally, when Detective Duran examined appellant's penis he saw no visible signs of injury other than a small white dot. (R203-204)

The trier of fact, the jury in this case, has to determine the facts including the credibility of the witnesses. When a criminal defendant takes the stand, his testimony is subject to the same rules of evidence as is the testimony of other witnesses. The jury can believe in a witness' testimony in whole or in part. Here, the jury obviously found certain parts of the defendant's testimony to be inconsistent with other evidence and common sense. Cochran v. State, *supra.*

The trial court properly denied the motion for judgment of acquittal on the issue of consent to the sexual battery and submitted the issue to the jury. There is competent evidence to support the jury's determination.

ISSUE IV

WHETHER THE TRIAL COURT ERRED BY OVERRULING APPELLANT'S OBJECTION TO PURPORTEDLY IMPROPER PROSECUTORIAL ARGUMENT IN THE PENALTY PHASE OF THE TRIAL.

As his next point on appeal, appellant contends that he is entitled to a new penalty phase because of purportedly improper closing argument made by the prosecutor in the instant penalty phase. Appellant contends that the prosecutor's statements concerning the denigration of life imprisonment as a sentencing alternative were improper but, in the context of the instant record and as will be shown below, appellant's point must fail.

At the outset, it must be observed that appellant made no request for curative instruction, nor a request for a mistrial. (R 731) The proper procedure where improper remarks are purportedly made is to object and move for curative instructions. If the curative instructions are denied or are inadequate a mistrial is the proper remedy. Thus, the failure to move for either curative instructions or for a mistrial should preclude appellate relief. The remarks were not so inflammatory as to deny a fair trial, Jackson v. State, 522 So.2d 802, 809 (Fla. 1988), and, thus, a request for curative instructions should have been made. Mabery v. State, 303 So.2d 369 (Fla. 3d DCA 1974), citing Perry v. State, 146 Fla. 187, 200 So. 525 (1941).

It must be remembered that a wide latitude in the closing argument to the jury is permitted. See e.g. Thomas v. State, 326 So.2d 413 (Fla. 1975). The question to be determined is whether the prosecutor's comment was so prejudicial as to deny the defendant a fair trial, Darden v. State, 329 So.2d 287 (Fla.

1976), or, as in the instant case, whether the prosecutorial misconduct was so egregious as to warrant remand for a new penalty phase. Bertoletti v. State, 476 So.2d 130, 133 (Fla. 1985). Only in the most egregious cases will a defect of constitutional proportion be found. Houston v. Estelle, 569 F.2d 372 (5th Cir. 1978). Your appellee submits that the comment complained-of when viewed in context with the entire closing argument is not so egregious as to render appellant's penalty phase fundamentally unfair. Indeed, although this Honorable Court in Jackson v. State, supra, criticized the type of closing argument employed by the prosecutor in the instant case, this Court nevertheless found that the comments were not so outrageous as to taint the validity of the jury's recommendation. Jackson, 522 So.2d at 809.

In his brief, appellant accuses the prosecutor of intentionally misleading the trial court with respect to the state of the law concerning the closing remarks used sub judice. Appellee submits that the prosecutor was not incorrect when he relied upon this Court's footnote in Hudson v. State, 538 So.2d 829 (Fla. 1989). In Hudson, as acknowledged by appellant in his brief filed in the instant cause, the same remarks were made during closing argument by the prosecutor, yet this Honorable Court considered appellant's argument concerning same and found them to be unsupported by the record and further noted that no reversible error occurred. Hudson, 538 So.2d at 832, footnote 6. Certainly, therefore, the prosecutor cannot be faulted wherein the most recent decision of this Court concerning these remarks

acknowledged that they did not form the basis of reversible error. In any event, the remarks made by the prosecutor should be contrasted with those made in Jackson, supra, where the instant record supports a reasonable use for those remarks. In Jackson, supra, there is no indication from the opinion of this Court that the comments were made for a purpose other than to urge consideration of factors outside the scope of the jury's deliberations. In the instant case, however, it is clear on the record that the remarks were made as anticipatory rebuttal to argument of defense counsel that the death penalty should be mitigated by virtue of the fact that appellant was to receive two life sentences and, therefore, appellant would never be let loose to rape, pillage and murder people again (R 745 - 746). Thus, where defense counsel was arguing that consecutive life imprisonments was a mitigating circumstance, the prosecutor, albeit anticipatorily, permissibly argued in rebuttal of this mitigation. In an analogous situation, this Honorable Court has determined that lack of remorse may not be considered as an aggravating circumstance or in enhancement of a proper statutory aggravatory circumstance. Pope v. State, 441 So.2d 1073 (Fla. 1983). However, in Agan v. State, 445 So.2d 326 (Fla. 1983), this Honorable Court determined that it is permissible to consider lack of remorse to negate mitigation. In the instant case, this is precisely the effect the prosecutor's remarks had upon the argument of defense counsel, to wit, rebuttal or negation of the mitigating circumstance of consecutive life imprisonments.

Lastly, even should this Honorable Court find the argument of the prosecutor improper in the instant case, your appellee submits that reversal is not proper. In Jackson v. State, supra, the case relied upon by appellant, this Honorable Court did not find the remarks so outrageous as to taint the validity of the jury's death recommendation. In the instant case, the same result should obtain.

ISSUE V

WHETHER THE LOWER COURT ERRED IN FAILING TO FIND NONSTATUTORY MITIGATING CIRCUMSTANCES.

Appellant claims that the trial court failed to find appellant's traumatic childhood as a mitigating factor and that he was a model prisoner. The trial court's sentencing order recites a finding of three statutory aggravating factors and:

> "2. The Court finds that the evidence fails to establish any statutory or nonstatutory mitigating circumstances.
> 3. Even if the age of Defendant (22) or any other aspect of his character or record, and any other circumstances of the offense, as presented during the guilt or innocence and penalty phases of the case, could possibly be considered mitigating circumstances, the Court finds that the aforesaid aggravating circumstances clearly outweigh such possible mitigating circumstances to such an extent that the Defendant deserves death by electrocution as unanimously recommended by the Jury." (R 1180).

Thus, the court did consider what was presented and found the evidence failed to establish any mitigating circumstances; even if what were presented could be considered mitigating the aggravating circumstances clearly outweighed them. The court further in paragraph 4 of its order explained why it was departing from the guidelines on the sexual battery count noting in part that the timing of the offense was "within six weeks of having been released from prison for sexual battery." (R 1181) Obviously, Taylor is not entirely a "model prisoner" and his "potential for rehabilitation" remains unperfected as he returns to similar criminal activity within a matter of weeks of release from incarceration.

Appellee respectfully submits that the lower court's alternative determination sufficiently complied with the mandate in Rogers v. State, 511 So.2d 526, 534 (Fla. 1987) and Lamb v. State, 532 So.2d 1007, 1054 (Fla. 1988). Obviously, the trial court's sentencing order antedates this Court's decision in Campbell v. State, __ So.2d __ 15 F.L.W. S342 (Fla. June 11, 1990), but trial judges need not be criticized for the apparently weekly fine-tuning of capital jurisprudence by this court. If, however, the court insists that a remand to the lower court is required for that court to more laboriously articulate that Perry Taylor's bed wetting problem as a child bears infinitesimally minute significance on the scales weighing life versus death[2] when compared with appellant's propensity for sexual batteries which in this case led to death, the inordinate expenditure of time and effort must ensue. But it should be clear to all that the result will not be different and that the trial court's correct finding of the presence of three aggravating factors will be sufficient support for the ultimate conclusion, concurred in by a unanimous jury recommendation. (R 1179)

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[2] Campbell declares: "Although the relative weight given each mitigating factor is within the province of the sentencing court, a mitigating factor once found cannot be dismissed as having no weight."

ISSUE VI

THE TRIAL COURT DID NOT ERR IN FINDING AS AN AGGRAVATING CIRCUMSTANCE THAT THE CAPITAL FELONY WAS COMMITTED DURING A SEXUAL BATTERY.

As was argued under Issue III of this brief, there was legally sufficient evidence from which the trier of fact could conclude a sexual battery occurred. That being the case, the trial court correctly found the murder occurred during the course of a sexual battery.

CONCLUSION

Based on the foregoing facts, arguments and citations of authority, Appellee would pray that this Honorable Court affirm the judgment and sentence of the lower court.

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. Regular Mail to Steven L. Bolotin, Assistant Public Defender, Polk County Courthouse, P.O. Box 9000, Drawer PD, Bartow, Florida 33830, this 14th day of August, 1990.

OF COUNSEL FOR APPELLEE