IN THE SUPREME COURT OF THE STATE OF FLORIDA

RICHARD EARL SHERE, JR.,

Appellant,

v. Case No. 74,352

STATE OF FLORIDA,

Appellee.

_____/

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

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

The state generally accepts Shere's recitation of the case and facts with the following additions. Some facts are necessarily repeated for continuity. Appellee specifically disputes the assertion that the trial court's sentencing order found "...3 or 4 statutory mitigating circumstances in addition to non-statutory mitigating (R. 1454-1458)." (B 1)[1] The sole mitigating factor was Shere's age of 21, which was balanced against three aggravating factors.

After midnight on December 25, 1987, Richard Earl Shere, Jr., and Bruce Michael "Brewster" Demo talked by telephone. (R 402, 697, 705) According to Shere's statement, they started discussing their mutual friend Drew Paul Snyder. (R 402) Shere said Demo stated he was thinking about killing Snyder, and Shere replied that, "I wouldn't mind seeing him dead..." (R 402-403) Shere's girlfriend overheard his side of the conversation, and at trial acknowledged making a statement to detectives that she overheard Shere say, "I can't believe Drew would turn state's evidence against me, but it seems right...", because he hadn't been arrested on the charge, and further, that Shere said that he and Demo should "make sure Drew wasn't going to say anything". (R 705-706) Testimony during the hearing on the motion to suppress (which was not admitted at trial) revealed that Shere, Demo and Snyder were suspects in a criminal investigation involving burglary and the theft of an air conditioner. (R 604-605, 1572-

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[1] (B) refers to the appellant's initial brief. (R) refers to the record on appeal.

1574) An unobjected to statement Shere made to the investigating officers implicated Snyder and Demo in the theft. (R 371-372) Shere also stated that Demo had told him that Snyder "ratted him out" for a crime that he and Snyder had committed. (R 372)

About a half an hour later, Shere arrived at Demo's residence in his car. (R 697) A witness observed Demo and Shere put a shovel in the trunk of the car. (R 697-702) This witness observed Demo return home several hours later at about 5 a.m. Demo started the washing machine, something he had never done before. (R 701)

Shere and Demo bought beer and went to Drew Snyder's house. (R 406) The men convinced Snyder to accompany them rabbit hunting. (R 406) The group went to an undeveloped subdivision a quarter of a mile from Shere's house, where they hunted for about an hour. (R 408, 386) Shere was using a .22 caliber pump action rifle, and Demo hunted with his .22 caliber pistol.

According to Shere, as he was relieving himself, Demo suddenly grabbed Shere's rifle and shot Snyder in the chest several times. (R 409) According to Demo's statement, Shere shot the rifle. (R 754-755) One of these shots cut an aorta, and the medical examiner testified that due to the large amount of hemorrhage, his heart pumped for some time. (R 555-556) Powder burns on his clothes indicated that this shot was to the back, and fired at close range. (R 578) Another of these shots pierced his liver, and would have caused death within an hour. (R 570, 589) This shot also entered from the back and had a horizontal trajectory, indicating that Snyder was standing when

shot, not sitting on the back seat of the car as Shere claimed. (R 410, 576-578)

There were a total of ten bullets fired into Snyder's body, including two shots which entered and exited his right forearm, and two shots into his right thigh. (R 560-569) Two potentially fatal shots were fired into Snyder's head, one entering the center of his forehead which was fired at close range, and the other entering from the back of the skull. (R 560, 563, 569, 577).

Shere and Demo loaded Snyder's body into Shere's car and transported it a short distance. They dug a hole with the shovel they brought and buried the body in a grave five feet deep. (R 283, 414-416)

Shere returned home and his girlfriend observed blood on his jeans. (R 710) After daylight she observed a stain on the back seat of Shere's car, and told detectives that Shere told her, "That's Drew's blood." (R 711) She observed Shere drag the back seat behind their property where he burned it. (R 712, 720, 424)

Later that day, Christmas Day, Shere went with his father to Snyder's house and left a gift for him there. (R 719) Shere returned to Snyder's house with Greulich a few hours later. (R 721) Shere entered Snyder's apartment and emerged with clothes and other personal belongings of the victim. (R 721) En route to Clearwater for Christmas dinner, Shere dumped the clothes in a trash container along the way to make it look like the victim left town suddenly. (R 428-429, 722) Shere later pawned some of Snyder's tools. (R 430)

Shere traded the rifle for other weapons with Donald Ham. (R 432), which the police recovered. (R 312, 381) Demo gave his pistol to Kevin Shannon a few weeks after the murder. (R 595)

Shere told Ray Pruden that he had shot the victim ten to fifteen times while they were out rabbit hunting, then buried his body. (R 739-740) Shere told his girlfriend that he had shot and killed the victim. (R 715-717) Demo's involvement was not mentioned to either of these witnesses; Shere claimed to them to have committed the murder alone.

The state presented testimony from several expert witnesses concerning the blood, ballistics and gunshot residue. Human blood was found on Shere's boots, and a hair from the victim's head was found on Shere's jacket. (R 636-638, 650-651). The ballistics expert testified that the bullets and casings were compared to the rifle and pistol, and in his opinion, the shots fired into the victim's head came from the pistol, and one bullet recovered from his leg was fired by the rifle. (R 661-679)

SUMMARY OF ARGUMENTS

The trial court correctly denied the motion for mistrial made after the prosecutor elicited information from the deputy that he had information that Shere would be at the courthouse on January 13, 1988, for some unspecified reason. This issue was not preserved by a request for a curative instruction which would have dissipated any prejudice arising from this fleeting remark. It is sheer speculation that the jury would have inferred other bad acts from the fact that the defendant was at the courthouse. The testimony concerning Shere's purpose for coming to the courthouse was admissible as it provided the motive for this murder. Even if preserved, if not speculative and inadmissible, no reversible error is presented.

One photograph of the victim was properly admitted into evidence because it was relevant. It was used to identify the victim and the medical examiner referred to it during her testimony. "Murder is a nasty business at best and dead bodies are never easy to look at." (R 613)

Shere's pro se motion for appointment of private counsel was correctly denied as facially insufficient.

The Florida death penalty statute has been repeatedly upheld against attacks upon its constitutionality which are reraised here.

The trial court properly denied the motion to suppress Shere's custodial statement because it was voluntarily made. The defense stipulated that Shere was **not represented by counsel** on the unrelated charge for which he was arrested after his bond was

revoked. At no time did Shere assert his right to counsel. After voluntarily discussing the case for nearly an hour, Shere stated that he desired to terminate the interview, and the interrogation ceased. Shere voluntarily spoke to the officers the next day and did not invoke his right to silence.

The trial court did not err by calling witness Heidi Greulich as a court witness without a predicate as to her hostility because she had given several inconsistent statements and the state could not vouch for her credibility. Any error in failing to establish a predicate is harmless in view of the court's subsequent statement that she was, in fact, hostile.

Any error in the manslaughter instruction is harmless given the conviction for first degree murder.

The instruction concerning principals was necessary to rebut the defense that Shere was not responsible for actions he blamed on Demo.

The motion for new trial on the ground of newly discovered evidence was properly denied. The information contained in the affidavit repeating jailhouse boasting from Demo was available during trial. The affidavit is conclusory and the witness would have been susceptible to considerable impeachment. It contradicted Shere's own version of the events. This evidence could not have alone vindicated Shere and so the court did not abuse its considerable discretion in denying the motion.

The court correctly ruled that an anonymous letter to the newspaper was probably not written by a juror in this case. Misunderstanding of the instructions inheres in the verdict.

Shere expressly waived the complaint that he knew one of the jurors. There is no evidence that any of the veniremen lied during voir dire.

Shere was sentenced to death in accordance with Florida law. The trial judge properly found three aggravating factors which were balanced against the sole mitigating factor of Shere's age of 21. There was substantial evidence that Shere and Demo murdered Snyder because he "ratted me out" by informing the police that they had been involved in criminal activity. The court properly found that the murder was committed to disrupt or hinder a governmental function. Francis, infra. There was evidence presented that the victim suffered physical pain from multiple gunshot wounds, including several that were not fatal, and endured the emotional anguish that he was being killed by his hunting buddies, rendering this murder especially heinous, atrocious or cruel. The murder was committed in a cold, calculated and premeditated manner. It was planned several hours in advance, was an execution style slaying and Shere carefully concealed his crime. The trial court properly considered and rejected other mitigating evidence.

ARGUMENTS

POINT ONE

EVEN IF PRESERVED FOR REVIEW, THE TRIAL COURT CORRECTLY DENIED THE MOTION FOR MISTRIAL MADE IN REFERENCE TO A REMARK THAT SHERE WAS FOUND AT THE COUNTY COURTHOUSE.

During the testimony of Hernando County Sheriff's Deputy Alan Arick, the prosecutor asked Arick if he came in contact with Shere on January 13, and he responded that he had, based upon information he had received that Shere would be at the County Courthouse. (R 339) An objection to this remark was sustained. (R 339) The prosecutor then asked if and where Shere had been located, and Arick responded, "At the courthouse." (R 340) Another objection was sustained, and the court permitted the defense to reserve the motion. (R 340, 399) The defense did not move to strike the statement and did not request a curative instruction.

Appellee contends that in order to preserve this issue for appellate review, the defense should have moved to strike the comment and/or requested a curative instruction. Ferguson v. State, 417 So.2d 939 (Fla. 1982). A curative instruction could have dissipated any prejudice arising from this fleeting remark. See, Clark v. State, 443 So.2d 973 (Fla. 1983).

This issue is based upon speculation. This Court should not reverse a conviction and sentence based upon conjecture. Even if the jury inferred that Shere was at the courthouse for a criminal case as opposed to getting a marriage license or paying a traffic ticket, he could have been a witness or a juror. It is not

uncommon for jurors to learn during a retrial that a defendant has been tried before for the same offense. Jennings v. State, 512 So.2d 169, 174 (Fla. 1987). This knowledge does not warrant a mistrial when there is no indication that the jurors knew what had occurred at the prior trial. Id. If it is not reversible error for a juror to learn of a retrial, then it should not be reversible error for jurors to learn that a defendant was at the courthouse for some unspecified reason.

The state recognizes that the defense filed a pretrial motion in limine, however, the trial court did not rule upon the motion until mid-trial, after the state proffered the witness. (R 604-606) The page to which appellant cites where he claims the ruling was made is page 244, but at that page the court merely indicates an inclination to grant the motion. The ruling was not made until long after Arick testified.

The evidence that Shere was at the courthouse for the purpose of arraignment was relevant to this case. The motive for the murder was Shere's belief that the victim had "ratted him out" by revealing Shere's responsibility in a crime which they both had committed. Although motive is not an element of the crime, it is nonetheless relevant evidence that helps the jury to understand the entire circumstances of the crime. Craig v.State, 510 So.2d 857 (Fla. 1987). Perhaps the comment complained of violated the trial court's **subsequent** ruling, but the state contends that the evidence of the other crime was directly relevant and admissible in this case.

Even if preserved, and not speculative and inadmissible, no error is presented. Shere was on trial for first degree murder. Even if the jury was clairvoyant and deduced that Shere was at the courthouse to answer criminal charges, theft of an air conditioner is a much less serious offense than first degree murder. There is no prejudice that warrants reversal. See, Waterhouse v. State, 429 So.2d 301 (Fla. 1983); Johnston v. State, 497 So.2d 863 (Fla. 1986). This answer does not suggest serious criminal wrongdoing which may have improperly influenced the jury's verdict. C.f. Elkins v. State, 531 So.2d 219 (Fla. 3d DCA 1988).

It is within the trial court's sound discretion to grant a motion for mistrial, which should be granted only in cases of absolute legal necessity when necessary to ensure a fair trial. Wilson v. State, 436 So.2d 908 (Fla. 1986); Marek v.State, 492 So.2d 1055 (Fla. 1986). A motion for mistrial should be granted only when the error complained of is so prejudicial that it vitiates the entire proceedings. Villavicencio v. State, 449 So.2d 966 (Fla. 5th DCA 1984); Cobb v. State, 376 So.2d 230 (Fla. 1979). The court did not abuse its discretion in denying the motion for mistrial.

POINT TWO

THE TRIAL COURT CORRECTLY ADMITTED A PHOTOGRAPH OF THE VICTIM AS RELEVANT EVIDENCE.

Appellant contends reversible error occurred when the trial court admitted into evidence state's exhibit 1, a photograph of the victim's body immediately after it was exhumed. When the state sought to introduce this exhibit, the trial court sustained the objection to three photographs on the ground that they were cumulative, and forced the state to choose one photograph. (R 289)

The state contends that this photograph was relevant and the trial court did not abuse its discretion in admitting it into evidence. As the judge stated, "Murder is a nasty business at best and dead bodies are never easy to look at." (R 613) The basic test of a photograph's admissibility is relevance. Straight v. State, 397 So.2d 903, 906 (Fla. 1981). The photograph admitted in this case was used to identify the victim and was used by the medical examiner to illustrate the condition of the victim's body. (R 288-290, 316, 549) Haliburton v. State, 15 F.L.W. S 193 (Fla. April 5, 1990). No error is presented.

POINT THREE

THE TRIAL COURT CORRECTLY RULED THAT SHERE'S PRO SE MOTION FOR APPOINTMENT OF PRIVATE COUNSEL WAS FACIALLY INVALID.

On December 16, 1988, Shere filed a motion for appointment of private counsel. (R 1100-1101) In this motion, he complains that his appointed counsel visited him twice during his eleven months of incarceration, that counsel encouraged him to enter a negotiated plea of guilty, and that the case had been continued.

On January 12, 1989, a hearing was conducted on the motion. (R 1532-1535) The court ruled that the motion was facially insufficient. (R 1533) The court asked the defendant if he wanted an explanation of the advantages and disadvantages of representing himself, and the defendant declined, stating, "I will continue with the Public Defender." (R 1534) A written order denying the motion was entered. (R 1108)

Shere was given an opportunity to fully present his allegations; this claim is without merit. Ventura v. State, 15 F.L.W. 190 (Fla. April 5, 1990) An indigent defendant does not have the right to decide which counsel the court should appoint to represent him. Steinhorst v. State, 438 So.2d 992 (Fla. 1st DCA 1983). Shere clearly did not want to represent himself rejected an opportunity for a Faretta hearing. Faretta v. California, 422 U.S. 806 (1975). The trial court correctly ruled that the grounds alleged were insufficient on their face and no abuse of discretion has been demonstrated. Ventura.

POINT FOUR

THE FLORIDA CAPITAL SENTENCING STATUTE IS CONSTITUTIONAL ON ITS FACE AND AS APPLIED.

Appellant suggests that the statute is unconstitutional on its face and as applied. He concedes that each argument has been repeatedly rejected. See, Stano v. State, 460 So.2d 890 (Fla. 1984). Although a statute's facial validity can be assailed for the first time on appeal, the application of the statute to the defendant's case must be raised at the trial level to preserve the issue for appellate review. Trushin v. State, 425 So.2d 1126 (Fla. 1983). Shere filed motions to declare the death penalty statute unconstitutional, alleging that the aggravating circumstances of cold, calculated and premeditated and heinous, atrocious or cruel were unconstitutionally vague, and that the statute does not sufficiently limit arbitrary and capricious application of the death penalty. (R 1125-1144; 1149-1150)

In Smalley v. State, 546 So.2d 720 (Fla. 1989), this Court held that the HAC aggravating factor was not unconstitutionally vague, distinguishing Maynard v. Cartwright, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988).

Neither is the aggravating factor of cold, calculated and premeditated unconstitutionally vague. Harich v. Dugger, 813 F.2d 1082, 1102 (11 Cir. 1987), adopted, 844 F.2d 1464 (11 Cir. 1988) As interpreted by this Court, this aggravating factor is sufficiently defined and uniformly applied. Rogers v. State, 511 So.2d 526 (Fla. 1987), Christian v. State, 550 So.2d 450 (Fla. 1989).

This court had repeatedly upheld the death penalty statute against constitutional challenges. Stano v. State, 460 So.2d 890 (Fla. 1984); Henderson v. State, 463 So.2d 196 (Fla. 1985).

All of the issues raised herein have been repeatedly rejected and Shere has failed to demonstrate any reason to reconsider them.

POINT FIVE

THE TRIAL COURT CORRECTLY RULED THAT SHERE'S STATEMENT TO DETECTIVES WAS VOLUNTARILY GIVEN AND THEREFORE ADMISSIBLE.

The defense filed an amended motion to suppress the statement Shere made to Detectives Arick and Blade on January 14, 1989, on the grounds that his detention was illegal. (R 1153-1155) At the hearing on the motion to suppress, the defense stipulated that at the time Shere initially came in contact with the officers, he was not represented by counsel. (R 1575)

The only witness to testify at the hearing was Detective Arick, and his uncontradicted testimony established that he first received information that Shere was involved in the homicide of Snyder on January 12, 1989. (R 1576-1577) The next day, Arick viewed Shere's car in a public parking lot and noticed blood stains. (R 1579) On January 13 at two in the afternoon, Arick obtained a search warrant for Shere's car and an order revoking Shere's bond in an unrelated criminal case. (R 1580-1583) At 2:30 p.m. that date, Arick met Shere at the courthouse. Arick testified that he told Shere that they were conducting an investigation into the death of Drew Snyder and asked him if he would come to the Sheriff's Office to answer some questions. (R 1584) Shere replied, "Yes, I thought you'd want to talk to me. I'll come with you." (R 1584) Shere was not under arrest at this time; he was not informed of the order revoking bond.

Shere was advised of his rights and voluntarily spoke with the officers for about 45 minutes. (R 1585-1587) Eventually, Shere said he was tired of answering the same questions over

again and asked to leave. (R 1587) The officers asked no further questions, but at this time told Shere that the court had revoked his bond in the other criminal case and he was not free to leave. Interrogation ceased and custody began.

The next morning, January 14, Arick interviewed Demo and Greulich, Shere's girlfriend, and learned more evidence implicating Shere in the murder. (R 1589) That afternoon, Arick and Blade went to the county jail and told Shere of the statements from Greulich and Demo. (R 1590) His response was, "Yes. I've been thinking about it and I want to talk to you. I wanted to get in touch with you but they took your cards away from me so I couldn't call you." (R 1590, 1603) Shere was readvised of his rights and gave an incriminating statement. He later took detectives to the murder scene, burial location, and other physical evidence. The statement at issue was taped at seven in the evening on January 14, 1989. (R 1595)

The trial court found as fact that the detention on the "off-bond" warrant was legal pursuant to § 907.141 (4)(d), Florida Statutes (1989), found that there was no evidence to support the contention that this detention was coercive or an improper ruse to get Shere to confess, and that the statement was freely and voluntarily given. (R 1619-1621) The ruling of the trial court on a motion to suppress comes to this court clothed in a presumption of correctness, and this court must interpret the evidence and reasonable inferences and deductions in the light most favorable to the ruling. McNamara v. State, 357 So.2d 410 (Fla. 1978); Owen v. State, 15 F.L.W. S 107 (Fla. March 1,

1990). Shere's simple disagreement with the court's conclusions does not demonstrate an abuse of discretion in the ruling.

The initial meeting in the courthouse and the interrogation that followed was noncustodial and completely voluntary. Shere's desire to cease questioning was honored. Shere did not invoke his right to silence, on the contrary, he voluntarily spoke with the officers for almost an hour. It is undisputed that Shere **never requested counsel**, and the defense stipulated below that at all times material, Shere was **not represented by counsel on the other case**. There is no sixth amendment claim presented.

Nor was there any improper coercion in this case. The officers testified[2] that they told Shere that it would be better for him if he cooperated with the investigation. This wise advice was heeded, but does not constitute improper coercion. Owen, supra. Shere was not "deluded as to his true position", but correctly informed that cooperation was in his best interest.

Appellee relies upon several decisions from this court for the proposition that this statement was voluntary and properly admitted. Muehleman v. State, 503 So.2d 310, 314 (Fla. 1987) held that after an interview is terminated at the defendant's request, a subsequent statement is admissible. "The law does accord a suspect the opportunity to voluntarily change his mind and confess." Id, quoting Witt v. State, 342 So.2d 497, 500 (Fla. 1977); Cannady v. State, 427 So.2d 723 (Fla. 1983). None of Shere's statements are subject to the interpretation that he

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[2] Arick testified at the hearing as the only witness. Blade was present, but not called in lieu of the stipulation that he would testify as stated.

was invoking his right to silence. Walton v. State, 481 So.2d 1197 (Fla. 1987) There is no evidence to support the contention that the police conduct was such as to overbear Shere's will or threaten him. "The confession clearly meets the requirements set forth in Michigan v. Mosley, 423 U.S. 96, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975)." Zerquera v. State, 549 So.2d 189, 192 (Fla. 1989).

POINT SIX

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN CALLING WITNESS HEIDI GREULICH SHERE AS A COURT WITNESS.

At the time the murder was committed, appellant lived with his sixteen year old girlfriend, Heidi Greulich. Before trial they supposedly married. The state moved to call Heidi Greulich Shere as a court witness on the grounds that she had made several inconsistent statements to police officers and during depositions, and because her conduct during the depositions indicated that she was hostile to the state. (R 606-610). The defense objected on the ground that hostility had not yet been established, but the court replied that hostility was only one basis to rule that a witness was a court witness, and granted the state's request. (R 609, 619) Later, after she testified, the court stated,

> On the witness Heidi Greulich or Shere, I wanted it put in the record that based on her tone of voice, her expression, eye contact, as well as her responses to questions, she in fact did prove to be a hostile witness, and therefore would have been subject to being called as a Court's witness anyway, had I not made the decision based on other factors. (R 778-779)

On appeal, Shere claims that the trial court committed reversible error in calling Greulich[3] as a court witness before a predicate was established that she was hostile. In light of the court's

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[3] For clarity, this witness will be referred to by the name she used at the time the crime was committed.

subsequent statement quoted above, no reversible error is presented. §924.33 Fla. Stat. (1989).

The state relies upon Freeman v. State, 547 So.2d 125 (Fla. 1989) as support for the proposition that no error occurred. In Freeman, the court called the defendant's stepbrother as a court witness after he made inconsistent statements. The stepbrother saw Freeman in possession of articles stolen during the murder/burglary. In this case, Greulich testified that she overheard the defendant talking on the telephone to his accomplice, planning the murder. (R 705-710) She testified that later that evening after he returned, she saw blood on Shere's jeans and boots. (R 710, 720) The next day, Greulich saw stains on the back seat of Shere's car and saw him burn the back seat and drag it to a swamp behind their house. (R 720) Later that day, Christmas day, she and Shere went to the victim's apartment, and Shere retrieved clothes and other personal belongings of the victim, which she observed him place in a trash container. (R 721-722).

As in Freeman, the trial court did not abuse his considerable discretion in declaring Greulich as a court witness. Hall v. State, 136 Fla. 644, 187 So. 392 (1939); Brumbley v. State, 453 So.2d 381 (Fla. 1984). Greulich was a witness to the planning of the crime and the defendant's efforts to conceal the crime after it was committed. See, Jackson v. State, 498 So.2d 906 (Fla. 1986). Although she testified to incriminating statements made to her by Shere, the bulk of her testimony was what she personally observed and overheard, which is not hearsay.

This distinction distinguishes this case from Dudley v. State, 545 So.2d 857 (Fla. 1989), upon which appellant relies. Moreover, her testimony is cumulative in many respects to physical evidence and statements from other witnesses. No abuse of discretion has been demonstrated.

POINT SEVEN

ANY ERROR IN THE MANSLAUGHTER INSTRUCTIONS IS HARMLESS GIVEN THE CONVICTION OF FIRST DEGREE MURDER.

In Banda v. State, 536 So.2d 221 (Fla. 1988), this Court held that an error in the manslaughter instruction is not a basis to reverse a conviction for first degree murder because it is two steps removed from the conviction, and harmless error at best, where, as here, there is no evidence to support the defenses of excusable or justifiable homicide. See also, Squires v. State, 450 So.2d 208 (Fla.) cert. denied, 469 U.S. 892 (1984). Shere's defense was that his accomplice committed the crime, not that the murder was excusable or justifiable. There is no pretense of self-defense or other justification for this murder which was committed in cold blood. No reversible error is presented.

POINT EIGHT

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN OVERRULING SHERE'S OBJECTION TO THE STANDARD JURY INSTRUCTION REGARDING PRINCIPALS.

Without citing any authority, Shere claims that the trial court erred in overruling his objection to the standard jury instruction on principals. (R 744) The objection below was that the theory of the state's case was that Shere acted alone, and therefore, this instruction was not applicable. First, this is a mischaracterization of the state's evidence. The state's case established that both Demo and Shere shot the victim, a theme which started in opening statement and continued throughout the trial until the closing argument. (R 255-259, 696-700, 782-793) Second, the **defense** was that Demo committed the murder and Shere was simply present at the scene. (R 260, 349-355, 751-755, 805) The instruction concerning a person's liability for another's actions as a principal was necessary to rebut this defense. Indeed, in closing argument, the prosecutor explained at length that both men were equally responsible for each other's actions regardless of who fired the fatal shot and the defense closing also discussed this issue. (R 788-793, 805-813) No abuse of discretion has been demonstrated; this instruction was properly given. See, Hall v. State, 403 So.2d 1319 (Fla. 1981).

POINT NINE

THE TRIAL COURT CORRECTLY DENIED THE MOTION FOR NEW TRIAL ON THE GROUND OF NEWLY DISCOVERED EVIDENCE.

Appellant contends that his motion for new trial pursuant to Florida Rule of Criminal Procedure 3.600 (a)(3) should have been granted on the ground of an affidavit from one Frank DeMotte. (R 1485) Shere contends that this affidavit constitutes new and material evidence which would probably have changed the verdict that could not have been discovered and produced during trial. The state disagrees on all counts.

The affidavit at issue states in full:

> About 4-5 weeks ago, I was in A-pod Her. Co. Jail and overheard Demo, and Higgins talking in their cell about 12:30-1:00 a.m. Demo was telling Higgins about shooting someone. He said that he shot "the sorry bastard, and had to finish him off because Shere was too scared to shoot him." He also told Higgins that Shere did not know that he was going to kill the "snitching motherfucker". In this conversation whitch (sic) lasted about 25-30 minutes he never mentioned the name of the person who was killed. He kept mentioning his as I described above. He also told Higgins that Shere was afraid, and that he should have shot him too. As I understood from listening to Demo talk, that Shere did not shoot anyone, and had made no plans earlier to kill anyone.
>
> I also heard Demo say after Shere's trial that he was glad Shere got the chair, but I didn't hear him say why he was glad. (R 1485)

This statement was made on May 22, 1989. Shere's trial was concluded on April 26, 1989. (R 1) Four to five weeks before May 22 was during the trial. Therefore, Shere did not sustain his burden of demonstrating that this evidence could not have been discovered with reasonable diligence and produced during trial. Although Demo was "unavailable", at all times, Higgins and DeMotte were available to the defense and could have been served with subpoenas to testify at Shere's trial. The motion was properly denied on this basis alone.

It is well established that the trial court has broad discretion in determining a motion for new trial and that "(o)nly very rarely should the trial court's determination be disturbed." Jent v. State, 408 So.2d 1024, 1031 (Fla. 1981) Appellee contends that Shere has failed to demonstrate an abuse of judicial discretion in denying the motion for new trial on the basis of newly discovered evidence.

DeMotte's affidavit is inconclusive, and as a witness he would have been susceptible to considerable impeachment. The affidavit itself is conclusory; at no time does he attribute to Demo a statement claiming sole responsibility for this murder. The claim that Shere had no prior knowledge of the murder is refuted by several witnesses, including Shere himself, who claimed that he went along to dissuade Demo from killing Snyder. The telephone conversation between Shere and Demo in which they discussed killing Snyder was overheard by other persons and testified to by several witnesses at trial. When the new evidence is susceptible to impeachment, there is no abuse of

discretion in denying the motion for new trial. Perry v. State, 395 So.2d 170 (Fla. 1980).

The jail house boasting repeated by DeMotte is not material evidence which alone could have vindicated Shere, and so he was not entitled to a new trial on this ground. Halliwell v. State, 323 So.2d 557 (Fla. 1975), see also and compare, O'Callaghan v. State, 461 So.2d 1354 (Fla. 1984). In many respects, it was cumulative to testimony before the jury. The defense presented testimony from Detective Arick that Demo claimed to have fired the fatal shots. (R 755) The defense claimed that Demo was solely responsible for the murder. Shere's statement to detectives denied any responsibility for the murder. The jury rejected this theory by their verdict. No reversible error is presented.

POINT TEN

THE TRIAL COURT CORRECTLY DENIED THE MOTION TO INTERVIEW JURORS AS FACIALLY INSUFFICIENT. THE ISSUES RAISED WERE KNOWN TO DEFENDANT AND HIS COUNSEL BEFORE THE JURY WAS SWORN AND WERE THEREFORE WAIVED OR ELSE WERE MATTERS THAT INHERED IN THE VERDICT.

On May 5, 1989, an anonymous letter was sent to the editor of the St. Petersburg Times, from a person who claimed to have been a juror in a case tried before "judge O'Neil". (R 1465) This letter expressed disagreement with the conviction and sentence of death. The writer continues to complain that one juror allegedly stated that she knew the defendant. Another juror supposedly "...told of her brother being murdered a few years ago..." (R 1465) The trial court rejected the motion to interview jurors after pointing out that the matters the defense claimed granted this letter an indicia of reliability were all matters that came out in open court. For instance, that the foreman of the jury was a woman was known by all when the verdict was read. Specifically, Judge McNeal stated:

> There's no testimony that they knew him. There's not testimony that they lied in jury selection....
>
> The only thing we have is Shere's testimony, unsworn comments after the jury verdict that at least one of the jurors knew him...I asked him did he discuss that fact with his attorney and he said, yes, that he had discussed it with his attorney, and after discussing it, they decided to keep the juror....
>
> You get letters all the time from people when you're in the criminal justice system who think they know something about what went on....

> It was obvious to me from reading this letter that this did not come from a concerned juror, certainly not one that sat on the case...In the first place, as you know, every one of the jurors that served in this case was given a jury certificate signed by me. There is no way they could have misunderstood who the judge was in the case...
>
> All of the jurors indicated that they could be fair and impartial in this case. The length of their deliberations, the very painstaking examination of the evidence in both the penalty phase and the guilt phase, I think indicates that they did an outstanding job...
>
> I'm not going to let you go back and interview the jurors about what their discussions were in the jury room. I think that would infringe on their ability to speak frankly in the jury room and to deliberate on these issues. (R 1525-1527)

The trial court did not abuse his discretion in deciding that this unsigned, anonymous letter was not from a person who sat on Shere's jury.

Even if the letter was from one of Shere's jurors, it was second-hand hearsay and insufficient to require an inquiry. The defense did not present an affidavit from the alleged jurors in question to properly place this issue before the court.

It is unnecessary to contact the jurors in this case because the trial court could not predicate reversal upon a matter that inhered in the verdict. Generally, jurors cannot impeach their own verdicts with post-trial affidavits. Kelly v. State, 39 Fla. 122, 22 So. 303 (1897); Linsley v. State, 88 Fla. 135, 101 So.

273 (1924) A misunderstanding of the judge's instructions, a claim that a juror did not agree with the verdict or that he was unduly influenced by a fellow juror are matters that inhere in the verdict. Russ v. State, 95 So.2d 594 (Fla. 1957); Smith v. State, 330 So.2d 59 (Fla. 1st DCA 1976). Matters which do not inhere in the verdict are collateral, for instance, that a juror was approached by a party or that the verdict was determined by lot or chance. Marks v. State Road Development, 69 So.2d 771 (Fla. 1954) Appellee suggests that misunderstanding of the instructions is a matter which inhered in the verdict.

The claim that one or more jurors knew the defendant was expressly waived. Moreover, it is a matter peculiarly within Shere's personal knowledge. The defendant personally acquiesced to seating persons on the jury with whom he was acquainted; this is a strategic decision. Even if this is not a matter that inhered in the verdict, a challenge on this ground must be made before the jury is discharged or before the verdict is accepted. Marks, supra. Even when the error comes to light the very next day after the verdict, the motion is untimely. Smith, supra. See also, State v. Blasi, 411 So.2d 1320 (Fla. 2d DCA 1981).

The anonymous letter was hearsay and the claim is purely speculative. There is no record support for the claim that a juror lied during voir dire. The venire all swore that they would try the case based upon the evidence and law. No abuse of discretion has been demonstrated. See, Scull v. State, 533 So.2d 1137 (Fla. 1988).

POINT ELEVEN

THE TRIAL COURT CONSIDERED ALL EVIDENCE IN THE PENALTY PHASE AND PROPERLY FOUND THREE AGGRAVATING FACTORS WHICH WHERE SUPPORTED BY THE EVIDENCE, WEIGHED THEM AGAINST THE MITIGATING FACTOR OF SHERE'S AGE AND SENTENCED HIM TO DEATH IN ACCORDANCE WITH FLORIDA LAW.

Shere contends that the trial court improperly found three aggravating factors, failed to clarify which mitigating factors were or were not found, and incorrectly sentenced him to death. The state contends that the court properly found the murder of Drew Snyder was committed to disrupt or hinder the enforcement of laws, that it was especially heinous, atrocious or cruel, and that it was committed in a cold, calculated and premeditated manner. §921.141 (5)(g)(h)(i), Fla. Stat. (1987). The court considered and properly rejected all offered mitigating evidence, finding that Shere's age of 21 years was the sole mitigating factor. The trial judge weighed the aggravating and mitigating factors and correctly determined that the only appropriate sentence for this murder is death.

A. Disrupt or hinder a governmental function or the enforcement of laws.

In his findings of fact, the trial court related the following evidence to support this aggravating factor:

> While on pretrial release in a pending case, Richard Shere agreed with another defendant, Bruce Demo, to pick up Drew Snyder and "make sure he doesn't say anything" in response to information from Bruce Demo that Drew had "ratted them out" on another charge by giving state's evidence. Although there is no evidence that Drew Snyder

> actuallly implicated the defendant in another case or that he would have been a state witness, there is proof beyond a reasonable doubt that Shere actually believed the victim was a witness. He expressed this belief by saying, "I can't believe that Drew would return state's evidence, but it seems right because he has not been arrested." The statement is also an admission that Snyder had the knowledge and ability to furnish information to law enforcement that would implicate Shere in another offense. The motive for the murder was to eliminate Drew Snyder as a witness. Lara v. State, 464 So.2d 1173(Fla. 1985). (R 1454-1455)

Shere contends on appeal that "...there was no clear evidence that Shere saw Snyder as a threat to him, or that Snyder was considered to be a possible witness against him." (B 28) The state disagrees. There is ample record evidence to support this factual finding. (R 371, 402-403, 426-427, 605, 705-707).

This aggravating factor has been upheld in other cases on comparable evidence. The case most factually similar is Francis v. State, 473 So.2d 672 (Fla. 1985), where the victim was a confidential informant and the defendant knew that fact. This court held that this aggravating factor was properly found. It is undisputed that the victim knew the defendant and could identify him. Smith v. State, 424 So.2d 726 (Fla. 1982); Adams v. State, 412 So.2d 850 (Fla. 1982). The body was left in a desolate location. Adams. There were several close range shots and Shere made statements indicating that the victim had to be killed to silence him. Lopez v. State, 536 So.2d 226 (Fla. 1988); Kokal v. State, 492 So.2d 1317 (Fla. 1987). The trial court properly found this aggravating factor.

B. Heinous, atrocious or cruel

With the defense's consent, the trial court instructed the jury and found that this murder was especially evil, wicked, atrocious or cruel. The court cited the appropriate statutory aggravating factor. The alleged "confusion" is illusory and of his own making. Substituting the words "evil" and "wicked" for "heinous" does not render this aggravating factor invalid. See, State v. Dixon, 283 So.2d 1 (Fla. 1973)

The trial court based this aggravating factor on the facts that the victim was shot at least ten times with small caliber weapons. (R 1455). Based upon the medical examiner's testimony, the judge found, "All of the initial shots would have caused pain and would have allowed the victim to experience the anguish of knowing that he was being killed by his hunting buddies." (R 583-585) Additionally, the court found, "The nature and number of the wounds alone would be especially...atrocious and cruel, but in this case there is additional evidence that the victim was alive and had to be shot with the pistol to finish him off. See, eg. Swafford v. State, 533 So.2d 270 (Fla. 1988)..." (R 1455) There were four shots to Snyder's arm and leg, which would have caused pain.

Although the medical examiner cannot testify when someone lost consciousness, the defendant's statements indicated that Snyder was conscious after being shot in the chest and did not die until after he was transported to the burial location and suffered additional shots to the head from the pistol. (R 420-

424) After they pulled him from the car, the victim coughed and gagged on his own blood. Snyder suffered physical pain from multiple gunshot wounds and endured the emotional "anguish of knowing that he was being killed by his hunting buddies." (R 1455) Greulich acknowledged making a statement that Shere told her he dragged Snyder's body from the back seat of his car and "just let him lay there and bleed for a while." (R 716)

Multiple gunshot wounds near death have been repeatedly held to be heinous, atrocious or cruel. Swafford, supra, Troedel v. State, 462 So.2d 392 (Fla. 1984). Several of the wound were superficial. See, Byrd v. State, 481 So.2d 468 (Fla. 1985) The trial court properly found that this aggravating factor was established.

Even if this court finds that Snyder's death from ten small caliber gunshot wounds was "instantaneous and painless", Cooper v. State, 336 So.2d 1133 (Fla. 1976), or that the suffering was not prolonged, Gorham v. State, 454 So.2d 556 (Fla. 1984), any error is harmless in light of the other, proper aggravating factors and slight weight afforded to the fact that Shere was 21. Sims v. State, 444 So.2d 922 (Fla. 1983) Any error in finding this factor would not affect the trial court's decision to impose a sentence of death. Clemons v. Mississippi, 4 Fed.L.W. S 224 (March 28, 1990).

C. Murder committed in a cold, calculated and premeditated manner with no pretense of moral or legal justification.

In support of this aggravating factor, the trial court found:

> The murder of Drew Snyder was planned in advance. Shere and Demo arranged to lure Snyder into the back of Ridge Manor Estates ostensibly to go rabbit hunting, but in actuality to silence his "big mouth". Before leaving they placed a shovel in the back of Shere's car. The victim was buried and later Shere burned the back seat of his car along with the clothes he had worn that evening. Richard Shere then went to Snyder's apartment and took some of Snyder's clothing to make it look as if he had left town. The total circumstances set this crime apart from an ordinary premeditated murder. See Melendez v. State, 498 So.2d 1258 (Fla. 1986); Eutzy v State, 458 So.2d 755 (Fla. 1984) (R 1455-1456)

It is undisputed that Shere and Demo discussed killing Snyder during their midnight telephone call on Christmas Eve. The shovel used to bury the victim was brought along to complete this plan. See, Lamb v. State, 532 So.2d 1051 (Fla. 1988) Several close range shots to the head ensured death, indicating that this murder was an execution style killing. Swafford, supra; Burr v. State, 466 So.2d 1051 (Fla. 1985); Ferguson v.State, 417 So.2d 639 (Fla. 1979). Shere was found guilty of premeditated murder, which helps support this finding. There is no pretense of moral or legal justification; there is no colorable claim that the defendant acted in self-defense. Christian v. State, 550 So.2d 450 (Fla. 1989)

Although post-death actions of the defendant cannot be used to support a finding that the victim's death was heinous, atrocious or cruel, nothing precludes reliance upon the defendant's concerted efforts to conceal the crime as part of the

factual basis that the crime was cold, calculated and premeditated. Hours after fatally shooting Snyder and burying his body, Shere went to his home with others and left a Christmas gift. It is undisputed that later that day, he celebrated Christmas with his family and acted normal. Shere stole clothing and personal items from the victim's apartment to make it appear that he had suddenly left town. These acts are cold and calculated. The state suggests that these post-death efforts to conceal his crime, in addition to the extensive planning before the murder and nature and number of the wounds, render this murder cold, calculated and premeditated. Rogers, supra.

D. Proffered mitigating evidence was considered and rejected.

Shere contends that the trial court's findings in regard to the mitigating circumstances were unclear, and argues that the court should have found that Shere was impaired and under the substantial domination of Demo.

In rejecting the statutory mitigating factor of no significant history of prior criminal activity, the trial court stated:

> Defendant was on pretrial release on pending charges of burglary of a dwelling and robbery when the murder was committed. By his own admission in the presentence investigation, Shere was selling and using illegal drugs at the time of the offense and had been using marijuana since age thirteen. **Convictions are not required to negate a mitigating factor of no significant history of prior criminal activity. Quince v. State**, 477 So.2d 535 (Fla. 1985) (R 1456)(emphasis added)

Even though Shere had not been previously convicted of a crime, the trial court correctly rejected this mitigating circumstance because convictions are not required to negate this mitigating factor. This order is not confusing or unclear. See, Rogers v. State, 511 So.2d 526 (Fla. 1987)

As to the mitigating factors of dominance and impairment, Shere makes no claim that the trial court restricted in any way his presentation of evidence on these proposed mitigating factors, he merely disagrees with the trial court's rejection of them as unproven. It is the trial judge's duty to resolve conflicts and his determination should be final. Lopez, supra. "Finding or not finding a specific mitigating circumstance applicable is within the trial court's domain, and reversal is not warranted simply because an appellant draws a different conclusion." Stano v. State, 460 So.2d 890, 894 (Fla. 1984) No abuse of the trial court's broad discretion in finding or not finding mitigating circumstances has been demonstrated. Floyd v. State, 497 So.2d 1211 (Fla. 1986) "It is not within this court's province to reweigh or reevaluate the evidence presented as to aggravating and mitigating circumstances." Hudson v. State, 538 So.2d 829, 832 (Fla. 1989). Shere was sentenced to death in accordance with Florida law.

CONCLUSION

Based upon the argument and authority presented, appellee respectfully requests this honorable court to affirm the judgment of guilt for first degree murder and sentence of death in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Answer Brief has been furnished, by U.S. Mail to Edward L. Scott, counsel for appellant at 2100 S.E. 17th Street, Suite 802, Ocala, FL 32671, this 15th day of May, 1990.

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