IN THE SUPREME COURT OF FLORIDA

TONY LEON HAYES,

Appellant,

v.

CASE NO. 75,040

STATE OF FLORIDA,

Appellee.

_____/

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

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STATEMENT OF THE CASE AND FACTS

The appellee accepts the appellant Tony Hayes' ("Hayes") statement of the case and facts with the following additions:

At the suppression hearing on August 24, 1989, Detective Greg Smith testified that at the time of his interview on July 21, 1988, Hayes was not impaired, had no difficulty running or walking, and his speech was not slurred (R 929). Hayes told the detective he had four beers from the time he left home at 8:00 p.m., then later said he drank two beers (R 937, 938). Hayes first testified that he drank about five beers, then later said he drank two beers (R 960, 970-71). The interview was taped at 2:00 a.m. (R 942). The trial court denied the motion to suppress statements which were freely and voluntarily given. As the basis for the ruling, the court found that in listening to the statement that was played, it was obvious that Hayes was sufficiently sober to know what he was doing (R 1013). The court also found that the testimony of Dr. Graham showed that he obtained valid test results which required a certain degree of comprehension. The court also observed that when Hayes testified, he seemed to understand the questions, the ramifications of the questions, and the terms used. He was able to answer without any degree of difficulty. When he didn't understand them, he did not hesitate at all to ask the question to be re-asked or explained to him (R 1013-14). Hayes had asked the officer to explain "homicide" during the interview, which the court found was a clear indication that he knew to ask questions about words and ideas and abstractions that he didn't understand

(R 1014). The trial court also found there was no duress or coercion (R 1014).

Regarding the photo identification by Bruce Hayes, Detective Smith testified that Bruce Hayes identified Hayes and the co-defendant, Nathan Watson (R 1024). Bruce Hayes testified that Detective Smith did not suggest who he should pick out (R 1040). Bruce Hayes also identified Hayes in court, and said his identification was based on seeing Hayes the night of the murder (R 1041-42). The trial court denied the motion to suppress photographic lineup identification, finding there had been nothing to indicate there was any suggestive or tainted lineup (R 1046).

At the trial September 5-7, 1989, John Mackey of the Yellow Cab Company, testified that the records showed the victim had collected $70.30 that night, $30.00 of which was a voucher (R 356). Testimony shows that Hayes took about $40.00 cash from the victim (R 470). Clyde Miles of Yellow Cab Company testified that a young black male called about 11:45 p.m. on July 20, asking for a cab to come to the bus station (R 366, 370). Mr. Miles said that the victim did not carry a gun (R 374). Anthony Gillam testified that the three co-defendants had drank beer and snorted some cocaine the night of the murder, but by the time they had gone to get the gun and walked to the bus station, his head had cleared and he knew what was happening (R 455, 466).

Bruce Hayes and his son, Sedrick, were driving down Oak Street and saw a cab coming through the woods (R 495). After he turned the car around and went back down the street, Bruce saw

two men on the sidewalk. One passed in front of his car and the other behind (R 497). Sedrick said that one of the men was "Nay Nay", the street name for Nathan Watson (R 499, 619). Bruce Hayes contacted Detective Smith and told him what he had seen (R 628). The detective thought that if Nathan Watson was present, Hayes may have been there since they were always together (R 619). After he left Bruce Hayes' house, the detective saw Hayes running across Orange Avenue. The detective approached and asked to talk to Hayes, after which Hayes agreed to go to the police station where he was interviewed beginning about 1:30 a.m. (R 619-621).

At some point in the investigation, the two co-defendants, Nathan Watson and Anthony Gillam, agreed to accept a plea offer and testify against Hayes (R 454, 690-92). Their version of the events was consistent that Hayes planned and carried out the murder and robbery (R 455-468, 694-703). Additionally, the state presented evidence from Dannica and Felicia Ross that Hayes told them he had killed the cab driver (R 540, 595).

The victim was shot in the back of the neck, and the shot severed the spinal cord, paralyzing the breathing muscles. The victim was probably unconscious immediately and died within minutes (R 584). The trajectory of the bullet showed that if the driver was facing forward, the shooter would be directly behind him (R 591-92). Both Gillam and Watson testified that Hayes was sitting directly behind the driver (R 458, 701).

At the penalty phase on September 14, 1989, Dr. Graham testified that Hayes' various IQ tests showed a scale of 73, 79,

and 74. His school records showed a first grade IQ of 73. The 1978 records showed 67, 71, and 68, and the 1982 records showed 75, 85, and 78 (R 1089). The psychologist believed there was some damage to the left parietal brain lobe which affected reading, spelling, and arithmetic (R 1092). Hayes completed the 10th grade by attending special classes at Seabreeze High School (R 1093). Dr. Graham said Hayes had no serious emotional disturbance, and knew the difference between right and wrong even if his judgment was impaired by the drugs and alcohol coupled with intellectual and nervous system dysfunction (R 1095). On cross-examination, the psychologist said that Hayes knew the type of behavior he was engaged in and did not suffer any serious emotional disorder (R 1102). When asked whether Hayes was a good candidate for rehabilitation, the psychologist said that "under the right conditions, he can do very specific kinds of manual labor" (R 1094). Dr. Graham indicated that Hayes would always have extreme difficulty in reading and spelling, which he could compensate for (R 1094). He was not suffering from any serious emotional disturbance, and <u>if</u> he maintained himself free of drugs and alcohol, "it would certainly serve to stabilize him" (R 1094).

Hayes' aunt, Jeannette Fulse, testified at the penalty phase that the grandmother provided Hayes with a home, but he would not stay (R 1112). Ms. Fulse had taken Hayes and his brothers to live with her, but could not control Hayes and had so many problems she could not let him stay (R 1112).

Before sentencing on October 27, 1989, the court heard several defense motions, including a motion for new trial and motion to interview jurors (R 1155). Defense counsel represented to the court that the motion to interview the juror appeared not to be well taken (R 1155). The trial court denied the motion to interview the jurors, observing there were no affidavits attached and that the case law directed the court not to invade the province of the jury (R 1159).

In sentencing Hayes to death, the trial court found two aggravating circumstances: pecuniary gain and cold, calculated and premeditated (R 1313). In support of the pecuniary gain circumstance, the trial court found that the sole purpose of this criminal endeavor was to obtain money to buy "crack cocaine", and Hayes shot and killed the victim for $40.00 (R 1313). In support of the cold, calculated factor, the trial court found that Hayes and the co-defendants carefully planned this course of action for several hours, Hayes was the leader who told the others they would need a gun and obtained the gun with the assistance of co-defendant Gillam, Hayes shot the victim in the rear of the head or neck as planned, dragged the victim from the car and searched him for money, and had hours to reflect upon his own plan which was carried out with cold indifference without any legal or moral justification (R 1313-14).

Regarding mitigating circumstances, the trial court found that Hayes' capacity to appreciate the criminality of his conduct or to conform it to the requirements of law was <u>not</u> substantially impaired even though he was of lower than normal intelligence and

may have been somewhat impaired (R 1315). The clinical psychologist testified that Hayes clearly understood the criminality of his conduct and clearly had the ability to conform his conduct to legal purposes. The court also found that there was no evidence to indicate Hayes could not control his behavior or that drug usage in any way impaired him (R 1315). The age of Hayes, 18, was a minor mitigating factor, since there was no evidence indicating immaturity in any way contributed to the act (R 1315).

The nonstatutory mitigating circumstances were outlined in detail. The court found that Hayes was of low intelligence, not retarded, but definitely developmentally learning disabled. He was a school dropout and grew up in a deprived environment with a neglectful mother, missing father, and abusive stepfather (R 1316). Based on the testimony of Ms. Fulse, the court also found that Hayes developed a street-wise mentality at an early age that allowed him to survive on his own since approximately the age of 15. The court also considered the sentences of the co-defendants, but found that Hayes was the more culpable, dominant party who chose to obtain a gun, decided the victim must be shot, and shot the victim with no concern for the victim or consequences of his act (R 1316).

The court concluded that the two aggravating circumstances were strong and entitled to great weight. The mitigating circumstances of Hayes' deprived childhood and age in no way counterbalanced or mitigated the aggravating factors (R 1316). The other mitigating factors, including the sentences of the

co-defendants, did not outweigh the conduct of Hayes (R 1317). The court further found that each aggravating factor alone greatly outweighed any and all mitigation (R 1317).

SUMMARY OF ARGUMENT

Point I: The trial court properly allowed Bruce Hayes to testify that his son said "Daddy, that's Nay Nay" because the statement was not hearsay and, even if it was, it was an exception to the hearsay rule since it was a spontaneous statement and excited utterance. Error, if any, was harmless because Nathan Watson testified he was at the scene of the murder.

Point II: The trial court properly allowed Detective Smith to testify that Hayes said at a suppression hearing that he drank two beers when defense counsel was trying to mislead the jury into thinking Hayes drank four beers. Defense counsel opened the door to this impeachment evidence and Hayes cannot attempt to thwart the justice system by hiding behind procedural technicalities. Error, if any, was harmless since it was irrelevant whether Hayes drank two or four beers within a five to six hour period. Hayes was not offering the evidence on the issue of guilt nor was he presenting a voluntary intoxication defense. The evidence was presented on the issue whether his statement was voluntary. Even if Hayes' entire statement had been excluded, the verdict would not change.

Point III: The trial court correctly denied Hayes' motion to suppress. Hayes was not in custody when he was interviewed by Detective Smith and was not entitled to Miranda rights. Therefore, whether he voluntarily waived his rights is irrelevant. Even if he was entitled to Miranda rights, he voluntarily waived those rights and signed a waiver form.

Although Hayes was eighteen years old, he had supported himself since he was fifteen years old and was streetwise. He had previous contact with the criminal justice system. He asked that something be explained when he did not understand it. There was no coercion and Hayes was free to leave when he wanted.

Point IV: The trial court was correct in ruling that a clinical psychologist was not competent to testify regarding the effect of alcohol and drugs on Hayes' ability to understand the Miranda rights. Further, the issue is meritless where Hayes was not entitled to Miranda rights in the first place since he was not in custody.

Point V: The trial court correctly ruled that whether there was cocaine and marijuana in the victim's urine was irrelevant and immaterial to any issue, especially where no testimony had been presented that Hayes murdered the victim during a drug dispute.

Point VI: Juror Kubel was properly excused for cause because she was suing the Daytona Beach Police Department which was the investigating agency in the case. Juror Seymore was properly not excused for cause simply because his wife was employed by a minor witness in the case. Juror Lockman was properly allowed to sit as a regular juror because he had been chosen as an alternate. The state was properly allowed to strike a juror since the jury had not been sworn.

Point VII: The trial court correctly ruled Bruce Hayes' identification was admissible where there were no suggestive procedures, no substantial likelihood of misidentification, and his in-court identification was independent of any previous

identification. Error, if any, was harmless where both co-defendants placed Hayes at the scene of the murder and Hayes told both Ross sisters he committed the murder.

Point VIII: The sentence of death is proportional considering the totality of the circumstances in the case and comparing it to other capital cases.

Point IX: The trial court properly weighed the aggravating and mitigating circumstances and concluded that death was the appropriate sentence. The two aggravating circumstances were entitled to great weight where this murder was carefully planned and executed without any justification and was senselessly and ruthlessly carried out for $40.00. The mitigating circumstances were not entitled to significant weight. Although Hayes was eighteen years old, he had lived on his own for at least three years and provided for himself. Hayes was learning disabled, but this in no way impeded his ability to understand the consequences of his act. Even though he had a difficult childhood, Hayes was not emotionally disturbed. Hayes was the prime mover in the murder who planned and carried out the murder. He should be sentenced to death even though the co-defendants received lesser sentences. The trial court followed this court's guidelines in analyzing aggravating and mitigating circumstances and reached the reasoned conclusion that the aggravating circumstances greatly outweighed the mitigating circumstances.

Point X: The trial court was correct in instructing on both pecuniary gain and "committed during a robbery". This issue was not properly preserved for appellate review and case law supports the trial court's ruling. Error, if any, was harmless.

Point XI: This court properly denied Hayes' request to supplement the record on appeal because the information was either already in the record or was meaningless.

Point XII: There was no error in the trial, either individual or cumulative, which denied Hayes a fair trial. Hayes has failed to show an abuse of discretion in the trial court's rulings. Some of the alleged errors were not preserved for appellate review. Error, if any, was harmless.

Point XIII: The Florida death penalty statute is constitutional on its face and as applied.

POINT I

THE TRIAL COURT CORRECTLY OVERRULED HAYES' HEARSAY OBJECTION.

Hayes argues that the trial court denied him a fair trial by allowing Bruce Hayes to testify that his son, Sedrick, said "Daddy, that's Nay-Nay and them". Hayes argues that this statement is hearsay and cannot be admitted as non-hearsay under §90.801(2), Florida Statutes. Section 90.801(2)(c), provides that a statement is not hearsay if the declarant testifies at the trial, is subject to cross-examination and the statement is one of identification of a person made after perceiving him.

Although this statement may not be within the definition of non-hearsay under §90.801(2(c), there are several reasons why it is admissible. Where the trial court reached the right result, even if for the wrong reason, the ruling should be affirmed. Combs v. State, 436 So.2d 93 (Fla. 1983); Stuart v. State, 360 So.2d 406 (Fla. 1978); Grant v. State, 474 So.2d 259 (Fla. 2nd DCA 1985).

The statement may be admissible as non-hearsay since it was not admitted for the truth of the matter asserted, (that the man running by the car was Watson) but to indicate such a statement was made which lead Bruce Hayes to contact Detective Smith, and Smith to contact Hayes. The state was not admitting the testimony to prove Watson was there, since Watson himself testified he was there.

If the statement was hearsay, it was admissible as a spontaneous statement under §90.803(1), Florida Statutes. The

statement was made while Sedrick was perceiving the event and was made under circumstances that indicate trustworthiness. The statement was also admissible as an excited utterance under §90.803(2), Florida Statutes. Shortly before the statement was made, the 13-year old child had seen a taxi coming through the bushes and hit a tree (R 495-96). Immediately thereafter, Bruce Hayes turned the car around and they saw the two men pass by the car (R 496). The statement was spontaneous and contemporaneous. See, Torres-Arboledo v. State, 524 So.2d 403 (1988); Garcia v. State, 492 So.2d 360, 365 (Fla. 1986); Jackson v. State, 419 So.2d 394 (Fla. 4th DCA 1982); Elmore v. State, 291 So.2d 617 (Fla. 4th DCA 1974); State v. Johnson, 382 So.2d 765 (1980); Monarca v. State, 412 So.2d 443 (1982).

Even if the statement were erroneously admitted, any error was harmless in light of the overwhelming evidence in this case and cumulative nature of the testimony. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). Both co-defendants testified that Hayes was not only at the crime scene, but that he planned and committed the murder. Bruce Hayes identified Hayes and Watson independent of any identification by his son. Both Ross sisters testified that Hayes told them he murdered the victim.

POINT II

THE TRIAL COURT WAS CORRECT IN ALLOWING DETECTIVE SMITH TO TESTIFY THAT HAYES PREVIOUSLY SAID HE DRANK TWO BEERS.

Hayes contends that the trial court committed reversible error in allowing Detective Smith to testify that two weeks before the trial, Hayes said under oath that he drank two beers

(R 680). On cross examination, defense counsel asked Detective Smith whether Hayes complained of feeling intoxicated before he taped his statement (R 675). The detective said Hayes told him he had been drinking, but did not say he felt intoxicated until the end of the taped statement (R 675). Defense counsel also asked the detective whether he had indicated that he checked off four beers on the Rights form before he started talking to Hayes (R 676). Defense counsel asked whether this meant he had four beers to drink (R 676).

The questioning on redirect exam was as follows:

> Q: Detective Smith, did you have an occasion to gain any other information regarding the amount of beer that Mr. Hayes claimed to have drunk on the evening of July 20th, 1988?
>
> A: Yes, sir.
>
> Q: And what, if anything, did Tony Hayes say regarding how much beer he had to drink that night?
>
> A: Well, that night, he said he had two beers.
>
> Q: And do you remember approximately when Mr. Hayes said that, in relationship to this trial?
>
> A: Yes, sir. It was last week.
>
> Q: Do you know whether or not Mr. Hayes was under oath at that time?
>
> A: Yes sir. He was.
>
> Defense counsel: Your Honor, I'm going to object to the witness talking about - - I'm going to object to this testimony about something at a hearing. I don't think it's admissible.
>
> The Court: Counsel approach the bench.
>
> Defense counsel: He's testifying from his recollection.

State attorney: He was present at the time. He can testify as to what he heard. The defendant was under oath. I'm offering it as an impeachment of Tony Hayes' statement to him and I think it's admissible on that basis. Counsel opened the door in asking him how many beers he had and Tony told him in his original statement and he's now made a separate statement in which he said that was not true. In fact, he said in a hearing that was a lie.

Defense counsel: Okay. That was not my recollection of what he said. I would object to this witness being allowed to testify as to what he's heard the defendant say.

The Court: Give me some grounds.

Defense counsel: The statement was not offered to Greg Smith. It was just said in the Courtroom.

The Court: Overruled.

Defense Counsel: Okay.

Q: Detective Smith, was your answer that Mr. Hayes told you that he had two beers that evening or he said that he had two beers?

A: Yes, sir.

Q: Do you know whether or not Mr. Hayes indicated at the time he made the statement regarding the two beers that he said he was also lying to you in his original statement?

A: Yes, sir.

(R 680-82).

This issue was waived. The objection was not specific. The court asked counsel to state his grounds, and the grounds stated were that the statement was not offered to Greg Smith, it was just said in the courtroom (R 681). As the state attorney indicated, Greg Smith was present at the time the statement was made. He had personal knowledge of the statement and was competent to testify. Section 90.604, Florida Statutes.

Therefore, the objection was not sustainable on the grounds stated. See, Bertolotti v. Dugger, 514 So.2d 1095, 1096 (Fla. 1987); Hoffman v. State, 474 So.2d 1178, 1181 (Fla. 1985); Tillman v. State, 471 So.2d 32 (Fla. 1985); Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982).

Defense counsel opened the door on the issue of the number of beers Hayes drank when he questioned the officer about the issue on cross examination. See Toole v. State, 479 So.2d 731, 735 (Fla. 1985). At the suppression hearing two weeks before the trial, Hayes said he had two beers (R 970-71). The state was entitled to bring this evidence to the jury's attention after defense counsel's questioning about four beers. A defendant's constitutional rights cannot be used as a method of perpetrating a fraud on the court. A defendant cannot "provide himself with a shield against contradicting his untruths." Michigan v. Harvey, 46 Cr.L.Reptr. 2159, 2161 (March 5, 1990). The court has never prevented use by the prosecution of relevant voluntary statements, particularly when the violations relate only to procedural safeguards. In such cases, the search for truth in a criminal case outweighs the speculative possibility that exclusion of evidence might deter future violations of rules. Id. at 2161. Hayes testified at the suppression hearing that he only drank two beers and defense counsel was misleading the jury into thinking he drank four beers.

The case cited by Hayes, Simmons v. United States, 390 U.S. 377 (1968), is inapposite. In Simmons, two men robbed a bank. Pursuant to the owner's consent, FBI agents searched the basement

of a house and found two suitcases of which the owner denied ownership. After investigation, three men were arrested. One co-defendant moved to suppress the suitcase and, in order to establish standing, testified that the suitcase was similar to one he owned and that he owned the clothing inside the suitcase. This testimony was admitted against him at trial. The Court held that the testimony as to standing, which proved an element of the offense, should not have been admitted. The Court observed that the only, or at least the most natural, way a defendant can establish standing is to testify that he is the owner. Id. at 391. If the defendant did not testify, he would have to forebear a constitutional benefit. Id. at 394. The Court stated:

> We therefore hold that when a defendant testifies in support of a motion to suppress evidence on Fourth Amendment grounds, his testimony may not thereafter be admitted against him at trial on the issue of guilt unless he makes no objection. (Emphasis added).

Id. at 394.

In the present case, Hayes was not put in a position where he was "compelled" to testify or relinquish his Fourth Amendment rights. See, Id. at 393. At the suppression hearing, Detective Smith had testified that Hayes said he drank four beers, which was noted on the Rights form (R 937, 1238). The detective also informed the court that Hayes said he was feeling drunk at one point (R 953). Hayes did not have to testify in order to present his claim to the court. Nor did he have to testify about his educational or intellectual level, since Dr. Graham testified (R 984-1013).

Nor was the evidence presented on the issue of guilt, as required by Simmons. The prior testimony was offered as impeachment of the statement given to Detective Smith during the interview. The number of beers Hayes drank was presented by the defense to challenge the voluntariness of the statement, not as a voluntary intoxication defense to negate guilt. In fact, there was insufficient evidence to support the defense of voluntary intoxication. See Bertolotti v. State, 534 So.2d 386 (Fla. 1988).

The other cases cited by Hayes are likewise inapposite. United States v. Garcia, 721 F.2d 721 (11th Cir. 1983), involved a double jeopardy claim. Pedreo v. Wainwright, 590 F.2d 1383 (5th Cir. 1979) involved a defendant testifying in support of the insanity defense. Clark v. State, 452 So.2d 1002 (Fla. 2d DCA 1984), involved testimony regarding a defendant's statement at a change of plea hearing which is specifically excluded by §90.410, Florida Statutes.

It has long been the policy of the United States Supreme Court that a defendant may not hide behind his constitutional rights to perpetuate a fraud on the court. A defendant's privilege to testify in his own defense does not include the right to commit perjury, and the prosecution may use even illegally obtained evidence to impeach a defendant's trial testimony. United States v. Havens, 446 U.S. 620, 627-28 (1980); Oregon v. Hass, 420 U.S. 714, 722-24 (1975); Harris v. New York, 401 U.S. 222, 224-26 (1971). Defense counsel was bringing out Hayes' statements through Detective Smith and that statement was

subject to impeachment with an inconsistent statement. There is no prohibition against using a defendant's voluntary statement that is inconsistent with his other testimony. See Anderson v. Charles, 447 U.S. 404, 408 (1980). The Fifth Amendment "protects a person only against being incriminated by her own compelled, testimonial, communications." Fisher v. United States, 425 U.S. 391, 409 (1976). There was nothing that compelled Hayes to testify at the suppression hearing since the information he provided was already before the court insofar as having been drinking and feeling drunk.

Any Fifth Amendment privilege was waived when defense counsel opened the door to the impeachment testimony. See Buchanan v. Kentucky, 483 U.S. 402 (1987). The Fifth Amendment only attaches when a defendant's testimony is compelled and incriminating. Estelle v. Smith, 451 U.S. 454, 462 (1981). In Hoffman v. United States, 341 U.S. 479, 486-87 (1956), the Supreme Court held that compelled testimony incriminates the defendant where there is reasonable cause to apprehend that a direct answer would support a conviction or provide a link in the chain of evidence leading to conviction. Whether Hayes drank two or four beers did not have anything to do with guilt. The evidence was relevant only to the voluntariness of the statement he made to the detective.

Even if the testimony were erroneously admitted, it was harmless error. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). The trial court had ruled that any statements were voluntary, so those statements were before the jury. The difference between

two and four beers would hardly be dispositive of Hayes' mental state, since the beers were consumed over approximately a four hour period before the murder and a five and one-half to six hour period before the interview. The co-defendants testified that after drinking the beer and consuming some drugs, they went to get a gun, and walked thirty minutes to the bus station (R 455-59, 694-97). Gillam testified that the amount of cocaine was small, and his head had cleared during the walk to the bus station (R 466). Furthermore, defense counsel reiterated the testimony about two beers in re-cross examination (R 687). Even if Hayes' entire statement had been excluded, the verdict would not have changed where two co-defendant's testified, Hayes admitted the murder to the Ross sisters, and there was an eye-witness who identified Hayes at the scene.

POINT III

THE TRIAL COURT CORRECTLY DENIED THE MOTION TO SUPPRESS.

Hayes argues that his statements to Detective Smith should have been suppressed because they were involuntary. He claims he was coerced, unable to understand the waiver of rights form, and intoxicated.

This entire issue is without merit since Hayes was not in custody at the time of the interview. A suspect is only entitled to Miranda warnings if he is in custody. California v. Beheler, 463 U.S. 1121, 1124 (1983); Correll v. State, 523 So.2d 562, 564 (Fla. 1988).

To determine whether a suspect was in custody, the inquiry is whether there is a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest. Oregon v. Mathiason, 429 U.S. 492, 495 (1977); Correll, supra, at 565. The inquiry is how a reasonable man in the suspect's position would have understood his situation. Roman v. State, 475 So.2d 1228, 1231 (Fla. 1985).

Because Hayes was not "in custody" at the time of the interview, he was not entitled to Miranda warnings, so whether he voluntarily waived his Miranda rights is irrelevant. Hayes agreed to go to the police station for an interview and left when he wanted.

Even if Hayes was in custody, he voluntarily waived his rights. Detective Smith testified that Hayes was not impaired, had no difficulty walking or running, and his speech was not slurred (R 929). When he first approached Hayes, the detective told him he was not under arrest but just wanted to talk to him (R 948). Hayes said that was okay and not a problem (R 931). He never indicated he was not willing to go to the police station (R 941). Once at the station, Hayes did not indicate he did not wish to speak to the detective, and when he asked to go to the rest room, he went unaccompanied (R 932). The detective read the Miranda [1] warnings and asked Hayes if he was positive he understood his rights and that he did not have to talk to the detective (R 936). Hayes signed the form (R 936). The portion of the tape recording which was transcribed shows Hayes responded

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[1] Miranda v. Arizona, 384 U.S. 436 (1966).

that he understand his rights and was not threatened, coerced, or promised anything (R 944). Hayes was at the police station a total of thirty-five minutes (R 940-41). Hayes testified at the suppression hearing and said he had two beers in the evening (R 971). He had taken some cocaine which made him very alert (R 973). He knew where he was (R 973). He had been to the police station many times (R 974). Detective Smith did not threaten him in any way (R 975). He understood he did not have to say anything (R 975).

The court found that in listening to the statement that was played, it was obvious that Hayes was sufficiently sober to know what he was doing (R 1013). The court also found that the testimony of Dr. Graham showed that he obtained valid test results which required a certain degree of comprehension. The court also observed that when Hayes testified, he seemed to understand the questions, the ramifications of the questions, and the terms used. He was able to answer without any degree of difficulty. When he didn't understand them, he did not hesitate at all to ask the question to be re-asked or explained to him (R 1013-14). Hayes had asked the officer to explain "homicide" during the interview, which the court found was a clear indication that he knew to ask questions about words and ideas and abstractions that he didn't understand (R 1014). The trial court also found there was no duress or coercion (R 1014). Hayes waived his Miranda rights and signed a waiver form (R 1238).

A trial court's denial of a motion to suppress evidence or statements comes to this court clothed with a presumption of

correctness. Wasko v. State, 505 So.2d 1314 (Fla. 1987); Medina v. State, 466 So.2d 1046 (Fla. 1985); DeConingh v. State, 433 So.2d 501 (Fla. 1983).

Voluntariness of a confession need be established only by a preponderance of the evidence. Colorado v. Connelly, 107 S.Ct. 515, 523 (1986). A written waiver is usually strong proof of the validity of the waiver. See North Carolina v. Butler, 441 U.S. 369, 373 (1989).

In Connelly, the court stated that "the sole concern of the Fifth Amendment, on which Miranda was based, is governmental coercion." 107 S.Ct. at 523. The court also stated that the voluntariness of a waiver has always depended on the absence of police overreaching, not on "free choice" in any broader sense of the word. 107 S.Ct. 523. The defendant in Connelly was mentally ill. The court held that although the defendant's mental illness may have made him perceive coercion, the Constitution protects only against actual government coercion. Coercive police activity is a necessary predicate to finding a statement is not voluntary. Id., 107 S.Ct. at 522.

A determination whether statements are admissible depends on the totality of the circumstances. The inquiry is the same whether the defendant is an adult or a juvenile. Fare v. Michael C., 442 U.S. 707, 725 (1979). In Michael C., the defendant was 16 1/2 years old and had considerable experience with the police. There was no indication he did not understand the rights he was waiving or that he was worn down by improper tactics or lengthy interrogation. Michael C. illustrates that young age is not

determinative of the voluntariness issue where, as in the present case, the defendant had previous contact with the criminal justice system and understood his rights. See also Francois v. State, 197 So.2d 492 (Fla. 1967); Ross v. State, 386 So.2d 1191, 1195 (Fla. 1980).

Although Hayes argues that intoxication made his statement involuntary, the effect of alcohol or narcotics relates generally to the credibility to be given the confession rather than its admissibility. Reddish v. State, 167 So.2d 858, 863 (Fla. 1964). Hayes was not intoxicaated to the extent he could not understand his rights. Hayes' own testimony was that he drank two beers between 8:00 p.m. and the time of the interview at 1:30 a.m. In Castro v. State, 547 So.2d 111 (Fla. 1989), the defendant was arrested for disorderly intoxication. While he was in the holding cell, he indicated he wished to make a statement and did so shortly thereafter. This court found the testimony sufficient to establish the confessions were voluntary and not influenced by Castro's previous consumption of alcohol. Id. at 113. In Thomas v. State, 456 So.2d 454 (Fla. 1984), the appellant contended that his statements were the product of coercion, confusion and intoxication. He also claimed that because of his youth and state of intoxication he was incapable of making a voluntary waiver. This court stated that if a confession is obtained by coercion it is inadmissible, but any delusion or confusion must be visited upon the suspect by the interrogators. "If it originates from the suspect's own apprehension, mental state, or lack of factual knowledge, it will not require suppression."

Id. at 458. Although the defendant and a friend testified Thomas was drunk, the detectives testified he did not appear intoxicated and intelligently waived his rights. Unless a defendant is drunk to the extent of "mania", drunkenness does not affect the admissibility of the statement, but may affect its weight and credibility with the jury. Id. at 458. This court also discredited the argument that youthful age renders a statement involuntary. Thomas illustrates that youthful age coupled with intoxication will not render inadmissible a statement which is otherwise voluntary.

Likewise, lack of mental capacity is generally considered only as it relates to credibility and not admissibility, and a confession will not be excluded on these grounds where it is shown the defendant understood his rights. Myles v. State, 399 So.2d 481 (Fla. 3rd DCA 1981). Mental weakness is only one factor to be considered in determining voluntariness. Kight v. State, 512 So.2d 922, 926 (Fla. 1987) (IQ of 69); Ross v. State, 386 So.2d 1191, 1194 (Fla. 1980).

The cases cited by Hayes are not applicable. Hayes was not in a "drug-induced" stupor nor was he extremely fatigued or his will overborne (Initial Brief at 26). He was first approached as he was running in the street, agreed to go to the police station, and left when he wanted. There was no evidence of coercion and Detective Smith testified Hayes was not impaired. Hayes had previous experience with the criminal justice system and voluntarily waived his rights.

The court's finding was supported by competent, substantive evidence and should not be disturbed on appeal. Garcia v. State, 492 So.2d 360 (Fla. 1986).

POINT IV

THE TRIAL COURT CORRECTLY RULED THAT A CLINICAL PSYCHOLOGIST WAS NOT COMPETENT TO TESTIFY REGARDING THE EFFECT OF ALCOHOL AND DRUGS ON HAYES' ABILITY TO UNDERSTAND THE MIRANDA RIGHTS.

Hayes complains that he was not allowed to elicit an opinion from Dr. Graham, a clinical psychologist, on whether the consumption of alcoholic beverages and cocaine would decrease the ability of someone to comprehend the language in the Miranda rights form. The state attorney objected to the question because Dr. Graham was not competent to testify (R 993-94). The court sustained the objection (R 994). Hayes recognizes that he must demonstrate an abuse of discretion by the trial judge (Initial brief at 29); Quinn v. Millard, 358 So.2d 1378, 1382 (Fla. 3rd DCA 1978); Johnson v. State, 393 So.2d 1069, 1072 (Fla. 1981).

Section 90.702, Florida Statutes requires that before an expert may testify to his opinion, two preliminary factual determinations must be made:

> 1) the subject matter is proper for expert testimony;
>
> 2) the witness is adequately qualified to express an opinion on the matter.

Ehrhardt, Florida Evidence, §702.1 (2nd Ed. 1984). An expert is defined by Section 90.702 as one qualified by knowledge, skill, experience, training or education. Dr. Graham was neither

qualified as an expert in the effects of drugs and alcohol, nor did he purport to be one. See Russ v. Iswarin, 429 So.2d 1237, 1241 (Fla. 2d DCA 1983); Wright v. State, 348 So.2d 26 (Fla. 1st DCA 1977). When a witness goes beyond his area of expertise he will not be allowed to testify in terms of expert opinion. Buchman v. Seaboard Coast Line Railroad Co., 381 So.2d 229 (Fla. 1980); Salinetro v. Nystrom, 341 So.2d 1059, 1061 (Fla. 3rd DCA 1977). Expert testimony is not admissible at all unless the witness has expertise in the area in which his opinion is sought. Huskey Industries, Inc. v. Black, 434 So.2d 988, 992 (Fla. 4th DCA 1983). An expert's opinion cannot be speculation and must be based on reliable scientific principles. Delap v. State, 440 So.2d 1242 (Fla. 1983); Stevens v. State, 419 So.2d 1058, 1063 (Fla. 1982).

The trial court found that Dr. Graham was not competent to testify about the effects of drugs and alcohol. Section 90.105, Florida Statutes requires the trial court to determine preliminary questions concerning the qualification of a person to be a witness. Determining whether an expert is qualified to testify about a subject is within the discretion of the trial court. Ramirez v. State, 542 So.2d 352, 355 (Fla. 1989); Dedge v. State, 442 So.2d 429 (Fla. 5th DCA 1983). The trial court's ruling on the admissibility of evidence will not be disturbed absent an abuse of discretion. Way v. State, 496 So.2d 126 (Fla. 1986); Hardwick v. State, 521 So.2d 1071 (Fla. 1988). Hayes has shown no abuse of discretion. Furthermore, whether the waiver of rights was voluntary is irrelevant since Hayes was not entitled

to Miranda rights (See Point III). Error, if any, was harmless beyond a reasonable doubt. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). Even if Hayes' statement was suppressed, the verdict would not have changed.

POINT V

THE TRIAL COURT WAS CORRECT IN NOT ALLOWING A TOXICOLOGIST TO TESTIFY THAT THE VICTIM HAD COCAINE AND MARIJUANA IN HIS URINE.

Hayes believes that the trial court should have allowed a toxicologist to testify that the victim had cocaine and marijuana in his urine. He believes he was deprived of his theory of defense. As he admits, the toxicologist could not say when the victim used the substances. The state objected to Mr. Long being offered as an expert in toxicology since he could say what he found in the blood or urine, but could not say what that actually meant (R 773). Defense counsel represented that he would limit the expert as far as relating his testimony to the fact that he took particular tests and what the results of those tests were (R 774). The state also argued that allowing Mr. Long to testify about substances in the urine without being able to interpret what it meant was irrelevant, immaterial, and more prejudicial than probative (R 775). Defense counsel again stated that he was not going to ask the witness to interpret the results in any way, just say what the results were (R 775, 776). The court asked what relevance this testimony had to the case, to which defense counsel responded that:

> 1) one of the defenses was that the defendant shot the victim because he pointed a gun at

Watson; there were inconsistent versions of what happened, and the co-defendants said cocaine was used prior to the event and the victim had cocaine in the blood stream;

2) there was cocaine in the blood stream of the victim;

3) the co-defendants said they planned to shoot the victim with the cab moving which the defense submits is improbable;

4) according to Gillam, Watson claimed he couldn't move the foot of the driver, which seems improbable;

5) Watson claimed he put his foot on the gas pedal and the car went forward, which is improbable;

6) the victim lost consciousness immediately after being shot which is more consistent with a struggle than with the co-defendants' version of events;

7) since there was no one else present besides the co-defendants', the only way to present a defense that the state's version might be untrue is to use extrinsic evidence;

8) the area of the murder is a high crime area well-known for drug activity and the cab driver never called in; this suggested a rendezvous or meeting with people;

9) there was never a gun pulled on the driver at the bus station; one of the defenses is that there was a gun pulled on the cab driver and the defense needs to show what might have been going on inside the cab (R 778-79).

The state attorney again objected that whether there may have been cocaine or marijuana in the victim's urine was irrelevant to any issue (R 779). He also observed that the sole purpose of the testimony would be to cast the victim in a bad light (R 779). Even if the theory of defense was that Hayes shot the driver because he pulled a gun on Watson, the victim's urine

contents were not relevant, particularly when the witness could not testify as to the meaning of the urine contents (R 779). Defense counsel argued that he was trying to show there was a drug related dispute. He argued he did not have to prove the details of it, but just wanted to suggest that it was a possibility and the state witnesses may not have been truthful.

The judge noted that she did not see where anything in the victim's urine tended to prove or disprove any issue before the court in this trial. Also the fact that he may have had some substance in his urine, without more, didn't show any fact or tend to prove any fact at issue (R 780). The witness verified that he could not interpret the results (R 780). Defense counsel also argued that the fact the victim had cocaine in his urine, together with the drug discussions the co-defendants had already testified about, was significant and very important to the defense (R 780). The court asked defense counsel what fact the testimony proved, and defense counsel replied that there was some sort of drug related dispute going on and the testimony about the cab being out of control was ridiculous (R 781). The judge observed that the fact of there being a drug dispute had not been placed in issue and she would not let the witness testify to that until the defense laid the proper predicate that this was an issue (R 781). The judge indicated that the defense needed to call another witness to put that scenario at issue and then Mr. Long could testify to corroborate or substantiate the theory. The judge would not allow the witness to just testify and then have nothing to tie it up with (R 781). The state observed that

there was no cross examination of either Gillam or Watson to suggest there was any drug activity between them and the cab driver, and the record was totally devoid of this testimony (R 781). The court again asserted that there was nothing indicating there was any type of drug activity going on or drug consumption in the cab itself. Until something was shown that the victim was somehow a participant in this theory, the court would not allow the witness to testify (R 783). The defense then proffered Mr. Long's testimony (R 783-89). After the proffer, the court again stated that relevancy was not established and until it was, the witness would not be allowed to testify (R 790).

Relevant evidence is evidence tending to prove or disprove a material fact. §90.401, Fla. Stat. When evidence is offered to prove a fact which is not a matter in issue, it is said to be immaterial. Ehrhardt, Florida Evidence §401.1 (2d Ed. 1984); Francis v. State, 512 So.2d 280 (Fla. 2d DCA 1987). Character evidence of the victim is inadmissible unless it shows prior consensual sexual activity in a sexual battery case, or peacefulness in a homicide case to rebut evidence the victim was the aggressor. §90.404, Fla. Stat. As the trial court observed, the testimony was not relevant to any issue. The theory about a drug dispute had not been placed in issue.

The trial court has broad discretion in the admissibility of evidence. Welty v. State, 402 So.2d 1129 (Fla. 1981); Demps v. State, 395 So.2d 501 (Fla. 1981). Unless an abuse of discretion can be shown, its ruling will not be disturbed. Hardwick v. State, 521 So.2d 1071 (Fla. 1988); Way v. State, 496 So.2d 126, 127 (Fla. 1986).

The cases cited by the appellant - Washington v. Texas, 388 U.S. 14 (1967); United States v. Nixon, 418 U.S. 683 (1974); and Hitchcock v. Dugger, 481 U.S. 393 (1987) - do not support his position. In Washington v. Texas, the issue was whether the Sixth Amendment required that the accused have compulsory process for obtaining witnesses in his favor. Nixon involved whether presidential communications were privileged or could be subpoenaed. Hitchcock involved admissibility of mitigating evidence in the penalty phase of a capital case.

Hayes has not shown an abuse of discretion in the trial court's ruling. Even if there were error, any error was harmless, as outlined in Points I and II. See State v. DiGuilio, 491 So.2d 1129 (Fla. 1986).

POINT VI

THE TRIAL COURT DID NOT DENY HAYES A FAIR TRIAL BY EXCUSING ONE JUROR FOR CAUSE, NOT EXCUSING ANOTHER JUROR FOR CAUSE, AND USING A JUROR CHOSEN AS AN ALTERNATE JUROR.

Hayes argues that the trial court denied him a fair trial because Juror Kubel was excused pursuant to the state's challenge for cause, but Juror Seymore was not excused pursuant to the defense challenge for cause. He also argues that Juror Lockman was chosen only as an alternate juror and the trial court erred in allowing him to sit as a regular juror.

Juror Kubel was suing the Daytona Beach Police Department, and the state challenged her on that basis. She had been charged with battery on a law enforcement officer which had been dismissed (R 56). When the court asked her whether that

experience would influence her decision, Ms. Kubel said "I think so" (R 56). When the jurors were excused for a recess, the court indicated that there were probably good challenges for cause on Ms. Kubel and Ms. Wells (R 78). [2] The court indicated that those two jurors needed to be excused for cause unless either counsel objected (R 79). Defense counsel said he "guessed" he was objecting, and would suggest questioning the jurors in chambers (R 79). Ms. Kubel was questioned without the jury venire present and said she was in litigation with the Daytona Beach Police Department (R 82-83). In response to defense counsel's question whether she could be fair and separate what happened in her case, she said she could not (R 83). In response to whether she could believe what Daytona Beach police officers said about the case, she responded: "I was put in a very bad circumstance and right now it's hard to justify the things that happened to me. I think I could -- I wouldn't be -- How can I say this now? As far as the case goes, I think I would be open-minded, but I still have a lot of hostilities in me over what happened" (R 84). The state attorney noted that even though she may make representations of attempting to make a separation, it would be very difficult for her, since she was suing the police department (R 84-85). The court excused Ms. Kubel for cause because of her involvement with the police department,

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[2] Ms. Wells told the court she had read newspaper accounts and was not sure she could disregard what she had read (R 77). Defense counsel indicated he would stipulate to excusing Ms. Wells for cause (R 86).

observing that Daytona Beach was the department involved in this case (R 85).

The trial court correctly excused Juror Kubel since she was suing the Daytona Beach Police Department, the investigating agency in this case. "Trying" to be impartial is insufficient to establish impartiality. Longshore v. Fronrath Chevrolet, 527 So.2d 922 (Fla. 4th DCA 1988); Sikes v. Seaboard Coast Line R. Co., 487 So.2d 1118 (Fla. 1st DCA 1986). When a juror indicates bias, a subsequent change in that opinion after further questioning is suspect. Club West, Inc. v. Tropigas, 514 So.2d 426 (Fla. 3rd DCA 1987). When a juror gives equivocal answers, it is within the trial court's discretion to excuse the juror. Randolph v. State, 15 F.L.W. S271 (Fla. May 3, 1990). Close cases involving juror impartiality should be resolved in favor of excusing the juror. Sydleman v. Benson, 463 So.2d 533 (Fla. 4th DCA 1985); Robinson v. State, 506 So.2d 1070 (Fla. 5th DCA 1987). The state did not exhaust its peremptory challenges, and could have excused her with a peremptory challenge. The state only used five challenges (R 187, 261, 293).

Mr. Seymore explained that his wife was Dr. Sherman's secretary, but he had never met the man and would not give greater or lesser weight to his testimony (R 196). His wife was the secretary in the lab at Humana Hospital and in direct contact with Dr. Sherman every day; however, he would not feel uncomfortable telling his wife he "let the defendant go" (R 242). Defense counsel challenged Mr. Seymore for cause, stating that although the juror said he would not be embarrassed, he had a

direct relationship to a state agency whose job was related to the prosecution process (R 256). The court noted that Mr. Seymore's wife did not work for a state agency, but worked at the hospital (R 256). The state noted that Dr. Sherman's testimony was not an important part of the case and Mr. Seymore said his wife's job would have no effect on him (R 256-57). The court denied the challenge for cause. Defense counsel then excused Juror Seymore (R 258).

Appellee's reasons for challenging Mr. Seymore because his wife worked for the medical examiner, are unconvincing. As the state observed, Dr. Sherman was a minor witness and simply established the cause of death. The manner of death was not at issue, i.e., whether the death was heinous, atrocious or cruel. There was no doubt from the testimony of the co-defendants that Hayes was the shooter (R 462, 703). Dr. Sherman was a minor witness and whether the medical examiner worked with the state does not assume the employee or her husband was biased. Even state prison employees are not inherently unfair or partial. Lusk v. State, 446 So.2d 1038 (Fla. 1984); Morgan v. State, 415 So.2d 6 (Fla. 1982).

Manifest error must be shown to overturn the trial court's findings of a juror challenged for cause. Mills v. State, 462 So.2d 1075, 1079 (Fla. 1985). As in Ross v. Oklahoma, 108 S.Ct. 2273, 2277 (1988), since Mr. Seymore did not sit on the jury, any claim that the jury was not impartial must focus on the jurors who ultimately sat. As in Ross, none of the twelve jurors who sat was challenged for cause and it was never suggested that any

of the twelve was not impartial. [T]he Constitution presupposes that a jury selected from a cross section of the community is impartial, regardless of the mix of individual viewpoints actually represented on the jury so long as the jurors can conscientiously and properly carry out their sworn duty to apply the law to the facts of the particular case. Id. at 2277, quoting from Lockhart v. McCree, 476 U.S. 162, 184 (1986). The Court in Ross limited the rule of Gray v. Mississippi, 107 S.Ct. 2045 (1987), to the facts of that case. Ross, 108 S.Ct. 2278. The Ross opinioin also rejected the notion that the loss of a peremptory challenge constituted a violation of the right to an impartial jury, recognizing that peremptory challenges are not of constitutional dimension. Id. at 2278.

After the second round of challenges, the panel consisted of eleven jurors and defense counsel had used ten peremptory challenges (R 262). After a recess, followed by a bench conference, there were twelve jurors (R 264). The judge called up four prospective alternate jurors for questioning without objection (R 264). Mr. Lockman said he was the victim of an armed robbery in Orlando ten to fifteen years ago, but the experience would not influence his decision (R 273). He had a first cousin and an uncle involved in law enforcement, one with the local sheriff's department and one in Orange County (R 274). He hadn't seen them in years (R 290). Mr. Lockman expressed some concern with the state attorney negotiating with the co-defendants (R 286). Both counsel were given the opportunity to voir dire the prospective jurors (R 281-291). After

questioning, Ms. Fitzgerald, who had been chosen as a regular juror, indicated that her oldest son had been charged with DUI (R 291). The court asked if either counsel wished to backstrike since there was new information (R 292). The state struck Ms. Fitzgerald (R 292). Defense counsel objected to backstriking since the jury had been selected (R 293). It is unclear from the record why Ms. Fitzgerald was still on the panel, since the state had stricken her before the prospective alternative jurors were called (R 261). Mr. Lockman then became the twelfth juror (R 293). Defense counsel indicated he would strike Mr. Lockman if he had any peremptories left (R 293). Defense counsel did not request additional peremptory challenges. The trial court had previously indicated that it allowed backstriking even after the jury was seated (R 81). This was a correct statement of the law. Fla.R.Crim.P. 3.310; Jones v. State, 332 So.2d 615, 619 n.3 (Fla. 1976).

The reasons given for wanting to excuse Juror Lockman - that he had relatives in law enforcement, prior criminal jury service, and had been a victim of an armed robbery - are unconvincing. The defense accepted Ms. Tanner whose son was a deputy sheriff in Richmond, Virginia, and had her car stolen in Daytona Beach (R 57, 115, 128, 130, 894-95). Mr. Wright had two friends who were deputy sheriffs in New Smyrna, and ex-students in law enforcement in New Smyrna and in Volusia County (R 126). Mr. Bex was also a victim of a crime (R 203). Ms. Tanner had been called to sit on a jury, but everyone plead guilty (R 54). Mr. Hughes had served on both civil and criminal juries that reached verdicts (R 200).

A reviewing court should pay great deference to a trial judge's finding as to juror impartiality because she, unlike a reviewing court, is in a position to observe the juror's demeanor and credibility. Randolph v. State, 15 F.L.W. S271 (Fla. May 3, 1990); Lambrix v. State, 494 So.2d 1143, 1146 (Fla. 1986); Valle v. State, 474 So.2d 796, 804 (Fla. 1985). As this court has repeatedly noted, the determination of juror impartiality and the propriety of excusal of prospective jurors for cause is a matter particularly within the trial court's broad discretion and it is only where manifest error is demonstrated by the complainant that the judge's decision will be disturbed on appeal. Jennings v. State, 512 So.2d 169 (Fla. 1987); Hooper v. State, 476 So.2d 1253 (Fla. 1985); Davis v. State, 461 So.2d 61 (Fla. 1984); Christopher v. State, 407 So.2d 198 (Fla. 1981). Indeed, as this court noted in Cook v. State, 542 So.2d 964, 969 (Fla. 1989):

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

Hayes has failed to show an abuse of discretion in any of the trial court's rulings.

POINT VII

THE TRIAL COURT CORRECTLY DENIED THE MOTION TO SUPPRESS THE PHOTOGRAPHIC LINEUP IDENTIFICATION MADE BY BRUCE HAYES.

Hayes claims that the photographic lineup identification made by Bruce Hayes was tainted and unreliable because the photos of Watson and Hayes were enhanced and there were discrepancies between his deposition and suppression hearing testimony. Hayes claims the identification was tainted because the backdrop of Hayes' photograph was an outdoor scene whereas the backdrop of the other photos was a wall. He also claims the identification was unreliable because one month had passed since the murder, Bruce expressed some doubt about his certainty and wanted to see the individual in person, and his contact with the assailants was in poor lighting for a brief period. Hayes also argues that Bruce Hayes vacillated in his testimony.

At the suppression hearing, Detective Smith testified that Bruce had previously given him a description of the suspects in the July 20 murder (R 1021). Bruce had told him two men crossed in front of his vehicle and the taller man looked directly in his face as he passed (R 1022). He was pretty sure he could identify the taller man if he saw him again (R 1026). On August 18, the detective prepared a photographic lineup (R 1021). He had some difficulty locating Bruce, who would not return phone calls (R 1022). Bruce was reluctant to make an identification (R 1024). Detective Smith told Bruce to take his time. Bruce looked at the first photo card, put it aside, looked at the second photo card, and identified the defendant and Nathan Watson (R 1024). He was positive of the identifications, but said he would also like to see Hayes in person (R 1025). The entire identification interview lasted ten minutes, including filling out the forms (R

1027). The detective was not allowed to testify about why he did not set up a real lineup (R 1025).

Bruce Hayes testified that Detective Smith did not suggest who he should pick out (R 1040). He said he was not positive of the identifications, but it looked like the persons he saw at the scene (R 1033). At the time of the murder, Bruce had seen one man standing on the sidewalk waiting for him to pass in his car (R 1034). The taller man who was standing on the sidewalk ran in front of his car and the shorter one ran behind (R 1034). Both looked at the car (R 1035). He thought he could recognize the men if he saw them again (R 1035). He got a look at the face of the taller man (R 1036). Bruce had given evasive testimony at a previous deposition because he wanted to stay out of the situation (R 1037). Watson's father had accused Bruce Hayes of having Nathan Watson put in jail (R 1038). Bruce's son, Sedrick, had also been threatened and Bruce was concerned Sedrick would be hurt if Bruce identified any of the defendants (R 1042). Watson's family also made threats to Bruce's family (R 1043). Bruce identified Hayes in court, and said his identification was based on seeing Hayes the night of the murder (R 1041-42). The trial court denied the motion to suppress photographic lineup identification, finding there had been nothing to indicate there was any suggestive or tainted lineup (R 1046).

The first inquiry in analyzing the admissibility of an out-of-court identification is whether the identification procedure was impermissibly suggestive. Manson v. Braithwaite, 432 U.S. 98, 108 (1977). Even if the procedure was suggestive, the trial

court determines whether, under the totality of the circumstances, the identification was reliable. Neil v. Biggers, 409 U.S. 188, 199 (1972). The factors set out in Neil to be considered in evaluating the likelihood of misidentification are:

> 1) opportunity of the witness to view the criminal at the time of the crime;
>
> 2) witness' degree of attention;
>
> 3) accuracy of the prior description of the criminal;
>
> 4) level of certainty demonstrated by the witness at the confrontation; and
>
> 5) length of time between the crime and the confrontation.

Id. at 199. When weighing all the factors, the question is whether there is a "very substantial likelihood of irreparable misidentification." Simmons v. United States, 390 U.S. 377, 384; Manson , 432 U.S. at 116.

In the present case, Hayes went right past the witness who could see his face. The witness' description of Hayes was consistent with that of the co-defendants' insofar as clothing (R 1020, 1044, 506, 701, 702). The identification was made one month after the crime. At the photo line-up, the witness was certain he had identified the proper person but wanted to see him in person to be positive. Bruce Hayes' in-court identification was unequivocal and made independent of any pre-trial identification (R 1042).

The trial court found the procedure was not suggestive and the facts support this finding. Detective Smith prepared two

photo cards which were presented to Bruce Hayes without any indication who he should choose. Even if the presentation were suggestive, it is not the suggestiveness of a pretrial identification procedure that viilates a defendant's right to due process, but any likelihood of misidentification which might result from the procedure. Neil, 409 U.S. at 199. In the second place, the identification was reliable according to the Biggers factors. Third, the in-court identification was not influenced by the pre-trial identification. See United States v. Crews, 445 U.S. 463, 473 n.18 (1980). Where there is ample evidence to support the trial court's findings, they should not be disturbed on appeal. State v. Guerra, 455 So.2d 1046, 1048 (Fla. 3rd DCA 1984). Even if there were error, it is harmless beyond a reasonable doubt where both co-defendants placed Hayes at the scene of the murder. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986).

POINT VIII

THE DEATH SENTENCE IS PROPORTIONAL.

Hayes asserts that his death sentence is not proportional where there are only two "rather ordinary" aggravating circumstances which are found in most murders, compared to several mitigating circumstances which were either established or should have been established. He also argues it is grossly unfair for him to be executed while the co-defendants may be released from prison while still in their early twenties. Proportionality review is not a comparison between the number of aggravating and mitigating circumstances. It is a thoughtful,

deliberate process of considering the totality of circumstances in a case and comparing it with other capital cases. Porter v. State, 15 FLW S353, S354 (Fla. June 14, 1990).

The cases cited by Hayes involve jury override situations or extemporaneous murders during a burglary or robbery, not a cold-blooded, premeditated, senseless murder where the jury recommended death eleven to one. Holsworth v. State, 522 So.2d 348 (Fla. 1988), was a jury override case. The murder was committed during a burglary. The defense argued voluntary intoxication and an expert testified the defendant was unable to appreciate the nature and consequences of his act. The defendant was physically abused but had positive character traits. This court found the override unjustified. Amazon v. State, 487 So.2d 8 (Fla. 1986), was another override case in which the murder was committed during a burglary. This court found the override unjustified where the jury could have based their recommendation on extreme emotional disturbance, lack of emotional maturity or the defendant's frenzied attack theory. In Miller v. State, 373 So.2d 882 (Fla. 1979), the trial court based the death sentence on a nonstatutory aggravating factor. Further, the defendant was under extreme emotional distress, extreme mental duress and was mentally ill. The trial court considered the defendant's mental illness as an aggravating factor which tipped the balance in favor of the death penalty. Burch v. State, 343 So.2d 831 (Fla. 1977), was an override case where the defendant had no prior criminal history and had a substantially impaired capacity to appreciate the criminality of his conduct. The murder was

committed during the commission of a rape. Jones v. State, 332 So.2d 615 (Fla. 1976), was an override case in which the murder was committed during a burglary and rape. The defendant had extreme psychiatric and alcohol addiction problems. One psychiatrist found him insane. Livingston v. State, 13 FLW 187 (Fla. March 10, 1988), involved a murder during a robbery. The defendant was young, inexperienced, under the influence of alcohol, abused and neglected and of low intelligence. Proffitt v. State, 510 So.2d 896 (Fla. 1987), was a murder committed during a burglary. The state conceded that a murder committed during a burglary was not cold, calculated and premeditated. The appellant argued that this court consistently reversed death sentences in this type of felony murder case. This court found death justified where the defendant had no prior criminal activity, turned himself in, was nonviolent and happily married, a good worker, had been drinking, and stabbed the victim only once. Caruthers v. State, 465 So.2d 496 (Fla. 1985), involved the murder of a convenience store clerk who jumped the defendant. This court struck two aggravating factors, leaving one aggravating factor weighed against no prior history and several nonstatutory mitigating factors. Rembert v. State, 445 So.2d 337 (Fla. 1984), was a murder during a robbery. This court struck two aggravating factors leaving one aggravating factor weighed against considerable nonstatutory mitigating factors. Richardson v. State, 437 So.2d 1091 (Fla. 1983), was another felony murder committed during a burglary in which the jury recommended life. This court struck two aggravating factors.

Hayes committed this murder rationally, premeditatedly and for personal gain with total disregard for life. This case is more like Eutzy v. State, 458 So.2d 755 (Fla. 1984), in which a cab driver was shot once in the head, execution style. In Eutzy, the trial court overrode the jury's recommendation of life and found the aggravating circumstances of 1) prior violent felony, 2) committed during a robbery and 3) cold, calculated and premeditated. Id. at 757. This court struck the second factor. The defendant did not present any evidence of mitigating circumstances, but this court analyzed the possible mitigating circumstances of age and the sentence received by the codefendant and rejected them. Id. at 760. A cab driver was stabbed to death in Kight v. State, 512 So.2d 922 (Fla. 1987). The trial court found two aggravating circumstances: during commission of a robbery and heinous, atrocious or cruel. There were two non-statutory mitigating circumstances: the defendant once apprehended a robber, and the co-defendant did not receive the death penalty because he pled to second-degree murder. Kight presented evidence of his mental retardation and deprived childhood, arguing this established the two mitigating factors of extreme emotional disturbance and inability to appreciate the criminality of his acts. This court held that the death penalty was proportionally imposed. Id. at 933.

Other comparable cases include Troedel v. State, 462 So.2d 392 (Fla. 1984) (victims shot in head during burglary in which defendant was triggerman in cold, calculated murder); Ventura v. State, 15 FLW S190 (Fla. April 5, 1990) (victim shot by defendant

pursuant to contract murder for pecuniary gain); Carter v. State, 14 FLW 525 (Fla. Oct. 19, 1989) (grocery store clerks shot by borderline mentally retarded defendant with deprived childhood); Tefteller v. State, 495 So.2d 744 (Fla. 1986) (victim shot during the course of a robbery); Hamblen v. State, 527 So.2d 800 (Fla. 1988) (victim died from single bullet wound during robbery); Jacobs v. State, 396 So.2d 1113 (Fla. 1981) (victim shot during robbery by defendant who had been drinking and had no history of criminal activity); Diaz v. State, 513 So.2d 1045 (Fla. 1987) (shooting during robbery; co-defendants got life sentences); Herring v. State, 446 So.2d 1046 (Fla. 1985) (convenience store clerk shot during robbery by defendant who had difficult childhood, learning disabilities and was nineteen years old).

Hayes' argument that the death penalty is disproportionate to the co-defendant's sentence is not persuasive, since proportionality review does not extend to cases where the death penalty was not imposed. Garcia v. State, 492 So.2d 360 (Fla. 1986). Prosecutorial discretion in plea bargaining with accomplices does not violate the principle of proportionality. Garcia,supra, at 368 (Fla. 1986); Diaz v. State, 513 So.2d 1045 (Fla. 1987). It is permissible to sentence a defendant to death when co-defendants are sentenced to life. For instance, in Antone v. State, 382 So.2d 1205 (Fla. 1980), the defendant was the mastermind of a contract murder committed for pecuniary gain during which the victim was shot. In the present case, Hayes both planned and carried out the murder. In Garcia v. State, 492 So.2d 360 (Fla. 1986), the triggerman received a death sentence

while his accomplices received life sentences as a result of plea bargaining. Two victims were shot in the back of the head and $80.00 taken. The eighteen year-old defendant in Woods v. State, 490 So.2d 24 (Fla. 1986) stabbed a prison guard. The co-defendant got life. The defendant was of low intelligence, and had mitigating circumstances in his past life. The defendant in Marek v. State, 492 So.2d 1055 (Fla. 1986), argued it was disparate treatment for the co-defendant to be sentenced to life. This court found that when circumstances demonstrate that a defendant is the dominating factor behind a homicide, death is justified. Here, the trial court found Hayes was the dominant party. See also Tafero v. State, 403 So.2d 355 (Fla. 1981); Jackson v. State, 366 So.2d 752 (Fla. 1978); Witt v. State, 342 So.2d 497 (Fla. 1977); Meeks v. State, 339 So.2d 192 (Fla. 1976).

Although similar crimes deserve similar sentences, where one person dominates in a truly senseless crime, death is the appropriate sentence. It is permissible to impose different sentences on capital co-defendants whose various degrees of participation and culpability are different. Hoffman v. State, 474 So.2d 1178 (Fla. 1985). This is especially true where, as here, the party suggests the killing and formulates the plan. Williamson v. State, 511 So.2d 289 (Fla. 1985). In Torres-Arboledo v. State, 524 So.2d 403 (Fla. 1988), the victim was shot during a robbery by three co-defendants. The jury recommended life. There were two aggravating circumstances and several mitigating circumstances including the disposition of the co-defendant's cases. This court upheld the override. In

Jackson v. State, 502 So.2d 409 (Fla. 1986), the co-defendant fired a single fatal shot which killed the robbery victim. The robbery had been planned prior to its commission. After analyzing the totality of the circumstances and comparing them to other capital cases, the only possible conclusion is that Hayes' death sentence is proportional.

POINT IX

THE TRIAL COURT CORRECTLY WEIGHED THE AGGRAVATING AND MITIGATING CIRCUMSTANCES AND CONCLUDED THAT DEATH WAS THE APPROPRIATE SANCTION.

Hayes asserts that the trial court erred in weighing the mitigating factors of age, learning disability, deprived environment, co-defendants' sentences, and in rejecting the evidence that he was retarded. He states that the trial court did not follow this court's guidelines for considering mitigating factors and the two aggravating circumstances were "run of the mill" which the trial court mistakenly gave great weight. He thinks that because the state was willing to plea bargain, the facts of the case are weak. He also believes that since, when you count the words in the trial court's findings, more pages were spent on the mitigating factors than the aggravating factors, the former must necessarily outweigh the latter.

Hayes' positions are contradictory. First he says the trial court did not follow this court's guidelines by addressing the mitigating circumstances presented, then he says the court spent too much time addressing them. This court recently provided the following guidelines to be used in addressing mitigating circumstances:

> When addressing mitigating circumstances, the sentencing court must expressly evaluate in its written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence and whether, in the case of nonstatutory factors, it is truly of a mitigating nature. See Rogers v. State, 511 So.2d 526 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988). The court must find as a mitigating circumstance each proposed factor that has been reasonably established by the evidence and is mitigating in nature. " A mitigating circumstance need not be proved beyond a reasonable doubt by the defendant. If you are reasonably convinced that a mitigating circumstance exists, you may consider it as established." Fla. Std. Jury Instr. (Crim.) at 81. The court next must weigh the aggravating circumstances against the mitigating and, in order to facilitate appellate review, must expressly consider in its written order each established mitigating circumstance. 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. To be sustained, the trial court's final decision in the weighing process must be supported by "sufficient competent evidence in the record." Brown v. Wainwright, 392 So.2d 1327, 1331 (Fla. 1981).

Campbell v. State, 15 FLW S342 (Fla. June 14, 1990).

Ever since State v. Dixon, 283 So.2d 1 (Fla. 1973), this court has consistently held that "the procedure to be followed by the trial judges and juries is not a mere counting process of X number of aggravating circumstances and Y number of mitigating circumstances, but rather a reasoned judgement as to what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of the

circumstances present". Id. at 10. The trial court followed the proper procedure in addressing each mitigating circumstance and explaining whether it was established and, if so, what weight it was given (R 1314-16).

The judge did not say that Hayes was not immature, she said "there was no evidence indicating immaturity in any way contributed to the act" (R 1315). This is supported by the fact that Hayes planned and committed an execution style murder and robbery. The judge's analysis of the weight to be given age is correct. In Deaton v. State, 480 So.2d 1279 (Fla. 1985), this court observed that there is "no per se rule which pinpoints age as an automatic factor in mitigation. Id. at 1283, citing Peek v. State, 395 So.2d 492, 498 (Fla. 1980). In Deaton, the defendant was eighteen years old but had been living on his own for several years and had the maturity to understand his act. In Herring v. State, 446 So.2d 1049 (Fla. 1984), this court upheld the death sentence of a defendant who shot a convenience store clerk. The aggravating circumstances were 1) previous violent felony, 2) committed during a robbery, 3) committed to prevent arrest and 4) cold, calculated and premedited. The mitigating circumstances were that the defendant was nineteen at the time of the offense, had a difficult childhood, and had learning disabilities. This court affirmed the death sentence, observing that it had affirmed similar robbery-murder cases involving defendants of youthful age who had no significant prior criminal activity. Id. at 1057. The United States Supreme Court has held that imposition of the death penalty on minors does not violate

the Eighth Amendment. Stanford v. Kentucky, 109 S.Ct. 2969 (1989). Dr. Graham's testimony was that the cut-off point for retardation was 70 and Hayes' scores were above that (R 1089). The judge's findings of low intelligence and learning disability not rising to the level of retardation are supported by Dr. Graham's testimony (R 1090, 1092). The United States Supreme Court allows imposition of the death penalty on a defendant even if he is mentally retarded. Penry v. Lynaugh, 109 S.Ct. 2934 (1989). In Carter v. State, 14 F.L.W. 525 (Fla. Oct. 19, 1989), this court affirmed a death sentence in which the trial court rejected evidence of mental retardation and decided the evidence of mental deficiency was not sufficient to support a factor in mitigation. The trial court in the present case did find there was some evidence the defendant was learning disabled, but this disability did not counterbalance the strong aggravating factors (R 1316). The trial judge found that the defendant's capacity to appreciate the criminality of his conduct was not impaired, as established by Dr. Graham's testimony (R 1315). Further, Hayes was not under the influence of extreme emotional disturbance as evidenced by Dr. Graham's testimony (R 1314). The trial court properly rejected the mitigating factors of emotional disturbance and impaired ability to appreciate the criminality of his conduct. See Provenzano v. State, 497 So.2d 1177 (Fla. 1986).

The trial court also considered the co-defendants' potential sentences and concluded Hayes was the dominant party. This finding is supported by the record and is a proper statement of the law. Eutzy v. State, 458 So.2d 755 (Fla. 1984); White

v. State, 415 So.2d 719 (Fla. 1982); Witt v. State, 342 So.2d 497 (Fla. 1977). This is particularly true when the defendant is the dominant force. Garcia v. State, 492 So.2d 360 (Fla. 1986); Marek v. State, 492 So.2d 1055 (Fla. 1986); Tafero v. State, 403 So.2d 355 (Fla. 1981); Jackson v. State, 366 So.2d 752 (Fla. 1978).

Finding or not finding a specific mitigating circumstance is within the trial court's domain, and reversal is not warranted simply because an appellant draws a different conclusion. Cook v. State, 542 So.2d 964, 971 (Fla. 1989); Stano v. State, 460 So.2d 890, 894 (Fla. 1984); Quince v. State, 414 So.2d 185, 187 (Fla. 1982). A trial court has discretion in rejecting mitigating factors. Hudson v. State, 538 So.2d 829 (Fla. 1989); Scull v. State, 533 So.2d 1137 (Fla. 1988); Hargrave v. State, 366 So.2d 1 (Fla. 1979). There is no requirement that a court must find anything in mitigation. Suarez v. State, 481 So.2d 1201 (Fla. 1985); Porter v. State, 429 So.2d 293, 296 (Fla. 1983). So long as all the evidence is considered the trial judge's determination of a lack of mitigation will stand absent a palpable abuse of discretion. Provenzano v. State, 497 So.2d 1177, 1184 (Fla. 1986); Pope v. State, 441 So.2d 1073, 1076 (Fla. 1983). Appellate counsel is faced with a very high hurdle in trying to convince this court that mitigating circumstances were proven when the judge who presided at trial has declined to find the same from the evidence. Thomas v. Wainwright, 495 So.2d 172, 175 (Fla. 1986). The trial court determines the weight to be given any mitigating circumstance and whether the circumstance

was even established. It is not within the reviewing court's province to revisit or reevaluate the evidence presented as to aggravating or mitigating circumstances. Hudson, supra at 831. This finding should not be disturbed where supported by competent substantial evidence. Bryan v. State, 533 So.2d 744 (Fla. 1988). The trial court makes the ultimate determination as to sentence and must himself consider which aggravating and mitigating factors apply, what weight should be accorded to each, and how they balance. Lopez v. State, 536 So.2d 226 (Fla. 1988); Grossman v. State, 525 So.2d 833 (Fla. 1988). Hayes has failed to demonstrate any error in the trial court's weighing of the aggravating and mitigating circumstances.

POINT X

THE TRIAL COURT WAS CORRECT IN INSTRUCTING THE JURY ON BOTH PECUNIARY GAIN AND COMMITTED DURING THE COURSE OF A BURGLARY.

Hayes contends it was error for the trial court to instruct on, and allow the prosecutor to argue, both pecuniary gain and "committed during the course of a robbery" as aggravating factors. Although trial counsel interposed argument about whether the two factors were doubled, he did not object when the prosecutor argued the factors or when the court instructed on the factors (R 1124, 1139). This issue was therefore waived for appellate review. Clark v. State, 363 So.2d 331 (Fla. 1978); Castor v. State, 365 So.2d 701 (Fla. 1978).

Hayes recognizes that this court has specifically rejected the instant claim in Suarez v. State, 481 So.2d 1201 (Fla. 1985),

but urges the court to reconsider its holding in that case. Suarez is on all fours with the present case, Hayes has presented no compelling reason for this court to change its ruling. The prosecutor arguing both aggravating factors did not prejudice Hayes where the trial court properly recognized the findings encompassed only one aggravating factor. Deaton v. State, 480 So.2d 1279, 1282 (Fla. 1985).

POINT XI

THIS COURT PROPERLY DENIED THE APPELLANT'S MOTION TO SUPPLEMENT THE RECORD.

Hayes claims this court erred in denying his motion to supplement the record with the original indictment, transcript of his taped statement, and transcript of the hearing on trial counsel's motion to withdraw.

On May 11, 1990, appellate defense counsel filed a motion to supplement the record. The state replied that Hayes' motion sought supplementation of the record with meaningless items that, in some cases may or may not exist, or which already existed in the record. Specifically, the previous indictment was meaningless since the indictment on which the conviction is based was already in the record. Similarly, the request for a speculative motion to withdraw by prior counsel was baseless and irrelevant. The state also objected to supplementing with a transcript of the tape recording because the tape was already a part of the record. The state did not object to supplementing with the December 15, 1988, hearing on counsel's motion to withdraw. This court denied the motion to supplement on June 1, 1990.

As stated in the state's reply, the items requested are unnecessary to a determination of this appeal. Even though the state did not object to supplementation with the hearing transcript, there is no issue here of conflict of counsel. Contrary to Hayes' assertion, defense counsel did not specifically decline to withdraw his previous motion to withdraw as counsel (Initial Brief at 60). What trial counsel said was "I think it's already been ruled on and there is nothing to withdraw. If there were new grounds for another such motion, it would have been raised again and it has not been" (R 904). Hayes advised the court at that time and on two other occasions that he was satisfied with counsel (R 904, 668, 1143). If there had been a problem at some point, it was resolved and the parties resolved their differences.

This court did not err in denying the motion to supplement the record.

POINT XII

HAYES WAS NOT DENIED A FAIR TRIAL DUE TO CUMULATIVE ERROR WHERE NO ERRORS EXIST.

Hayes' final attack is based upon cumulative error, alleging the trial court: 1) limited voir dire, 2) restricted cross examination, 3) allowed the medical examiner to build a model of the taxi in the courtroom, 4) denied his motion to interview a juror, and, 5) was less than even-handed in its minor evidentiary rulings.

1. Limitation on voir dire

Hayes complains that the trial court limited defense counsel's questioning of the venire. The incident complained of was when defense counsel asked a juror why she thought the law put the burden on the state. The court called counsel to the bench and said:

> THE COURT: Okay. I called you up here because I advised Mr. Kimball that I thought it was proper inquiry to ask jurors whether they accepted a certain point and agreed with it and what they would find, but I don't think it's proper to go into why they feel that's the right theory of law or the right burden. Mr. Kimball?
>
> MR. KIMBALL: I just wanted to ask why, to make sure that they understand these principles and apply these principles.
>
> THE COURT: There's a difference between asking them if they understand a principle and then having them attempt to explain what it is.
>
> MR. KIMBALL: They would always say that they understand it, whether they do or not.
>
> THE COURT: You can inquire further, but just simply why do you think it's that way. Personally I don't care why they think that. It's not for them to decide why. That is a premise of law or theory of our system of government, and why they think -- if they know the actual reason behind it. It is only whether they will accept it and apply it.
>
> MR. KIMBALL: Uh-huh.

(R 138) (End of benchside conference.)

Defense counsel then proceeded to question the jurors in a different manner as follows:

> MR. KIMBALL: I'm going to ask you the reverse or sort of the flip side of the question that Mr. Damore asked you. I believe he asked you if you were convinced that the State had met its burden and had proved the Defendant guilty beyond a reasonable doubt, if you could you return a

guilty verdict. Well, I want to ask you the opposite.

After hearing all of the evidence in the case and you're convinced that the State had not met its burden and that there is a reasonable doubt in the case, will you return a not guilty verdict.

And let me just start with someone here. Mr. Seward?

MR. SEWARD: Yes.

(R 139).

Defense counsel did not object that his questioning was restricted and this issue is not preserved for review. Clark v. State, 363 So.2d 331 (Fla. 1978); Castor v. State, 365 So.2d 701 (Fla. 1978). Voir dire may be limited by the trial court and absent an abuse of discretion the ruling should not be overturned. See Stano v. State, 473 So.2d 1282, 1285 (Fla. 1985); Kalinosky v. State, 414 So.2d 234 (Fla. 4th DCA 1982); Peri v. State, 426 So.2d 1021 (Fla. 3rd DCA 1983); Jones v. State, 343 So.2d 921 (Fla. 3rd DCA 1977). Hayes has shown no abuse of discretion.

2. Restriction on cross-examination

Hayes claims the trial court erred in restricting cross-examination of Felicia Ross and Nathan Watson. Defense counsel wanted to question Felicia Ross about an occasion when she and her brother Nevis were stopped in a car (R 546). It appears Watson was also in the car. The state objected that the question about whether Nathan Watson was arrested in an automobile in which she was present was irrelevant and immaterial (R 547). Defense counsel argued that the relevance was to show the Ross

girls were pressured by their father, Jake Ross, to give testimony and the father would have been upset by the daughter being in a car where a gun was (R 548). The court asked defense counsel whether what he was trying to elicit was the fact that the witness was found with Watson and her father found out (R 549). The court ruled that defense counsel could question the witness about any knowledge or pressure related to her father, but the facts of the incident with Mr. Watson being arrested were not relevant. Counsel was advised he could question about the incident and elicit the information but the arrest itself was not relevant (R 550).

Defense counsel did not object to this ruling, so any issue is waived. Clark v. State, supra; Castor, supra. Additionally, there was no proffer of the excluded testimony, so the issue is not preserved. Woodson v. State, 483 So.2d 858 (Fla. 5th DCA 1986); Salamy v. State, 509 So.2d 1201 (Fla. 1st DCA 1987).

The trial court did not abuse its discretion in limiting cross-examination on a collateral matter. Gelabert v. State, 407 So.2d 1007 (Fla. 5th DCA 1981). The testimony about Watson being arrested was totally irrelevant to this witness' testimony and designed only to show bad character. See Cummings v. State, 412 So.2d 436 (Fla. 4th DCA 1982); Pate v. State, 529 So.2d 328 (Fla. 2d DCA 1988). As the state observed, defense counsel was free to question Jake Ross on the issue (R 551). However, the testimony was not relevant to show bias on the part of Felicia Ross.

The second alleged restriction on cross-examination was when the court sustained a state objection to a question about

why Nathan Watson never said anything about "this thing at the Ross house the day after the incident" (R 721). The state objected on the grounds the question was beyond the scope of direct examination (R 721). Although the Ross girls testified about Hayes telling them the day after the murder that he had done it, there was no testimony by Watson about these conversations (R 539-40, 595, 690-713). Cross examination is limited to the subject matter of direct examination and matters affecting the credibility of the witness. §90.612(2) Fla. Stat. The trial court properly sustained the objection.

A limitation on cross examination is not prejudicial where it merely serves to keep out irrelevant matters. Washington v. State, 432 So.2d 44 (Fla. 1983). Section 90.612, Florida Statutes (1987) provides that the judge shall exercise reasonable control over the mode and order of the interrogation of witnesses and presentation of evidence so as to facilitate discovery of the truth, avoid needless consumption of time and protect witnesses from harassment. The rule also provides that cross examination is limited to subject matter brought out on direct examination and to matters affecting credibility.

The trial court has broad discretion in the admission of evidence. Welty v. State, 402 So.2d 1159 (Fla. 1981); Demps v. State, 395 So.2d 501 (Fla. 1981). Unless an abuse of discretion can be shown, its ruling will not be disturbed. Hardwick v. State, 521 So.2d 1071 (Fla. 1988). Hayes was afforded ample opportunity to cross-examine each witness. He is not entitled to unlimited cross-examination in whatever way and to whatever

extent the defense might wish. Kentucky v. Stincer, 482 U.S. 730, 107 S. Ct. 2658, 2664 (1987), quoting Delaware v. Fensterer, 474 U.S. 15, 20, 106 S. Ct. 292, 295, 88 L.Ed. 2d 15 (1985). In Steinhorst v. State, 412 So.2d 332 (Fla. 1982), this court recognized that an accused has a constitutional right to full and fair cross-examination. However, that right is not unlimited. Questions on cross-examination must be related to credibility, or to matters brought out on direct examination. Steinhorst at 337.

Even assuming for the sake of argument that this ruling was error, it is harmless at best. In Delaware v. Van Arsdall, 475 U.S. 673, 684, 106 S.Ct. 1431, 89 L.Ed. 2d 676 (1986), the Court held:

> The correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt. Whether such an error is harmless in a particular case depends upon a host of factor, all readily accessible to reviewing courts. These factors include the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case. Cf. Harrington, 395 U.S. at 254, 89 S.Ct., at 1728; Schneble v. Florida, 405 U.S., at 432, 92 S. Ct., at 1059.

In the present case, none of the testimony excluded was important, defense counsel was allowed liberal cross-examination, and the points he wished to elicit would not have impacted on the verdict. Hayes has not demonstrated the trial court abused his

discretion in excluding the evidence. Smith v. State, 404 So.2d 167 (Fla. 1st DCA 1981).

3. Allowing medical examiner to "build" a model of the taxi

Hayes contends it was error to allow the medical examiner to demonstrate the angle of the trajectory of the bullet using a hypothetical arrangement of chairs (R 585-86). Anthony Gillam had already testified that Hayes was sitting behind the driver (R 461). An expert witness may state his opinion based on fact within his personal knowledge. In addition, an expert may state his opinion on facts which he does not personally know by answering a hypothetical question in which he is asked to assume certain facts are true. Ehrhardt, Florida Evidence (2nd Ed. 1984) §704.2. The hypothetical question posed by the state was supported by facts in evidence. See Burnham v. State, 497 So.2d 904 (Fla. 2d DCA 1986). The demonstration was relevant to establish that the trajectory of the bullet was consistent with the testimony that Hayes shot the driver from the back seat.

The trial court has broad discretion in the admissibility of evidence. Welty v. State, 402 So.2d 1129 (Fla. 1981); Demps v. State, 395 So.2d 501 (Fla. 1981). Unless an abuse of discretion can be shown, its ruling will not be disturbed. Hardwick v. State, 521 So.2d 1071 (Fla. 1988). Hayes has shown no abuse of discretion.

4. Motion to interview juror

Hayes moved to interview a juror alleging that Ms. Tanner was pressured into compromising her verdict by the majority of the jurors (R 1288-90). The trial court heard the motion on

October 27, 1989, at which time defense counsel represented as an officer of the court that the motion was not well taken (R 1155, 1156). The court observed that there were no affidavits to support the motion and the juror's behavior in a death case was consistent with the gravity of the situation (R 1159). A claim that a juror did not agree with a verdict or was unduly influenced by fellow jurors are matters which inhere in the verdict. Russ v. State, 95 So.2d 594 (Fla. 1957); Smith v. State, 330 So.2d 59 (Fla. 1st DCA 1976). Even if this issue is one which did inhere in the verdict, the motion was untimely. A challenge on these grounds must be made before the jury is discharged or the verdict accepted. Marks v. State Road Dept., 69 So.2d 771 (Fla. 1954); Powell v. State, 414 So.2d 1095 (Fla. 5th DCA 1982). Even when the error comes to light the very next day, the motion is untimely. Smith, supra. As the trial court noted, there were no affidavits to support defense counsel's allegations. See Powell, supra. Activities involving juror deliberations inhere in the verdict and even if there are affidavits alleging a juror was pressured, a new trial is not required. Mitchell v. State, 527 So.2d 179 (Fla. 1988); See also, Scongers v. State, 513 So.2d 1113 (Fla. 2d DCA 1987).

5. Trial court was not even-handed

Hayes alleges the trial court was not even-handed in its evidentiary rulings because it frequently sustained the state's objections and denied defense counsel's. He cites one instance in which the court overruled defense counsel's objection on the ground the question was outside the scope of cross examination

when the state asked Gillam to identify Hayes. Hayes compares this to a state objection which was sustained when defense counsel asked a witness whether he ever said Watson looked directly towards the car. The question was posed immediately after the witness had testified that Watson had his head down. Not only was the question asked and answered, but it was also argumentative. The trial court was correct in its rulings. Hayes has failed to show any vestige of partiality and his allegations are unfounded.

There was no error, either individually, cumulatively, or otherwise as outlined in Points I and II. Error, if any, was harmless beyond a reasonable doubt. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986).

POINT XIII

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

This argument is presented virtually word for word in every brief, and consistently rejected by the court. Mendyk v. State, 545 So.2d 846 (Fla. 1989); Stano v. State, 460 So.2d 890 (Fla. 1984). Most of the alleged constitutional infirmities raised on appeal were not raised at the trial court level and are procedurally barred. Ventura v. State, 15 F.L.W. S190 (Fla. April 5, 1990); Swafford v. State, 533 So.2d 270 (Fla. 1988). Those issues which are not procedurally barred have been rejected. Proffitt v. Florida, 428 U.S. 242 (1976); Lightbourne v. State, 438 So.2d 380 (Fla. 1983); State v. Dixon, 283 So.2d 1 (Fla. 1973).

This court's recent opinions indicate that this court continues to reject constitutionality arguments. Carter v. State, 14 F.L.W. 525 (Fla. Oct. 19, 1989); Bouie v. State, 15 F.L.W. S188 (Fla. April 5, 1990); Ventura v. State, 15 F.L.W. S190 (Fla. April 5, 1990); Randolph v. State, 15 F.L.W. S271 (Fla. May 3, 1990).

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Answer Brief of Appellee has been furnished by delivery to Christopher S. Quarles, Assistant Public Defender, 112-A Orange Avenue, Daytona Beach, Florida 32114, this 1 day of August, 1990.

Barbara C. Davis

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