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IN THE SUPREME COURT OF FLORIDA

CASE NO. 75,467

HENRY ALEXANDER DAVIS,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

****

ON APPEAL FROM THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT IN AND FOR POLK COUNTY, FLORIDA CRIMINAL DIVISION

****

BRIEF OF APPELLEE

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INTRODUCTION

Appellee, **the State of Florida**, was the prosecution in the trial court and Appellant, **Henry Alexander Davis**, was the defendant. The parties will be referred to as they stood in the trial court. The symbol "R" will designate the record on appeal, which includes the trial court transcripts. The State's exhibits admitted at trial are contained in a separate manila folder, with the State's exhibit number printed on the back of each exhibit. In referring to these exhibits, the State will cite to the exhibit number on the back of the exhibit. All emphasis is supplied unless the contrary is indicated.

STATEMENT OF THE CASE

The State accepts the defendant's Statement of the Case as fair and accurate.

STATEMENT OF THE FACTS

The State accepts the defendant's Statement of the Facts as fair and accurate. The State will however supplement with additional facts in the argument portion of its brief, though the defendant's factual presentation is in almost all respects an accurate and comprehensive one.

ISSUES PRESENTED

I.

WHETHER THE TRIAL COURT ERRED IN ADMITTING EVIDENCE OF A PHOTOGRAPHIC LINE-UP DURING THE GUILT PHASE AND IN DENYING A MOTION FOR MISTRIAL WHEN THE PROSECUTOR ASKED THE DEFENDANT'S SISTER ABOUT HIS COCAINE USE AT THE PENALTY PHASE.

II.

WHETHER THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION FOR MISTRIAL FOLLOWING THE PROSECUTOR'S GOLDEN RULE VIOLATION DURING THE PENALTY PHASE.

III.

WHETHER THE TRIAL COURT ERRED IN FINDING THE WITNESS ELIMINATION AGGRAVATING FACTOR.

IV.

WHETHER THE TRIAL COURT ERRED IN FINDING THE HEINOUS, ATROCIOUS OR CRUEL AGGRAVATING FACTOR.

V.

WHETHER THE TRIAL COURT FAILED TO CONSIDER CERTAIN MITIGATING EVIDENCE.

SUMMARY OF ARGUMENT

I.

There was absolutely nothing said by any witness, nor is there anything in the photo spread itself, which would indicate the defendant had a prior record, and the mere fact that the police were able to obtain a photograph of the defendant is not grounds for excluding evidence of a highly relevant photo spread identification made immediately after the crime, even where the witness is able to identify the defendant at trial, almost three years later.

The prosecutor's question to the defendant's sister about his cocaine use in the period prior to the murder was directly relevant to rebut the defense's hypothesis that his behavior and memory become erratic in the four month period between November 1986, when he fell from a tree and allegedly suffered brain damage, and March 1987, when the murder occurred. The prosecutor had a good faith basis to believe the defendant had used cocaine during this period, and he was entitled to ask the witness if she was aware he was using cocaine, and if this might have been the reason for his behavioral changes, which she attributed to his fall from the tree.

II.

The trial court found that the prosecutor's golden rule violation was an unintentional slip of the tongue, and indeed for

this particular aggravating factor, HAC, the line between a proper "imagine the pain she felt" and an improper "imagine the pain you would have felt" is almost illusory, as the only way the jurors can gauge how the victim felt was to imagine how they would have felt. The defendant's objection to the prosecutor's comment was sustained, and as the trial court properly found, this single comment during the prosecutor's otherwise proper, noninflammatory hour long argument was not sufficiently egregious to warrant a mistrial.

III.

The evidence disclosed that the 73 year old victim knew the defendant and thus would have named him, not merely described him, had he allowed her to live. The physical evidence, including the location of the body and the defendant's fingerprint, in the victim's blood, on the key chain in the bedroom, establish that the defendant killed the victim in the doorway, after being admitted by the victim, and <u>then</u> proceeded to ransack the house, load the Cadillac with stolen valuables, wipe the murder weapon clean and hide it under the bed, lock the front door, and close the garage door behind him, during which time the victim slowly bled to death. This was not a "robbery gone bad" or "panic killing," as the defendant contends. The defendant could easily, upon being admitted, have subdued the diminutive 73 year victim, and the fact that he stabbed her 21 times and <u>then</u> went about his business shows that the defendant's

sole or dominant motive in killing her was to prevent her certain identification of him.

IV.

The medical examiner testified that it was unlikely that the blow to the head (source unknown) would have rendered the victim unconscious. Although it is unknown how long she remained conscious, it is clear from the location of the body, the head wound, and the various stab wounds that the victim was not knocked unconscious and then stabbed, as the defendant contends. Additionally, a State witness testified that the following day the defendant had fresh scratch marks on his face which the defendant said came from "an old lady," and that at the same time the defendant made statements which seemed to indicate he and others had killed someone, but hadn't intended to do so. In short, the evidence was sufficient to sustain this aggravating factor.

V.

The trial court's order as to the nonstatutory mitigating evidence was legally sufficient under the law in effect at that time. There is nothing to suggest the Court failed to consider any of the nonstatutory mitigating evidence offered by the defendant, rather it is clear that the court did so, and found it to be insufficient to outweigh the aggravating factors.

ARGUMENT

I.

THE TRIAL COURT DID NOT ERR IN ADMITTING EVIDENCE OF A PHOTOGRAPHIC LINE-UP DURING THE GUILT PHASE, AND IN DENYING A MOTION FOR MISTRIAL WHEN THE PROSECUTOR ASKED THE DEFENDANT'S SISTER ABOUT HIS COCAINE USE AT THE PENALTY PHASE.

A). PHOTO LINE-UP.

As soon as witness Harold Brown was asked if he had viewed a photographic line-up, defense counsel objected and moved for mistrial because, counsel reasoned, the mere fact that the police had the defendant's photograph suggested that he had a criminal record. The trial court ruled that there was nothing to suggest to the jury that the photograph was a mugshot or that the defendant had a prior record, and the court denied the motion. (R.710, 711). Brown then made an in-court identification of the defendant. (R.712). He stated that he was not sure if he had ever seen the defendant prior to the day of the murder (R.713), and that he selected the defendant's picture from the photospread the same day the murder occurred. (R.714).

At this juncture, defense counsel renewed his objection to testimony concerning the photospread identification by the witness. The prosecutor pointed out that there was absolutely nothing to suggest that the defendant's photo was a mugshot from a prior arrest, that the police often get photographs from all

different sources, and that he had no idea where the police obtained the defendant's photo, and neither did the jury. (R.716).

The trial court then revisited the issue during a break in the testimony, asking the prosecutor why evidence of the photospread identification was necessary given the witness' in-court identification. The prosecutor then aptly pointed out that it was no great feat for the witness to pick out the defendant at trial, in an essentially "show-up" posture, especially where all the attorney's were white and the defendant is black. It is far more probative that the witness selected the defendant's picture from a field of six similar individuals three years earlier, just after the murder occurred. (R.738-740). The photospread itself was relevant as evidence so the jury could see that it was not a suggestive photospread. The State would also add that at the time of viewing the line-up, the witness cannot be positive that the man he saw will be in the line-up, whereas at trial the witness knows that the man in the defendant's seat is not only the suspect, but has been charged and brought to trial, presumably after a full police investigation has determined he is the guilty party.

Detective Hendrix later testified that he showed Brown the photospread not on the day of the offense, as Brown testified, but a week later, on March 25, 1987. Brown's error as

to the date that he was shown the photospread highlights the importance of the jury learning what occurred immediately after the offense, in terms of the witness' ability to remember what occurred and identify who he saw, rather than having to rely on the witness' recollections three years down the road, at trial.

As for legal analysis, the cases relied upon by the defendant all involve instances where testimony was elicited or evidence presented which directly pointed to an earlier arrest. Thus in D'Anna v. State, 453 So.2d 151 (Fla. 1st DCA 1984), the court condemned the use of mugshots where the front and side photos contained the booking information, including the arrest date, which was for an earlier arrest unrelated to the current case against D'Anna.

In the instant case the defendant's photo, and that of the other five individuals in the photospread (see State's exhibit #62, the first exhibit in the exhibits folder) were all closely "cropped," showing only the neck and face, which the court in D'Anna noted was the proper predicate for the introduction of such photos. See also Houston v. State, 360 So.2d 468 (Fla. 3d DCA 1978).[1]

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[1] The State would note also that the defendant herein was arrested March 20, 1987, and the photospread was shown to the witness March 25, 1987. Since the detectives would have wanted to use the most recent photo of the defendant, the State would bet dollars to donuts that the defendant's photo in the spread was his March 20, 1987 booking photo, however that is of course pure speculation.

The defendant's assertion that the photospread/identification was not sufficiently probative is dealt with above. Its value and relevance far outweighed that of the in-court identification. What the defendant is in essence asking this Court to do is ban the use of photospread identifications at criminal trials, a proposition too ominous and onerous to contemplate. Indeed, if the defendant's reasoning were played out to its logical conclusion, evidence of fingerprint matches made prior to the defendant's arrest (as occurred here) would have to be excluded, because the jurors might speculate that since the police had the defendant's prints on file, he must have had a criminal record.

B). PROSECUTOR'S QUESTION CONCERNING DEFENDANT'S COCAINE USE DURING PENALTY PHASE.

Barbara Stoudemire, the defendant's mother, testified that in 1986 the defendant fell out a tree, and that the fall caused pronounced behavioral changes, including his ability to remember. (R.1303, 04). Dr. Dee subsequently testified the fall occurred in November of 1986, four months before the murder. (R.1333). The defendant's sister, Alma Davis Sheppard, stated that after the fall, the defendant no longer acted normal, and that his behavior was quite different than before the fall. (R.1311, 1312). On cross-examination, the following occurred:

Q. Now, you indicated that about this time Henry's behavior changed somewhat, correct?

A. To me, uh-huh.

Q. To you.

A. Right.

Q. Was there anything else Henry had become involved in that you thought might have added to his change in behavior?

A. I don't know. When you say involved in?

Q. Well, isn't it true, Alma, that Henry became involved in cocaine back about the same time?

A. I cannot answer that because I don't know.

MR. BRAWLEY: Objection, Your Honor.

A. I never seen him----

MR BRAWLEY: Objection--Alma. Your Honor, I have a motion.

THE COURT: Come up, Gentlemen.

(R.1314).

Defense counsel then argued that the prosecutor's question raised an improper inflammatory matter, the defendant's drug use, and that a mistrial should be granted.[2] The prosecutor then responded that he had a good faith basis to ask the question, as a bent soft drink can with cocaine residue was found

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2 The State cannot help but note the irony of the situation, in that the defendant complains that he was unfairly portrayed as a drug abuser, when this and other Courts have repeatedly held that the defendant's drug abuse is a mitigating factor.

in the victim's car, and the police had information that the defendant was involved in cocaine. The State would also note that during the guilt phase, State witness David Roberts testified that the day after the murder, the defendant "seemed like he was high or something." (R.979).

A lengthy legal argument then ensued (R.1315-1317, 1319-1327), after which the court ruled that based on the cocaine found in the victim's car, and the short time span between the fall from the tree and the murder, the prosecutor had a good faith basis to ask the question. (R.1327).

The prosecutor's question was definitely relevant, as the defendant's sister, and her mother before that, testified that during the period November 1986 to March 1987, the defendant's behavior changed due to his November fall from a tree. The defense experts subsequently diagnosed the defendant as having suffered brain damage from that fall. The prosecutor had hard evidence that, at least at the time of the murder, the defendant was using and indeed smoking cocaine, presumably not for the first time. The prosecutor was told by the police that the defendant was known as a cocaine user, although the source of this knowledge is unknown. The State submits that under these circumstances, the prosecutor was entitled to ask the defendant's sister if the defendant had been using cocaine during the relevant four month period, and whether this could have contributed to his behavioral changes.

Finally, even if the question was improper, the witness denied any knowledge of cocaine use by the defendant. The jurors had already heard the evidence concerning the bent soft drink can and that the defendant appeared "high" the day after the murder. There is simply no legitimate possibility that this single question contributed to the jury's 12 to 0 death recommendation, given the nature of the crime, the aggravating factors, and the almost complete lack of legitimate mitigating factors.

II.

THE TRIAL COURT DID NOT ERR IN DENYING THE DEFENDANT'S MOTION FOR MISTRIAL FOLLOWING THE PROSECUTOR'S GOLDEN RULE VIOLATION DURING THE PENALTY PHASE.

The State can hardly dispute that the prosecutor's ". . . think about what it would feel like if it went two inches into your neck" (R.1558) comment constituted a golden rule violation. The prosecutor was in fact not even aware he had used that phraseology. After the court reporter read back his words, the prosecutor stated that he had not intended to use the word "your," that he scrupulously attempted to avoid any improper comment, and that this single "slip-up" does not warrant a mistrial. (R.1560-1563). The trial court first noted that the prosecutor's closing argument, which was virtually completed when this occurred, was not an emotional or inflammatory one, but rather one which stressed the legal rules the jurors should follow. (R.1262). The Court then stated that the remark, though improper, was not intentional nor in character with the rest of the prosecutor's closing argument, and that:

> . . . the Court will return the jury and simply inform them that they are to disregard the prosecutor's observation about how it would feel to them in terms of putting themselves in relationship to the victim and we'll proceed.
>
> **MR. BRAWLEY:** Yes, sir, Your Honor. I understand that you're going to say that. In the interest of not interrupting the trial further, let me say that I believe

that remark would be--that instruction to the jury would be insufficient, and I press my motion for mistrial.

MR. AGUERO: Judge, I think that the bigger problem with that remark is--and it doesn't matter to the State except on appeal, is all you're going to do is highlight something that the jury--

THE COURT: Well, I appreciate that. Defense counsel has suggested that the Court should do that.

MR. BRAWLEY: I believe the appellate law requires me to request a curative instruction before--in closing argument before I can have the predicate made for a motion for mistrial.

THE COURT: Well, gentlemen, I'll take this position. The motion as stated for reasons stated is denied, and I will not give that curative instruction. On the balance, a fair trial to the State and the defendant, I believe that if the Court does focus on that remark, it is only to bring it back to their attention. And the great body of the argument certainly now to be exposed to the argument of defense, it may very well be in practical terms that the jury may not at all remember that particular remark. If the Court should address it, I will certainly highlight it and emphasize it, and I think that it serves no purpose of fairness or justice to either part to do so. So I will not.

(R.1564, 65).

The State's initial contention is that the issue was not properly preserved. When the Court stated that it would instruct the jury to disregard the prosecutor's comment concerning how it would feel like to be in the position of the victim, defense counsel stated that the proposed instruction was insufficient.

Rather than proposing its own instruction, defense counsel stated ". . . that instruction to the jury would be insufficient, <u>and I press my motion for mistrial</u>. The only logical reading of this statement is that defense counsel does not want <u>any</u> curative instruction because the error is too serious to be cured by such instruction. Counsel could have proposed his own instruction, but elected not to do so. The issue was thus not properly preserved, as counsel never actually requested a curative instruction. <u>Ferguson v. State</u>, 417 So.2d 639 (Fla. 1982), <u>Smith v. State</u>, 365 So.2d 405 (Fla. 3d DCA 1978), and <u>Palmer v. State</u>, 486 So.2d 22 (Fla. 1st DCA 1986).

What occurred next certainly makes interesting reading. The prosecutor stated that a curative instruction might just highlight the comment to the jury. The trial court then makes a comment that the State cannot decipher. The Court is saying either that a) Not giving an instruction sounds like a good idea ("Well, I appreciate that), and defense counsel also doesn't want me to give one ("defense counsel has suggested that the Court should do that"), or b) Not giving one sounds like a good idea, except that defense counsel thinks I should give one. Defense counsel then responds that he believes the law requires him to request a curative as a predicate to a motion for mistrial. The Court then states it will not give "that" instruction (the one rejected by defense counsel) because it would merely call attention to the remark, which the jury has probably forgotten by now.

The State respectfully asserts that defense counsel never requested a curative, that he had every opportunity to do so, and that the issue is thus not preserved. Even if this Court disagrees, this single isolated comment, to which objection was sustained, and which occurred at the conclusion of a lengthy and otherwise noninflammatory, proper closing argument, was not so egregious as to warrant a mistrial, even absent a curative instruction. This Court has found far worse comments not to warrant reversal, see Pope v. Wainwright, 496 So.2d 798 (Fla. 1986) (comments on lack of remorse and telling jury defendant stated he wanted to die, held harmless), Bertollotti v. State, 476 So.2d 130 (Fla. 1985) (comments on right to remain silent, asking jurors to put themselves in victim's shoes, and send message to community, held harmless), and Jackson v. State, 522 So.2d 802 (Fla. 1988) (comments about statement to community, community watching, victims will no longer read books, visit families, see sun rise, etc., held harmless). For the types of egregious comments warranting reversal, see Garron v. State, 528 So.2d 353 (Fla. 1988).

III.

THE TRIAL COURT CORRECTLY FOUND THE WITNESS ELIMINATION AGGRAVATING FACTOR.

In its sentencing order the trial court relied on the fact that the victim knew the defendant, and hence would have named him as the perpetrator had the defendant allowed her to live (R.1636). This Court has consistently recognized this as an important factor in finding the witness elimination aggravating circumstance. See Correll v. State, 523 So.2d 562, 568 (Fla. 1988) ("Correll was well acquainted with Jones and she could have easily identified him"), Routly v. State, 440 So.2d 1257, 1264 (Fla. 1983) ("First, the defendant knew that the victim knew him and could later provide the police with his identity"), Griffin v. State, 474 So.2d 777, 781 (Fla. 1985) (witness elimination rejected in part because "There is no evidence that Neives knew or recognized Griffin"), and Card v. State, 453 So.2d 17, 24 (Fla. 1984) (First of two factors supporting witness elimination was that "the appellant knew the victim and she could have identified him"). In Doyle v. State, 460 So.2d 353, 358 (Fla. 1984), this Court held that the fact that the rape/murder victim knew the defendant was, by itself, insufficient to support this circumstance. However the Court stressed that where the victim is murdered after being raped, the murder is often "the culmination of the same hostile - aggressive impulses which triggered the initial attack" (Id. at 358). In the instant case,

the physical evidence shows that the murder preceded the taking of the victim's property, the latter being a crime of greed, not passion.

There are other facts which support this aggravating circumstance, and which contradict the defendant's assertion that this murder could reasonably be construed as a "burglary gone bad", or an unreasoned panic. As this Court noted in Swafford v. State, 533 So.2d 270, 276 (Fla. 1988).

> Swafford relies on cases in which the support for the factor was too speculative because other possible motives existed. These cases are inapplicable. Even without direct evidence of the offender's thought processes, the arrest avoidance factor can be supported by circumstantial evidence through inference from the facts shown. *See, e.g., Harich v. State,* 437 So.2d 1082, 1086 (Fla. 1983), *cert. denied,* 465 U.S. 1051, 104 S.Ct. 1329, 79 L.Ed.2d 724 (1984).

Id. at 276, n. 6

Not only did the victim know the defendant, the local police in this small community also knew him, as he was on probation in two cases (accessory after fact, 85-3143, and trespass to conveyance and grand theft, 85-1092, see R.1671). Once the victim, if allowed to live, reported the crime, the defendant would be picked up within minutes and he would be facing ten years in jail on his probation charges alone, which is what he eventually received (Id).

The physical evidence at the scene is completely consistent with witness elimination and inconsistent with a "burglary gone bad" or panic killing.

Harold Brown saw the defendant walk up to the victim's front door at 7:15 a.m. (R.707). The front door had a peep hole. There were no signs of forced entry. (R.700, 704). A breakfast for one had been prepared in the kitchen. (R.856). From these facts, combined with the fact the victim knew the defendant, who had done yard work for her as recently as five months before, it is beyond doubt that the victim admitted the defendant into her home through the front door, where she was immediately attacked, as is made clear by State's exhibit #6, which shows the victim's body. The position of her feet is precisely where they would be as she opened the door and faced the incoming defendant. Indeed, the position of the twisted persian rug is absolutely consistent with the defendant having forced his way in after the victim opened the door partially to speak with him.

The important point here is that the victim did not suddenly come upon the defendant as he was ransacking the house, rather he attacked her as he was admitted, stabbed her twenty-one times, then methodically went through every drawer in the house (R.857), wiped the murder weapon (jackknife) clean on drapes in the bedroom and hid it under the bed, (R.833, 837, 924, 1005-07),

loaded the victim's cadillac with numerous valuables, then locked the front close and closed the garage door before departing. (R.736, 828).

That the victim was viciously attacked, and left to slowly bleed to death while the defendant went about his endeavor in greed, is demonstrated beyond doubt by the fact that his fingerprint, in the victim's blood, was found in the bedroom on the key chain for the keys to the large chest therein, which keys were left in the lock thereto. (R.1005, 1036).

What all this demonstrates is that the diminutive 73 year old victim, who in a million years could not have prevented the defendant from stealing her valuables, was ruthlessly butchered not because it was a preequisite to stealing her property, which he then proceeded to do in thorough fashion, but as a preequisite to ensuring that he could enjoy the fruits of his work without fear of swift apprehension and sure and severe punishment. He could have tied her up, he could have held her at knifepoint. There is no other legitimate explanation but that the sole or dominant motive for the murder of Joyce Ezell was to eliminate her as a witness.

As a final point, it is obvious that in the sentencing order the trial court's statement that it found that "one of" the defendant's motives was witness elimination, is not a correct

statement of the law. However if this Court finds the evidence to be sufficient under the correct "sole or dominant" standard, there is certainly no point in a remand.

IV.

THE TRIAL COURT PROPERLY FOUND THE AGGRAVATING FACTOR OF HEINOUS, ATROCIOUS OR CRUEL.

Death by multiple stabbing is an appropriate basis to find this aggravating circumstance. Bertolotti v. State, 476 So.2d 130 (Fla. 1985), Duest v. State, 462 So.2d 446 (Fla. 1985), Mason v. State, 438 So.2d 374 (Fla. 1983). Evidence that the victim "saw it coming" and attempted to fend off the attack also supports this aggravating factor. Huff v. State, 495 So.2d 145 (Fla. 1986), Phillips v. State, 476 So.2d 194 (Fla. 1985). As this Court affirmed in Gilliam v. State, ___ So.2d ___, 16 FLW S292 (Fla. May 2nd, 1991).

> It arriving at a determination of whether an aggravating circumstance has been proved the trial judge may apply a "commonsense inference from the circumstances," *Swafford v. State,* 533 So.2d 270, 277 (Fla. 1988), cert. denied, 109 S.Ct. 1578 (1989), and the common-sense inference from these facts is that the victim struggled with her assailant and suffered before she died. We find no abuse of discretion. *Grossman v. State,* 525 So.2d 833, 841 (Fla. 1988), cert. denied, 109 S.Ct. 1354 (1989).
>
> Id. at S292.

In the instant case the victim lived 30-60 minutes before finally bleeding to death from her stab wounds. She did have a blunt trauma injury to the left side of her head (See State's exhibit 108, the medical examiners diagram, which is the fourth

exhibit in the exhibits folder), however the medical examiner said it was "unlikely" this wound had caused unconsciousness though it was "possible." It was also "possible" that she fainted or went into shock after receiving her many wounds (R.1296-98). From these "possibles," the defendant concludes that the State has failed to prove this factor beyond a reasonable doubt, because the victim may have been knocked unconscious initially, and then stabbed. The physical and testimonial evidence, and logical inferences therefrom, dictate otherwise.

David Roberts testified that the day after the offense, the defendant had scratches around his eyes which were "starting to scab up with blood." The defendant said "an old lady scratched me," and then went on to make statements indicating "they didn't intend to do it, they don't know why it happened." (R.977-979). The jury could certainly conclude from this that Joyce Ezell was very much aware she was being attacked, and tried to defend herself.

The medical examiner's diagram (state's exhibit 108), and the three photos of the victim's body (state's exhibits #6, 7,and 8) provide a wealth of data as to the sequence of events. The three photos show that she fell to her left and landed on her left side, with her upper body twisted clockwise into an almost face down position. The medical examiners diagram shows all the

wounds, but three are of particular interest. The first is the blunt trauma injury which is on the upper left side of her head, the area which would have struck the floor when she landed. If she had received that blow while standing, she would have fallen to her right, not her left.

The next two wounds are stab wounds to her adam's apple and upper chest area, both in the center of the vertical midline. It is clear that these straight-on wounds could not have been inflicted while the victim was in the position she was found in, and see especially exhibit #7. She had to have received these wounds while either standing up, or moving/struggling/conscious on the ground.

In sum, assuming the jury believed David Roberts, and drew reasoanble and indeed inescapable inferences from the physical evidence and the medical examiners testimony, it is clear that the trial court did not abuse its discretion in finding this factor to have been proven beyond a reasonable doubt.

V.

THE TRIAL COURT DID NOT FAIL TO CONSIDER ANY MITIGATING EVIDENCE.

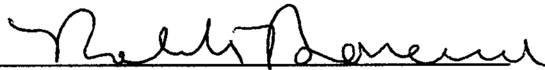
Unfortunately for the defendant's arguments, Cambell v. State, 571 So.2d 415 (Fla. 1990), does not apply retroactively, see Gilliam supra. The sentencing order herein was filed January 12th, 1990, whereas Cambell was decided June 14th, 1990. The trial court herein entered detailed findings as to why he rejected each of the statutory mitigating factors, and then stated that it had considered in mitigation the nonstatutory areas propounded by the defendant. There is absolutely no basis to believe that the trial court failed to consider any mitigating evidence offered by the defendant, in violation of Eddings v. Oklahoma, 455 U.S. 104 (1982). The trial court considered all the mitigating evidence, and found it did not outweigh the aggravating factors. That is all that the law required at the time.

CONCLUSION

The judgment and sentence of death are proper, and should be affirmed.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General



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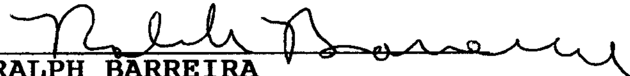
CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing **BRIEF OF APPELLEE** was furnished by mail to **ROBERT F. MOELLER**, Assistant Public Defender, Public Defender's Office, Polk County Courthouse, P. O. Box 9000 -- Drawer PD, Bartow, Florida 33830 on this 12th day of September, 1991.



RALPH BARREIRA
Assistant Attorney General

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