IN THE SUPREME COURT OF FLORIDA

LARRY EUGENE MANN,

Appellant,

v.

Case No. 75,952

STATE OF FLORIDA,

Appellee.

BRIEF OF THE APPELLEE

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PRELIMINARY STATEMENT

Larry Eugene Mann will be referred to as the "appellant" or "defendant" herein. The State of Florida will be referred to as the "appellee." The record on appeal, consisting of sixteen (16) volumes, will be referred to by the symbol "R" followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

Your appellee accepts the Statements of the Case and Facts contained within the Brief of Appellant at pages 1 - 14 as a substantially accurate recitation of the proceedings below.

SUMMARY OF THE ARGUMENT

As to Issue I: Appellant's claim that a state witness commented upon appellant's invocation of his right to remain silent is not preserved for appellate review. No objection was made within the time frame for a contemporaneous objection and, in any event, no objection other than a general objection was made. Alternatively, appellant cannot prevail on this point where there is no indication that appellant invoked his right to remain silent. Even if error was committed, a proposition which your appellee does not concede, such error would be harmless beyond a reasonable doubt.

As to Issue II: The prosecutor in the instant case did not make any comments which violated appellant's right to a fair penalty proceeding. The complained-of comments were not objectionable in that the prosecutor was offering permissible argument and fair comment on the evidence pertaining to the negation of a mitigating circumstance propounded by the defense. The prosecutor was commenting upon the state's theory that the statutory mitigating circumstance of extreme emotional or mental disturbance was not factually proven in the instant case.

As to Issue III: Appellant's challenge to jury instructions pertaining to two of the three aggravating circumstances existent in the instant case must fail. His challenge to the instruction on "prior violent felony" must fail where it was not preserved for appellate review. The argument advanced on appeal was never presented to the trial court, nor was any objection made to the

jury instruction at all. Failure to object to the jury instructions as given by the trial court in a penalty phase precludes appellate review. With respect to the challenge to the "committed during a kidnapping" jury instruction, appellant's point has no merit. Evidence was adduced during the penalty phase which supported the jury instruction given by the trial court.

As to Issue IV: The trial judge did not erroneously fail to recuse himself at sentencing. His clear statement that he reached his sentencing conclusion independent of any correspondence that was received from members of the community is sufficient to support the validity of the death sentence imposed. Any correspondence submitted by members of the community was not a factor in the sentencing decision undertaken by the trial judge.

As to Issue V: The trial court's written findings are clear and sufficient to enable this Honorable Court to undertake its review of the death sentence imposed sub judice. There is no indication in this record that lack of genuine remorse was considered as an aggravating circumstance. To the contrary, remorse was considered established by the trial judge, although the weight to be accorded to that remorse was within the province of the trial judge.

As to Issue VI: Your appellee agrees that appellant was adjudged guilty one time for the murder of Elisa Nelson and a second judgment can be stricken as a nullity.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION FOR MISTRIAL MADE AFTER A STATE'S WITNESS, UPON QUESTIONING ON CROSS EXAMINATION BY DEFENSE COUNSEL, PURPORTEDLY TESTIFIED CONCERNING APPELLANT'S INDICATION OF HIS RIGHT TO REMAIN SILENT.

As his first point on appeal, appellant contends that a new penalty phase is warranted where a state's witness, Manuel Pondakos, a Pinellas County Deputy Sheriff who investigated the homicide of Elisa Nelson purportedly testified concerning appellant's invocation of his right to remain silent. The denial of appellant's motion for mistrial made after the statement in question was not error and, for the several reasons expressed below, appellant's first point must fail.

During the cross examination of Deputy Pondakos, defense counsel asked, "and the reason for proceeding to Mease Hospital is because that's where Mr. Mann was?" Agent[1] Pondakos replied, "Yes. After we received this note, both myself and Detective Newmann went to Mease Hospital while we left the officers at the Mann residence. We went to question Mr. Mann and, of course, there was no statements given." (R 1236). No objection to this

[1] Manuel Pondakos was working in the Pinellas County Sheriff's Office Homicide Unit during the time period of the investigation of Elisa Nelson's homicide (R 1174). Subsequent thereto and at the present time, Mr. Pondakos is the assistant special agent in charge of the Tampa Office of the Florida Department of Law Enforcement (R 1173).

testimony was interposed by defense counsel at this time. Instead, approximately twenty further questions were asked by defense counsel (R 1236 - 1240), two photographs were introduced into evidence by the defense, and the trial court instructed the members of the jury to view the photographs quickly because the evidence would be taken back to the jury room during deliberations (R 1240 - 1241). Thereafter, defense counsel asked to approach the bench and offered an objection to the above-quoted statement as being unresponsive and a reference to appellant's right to remain silent (R 1241). The court noted that in response to defense counsel's question as to why Agent Pondakos went to the hospital, Agent Pondakos answered that question (R 1241). Thereafter, defense counsel made a motion for mistrial and in response thereto the prosecutor offered the following:

> MR. MCCABE: It was generally responsive. Secondly, it wasn't -- there wasn't -- there was no indication that questions were actually asked; and third, this request is not contemporaneous with the alleged response. (R 1242 - 1243)

The trial court denied appellant's motion for mistrial (R 1243).

As argued by the state below, your appellee submits that the denial of appellant's motion for mistrial has not been adequately preserved for appellate review. Initially, it is significant to observe that no objection was made contemporaneously with the statement of Agent Pondakos. Your appellee is not unmindful of this Honorable Court's decision in Johnston v. State, 497 So.2d

863 (Fla. 1986), and the authority cited therein, Roban v. State, 384 So.2d 683 (Fla. 4th DCA), review denied, 392 So.2d 1379 (Fla. 1980). In those cases it was held that an objection and motion for mistrial made three or four questions after the improper comment was sufficient to preserve the claim for appellate review. In Roban, the court held that although the motion for mistrial was not made until three additional questions were asked, ". . . that is within the time frame for a contemporaneous objection." Roban, supra at 685. In the instant case, however, and as noted above, many additional questions were asked by defense counsel prior to moving for a mistrial. Your appellee respectfully submits that failure to move for a mistrial until asking approximately twenty questions after the allegedly improper comment is not sufficiently "within the time frame for a contemporaneous objection." Additionally, it must be observed that the trial court, when the objection was first made, specifically asked defense counsel about the relevancy of the objection "at this portion of the proceedings?" (R 1242) In response to the trial court's inquiry, defense counsel merely stated that it is relevant any time you talk about a defendant's right to remain silent including in a penalty phase proceeding (R 1242). Defense counsel never offered any reason beyond this general objection to the trial court. In other words, no specific reason was offered to the trial court which would indicate that Agent Pondakos' statement substantively prejudiced appellant. These reasons are only offered on appeal. Having

failed to assert the grounds relied upon in his brief before the trial court, appellant should be precluded from appellate review on this point. Cf. Lucas v. State, 376 So.2d 1149, 1152 (Fla. 1979). Your appellee submits that, as was the case in Johnston v. State, supra:

> [T]he general objection and motion for mistrial were not made with the required specificity to apprise the trial court of error or preserve the objection for appellate review. *Ferguson v. State*, 417 So.2d 639 (Fla. 1982); *Castor v. State*, 365 So.2d 701 (Fla. 1978). (497 So.2d at 869)

Thus, for the several reasons expressed above, appellant has failed to sufficiently preserve this issue for appellate review.

Alternatively, your appellee submits that the trial court did not err in denying the motion for mistrial based upon the facts of this case. Although it is true that Agent Pondakos stated that he went to question appellant and no statements were given, there does not appear to be an adequate predicate in this record to support the theory that there was a comment on appellant's right to remain silent. There does not appear to be any indication in this record that appellant invoked his right to remain silent. Absent the invocation of the right to remain silent, it does not appear that any error was committed in the instant case. See Donovan v. State, 417 So.2d 674 (Fla. 1982); State v. Prieto, 439 So.2d 288 (Fla. 3d DCA 1983).

Finally, even should this Honorable Court determine that this claim is preserved for appellate review, and even should this Honorable Court determine that there is some indication that

appellant invoked his right to remain silent which would permit appellant to raise this claim on its merits, your appellee submits that error, if any, was harmless beyond a reasonable doubt. The only reason advanced by appellant in his brief (and which was not asserted to the trial court below) is that the thrust of the defense argument at the new penalty phase was that appellant was extremely remorseful and this argument may have been undercut by Agent Pondakos' statement. Appellant opines that the jury might have believed that if appellant was truly remorseful he would have immediately accepted responsibility for his offense and would have expressed his remorse at that time (Brief of Appellant at pages 21 - 22). This contention is totally belied by the record and will be discussed more fully under Issue V of this brief. However, at this point it must be observed that there is no evidence in the record that appellant expressed any remorse prior to the signing of the first death warrant in his case in 1986. Indeed, in the penalty phase a defense witness, appellant's wife Donna, testified that she was told by appellant initially that he did not commit the crime in question but that after his first death warrant was signed she observed remorse in appellant (R 1555, 1564 - 1565, 1570 - 1572). Indeed, none of the many witnesses presented by the defense at the penalty phase could testify that appellant expressed remorse prior to the signing of his first death warrant in 1986. Appellant committed the homicide in 1980. Therefore, appellant's speculative theory that Agent Pondakos' statement somehow

undercut the defense theory is belied by the great weight of the evidence presented at the penalty phase. Your appellee submits that there is no reasonable possibility that Detective Pondakos' statement affected the jury's 9 - 3 recommendation of death in the instant case. See, State v. DiGuilo, 491 So.2d 1129 (Fla. 1986). This Honorable Court should reject appellant's first claim.

ISSUE II

WHETHER THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S OBJECTION TO PURPORTEDLY PREJUDICIAL COMMENTS MADE BY THE PROSECUTOR DURING CLOSING ARGUMENT.

Appellant next contends that certain remarks made by the prosecutor during the penalty phase violated appellant's right to a fair penalty proceeding. The prosecutor's argument consists of nearly thirty-seven pages in the record (R 1997 - 2034). Appellant directs this Court's attention to one point in the prosecutor's argument and opines that the statements therein were so egregious as to deny appellant his right to a fair penalty trial. Your appellee contends otherwise and, as will be demonstrated below, appellant's point must fail.

It must be remembered that a wide latitude in closing argument to the jury is permitted. See, e.g. Thomas v. State, 326 So.2d 413 (Fla. 1975). The question to be determined is whether the prosecutor's comment was so prejudicial as to deny the defendant a fair trial. Darden v. State, 329 So.2d 287 (Fla. 1976). Only in the most egregious cases will a defect of constitutional proportion be found. Houston v. Estelle, 569 F.2d 372 (5th Cir. 1978). Specifically with respect to a penalty phase in a capital trial, this Honorable Court has held:

> . . . In the penalty phase of a murder trial, resulting in a recommendation which is advisory only, prosecutorial misconduct must be egregious indeed to warrant our vacating the sentence and remanding for a new penalty phase trial.

Bertolotti v. State, 476 So.2d 130, 133 (Fla. 1985); See also, Jackson v. State, 522 So.2d 802, 809 (Fla. 1988). The comments of the prosecutor now complained-of by appellant are not so egregious as to warrant a new penalty trial. In fact, your appellee submits that the comments of the prosecutor are not objectionable.

In order to place the objected-to comments of the prosecutor in context, your appellee will set forth immediately below the entire section of the state's closing argument pertaining to argument in negation of appellant's proposed mitigating circumstance of "under the influence of extreme mental or emotional disturbance". Included within the following excerpt of the record are the objection of defense counsel, the state's response thereto, and the court's overruling of the defense objection:

* * *

> What are the mitigating circumstances that you will be instructed on? I told you there are two specific ones, and then there is a third generalized category. I will talk about the specific ones and the evidence as it relates to those and then -- and then we will go into the third.
>
> Number one, the crime for which the Defendant is to be sentenced was committed while he was under the influence of extreme mental or emotional disturbance.
>
> Well, consider for a second what the meaning of this is. Certainly the murder of a ten year old girl in this brutal fashion is clear evidence that this man is a disturbed person. But the real issue here is the mental or emotional nature as opposed to

criminal nature and the extremity to which it exists.

What is the evidence upon which the Defense wants you to rely in existence of this mitigating circumstance? Well, we had long at last the testimony of Dr. Carbonell, the fourth expert retained by the Defense to testify, that ten years later, she came in and gave him some test and she was able to determine earlier that this -- extreme mental or emotional disturbance.

I think if you look at her testimony and analyze her credibility, it was apparent as many of the Defense witnesses did, they looked at Larry Mann with blinders. They saw only what they wanted to see. They ignored the inconsistencies, and they ignored his history. And they accepted at face value his inconsistent statements, denials and lies.

She was evasive in answering questions. Not a single yes or no answer that I recall in an hour and a half of testimony. But in the final analysis, what has been shown to mitigate this crime of a psychological nature, and this is really, I suggest to you, almost appalling that it's offered in mitigation.

The primary diagnosis upon which she relies is the Defendant is a pedophile. The fact that that has a name does not diminish or change what that is. She is arguing and suggesting to you on the witness stand because this man is a child molester and a pervert, that his actions are somehow more excusable than a person that is not a child molester and a pervert.

Now, consider that for a second. This is actually the best she can do --

MR. PARRY: Excuse me, Your Honor. I'm going to object to that line of argument. Can we approach the bench?

THE COURT: You may.

(Thereupon, a bench conference was held.)

MR. PARRY: For him to argue that an established mitigating factor, if you take the establishment of it from our doctor, and then turn it around and say that it should be considered in aggravation is improper. He can argue that the specific aggravating factors are aggravation in this case, and he can argue that a mitigating factor is not established or that the witness should not be listened to, but he cannot turn it around and argue that it is an aggravating factor, because it is not one.

MR. CROW: Judge, I'm arguing that perverted sexual desires are not part of emotional disturbance that establish the criteria.

MR. PARRY: That's fine if you said that.

THE COURT: That's what I heard.

MR. PARRY: What he said, isn't it ironic that the fact that he is a pedophile and a sexual deviant shows that he shouldn't receive the electric chair. He is saying that a reason in aggravation, and it's not.

THE COURT: The objection will [be] overruled.

(Thereupon, the bench conference was concluded.)

MR. CROW: As I was saying, the best Dr. Carbonell can do to justify the mitigating circumstances, this man is a child molester.

I suggest to you that is not, in any way, something that fits within the circles. And I think as Dr. Whalen pointed out to you, the mechanics of child molestation, the mechanics of sexual deviance is a behavioral disorder that over time an individual who engages in that through his fantasy lies about fantasizing about children, as Dr. Carbonell indicated to you that Larry Mann

has done throughout the course of his life. He enhances and builds toward the commission of future crimes.

The extreme mental or emotional disturbance. Other than pedophilia, what was offered to you? Well, he has an alcohol and drug problem. Again, this is the evidence offered in mitigation that throughout his life, this man and the drugs he was using were not necessarily addictive drugs. We're talking about PCP, LSD, you are talking about a use of alcohol from the age 13, that his desire, as Dr. Chambers described it, with this life and continued throughout his life is an extreme mental or emotional disturbance.

I suggest that it is not, and I suggest to you further that, in fact, the evidence is quite clear that in discussing the next proposed mitigating circumstance that, in fact, he was not intoxicated at the time of the offense to any significant degree.

And what else? Well, he was under stress, you know. Things weren't going real well with the job, and he may have had an argument with his wife that morning and, you know, there was stress in his life.

Well, certainly, there is stress in everyone's life. That does not excuse, that does not mitigate this type of homicide, and it does not establish the existence of that mitigating decision.

If you recall the testimony of Dr. Whalen, yes, this man suffers from personality disorder, and yes, he is disturbed in a sense that many criminals are, but he was not under the influence of extreme mental or emotional disturbance.

* * *

(R 2013 - 2018)

The obvious focus of the above quoted portion of the record was on the prosecutor's argument in opposition to appellant's

assertion that he was under the influence of extreme mental or emotional disturbance at the time he killed Elisa Nelson. Although defense counsel may have believed that the prosecutor was arguing nonstatutory aggravating circumstances, it appears clear from the record that the prosecutor was attempting to negate appellant's proposed statutory mitigating factor. Indeed, as included in the excerpt above, following the defense objection the prosecutor advised that he was "arguing that perverted sexual desires are not part of emotional disturbance that established the criteria." (R 2015) The trial court agreed that this was what the prosecutor was arguing (R 2016). This was permissible argument and fair comment on the evidence which did not deny appellant a fair penalty phase proceeding.

Before the court below, defense counsel contended that the prosecutor was actually attempting to have the jury consider as a nonstatutory aggravating circumstance the fact that appellant was a child molester and a pervert and should be put to death because of this description. Because status as a child molester and a pervert is not one of the enumerated aggravating circumstances in §*921.141(5)* of the *Florida Statutes*, the prosecutor's argument was improper. Your appellee submits that the above-quoted excerpt of the record indicates clearly that the prosecutor was attempting to negate a mitigating circumstance and was not suggesting that a nonstatutory aggravating circumstance be considered.[2]

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[2] It is clear from a review of the trial court's written findings in the instant case that the fact that appellant was a child

Analogously, lack of remorse may not be argued by the prosecution as an aggravating circumstance or enhancement of a proper statutory aggravating circumstance. Pope v. State, 441 So.2d 1073 (Fla. 1983). However, it is permissible for a prosecutor to argue that lack of remorse can be considered to negate mitigation. Agan v. State, 445 So.2d 326 (Fla. 1983), cert. denied, 469 U.S. 873, 105 S.Ct. 225, 83 L.Ed.2d 154 (1984). This is precisely the effect of the state's argument in the instant case. The argument was clearly offered to negate the mitigating circumstance of under extreme mental or emotional disturbance.

Appellant's further contention under this point that the prosecutor's argument was also improper because it denigrated defense expert psychological testimony is also unavailing. Appellant equates the prosecutor's statement that the defense expert's testimony was "actually the best she can do -- " (R 2015) with the situation in Garron v. State, 528 So.2d 353 (Fla. 1988), wherein this Court held it was improper for a prosecutor to discredit the insanity defense as a legal defense. The prosecutor in the instant case, unlike the prosecutor in Garron, was not denigrating the existence of a legislative enactment. The prosecutor was not attempting to discredit the concept that extreme mental or emotional disturbance can be a valid mitigating factor. Rather, the prosecutor was arguing that the facts as

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molester and a pervert was not considered as a nonstatutory aggravating circumstance (R 670 - 677).

developed during the testimony in the penalty phase did not support the existence of that statutory mitigating factor. In fact, the comment that Dr. Carbonell's testimony was "actually the best she can do --" was an incomplete statement because of the interruption of defense counsel in making his objection. As the record excerpt reveals, when allowed to continue the prosecutor stated that "As I was saying, the best Dr. Carbonell can do to justify the mitigating circumstances, this man is a child molester." (R 2016) It is clear that the prosecutor was not attempting to belittle the mitigating circumstance on its face, but rather was permissibly arguing that the evidence presented did not justify finding the mitigating circumstance to be established in this case.

Inasmuch as the remarks of the prosecutor were directed towards a fair comment on the evidence and the state's theory that the statutory mitigating circumstance of extreme emotional or mental disturbance was not proven in the instant case, the trial court did not err in overruling appellant's objections to those comments. The comments were certainly not so egregious or so outrageous as to taint the validity of the jury's recommendation. See, Bertolotti v. State, supra. Appellant's second point must fail.

ISSUE III

WHETHER THE TRIAL COURT ERRED IN GIVING CERTAIN JURY INSTRUCTIONS CONCERNING THE AGGRAVATING CIRCUMSTANCES OF PRIOR CONVICTION OF A VIOLENT FELONY AND HOMICIDE COMMITTED DURING A KIDNAPPING.

As his next point on appeal, appellant presents a two-fold claim concerning certain jury instructions given by the trial court pertaining to two of the three aggravating circumstances found in this case. For the reasons expressed below, appellant's third point must fail.

A. Prior Violent Felony

Appellant claims that the trial court's instruction on the prior violent felony for appellant's Mississippi burglary conviction impermissibly shifted the burden to the defense thereby necessitating a new penalty phase. It is clear that this claim has been waived and is not cognizable in this appeal. In his brief, appellant advises this Court that defense counsel argued below that the jury should not be permitted to consider the prior burglary conviction in aggravation for several reasons (appellant's brief at page 27). Appellant offered four objections to the consideration of the Mississippi conviction. First, appellant contended that the Mississippi conviction was premised on an unconstitutionally vague statute (R 1324). Second, appellant contended that he received ineffective assistance of counsel during the course of the Mississippi proceedings which led to his conviction (R 1324). Third, appellant contended that the Mississippi conviction was violative

of double jeopardy principles (R 1325). The trial court correctly ruled that appellant was not permitted to attack his Mississippi conviction in the Florida courts. It was also observed that this claim had been previously raised in prior post-conviction proceedings in Florida and was denied (R 1326 - 1328). Lastly, appellant contended that, on its face, the Mississippi burglary conviction was not a prior violent crime pursuant to Florida Statute so that it could be considered as an aggravating factor (R 1328). The court denied this objection and noted that this claim had previously been ruled upon (R 1330). Indeed, this Honorable Court rejected this claim and held that the proof was sufficient to show that the Mississippi burglary conviction was, indeed, a prior violent felony. Mann v. State, 453 So.2d 784, 785 - 786 (Fla. 1984). Thus, the trial court properly overruled all of appellant's objections to the use of the Mississippi conviction as a prior violent felony in aggravation.

Noteworthy is the fact that the appellate argument now advanced was not presented to the trial court. There was never any objection to the jury instruction now at issue (R 1940). Appellant never claimed before the trial court that the proposed jury instruction would shift the burden to the defendant or direct a verdict as to the aggravating circumstance. Generally, in order for an issue to be preserved for further review by an appellate court, that issue must first be presented to the trial court and the specific legal argument or ground to be argued on

appeal must be part of that presentation. Tillman v. State, 471 So.2d 32 (Fla. 1985), citing Steinhorst v. State, 412 So.2d 332 (Fla. 1982), and Black v. State, 367 So.2d 656 (Fla. 3d DCA 1979). Under the contemporaneous objection rule set forth in Castor v. State, 365 So.2d 701 (Fla. 1978), errors in jury instruction will not be considered on appeal unless objection is lodged in the trial court. More specifically, this Honorable Court has determined that the failure to object to the jury instructions as given by the trial court in the penalty phase precludes appellate review. Bottoson v. State, 443 So.2d 962 (Fla. 1983), cert. denied, 469 U.S. 873, 105 S.Ct. 223, 83 L.Ed.2d 153 (1984), citing Demps v. State, 395 So.2d 501 (Fla.), cert. denied, 454 U.S. 933, 102 S.Ct. 430, 70 L.Ed.2d 239 (1981). Thus, the failure to even object to the jury instruction now at issue precludes appellate review.

Although your appellee submits that this claim is clearly barred from appellate consideration, if the merits could be reached, appellant would not prevail. The cases cited by appellant dealing with directing a verdict deal with an element of a crime. In Hildwin v. Florida, 490 U.S. 638, 109 S.Ct. 2055, 104 L.Ed.2d 728 (1989), the United States Supreme Court held in a case involving the Florida death penalty statutory scheme that "[T]he existence of an aggravating factor here is not an element of the offense but instead is 'a sentencing factor that comes into play only after the defendant has been found guilty'", citing McMillan v. Pennsylvania, 477 U.S. 79, 106 S.Ct. 2411, 91

L.Ed.2d 67 (1986). Additionally, it must be remembered that immediately prior to setting forth the aggravating circumstances which could be considered by the jury was the court's instruction that those aggravating circumstances have to be established by the evidence (R 1940, 2072). Thus, it was necessary under the totality of the trial court's instructions for the jury to determine whether the prior violent felony existed based upon the evidence which was presented at the penalty phase (including the testimony of the victim and the investigating detective).

B. Committed During a Kidnapping

Defense counsel objected to the trial court's instruction pertaining to the commission by appellant of a kidnapping during the course of the homicide. Specifically, defense counsel objected to that portion of the instruction which stated that appellant acted to facilitate the commission of a lewd and lascivious or indecent assault on a child under the age of fourteen and this objection was overruled by the trial (R 1941 - 1943, 2072 - 2073). The defense objection was only that the evidence did not support the giving of that instruction, and there was no objection that the instruction did not conform to the allegations of the charging document. Appellant's objection was properly overruled by the trial court.

During the colloquy concerning the defense objections to this particular jury instruction, defense counsel will argue that there is no evidence that appellant acted to facilitate the commission of a sexual battery or lewd, lascivious or indecent

assault on a child under the age of sixteen. The prosecutor agreed to strike the reference to the sexual battery presumably because the physical evidence did not support the commission of a sexual battery (R 1942). However, with respect to whether appellant acted to facilitate the commission of a lewd, lascivious or indecent assault on a child, the evidence supported that charge. Indeed, defense counsel acknowledged that his client was a pedophile and the trial court astutely observed that although the physical evidence did not support a sexual battery, "there is plenty of testimony that he perhaps could have achieved his gratifications in other ways." (R 1942) Defense counsel also acknowledged that there was testimony concerning appellant's satisfaction of his pedophilic desires through masturbation (R 1942). Defense counsel further acknowledged that that would be a lewd and lascivious act (R 1942). Thus, it appears that there was evidence to support the jury instruction given by the trial court.

In any event, even should this Honorable Court find error in the jury instruction, a proposition which your appellee firmly denies, any such error would be harmless beyond a reasonable doubt. The portion of the jury instruction in question was disjunctive in that appellant could also have acted with intent to inflict bodily harm or to terrorize the victim. There has been no contention by appellant, nor could there be, that the evidence did not support that portion of the jury instruction. Additionally, appellant had been convicted of kidnapping and the

jury was so advised (see, e.g., R 1142, the opening statement of the prosecutor at the new penalty phase wherein the jury is advised ". . . Mr. Mann was convicted of kidnapping for that same event. So we have two convictions at that time, murder in the first degree of Elisa Vera Nelson and the kidnapping of Elisa Vera Nelson."). Therefore, your appellee submits that the trial court did not err in overruling the defendant's objections to the jury instruction concerning the elements of kidnapping.

C. Conclusion

Appellant's contentions regarding the jury instructions given in this case do not support the granting of appellate relief. Either for want of proper objection or because there was no error in the jury instructions where the proof adduced at the penalty phase supported the instructions, there is no error here.

ISSUE IV

WHETHER THE TRIAL COURT ERRED BY REFUSING TO RECUSE HIMSELF AT APPELLANT'S SENTENCING.

As his fourth point on appeal, appellant contends that the trial court should have recused himself from presiding at appellant's sentence by virtue of the fact that numerous letters were sent to the judge by members of the community subsequent to the rendition of the jury's 9 - 3 vote to recommend the death penalty and prior to the actual sentencing of appellant. Appellant contends that the precepts of Booth v. Maryland, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987), were violated because of the existence of these letters. Booth has been overruled by Payne v. Tennessee, 501 U.S. ___, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991), insofar as Booth held that evidence in argument relating to the victim and the impact of the victim's death on the victim's family are inadmissible at a capital sentencing hearing.[3] As will be discussed below, the facts of the instant case compel the conclusion that appellant's point must fail.

There is no doubt that in the instant case the trial judge received numerous letters from members of the community voicing

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[3] The opinion in Payne leaves open the question as to whether the admission of a victim's family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence violates the Eighth Amendment. No evidence of this nature was presented at trial in Payne and, thus, the Court did not reach this question in its holding.

opinion as to the proper sentence to be subsequently imposed by Judge Case. These letters were written after the jury's 9 - 3 recommendation of the death sentence was rendered. This case, therefore, is different than the situation presented in Booth and Payne because there was no improper introduction of inadmissible nonstatutory aggravating circumstances by the prosecution. Rather, these letters were written by members of the community (and also by friends and family of the defendant) in reaction to the jury's recommendation of a death sentence. Indeed, the state had not been provided with copies of the letters prior to the sentencing hearing (R 2099). Thus, the question in this case becomes whether the mere receipt of letters by a trial judge from members of the community violated the defendant's right to a fair trial. Your appellee firmly submits that it does not. As a threshold point, your appellee would observe that the record indicates that the trial judge made clear that he did not study the contents of the letters he received other than the letters from the defendant and his family (R 2098). The court stated that he reviewed the letters, but he did not study them. Indeed, how could the trial judge do any less than but to review the letters? Letters were addressed to and received by the court and, at the very least, the judge had to open them to ascertain what the contents were. The prosecutor's remarks concerning this matter were well taken and demonstrate the problem faced by the trial judge:

> MR. McCABE: The court would have to be like Carnack, I suppose, to be able to take that envelope, put it up to swami's turban and tell what's in it.
>
> What Mr. Parry is suggesting is that the citizens of this community have lost their constitutional rights to write letters and send them through the mail, and somehow Your Honor is supposed to know before opening that letter what's in it. That is ludicrous, Judge. I suggest you go on to the sentencing. (R 2103)

Where it is clear that the trial judge reviewed and did not study the correspondence submitted by members of the community, it cannot be established that nonstatutory aggravating factors were introduced into the sentencing process undertaken below.

The most significant fact developed below concerns the use, or non-use of the letters by the trial court in his determination of the proper sentence to be imposed in appellant's case. Defense counsel specifically requested the court "to at least get an inquiry as to whether you do recall anything in the substance of those letters [and] whether you intend in any way to make them part of your order or part of your decision today." (R 2098 - 2099) In response to the defense request, the trial court stated:

> The Court will make it plainly clear, then at this point, that whatever conclusions the Court has reached in this matter, was reached independent of any correspondence that I have received from either position; either from the family or from the victims or friends of the victims. (R 2099).

The trial judge reiterated this position (R 2102) and, contrary to appellant's speculation at page 36 of his brief, it is clear

that the letters played no part in the trial court's determination of the proper sentence to be imposed in this case.

Your appellee submits that disposition of this issue is controlled by this Honorable Court's decision in Grossman v. State, 525 So.2d 833 (Fla. 1988). In Grossman, this Court held that it was harmless error for the trial judge to hear victim impact evidence. In the instant case, as was the case in Grossman, the trial court's order does not indicate that he improperly weighed the contents of the letters from the community in assessing whether to impose the death penalty (R 670 - 677). Here, as in Grossman "the written findings [ ] show that there was no reliance or even a hint of reliance," on the letters received from the community." Grossman, supra at 845. Also, as in Grossman, the jury in the instant case did not have any knowledge of the contents of any letters written by the community or by family friends of the victim's family, but recommended death by a substantial majority. As this Court noted in Grossman, the jury recommendation of death is entitled to great weight and, based on that recommendation and the finding of the trial judge of three valid aggravating circumstances, "the trial judge's actual discretion here was relatively narrow." Grossman supra at 846. It is clear from this record that death was the appropriate penalty in this case for the heinous murder of a ten-year-old child.

This Honorable Court observed in Grossman in footnote 9 "that judges are routinely exposed to inadmissible or irrelevant

evidence, but are disciplined by the demands of the office to block out information which is not relevant to the matter at hand." See also, Harris v. Rivera, 454 U.S. 339, 102 S.Ct. 460, 70 L.Ed.2d 530 (1981) (judges are capable of disregarding that which should be disregarded). It appears from the record of this case that the trial judge did just this and did not consider the contents of the letters submitted by members of the community in imposing the sentence of death.

Appellant also contends that the precepts of Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), were violated by virtue of the fact that appellant had no opportunity to contest the contents of the letters in the possession of the judge. This argument is particularly unavailing in light of the holding in Gardner that due process rights are violated "when the death sentence [is] imposed, at least in part, on the basis of information which [the defendant] had no opportunity to deny or explain." Gardner v. Florida, 430 U.S. at 362. The record is clear in the instant case that appellant's death sentence was not imposed in any part on the basis of the letters written by members of the community to the trial judge. Your appellee submits, therefore, that there were no constitutional infirmities in the sentencing process which resulted in the death sentence being presently appealed.

ISSUE V

WHETHER THE TRIAL COURT ERRED IN HIS FINDING AND TREATMENT OF THE PROPOSED NONSTATUTORY MITIGATING CIRCUMSTANCE OF REMORSE.

As his next point on appeal, appellant contends that the findings of the trial court with respect to the proposed mitigating circumstance of remorse were not "sufficient" to provide meaningful review in this Court of the sentence of death. For the reasons expressed below, appellant's point is totally without merit and must fail.

The gist of appellant's complaint concerns the purported ambiguity between the trial court's written finding of remorse and certain comments made by the trial court at the sentencing hearing. There is no question that the written findings of the trial court reflect that he found reasonably convincing evidence to support the fact that the defendant had demonstrated remorse for his crime (R 676 - 677). It is also beyond dispute that the trial court found that the mitigating circumstances established, including remorse, were "unremarkable" and in no way outweighed the aggravating factors also found by the trial court (R 677). Appellant takes issue with the finding of remorse vis a vis the following remarks made by the trial court immediately prior to oral imposition of the death penalty:

> . . . it's clear to this Court that Larry Eugene Mann's first impression of remorse, if you will, was realized from the time of the first death warrant was signed in this case. It seems to be consistent with the testimony of all the witnesses that were put on on behalf of the defendant. His sorrow or this

> remorse, I would tend to agree with the State's position that it is not due to the death of Elisa Nelson, that it's simply or rather the situation that he finds himself in as a result of his prior action. (R 2138)

Your appellee submits that there is no ambiguity between the oral and written pronouncements of the trial court with respect to appellant's remorse.

As the trial court observed, there was a question of fact concerning the origin of appellant's remorse and when that remorse first appeared. Appellant attempted to adduce much testimony at the penalty phase indicating that he had genuine remorse for his heinous murder of ten-year-old Elisa Nelson. However, it was not clear when these feelings of remorse actually came upon appellant. Appellant's brother Charles testified that he believed appellant was sorry in the context of noticing any changes in the defendant since the time of appellant's original arrest ten years ago (R 1456 - 1457). Appellant's cousin, Steve Wambel, testified that over the past ten years appellant is generally repentant. Billy Nolas, a former attorney with the Office of the Capital Collateral Representative who represented the defendant subsequent to the signing of the first death warrant, testified that appellant exhibited extreme remorse, but his first contact with the defendant was after a death warrant had been signed (R 1586 - 1587). Gail Anderson, a legal assistant with the Office of the Capital Collateral Representative, first met the appellant in 1986 while she worked as an investigator with CCR when she was attempting to develop

background information on appellant. She believed that appellant showed great remorse (R 1574 - 1575), but again these observations were made many years after the homicide and during preparations to fight a death warrant. The mental health expert retained to examine appellant found him to be incredibly remorseful (R 1632), but Dr. Carbonell met with appellant in August and September of 1989, nearly nine years after the homicide and some four years after the signing of appellant's first death warrant. Thus, based on the testimony of the persons outlined above, there simply is no evidence that appellant exhibited remorse shortly after he committed the homicide but, rather, this remorse developed after the signing of his first death warrant. Indeed, perhaps the most compelling evidence of this phenomenon came from appellant's wife Donna in the penalty phase. Donna Mann testified that appellant initially told her he didn't commit the crime. However, after the first death warrant was signed in his case, Donna Mann was convinced appellant was remorseful (R 1555, 1564 - 1565, 1570 - 1572). Therefore, the evidence adduced at the penalty phase concerning appellant's remorse compels but one conclusion, that is, that appellant's remorse sprang into being upon the signing of his first death warrant.

However, notwithstanding the clear ramifications of the evidence presented that appellant's remorse first appeared after the signing of his first death warrant, the trial court found that appellant did exhibit great remorse. This indeed may be

true, and, in fact, the trial court found remorse to be supported by the evidence presented. But how much weight must the trial court accord this remorse? Your appellee submits that the oral statements of the trial court exhibit the weight that was accorded the finding of remorse and evidence of the court's finding that the remorse exhibited by the appellant was "unremarkable" and in no way outweighed, along with the other mitigating circumstances established, the aggravating circumstances found. It is apparent from this record that the finding of remorse by the trial court was lessened in weight by virtue of the timing of that remorse. There is no lack of clarity in the trial court's written findings. Appellant is attempting, under the guise of lack of clarity, to have this Honorable Court reweigh findings of the trial court and to come to a different conclusion. This Court will not oblige appellant. Campbell v. State, 571 So.2d 415, 420 (1990) (the relative weight given each mitigating factor is within the province of the sentencing court).

Appellant also speculates that the trial court's remarks at sentencing may indicate that he considered appellant's lack of genuine remorse in aggravation. There is no indication in the written findings that any nonstatutory aggravating circumstance was considered. Instead, the trial court's order is clear and sufficient to enable this Honorable Court to undertake its review of the death sentence imposed in this case. There is no error here and this point must fail.

ISSUE VI

WHETHER IT IS ERROR FOR THE RECORD TO CONTAIN TWO WRITTEN JUDGMENTS FOR FIRST DEGREE MURDER.

Appellant lastly submits that there are two written judgments for first degree murder contained within the record, one dated January 14, 1983, (R 18 - 19), and the other dated March 2, 1990 (R 679 - 680). Appellant submits that the March 2, 1990, judgment is extraneous and should be stricken from the record. Your appellee agrees that appellant has been adjudged guilty one time for the murder of Elisa Nelson. If this Honorable Court believes that the March 2, 1990, judgment is a nullity, it can be stricken from the record.

CONCLUSION

Based upon the foregoing reasons, arguments and authorities, the sentence of death imposed upon appellant should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Robert F. Moeller, Assistant Public Defender, Polk County Courthouse, P.O. Box 9000, Drawer PD, Bartow, Florida 33830, this 24th day of September, 1991.

Robert J. Krauss

OF COUNSEL FOR APPELLEE.