IN THE SUPREME COURT OF FLORIDA

CASE NO. 76,456

STANLEY RAY ROGERS,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

****

ON APPEAL FROM THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT, IN AND FOR BROWARD COUNTY, FLORIDA

****

ANSWER BRIEF OF APPELLEE

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TABLE OF CONTENTS

PAGE

TABLE OF CITATIONS

CASES: **PAGE**

FLORIDA STATUTES:

PRELIMINARY STATEMENT

Appellant was the defendant and appellee was the prosecution in the Criminal Division of the Circuit Court of the Nineteenth Judicial Circuit, in and for Martin County, Florida. In the brief, the parties will be referred to as they appear before this Honorable Court.

The following symbols will be used:

"R" Record on Appeal

"2SR" Supplemental Record

STATEMENT OF FACTS

Appellee accepts appellant's statement of the facts to the extent that they represent a fair and accurate rendition of the facts. Appellee will add the following facts as they are relevant to the issues raised.

Crystal Hubert testified that appellant was not unconscious. (R 1330). In her report she stated that he was semi-conscious only because he would not answer any questions. (R 1335).

John Holman testified that appellant was probably conscious and intentionally tried to stop breathing. (R 1313-14).

Dr. Vila testified that the trajectory of the bullet was from back to front. (R 1351).

A police officer successfully started appellant's car the following morning. (R 904-05).

Gerald Legget testified that marijuana is very sedating. People become very relaxed after injesting marijuana. (R 1976-79).

Appellant's mother testified that he graduated from college and had a good job. (R 2765).

Appellant's sister testified that she was not very close to her brother. Prior to his coming to Florida, she had not seen him sixteen years. (R 2737). Appellant was given every opportunity and advantage in his youth. (R 2736-37).

Scarlotti testified that Appellant is an alcoholic. His opinion is based on the fact that appellant's blood alcohol level was .16 on the night of the murder. (R 2794-95). Scarlotti made a general statement that appellant's prognosis for rehabilitation could be high. However such a prognosis was based on an individual's willingness to seek help. Appellant has yet to seek out help, nor could Scarlotti give an opinion as to when appellant would be so motivated. (R 2803, 2811).

SUMMARY OF THE ARGUMENT

1. The prosecutor's reference to prior consistent statements made by a state witness, was a proper reply to defense counsel's initial mention of those same statements. In any event, reference to the statements was cumulative, given that the jury was aware that Ms. Daniel made similar statements to others.

2. Ms. Daniel's statement to Laurie Dunn was properly admitted as an excited utterance or spontaneous statement.

3. The trial court did not abuse its discretion in allowing the jury to hear an audio tape playback of Ms. Daniel's testimony.

4. The trial court properly denied appellant's request for a standard jury instruction on prior threats. There was no evidence to support such an instruction.

5. During the cross-examination of the EMT who treated appellant at the murder scene, defense counsel attempted to impeach the witness with a prior answer given at a deposition. The trial court properly allowed the witness to read aloud the entire question and answer asked of him during his deposition. Furthermore, the statement objected to was not in reference to appellant's right to remain silent. Finally any error must be considered harmless given that a similar statement was made by another EMT and was not objected to.

6. Since resolution of the factual issues rested on which witnesses were to be believed, the trial court properly denied appellant's motions for judgment of acquittal.

7. Appellant's attack on the trial court's statements was not preserved for appeal. The trial court's amorphous explanation to the jury regarding delays in the trial cannot be construed as comments that the state had additional evidence.

8. The trial court was not required to allow a proffer of evidence since the substance of same was already known. The court correctly ruled that such evidence was irrelevant.

9. The prosecutor did not engage in any activities that can be construed as improper. In any event this issue was not preserved for appeal as there was no objection to the prosecutor's actions.

10. The state was allowed to introduce evidence of the victim's reputation for peacefulness based on appellant's claim of self defense.

11. Although the trial court determined that the victim's character trait for drugs was irrelevant, he gave appellant the opportunity to present such evidence, appellant ultimately declined. This issue is therefore waived.

12. The trial court properly denied appellant's request to present the testimony of a witness regarding appellant's conviction for a prior violent felony. The purpose of the testimony was to call into question, appellant's guilt for that crime. This witness did not have any personal knowledge of the facts of the prior violent felony. The trial court properly ruled that the evidence was irrelevant.

13. Contrary to assertions otherwise, the state never mentioned appellant's charge for attempted murder. The state did properly introduce evidence of the details of the prior rape through the testimony of the victim.

14. Introduction of the panties was solely related to the victim of the prior rape. No mention or insinuation was made regarding any other collateral crimes. The jury was well aware of appellant's conviction for same consequently there can be no error.

15. The trial court properly considered all of the non-statutory mitigating presented.

16. The trial court specifically mentioned most of the non-statutory mitigating evidence presented and why such did not warrant a life sentence. He made it clear in his order that he did consider all that was presented.

17. This issue is not preserved for appeal, given that the argument tendered on appeal was not the argument made to the trial court. In any event, there was no error as the aggravating factors found by the trial court did not warrant an instruction on doubling.

18. The jury was properly instructed on their role in Florida's capital sentencing scheme.

19. The trial court did not abuse its discretion in not allowing hearsay evidence at the penalty phase. In any event the evidence excluded was of minimal value.

20. The jury was adequately instructed on the mitigating evidence that it could consider.

21. The trial court properly instructed the jury regarding the aggravating factor of "cold, calculated, and premeditated".

22. Appellant's sentence of death is proportionately warranted.

23. The trial court properly denied appellant's special jury instructions regarding mitigating evidence.

24. There was sufficient evidence to find the aggravating factor that appellant was under sentence of imprisonment.

25. The standard jury instructions regarding the burden of proof does not shift the burden to the defendant to prove that death is not the appropriate sentence.

26. Florida's death penalty statute is constitutional.

27. The aggravating factors found in the instant case are constitutional on their face and as applied.

28. The trial court properly departed from the guidelines for appellant's noncapital convictions of kidnapping and attempted sexual battery.

ISSUE I

THE TRIAL COURT DID NOT ERR AS THE PROSECUTOR'S CLOSING ARGUMENT WAS A FAIR COMMENT ON APPELLANT'S ATTEMPT TO CROSS-EXAMINE THE STATE'S EYEWITNESS

Appellant claims that the trial court erred in denying his objection to the prosecutor's closing argument. Specifically, appellant claims that the prosecutor impermissibly commented on facts not in evidence. Wide latitude is permitted in arguing to a jury. Breedlove v. State, 413 So.2d 1, 4 (Fla. 1982). Statements made to rebut a defendant's argument is permissible. Mann v. State, 17 FLW S571 (Fla. August 21, 1992). Furthermore, appellant cannot invite error at trial, and then seek reversal based on same on appeal. Pope v. State, 441 So.2d 1073 (Fla. 1083); Edwards v. State, 530 So.2d 936 (Fla. 4th DCA 1988). With these principles in mind, the trial court properly overruled appellant's objection.

Appellant claims that the state was allowed to bolster the testimony of the state's eyewitness, Rene Daniel, with her prior consistent statements to police. During cross-examination of Ms. Daniel, appellant's counsel asked her if she had given a number of statements regarding the murder to which replied that she had. (R 1181). She was then specifically asked if she had given statements to Detectives Silvas and Baker. (R 1182). Defense counsel attempted to demonstrate that Daniel had gained a lot practice in giving her numerous statements and had spent a

significant amount of time preparing for her trial testimony. (R 1182-1191). Later appellant's counsel attempted to impeach Ms. Daniel with her statement to Detective Baker regarding the amount of time that she and the victim, Mark Hastings, spent outside Mr. Laff's, talking. (R 1204-1205). In response to defense counsel's strategy, on redirect, Ms. Daniel explained that she had given a statement to Silvas but had to give another one to Baker because the first one was not properly recorded.[1] (R 1223-1224). Later during redirect, Ms. Daniel explained the inconsistency between her trial testimony and the statement to Baker.[2] (R 1225).

.As demonstrated by the record, the jury was well aware of Daniel's statements to the detectives, consequently, the prosecutor's reference to same was permissible. Mann, supra. Furthermore, since appellant opened the door by initiating the questioning regarding those statements, he cannot now complain. Pope, supra; Holton v. State, 573 So.2d 284, 287-88, (1990), cert. denied, 114 L.Ed.2d. 726, 111 S.Ct. 2275 (1990).

If this Court determines that the trial court erred in failing to sustain appellant's objection, any error must be considered harmless. The eyewitness testimony of Rene Daniel was corroborated by her consistent statements to Laurie Dunn, (R

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[1] There was an initial objection to Ms. Daniel's testifying about why she had to give a second statement to Baker. The legal ground for that objection is not the same one that is being raised in this issue. (R 1223-1224).

[2] Appellant did not object to the state's questions regarding Daniel's statements to Baker and Silvas. (R 1224-1225).

1025-1137), and her call to 911. (R 1239-1248). Any mention of her consistent statements to Detectives Baker and Silvas was merely cumulative. Furthermore, appellant's defense at trial was simply not credible.

Appellant testified that he accidentally killed Mark Hastings during a struggle. The struggle ensued after appellant placed a gun to the head of Hastings. Appellant states that this became necessary when he realized that Hastings was kidnapping him. Appellant alleges that the victim kidnapped Rogers because he failed to give Hastings some cocaine in exchange for a half a mile ride home. (R 1691-1697, 1700-1703). Although appellant claims that he asked Daniel and Hastings for a ride home because his car didn't start, a police officer had no difficulty in starting the car the next morning. (904-905). Although appellant claims that he offered Daniel and Hastings cocaine in exchange for a ride home, no such drugs were found on appellant, Daniel, or Hastings. (R 944).[3]

Appellant testified that during the struggle, he pushed the victim away from him with his feet. He positioned his feet on Hastings's chest under his chin and pushed. (R 1703-1704). The gun "accidentally" went off as he pushed Hastings away. (R 1704). Consequently, if the gun had discharged at that precise moment, as testified to by appellant, Hastings would have been facing appellant when he was shot. Clearly the trajectory

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[3] A small trace of marijuana was found in Hastings.

would have to have been from front to back. However, the medical examiner testified that the bullet that entered Hastings's brain entered from the back and came forward. (R 1342-1351), consequently, appellant's version of the incident was not credible. (R 2340-2341). Furthermore, the off duty EMT found Hastings slumped over the steering wheel with his foot on the brake. (R 1009-1010). Again if Hastings was shot as appellant claims, i.e., with Hastings facing him, it is not physically possible for Hastings to be shot in the brain and then turn around, face the steering wheel, and place his foot on the brake. Finally if appellant shot Hastings by accident/self defense, why did he run from the scene, attempt to hide from the police and feign unconsciousness when he was apprehended. (R 1261-1265, 1291, 1295, 1313-1324, 1330-1335).

The prosecutor's reference to Daniel's statements to police did not contribute to the verdict. There was no undue emphasis regarding the prior consistent statements, they were not a focal point of the case and the jury was already aware that Ms. Daniel had given consistent statements to Laurie Dunn and Officer Smith. (R 1055-137, 1239-1248, 2011-2015). Any error must deemed harmless. State v. Lee, 531 So.2d 133 (Fla. 1988); State v. DiGuilio, 491 So.2d 1129 (Fla. 1986).

ISSUE II

THE TRIAL COURT DID NOT ERR IN ADMITTING RENE DANIEL PRIOR CONSISTENT STATEMENT AS IT WAS ADMISSIBLE AS AN EXCITED OR SPONTANEOUS UTTERANCE

Appellant claims that the trial court erred in allowing Laurie Dunn to testify regarding a statement given to her by Rene Daniel. The trial court admitted the testimony as an excited utterance and/or spontaneous statement. (R 1042-1046). Appellant alleges that the statement cannot be considered an excited utterance because it was made after Ms. Daniel was able to sit down, drink a soda, and reflect on the events that had just taken place. (R 1035-1036). The trial court's ruling to the contrary was correct. Jano v. State, 524 So.2d 660 (Fla. 1988).

In order for Dunn's hearsay statement to be admissible under Sections 90.803(1) and (2), Fla. Stat. (1979), Daniel's statement to Laurie Dunn must satisfy certain essential elements. As outlined by this Court in Jano, there must be an event which causes nervous excitement, the statement was made before there was any time to contrive the statement, and the statement was made while the person was under stress of excitement caused by the event. Jano, 524 So.2d at 661. A review of the record establishes that the essential elements listed above have been met.

Daniel's was clearly upset and nervous about the events that just took place in her car. She perceived the

situation as life threatening to both herself and Mark Hastings. (R 1176). The statement to Laurie Dunn was made within eight to ten minutes of the time that Daniel ran to Dunn's apartment for help. (R 1033). Consequently, there was little if any time to contrive or misrepresent the situation.[4] Finally the statements made by Daniel were made while she was still under the stress of the event. She was fearful and concerned for the safety of Mark Hastings, as she called 911 and continually expressed concern for him. (R 1172, 1176, 1241, 1251 2009-2015). The trial court correctly admitted the testimony of Ms.Dunn. Power v. State, 17 FLW S572, 574 (Fla. August 27, 1992); Ware v. State, 596 So.2d 1200, 1201 (Fla. 3rd DCA 1992).

In the alternative, if this Court determines that the trial court erred, such error must considered harmless. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). Rene Daniel testified at trial and was subject to cross-examination regarding her statements. (R 1176-1221). Dunn's statement was cumulative as the jury heard Daniel's similar statement made to the 911 operator. Furthermore the jury was aware that Daniel gave

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[4] Unlike the situation in Preston v. State, 470 So.2d 836, 837 (Fla. 2nd DCA 1985), there was no possible reason for Daniel to contrive the story. Any compromising fact regarding Daniel would be that she was a married woman in the company of another man, Mark Hastings. That fact was already established and admitted by her. Resolution of the real issue, i.e., did appellant kill Mark Hastings in self defense or was it premeditated murder, is not furthered by whether or not Daniel association with Hastings involved marital infidelity or not.

consistent statements to the police. (See Issue I). Powers; Hamilton v. State, 547 So.2d 630, 633 (Fla. 1989).

ISSUE III

THE TRIAL COURT DID NOT ERR IN PLAYING AN AUDIOTAPE OF RENE DANIEL TESTIMONY FOLLOWING THE JURY'S REQUEST FOR A "READBACK"

Appellant claims that trial court erred in allowing the jury to hear an audio readback of Rene Daniel' testimony. Appellant has failed to show that the trial court abused its discretion. Haliburton v. State, 561 So.2d 248 (1990), cert. denied, 111 S.Ct. 2910 (1990).

Appellant contends that the audio tape distorted the jury's view of the witness's demeanor. Appellant claims that he was relying on the fact that Ms. Daniel was "putting on" even though she was hysterical. He claims that her physical performance was fake. Although appellant claims that this fact was important in his defense, trial counsel never made mention of this "flaw" in Ms. Daniel's testimony during closing argument. (R 2356-2421). Furthermore since the only available means of allowing the jury to consider Daniel' testimony was to playback the tape, the trial court was correct in allowing the jury to hear the tape. Waddy v. State, 355 So.2d 477 (1st DCA 1978).

ISSUE IV

THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S REQUEST FOR THE STANDARD JURY INSTRUCTION ON PRIOR THREATS AS THERE WAS NO EVIDENCE TO WARRANT SUCH AN CHARGE

Appellant requested that the trial court instruct the jury regarding the standard jury instruction on prior threats or difficulties with the victim. (R 2232). Appellant attempts to characterize Hasting's alleged false imprisonment of him as a prior threat. (R 2232). The trial court properly ruled that the requested instruction was not applicable as that portion of the instruction was relevant for prior conduct only, i.e. difficulties not occurring during the incident in question. (R 2233). Testimony regarding violent actions of the victim that occurred before the murder are relevant and admissible. Reddick v. State, 443 So.2d 482, 483 (Fla. 2nd DCA 1984). See generally Santana v. State, 535 So.2d 689 (Fla. 1988); King v. State, 545 So.2d 375 (Fla. 4th DCA 1988).

A review of appellant's own testimony indicates that the alleged false imprisonment of appellant by Hastings occurred within minutes of the shooting. (R 1703, 1774). Clearly, Hastings alleged actions cannot be considered as a prior incident within the meaning of the instruction.

Furthermore, the self defense instructions that were given clearly covered appellant's defense. (R 2233). The instructions adequately explained to the jury that appellant was

defending himself from Hastings's alleged attempt at forcing appellant to remain in the car against his will. (R 2471-2475). The trial court correctly denied appellant's request. United State v. Camejo, 929 F.2d 610 (11th Cir. 1991).

ISSUE V

THE TRIAL COURT'S RULING DID NOT FORCE PRESENTATION OF EVIDENCE/COMMENT ON APPELLANT'S RIGHT TO REMAIN SILENT

Appellant alleges that a state witness was allowed to comment on appellant's right to remain silent during cross-examination of the witness. A review of the record reveals that no such error occurred.

During opening statement, appellant's attorney claimed that appellant was in shock after the accidental shooting. (R 730). In an attempt to rebut that contention, the state introduced the testimony of John Holman, an emergency medical technician who treated appellant at the scene. (R 1304-1326). Mr. Holman testified that after administering certain tests, he concluded that appellant was conscious and aware of his surroundings and was simply feigning unconsciousness. (R 1312-1325).

On cross-examination, defense counsel attempted to impeach Holman's conclusion with an answer he had given during his deposition. (R 1318). At that deposition when asked if he [Holman] could determine if appellant was aware of his surroundings, Holman responded:

> "I'm not able to tell you that. He opened his eyes again. He was never verbal with anything we did. He would not answer anything. So."

(R 1322). Trial counsel attempted to preclude the witness from reading his entire answer, he simply wanted Holman to read the

first sentence only, "I'm not able to tell you that". (R 1321). The trial court required that the witness's complete answer be read. (R 1322).

The trial court's ruling was correct. Under the rule of completeness, Section 90.108, Florida Statutes (1987), Holman's complete answer was properly admitted in order to rebut or explain an inference that he was not able to ascertain if appellant was conscious or not. Johnson v. State, 17 FLW S603, 650 (Fla. October 1, 1992). Although he stated as such at deposition, he qualified his answer by also stating what his observations were regarding appellant's demeanor/general state. Given trial counsel's questions, the trial court's ruling was correct. Tompkins v. State, 502 So.2d 415, 419 (1986), cert. denied, 483 U.S. 1033, 110 S.Ct. 555, 107 L.Ed.2d 551 (1986).

If this Court should determine that the remainder of Holman's answer was irrelevant, reversal is not warranted as his answer cannot be considered a comment on appellant's right to remain silent. In all the cases relied upon by appellant, it is clear that the offending remarks were made by police officers in response to direct questions concerning whether the defendant spoke after he was "Mirandized" or was arrested. State v. Thorton, 491 So.2d 1143, 1144 (Fla. 1986); Graham v. State, 573 So.2d 166, 167 (Fla. 4th DCA 1991); Hicks v. State, 590 So.2d 498, 500 (Fla. 3rd 1991). Appellant's reliance on State v. Kinchen, 490 So.2d 21, 22 (Fla. 1985) is also of no moment as it relates to defendant's right not to testify. In the instant case, appellant took the stand in his own defense. (R 1658-1798).

When looking at the context in which the statement was made it is clear that the remark did not involve appellant's right to remain silent nor was there any state action involved. State v. Jones, 461 So.2d 97, 99 (Fla. 1984). Holman was not involved in the arrest or apprehension of appellant as in Hicks, 590 So.2d at 500. He was there to medically treat appellant. (R 1307-1317). The question asked which elicited the challenged remark had nothing to do with what appellant said or did not say when he was arrested. It was directed exclusively to the issue of appellant's state of mind at the time of the murder, i.e. inferentially, his ability to form the intent to commit first degree murder. Jones.

In any event any mention of appellant's failure to answer any of the medical personnel's questions must also be considered harmless as they are cumulative. Crystal Hubert, another EMT treating appellant made identical statements regarding appellant's unwillingness to answer questions. (R 1335). Her testimony was not objected to and not raised as an issue on appeal.

Furthermore given the overwhelming evidence of guilt, Holman's statement should be considered harmless error. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). As stated in DiGuilio, application of the harmless error test requires a close examination of the impermissible evidence and the possible influence it may have had on the jury. Id at 1138. The fact that appellant did not make a statement to police when he was

apprehended did not contribute to the verdict. The testimony of Rene Daniel along with the lack of credibility in appellant's explanation is responsible for the jury's verdict. Holman's innocuous comment that appellant did not respond verbally to the paramedics neither bolstered Daniel's testimony nor negated appellant's testimony. It is clear beyond a reasonable doubt that Holman's comment did not affect the jury's verdict. DiGuilio.

ISSUE VI

THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL FOR ATTEMPTED SEXUAL BATTERY, KIDNAPPING, AND MURDER

Appellant contends that grabbing Ms. Daniel's breast in conjunction with holding a gun to Hastings's head and ordering that Daniel take her clothes off is insufficient evidence of attempted sexual battery. The trial court properly denied appellant's motion for judgement of acquittal. (R 2090-2094).

In moving for a judgement of acquittal, a defendant admits both the facts in evidence and every favorable conclusion to the state that can be drawn from that evidence. Lynch v. State, 293 So.2d 44, 45 (Fla. 1974); Taylor v. State, 583 So.2d 323, 328 (Fla. 1991). Issues regarding credibility are not the focus in a determination of a judgement of acquittal. Lynch, Rose v. State, 425 So.2d 521, 523 (1978), cert. denied, 461 U.S. 103 S.Ct. 1883 (1983).

Although a woman's breast is not considered a sexual organ for purposes of the completed act of sexual battery, clearly appellant's actions evidence his intent to commit such a battery on Daniel. While holding a gun at Hasting head, appellant first tells Ms. Daniel to take her clothes off. When she made no effort to do so, appellant then said to Hastings:

> "Make her take her clothes off". (R 1168). Hastings replied: " I can't make her take off her clothes".

Appellant then grabbed and squeezed Ms. Daniel's breast. (R 1168-69). At that time Hastings slowed the car down and attempted to turn the car around to go back towards Mr. Laff's. (R 1169). Appellant threatened to kill Hastings if he did not drive where he was told to go. (R 1169). Hastings attempts to reason with him explaining that if he shoots Hastings the car will wreck. Hastings then pinned appellant to the seat and told Daniel to escape, which she did. (R 1170).

Ms. Daniel testimony clearly establishes appellant's attempt to commit a sexual battery. Contrary to his assertions otherwise, appellant's use of a gun in conjunction with ordering Daniel to take off her clothes, then ordering Hastings to make her take off her clothes, followed by the unconsensual touching of Daniel's breast are overt acts by appellant which infer his intent. Morehead v. State, 556 So.2d 523, 525 (Fla. 5th DCA 1991); State v. Carter, 452 So.2d 1137 (Fla. 5th DCA 1984).

With the same principles in mind, the trial court properly denied appellant's motion for judgement of acquittal for two counts of kidnapping. Although appellant was allowed to get into Daniel's car under the pretense that they were giving him a ride home, there was sufficient evidence of subsequent movement of the car done to facilitate the attempted sexual battery. Gilley v. State, 412 So.2d 68 (Fla. 1st DCA 1982). Appellant secretly isolated his victims from meaningful contact with the public. Robinson v. State, 462 So.2d 471 (Fla. 1st DCA 1985). The overall movement of the car away from the parking lot of Mr.

Laff's, away from people, along with appellant pulling the gun on Hastings directing the removal of Daniel clothes was sufficient evidence of kidnapping. Dowdell v. State, 415 So.2d 144 (Fla. 1st DCA 1980); Lamanin v. State, 515 So.2d 309 (Fla. 3rd DCA 1987). Clearly, both victims were not free to leave. Simply because Hastings was able to temporarily subdue appellant in order for Ms. Daniel to escape does not mean that both victims were not initially kidnapped.

The trial court correctly denied appellant's motion for judgement of acquittal for first degree murder. During both opening and closing argument appellant's counsel stated that the outcome of the case depended on which witnesses the jury believed. If the jury believed the testimony of Rene Daniel then appellant should be convicted, if the jury believed the testimony of appellant then he should be acquitted. (R 720, 2420-2421). Since the issue was one of credibility, the motion for JOA was properly denied. Lynch. The jury is not required to believe appellant's version of the killing when conflicting evidence is presented by the state. Cochran v. State, 547 So.2d 928 (Fla. 1989). There was substantial competent evidence to sustain the jury's verdict.[5] Appellant's motion was properly denied. Bedford v. State, 589 So.2d 245 (Fla. 1991).

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[5] See harmless error analysis in Issue I.

ISSUE VII

THE ALLEGED IMPROPER COMMENTS MADE BY THE TRIAL COURT WERE NOT OBJECTED TO AND DO NOT CONSTITUTE FUNDAMENTAL ERROR, CONSEQUENTLY THIS ISSUE IS PRECLUDED FORM REVIEW

Appellant complains that the trial court made two improper comments in the jury's presence which require reversal of his conviction. Since neither comment was objected to, this issue is not preserved for appeal. Herzog v. State, 439 So.2d 1372, 1376 (Fla. 1983). Given that the alleged comments do not amount to a denial of due process nor involve a jurisdictional error they cannot be considered fundamental. Review is precluded. Ray v. State, 403 So.2d 956 (Fla. 1981); Sochor v. State, 580 So.2d 595 (1991), remanded on other grounds, 504 U.S. __, 119 L.Ed.2d 326, 112 S.Ct. (1992).

In the alternative, neither comment by the court requires reversal. A review of the record reveals that the trial court was simply explaining to the jury why there was a delay. No prejudicial information was revealed to the jury as in United States v. Hansen, 544 F.2d 778, 780 (5th Cir. 1977), a case relied upon by appellant. The trial court never said that the state had additional evidence that was not going to be admitted, the court simply made a general comment regarding "a ruling". (R 1998). Consequently the judge's amorphous explanation cannot be considered prejudicial. Unlike the situation in Ferber v. State, 353 So.2d 1256 (Fla. 2nd DCA 1978), his explanation also included

an admonishment that the jury should not speculate as to what was going on. His statement cannot be construed as bias in favor of the state or as an expression regarding the court's opinion as to the strength of the case. Jackson v. State, 545 So.2d 260, 264 (Fla. 1989); United States v. Rodriguez, 765 F.2d 1546 (11th Cir. 1985).

Appellant's reliance on McClain v. State, 353 So.2d 1215 (Fla. 3rd DCA 1977) is of no moment. Although there was no objection in that case, the district court made it clear that reversal was warranted because of the cumulative effect of two errors. The defendant was not represented by counsel nor was there a proper inquiry regarding the defendant's waiver of counsel. McClain, 353 So.2d at 1217. Equally unavailing is appellant's reliance on Richardson v. State, 335 So.2d 835 (Fla. 4th DCA 1976). There the defendant made a timely objection to the prosecutor's remark.

The second alleged improper comment was made immediately prior to the close of the state's case in chief. Again the trial court was simply explaining to the jury why there was a delay in the trial. Although, the jury was specifically told that the delay was for a state witness who was to be called but ultimately did not testify in the state's case in chief, there can be no error given that Officer Smith did ultimately testify in rebuttal. Consequently the jury was not left to speculate as to what additional evidence Officer Smith could have presented. (R 2009-2015). This issue is both procedurally deficient as well as void of any merit.

ISSUE VIII

THE TRIAL COURT DID NOT ERR IN PRECLUDING A PROFFER OF TESTIMONY THAT THE TRIAL COURT FOUND TO BE IRRELEVANT

During the cross-examination of Rene Daniel, appellant's trial counsel asked her if there was a young crowd at Mr. Laff's the night of killing. (R 1197). She responded that there was a combination. (R 1197). Later on trial counsel asked her again about the age of the crowd:

> "All right. Out there where the reggae is being played retirees don't tend to congregate out there, do they?
>
> Ms. Daniel replied: "It's my--- I mean I've seen several ages out there."
>
> Prosecutor: "Judge, I'm gonna object to the relevancy of this line of questioning."
>
> The Court: "I'll sustain that. That's irrelevant. The age of the people that go there is irrelevant."
>
> Defense attorney: "I move to proffer the answers, Judge, to this line of questioning."
>
> The Court: "Well--- I'm gonna deny the proffer on the age of the people who go out there to listen to the reggae music. I'm gonna deny that."
>
> Defense attorney: " I'd like access__
>
> The Court: "Well, I understand that, it's denied."
>
> Defense attorney: "Okay. I'd like to access the record for argument so that I __.

> The Court: "That's denied as well".
>
> Defense attorney: "Thank you judge."
>
> The Court: "Okay. Proceed. Ordinarily I'd give you a proffer and I'm required to but, I think that's so irrelevant that I'm not gonna give you the proffer. Go ahead." (R 1198-99).

It is clear what the substance of the evidence would have been, i.e. the age of the people who frequent Mr. Laff's. A proffer need not be granted when the substance of the evidence is apparent. Reaves v. State, 531 So.2d 401 (Fla. 1988). Mindful of his duty to ordinarily grant requests for proffers the trial judge denied same as the evidence to be proffered was irrelevant.[6] Furthermore, Ms. Daniel already answered a similar question twice. (R 1197-98). Appellant also testified that people close to his age did coke and frequented Mr. Laff's (R 1691). The trial court's refusal to allow a proffer was not error. Willams v. State, 353 So.2d 956 (Fla. 1st DCA 1978).

Appellant claims that the relevancy of the proffer is not apparent from the record. Appellant is mistaken. Prior to trial, the court held a hearing on admissibility of defense evidence regarding the reputation of Mr. Laff's as a place where people use drugs. (R 685-692). Appellant claims that such evidence is relevant to corroborate appellant's defense that Hastings and Daniel accepted the offer of cocaine in exchange for

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[6] On at least seven occassions the trial judge granted requests for proffers. (R 690-91, 694, 700, 1722-33, 1953, 1998, 2002-07).

a ride. (R 686-686). Appellant himself so testified. He stated it was a reasonable offer given the kind of people that frequent Mr. Laff's. (R 1691). Appellant was given an opportunity to proffer evidence regarding Mr. Laff's general reputation for being a place where people do drugs. (R 685-692). Appellant declined the trial court's offer. (R 1618-1624). In conclusion, even if the evidence to be proffered was admissible, to show that the type of people that went to Mr. Laff's would do drugs, appellant waived his opportunity to present it. Gunsby v. State, 574 So.2d 1085 (1991)., cert. denied, 116 L.Ed.2d 102, 112 S.Ct. 1991).

ISSUE IX

THERE WAS NO PROSECUTORIAL MISCONDUCT DURING APPELLANT'S TRIAL

Appellant alleges that various comments or actions of the prosecutor resulted in unfair prejudice to the extent that he received an unfair trial. Specifically appellant claims that the prosecutor impermissibly alluded to an "unpopular" case in which both that the defense attorney and defense witness, Robert Scarlotti were involved. A review of the record indicates that the state engaged in permissible cross-examination/impeachment of a defense witness.

The bias or prejudice of a witness is a proper area of inquiry during cross-examination. Burns et al v. Freund, 49 So.2d 592 (Fla. 1950); Dukes v. State, 442 So.2d 316 (Fla. 2nd 1983); Sias v. State, 416 So.2d 1213 (Fla. 1981). Defense witness, Robert Scarlotti was tendered as an expert in the area of addiction. (R 1856-69). He testified regarding the general availability and social aspects of cocaine in American society. (R 1876, 1881). He further testified about the connection between cocaine and marijuana use. (R 1877-78). Scarlotti testified that he had been qualified as an expert in the area of addiction on five other occasions. (R 1864). During cross-examination, the prosecutor impeached Scarlotti with his deposition where he stated that he had been so qualified on only two other occasions. (R 1886-89). Appellant concedes that such

impeachment was proper. (R 1889). Appellant contends however that the prosecutor should not have been allowed to read the entire question and answer of the deposition because the defendant's name in the prior criminal case, was included in that question. (R 1890-91). Appellant has not stated why and how the "Annette Green" case is unpopular or that any of the jury would be aware of the prior case from a neighboring county. Appellant's reliance on State v. Norris, 168 So.2d 541 (Fla. 1954) is of no moment as that case involved the admissibility of collateral crime evidence against the defendant. Appellant cannot demonstrate the relevancy to the instant case. There simply was no prosecutorial misconduct.

Appellant next claim that prosecutor "goaded" him in to making an objectional comment to the prosecutor. This issue lacks merit both procedurally and substantively. During cross-examination of the defendant, the prosecutor simply asked appellant if the murder weapon belonged to him. (R 1772). After replying that it did, the prosecutor asked appellant to show the jury how he held the gun that night. (R 1772). There was no objection by appellant to the prosecutor's request. The trial court asked appellant not to point the gun at anyone. In response to the judge's cautionary statement, appellant asked if it would be alright to point the gun at the prosecutor. (R 1772). During closing argument, the prosecutor mentioned appellant's remark, telling the jury to take note of appellant's demeanor and cockiness. (R 2323-2325). There was no objection to

the prosecutor's comments. If the prosecutor's actions or comments were prejudicial, appellant should have objected to same. Since they were not this issue is not preserved for review. Gusby v. State, 574 So.2d 1085 (1990), cert. denied, 116 L.Ed.2d 102, 112 S.Ct. (1991).

In any event the prosecutor's actions and remarks were not prejudicial or improper. Appellant's demonstration of how he held the gun at the victim was clearly relevant to the issues at hand. Robinson v. State, 17 FLW S389 (Fla. June 25, 1992). Similarly as in Robinson, the gun was not a feature of any portion of the case, nor did the prosecutor misuse or abuse the gun.

As far as the prosecutor's closing argument where he made reference to appellant's comment, such was proper argument on the logical inferences that may be drawn from the demeanor of the witness. Breedlove v. State, 413 So.2d 1, 8 (Fla. 1982). The jury was free to consider and the prosecutor was permitted to point out Appellant's courtroom behavior including his voluntary remark. Spriggs v. State, 392 So.2d 9, 10 (Fla. 4th DCA 1981).

Relying on Gonzalez v. State, 450 So.2d 585 (Fla. 3rd DCA 1984), appellant alleges that the prosecutor committed reversible error by "repeatedly" asking questions that were previously objected to and sustained by the trial court. This issue is not preserved for appeal as appellant failed to make a motion for a mistrial nor did he request a curative instruction. Brown v. State, 550 So.2d 527 (Fla. 1st DCA 1989); Clark v. State, 363 So.2d 331 (Fla. 1978).

Unlike the facts in Gonzalez, the prosecutor did not portray the victim as an object of sympathy, did not make disparaging remarks about the appellant, and did not continuously summarize the testimony. The specific questions all pertained to the same subject, i.e. what did you say to Mr. Scarlotti? (R 1744-1751). Although some of the questions were successfully objected to, some were not objected to and appellant answered them (R 1744), consequently any error must be considered harmless. Tobey v. State, 486 So.2d 54 (Fla. 2nd DCA 1986).

ISSUE X

THE STATE PRESENTED EVIDENCE OF THE VICTIM'S REPUTATION FOR PEACEFULNESS IN A PERMISSIBLE MANNER

A review of the record indicates that the prosecutor did lay a proper predicate for the testimony of the witnesses. Although Mr. Wells attempted to discuss specific instances regarding his personal knowledge of Mr. Hastings, he never was allowed to actually state what those instances were. (R 1916, 1918, 1919). After a side-bar conference, Mr. Wells did state that Hastings's did have a general reputation for peacefulness. (R 1918-19). Two other witnesses testified without objection as to Mr. Hastings reputation for peacefulness. (R 1925-26, 1933). Appellant cannot establish that any error occurred or that any error was harmful. Tobey v. State, 486 So.2d 54 (Fla. 2nd DCA 1986).

Appellant also claims that the trial court erred in allowing a state witness, a Catholic priest, to testify in his garb. The trial court has wide discretion in determining the admissibility of evidence. Welty v. State, 402 So.2d 1159 (Fla. 1981). Appellant has failed to demonstrate that the trial court abused that discretion.

The witness's testimony entire testimony consists of four pages. (R 1933-37). The substance of his testimony has not been challenged. There was no emotional outburst, or testimony that would elicit sympathy from the jury. Smith v. State, 565

So.2d 1293 (Fla. 1990). The fact that the witness happens to be a priest does not require a per se rule that he is not allowed to appear in his professional "uniform". Clearly, police officers are not precluded from testifying in their uniforms. Absent any instances of improper bolstering or attempts to play on the emotions of the jury, there can be no prejudice simply because of the way a witness dresses for court.[7]

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[7] The jury was well aware of the fact that the witness was a priest as stated without objection (R 1933).

ISSUE XI

THE TRIAL COURT DID NOT ERR IN PREVENTING APPELLANT FROM INTRODUCING EVIDENCE THAT MARK HASTINGS HAD A REPUTATION FOR USING DRUGS

After extensive argument, the trial court ruled that appellant could not introduce evidence regarding the victim's past use of cocaine. (R 1608-1609). The court determined that such evidence was not relevant to any issue especially the main issue of self-defense. (R 1609, 1629-30, 1633). If appellant could show Hastings had a general reputation for violence, rather than that he injested cocaine in the past, then such evidence would be admissible. (R 1631-32). The trial court's ruling was correct. Edwards v. State, 548 So.2d 656 (Fla. 1989); Hayes v. State, 581 So.2d 121, 126 (1991), cert. denied, 112 S.Ct. 450 (1992).

Appellant claims that such evidence was relevant to demonstrate that due to Hastings "cocaine history", he became angry when appellant did not produce the cocaine as originally promised. (R 1603-04). However, there was no evidence that the victim injested cocaine that night, or that appellant was aware of Hastings "reputation" for cocaine use. (R 1604, 1608-1610).

After the court's ruling, the prosecutor learned that Ms. Palmer, the defense witness who was to testify regarding Hastings reputation, may not have even identified the correct person as Mark Hastings, consequently, her testimony was

irrelevant. (R 1625-27). Appellant's counsel refuted that claim stating that Ms. Palmer had become a very reluctant witness and her allegation that she identified the wrong person was a ploy to avoid testifying. (R 1628-29, 1631-32). Subsequent to this allegation, the trial court stated that he would allow a proffer of Ms. Palmer's testimony regarding Hastings general reputation including his past cocaine use, appellant declined the request, consequently this issue has been waived.[8] (R 1632-33, 2058-59, 2072). Gunsby v. State, 574 So.2d 1085, 1088 (1991), cert. denied, 116 L.Ed.2d 102, 112 S.Ct. 1991).

If this Court should determine that appellant should have been allowed to present such testimony, any error must be considered harmless. State v. DiGuilio, 491 So.2d 1129 (Fla. 1987). As noted by the trial court and conceded by appellant, Ms. Palmer was a hostile witness and her credibility was severely lacking. Furthermore, her testimony was of little probative value, since Mr. Hastings did not injest cocaine on the night of the murder. Appellant's general character assassination of the

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[8] During litigation of appellant's motion to call Ms. Palmer, the appellant claims that he cannot now call Ms. Palmer because she has changed her story. (R 2059). Appellant claims that Ms. Palmer's change of heart is the direct result of prosecutorial misconduct. (R 2052-2060).

The prosecutor spoke to Ms. Palmer and she stated that appellant had not given her a photo of the victim. After taking testimony regarding this issue, the trial court denied appellant's motion for mistrial based on prosecutorial misconduct. (R 2060-2072).

victim would have done very little in persuading the jury to acquit him of first degree murder.

PENALTY PHASE

ISSUE XII

THE TRIAL COURT DID NOT ERR IN EXCLUDING A DEFENSE WITNESS FROM TESTIFYING AT THE PENALTY PHASE

The trial court ruled that the defense could not present the evidence of Marsha Jones to attack the validity of appellant's conviction for sexual battery. (R 2673-74). The court denied appellant's request to proffer the testimony since the state had already proven that such a conviction existed. (R 2674). The trial court's ruling was correct.

Evidence presented at the penalty phase must be relevant in order to be admissible. The trial court has wide discretion in deciding such matters. Chandler v. State, 534 So.2d 701 (1988), cert. denied, 490 U.S. 1976, 109 S.Ct. 2089 (1988). The trial court need not grant a proffer if it is clear that the testimony would not be admissible. With these principles in mind, it is clear that appellant has failed to establish that reversible error occurred.

Prior to appellant's request to admit the evidence of Marsha Jones, appellant attempted to preclude the state from presenting any testimony from the victim, prosecutor, or investigator involved in the prior rape. (R 2672). Based on McRae v. State, 395 So.2d 1145 (1980), cert. denied, 454 U.S. 1037, 102 S.Ct. 583, 70 L.Ed.2d 486 (1981). The trial court determined that a character analysis of the defendant including

his propensity to commit crime is proper analysis for phase two. (2673). In light of that ruling, appellant then moved to supplement the witness list with Marsha Jones. The purpose of her testimony was strictly to attack the validity of the prior conviction. (R 2673, 2868-69).

Appellee agrees that the appellant is allowed to present evidence regarding his degree of participation in a prior violent felony. Francois v. State, 407 So.2d 885, 890 (1982), cert. denied, 458 U.S. 1122, 102 S.Ct. 3511, 73 L.Ed.2d 1384 (1983). Unlike the situation in Harvard v. State, 414 So.2d 1032, 1035 (1982), cert. denied, 459 U.S. 1128, 103 S.Ct. 764, 74 L.Ed.2d 979 (1982), appellant was not attempting to offer evidence pertaining to his character or background, nor was he attempting to explain the circumstances of his involvement in the crime, he was strictly attacking the validity of the conviction.[9] Clearly since a redetermination of guilt for a capital conviction is prohibited at the penalty phase, Chandler, 543 So.2d at 703, the sentencing phase of a capital trial is also not the proper forum to retry the guilt or innocence of a prior felony

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[9] In his motion for a new trial, appellant claims that the purpose of Ms. Jones's testimony would have been to cast doubt on the credibility of the victim regarding the beating that she recieved during the sexual battery, rather than attacking the validity of the sexual battery itself. (R 2927-). He makes this claim even though Ms. Jones was not present at the time of the rape. (R 2928). As stated above, at the time the testimony was offered, appellant claimed the he was attempting to attack the validity of the conviction itself. (R 2927-29).

conviction. The trial court properly precluded appellant from offering the testimony. (R 2868-69).

ISSUE XIII

THE TRIAL COURT DID NOT ERR IN ITS RULING REGARDING THE ADMISSIBILITY OF COLLATERAL CRIME EVIDENCE DURING THE PENALTY PHASE

Appellant claims that the trial court erred in allowing the state to introduce evidence of a collateral crime for which he was acquitted. A review of the record reveals that the trial court made no such ruling, nor did the state introduce any such evidence.

Prior to the admission of evidence regarding the prior rape, appellant motioned the court to preclude the state from introducing photographs of the victim and also from mentioning the charge of attempted first degree murder. (R 2689). The court ruled that the state could not mention the charge of attempted first degree murder (R 2690), and ruled that the photographs were admissible. (R 2690-92).[10] During the testimony of the three state witnesses regarding the prior rape conviction, there was never any mention of the charge for attempted first degree murder. (R 2678-2688, 2962-2700, 2707-2715). The photographs were properly admitted and depicted the injuries the victim received as a result of the rape. (R 2697). Waterhouse v. State, 596 So.2d 1008, 1016 (Fla. 1992).

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[10] Appellant was prepared to prove that he was acquitted of attempted first degree murder. (R 2689).

Appellant's reliance on Burr v. State, 576 So.2d 278 (Fla. 1991) is misplaced given that evidence of crimes for which a defendant has been acquitted was never admitted. In the instant case the victim's injuries occurred during the attack. (R 2697, 2704, 2715). Simply because a jury did not convict appellant of the separate crime of attempted murder in addition to the conviction for rape, does not negate the fact that Ms. Hayes was beaten during the rape. The details of the prior rape testified to by Ms. Hayes as well as the pictures depicting her injuries, were clearly admissible evidence. (R 2707-2715). Rhodes v. State, 547 So.2d 1201 (Fla. 1989). In summation the jury was never exposed to any inaccurate information regarding appellant's background.

Also without merit is appellant's claim that reliance on collateral offenses violates double jeopardy. This contention is implicitly rejected by this Court in Rhodes, as a defendant's prior record is clearly relevant for a capital sentencing determination. United States Supreme Court has explicitly stated that consideration of a defendant's prior record does not violate the federal constitution. Barclay v. Florida, 463 U.S 939, 956, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983).

ISSUE XIV

THE TRIAL COURT DID NOT ERR IN PERMITTING TESTIMONY REGARDING A PAIR OF WOMEN'S UNDERWEAR

Appellant claims that the trial court erred in allowing testimony regarding a pair of disheveled and torn panties that were found in his apartment at the time of his arrest. (R 2699-2700). Appellant has failed to establish that any error occurred.

The state's failure to clearly establish a link between the panties and the victim goes to the weight of the evidence rather than to admissibility. United States v. Kubiak, 704 F.2d 1545 rehearing denied, 712 F.2d 1419 cert. denied, 104 S.Ct. 163 (1983). Appellant's reliance on Catro v. State, 547 So.2d 111 (Fla. 1989) and Huhn v. State, 511 So.2d 583 (Fla. 4th DCA 1987) is unavailing. In Castro, the inadmissibility of the knife was found harmless for purposes of the guilt phase and was not even considered under harmless error review for purposes of the penalty phase. A fortiori, this Court deemed it's prejudicial effect to have been nil given the absence of it's consideration for the penalty phase.

In Huhn, supra, the district court reversed a defendant's conviction based on inadmissible collateral crime evidence. Hearsay evidence regarding several remote drug trafficking events, in which Huhn was to have participated, was irrelevant to the charges of kidnapping and assault. Id, at 589.

In the instant case, there was no question as to the guilt of the defendant for the collateral offense. Nor does the underwear amount to evidence of a collateral crime. The undergarment was admitted for purposes of detailing the facts of the prior crime. Waterhouse v. State, 596 So.2d 1008, 1016 (Fla. 1992). The guilt of the defendant with respect to that offense was not in question. Clearly the jury was left with the impression that the evidence was admitted to establish that they belonged to the victim Tia Hayes. (R 2700). Appellant's theory that a jury would interpret its admission as evidence of other collateral crimes is pure speculation. The prosecutor never stated or otherwise suggested to the jury that appellant was involved in any other collateral crimes. The underwear was mentioned once and clearly in the context of the victim, Tia Hayes. (R 2700). Appellant has failed to establish otherwise.

ISSUE VX

THE TRIAL COURT DID NOT ERR IN FAILING TO FIND THAT APPELLANT'S NON-STATUTORY MITIGATING EVIDENCE WARRANTED A LIFE SENTENCE

Appellant claims that the trial court erred in not giving the proper weight to his non-statutory mitigating evidence. A review of the record and the trial court's order, establishes that the trial court did not abuse its discretion in failing to find the existence of non-statutory mitigating evidence.

A mitigating circumstance must in some way lessen a defendant's culpability. Eutzy v. State, 458 So.2d 755, 759 (1984) cert. denied, 471 U.S. 1045, 105 S.Ct. 2062, 85 L.Ed.2d 336 (1984); Lucas v. State, 568 So.2d 18, 23 (Fla. 1990). Since sentencing is an individualized process, circumstances considered mitigating evidence in one case may not be so in another case. Jones v. State, 580 So.2d 143, 146 (Fla. 1991); Sochor v. State, 580 So.2d 595, 604 (Fla. 1991), remanded on other grounds, 504 U.S. __, 119 L.Ed.2d 326, 112 S.Ct. __ (1992). A trial court has the discretion to discount an expert's opinion when there exists substantial evidence in the record to refute same. Bruno v. State, 574 So.2d 76, 83 (Fla. 1991), cert. denied, __ U.S. __, 116 L.Ed.2d 81, 112 S.Ct. 112 (1991); Thompson v. State, 553 So.2d (Fla. 1989), cert. denied, 495 U.S. 940, 109 L.Ed.2d 521, 110 S.Ct. 2194 (1990).

The record establishes that the trial court did take into account all the evidence that was presented in the way of mitigation. His sentencing order was prefaced with the following:

> Therefore, this court will now discuss the limited aggravating circumstances set out in Section 921. 141 (5)(a) through (k), Florida Statues, and the unlimited mitigating circumstances set out in Section 921. 141 (6)(a) through (g), including but not limited to any other aspect of the defendant's character or record, background and early life, and any other circumstance of the offense.

(R 4360). Prior to assessing the evidence presented as non-statutory mitigators, the court stated:

> "This court has duly considered all the testimony and evidence regarding non-statutory mitigating circumstances, but finds that none were shown by any standard of proof."

(R 4368). Subsequent to the presentation of testimony from various family and friends, the trial court granted appellant's motion to instruct the jury on appellant's early childhood, background, drinking and medical problems. (R 2772).

Appellant alleges that the evidence established six non-statutory mitigating circumstances. The trial court found such to be insignificant. (R 4368). A review of the record indicates that the following evidence was offered as mitigation; Appellant's sister and mother testified that he was a good student, had every advantage and opportunity as a child, and was not deprived of anything. (R 2724, 2737). He graduated from college and obtained a good job, and was able to make a living.

(R 2765). Appellant's father died the summer appellant graduated from high school. (R 2724). Appellant took his father's death very hard as he was close to him. (R 2760-61). Appellant cared for his mother after his father died. (R 2763). Appellant was injured in a car accident when he was five years old, prior to that, life was pretty normal. (R 2758).

This information is being offered to establish the mitigating evidence that (1) the death of appellant's father changed his life; (2) Appellant was good to his family and provided for his mother; (3) Appellant was severly injured during childhood and the injuries affected the rest of his life. Appellant claims that since this evidence was uncontroverted, it must be considered as mitigation.

Simply because these events may have occurred in appellant's life, does not automatically transform same into meaningful mitigation. Jones; Sochor. The United States Supreme Court recognized as such in Eddings v. Oklahoma, 455 U.S. 104, 71 L.Ed.2d 1, 102 S.Ct. 869 (1988). The sentencer is required to listen to what evidence a defendant presents as mitigation. Eddings, 455 U.S. at 114, n.10. However the weight to be given same is within the discretion of the sentencer. Id.[11] It is clear that the jury was instructed to consider and the judge did

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[11] The Court recognized that a difficult family childhood and emotional distrubance may be given little weight in some cases. Eddings v. Oklahoma, 455 U.S. 104, 115 (19).

in fact consider all that was presented in the way of mitigation. (R 2724, 43).

Appellant claims that the events of appellant's childhood, including the death of his father, appellant's efforts to care for his mother and various medical problems, dramatically changed his life. Such events triggered appellant's drinking and caused depression. This claim must be viewed in context of appellant's entire life. His father's death, the car accident and appellant's caring for his mother all occurred between twenty to thirty years prior to this murder, consequently, any ameliorative affect would be minimal. Francis v. State, 529 So.2d 670, 673 (Fla. 1988). Furthermore, in spite of these events, appellant was given opportunities to excel in his life as he was able to graduate from college and maintain a living. (R 2724-2737, 2765). Consequently, the trial court did not abuse his discretion in giving little weight to appellant's mitigation. Sochor; Jones; Francis; State v. Bolender, 503 So.2d 1247, 1249-50 (Fla. 1987), cert. denied, 484 U.S. 72, 108 S.Ct. 209, 98 L.Ed.2d 161 (1987).

The remainder of appellant's non-statutory mitigating evidence centers around his alcohol consumption/abuse during his life and at the time of the murder. In conjunction with his alcohol abuse, appellant claims to have presented evidence which indicates a very good chance for rehabilitation. Appellant presented this evidence through the testimony of Robert Scarlotti, an expert in addiction. (R 2787-2818). Scarlotti

testified generally about alcoholics, including the observation that alcoholics will often misread behaviors of others.(R 2788-93, 2799). He then opined that appellant is an alcoholic and had been one for approximately ten years before the murder. He based that conclusion on the fact that appellant's blood alcohol level the night of the murder was .16. (R 2795, 2816). Scarlotti further testified that appellant was so inebriated the night of the murder that he was unaware of what happened and that he could not appreciate the criminality of his action. (R 2816).

Contrary to appellant's claim otherwise there was no opinion or prognosis regarding appellant's chance for rehabilitation. (App. B. at pg. 72). At best, Scarlotti stated that a first degree murder conviction is the type of incident that may motivate someone to want to recover. (R 2803). He was not able to give any such prediction regarding appellant. (R 2811, 2819).[12] Trial counsel's opinion to that effect is not relevant evidence to establish same. (R 2855-59).

The trial court did not abuse its discretion in rejecting appellant's claim that he was intoxicated during the murder as there existed competent substantial evidence to rebut same. Gunsby v. State, 574 So.2d 1085, 1090 (1991), cert. denied, 116 L.Ed.2d 102, 112 S.Ct. 136 (1991). Appellant gave a detailed account of the events that evening to the jury, and

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[12] Appellant ultimately withdrew his request for an instruction regarding his ability to adapt favorably to prison life. (R 2823).

never even mentioned that he was "extremely inebriated". (R 1658-1705). Shortly before the murder appellant was sober enough to drive his car back to Mr. Laff's after receiving a ride home. (R 2742). He was then sober enough to attempt to fix his car and elicit the help of others. After the murder appellant attempted to escape and hide and feigned unconsciousness. (R 1300, 1313-14). The trial court properly rejected appellant's claim that he was too drunk to know what happened the night of the murder. Bruno v. State, 574 So.2d at, 83. The trial court's findings are supported by the record. Ponticelli v. State, 593 So.2d 483 (Fla. 1991); Roberts v. State, 510 So.2d 885, 895 (Fla. 1987); Thompson, supra.

ISSUE XVI

THE TRIAL COURT DID NOT FAIL TO CONSIDER ALL THE NON-STATUTORY MITIGATING EVIDENCE PRESENTED

Appellant claims that the trial court failed to consider all the mitigating evidence presented. He bases his claim on the fact that the court only mentioned one of the non-statutory mitigating factors. Although the court did not mention by name the mitigation regarding appellant's familial background, the record establishes that such was considered by the court.

The thrust of appellant's non-statutory mitigating evidence centered on his alcohol abuse, as such it was reasonable for the trial court to mention that evidence in particular. The judge stated that he considered all that was presented. (R 4360, 4368). He gave a specially requested instruction to the jury regarding this evidence. (R 2772). Dissatisfaction with the trial court's findings does not suggest that the court failed in its duty to consider such evidence. Downs v. State, 572 So.2d 895, 901 (1990), cert. denied, 112 S.Ct. 101, 116 L.Ed.2d 72 (1991) Holton v. State, 573 So.2d 284, 292-93 (1990), cert. denied, 114 L. Ed.2d 2726, 111 S. Ct. 2275 (1991).[13] See generally, Spaziano v. Dugger, 557 So.2d 1372, 1373 (Fla. 1990);

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[13] Appellant's reliance on Maxwell v. State, 17 FLW S396 (Fla. June 25, 1992) is misplaced. This Court's concern centered on what effect a Hitchcock violation had on the sentencing determination. No such error is present in the instant case. This Court need not speculate what a jury or judge would have done if presented with certain non-statutory mitigating evidence.

ISSUE XVII

THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S REQUESTED INSTRUCTION ON THE DOUBLING OF AGGRAVATING FACTORS

Appellant has failed to specify what two factors constitute an impermissible doubling of factors. Relying on Castro v. State, 597 So.2d 259 (Fla. 1992) appellant claims that the trial court erred in refusing to give the requested instruction on doubling up of aggravating factors.[14] Appellant's reliance on Castro is of no moment as the issue of doubling up aggravating factors involved pecuniary gain and the murder was committed during the course of a robbery. Castro, 597 So.2d at 261.

It is clear that the jury was properly instructed and the judge was well aware of his duty to consider all that was presented.

[14] In the alternative this issue has not been preserved for appeal as the argument now offered was not the argument made to the trial court. Sapp v. State, 411 So.2d 363 (Fla. 4th DCA 1982). During the charge conference appellant requested a "doubling" instruction. (R 2590, 2592). The trial court afforded appellant the opportunity argue to his position, he declined. (R 2590). The trial court ultimately denied the special instruction on the basis of Swafford v. State, 533 So.2d 270, 277 (Fla. 1988). (R 2658-59). The trial court explained that he was denying the request because one can be convicted of felony murder and the state may still rely on the aggravating factor that the murder was committed during the course of a felony. (R 2658-59). Swafford; Mills v.State, 476 So.2d 172, 177 (Fla. 1985), cert. denied, 475 U.S. 1031, 106 S.Ct. 1241, 89 L.Ed.2d 349 (1986); Lowenfield v. Phelps, 484 U.S. 231, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988). Since appellant failed to explain his position to the court, review is precluded. Gunsby v. State, 574 So.2d 1085, 1088 (1991)., cert. deneid, 116 L. Ed. 2d 102, 112 S. Ct. 136 (1991).

The jury was instructed on the aggravating factors of prior violent felony, appellant was under sentence of imprisonment, the murder was committed during the course of a kidnapping and sexual battery, and the murder was cold, calculated and premeditated. (R 2860-61).[15] The trial court found the aggravating factors listed above with the exception of cold, calculated and premeditated. (R 4358-69). Given that there does not exist any doubling of the factors instructed upon or ultimately found, there can be no error.

[15] Section, 921.141 (5) (a), (b), (d) and (i).Fla. Stat.

ISSUE XVIII

THE TRIAL COURT PROPERLY INSTRUCTED THE JURY AS TO THEIR ROLE IN THE PENALTY PHASE

Appellant claims that the trial court's instruction violated Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985). This claim lacks merit both procedurally as well as substantively.

The trial court granted appellant's special instruction regarding their sentencing recommendation. (SR II 153, 2622-24). The court also cautioned the prosecutor not to minimize the jury's role in its closing argument. (R 2573-76). However during the charge to the jury the court instructed them under the standard instruction without reference to appellant's requested instruction. (R 2859). This was done without the objection of the appellant. (R 2859). As such this issue is not preserved for appeal. Gunsby v. State, 574 So.2d (1991), cert. denied, 116 L.Ed.2d 102, 112 S.Ct. 136 (1991).

In any event this claim lacks merit as well. This Court has repeatedly held that a Caldwell violation is inapplicable in Florida. Combs v. State, 525 So.2d 853 (Fla. 1988); Grossman v. State, 525 So.2d 883 (1988), cert. denied, 489 U.S. 1071, 109 S.Ct. 1354 (1988). The jury was properly instructed as to their role in Florida's sentencing scheme. (R 2859). Section 921.141 (2). Fla, Stat. (1989).

ISSUE XIX

THE TRIAL COURT DID NOT ERR IN PRECLUDING APPELLANT FROM INTRODUCING HEARSAY EVIDENCE DURING THE PENALTY PHASE

Appellant alleges that the trial court erred in refusing to allow appellant's sister, Sue Allen, to testify to hearsay. The trial court possess a wide latitude of discretion in ruling on the admissibility of penalty phase evidence. Muehleman v. State, 503 So.2d 310, 316 (1987), cert. denied, 484 U.S. 882, 108 S.Ct. 39 (1987). A review of the record establishes that the trial court did not abuse that discretion.

Ms. Allen testified that she placed her brother in a hospital at the insistence of the doctor who had just examined him (R 2727). In spite of his lack of insurance, the doctor told Mrs. Allen that her brother was a walking dead man. (R 2727). When she attempted to state what the doctor told her regarding what was wrong with him, the state objected. (R 2727). Ms. Allen then explained how long appellant was hospitalized, and that he left the hospital before he was well. (R 2727-30). The trial court sustained another objection when again Ms. Allen attempted to state what the doctor had said to her. (R 2728).

Mrs. Allen was able to testify to the fact that appellant was sick and hospitalized. (R 2727-30). The fact that she was precluded from stating what particular malady appellant was suffering from is of no moment. The significant portion of

her testimony, i.e., appellant's hospitalization, was before the jury. Muehlman; Chandler v. State, 534 So.2d 701, 703 (1988), cert. denied, 490 U.S. 1076, 109 S.Ct. 2089 (1988). If appellant's specific medical condition was a crucial aspect of this testimony, appellant could have introduced his hospital records or could have called Dr. Cohen to testify. Appellant has failed to demonstrate how such evidence was relevant to his character, background or circumstances of the crime.

ISSUE XX

THE TRIAL COURT DID NOT ERR IN REFUSING TO GIVE A SPECIAL REQUESTED INSTRUCTION ON NON-STATUTORY MITIGATING EVIDENCE REGARDING APPELLANT'S ALCOHOL ABUSE

Appellant claims that the trial court erred in refusing to give a specially requested instruction regarding appellant's history of alcohol abuse. (R 2827). Appellant claims that the qualifiers "extreme" and "substantial" which appear in the statutory language of the mental mitigating factors[16] limits the jury's consideration of such evidence as non-statutory mitigation. Appellant claims that the limiting nature of these qualifiers prevented the jury from considering Scarlotti's testimony regarding appellant's blood alcohol level and his inability to make sound judgements because of his alcohol abuse. The trial court refused stating that the instructions to be given adequately covered the mitigating evidence offered. (R 2727-29).

The following instructions were given to the jury:

> Among the unlimited mitigating circumstances that you may consider if established by the evidence are, 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. And number two, the capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements

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[16] Section 921.141 (6)(b)(e), Fla. Stat. (1989).

> of the law was substantially impaired. And number three, any other aspect of the Defendant's character or record including, but not limited to his background and early life, and any other circumstances of the offense.

(R 2861-62).

Furthermore, during closing argument, the jury heard appellant's counsel describe the long term effect of appellant's alcohol abuse. (R 2854-59). The jury was adequately instructed regarding what evidence they were to consider and in what context that evidence could be viewed. Foster v. State, 17 FLW S658, 659 (Fla. October 22, 1992).

ISSUE XXI

THE TRIAL COURT DID NOT ERR IN INSTRUCTING THE JURY ON THE AGGRAVATING FACTOR OF "COLD CALCULATED AND PREMEDITATED"

Appellant claims the trial court erred in instructing the jury on the aggravating factor of "cold calculated or premeditated". Since there was insufficient evidence to establish same, the court erred in instructing the jury on that factor. Relying on Stewart v. State, 558 So.2d 416, 420 (Fla. 1990) the trial court denied appellant's instruction. (R 2835-36).

The trial court correctly determined that there was sufficient evidence regarding the extent of appellant's premeditation to justify the instruction. This jury had already convicted appellant of premeditated murder. The state's theory included the possibility that appellant, armed with a gun, had gained entry into the victim's car under a false pretense. Appellant has failed to establish error. Stewart; Bowden v. State, 588 So.2d 225, 231 (1991), cert. denied, 118 L.Ed.2d 311, 112 S.Ct. 1596 (1991); Haliburton v. State, 561 So.2d 248, 252 (1990), cert. denied, 114 L.Ed.2d 2726, 111 S.Ct. 2275 (1990).[17] Furthermore there was no undue emphasis placed on this

[17] The United States Supreme Court has rejected a similar claim. In Sochor v. Florida, 504 U.S. __, 119 L.Ed.2d 326, 112 S.Ct. __ (1992) the Court stated that a jury instructed on two separate theories is indeed likely to reject an option not supported by the evidence. Sochor, 119 L. Ed. 2d at 340.

aggravating factor. The state was relying on the finding of four aggravating factors. (R 2841-51). All four were mentioned, not anyone was emphasized over the other three. (R 2841-46).

Appellant's reliance on Omelius v. State, 584 So.2d 563 (Fla. 1991) and Jones v. State, 569 So.2d 1234 (Fla. 1990) is misplaced. In Omelius, supra, the potential invalidity of the aggravating factor was not because of a deficiency in proof, as was the case here. (R 4364). This Court determined that as a matter of law, the defendant could not be vicariously responsible for the actions of the actual killer. Omelius, 584 So.2d at 566. Consequently the jury was erroneously instructed as to the applicable law. Furthermore, a harmless error analysis could not be conducted based on the state's emphasis on the aggravating factor, the trial court did find mitigating evidence, and the vote for death was only eight to four. Id. As stated above, in the instant case, there was no emphasis on the "cold, calculated, and premeditated" factor, (R 2845-46), there was no significant evidence found in mitigation, (R 4358-70) and the jury's vote for death was ten to two.

Equally unavailing is Jones, supra. This Court recognizes that normally an instruction regarding an aggravating factor not found to exist by the trial court would not be error. Id at 1238. However this jury was also erroneously instructed as a matter of law regarding sexual battery. Since the alleged sexual battery formed the basis for a finding of heinous, atrocious, or cruel factor, the jury was allowed to consider

improper evidence. In the instant case the jury did not hear any inadmissible evidence regarding the aggravating factor.[18] There was no error.

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[18] The United States Supreme Court undertakes a similar analysis. Zant v. Stephens, 462 U.S. 862, 77 L.Ed.2d 235, 103 S.Ct. 2733 (1983); Sochor v. Florida, 504 U.S. __, 119 L.Ed.2d 326, 112 S. Ct. __, (1992); Griffin v. United States, 502 U.S. __, 116 L.Ed.2d 371, 112 S.Ct. __ (1991).

ISSUE XXII

APPELLANT'S DEATH SENTENCE IS PROPORTIONAL TO OTHER CAPITAL CASES

Appellant claims that his death sentence is disproportional for a number of reasons. First appellant claims that since the trial court did not find that the murder was heinous, atrocious, or cruel[19] or that it was cold, calculated, and premeditated,[20] death is not warranted. Appellant's reliance on McKinney v. State, 579 So.2d 80, 84 (Fla. 1991) is misplaced.

In McKinney, two of the three aggravating factors relied upon for imposition of the death penalty, were found to be invalid by this Court. Id, at 84. Consequently that left only one aggravating factor, along with one statutory mitigating circumstance and substantial non-statutory mitigating circumstance. Unlike the instant case, the non-statutory evidence consisted of unrebutted mental health expert testimony regarding his borderline mental deficiency, poor school performance and overall mental impairment.[21]

Also unavailing is appellant's reliance on Nibert v. State, 574 So.2d 1059 (Fla. 1990) for the proposition that the quality of the mitigating evidence presented was such that death

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[19] Section 921.141(5)(h), Fla. Stat. (1985)

[20] Id.921.141(5)(i).

[21] In contrast, the evidence demonstrates that appellant is very intelligent and graduated from college.

was not the appropriate penalty. In Niebert, there was uncontroverted evidence regarding the defendant's physical and psychological abuse suffered as a child, brain dysfunction, chronic and extensive alcohol abuse, remorse and good potential for rehabilitation. Id, at 1062. In the instant case, Scarlotti's testimony was clearly rebutted by the facts of the case, consequently the trial judge was well within his discretion in finding that such evidence was established. Kokal v. State, 492 So.2d 1317, 1319 (Fla. 1986).

Finally appellant's reliance on Fitzpatrick v. State, 527 So.2d 809 (Fla. 1988) is of no moment. Irrespective of the existence of five aggravating factors, death was not appropriate because the "record on resentencing is replete with evidence of Fitzpatrick's substantially impaired capacity, his extreme emotional disturbance and low emotional age." Fitzpatrick, 527 So.2d at 811. As previously stated, appellant's evidence of mitigation was either rebutted by the record or so insignificant as to not warrant much weight. Sochor v. State, 580 So.2d 595 (1991), remanded on other grounds, 504 U.S. __, 119 L.Ed.2d 326, 112 S.Ct. __ (1992); Francis v. State, 529 So.2d 620 (Fla. 1988).

Contrary to appellant's assertions otherwise, the aggravating factors of prior violent felony[22] and under sentence of imprisonment[23] consider different aspects of appellant's

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[22] Section, 921.141(5)(b), Fla. Stat. (1989)

[23] Id. 921.141(5)(a).

criminal history. Delap v. State, 440 So.2d 1242 (Fla. 1983), cert. denied, 467 U.S. 1264 104 S.Ct. 3559, 82 L.Ed.2d 860 (1983). The aggravating factors depict a violent man who has not been responsive to incarceration. Following his incarceration for a prior rape, appellant escalated to killing an innocent man during the attempt to commit yet another rape. His contempt for law and human life is further evidenced by the fact that he was still under a sentence of imprisonment for that prior rape when he killed Mark Hastings and attempted to rape Rene Daniel.

The fact that appellant's father died almost twenty years before this crime and he was a good son to his mother does not mitigate against his sentence. Appellant was given every advantage in life, and yet he chose to turn to alcohol and crime. Unlike the defendants appellant relies on to demonstrate a disproportionate sentence, he has not had to overcome emotional, or economic deprivation. He was never victimized psychologically or physically and he possessed the intelligence to succeed in his chosen endeavors. Appellant's death sentence is consistent with prior decisions of this Court. Watts v. State, 593 So.2d 198, 204 (Fla. 1992); White v. State, 446 So.2d 1031, 1037 (1984), cert. denied, 111 L.Ed.2d 818, 111 S.Ct. 2 (1984); Mills v. State, 476 So.2d 172, 179 (Fla. 1985).

ISSUE XXIII

TRIAL COURT PROPERLY INSTRUCTED THE JURY REGARDING THE NON-STATUTORY MITIGATING EVIDENCE THEY WOULD HEAR

Appellant claims that the trial court erred in failing to give requested instructions regarding specific non-statutory mitigating evidence. (2SR 154, 168, 169). The trial court ruled that the instruction on residual doubt was improper under King v. State, 514 So.2d 534 (Fla. 1987). (R 2599). The trial court did grant appellant's special instruction regarding his childhood health problems and drinking. (R 2772 2861-62)). With respect to the final instruction regarding appellant's alcohol use at the time of the crime, the trial court reserved ruling until he heard the penalty phase evidence. (R 2608-12). He informed counsel that he must again request the instructions after the evidence was presented. (R 2611-12). Appellant never made the request.[24] The trial court's ruling regarding residual doubt was correct. King; Franklin v. Lynaugh, 487 U.S. 164, 108 S.Ct. 2320, 101 L.Ed.2d 155 (1988). Appellant's requested instruction regarding the influence of alcohol at the time of the crime is not preserved for appeal. Gunsby v. State, 574 So.2d 1085, (1991), cert. denied, 116 L.Ed.2d 102, 112 S.Ct. 136 (1991).

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[24] Appellant withdrew his request for an instruction regarding voluntary intoxication during the guilt phase.

Even if this Court should find that this issue is preserved for appeal, there is no merit. The jury was properly instructed regarding the mitigating evidence that should be considered. (R 2860-62). The jury was also told to consider all the evidence at both phases of the trial. (R 2860). Appellant's contention is without merit. Robinson v. State, 574 So. 108, 111 (1991), cert. denied, 116 L.Ed.2d 99 (1988); Jackson v. State, 530 So.2d 269, 273 (1988), cert. denied, 488 U.S. 1051, 109 S.Ct. 882, 102 L.Ed.2d 1008 (1988); Randolph v. State, 562 So.2d 331, 339 (1990).

ISSUE XXIV

THERE WAS SUFFICIENT EVIDENCE OF THE AGGRAVATING CIRCUMSTANCE THAT APPELLANT WAS UNDER SENTENCE OF IMPRISONMENT

Appellant claims that there is insufficient evidence that he was under sentence of imprisonment at the time of this capital murder.[25] This issue is not preserved for appeal as appellant never presented this argument to the trial court. Johnson v. State, 478 So.2d 885, 886 (Fla. 3rd DCA 1985).

In any event, appellant's argument is without merit. As found by the trial court, on April 30, 1986, appellant was convicted and sentenced to fifteen years for his prior rape conviction. (R 2687-88, 4360). Appellant has not presented argument to rebut this proof. Parker v. State, 456 So.2d 436, 444 (Fla. 1984). This issue is without merit.

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[25] Section, 921.141(5)(a) (1989).

ISSUE XXV

THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON THE BURDEN OF PROOF REQUIRED AT THE PENALTY PHASE

Appellant claims that the trial court erred in failing to give a requested jury instruction regarding the burden of proof at the penalty phase. (2SR 162, R 2605). The trial court denied the request because the special instruction was already covered by the standard instruction. (R 2605). The trial court properly instructed on the burden of proof and that all aggravating circumstances must be proven beyond a reasonable doubt. (R 2860-61). Appellant's claim that the standard instruction impermissibly shifts the burden of proof has already been rejected by this Court. Robinson v. State, 574 So.2d 108, 113 n.6 and n.7 (1991).

ISSUE XXVI

FLORIDA'S DEATH PENALTY STATUTE IS CONSTITUTIONAL

Appellant challenges several aspects of Florida's death penalty statute. His first claim that the death penalty in Florida is both arbitrary and capricious has previously been rejected by this Court. Jones v. State, 569 So.2d 1234 (Fla. 1991); Young v. State, 579 So.2d 721 (1990), cert. denied, 117 L.Ed.2d 112 S.Ct. 1198 (1992).

Appellant next attacks the constitutionality of the aggravating factors of "heinous, atrocious, and cruel", "cold, calculated, and premeditated", and "prior violent felony". This issue has not been preserved for appeal, consequently review is denied. Sochor v. State, 580 So.2d 595, 605 n.10 (Fla. 1990), remanded on other grounds, 504 U.S. __, 119 L.Ed.2d 326, 112 S. Ct. __ (1992). Since "HAC" was not an aggravating factor that was considered in the instant case, appellant's argument is irrelevant. In any event this Court has upheld the constitutionality of this factor. Preston v. State, 17 FLW S669, 671 (Fla. October 29, 1992). Finally, the United States Supreme Court has upheld this Court's application of same. Sochor v. Florida, 119 L.Ed.2d at 339-40.

Equally unavailing is appellant's constitutional attack regarding "CCP". Klokoc v. State, 589 So.2d 219 (Fla. 1991); Hodges v. State, 595 So.2d 929 (Fla. 1992). Furthermore,

there can be no error as the trial court did not consider this factor in its sentencing determination. (R 4358-69). Sochor v. Florida, 119 L.Ed.2d at 340.

Finally this Court, as well as the United States Supreme Court has rejected appellant's challenge to the felony murder aggravating factor. Mills v. State, 476 So.2d 172 (Fla. 1985); Lowenfield v. Phelps, 484 U.S. 231, 108 S. Ct. 546, 98 L. Ed. 2d 568 (1988).

Appellant claims that the sentencing scheme is also unconstitutional because the jury's recommendation of death need not be unanimous, and a death recommendation need only be by a bare majority. Spaziano v. Florida, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984).

The jury's role in Florida's sentencing scheme is accurately described in the standard instructions. Combs v. State, 525 So. 2d 853 (Fla. 1988).

Appellant's general attack on the quality of attorneys that represent capital defendants is without merit. If appellant wishes to attack the effectiveness of his counsel, the proper standard is articulated in Srickland v. Washington, 466 U.S. 668, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984), and the appropriate forum is in a collateral proceeding. McKinney v. State, 579 So.2d 80, 82 (Fla., 1991).

Next appellant attacks the role and quality of the trial court in Florida's capital sentencing scheme. The actual sentencer in Florida's scheme is the judge. Smalley v. State, 546

So.2d 720 (Fla. 1989); Grossman v. State, 525 So.2d 833 (Fla. 1988); Section 921.141 (3), Fla. Stat. (1989). A sentence of death can be upheld regardless of either the jury's recommendation or their written findings. Grossman, supra; Hildwin v. Florida, 490 U.S. 638, 104 L.Ed.2d 728, 109 S.Ct. (1989).

Appellant's general attack against the selection process of circuit court judges is irrelevant to this case. If appellant has a particular claim against the judge who presided over his trial, that specific claim should be raised now. Wilson v. State, 305 So. 2d 50 (Fla. 3rd DCA 1975). Furthermore, since there is no constitutional right to a juror of a particular race, Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), a fortiori, there can be no such right to a judge of a certain race.

Appellant has also failed to establish that this Court does not conduct a proper appellate review. The United States Supreme Court has recently stated that this Court continues to narrowly construe aggravating factors. Sochor v. Florida, 119 L.Ed.2d at 339-49 (1992). This Court's adherence to the contemporaneous objection rule in death cases has been recognized by the United States Supreme Court. Dugger v. Adams, 489 U.S. 401, 410, n.3, 109 S.Ct. 1211, 103 L.Ed.2d 435 (1989). Florida's sentencing scheme does not presume death to be the appropriate penalty. Robinson v. State, 574 So.2d 108, 113, n.6 (Fla. 1991); Boyde v. California, 494 U.S. 370, 108 L.Ed.2d 316, 110 S.Ct.

1190 (1990); Blystone v. Pennsylvania, 494 U.S. 299, S.Ct. 1078, 108 L.Ed.2d 255 (1990). A capital defendant has the opportunity to present any and all relevant mitigating evidence. Hitchcock v. Florida, 481 U.S. 393, 95 L.Ed.2d 347, 107 S.Ct. 1821 (1987); Jackson v. State, 530 So.2d. 269, 273 (1988), cert. denied, 488 U.S. 1051, 109 S.Ct. 882, 102 L.Ed.2d 1008 (1988). There is no constitutional requirement to a jury's unfettered discretion. Boyd, supra. Death by electrocution is not unconstitutional. Buenoano v. State, 565 So.2d 309 (Fla. 1990).

ISSUE XXVII

THE AGGRAVATING CIRCUMSTANCES USED AT BAR ARE CONSTITUTIONAL

Appellant claims that application of the three aggravating factors found by the trial judge are unconstitutional as applied. This claim is not preserved for appeal as no such argument was made to the trial court. Sochor v. State, 580 So. 2d 595 (Fla. 1991), remanded on other grounds, 504 U.S. __, 119 L.Ed.2d 326, 112 S.Ct. (1992).

The propriety of the aggravating factor that the capital murder was committed during the course of a felony has been upheld and remains valid. Mills v. State, 476 So.2d 172 (Fla. 1985); Lowenfield v. Phelps, 484 U.S. 231, 98 L.Ed.2d 568, 108 S.Ct. 546 (1988).

Appellant was convicted of a prior violent felony, i.e. rape. That conviction has not been overturned. The propriety of considering such a factor has been held constitutional. Barclay v. Florida, 463 U.S. 939, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983).

Application of the aggravating factor of "under sentence of imprisonment" is constitutional as applied. The intent of the statute includes defendants who are on parole, as parole does not terminate a sentence. White v. State, 403 So.2d 331, 337 (Fla. 1983); Haliburton v. State, 561 So.2d 248 (1990), cert. denied, 114 L.Ed.2d 2726, 111 S.Ct. 2275 (1991). Persons

on probation do not fall within the statute. Ferguson v. State, 417 So.2d 631 (Fla. 1982).

ISSUE XXVIII

THE TRIAL COURT RELIED ON VALID REASONS FOR AN UPWARD DEPARTURE

The trial court gave two valid reasons for its upward departure. The first one involved appellant's escalating pattern of criminal behavior. Appellant, who was still under a sentence of imprisonment for his prior violent felony of sexual battery, was convicted of kidnapping with intent to commit another sexual battery, as well as murder. This constitutes a valid reason for departure. (R 4356). Eavan v. State, 545 So.2d 452 (Fla. 3rd DCA 1989).

The trial court also used the capital murder of Mark Hastings as a reason for departure. (R 4356). The case law clearly supports such a departure. Weems v. State, 469 So.2d 128 (Fla. 1985).

Finally, invalidation of one would still not warrant a reversal of appellant's sentence, given appellant's concession that at least one of the reasons given by the court has been upheld on prior occasions. Weems; Section 921.001(5), Fla. Stat. (1989).

CONCLUSION

WHEREFORE, based on the foregoing facts and relevant case law, appellee respectfully requests that this Court AFFIRM appellant's conviction for first degree murder and sentence of death, as well as his convictions for two counts of kidnapping and attempted sexual battery.

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 courier to: **JEFFREY L. ANDERSON, ESQUIRE**, Assistant Public Defender, The Criminal Justice Building, 421 3rd Street, 6th Floor, West Palm Beach, Florida 33401 this 9th day of December, 1992.

Of Counsel

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