IN THE SUPREME COURT OF FLORIDA

ROBERT B. POWER, JR.,

Appellant/Cross-Appellee,

v. CASE NO. 77,157

STATE OF FLORIDA,

Appellee/Cross-Appellant.

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

ANSWER BRIEF OF APPELLEE/
INITIAL BRIEF OF CROSS-APPELLANT

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SUMMARY OF ARGUMENTS

There is substantial competent evidence to support the jury verdict. The jury is not required to believe the defendant's version when the State has produced conflicting evidence.

The trial court did not abuse its discretion in admitting a business record maintained at the Sheriff's Office, in giving the flight instruction, in denying a motion for mistrial when a bailiff stepped forward, in admitting Deputy Welty's statements regarding Mr. Miller's identification statement, in denying the motion to suppress, in admitting items seized from Power's maroon bag, in limiting cross-examination, in admitting an autopsy photograph, in denying additional peremptory challenges, in not sequestering the jury, in not giving two special requested instructions, in limiting rehabilitation of Dr. Radelet or in other evidentiary rulings.

The trial court's findings of heinous, atrocious, and cruel and cold, calculated and premeditated are supported by substantial competent evidence. Even if an aggravating circumstance were stricken, it would be harmless.

A minor error in the transcript which is quite obvious on first reading does not render the entire transcript unreliable.

This court has repeatedly rejected Power's arguments that the aggravating circumstance of heinous, atrocious and cruel is unconstitutionally vague and the death penalty statute is unconstitutional.

Regarding the cross-appeal issues, the trial court erred in excluding similar fact evidence which was relevant to identity, opportunity, plan, preparation and modus operandi. The trial court also erred in allowing Dr. Radelet to testify in the penalty phase where his testimony did not relate to any aspect of Power's character or circumstance of the offense.

STATEMENT OF THE CASE AND FACTS

The Appellee accepts the Appellant's Statement of the Case and Facts with a few additions which will be contained within the appropriate issue on appeal.

ARGUMENT

POINT I

THE FIRST DEGREE MURDER CONVICTION IS SUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE BASED ON EITHER THE UNDERLYING FELONY OR A FINDING OF PREMEDITATION.

The question of whether the evidence proves premeditation to the exclusion of all other reasonable inferences is a question of fact for the jury, whose verdict will not be reversed on appeal where there is substantial competent evidence to support it. Bedford v. State, 16 F.L.W. S665, S667 (Fla. Oct. 10, 1991); Holton v. State, 573 So.2d 284, 289 (Fla. 1990); Cochran v. State, 547 So.2d 928, 930 (Fla. 1989); State v. Law, 559 So.2d 187, 188 (Fla. 1989). The circumstantial evidence rule does not require the jury to believe the defendant's version of the facts when the State has produced conflicting evidence. Cochran, supra at 930.

The State offered evidence that a person fitting Power's description was in the Bare house with a gun at approximately 8:55 a.m. The medical examiner testified death occurred around 9:15 a.m. when Mr. Miller arrived to pick up Angeli for school. The man had apparently threatened to kill Angeli since she told Mr. Miller he would kill all three persons if he didn't leave. Power robbed Deputy Welty at gunpoint[1] at approximately 9:25 a.m. at a location 65 to 75 paces from the body. Hair indistinguishable from Power's was found on the bedding in the

[1] Defense counsel conceded there was sufficient evidence of the robbery.

home and on the victim's pubic area. Head hairs recovered from a sweatshirt in the room where Power slept were consistent with the victim's. When Power was arrested he was found hiding in the attic crouched near a maroon bag containing a gun, a knife and gloves. Parts from Deputy Welty's radio were in the room where Power slept (R **823, 825, 832, 1201, 1222, 1577).** Power was staying at a motel on Orange Blossom Trail in the days before the murder and did not go to work the day of the murder (R **592, 1001).** The murder took place approximately five blocks from Power's place of work (Defense Exhibit **#1** dated **5-14-90).** The day after the murder Power's brother picked him up at McDonald's and Power had the maroon bag (R **593).** Power later asked his employer for electronic equipment to work on the radio (R 1001). Deputy Welty positively identified Power as the man who stole his radio and gun only **65** to **75** paces from the murder scene and only ten minutes from the approximate time of death (R **860).** Additionally, Williams rule evidence from three similar crimes was erroneously precluded (see Point I on cross-appeal). The facts show Power threatened to kill Angeli, which he methodically performed by hog-tying and stabbing the child after raping and sodomizing her. The state proved Power committed premeditated first degree murder.

The state also proved felony murder. Power did not have permission to enter the home, kidnap and sexually batter Angeli. Defense counsel conceded there was sufficient evidence of armed robbery.

This case is similar to Duckett v. State, 568 So.2d 891 (Fla. 1990). In Duckett, the state's evidence consisted of proximity to the victim before the murder, unusual tire tracks, the victim's fingerprints on the defendant's car and a hair in the victim's underpants that probably was the defendant's. Additionally, the State offered Williams rule evidence from three prior victims of the defendant's sexual encounters. Duckett admitted having contact with the victim and that she possibly had been on the hood of his car. Duckett argued the evidence was not inconsistent with every reasonable hypothesis of innocence and pointed to inconsistencies in the evidence. This court found that neither the facts cited by Duckett nor his denial of involvement was sufficient to raise any hypothesis of innocence given the total circumstances in the case.

As previously outlined, the State's case was not based solely on hair samples. Further, the FDLE hair expert testified Power had a distinctive hair color that was highly unusual (R 1536-37). Power attacks the credibility of the State hair experts. The State presented not only an FDLE microanalyst, Deb Steiger, but also an independent research microscopist, Richard Bisbing. The defense testimony came from a metallurgist consultant, Dr. Hart, with a doctor of philosophy degree in metallurgy who had testified three times for the defense (R 1695, 1696, 1706). Dr. Hart had a microscope in his basement with which he examined hairs (R 1708). Dr. Hart had done eight hair analyses in the past twelve years (R 1769). The State expert testimony was conclusive regarding the hairs and Dr. Hart's

testimony did not cast doubt upon it. Given the total circumstances of the case, there was no reasonable hypothesis of innocence suggested by the defense. The verdict is supported by competent substantial evidence. See Rembert v. State, 445 So.2d 337 (Fla. 1984).

POINT II

THE TRIAL DID NOT ERR IN DENYING THE MOTION FOR MISTRIAL.

Power claims the prosecutor's comment that "when the person is innocent, these two or three circumstances are easily explained away" is an improper comment on defendant's right to remain silent. The trial court invited defense counsel to frame a curative instruction but he apparently declined the invitation. Where the trial judge has extended counsel an opportunity to cure any error, and counsel fails to take advantage of the opportunity, such error, if any, was invited and will not warrant reversal. Sullivan v. State, 303 So.2d 632 (Fla. 1974).

The prosecutor's statement was not a comment on Power's right to remain silent nor can it be susceptible of that interpretation. The prosecutor was making a fair comment on the evidence. Power presented evidence to rebut evidence presented by the State, including witnesses to discredit Deputy Welty's identification (R 1682), the hair analyses (R 1714) and Welty's statement about a half-eaten sandwich (R 1805).

The prosecutor's statement that the circumstantial evidence had not been explained away was not a comment on the right to silence but on Power's failure to rebut the circumstances with the evidence he presented. The jury was instructed on circumstantial evidence pursuant to defense counsel's request (R 1935). The prosecutor's explanation of circumstantial evidence was invited.

Simply because the word "explain" is used does not mean every statement is a comment on silence. The statement must be examined in the context of the entire statement,

In State v. Shepard, 479 So.2d 106 (Fla. 1985), the prosecutor said he "had a lot of difficulty in trying to figure out exactly what the defense was going to be because, frankly, for my purpose, I haven't heard any". This court ruled the comment was merely a comment on the uncontradicted nature of the evidence and did not constitute prejudicial error. Id. at 107. This court also stated:

> It is well settled that a prosecutor may comment on the uncontradicted or uncontroverted nature of the evidence during argument to the jury.

Shepperd at 107, citing White v. State, 377 So.2d 1149, 1150 (Fla. 1979). In White, the prosecutor's comment was "you haven't heard one word of testimony to contradict what she has said, other than the lawyer's argument". In summary, this court held:

> In order to clarify exactly when a comment is "fairly susceptible" of being interpreted by the jury as referring to the defendant's failure to testify, we hold that a prosecutorial comment in reference to the defense generally as opposed to the defendant individually cannot be "fairly susceptible" of being interpreted by the jury as referring to the defendant's failure to testify.
>
> The comment in this case refers to the absence of a defense, not the defendant's failure to testify.

Shepperd at 107.

The comment in the case sub judice was a comment on the lack of a defense, not Power's failure to testify.

The prosecutor's comment in Snowden v. State, 449 So.2d 332 (Fla. 5th DCA 1984), that "I challenge the defendant to present a reasonable inference to explain why the defendant tore these soles off and flushed them down the commode at the Titusville Police Department", when viewed in the context of the complete statement, was a comment on the evidence. Id. at 334-35. In Snowden, as in the present case, the State had opening and closing final arguments and the comment complained about was made during the State's opening portion of the final argument. The court viewed the language as "an invitation to come up with a better explanation". Id. at 335.

In Torres v. State, 541 So.2d 1224 (Fla. 2d DCA 1989) the prosecutor commented to the jury that it had not heard any testimony to contradict the State's witnesses. Id. at 1226. The court held it was not improper for a prosecutor in closing argument to review the evidence as a whole and point out that it is uncontradicted.

Even if this could be inferred as a comment on Power's right to remain silent, it was harmless error. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). In McCain v. State, 480 So.2d 189 (Fla. 2nd DCA 1985), the prosecutor twice referred to the defendant's failure to testify. This was harmless error. In Budd v. State, 477 So.2d 52 (Fla. 2nd DCA 1985), the prosecutor said the state's case was unrefuted. The court found the remarks not sufficiently direct and egregious to nullify the entire trial. In Knox v. State, 521 So.2d 321 (Fla. 4th DCA 1988), the prosecutor's remark that the jury could consider that nothing contradicted the

sheriff's testimony was harmless error. See also, Domberq v. State, 518 So.2d 1360 (Fla. 1st DCA 1988); State v. Lowry, 498 So.2d 427 (Fla. 1986). The Eleventh Circuit County Appeals found the following comment harmless: [the defendant] doesn't have the guts to tell it about the Colombians and get on that stand". United States v. LeQuire, 5 FLW Fed. C1703 (11th Cir. Oct. 17, 1991). Reversal of a conviction is warranted only where the error committed was so prejudicial as to vitiate the entire trial. Cobb v. State, 376 So.2d 230, 232 (Fla. 1979); State v. Murray, 443 So.2d 955 (Fla. 1984). There was no reversible error in this case. The comment was a reasonable comment on the evidence made in anticipation of the defense argument on circumstantial evidence and the giving of the circumstantial evidence instruction.

POINT III

THE TRIAL COURT DID NOT ERR IN ADMITTING EVIDENCE.

Power rgues the trial court erred in admitting State Exhibit #69, a copy of microfilm records titled "Vehicle and Equipment Receipt". The basis of the objections at trial was the witness was not the custodian for the records, there were portions of the form that were changed, and the witness didn't know who made the changes or when the changes were made (R 1195). The State then proffered testimony that the document was prepared in the regularly conducted business activity of the Sheriff's Office (R 1197). Defense counsel conducted voir dire regarding when the witness was custodian of records (R 1198-99). The defense then objected to the document coming in with the witness because the witness was not the present custodian and could not tell when the alterations were made (R 1200). The witness testified he retrieved the document from the microfiche and that he was the custodian at the time he prepared the record but was not presently the custodian (R 1203-1204). Defense counsel then objected as to relevance and business records (R 1204). The court overruled the objection.

As Power states, Exhibit #69 is a record kept in the course of business in the Sheriff's Office. (Initial Brief at 64). Power also recognizes that the question of a proper foundation is within the trial court's discretion (Initial Brief at 67); McEachern v. State, 388 So.2d 244, 246 (Fla. 5th DCA 1980). However, he insists the circumstances show a lack of trustworthiness and the document was irrelevant.

The record was relevant to establish the radio found in Power's residence was the same radio he took from Deputy Welty. Power's summary of the testimony shows that the state did present, through Deputy Welty and Deputy Hulse that Exhibit #69 was a document prepared at or near the time by, or from information transmitted by, a person with knowledge and kept in the course of a regularly conducted business. Deputy Hulse was a qualified witness. The record was admissible under the business records exception. §90.803(6)(a), Fla. Stat. (1989). Even though Deputy Hulse was uncertain of the exact person who made alterations, he said it was probably one of the supply persons (R 1199). The document is an official record kept at the Sheriff's department and is trustworthy. Power has failed to show or even allege how this record, to which a limited number of Sheriff's employees would have access, could possibly be untrustworthy. The purpose of hearsay exceptions is to avoid the necessity of bringing to court every person who played a part in the preparation of a particular business record. McEachern, supra.

The trial court has broad discretion in the admission of evidence. Welty v. State, 402 So.2d 1159 (Fla. 1981). Unless an abuse of discretion can be shown it's ruling will not be disturbed. Hardwick v. State, 521 So.2d 1071 (Fla. 1988). The issue is one of the weight to be given the evidence rather than the admissibility. See Johnson v. State, 442 So.2d 193, 196 (Fla. 1983). The trial court correctly determined that even if Welty did not have knowledge of every detail, this did not bar admission of the record. See, Garcia v. State, 564 So.2d 124

(Fla. 1990). Error, if any, was harmless since there was testimony regarding the serial number on the radio, and there was a specific part in the Orange County radio that was different from all other radios (R 1574). See, State v. DiGuilio, 491 So.2d 1129 (Fla. 1986).

POINT IV

THE TRIAL COURT DID NOT ERR IN GIVING THE FLIGHT INSTRUCTION.

Power claims the trial court erred in giving the State's requested flight instruction. Power also claims the trial court erred in not giving a limiting instruction. He claims he was fleeing Deputy Welty only because there was an outstanding warrant on him, but admits this argument was not presented to the jury. Power also recognizes this court has held the flight instruction is appropriate where there is more evidence against a defendant than flight standing alone. Whitfield v. State, 452 So.2d 548 (Fla. 1984); Bundy v. State, 472 So.2d 9 (Fla. 1985). Power claims the only evidence against him was flight, even though he argued in Point I the hair analyses was the sole evidence.

Power was near the body within ten minutes of the estimated time of death. A person fitting his description was in the Bare household when Mr. Miller arrived. His hair was found in the home and on the victim's pubic area. Her hair was found on a sweatshirt where he slept. He robbed Deputy Welty of his gun and radio and ran. Additionally, he had sexually assaulted victims in a similar manner although this evidence was kept from the jury until the penalty phase.[2] Under the facts of this case, the instruction on flight was appropriate. See, Ventura v. State, 560 So.2d 217, 221 (Fla. 1990); Harvey v. State, 529 So.2d 1083

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[2] The Williams rule evidence should have been admitted and adds even more weight to the State's case. See Point I on cross appeal.

(Fla. 1988); Bundy, supra; Washington v. State, 432 So.2d 44 (Fla. 1983); Mackiewicz v. State, 114 So.2d 684 (Fla. 1959); Daniels v. State, 108 So.2d 755 (Fla. 1959).

In Freeman v. State, 547 So.2d 125 (Fla. 1989), the defendant presented an argument similar to Power's argument for a limiting instruction. The court found that evidence of flight was appropriate for both charges for which he was incarcerated. Although Power argues a limiting instruction should have been given that the flight instruction applied only to the robbery, the murder was only ten minutes previous and he was obviously eluding the murder scene as well as the robbery scene. Freeman at 128.

Power has failed to show the trial court abused its discretion in refusing to give a limiting instruction. To prevail on a claim the court erred in refusing to give a requested instruction, a defendant must show the requested instruction was correct, that it was not substantially covered by other instructions and that it concerned points in trial so important the failure to give the instruction seriously impaired the defendant's ability to present an effective defense. United States v. Diaz, 916 F.2d 655, 658 (11th Cir. 1990). Power's analogy to the 1imiting instruction provision in §90.404(2)(b)(2), Florida Statutes, is inapplicable in this situation since that section involves a specific provision regarding Williams rule evidence.

Even if the flight instructions were erroneous any error was harmless. See, Rhodes v. State, 547 So.2d 1201 (Fla. 1989). The

jury was instructed that circumstantial evidence must be of such a conclusive nature the jury must be convinced beyond a reasonable doubt of the fact to be proved (R 2090). This standard would apply to flight as circumstantial evidence of guilt. The circumstantial evidence instruction diminished any effect the flight instruction may have had. It was not the flight after the murder which was so detrimental but the fact Power robbed a police officer at gunpoint.

POINT V

POWER WAS NOT DENIED A FAIR TRIAL BECAUSE OF AN INCIDENT INVOLVING A DEPUTY SHERIFF.

Power claims a deputy sheriff made an unnecessary show of force when Power stood up to show his chest. The trial court conducted a hearing on the matter. Defense counsel re-stated his motion for mistrial, saying that the bailiff in charge, Robert, had been informed Power had asked permission to show his chest to the jury but when the time came one of the bailiffs seated in a corner walked a fast clip twenty paces in front of Power to stand about eight feet in front of him, unsnapped the holster of his pistol, put his hand on his gun and took a stance in front of Power in full view of the jury (R 1864). The trial judge asked "What stance? What do you mean? He didn't unholster his gun" (R 1864). Trial counsel then characterized the bailiff's posture as a "combat stance" which was very intimidating to him as the attorney sitting there viewing it. The court asked the deputy to come forward and reenact the scene. The deputy stated:

> WITNESS: I was in a seated position here. As far as the fair warning, to understand what exactly had taken place, I didn't hear that. Okay. So it kind of startled me. As the chair kicked back, I kind of went this way to get out of the chair. Okay. Let me express something, first of all. I'm not handicapped, or benefit to me, your average road cop. I am a defensive tactics instructor and a firearms trainer, also. So I am unfortunately in a combat mode most of my awake moments of the day. As I jumped up to the side, it wasn't really a lunge forward, just awareness. My hand goes down here. My back -- the holster has two snaps. One on top, one on the back. One on back is a safety snap. Very easily unsnapped. That came off at this point as I

jumped up. Over here the chair was being kicked in the back. As far as the combat stance to the side, it was a belated stance, not like in Orlando, where you are just right about here in front, looking at the defendant.

THE COURT: And how far over did you move?

WITNESS: I couldn't tell you exactly. Over to the front.

THE COURT: Mr. Jaeger, show me--

MR. JAEGER: He was here. He came in front of this table, right here, and stood right in front of--

THE COURT: Okay. Robert, you were standing to the left of him?

DEPUTY FORREST: Would you like my recollection, your Honor?

THE COURT: Yes, sir. Please

DEPUTY FORREST: That table here was not -- wasn't present at the time.

THE COURT: Let's move it.

DEPUTY FORREST: All right. My recollection of these events are that I was standing right over here, in this position, arms crossed, I believe. And that Deputy Santalla -- for the record, the bailiff in question is Deputy Jeff Santalla -- moved up quickly, and that he had -- the only way I can describe it, because at best, in the beginning of the sequence of events, I was only dealing with peripheral vision. My eyes were trained on the defense table. I saw him move over; again quickly, what I would estimate to be about eight feet, and stand very close to the proximity where Mr. Jaeger is standing. Maybe just a little bit further away from him. I did see Deputy Santalla take a stance similar to what he described. Something like this (indicating) with his hand on the butt of his gun. I did not see him withdraw the weapon. I did not see, nor did I hear any clicking at any time. I would represent to the Court that because I was standing where I am now, and Deputy Santalla was standing just to my right, just

about even with the corner of this table, to my right.

THE COURT: Okay. Would you step over here, Deputy Santalla. Let Robert direct you as to where he believes you were.

DEPUTY FORREST: Now, okay. Come up here, now turn like that. Put your hand on your gun. Okay. That's very close. Obviously, I can't be exact, but that's very close to the area in a position that I recall I saw Deputy Santalla. I did not see him withdraw the weapon. I did not hear any snap. In all honesty, I will say immediately after the incident, I went over to the deputy, who was around the corner at that point. At that moment, I did observe that his top -- and his holster is identical to mine. And his top snap was undone.

THE COURT: Okay. Mr. Jaeger?

Mr. JAEGER: Your Honor, I would say this. First of all, Officer Robert Forrest did not respond in any inappropriate manner. Let me say that, for the record.

The judge then positioned the parties as they would have been during the incident. The prosecutor stated:

MR. TOWNES: Well, the only thing I would say, your Honor--

THE COURT: Not as far as argument. I want to know if there is any positioning.

MR. TOWNES: No.

THE COURT: That you feel is different.

MR. TOWNES: Well, my eyes were trained on the defendant. I think everyone was looking at him. I didn't even notice any movement out of him. I was looking straight at him.

(R **1865-69**).

The trial judge then positioned himself in several locations in the jury box (R **1870**). The prosecutor argued that the Court

should take into consideration that while this occurred, everyone was looking straight at the defendant which would put the bailiff out of the direct line of focus. The bailiff would be in a peripheral view. The prosecutor stated he did not notice any movements except those of the defendant (R **1871).** Power stated:

> DEFENDANT: When he asked me to do that, demonstrate that for them, I looked up at the jury. I didn't see the man coming. But I heard his footsteps. And when I stood up and started to take my jacket off, I seen several jurors' heads shift from me to him and back to me. I continued what I was doing and didn't pay him any more attention.

(R **1872).**

The judge then ruled a6 follows:

> THE COURT: The Court has looked at the jury's view of this. The Court recalls the incident, having been sitting at the bench. I don't recall the defendant or the deputy having his hands on his weapon, but I do remember hearing the movement, and see him move up beside Robert. From the jury's viewpoint, the quick movement, and the fact that he had moved on to a position very near to Robert, does not appear to the Court to be necessarily threatening. It would be clear that he probably was resting his hand on his gun, but it was not nearly as threatening from the jury's viewpoint as it would have been from the defendant's viewpoint and the defense attorney's viewpoint. Having been in that viewpoint, as I walked by there, I could see where that would be more of a threatening gesture to you than it would be to the jury. All in all, I don't think it has prejudiced the jury and does not rise to the point of a justification for mistrial in this case. So I'll deny the motion for mistrial.

(R 1872-73).

Power has failed to show the trial court abused its discretion in denying the motion for mistrial. It is within the

trial court's sound discretion to grant a motion for mistrial, which should be granted only in cases of absolutely legal necessity when necessary to ensure a fair trial. Wilson v. State, 436 So.2d 908 (Fla. 1986); Marek v. State, 492 So.2d 1055 (Fla. 1986). A motion for mistrial should be granted only when the error complained of is *so* prejudicial that it vitiates the entire proceedings. State v. Murray, 443 So.2d 955 (Fla. 1984); Cobb v. State, 376 So.2d 230 (Fla. 1979).

Both the judge and prosecutor stated that the actions of the bailiff were not threatening and the Court stated there was no prejudice. Power testified that he continued what he was doing and paid no attention to the bailiff. The cases cited by appellant are inapposite. There are no allegations Power was forced to stand trial in prison garb or was bound and gagged. Holbrook v. Flynn, 475 U.S. 560 (1986) supports the State's position that there was nothing inherently prejudicial in the bailiff moving forward. Even if the jury noticed the bailiff, the procedure could be interpreted as standard operating procedure when a defendant rises to address the jury. The trial court did not abuse its discretion in denying the motion for mistrial. **See**, Derrick v. State, 581 So.2d 31, 35 (Fla. 1991).

POINT VI

THE TRIAL COURT DID NOT ERR IN OVERRULING THE OBJECTION REGARDING DEPUTY WELTY'S TESTIMONY.

Power argues the court erred in allowing Deputy Welty to testify about statements made to him by Mr. Miller. When Angeli told Mr. Miller there was a man in the house who was going to kill them all, he called the police then went back to the scene. He flagged down Deputy Welty and told the deputy what he had seen. Power claims Mr. Miller's statements to Welty were hearsay, not within the spontaneous statement/excited utterance exception. The statements were:

- Mr. Miller and his daughter customarily picked Angeli up for school around 9:00 a.m.

- The suspect was a white male with reddish-colored hair.

The prosecutor offered the statements not only as an excited utterance/spontaneous statement but also to explain the information the deputy had available to him at the time he made subsequent decisions (R 760). Mr. and Mrs. Bare were informed Mr. Miller saw an individual with red hair and they told the deputy it may have been Angeli's biological father (R 763). All this information was relevant to Deputy Welty's subsequent actions and was non-hearsay.

The statements also fall within the spontaneous statement/excited utterance exception to the hearsay rule 890.803 (1) and (2), Fla. Stat. (1989). Deputy Welty testified that when Mr. Miller flagged him down he "appeared to be a person that had just witnessed an unusual or serious crime and very shaken" (R

757). The statement was spontaneous and contemporaneous. See, Torres-Arboledo v. State, 524 So.2d 403 (1988); Garcia v. State, 492 So.2d 360, 365 (Fla. 1986); Jackson v. State, 419 So.2d 394 (Fla. 4th DCA 1982); Elmore v. State, 291 So.2d 617 (Fla. 4th DCA 1974); State v. Johnson, 382 So.2d 765 (1980); Monarca v. State, 412 So.2d 443 (1982). It must also be remembered that Mr. Miller was disabled, had pleaded with Angeli to get into the car, and was helpless to prevent the crime. These circumstances add to Mr. Miller's excitement and mental state.

Additionally, the statement regarding reddish hair was admissible as one of identification of a person made after perceiving him. §90.801(2)(c), Fla. Stat. (1989).

Even if the statement were erroneously admitted, any error was harmless. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986); Hayes v. State, 581 So.2d 121 (Fla. 1991). Mr. Miller had already testified he customarily picked Angeli up for school (R 729-30). The fact Miller described the assailant as having reddish hair, could only help Power since the Bare's then told Welty Angeli's biological father had red hair and Welty described the man who later robbed him as having sandy blond hair (R 844).

POINT VII

THE TRIAL COURT DID NOT ERR IN DENYING THE MOTIONS TO DISMISS THE INDICTMENT.

Power claims the indictment should have been dismissed because: (1) the grand jury foreperson was selected discriminatorily; (2) the grand jury was improperly impanelled; (3) the grand jury was illegally constituted; and (4) the grand jury was selected discriminatorily.

(1) and (4) Selection of foreperson and grand jury discriminated against blacks and women. Power takes issue with the statutory procedures of selecting jurors from voter registration roles and excusing women who are pregnant or have children under six. Section 40.02, Florida Statutes (1989) provides that jurors should be selected from voter registration lists. Parker v. State, 456 So.2d 436 (Fla. 1985) holds that the issue regarding excusing women has no merit. Power has not alleged that the foreperson on his jury was selected in a discriminatory manner or that he was prejudiced in any way. See, Andrews v. State, 443 So.2d 78, 81 (Fla. 1983). As discussed in Andrews it would be improbable a defendant could show prejudice by the selection of a certain foreperson since the role of the foreperson is not very significant and would not justify quashing on indictment. Id. See, Hobby v. United States, 468 U.S. 339, 104 S.Ct. 3093, 82 L.Ed.2d 260 (1984); Valle v. State, 474 So.2d 796 (Fla. 1985). The trial court did not abuse its discretion in denying the motion for mistrial where the only showing made was that the statutory procedures were followed. If Power has a

problem with the statutory scheme, it is a legislative problem. If the legislature has deemed it appropriate to change the manner of selection of grand jurors, this does not mean there is a retroactive change in law or that there was error in the previous procedure. Power's figures only indicate that fewer blacks register to vote. Power has not established discriminatory selection. See Hernandez v. State, 397 So.2d 435 (Fla. 3d DCA 1981).

In Bryant v. State, 386 So.2d 237, 239 (Fla. 1980), this court held that the fact juries do not statistically reflect the make-up of a community does not, by itself, show an invidious discrimination. This court also rejected the argument that using voter registration lists was discriminatory. Id. at 240. The statistics in Bryant are comparable to the statistics offered by Power and do not show substantial underrepresentation for a significant period of time. See, also Porter v. State, 160 So.2d 104 (Fla. 1964).

The method of grand jury selection sub judice and the legislation authorizing grand jury selection have been consistently upheld as both constitutional and effective. Valle v. State, 474 So.2d 796 (Fla. 1985). Power has failed to establish a defect in the grand jury selection process. See, Id. at 800.

(2) Eighteen member grand jury. Power claims the indictment should be dismissed because there should have been twenty-three members on his grand jury according to Chapters 25554, Laws of Florida, or fifteen to eighteen jurors according to §905.01(1)

Florida Statutes (1989). According to Power, there were eighteen grand jurors, only sixteen of whom deliberated on his case. He argues that under State ex. rel. McClure v. Sullivan, 43 So.2d 438 (Fla. 1949), he is entitled to relief. Section 905.01(1), Florida Statutes (1989), provides for a grand jury panel of not fewer than fifteen or more than eighteen persons. There is no minimum number of persons required to indict. A conflict between a Law of Florida and Section 905.01(1) was recognized in State v. Digman, 294 So.2d 325 (Fla. 1974). This court held that it had a duty to uphold the validity of both acts, if possible. It did so by construing the provisions of the Law of Florida as alternative and cumulative to the provisions of Chapter 40, Florida Statutes as applied to grand juries by §905.01(1). This court upheld the indictment. Id. at 327.

Although Power cites State v. Sullivan, 43 So.2d 438 (Fla. 1949), to support his position, that case clearly states that absent a showing of prejudice a defendant is not entitled to relief. Id. at 441. Power has failed to demonstrate prejudice. Error, if any was harmless. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986).

(3) Legal Irregularities. Power claims the indictment should be dismissed because there is a contradiction between the interim report and the court minutes as to whether Judge Miller or Judge Pfeiffer impanelled the grand jury, there is no order designating any other judge to impanel the grand jury, Judge Byrd's absence was not explained, and the Interim Report indicated the judge and jury, rather than the foreman, appointed

one of the jurors as clerk. Power claims the irregularities render his indictment illegal.

The only basis on which to challenge a grand jury panel is that the grand jurors were not selected according to law. 8905.03, Fla. Stat. (1989). Any irregularity in the judicial administration did not render the indictment defective or prejudice the defendant. When procedural irregularities occur the emphasis is on determining whether there was prejudice. See Lackos v. State, 339 So.2d 217, 219 (Fla. 1976). Power has failed to show prejudice. See also United States v. Brown, 872 F.2d 385 (11th Cir. 1989).

A grand jury indictment carries with it a presumption of correctness. State v. Barnett, 344 So.2d 863, 866 n.1 (Fla. 2d DCA 1977). Indictments and information should be upheld if they are in substantial compliance with the law. Id., Barber v. State, 52 Fla. 5, 42 So. 86 (1906).

POINT VIII

THE TRIAL COURT DID NOT ERR IN DENYING THE MOTION TO SUPPRESS EVIDENCE.

The Affidavit. Power contends the affidavit presented to obtain the search warrant omitted material facts that affected the determination of probable cause. Supposedly, the affidavit omitted the fact that:

- prior to identifying Power, Debra Warden had identified two other people.

- the victims identified a photograph of Power that was eight years old.

Power cites cases which hold that suppression is appropriate if the magistrate is misled by false information which the affiant knew was false or would have known was false except for his reckless disregard for the truth. Power also argues the "good faith" exception does not apply.

Deputy Welty positively identified Power. Cynthia and Debra Warden also positively identified Power as the assailant. Cynthia had never previously identified any other person.

Inclusion of the information regarding Debra's prior tentative identifications would not have precluded a finding of probable cause where there were positve identifications from Deputy Welty and Cynthia. The affidavit contains additional sufficient facts to constitute probable cause (Defense Exhibit #1 dated 5-14-90).

A magistrate's determination should be accorded a presumption of correctness and not disturbed absent a clear demonstration' the issuing magistrate abused his discretion. State v. Prize, 564 So.2d 1239, 1241 (Fla. 5th DCA 1990).

The trial court did not abuse its discretion in denying the motion to suppress. The trial court's ruling comes to this court clothed with a presumption of correctness. Medina v. State, 466 So.2d 1051 (Fla. 1985). The issue raised sub judice was addressed in Sotolongo v. State, 530 So.2d 514 (Fla. 2d DCA 1988). In Sotolongo, this court stated:

> We have found no Florida case dealing with a situation where relevant information has been omitted from a facially sufficient search warrant affidavit, and neither the state nor the appellant has suggested to us an appropriate analysis for resolution of the question. It is clear that a defendant may attack the veracity of the affidavit underlying a search warrant. Franks v. Delaware, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978). In the Franks case, the Supreme Court dealt with allegedly false statements in the affidavit. Courts in other jurisdictions have recognized that the reasoning of the case logically extends to material omissions from the affidavit. 2 W. LaFave, Search and Seizure § 4.4(b), at 194 (2d ed. 1987). This view is nicely discussed and applied in State v. Lehnen, 403 So.2d 683 (La. 1981). The court held there that when a question is raised as to material omissions from the search warrant affidavit, the court reviewing the matter should consider the affidavit as though the omitted facts were included and then evaluate the presence of probable cause in light of the added facts. This is true whether the facts were intentionally omitted or omitted in good faith. The rule should be applied if the omitted facts were nevertheless relevant and should have been included.

Id. at 515-16. In the present case, even if the omitted facts had been included, probable cause existed. Power has failed to demonstrate an abuse of discretion.

Tainted Identification. Included in the affidavit issue is an allegation the identifications were tainted because the state

used a photograph of Power that was not current. Power contends the state used this photo to conform to Welty's description but this is unsupported by any record cite. Power has not alleged the procedure was unnecessarily suggestive or that a suggestive procedure gave rise to a substantial likelihood of irreparable misidentification. See Manson v. Braithwaite, 423 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977). This sub-issue has no merit.

Knock and Announce. Power contends the officers violated the "knock and announce'' provision. 8901.19, 933.09 Fla. Stat. (1989). He recognizes that officers may enter without knocking and announcing when there are reasonable grounds to believe compliance would endanger the officers or the occupants would try to escape, destroy evidence, or harm someone inside.

Officer Barnes, Kissimmee Police Department, testified the officers serving the warrant were informed Power had used a gun or knife to rape females and had committed armed robbery of a deputy (Defense Exhibit #3, p. 526). Barnes felt that if the officers knocked and announced the defendant would arm himself or hinder the arrest. Additionally, the door opened out so it would have been difficult to knock and announce (Defense Exhibit #3, p. 529). Other residents of the house had informed law enforcement Power had a black belt in karate and had a gun in the house (Defense Exhibit #3, p. 534, 541). Lieutenant Taylor testified that through interviews of family members they knew Power had a violent background (Defense Exhibit #3, p. 542). They had talked to Power's father in Brevard who said the defendant was capable of killing (Defense Exhibit #3, p. 542). They had detained

members of Power's family leaving the residence at 2220 Vine Street and those members said Power had a gun and knowledge of the martial arts (Defense Exhibit #3, p. 542). The officers knew Power was armed with a semi-automatic weapon and knives (Defense Exhibit #3, p. 545).

The circumstances are clearly within the exceptions outlined in Benefield v. State, 160 So.2d 706 (Fla. 1964). Power testified he saw an officer coming and was aware he was to be arrested, albeit for a different charge (Defense Exhibit #3, p. 514). The officers were justified in their belief Power was armed and dangerous. He had already robbed a deputy at gunpoint. In fact, Power was hiding in the attic with the maroon bag containing a gun and knife at his side. Power did try to hide and most probably would have tried to escape if he had time. The fact Power was hiding in the attic with the maroon bag containing his gun, gloves and knife illustrates he would have tried to hide or destroy the evidence. This is not a case like State v. Robinson, 565 So.2d 730 (Fla. 2d DCA 1990) in which there were vague references to the possibility of guns. Family members living in the house stated unequivocally Power had a gun and knives. Power's other cited cases are clearly distinguishable. This case is similar to State v. Price, 564 So.2d 1239 (Fla. 5th DCA 1990) in which the officers knew the defendant had an automatic weapon and a family member had a criminal history. See also, State v. Avendano, 540 So.2d 921 (Fla. 1st DCA 1989). The trial court did not abuse its discretion in denying the motion to suppress.

Wrong Name on Search Warrant

Power argues the name on the warrant, Donald McNeal, was defective thus the description of the place to be searched was insufficient.

Power's mother, Donna McNeal rented the residence (Defense Exhibit #3, p. 488-89). The fact the search warrant read that the premises were under the control of Donald McNeal does not render the search warrant invalid. Section 933.05, Florida Statutes (1989) provides:

> 933.05. Issuance in blank prohibited
>
> A search warrant cannot be issued except upon probable cause supported by affidavit or affidavits, naming or describing the person, place, or thing to be searched and particularly describing the property or thing to be seized; no search warrant shall be issued in blank, and any such warrant shall be returned within 10 days after issuance thereof.

The description of the premises in the search warrant and affidavit was:

> Beginning at the intersection of West Vine Street and Phillip Street in Kissimmee, Osceola County, Florida proceed in an easterly direction on West Vine Street for approximately one-tenth of a mile to the sixth house on the southside of West Vine Street. The house sits approximately 100 feet south from the Highway, it is a concrete structure, beige house with dark brown trim, has a carport attached to the east side of the house. The numbers 2220 are above the front door. The address of the house being 2220 West Vine Street.

(Defense Exhibit #1 dated May 14, 1990).

The residence was described in detail. Failure to identify the owner or operator of the premises does not render the warrant

invalid. Samuel v. State, 222 So.2d 3 (Fla. 1969); State v. Cook, 213 So.2d 18 (Fla. 3d DCA 1968).

In Clapsadale v. State, 545 So.2d 946, 947-948 (Fla. 2d DCA 1989) the Court summarized as follows:

> The test to be applied in determining the validity of a search warrant is whether, when a search warrant is read in a common sense, not technical, way, it shows ample facts to establish probable cause and enables the searcher, with reasonable effort, to identify the place to be searched. The test is one of practical accuracy, not technical nicety. United States v. Ventresca, 380 U.S. 102, 85 S.Ct. 741, 13 L.Ed.2d 684 (1965); Stevens v. State, 383 So.2d 1156 (Fla. 5th DCA 1980); Dethlefsen v. State, 363 So.2d 401 (Fla. 4th DCA 1978). The description must be sufficient to point out the place to be searched to the exclusion of all others, and on inquiry, lead officers unerringly to it. Shedd v. State, 358 So.2d 1117 (Fla. 1st DCA 1978).

So long as the place to be searched is sufficiently identified, an inaccuracy will not invalidate the warrant. Ramos v. State, 529 So.2d 807 (Fla. 2d DCA 1988). The trial court did not abuse its discretion in denying the motion to suppress. Even if the search warrant were defective in any way, it was served in good faith. See, United States v. Leon, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984).

POINT IX

THE TRIAL COURT DID NOT ERR IN ALLOWING A KNIFE INTO EVIDENCE; DEFENSE COUNSEL AGREED TO THE CURATIVE INSTRUCTION.

Power claims the trial court erred in admitting the knife in the maroon bag which was in close proximity to him when he was arrested. Power claims the blade on the knife was too narrow to be the murder weapon. Whether the knife introduced into evidence could have been the murder weapon is a question of fact for the jury. See Grossman v. State, 525 So.2d 833, 837 (Fla. 1988) (whether sneakers belong to defendant was a jury question). Any question goes to the weight of the evidence rather than its admissibility. See Mills v. State, 476 So.2d 172, 177 (Fla. 1985); Johnson v. State, 442 So.2d 193 (Fla. 1983). The medical examiner testified the stab wound was 2.8 centimeters long and the crime scene analyst testified the pocket knife was one inch wide (2.54 centimeters). The trial court indicated that there was nothing to conclude the knife was not the murder weapon (R 1569). The knife was properly admitted. Castro v. State, 547 So.2d 111, 114 (Fla. 1989), is distinguishable. In Castro there was no question the steak knife was not the murder weapon since by Castro's own admission he had broken the weapon into pieces and thrown it out the window of a car.

The trial court excluded a report showing there was blood on the knife and instructed the jury that defense counsel's comments regarding blood on the knife were incorrect. Defense counsel agreed to the instruction which Power now claims was a comment on

the evidence (R 1602). The issue is waived. Castor v. State, 365 So.2d 701 (Fla. 1978).

Power also claims the trial court erred in admitting the gun and gloves found in the maroon bag which was next to him when he was arrested. Trial counsel objected that the evidence was irrelevant and unduly prejudicial. Deputy Welty testified he did not see gloves on Power's hands and that Power had a light to medium tan (R 889). The gloves were tan. The gloves were seized in Power's bag that he had while hiding in the attic. The gloves were relevant to show Power possessed items which would explain the lack of fingerprints in the Bare residence and on the gun. Whether Deputy Welty saw the gloves or Power had them on when he robbed the deputy is a question of fact for the jury. See Grossman, supra. The fact Power possessed and was concealing a gun is relevant because Angeli was threatened at gunpoint and Welty was robbed at gunpoint. The fact the gun, gloves and knife were in Power's possession when he was hiding establishes Power had available the items he used in the murder and was indicative of his method of operation. The items were relevant to the identity of the perpetrator.

The trial court has broad discretion in the admission of evidence. Welty v. State, 402 So.2d 1159 (Fla. 1981). Unless an abuse of discretion can be shown its ruling will not be disturbed. Hardwick v. State, 521 So.2d 1071 (Fla. 1988). Defense counsel attacked the gun, gloves and knife in closing argument (R **2003**). He argued that Welty described the gun as a brown-tinted, **.45** semi-automatic (R 2008) or a nine millimeter (R

2011), and that Welty had great difficulty with the gun (R 2013). Counsel argued the knife seized from Power was not the murder weapon (R 2030-2031). He attacked the gloves (R 2033). Error, if any, was harmless. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986).

All evidence presented by the State is prejudicial to a defendant. Evidence is only excluded where unfair prejudice substantially outweighs the probative value. 890.403, Fla. Stat. (1989). Where a trial court has weighed probative value against prejudicial impact an appellate court will not overturn that decision absent a clear abuse of discretion. Fleming v. State, 457 So.2d 499, 501-502 (Fla. 2d DCA 1984); Pulliam v. State, 446 So.2d 1172, 1173 (Fla. 2d DCA 1984). The trial court did not abuse its discretion.

POINT X

THE TRIAL COURT DID NOT RESTRICT CROSS-EXAMINATION.

Power claims cross-examination was restricted when he was precluded from impeaching Officer Welty on information left out of his report. Defense counsel had pointed out that Welty's report did not mention unusual hair color, the state objected, and the trial court instructed the jury to disregard the statement (R **855-57, 877**). Trial counsel did not specifically object that cross-exam was restricted and this issue was not preserved for appellate review. Bertolotti v. State, **565** So.2d **1343** (Fla. **1990**); Hitchcock v. State, **578** So.2d **685, 689** n.4 (Fla. **1990**).

Section **90.612**, Florida Statutes (**1989**), provides that the judge shall exercise reasonable control over the mode and order of the interrogation of witnesses and presentation of evidence so as to facilitate discovery of the truth, avoid needless consumption of time and protect witnesses from harassment. The rule also provides that cross examination is limited to subject matter brought out on direct examination and to matters affecting credibility.

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

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

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

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

Power has not demonstrated the trial court abused his discretion in excluding the evidence. Cruse v. State, 16 F.L.W. S702 (Fla. Oct. 24, 1991).

Although Power attempts to distinguish State v. Johnson, 284 So.2d 198 (Fla. 1973), that case held that police reports should

not be used for impeachment as to an omission in a report. Id. at 200. Johnson allowed impeachment only in the restricted sense outlined in that case and only within the trial court's sound discretion. Id. at 200-201.

The trial court did not abuse its discretion. See Hardwick v. State, 521 So.2d 1071, 1075 (Fla. 1988); Jones v. State, 580 So.2d 143, 145 (Fla. 1991); Banda v. State, 536 So.2d 221, 224 (Fla. 1988); Jackson v. State, 530 So.2d 269 (Fla. 1988).

POINT XI

THE INTRODUCTION OF *AN* AUTOPSY PHOTOGRAPH DID NOT DENY POWER A FAIR TRIAL.

Defense counsel objected to exhibit #65. The photograph was necessary for the medical examiner to describe the stretching and contusion in the vaginal and anal areas. It was also relevant to show the contusions on the inner thighs. The photograph was cited in the trial court's findings of facts as showing the abrasions (R 3265). The photograph was relevant to the offense of sexual battery and to the aggravating circumstance of heinous, atrocious and cruel. Power cites Hoffert v. State, 559 So.2d 1246 (Fla. 4th DCA 1990); Bush v. State, 461 So.2d 936, 940 (Fla. 1984); and Alvord v. State, 307 So.2d 433 (Fla. 1975), to support his position. In Hoffert, the photograph depicted the internal portion of the victim's head after an incision had been made from behind the ears to the top of the head, with the scalp rolled away revealing flesh. The photograph was cumulative to other testimony and evidence. In Bush photographs of a blow-up of the victim's bloody face at the morgue and a close-up of the gunshot wound to the head were admissible and this court stated:

> The test of admissibility of photographs in situations such as this is relevancy and not necessity. Photographs are admissible where they assist the medical examiner in explaining to the jury the nature and manner in which the wounds were inflicted. Welty **v.** State, 402 So.2d 1159, 1163 (Fla. 1981); Bauldree v. State, 284 So.2d 196, 197 (Fla. 1973). In the instant case, exhibit twenty-one was used in order to assist the medical examiner in explaining the external examination of the victim. This exhibit was clearly admissible as an aid in illustrating

> to the jury what the examiner observed during his examination. Exhibit fifteen, though taken away from the scene, is treated no differently than exhibit twenty-one. We have repeatedly stated that:
>
> > [T]he current position of this Court is that allegedly gruesome and inflammatory photographs are admissible into evidence if relevant to any issue required to be proven in a case. Relevancy is to be determined in the normal manner, that is, without regard to any special characterization of the proffered evidence. Under this conception, the issues of "whether cumulative", or "whether photographed away from the scene," are routine issues basic to a determination of relevancy and not issues arising from any "exceptional nature" of the proffered evidence. State v. Wainwright, 265 So.2d 361, 362 (Fla. 1972)(emphasis supplied). See Herringer v. State, 251 So.2d 862, 864 (Fla. 1971); and Meeks v. State, 339 So.2d 186 (Fla. 1976). Bush argues that exhibit fifteen was unduly prejudicial because it was gruesome and may have made a crucial difference in the jury's recommendation in this case. In Williams v. State, 228 So.2d 377 (Fla. 1969), this Court noted that similarly gruesome photographs depicted a view which was "neither gory nor inflammatory beyond the simple fact that no photograph of a dead body is pleasant." Id. at 379.

Bush at 939-40. Similarly, the photographs in Alvord were admissible.

The photographs of the victim were relevant and admissible. Patterson v. State, 513 So.2d 1257 (Fla. 1987); Grossman v. State, 525 So.2d 833 (Fla. 1988). The trial court found the photographs to be not unusually gruesome, but even if they were, that would not affect admissibility. If a photograph is relevant to an issue to be decided in a case, the fact that it is gruesome and offensive does not bar admissibility. Adams v. State, 412 So.2d 850 (Fla. 1982). The evidence was not unfairly

prejudicial. Swafford v. State, 533 So.2d 270 (Fla. 1988). In Henderson v. State, 463 So.2d 196, 199 (Fla. 1985) this Court allowed photographs of partially decomposed bodies and stated that "those whose work products are murdered human beings should expect to be confronted by photographs of their accomplishments". Id. at 200. See also, Burns v. State, 16 FLW S389 (Fla. May 16, 1991) (color slides of the victim in charred state); Haliburton v. State, 561 So.2d 248 (Fla. 1990) (used by medical examiner to illustrate the nature of the victim's wounds). The trial court did not abuse its discretion.

POINT XII

THERE WAS NO ERROR IN JURY SELECTION TO JUSTIFY A NEW TRIAL.

Power claims he should have been allowed fifty peremptory challenges, but was allowed only nine. Florida Rule of Criminal Procedure **3.350** provides:

> Each party shall be allowed the following number of peremptory challenges:
>
> (a) Ten, if the offense charged is punishable by death or imprisonment for life;
>
> (e) If an indictment or information contains two or more counts or if two or more indictments or informations are consolidated for trial, the defendant shall be allowed the number of peremptory challenges which would be permissible in a single case, but in the interest of justice the judge may use his judicial discretion in extenuating circumstances to grant additional challenges to the accumulate maximum based on the number of charges or cases included when it appears that there is a possibility that the State or the defendant may be prejudiced. The State and the defendant shall be allowed an equal number of challenges.

The Rules of Criminal Procedure govern the procedure in all criminal proceedings in State courts. Fla.R.Crim.P. **3.010.** Power was charged with first degree murder and entitled to ten peremptory challenges. See, Mendyk v. State, **545** So.2d **846, 849** (Fla. **1989).** The trial court did not abuse its discretion. Parker v. State, **456** So.2d 436 (Fla. **1984).**

Power next claims the trial judge erred in refusing to sequester the jury. He cites various reasons for sequestration but admits the trial judge followed through on each potential situation to insure there was no possibility of error. He has

presented no evidence the "community was clamoring for a conviction and death sentence". Power has shown no abuse of discretion or prejudice. Sequestration of a jury is within the discretion of the trial court absent a showing of harm or prejudice to the defense. Banda v. State, 536 So.2d 221, 224 (Fla. 1988).

Power argues the trial court erred in overruling his objection regarding the absence of African-Americans and death-sentence-opposed jurors on the venire. Power claims using voter registration rolls to select the venire resulted in an underrepresentation of African-Americans. Although the legislature has enacted legislation effective January 1, 1991 which provides jurors shall be selected from those who possess drivers licenses (Ch. 91-235, S.B. 678), the law which controlled at the time of Power's trial specified that jurors be taken from those persons registered to vote. §40.02, Fla. Stat. (1989). The trial judge did not abuse his discretion in overruling defense counsel's objection (R 67). Power further recognizes he must show some systematic exclusion in the jury selection process and admits he cannot show this (Initial Brief at 51-52).

Power also argues he was prejudiced that no juror in the first sixty-one jurors opposed the death penalty but cites no case law or reason on which to base his claim of error. There is no merit to this claim. The trial court did not abuse its discretion in overruling the motions. See, Occhicone v. State, 570 So.2d 902 (Fla. 1990). Error, if any, was harmless beyond a reasonable doubt. State v. DiGuilio, 491 So.2d 129 (Fla. 1986).

Power has failed to show any juror who actually sat was not impartial. See Ross v. Oklahoma, 487 U.S. 81, 108 S.Ct. 2273, 101 L.Ed.2d 180 (1988). The Constitution entitles the defendant to a fair trial not a perfect one. Id. at 108 S.Ct. 2280, citing Delaware v. Van Arsdale, 475 U.S. 673, 681, 106 S.Ct. 1431, 1436, 89 L.Ed.2d 674 (1986).

POINT XIII

THE TRIAL COURT DID NOT ERR IN DENYING TWO SPECIAL JURY INSTRUCTIONS.

Power requested a special instruction regarding hair comparisons and circumstantial evidence.

The trial court does not abuse its discretion in rejecting instructions beyond those contained in the standard jury instructions. Mendyk v. State, 545 So.2d 846, 850 (Fla. 1989). The trial court gave the former standard instruction on circumstantial evidence which he was not required to give but did so at the request of defense counsel. See Rembert v. State, 445 So.2d 337 (Fla. 1984). The requested instructions were not standard instructions. A refusal to deviate from the standard instructions is not improper. Dufour v. State, 495 So.2d 154, 163 (Fla. 1980). A trial judge "walks a fine line indeed" in departing from the standard instructions. See Kelley v. State, 486 So.2d 578, 584 (Fla. 1986). The trial court did not abuse its discretion. King v. State, 514 So.2d 354 (Fla. 1987). Defense counsel argued the weight to be given hair analysis and circumstantial evidence in closing argument. This renders any error harmless. Seckington v. State, 424 So.2d 194 (Fla. 5th DCA).

POINT XIV

THE TRIAL COURT DID NOT ERR IN LIMITING POWER'S ATTEMPTS TO EXPLAIN DR. RADELET'S BIAS.

Power complains that the trial court would not allow him to rehabilitate Dr. Radelet after the state impeached the witness regarding bias. This issue is not preserved since counsel did not proffer the testimony he claims was excluded. §90.104(1)(b), Fla. Stat. (1989); Woodson v. State, 483 So.2d 858 (Fla. 5th DCA 1986). Neither did defense counsel object to the prosecutor's closing argument (R 2583). The trial court did not abuse its discretion in sustaining the state objections. Supposedly Dr. Radelet was testifying on Power's future dangerousness. Whether the doctor was for or against the death penalty was a completely collateral issue not justifying the time and clouding of issues Power attempted.

Power states that Dr. Radelet was qualified as an expert without objection. To the contrary, the State objected to Dr. Radelet testifying at all (R 2432-36). The trial judge heard argument on the motion to exclude Dr. Radelet's testimony (R 2436-41). The judge denied the motion in limine (R 2443). The State cross-appealed the trial judge allowing Dr. Radelet to testify (Point II on cross-appeal).

POINT XV

THE TRIAL COURT DID NOT ERR IN FINDING THE MURDER WAS HEINOUS, ATROCIOUS AND CRUEL AND COLD, CALCULATED AND PREMEDITATED.

Heinous, Atrocious, and Cruel.

Angeli Bare was accosted at gunpoint in her own home. She was very nervous, frightened and crying when she told Mr. Miller Power would kill all three of them (R **734).** Mr. Bare testified that if the wet sheets had been on the floor before he left he would have noticed them, and Angeli would never leave her doll on the floor (R **665-66).** Power's pubic hairs were on the bedspread (R **1535, 1629-75).** The state argued that something happened in the bedroom that caused her to urinate on the covers (R **1953).** Power offers no other explanation for his pubic hairs being on the bedspread.

Although Power contends Angeli was knocked unconscious at some point he does not say when. The medical examiner said the blow to the child's head was before death (R **3311)** and that it was only "possible" the blow could cause unconsciousness (R **3317).** There is no doubt Angeli was conscious when Power marched her across the field at gunpoint with her school books, lunch bag, purse and jacket. As the trial court found, even if the blow to the head at some point rendered the child unconscious the only reasonable explanation for the hog-tying was she was either conscious or regained consciousness during the sexual batteries **(R 3264).** As the prosecutor pointed out, the child's thumbs were clenched inside her hands indicating consciousness at the time of death (R **2578,** state exhibit #58). The trial court found:

Defense argues this aggravating circumstance does not apply because the State has failed to prove the victim was conscious when the sexual assault and the fatal wound occurred. Defense relies upon the testimony of the medical examiner that there was a blow to the victim's head which could have rendered the victim unconscious and he could not state when the blow had occurred.

The defense sent the victim to Miller's car to tell him to leave. The defendant had by that time done something to sufficiently terrorize the victim to the point she was afraid to attempt to escape, although she was only a few feet from the car and was farther from the defendant who was in the house, and she was being urged to escape by Miller.

Pubic hair consistent with the defendant's was found in the victim's bedding. The victim's bed was in disarray as if a struggle had occurred. It was not noticed to be in that condition earlier that morning before her parents left for work. Both her parents testified she was required to make her bed in the morning and they would have noticed if it had not been made.

The victim was found in a wooded area near her house. In close proximity to her body were her school books, jacket, purse and empty lunch bag. It appears when she left the house she expected to go to school.

She was found bound with strips of cloth cut from her pants. Obviously, at the location of her death, the defendant forced the removal of her pants. Was she conscious at that point? If so, her terror was rekindled by the realization she was going to be sexually assaulted, not released. If she was not conscious, it is clear that at some time she regained consciousness and became aware of her state of undress because there is no other reasonable explanation why the defendant would take the time to hog tie and gag her except to prohibit her struggles, escape or alerting others to her presence and need for help.

The medical examiner testified there were abrasions on the inside of her thighs and on

her labia major and minor which were caused by rubbing of her skin with cloth. These abrasions are clearly visible in State's exhibit #65.

The location of these abrasions are consistent with a sexual assault by a person wearing pants. When the location of the abrasions are compared with the position of the victim's body when hog tied as shown in State's exhibit #8 they are more consistent with the conclusion that they occurred before she was bound than after she was found. That would also be consistent with the manner in which the defendant committed his prior sexual assaults as testified to by those victims, specifically that they were assaulted and then bound.

If the victim was unconscious during the sexual assault, it is a reasonable conclusion that when she regained consciousness and the defendant determined a need to bind her, she would have become aware of and suffered the pain which would have resulted from the sexual assault as testified to by the medical examiner.

The defendant, at age **25,** over **6** foot tall, weighing in excess of **140** pounds and armed with a gun, took a small **12** year old girl prisoner. Terrorized her to the extent she was afraid to attempt to escape when a viable opportunity was presented. Removed her pants and sexually assaulted her anally and vaginally. Hog tied and double gagged her and then, when she was entirely helpless, administered *a* fatal stab wound that caused her to slowly bleed to death over a period of 10 to 20 minutes. Some, if not all, of these acts had to have occurred while she was conscious.

I cannot envision an argument that this crime was less than "extremely wicked or shockingly evil" and thus "heinous"; or "outrageously wicked and vile" thus "atrocious". Clearly it was committed in a manner "designed to inflict a high degree of pain with utter indifference to the suffering of this child" thus "cruel".

(R 3263-66). There is sufficient, competent evidence to support a finding of heinous, atrocious and cruel. See Tompkins v. State, 502 So.2d 415, 420 (Fla. 1986); Sanchez-Velasco v. State, 570 So.2d 908, 916 (Fla. 1990).

As the trial judge observed, the position of the body and Power's pattern with his victims support the position Power would bind the victim before intercourse. If Angeli were unconscious there would be no reason to bind her. The testimony from Power's other victims showed he enjoyed toying with the victim and engaged in oral, anal and vaginal intercourse (R 2397-2426). There was no reason for Power to gag a victim who couldn't cry out.

In arriving at whether an aggravating circumstance has been proved the trial judge may apply a "common-sense inference from the circumstances". Gilliam v. State, 582 So.2d 610, 612 (Fla. 1991); Swafford v. State, 533 So.2d 270, 277 (Fla. 1988). Power does not seem to contest the fact this crime was heinous, atrocious and cruel unless the victim was unconscious. The abduction and brutal rape of a young child has been consistently upheld as heinous, atrocious and cruel. Adams v. State, 412 So.2d 850 (Fla. 1982); Hitchcock v. State, 578 So.2d 685 (Fla. 1990); Jennings v. State, 453 So.2d 1109 (Fla. 1984); Goode v. State, 365 So.2d 381 (Fla. 1978); Duckett v. State, 568 So.2d 891 (Fla. 1990); Sanchez-Velasco v. State, 570 So.2d 908 (Fla. 1990).

Although the only logical conclusion is that Angeli was conscious throughout the sexual batteries and stabbing, even if she were knocked unconscious in the field, the fear, and

emotional strain up to that point supports a finding of heinous, atrocious and cruel. See Adams v. State, 412 So.2d 850, 856 (Fla. 1982); Hitchcock v. State, 578 So.2d 685, 693 (Fla. 1990); Jennings v. State, 453 So.2d 1109, 1115 (Fla. 1984).

Power compares this case to Robinson v. State, 574 So.2d 108, 112 (Fla. 1991). In Robinson this Court observed that "ordinarily, an instantaneous or near-instantaneous death by gunfire does not satisfy the aggravating circumstance of heinous, atrocious and cruel". Id. at 112. Angeli was not shot, she was stabbed in the neck and would bleed for ten minutes to one-half hour before she died and would have remained conscious for a long time (R 1154, 1162[3]). Furthermore, the victim in Robinson was never under the apprehension she would be killed, and this fact was established by the co-defendant's testimony. Id. at 112. Power told Angeli he would kill all three people if Mr. Miller and his daughter didn't leave. She was obviously in fear for her life and theirs and refused to enter the car because then all three would die. Surely Angeli would not have thought Power only intended to rob her when she was marched at gunpoint across the field and hog-tied. There is no comparison to Robinson. This case compares to Adams, Hitchcock, Jennings, Goode, Duckett, and Sanchez-Velasco, supra.

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[3] There was an objection at the end of the paragraph containing the testimony regarding consciousness; however, it appears the objection was only to testimony regarding blood supply to the brain since the objection was posed two sentences after the cited testimony. There was no motion to strike.

Cold, Calculated and Premeditated.

Angeli Bare was abducted at gunpoint, hog-tied and gagged, sexually battered, and stabbed one time in the neck. There was no sign of panic. Power coldly cut the child's pants into strips to hog-tie and gag her (R 1105). When he had sexually battered her he placed one strategic stab wound in the right side of her neck. On September 23, **1987**, two weeks earlier, Power had threatened Allison Wallace, saying if she didn't shut up he would slit her jugular and be dead (R **2398**). Power abducted the Dunbar and Warden sisters September **10** and **11**, raped Allison Ramos on September 23, and murdered Angeli on October 6, 1987. Every two weeks he would commit a rape and the violence escalated **as** he progressed. Power cut Allison Wallace on the hand when she struggled. The only logical conclusion is that Power was serious in his threat to Ms. Wallace - that he would kill a person who struggled - and carried through the threat with Angeli. Angeli had abrasions on her neck indicating her collar had been held back tightly **(R 1109, 1121)**. She had abrasions on her knees, forehead, nose and cheeks (R **1110**). The circumstances show that Power took Angeli to an isolated area and committed the murder silently with a knife. Whether or not Power killed the previous victims has nothing to do with whether this murder was cold, calculated and premeditated. It only means he would have killed the others, too, except that they were subservient and did not struggle. There is no explanation for Power stabbing Angeli one time in the neck if he did not intend to kill her or if he was in a panic.

The trial court found:

> It is clear from the evidence in this case and the testimony of the victims of the defendant's prior sexual assaults that the defendant had thought out, designed, prepared or adapted by forethought his method of attacking females. He subdued them through the use or threat of violence and the use of a deadly weapon, sexually assaulted them in various similar ways and then bound and gagged them with a double gag.
>
> In his first attack on September 10, 1987 he forcibly struck one of the victims in the face and choked the other. In the next attack on September 23, 1987 he cut the victim in the struggle and told her he would cut her jugular vein and she would bleed to death in minutes.
>
> In this case he followed his previously designed method or plan of attack. He subdued Angeli Bare with the threat of violence and the use of a gun. He sexually assaulted her anally and vaginally and bound her with strips of cloth cut from her pants. While she was helpless, without any pretense of moral or legal justification, he stabbed her in the neck, causing her to bleed to death in the manner he had previously thought out and described to his victim of September 23, 1987. He prepared for this murder by obtaining a knife, even though he had a gun, and by rendering his victim unable to resist by hog tying her.
>
> The coldness with which this was accomplished was demonstrated by the defendant eating the victim's sandwich she had prepared for lunch as he walked away from the scene of this brutal murder and his lack of emotion or nervousness when confronting Deputy Welty.

(R 3266-67). The trial court findings are supported by substantial competent evidence. This case is comparable to other cases in which this court has upheld the aggravating circumstances of cold, calculated and premeditated. See Robinson v. State, 574 So.2d 108 (Fla. 1991); Sireci v. State, 16 FLW 623

(Fla. Sept. 19, 1991); Shere v. State, 579 So.2d 86 (Fla. 1991); Brown v. State, 565 So.2d 304 (Fla. 1990)(defendant only planned to shoot the victim if she started hollering); Swafford v. State, 533 So.2d 270 (Fla. 1988).

While aggravating factors must be proven beyond a reasonable doubt, evaluating the evidence and resolving factual conflicts are the trial judge's responsibility. When a trial judge, mindful of the applicable standard of proof, finds that an aggravating circumstance has been established, the finding should not be overturned unless there is a lack of competent substantial evidence to support it. Bryan v. State, 533 So.2d 744 (Fla. 1988); Swafford v. State, 533 So.2d 277 (Fla. 1988).

Even if any aggravating factor were stricken, it would not change the sentence where there are four aggravating factors weighed against no mitigating circumstances. Rogers v. State, 511 So.2d 526 (Fla. 1987). See Clemons v. Mississippi, 110 S.Ct. 1441 (1990). This crime is clearly one of those for which the death penalty is deserved. State v. Dixon, 283 So.2d 1 (Fla. 1973).

POINT XVI

POWER WAS NOT DENIED EFFECTIVE ASSISTANCE OF COUNSEL AND FULL REVIEW BY THIS COURT.

Power claims a minor editorial error in the trial transcript renders the entire transcript unreliable. When Power filed his Initial Brief on October 22, 1991 it contained allegations that the trial only allowed the defense nine peremptory challenges rather than ten (Point II A). In reviewing the jury selection issue, it became quite apparent that a statement attributed to the prosecutor was actually made by defense counsel. There were three prosecutors and three defense counsel present. When the trial judge asked whether the defense objected to jurors four through nineteen the following ensued:

> The Court: Any objection from the defense four through nineteen?
>
> Mr. Blankner: One thing is Mr. Rodman's vacation. I have a concern about this.
>
> The Court: As well I think you should.
>
> Mr. Townes: Let's yank Mr. Rodman.
>
> The Court: Okay. Any objection from the State on four through twenty.
>
> Mr. Townes: State will strike twenty.
>
> The Court: Defense, four through twenty-one.
>
> Mr. Blankner: We would challenge juror number seventeen.
>
> The Court: Any objection from the State jurors four through twenty-two.
>
> Mr. Townes: No objection, sir.
>
> The Court: Four through twenty-two.

Mr. Blankner: Strike number 19.

The Court: State, four through twenty-three.

Mr. Townes: Twenty-three.

The Court: Each of you have used half of your peremptory challenges. Defense, four through twenty-four.

(R 387). It is generally inconsistent with the general flow of the colloquy for the prosecutor to have amicably agreed with his adversary "[l]et's yank Mr. Rodman". Further, the judge would question each side in turn. If there was a challenge for cause, the judge would ask for a response (R 384). Additionally, the judge stated that each side had used half of his peremptory challenges and the defense accepted this statement. Surely if the defense had only used four challenges instead of five in the first round, they would have objected to this statement. These clues lead the state to question the accuracy only of which of the five attorneys involved actually stated "Let's yank Mr. Rodman". There is no other such obvious inaccuracy noted by appellate counsel and his claim is without merit. This is not a situation in which the entire transcript is questionable. This editorial error jumps from the page.

POINT XVII

THE AGGRAVATING CIRCUMSTANCE HEINOUS, ATROCIOUS AND CRUEL IS NOT UNCONSTITUTIONALLY VAGUE AND THE JURY INSTRUCTION PROVIDES ADEQUATE GUIDANCE.

The claim that the instruction on heinous, atrocious and cruel is unconstitutionally vague has been repeatedly rejected. Smalley v. State, 546 So.2d 720 (Fla. 1989); Sanchez-Velasco v. State, 570 So.2d 908 (Fla. 1990); Smith v. Dugger, 565 So.2d 1293, 1295 n.3 (Fla. 1990); Tompkins v. Dugger, 549 So.2d 1370 (Fla. 1989). Power has advanced no compelling reason to re-examine this issue.

POINT XVIII

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

Appellant next presents a menagerie of constitutional claims asserting that the Florida sentencing scheme is unconstitutional on its face and as applied.

Without addressing each, appellee would merely urge that acknowledgment by appellant that the claims he has presented have all been addressed or decided adversely to capital defendants and a similar result is mandated herein. See, Hitchcock v. State, 578 So.2d 685, 688 n.2 (Fla. 1990); Blystone v. Pennsylvania, 494 U.S. 299 (1990); Proffitt v. Florida, 428 U.S. 242 (1976); Barclay v. Florida, 463 U.S. 939 (1983); Garcia v. State, 492 So.2d 360, 367 (Fla. 1986); Robinson v. State, 574 So.2d 108 (Fla. 1991); Gunsby v. State, 574 So.2d 1085 (Fla. 1991); Roqers v. State, 511 So.2d at 536; Brown v. State, 473 So.2d 1260 (Fla. 1985); Spaziano v. Florida, 468 U.S. 447 (1984); Stano v. State, 460 So.2d 890 (Fla. 1984); and State v. Dixon, 283 So.2d 1 (Fla. 1973).

CROSS APPEAL

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN EXCLUDING THE EVIDENCE OF COLLATERAL CRIMES FROM THE GUILT PHASE.

On May 8, 1990, the state filed a Notice of Intention to Use Collateral Evidence (R 2914). The collateral evidence attached to the Notice involved a series of crimes committed by Power between September 11 and October 6, 1987 when Angeli Bare was murdered. On September 11, Power forced his way into the Warden home, abducted Debbie and Cindy Warden while their parents slept, and sexually battered them in an unoccupied house nearby (R 2917-21). On September 12, Power forced his way into the Dunbar home, abducted Maria and Terri Dunbar, and sexually battered them in an unoccupied house nearby (R 2929-34). On September 23, Power forced his way into the apartment where Allison Ramos was alone, sexually battered her, and stole her car (R 2915-16). On September 24, Ms. Ramos' car was found two blocks from the Warden home, which was also near Power's mother's house (R 2916, 2926). Ms. Ramos lived in Longwood where Power was spending the night with his brother (R 2926). On September 28 Power was hired by Auto Detail using the name of Mark O'Steen, a guest in the Dunbar home whose wallet was stolen the night the children were abducted (R 2925, D Exh. #13 Interview with Maria Dunbar at 30). On October 6 Power was absent from work (R 1001). This was the day Angeli Bare was murdered near the Auto Detail business, the Galaxy Motel where Power was staying (R 465, 550, 589, 592).

Defense counsel objected to the use of collateral crime and similar fact evidence (R 2995-98). The trial court heard argument on the motion May 21, 1990 (R 2266-2320). The trial judge ordered that evidence of collateral crimes would be excluded (R 3047). This ruling was error.

The trial court's order does not state the reason for granting the defendant's objections to the similar fact evidence (R 3047). The Objection to Use Collateral Crimes and Similar Fact Evidence includes several arguments which will be discussed numerically:

1. Notice not timely. The state filed its Notice of Intention to Use Collateral Evidence on May 8, 1990 (R 2914). Trial was May 21 through June 3, 1990. Florida Rule of Evidence 90.404 (2)(b)(1) provides:

> When the state in a criminal action intends to offer evidence of other criminal offenses under paragraph (a), no fewer than 10 days before trial, the state shall furnish to the accused a written statement of the acts or offenses it intends to offer, describing them with the particularity required of an indictment or information. No notice is required for evidence of offenses used for impeachment or on rebuttal.

At the hearing, defense counsel seemed to direct his timeliness objection to the testimony of the Wardens (R 2268-69). The attachments to the Notice clearly contained a detailed statement of the Warden offenses, as well as the Ramos and Dunbar offenses.

2. Form of the Notice. Defense counsel cited Garcia v. State, 521 So.2d 191 (Fla. 1st DCA 1988) to support his argument that the form of the notice was legally insufficient and improper

(R 2995). In Garcia, the state filed an amended statement of particulars immediately before jury selection. Id. at 195. The amended statement expanded the time frame of the offense from a two-hour time period to a twenty-four hour time period. The appellate court found that although the state did not comply with the statutory notice requirements, the defective notice was harmless. Garcia is inapposite to this case. The state filed its notice timely and there was no such untimely amendment as in Garcia. In any case, Garcia held any error harmless.

3. The acts surrounding the collateral offenses are not "signature" or "hallmark" events. Defense counsel argued that the crimes were dissimilar and that "no reasonable individual could conclude that the person who committed the first offense is necessarily the same person who committed the abduction, sexual battery, and murder of Angeli Bare" (R 2998).

Florida Rule of Evidence 90.404(2)(a) provides:

> Similar fact evidence of other crimes, wrongs, or acts is admissible when relevant to prove a material fact in issue, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, but it is inadmissible when the evidence is relevant solely to prove bad character or propensity.

See also, Williams v. State, 110 So.2d 654 (Fla. 1959). Evidence showing collateral crimes or wrongful acts is admissible if it is relevant for any purpose other than to show bad character or propensity. Id. So-called "similar facts crimes" are merely a special application of the general rule that all relevant evidence is admissible unless specifically excluded by a rule of evidence. The requirement that similar fact crimes contain

similar facts to the charged crime is based on the requirement to show relevancy. This does not bar the introduction of evidence of other crimes which are factually dissimilar to the charged crime if the evidence of other crimes is relevant. Bryan v. State, 533 So.2d 744 (Fla. 1988). In Bryan, the state introduced evidence that the defendant committed a bank robbery three months prior, and had stolen a boat in Gulf Breeze one week prior, to the murder. The boat theft was also relevant because it was close enough in time to give the jury a full and accurate picture of how the defendant came into contact with the victim and the full context of the crimes. "Among the other purposes for which a collateral crime may be admitted under Williams is establishment of the entire context out of which the criminal conduct arose". Jackson v. State 522 So.2d 802, 804 (Fla. 1988). Among the comments admitted over objection in Jackson were statements that the defendant had an argument with an unnamed person in the back of a bar, threatened to kill him, and shot at him several times, just prior to taking the first victim in the car. This court found the assault properly admissible as one incident in a chain of chronological events. The trial court also admitted testimony concerning a prior assault by Jackson on one of the two victims approximately two weeks before the murders. Similarly, in Rogers v. State, 511 So.2d 526 (Fla. 1987), evidence of two grocery-store robberies in which no murder occurred was admissible.

In the present case, the information concerning the continuous pattern of sexual battery was relevant for several

reasons, including motive and to provide the jury with the entire factual context in which the charged crimes arose. See Craig v. State, 510 So.2d 857 (Fla. 1987). In Craig, this court held that evidence of cattle thefts on several occasions was relevant to show his motive for killing the two victims. The cattle thefts were not wholly independent of the murders but rather were an integral part of the entire factual context in which the charged crimes took place. While evidence of motive is not necessary to a conviction, when it is available and would help the jury to understand the other evidence presented, it should not be kept from them merely because it reveals the commission of crimes not charged. The test for admissibility is not the necessity of evidence, but rather its relevancy. Id. at 863.

The Williams rule evidence was relevant to establish a mode of operation, identity and a common plan. This case is similar to Duckett v. State, 568 So.2d 891 (Fla. 1990), in which the defendant picked up young women and made sexual advances. There were three such incidents within six months of the victim's death. The collateral incidents involved no force or violence and involved women who were older than the victim. This court found two incidents to be relevant to establish Duckett's mode of operation, his identity, and a common plan. Id. at 895. The third incident was consensual and not proper Williams rule evidence.

Power's theory of defense was that he did not murder Angeli Bare. The collateral crimes evidence was relevant to Power's motive, opportunity, intent, preparation, plan and identity.

There is more than a general similarity between the facts of the incidents involving Cindy and Debbie Warden, Terri and Marie Dunbar, Ms. Ramos, and the instant offense. The history of events is also relevant to the entire context out of which the crime arose. The attack on The Dunbars was September 11, 1987; on the Wardens was September 12, 1987; on Ms. Ramos was September 23, 1987; and on Angeli Bare was October 6, 1987. The Dunbars and Wardens lived in Kissimmee where Power stayed with his mother (R 2319, 2329, 2917, 2934-35). Ms. Ramos lived in Longwood. Power was visiting his brother in Longwood on the night of the attack (R 2922-23). Power was staying at the Galaxy Motel on Orange Blossom Trail and had a job on Orange Blossom trail when Angeli Bare was murdered (R 589, 2927). The Bare residence was near Orange Blossom Trail. Ms. Ramos' car was found near the Warden house (R 2916). Some of the similarities in the crimes are as follows:

Debbie and Terri Warden:

1. Entered by forcing his way into house (R 2917).

2. Threatened to kill the victims with a gun (R 2917).

3. Cut available material (Debbie'sshirt) into strips to tie the victims (R 2921, 2414).

4. Took the victims to an isolated location to perform sexual acts (R 2920).

5. Made the victims perform oral sex, then assaulted from the rear (R 2920-21, 2416).

6. Tried to choke the victim (R 2414).

7. Hit victim in face (R 2424).

8. He gagged the victims using the cloth strips he cut (R 2921).

9. He tied one victim's feet to the other's hands (R 2921).

Maria and Terri Dunbar:

1. Entered by force, cutting screen (R 2329, 2933, Defendant's Exhibit #13 at 19).

2. Threatened to kill victims with a gun (R 2929).

3. Cut available material (Terri's shirt) to tie the victims (R 2929, 2931).

4. Took the victims to an isolated location to perform sexual acts (R 2929).

5. Made the victims perform oral sex, then assaulted from the rear (R 2929).

6. Tried to choke the victims.

7. Hit victim in head (2931, Defense Exhibit #14 Taped Interview at 21).

8. Gagged the victims using the cloth strips he cut, and tied the victims together "like you would an animal" (R 2929, 2931, Defendant's #13 at 32).

9. Took a memento - Mark Osteen's wallet (R 2933).

Ms. Ramos:

1. Entered by forcing his way into house, using a "T" cut in the screen (R 2916).

2. Threatened to kill the victim, holding a knife to her neck (R 2915).

3. Cut available material into strips to tie the victim (R 2915).

4. Ordered the victim to perform oral sex, then sexually assaulted her using a rear approach (R 2915-16, 2402).

5. Told the victim he would slit her jugular and she would be dead in minutes (R 2398).

6. Hog-tied the victim with the cloth strips he had cut from available materials (R 2916).

7. Gagged the victim with half a washcloth and tied it in her mouth with the cloth strips (R 2916).

8. Rummaged through the apartment and took a memento - a silver cobra ring (R 2916).

9. Went through the refrigerator and ate some food (R 2400).

Angeli Bare:

1. Entered by force (testimony showed Power did not have permission to enter) (R656, 700).

2. Victim threatened with gun (victim told Sam Miller the man would shoot them (R 730).

3. Cut victim's pink pants into strips to tie her (R 701, 1098, 1100).

4. State's theory was that victim forced to perform oral sex in the house and thus Power's three pubic hairs on the bedspread and pubic hair on the bed sheet (R 1535, 1538, 1653). He then removed the victim to an isolated area and assaulted her anally (R 1117).

5. Gagged the victim with strips cut from pants (R 1097, 1105).

6. Victim struck in face (R 459, 1112, 2577).

7. Hog-tied victim (R 1097, State Exhibit #8).

8. Was eating sandwich whe'n approached by Welty (R 868).

9. Took a memento - Welty's radio (R 781).

10. Evidence indicated victim choked by shirt being pulled from behind (R 1109, 1121).

11. Slit the victim's jugular vein (R 1108).

The fact that the instant case resulted in a murder while the other incidents did not is not dispositive, particularly where the evidence is relevant to issues other than identity. Chandler v. State, 442 So.2d 171 (Fla. 1983); Kight v. State, 512 So.2d 922 (Fla. 1987); Randolph v. State, 463 So.2d 186 (Fla. 1984); Mason v. State, 438 So.2d 374 (Fla. 1983).

In Chandler, the similar fact evidence was admitted solely to establish identity, and consisted of a Texas conviction seven years prior to the murder in Florida, where the victim had been abducted, tied, beaten and robbed, but not killed. This court determined that the similarities, considered one against the other, established a sufficiently unique pattern of criminal activity to justify admission of the evidence, and that the dissimilarities only suggested differences in opportunity rather than significant differences in method of operation. Id. at 173. Similarly, in the instant case, the similarities establish a sufficiently unique pattern of activity. Each victim lived near the location where Power stayed at the time. He would seize the opportunity and proceed in the same fashion with each victim: subdue the victim with force and threats to kill, cut their clothing or available material into strips which he used to tie and gag the victim, force the victim to perform oral sex then sexually assault them from behind, strike and choke them if they complained, tie them like an animal, and take a memento.

Mason also involved similar fact evidence which was used solely to establish identity. This court noted there were several dissimilarities, including the fact one of the crimes was a homicide and the other a rape. This court went on to acknowledge that there were many similarities between the crimes: the attacker entered the home through the window, armed himself with a knife, and assaulted the woman in her bedroom.

In Kight, the two offenses occurred on the same day, both victims were black cab drivers, they were taken to the same

general area of town, a knife was used, the victims were robbed, and the defendant was picked up outside a Main Street bar. This court acknowledged the major dissimilarity that one of the victims fortuitously escaped with his life, but further noted that under the facts, the evidence was relevant not only to identification, but also to show motive and intent, and was therefore admissible. Id. at 928.

In the instant case, the similar fact evidence was relevant to show motive, intent, opportunity, pattern and plan as well as identity. The fact Power sexually assaulted each victim in an atypical manner shows sexual motive and was probative on the issue of intent. The fact Power assaulted females near the place he was staying was probative on the issue of opportunity. The unusual method of proceeding shows plan and pattern.

The fact the state nolle prossed the crimes against the Dunbar girls does not preclude the evidence from being presented. Burr v. State, 550 So.2d 444 (Fla. 1989). In Burr, the state called three other convenience store clerks to testify that Burr had robbed their stores in a manner similar to the robbery alleged to have occurred in the case being tried.

Although Power argued that the evidence was more prejudicial than probative, almost all evidence introduced by the state is prejudicial to a defendant. Only where the unfair prejudice substantially outweighs the probative value of the evidence should it be excluded. Amoros v. State, 531 So.2d 1256 (Fla. 1988). That Power committed sex crimes is inherent in the offenses. It would be unreasonable for a court to exclude

evidence simply because it involves a sex crime. If evidence of sex crimes were per se prejudicial, the state could never prosecute a sex crime because the defense bar could just say all the evidence was more prejudicial than probative. Unfortunately for the defendant, all evidence that points to a defendant's commission of a crime is prejudicial. The true test is relevancy. Bryan v. State, 533 So.2d 744 (Fla. 1988). In Randolph, supra, the state introduced evidence that several days prior to the murder an robbery for which the defendant was being tried, he robbed two people who had picked up his girlfriend, a prostitute, as they left the rooming house where she conducted business. The defendant had used a .25 caliber gun and was heard to say that he could have killed one of the men because he did not have any money. This court determined that the incidents took place in the same general area within days of each other, and involved the same participants, same weapon, same type of modus operandi, same type of victim and same type of offense. This court held that the collateral crimes evidence was clearly relevant and admissible as it demonstrated Randolph's motive, intent and state of mind in approaching the victim's truck and eventually killing the victim. Id. at 189.

Defense counsel also argued that at the time of the hearing the Williams rule issue was on appeal to the Fifth District Court of Appeals in the Ramos and Warden cases (R 2281)[4].

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[4] The Ramos case, Fifth DCA Case No. 89-1302, was per curiam affirmed on June 26, 1990. The Warden case, Fifth DCA Case No. 89-1548, was affirmed with corrections to the sentence. Power v. State, 568 So.3d 511 (Fla. 5th DCA 1990).

The similar fact evidence offered by the state was relevant, was not unduly prejudicial, and should have been admitted.

POINT II

THE TRIAL COURT ERRED IN ALLOWING POWER TO PRESENT IRRELEVANT TESTIMONY IN THE PENALTY PHASE.

The state filed a motion to exclude evidence and argument about residual doubt (R **2351**). The court partially granted the state's motion and disallowed any evidence designed solely dealing with the issue of defendant's guilt (R **2355**). However, the trial court ruled that defense counsel could argue the evidence already presented in the guilt phase even if it went to lingering doubt (R **2355, 3225**). This was error. Hitchcock v. State, **578** So.2d **685, 695** (Fla. **1990**).

The state also moved to exclude the testimony of Dr. Radelet (R **3219, 2432-34**). The basis of the objection was Lockett v. Ohio, **438** U.S. **586 (1975)**. Defense counsel characterized Dr. Radelet's testimony as regarding future dangerousness (R **2435**). The state argued that Dr. Radelet's testimony did not involve any aspect of the defendant's character but was a statistical analysis of Power's sentences (R **2438**). The testimony did not relate to any aspect of the defendant's character or any circumstance of the offense (R **2439**).[5] In the state's opinion, Dr. Radelet was going to take the stand and have a general tirade against the death penalty itself (R **2441**). The trial judge thought that Power's potential release date related to future

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[5] It is interesting that Power was successful in keeping evidence of his previous crimes out of the guilt phase because irrelevant, but they suddenly became relevant mitigation in the penalty phase.

dangerousness and denied the state's motion in limine (R 2442-43).

Dr. Radelet, a professor of sociology at the University of Florida, testified that he had testified in the Florida and United States' legislatures regarding convicting innocent people in homicide cases (R 2452). He told the jury he was writing two books: one on mothers of death row inmates and one on innocent people who were convicted of homicide (R 2454). He had published papers about innocent people being convicted (R 2455). Dr. Radelet stated there are 2 reasons for the death penalty: the possibility of repeat behavior and retribution (R 2461). Dr. Radelet had reviewed Power's sentences which included ten consecutive life sentences plus two-hundred years (R 2473-74). Defendants whose death sentences are commuted to life are sent to Florida State Prison or Union Correctional Institution (R 2477). To get into Florida State Prison, one has to go through doors covered with razor wire (2477). It is a miserable place to be: hot in the summer and cold in the winter (R 2478). The only person who had ever been released from Death Row since 1972 was Roswell Gilbert (R 2480-81). In his opinion, Power would be confined to prison forever (R 2483).

Dr. Radelet informed the jury each death penalty costs $3.2 million as compared to $600,000 for life imprisonment (R 2514). A death penalty case involves 10 years of litigation (R 2525).

In closing argument defense counsel argued that Power could be sentenced to another five life sentences on top of the ten he already has, plus a minimum mandatory of twenty-five years.

Power would never get out of prison and would never hurt anyone again (R **2586**). Defense counsel also argued it costs six times more to kill someone as to hold him in prison the rest of his life (R **2586**). The jury was told if they imposed the death penalty there would be ten years of appeals which would cost an extra **$2½** million (R **2587**).

Dr. Radelet was the subject of this court's opinion in Hitchcock v. State, **578** So.2d **685** (Fla. **1990**).[6] On direct appeal, Hitchcock claimed the trial court prevented him from presenting mitigating evidence, i.e. the sociologist's theories that: (a) Hitchcock's execution would not deter others from committing murder, (b) it would cost less to imprison Hitchcock for life than to execute him, (c) lingering doubt as to Hitchcock's confession, (d) the conditions Hitchcock would face under a sentence of life imprisonment, and (e) the level of premeditation in this killing in light of Hitchcock's educational level.

This court explained:

> Lockett requires that a sentencer "not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.'' **438** U.S. at **604**, **98** S.Ct. at **2964-65** (emphasis in original, footnote omitted). After making this statement, the Court noted: "Nothing in this opinion limits the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his

[6] See initial brief in Hitchcock, Fla. Sup. Ct. Case No. **72,200** at 7.

> offense." Id. at n. 12. Therefore, "the State cannot bar relevant mitigating evidence from being presented and considered during the penalty phase of a capital trial." Saffle v. Parks, 494 U.S. 484, 110 S.Ct. 1257, 1261, 108 L.Ed.2d 415 (1990)(emphasis supplied).

This court then held that it agreed with the trial court's ruling the sociologist's opinion in these areas was "irrelevant because it did not relate to Hitchcock's character or prior record or to the circumstances of the crime." Hitchcock at 690.

In his sentencing order, the judge wrote:

> Defendant's lack of future dangerousness.
>
> This argument rested solely on the fact that the defendant was serving 10 consecutive life sentences followed by a term of years in excess of 200 years and therefore he would never be released from prison. This was convincingly established by the testimony of Dr. Radelet, but weighs little when balanced against any one of the aggravating circumstances established in this case.
>
> The comparative cost and degree of punishment by executing the defendant versus life in prison.
>
> This argument is a forceful mitigating circumstance weighing greatly against the death penalty in general.
>
> Dr. Radelet testified that in Florida it costs an average of six times more to execute a defendant than it would to maintain them in prison for the rest of their natural life. He further testified that on the average it costs $6,000,000 to convict and execute a person for murder and that $4,000,000 is attributable to post conviction proceedings.
>
> Using those figures, the taxpayers will spend $1,200,000,000 to attempt to execute the more than 300 prisoners on Florida's death row rather than $200,000,000 to imprison them for life. The cost of maintaining the death penalty is one billion dollars at this time.
>
> There are generally three reasons propounded in favor of the death penalty.

The first is deterrence of others from committing murder.

This argument is not and has never been supported by any credible evidence showing the imposition of the death penalty deters others from committing murder. Comparison of the murder rates of states and countries which have abolished the death penalty with the murder rate in those states which maintain and carry out the death penalty, including Florida, demonstrates no distinguishable difference.

The second reason is to protect society from the defendant.

An executed defendant is no physical threat to the citizens of our society, but our citizens can be as effectively protected if the defendant were imprisoned for life without parole or any form of release except clemency granted by the governor and cabinet. This could be accomplished through a constitutional amendment. It would certainly be more cost effective and would better utilize the resources of our criminal justice system.

This third reason most often cited is retribution.

While retribution may well be a valid reason for imposition of the death penalty, its cost in human emotion is high. The survivors of the victims must live with the emotional wounds of the crime each day the criminal justice system seeks to carry out the sentence. This averages between six to ten years to carry out an execution or see the sentence reduced to life.

Death penalty sentences are reversed or re-litigated more than any other sentence. In the past two years this court has conducted three re-sentencing hearings on death penalties imposed in 1976. In each case the emotional turmoil of the witnesses and survivors was renewed. In each case the death penalty was reimposed and now the waiting for execution begins for them again. I cannot help but believe the witnesses, survivors and society in general would have been better served had the defendants been originally sentenced to life without parole in 1976, the matters closed and those affected by the crime freed to allow the emotional wounds to heal and to begin to rebuild their lives. I believe the time spent by the

> criminal justice system would have been better utilized in dealing with the current case load.
>
> This mitigating circumstance is strong and weighs heavy against the death penalty in general but is not legally appropriate in the case at bar or any individual case under the law as it exists in the State of Florida at this time. This court can afford it no weight against the aggravating circumstances (emphasis added) (R 3268-70).

The trial judge recognized the testimony was irrelevant and not "legally appropriate," yet he allowed Dr. Radelet to impose his views against the death penalty to the jury. This was error under Lockett and Hitchcock.

CONCLUSION

Based on the arguments and authorities presented herein, Appellee respectfully prays this honorable court affirm the judgment and sentence of the trial court in all respects on the cross-appeal issues, cross-appellant respectfully requests an advisory opinion for future guidance.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Answer Brief has been furnished by hand delivery to Christopher S. Quarles, via his basket at the Fifth District Court of Appeal, Daytona Beach, FL 32114, this 22 day of November, 1991.

Barbara Davis

Barbara C. Davis
Of Counsel