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IN THE SUPREME COURT OF FLORIDA

CASE NO. 77,234

RONALD PALMER HEATH,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

****

ON APPEAL FROM THE CIRCUIT COURT OF THE EIGHTH JUDICIAL CIRCUIT, IN AND FOR ALACHUA COUNTY, FLORIDA

****

BRIEF OF APPELLEE

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INTRODUCTION

The Appellee, **THE STATE OF FLORIDA**, was the prosecution in the trial court. The Appellant, **RONALD PALMER HEATH**, was the defendant. All parties will be referred to as they stood in the lower court. The symbols "R" and "T" will be used respectively to designate the record on appeal and the transcript of proceedings.

STATEMENT OF THE CASE AND FACTS

An indictment, in Case No. 89-3026, charging Defendant and his brother, Kenneth Heath, with the first degree murder and armed robbery of Michael Sheridan was filed on July 12, 1989. (R. 23). On September 13, 1989, an amended information was filed, in Case No. 89-2581, charging Defendant and his brother with the following: one count of conspiracy to commit uttering a forgery, one count of conspiracy to commit a forgery, two counts of grand theft, nine counts of credit card forgery, and nine counts of uttering a forgery. (R. 202-8). Following a defense motion to consolidate, Case No. 89-3026 was consolidated with Case No. 89-2581. (R. 166-67, 193).

On February 5, 1990, Kenneth entered into a plea agreement wherein he entered guilty pleas to one count of first degree murder, one count of armed robbery, ten counts of forgery, ten counts of uttering a forgery, one count of conspiracy to commit

forgery, one count of conspiracy to commit uttering a forgery, one count of escape, and one count of conspiracy to commit escape. (T. 959-70, Exhibit #s 16, 17, and 18). Kenneth was sentenced to life imprisonment, with a twenty-five year minimum mandatory, for the murder conviction, to concurrent prison time for the robbery conviction, and to twelve years, concurrent, for the two escape charges. Sentencing on the forgery charges was delayed until after Defendant's trial. As part of the plea agreement, Kenneth agreed to give a statement to the prosecutor and to testify truthfully about the murder of Michael Sheridan at Defendant's trial. (T. 963).

On November 5, 1990, trial commenced before the Honorable Robert P. Cates. After an uneventful voir dire, the State began presentation of its case on November 7, 1990. The following testimony was presented to the jury:

Kenneth testified that he had participated with Defendant in the robbery and murder of Michael Sheridan. (T. 958-59). Their activities began on Saturday, May 20, 1989 when Defendant and Penny Powell, Defendant's girlfriend, and Powell's two children came to Jacksonville to Kenneth's grandmother's house. (T. 970-71). While there Defendant and Powell had an argument, so Powell left the next morning and went back to Douglas, Georgia where she and Defendant lived. (T. 972). On Monday, Defendant and Kenneth went to Georgia to pick up some of Defendant's clothes. While in the trailer, Kenneth observed a knife that had been his.

Defendant claimed that he had found the knife. (T. 973). Before leaving Georgia the two brothers obtained a small caliber pistol, like a .22. (T. 974).

Monday evening Defendant and Kenneth returned to their grandmother's house in Jacksonville. (T. 975). After a brief stay, Defendant decided they should go to Gainesville to visit his friends King Douglas and Jennifer Zimble. (T. 976-77). Defendant knew the way, so he drove the two of them in Kenneth's car to Gainesville. (T. 978-79). Once in Gainesville, the two stopped to eat and then visited King Douglas at his house. King invited the two to spend the night. Thereafter, Defendant decided that he and Kenneth would go to the Purple Porpoise. (T. 980).

Defendant and Kenneth arrived at the Purple Porpoise about ten p.m. (T. 981). Jennifer Zimble, Defendant's friend, was working that night as a waitress. (T. 785, 981). Zimble testified at trial about her interaction with and observations of the Heath brothers. (T. 783-886). On the evening of May 22, 1989, Zimble was not waiting on Defendant and Kenneth, but both brothers were drinking beer to the extent that they both became drunk. (T. 788-89, 982). The two drank until the bar closed, whereupon they waited for Zimble to get off of work. (T. 789, 982). Zimble told them that they were too intoxicated to drive back to Jacksonville and offered to let them sleep at her apartment. (T. 790). Defendant drove and they followed Zimble to

her apartment, where they spent the night. (T. 791-92, 983). Zimble noted that during the time she observed the two brothers, that Kenneth was quiet and would follow the directions of Defendant. (T. 866-68).

The next evening, May 23, 1989, Defendant and Kenneth returned to the Purple Porpoise about 10 p.m. (T. 793, 984). Another friend of Defendant's, Cynthia Golub, was also working as a waitress that evening. (T. 816). Zimble was working that night as a bartender and gave the two brothers a pitcher of beer. (T. 793, 799, 985).

Kenneth sat next to the victim, Michael Sheridan, at the bar and struck up a conversation. (T. 824, 986). As victim and Kenneth discussed baseball, the victim offered to buy Kenneth a drink. (T. 986). The victim stated that he was in town on business and was driving a rental car. (T. 987-90). The victim asked Kenneth whether he "got high" and whether he had any marijuana. Kenneth responded that he did not have any marijuana, but that Defendant did and he would ask Defendant to smoke some with the victim. (T. 990). Thereafter, Defendant asked Kenneth where he had gotten the drink and Kenneth told him that the victim bought it. The victim proceeded to buy Defendant a drink. (T. 999). Defendant told Zimble to put their drinks on the victim's tab. (T. 825). The victim paid the bar tab with his credit card. (T. 832-38). Zimble observed that neither Defendant nor Kenneth was drunk, but that the victim appeared to be drunk. (T. 853).

When Kenneth informed Defendant that the victim wanted to smoke marijuana, Defendant stated that if they could get the victim to leave with them, they could rob him of his jewelry. (T. 1000). The three men left the bar together a short time after midnight and Zimble did not see any of them again that night. (T. 841). They left the bar in Kenneth's car, with Defendant driving and drove to a remote area in Alachua County. (T. 1018-19).

After parking on a dirt road the three men got out of the car and smoked a joint. Defendant asked Kenneth, "Did you get it?", and made the hand motion of a pistol. Kenneth responded, "No, I didn't get it." Defendant asked Kenneth if he was going to get it, so Kenneth retrieved the small caliber handgun from under the car seat. (T. 1020). Kenneth pointed the gun at the victim and told him that he was being robbed- to take out his wallet and to remove his jewelry. The victim stated, "Y'all aren't serious, are you?". Defendant and Kenneth both responded that they were serious. Defendant ordered Kenneth to "shoot the fucker in the head". When Defendant lunged at Kenneth, Kenneth shot him in the chest. (T. 1021).

The victim stood back, sat down on the ground, and exclaimed that "it hurt". Defendant told the victim to give him his wallet and chains. As the victim started moving as if he were trying to get his belongings, Defendant started kicking him. Defendant proceeded to remove the victim's wallet, chains, and watch, but

could not find his bracelet. He stated to the victim, "You give me the bracelet and we'll get you to a hospital." (T. 1022). Defendant directed Kenneth to look for the bracelet. (T. 1023).

Meanwhile, Defendant went to the car to search for the bracelet and returned with the knife. Defendant walked up to the victim, tried to cut the victim's throat with the dull knife, and ultimately jabbed it into the victim's throat and cut. Defendant instructed Kenneth to shoot the victim in the head to make sure that he was dead, so Kenneth shot the victim in the head. (T. 1023). Thereafter, Defendant suggested that they move the victim's body, so they picked the body up and carried it into the woods. (T. 1024-25). Defendant wiped the knife off and put it back in the car. (T. 1025).

The two brothers returned to the Purple Porpoise where they saw the victim's rental car parked. (T. 1026-29). Defendant gave Kenneth the victim's keys and told Kenneth to drive the rental car and follow him. (T. 1030). Kenneth drove the rental car to a dirt road, where he and Defendant removed some items before cutting the gas line and burning the rental car. (T. 1032). The knife, used to cut both the victim's throat and the gas line, was left in the rental car. (T. 1033).

On Wednesday, May 24, 1989, Defendant and Kenneth went to the mall in Gainesville and bought clothes, shoes, and other merchandise using the victim's credit cards. (T. 1033-36, 1663-

96) Defendant instructed Kenneth to sign all of the credit card slips, because he might mess it up if he did it. (T. 1034-35) Several clerks from the various stores testified about the purchases made by the brothers and their later identification of Defendant in a photo lineup. (T. 1701-9, 1710-19, 1728-30, 1734-39). After shopping, the two brothers spent the night at King Douglas' house. (T. 1037).

The next morning Defendant and Kenneth continued to use the victim's credit card to buy merchandise. (T. 1037). When a sales clerk at an audio store became suspicious, Defendant and Kenneth left the store and returned to Jacksonville. (T. 1039-40). Once in Jacksonville, the two brothers tossed the handgun into the St. John's River. (T. 1042).

Medical Examiner William Frank Hamilton, M.D., was dispatched to the scene of the murder on May 30, 1989, to examine the body. The victim's body was in a moderately advanced state of decomposition. (T. 1346). Doctor Hamilton, an expert in forensic pathology, estimated the time of death as having been between three and ten days before discovery. He observed three gunshot wounds on the body; two to the head and one to the torso. (T. 1336).

The next day, Dr. Hamilton performed an autopsy on the victim. He determined that the two bullets from the shots to the head entered from the front above the victim's left eyebrow,

on his left forehead, and were recovered from the back of the skull. The third shot was high in the victim's mid-abdomen, jut below his chest. The bullet from the third shot was found at the scene, under the body of the victim. (T. 1349). Due to the advanced state of decomposition and animal predation, the medical examiner was unable to determine the precise path of the bullet. Considering the location of the wound, he was able to state that it was extremely likely that important injury resulted from the shot to the torso. Specifically, he listed loss of a lot of blood and decreased blood pressure as two of the results. (T. 1349-50). However, the shot to the torso, while potentially fatal, was not immediately fatal. (T. 1359). Further, Dr. Hamilton could not "find any reason why there would be any decreased level of consciousness, at least for a little while." (T. 1352).

Additionally, the doctor reported a sharp force injury on the left side of the victim's head. He observed an incised wound of approximately one inch in length, but due to the decomposed condition of the body, he was unable to tell the full extent of that injury. (T. 1351). The wound to the neck may have been longer, but he was unable to tell because the front part of the victim's neck was gone. (T. 1370). Dr. Hamilton determined that the death of the victim was caused by multiple gunshot wounds and the sharp force injury to the neck. (T. 1351).

On May 30, 1989, Alachua County Sheriff's Office crime scene investigator Alfonso Rawls, Jr. was called to the scene of the victim's homicide. (T. 1299). He, with the assistance of investigator Mike Kittle, preserved the details of the scene by taking photographs, sketching the scene, and lifting latent prints. (T. 1300-05, 1319-27). Due to the environment and the length of time the corpse was exposed, no prints of value were obtained. (T. 1324). Additionally, Rawls recovered the three small caliber bullets from the medical examiner's office, after the autopsy, to admit into evidence. (T. 1306-08).

Deputy Kenneth Mack was dispatched to the crime scene where the victim's burnt car was recovered. (T. 1331). The vehicle was completely and totally burned. (T. 1333). Deputy Mack also coordinated an unsuccessful search in the St. John's River to look for the handgun used in the murder. (T. 1334-35).

During the trial, defendant filed a motion to suppress the fruits of the search of Powell's trailer and car. (T. 1393). Following a hearing on the motion, (T. 1394-86), the trial court ruled that there was no evidence of coercion, that the search was legitimate, and that the motion was denied. (T. 1586-89).

Several police officers were called at trial to testify about the details of their credit card fraud investigation which ultimately led to the arrests of Defendant and Kenneth. (T. 1591-1621, 1629-41, 1642-49, 1650-53).

Alachua County Sheriff's Office Detective Danny Brown testified that he went to Powell's trailer, in Douglas, Georgia to arrest defendant for the forgery charges. After Defendant was arrested, Powell gave consent to search both the trailer and car which she shared with Defendant. Detective Brown described the items recovered from the trailer which corresponded to the merchandise purchased with the victim's credit cards. (T. 1745-53). Most significantly, Detective Brown testified that he recovered the victim's watch from the car driven by Defendant. (T. 1754-55).

A Notice of Intention to Introduce Similar Fact Evidence of Other Crimes, Wrongs, or Acts was filed by the State on April 24, 1990. (R. 171-72. Defendant objected to the introduction of evidence regarding his discussions with Wayburn Williams, and the trial court overruled the objection and admitted the evidence. (T. 1222). Williams testified that he had been a cellmate of Defendant's in Alachua County Jail. (T. 1263). Defendant and Williams had discussed an escape because Defendant stated that he wanted to get out to get two girls who could connect him to the murder. Defendant identified Cindy and Jennifer as the two girls, and stated that he wanted to "blow their fucking brains out". (T. 1265). Williams wrote the names of the two girls down on a card and gave the card to his attorney. (T. 1266-68, Exhibit # 21). Further, Defendant told Williams that Kenneth had shot the victim in the head, but that Defendant had to hit the victim and cut his throat, "because the S.O.B. wouldn't die". (T. 1270).

After the State rested its case-in-chief, (T. 1794), Defendant made a motion for judgment of acquittal. The trial court granted the motion for acquittal on one count each of uttering a forgery, forgery of a credit card, and grand theft. (R. 310, T. 1821).

During Defendant's case, Detectives Jordan and Sergeant Mack testified that they interviewed defendant for more than five hours after he was arrested. One hour of the interview was taped. During the interview, Defendant was given an opportunity to speak to his girlfriend, Powell. After speaking to Powell, defendant was visibly upset. (T. 1384-88, 1875-78).

Jacksonville Sheriff's Officer Gayward Hendry was called to describe the items confiscated when he arrested Kenneth on the forgery charges. Several items of clothing, merchandise, a pistol, and his father's police badges were recovered. (T. 1883-86).

Ronald Hayden testified that he saw Defendant and Kenneth at a Memorial Day barbecue in May, 1989. Defendant was wearing new clothes, new tennis shoes, and a gold watch. Kenneth offered to sell Hayden a ring, which Hayden gave him ten dollars for. Hayden later turned the ring over to detectives. (T. 1888-92). The ring recovered from Hayden was identified as the victim's wedding band. (T. 1908-11).

Defendant stated that he did not wish to testify and rested. (T. 2031-35). The State presented rebuttal testimony of detective Danny Brown that, prior to searching her car, he had informed Powell that Defendant was a murder suspect. (T. 2036-37). The State rested and Defendant's renewed motion for judgment of acquittal was denied. (T. 2041, 2044-49). Closing arguments were given. (T. 2054-2130). The jury was instructed and retired to deliberate. (R. 346-69, T. 2132-56). The jury found Defendant guilty of the first degree murder and armed robbery of Michael Sheridan. Additionally, they found Defendant guilty of conspiracy to commit uttering a forgery, conspiracy to commit forgery, seven counts of forgery, and seven counts of uttering a forgery. (R. 313-17, T. 2158-61). The cause was passed for sentencing. (T. 2165).

On November 27, 1990, the trial court reconvened for the penalty phase and opening statements were not made by either party. (T. 2183). The trial court instructed the jury as to their role prior to the presentation of evidence. (T. 2185-87).

First, detective Gerald H. Parker testified for the State that he was the Jacksonville Sheriff's Office Homicide Detective who had been assigned to investigate the murder of Michael Lee Green on December 17, 1977. (T. 2188-89). At approximately 6:30 a.m., on December 17, 1977, he was notified of a reported robbery, abduction, and missing person. (T. 2189). The dead body

of the missing person, Michael Green, was found a few hundred feet away from his 1973 Ford which had been burned. (T. 2190-91). The victim had sustained twenty-three stab wounds and had a crushed skull. (T. 2192).

Detective Parker interviewed Defendant, who was seventeen years old at the time, on December 17, 1977. Defendant described how the victim had died. Defendant gave a sworn statement on December 22, 1977, detailing the circumstances of the murder, which was admitted into evidence and read to the jury. (R. 370-419, T. 2195-2243). In the statement, Defendant described how he had stabbed the victim in the back and chest. This initial stabbing did not result in the victim's death, so Defendant told him he would take him to get help. Defendant proceeded to drive the bleeding victim around Jacksonville for over one hour. (T. 2209-10).

Defendant then returned to the scene of the initial stabbing and, after choking the victim, attempted to burn the car with the victim inside of it. (T. 2211-12). When the victim escaped from the burning car, Defendant kicked him and wrestled him to the ground, before stabbing him repeatedly again. Defendant then picked up a log and struck the victim in the head three times. Finally, Defendant drug the victim's lifeless body into the bushes and fled. (T. 2213-14). Defendant entered a plea of guilty to second degree murder and was sentenced to thirty years imprisonment. (T. 2244. A certified copy of the Judgment and

Sentence dated April 25, 1977, was entered into evidence. (R. 511, T. 2244).

Thereafter, the State rested.

Vivian Heath, Defendant's mother, and William Palmer Heath, defendant's father, testified on his behalf at the sentencing hearing. (T. 2247-63, 2263-73). Vivian and William described the problems that they began having with Defendant when he was thirteen years old. (T. 2250, 2265). After having difficulties with Defendant stealing, skipping school, and staying out late, they took him to a psychologist. (T. 2251, 2265). A few weeks before the murder of Michael Green, Defendant overdosed on drugs. (T. 2252, 2266). Both parents agreed that once Defendant was incarcerated for the murder of Green, he seemed to adjust well to prison life and used his time constructively; he obtained his high school diploma and became involved in a civic organization. (T. 2253-54, 2267).

Penny Powell stated that she met Defendant while she was working at Lake Butler Correctional Institution, where he was incarcerated, in February, 1988. When Defendant was released from prison in November, 1988, he moved in with Powell. (T. 2314-16). Powell also testified that Kenneth Heath drank excessively and smoked pot and that Defendant did not get along well with Kenneth. (T. 2321-23).

Defendant again waived his right to testify and also waived his right to call Dr. Krop to testify regarding psychological examinations. (T. 2331-33). Following these waivers, the defense rested. The State did not present any evidence in rebuttal.

After both sides rested, closing arguments were given. (T. 2334-2359). The State argued that the following aggravating factors were applicable to the murder of Michael Sheridan: (1) the murder was committed during the commission of a robbery; (2) the defendant had been previously convicted of another capital offense or of a felony involving the use or threat of violence to some other person; (3) the murder was heinous, atrocious, and cruel. (T. 2335-39).

Defendant conceded the applicability of two aggravating factors, but contested the applicability of (3) the murder was heinous, atrocious, and cruel. (T. 2351). Defendant argued in mitigation that the murder was committed while he was under extreme mental or emotional disturbance, he was an accomplice, he had potential for rehabilitation, and his brother Kenneth was sentenced to life imprisonment. (T. 2253-58).

Thereafter, the jury received the penalty phase instructions. (R. 422-26, T. 2360-68). The jury recommended the imposition of the death penalty by a 10-2 vote for the murder of Michael Sheridan. (R. 427, T. 2385-88).

On December 10, 1990, defense counsel presented additional argument against finding the aggravating factor of heinous, atrocious, and cruel. (T. 2398-2401).

The trial court entered the sentencing order on December 17, 1990, (R. 452-71, T. 2444-60), finding two aggravating factors for the murder of Michael Sheridan:

> 1. The defendant was previously convicted of another capital felony or of a felony involving the use of, or threat of, violence to the person. (R. 456-58, T. 2449-50).
>
> 2. The murder was committed during the course of an armed robbery. (R. 458-60, T. 2450-51).

The court did not find the aggravating circumstance that the murder was heinous, atrocious, or cruel. (R. 460, T. 2451).

The court found mitigating factors, to-wit:

> 1. The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance.
>
> 2. Aspects of the defendant's character; behavior in prison was above standard.
>
> 3. That the codefendant received a life sentence.

The court rejected the following as mitigation: (1) the victim was a participant; (2) the defendant was an accomplice and his participation was relatively minor; (3) the defendant acted under the substantial domination of another person; (4) the capacity of

the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired; and (5) the age of the defendant. (R. 460-69, T. 2453-60). The sentencing order concluded with the following:

> Accordingly, the Court having weighed the aggravating factors of the prior violence of Ronald Heath and the fact that this murder was committed while in the course of committing robbery while armed with a firearm, against the weight to be given to the mitigating factors of operating under emotional or mental disturbance caused by the consumption of alcohol and marijuana, the Defendant's good character while in State prison, and the fact that the codefendant, Kenneth Heath, will receive a life sentence, and weighing all of those factors together, the Court finds that the aggravating circumstances substantially outweigh the mitigating factors offered by the defense.
>
> (R. 469).

Defendant was adjudicated guilty and sentenced to death on the first degree murder conviction. (R. 444-45, T. 2445). The State had filed a Notice of Intent to Seek Enhanced Penalties as Habitual Offender on June 29, 1989. (R. 199). Defendant stipulated that he was eligible for habitual offender status, thus he was sentenced to life imprisonment, as a habitual violent felony offender, on the armed robbery conviction. On the conspiracy to commit forgery and conspiracy to commit uttering a forgery convictions, Defendant was sentenced to six months imprisonment, credit for time served. On each of the seven convictions for forgery and seven convictions for uttering a forgery, Defendant was sentenced to consecutive sentences of ten years as a habitual offender. (R. 446-51, T. 2516-20).

Notice of appeal was filed on January 10, 1991. (R. 502). This appeal then followed.

POINTS ON APPEAL

I.

WHETHER THE TRIAL COURT PROPERLY DENIED DEFENDANT'S MOTION FOR MISTRIAL DURING THE STATE'S OPENING STATEMENT?

II.

WHETHER THE TRIAL COURT CORRECTLY ADMITTED EVIDENCE ABOUT THE VICTIM, MICHAEL SHERIDAN?

III.

WHETHER THE TRIAL COURT CORRECTLY ADMITTED TESTIMONY THAT DEFENDANT WANTED TO ESCAPE FROM THE ALACHUA COUNTY DETENTION CENTER IN ORDER TO KILL WITNESSES?

IV.

WHETHER THE TRIAL COURT PROPERLY FOUND TESTIMONY OF DEFENDANT'S EMPLOYMENT TO BE IRRELEVANT DURING THE GUILT PHASE?

V

WHETHER DEFENDANT SOUGHT TO ADMIT HIS EXCULPATORY HEARSAY STATEMENTS?

VI

WHETHER DEFENDANT WAS PROPERLY SENTENCED TO DEATH FOR THE MURDER OF SHERIDAN?

VII

WHETHER THERE WAS ANY ERROR WITH RESPECT TO THE AGGRAVATING CIRCUMSTANCE OF HEINOUS, ATROCIOUS, AND CRUEL?

VIII

WHETHER THE TRIAL COURT CORRECTLY SENTENCED DEFENDANT AS A HABITUAL OFFENDER FOR THE ROBBERY CONVICTION?

IX

WHETHER THE HABITUAL OFFENDER STATUTE IS CONSTITUTIONAL?

SUMMARY OF ARGUMENT

Initially, Defendant asserts that the trial court erred in overruling his objection to the comment of the prosecutor in opening statement. The record, however, does not indicate that the objection was overruled. The record indicates that the trial court denied a motion for mistrial, whereupon defendant refused the offer of a curative instruction, thereby failing to preserve the issue for review. Moreover, the comment was not fairly susceptible of being a comment on defendant's right to remain silent. Even if the comment was improper, any error was harmless in view of the overwhelming evidence of guilt.

Contrary to Defendant's argument, testimony that the victim was "just a good person" was not presented to the jury. Such evidence was only offered during the proffer of Regina Sheridan's testimony. Additionally, evidence that the victim traveled extensively, enjoyed sports, and owned Gator flip-flop shoes was relevant and properly admitted. The evidence corroborated the testimony of the witnesses at the Purple Porpoise and the testimony of the codefendant. The State did not present the evidence to curry favor with the jury, rather the State presented both positive and negative evidence of the victim to explain his actions on the night of the murder.

The trial court properly admitted evidence from Defendant's former cellmate that Defendant wanted to escape to kill the only

two people, Jennifer and Cindy, who could tie him to the murder. Evidence that a suspected person in any manner endeavors to evade prosecution infers consciousness of guilt and is relevant.

The trial court did not abuse its discretion in prohibiting the irrelevant testimony of Defendant's former employer. Furthermore, any error in prohibiting such testimony was harmless as the evidence of Defendant's employment was introduced during the defense case through another witness.

Defendant did not seek to admit his self-serving hearsay statements at trial. If Defendant had sought to admit the statements they would have been excluded as inadmissible hearsay. Moreover, any error in not admitting the testimony did not affect the verdict as the gist of the statements, to-wit: that Defendant was shocked and surprised when he discovered the victim's watch in his luggage, was conveyed to the jury.

By expressly evaluating each mitigating factor proposed by Defendant, the trial court did not convert the absence of a mitigating factor into a nonstatutory aggravating factor. Additionally, the trial court gave substantial consideration to the nonstatutory circumstance of codefendant's sentence, thus Defendant's argument is not supported by the record.

Defendant failed to contemporaneously object to the jury instruction on heinous, atrocious, and cruel, thereby waiving the

point for review. Notwithstanding this failure to preserve the issue, this Court previously found the dictates of Maynard inapplicable to this State's sentencing scheme. Additionally, the sentence imposed was not affected by the instruction as the trial court did not find the aggravating circumstance of heinous, atrocious, and cruel.

Armed robbery is specifically made punishable under the habitual offender statute, thus the trial court properly sentenced Defendant to a term of life imprisonment as a habitual violent offender. Furthermore, first degree felonies punishable by life are not in a different category from first degree felonies generally.

Although this Court has not explicitly addressed the constitutionality of the habitual offender statute, it has repeatedly declined to review decisions of the district courts finding the statute to be constitutional. The statute does not violate the equal protection or due process clause, nor is it void for vagueness.

ARGUMENT

I.

THE TRIAL COURT PROPERLY DENIED DEFENDANT'S MOTION FOR MISTRIAL DURING THE STATE'S OPENING STATEMENT.

Initially, Defendant maintains that the trial court erred in overruling his objection to the comment of the prosecutor in opening statement. This position is without merit. The record does not indicate that the objection was overruled. The record indicates that the trial court denied a motion for mistrial, whereupon defendant refused the offer of a curative instruction, thereby failing to preserve the issue for review. During opening statement, the following transpired:

> [Prosecutor]: You're going to hear testimony, ladies and gentlemen, from the only person who can tell you about what Kenny and [Defendant] did. Michael Sheridan's dead; he can't tell you what happened. Kenny Heath is going to come before you and tell you how Michael Sheridan died.
>
> [Defense counsel]: Your Honor, I object at this point and ask to approach the bench.
>
> WHEREUPON, at 10:50 a.m., the following proceedings were had at sidebar, in the presence, but out of the hearing of the Jury:
>
> [Defense counsel]: Your Honor, I understand [the prosecutor's] back's to me; it's a little hard to hear it. But I think "You're going to hear from the only person who can tell you what happened there--" I think he's referring to Kenny; it also refers to [Defendant].
>
> I think that's a comment on [Defendant's] right to remain silent: "There's some reason why [Defendant] doesn't tell you--"

I would certainly argue that he couldn't because he wasn't there, but I think that certainly does act as a comment on the defendant's right to remain silent.

There's two people here; we're only going to hear from one person. It's my understanding that that has been held to be a comment on it.

That's my position, and that's the extent of my argument.

[Prosecutor]: Your Honor, I cannot say that there were two persons who can tell you about this and the other is [Defendant]. What I can say is there is a person who can tell you about this, and that person is Kenny Heath, and Kenny Heath is coming forward.

And I did not say that that was the only person; I said there's a person who can tell you, because he was there.

THE COURT: Are you moving for a mistrial?

[Defense counsel]: Yes, sir, moving for a mistrial; it would be based on that comment, inappropriate comment, at this time.

THE COURT: That motion is denied.
Do you wish to have a curative instruction?

[Defense counsel]: No, your Honor.

[2d Defense counsel]: I didn't hear a ruling; I don't know if you put a ruling on the record as to whether the objection was overruled or sustained.

THE COURT: I was clarifying; I thought you said you were making a motion for a mistrial rather than a mere objection. I said the motion for mistrial--I said it was denied.

[2d Defense counsel]: Okay, Thank you.

(T. 708-10).

By rejecting the trial court's offer for a curative instruction, defense counsel waived the right to assert this issue on appeal.

When, as here, the trial court has extended counsel the opportunity to cure error and counsel fails to take advantage of opportunity, such error if any, was invited and will not warrant reversal. Sullivan v. State, 303 So.2d 632, (Fla. 1974), cert. denied, 428 U.S. 911, 96 S.Ct. 3226, 49 L.Ed.2d 1220 (1976), reh'g. denied, 429 U.S. 873, 97 S.Ct. 190, 50 L.Ed.2d 154 (1977).

Moreover, the comment was not fairly susceptible of being a comment on defendant's right to remain silent. The prosecutor was simply describing the evidence it would present. It would have been improper to state that "two people could testify about what happened, Defendant and Kenneth". However, the State could only call Kenneth, thus the comment that the victim was dead and Kenneth would tell what occurred, was not a comment on Defendant's failure to testify.

Even if the comment was improper, any error was harmless where the Defendant's right to remain silent had been discussed during voir dire by defense counsel, (T. 472, 527-28, 597) and Defendant introduced evidence that he waived his right to remain silent and gave a statement to Detectives Mack and Jordan. (T. 1385-88, 1877-78). Defendant specifically requested an instruction regarding not testifying at trial, (T. 2053), and the request was granted, (T. 2150).

Moreover, any error caused by the statement had little or no impact in light of the overall strength of the case and the

defenses asserted. The State presented testimony that Defendant left with the victim on the evening when the victim was last seen alive. (T. 840). Kenneth testified that Defendant devised the plan to lure the victim away from the Purple Porpoise and rob him. (T. 1000). Once away from the bar, Defendant directed Kenneth to get the gun and rob the victim. (T. 1020). When the victim thought the two men were kidding, Defendant ordered Kenneth to "shoot the fucker in the head". (T. 1021). After Defendant jabbed and sawed the victim's throat, he instructed Kenneth to shoot the victim in the head to make sure he was dead. (T. 1023). The wounds discovered by the medical examiner in his autopsy of the victim were consistent with the shots and stabbing described by Kenneth. (T. 1349-50). Kenneth and several merchants described Defendant's participation in the use of the victim's credit cards the day after the murder. (T. 1661-1742). Additionally Detective Brown listed the items purchased with the victim's credit card which were later found in Defendant's trailer in Georgia. (T. 1746-53). Also, the victim's watch was found in Georgia, in the car driven by Defendant. (T. 1754-55). Finally, once he was arrested for the crimes, Defendant expressed his intent to escape from jail so he could eliminate two witnesses who could link him to the murder. (T. 1265). It cannot reasonably be said that the comment of the prosecutor affected the verdict.

II.

THE TRIAL COURT CORRECTLY ADMITTED EVIDENCE ABOUT THE VICTIM, MICHAEL SHERIDAN.

Secondly, Defendant argues that the trial court erred in admitting testimony from the victims's wife that the victim was "just a good person". However, such evidence was never presented to the jury. The State proffered the direct testimony of Regina Sheridan outside of the jury's presence. (T. 728-37). During her proffered testimony, Regina stated, when describing the victim, "He was just a good person." (T. 732). Following the proffer, the admissibility of the testimony was argued. (T. 738-58). During this argument defense counsel conceded the relevance of the victim's extensive business travel, and specifically his travel to Gainesville. (T. 738).

During the direct examination of Regina Sheridan, in the presence of the jury, she stated that the victim talked with a southern slang, was a Gator football season ticket holder and owned a pair of Gator flip-flop shoes. (T. 759-64). This evidence was relevant to establish that the victim was a sports fan and that the shoes, with a sports logo, found at the scene of the murder were the victim's shoes. (T. 1788, Exhibit #48). The evidence of his southern accent was relevant to establish that his final statement before dying, "Y'all aren't serious, y'all are kidding", was characteristic of his manner of speaking. (T. 1021). The State did not improperly present an abundance of good character evidence of the victim.

In Jackson v. State, 498 So.2d 906, 910, (Fla. 1986), the trial court improperly considered evidence of the victim's life-style, character traits, and community standing in determining that the murder was heinous atrocious, and cruel. Jackson is inapplicable to the instant case. Here the evidence that the victim traveled extensively and enjoyed sports was relevant to establish his reason for being in Gainesville and to identify some of his clothing. Additionally, the evidence was relevant to corroborate the observations of Jennifer Zimble Berquist regarding the actions of the victim on the night of his murder. Finally, the evidence also corroborated the testimony of Kenneth regarding his interaction with the victim prior to the murder.

Unlike the description put forth by Defendant, the victim was not portrayed as a "good neighbor Sam". The State presented evidence of negative characteristics of the victim, as follows: Regina testified that her husband had smoked marijuana in the past and would have smoked it with strangers. (T. 772); Jennifer Zimble Berquist stated that the victim was drinking at the bar alone, prior to drinking with Defendant and Kenneth. Further she saw the victim leave and then come back in looking a little red-eyed and spaced out. (T. 825-31); Kenneth stated that the victim struck up a conversation with him before inquiring whether Kenneth had any marijuana. (T. 990);. Further, Kenneth testified that the wedding band of the married victim was, not on the victim's hand but, inside the leather cosmetic bag in his rental

car. (T. 1146). Based on the evidence presented, it cannot be said that the State attempted to canonize the victim to garner sympathy from the jury.

III.

THE TRIAL COURT CORRECTLY ADMITTED TESTIMONY THAT DEFENDANT WANTED TO ESCAPE FROM THE ALACHUA COUNTY DETENTION CENTER IN ORDER TO KILL WITNESSES.

Defendant asserts that the trial court erred in allowing collateral offense evidence relating to Defendant's attempt to escape from Alachua County Detention Center as the evidence was irrelevant and unduly prejudicial. However, this Court has held that evidence that a suspected person in any manner endeavors to escape or evade prosecution by any *ex post facto* indication of a desire to evade prosecution, is admissible and relevant based on the consciousness of guilt inferred from such actions. Mackiewicz v. State, 114 So.2d 684 (Fla. 1959), cert. denied, 362 U.S. 965, 80 S.Ct. 883, 4 L.Ed.2d 879 (1960).

The trial court correctly allowed the complained of testimony which was highly relevant to the underlying charge and since it did not become a feature of the trial, it did not unduly prejudice Defendant. Defendant stated to his cellmate, Wayburn Williams, that he wanted to escape from prison to kill Cindy and Jennifer, the only two people who could tie him to the murder. (T. 1265). The trial court properly admitted the evidence as it was relevant to show Defendant's consciousness of guilt and his

desire to evade prosecution. *See* Sireci v. State, 399 So.2d 964 (Fla. 1981), cert. denied, 456 U.S. 984, 102 S.Ct. 2257, 72 L.Ed.2d 862 (1982), reh. denied, 458 U.S. 1116, 102 S.Ct. 3500, 73 L.Ed.2d 1378 (1982)(Evidence regarding an alleged attempt by the defendant to have his brother-in-law killed, to avoid a conviction, was relevant and admissible.). The evidence was reflective of Defendant's own consciousness of guilt since Wayburn Williams testified that he and Defendant had a plan to escape so Defendant could get the two girls and "blow their fucking brains out". (T. 1265). This case is thus similar to cases in which evidence of a defendant's flight or bribery provides relevant support of that defendant's guilt. See Dawson v. State, 401 So.2d 819 (Fla. 1st DCA), review denied 408 So.2d 1092 (Fla. 1981)(Evidence of alleged bribe was relevant for jury's consideration as indication of guilty knowledge of the defendant).

IV.

THE TRIAL COURT PROPERLY FOUND TESTIMONY OF DEFENDANT'S EMPLOYMENT TO BE IRRELEVANT DURING THE GUILT PHASE.

Defendant asserts that the trial court improperly prevented him from presenting testimony from Lamar Stodghill regarding Defendant's employment before and after the murder. The trial court was correct in prohibiting such testimony as it was irrelevant. The trial court has great latitude in determining the relevance of evidence and such determination will not be disturbed absent an abuse of discretion. Hardwick v. State, 521 So.2d 1071 (Fla. 1988), cert. denied 488 U.S. 871 (1988). Defendant's argument that the evidence of his employment was relevant because people who have a job are less likely to steal or rob is fallacious.

Furthermore, any error in prohibiting the testimony of Lamar Stodghill was harmless as the evidence of Defendant's employment was introduced during the defense case with the following testimony of Penny Powell:

> [Defense counsel] Q: Do you know; was [Defendant] employed in May of 1989?
>
> [Penny Powell] A: Yes.
>
> [Prosecutor]: Objection, your Honor, as to relevancy.
>
> THE COURT: Overruled.
>
> Q: Where was he employed?
>
> A: Comet Enterprises.

(T. 1997-98).

Powell also testified that Defendant made arrangements to go back to work after the murder. (T. 2017). All of the information sought to be elicited from Stodghill, to-wit: that he had a job both before and after the murder, and that he did not attempt to flee after the murder, was admitted through the testimony of Powell. Additionally, defense counsel highlighted Defendant's employment, and therefore his lack of motive to rob, in closing argument. (T. 2083). There is no reasonable possibility that the omission of Stodghill's cumulative testimony affected the verdict. DiGuilio v. State, 491 So.2d 1129 (Fla. 1986).

V

DEFENDANT DID NOT SEEK TO ADMIT HIS EXCULPATORY HEARSAY STATEMENTS.

Defendant asserts that the trial court erred in excluding his self-serving hearsay statements about the victim's watch. This issue, in addition to being without merit, was never presented to the trial court for consideration. The State filed a motion in limine to prohibit introduction of Defendant's exculpatory statements, to Powell regarding his lack of involvement in the murder and his surprise about the watch. (T. 901-2). Defense counsel conceded that, "The content of the statements themselves would be--would be excluded." (T. 902). During the direct testimony of Penny Powell the following statements were made:

[Defense counsel] Q: I want to turn your attention to when you picked up [Defendant] in Jacksonville and brought him back home: Do you recall when he was unpacking his things?

[Powell] A: Yes, I do.

[Prosecutor]: Objection, your Honor. May we approach the bench?

THE COURT: You may. [court reporter], if you would come up, please.

WHEREUPON, at 3:37 p.m., the following proceedings were had at sidebar, in the presence, but out of the hearing, of the Jury:

[Prosecutor]: Your Honor, [defense counsel] is intending to go into an area that I think he's going to- into [Defendant] having the watch in his luggage, her observations of that, and what [Defendant] said about that. That's all self-serving: He's going to say, "I didn't know the watch was there.""--She's going to say he said, "I didn't know the watch was there." She's going to say he looked surprised. This is all self-serving testimony and--

THE COURT: Self-serving if he says it; she's just a witness.

[Prosecutor]: If she said what he said--if she said where he said he got that watch from, that's self-serving.

THE COURT: I would agree. It's hearsay, self-serving.

[Defense counsel]: Your Honor, I didn't intend to elicit hearsay; I'm very cognizant of the Court's ruling.

[Prosecutor]: Thank you, your Honor.

THE COURT: Okay.

(T. 2019-20).

It is evident from the foregoing that defense counsel did not seek to admit defendant's exculpatory hearsay statements. Assuming that counsel did intend to elicit hearsay, then the evidence should have been proffered and the legal basis for its admissibility preserved on the record. It is axiomatic that in order to properly preserve an issue for appellate review trial counsel must proffer the testimony sought to be elicited. *See* A. McD. v. State, 422 So.2d 336 (Fla. 3d DCA 1982); *cf.* Downs v. State, 574 So.2d 1095, 1097 (Fla. 1991)(Excluded testimony of the defendant's statements, to his sister-in-law and to police dispatcher, was proffered to the trial court). However, in this case, not only did defense counsel fail to either proffer the self-serving hearsay statements or to offer a legal basis for their admission, defense counsel specifically stated that his questions were not intended to elicit hearsay.

If, however, the issue had been correctly preserved for review, then the statements were properly excluded as inadmissible hearsay. Defendant submits that his statements regarding the victim's watch should have been admitted under section 90.803(3), Florida Statutes. Section 90.803(3), Florida Statutes provides:

> (3) **Then Existing Mental, Emotional, or Physical Condition.**
>
> (a) A statement of the declarant's then existing state of mind, emotion, or physical sensation, including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health, when such evidence is offered to:

> 1. Prove the declarant's state of mind, emotion, or physical sensation at that time or at any other time when such state is an issue in the action.
>
> 2. Prove or explain acts of subsequent conduct of the declarant.
>
> (b) However, this subsection does not make admissible:
>
> 1. An after-the-fact statement of memory or belief to prove the fact remembered or believed, unless such statement relates to the execution, revocation, identification, or terms of the declarant's will.
>
> 2. A statement made under circumstances that indicate its lack of trustworthiness.

Defendant did not lay a proper predicate to bring the statements within this exception to the hearsay rule. Moreover, Defendant's surprise at finding the watch in his luggage established his state of mind the week after the murder, not at the time of the murder. His state of mind one week after he killed Michael Sheridan was not "an issue in the action" and was properly excluded.

Additionally, Defendant asserts that his statement was not self-serving. Contrary to Defendant's assertions, the rationale excluding self-serving statements has not "lost its legal force". (Brief of Appellant at p. 34). *See* Overton v. State, 429 So.2d 722 (Fla. 1st DCA 1983), review denied 440 So.2d 352; Moore v. State, 530 So.2d 61 (Fla. 1st DCA 1988); Barber v. State, 576 So.2d 825 (Fla. 1st DCA 1991); Fagan v. State, 425 So.2d 214 (Fla. 4th DCA 1983); and Logan v. State, 511 So.2d 442 (Fla. 5th

DCA 1987). In Overton, defense counsel attempted to elicit a statement the defendant made to the arresting officer that he had the "wrong guy". The professed purpose of offering the statement was to show the defendant's state of mind at the time of apprehension. However the trial court correctly excluded the statement as it was self-serving and made under circumstances that indicate its lack of trustworthiness. Similarly, the exculpatory statement made by Defendant was inadmissible hearsay not within any of the exceptions to the hearsay rule.

Furthermore, if this Court should determine that Defendant's statements were admissible, their exclusion was harmless error. According to Defendant's argument, his statement that he was surprised to find the watch in his luggage would prove "his lack of guilty knowledge about Sheridan's murder". (See Brief of Appellant at p. 33). However Defendant's surprise at finding the watch was conveyed to the jury with the following testimony:

> Q: Ms. Powell, I'd ask you to turn your attention to when you'd picked up [Defendant] in Jacksonville and went back to home in Georgia after the six days he was gone: Do you recall when he was unpacking his luggage?
>
> A: Yes, I do.
>
> Q: Did you ever see a watch when he was unpacking his luggage?
>
> A: Yes, I did.
>
> Q: I show you what's been marked as State's Exhibit 6, in identification. I ask you if you recognize the watch.
>
> A: It looks like the same watch.
>
> Q: Okay. Where did it come from?

A: (No response)

Q: Where did you--where is the first time you see that watch?

THE COURT: Not where did [Defendant] get the watch, but where you first saw it?

[Defense counsel]: Right.

A: When--on Monday morning, before I was going to work, [Defendant] was unpacking some of his things. And he took his shoes, his tennis shoes, out to put them on to take me to work. And when he picked his shoes up, this watch fell down and fell out of his tennis shoe.

Q: Did he have any reaction?

A: Yes, he did.

Q: What was that?

A: Shock and surprise.

(T. 2020-21).

The jury was apprised of Defendant's reaction to finding the watch in his luggage, thus the omission of defendant's self-serving statement did not affect the verdict and was harmless. Ciccarelli v. State, 531 So.2d 129 (Fla. 1988).

VI

DEFENDANT WAS PROPERLY SENTENCED TO DEATH FOR THE MURDER OF MICHAEL SHERIDAN.

Next, Defendant argues that the trial court improperly converted the absence of a mitigating factor, to-wit: substantial domination by another, into an aggravating factor. This argument is spurious and is directly refuted by the cogent sentencing order of the trial court.

The trial court carefully organized the sentencing order as follows:

> ORDER IMPOSING SENTENCE OF DEATH
>
> I. PROLOGUE
>
> **********
>
> II. **THE CRIME**
>
> **********
>
> III. **THE TRIAL**
>
> **********
>
> IV. **AGGRAVATING CIRCUMSTANCES**
>
> The State presented three aggravating circumstances for consideration by the penalty phase jury. [The trial court then specifically addressed each of the three aggravating circumstances presented by the State, (R. 456-60, T. 2449-51)].
> **********
>
> V. **MITIGATING CIRCUMSTANCES**
>
> The defense offered seven statutory mitigating circumstances, and one non-statutory mitigating circumstance.**********

The first mitigating circumstance**********

The second mitigating circumstance*********

The third mitigating circumstance is that the Defendant was an accomplice in the offense for which he is to be sentenced but that the offense was committed by another person and that the Defendant's participation was relatively minor. It is true that the Defendant was an accomplice in the offense and that the offense was committed by another person. However, the Defendant's participation was anything but "relatively minor". The facts show that Ronald Heath dominated his brother Kenneth, that Ronald suggested the use of the firearm, that Ronald himself attempted to murder Sheriden by using a knife, and that the suggestion to rob was originally made by Ronald Heath. The Court has carefully considered this mitigating circumstance but affords it no weight because the Defendant's participation in the robbery and murder was not "relatively minor".

The fourth mitigating circumstance offered by the Defendant was that the Defendant acted under extreme distress or under the substantial domination of another person. In order to arrive at its verdict of guilty on the charge of first degree felony murder, the jury had to weigh the relative participation and roles of Kenneth Heath and Ronald Heath. Without question, the jury found that Ronald Heath was the dominant actor in the murder and robbery, and that he maintained substantial influence over his younger, weaker brother, Kenneth. I am persuaded by the jury's finding, but would have found the same from the testimony myself. While it is true that Kenneth had an interest in how the case would be decided based on his plea to the charge of first degree murder, and while it was suggested that familial influence may have caused him some bias against his brother Ronald Heath, the jury and the Court both found Kenneth Heath's testimony to be credible, reliable and believable. I accord no weight to this mitigating circumstance because, in fact, the Court finds that Kenneth Heath acted under the substantial domination of Ronald Heath.

****

(R. 460-69, T. 2453-60).

Pursuant to the dictates of this Court, in Campbell v. State, 571 So.2d 415 (Fla. 1990), the trial court expressly evaluated each of the seven statutory and one nonstatutory mitigating circumstances presented by Defendant. (R. 460-69, T. 2453-60). The record indicates that the trial court followed the law, by stating its basis for rejection of the mitigating circumstances not found, and disproves the argument that the mitigating factors of §921.141(6) were converted into a nonstatutory aggravating factor.

With respect to Defendant's argument of disparate treatment, the trial court gave substantial consideration to the nonstatutory mitigating circumstance that the codefendant was sentenced to life imprisonment. (R. 466-69). However, the weight of mitigation was insufficient to overcome the unrefuted aggravating factors of a prior murder conviction and during the commission of an armed robbery.

VII

THERE WAS NO ERROR WITH THE AGGRAVATING CIRCUMSTANCE OF HEINOUS, ATROCIOUS, AND CRUEL.

Defendant contends that the trial court erred in instructing the jury that it could find this aggravating factor if the

evidence established the murder was especially wicked, evil, atrocious, or cruel. Although Defendant filed a pretrial Motion to Declare Section 921.141(5)(h) Unconstitutional, (R. 76-77), and the motion was denied, (T. 2480-81), Defendant failed to contemporaneously object, either during the charge conference or at the time the instruction was given. (T. 2279-80, 2363, 2383-84). Florida Rule of Criminal Procedure 3.390(d), provides that a party must object to the giving or the failure to give a requested instruction. Furthermore, that rule requires the objecting party to specifically state the grounds for any objection. As in Smalley v. State, 546 So.2d 720 (Fla. 1989), to the extent that defendant now complains of the jury instruction the point has been waived. *See* Castor v. State, 365 So.2d 701 (Fla. 1978)(A timely objection is required where the error relates to the giving or failing to give a particular jury instruction.).

Notwithstanding Defendant's failure to contemporaneously object, he claims the instruction given was unconstitutionally vague under Maynard v. Cartwright, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988). This Court, in Smalley, held that Maynard has no application to this State's sentencing scheme with the following:

> It is true that both Florida and Oklahoma capital sentencing laws use the phrase "especially heinous, atrocious, or cruel." However, there are substantial differences between Florida's capital sentencing scheme and Oklahoma's. In Oklahoma the jury is the sentencer, while in Florida the jury gives an advisory opinion to the trial judge, who then

passes sentence. The trial judge must make findings that support the determination of all aggravating and mitigating circumstances. Thus, it is possible to discern upon what facts the sentencer relied in deciding that a certain killing was heinous, atrocious, or cruel.

This Court has narrowly construed the phrase "especially heinous, atrocious, or cruel" so that it has a more precise meaning than the same phrase has in Oklahoma. In *State v. Dixon*, 283 So.2d 1, 9 (Fla. 1973), *cert. denied*, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974), we said:

It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and, that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies-the conscienceless or pitiless crime which is unnecessarily torturous to the victim.

It was because of this narrowing construction that the Supreme Court of the United States upheld the aggravating circumstance of heinous, atrocious, or cruel against a specific eighth amendment vagueness challenge in *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). Indeed, this Court has continued to limit the finding of heinous, atrocious, or cruel to those conscienceless or pitiless crimes which are unnecessarily torturous to the victim. (citations omitted) That *Proffitt* continues to be good law today is evident from *Maynard v. Cartwright*, wherein the majority distinguished Florida's sentencing scheme from those of Georgia and Oklahoma. *See Maynard v. Cartwright*, 108 S.Ct. at 1859.

Smalley, 546 So. 2d at 722.

Furthermore, the trial court specifically found that the State did not establish beyond a reasonable doubt that the murder

was heinous, atrocious, and cruel and gave no weight to this aggravating circumstance. (R. 460, T. 2451). Therefore, any deficiency in the jury instruction with respect to this aggravating factor did not affect the sentence imposed.[1]

VIII

WHETHER THE TRIAL COURT CORRECTLY SENTENCED DEFENDANT AS A HABITUAL OFFENDER FOR THE ROBBERY CONVICTION?

Defendant's argument that the habitual offender statute does not apply to first degree felonies punishable by life imprisonment is without merit. Defendant was convicted of armed robbery under Section 812.13, Florida Statutes (1989). Subsection (2)(a) of the robbery statute reads as follows:

> If in the course of committing the robbery the offender carried a firearm or other

---

[1] While the trial court did not find this aggravating circumstance, the evidence would have supported such a finding where the facts of the murder are sufficient to set this murder apart from the norm of capital felonies and to support the conclusion that Defendant was utterly indifferent to the suffering he caused. The victim was shot in the chest with a small caliber bullet, stated, "it hurt", then sat down on the ground and moved as if he were trying to comply with the order to give up his wallet and jewelry, continued to sit as Defendant went to the car to look for the jewelry, remained conscious while Defendant returned with a knife and tried to cut his throat, ultimately jabbing the dull knife in and sawing, and finally was shot twice in the head, and died. *See* Jackson v. State, 522 So.2d 802 (Fla.), cert. denied 488 U.S. 871, 109 S.Ct. 183, 102 L.Ed.2d 153 (1988)(factor upheld where victim who remained conscious after initial gunshot wound was required to get into laundry bag and lie on floor of car while he was driven around); Huff v. State, 495 So.2d 145 (Fla. 1986)(factor upheld where victim of double homicide was shot twice in the head but remained conscious and was struck eight or nine times with pistol before being killed with a third shot).

> deadly weapon, then the robbery is a felony of the first degree, punishable by imprisonment for a term of years not exceeding life imprisonment or as provided in s. 775.082, s. 775.083, or s. 775.084.

The robbery statute expressly states that Defendant's conviction is punishable under the habitual offender statute found in section 775.084. Thus, contrary to Defendant's position, the plain language of the robbery statute specifically provides for punishment under the habitual offender statute.

The Florida District Courts of Appeal have held that first degree felonies punishable by life imprisonment are subject to enhanced sentences under the habitual offender statute.[2] In Westbrook v. State, 546 So.2d 1187 (Fla. 3d DCA 1991), the Third District rejected the argument put forth by Defendant that Barber v. State, 564 So.2d 1169 (Fla. 1st DCA 1990), supported the position that first degree felonies punishable by life were not subject to habitual offender enhanced sentences, with the following:

> Secondly, the statement in *Barber*, 564 So.2d at 1173, concerning the *possible* nonapplicability of the habitual offender statute to those convicted of a first degree life felony is purely dicta. Moreover, *Barber* is not controlling here since the habitual offender statute addressed in that case was the 1987 version which was substantially rewritten by the Florida Legislature in 1989

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[2] This issue is presently pending before this Court in the following cases, set for oral argument on December 6, 1991: Burdick v. State, Case No. 78,466; Henry v. State, Case No. 77,790; Westbrook v. State, Case No. 77,788.

> to take penalties prescribed under the habitual offender statute outside the province of the sentencing guidelines and to allow the trial court to impose the penalty of life imprisonment on a defendant by simply making a determination that the defendant fit the statutory definition of a habitual felony offender. *See Owens v. State*, 560 So.2d 1260 (Fla. 1st DCA 1990).
>
> Westbrook, supra at 1188.

This position, of the Third District, was followed by the First, Fourth, and Fifth Districts in Burdick v. State, 584 So.2d 1035 (Fla. 1st DCA 1991); Newton v. State, 581 So.2d 212 (Fla. 4th DCA 1991); and Paige v. State, 570 So.2d 1108 (Fla. 5th DCA 1990).

In Burdick, supra, the First District also rejected Defendant's argument that a separate classification of felonious crime, to-wit: first degree felony punishable by life, is excluded from Section 775.084, with the following:

> In essence, appellant here asks us to judicially amend Section 775.081, Florida Statutes to add another classification of felonious crime, that of 'first degree felony punishable by life'. We decline appellant's invitation an, in doing so, observe that a first degree felony, no matter what the punishment imposed by the substantive law that condemns the particular criminal conduct involved, is still a first degree felony and subject to enhancement by section 775.084(4)(a)(1), Florida Statutes.
>
> Burdick at 1037-38.

Defendant stipulated that he was a habitual offender, (T. 2508-11), and was properly sentenced as a habitual offender for his armed robbery conviction.

IX

THE HABITUAL OFFENDER STATUTE IS CONSTITUTIONAL.

In his final argument, Defendant contends that the habitual offender statute, Section 775.084, Florida Statutes (1988), is unconstitutional. While this Court has not explicitly addressed the constitutionality of the habitual offender statute, it has repeatedly declined to review decisions of the district courts finding the statute to be constitutional. *See* King v. State, 557 So.2d 899 (Fla. 5th DCA), review denied 564 So.2d 1086 (Fla. 1990); Arnold v. State, 566 So.2d 37 (Fla. 2d DCA 1990), review denied 576 So.2d 284 (Fla. 1991); Smith v. State, 567 So.2d 55 (Fla. 2d DCA 1990), review denied 576 So.2d 291 (Fla. 1991); Pittman v. State, 570 So.2d 1045 (Fla. 1st DCA 1990), review denied 581 So.2d 166 (Fla. 1991).

The Second District Court of Appeal addressed the constitutionality of the statute as to equal protection in Arnold State, supra., with the following:

> The classification of habitual offenders is rationally related to the legitimate state interests of punishing recidivists more severely than first time offenders and protecting the public by incarcerating career criminals. *See Eutsey v. State, 383 So.2d 219, 223 (Fla. 1980); Roberts v. State, 559 So.2d 289, 291 (Fla. 2d DCA 1990); King v. State, 557 So.2d 899, 902 (Fla. 5th DCA 1990).* The appellant argues that the state has arbitrarily applied the statute, but the record contains no facts to support this allegation. Furthermore, the state need prove only objective criteria for a defendant

> to be classified as a habitual felony offender: two or more of the requisite felony convictions within the prescribed time frame that have not been pardoned or the subject of post-conviction relief. *See* §*775.084(1)(a), Fla. Stat. (Supp. 1988).* Thus, section 775.084 does not create an arbitrary classification and does not violate the appellant's constitutional right to equal protection of the laws.
>
> Arnold, supra. at 38.

With respect to any due process violations, the Fifth District, in King, supra., stated as follows:

> Under substantive due process, the test is whether the statute bears a reasonable relation to a permissible legislative objective and is not discriminatory, arbitrary, capricious or oppressive. *Lasky v. State Farm Insurance Company, 296 So.2d 9 (Fla. 1974).* Courts will not be concerned with whether the particular legislation in question is the most prudent choice, or is a perfect panacea, to cure the ill or achieve the interest intended, if there is a legitimate state interest which the legislation aims to effect, and is the legislation a reasonably related means to achieve the intended end, it will be upheld. *(citations omitted).*
>
> Habitual offender statutes are the means to achieve the state goal of protecting the citizens of Florida by incarceration of career criminals. Generally, a state is justified in punishing a recidivist more severely than it punishes a first offender. *Solem v. Helm, 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983).*
>
> King, supra. at 902.

Defendant further argues that the statute is unconstitutionally vague because the State "has unfettered discretion in determining when to seek an enhanced habitual

felony offender sentence". (See Brief of Appellant at p. 54). However, the statute sets forth specific criteria that a defendant must meet before the State or the trial court may seek the application of an enhanced penalty. Id. at 903. If the State seeks sentencing under the statute, the trial court has the ultimate discretion under subsection (4)(c) to decline to impose the enhanced penalty if the court decides that such is not necessary for the protection of the public, which is the underlying purpose of such a recidivist statute. The language of the statute is sufficiently clear to enable ordinary people to understand what the statute requires or forbids, measured by common understanding and practice, thereby defeating the vagueness challenge. State v. Bussey, 463 So.2d 1141, 1144 (Fla. 1985).

CONCLUSION

Based upon the foregoing points and authorities the State respectfully urges this Court to affirm Defendant's convictions and sentences.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing **BRIEF OF APPELLEE** was furnished by mail to **DAVID A. DAVIS,** Assistant Public defender, Leon County Courthouse, Fourth Floor North, 301 South Monroe Street, Tallahassee, Florida 32301, on this 18th day of December, 1991.

ANITA J. GAY
Assistant Attorney General