IN THE SUPREME COURT OF FLORIDA

CASE NO. 78,030

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CLERK, SUPREME COURT
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Chief Deputy Clerk

WILLIE JAMES KING,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

****

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

****

BRIEF OF APPELLEE

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INTRODUCTION

Appellee, **the State of Florida,** was the prosecution in the trial court and Appellant, **Willie James King,** was the defendant. The parties will be referred to as they stood in the lower court. The symbol "R" will refer to the record on appeal, and "S.R." to the supplemental record on appeal. Emphasis will be as indicated.

STATEMENT OF THE CASE AND FACTS

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

STATEMENT OF THE ISSUES

I.

WHETHER THE DEFENDANT'S NEIL/SLAPPY CLAIM IS PROPERLY PRESERVED, AND IF SO, WHETHER THE TRIAL COURT'S ACCEPTANCE OF THE PROSECUTOR'S EXPLANATION CONSTITUTED AN ABUSE OF DISCRETION.

II.

WHETHER THE DEFENDANT'S GUILT PHASE CLAIMS OF IMPROPER PROSECUTORIAL COMMENTS WERE PROPERLY PRESERVED, AND IF SO, WHETHER THE TRIAL COURT'S DENIAL OF THE DEFENDANT'S MOTIONS FOR MISTRIAL CONSTITUTED AN ABUSE OF DISCRETION.

III.

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING A PHOTOGRAPH OF THE VICTIM'S BODY, AND IF SO, WHETHER THE ADMISSION WAS HARMLESS.

IV.

WHETHER PORTIONS OF THE PROSECUTOR'S PENALTY PHASE ARGUMENT WERE IMPROPER, AND IS OF, DID THE IMPROPRIETY CONSTITUTE FUNDAMENTAL ERROR SO AS TO EXCUSE THE LACK OF AN OBJECTION BELOW.

V.

WHETHER THE TRIAL COURT'S TRUNCATED NOTATION ON THE SCORESHEET, VIEWED IN CONJUNCTION WITH ITS ORAL PRONOUNCEMENT, SATISFIED THE REQUIREMENT OF WRITTEN REASONS FOR DEPARTURE.

VI.

WHETHER THE TRIAL COURT CONSIDERED THE DEFENDANT'S REJECTION OF THE STATE'S PLEA OFFER AS AN AGGRAVATING FACTOR.

VII.

WHETHER THE TRIAL COURT FAILED TO CONSIDER ALL MITIGATING CIRCUMSTANCES, AND WHETHER ITS SENTENCING ORDER IS IMPROPERLY AMBIGUOUS.

VIII.

WHETHER THE TRIAL COURT FAILED TO INDEPENDENTLY WEIGH THE AGGRAVATING AND MITIGATING FACTORS.

IX.

WHETHER THE DEATH SENTENCE IS DISPORTIONATE.

SUMMARY OF THE ARGUMENT

The defendant did not preserve his Neil/Slappy claim because he never asked the Court to make the initial "strong likelihood" threshold determination, nor did the trial court make that determination. Additionally, the fact that the State challenged the second black prospective juror called does not establish a "strong likelihood", especially where the State had already accepted the first black juror called, and at least three other black venireman remained in the likely selection pool. The defendant also failed to request any remedy. Finally, the prosecutor's reason was race neutral and made perfect sense. A person who had to dive off his bicycle to avoid being shot by the occupant of a passing car, and who was unable to identify his attacker, would most probably tend to be skeptical of an identification made by the surviving victim of a similar attack. A juror with that type of similar experience knows firsthand the effects of adrenaline-fueled terror, and this firsthand knowledge, which all the jurors are now aware of, is definitely not something the prosecutor wants in the jury room during deliberations.

The prosecutor's two references to the victim's status as a mother, the first in opening statement and the second in closing argument, were both improper. The trial court sustained the objection to the latter and did not specifically rule on the

former, nor did counsel request a specific ruling thereon. Rather, counsel in both instances requested a mistrial, but failed to request either a curative instruction or admonishment, nor did he move to strike. The instant claims are thus not properly preserved. Additionally, the comments are not sufficiently egregious to warrant a mistrial, especially given the overwhelming nature of the evidence of guilt.

The photograph in question was relevant and was used by the medical examiner to show the location of the wound. The photograph was in no way gruesome and its admission could not possibly have effected the verdict of guilt.

The portions of the prosecutor's penalty phase argument cited by the defendant, none of which were objected to, are taken out of context. The prosecutor had repeatedly and accurately told the jurors their solemn duty was to weigh the aggravating and mitigating factors, and impose life if the mitigating predominated and death if the opposite was true. Read in context, the prosecutor's "Do not violate your duties in this case. Do not cooperate with the evil here. The appropriate penalty is death," comment is telling the jurors that because the aggravating factors outweigh the mitigating factors, it would be illegal and immoral for the jurors to impose a life sentence. It is certainly true that the prosecutor should have included the above emphasized phrase at this juncture, however the argument

must be viewed in its entirety. The prosecutor is not telling the jurors they are evil people if they do not return the recommendation the prosecutor wants, rather he is emphasizing the need to follow the law, i.e., return a recommendation of death if the aggravating outweigh the mitigating, as they do in this case. Therefore, no fundamental error occurred during the prosecutor's penalty phase closing argument.

The trial court did give a written reason for departure as to count II. After orally announcing it would depart based on an unscored capital felony, the trial court wrote the word "felony" on the scoresheet as the basis for departure. Although such succinct shorthand is not exactly bluebook style, it should suffice herein because it is beyond obvious what the notation signifies.

The trial court did not hold the defendant's rejection of the State's plea offer against him at sentencing, rather the complete opposite was true, i.e., the Court was musing that the plea offer showed that the State had not always considered this a death penalty case.

The trial court's sentencing order adequately addressed the mitigating factors and, viewed in its entirety, was not ambiguous. The order also does not give undue weight to the jury's recommendation, and contains an independent determination that the aggravating factors outweigh the mitigating factors.

The sentence of death is not disportionate. The cases relied on by the defendant are either domestic killings or ones with only a single aggravating factor. This court has repeatedly found the death sentence proportionate where the murder occurred during a robbery, a second aggravating factor was present, and there was not an overwhelming case in mitigation, as was certainly the case here. The defendant deliberately shot the victim in the head when, after hearing the defendant's threats, she took her foot off the brake and the car began moving slowly forward. This was not an accidental or unintended "reflex action." In addition to a second victim in this case, the defendant's prior violent felonies include two separate robberies, one an armed robbery in which the defendant specifically threatened to kill the victim with a .45 caliber handgun if he "tried anything". The death sentence herein is thus far from disportionate.

ARGUMENT

I.

THE DEFENDANT'S NEIL/SLAPPY CLAIM WAS NOT PRESERVED AND IS WITHOUT MERIT.

The instant case presents a classic case of how not to preserve a defense challenge pursuant to State v. Neil, 457 So.2d 481 (Fla. 1984), and its progeny. After the State accepted the first black juror, Ms. Douglas (R.269), the State exercised a peremptory on the second black juror called, Mr. Ashley. (R.270). The defense's challenge to the strike of Mr. Ashley consisted of the following:

> MR. KASTRENAKES: The State exercises a peremptory challenge on Mr. Ashley.
>
> MR. KASSIER: Judge, under the recent change in the case law, I believe an inquiry can be asked by the Defense, even though there is one juror only struck--I would ask the State at this point, because there is nothing to indicate there was a challengeable person for cause, and I can't see from his answers there is any reason other than a racial reason.
>
> So I would ask the State about that.

Id.

The judge then questioned the State as to the reason for its strike, and finally accepted the State's explanation that Mr. Ashley had been shot at and unable to make an identification. Defense counsel then stated that the Court's acceptance of this

reason was "over my objection." After twelve jurors were accepted by both sides, the Court asked both sides if the panel was acceptable, and both sides stated it was: "Judge, the defendant tenders that panel, as well." (R.277). The jurors were then sworn.

Under these facts, the issue is not preserved for two reasons. First, the defendant never asked the trial court to make the threshold determination that there was a "strong likelihood" the State was using peremptories in a racially discriminatory manner, nor did the trial court make that determination on its own. Thus the burden never shifted to the State to explain its reasons. See Valle v. State, 581 So.2d 40 (Fla. 1991).

The second reason the issue is not preserved is that the defense made no objection to the panel and indeed did not seek any remedy at any point. See Brown v. State, ___ So.2d ___, 17 F.L.W. D2451 (Fla. 1st DCA October 22nd, 1992), and cases cited therein.

Additionally, the facts show that no strong likelihood arose from the strike of Mr. Ashley. The State had already accepted the first black called, Ms. Douglas, and at least three more blacks remained on the venire. (Ms. Rolle and Ms. McDonald sat on the jury, along with Ms. Douglas, and Mr. Allen was struck

by the defense, R.296). See Taylor v. State, 583 So.2d 323 (Fla. 1991) (strike of single black does not raise strong likelihood where three other blacks remained in venire). See also Fotopoulos v. State, ___ So.2d __, 17 FLW S643 (Fla. October 15, 1992) (striking of two blacks did not create strong likelihood under circumstances, including presence of four other blacks on jury).

Finally, the trial court was well within its discretion in accepting the State's reasons for striking Mr. Ashley. The surviving victim in this case experienced his wife shot while seated next to her in their car, then he stared down the barrel of the defendant's gun for five seconds before the defendant fled. In these few seconds of sheer terror, he nevertheless was able to remember the defendant's face and then select his picture from a line-up. Mr. Ashley had been the victim of a drive-by shooting whereby he had to leap from his bicycle to avoid being shot. He was then unable to recognize his assailant. (R.130, 131). No other juror had a remotely similar experience. Juror Forti had been in a bar when someone was shot, but told the prosecutor he was not actually a witness. (R.155). Another juror had been shot accidently by his cousin while hunting.

There is something very unnerving about being shot at and/or having a gun pointed at you at close range. It hardly matters whether Mr. Ashley could not recognize his attacker

because he only saw him briefly, or never saw him at all because he was too busy diving for his life. Ashley knows full well the terror the surviving victim felt, and the prosecutor certainly would not want this firsthand experience in the jury room when the jurors are deciding how much weight to give the surviving victim's identification of the defendant. See Reed v. State, 560 So.2d 203 (Fla. 1990), and Dougan v. State, 595 So.2d 1 (Fla. 1992) (trial judge accorded broad discretion on ruling on motive for strikes). See especially Green v. State, 583 So.2d 647 (Fla. 1991). There, the state struck a black juror because of his opinion that the death penalty lacked deterrent value. The defendant argued this was pretextual under Slappy, because the State did not strike other jurors with reservations about the death penalty. This Court noted that only the stricken juror had a specific concern about lack of deterrence. Similarly, the State struck a second black juror because she knew a defense penalty phase character witness, but did not strike a juror who knew a State witness. Again, this Court held the distinction valid. The distinction in the instant case is even more pronounced, as no other juror had any experience remotely similar to that of Mr. Ashley.

II.

THE DEFENDANT'S GUILT PHASE IMPROPER PROSECUTORIAL COMMENTS CLAIM WAS NOT PRESERVED, AND RELIEF IS UNWARRANTED IN ANY EVENT.

The comments cited, one in opening statement (R.302) and one in closing argument (R.887), were both improper because the victim's status as a mother was irrelevant.[1] The first comment ("... wiped off the face of the earth the mother of his children.") elicited an objection and immediate request for sidebar, which request was granted. Counsel then stated his objection and grounds, and concluded with "I move for a mistrial." The trial court responded "I'll deny the motion for mistrial." (R.302). Defense counsel never obtained a specific ruling on his objection, as he was required to do. More importantly, he did not move to strike nor request a curative instruction or admonishment of the prosecutor.

The second comment, which occurred in closing argument ("... a mother was gunned down." R.887) was objected to and the objection was sustained. Counsel once again failed to move to strike, to request a curative instruction or an admonishment of counsel, instead moving only for a mistrial.

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1 The jury did learn the couple had three children during the surviving victim's/father's testimony. (R.375).

Because the effects of almost all improper prosecutorial comments can be cured by a timely curative instruction or admonishment of the prosecutor, counsel must request these curative remedies as a prerequisite to a motion for the extreme remedy of a mistrial. See Rodriquez v. State, ___ So.2d ___, 17 S623 (Fla. October 8th, 1992), Marshall v. State, ___ So.2d ___, 17 FLW S459 (Fla. July 16, 1992), and Reichmann v. State, 581 So.2d 133 (Fla. 1991). In Nixon v. State, 572 So.2d 1336 (Fla. 1990), the prosecutor told the jurors he needed to make them feel a little bit of what the victim felt, and this Court noted that the proper remedy for this golden rule violation would have been a curative instruction/admonishment. In Holton v. State, 573 So.2d 284 (Fla. 1990), this Court stated that the prosecutor's comments about the defendant's courtroom demeanor, and statement that the defendant had a "twisted mind," could have easily been cured by a swift rebuke from the Court. In Freeman v. State, 563 So.2d 73 (Fla. 1990), the prosecutor made references to the victim's children. Noting that the objection was sustained and a curative instruction given, this Court denied relief.

In short, whatever taint was created by the references to the victim's status as mother could easily have been cured by a motion to strike, curative instruction or admonishment, or a combination thereof. The issue is thus not properly preserved.

Additionally, the comments are not so egregious as to warrant a mistrial. In Watts v. State, 593 So.2d 198 (Fla. 1992), this Court held comments concerning the victim's surviving spouse did not warrant a new trial, a remedy only applied where a comment "... was so prejudicial as to vitiate the entire trial," Id. at 203, quoting State v. Murray, 443 So.2d 955, 956 (1984). In Scott v. State, ___ So.2d ___, 17 FLW S577 (Fla. August 27, 1992), this Court stated:

> After carefully reviewing the prosecutor's argument, as well as the record as a whole, we conclude that the complained-of comments were not so prejudicial or inflammatory as to violate Scott's right to a fair trial, nor were they of such a nature as to influence the jury to return a more severe verdict than otherwise warranted. While some of these remarks were improper, they were not so offensive that a mistrial was required.
>
> Id. at 578.

In Randolf v. State, 562 So.2d 331 (Fla. 1990), this Court stressed that motions for mistrial based on improper comments are addressed to the sound discretion of the trial court.

A final point is that the evidence of guilt was absolutely overwhelming. In addition to the identification by the surviving victim, witness Denise Rechourse, who knew the defendant all her life, saw the defendant standing next to the

victim's car, heard the defendant order the victims outside, and saw the defendant's hand come up after the shooting. (R.469-475). Sabrina Osbourne was talking on the phone to her friend Maria Mejia, and as she looked out her window she saw the defendant, whom she had known for two years, shoot into the car. She was positive it was the defendant who did the shooting. (R.612-616). Maria Mejia then testified that while talking to Sabrina on the phone, Sabrina got very excited and said "a white lady got shot." Maria asked who did it and Sabrina said "Willie". When Maria said "Willie who?", Sabrina said "Willie King". Maria asked if she was sure, and Sabrina said she was sure. (R.601, 602).

Jerry Nelson had gone to grade school with the defendant. He saw the defendant and his accomplices get into their car and drive over to the white people's car. He saw the defendant shoot into the car. Jerry was sitting with his aunt Shirley at the time. (R.640-653). Shirley Nelson, Jerry's aunt, heard Jerry say "There goes Willie King. Their off to rob those crackers." (R.659-662). Vann Wilson, the defendant's half brother, testified that he was present when the defendant and his accomplices planned and set out on the robbery, and that the defendant had a .38 caliber handgun (the victim was killed by either a .38 caliber or .357 caliber handgun). Vann tried to talk the defendant out of it. (R.673-685). Officer Brown then testified that Vann flagged him down the day after the murder, told Brown the defendant had committed the murder, and requested police protection. (R.634, 35).

Finally, the defendant changed his story six times, going in stages from "I wasn't there, I was with my girlfriend," to "I was there, I saw it, but I didn't do it." (R.563-573).

An additional comment complained of was the prosecutor's reference in closing to the defendant's telephone calls to defense witness Cheryl Ogletree:

> "She got two phone calls from the defendant. Nobody else is getting phone calls from the defendant about what they may or may not have seen." (R.886).

The State submits that the lack of testimony from any other witness about phone calls raises the legitimate inference that no such calls were made. Argument is all about raising logical inferences from the facts, and that is all the prosecution did herein. Even if the comment was somehow improper, the defendant never requested a motion to strike, curative instruction or admonishment, and in any event the comment is hardly egregious enough to warrant a new trial especially in view of the overwhelming evidence of guilt.

III.

THE TRIAL COURT PROPERLY ADMITTED A PHOTOGRAPH OF THE VICTIM'S BODY.

The photograph in question, State's exhibit #20 (S.R.100) is far from gruesome and indeed is no different than State's exhibit #22 (S.R.102), except that it is taken from a greater distance. The medical examiner testified that #20 helped her put the position of the wound in better perspective than the close-up view in #22, and contrary to the defendant's suggestion in his brief, the medical examiner did in fact use #20 in explaining the position of the wound to the jury. (R.423). The photograph was relevant, there was little if any unfair prejudicial effect, and thus the trial court acted well within its discretion in admitting the photograph. See Haliburton v. State, 561 So.2d 248 (Fla. 1990) (photographs properly admitted where medical examiner used them to illustrate nature of victim's wounds).

IV.

THE PROSECUTOR'S PENALTY PHASE ARGUMENT, VIEWED IN ITS ENTIRETY, DID NOT CONSTITUTE FUNDAMENTAL ERROR.

None of the complained of arguments were objected to, and thus the claim is one of fundamental error. See Henry v. State, 586 So.2d 1033 (Fla. 1991). In Socher v. State, 580 So.2d 595 (Fla. 1991), rev. and rem. on other grounds, 504 U.S. _____, 119 L.Ed.2d 326, 112 S.Ct. ____ (1992), this Court enunciated the standard for fundamental error, which is the same for capital as noncapital cases:

> Sochor next complains of various errors which, taken as a whole, led to an unfair trial. He acknowledges that counsel did not object at trial to any of the complained-of errors and, pursuant to the contemporaneous objection rule, they are not preserved for review. *See Wainwright v. Sykes,* 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977); *Jones v. State,* 449 So.2d 253 (Fla.), *cert. denied,* 469 U.S. 893, 105 S.Ct. 269, 83 L.Ed.2d 205 (1984). Despite the lack of objections, Sochor contends that (1) the trial was so unfair that fundamental error occurred and (2) the contemporaneous objection rule has less force in capital cases. This Court has previously rejected the second argument. *Rose v. State,* 461 So.2d 84 (Fla.1984), *cert. denied,* 471 U.S. 1143, 105 S.Ct. 2689, 86 L.Ed.2d 706 (1985); *see Pope v. Wainwright,* 496 So.2d 798 (Fla. 1986), *cert. denied,* 480 U.S. 951, 107 S.Ct. 1617, 94 L.Ed.2d 801 (1987); *Jones v. Wainwright,* 473 So.2d 1244 (Fla. 1985).
>
> As to the first argument, fundamental error occurs in cases "where a jurisdictional error appears or where the interests of justice present a compelling demand for its application." *Ray v. State,*

> 403 So.2d 956, 960 (Fla. 1981). The error must amount to a denial of due process.
>
> Id.

This Court further stated that fundamental error "... is error which goes to the foundation of the case." Id.

As this Court stated recently in Scott, as quoted above, the reviewing court must view the complained of comments in the context of the entire record in order to properly assess their probable effect on the jurors. In the instant case the only comments which could possibly fall in the fundamental error range are the following:

> Martin Luther King wrote in 1958, that he who passively accepts evil is as much involved in it as he who helps perpetuate, and he who accepts evil without protesting against it is really cooperating with it.
>
> Do not violate your duties in this case. Do not cooperate with the evil here. The appropriate penalty is death.
>
> (R.1001).

The State submits that when this phrase is put in its proper context in the prosecutor's argument, it is clear the prosecutor is telling the jurors that because the aggravating factors outweigh the mitigating factors, it would be illegal, immoral and a violation of their oaths to return a recommendation of life imprisonment. In order to understand the prosecutor's words in context, his entire argument must be dissected.

The prosecutor began his argument by stressing that their "solemn duty under the law" was to make a recommendation "... as to what you feel is the appropriate sentence in this case." (R.990). He told them "your duty is a legal duty." The prosecutor then set out the jurors legal duty in absolutely accurate terms:

> You are going to hear the law from the judge. You have to make a legal decision. I am only asking you to do one thing, follow the law. Do the right thing. Listen to the evidence and follow the instructions of the Court, and to judge the conduct of the defendant and the character of the defendant and make the appropriate recommendation.
>
> * * * * *
>
> You know I am here asking you to decide this case based on your oath, based on the law and the evidence and the Legislature, in their infamous [sic] wisdom, and the Supreme Court of Florida have said and have devised this proceeding so that you can consider certain aggravating factors and certain mitigating factors and come up with an appropriate recommendation.
>
> In the old days it used to be the jury that heard the case, they would just check a box recommending a penalty or not recommending a penalty. That was applied unfairly. That was not applied based on the law, and the jurors ruled from their guts and from not listening to the evidence and not following the law, so the Legislature, in their infamous [sic] wisdom and under the guidance of the Supreme Court of the United States and Supreme Court of Florida, have laid out certain aggravating factors which you should consider in deciding what the appropriate recommendation should be, and

> they have also set out mitigating factors, things that may excuse a first-degree murder or that would weigh against an aggravating factor, and the ultimate analysis, your job as jurors, is to see which weighs more.
>
> Do the aggravating outweigh the mitigating? If so, your recommendation, legal recommendation, should be death.
>
> If the mitigating outweighs the aggravating then your legal, solemn duty is to recommend life imprisonment.
>
> I am asking you just to follow the law.
>
> (R.993, 94).

The prosecutor then explained that the first aggravating factor to be considered was the defendant's prior convictions for violent crimes, and that "this is a character analysis of the defendant" (R.995), as it most certainly is. The prosecutor explained that the defendant's character was irrelevant at the guilt phase but now was extremely important. He then described the defendant's life of crime, beginning at age seventeen when he robbed a woman of her purse, then a week later robbed a man at gunpoint and threatened to kill him if he resisted. The defendant was given a youthful offender sentence in 1981 for these crimes, and in 1985 the defendant was given an additional ten (10) years,[2] which he obviously was released early from

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[2] The State's sentencing memoranda explains the source of the additional ten (10) years, i.e., a violation of community control based on escape, carrying a concealed firearm and possession of a firearm by a convicted felon, which occurred on February 1st, 1985. (R.1125).

because in January, 1990 the defendant committed the instant crimes, which includes the attempted murder of the husband, for which the jury had already convicted the defendant. (R.996, 997). The prosecutor then stated:

> How weighty is that factor to be considered by you as the jurors? It is not a numbers game. Just because there are three aggravating and maybe one or two mitigating that does not mean you should vote for capital punishment. I am not telling you that. You should weigh the factor.
>
> How strong is this factor? Well, let's discuss that.
>
> If this defendant had never been involved in a violent crime before in his life this factor would still have been proven because you would have been entitled to consider the attempted murder of the husband as a prior crime because it is prior to the date. That factor would have been proven.
>
> What weight? Well, you could say, "Hey, look, this is one incident, she dies, he points a gun at the husband." You found him guilty of attempted murder of the husband. I am not going to give that such weight. But what do you have in this case? You have two prior robbery convictions for this defendant. It tells you everything you need to know about this man. It is the utter rejection of family values and the advice of his father. It is a life of crime. It tells us a very sad thing about the criminal justice system.
>
> I think this man indicated we failed. We have failed with Willie James King. He has not been rehabilitated over the years and he is not rehabilitatable.
>
> (R.997, 98).

At this juncture the State notes that the prosecutor, in the last paragraph, is not arguing lack of rehabilitative prospects as an aggravator, but rather is characterizing what defense counsel either had said or would probably say.

The prosecutor then admitted that neither the facts of the crime nor the defendant's record, standing seperately, warranted the death penalty, but that when added together (prior violent felony plus in the course of a felony) they did warrant death (R.999). The prosecutor then stated:

> What has the evidence shown that the defendant learned through his prison record, through his convictions of prior violent felonies?
>
> What has he learned? Nothing. He has learned to continue to take what is not his. He has learned to kill those who resist so apparently he cannot be rehabilitated.
>
> (R.999).

Although the prosecutor uses the phrase "... so apparently he cannot be rehabilitated," the point he is making is that the defendant's violent felony convictions show a pattern of escalating violence in order to obtain others property, and this is a perfectly valid point because the defendant's entire violent felony conviction record is fair game. The prosecutor then states:

> MR. KASTRENAKES: The Court will tell you that in twenty-five years this man will

> be eligible for parole. In the book, which is the adult life of this man, it is a testament to a life of crime. A life of robbery, a failure of the criminal justice system. And why? Perhaps the simple reason is that he is evil and an evil person cannot be rehabilitated.
>
> Joseph Conrad, who was an author back at the turn of the century, wrote that belief in a supernatural source of evil is not necessary. Men alone are quite capable of every wickedness.

(R.1000).

As for the defendant's argument that the prosecutor is insinuating the defendant will get out in twenty-five (25) years and commit new crimes, the State submits that a prosecutor must do more than mention parole eligibility before this argument can validly be made. Even if this reference is read as the defendant states, it would not require reversal even if the issue was preserved by objection. See Freeman v. State, 563 So.2d 73 (Fla. 1990) ("How many times is this going to happen" comment, though inferring future crimes if ever released, did not warrant new sentencing").

As for the characterization of the defendant as evil, the use of this term in conjunction with the prior violent felony aggravator seems reasonable, as this factor certainly hones in on the defendant's dark side. In Watts v. State, 593 So.2d 198 at 203 (Fla. 1992), the prosecutor's characterization of the crime as evil evoked no comment by this Court, and certainly did not

evoke an objection by defense counsel herein, who pounced on the State's evil characterization in his own argument. (R.1014, 1018).

The prosecutor once again referred to the system's failure to rehabilitate the defendant and suggested that might be because he cannot be rehabilitated. However, the prosecution is not using lack of rehabilitation in aggravation, rather he is asking the jurors not to hold it against the State that the system failed to rehabilitate the defendant, because it is the defendant's fault and no one elses that he went back to robbery after two stints in prison.

The prosecutor then reminded the jurors it was their solemn duty to "assess the aggravating factors, give it its weight and make the appropriate recommendation." (R.1000, 01). He then made the comments upon which the defendant primarily relies:

> Martin Luther King wrote in 1958, that he who passively accepts evil is as much involved in it as he who helps perpetuate it, and he who accepts evil without protesting against it is really cooperating with it.
>
> Do not violate your duties in this case. Do not cooperate with the evil here. The appropriate penalty is death.
>
> Id.

Looked at in a vacuum, it would seem the prosecutor is saying that a verdict of life would mean the jurors were doing something evil. However viewed in the context of the prior and subsequent comments of the prosecutor, it is abundantly clear that the "Do not contribute ..." comment was an argument that <u>because the aggravating factors completely outweigh the mitigating factors</u>, it would be illegal and immoral to return any recommendation other than death, and indeed where the jurors determine the aggravators are sufficient and that they outweigh the mitigators, they are instructed to vote for death. <u>See</u> <u>Dougan v. State</u>, ___ So.2d ___, 17 FLW S10 (Fla. January 2nd, 1992) (where aggravators are sufficient and predominate, jurors must vote death).

The prosecutor then went through the rest of the aggravating and mitigating factors, arguing that each possible mitigator should be given little or no weight. The prosecutor then closed with the following:

> The factors proven in aggravation in this case so outweigh any argument for mitigation there can be only one recommendation, if you are following the law.
>
> You took an oath, each and every one of you, to follow the law. Remember your vote, while it does not have to be unanimous, a six-six vote for example is possible, that is a recommendation for life. A majority vote is possible. You can vote whatever way but the one vote that you have to take is a legal vote. A lawful vote.

> Be true to your oath. Be true to yourselves. Follow the law. Follow your duties.
>
> An American patron once said about duty, "Duty is a subliminal word in our language so do your duty in all things. You cannot do more. You should never wish to do less.
>
> I am asking you on behalf of the people in this state and this community to do your duty. I cannot ask anymore. I expect no less.
>
> There can be only one lawful recommendation in this case and that recommendation is a recommendation of death.
>
> The aggravating factors overwhelm any argument in mitigation.
>
> Do the right thing. Thank you.
>
> (R.1013, 1014).

In sum, the cited comments of the prosecutor, when viewed in their proper context, were not improper, and certainly did not rise to the level of impropriety needed to invoke the fundamental error doctrine.

V.

THE TRIAL COURT'S SHORTHAND NOTATION ON THE SCORESHEET WAS SUFFICIENT TO SATISFY THE WRITTEN REASONS REQUIREMENT.

After announcing orally that it was departing upward on Count II because of an unscored capital felony conviction in Count I (R.1062), the trial court wrote the word "felony" in the "Reason for departure" space on the scoresheet. (R.1139). This appears to be a case of first impression, and the State submits that there is only one possible interpretation of the word "felony" in this context, thus although the trial court's method should be avoided and certainly deserves no accolades, it is nevertheless sufficient in this case.

VI.

THE TRIAL COURT DID NOT USE THE DEFENDANT'S REFUSAL TO PLEAD GUILTY AS AN AGGRAVATING FACTOR.

In its order the trial court stated:

> The State also urges the imposition of the death penalty, although it did not always do so. Prior to trial the State offered not to seek the death penalty if the defendant would plead guilty, a fact not known to the jury. This case may not fit the class of cases in which one would ordinarily believe the death penalty is appropriate; this murder was not especially wicked, nor was it cold, calculated or even premeditated. However, this court cannot state that there is no basis for the jury recommendation, and, therefore, the

> recommendation of the jury should be followed.
>
> (R.1137).

It appears obvious to the State that the trial court is musing that the prosecution did not really believe this to be a death case, despite the prosecutor's urgings for death. That is the complete opposite of using the rejection of the plea offer against the defendant. If anything, the Court used it as mitigation.

VII.

THE TRIAL COURT CONSIDERED ALL THE MITIGATION AND ITS ORDER WAS NOT FATALLY AMBIGUOUS.

The trial court's order complied with the dictates of Campbell v. State, 571 So.2d 415 (Fla. 1990). The trial court's order states:

> The court has considered and weighed all statutory and non-statutory mitigating factors, and finds that none exist. The defendant was not under the influence of extreme mental or emotional disturbance. Although the victim was engaged in attempting to buy drugs at the time of the murder, she was not buying them from the defendant, and even if she was, the action did not constitute consent, nor was she a participant in the defendant's conduct. The defendant's participation in this crime was not minor. Although there were other participants, the defendant was deeply involved in the planning of the robbery, and he is the person who shot and killed

> the victim. There is no evidence to suggest that the defendant was under duress or the domination of another person. The defendant, although of low intelligence, had no impairment affecting his ability to appreciate his criminal conduct or to conform his conduct to the requirements of law. At the time of the commission of the crime the defendant was twenty-five years of age. The defendant presented psychological expert testimony; it showed that he was of low intelligence, but not to a degree that would reach the level of a mitigating circumstance. After reviewing all the evidence and matters of record, the court finds no other non-statutory mitigating circumstances were shown.
>
> (R.1136).

Although the trial court did not specially address the defendant's upbringing, this was brought out through the defense's expert, whose testimony the trial court cited in its order. The expert said that the defendant's history might "possibly" be mitigating. (R.961), but only in the statistical sense. (R.962). The logical inference from the language of the trial court's order is that it considered the history related by the expert, but did not find it was of a mitigating nature.

The trial court's order does use the phrase "mitigating factors do not exist," however it is abundantly clear the Court has acknowledged the existence of certain mitigation, i.e., below average intelligence, but finds it has no mitigating weight. The trial court has broad discretion in determining the weight to be accorded mitigating factors. See Capehart v. State, 583 So.2d 1009 (Fla. 1991).

The sentencing order was not ambiguous in its weighing analysis. The Court stated twice that the aggravating outweighed the mitigating factors. (R.1136). Its statement that no mitigators existed meant, as stated above, that the court found the proposed mitigators to have virtually no weight.

VIII.

THE TRIAL COURT DID NOT GIVE UNDUE WEIGHT TO THE JURY'S RECOMMENDATION.

The trial court twice stated that the aggravating factors outweighed the mitigators, thus it clearly undertook an independent weighing. The death recommendation was also entitled to great weight. Stone v. State, 378 So.2d 765 (Fla. 1980).

IX.

THE DEATH SENTENCE IS NOT DISPORTIONATE.

This death sentence is far from disportionate. To begin with, this was not a "reflex action," rather this was an intentional shot to the back of the head because the victim did not obey the defendant's command to exit the car, but rather initiated an attempt to escape by taking her foot off the brake. The defendant was not startled by a lurching vehicle, he was angered by her attempt to thwart his plan, as specifically found by the trial court. (R.1134).

In addition to the aggravator of "in the course of an armed robbery"/pecuniary gain, the defendant had two prior robberies, the second of which was an armed robbery during which the defendant threatened to kill the victim if he resisted, a threat he made good on nine years later, with most of the interim period spent safely behind bars. The defendant was also convicted of attempted murder of the husband in this case, bringing to three (3) the number of people the defendant has been convicted of violently assaulting, excluding the murder victim.

Additionally, the mitigating factors are certainly not overwhelming, and indeed are relatively weak, i.e., an I.Q. estimated by Dr. Haber between 75-85, and a background that was economically deprived but otherwise unremarkable. There was no abuse, no psychological disorders and no mental health mitigation.

The cases relied on by the defendant are all inopposite, involving only a single aggravating factor or domestic killing with major mitigation. This Court has uniformly dismissed proportionality attacks in situations similar or indeed indistinguisable from that herein.

See Freeman v. State, 563 So.2d 73 (Fla. 1990) (two aggravating, during burglary and prior murder conviction, and

unremarkable mitigating), Shriner v. State, 386 So.2d 525 (Fla. 1980) (two aggravating, during robbery and prior conviction of robbery, and little mitigation), Young v. State, 579 So.2d 721 (Fla. 1990) (two aggravators, during burglary and avoiding arrest, and some mitigation) and Cook v. State, 581 So.2d 141 (Fla. 1991) (two aggravators, during burglary and prior murder, and some mitigation).

CONCLUSION

The conviction and sentence are proper and should be affirmed.

Respectfully submitted,

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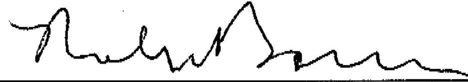
Attorney General



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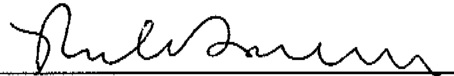
CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing **BRIEF OF APPELLEE** was furnished by mail to **MARTI ROTHENBERG,** Assistant Public Defender, **OFFICE OF THE PUBLIC DEFENDER,** 1351 N. W. 12th Street, Miami, Florida 33125 on this 24 day of November, 1992.



RALPH BARREIRA
Assistant Attorney General

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