IN THE SUPREME COURT OF FLORIDA

CASE NO. 78,202

MICHAEL G. LOVETTE,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

****

ON APPEAL FROM THE CIRCUIT COURT
OF THE NINETEENTH JUDICIAL CIRCUIT,
IN AND FOR INDIAN RIVER COUNTY, FLORIDA

****

ANSWER BRIEF OF APPELLEE

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

CELIA A. TERENZIO
Assistant Attorney General
Florida Bar No. 656879
1655 Palm Beach Lakes Blvd.
Suite 300
West Palm Beach, FL 33401-2299
Telephone: (407) 688-7759

Counsel for Appellee

TABLE OF CONTENTS

PAGE

TABLE OF CITATIONS

CASES **PAGES**

FLORIDA STATUTE:

PRELIMINARY STATEMENT

Appellant was the defendant and appellee was the prosecution in the trial court. "R" represents the record on appeal, followed by the appropriate page number.

STATEMENT OF THE FACTS

Appellee accepts appellant's statement of the facts to the extent that they represent a nonargumentative and accurate rendition of the facts adduced at trial. Appellee would make the following additions;

1. Appellant admits that he intended to rob Domino's Pizza and walked in there with Wyatt. He and his co-defendant entered Domino's carrying guns.(R 1105).

2. Appellant admitted to being in the back area where all the victims were. That area measures fourteen to sixteen feet. (R 1140). Eyewitnesses testified that no one was in the front of the store at 11:45 P.M. (R 414, 409, 423-424, 434, 437).

3. Appellant stated that he heard Mrs. Edwards moan while she was in the back with Wyatt. (R 1106).

4. Appellant made a statement that both he and Wyatt were intoxicated, but that Wyatt was more so than appellant. (R 1108).

5. State witness Bennett who talked with both men earlier that evening said that appellant was not intoxicated. (R 893). Bennett also stated that the defendant appeared to be showing Wyatt the ropes. (R 892).

6. The physical evidence indicates that appellant put on Bornoosh's shirt. (R 1159-1162).

7. Appellant listed Dr. Berland as a witness. (R 1173). The state gave appellant notice of intent to depose Dr. Berland.(R 1173). Dr. Berland was told by defense counsel to

attend the deposition and make notes and test results available to the prosecutor. (R 11176-1177, 1180, 1213, 1214). The state made the deposition available to the defense. (R 1180). Appellant never took the witness off the witness list.

SUMMARY OF THE ARGUMENT

The state conducted a proper voir dire without reference to the specific facts of the case. Appellant was allowed to discuss his theory of the case but was not allowed to discuss legislative intent regarding felony murder.

After holding a Richardson hearing, the trial court properly determined that appellant had waived the attorney client privilege thereby allowing the state to call defense witness Dr. Berland. The court further found that no discovery violation occurred consequently no prejudice had been established.

The trial court properly denied appellant's request to give a jury instruction regarding independent acts as the evidence did not support such an instruction.

The trial court did not err in instructing the jury on flight. The law at the time of the trial clearly permitted such an instruction. Fenelon v. State, 594 So. 2d 292 (Fla. 1992) should not be applied to the instant case. In any event any error to do so was harmless.

5. The trial court did not err in refusing to grant appellant's motion for judgement of acquittal for first degree murder. Appellant's participation in the entire crime spree, along with his presence during the murders presented sufficient evidence of appellant's culpability for first degree murder.

6. The trial court did not err in refusing to grant appellant's motion of judgement of acquittal for sexual battery as Wyatt could not have raped Mrs. Edwards without appellant's help.

7. The trial court did not err in refusing to grant appellant's motion for judgement of acquittal for robbery of the victim's shirt as appellant was a principal in the crime. Appellant wore the shirt during the robbery to avoid suspicion. Appellant kept the shirt on during his escape from the scene.

8. The trial court did not err in refusing to grant appellant's motion for judgement of acquittal for two counts of kidnapping. Appellant, as a principal in the robbery acted in concert with Wyatt in kidnapping all three victims in order to rob the Domino's.

9. Since the trial court did not err in the rulings that are challenged in issues II, V-VIII this claim is without merit. In any event any error as to any of these issues did not deprive appellant of a fair sentencing hearing.

10. Various photos and a comment by a state witness were admissible during the sentencing phase. The trial court properly denied relief.

11. The trial court did not err in refusing to grant a mistrial or give a curative instruction based on alleged prosecutorial comments. The comments were either logical inferences regarding the evidence or not prejudicial enough to warrant any corrective ation by the court.

12. and 13. The trial court properly found the existence of the four challenged aggravating factors. Appellant's presence and participation in the crimes does not preclude the applicability of the aggravating factors to him.

14. The trial court properly found the existence of the aggravating factors of pecuniary gain and that the murders were committed during the course of a sexual battery and kidnappings. No impermissible doubling of aggravating factors occurred.

15. There was sufficient evidence to establish the aggravating factor of "cold, calculated and premeditated".

16. There was sufficient evidence to establish the aggravating factor of "heinous,atrocious and cruel".

17. There was sufficient evidence to establish the aggravating factor of "pecuniary gain".

18. The trial court considered all the evidence that was presented in mitigation and detailed its findings in the sentencing order.

19. Appellant's death sentence is proportionally warranted in the instant case.

20. Florida's death penalty statute is constitutional on its fact and as applied to the instant case.

ISSUE I

THE TRIAL COURT DID NOT ERR IN OVERRULING APPELLANT'S OBJECTION TO PROSECUTORIAL COMMENT DURING VOIR DIRE

Appellant claims that the trial court erred in overruling a defense objection to the prosecutor's comments regarding the law on principals and felony murder. Issues regarding appropriate questions of prospective jurors is subject to the sound discretion of the trial court. Peri v. State, 426 So. 2d 1021 (Fla. 3rd DCA 1983). The trial court's ruling was correct.

A prospective juror asked the prosecutor the following question;

"If there's two people involved in the crime and one person commits the murder, is the other person guilty?"

(R 91). The prosecutor answered "yes" without an objection from the defense.[1] He further explained that her question involved the law of principals and not felony murder. (R 91-92). At that point the prosecutor stated;

> "For example, in this case, to get specific, what the State is going to show you is there were two people that committed these crimes, obviously only one person is on trial here. There was another person besides the Defendant Lovette and his name was Tommy Wyatt. He the States intends to prove__".
> (R 92). The prosecutor never finished that statement. After the objection,

[1] Prior to this exchange, the prosecutor explained the law of felony murder without an objection by the defense. (R 89-90).

> the prosecutor said; "As I was saying, talking about the general principal of more than one person committing a crime and one person being responsible for all the acts the other person did as well....(R 93). "The Judge will give you an instruction on principals, and what I need to know is very important to the State to know at this point, not what you will do at the end of this case, but whether or not in general you can follow the law that the Judge gives you, if the judge gives you an instruction, and again, you don't know any of the facts yet, ... Again I'm not asking you to tell me at this point that you are going to find Michael Lovette guilty; I'm asking you whether or not you can accept in general this instruction on principals that basically says two people go together to commit a crime that each is responsible for the acts of the other. Does anyone have a problem with that? (R 94).

As conceded by appellant, the prosecutor never asked if the jury would convict him. The record demonstrates that the prosecutor was asking a general question regarding various principals of law. (R 95-99, 100 -109). Such an inquiry was proper. Lavado v. State, 492 S. 2d 1322 (Fla. 1986).

Appellant claims that the error was exacerbated by the prosecutor's statement regarding legislative intent and his "misstatement" regarding the definition of felony murder. This portion of the issue is not preserved for appeal as there was no objection to the prosecutor's statement regarding legislative intent, (97-98), or his definition of felony murder. (R 89-90). Henry v. State, 586 So. 2d 1033, 1036 (Fla. 1991). Also appellant complains that the judge refused to allow him to

explain his theory regarding the legislative intent of felony murder. Contrary to assertions otherwise, the judge never ruled that appellant gave an incorrect statement regarding the definition of felony murder. (R 171). The judge ruled that legislative intent was not an appropriate ground during voir dire. (R 171).[2]

Irrespective of the lack of preservation regarding most of this issue, appellant has failed to establish any error. The prosecutor's definition of felony murder included the following; "death occurred during the course of or as a result of the robbery". (R 89-90). Appellee fails to see how this term is different than appellant's phrase that "death be a consequence of the commission of the felony". Bryant v. State, 412 So. 2d 347, 350 (Fla. 1982).

Furthermore, unlike the cases relied upon by appellant, the prosecutor never gave specific facts about the case, nor did he ever ask for a commitment regarding how a prospective juror would vote. (R 89-90, 100-109). The trial court properly denied appellant's objection. Lovado.

---

[2] The judge also noted that appellant certainly has a right to object to the prosecutor's theory regarding legislative intent but failed to do so. (R 171).

ISSUE II

THE TRIAL COURT DID NOT ERR IN ADMITTING APPELLANT'S STATEMENTS TO A MENTAL HEALTH EXPERT IN THE STATE'S CASE IN CHIEF

Appellant claims the trial court erred in admitting the testimony of Dr. Berland during the guilt phase of the trial. Appellant claims that this violated his Fifth Amendment right under Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966) and Estelle v. Smith, 451 U.S. 454, 68 L. Ed. 2d 359, 101 S. Ct. 1866 (1981), it amounted to a discovery violation under Richardson v. State, 276 So. 2d 771 (Fla. 1991) and it violated the attorney-client privilege. After conducting a Richardson, hearing the trial court made the following findings;

> There is no discovery violation. The defense listed the Doctor as a witness. The state then filed a notice to depose. The defense notified the doctor and told him to turn over notes, test results and be available for deposition. No protective order or objection was raised by the defense. After the deposition, the doctor remained on appellant's witness list. There was no procedural prejudice, given the fact that appellant had ample opportunity to depose him again.
>
> Richardson case discovery rule was designed to furnish the defendants with information to help in the preparation of the defense, it was not to provide him with the procedural device to escape justice or provide the trier of fact with only a portion of the admissible testimony.(R 1223-1225).
>
> There is no attorney-client violation given the fact that appellant made the witness available to the state.(R 1226).

The trial court ruling was correct. Whitefield v. State, 479 So. 2d 208, 213-214 (Fla. 4th DCA 1985); Thompson v. State, 565 So. 2d 1311 (Fla. 1990). Appellant had a copy of the deposition taken by the state, there can be no prejudice.

The court's finding that no attorney-client privilege was violated was also correct. Tucker v. State, 484 So. 2d 1299 (Fla. 4th DCA 1986). (R1226-1228). The facts of this case are right on point with Hargrave v. State, 427 So. 2d 713 (Fla. 1983). In ruling on this issue in Hargrave, this Court distinguished the facts of Hargrave, with the facts of Smith v. Estelle, supra. In Hargrave as in the instant case, appellant requested the appointment of an expert as opposed to a sua sponte order without notice as in Smith. Appellant then listed the doctor as a penalty phase witness. (R 1173). Also as in Hargrave, appellant was aware of the state's intention to call Berland as they told him to submit to the state's deposition and make available his notes and test results. (R 1176-1177, 1180, 1213, 1214). Appellant was in possession of the deposition conducted by the state. (R 1180). Appellant had ample opportunity to discuss this with the witness. (R 1200, 1216). Appellant chose not cross-examine the doctor, decided not to use him at penalty phase, nor present any other mental health expert. Dispositive of this issue is the fact that appellant waived any privilege when he listed the doctor as a witness, and more importantly, allowed the doctor to be deposed. Under these facts there can be no privilege or violation of Smith. Tucker;

Hargrave; Preston v. State, 528 So. 2d 896, 899 (Fla. 1988).

The fact that the state made the doctor a state witness prior to appellant's use of the doctor at penalty phase is of no moment. In Hargrave the doctor made a pre-trial examination and then that witness testified for the state. Hargrave, 427 So. 2d at 714. In the instant case, appellant waived the attorney-client privilege by listing the doctor as a witness, allowing the doctor's notes to be examined and by allowing the deposition. Tucker; Hargrave. The doctor's testimony was properly admitted.

If this Court determines that the trial court erred in admitting this testimony, any error must be considered harmless as to guilt. The fact that appellant may have seen Mrs. Edwards naked, heard her scream and witness the executions of the victims does not amount to proof of participation in the crime. Howard v. State, 473 So. 2d 841 (Fla. 1st DCA 1985). Furthermore, Berland's testimony is irrelevant to appellant's culpability under felony murder, consequently there is sufficient evidence to sustain his conviction for first degree murder.

ISSUE III

THE TRIAL COURT CORRECTLY REFUSED TO GIVE APPELLANT'S REQUESTED JURY INSTRUCTION ON INDEPENDENT ACTS WITH REGARD TO THE THREE MURDERS

Relying on Bryant v. State, 412 So. 2d 347 (Fla. 1982), appellant claims that the trial court erred in refusing to give an instruction regarding independent acts of a co-felon. A review of the evidence indicates that the trial court's ruling was correct.

Appellant maintains that he had no intention to murder any of the victims nor was he aware of Wyatts' intention to do so. Appellant's claim of lack of knowledge regarding the murders is irrelevant. Simply because the intent to murder was not present prior to the commission of the robbery, does not warrant an instruction on independent acts. Diaz v. State, 600 So. 2d 529, 530 (Fla. 3d DCA 1992); State v. Amaro, 436 So. 2d 1056, 1061 (Fla. 2d DCA 1983); Campbell v. State, 227 So. 2d 873 (Fla. 1969), cert. dismissed, 400 U.S. 801, 91 S. Ct. 7, 27 L. Ed. 33 (1970).

Relying on the standard as articulated by this Court in Parker v. State, 458 S. 2d 750 (Fla. 1984), the trial court made the following factual findings;

> As in Parker I specifically find that the murder was a natural and foreseeable culmination of the motivations for the original robbery and the kidnapping. Moreover as a principal the kidnapping and robbery the defendant clearly has become principal to sexual battery, therefore, he is principal to murders,

> once again taken in the light most favorable to the defendant and not considering a finding that could be made to finder of facts as to the premeditation aspects of first degree murder. (R 1243).

Unlike the facts in Bryant v. State, 412 So. 2d 347 (Fla. 1982), appellant was present for the entire thirty minute criminal episode.[3] He was a willing and active participant in the robbery and kidnappings. Appellant admits to being in the back in the store where the rape and murders took place.[4] (R 1140). The logical conclusion from the evidence is that during the rape, appellant held a gun to Mr. Edwards. He was present during the rape and left with Wyatt after the three victim were shot. (R 1242). The fact that appellant's original motivation was to obtain money does not negate the fact that the murder was a natural and foreseeable culmination of that original robbery. Parker.

---

[3] In closing argument, defense attorney argued that the murders were a consequence of the co-defendants fear the victims would identify him. (R 1366). Ironically, appellant could also be identified as he remained and participated in the robbery and at the very least remained during commission of the rape.

[4] To the extent that appellant claims that the murders were pursuant to the alleged independent act of the subsequent sexual assault, any error must be considered harmless, given that the evidence would still establish felony murder regarding the robbery and kidnapping. Sochor v. State, 580 So. 2d 595, 601-602 (Fla. 1991), remanded on other grounds, 504 U.S. __, 119 L. Ed. 2d 326, 112 S. Ct. __ (1992).

ISSUE IV

THE TRIAL COURT DID NOT ERR IN GIVING AN INSTRUCTION ON FLIGHT AS THAT WAS THE STATE OF THE LAW AT THE TIME OF TRIAL, IN THE ALTERNATIVE ANY ERROR TO DO SO WAS HARMLESS ERROR

Appellee concedes that if this Court applies Fenelon v. State, 594 So. 2d 292 (Fla. 1992) to the instant case,[5] the trial court erred in giving the instruction. Appellee maintains however, that appellant is still not entitled to relief as any error must be deemed harmless beyond a reasonable doubt. State v. DiGuillio, 491 So. 2d 1192 (Fla. 1989); Fenelon.

Appellant claims that where the accused does not deny identity, the error is not harmless. In Fenelon, identity was not an issue, yet this Court found the error to be harmless. Id. In the instant case, identity is not an issue. His defense at trial was that the murders were committed by his co-defendant, Wyatt without appellant's participation or prior knowledge. However appellant's defense does not undermine the evidence to establish felony murder. Appellant, admitted he entered the Domino's restaurant with a gun and the intent to commit a robbery. He held a gun on the store manager while his co-

---

[5] Appellee maintains that Fenelon should not be given retroactive application. There is no equity to the state if a trial court follows the law as it existed at the time of trial. Clearly, the trial court gave the instruction with explicit reliance on case law from this Court. (R 1238). To force the state to incur the expense of a new trial based on error that was non existent at the time of trial does nothing to promote finality, enhance the likelihood that subsequent rulings will be accurate, nor does it foster any confidence in the criminal justice system as a whole.

defendant took the other two victims to the back of the store. Appellant and Wyatt were in the store for approximately thirty minutes. He admits to holding a gun on the manager while the manager opened the safe. The manager was then brought to the office to locate more money. Eventually all three victims were executed. Consequently, in light of the evidence supporting appellant's guilt of felony murder, the giving of the flight instruction was harmless error beyond a reasonable doubt.

ISSUE V

THE TRIAL COURT DID NOT ERR IN REFUSING TO GRANT APPELLANT'S MOTION FOR JUDGEMENT OF ACQUITTAL AS TO PREMEDITATED MURDER

Appellant claims that he cannot be convicted of premeditated murder based on the principal theory because he did not intend for the victims to be murdered. The state argued that the evidence demonstrates that the victims were killed to avoid detection, and the execution style murders were committed at close range. (R 1276). In order to be convicted of murder under a principal theory appellant must have intended that the murders take place and must commit an act to assist the other person in committing the crime. State v. Dene, 533 So. 2d 265, 266 (Fla. 1988); Staten v. State, 519 So. 2d 622, 624 (Fla. 1988).

Appellant relies on Van Poyck v. State, 564 So. 2d 1066 (Fla. 1990) and Jackson v. State, 575 So. 2d 181 (Fla. 1991) to establish his claim. Both of those cases are distinguishable. In the case sub judice, the entire criminal episode took at least thirty minutes to complete. (R 413, 439, 440, 611). Appellant held a gun to Mr. Edwards as Wyatt did the same to the other two victims. All three victims were moved about the store to effectuate the robbery, sexual battery and murders. (R 1105). The killings were done at close range, execution style. (R 647-648, 651, 665, 674). Consequently unlike the facts in Jackson, these murders were not the result of any reflexive action taken after any resistance from the victim. Furthermore, unlike the

situation in Van Poyck, appellant's whereabouts is not in question. He admits to being in the office area of the store, approximately fifteen feet from where the sexual battery and murders took place. (R 1131-1132, 1134-1135, 1138-1140, 1164). The physical evidence demonstrates that a person standing in that area, has a clear view of the rest of the store. (R 478. 479). The evidence also demonstrates that the robbery of the safe could have taken fifteen minutes at most given that the safe was on a time delay. (R 611). After the robbery of the safe, appellant brought Edwards back to the office. Since that robbery occurred first, appellant had at least another fifteen minutes to participate or facilitate in the remainder of the crimes. As stated elsewhere, from the office one is aware of what else is transpiring in that area. Given appellant's testimony that the shots were fired in succession, all the victims were executed at the same time, and after completion of all the other crimes. Given the nature of the crimes, especially the sexual battery, one person could not have committed these crimes without the help of a second person. C.L.A. v. State, 478 So. 2d 872 (Fla. 3rd DCA 1985). Appellant claims that Wyatt shot the victims to avoid detection. Logic dictates that appellant's identity was equally visible to the victims, consequently their murders ensured that appellant's identity would also not be revealed. To that end appellant disposed of the murder weapon and participated in the burning of car. (1111-1113).

In summary, despite appellant's self serving statements to the contrary, the physical evidence establishes that appellant was a principal to the triple murders.

In any event even if there was not sufficient evidence to convict appellant as a principal, there was sufficient evidence to convict him of felony murder. Appellant's concedes that he went in the store armed with the intent to rob. He concedes that he did rob Mr. Edwards. (R 1105). Appellant wore a Domino's pizza shirt during the robbery to facilitate the successful completion of the crime. (R 1159-1162). There was sufficient of felony murder to uphold appellant's conviction. Hough v. State, 448 So. 2d 628, 629 (Fla. 5th DCA 1984); State v. Aguliar, 418 So. 2d 245, 246 (Fla. 1982); Howard v. State, 473 So. 2d 841 (Fla. 1st DCA 1985).

ISSUE VI

THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION FOR JUDGEMENT OF ACQUITTAL OF THE SEXUAL BATTERY CHARGE

Appellant claims that he was not aware of Wyatt's intent to commit a sexual battery on Mrs. Edwards. Irrespective of Dr. Berland's testimony, appellant admitted to the police that he heard Mrs. Edwards moaning when he was up front with Mr. Edwards. (R 1106). Furthermore, he also admits to being in the area where the sexual battery took place, thereby negating his claim that he was not aware of what was happening. (R 1180). Finally Wyatt could not have committed the sexual battery without appellant's help. Although Bornoosh was locked in the bathroom, Mr. Edwards was with appellant being forced to open the safe and locate money from the office. Mr. Edwards's blood was found in the office. Without Mr. Edwards confinement, Wyatt could not have committed the sexual battery upon his wife. Appellant's participation/facilitation demonstrates his intent to commit the crime, and aid his co-defendant in its commission. Howard v. State, 473 So. 2d 841 (Fla. 1st DCA 1985).

ISSUE VII

THE TRIAL COURT DID NOT ERR IN REFUSING TO GRANT APPELLANT'S MOTION FOR JUDGEMENT OF ACQUITTAL REGARDING THE ROBBERY OF THE VICTIM'S SHIRT

Appellant claims that he was unaware that Bornoosh's shirt was taken by force. Appellant was aware that Bornoosh was taken by gunpoint to the back of the store. (R 1159-1162). Shortly thereafter, appellant was handed Bornoosh's shirt. Common sense and logic dictates that Bornoosh was forced to take off his shirt. Appellant took the shirt and put it on to facilitate the robbery. He left with the store still wearing it. (R 990-998). There was sufficient evidence that appellant was aware of the forced taking and benefitted from it by wearing same to effectuate the robbery. Robbins v.State, 581 So. 2d 581 (Fla. 1st DCA 1991).

ISSUE VIII

THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION FOR JUDGEMENT OF ACQUITTAL REGARDING THE KIDNAPPING OF MRS. EDWARDS AND MATTHEW BORNOOSH

Appellant claims that he did not know ahead of time of Wyatt's intent to kidnap Mrs. Edwards and Mr. Bornoosh nor did he do any act in furtherance of those crimes. The facts contradict appellant's contention.

Appellant admitted that his intention was to rob the pizza store when he went in there armed. Wyatt was also armed. He kidnapped Mr. Edwards and forced him to open the safe, while Wyatt kidnapped the other two victims. Appellant and his co-defendant were required to control all three victims in order to successfully complete their intended goal of robbery. Appellant is equally guilty for the kidnapping of Bornoosh and Mrs. Edwards under a principal theory. Howard v. State, 473 So. 2d 841 (Fla. 1st DCA 1985). The asportation of Mrs. Edwards and Bornoosh to the back of the store was done to avoid detection of the robbery. The movements were not incidental to the subsequent sexual battery or robbery, they were clearly done to facilitate those offenses. Faison v. State, 426 So. 2d 963 (Fla. 1983). Sochor v. State, 580 So. 2d 595 (1991) remanded on other grounds, 504 U.S. __, 119 L. Ed. 2d 326, 112 S. Ct. __ (1992).

ISSUE IX

THE ALLEGED INADMISSIBLE TESTIMONY OF DR. BERLAND AND THE CONVICTIONS FOR COUNTS DISCUSSED IN ISSUES V THROUGH VIII DID NOT DEPRIVE APPELLANT OF A FAIR SENTENCING HEARING

Appellant claims that the testimony of Dr. Berland during the guilt phase rendered his sentencing hearing unfair. Appellant's reliance on Castro v. State, 547 So. 2d 111 (Fla. 1989) is to no avail as the facts of the case sub judice are distinguishable. The evidence ruled inadmissible at the guilt phase related to collateral crime evidence. Castro. Such evidence negated the entire case for mitigation. Id at 116. In the instant case, appellant's case for mitigation centered on the fact that he did not actually commit the sexual battery nor did he actually pull the trigger. The state conceded both of those points from the beginning, consequently appellant's theory/theme of mitigation was not negated or somehow rebutted by Berland's testimony. The jury was well aware of the fact that appellant heard moaning by Mrs. Edwards while she was in the backroom, as he stated as such to the police, consequently he was aware that she was in some type of distress. Whether he actually saw her naked as testified to by Berland is not sufficiently prejudicial enough to warrant reversal of his sentence. Likewise, appellant's statement to Berland that he saw appellant shoot the victims is also not sufficiently prejudicial as it does not negate his claim that he never intended to murder the victims nor does it negate his claim that he was unaware of Wyatt's plan to do so before hand.

In applying a harmless error analysis based on a violation of Estelle v. Smith, 451 U.S. 454, 101 S. Ct. 1866, 68 L. Ed. 2d 359 (1981), this Court noted the difference between the death penalty statutes of Florida and Texas. In Texas, the jury is required to answer three questions, an affirmative response to all three will result in a sentence of death. Hargrave v. State, 427 So. 2d 713, 714 n. 2 (Fla. 1983). The essence of the inadmissible testimony in Smith provided the basis for an affirmative answer to one of the three questions. Florida's statute is completely different. The substance of Berland's testimony does not possess the same impact as that in Smith. The United States Supreme Court has adopted a similar analysis in its harmless error analysis regarding this claim. In Satterwhite v. Texas, 486 U.S. 249, 100 L. Ed. 2d 284, 108 S. Ct. 1792 (1988) the Court recognized the impact of such testimony[6] in the death penalty scheme of Texas. Satterwhite, 486 U.S. at 258-259. Due to the nature of the testimony and its direct relevance to one of the questions to be answered by the jury, any error could not be considered harmless. Furthermore there was no specific reference to or reliance on Berland's testimony, by the state during closing argument as there was in Satterwhite, 486 U.S. at 260. (R 1552-1585). Finally the substance of the testimony in Satterwhite does not compare to what was presented in the instant

[6] The nature and substance of the inadmissible testimony in Smith is of the same ilk as the testimony in Satterwhite. Ironically the expert in both was the same, Dr. Grigson.

case. In Satterwhite the expert emphatically that the defendant was a sociopath, a continuing threat to society, he was beyond the reach of psychiatric rehabilitation" and on a scale from 1 to 10, the defendant was "ten plus". Id at 486 U.S. 259-260.

In the instant case, Berland stated that he heard the wife pled with the co-defendant, he went back there and saw her naked. (R 1231). He then stated that appellant saw the co-defendant aim the gun and fire four shots. (R 1232). Appellant's admissible statements to the police indicate that he heard Mrs. Edwards moaning and when the co-defendant was in the backroom with the victims, he heard four shots. The only substantive difference is whether appellant saw and heard the shots or just heard the shots. That difference does not warrant a reversal of appellant's death sentence.[7]

The fact that the jury was instructed upon and appellant was convicted as a principal for the various offenses regarding Mrs. Edwards and Matthew Bornoosh does not bolster

---

[7] The fact that the jury recommended death by a vote of seven to five is not relevant in a harmless error analysis.

Analysis of a reasonable probability of a different result should not vary according to the number of jurors voting for the death penalty. "A defendant has no entitlement to the luck of a lawless decision maker, even if a lawless decision cannot be reviewed. The assessment of prejudice should proceed on the assumption that the decision maker is reasonably, conscientiously, and impartially applying the standards that govern the decision. It should not depend on the idiosyncracies of the particular decision maker, such as unusual propensities toward harshness or leniency." Bertolloti v. Dugger, 883 F. 2d 1503, 1519 n. 12 (11th Cir. 1989), quoting from Strickland v. Washington, 466 U.S. 668, 695, 80 L. Ed. 2d 674, 698, 104 S. Ct. 2052 (1984)

appellant's claim. The jury was properly instructed on various crimes based on the evidence presented. None of the evidence considered by the jury was inadmissible, nor does appellant make such an allegation. As with penalty phase instructions, if evidence is presented, relevant instructions should be given regardless of the fact that sufficient evidence may or may not exist. Haliburton v.State, 561 So. 2d ; Stewart v. State, Bowden v. State. Unlike the situation in Jones v. State, 569 So. 2d the jury was not improperly instructed on the law. Appellant has failed to establish any harmful error.

ISSUE X

THE TRIAL COURT DID NOT PERMIT THE INTRODUCTION OF ANY IMPROPER EVIDENCE DURING THE SENTENCING PHASE

Appellant claims that the trial court erred in failing to sustain an objection regarding a statement made by a state witness during penalty phase testimony. During the testimony of Captain DuBose, the state asked him to explain how and why they were able to get a possible lead on the suspects. (R 1465). In response, the officer stated that they were not looking for amateurs. (R 1465-1466). The statement was made to establish why the police decided to obtain prison releases and escapes from various states. (R 1466). Those prison release records were introduced without objection. (R 1468). The jury also received information regarding appellant's escape status. (R 1468-1470). Since appellant's prior record, including his escape status is relevant information to establish various aggravating circumstances, there can be no error regarding an officer's characterization of appellant as not being an amateur. Waterhouse v. State, 596 So. 2d 1008 (Fla. 1992). To the extent that there was error, it must be considered harmless as the jury was aware of appellant's past criminal behavior. State v. DiGuillio, 491 So. 2d 1191 (Fla. 1989); Johnston v. State, 497 So. 2d 863, 868 (Fla. 1986); Gunsby v. State, 574 So. 2d (Fla. 1991).

Also without merit is appellants claim that the trial court erred in allowing in to evidence three rather recent

photographs of appellant.[8] The state introduced same to rebut appellant's portrayal of himself as an innocent, bright child. (R 1546-1548). Hildwin v. State, 531 So. 2d 124 (Fla. 1988); Valle v. State, 581 So. 2d 40 (Fla. 1991). Appellant's reliance on Colina v. State, 570 So. 2d 929 (Fla. 1990) and Castro v. State, 547 So. 2d 111 (Fla. 1989) is of no moment. In Colina, supra, the state's error was exacerbated by the introduction of lack of remorse. Id. In Castro, supra, the state improperly introduced evidence of collateral crimes. In the instant case, appellant's own photograph cannot be characterized as inherently prejudicial as would evidence of past crimes. Appellant has failed to establish any error, let alone one that would warrant reversal. Mendyk v. State, 545 So. 2d 846 (Fla. 1989).

---

[8] The photographs depicted appellant at the time of his arrest for these murders, at the time of his arrest for a prior burglary, and a picture of himself that was in his possession when he was arrested. (R 1548-1549).

ISSUE XI

THE TRIAL COURT DID NOT ERR IN FAILING TO GIVE A CURATIVE INSTRUCTION OR IN FAILING TO GRANT A MISTRIAL BASED ON ALLEGED IMPROPER PROSECUTORIAL COMMENTS

Appellant claims that the prosecutor's closing remarks at the penalty phase were improper and diminished his right to a jury in violation of Brooks v. Kemp, 762 F. 2d 1383 (11th Cir. 1985). The state contended that the remarks in the instant case do not rise to the level of those in Brooks. (R 1581). In the abundance of caution the trial court sustained the objection but denied appellant's request for a curative instruction. (R 1582). The trial court's ruling was correct.

In order to overturn a trial court's ruling regarding prosecutorial comments, appellant must demonstrate that the trial court abused its discretion. Breedlove v. State, 413 So. 2d 1 (Fla. 1982). Appellate must also demonstrate that the prosecutor's comments "vitiated the entire trial." Jones v. State, 18 Fla. L. Weekly S11 (Fla. December 18, 1992)(citations omitted). Appellant has failed to meet that burden. In Brooks, the prosecutor stated his personal beliefs about the defendant's guilt, made a plea to the jury regarding the war on crime, quoted from the bible made reference to facts not in evidence. Id, 762 F. 2d at 1394-1397. In the instant case there was not the amount/quantity of remarks in the instant case as there was in Brooks. Furthermore the comments were similar to those in Jones were this Court refused to find harmful error.

Appellant also claims that the trial court failed to sustain his objection to the prosecutor's two sentences that the jury should not be made to feel guilty regarding their role and potential death recommendation. (R 1584). The trial court properly overruled appellant's objection;

> I don't interpret this as an attack, I interpret it to be what it is, which is an ability-- they only have one part to anticipate a closing on the part of you at this stage, that's what they are allowed to do. Let's proceed.

(R 1584). Prior to the challenged statement, the prosecutor made a similar remark that was not objected to. That remark was merely a warning to the jury not to be swayed by emotion alone, but rather make a decision based on the law and the facts. (R 1557). Given that the prosecutor must anticipate what the defense will argue, the comments were legitimate argument. Breedlove.

ISSUES XII-XIII

THE TRIAL COURT DID NOT ERR IN FINDING THE EXISTENCE OF THE AGGRAVATING FACTORS BASED ON APPELLANT'S THEORY THAT HE CANNOT BE VICARIOUSLY LIABLE FOR THE AGGRAVATING FACTORS

Relying on Omelus v. State, 584 So. 2d 563 (Fla. 1991), appellant claims that the trial court erred in finding the existence of six of the aggravating factors. Appellant's reliance on Omelus is misplaced. Carried to its logical conclusion, whenever more than one person commits a murder, the non-shooter can not be eligible for death because the aggravating factors are not applicable to him.

This Court's concern in Omelus centered around the culpability of a defendant who was not even present during the murder nor could he anticipate how it was to occur. Appellant armed with the intent to rob participated in the thirty minute criminal episode. Appellant split the money from the robbery and disposed of the murder weapon. See also, White v. Wainwright, 809 F. 2d 1468, reh. denied, 813 F. 2d 411, stay denied, 483 U.S. 1039, 97 L. Ed. 2d 809, 108 S. Ct. 10, cert. denied, 483 U.S. 1044, 97 L. Ed. 2d 807, 108 S. Ct. 20 (1987).

Appellant's argument has been implicitly rejected by this Court every time a death sentence is upheld based on felony murder. DuBoise v. State, 520 So. 2d 260, 265 (Fla. 1988). Provided the requirements of Enmunds v. Florida, 458 U.S. 782, 102 S. Ct. 3368, 73 L. Ed. 2d 1140 (1982) and Tison v. Arizona, 481 U.S. 137, 95 L. Ed. 2d 127, 107 S. Ct. 1676 (1987) are meet,

there is no constitutional violation for imposing the death sentence on the non-shooter. White v. State, 403 So. 2d 331, 335-36 (Fla. 1981)(death appropriate sentence to non-shooter even though defendant opposed the killings). Appellant was properly held liable for the aggravating factors and ultimately his death sentence.[9]

---

[9] If this Court determines that appellant cannot be liable for the aggravating factors associated with victims Bornoosh and Mrs. Edwards, he is still liable for same regarding Mr. Edwards as he was directly responsible for the robbery and kidnapping of Mr. Edwards.

ISSUE XIV

THE TRIAL COURT DID NOT IMPROPERLY DOUBLE THE AGGRAVATING FACTORS OF PECUNIARY GAIN AND THE MURDER WAS COMMITTED IN THE COURSE OF A ROBBERY

Two of the aggravating factors found by the trial court are pecuniary gain and the murders were committed during the course of a kidnapping and sexual battery. Appellant claims that this was impermissible as the two factors arose out of the same episode. Appellant fails to acknowledge that the aggravating factor that the crime was committed during the course of a felony is proven in the instant case without the underlying robbery. Routly v. State, 440 So. 2d 1257 (Fla. 1983), cert. denied, 104 S. Ct. 359 (1983); Johnson v.State, 438 So. 2d 774, 778 (1983); The trial court is not required to make any particular finding regarding any aggravating factor.[10] Such findings are made within his discretion. Sochor v. State, 580 So. 2d 595 (1991), remanded on other grounds, 504 U.S. __, 119 L. Ed. 2d 326, 112 S. Ct. __ (1992).

In any event, any "error" must be considered harmless. The trial court did not rely on the underlying felony of robbery in his sentencing determination. If this Court determines that this aggravating factor should have merged with pecuniary gain, reversal is still not required given that there still remained five valid aggravating factors and very little in

---

[10] The trial court could have included as a basis for the aggravating factor of prior violent felony the multiple murders in the instant case. He did not do so.

mitigation. Clark v. State, 18 Fla. L. Weekly S17 (Fla. December 24, 1992); Jones v. State, 18 Fla. L. Weekly S11 (Fla. December 17, 1992); Vaught v. State, 410 So. 2d 147 (Fla. 1982).

ISSUE XV

THE TRIAL COURT PROPERLY INSTRUCTED UPON AND FOUND THE AGGRAVATING FACTOR OF "COLD CALCULATED AND PREMEDITATED"

Appellant claims that there was insufficient evidence to establish his intent to kill the victims prior to walking into the Domino's. At best, co-defendant Wyatt decided to kill the victims when he realized that they could identify them. The trial court found that the executions were the culmination of a crime spree where they intended to leave no witnesses. Appellant did nothing to disassociate himself from any of the crimes. (R 2327, 2335, 2344).

The cases relied upon by appellant are distinguishable. This is not a chance encounter as in Mckinney v. State, 579 So. 2d 80 (Fla. 1991) nor does it involve a spontaneous act following unconsensual sex. Holton v. State, 573 So. 2d 284 (Fla. 1990). The facts of the instant case are akin to the facts in Chandler v. State, 534 So. 2d 701 (Fla. 1988). Appellant was neither startled or provoked into attacking the victim. Id at 704. Appellant and his accomplice both armed with guns, decided to rob the Domino's restaurant. Neither man ever attempted to hide their identity during the criminal episode. After a thirty minute crime spree, which included two armed robberies, three kidnappings., and one sexual battery, all three victims were herded into a small bathroom and executed.(R). All three were each shot at least twice and a majority of the fatal injuries were contact wounds. The three victims were found

together in a human pile. The trial court properly found, beyond a reasonable doubt, that this aggravating factor has been established. Valle v. State,581 So. 2d 48 (Fla. 1992); Swafford v. State, 533 So. 2d 270, 277 (Fla. 1988); Eutzey v. State, 458 So. 2d 755 (Fla. 1984).

If this Court determines that there is insufficient evidence to establish "CCP" death is still the appropriate sentence, as the jury did not hear any otherwise inadmissible evidence. Furthermore there still exists six other valid aggravating circumstances in comparison with very weak nonstatutory mitigating evidence. Sochor v. State, 580 So. 2d 595 (Fla. 1990) remanded on other grounds, 504; Herring v. State, 16 FLW S293 (Fla. 5/2/91).

ISSUE XVI

THE TRIAL COURT PROPERLY FOUND THE EXISTENCE OF THE AGGRAVATING FACTOR OF HEINOUS ATROCIOUS AND CRUEL

The trial court properly found the murder were "heinous, atrocious and cruel". It is clear from the evidence that all three victims were within a very short distance from one another, once Mr. Edwards was brought to the back of the store. (R). Mr. Bornoosh was confined in the bathroom, a very short distance form where Mrs. Edwards was being kidnapped/sexual assaulted. Appellant admitted hearing her moan when he was in the front of the store.(R 1106). Mr. Bornoosh, obviously could hear what was taking place as he attempted to save his wedding ring by placing it in the waste basket. (R 515). All three were put in fear and emotional strain for over thirty minutes. Finally all three were brought together to be killed. They were executed in front of each other and laid dying on top of one another. The trial court properly found these crimes to be "heinous, atrocious, and cruel." Chandler v. State, 534 So. 2d 701 (Fla. 1988); Parker v. State, 476 So. 2d 134 (Fla. 1985).

If this Court determines that there is insufficient evidence to satisfy this aggravating circumstance, any error must be considered harmless. Smith v. State, 424 So. 2d 726 (Fla. 1983).

ISSUE XVII

THE TRIAL COURT PROPERLY FOUND THE EXISTENCE OF THE AGGRAVATING FACTOR OF PECUNIARY GAIN

It is clear that the original motive was to rob the Domino's restaurant. (R 1105). To that end appellant and his co-defendant remained in the store for at least thirty minutes. The victims were killed in furtherance of that plan. The trial court properly found the existence of this factor. Johnson v. State, 438 So. 2d 774, 778 (Fla. 1983); Floyd v. State, So. 2d (Fla. 1990). However, if this Court determines otherwise, any error must be considered harmless given that there remained five valid aggravating factors and weak mitigating circumstances. Routly v. Sate, 440 So. 2d 1257 (1983), cert. denied, 104 S. Ct. 359 (1983).

ISSUE XVIII

THE TRIAL COURT PROPERLY CONSIDERED ALL EVIDENCE THAT WAS PRESENTED IN MITIGATION

Appellant contends that the trial court failed to consider and subsequently find all of his proposed nonstatutory mitigating evidence. The basis for this claim is that the sentencing order fails to mention every separate circumstance offered in mitigation, as allegedly required by Campbell v. State, 571 So. 2d 415 (Fla. 1990). A review of the sentencing order reveals that the trial court properly considered all that was presented and articulated as such in the order.

The trial court mentions by name five of the six people who testified at the penalty phase. (R 2328-2329). The court then paraphrased the substance of all the testimony, including appellant's early childhood which was spent with an abusive and alcoholic father, appellant's employment history, and he received the love of his family and friends. The court further stated that appellant did not shoot the victims nor did he rape Mrs. Edwards. (R 2327-2330). The court then articulated its analysis regarding presentation of the mitigating evidence and its effect on the sentencing determination:

> This Court specifically finds that these mitigating circumstances were established by the greater weight of the evidence as defined in Campbell v.State, 571 SO. 2d 415 (Fla. 199) and Chesire v. State, 568 So. 2d 908 (Fla. 1990).

> However, these factors are not of a kind capable of mitigating nor are they of a type extenuating or reducing the degree of moral and legal culpability for the crimes committed; nor are they of such a nature when considering the totality of the defendant's life and the obvious love and nurturing provided for him throughout his childhood and even into his adult life.
> The Court specifically finds that this mitigating evidence is not substantial and is not of sufficient weight to outweigh any one of the aggravating circumstances proved beyond a reasonable doubt.

(R 2330). Obviously the court was well aware of its obligation under Campbell. Simply because the court did list verbatim appellant's mitigating circumstances does not mean same was not considered. Lucas v. State, 18 FLW S15, 16 (Fla. December 24, 1992). Furthermore, mere dissatisfaction with the trial court's findings does not warrant reversal as long as the findings are supported by the record.[11] Sochor v. State, 580 So. 2d 595 (Fla. 1990), remanded on other grounds, 504 U.S.__ , 119 L. Ed. 2d 326, 112 S. Ct. __ (1992); Lucas, supra.

Rather than nonstatutory aggravating circumstances, the trial court's order exhibits a reasoned analysis of the evidence presented by appellant's witnesses. See generally Echols v. State, 484 So. 2d 568, 575 (Fla. 1985)(trial court required to set forth findings to negate evidence in mitigation).

---

[11] Appellant claims as mitigation that he was intoxicated. His claim is supported only through himself serving statement.

It is rebutted by the testimony of Bennett who saw appellant just before the killings. (R 892-893). Furthermore, appellant never

It was appellant's family who qualified their testimony that he was loved as child and taught right from wrong. (R 1502-1533). The trial court's findings are supported by the record, and afford this Court the opportunity to engage in meaningful appellate review regarding the sentencing determination as required under Campbell.

---

attempted to raise an intoxication defense nor did he argue same to jury.

ISSUE XIX

APPELLANT'S DEATH SENTENCE IS PROPORTIONALLY WARRANTED

Relying on Jackson v. State, 575 So. 2d 181 (Fla. 1991), appellant claims that his death sentence is disproportionate. He concedes that he was a major participant in the robbery and kidnapping of Mr. Edwards, however he did not have a "reckless indifference to human life." He bases this argument on the fact that he did not intend to kill, or have knowledge of his co-defendant's intent to kill. Appellant's argument is faulty as reckless indifference to human life does not require an intent to kill. Tison v. Arizona, 481 U.S. 137, 157-158, 95 L. Ed. 2d 127, 144, 107 S. Ct. 1676 (1987); Jackson, 575 So. 2d at 191. More is needed than major participation in the felony, however such participation is a factor in determining the culpable state of mind. Jackson, citing to Tison.

Appellant's reliance on Jackson is unavailing as the facts of the instant case are distinguishable from Jackson. In Jackson this Court found no evidence that the defendant even carried a gun into the store. Id at 192-193. In the instant case, both the appellant and his co-defendant were armed when they walked into the store. (R). In Jackson the defendant did not have the opportunity "to prevent the murder since the crime took only seconds to occur, and the sudden, single gunshot was a reflexive reaction to the victim's resistance." Id at 193. In the instant case the crime spree took at least thirty minutes and

involved multiple criminal offenses to multiple victims. At one point, as conceded by appellant to the police, and testified to by eyewitnesses, everyone was in the back of the store after the initial robbery of the safe. Given the fact that the backroom area was so small, appellant was aware of what was taking place. Wyatt could not have carried out the crime without appellant's help. The killings were not reflexive, but were execution style after all the victims were placed together. Appellant helped in the escape, disposed of the murder weapon and shared in the money obtained in the robbery. Both men were escapees from prison and both could have been recognized by their victims. Prior to the robbery, appellant was described by a witness as the dominant one of the two. He was older and stated that he was going to show his partner about life. Appellant did not appear intoxicated.(R 892-893).

The facts of the instant case demonstrate appellant's major participation in the felonies along with his reckless disregard for the lives of those three victims. The facts of this case are similar to the facts of DuBoise v. State, 520 So. 2d 260 (Fla. 1988). In that case the defendant initiated the purse snatching. He was then helped by his co-defendants. While he rapped the woman, his cohorts hit her. They then raped her and killed her. The defendant's conduct during the entire episode exhibited a reckless indifference for human life. In the instant case appellant's conduct during those thirty minutes also demonstrated reckless indifference for human life. Appellant's

sentence is proportionate to his culpability and to other nontrigger capital defendants. White v. State, 470 So. 2d 1377, 1378 (Fla. 1985);

ISSUE XX

FLORIDA'S DEATH PENALTY STATUTE IS CONSTITUTIONAL

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

Appellant next attacks the constitutionality of the jury instructions regarding the aggravating factors of "heinous, atrocious, and cruel", "cold, calculated, and premeditated", and "committed during the course of a felony". This issue has not been preserved for appeal, consequently review is denied. Sochor v. State, 580 So.2d 595, 605 n.10. (Fla. 1990), remanded on other grounds, 504 U.S. __, 119 L.Ed.2d 326, 112 S. Ct. __ (1992).

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

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

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

Next appellant attacks the role and quality of the trial court in Florida's capital sentencing scheme. The actual sentencer in Florida's scheme is the judge. Smalley v. State, 546 So.2d 720 (Fla. 1989); Grossman v. State, 525 So.2d 833 (Fla. 1988); Section 921.141 (3), Fla. Stat. (1989). A sentence of death can be upheld regardless of either the jury's recommendation or their written findings. Grossman, supra; Hildwin v. Florida, 490 U.S. 638, 104 L.Ed.2d 728, 109 S.Ct. (1989).

Appellant also attacks the constitutionality of several aggravating factors; "heinous, atrocious, and cruel", "cold, calculated' and premeditated", and "committed during the course of a felony". Both this court and the United States Supreme Court have upheld the constitutionality of "HAC". Preston v. State, 17 FLW S669, 671 (Fla. October 29, 1992); Sochor v. Florida, 119 L.Ed.2d at 339-40. Equally unavailing is appellant's constitutional attack regarding "CCP". Klokoc v. State, 589 So.2d 219 (Fla. 1991); Hodges v. State, 595 So.2d 929 (Fla. 1992).

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

Appellant also attacks the constitutionality of three other aggravating factors; "prior violent felony", "under sentence imprisonment", and "hinder government function of law". This challenge is not preserved for appeal as it has not been raised in trial court. Vaught v. State, 410 So. 2d . In any event, appellant's claim is without merit. Jones, supra.

Appellant has also failed to establish that this Court does not conduct a proper appellate review. The United States Supreme Court has recently stated that this Court continues to narrowly construe aggravating factors. Sochor v. Florida, 119 L.Ed.2d at 339-49 (1992).

Florida's sentencing scheme does not presume death to be the appropriate penalty. Robinson v. State, 574 So.2d 108, 113, n.6 (Fla. 1991); Boyde v. California, 494 U.S. 370, 108 L.Ed.2d 316, 110 S.Ct. 1190 (1990); Blystone v. Pennsylvania, 494 U.S. 299, S.Ct. 1078, 108 L.Ed.2d 255 (1990). A capital defendant has the opportunity to present any and all relevant mitigating evidence. Hitchcock v. Florida, 481 U.S. 393, 95 L.Ed.2d 347, 107 S.Ct. 1821 (1987); Jackson v. State, 530 So.2d. 269, 273 (1988), cert. denied, 488 U.S. 1051, 109 S.Ct. 882, 102 L.Ed.2d 1008 (1988). There is no constitutional requirement to a

jury's unfettered discretion. Boyd, supra. Death by electrocution is not unconstitutional. Buenoano v. State, 565 So.2d 309 (Fla. 1990). Appellant's claim is without merit and should be denied.

CONCLUSION

WHEREFORE, based on the facts and relevant case law, appellee requests that this Court AFFIRM all of the convictions and the three sentences of death.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

CELIA A. TERENZIO
Assistant Attorney General
Florida Bar No. 656879
1655 Palm Beach Lakes Boulevard
Suite 300
West Palm Beach, Florida 33401
(407) 688-7759

Counsel for Appellee

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing "Answer Brief of Appellee" has been forwarded by United States Mail to: **CLIFFORD H. BARNES, ESQUIRE,** The Historic Sunrise Theater, 117 South Second Street, Suite 202, Fort Pierce, Florida, 34950, this 5th day of March, 1993.

Of Counsel

/pas