IN THE SUPREME COURT OF FLORIDA

CASE NO. 78,411

HENRY GARCIA,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

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

BRIEF OF APPELLEE

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STATEMENT OF THE FACTS

The Appellant's Statement of the Facts contains material omissions and is thus rejected by the Appellee who submits the following account: The defendant was charged with two counts of first degree murder, one count of sexual battery with great force, and one count of armed burglary (R1-5). This is the third trial of this cause. The first ended in mistrial; the second was reversed by this court. Garcia v. State, 564 So. 2d 124 (Fla. 1990).

A. Guilt Phase

The victims herein, Julia Ballentine and Mabel Avery, were elderly sisters who lived together in the Leisure City area, now known as Homestead (T.617, 618). Mabel Avery was 86 years old at the time of the commission of these crimes in January, 1983 (T.617). Julia Ballentine was 90 years old, very frail, and had trouble walking (T.617-19).

The victims had given up driving approximately two years prior to the crimes herein (T.617). They thus depended on their neighbor, Rose Flight, for transportation. Id. Ms. Flight had known the victims very well for approximately ten years and was familiar with their habits. Id.

The sisters were immaculate housekeepers (T.626). Mabel Avery did the shopping for the household (T.618-19). Mabel loved to read (T.618). She was an early riser, who got up at around 6:00 a.m. every day, would go outside and get the newspaper, and draw open the curtains inside (T.618). She would read the paper before her sister got up at 9:00 a.m. (T.618, 627). Julia's hobby was crossword puzzles. She would work any crossword puzzle given to her (T.618). Ms. Flight last saw the sisters alive and well on Friday, January 14, 1983, when she took Mabel grocery shopping (T.619).

On Monday morning, January 17, 1983, Ms. Flight was getting ready for a doctor's appointment, when another neighbor asked her to check on the victims. Id. The victims' curtains were still drawn, newspapers were still uncollected in

the yard, and a grocery bag full of citrus, which the neighbors had left for the sisters, was by their door (T.620). The neighbors first telephoned the victims, but got no answer. They then knocked on the door and bedroom windows to no avail. Ms. Flight then attempted to use a key given to her by the sisters, but was unable to open the front door, as it was latch-locked from the inside (T.620, 622). The neighbors then went around the back of the house to the back patio and discovered that the patio door's screen was slashed, with broken glass around it (T.621). Another neighbor, Mr. Diaz, pushed in the rest of the glass, entered, and opened the front door (T.622). The neighbors waited outside until the police arrived at approximately 10:00 a.m (T.635, 661).

Sergeant Anne Gribbins cordoned off the victims' house, and waited until the crime scene technicians and the medical examiner arrived approximately an hour later (T.637). The only point of forced entry to the victims' house was in the rear; the screen on the back patio screen door, leading to the kitchen, had been cut. The kitchen door, which was a jalousie door with screening, and locked with dead bolt locks needing keys from both sides, had several jalousies broken, with the screening cut and pushed into the kitchen area (T.684-5, 695).

The kitchen itself was neat and tidy and did not show any signs of disturbance (T.693). There were two grapefruit halves each sitting in a bowl, covered, on the kitchen counter (T.694). The night light outside the front door was off (T.642). Two Miami Herald newspapers, dated Sunday and Monday, January 16 and 17, 1983, respectively, remained uncollected and still in their wrappers on the front lawn (T.639). A copy of the Miami Herald, dated Saturday, January 15, 1983, was found in the victims' garbage can, which had been rolled out to the curbside (T.659, 700). This paper had "obviously been read," and its crossword puzzle section was filled out and completed (T.700).

The living room and bathroom areas of the house were also undisturbed (T.644-45). A hallway leading to the two bedrooms in the house had drops of blood on the floor (T.703). This blood was not smeared or splattered (T.774);

the drops were deposited in a downward motion with no velocity (T.800). In a 10 hour search of the house, the crime scene technicians were unable to locate any pocketbook or wallet, or any items normally contained within these, such as credit cards, social security cards, medicare cards, prescription cards, etc., belonging to the victims (T.752-53). Crime scene technician Gilbert also testified that he canvassed the area around the victims' house for said "personal effects, identification, money," which had not been located in the house (T.1241). Nothing was recovered (T.1242, 1204).

Mabel Avery was found in the southwest bedroom of the house. She was in a sitting position, "cornered" against the wall, next to a closet which was open (T.853, 896, 686). The position that the body was found in was consistent with the position that death actually occurred in (T.853). The body was in full rigor when discovered. Id. She was wearing pajamas (T.651). One of the two single beds in the bedroom was neatly made. The other had been slept in and was not made (T.686). There were no signs of blood on these beds.

Mabel had 14 stab wounds on the frontal area of her body (T.854, 855). Five lethal wounds were to the chest and the abdomen area (T.855, 860). A stab wound to the abdomen was approximately five (5) inches in length, and went all the way through her intestines to the interior vena cava, a major blood vessel which comes down the back (T.858, 897). A stab wound to the chest "ripped open" the front of the heart (T.859). Another stab wound to the chest went through the chest wall where the rib joins the cartilage (T.860). Other stab wounds in the area of the breast pierced the lung on the left side (T.859). In addition, Mabel had nine (9) defensive wounds, eight (8) of which were on the arms and hands, one of which was on one of her legs (T.855). The irregular cutting and abrasions around the defensive wounds reflected that the arm and hands of the victim were moving, in an attempt to block the knife and shield other parts of the body (T.855, 865-68). The defensive wounds to the fingers also reflected the severance of tendons; the stab wound to the leg entered one

side of the leg and exited the other (T.867, 869). Mabel's cause of death was multiple stab wounds (T.870). The stab wounds collectively gave her enough blood loss to cause her death (T.860).

Julia Ballentine was found face down, mouth open, on a rug in the middle of the southeast bedroom of the house. Her legs were spread apart (T.897, 901). Her pajama top was pulled up on the body (T.728, 898); her pajama bottom was around her right shoulder (T.652, 898). The medical examiner testified that it was "clear" that a sexual battery occurred, because Julia had a bruise on her labia, the folds in the outer genital area, and, "an abrasion going around the back of the vagina, near the entrance part" (T.909). She also had a "laceration that was about an eighth of an inch long in the anal canal." (T.909). The presence of hemorrhage in this area indicated blood pressure, and reflected that she was alive when these injuries were inflicted. Id. The anal injury was more consistent with having been inflicted by a knife (T.909-10). The injuries to the vagina were consistent with having been caused by fingers or other objects (T.910).

Julia's cause of death was also multiple stab wounds (T.908). She had a total of 28 stab wounds on her body (T.903). Julia was stabbed through her cheek, the nipple of her breast, chest and abdomen (T.902-06). Some of these stab wounds were caused by the "twisting of the knife blade," as evidenced by holes in the skin resembling "Chinese alphabet letters." (T.902). The stab wounds tore the heart apart (T.904), and went through the rib area, lungs, liver and miscellaneous internal organs of the abdomen (T.905-06).

Julia also suffered twelve defensive injuries of the arms and hands, which reflected these parts were in motion, attempting to block the knife from stabbing the vital organs, and which caused the tendons in the hand to be severed (T.906-08). There were also defensive injuries to the legs: one "through and through" stab wound below the knee on the right side of the calf area, and another stab wound that entered just below the knee on the left side (T.911-12).

The deepest stab wound on this victim was to the heart and five (5) inches long (T.905). The wound to the cheek and the chest wounds, which leaked a lot of blood, coupled with the presence of the large amount of blood on the sheets and pillow case of the bed, reflected that the attack on this victim began in her bed and culminated on the floor (T.905,908).

Based upon the depth and pattern of the victims' injuries, and the fact that hard matter such as tendons, rib, cartilage, etc., had been penetrated, the medical examiner opined that the weapon used was a folding, single blade knife with a hand guard; the tip of this weapon would have been bent or broken due to the penetration of ribs, cartilage, etc (T.860-61, 906, 928). The medical examiner also examined the stomach contents of both victims and found them to be empty (T.908). Mabel Avery's bladder was contracted and empty, with no signs of incontinence, but consistent with an individual who has risen in the morning and urinated (T.896, 913). Based upon the rigor mortis, the stomach contents, Mabel's empty bladder, the presence of cut grapefruit on the kitchen counter, the fact that the Sunday newspaper had not been collected, and other physical evidence of the immediate surroundings of the victims, the medical examiner opined that the victims had died in the early morning hours of Sunday, January 16, 1983 (T.913-14).

Witness Ximena Evans testified that she was the victims' neighbor; they lived right behind her house (T.1079). Her backyard and that of the victims abutted each other (T.683, 730, 1121). Early Sunday morning, January 16, 1983, she was woken up by the sound of glass breaking; the sound came from the back of her house (T.1076-77). She looked at her clock, which showed 6:00 a.m., and her infant son, who usually woke up for food at around six a.m., began crying (T.1077). Ms. Evans breast fed her son and did not investigate the sound of glass breaking. Id.

Mrs. Elizabeth Aguayo, a family friend of the defendant, testified that at 7:00 a.m. that Sunday morning, she saw the defendant, through her

bathroom window, running towards her house, in Leisure City (T.814-15, 818). This bathroom window faced west, in the direction of the victims' residence (T.1133-34). The distance between the Aguayo residence and that of the victims is one-half mile or less, approximately three or four avenues apart (T.1114-15). The defendant knocked on her door and asked for her son, Feliciano Aguayo (T.816). The defendant did not come inside as he usually did. Id. The defendant had blood on his shirt, pants, hem of his pants, and face (T.817). There was no dirt sticking to his clothes or on his shoes (T.820-21).

Feliciano Aguayo testified that he was a friend of the defendant's (T.946). In January, 1983, he and the defendant worked as farm laborers in the same fields (T.946). The defendant lived in the South Dade labor camp, with one of his relatives, Wally Gomez. Id. Feliciano lived with his parents. The camp was approximately 2-3 miles away from Feliciano's house (T.977).

Early Sunday morning, Feliciano was awakened by his parents and told the defendant was at the front door (T.953). Feliciano went outside and saw the defendant, "upset - you can say scared." Id. The defendant had blood on his clothing, on his shirt, and front and bottom of his pants (T.954).

The blood on the defendant was "fresh," in the process of "drying up," "like it was jellying up." (T.955). Feliciano asked the defendant what happened. Id. The defendant stated that he had been walking home from the Cuervo bar, more than ten miles away, when two males and one female approached him with a car, got out and started beating him with a tire jack and other objects, for "no reason at all." (T.955-57). The defendant stated that he was thrown down, struggled, got back up, "stuck one of the guys," and stabbed the female (T.957).

The defendant then showed Feliciano his knife, which was full of still drying blood (T.960). The defendant's knife was a folding knife, with a four to six inch blade; its tip was bent (T.961). Feliciano testified that the defendant's knife's blade tip had not been bent when he had seen the knife on prior occasions (T.961-62).

The defendant further stated that he was attacked by the unknown assailants in an area south of the Everglades Trailer Camp, by the curve of the road in front of a corn field (T.961, 963). The defendant stated that he ran through the corn, took the back road down to Florida City, and walked straight down to Feliciano's house (T.963). Unbeknownst to the defendant, Feliciano was very familiar with the area described by the defendant, because, he had been a tractor driver in those corn fields for approximately four to five years (T.962). The "back road" to Florida City at the time consisted of dirt roads (T.963). The corn fields were of glazed, "very sticky" dirt (T.969).

The distance between Florida City and Feliciano's home was approximately eight miles (T.963-64). The defendant did not have any injuries on him; no "lumps" or "bumps" from any tire jack were visible (T.959). Although it had rained heavily during the night on Saturday (T.820), and the defendant had allegedly struggled and been thrown to the ground, there was no dirt on his clothes or shoes either, and he was not wet (T.959, 820, 969-70).

The defendant then asked Feliciano for a ride back to his house at the South Dade labor camp, which is in between Florida City, where the defendant said he had come from, and Feliciano's house (T.963-64). Feliciano obliged. During the car ride to the defendant's residence, the defendant kept saying, "I told them not to get me mad. I have this animal inside of me." (T.965). The defendant did not explain what he meant, and Feliciano did not ask. Id.

When they reached the South Dade labor camp, the defendant asked Feliciano to drive around the camp several times first (T.966). Feliciano again obliged and they drove around the camp for approximately ten minutes, before dropping off the defendant at his home. Id. The defendant then tried to go in the side door of his residence, but was unable to open this door. Id. He then walked to the front door, knocked, and was let in by his relatives. Id.

Later on that same Sunday, in the afternoon, Feliciano and his mother went to the corn field specified by the defendant (T.968), where the alleged

assailants had attacked the defendant. As previously mentioned, Feliciano was very familiar with the area (T.962, 968). Feliciano wanted to see if there was any indication of somebody getting stabbed, killed, etc., in the area (T.968). Feliciano drove up and down the road in front of the corn fields, stopped and walked around for a few minutes (T.1009). Feliciano did not see any indications of a struggle, blood, tire jacks or other metal instruments (T.968).

Feliciano also testified as to the events on the day preceding the murders. On Saturday afternoon, January 15, 1983, Feliciano had visited the defendant at the latter's residence at the South Dade labor camp (T.947). At approximately 7:00 p.m., they went together to a Circle K food store, where they purchased a beer for the defendant and a coke for Feliciano (T.948). They then went to the Sky Vista Amusement Center where they played pool (T.948-49). They then went back to the camp because the defendant had a date with "Marylou." (T.949). However, Marylou was with her "other boyfriend." Id. The defendant became "mad; upset." (T.950). The defendant and Feliciano then went back to the Circle K store, purchased another beer and another coke, and again went to the Sky Vista Amusement Center. Id. They stayed for approximately 30-40 minutes, left to give a ride to Feliciano's mother, and came back to the Sky Vista, where they played pool until approximately 11:00 p.m (T.951). The defendant was no longer "upset" at this time (T.987).

At 11:00 p.m., Feliciano told the defendant that he wanted to go home; the defendant requested that he be dropped off at the "Leisure City Lounge." (T.951). Feliciano thus drove the defendant to the Leisure City Lounge, dropped him off and went home (T.952). Feliciano also told the defendant to call him at "anytime" if he needed a ride home. Id. The defendant did not call for a ride thereafter. Id.

The Leisure City Lounge is approximately a mile away from Feliciano's home. The victims' house was in between Feliciano's home and the Leisure City Lounge (T.1114). The distance between the Leisure City Lounge and the victims' residence was approximately one-half to six-tenths of a mile (T.1115).

Rufina Perez-Cruz testified that she has lived at the South Dade labor camp since 1965 (T.1022). She worked in the fields picking crops for crew leader Trevino, with whom she had come down from Texas, since 1965 (T.1047). She knew that the defendant was staying at the camp with Wally Gomez, and had seen him around the camp (T.1022, 1052). In January 1983, she was working in the same fields as the defendant, picking limes (T.1023). The defendant worked there every day at that time. (T.1050). One day in January, 1983, while working in the fields, Rufino was taking a break, as is customary for the farm workers when a truck is filled up with limes and they have to await the arrival of the next truck (T.1024, 1039). The defendant was also taking a break and talking to a group of men, approximately 10 to 12 feet away from her (T.1025).

Rufina heard the defendant tell the other men with him, "Do you know what happened?" (T.1026). One of the men asked, "What?" Id. She then heard the defendant say, "I got in trouble with these women, but I don't have to worry about it, because they are already in hell." Id. One of the men then asked, "Te la shingastes?", which Rufino stated is a slang expression meaning, "Did you fuck them up?" Id. The defendant responded, "yes, but I don't have to worry about them, because they are already in hell." Id. One of the men then asked, "How did you do it?" (T.1027). The defendant stated, "I went through the back door and I ripped out the screen door." Id. The defendant then saw Rufina looking at him and stopped talking. Id. The entire conversation had been in Spanish, which is Rufina's native language (T.1028).

Rufina Perez also testified that she has a social security number, and always supplies the number to the field crew leaders and Trevino, because she applies for social security benefits every year (T.1033). She stated that a lot of crew leaders in Dade County take social security from the workers, but don't send the money to the "big office." (T.1034). Instead, they keep the money for themselves. Id. She thus always makes sure to give her social security number and get credit for the money paid to social security (T.1034).

Rufina Perez also knows crew leader Trevino's daughters, Irma and Ida (T.1035). In 1983, Irma kept the payroll records for Trevino (T.1036). Later on, Ida did these records (T.1036). Ms. Perez stated that Irma and the defendant "were friends." (T.1037). When asked if she knew who the defendant used to see on a "social basis," Rufina stated: "He would talk to Marylou, but he would talk to Irma, too. That's what I was trying to say." (T.1037). Perez also stated, "I know about him and Marylou, because Marylou and myself worked together in the field." (T.1036).

Detective John LeClair was assigned to the instant case in 1985, as part of the cold case squad (T.1103). On September 25, 1985, he came into contact with the defendant in the State of Texas (T.1135). The defendant was born in Texas (T.1137). The defendant was using, and provided, the name of David Garcia (T.1139, 1149). LeClair mirandized the defendant. The defendant signed and initialed the Miranda waiver form, in the name of "David Garcia." (T.1140, 1139). LeClair then explained to the defendant that he wanted to talk about the homicide investigation (T.1137). He advised the defendant that witnesses had seen him in the neighborhood where these crimes occurred, with blood on his clothing, and asked if he could explain his actions (T.1150).

The defendant explained that he had been to the Leisure Lounge, drinking, and had left and gone to another bar, Cuevo bar. Id. The distance between Leisure Lounge and Cuevo bar is approximately 14 miles (T.1152). The defendant believed he had gotten a ride to the Cuevo bar but did not know by whom (T.1150). The defendant stated that he remained at the Cuevo bar for an undetermined length of time, drinking, and then left and began walking (T.1151). He stated that as he was walking in front of Everglades Labor camp, a vehicle stopped and two white males and a white female got out of the vehicle (T.1156). One of the males approached him with a raised tire iron, as if to attack (T.1151). He then positioned himself behind the female. The male was swinging at him with the tire iron without hitting him, and the defendant stabbed the

female five or six times (T.1151). The defendant also added that at one point he fell and scraped his face. Id. He also believed that he had stabbed one of the males. Id. The defendant could not provide any description of the vehicle, such as color, model, make, manufacturer, etc (T.1153). He could not provide any description of his assailants, such as build, height, age, color of hair, description of clothing, etc (T.1153-54). The defendant then added that he had run through a corn field, until he had reached a dirt road, then ran to another dirt road and up to a "big main road." From there, he said he ran to the Aguayo house (T.1155).

Detective LeClair, with the aid of area plat maps, obtained from the Department of Public Works, depicting the southwest section of Dade County, demonstrated the location, terrain and distances of the routes taken as described by the defendant (T.1161-68). The distance walked by the defendant was approximately 15 miles as described by the defendant (T.1168). The bulk of the route included agricultural areas, and areas with bushes, woods, dirt and gravel (T.1161-68). The defendant would also have travelled directly in front of the Florida City police department in the route he described (T.1166-67). He would have reached his residence at the South Dade labor camp approximately two to three miles before reaching the Aguayo residence (T.1168). LeClair similarly demonstrated the routes described by the defendant to Feliciano Aguayo (T.1170-71).

Having been supplied with the information by the defendant, LeClair also checked all of the area hospitals and did not find any reports of a stab injury in the area at the time (T.1158). The only hospital report reflecting any stab injury was the Baptist Hospital on Kendall Drive, which was not even remotely in the area described by the defendant, and which reported a self-inflicted stab wound by a male during a domestic type argument (T.1157-58). No stabbing deaths had occurred in the area on January 16-17, 1983, either (T.1158). Similarly, there were no reports of any stabbing incidents at the Florida City Police Department. Id.

The State also presented the testimony of Detective Radcliff (T.1082). He testified that in September, 1985, he went to crew leader, Trevino to obtain work records of a group of individuals who were working in the fields, "in an effort to gain more witnesses in a certain event." (T.1088). Trevino was cooperative and attempted to retrieve the records requested (Id). The end result was that it was an unproductive interview. (Id). Radcliff was then shown what was marked as State exhibits 3I and 3J (Id). He stated that he had never seen said exhibits, did not know what they were, and Trevino had never produced same (T.1088-9).

The State rested and the defense moved for judgment of acquittal on the grounds that the State had not proven the crimes or the perpetrator's identity beyond a reasonable doubt, due to the circumstantial nature of the evidence (T.1221, 1224-5).

The defense presented the testimony of Ida Paz (T.1307, et. seq.). Ms. Paz stated that she is Mr. Trevino's daughter; Trevino died in January, 1989 (T.1307). Ms. Paz testified that in January, 1983, she was employed as bookkeeper for her father and did payroll records. (Id). She identified the aforementioned exhibits 3I and 3J, yellow sheets of ledger paper with handwritten notations, as the payroll records of Rufino Perez and Enrique Juarez for the early part of 1983 (T.1309). The defense then moved said records into evidence, pursuant to her testimony that she was the custodian and kept said records during the course of her employment in 1983 (T.1310). Ms. Paz stated that according to said exhibits, Rufina Perez had only worked on January 7, 14, 21 and 28, 1983; Mr. Juarez had only worked on January 7, 1983 (T.1311-12). Ms. Paz also stated that she had tried locating payroll records for Henry Garcia and David Garcia, but had been unable to find any such records (T.1312-13).

On cross examination Ms. Paz admitted that contrary to her above testimony, the records did not reflect the days worked by Perez and the defendant (T.1314-15). Rather, the dates contained in said records reflected that the

individual had worked during the week ending on said dates. (Id). Thus, Mrs. Perez had worked during the weeks ending on January 7, 14, 21 and 28, 1983. (Id). Mr. Juarez had worked during the week ending on January 7, 1983. (Id). Ms. Paz then stated that, contrary to her testimony that said records were in her handwriting, the names on said records identifying the individual whom they belonged to, were in fact not her handwriting (T.1315-1316). The names were written out by her sister, Irma. (T.1316). Ms. Paz admitted that there was no other identifying indicia on said records, such as, address, telephone number, social security number, date of birth, etc (T.1323-1324). Ms. Paz did not recognize or know the defendant either (T.1324, 1313). Ms. Paz's explanation for the lack of any social security numbers on Ms. Perez's record was that, "she must have not given it to him [Trevino] when she was hired." (T.1320). Finally, Ms. Paz stated that she remembered that detectives from Metro Dade came to see her and her father in 1985, requesting payroll records (T.1317). She also added that she had previously supplied these records (T.1326).

Detective Gregory Smith then testified that charges against the defendant were filed in the names of Henry Garcia, David Garcia and Enrique Juarez, based upon information obtained during the investigation of the crimes herein (T.1329-1330). Detective Smith also stated that his investigation did not determine nor could it determine whether Mr. E. Juares, spelled with an "S" as reflected in the payroll record above, was the same as Juarez, spelled with a "Z", an alias utilized by the defendant, because the police didn't have these payroll records, and said records bore no other identifying indicia (T.1330-31).

Crime scene technician, D. Gilbert, who was a witness in the State's case in chief, also testified. He stated that in addition to the initial eleven hours spent at the victim's home, he had performed other investigatory functions in this case (T.1230-31). He had for example taken aerial photographs of the victim's home, surrounding residences, neighborhood and a wooded area surrounding this residential area (T.1236). He had also canvassed the wooded areas, looking

for the victims' property, because, as previously mentioned, "purses and personal effects, identification, money, those kinds of things were not located by us in the house." (T.1241). In the course of said search, Gilbert only found a campsite of airmen who worked at the Homestead Air Force base. (T.1242, 1250). There was nothing of any evidentiary value. (Id). The victim's property was never recovered (T.1246). Gilbert also stated that the search of the crime scene had revealed only seven latent fingerprints. Five of these were of no value; the remaining two belonged to neighbor Diaz who had opened the front door (T.1250-51). Even the victim's own fingerprints were not located at their home (T.1252).

Finally, David Rhodes, a criminalist/serologist with the Metro-Dade Police, assigned to do blood typing, hair examination, etc., testified (T.1262). He stated that he examined multiple blood samples from the hall, the two bedrooms, kitchen floor, the broken lamp, bed covering, clothing, rug, etc (T.1264), and compared same against samples collected from the victims. The blood at the scene belonged to the victims and no foreign blood was found (T.1273).

Rhodes also examined a hair collected from the green rug in Julia Ballentine's bedroom and a hair found on the latter's body (T.1256). These hairs were brown caucasian hair, and had particles of "foreign material," which could be dirt clinging to them (T.1268). One of Rhodes' conclusions was that said hair belonged to a person who had not bathed or was not very tidy about his appearance (T.1268). Rhodes stated that he had compared the hair found against that of defendant's; they did not belong to him (T.1269).

On cross-examination, Rhodes testified that because of the commonness of hair in the environment - there are thousands of hairs in a crime scene such as that in the instant case-its analysis is dependent upon such factors as timing, location, origin, etc (T.1280, 1289, 1291). Hair analysis is only performed upon head and pubic hair (T.1279). Examination of hair from other parts of the body is not recognized (Id). Even with head and pubic hairs, each

individual has a wide range of hairs within these regions (T.1271-72). Hair from the same region in the same individual may thus show dissimiliar characteristics (Id). Hair comparison is also only valid if hairs from the same region are compared, i.e., head hair must be compared to head hair and pubic hair to pubic hair (T.1279). In the instant case, the hair found on Julia Ballentine's body exhibited similar characteristics to the victim's own hair (T.1281). One hair extracted from the green rug upon which the victim's body was found did not reflect similar characteristics to that of the victim or the defendant (T.1281). Rhodes stated that he had "no idea" whether said hair had anything to do with the victim's death (T.1276). This was because, first, the green rug containing the hair was "pretty dirty", with indications that the dirt had remained in the rug from some time (T.1275). Thus, the hair could have been in the rug months before death took place (T.1276). Second, the origin of said hair could not be determined (T.1277). Rhodes opined that said hair may have originated from the thorax, abdomen, or pubic area (T.1278, 1281). Third, the hair samples of the defendant had been obtained from his head and pubic area, in 1985, and compared to hair collected in 1983 (T.1274, 1279-80). Hairs are supposed to be collected and compared within a close time frame (T.1280). A change in living conditions over a period of time would probably affect the analysis (Id). Thus, Rhodes testified that based upon his analysis, he could not rule out the defendant as the perpetrator of these crimes (T.1244-45).

The defense rested and renewed its prior motion for acquittal (T.1331-2). The defense stated that based upon Ms. Paz's testimony, the statements of Rufina Perez should be discarded (T.1332). The defense then argued that the remainder of the evidence against the defendant was circumstantial evidence and the state had thus "not met its burden." (Id). The motion was denied (T.1333).

The parties and the court then reviewed the proposed jury instructions (T.1333-1337). The defense stated that the instructions were "in accordance with

[its] requests." (T.1337). No objections were voiced by the defense after the reading of the jury instructions (T.1440-41, 1443).

The jury then requested that certain portions of the testimony be re-read to them (T.1446-1447, 1496-97). Substantial portions of the trial testimony were then read back to the jury (T.1498-1515,1518-1520, 1543-1548). The jury found the defendant guilty of all four counts as charged (T.1552-1553; SR.22-5). The court then adjudicated the defendant guilty in accordance with the jury's verdict (T.1554).

B. Sentencing Phase

At the sentencing hearing before the jury, on May 28, 1991, the State moved several certified copies of prior judgments of conviction and sentences from Texas into evidence, without any objection from the defense (T.1569, R.135-153). Indeed, the defense stated that it had "examined these documents and they appeared to be self-authenticating" (T.1569). These documents had also been discussed with the defendant to limit any "private" information. (T.1569).

Said documents reflected that: (1) Enrique Juarez, aka, David Garcia, had been convicted of "Assault with Intent to Rob" in Texas, on May 14, 1968 and sentenced to four years (R.135-138, T.1572); (2) Henry Juarez, aka, David Garcia, was convicted of bank robbery and use of a dangerous weapon in the Western District of Texas, on May 25, 1972, sentenced to fifteen years in prison, and released, "as if on parole as provided in Section 4164, Title 18, U.S.C.," on June 23, 1982, subject to conditions, including but not limited to, regular reporting and residence in Western Texas, until the expiration of said sentences on February 26, 1988 (R.140-144, T. 1572); (3) Henry Juarez was convicted of "willfully instigating and attempting to cause mutiny at the United States Penitentiary at Leavenworth, Kansas," on January 8, 1979, and sentenced to three years (R.147, T.1572); and 4) David Garcia was convicted of "aggravated robbery, a felony," and found to have used and exhibited "a deadly weapon, to wit: a firearm during the commission of this offense", on July 1, 1983, and sentenced to

seven years (R.149-153, T.1572). The certificates of the Record Clerk of the Texas Department of Corrections, also reflected that said office had compared the certified copies, against the originals, based upon the photographs, fingerprints, and commitments of "David Garcia aka Enrique Juarez." (R.153, 138). Said individual was a white male born in Texas, on September 26, 1948, among other distinguishing factors (R.137, 151).

The State also presented the testimony of the medical examiner (T.1576-1590). Dr. Maricini testified that the physical evidence indicated that Mabel Avery's death was a result of a confrontation which began in the hallway and terminated in her bedroom where she was found (T.1577). He stated that Ms. Avery's death was a "prolonged event", with fourteen wounds "coming sequentially" (T.1578). Dr. Maricini explained:

> "you have an interplary of knife thrusts coming through the tissue of the arm, slashing across the hand and stabbing into the leg. And then interspersed with that, you have a knife thrusting deep into the chest, coming through the lungs, into heart and ultimately working down into the belly, coming all the way to the back of the belly and up through the back.
>
> * * *
>
> The irritation of the lining around the heart is described as a burning pain, a searing pain, or alternatively, a pain that would take your breath away and cause you to react and contract the muscles around the knife when it comes in.
>
> * * *
>
> So that, in summary, would be the type of experience that Ms. Avery had, which was on top of the sensation of terror as you are closed down and impaled against the wall.

(T.1578-80). The length and depth of some of the injuries on Ms. Avery also reflected that the knife was thrust with sufficient force so that it went through all the way, and was stopped because, "the handle of the knife is there and just won't go any further." (T.1580).

With respect to Ms. Ballentine, Dr. Maricini stated that death took place a "number of minutes following the completion of all of the wounds."

(T.1586). Ms. Ballentine had a total of 30 stab and cut wounds (T.1581). The length of the time of suffering was also evidenced by the struggle going from the bed to the floor of the bedroom, and also considering the presence of "twelve individual defensive injuries." (T.1581). Dr. Maricini described Ms. Ballentine's "level of awareness", as:

> She threw up her arms and legs and caught the knife here and there (indicating), creating slashing and searing pain. And ultimately the knife began to cut into the more serious areas of the body, and caused the same type of internal pain we discussed prior with Ms. Avery.
>
> This kind of searing and stabbing pain takes your breath away, and causes your muscles to freeze up and can double you over. And that is what she experienced as she tried to save herself in the minutes that transpired before her demise."

(T.1581-2). Dr. Maricini also stated that Ms. Ballentine additionally had, "injuries to her labia, the fold around the vagina, to the vagina itself, and to the anal part of the body. There were abrasions to the vaginal canal, and lacerations of the anal tissue." (T.1584). She was alive at the time of these injuries as well (T.1585). Based upon the pattern of the defensive wounds, Dr. Maricini stated that Mabel and Julia, were alive and conscious at least during each of the nine and twelve defensive wounds suffered respectively (T.1587-90). The State then rested its case (T.1590).

The defense did not call any witnesses in mitigation (T.1590). Defense counsel, at side bar, and in the presence of the defendant, stated that he had conferred with the defendant and, "advised him that he may present testimony or testify in connection with the penalty phase of this trial. It has been his decision, in which I join not to go forward with any of this at this time." (T.1596). The defendant concurred with his attorney's statement. (Id). The defense then argued that the jury's decision was whether to "kill" the defendant or ensure his punishment "for the rest of his life." (T.1621). The defense stated that a "reasonable doubt" still existed, and that defendant would, at a

minimum, be imprisoned for fifty years, without parole (T.1617). The defense added that the decision was a "human process," not dependent upon the number of aggravating circumstances (T.1620). The defense also told the jury that "it was not arguing intoxication, mental impairment, or failure to appreciate criminality of conduct:

> "So I am not going to walk in here today and say, "well, he committed this crime. He took these lives, but didn't understand what he was doing. He didn't appreciate the criminality of his actions. He was intoxicated. He was compelled to do this by someone else or some evil spirit." (T.1620).

The jurors were then instructed upon four aggravating circumstances, 921.141(5)(a), (b), (d) and (h) (T.1624-25, R. 157-160), and mitigating circumstances, F.S. 921.14(6) (b), (f), and "any other aspects of the defendant's character or record, or any other circumstances of the offense." (T.1625-26, R.162-4). No objections were raised to the penalty instructions as read (T.1628). Nor were there any specially requested instructions by the defense. The written penalty phase jury instructions were sent to the jury (T.1628, R.156-167). The jury recommended an advisory sentence of death for the murder of Julia Ballentine, by a vote of twelve to zero (T.1630). The jury recommended an advisory sentence of life imprisonment for the murder of Mabel Avery, by a vote of seven to five. (Id).

The sentencing hearing before the trial court was scheduled for July 12, 1991 (T.1635, et. seq.). At said hearing, the parties did not present any additional evidence (T.1638). The defense, however, requested that, although they had not attempted to "show as a mitigating factor the behavior of this defendant while in prison awaiting trial and awaiting the death penalty," that his behavior be considered as mitigation by the Court, with respect to the Ballentine murder (T.1639). The Court then recessed, returned with its written order, and announced its sentence of death with respect to the murders of Julia Ballentine and Mabel Avery (T.1641-2, R.188-195).

As to both murders, the trial court found four aggravating circumstances: 1) that the capital felony was committed by a person under a sentence of imprisonment, because at the time of the killing, the defendant was on parole from the federal penitentiary, 2) that the defendant was previously convicted of another capital felony or of a felony involving a threat of violence to the person, because, "the evidence showed that defendant was convicted in Texas State Court of Assault with Intent to Commit Robbery on May 14, 1968; was convicted in Texas Federal Court of Bank Robbery with a Dangerous Weapon on May 25, 1972; was convicted of instigating and attempting to cause mutiny while serving time at the federal penitentiary at Leavenworth, Kansas on January 8, 1979; and, was convicted in Texas State Court of Aggravated Robbery on July 1, 1983,"; 3) that "the capital felony was committed while the defendant was engaged ... in the commission of, or an attempt to commit or in flight after committing or attempting to commit any ... sexual battery," as the evidence showed that Julia Ballentine's "anus and vagina were penetrated prior to her death, most likely by an object and consistent with a knife,"; and, 4) that the capital felonies were especially henious, atrocious and cruel (R.188-189). With respect to this last aggravating factor as to Julia Ballentine, the court found:

> Julia Ballentine suffered at least twenty-eight stab wounds to all areas of her body as well as being sexually assaulted. The presence of many defensive wounds indicates that she was conscious, aware of this vicious attack and suffering great pain. The pathologist testified that some knife wounds extended to near five inches in depth and penetrated her heart and lungs as she struggled for her life. This obviously evil and wicked deed is shocking in its cruelty. Floyd v. State, 569 So. 2d 1225 (Fla. 1990).

(R.189). With respect to said aggravating factor as to Mabel Avery, the Court made the following findings:

> Mabel Avery, an 86 year old widow, was repeatedly stabbed, fifteen times. Stab wounds were found in her lungs, heart, gut muscles and in the major blood vessels of her back. She also had seven defensive wounds on her arms and legs. She suffered

> horrible pain from deep organ piercing stabs. As she was pinned to her bedroom wall the knowledge that she would soon die must have gone through her mind, even with the high degree of pain she suffered. The heinous nature of this murder is obvious. (R.190-19).

The Court also found that the evidence presented did not support any statutory mitigating factors pursuant to F.S. 921.141(6). (R. 191-92). With respect to non-statutory mitigation, the Court stated:

> There was no evidence of any other aspect of the defendant's character or record and the circumstances of the offense which warrant mitigation. The Court finds the evidence of drinking beer unconvincing. Merely drinking some beer without any evidence of intoxication is simply not enough. (R.191-192).

The Court thus imposed the sentence of death for the above reasons, in accordance with the jury's recommendation, as to the murder of Julia Ballentine (T.192-194). As to the death of Mabel Avery, the court overrode the jury's recommendation, stating:

> As to the murder of Mabel Avery, the Court has independently reviewed and weighed the evidence presented before the Jury and to the Court. The Court finds more than sufficient aggravating circumstances proven beyond and to the exclusion of every reasonable doubt to justify the sentence of death. There are no mitigating circumstances, either statutory or non-statutory in any degree, that would cause the Court to mitigate this sentence below the ultimate sanction.
>
> The Court is well aware that the jury's recommendation should not be overridden unless the facts suggesting a sentence of death is so clear and convincing that virtually no reasonable person could differ. Tedder v. State, 322 So. 2d 908 (Fla. 1975), Hallman v. State, 560 So. 2d 233 (Fla. 1990).
>
> In this case both homicides are especially heinous. Both also have four aggravating circumstances. There are no mitigating circumstances of any kind. The only factual difference is that Mabel Avery was NOT raped. The absence of an additional aggravating factor is not a reason to sentence an offender to life. Stewart v. State, 549 So. 2d 171 (Fla. 1989).

> The Court therefore, finds no reason for the difference in the jury's treatment of each murder. Virtually no reasonable person could differ as to the appropriateness of the death sentence for the murder of Mabel Avery.
>
> (R.194-195).

Additional facts pertaining to particular issues are set forth in the Argument portion of this brief and are hereby incorporated.

SUMMARY OF ARGUMENT

Evidence of multiple stabbings, the nature of the wounds, the duration of the attack and similar factors constitute sufficient evidence of premeditation. Alternatively, the underlying felonies were amply established with proof of intent and penetration for the sexual battery, and unlawful entry and remaining with intent to commit an offense, for the burglary. The trial court's unobjected to instructions on the underlying felonies were proper.

The rereading of evidence was properly within the court's discretion, and was done with the agreement of the parties as to all matters which were reread. The evidence regarding the absence of hospital records was not preserved for appeal, was not prejudicial as it was cumulative evidence, and was not erroneously presented herein. The photographs herein were properly admitted, as each was relevant to different aspects of the case, as to which the State had the burden of proof. The defendant's out-of-court statements, although appearing to be exculpatory in part, were shown to be false. They were thus proper evidence reflecting consciousness of guilt. The circumstantial evidence instruction herein was read pursuant to defense counsel's request and did not contain any errors. The trial court did not abuse its discretion in excusing a juror from the penalty phase, because the latter unequivocably stated that he would not recommend death under any circumstances.

Complaints about prosecutorial comments were not preserved for appellate review in the absence of objections and a motion for mistrial. The comments were not fundamental error and were not prejudicial to the defendant, in light of the

instructions to the jury. The comments were typically fair response to subjects initiated during prior arguments by defense counsel. As there were no significiant errors, appellant's cumulative error argument is likewise without merit.

The trial court properly imposed the death sentences herein. Every aggravating factor, including numerous prior violent felonies, was established beyond a reasonable doubt and proven to be comitted by the defendant herein. There was no evidence of any statutory or nonstatutory mitigating circumstances. The nonstatutory factors argued on appeal were not presented to the trial court or the jury. Any error in the instructions as to aggravating and mitigating factors are not preserved and were not harmful to the defendant. Finally, there was no error in enhancing the sentences for sexual battery and burglary herein as the jury found the defendant guilty as charged, armed with a deadly weapon and using great force.

ARGUMENT

I. & II. THERE WAS SUFFICIENT EVIDENCE OF THE CRIMES CHARGED AND THE COURT PROPERLY INSTRUCTED THE JURY AS TO THE ELEMENTS OF SAID CRIMES.

A. Premeditation

In the trial court the defendant moved for judgment of acquittal on the grounds that the State had not proven his identity as the perpetrator of the crimes herein, due to the circumstantial nature of the evidence. On appeal, however, the Appellant claims that "there was no evidence of premeditation," in the instant case. The State would note that this argument was not presented by the defense in the lower Court. Indeed, at one point during the trial the defense was willing to stipulate that this was a "premeditated murder," but an unsolved one. (T. 845) See Hoefert v. State, 18 Fla. L. Weekly S149, 150 (Fla. March 11, 1993) (basis for motion for judgment of acquittal must be reviewed in the trial court).

In any event, as noted by the Appellant, premeditation is an essential element which distinguishes first-degree murder from second-degree murder. Wilson v. State, 493 So. 2d 1019, 1021 (Fla. 1986). "Premeditation is more than a mere intent to kill; it is a fully formed conscious purpose to kill. This purpose to kill may be formed a moment before the act but must exist for a sufficient length of time to permit reflection as to the nature of the act to be committed and the probable result of that act. Sireci v. State, 399 So. 2d 964, 967 (Fla. 1981), cert. denied, 456 U.S. 984, 102 S.Ct. 2257, 72 L.Ed.2d 862 (1988). Whether or not the evidence shows a premeditated design to commit a murder is a question of fact for the jury which may be established by circumstantial evidence. Preston v. State, 444 So. 2d 937, 944 (Fla. 1984)." Wilson, supra, at 1021. Evidence from which premeditation may be inferred, includes such matters as:

> the nature of the weapon used, the presence or absence of adequate provocation, previous difficulties between the parties,

> the manner in which the homicide was committed, and the nature and manner of the wounds inflicted.

Larry v. State, 104 So. 2d 352, 354 (Fla. 1958).

In the instant case there were no previous difficulties between the defendant and the victims, and there was no provocation since the victims were in their own home. Clear and substantial evidence of premeditation was established through the number, depth and nature of the wounds inflicted upon each victim. Mabel Avery who was eighty-six year old and not in possession of any weapons, was attacked in a hallway and then cornered against a wall in her bedroom. She sustained fourteen stab wounds, nine of which were defensive wounds. The defensive wounds reflected she was alive and attempting to block the knife and shield her vital organs; the force used to defeat these efforts was so ferocious as to cause the severance of the tendons in the victim's hands. Of the other lethal wounds to the body, one "ripped open" the front of the heart; another went through the abdomen, all the way through the intestines to a major blood vessel in the back; yet another stab went through the chest wall to the ribs; and, another pierced the lung on the left side. Ninety year old Julia Ballentine died after a struggle in her bedroom. She too was not in possession of any weapon. She sustained twenty-eight stab wounds. The stabs on this victim's body tore the heart apart, went through the ribs, lungs, liver and the internal organs of the abdomen. Julia too was alive and attempted to block the knife and shield her vital organs twelve separate times; the force employed in the course of inflicting those defensive wounds was also severe enough to cause the severance of the tendons in her hands. The knife in the instant case was approximately five inches long and thrust into the bodies as far as it would go. The pattern of some of the injuries also reflected the twisting of the knife inside the body of the victim.

The deliberate use of the knife to inflict the brutal injuries herein amply demonstrates the defendant's consciousness of the "nature of the deed he is about

to commit and the probable result to flow from it insofar as the life of his victim is concerned." Larry, supra. The number of injuries inflicted on each of the victims reflects that the defendant had ample time to reflect upon his actions. The evidence as to premeditation was thus sufficient. Preston, supra, at 944. ("There is substantial evidence from which premeditation would have been inferred by the jury. The victim sustained multiple stab wounds. The nature of the injuries she sustained were particularly brutal. There was almost a complete severance of her neck, trachea, carotid arteries and jugular vein. The medical examiner stated the murder weapon was probably a knife of four or five inches in length. Such deliberate use of this type of weapon so as to nearly decapitate the victim clearly supports a finding of premeditation."); see also Kramer v. State, 18 Fla. L. Weekly S266 (Fla. April 29, 1993) (victim's defensive wounds, the passive position of his body and lack of visible injuries on defendant, were sufficient evidence of premeditation in a beating death).

The Appellant's contention that the "state's evidence failed to exclude the reasonable hypothesis that the killings here occurred by other than premeditated design," because he was "mad and upset before and after the killings," Appellant's Brief, pp. 7-8, is likewise without merit. The evidence at trial demonstrated that at 7:00 p.m. the night before the murders, the defendant expected to go on a "date" with Marylou. Marylou was with her "other boyfriend", and the defendant became "mad; upset." (T.949). However, the defendant then went to play pool and was no longer "mad" or "upset" prior to 11:00 p.m. the night before the murders. (T.987). The evidence thus does not support the Appellant's contention that there was anything wrong with the defendant's mental or emotional condition prior to the murders. Likewise, immediately after the murders, the defendant appeared, "upset you can say scared." (T. 953). The State respectfully submits that appearing scared after brutally murdering two people does not negate the previous fully formed conscious purpose to kill, as evidenced by the nature and the number of wounds inflicted herein. Finally, the defendant's self-serving

statement, while recounting a fictitious attack by unknown assailants, that "I told them not to make mad, I have this animal inside of me," does not negate premeditation. The eighty-six and ninety year old victims herein were found in their own home, without any weapons or other evidence of having attacked the defendant. Furthermore, the defendant emerged unscathed from the alleged attack. Kramer; see also Wilson, supra, at 1022, where this court found sufficient evidence to negate the defendant's hypothesis of having killed his father in a "heat of passion" during mutual combat, and held:

> Considering the totality of the circumstances surrounding the murder of Sam Wilson, Sr., we find there was sufficient evidence from which the jury could have inferred premeditation to the exclusion of all other possible inferences, including accident or heat of passion. Most notably, the appellant's story of an accidental shooting during mutual combat is countered by evidence concerning the nature of the father's wounds and the manner in which these wounds were inflicted. Wilson, Sr. was found in a seated position on the floor with his head in a chair. ... The appellant's account of the incident is further discredited by evidence establishing that Wilson, Sr. was brutally beaten with a hammer before he was killed, while the appellant emerged unscathed.
>
> The evidence is also sufficiently inconsistent with an extreme rage, heat of passion scenario for the jury to have reasonably excluded that hypothesis. Wilson, Sr.'s murder climaxed a protracted violent episode which began with the appellant's unjustified attack on Earline Wilson, continued with an equally unjustified attack against Wilson, Sr. and ended with his determined, unsuccessful effort to kill Earline with the hand gun.... [cite omitted]. There was substantial evidence of an attack on Wilson, Sr. which continued throughout the house, moving back and forth between bedroom and hall, finally ending with the fatal shooting in the living room. There was more than adequate time for any cloud on the appellant's mental faculties to have lifted and for him to have realized the probable consequences of his actions.

The Appellant's reliance upon Tien Wang v. State, 426 So. 2d 1004, 106-7 (Fla. 3d DCA 1983), rev. denied, 434 So. 2d 889 (Fla. 1983) is unwarranted as the homicide in that case involved a family member and occurred during the climax of a protracted domestic quarrel which was not initiated by the defendant. In contrast, the instant case did not involve a protracted domestic quarrel. The victims were unknown to the defendant, had never harmed him, and the murders

occurred during a forced entry to their home. In short there was no evidence of "heat of passion." The manner, nature and number of the wounds inflicted herein was ample evidence of a fully formed conscious purpose to kill with sufficient time to reflect upon the nature of the acts committed and the probable result therefrom. Wilson, supra. The remainder of the cases relied upon by the Appellant are likewise inapplicable to the circumstances herein, as they involve accidental shootings, Parkhiser v. State, 210 So. 2d 488 (Fla. 1968), shootings committed during the course of a struggle without intent to kill, Hall v. State, 403 So. 2d 1319 (Fla. 1981) shootings in self defense, Douglas v. State, 152 Fla. 63, 10 So. 2d 731 (1962) or situations where the State did not demonstrate how the homicide occurred. Smith v. State, 568 So. 2d 965, 968 (Fla. 1st DCA 1990), Sheffield v. State, 73 So. 2d 65 (Fla. 1954).

B. Felony Murder

The Appellant has argued that there was insufficient evidence of felony-murder in counts I and II of indictment, because the State was limited to the methods of commission of the underlying felonies as pled in subsequent Counts III and IV of the indictment, and there was insufficient proof of the latter counts. The Appellant also argues that it was erroneous to instruct the jury on all of the elements of the underlying felonies, as same should have been limited solely to those pled in felony counts III and IV. The complete standard jury instructions on sexual battery and burglary, the underlying felonies herein, were not objected to. Nor was the current argument that the State was limited in its presentation of proof due to the variance of allegations in the indictment ever advanced in the trial court. These arguments thus cannot be presented for the first time herein. Sochor v. State, 18 Fla. L. Weekly S273 (Fla. May 6, 1993) (failure to object to the standard jury instructions procedurally bars the issue from consideration on appeal); Hoefert, supra (basis for motion for judgment of acquittal presented to the trial court); Fla. R. Crim. P. 3.140(o):

> Defects and Variances. No indictment or information, or any count thereof shall be dismissed or judgment arrested, or new trial granted on account of any defect in the form of the indictment or information or of misjoinder of offenses or for any cause whatsoever, unless the court shall be of the opinion that indictment or information is so vague, indistinct and indefinite as to mislead the accused and embarrass him in the preparation of his defense or expose him after conviction or acquittal to substantial danger of a new prosecution for the offense.

See also Tucker v. State, 459 So. 2d 306, 308-9 (Fla. 1984) (Defects in an indictment will not render the charging instrument void absent a showing of prejudice to the defendant. "No argument has been raised that Tucker was in any way embarrassed in the preparation of his defense nor is there any threat of double jeopardy. Those facts alleged in the indictment indicate a specific date and a specific victim; other details were provided in a bill of particulars. Finally, the evidence adduced at trial was more than adequate to sustain a Blockburger defense to any possible further prosecution."); Sharp v. State, 328 So. 2d 503 (Fla. 3d DCA 1976) (Variance between allegations and proof is waived when issue is not raised in the trial court. Moreover, such a variance is fatal to conviction only if the record reveals the possibility that defendant may have been misled or embarrassed in preparation or presentation of his defense); Grissom v. State, 405 So. 2d 291 (Fla. 1st DCA 1981) (where variance between allegations in charging instrument and proof at trial is not such as to have misled defendant or subject him to substantial possibility of reprosecution for same offense, variance is immaterial and does not preclude conviction).

In the instant case, the indictment charged murder in the first degree, utilizing the following language:

> ...between January 14, 1983 and January 17, 1983, within the County of Dade, State of Florida **HENRY GARCIA** and **ENRIQUE FERNANDEZ**, did unlawfully and from a premeditated design to effect the death of a human being, or while engaged in the perpetration of, or in an attempt to perpetrate Sexual Battery and/or Burglary kill **JULIA BALLENTINE**, a human being, by stabbing her repeatedly with a knife, in violation of Florida Statutes 782.04 and 775.087. ... (R.1) (Emphasis added).

The precise language set forth above was also utilized in count II, but named Mabel Avery as the victim (R1-2). The exact language in the instant case, which did not contain further facts as to the enumerated felonies has been deemed sufficient to withstand a "vagueness" or "indefiniteness" attack, and put a defendant on notice that he was charged with first degree murder resulting from premeditated design, or during the commission of any sexual battery or burglary. Lightbourne v. State, 438 So. 2d 380, 383-4 (Fla. 1983).

Sexual battery, as pled in the murder counts set forth above, means: "oral, anal or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by any other object;". See Fla. Stat. 794.011(1)(h). Burglary, as pled in the murder counts set forth above, means: "entering or remaining in a structure or a conveyance with the intent to commit an offense therein," see Fla. Stat. 810.02. In accordance with these statutory definitions, with respect to felony murder in the course of sexual battery, the State presented evidence of homicide in the course of both anal and vaginal penetration of victim Ballentine. With respect to felony murder during the course of a burglary, the State presented evidence of homicide in the course of both entering and remaining in the victim's home, with the intent to commit both the offenses of sexual battery and theft.[1]

As noted, the defendant was properly charged with and had notice of said offenses. Contrary to the Appellant's argument, the State was not limited to the allegations of count III and count IV of the indictment as to sexual battery and burglary, respectively, as said allegations were not incorporated in the murder counts and are not deemed to be so incorporated (R1-2); Fla. R. Crim. P. 3.140(e) ("Incorporation by Reference - Allegations made in one count shall not be incorporated by reference in another count."); Fla. R. Crim. P. 3.140(k)(5) (alternative or disjunctive allegations permissible). The State's presentation

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[1] The sufficiency of proof is argued in sections "C" and "D" herein, respectively.

of additional proof as to sexual battery and burglary, as set forth above, in no way "misled or embarrassed" the defendant in the preparation or presentation of his defense, either. Not only has the appellant not raised any such argument, but the State would also note that this was the third trial of this cause, conducted after extensive discovery. Moreover, defense at trial repeatedly stated that the crimes herein had occurred and were proven; the defense was that the defendant was not the perpetrator. See Fla. R. Crim. P. 3.140(o), supra; Tucker supra, Sharp, supra, Grissom, supra.

The Appellant's reliance upon Long v. State, 92 So. 2d 259 (Fla. 1957); Lewis v. State, 53 So. 2d 707, 708 (Fla. 1951), and O'Neal v. State, 308 So. 2d 569 (Fla. 2 DCA 1975), is thus misplaced, as these cases involve convictions of defendants for crimes which were not charged at all.

Finally, as the defendant was properly charged with murder during the perpetration of sexual battery and/or burglary, and the State properly presented proof of the alternative methods of commission of said felonies, the trial court correctly instructed the jury on the complete definition of said felonies. See Vasil v. State, 324 So. 2d 465, 470 (Fla. 1979) ("In a first degree murder prosecution based on felony murder, the court must instruct the jury on the definition of the underlying felony [cites omitted]. ...The trial court, in instructing the jury on the underlying felony, recited all of the elements of the crime of rape."); see also Franklin v. State, 403 So. 2d 975 (Fla. 1981) (error not to instruct on the underlying felonies). The Appellant's argument that the instructions as to the underlying felonies of sexual battery and burglary should have been limited to the specific methods alleged in counts III and IV, instead of the complete standard jury instruction on said offenses actually given herein, is thus not only procedurally barred for failure to object to same at trial, but also without merit. Vasil, supra. Moreover, any error in providing the complete definitions of sexual battery and burglary was harmless beyond a reasonable doubt, as jurors are presumed to disregard theories and instructions not

supported by the evidence. Sochor v. Florida, 504 U.S. ___, 119 L.Ed.2d 326, 112 S.Ct. ___ (1992); Griffin v. United States, 502 U.S. ____, 116 L.Ed.2d 371, 112 S.Ct. 466 (1991).

The Appellant's reliance upon Causey v. State, 307 So. 2d 197 (Fla. 2 DCA 1925) and Johnson v. State, 226 So. 2d 884 (Fla. 2 DCA 1969) is unwarranted, as the courts in said cases gave jury instructions on crimes which had not been charged at all and the juries convicted those defendants of said crimes. Reliance upon Christian v. State, 272 So. 2d 852 (Fla. 1973) and Ellis v. State, 202 So. 2d 576 (Fla. 1967) is also unwarranted as those cases involved jury instructions on non-existent crimes, pursuant to unconstitutional or repealed statutes. Doyle v. State, 483 So. 2d 89 (Fla. 4 DCA 1986), Carter v. State, 469 So. 2d 194 (Fla. 2 DCA 1985), and Gil v. State, 586 So. 2d 471 (Fla. 4 DCA 1991), relied upon by the Appellant, are likewise inapplicable herein, as each of said cases involved the giving of erroneous instructions. In the instant case, by contrast, the Appellant's complaint is to providing the jury with complete definitions of the crimes charged, pursuant to the standard jury instructions.

C. Sufficiency of proof-Sexual Battery

As noted previously, the State presented evidence of both anal and vaginal penetration of Julia Ballentine by an object. The Appellant first contends that the evidence did not demonstrate "penetration."

The State presented the testimony of the medical examiner that victim Ballentine had a "laceration" about an eighth of an inch long in the "anal canal". (T.909). Said injury was inflicted while the victim was alive; it was also consistent with having been inflicted by a knife. (T.909-10). There was thus sufficient evidence of the victim's "anus" having been "penetrated" by an object, as required in Fla. Stat. 794.011.

The medical examiner also stated that the victim had bruises to the outer folds of the vagina, in addition to: "an abrasion going around the back of the vagina, near the entrance part of the vagina." The term "abrasion", is

defined as: "the rubbing or scraping of the surface layer of cells and tissue from an area of the skin or mucous membrane;". See Webster's Third New International Dictionary. The above injuries to the vagina were consistent with having been inflicted by fingers. (T.910). Clearly, evidence of fingers having "scraped" the membrane inside of the vagina, reflects "penetration" of said organ by an "object". The State thus presented sufficient evidence of penetration of both the anus and the vagina by an object, as permitted in Fla. Stat. 794.011, set forth previously. The Appellee would also note that the medical examiner at sentencing further described these injuries as: "injuries to her labia, the fold around the vagina, to the vagina itself, and to the anal part of the body. There were abrasions to the vaginal canal, and lacerations of the anal tissue." (T.1584).

The Appellant also argues that there was, "no evidence here of the intent to intrude into Julia Ballentine's sexual privacy," because the injuries to the vagina were the result of a struggle that caused "similar injuries in many locations." The Appellant's argument has no support in the record. The State would first note that Julia Ballentine, who was initially attacked in her bed, was found face down on the floor with her legs spread apart; her pajama top was pulled up on her body, and the pajama bottom removed and around her shoulder. Second, the lethal and defensive stab wounds on this victim were in the upper frontal area of her body and on the legs, below the knees.[2] Medical examiner's testimony and the photographs of the wounds reflect that there were no lethal or defensive stab wounds to the genital area,[3] thighs, back, buttocks, etc. Third and most importantly, both the bruises to the outerfold and the abrasion inside of the vagina, were caused by fingers, not stab wounds. Thus, contrary to the

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[2] See p.4, herein.

[3] The one-eighth inch laceration or tear inside the anal canal was consistent with having been inflicted by the knife, but was certainly not a lethal or defensive wound; nor was it comparable to the other injuries on the body.

Appellant's arguments, there were no other similar or comparable injuries throughout the body. The position of the victim's body, the appearance of her clothing, the evidence of injuries to and penetration of her vagina by means different than those utilized to cause her death, were ample evidence of the intentional nonconsensual intrusion into the victim's sexual privacy.

Finally, the Appellant contends that there was insufficient evidence of Mabel Avery having been murdered during the perpetration of sexual battery on Julia Ballentine, because the State argued that the former had been killed prior to the commission of sexual battery on the latter. This argument too is without merit. First regardless of the State's argument, the jury was entitled to find that Mabel Avery although stabbed, had not yet died. Nothing in the medical testimony presented, as to the times of death, precluded such finding by the jury. See Holton v. State, 573 So. 2d 284, 290 (Fla. 1991). Second, even if Ms. Avery was deceased prior to the sexual battery, her homicide facilitated the sexual battery of Julia Ballentine, who was partially disabled and had difficulty even walking. See Roberts v. State, 510 So. 2d 885 (Fla. 1987), where the murder of the first victim was an early link in a chain of events calculated to set the stage for the subsequent sexual battery. Appellant's reliance on Bryant v. State, 412 So. 2d 347 (Fla. 1982) is misplaced, as that case involved the failure to give an independent act instruction, where the defendant had no knowledge of and had left the premises when a coperpetrator sexually battered the victim, causing death.

D. Sufficiency of Proof as to Burglary

As noted previously, the State presented proof as to both entering and remaining in the victim's home with the intent to commit sexual battery and/or theft. Initially the Appellant contends that there was insufficient proof of intent to commit sexual battery. This issue has been fully addressed on p. 33-4, herein and the State relies on its argument therein.

The Appellant also argues that there was insufficient evidence of intent to commit theft, because the State did not "show that any property was missing". Mabel Avery was found next to a closet which was open, in her bedroom. Crime scene technician Gilbert testified that during a 10 1/2 hour search of the house, he and two other technicians were unable to locate any pocketbook or wallet, or any items normally contained within these, such as credit cards, social security cards, medicare cards, prescription cards, etc. belonging to the victims (T.752-753). No "money" was located in the house, either (T.1241). The police canvassed the area surrounding the victim's home and searched for said items, but were unable to recover them[4] (T.1204, 1242). Thus contrary to the Appellant's argument, circumstantial evidence of missing property was presented. The Appellant then contends that there was a "reasonable, and perhaps even likely, hypothesis that the victims did not own or keep in their house any of the items about which testimony was elicited." The State respectfully submits that this is an unreasonable hypothesis and refuted by the record. The evidence at trial reflected that the victims, despite being partially disabled and both being elderly, led normal lives and performed ordinary daily chores, such as grocery shopping, going to the doctor, the library, etc. Their family and relatives lived outside of the State. Although they depended upon their neighbor for transportation in order to perform these chores, there was no evidence that said neighbor was in possession of all of their means of identification, money and other means of purchasing power. To the contrary, said neighbor testified that Mabel Avery herself shopped for groceries two days before her death. Moreover, this neighbor, although in possession of the key to the victim's front door, had no access to their home, as demonstrated by her inability to open the door, even

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[4] Appellant's reliance upon Detective John Leclaire's testimony that he made no effort to locate any of said personal property and didn't know if they had any credit cards, is misplaced. This detective was not assigned to this case until two years after the initial investigation, and had no reason to search for the property at that point in time.

in the face of an emergency, as the victims were in the habit of latching said door from the inside. The Appellant's reliance upon Eutzy v. State, 458 So. 2d 755 (Fla. 1984) is thus misplaced. The victim in Eutzy was a taxi cab driver found murdered in his cab. The State sought to prove murder during the commission of a robbery, by solely arguing that cab fare was "due and owing" the victim from the defendant. This court held that although there was sufficient evidence of murder for precuniary gain, there was no evidence of a taking having occurred by "force, violence, assault or putting in fear," as required by the robbery statute. As to the taking of property, this court stated, "no evidence was submitted that the victim was in custody of cash or other property before he picked up the Eutzy couple. Neither was evidence presented that no cash or property was found near the victim's body." (Id). In the instant case, the victims were not murdered and found in the course of performing their job; they were in their home. The evidence reflected that they normally did use and thus had custody of the missing property, and that same was not found on their person, in their home or the surrounding areas.

III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN READING PORTIONS OF THE TESTIMONY TO THE JURY.

The jury, during their deliberations requested that portions of the testimony of Mrs. Feliciano, Mr. Aguayo, Ms. Perez-Cruz, the medical examiner, and technician Rhodes be read back to them. (R.89-90). The State requested that the entire testimony of each of said witnesses be read, in order to keep same in context. (T.1450). The defense disagreed, and requested the court to "pinpoint the exact area ... of concern to the jury." (T.1450, 1457-8). The parties then reviewed transcripts of said witnesses' testimony, and agreed that the relevant portions of both direct and cross-examination testimony would be read. (T.1457-58). There were no requests at any time for any clarification of the scope of the jury's questions. Furthermore, those portions of testimony actually read to the jury, were agreed upon by both parties. The Appellant herein complains of omitted portions of testimony.

The standard for rereading of testimony has been set fort by this court in Haliburtion v. State, 561 So. 2d 248, 250 (Fla. 1990). "The rereading of testimony is within the discretion of the trial judge. Kelley v. State, 486 So. 2d 578, 583 (Fla.) cert. denied, 479 U.S. 871, 107 S.Ct. 244, 93 L.Ed.2d 169 (1986). We find no abuse of discretion where the trial judge rereads the testimony specifically requested by the jury and that testimony, as in the instant case is not misleading." Id.

A. Testimony of Elizabeth Feliciano

Appellant first complains about an omission in reading witness Feliciano's testimony. The jury's request with respect to this witness was her testimony, "AS TO HER DESCRIPTION OF MR. GARCIA HOW WE WAS DRESSED; AND THE BLOOD OF HIS FOREHEAD AND THE TIME SHE FIRST SAW MR. GARCIA." (R.89). The defense did not make any requests for an inquiry as to scope of the jury's request. However, the defense, in response to this question wanted the following questions and answers read to the jury:

Q. Did you see him carrying a woman's purse?
A. No, I didn't see any woman's purse on him.
Q. Did you see him carrying any woman's wallet?
A. No, I didn't.

(T. 1462). The State respectfully submits that the reasonable interpretation of "DESCRIPTION OF MR. GARCIA HOW HE WAS DRESSED" is a description of the clothing the defendant was wearing. The witness' statement that she did not see the defendant "carrying" an unusual object, is not fairly responsive to the question of the clothing worn by the defendant. The trial court thus did not abuse its discretion. Haliburton, supra.

The State additionally notes that those portions of this witness' testimony, which were in fact read to the jury, were agreed upon by both parties. The portions so read in no way, shape or form implied that the defendant was carrying anything. In fact the portion of cross-examination which was reread immediately prior to the omitted part, was:

A. "A blue pair of pants, a blue shirt and blue tennis shoes, yes.
Q. What else was he wearing. Ma'am, if you recall?"
A. That's what he had on, What I just told you.

(T.1508). (emphasis added). There was thus nothing "misleading" about the testimony read to the jury. Haliburton, supra.

Appellant's complaint herein is that the excluded testimony was of "great significance", because it was a factor in determining whether a burglary had occurred. As noted previously in point I herein, there was ample evidence of both premeditation and entry to the victims' home with intent to commit sexual battery. Furthermore, in response to another jury question as to Ms. Feliciano's son, Aguayo, whose testimony was reread to the jury immediately prior to Feliciano's testimony, the jurors were in fact informed of the omitted questions and answers complained of herein. A portion of Aguayo's testimony, that he did not see the defendant carry "any woman's purse", nor "any women's wallets", and that there were no "women's pocket purse bulging out of his pockets", was reread to the jury. (T.1502). Thus considering the totality of the testimony re-read to the jury, no prejudice has been demonstrated. Haliburton, supra.

B. Testimony of Rufina Perez-Cruz

The jury also requested to hear this witness' testimony "AS TO WHAT SHE HEARD MR. GARCIA SAY." (R.89). The Appellant has first argued that the court erroneously allowed changing the word "la," singular, to "las", plural, because the court reporter's notes reflected that the witness had not stated "las". The word had been utilized in that portion of Perez-Cruz's testimony where she stated she had overheard a conversation between the defendant and a group of men, while working in the fields. (T. 1024). The entire conversation had been in Spanish (T.1028). Perez-Cruz had testified that:

A. Yes, He [defendant] said, "Do you know what happened?"
Q. And what else?

A. Then one of the other men said to him, "what?" And he said, "I got in trouble with these women, bt I don't have to worry about it, because they are already in hell."
Q. "Because they are already in hell"?
A. "They are already in hell," yes. And the other one said, Te la Shingates? That's a Spanish word we use.
Q. Te la Shilagastes?"
A. Yes, ma'am.
Q. Is that a slang expression?
A. Yes, it is.
Q. Can you tell us what it means?
A. Well, in English, sometmes we say, "Did you fuck them up? He said, "yes, but I don't have to worry about them, because they are already in hell."

(T.1026) (Emphasis added). Further questioning as to the slang expression also reflected:

Q. Ms. Perez, Te la Shingastes," is that plural or singular?
A. Plural.
Q. And "las," is that feminine or masculine?
A. Femimine.

(T.1037). As even noted by the defense counsel, the problem was one of "spelling" (T.1462). As seen from the above quoted testimony it is obvious that the slang expression referred to a plural term. As observed by even defense counsel, "when you look at the word shingates it has an "s" at the end. It changes singular to plural." (T.1468). The State respectfully submits that correcting a spelling error by the court reporter as was done herein is not prejudicial error. The trial court was authorized to do so. See Fla. R. Crim. P. 9.200(f)(1): "If there is an error or omission in the record, the parties by stipulation, the lower tribunal before the record is transmitted, or the court may correct the record." (emphasis added).

The Appellant's argument that the change of "la" to "las" was prejudicial, because use of the word "la" would have been consistent with the defendant's account of having stabbed one unknown female, is without merit. The translation of the the whole expression, "Did you fuck them up," was in no way changed and was not erroneous. The defendant's account of having stabbed an

unknown female in no way implied a sexual battery; he stated that he had been attacked by three unknown assailants, two of whom were male, and he stabbed the female in self defense. Moreover, in the overheard conversation, the defendant stated that he accomplished the acts described in the slang expression, by slashing the screen of the victim's back door. (T.1027). The defendant's account of stabbing an unknown female assailant, however, stated that his actions took place in front of open corn fields. The change of the word "la" to "las" obviously had no prejudicial effect; the conversation overheard by Perez-Cruz was entirely inconsistent with the defendant's false account.

The Appellant has also complained that in response to the jury's question of "what" Perez-Cruz "heard Mr. Garcia say", the witness' statement that the defendant "may have been" "joking", but, "Not to myself. It's not a joke" was not read to the jury. (T.1472, 1044). The State respectfully submits that a reasonable interpretation of "what" she heard the defendant "say", is the words spoken by the defendant. The witness' interpretation of whether or not the defendant's statements constituted a joke, is not encompassed within the jury's question. There was thus no abuse of discretion in not reading this portion of the witness' testimony. Haliburton, supra. In any event, once again the State notes that the parties agreed as to what portions of this witness' testimony were to be read to the jury. There was nothing misleading about the testimony that was actually read. Moreover, defense counsel stated that he wanted the omitted portion as to the defendant joking read because, in his closing argument he had told the jury that, "this lady said the man was joking." (T.1473). A portion of this witness' testimony that the defendant and his companions were "joking", was in fact re-read to the jury: "Answer: He said that, and then you know, the way that they were expressing themselves, were just like joking around or something like that." (T.1513-14). The State thus fails to see any prejudice in re-reading this witness' testimony.

C. The testimony of Technician Rhodes

The jury also requested, "Mr. Rhodes' testimony regarding the source of the two hairs found on Julia's body" (R.90). The parties stipulated that Rhodes' entire testimony, from his qualifications forward, would be read in response. (T.1531). The transcripts then reflect that, "the court reporter read back Mr. Rhodes' testimony." (T.1548). Mr. Rhodes' testimony is already transcribed and part of the record before this court. (T.1261-1295). The Appellant has complained that the reading of this transcript is not transcribed, and claims he has been prejudiced because there may have been an "error in how that testimony was read". The State respectfully submits that the Appellant's speculation is without merit. First, the transcript of the reading of testimony does not reveal "how" it was read. The transcript of this witness' testimony was read in its entirety, as opposed to various "pinpointed" areas of other witness' testimony as requested by defense counsel. The parties were in possession of the transcripts of testimony and present when this transcript was read. There were no objections as to "how" the testimony was being read at the time, nor has appellate counsel profferred knowledge of any undue emphasis, omission or other error in reading that which is already part of the record. If there was a belief of error, counsel could have requested relinquishment and reconstruction of the record. Craig v. State, 510 So.2d 857, 860-1 (Fla. 1987). The record herein is adequate for appellate review process.

IV. THE LOWER COURT DID NOT ERR IN ALLOWING THE PROSECUTOR TO INTRODUCE EVIDENCE THAT THERE WERE NO HOSPITAL RECORDS OF STABBING VICTIMS.

The Appellant asserts that Detective Leclair's testimony, that hospital records for the date in question did not reveal the existence of stabbing victims, was admitted in violation of the hearsay rule. This issue has not been preserved for appellate review. At trial, examination of the witness proceeded as follows:

> Q. Did there come a time, Detective, when once supplied with this information by the defendant that you had occasion to check all of the area hospitals to find out if there were any reports of any patients, anybody who presented themselves --
> MR. DIAZ [defense counsel]: Objection.
> Q. -- anywhere in he location of Dade County --
> MR. DIAZ: Objection.
> THE COURT: Objection is overruled.
> THE WITNESS: Yes, ma'am.
> Q. -- with a stab injury?

(T.1157). There was no further objection to this line of questioning. The witness then proceeded to relate that various hospitals had been checked, and they had no records of stabbing victims, except for one self-inflicted stab-wound patient at Baptist Hospital. (T.1157-59).

This issue has not been preserved for appellate review. The sole objection herein failed to state any legal basis for the objection. In Castor v. State, 365 So. 2d 701, 703 (Fla. 1979), this Court stated, that "[t]o meet the objectives of any contemporaneous objection rule, an objection must be sufficiently specific both to apprise the trial judge of the putative error and to preserve the issue for intelligent review on appeal." See also, Tillman v. State, 471 So. 2d 32, 34-35 (Fla. 1985). Nor is there any basis for concluding that any error herein was fundamental. See, e.g., United States v. Rich, 580 F.2d 929, 937-39 (9th Cir. 1978) (absence of records/hearsay issue not preserved for appellate review in absence of specific objection and did not constitute "plain" error to permit review in the absence of preservation).

Furthermore, the issue raised by the Appellant does not reflect the existence of any hearsay violation. The absence of records, depending upon the facts and circumstances, may or may not raise a hearsay issue and may or may not implicate the hearsay exception under 90.803(7), Florida Statutes. Statements are not hearsay when they are not introduced for the purpose of proving the truth of the matter asserted therein. Section 90.801, Florida Statutes; Breedlove v. State, 413 So. 2d 1, 6 (Fla. 1982). Frequently, in absence of record situations, hearsay is not involved. As stated by Professor Ehrhardt:

> Technically, evidence of the absence of a record is not hearsay under section 90.801. The record is not being offered to prove the truth of any fact contained in the record but rather is being offered as a basis of an inference of the fact of non-occurrence. However, to make certain that there would be no dispute as to the admissibility of a business record to prove the non-occurrence of an event, section 90.803(7) was included in the Code.

Ehrhardt, Florida Evidence, 803.7, p. 631 (1993 Ed.). In the instant case, the evidence was not being admitted to prove the truth of the matter asserted - i.e., that various hospitals had no stabbing victims. Rather, the evidence was being admitted to form the basis of an inference of the fact of non-occurrence. The Advisory Committee's Notes to Federal Rule of Evidence 803, with respect to 803(7), make the same point, by suggesting that evidence of the absence of records is "probably not hearsay." There may be situations where the absence of the record itself is the issue. For example, in a medical malpractice action, the plaintiff may be asserting that the hospital was negligent for failing to keep records of the administration of the patient's drug dosages, thereby causing a nurse to administer excessive dosages, without knowledge of what had previously been administered. In such a situation, the absence of the record itself goes to the truth of the matter asserted by the declarant claiming that there was no record. Under such circumstances, all procedural requirements of the rule should have to be complied with. However, when the situation involves only the basis of an inference of the fact of non-occurrence, it should be deemed a non-hearsay situation which does not even require compliance with the exception.

In any event, the State would note that any error in the admission of this testimony was harmless beyond a reasonable doubt, as the testimony went to the falsity of the defendant's account of the stabbing. The defendant's account was also proven false through the testimony of Feliciano and Aguayo. The defendant, despite claims of having been beaten with a tire iron in an attack by three unknown assailants, had no visible injuries. Despite claims of

having struggled, been thrown down, and having run through fifteen miles of sticky dirt cornfields and back roads where it had been raining, there was no dirt or wetness on his person, clothing, shoes, etc. Despite arriving at Aguayo's residence for the purpose of getting a ride home, the routes which the defendant claimed he had travelled would have placed him at his home prior to reaching Aguayo's residence. Finally, the precise location of the alleged attack was examined on the same day by witness Aguayo. There were no signs of a struggle, blood, tire irons, etc.

The Appellant next complains that Detective Leclair improperly testified that witness Aguayo had been arrested for a driving infraction. (T.1207). While trial counsel made a hearsay objection as to this testimony, it is apparent that defense counsel, on cross-examination of the officer, had previously opened the door to this redirect examination. On cross-examination, defense counsel asked whether the officer had learned that Aguayo had been arrested on January 18, 1983. (T.1174). Defense counsel continued asking whether the officer knew "what impact" this arrest had on Aguayo's "claims to the police". Id. In view of the fact that defense counsel had already elicited this, the door was already opened for the prosecution, on redirect examination, to further discuss the nature of that arrest. See, Medina v. State, 466 So. 2d 1046, 1048-49 (Fla. 1985) (scope of redirect examination as to matters elicited on cross examination); Wright v. State, 582 So. 2d 774 (Fla. 2d DCA 1991) (where defense counsel, on cross examination, elicited that officer's investigation produced one witness giving information leading to arrest of defendant, on redirect examination, prosecution could elicit details of conversation between officer and witness giving evidence against defendant); Walton v. State, 481 So. 2d 1197, 1199-1200 (Fla. 1985) (on cross examination, defense counsel discussed arrest warrant affidavit and, on redirect examination, state was therefore permitted to elicit that the affidavit included incriminating information furnished by codefendant). "Generally, testimony is admissible on redirect

which tends to qualify, explain, or limit cross-examination testimony." Tompkins v. State, 502 So. 2d 415, 419 (Fla. 1986). Holton, supra, at 288. In the instant case, defense counsel elicited information about Aguayo's arrest, implying that it somehow undermined Aguayo's testimony. The prosecution, on redirect examination, merely demonstrated that the arrest was for a traffic infraction and that it should not undermine Aguayo's testimony. Therefore, the prosecution's redirect qualified, explained or limited the cross-examination testimony. Alternatively, any error must be deemed harmless, as it relates to a minor matter and the defense had already elicited much of it.

The Appellant next complains that the prosecution attempted to elicit, on cross examination, what Detective Gilbert, after obtaining hair samples from John Conners, had been told to do by other detectives. (T.1254-55). Defense counsel's objection to this questioning was sustained. Subsequently, defense counsel did not seek any curative instruction for the jury to disregard the questioning; nor did counsel move for a mistrial. Under such circumstances, this issue has not been preserved for appellate review. Duest v. State, 462 So. 2d 446, 448 (Fla. 1985); Ferguson v. State, 417 So. 2d 639 (Fla. 1982); Clark v. State, 363 So. 2d 331, 335 (Fla. 1978). Alternatively, insofar as the question was interrupted before any answer was elicited, any error must also be deemed harmless. Holton, supra, at 288.

Lastly, the Appellant complains that (1) on redirect, Detective Leclair was permitted to testify that, as a result of his investigation, there were no other suspects in the case, and (2) Detective Gilbert was similarly permitted to testify that he had no knowledge of other suspects in the case. (T.1212, 1254). Neither issue is preserved for appellate review. In both instances, the sole objection was a general objection, failing to state any particular grounds. Such objections are insufficient to apprise the trial court of the nature of the objection and do not preserve any issue for appeal. Castor, supra; Tillman, supra. In any event, these comments do not raise any error.

The questions were based on the officers' personal knowledge and do not relate, either directly or implicitly, any hearsay information inculpating either the defendant or anyone else. The State would also note that the subject of "suspects" was raised by the defense counsel, who throughout trial was questioning witnesses as to "Mr. Fish - Fish's" son, John Conners. Defense counsel, through wholly improper compound hearsay questions, stated that John Conners was a "mentally deranged drifter" who was living in the woods, without access to bathing facilities, and was thus the perpetrator of these crimes, because the "dirty hair" found in the rug beneath Julia Ballentine belonged to him. Defense further implied that the police thought he was suspect because they had arrested him and taken a sample of hair and a pair of his pants. (T.930, 1011-2, 1177, 1185, 1190-1. 1201, 1218-9, 1232, 1237, 12399, 1243, 1257, 1264). The defense accusations were baseless. The prosecutor established that John Connors was not mentally deranged, was not a drifter, did not live in the woods, was well-groomed, his hair was dark and thus inconsistent with the brown "dirty hair" at the scene, his pants had tested negative for blood, he was not arrested, and thus not considered a suspect. (T.1213, 1238, 1242-3, 1250-1, 1253, 1282). The prosecutor was entitled to rebut the baseless inferences raised by the defense. Holton, supra at 288. Moreover, the unobjected to remarks by the prosecutor as to "suspect" John Conners being "eliminated", complained of herein by the Appellant, was a proper comment on evidence which was first elicited by the defense. White v. State, 377 So. 2d 1149, 1150 (Fla. 1980).

V. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING RELEVANT PHOTOGRAPHS INTO EVIDENCE.

The Appellant argues that various photographs were improperly admitted into evidence at trial, because the victims' identity and their causes of death by stab wounds were not in dispute, and there was thus "no necessity

for the photographs here and their relevance was marginal." Specifically, the Appellant complains about exhibits 19, 20, 21, 22, 27, 33, 34 and 37 through 52, inclusive.

Exhibits 19 and 20 were one photo each of the southwest bedroom and southeast bedroom, where Mabel and Julia were found, respectively. These pictures showed the position of each of the bodies in which death had occurred, and their immediate surroundings. Mabel's bedroom reflected that her bed had been slept in; the time of deaths had been challenged in opening argument where the defense had stated that death took place the night before, prior to the victims having gone to sleep, when the defendant was in the company of others. (T.610). In Julia's bedroom a struggle reflected by the destruction and disarray of various items of furniture, in addition to the position and disarrangement of her clothing, were also depicted. These exhibits were not objected to on the grounds of what they depicted, but rather were challenged due to their size (T.649-50). Exhibits 21 and 27 depicted the positions of beds not visible in the foregoing exhibits. (T.655; R.70, 64). These photos, in addition to establishing that the victims had slept in the beds, also depicted that, due to the amount and location of the blood, the attack on Julia had originated in her bed and culminated on the floor where she was found. (T.905). These photos were also taken from a different vantage point, and did not depict the victims' bodies in their entirety. Exhibit 22 was a photo of the outside of the victims' house. (R.65). Exhibit 33 was a photo of Avery's bedroom from the vantage of the hallway. (R.74). Exhibit 34 was a photo of Julia's pajama top, after it had been removed from the victim. (T. 727). None of these latter three photos depicted the victims, and they were not objected to. (T. 725-27). The medical examiner testified that the position of the bodies, the presence of blood splatter, evidence of a struggle and a break-in, all contributed to his overall assessment of the deaths. (T. 850).

As stated previously, Mabel Avery had 14 and Julia Ballantine had 30 stab wounds. Exhibits 37 through 40 depicted the lethal wounds on Mabel's body. (T. 855-60). Exhibits 41 through 47 depicted the defensive wounds on this victim. (T. 861-65). Exhibits 48 through 52 depicted the wounds on Julia's body. (T. 899-900). These photos were of different parts and appendages of the bodies; the bodies in their entirety were not depicted. The photos were selected by the medical examiner. (T. 844). He testified that they were necessary to explain his conclusions. (T. 855). These photos were taken at the scene, and as to the size in which each was presented, the medical examiner testified that every photo was a "fair and accurate" depiction of the wounds as they appeared on the victims' bodies. (T. 856, 861-64,898-99). The photos also depicted the depth, pattern and location of the wounds on each victim. These details could not be seen in smaller photos. (T. 843).

The nature, depth, pattern and exact location of each wound was utilized to explain the type and length of the knife used, the length of time taken by the defendant to accomplish the victims' demise, the nature and force of the violence, and thus defendant's knowledge of what his actions would entail. (T. 853-913). These factors, in addition to the position of the bodies and their immediate surroundings as reflected by the previous photos, established the time of death, the essential element of premeditation, and intent to commit sexual battery. The State would note that the latter two are the very factors disputed in point I of the Appellant's argument.

The State first submits that the photos herein were, "neither gory nor inflammatory beyond the simple fact that no photograph of a dead body is pleasant." Williams v. State, 228 So.2d 377, 379 (Fla. 1969); Bush v. State, 461 So.2d 936, 939-40 (Fla. 1984) ("blowup of victim's bloody face," and "closeup" of a gunshot wound to the victim's head, utilized by the medical examiner to establish to the jury what he had observed, were not "so shocking in nature" as "to defeat their relevancy."); Henninger v. State, 251 So.2d 862 (Fla. 1971)

("series of gruesome, enlarged color photographs which showed the victim in various positions with knife wounds in her back and depicted "her head half cut off," admissible where relevant to cause of death). "[A]llegedly gruesome and inflammatory photographs are admissible into evidence if relevant to any issue required to be proven in a case." State v. Wright, 265 So. 2d 361, 362 (Fla. 1972); see also, Haliburton, supra, at 250 ("The basic test of a photograph's admissibility is its relevance."). The mere fact that a defendant stipulates to the identity of the victim and cause of death does not defeat the relevancy of allegedly gruesome photographs. Foster v. State, 369 So. 2d 928, 930 (Fla. 1979). Photographs which, as in the instant case, assist the medical examiner in explaining his examination, prove identity, nature and extent of injury, nature and force of violence, show premeditation, etc., are relevant. Bush, supra; Wilson v. State, 436 So.2d 708 (Fla. 1983) (autopsy photographs admissible where relevant to prove identity, nature and extent of victim's injuries, manner of death, nature and force of violence, and to show premeditation); Jackson v. State, 545 So.2d 260 (Fla. 1989) (photos of victims' charred remains admissible where relevant to prove identity, circumstances surrounding murder, and to corroborate medical examiner's testimony); Haliburton, supra, at 251 ("The photographs submitted in this instance were used to identify the victim and were used by the medical examiner to illustrate the nature of the victim's wounds. Any prejudice is outweighed by the probative worth of the photographs and the trial judge did not err in admitting them into evidence.").

The Appellant's reliance upon Young v. State, 234 So.2d 341 (Fla. 1970), is misplaced, as that case involved the admission of "45 cumulative photographs of a gruesome nature taken away from the scene of the crime." See Wright, supra, at 362; Haliburton, supra, at 250-51. The photos herein were neither taken away from the scene, nor cumulative, as each photo depicted a wound not reflected by the others. See, Wright, supra (where each exhibit

depicted "a wound or wounds not depicted by the others," photographs were not cumulative, and were properly admitted into evidence). Likewise, Czubek v. State, 570 So.2d 925 (Fla. 1990), Pottgen v. State, 589 So.2d 390 (Fla. 1st DCA 1991) and Hoffert v. State, 559 So.2d 1246 (Fla. 4th DCA 1990), relied upon by the Appellant, all involved admission of photographs whose gruesome nature was due to circumstances "above and beyond the killings," such as decomposition of the body and infliction of additional wounds by small animals due to the length of time before the victims were found, or additional injuries due to the autopsy. Moreover, in those cases, the photographs did not establish identity or cause of death, did not assist in explaining the medical examiner's testimony, and did not corroborate other relevant evidence.

Finally, the Appellant's complaint that the crime scene photos herein were also utilized repeatedly, and thus prejudicially, to demonstrate various items of furniture, rugs, etc., is without merit. The depiction of the beds, open closet door, small piles of clothing set forth in readiness for wearing, etc., as found on the scene, were relevant to establishing time of death, which as noted previously, had been challenged by the defense as having taken place the night before, prior to the victims having gone to bed. The details of Julia's bed and various items of furniture which were depicted as askew, in disarray or broken, were relevant to establishing a struggle and demonstrating this victim's attack had been initiated in her bed. These factors, in addition to the number of defensive wounds, demonstrated the length of time taken by the defendant and were relevant to establishing premeditation. Technician Gilbert also utilized the pictures to demonstrate that all items were properly examined for fingerprints and other evidence, in response to defense contentions that this was an unsolved crime and police methods were deficient. The crime scene photo of the rug upon which the victim was found and hair thereon, was utilized not to demonstrate the color of the rug, as claimed by the appellant, but for its depiction of ground-in dirt which had existed for an

indeterminate period of time. (T.790-91). One of the primary defense contentions at trial was that because a "dirty hair" had been discovered on this rug, the perpetrator of the crime was a mentally deranged "drifter," who lived in the woods," did not have access to bathing facilities, and thus had deposited the "dirty" hair on the rug. (T.1190). The prosecution was merely demonstrating that due to the condition of the rug, the presence of a "dirty" hair thereon had no significance. (T.790-91). The State would also note that the photo was utilized after the defense had also challenged the propriety of police methods in not employing "vacuuming techniques" on the scene. (T.783-85). Finally, contrary to the Appellant's arguments, the trial judge allowed the State to utilize the crime scene photos during its direct examination of the relevant witnesses (T.652), and they were removed upon defense objections that the jury may be able to see them while they were not in use. (T. 740). Moreover, the State would note that once properly admitted, the jury has the right to examine the evidence. See Fla. R. Crim. P. 3.400. The photos herein were properly admitted and their utilization by the State was not error. Wright, Henninger, Foster, Bush, Wilson, Haliburton, supra.

VI. THE TRIAL COURT PROPERLY DENIED THE DEFENDANT'S MOTION IN LIMINE AND CORRECTLY ADMITTED THE DEFENDANT'S ADMISSIONS OF GUILT.

As noted in the Statement of the Facts herein, within an hour of the commission of these crimes, the defendant was seen running from the direction of the scene, one half mile away, with bloody clothes and in possession of a knife entirely consistent with the murder weapon. He admitted he was involved in a stabbing. However, he gave an exculpatory account of this stabbing, stating that the incident took place in self defense, when he was attacked by unknown assailants, in a corn field. As the person who saw him thus, knew that he was last seen at a location one half mile away from the victims' house, the defendant also sought to further exculpate himself by adding

that he had walked to another location, 15 miles away, where the alleged attack had occurred. At trial, the State presented the testimony of the two witnesses[5] to whom the defendant had made his statements. The State also proved the falsity of the exculpatory portion of the defendant's account through these same two witnesses.

The Appellant complains that the defendant's statements should not have been admitted into evidence, and the State should not have been allowed to prove the falsity of their exculpatory portion, because, at trial the defendant did not rely on these statements as a defense. The defendant's contentions are entirely without merit. The defendant's statement as to having been involved in a stabbing was an admission of guilt, and was obviously admissible. See Fla. Stat. 90.803(18)(a); Moore v. State, 530 So.2d 61, 63 (Fla. 1st DCA 1988) ("an out of court admission by the accused is admissible under section 90.803(18), Florida Statutes, when offered by an adverse party."). The State was also entitled to present the details of the stabbing recounted by the defendant, and prove its falsity, in order to establish consciousness of guilt and refute any reasonable hypothesis of innocence.

Exculpatory statements, when shown to be false, are rendered inculpatory, and are treated as admissions. Brown v. State, 391 So.2d 729 (Fla. 3d DCA 1980); Padro v. State, 428 So.2d 290 (Fla. 3d DCA 1983), review dismissed, 436 So.2d 100 (Fla. 1983). As admissions, such statements may be introduced during the State's case-in-chief from which guilt may be inferred.

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[5] Contrary to the Appellant's arguments herein, only Aguayo and Leclaire testified to the statements made to them by the defendant, and the falsity thereof. Neither Elizabeth Feliciano nor Beverly Hall, in any way, referred to the defendant's statements or their falsity. Elizabeth Feliciano testified as to the defendant's appearance and the location where he was running from, when he appeared at her house. She also stated that she accompanied her son to certain corn fields later on that day. The details of her activities in the corn field and the reasons therefore were elicited by the defense on cross-examination. The State thus did not make the defendant's false statements a "feature" of its case, as argued by the Appellant.

Smith v. State, 424 So.2d 726 (Fla. 1982), cert. denied, 462 U.S. 1145 (1983). As noted in Brown, supra, at 730:

> Evidence of a defendant's acts or statements calculated to defeat or avoid his prosecution is admissible against him as showing consciousness of guilt. See, e.g., Mackiewicz v. State, 114 So.2d 684 (Fla. 1959), cert. denied, 362 U.S. 965, 80 S.Ct. 883, 4 L.Ed.2d 879 (1960); Spinkelink v. State, 313 So.2d 666 (Fla. 1975), cert. denied, 428 U.S. 911, 96 S.Ct. 3227, 49 L.Ed.2d 1221. See also United States v. Myers, 550 F.2d 1036 (5th Cir. 1977), appeal after remand, 572 F.2d 506, cert. denied, 439 U.S. 847, 99 S.Ct. 147, 58 L.Ed.2d 149 (1978); United States ex rel. Royster v. McMann, 292 F.Supp. 116 (E.D.N.Y. 1968) (exculpatory statements, when shown to be false, become inculpatory and are to be treated as admissions); Wilson v. United States, 162 U.S. 613, 16 S.Ct. 895, 40 L.Ed. 1090 (1895); United States v. Boekelman, 594 F.2d 1238 (9th Cir. 1979); Fox v. United States, 381 F.2d 125 (9th Cir. 1967); Holt v. United States, 272 F.2d 272 (9th Cir. 1959) (the destruction, suppression or fabrication of evidence is relevant to prove guilt).

See also, State v. Frazier, 407 So.2d 1087 (Fla. 3d DCA 1982) (even if one of the defendant's two versions of stabbing of his wife was sufficient to warrant dismissal of second-degree murder charge, the second, inconsistent, but not thoroughly exculpatory version of events, was evidence of the falsity of the first exculpatory statement, not only justifying rejection of that statement, but affirmatively showing consciousness of guilt and unlawful intent); United States v. Eley, 723 F.2d 1522 (11th Cir. 1984) (wholly incredible explanations may form sufficient basis to allow jury to find the defendant has requisite guilty knowledge); United States v. Holbert, 578 F.2d 28 (5th Cir. 1978) ("the [defendant's] argument overlooks a long line of authority which recognizes that false exculpatory statements may be used not only to impeach, but also as substantive evidence tending to prove guilt.").

The Appellant's reliance on Bayshore v. State, 437 So.2d 198 (Fla. 3d DCA 1983), is misplaced. In Bayshore, supra, the defense raised no alibi defense. Instead, it relied upon the victim's statement to the police that the perpetrator had a distinctive birth mark, which the defendant did not have. The defendant had also told the police that he was at his father's residence on the

night of the crime. The State did not present any evidence as to the falsity of the defendant's statement. Nevertheless, at closing argument, the prosecutor stated that the defendant's father had not testified as an alibi witness and the defendant was thus guilty. The district court of appeal held that the State's comment on the defendant's failure to call witnesses may have led the jury to believe that he had the burden of proving his innocence, and thus was error. Bayshore, supra, at 198-99. In the instant case, the State did not comment on the defendant's failure to call any witnesses. It presented evidence of the defendant's statements, which partly admitted guilt and in part were exculpatory. It then affirmatively proved the falsity of the exculpatory portion. The prosecutor then commented on the falsity of the exculpatory explanation, as established by the evidence, and argued consciousness of guilt and lack of a reasonable hypothesis of innocence, as it was allowed to do. See, Brown, Smith, Eley, Holbert, supra. Appellant's reliance upon Kindell v. State, 413 So.2d 1283 (Fla. 3d DCA 1982), and Brown v. State, 524 So.2d 730 (Fla. 1988), is also unwarranted. Both of these cases involved situations where no alibi defense was presented at trial, nor had the defendants made any statements with respect to an alibi. The prosecutors in said cases falsely stated that the defendants had raised an alibi defense, and then proceeded to argue the defendants' failures to call these alleged witnesses. Clearly, these cases are not applicable to the circumstances in the instant case.

VII. THE COURT DID NOT ERR IN INSTRUCTING THE JURY ON CIRCUMSTANTIAL EVIDENCE.

As noted by the Appellant, pursuant to a request by both parties, the Court read a circumstantial evidence instruction to the jury during voir dire. During the final jury instructions, the court did not read this instruction, as same was not requested, nor was it required. During deliberations, the jury requested a definition of circumstantial evidence. (R. 89). The trial court, in accordance with the defense request, read the

circumstantial evidence instruction, and sent a typewritten copy of same to the jury. (R. 120, T.1448). There was no objection to the reading of the typewritten instruction. The Appellant, however, complains that the transcript of the oral instruction reflects that the court erroneously stated, "[a] well connected chain of circumstances is as conclusive in proving a crime as is possible evidence," as opposed to "positive" evidence, as reflected in the typewritten instructions sent to the jury. (T. 1519, page 65 of the May 23, 1990 transcript).

The State has obtained an "errata sheet" from the court reporter for the May 23, 1990 hearing, stating that the word "possible" is a typographical error in the transcription of her notes; the notes reflect that the trial court correctly stated "positive" evidence. See attachment A to this brief. There was thus no error or "confusion" as claimed by the Appellant.

VIII. THE TRIAL COURT PROPERLY EXCUSED A JUROR BASED UPON HIS REPEATED STATEMENTS THAT HE COULD NOT IMPOSE THE DEATH PENALTY UNDER ANY CIRCUMSTANCES.

The State began presenting its case-in-chief on May 15, 1991. (T. 616, et seq.). The parties presented evidence each day, for half a day. On May 17, 1991, prior to presentation of evidence, the trial judge informed the parties that he had received a telephone call, the day before, from juror Cruz-Pino. (T. 878). The trial judge stated that before he realized who Cruz-Pino was, the latter told him that "he misjudged and could not assess the death penalty." Id. The trial judge immediately had told the juror that he could not speak with him without the lawyers present. Id. The State requested that the juror be taken out of the jury room and voir dired. (T. 879-880). The trial judge agreed and requested both parties to research for a remedy during a thirty minute recess. (T. 880). Jennings v. State, 512 So.2d 169 (Fla. 1987) was thus presented to the trial court. (T.889-890).

In Jennings, supra, at 172, after the jury had been sworn and some testimony given, a juror told the court that, "while she still could render an impartial verdict in the guilt phase, she could not recommend a death sentence." The defense and the state did not object to the juror sitting in the guilt phase. However, the trial court granted the state's motion to substitute an alternate juror at the penalty phase. This Court approved of the trial judge's solution, and stated: "Florida Rule of Criminal Procedure 3.280 authorizes the court to substitute alternates for jurors who 'become unable or disqualified to perform their duties.' Had the subject juror originally stated during voir dire that she could not vote for death at the penalty phase, she would have been subject to removal for cause. Lockhart v. McCree, 476 U.S. 162, 106 S.Ct. 1758, 90 L.Ed.2d 137 (1986); Hellman v. State, 492 So.2d 1368 (Fla. 4th DCA 1986)." Id. The juror in the instant case was voir dired in accordance with Jennings. The trial court determined that he would be fair in the guilt phase, and thus allowed him to sit without any objection from the defense. However, the trial court excused him in the penalty phase and replaced him with an alternate juror, because Cruz-Pino stated that he could not recommend the death penalty under any circumstances.

The Appellant has complained that Cruz-Pino's remarks that he could not recommend death "in any case," were ambiguous, and may have reflected that the juror's statements were solely due to his "evaluation of the evidence presented up to that point in the trial." Brief of Appellant at p.40. The Appellant has relied upon out-of-context remarks by the juror; this argument is refuted by the record.

Initially, the trial judge, in the presence of the parties, stated:

> The Court: For the record, Mr. Cruz-Pino telephoned me yesterday afternoon and essentially told me that he could not, in this case, impose the death penalty.
>
> . . .

> The first [question] I want to ask you is: Am I accurate in what I have just told the people?
>
> Juror Cruz-Pino: I think that's exactly what I told you. But what I meant to say, though, is that I couldn't impose the death penalty in any case.

(T.881) (emphasis added). The juror stated that he had called the judge because, during voir dire, the parties had asked about difficulties in recommending death, "and I didn't raise my hand." (T.884). The prosecutor then asked, "you feel that not only in this case could you not impose the death penalty, but you couldn't do it in any case; is that right?" (T.882). The juror responded, "yes" (T.883). The juror continued, "I could not do that, no matter what verdict we would come up with, I couldn't impose the death penalty or recommend it." (T.884). In response to the defense's repeated attempts to rehabilitate, the juror again stated, "It's the second phase that I have a problem being fair to the state with." (T.887). The juror concluded that in the penalty phase he would vote his "conscience," which meant that, he would "not in any case impose the death penalty." (T. 889).

As is clear from the foregoing, juror Cruz-Pino repeatedly and unequivocally stated that he could not and would not recommend death under any circumstances, regardless of the evidence. Indeed, even the defense counsel agreed with the judge's observation that, "Well, he is unequivocal about his inability to pull the trigger, so to speak. He will not impose the death penalty in any case. He couldn't have been clearer. He must have said that five time." (T. 890). Nevertheless, upon the defense request that it was unknown whether the case would reach the penalty stage, the court reserved ruling and agreed to conduct another inquiry at the penalty stage. (T. 890-91). At the penalty phase, the court again made inquiry of Cruz-Pino:

> The Court: My first question to you is, do you still feel that you could not in any case impose the death penalty?
>
> Juror Cruz-Pino: Yes I do.

(T. 1565) (emphasis added). The defense was then allowed to make further inquiry, and again attempted to rehabilitate the juror. (T.1565-66). The juror still stated that, "[he] would not be able to make a recommendation fairly to both sides by considering the pros and cons; but rather . . . [felt] there is no possible way to . . . recommend a sentence of death." (T.1566). The court thus removed this juror and replaced him with an alternate, "pursuant to the authority of Jenning v. State." (T.1567). The State thus respectfully submits that there was no abuse of discretion in removing this juror at the penalty phase.

IX. THE UNPRESERVED INSTANCES OF ALLEGED PROSECUTORIAL MISCONDUCT DID NOT DEPRIVE THE DEFENDANT OF A FAIR TRIAL.

The Appellant has complained of numerous instances of alleged prosecutorial misconduct during closing argument. None of the remarks, with the exception of one, see p. 68 herein, were properly objected to. There were no motions for mistrial at any point during or after closing argument, either. The State thus respectfully submits that the defendant's failure to object and request a mistrial waived any error at closing argument. Craig v. State, 510 So. 2d 857, 964 (Fla. 1987) (where objections to closing argument were "not specifically made to the trial court," same can not be raised for the first time on appeal and will not be considered); Holton v. State, *supra*; Ferguson, *supra* at 641, Steinhorst v. State, 412 So. 2d 332, 339 (Fla. 1982) (alleged error in prosecutor's comments, which inter alia, expressed his opinion as to appellant's guilt and misstated evidence, not preserved when not objected to at trial); Maggard v. State, 399 So. 2d 973, 976 (Fla. 1981) (alleged error due prosecutor's comment about his personal beliefs waived on appeal where not objected to at trial); State v. Cumbie, 380 So. 2d 1031, 1032-3 (Fla. 1980) (improper prosecutorial comment, that police officers had nothing against the defendant and would have cleared him if he was innocent, was not "fundamental error").

Moreover, the State would note that the court repeatedly instructed the jury that the arguments of counsel were not evidence, that they should look only to the evidence presented at trial for proof, that they must follow the law as set out in their instructions, and, that "the lawyers are not on trial. Your feelings about them should not influence your decision in this case." (T. 580-82, 1341, 1433-36). Jurors are presumed to follow their instructions. Greer v. Miller, 483 U.S. 756, 767,n. 8 (1987); see Paramore v. State, 229 So. 2d 855, 860 (Fla. 1969) ("it will not be presumed that [the jurors] are led astray, to wrongful verdicts, by the impassioned eloquence and illogical pathos of counsel."). Indeed, in the instant case, it is apparent that arguments of counsel had no effect, and the jury relied solely upon the evidence, as reflected by the substantial portions of testimony reread to the jury at their request. The State thus submits that any error in the arguments did not prejudice the defendant and was harmless beyond a reasonable doubt. The arguments as to preservation and lack of prejudice are applicable to each subpart herein, and are thus specifically incoporated in the ensuing subsections.

A. Comments on Rebuttal

The Appellant has first complained of comments made on rebuttal, which he claims suggested the prosecutor's personal belief in the defendant's guilt, credibility of witnesses, and the existence of additional reasons for her beliefs. Brief of Appellant, pp. 42-43. As noted initially, none of these comments were objected to; nor was there a motion for mistrial. Any error as to these comments is thus waived. Craig, Steinhorst, Maggard, Ferguson, supra.

The State would also note that the defense closing argument in its entirety was a personal attack on the prosecutor and police in the instant case. Defense counsel contended that this was an unsolved homicide which presented a "challenge" to the prosecutor and the police officers, who had resorted to "desperate" means. Despite an alleged lack of any evidence, the prosecutor

according to defense counsel, had charged the defendant because she didn't like him, and because of her "ambition" and desire for "recognition and respect":

> ...really what you have here you have a case that belonged to the cold case squad, a murder that had not been solved, a murder that presented a challenge. It presents a challenge to the police officers, most of all, most important I think it's quite obvious it presented a challenge to her [prosecutor]. A challenge that can only be satisfied with a conviction.
>
> . . .
>
> In essence, what she [prosecutor] has told to you: I have no evidence that this man committed these crimes but you know something, I don't like the fact he went out drinking the night before, and I don't like the fact that he is giving some stories as to where he was. So what I want you to do, I want you to find him guilty and take away his life because I don't like his story. (T.1373-75).
>
> . . . Of course through the great art of cross examination we know now that Enrique Juarez wit a Z, Enrique Juares with an "S" are two different people.
>
> Is that an act of somebody that is desperate?
>
> . . .
>
> What is wrong is when other motives interfere with the process of justice because we are not here to do revenge, we are not here to make money, because justice is not for sale. We are here to seek the truth. . . . (T. 1381-82)
>
> . . . that police officer has something else in mind. He knows he has no evidence against you, has no physical evidence against you, he has a hunch you look like the type. You look like the type that would have done this. . . .
>
> . . . Because that is someone who is saying, you don't want to explain to me last night, I will teach you. I will teach you. I will teach you what a great and skillful lawyer I am. (T.887-8)
>
> . . . This is a horrible homicide. Hundreds of them in this County have not been solved. We would like to solve them, we wish we could, we all do. We have a lot of respect for the people who solve them, and the people who solve them because they want recognition and respect in their area for solving these tough homicides and there is nothing wrong with that. . . .
>
> What is wrong is when ambition to solve a crime, when a goal gets in the way of justice. (T. 1394-95).

In response to the above defense theory, the prosecutor made the first comment complained of herein by the Appellant:

> Prosecutor: Mr. Diaz would suggest to this jury that these detectives and this court and all of those good people who came and testified in this case and myself would be satisfied if these

> murders to convict the wrong man. Do you think Rose Flight would sleep lightly at night? How about Feliciano Aguayo or Elizabeth Feliciano or Rufino Perez or Detective LeClair or David Gilbert or David Rhodes or myself? Do you think we could settle for that and yet this is what he tells you this is about, that we don't have any evidence. It is an unsolved homicide and all they want is a body.
>
> If you believe that, if you think that is what this case has been, you find him not guilty.

(T. 1402). Having thus fairly summarized defense counsel's attacks set forth previously, the prosecutor then immediately went through the testimony of all the witnesses, and demonstrated that the evidence presented supported a verdict of guilty (T. 1402-17).

The Appellant has also complained of unobjected to comments by the prosecutor demonstrating why she had spoken to witness Rhodes prior to trial. These comments too, were in direct response to defense counsel's accusations. At trial, the defense called Rhodes and on direct examination established that a "dirty" hair found on the green rug did not belong to the defendant. On cross-examination, the prosecutor established that due to the methodology of the hair examination and the fact that the source of the hair on the rug was not determinable, the examination was inconclusive.[6] On redirect, defense counsel stated, "When [prosecutor] puts down the process. . . it was, in fact, [prosecutor's] idea to examine the defendant's hair in this case, wasn't it sir?" (T. 1293). On recross the prosecutor then, without any objection, elicited that the witness had discussed his conclusions with the prosecutor, prior to trial (T. 1294), and that the witness's examination and conclusions did not rule out the defendant as the murderer. (T. 1294-95).

In closing argument, the defense counsel then emphasized that the prosecutor had requested the hair examination and added: "Did she believe in that science when she asked that [Rhodes] examine those hairs? . . . So either

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[6] See, pp. 14-15, herein.

she believed in that science until she got the results, until she got the results, or she was ready and able to present you with unreliable conclusions. Does it make you think? Does it make you wonder? Do you have a doubt?" (T. 1377-78).

The Appellant complains about the prosecutor's remarks in response to the above argument, where she stated that her motive was not presenting the jury with unreliable conclusions, as contended by the defense. Rather, as demonstrated by the evidence, the prosecutor sought to show the hair comparison was inconclusive and that she knew about it (T. 1403-04).

As seen above, the Appellant's argument herein that the above comments expressed the prosecutor's personal beliefs in the defendant's guilt and in the credibility of witnesses, is without merit. The prosecutor's remarks were permissible fair reply to the defense arguments, and commented on evidence presented at trial. Barber v. State, 288 So. 2d 280, 281 (Fla. 4 DCA 1974) (where defense castigated the police testimony and the prosecutor, the latter's expression of personal belief on the believability of evidence and remarks that if the jury believed the defense accusations they should find defendant not guilty, were "fair rebuttal"); Ferguson, supra at 642 (defense trial tactics will not be insulated from fair comment by the prosecution); Brown v. State, 367 So. 2d 616, 625 (Fla. 1979) (having "invited a prosecution response, the defense may not be granted a new trial because the State 'rose to the bait'".)

The Appellant has also complained of improper testimony, with respect to suspects, from Detectives Leclaire and Gilbert, and prosecutorial comment thereon. These contentions have been fully addressed in point IV herein, and the State relies upon said arguments. In various subparts of the instant point, the Appellant has also complained of other parts of the State's rebuttal argument in response to defense counsel's personal attacks. Brief of Appellant, pp. 46-47. These arguments will thus be addressed herein.

The first of the remainder of comments complained of was the prosecutor's remark, immediately after defense counsel's closing argument, that: "Now I would like to address in a rapid fashion the issues Mr. Diaz raises. There is an old adage in the courtroom, it goes something like this: when you can't attack the law, attack the facts, when you can't attack the facts attack the prosecutor. . . ." (T. 1398-99). Obviously, this was in response to the previously quoted remarks by defense counsel. Ferguson, Barber, Brown, supra.

The Appellant next complains of the prosecutor's comments with respect to Feliciano Aguayo. Brief of Appellant, p. 46. The evidence at trial reflected that defense counsel never questioned Aguayo about any arrest by the police. However, on cross-examination of Detective Leclair, who was assigned to these homicides two years after they occurred, and whose direct examination was limited to the defendant's statements to him, defense counsel asked: "Had you already learned Feliciano Aguayo had been arrested January 18, 1983?" (T.1174). Defense counsel continued: "Did you inquire of Mr. Aguayo what impact, if anything, [his arrest on] January 18, 1983 had in his claims to the police.." (T.1174). On redirect, the State inquired of this witness if he knew what Aguayo had been arrested for in 1983. (T.1207). He responded that it was a traffic related offense. Id. In closing argument, defense counsel nevertheless persisted: "Mr. Aguayo, nobody here said anything until I asked the detective what impact if any, his arrest on the 18th of January had in his alleged willingness to cooperate and to be so helpful to the police and maybe just stretch the truth a little, you know. . . ." (T.1390-91). In light of the foregoing comment, the prosecutor merely elaborated on the sequence of the evidence presented, and stated that defense counsel knew Aguayo had been arrested only for a traffic related offense that had nothing to do with this case, and thus Aguayo had no motive to lie. This was a fair response to the defense argument. Moreover, the State is entitled to refer to the evidence as it exists and point out that there is an absence of evidence on a certain issue. White v. State, 377 So. 2d 1149, 50 (Fla. 1980).

Finally, the Appellant complains of the prosecutor's remarks, in response to defense counsel's comments as to the medical examiner's "speculations" with respect to a knife recovered during the investigation. Brief of Appellant, p. 47; T. 1378-79, 1411. The evidence at trial reflects that during the cross-examination of the medical examiner, defense counsel elicited that the former had received a knife with a broken tip, and that this witness could not recall how the knife was found or what had happened to it. (T. 932-93). Subsequent testimony established that said knife had nothing to do with the investigation, as it had been in custody, at the Homestead Air Force Base, since December, 1982, approximately a month prior to the homicides herein. (T. 1171). In light of the foregoing, the prosecutor's comments that the defense counsel had brought up "a knife," and left it "hanging" and "knows its not going to be tied up," because he found out later the rest of the story about the knife being obtained in December, 1982, was an accurate comment on the evidence presented and in response to the defense counsel's argument.

Thus, as seen above, not only were the complained of comments unpreserved and not prejudicial in light of the court's instuctions, but they were also in direct response to the defense counsel's arguments, and fair comment on evidence presented without objection at trial.

B. Comments attacking defense counsel

The comments herein again were either not objected to or when objected to, were sustained. There were no requests for curative instructions or a motion for mistrial. These comments are thus unpreserved and not prejudicial, as noted in the introduction to this point. The State would also note that, initially, the Appellant complains of the prosecutor's questions to Detective Leclair on redirect examination, which referred to some of the defense counsel's questions on cross-examination and characterized these questions as "speculative." Brief of Appellant at pp. 44-45. The questions on cross-examination are reflected at T. 1178, 1185, 1196, 1202-03. It should be noted

that Detective Leclair was not assigned to these homicides until two years after their occurrence. As noted by the trial judge, at sidebar, during defense counsel's examination, the questioning was a "charade": "Your [defense counsel's] questions are the kind of questions that gives the jury all kinds of information and expect them not to hear it and have me sustain it." (T. 1134). The prosecutor's characterization of said questions as "speculative" and her remark that defense counsel wanted the jury to think about "speculative people. . .", was thus fair and did not prejudice the jury as noted in the preceding section. Ferguson, Barber, Brown, Paramore.

The Appellant has also complained of other remarks during the prosecutor's initial closing argument. Again, these remarks are unpreserved because they were not objected to, and no motion for mistrial was requested. Craig, supra. Moreover, the remarks reflect accurate comments on the evidence presented, and not an "attack" on the defense counsel, as claimed by the Appellant. Initially, the Appellant complains of the prosecutor's remark that defense counsel spent some time trying to challenge the time of death. Brief of Appellant, p. 45. The record reflects that on cross-examination, defense counsel repeatedly asked the medical examiner whether, based upon the physical examination of the bodies alone, and setting aside the physical evidence at the scene, the time of death could have been any time within 36 hours of discovery. (T. 915-17). On redirect, the prosecutor established that taking into account all of the physical circumstances, the time of death was the early morning hours of Sunday. (T. 939-40). Likewise, in reference to Mrs. Feliciano's knowledge of the time when the defendant arrived at her house, the evidence reflected that defense counsel spent a significant amount of time asking the details and timing of her chores, reading habits, etc., throughout that day. (T.828-875). Nevertheless, the witness was still sure of the time because it was a church day and she was getting her children awake. (T.813-14). The prosecutor merely recounted this evidence (T. 1354) and stated, "where is the great mystery for

Mr. Diaz? It is obvious this woman knew what time it was because her kids have to go . . . ." Id. Finally, the Appellant complains of the prosecutor's remark that, "I guess all of these people, independent of each other, got together, maybe they were all looking for a reward that didn't exist, and conjured up this grand scheme to convict that man of these murders. . . ." (T. 1369). The argument was in response to the defense counsel's opening statements that this was an unsolved crime, where the witnesses' recollections had been influenced by "offers of rewards" and passage of time, and that some may have simply lied. (T.615-16). The complained of remarks, in addition to being unpreserved and nonprejudicial, were thus fair comments on the evidence and again in response to the defense arguments.

C. Credibility of the State's Witnesses

The Appellant has complained that during the examination of witnesses Aguayo, Perez-Cruz and Evans, the State elicited testimony that these witnesses did not know about any rewards offered for assistance in solving the homicides and that these witnesses had spoken to the police, in 1983, in accordance with their trial testimony. None of the testimony about which the Appellant now complains was objected to at trial. Under such circumstances, this issue is not preserved for appellate review. Jalbert v. State, 95 So.2d 589 (Fla. 1957) (admission of hearsay testimony without objection at trial not preserved for appellate review); Hills v. State, 428 So.2d 318 (Fla. 1st DCA 1983) (same); Stone v. State, 547 So.2d 657 (Fla. 2d DCA 1989).

D. Alleged Attacks on Defendant's Character

Appellant contends that during examination of witness Perez-Cruz, the prosecutor erroneously elicited that the defendant in 1983 looked different, as he had previously had long hair with a bandana and a moustache; he did not appear as he had in court. The Appellant states that the "only possible reason for this testimony was to create a "stereotypical image" of a criminal. The State would first note that none of this testimony was in any way objected to

(T.1032). The issue is thus not preserved for appellate review. Castor, supra. Moreover, the purpose of eliciting said information was in no way related to the defendant's character. As noted previously, defense counsel, throughout trial, had argued that the perpetrator had been a "drifter," living in the woods, without access to bathing facilities, and with "dirty" hair, because a hair found on a rug at the victims' home was caked with dirt. During a preceding witness' examination, the defense attempted to elicit that by contrast, the defendant was a well groomed individual at the time of the crime. (T. 977-79). The prosecutor's subsequent questions as to the defendant's appearance at that time was thus in no way an attack on his character or designed to create a "stereotypical image."

E. Misstatements of Fact

The Appellant initially complains about the prosecutor's argument as to payroll records admitted into evidence at trial. The Appellant states that there was no evidence to support the prosecutor's argument that, "in 1985 September, Mr. Trevino and his daughter told police that the records didn't exist and they don't get produced." (T.1409). The State would again note that the comment was not objected to and is thus unpreserved. Moreover, the prosecutor's argument was supported by the record. Rufino Perez had testified that within several days of the instant crimes she had overheard the defendant speaking to several workers in the fields. Sgt. Radcliff testified that he had gone to Trevino, in September 1985, and requested the "work records of a group of individuals that were working in an effort to gain more witnesses," (T.1088), with the purpose of finding, "a list of individuals that Henry Garcia had been talking to." (T.1010). Ms. Paz, Trevino's daughter, testified that she had been present when the police had made the above request. (T.1317). She stated that she had supplied the payroll records at issue. (T.1326). Sgt. Radcliff stated that said records had not been produced. (T.1088-89). A prosecutor is entitled to argue reasonable inferences and inconsistencies in the evidence presented.

Kramer, supra, at S267. The prosecutor's argument was clearly supported by the testimony.

The Appellant also argues that the prosecutor's argument that the defendant had dated Irma Paz was erroneous. The State would note that witness Perez-Cruz testified that the defendant and Irma "were friends." (T. 1037). In response to questions as to whether she knew the "nature of the relationship between Irma Trevino and the defendant," and "who Mr. Garcia saw on a social basis," the witness stated: "I know about him and Marylou,[7] . . . He would talk to Marylou, but he would talk to Irma too. That's what I was trying to say." (T. 1036-37). The prosecutor's remarks with respect to the defendant having dated Irma were a reasonable inference from the evidence presented. The prosecutor, however, mistakenly attributed the source of this information to both Perez-Cruz and Ida Paz, to whom the question had not been posed. The State would note that upon objection by defense counsel that, there was no evidence of any dating, the trial court promptly instructed the jury:

> Ladies and gentlemen, if you remember this as evidence as an accurate comment on the evidence, accept it. If you don't reject it.

(T. 1407). Any impropriety with respect to the prosecutor's confusion in this matter was thus corrected by the trial court. Steinhorst, supra, at 339. (Any impropriety in argument was cured by the trial judge's advising the jurors that they were the sole judges of evidence, where the "prosecutor attributed to appellant a particularly callous remark regarding one of the victims when the testimony showed it was actually made by [another witness].").

F. Alleged Misstatements of Law

The Appellant has claimed that the prosecutor's remarks during voir dire: (1) that, "the defendant begins the trial with the presumption of innocence, and he's cloaked in an imaginary cloak of innocence during the course

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[7] Marylou and the defendant dated. (T. 949).

of the trial," and that at the conclusion of evidence, after instructions by the court, and if the jury believed that the state proved the charges beyond a reasonable doubt, "you would then have to remove the cloak of innocence from the defendant and find him guilty, if you so believed" (T.295-96); (2) her definition of premeditation (T. 429); (3) a statement that the jurors are finders of what is "true" and "what really happened" (T.403); and (4) statements that a reasonable doubt is a doubt for which you have a reason, were improper. Again, none of these remarks were objected to, and they are unpreserved. Craig, supra. To the extent that the prosecutor may have misstated the law, the trial judge cautioned the jury that, "you are concerned with the law only as I will instruct you at the close of the case". (T. 581). The cautionary instruction cured any impropriety alleged herein. Craig, supra at 864-65 (court's statement to the jury that it would instruct them on the law and that they should follow the instructions of the court, "adequately remedied any impropriety" in the prosecutor's erroneous statements of law).

G. Alleged appeals to sympathy

Appellant argues that the prosecutor's statement, during opening, while recounting the circumstances of the victims being found by their neighbor, Ms. Flight, that the latter upon finding the victims' telephoned their family in New York, was error. There was no objection to this remark (T.587). Subsequently, witness Flight, although not specifically asked, stated that she had called the family members. (T.622-623). Again, there was no contemporaneous objection, either on the grounds of improper appeal; sympathy, etc., as argued on appeal, or otherwise. (Id). Subsequently, when the witness was asked to identify the photographs of the victims, defense counsel requested a side bar. (T.623). Defense counsel stated that he wished to stipulate to identification photographs and had objections to utilizing this witness for identification, objections to the prosecutor's "handling" of the witness when she had to come to court, and objections to the questioning which called for a narrative and

hearsay (T.624). The court did not overrule the objections but asked to "take these one at a time." (Id). The parties agreed to stipulate the photos into evidence; the court admonished the prosecutor to let someone else help the witness out of court. (T.624-625). Defense counsel made no request to strike the witness' statement, nor did he request any curative instruction or mistrial, on the grounds of hearsay or improper appeal to sympathy, etc. This issue thus has not been preserved for appeal. Craig, supra. Moreover, due to its isolated nature, it was not harmful.

H. Comments on failure to testify

The Appellant has argued that the prosecutor's argument, "what motive does Rufino Perez have to come to this court and testify if it isn't the truth ...Don't do you think he would have known about it? Don't you think Mr. Diaz would have brought something to your attention? and yet her testimony is totally unimpeached," was an improper comment on failure to testify. This comment was not objected to and was thus unpreserved. Moreover, as noted previously, defense counsel at opening had stated that the "migrant workers" may have been affected by a "reward," and that Rufina Perez was lying. The evidence established that Perez had not received a reward; nor was any other improper motive for her testimony established. The prosecutor's comment that the witness was unimpeached, had no motive to lie and defense counsel had not established otherwise, was permissible. White, supra, at 1150 (comment that, "you haven't heard one word of testimony to contradict what [witness] has said, other than the lawyer's argument," was held permissible, as prosecutor may refer to an absence of evidence on a certain issue and may comment on the uncontradicted nature of evidence.); Kramer, supra, at S267.

I. Alleged Cumulative Effect of Error

Finally, the Appellant's argument that the cumulative effect of the alleged prosecutorial misconduct is grounds for a new trial is without merit. As argued in the introduction herein none of the alleged instances of misconduct

were properly preserved, nor were they prejudicial in light of the court's instructions. Moreover, as seen in the preceding sections, the majority of the alleged misconduct was in reply to defense tactics, or proper comments on the evidence.

X. ALLEGED CUMULATIVE EFFECT OF ERRORS.

The Appellant asserts that an alleged cumulative effect of errors warrants reversal. The Appellee relies on the preceding sections and states that: (1) most matters complained of were not objected to; (2) alleged errors were not fundamental; (3) any errors, whether viewed individually or cumulatively, were relatively minimal; and (4) the defendant received a fair trial.

XI. THE AGGRAVATING CIRCUMSTANCES RELIED UPON BY THE LOWER COURT ARE SUPPORTED BY THE EVIDENCE AND THE FINDINGS REGARDING MITIGATING CIRCUMSTANCES ARE SUPPORTED BY THE RECORD.

A. Aggravating Circumstances

1. Murders committed by person under sentence

Initially, the Appellant argues that there was insufficient proof that the defendant was the same person who was on parole from the federal penitentiary in Lampoc, California. This aggravating factor relates to the federal court judgment and conviction for bank robbery and use of a dangerous weapon. (R.139-45). Although those documents are in the name of Henry Juarez, they contain a certificate from the regional administrator of the U.S. Parole Commission in Dallas, Texas, reflecting that Henry Juarez is also known as David Garcia. (R.143). Defense counsel did not object to the admission of any of these documents; indeed, defense counsel stipulated that the documents were self-authenticating. (T.1569). Moreover, the defendant also reviewed these documents to limit any "private" information therein. Id.

David Garcia was one of the names under which the Appellant herein was indicted. A review of the record, the documentary evidence of prior

convictions, and testimony from the guilt phase, leads to the inescapable conclusion that the defendant was the same person convicted of all of the prior offenses which were introduced into evidence. Defense counsel, throughout the trial, argued that the defendant was known as Henry Garcia, David Garcia and Enrique Juarez. (T.606, 1381). One state witness stated that he had met with the defendant in Texas, in September, 1985, and identified the defendant in court. (R.1135-37). He further stated that the defendant was born in Texas. The defendant identified himself as David Garcia to the witness, and signed a Miranda waiver form in the name of David Garcia. (T.1137-39).

The defendant was charged, in the instant case, under the names of David Garcia, Henry Garcia and Enrique Juarez. (R.1). The judgment of conviction contains his fingerprints. (R.126). His date of birth is listed 9/26/48. (R.130). His race and sex are designated as a white male.

The two State of Texas convictions (R.135-39; 149-53), are in the respective names of Enrique Juarez, and David Garcia a/k/a Enrique Juarez. The certificates of the Record Clerk of the Texas Department of Corrections, reflects that said office had compared the certified copies, against the originals, based upon the photographs, fingerprints, and commitments of "David Garcia aka Enrique Juarez." (R.153, 138). Those documents list the date of birth as 9/26/48 and reflect that the defendant was born in Texas. They also include copies of the defendant's fingerprints.

The federal conviction for bank robbery and use of a dangerous weapon is in the name of Henry Juarez. (R.140). A certificate from the Regional Administrator of the U. S. Parole Commission, which was not objected to by defense counsel, indicates that Henry Juarez was also known as David Garcia. The federal conviction for attempted mutiny is also in the name of Henry Juarez. (R.147).

In view of the foregoing, all of the convictions, including the federal court convictions, should be viewed as sufficiently establishing that

they are of the same person. The use of aliases is well established, and the names are all connected. The David Garcia or Henry Juarez is established as a person having come from Texas, the source of most of the prior offenses. Identifying fingerprints, date and place of birth, sex and race appear on the Texas convictions. The name (David Garcia), date and place of birth, sex and race all correspond to the same information in the record herein. Not only did defense counsel stipulate that the documents were self-authenticating, thereby relieving the State of any duty to put on witnesses to establish such authentication, but the defendant also personally reviewed said documents. Most significantly, defense counsel never argued that the aggravating factors in question were not established due to insufficient proof of identity of the person convicted in the prior offenses. Defense counsel has never claimed that the instant defendant was different from the person referred to in any of those prior convictions.

Thus, just as this Court found in Gorham v. State, 454 So. 2d 556 (Fla. 1984), that a defendant was properly identified as the same person convicted of prior offenses, in the absence of fingerprints or photographs, due to factors such as name, sex, race and date of birth, the same can be said in the instant case. Furthermore, the presentence investigation report, which this Court will have a copy of, will similarly provide the same information as delineated above. In Gorham, this Court found that it was significant that the defendant voiced no objection to the consideration or use of the presentence investigation. Id. at 560. So, too, in the instant case, it is significant that the defendant never objected, or stated that the prior convictions were not his. Under such circumstances, it must be concluded that the prior convictions were sufficiently established to have been those of this defendant.

a. The defendant was under sentence of imprisonment

The Appellant also argues that there is insufficient evidence that he was under a sentence of imprisonment. The lower court found that the

defendant was on parole at the time of the murder (R.188). A person on parole at the time of the murder is deemed to be under a sentence of imprisonment. See, Jackson v. State, 530 So. 2d 269 (Fla. 1988). This factor was based on the federal court bank robbery conviction, for which there is a Certificate of Mandatory Release. (R.144). That document certified that defendant was entitled to 2,284 days of "good time deductions from the maximum term of sentence imposed as provided by law, and is hereby released from this institution under said sentence on June 23, 1982." (R.144). The original conviction, in 1972, had imposed a 15 year sentence. (R.140). The Certificate of Mandatory Release specified that the defendant was "released by the undersigned according to Section 4163 Title 18, U.S.C." (R.144). The document further provided that "[u]pon release the above-named person is to remain under the jurisdiction of the United States Parole Commission, as if on parole, as provided in Section 4164, Title 18, U.S.C., as amended, under the conditions set forth on the reverse side of this certificate, and is subject to such conditions until expiration of the maximum term or terms of sentence, less 180 days on February 26, 1988." (R.144). The conditions of the mandatory release appear on the reverse side. (R.144A). They include fairly typical conditions associated with parole or probation: notifying the probation officer of changes in residence; reporting each month; not violating any law; refraining from alcoholic beverages (to an excess), not using illegal drugs; and possessing firearms; etc. (R.144A).

The Appellant argues that the release, effected on June 23, 1982, should not be treated as parole, because it was a mandatory release, rather than a discretionary release. Parole, under Florida law, is treated as a continuation of the sentence. White v. State, 403 So. 2d 331, 337 (Fla. 1981).

A review of the applicable statutes, reflects that the release under 18 U.S.C. 4163 is viewed as parole under the federal correctional system. Section 4163 provides that: "Except as hereinafter provided a prisoner shall be released at the expiration of his term of sentence less the time deducted for

good conduct." 18 U.S.C. 4164 then provides that: "A prisoner having served his term or terms less good-time deductions shall, upon release, be deemed as if released on parole until the expiration of the maximum term or terms for which he was sentenced less one hundred and eighty days."

The federal courts have consistently viewed the period of time under 4164 as parole. In Robinson v. Willingham, 369 F.2d 688 (10th Cir. 1966), the Court observed that when sections 4163 and 4164 are read in conjunction, "a prisoner released as a mandatory releasee is subject to the same conditions of release as a parolee under 18 U.S.C. 4203." 369 F.2d at 689. According to United States v.Franklin, 440 F.2d 1210, 1212 (7th Cir. 1917), a person released under 4164 "remains on parole until the expiration of the maximum terms for which he was sentenced." Mandatory release is revocable in the same sense as parole. Woods v. United States, 449 F.2d 740 (5th Cir. 1971); Tippit v. Clark, 444 F.2d 534 (5th Cir. 1971).

Under Peek v. State, 395 So. 2d 492, 499 (Fla. 1981), the phrase "person under sentence of imprisonment" includes "persons who are under sentence for a specific or indeterminate term of years and who have been placed on parole." That is because parole does not terminate a sentence, but is a continuation of it. White, supra; Aldridge v. State, 351 So. 2d 942 (Fla. 1977). The reasoning of this Court in Haliburton v. State, 561 So. 2d 248, 252 (Fla. 1988), is analogous and dispositive. There, the defendant had been placed on mandatory conditional release, pursuant to 944.291, Florida Statutes (1979), and was on that status at the time of the murder. At the time that he was placed on MCR, the statute read as follows:

> A prisoner who has served his term or terms, less allowable statutory gain-time deductions and extra-good time allowances, as provided by law, shall, upon release, be under the supervision and control of the department and shall be subject to all statutes relating to parole, but in no event shall such supervision extend beyond 2 years, as determiend by the Parole and probation Commission.

561 So. 2d at 252. This Court concluded that a person released on MCR "is serving a sentence, a portion of which is in prison, and the remainder in freedom subject to supervision as if on parole." 561 So. 2d at 252. The phrase "as if on parole" is the same as that used in the federal manatory release provision. The schemes are virtually identical, except that the federal scheme is even harsher, as it is not limited to two years, but extends for the duration of the maximum sentence, less 180 days. Accordingly, pursuant to Haliburton, the Appellant herein was on parole at the time of this murder, and he was thus under a sentence of imprisonment.

The Appellant attempts to distinguish Haliburton, by claiming that under the state system, mandatory and discretionary good-time allowances were permissible, while the federal system was strictly mandatory. This is a frivolous distinction, and it is not even supported by the applicable statutes and documentation. First, under 18 U.S.C. 4161, good time allowances of a specified number of days per month are allotted, but only for those "whose record of conduct shows that he has faithfully observed all the rules and has not been subjected to punishment. . . ." Thus, this was hardly a "mandatory" allowance, since it was contingent upon good conduct. Furthermore, even this allowance was subject to forfeiture. Coronado v. U.S. Board of Paroles, 303 F.Supp. 399 (D.C. Tex. 1969); Hall v. Welch, 185 F.2d 525 (4th Cir. 1950). Second, additional statutory gain time, referred to as industrial good time, under 18 U.S.C. 4162, was available, for a specified number of days per month, in the discretion of the Attorney General, based on employment during incarceration or meritorious service and other similar factors. This gain time was also subject to forfeiture. Northcutt v. Wilkinson, 266 F.2d 2 (5th Cir. 1959). Finally, separate and apart from the statutory allowances, the Certificate of Mandatory Release referred to both "statutory and extra good time deductions." (R.144). In view of the foregoing, the Appellant's effort to distinguish Haliburton is entirely devoid of merit.

b. Sentence was in effect at time of these crimes

The Appellant also contends that there was insufficient proof that a sentence was in effect at the time of the instant murder. The Appellant bases this on a discrepancy appearing on the face of the above-discussed Certificate of Mandatory Release. The front page of that document specifies that the defendant was released from incarceration on June 23, 1982, and that upon release, the defendant is to remain under the jurisdiction of the parole commission, until February 26, 1988. The front side of the document also states that "this certificate will become effective on the date of release shown on the reverse side." The reverse side of that document states that the defendant "was released on the 23rd day of June, 1983, with a total of 2,284 days remaining to be served." (R.144-144A). On the basis of the discrepancy, the Appellant argues that the certificate of mandatory release did not go into effect until June 23, 1983, the date specified on the reverse side, and that the Appellant was therefore not under mandatory release until that time.

Appellant's semantic game is of no consequence. If the Appellant was not released until the date on the reverse side, June 23, 1983, he was thus still incarcerated in the federal penitentiary, and he would obviously have been under sentence of imprisonment at the time of the murder in January, 1983. Alternatively, if he was released on June 23, 1982, the date specified on the front of the certificate, that same document specifies that he is subject to the jurisdiction of the parole condition and the conditions on the certificate until February 26, 1988. In either case, the defendant was "under sentence of imprisonment" in January, 1983. There is no construction of the document under which he was released from prison and totally free for a period of time before the parole restrictions commenced. Thus, the clerical discrepancy is of no consequence.

Furthermore, the Appellant never objected to any clerical discrepancy in the lower court. Had the Appellant done so, the prosecution

could have either obtained witnesses to explain the discrepancy or obtained additional certified documentation to explain the discrepancy. Thus, this is not the type of sentencing error which does not require a contemporaneous objection.

2. Prior felony convictions involving use or threat of violence

The Appellant also argues that the lower court erred in finding that he was previously convicted of a felony involving the use or threat of violence to the person. The lower court's sentencing order, in finding that this aggravating factor was established, relied upon the following prior convictions: the Texas state court conviction for assault with intent to commit robbery; the Texas federal court conviction for bank robbery with a dangerous weapon; the Kansas federal court conviction for attempting to cause mutiny; and the Texas state court conviction for aggravated robbery. (R.188-90; 135-52).

Initially, the Appellant asserts that the proof that he was the same person as the person named in those convictions was insufficient. This point has been fully addressed at pp. 71-3 herein, and the State reasserts the arguments presented there.

One of the prior convictions was for bank robbery, and the defendant was sentenced pursuant to 18 U.S.C. 2113(d). The Appellant contends that it was possible that that offense did not involve the use or threat of violence to the person. The statutory scheme and interpretive case law clearly repudiate that contention. 18 U.S.C. 2113(d) provides:

> Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not more than $10,000 or imprisoned not more than twenty-five years, or both.

The essence of the Appellant's argument is the allegation that under 2113(b), it is possible to commit a bank robbery without using or threatening violence to any person, even if the robbery is committed with a dangerous weapon. Thus, the

Appellant hypothesizes that the robbery could be committed while no one was present, but with a dangerous weapon, which is used to cut power lines, and the downed lines subsequently pose a danger to those approaching the bank. The Appellant presents no federal case law supporting the contention that such conduct would suffice to be an assault on a person or to put a person's life in jeopardy, for the purposes of 2113(d). Indeed, all case law under 2113(d) suggests that the assault or putting in jeopardy language would only be applicable in situations where the individual is directly assaulted or confronted with the weapon. For example, in United States v. Beasley, 438 F.2d 1279, 1282-83 (6th Cir. 1972), the Court discussed the requirements of 2113(d), and stated:

> . . . Thus, where a defendant is shown (a) to have created an apparently dangerous situation, (b) intended to intimidate his victim to a degree greater than the mere use of language, (c) which does, in fact, place his victim in reasonable expectation of death or serious bodily injury, the requirements of section 2113(d) are satisfied.

The Eighth Circuit has stated that, "[u]nless placing in jeopardy can be said to mean more than placing in fear, then nothing has been added to 2113(d) to explain or justify the enhanced punishment which subdivision (d) permits." United States v. Thomas, 521 F.2d 76, 81 (8th Cir. 1975). Other cases require that a person's life be placed in an objective state of danger. See, United States v. Coulter, 474 F.2d 1004, 1005 (9th Cir. 1973); Morrow v. United States, 408 F.2d 1390, 1391 (8th Cir. 1969). A more recent case spoke of the requirement under 2113(d) of the robber placing a person "in reasonable expectation of death or serious bodily injury." United States v. Spedalieri, 910 F.2d 707, 710 (10th Cir. 1990). Thus, all of the case law interpreting this provision speaks of objective dangers to the victim of the robbery. Nothing supports the contention that the provision could relate to a remote endangerment to someone who is not even a victim of the robbery, but who happens to come by,

finding a downed power line, hours or days after the robbery. Accordingly, it is evident that this statutory offense inherently involves the threat or use of violence to the person.

Another of the prior offenses was aggravated robbery, with a firearm, under the laws of Texas. (R.149-51). Robbery is defined, in Texas, as follows:

> (a) A person commits an offense if, in the course of committing a theft as defined in Chapter 31 of this Code and with intent to obtain or maintain control of the property, he:
>
> (1) intentionally, knowingly, or recklessly causes bodily injury to another; or
>
> (2) intentionally or knowingly threatens or places another in fear of imminent bodily injury or death.

Vernon's Texas Codes Annotated, Penal Code, 29.02. Section 29.03 then defines aggravated robbery:

> (a) A person commits an offense if he commits robbery as defined in Section 29.02 of this code, and he:
>
> (1) causes serious bodily injury to another; or
>
> (2) uses or exhibits a deadly weapon.

The documents admitted into evidence reflect that the defendant used a firearm during this offense. (R.149-51). Whether he caused bodily injury to the victim with the firearm, or whether he threatened the victim with the firearm, the offense is clearly one which involves the use or threat of violence and satisfies 921.141(5)(b), Florida Statutes.

Contrary to Appellant's arguments, under the Texas statutes, committing a theft with a gun and breaking a window pane, without any victim, would not constitute aggravated robbery. The robbery, under 29.02(a), requires more than just a theft. The victim must be physically injured or threatened. And, under 29.03, this was done with a firearm in the instant case.

With respect to the 1968 prior Texas conviction for assault with intent to commit robbery, as the Appellant notes, there is no longer a distinct

offense of that nature in Texas. However, the 1973 Commentary to the robbery statute, 29.02, clearly shows that under prior Texas law, assault with intent to commit robbery was an offense which involved the use or threat of violence:

> Under prior law robbery consisted of an assault, violence, or causing fear of life or bodily injury for the purpose of completing a theft from the possession of another. . . . As in prior law, the violence used or threatened must be for the purpose of compelling acquiescence to the theft or of preventing or overcoming resistance to the theft is a separate offense against the person. . .

Vernon's Texas Code Annotated, Penal Code, Commentary following 29.02.

Furthermore, the 1973 Commentary following 22.02, regarding aggravated assault, reflects that assault, prior to 1974, involved the threat of violence:

> Sections 22.01 and 22.02 [effective January 1, 1974] change the focus of criminal assault from the use, attempted use, or threat to use violence with intent to injury another, Penal Code art. 1138, to the causing of the harms the assault offenses seek to prevent.

Thus, prior to 1974, any assault, under Texas law, involved the use, attempted use, or threatened use of violence.

Prior Texas law on assault was contained in Article 1138 of the Penal Code, which is quoted in Pitts v. State, 197 S.W. 2d 1012 (Tex. App. 1946):

> Art. 1138, P.C. defines assault and battery and assault as follows: 'The use of any unlawful violence upon the person of another with intent to injure him, whatever be the means or the degree of violence used, is an assault an battery. Any attempt to commit a battery, or any threatening gesture showing in itself or by words accompanying it, an immediate intention, coupled with an ability to commit a battery, is an assault.'

(emphasis added). Thus, Texas law clearly demonstrates that assault with intent to commit robbery was a crime involving the use or threat of violence.

With respect to the federal charge of attempting to cause a mutiny, it is possible that this one does not involve violence or the threat of violence. However, in view of the three other prior violent felonies, any

erroneous reliance on the mutiny would be harmless. That is all the more so, since this defendant was contemporaneously convicted of two other violent felonies and those felonies could similarly serve as the proof in support of this aggravating factor. Thus, in Tafero v. State, 561 So. 2d 557 (Fla. 1990), this Court stated that even if Tafero's prior convictions were ever vacated, the aggravating factor relying on prior violent offenses would still be established beyond a reasonable doubt due to the contemporaneous convictions for felonies committed along with the murder. Even though those contemporaneous convictions had not been relied upon by the trial court, they could have, and they certainly would contribute to rendering harmless the striking of any of the out-of-state prior convictions.

Tafero relied on Duest v. Dugger, 555 So. 2d 849 (Fla. 1990), in support of this proposition. Duest argued that the aggravating circumstance of a prior felony involving the use or threat of violence should be stricken because the prior conviction in Massachusetts had been vacated. This Court rejected that claim, finding that Duest, in addition to his murder conviction in Florida, had contemporaneous convictions for another violent felony, an armed robbery. That violent felony still provided the basis for the aggravating circumstance. 555 So. 2d at 851. Although the Eleventh Circuit Court of Appeal, in federal habeas corpus proceedings, in Duest v. Singletary, 967 F.2d 472 (11th Cir. 1992), had concluded that the reliance on the vacated Massachusetts prior felony was not harmless, the United States Supreme Court, in Singletary v. Duest, 53 Cr. L. Rptr. 3021 (U.S. April 26, 1993), by curiam order, vacated the judgment of the Eleventh Circuit. See also, Henderson v. Singletary, 18 F.L.W. S256 (Fla. April 19, 1993) (Even if the Putnam County convictions were vacated, the aggravating factor of prior conviction for a capital felony would still have been established beyond a reasonable doubt. In this case, Henderson was convicted of three counts of first-degree murder and sentenced to death for each. As noted above, each of these convictions supports the finding of a prior

capital felony conviction in connection with the other sentences. Thus, consideration of the Putnam County convictions would be harmless beyond a reasonable doubt because there is ample independent support for this aggravating factor.)

3. **Murders committed while engaged in commission of a sexual battery**

The Appellant next asserts that the lower court erred in finding that the murders were commited while the defendant was engaged in the commission of a sexual battery. The State has previously argued in Point I herein that the evidence was sufficient as to the sexual battery.

The Appellant also claims that this factor is inapplicable as to the murder of Mabel Avery, since Ms. Avery had been stabbed prior to the sexual battery committed on Julia Ballentine. Even if Ms. Avery was deceased prior to the sexual battery, her homicide facilitated the sexual battery of Julia Ballentine, who was partially disabled and had difficulty even walking. This factor was upheld in Roberts v. State, 510 So. 2d 885, 894 (Fla. 1987), where the murder of the first victim was an early link in a chain of events calculated to set the stage for the subsequent sexual battery.

4. **Murders Were Heinous, Atrocious or Cruel**

The Appellant argues that the lower court erred in finding that the murders were especially heinous, atrocious or cruel. Initially, the Appellant argues that the jury instruction on this factor was erroneous, because it substituted the words "wicked, evil" for "heinous." There were no objections to the jury instructions on this factor. In the absence of any objections, the Appellant's arguments regarding errors in the language used in the instructions, have not been preserved for appellate review. The same holds true with respect to the Appellant's arguments that the instructions as given were improper under Espinosa v. Florida, ___ U.S. ___, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992). See, e.g., Ponticelli v. State, 18 Fla. L. Weekly S133 (Fla. March 5, 1993) (unconstitutional jury instruction claim waived when there was no objection to

the instruction at trial and no request for a specific instruction); Gaskin v. State, 18 Fla. L. Weekly S161 (Fla. March 26, 1993) (Espinosa claim found not to have been preserved for review where there was no objection or request for special instruction at trial); Ragsdale v. State, 609 So. 2d 10, 14 (Fla. 1992) (Espinosa issue regarding instruction was not preserved at trial); Davis v. State, 18 Fla. L. Weekly S238 (Fla. April 8, 1993) (issue of vagueness of heinous, atrocious, cruel jury instruction was barred on direct appeal because the issue of the vagueness of the instruction was not raised before the trial judge).[8]

The State would note, in the alternative, that any error as to the instruction would have to be deemed harmless. This factor was properly applied. Based on the evidence, there is no possible argument that this factor was inapplicable. With respect to Julia Ballentine, there were 28 stab wounds to her entire body, and the presence of defensive wounds indicated that she was conscious, aware of the attack and suffering great pain. As the lower court further found, the pathologist testified that some of the wounds were almost five inches in depth and penetrated her heart and lungs as she struggled for her life. (R.189). Dr. Mariccini stated that she was alive at the time of the sexual battery and that it would take a few minutes for her to bleed to death. There is no doubt that this factor was properly applied. See, Floyd v. State,

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[8] The Appellant appears to be indirectly suggesting in his brief that the issue regarding the propriety of the jury instruction was preserved for appellate review because the defendant filed, prior to trial, a motion seeking to declare the statute unconstitutional. However, said motions were filed during the course of the prior trials, and not renewed in the instant case. Furthermore the motion to which the Appellant refers sought to hold the statute unconstitutional and did not relate to the language in the jury instruction. Such a motion cannot preserve for appellate review the separate and distinct issue regarding the propriety of the language of the jury instruction. The same situation arose in Davis, where the issue regarding the language in the jury instruction was deemed unpreserved for appellate review, even though there was an objection as to the applicability of the factor to the case. Davis had also raised the vagueness of the statue as an issue in his direct appeal.

569 So. 2d 1225 (Fla. 1990); Johnson v. State, 497 So. 2d 863 (Fla. 1986); Davis v. State, 18 Fla. L. Weekly S238 (Fla. April 8, 1993).

Likewise, with respect to Mabel Avery, there were 15 stab wounds, covering her entire body, and there were seven defensive wounds on her arms and legs. Dr. Mariccini similarly testified that she would have lived for at least a few minutes until she bled to death. The pain suffered during this attack, as with that on Ms. Ballentine, is clearly obvious. The prospect of impending death was clearly existent as Ms. Avery was pinned to her bedroom wall while suffering the barrage of knife wounds.

Not only was this factor most clearly applied by the court in a proper manner regardless of any error in the instructions, but, any error would also be harmless in the context of the remaining aggravating and mitigating factors. Three other aggravating factors were found to exist, and the lower court found that no mitigating factors were established. Under such circumstances, any error in the jury instructions, even if preserved, would have to be deemed harmless. Ragsdale, supra, 609 So. 2d at 14; Davis, supra.

It should be noted that the instruction which was given in this case was not the abridged version which the United States Supreme Court disapproved of in Espinosa v. Florida, ___ U.S. ___, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992). The instruction given herein was the longer version, which includes the final sentence limiting the factor to an offense "accompanied by additional actions that show the crime was conscienceless or pitiless and was unnecessarily torturous to the victim." This qualifying language derives from State v. Dixon, 283 So. 2d 1 (Fla. 1973), and has been held to provide the sentencer with adequate guidance. Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976); Sochor v. Florida, ___ U.S. ___, 112 S.Ct. 2114, 119 L.Ed.2d 326, 339 (1992).

While the Appellant argues that the court's oral instructions substituted the term "unconscionable" for "conscienceless," there was no

objection to the oral instruction, thereby rendering the issue unpreserved for appellate review. The State would also note that the terms unconscionable" means "contrary to what one's conscience feels is right,". See Oxford American Dictionary. Moreover, in the written instructions which were submitted to the jury, the word "conscienceless" was properly included. (R.161).

The Appellant, in a related argument, suggests that the statutory factor is itself invalid. The issue was not raised below. See n. 8 herein. Moreover, as noted above, the United States Supreme Court in Sochor has rejected any such claim. 112 L.Ed.2d at 339-40.

The Appellant continues the attack on the applicability of this factor by arguing that it was improperly applied to the facts of this case. The essence of the Appellant's argument is that the factor should not be applied when the offense is a killing in an emotional rage; and the factor is inapplicable when the acts occur when the victims are unconscious. The Appellant's reliance on Halliwell v. State, 323 So. 2d 557 (Fla. 1975), is misplaced. In Halliwell, there was evidence that the killing occurred during an emotional rage resulting from a love triangle. Furthermore, most of the gruesome acts occurred hours after the victim had been murdered. By contrast, the instant case contains no evidence to support a finding that the killings occurred in an emotional rage derived from a love triangle or other domestic situation. For that very same reason, this Court distinguished Halliwell in Buford v. State, 403 So. 2d 943 (Fla. 1981), and applied the "heinous, atrocious, cruel" factor in a case where, after the defendant completed a sexual battery on a young child, he crushed her head with a heavy concrete block. There is no evidence that the instant offenses were committed in an emotional rage. See point I A herein. The application of the HAC factor in this case is compelled by such cases as Davis, supra; Floyd, supra; Johnson, supra.

With respect to the contention that the factor is inapplicable because the medical examiner could not say when the victims lost consciousness,

the presence of multiple defensive wounds clearly reflects that the victims were struggling, and that the struggling was not during a period of lost consciousness. This argument is refuted by the record.

5. No Doubling of Aggravating Circumstances

The Appellant next asserts that the court erred by doubling the aggravating circumstances as to Julia Ballentine. The Appellant complains that the factors of (a) commission of the murder during the course of the sexual battery, and (b) heinous, atrocious or cruel, were improperly doubled, because the court's written findings regarding the HAC factor make reference to the sexual assault. There was no improper doubling here. These two factors are distinct. The first factor is based on the commission of the murder during the course of the sexual battery. The second factor is based on the manner of the commission of the murder. The fact that the findings regarding HAC make reference to the prior sexual battery does not invalidate that finding; nor does it double the factors. The reference to the sexual battery may be surplusage in the HAC factor, but it neither invalidates that factor nor detracts from the remainder of the findings as to HAC which clearly support its applicability as a separate factor.

B. Mitigating Circumstances

1. Extreme Mental or Emotional Disturbance

During the charge conference, defense counsel requested that the jury be instructed on the mitigating factor that the crime was committed while under the influence of extreme mental or emotional disturbance. (T.1592). Although the prosecution asserted that there was no evidence as to that factor, the judge allowed the jury to be instructed as to it. (T.1593). During closing arguments in penalty phase, defense counsel never addressed this mitigating factor and never advised the court as to what evidence supposedly supported it. (T.1616-23). In essence, defense counsel abandoned any reliance on the mitigating factor. Defense counsel, during the penalty phase argument, claimed

residual doubt (T.1617) and advised the jury that the aggravating factors were insufficient to justify death. (T.1620-23). Defense counsel specifically told the jury that he was not going to come into the sentencing phase admitting guilt after having professed the innocence of his client during the guilt phase. (T.1620). Not only did defense counsel not argue any facts in support of this mitigating factor during the penalty phase closing arguments, but two months later, in a written sentencing memorandum which went to the judge and not the jury, defense counsel still failed to argue any facts in support of this alleged mitigating factor. (R.183). Likewise, at the sentencing hearing before the judge, this factor was not argued.

With that background in mind, it can easily be seen how the trial court could enter findings as to this factor, stating that "[t]he evidence supports no such position and the Court will not consider it." (R.191). Under Campbell v. State, 571 So. 2d 415, 419 (Fla. 1990), the lower court "must expressly evaluate in its written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence and whether, in the case of nonstatutory factors, it is truly of a mitigating nature." "The decision as to whether a particular mitigating circumstance is established lies with the judge. Reversal is not warranted simply because an appellant draws a different conclusion. Sireci v. State, 587 So. 2d 450, 453 (Fla. 1991).

In the instant case, the judge did evaluate the factor, but found no evidence to support it. The Appellant now claims that the lower court failed to find that this factor existed, in view of evidence at the guilt phase that a woman had broken a date with the defendant the previous night, and the next day the defendant told an acquaintance, "I told them not to get me mad. I have this animal inside of me." (T.739-40, 755). Considering the failure of defense counsel to ever argue that this was the evidence that supported the factor of extreme mental or emotional disturbance, it is certainly understandable how the trial judge, in reviewing the evidence, could fail to find this on his own and

treat it as such evidence. Hodges v. State, 595 So. 2d 929, 935 (Fla. 1992) ("we will not fault the trial court for not guessing which mitigation Hodges would argue on appeal.)

Furthermore, the trial court's conclusion that this factor was not supported by the evidence is proper, notwithstanding the evidence now argued by Appellant. The factor of "extreme mental or emotional disturbance" has been interpreted by this Court as "less than insanity but more than the emotions of an average man, however inflamed." State v. Dixon, 283 So. 2d 1, 10 (Fla. 1973); Duncan v. State, 18 Fla. L. Weekly S268, 270 (Fla. April 29, 1993). Evidence of a broken date and the defendant's anger over it does not constitute evidence of extreme mental or emotional disturbance. The conduct described by the Appellant is indicative of nothing more than normal human emotions. There was nothing extreme about the alleged emotional disturbance. Furthermore, to whatever extent the above-described testimony reflects any emotional disturbance, it must also be considered that several hours after the broken date, while the defendant was spending the evening with Feliciano Aguayo, there was no indication of any emotional distress, extreme or otherwise. Moreover, the defendant's self-serving statement, that he "told them not to get me mad. I have this animal inside of me," was uttered only after the defendant was found covered with blood and began recounting a fictitious attack by unknown assailants.

The Appellant's reliance on Santos v. State, 591 So. 2d 160 (Fla. 1991), is misplaced. There, the trial court failed to consider evidence that Santos was involved in an ongoing, highly emotional domestic dispute with the victim and her family. Expert testimony indicated that the dispute severely deranged him. The domestic dispute was directly related to the homicide. Even so, this Court did not conclude, under those facts, that the trial court had to find that the mitigating factor existed. By contrast, in the instant case, there was no evidence of any highly emotional domestic dispute; merely a broken date which the defendant proceeded to calmly ignore for the rest of the evening

while he was with his companion. The defendant's own utterance - "I told them not to get me mad" - does not even refer to the woman who broke the date with him. He appeared to be claiming that fictitious unknown assailants did something to get him mad. The nature of the madness is never described; the act which triggered it is never described. The comment in question is similar to the comment in Duncan, supra, where the defendant told the police that he "went nuts" after arguing with the victim. Duncan, supra, slip op. at 11. That statement was deemed insufficient to establish the existence of the alleged mental mitigation. Under such circumstances, even considering the pieces that Appellant has strung together for the first time, there is nothing indicative of extreme mental or emotional disturbance. The trial court did not err in finding that there was no evidence to support that factor.

The Appellant also argues that the defendant's use of alcohol constitutes a mitigating factor, also tying it into the influence of extreme mental or emotional influence. The only evidence of use of alcohol relates to one beer, at approximately 7:00 p.m., another beer prior to 11:00 p.m., and unspecified "drinking" at a bar according to the defendant's fictitious accounts. The lower court addressed the evidence of beer drinking:

> There was no evidence of any other aspect of the defendant's character or record and the circumstances of the offense which warrant mitigation. The Court finds the evidence of drinking beer unconvincing. Merely drinking some beer without any evidence of intoxication is simply not enough.

(R.191-92). Not only was there no evidence of impairment, but the evidence reflected that there was no impairment. After the defendant committed the murders, he left the victims' home, went to the home of his friend, Feliciana Aguayo, and gave a false exculpatory explanation for his appearance, asked for a ride to the house where he was staying at, but insisted upon ensuring that he would not be detected.

A mitigating circumstance must be "reasonably established by the greater weight of the evidence." Campbell v. State, 571 So. 2d 415, 419 (Fla. 1990); Nibert v. State, 574 So. 2d 1059, 1061 (Fla. 1990). "A trial court's findings concerning mitigation will not be disturbed if the findings are supported by 'sufficient competent evidence in the record.'" Duncan, supra, slip op. at 8. In Duncan, this Court found that the record was devoid of evidence to support the alleged mitigating circumstances. There was evidence in the guilt phase of Duncan that Duncan appeared to have been drinking, although not on the night before or on the morning of the murder. The only evidence of intoxication was one witness's testimony that Duncan appeared to have been drinking when he returned home the night before the murder.

This Court has frequently affirmed trial court findings rejecting mitigating factors based on drug or alcohol use. In Bruno v. State, 574 So. 2d 76 (Fla. 1991), there was evidence that the defendant had one beer before going over to the victim's apartment, in addition to psychiatric testimony regarding drug abuse and brain damage. Notwithstanding such testimony, the lower court's rejection of factors based on drug or alcohol use was deemed proper. In Preston v. State, 607 So. 2d 404, 411-12 (Fla. 1992), there was evidence that Preston used drugs regularly and smoked marijuana and drank alcoholic beverages on the night of the murder. The defendant himself claimed to have taken PCP on the night of the murder. While the lower court did find that the defendant was under some influence, the intoxication was not deemed to constitute extreme mental or emotional disturbance sufficient to establish the mitigating factor. That finding was approved by this Court. See also, Johnson v. State, 608 So. 2d 4 (Fla. 1992); Sireci, supra.

In the instant case, in addition to the lack of evidence of intoxication, the defendant's actions after the homicides further belies a claim of intoxication sufficient to establish a mitigating factor.

The Appellant also argues that the trial court should have considered the effect of the broken date and the alcohol consumption as nonstatutory mitigation even if they did not constitute statutory mitigation. With respect to nonstatutory mitigation, "the defense must share the burden and identify the specific nonstatutory mitigating circumtances it is attempting to establish." Lucas v. State, 568 So. 2dd 18, 24 (Fla. 1990). Insofar as defense counsel never proffered any such categories of nonstatutory mitigation, the trial court was certainly under no obligation to determine what categories the defense might remotely or conceivably wish to have considered. Hodges, supra. In any event, testimony regarding a broken date and one or two beers some seven hours before the murders, does not arise to the level of nonstatutory mitigating evidence.

2. Capacity of Defendant to Appreciate Criminality of his Conduct

With respect to 921.141(6)(f), the lower court's order stated:

> The defense further opined that the capacity of the defendant to appreciate the criminality of his conduct to the requirements of the law was substantially impaired. 921.141(6)(f) F.S.
>
> The evidence shows to the contrary. After the crimes the defendant walked about half a mile to his friend Aguayo's home and asked for a ride to labor camp where he was living. These are not the actions of a person who is psychotic or delusional. They are the actions of a person acting in logical sequence. The Court finds that this is not a mitigating factor under the evidence in this case.

(R.191). Once again, there is no evidence to support the existence of this factor. This factor "refers to mental disturbance that 'interferes with but does not obviate the defendant's knowledge of right and wrong.'" Duncan, supra, slip op. at 10-11 (quoting Dixon, supra). Just as in Duncan, there is no evidence that a broken date and two beers, hours before the murders, interfered with the defendant's knowledge of right and wrong. See also Adams v. State, 412 So. 2d 850, 857 (1982) ("There is little or no, causal relationship between

defendant's marital problems" and an unrelated victim. "The trial court did not err in failing to find that the capacity of defendant to conform his conduct to requirements of law was substantially impaired as a result of his marital distress."); Pardo v. State, 563 So. 2d 77, 80 (1990) (factor properly rejected where "there was no testimony that [defendant's] ability to conform his conduct was impaired or that he didn't know that killing these victims was wrong. The court did not have to accept the [defendant's] self-serving statements regarding his motives").

Not only did this evidence not suffice to establish the statutory mitigating factor, but it did not establish any nonstatutory mitigating factor. Defense counsel did not proffer this as any category of nonstatutory mitigation under Lucas and the lower court thus had no obligation to so consider it. Indeed, as previously noted, defense counsel's closing argument to the jury abandoned any reliance on this factor, statutory or otherwise. (T.1620). Counsel's subsequent sentencing memorandum made no reference to this conduct as statutory or nonstatutory mitigation, either. The two beers were in no way connected to the commission of the offense, and the effect of the broken date was in no way connected to the commission of the offenses. This was not mitigating evidence, either statutory nonstatutory.

The Appellant's reliance on Cheshire v. State, 568 So. 2d 908 (Fla. 1990), is misplaced. There, there was evidence that the defendant had been drinking at the time of the murder. That is different from evidence of one or two beers 7-8 hours prior to the murders. Furthermore, the alcohol use in Cheshire was tied in to testimony from which it could be concluded that the murder was the result of a lovers' quarrel, a crime of passion prompted by emotional distress over a pending divorce, and the defendant's child.

3. Other Nonstatutory Mitigation

The Appellant claims that the lower court failed to consider other alleged nonstatutory mitigating factors. Initially, the Appellant refers to his

"exemplary prison record." With respect to this factor, defense counsel, immediately prior to sentencing, advised the court:

> Additionally, at the time of the trial and during the sentencing phase of the trial, we didn't attempt to show as a mitigating factor the behavior of this defendant while in prison while awaiting trial and awaiting the death penalty. The reason we didn't do that was quite obvious in that it would have alerted the jury of the prior history of this case. And therefore, I didn't think it was a wise choice to make at that point.

(T.1639). Then, defense counsel asked the court to consider the defendant's behavior awaiting the death penalty, but did not proffer any evidence or records of any kind. No facts regarding the defendant's conduct while in prison were presented to the trial court. In the absence of any evidence of such exemplary conduct, there was clearly nothing for the lower court to consider. The lower court did not preclude the defense from presenting any evidence as to this factor. Thus, it is not a failure of the lower court to consider a mitigating factor; there was nothing to consider.[9]

The Appellant next argues that the trial court failed to address the factor that the defendant could have been sentenced to life without parole for 50 years. While this is a factor which can be argued to the jury and judge, it is not the type of factor which needs to be addressed in the sentencing order. The examples of nonstatutory mitigating factors which this Court found, in Campbell, that need to be addressed, all related to either the defendant's background or behavior, or the court's treatment of a codefendant. The prospect for a long prison sentence without parole is a purely legal, not a factual, matter. Any judge who imposes a death sentence is presumed to know the other sentencing alternatives. The findings and evaluation contemplated in Campbell

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[9] Contrary to the Appellant's representations, the State never agreed that the defendant's record was exemplary.

all relate to factual matters, where evidence and facts need to be evaluated and weighed.

The Appellant next argues a lack of premeditation. Not only has this "category" of mitigation never been asserted to the trial court, but the premeditation is found in the sufficiency of the evidence to sustain the conviction. The lower court has no obligation to consider or address that which is never asserted below. Lucas, Hodges, supra.

The Appellant next argues, as nonstatutory mitigation, that the defendant was employed and worked. Again, this was never argued in the lower court as a category of nonstatutory mitigation and the lower court had no obligation to consider or address it Lucas, Hodges, supra. The Appellant similarly argues that the defendant was a "peaceful man." Once again, no such category of mitigating circumstances was ever proposed to the trial court and that court therefore had no obligation to consider or address the alleged factor. Id.

The Appellant next argues that the codefendant received two life sentences. Again this was never argued as a category of nonstatutory mitigation and thus the lower court was not obligated to consider or address the factor. Indeed, the State would note that the defendant expressly declined to rely on this factor, in order to prevent the State from presenting damaging information. (T.1561-3). Furthermore, as the codefendant was only the driver, there was hardly equal culpability with Garcia, who actually committed the vicious murders.

4. History of Prior Criminal Activity

The Appellant asserts that the lower court's sentencing order failed to address the mitigating factor of the absence of a significant prior criminal history. The lower court declined to instruct the jury on this factor (T.1592), because there was no evidence to support the factor. Defense counsel never argued at trial that there was an absence of a significant prior criminal

history. While current appellate counsel has asserted factors such as the discrepancy of names in the prior convictions, trial counsel repeatedly referred to his client by all of those aliases. In view of the extensive evidence of prior convictions, and trial counsel's failure to attack those convictions in any manner,[10] any oversight in failing to specifically address this factor must be deemed harmless. Furthermore, the lower court's order states that "the remaining mitigating circumstances under 921.141(6) F.S. to wit: . . . are not applicable to this case." (R.192). It is obvious that the lower court intended that provision to cover all statutory mitigating factors which were not specifically evaluated in detail. Due to the absence of any evidence of a lack of a significant prior criminal history, the court's apparent intent to include this factor in the summary denial of remaining factors should be obvious.

5. Instructions on Mitigating Circumstances

The Appellant argues that the jury instructions on mitigating circumstances were flawed in several respects. None of the objections raised in this appeal were presented to the trial court, either during the charge conference or after the instructions were given. Accordingly, none of these claims is preserved for appellate review. See, e.g., Ponticelli, supra; Gaskin, supra; Ragsdale, supra; Davis, supra.

The State would note, with respect to the assertion that the court omitted the sentence that a mitigating circumstance need not be proved beyond a reasonable doubt by the defendant, that, while the sentence was omitted from the verbal instructions, it was included in the written instructions which were given to the jury. (R.166). Moreover, the jury was instructed that, "you should consider all the evidence tending to establish one or more mitigating circumstances, and give that evidence such weight as you feel it should receive in reaching your conclusion as to the sentence that should be imposed,"

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[10] Trial counsel did not even argue that the aggravating factor predicated on the prior violent felonies was not established.

(T.1626). Similarly, while the judge verbally misplaced the word "or" in the instruction on extreme mental or emotional disturbance, verbally stating "extreme or mental emotional disturbance," the written instructions had the correct, grammatical word order. (R.162). Likewise, the verbal misstatement regarding the capacity of the defendant to appreciate the criminality of his conduct was accurately set forth in the written instructions. (R.163).

It is clear that all of the misstatements referred to were situations in which the judge misread something which had been written correctly on the written instructions. These are the types of matters which most necessitate contemporaneous objections. Since the misstatements were obviously unintentional, had anyone called them to the attention of the court, they would undoubtedly have been promptly corrected. Secondly, apart from the previously cited case law that errors in sentencing phase instructions must be preserved by proper objection, it is further significant that the written instructions, which were submitted to the jury (T.1628), were entirely accurate. Thus, any grammatical errors during the verbal instructions or misplaced or omitted words would be readily recognizable as such to anyone reading the written instructions. Finally, due to the nature of the alleged errors - misplaced word, omitted words - the failure of defense counsel to object raises the serious possibility that the court reporter erred in the transcription. In any event, the errors asserted are harmless beyond a reasonable doubt. As noted previously, the defense expressly declined to rely on the mitigating factors, which were the subject of the misstated instructions, in its argument to the jury. (T.1620). The jury's recommendation was thus not affected.

XII. THE LOWER COURT DID NOT ERR IN ENHANCING THE SENTENCES FOR SEXUAL BATTERY AND BURGLARY.

Although the jury failed to make any entries on the verdict forms interrogatories regarding the use of a deadly weapon enhancement of the degrees

of the offenses for sexual battery and burglary due to the use of a deadly weapon was nevertheless proper. The verdicts for those offenses found the defendant guilty as charged. (SR. 23-4). The indictment had charged the defendant with committing those offenses with a deadly weapon. (R.1-3). The trial jduge in the jury instructions stated, "Henry Garcia, the defendant in this case has been accused of the crimes of first degree murder, two counts, sexual battery by great force and armed burglary." (T.1418-19). Under such circumstances, where a defendant is found guilty as charged, the absence of specific responses to interrogatories regarding the use of a deadly weapon is firearm is irrelevant. See, Whitehead v. State, 446 So. 2d 194, 197-98 (Fla. 4th DCA 1984); Massard v. State, 501 So. 2d 1289 (Fla. 4th DCA 1986); State v. Jones, 536 So. 2d 1161 (Fla. 5th DCA 1988); Luttrell v. State, 513 So. 2d 1298 (Fla. 2d DCA 1987).

Alternatively, it should be noted that this issue is not preserved for appellate review. The defendant never objected, in the trial court, to the absence of express findings by the jury regarding the use of the deadly weapon. While the contemporaneous objection rule has been deemed inapplicable to sentencing matters, State v. Rhoden, 446 So. 2d 1013 (Fla. 1984), that reasoning is inapplicable herein. The objection is not deemed necessary in sentencing matters because such matters can always be corrected by simple remand to the judge. Id. at 1016. However, the same does not hold true when the alleged sentencing defect relates not merely to the judge's action, but to the jury's verdict. Obviously, the case cannot simply be remanded to the jury for correction as to such a matter. Accordingly, this is an issue which needs an objection in the trial court for preservation on appeal. See Tillman v. State, 471 So. 2d 32 (Fla. 1985), where the Appellant sought a remand as to a conviction for attempted manslaughter, on the grounds that it was unclear whether the jury's verdict was based on culpable negligence. The issue was deemed unpreserved for appellate review. Where the alleged error inheres in the

verdict, it is a matter which must be objected to. Had there been a timely objection, the issue could have been sent back to the jury, prior to the jury's discharge.

CONCLUSION

Based on the foregoing, the State respectfully submits that the judgments and sentences herein should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing **BRIEF OF APPELLEE** was furnished by mail to **ANTHONY MUSTO**, P. O. BOX 16-2032, Miami, Florida 33116-2031 on this 3 day of June, 1993.

FARIBA N. KOMEILY
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