IN THE SUPREME COURT OF FLORIDA

DOMINICK DEANGELO,

Appellant/Cross-Appellee,

v. CASE NO. 78,499

STATE OF FLORIDA,

Appellee/Cross-Appellant.

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

ANSWER BRIEF OF APPELLEE/ CROSS APPEAL OF APPELLANT

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SUMMARY OF ARGUMENTS

Point I: The State proved cold, calculated and premeditated beyond a reasonable doubt through the testimony of Joy DeAngelo that DeAngelo considered murdering the victim one to two weeks before the murder and the night of the murder proceeded as he had planned to murder the victim. The trial court specifically found the murder was not the result of a domestic dispute. The trial court considered the expert's testimony on the statutory mitigating circumstances of extreme emotional disturbance and substantially impaired capacity and did not abuse its discretion in rejecting the testimony. The trial judge considered all the nonstatutory mitigation proffered and gave the appellant the benefit of the doubt insofar as finding and weighing the mitigating factors. In fact, the trial court found some factors were mitigating which were inappropriate for him to even consider. DeAngelo's death sentence is proportionate to other capital cases. DeAngelo coldly and ruthlessly strangled the victim for seven to ten minutes.

Point 11: The issue regarding nonstatutory aggravating Circumstances is not preserved for appellate review. Additionally, it was the defense witness who introduced the subject of remorse and the defense opened the door to any questioning concerning remorse. Any mention of remorse was by the defense expert and error, if any, was harmless considering his entire testimony.

Point III: The state presented evidence on both cold, calculated and premeditated and heinous, atrocious and cruel. The trial court did not abuse its discretion in instructing the jury on these aggravating circumstances. The aggravating factor of cold, calculated and premeditated was clearly established. Even though the trial court did not make a factual finding that heinous, atrocious and cruel was established, the jury should not be precluded from considering that aggravating factor. The jury instructions on cold, calculated and premeditated and heinous, atrocious and cruel are not unconstitutionally vague and this court has repeatedly upheld these instructions. The trial court did not abuse its discretion in denying special requested defense instructions. Error, if any, was harmless.

Point IV: The trial court did not abuse its discretion in denying the motion for judgment of acquittal. The state presented evidence the murder was premeditated. The jury is not required to believe the defendant's version of events when the state produces conflicting evidence.

Point V: The Florida Capital Sentencing Statute is constitutional both on its face and as applied.

Paint on Cross-Appeal: The trial court erred in rejecting the aggravating circumstance of heinous, atrocious and cruel. DeAngelo testified he woke the victim up. The medical examiner testified the victim would remain conscious for five minutes during the strangulation and would be dead after seven to ten minutes. There was no testimony the fact the victim may have been "high" on marijuana would diminish her awareness. The fact

Joy DeAngelo did not hear screams does not mean there was no struggle. She did not hear the parties yelling loudly, either. The presence of "defensive wounds" can hardly be a requirement for heinous, atrocious and cruel in a strangling case. The only common sense inference is that Mary Price died a slow agonizing death and was aware she was dying. DeAngelo strangled her both manually and with a ligature in a vile, wicked manner with total disregard for her suffering.

STATEMENT OF THE CASE AND FACTS

The Appellee accepts the Appellant's Statement of the Case. The Appellee accepts the Appellant's Statement of the Facts with the following additions:

After DeAngelo took Joy at knifepoint to hold a blanket over Mary's head one to two weeks before the murder, he stood over Mary and flexed his hands. He then told Joy to forget it and if she told anyone he would kill her (R 314-16).

When Joy DeAngelo talked to Mary Price after Joy returned home from work sometime between 3:30 and 5:30 a.m. the night of the murder, Mary was "[s]ober. She didn't seem to be drunk or on drugs or nothing" (R 319, 397-399). Joy fell asleep on the couch, then moved to the back bedroom. DeAngelo was in the bedroom, asked her for a pair of socks and went out of the room with them (R 320). Joy went back to sleep and DeAngelo woke her up about 7:00 a.m. (R 320). When DeAngelo woke Joy up, he had socks on his hands and said "[t]he bitch has lied to me for the last time" (R 321). At the time of the murder, DeAngelo was not working and Joy and Mary paid the bills (R 317). DeAngelo knew Mary had been giving her money because that was how DeAngelo got home from New Jersey (R 335). Between the time Joy saw Mary's body and they left for the flea market, DeAngelo was going through Mary's stuff (R 323). He was bringing her stuff for Joy to go through (R 322). While at the flea market Joy saw DeAngelo shopping for machetes and chain saws (R 324).

The Medical Examiner testified Mary had ligature marks around the neck as well as scrapes, bruises and contusions around

her face (R 423). There were multiple small abrasions and scrapings on both sides of the neck which could simply be from a struggle in general or from objects pressed against the neck (R 424). There were multiple small bruises on the extremities, especially the left thigh (R 426). In his opinion, death was asphyxiation due to combined manual and ligature strangulation (R 427).

If someone struggles against a cord or other object around the neck there will be bruising around the neck (R 427-28). There were more marks than expected and, more importantly, deeply, the muscle layers within the neck showed a lot of hemorrhage which is typical of manual strangulation (R 428). The bruises on the scalp could be from broad force or direct pressure and were contemporaneous with the ligature marks (R 439). Mary had no alcohol or drugs except marijuana in her blood (R 430-432). The level of marijuana was 130 anagrams but he could not comment on whether the victim was "high" (R 433). When a person is strangled, it generally takes five minutes to cut off the oxygen supply and seven to ten minutes before the person would be dead (R 433).

ARGUMENT

POINT I

THE TRIAL COURT DID NOT ERR IN SENTENCING DEANGELO TO DEATH AND THE SENTENCE IS PROPORTIONATE.

DeAngelo claims the state failed to prove cold, calculated and premeditated beyond a reasonable doubt, the trial court erred in rejecting unrefuted statutory mitigating circumstances, the trial court erred in weighing nonstatutory mitigating circumstances and the death sentence is disproportionate.

Cold, Calculated and Premeditated

One to two weeks before the murder, DeAngelo put socks on his hands, marched his wife at knifepoint into Mary Price's bedroom with the intention of killing her, then backed out. After returning from New Jersey, DeAngelo seized the opportunity to approach Mary when she was asleep, confined to her sleeping bag, and vulnerable. He went into his bedroom, got his socks, and prepared to strangle the victim. The medical examiner testified it would take seven to ten minutes to kill the victim by strangulation.

DeAngelo compares his case to Thompson **v. State**, **565 So.2d** 1311 (Fla. 1990). In Thompson, this Court found that the defendant hit his breaking point and killed the victim instantly in a fit of rage. Id. at 1318. In the present case, DeAngelo got his socks, as he had done the week before when he went to strangle Mary, and proceeded to the room. He did not kill her instantly in a fit of rage; but rather slowly and methodically strangled her, not only manually, but with a ligature he wrapped around her neck. Thompson is inapposite.

DeAngelo cites Mitchell v. State, 527 So.2d 179 (Fla. 1988). In Mitchell, the medical examiner testified the wounds were consistent with a killing consummated in a rage. Id. at 182. DeAngelo fails to account for Joy DeAngelo's testimony that DeAngelo came to get his socks before the murder then returned after the murder with the socks on his hands explaining "[t]he bitch has lied to me for the last time" (R 320-21). He also fails to recognize the medical examiner's testimony that the death would take seven to ten minutes to occur. The testimony was inconsistent with a killing consummated in rage.

The murder was not the result of a domestic dispute. The fact a murder occurs in a home in which a person lives does not automatically classify it as domestic. See, Klokoc v. State, 589 So.2d 219 (Fla. 1991); Occhicone v. State, 570 So.2d 902 (Fla. 1990); Correll v. State, 523 So.2d 562 (Fla. 1988). The trial court specifically found that although the victim was renting a room in a trailer owned by the defendant, that does not in and of itself create a domestic situation (R 1143). The facts of Douglas v. State, 575 So.2d 165 (Fla. 1991), and Santos v. State, 16 F.L.W. S633 (Fla. Sept. 26, 1991)[1] are distinguishable. In Douglas, the passion evidenced, the relationship between the parties and the circumstances leading up to the murder negated a finding of cold, calculated and premeditated. Id. at 167. There was no evidence of a prearranged plan in Douglas. The victim was killed by a shot to the head during an extremely emotional situation. Santos involved a purely domestic situation involving

[1] This case is currently on rehearing.

an explosive situation with the defendant's child and the child's mother. The facts in this case show that DeAngelo was simply fed up with Mary and decided to rid himself of her. Rather than the heated fit of passion DeAngelo claims surrounded his murder, the facts show he coldly planned to kill and killed the victim, ***See***, Wickham v. State, 16 F.L.W. 5777 (Fla. Dec. 12, **1991).**

DeAngelo cites Capehart v. State, **583** So.2d 1009 (Fla. 1991), to support his position. In Capehart, the victim woke up when the defendant broke into the house through a window and he tried to knock her out with a pillow aver her face but accidentally killer her. Id. at **1011.** The same night, Capehart assaulted another victim by mashing a cushion down tightly on her face and demanding money. When she passed out, Capehart left. Id. at 1011. In the present case, DeAngelo intended to kill the victim and wrapped a ligature around her **neck** in addition to manually strangling her. There was no question **as** to intent. Holton v. State, 573 So.2d **284** (Fla. **1991),** cited by the appellant, is similar to Capehart because the defendant did not intend to kill the victim. Further, the trial judge erroneously relied on the jury's determination the murder was premeditated rather than during a felony. Id. at ***292.*** Here, the trial judge made detailed findings of fact supporting heightened premeditation (R 1139-40).

DeAngelo's other cases are also distinguishable. In Reed v. State, 560 **So.2d** 203 (Fla. **1990),** the defendant only intended to rob the house. Farinas v. State, 569 So.2d **425** (Fla. **1990),** involved a passionate domestic situation with no evidence of a

preceding plan. In Green v. State, 583 So.2d 647 (Fla. 1991), there was no evidence of intent to murder or a prearranged plan. On the contrary, in the present case, DeAngelo had a plan and had made a dry run previously but decided not to strangle Mary in front of his wife. The next opportunity he had, DeAngelo went to get those socks and strangle Mary then coldly announce to his wife "[t]he bitch has lied to me for the last time."

The finding of cold, calculated and premeditated in this case compares to that in Asay v. State, 580 So.2d 610 (Fla. 1991) (victim started to get in the truck after having sex with defendant who was unaware the victim was a man dressed as a woman); Bruno v. State, 574 So.2d 76 (Fla. 1991) (defendant's version was that a fight erupted and defendant hit the victim with a crowbar then shot victim when he grabbed defendant's gun); Sireci v. State, 587 So.2d 450 (Fla. 1991) (intent was to rob victim; hit and stabbed victim numerous times during a struggle); Brown v. State, 565 So.2d 304 (Fla. 1990) (defendant told authorities he did not intend to kill victim but intended to shoot her if she made any noise); Occhicone v. State, 570 So.2d 902 (Fla. 1990) (case involved substantially more than a passionate obsession; it was the culmination of avowed threats to terminate the lives of parents standing between defendant and his girlfriend); and Jackson v. State, 522 So.2d 802 (Fla. 1988) (defendant had ample time during series of events leading up to the murder to reflect an actions and attendant consequences). See also, Shere v. State, 579 So.2d 86 (Fla. 1991) (no evidence to reasonably suggest defendant had any motive other than to kill

victim); Porter v. State, 564 So.2d 1060 (Fla. 1990) (while motivation may have been grounded in passion, it is clear murder was contemplated well in advance). The trial court's findings are supported by competent substantial evidence.

Nonstatutory Mitigation

DeAngelo claims the trial court improperly rejected the statutory mitigation circumstances of extreme emotional disturbance and substantially impaired capacity. DeAngelo argues that because Dr. Berland testified the two statutory mitigating circumstances existed because of DeAngelo's mental problems and because the state presented no expert to refute that testimony, the trial court was obligated to find the two mitigating factors.

As DeAngelo admits, Dr. Berland was rigorously cross-examined. Although Dr. Berland testified he had no way of knowing what DeAngelo was thinking at the time he murdered Mary Price, he still concluded the appellant was substantially impaired (R 703). The doctor said DeAngelo claimed he blacked out, but most claims of this nature are suspicious (R 717). Dr. Berland's work was 95% at the request of a defense counsel (R 671). More than 90% of the people he examined he found mentally ill and 80% had brain damage (R 677-81). He believed the bipolar disorder was hereditary, yet DeAngelo's family showed no symptoms (R 693-94). Family members did not report delusions, nor was DeAngelo diagnosed as having any mental disorder during the four years in the military (R 698-700). The first time anyone noticed a mental illness was in June 1990 after DeAngelo was charged with first degree murder (R 700). DeAngelo told Dr. Berland he kept

looking out the window prior to the murder, but DeAngelo never told the police that fact (R 701, 704-705). Medical tests are available which could establish brain damage, but those tests were not requested (R 713). Dr. Berland could not explain how DeAngelo could have mental disturbances since the age of 16 or 17 but had not previously had a violent outburst (R 728). Dr. Berland admitted commission of the murder could be unrelated to mental illness (R 729).

Joy DeAngelo's testimony contradicts Dr. Berland's conclusion DeAngelo was extremely emotionally disturbed or substantially impaired at the time of the murder. She saw DeAngelo bath before and after the murder, and her portrayal is one of a man calmly taking care of business. Immediately after the murder DeAngelo calmly announced "[t]he bitch has lied to me for the last time", then took Joy to see his handiwork (R 321). DeAngelo was happily smoking cigarettes and acting as if nothing had happened while going through Mary's belongings (R 323). Dennis DeAngelo, the appellant's brother, testified DeAngelo's only problem in school was one time he had to see a counselor about alcohol and misconduct (R 605). DeAngelo simply got in with the wrong crowd (R 607).

Deciding whether particular mitigating circumstances have been established and, if established, the weight afforded it lies with the trial court, and a trial court's decision will not be reversed because an appellant reaches the opposite conclusion. Duqan v. State, 17 F.L.W. S10 (Fla. Jan. 2, 1992); Sireci v. State, 587 So.2d 450 (Fla. 1991); Stano v. State, 460 So.2d 890

(Fla. 1984). The credibility of a witness is to be assessed by the trier of fact which, when finding whether mitigating circumstances are established, would be the judge. See, Carter v. State, 560 So.2d 1166, 1168 (Fla. 1990); Gunsby v. State, 574 So.2d 1085 (Fla. 1991). Dr. Berland's testimony - that the mental disorders necessarily established the two statutory mitigating circumstances even though Dr. Berland had no information on mental state at the time of the murder - was incredible. The trial court properly rejected the statutory mitigating circumstance. See, Bruno v. State, 574 So.2d 76, 83 (Fla. 1991); Valle v. State, 581 So.2d 40, 48 (Fla. 1991).

Although DeAngelo complains of the trial court's findings, the trial judge was extremely liberal in his consideration of mitigating circumstance. The judge gave nonstatutory mitigating weight equal to statutory mitigation (R 1141). The trial judge considered as nonstatutory mitigation the following:

1) the killing was not for financial gain
2) it did not create a great risk of death to many persons
3) it did not occur while the defendant was committing another crime
4) the defendant was not a drifter
5) the victim was not a stranger
6) the victim was not a child

(R 1142-43).

The state is not required or expected to present evidence on all aggravating circumstances. To consider the absence of an aggravating circumstance as mitigation is inappropriate as would be considering the absence of a statutory mitigation as aggravation. Considering as mitigation whether the victim as a child or stranger is also inappropriate. If it were appropriate,

defendants could present evidence all day with who the victim was not. The focus is on aspects of a defendant's life. Evidence is mitigating if in fairness or in the totality of the defendant's life or character, it may be considered as extenuating or reducing the degree of moral culpability for the crime committed. Wickham v. State, 16 F.L.W. S777, 778 (Fla. Dec. 12, 1991), citing Rogers v. State,, 511 So.2d 526, 534 (Fla. 1987) (emphasis added). Therefore, even if the trial judge erred in failing to consider two statutory mitigating circumstances, he considered five nonstatutory mitigating circumstances which he should not have considered, and gave nonstatutory mitigators the same weight as statutory mitigating circumstances. Imposing a death sentence is a weighing, not a counting process. State v. Dixon, 283 So.2d 1 (Fla. 1973). Even if the trial judge erred in rejecting mitigation, he also erred in including mitigation. In the present case, the death sentence was justified.

Nonstatutory Mitigating Circumstances

The trial judge found certain nonstatutory mitigation received little or no weight. As previously discussed, five of the six factors should not have been considered as mitigating and the sixth, that DeAngelo was not a drifter, can hardly be considered anything more than society expects of the average individual. See, Zeigler v. State, 580 So.2d 127, 130 (Fla. 1991).

The trial judge did not err in giving little or no weight to the enumerated nonstatutory mitigating circumstances. See, Shere v. State, 579 So.2d 86, 96 (Fla. 1991).

Proportionality

DeAngelo claims his death sentence is disproportionate. Proportionality review is not a comparison between the number of aggravating and mitigating circumstances, but is a thoughtful deliberate review to consider the totality of the circumstances in a case and compare it with other capital cases. Porter v. State, 564 So.2d 1060, 1064 (Fla. 1990). Although DeAngelo advises this court it has never affirmed a death sentence where cold, calculated and premeditated is the only aggravating circumstance, the number of aggravating circumstances established is not the question. The question is how, considering the totality of the circumstances, the case compares to other capital cases[2]

DeAngelo compares this case to Songer v. State, 544 So.2d 1010 (Fla. 1989). In Songer a trooper approached a car, a volley of shots rang out, and the officer fell dead. The trial court found Songer was under the influence of extreme emotional disturbance, substantially impaired, twenty-three years old, felt sincere remorse, was dependent on drugs, adapted well to prison life, helped others, had an emotionally deprived upbringing, had a strong influence on his family and developed strong spiritual standards. This court found Songer may be the least aggravated and most mitigated case to undergo proportionality analysis. Id. at 1011. DeAngelo also compares his case to Fitzpatrick v. State, 527 So.2d 809 (Fla. 1988). At the time of his crime,

[2] In counting the aggravating circumstances, DeAngelo fails to recognize that heinous, atrocious and cruel was improperly rejected (see cross-appeal).

Fitzpatrick was completely out of control, He had a history of delusions. Not only were the two statutory mental mitigators established, but it was also proven Fitzpatrick had an emotional age between nine and twelve years old and was "crazy as a loon". A neurologist testified Fitzpatrick had extensive brain damage. Id. at 812[3].

Penn v. State, 574 So.2d 1079 (Fla. 1991) and McKinney v. State, 579 So.2d 80 (Fla. 1991), cited by DeAngelo, are likewise unavailing. Penn beat his mother to death after consuming six to seven pieces of crack cocaine. Penn had no significant history of prior criminal activity and acted under the influence of extreme emotional disturbance. In light of Penn's heavy drug use and his wife telling him his mother stood in the way of their reconciliation, this court found the case disproportionate. Id. at 1083. Similarly, McKinney had no significant prior history, had mental deficiencies, and a drug and alcohol history. Id. at 85. DeAngelo's murder was senseless and shocking. He coldly eliminated a human being with no more thought than swatting a fly. He strangled her both manually and with a ligature then happily rifled her belongings. There were no signs of extreme disturbance or substantially impaired capacity before or after the murder and the manner of death supports a cold, calculated plan, not an emotional frenzy or fit of rage. The cases cited by DeAngelo are distinguishable and occurred during an impetuous

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[3] This court noted that the aggravating circumstances of heinous, atrocious and cruel and cold, calculated and premeditated were "conspicuously absent" seeming to indicate these aggravating factors carried great weight. These are the two aggravating factors that should have been applied in DeAngelo's case.

emotional incident, not one in which a defendant prepares to slowly drain the life from a victim and calmly proceeds to do so.

This case should be compared to those cases in which the defendant intentionally and with forethought, eliminates the object of his concern. See, Turner v. State, 530 So.2d 45 (Fla. 1988); Hudson v. State, 538 So.2d 829 (Fla. 1989); Bowden v. State, 588 So.2d 225 (Fla. 1991); Hayes v. State, 581 So.2d 121 (Fla. 1991); Wickham v. State, 16 F.L.W. S777 (Fla. Dec. 12, 1991); Gaskin v. State, 16 F.L.W. S762 (Fla. Dec. 5, 1991); Gunsby v. State, 574 So.2d 1085 (Fla. 1991); Hodges v. State, 17 F.L.W. S74 (Fla. Jan. 23, 1992); Reichmann v. State, 581 So.2d 133 (Fla. 1991); Young v. State, 579 So.2d 721 (Fla. 1991); Occhicone v. State, 570 So.2d 902 (Fla. 1990); Porter v. State, 564 So.2d 1060 (Fla. 1990).

POINT II

THE JURY'S DEATH RECOMMENDATION WAS NOT TAINTED BY EVIDENCE OF NONSTATUTORY AGGRAVATING CIRCUMSTANCES; THE ISSUE IS NOT PRESERVED FOR APPELLATE REVIEW.

DeAngelo claims the prosecutor, on cross-examination of Dr. Berland, elicited testimony regarding lack of remorse. He concedes trial counsel did not object. This issue is not preserved for appellate review. Teffeteller v. State, 495 So.2d 744, 747 (Fla. 1986); Clark v. State, 363 So.2d 331 (Fla. 1978).

The issue has no merit. On direct exam Dr. Berland said DeAngelo had a significant amount of anti-sociopathic kind of thinking (R 644). The antisocial personality was explored on cross-examination (R 710-12). The language cited by DeAngelo as error occurred on cross exam. What DeAngelo does not cite is the language which precedes the mention of remorse which shows it was Dr. Berland who first started talking about DeAngelo as being a person who doesn't "feel the need to follow the rules and laws of society. When he wants things, he's going to have to want to get his way without benefit of his rules at times" (R 727). The state did not initiate the discussion regarding remorse, nor did the prosecutor ever say "remorse". When questioned about DeAngelo's antisocial characteristics, it was Dr. Berland who first mentioned remorse and said he didn't assess that area. The only questions regarded whether remorse was an aspect of a person's psychological make-up. The questions then turned to whether antisocial people have little concern for others or the rules and whether DeAngelo had an antisocial personality (R 727-

28). There was no direct questioning regarding whether DeAngelo felt remorse. The theme of the questioning was whether DeAngelo had an antisocial personality. Dr. Berland was a defense witness, and any questioning by the prosecutor was in rebuttal to direct or redirect exam after the defense opened the door to this line of questioning. See, Hodges v. State, 17 F.L.W. S74, 75 (Fla. Jan. 23, 1992); Lucas v. State, 568 So.2d 18, 21 (Fla. 1990); Dragovich v. State, 492 So.2d 350 (Fla. 1986).

Furthermore, Dr. Berland diagnosed DeAngelo as having an antisocial personality. Dr. Berland referred to the DSM III (Diagnostic and Statistic Manual of Mental Disorders) in his discussion (R 682, 692, 693). The diagnostic criteria for antisocial personality disorder in the DSM III includes lack of remorse. Diagnosis and Statistic Manual of Mental Disorders, Third Edition - Revised, 1987, p. 346. Therefore, even though the prosecutor did not specifically question the doctor about lack of remorse, the doctor had opened the door for him to do so. Any testimony regarding lack of remorse was invited. See, Cruse v. State, 588 So.2d 983, 991 (Fla. 1991).

DeAngelo's allegations based on Elledge v. State, 346 So.2d 998 (Fla. 1977) that evidence of antisocial personality is impermissible since it is a nonstatutory aggravating factor, are unavailing since it was the defense that first introduced this evidence. The prosecutor's cross-examination on the subject was invited. Furthermore, Elledge had nothing to do with introduction of evidence of an antisocial personality but rather involved whether a conviction was "prior" for the purpose of admitting it as an aggravating circumstance.

Error, if any, was harmless in light of the fact it was Dr. Berland, the defense witness, who categorized DeAngelo as antisocial and lack of remorse is a characteristic of that diagnosis. See, Randolph v. State, 562 So.2d 331, 338 (Fla. 1990); State v. DiGuilio, 491 So.2d 1129 (Fla. 1987). Lack of remorse was not a part of any finding by the trial court and did not affect the death sentence. See, Pope v. State, 441 So.2d 1073 (Fla. 1983). See also, Menendez v. State, 368 So.2d 1278, n. 12 (Fla. 1979) (trial court found lack of remorse as aggravating factor). Jones v. State, 569 So.2d 1234 (Fla. 1990) is distinguishable. In Jones, the state not only called a law enforcement officer for the express purpose of testifying the defendant showed no remorse, but the prosecutor directly commented on lack of remorse. Here, any inference of lack of remorse did not rise to the level of specificity required to warrant resentencing. See, Sochor v. State, 580 So.2d 595, 602 (Fla. 1991). Viewed in the context of Dr. Berland's testimony, any error was harmless. See, Sireci v. State, 587 So.2d 450, 454 (Fla. 1991); Valle v. State, 581 So.2d 40, 46 (Fla. 1991).

POINT III

THE TRIAL COURT DID NOT ERR IN INSTRUCTING ON HEINOUS, ATROCIOUS AND CRUEL OR COLD, CALCULATED AND PREMEDITATED, OR IN DENYING SPECIAL JURY INSTRUCTIONS, AND THE INSTRUCTIONS ON HEINOUS, ATROCIOUS AND CRUEL AND COLD, CALCULATED AND PREMEDITATED ARE NOT UNCONSTITUTIONALLY VAGUE.

DeAngelo claims the trial court erred in instructing the jury on the aggravating circumstances of heinous, atrocious and cruel since the trial judge ultimately did not find this aggravating circumstance. He also claims cold, calculated and premeditated was not established so the trial judge erred in instructing on that aggravating circumstance. DeAngelo argues the standard instruction on heinous, atrocious and cruel is unconstitutionally vague. Finally, he claims the trial court erred in rejecting specially requested instructions on cold, calculated and premeditated and heinous, atrocious and cruel.

There was no objection to the instructions and the issue is waived. Castor v. State, 365 So.2d 701 (Fla. 1978).

This aggravating circumstance of cold, calculated and premeditated was supported by the evidence and the instruction was proper (See Point I). The aggravating circumstance of heinous, atrocious and cruel was established by the evidence and should have been found by the trial court (See cross appeal).

Even though heinous, atrocious and cruel was not found by the trial court it was not error to instruct the jury on it. Evidence of this factor was presented at trial, and a trial court is required to instruct on all aggravating and mitigating factors

an which evidence is presented. Bowden v. State, 588 So.2d 225 (Fla. 1991); Stewart v. State, 558 So.2d 416 (Fla. 1990). The evidence was sufficient to present a jury question on heinous, atrocious or cruel. Haliburton v. State, 561 So.2d 248 (Fla. 1990).

The reason the instruction on heinous, atrocious and cruel was error in Jones v. State, 569 So.2d 1234 (Fla. 1990) was because there was no evidentiary support for the instruction and there was evidence improperly presented regarding sexual battery on the corpse. Id. at 1238. This court explained that in many cases the fact the trial court did not make a factual finding of the factor in his sentencing order would obviate any error. Id. at 1238. This court also found the error not harmless in Omelus v. State, 584 So.2d 563 (Fla. 1991), because the state emphasized heinous, atrocious and cruel during the penalty phase. In fact the only state witness at Omelus' penalty phase was the medical examiner and the prosecutor vigorously argued the details. Id. at 566-67. In the present case, the prosecutor touched on heinous, atrocious and cruel but did not overemphasize it (R 740-41). His argument basically restated the facts. Defense counsel argued the murder was not heinaus, atrocious and cruel because the victim was asleep and stoned (R 764-65). The defense argued the victim could have been awake as little as thirty seconds (R 765). Error, if any, was harmless. State v. DiGuilio, 491 So.2d 1129 (Fla. 1987).

Unconstitutionally Vague Instructions

This issue has been repeatedly rejected and should be rejected in this case. See, Smalley v. State, 546 So.2d 720 (Fla. 1989); Brown v. State, 565 So.2d 304 (Fla. 1990); Occhicone v. State, 570 So.2d 902 (Fla. 1990); Beltran-Lopez v. State, 583 So.2d 1030 (Fla. 1991); Bruno v. State, 574 So.2d 76 (Fla. 1991); Robinson v. State, 574 So.2d 108 (Fla. 1991); Sanchez-Velasco v. State, 570 So.2d 908 (Fla. 1990). In any case, the trial court did not find the murder was heinous, atrocious and cruel so any challenge to the validity of that factor is inappropriate. See, Jones v. Dugger, 533 So.2d 290, 293 (Fla. 1988); Daugherty v. State, 533 So.2d 287, 288 (Fla. 1988).

Specially Requested Instructions

The trial judge reviewed each requested instruction and denied each one individually (R 734-736). This court has consistently held the standard instructions are adequate and a trial judge does not err in rejecting requested instructions. See, Dougan v. State, 17 F.L.W. S10, 11 (Fla. Jan. 2, 1992)(standard instruction on nonstatutory mitigating evidence); Randolph v. State, 562 So.2d 331 (Fla. 1990)(instruct separately an nonstatutory circumstances); Mendyk v. State, 545 So.2d 846, 849 (Fla. 1989)(doubling of aggravating circumstances, death sentence only for the most aggravated crimes); Henry v. State, 586 So.2d 1033, 1038 (Fla. 1991); Sochor v. State, 580 So.2d 595 n. 10 (Fla. 1991); Robinson v. State, 574 So.2d 108 n. 7 (Fla. 1991)(burden shifting, doubling, consideration of listed aggravating circumstances, burden of proof on aggravating circumstances). DeAngelo has failed to show the trial judge

abused his discretion. See, Mendyk v. State, 545 So.2d 846 (Fla. 1989).

POINT IV

THE TRIAL COURT DID NOT ERR IN DENYING DEANGELO'S MOTION FOR JUDGMENT OF ACQUITTAL.

DeAngelo claims the trial court erred in denying the motion for judgment of acquittal because the state failed to prove premeditation. DeAngelo recognizes that premeditation may be formed in a moment and need only exist for such time as will allow the accused to be conscious of the nature and probable result of the act. Asay v. State, 580 So.2d 610 (Fla. 1991). He also recognizes the issue is a question of fact for the jury which may be established by circumstantial evidence. Wilson v. State, 493 So.2d 1019, 1021 (Fla. 1986). See also, Sireci v. State, 399 So.2d 964 (Fla. 1981).

The state presented evidence DeAngelo put a pair of socks on his hands and went to strangle Mary one week before the murder but backed out. The night of the murder DeAngelo got a pair of socks from his bedroom then strangled the victim. The medical examiner testified it took him seven to ten minutes to kill Mary. This court discussed the issue of premeditation in Holton v. State, 573 So.2d 284, 289 (Fla. 1990), stating that if there is substantial competent evidence to support a jury verdict it will not be reversed. (The victim in Holton was Strangled with a ligature as was Mary Price). This court has held that the circumstantial evidence standard does not require the jury to believe the defense version of the facts on which the state has produced conflicting evidence. Id. at 290. DeAngelo's account that he didn't know what happened was totally unbelievable in

light of the testimony from Joy DeAngelo and the medical examiner. See, Taylor v. State, 583 So.2d 323, 328-29 (Fla. 1991). In the present case, as in Holton, there was competent substantial evidence to support the jury verdict.

The trial court did not err in denying the judgment of acquittal. A court should not grant a motion of judgment *of* acquittal unless there is no view of the evidence the jury might take favorable to the opposite party that can be sustained under the law. Taylor v. State, 583 So.2d 323, 328 (Fla. 1991).

POINT V

THE FLORIDA CAPITAL SENTENCING STATUTE IS CONSTITUTIONAL AND THE TRIAL COURT DID NOT ERR IN DENYING PRETRIAL MOTIONS ATTACKING THE CONSTITUTIONALITY OF THE FLORIDA STATUTE.

DeAngelo raises constitutional claims that have been decided adversely to DeAngelo's contentions and a similar result is mandated here. See, Hayes v. State, 581 So.2d 121 (Fla. 1991); Hitchcock v. State, 578 So.2d 685 (Fla. 1990); Young v. State, 579 So.2d 721 (Fla. 1991); Gunsby v. State, 574 So.2d 1085 (Fla. 1991); VanPoyck v. State, 564 So.2d 1066 (Fla. 1990); Sochor v. State, 580 So.2d 595 (Fla. 1991); Robinson v. State, 574 So.2d 108 (Fla. 1991); Henry v. State, 586 So.2d 1033 (Fla. 1991).

ISSUE ON CROSS-APPEAL

THE TRIAL COURT ERRED IN FAILING TO FIND THE AGGRAVATING CIRCUMSTANCES OF HEINOUS ATROCIOUS AND CRUEL.

The trial court rejected the aggravating circumstances of heinous, atrocious and cruel stating:

> To determine whether this case conforms to the criteria promulgated by our Florida Supreme Court this Court has reviewed in detail the expert testimony of Jesse C. Giles, M.D. an Orange County Medical Examiner engaged in the practice of forensic pathology. Dr. Giles' testified that he visited the scene of the homicide and carefully examined the trailer, the body, how the body was situated within the sleeping bag as well as examined the decedent for any external marks, the fingernails, the hands, the hair and the clothing. Basically, the examination disclosed obvious ligature marks on both sides of the neck of the decedent. He also observed what he characterized as petechial hemorrhages about the face, eyes and mucus membranes of the mouth and some hemorrhaging from the ears and nose. The doctor also observed lacerations on each side of her forehead, accompanied by a deep bruise on the skull. There were also bruises observed on the left interior thigh. The doctor testified that the cause of the death was asphyxiation due to combined manual and ligature strangulation. Dr. Giles opined that the ligature could have been wrapped around the victim's neck and then twisted or tightened by hand in order to affect increased pressure around the throat.
>
> Toxicology examination revealed the presence of cocaine or its metabolites. There was, however, evidence of marijuana ingestion. The doctor testified that the level of marijuana in the decedent's system was approximately 113 anagrams per milliliter. Generally speaking 90 anagrams per milliliter is considered sufficient to create a "high". He did testify, however, that the effect of marijuana is variable and is dependent upon the person's expectations, mood and past experience with the drug. Further, the testimony of Dr. Giles reveals that it would

> take and most probably did take between five to seven minutes of ligature pressure to effect the death of Mary Anne Price.
>
> Upon cross examination, Dr. Giles testified he found no defensive wounds on the body of Mary Anne Price. Further, he found no physical evidence of any struggle whatsoever at the scene. In response to a defense question as to whether Ms. Price was conscious during this ordeal the doctor testified that it would depend upon how much pressure was applied by either the hand, or the ligature or both. He further stated that it was possible that she was unconscious because of the blow to the head. Of further significance to the Court is the fact that his homicide took place within the relatively small mobile home. No sounds of struggle were heard, nor were any screams heard by either Joy DeAngelo or any of the neighbors.
>
> It is the Court's opinion, based upon a thorough and complete review of the photographs and the testimony of the Medical Examiner that the murder of Mary Anne Price was not especially heinous, atrocious or cruel. The Court is convinced that the State of Florida has failed to prove beyond a reasonable doubt that the crime was heinous, atrocious or cruel. There is no evidence to support a struggle; no testimony with respect to any scream from the victim and there is no evidence whatsoever of any "defensive type" wounds upon the body of Mary Anne Price. There was even a lack of skin or fiber located by the police beneath the fingernails of Mary Anne Price. This Court finds that the State of Florida has failed to prove that the victim was conscious during this terrible ordeal. The issue of the consciousness vel non is buttressed by the equivocation in the testimony of Dr. Giles. Therefore, the State of Florida has failed to prove, beyond a reasonable doubt, the existence of this aggravating circumstance.

(R 1136-39).

The trial judge bases his findings on the fact Joy heard no screams yet ignores the fact DeAngelo said he and the victim were yelling loudly and Joy failed to hear this either (R 336, 401).

The trial judge also fails to account for the fact the victim's arms were inside the sleeping bag thus negating the possibility of scratching or defensive wounde. The trial judge further failed to explain how the absence of defensive wounds in a strangling situation is significant. The judge's conclusion Mary was rendered unconscious due to a blow to the head is contradicted by DeAngelo's statement in which he says he slapped her one time (R 402). The trial judge also misconstrued Dr. Giles' testimony which was quite clear a vicitm woudl not lose consciousness for five minutes and that Mary was rendered unconscious by the blow was only "possible." The only common sense conclusion is that Mary Price was fully conscious and aware of her impending death, sustained bruises on the extremities and face during the struggle and died a horrible death by asphyxiation which lasted seven to ten minutes. See, Gilliam v. State, 582 So.2d 610, 612 (Fla. 1991).

According to this court's precedent, the heinous, atrocious and cruel factor should have been applied to this murder. See, Happ v. State, 16 F.L.W. S68 (Fla. Jan. 23, 1992) (victim strangled with a pair of stretch pants and had suffered 10-20 blows to the head); Hitchcock v. State, 578 So.2d 685 (Fla. 1990) (defendant kept choking victim and hitting her; strangulations are nearly *per se* heinous); Sochor v. State, 580 So.2d 595, 603 (Fla. 1991) (it can be inferred that strangulation, when perpetrated upon a conscious victim, involves foreknowledge of death, extreme anxiety and fear, and that this method of killing is one to which the factor of heinousness is applicable); Doyle

v. State, 460 So.2d 353, 357 (Fla. 1984) (murder by strangulation has consistently been found to be heinous, atrocious and cruel because of nature of suffering imposed and the awareness of impending death). The trial court erred in rejecting this aggravating circumstance.

CONCLUSION

Based on the arguments and authorities presented herein, Appellee respectfully prays this honorable court affirm the judgment and sentence of the trial court in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Answer Brief of Appellee has been furnished by hand delivery to Christopher S. Quarles, Assistant Public Defender, 112-A Orange Avenue, Daytona Beach, Florida 32114, via his basket at the Fifth District Court of Appeal, this 27 day of **February, 1992.**

Barbara C Davis

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