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IN THE SUPREME COURT OF FLORIDA

ROBERT LEE LARKINS,

Appellant,

v. Case No. 78,866

STATE OF FLORIDA,

Appellee.

BRIEF OF THE APPELLEE

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STATEMENT OF THE CASE AND FACTS

Appellant Larkins was charged by indictment with first degree murder and armed robbery (R 1). Trial by jury resulted in guilty verdicts (R 98 - 99). Following a penalty phase proceeding the jury returned an advisory recommendation of death by a 10 to 2 vote (R 135).

At trial the state introduced the testimony of Arnold Lanier, Steve Shumark and Lori Fite regarding the discovery of the murder victim at the Circle K Store and the crime scene (R 760 - 819). The deposition of Dr. Melamud was read to the jury by an agreement (R 830 - 34). Dr. Melamud performed an autopsy on Faith Nicholas. She had been shot under the right shoulder. The bullet went through the right lung, through the back wall of the aorta, through the left lung and stuck in the chest wall. The wound caused massive bleeding and death (R 833).

Miguel Adama found the cash register which had been removed from the Circle K Store in an alleyway outside his backyard about sixty yards from the store (R 836 - 38). David Smalley found a .22 rifle outside the house on Seller Street and turned it over to Officer Selph (R 842 - 44).

Officer Clyde Hall testified that appellant voluntarily came to the police station and was given Miranda rights. He gave consent to search his house (R 848 - 50). Glenella George, district manager of the Circle K convenience stores, testified that Roberta Faith Nicolas was an employee (R 862). When George arrived at the store the cash register was missing. The witness

explained that the cash register had a bait clip -- when money is pulled from it, it would automatically set off a 35 millimeter camera. The camera would not be activated if the cash register were unplugged and removed (R 863 - 65). There was still money in the cash register recovered (A secret lever underneath the cash register opens the register if the electricity goes off) (R 866 - 67).

A trail of dimes was found in the alleyway north of the Circle K Store (R 873). Ballistic expert Hall identified the bullet from the victim; it came from the recovered rifle (R 904).

Debbie Santos, a customer at the Circle K store the night of the murder and robbery, testified that she knew the appellant and had talked to him before so that she recognized appellant entering the store even though he wore tape on his face. Larkins had a rifle (R 922 - 923). He aimed the rifle at the victim and demanded money; then he shot her (R 924 - 25). Santos' son began crying and she got down and hugged him. Appellant went to where the cash register was; then he backed up to leave the store (R 926 - 28). She was scared to return to her home because appellant knew where she lived (R 933). She went to the police station and identified Larkins' voice in another room. The next day she returned to the police and told them (R 935 - 36).

Thomas (Nukie) Gibson identified state exhibit 20 as his .22 rifle which he gave to appellant because Gibson did not want his probation officer to learn about, prior to the Circle K robbery (R 961 - 63). After the robbery he told Officer Hall that

Larkins had his gun. Larkins did not return the gun to Gibson; he told the witness it's best to stay where it's at since he didn't know if it was used in the robbery. Larkins instead offered to give him a new weapon. Gibson did not locate the gun when he went to look for it (R 964 -67).

Ronnie Baker saw appellant the night of the murder and saw Gibson hand him the short-handled rifle (R 983 - 85). Charles Baker saw appellant with a gun (R 1014). Rickey Blandon told appellant a woman was killed at the Circle K and appellant said they're going to think he did it and give him the electric chair (R 1031). Marvin Simmons had a conversation with appellant after the robbery. When Simmons suggested more than one person must have been involved to carry off a heavy cash register, appellant suggested that was not so since they are made of light heavy-duty plastic and it might take only one person. Simmons asked appellant if he committed the crime and Larkins did not answer the question. Debbie Santos who lived nearby was acting nervous and afraid (R 1047 - 1049).

Ovieda Berrien saw appellant the night of the murder; he asked her to call his sister for money for a bus ticket. He claimed police were harassing him. The police had not come down to her house to question Larkins at that time. Later, Officer Hall came to talk to appellant (R 1060 - 61). The next day he told her he pawned the gun in Ft. Meade and had to get it before the police did. He also said Nukie talked too much (R 1061). Larkins stated Nukie wanted his gun back and he wasn't worried about his shoes since they had already checked them (R 1063).

Timothy Burkes, while in the Hardee County jail, testified that Larkins admitted shooting the lady while she was pleading and that the police had obtained the wrong shoes. Larkins said the gun came from Nukie Gibson. He also said he knew the female witness to the crime (R 1105 - 06).

Officer Herschel Selph testified that Debbie Santos was upset and nervous at the police station (R 1128). Selph recovered the murder weapon located by Mr. Smedley (R 1129).

Defense witness Reuben Hernandez testified; he admitted on cross examination he did not know Larkins prior to the incident (R 1161) and is now under a psychiatrist's care following this incident (R 1162). He thought the victim was shot twice (R 1171).

Following the jury's guilty verdicts and recommendation of a death sentence, the trial court agreed, finding two aggravators (prior felony conviction and pecuniary gain) and little mitigation (R 155 - 156).

Larkins now appeals.

SUMMARY OF THE ARGUMENT

I. A remand is not necessary to "preserve" jury selection issues for collateral review. Appellant concedes that nothing has been preserved on this score for direct review so no relief is appropriate.

II. There was sufficient evidence to sustain a verdict of guilty. This is not a circumstantial evidence case but a direct evidence case wherein appellant was identified by eyewitness and earwitness, Debbie Santos. This Court should not act as a jury to disbelieve witnesses, especially those whom it has not seen or heard.

III. There is no fundamental error present on the surgical gloves issue. The trial court granted the defense request to withdraw the exhibit and to instruct the jury not to consider it.

IV. There was no reversible error in the admission into evidence of a photograph and smock as they were relevant in demonstrating the wound and cause of death.

V. No reversible error appears in the court's denial of impeachment of Ronnie and Charles Baker. The proffered answers to the questions shows that the testimony, if allowed, would have been more beneficial to the state and detrimental to the defense. Any error is harmless.

VI. Appellant did not interpose a hearsay objection to the testimony of witness Barrien and the claim is not preserved for appellate review.

VII. The trial judge's order adequately explains the reasons for not finding mitigation or concluding that what was proffered was insubstantial.

VIII. The trial court's sentencing order was adequate and in substantial compliance with Campbell v. State, 571 So. 2d 415 (Fla. 1990).

IX. The pecuniary gain aggravating factor was established since the evidence showed Larkins killed the convenience store clerk in the effort to steal the cash register in her custody and its contents.

X. The death sentence is not disproportionate. Two valid aggravators are present and this is not a case involving domestic violence, heat of passion or severe mental disturbance.

XI. No one denigrated the role of the jury and the issue has not been preserved for appellate review by appropriate objection below.

XII. Appellant offers no specific argument and, consequently, the claim is procedurally barred. His contentions are meritless.

ARGUMENT

ISSUE I

WHETHER A REMAND IS NECESSARY BECAUSE JURY SELECTION ISSUES WERE NOT PRESERVED.

As appellee understands Mr. Larkin's argument, appellate counsel requests a remand for an evidentiary hearing "to expressly preserve them for purposes of a Motion under rule 3.850 Florida Rules of Criminal Procedure" (Brief, p. 31). The unhappiness seems to be that some jurors were challenged peremptorily rather than for cause (Lanier, Porter and Ciker), others were not challenged for cause or peremptorily (Roberts, Thomas and Schwartz); trial defense used all ten of his peremptory challenges but did not ask for additional peremptories or specify those he would excuse if given additional strikes -- see Pentecost v. State, 545 So. 2d 661 (Fla. 1989). A concern is expressed that the prosecutor exercised a challenge for cause to a prospective black juror (Romeo).[1]

In Wainwright v. Sykes, 433 U.S. 72, 53 L.Ed.2d 594 (1977), the Supreme Court spoke wistfully of the "perception of the trial of a criminal case in state court as a decisive and portentous

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[1] The record reflects that the prosecutor exercised a racially-neutral challenge for cause because Romeo had the same information that jurors Keene, Albritton and Evans had about the prior record whom defense counsel had explained should not be qualified and the prosecutor had just finished prosecuting her brother for felonies and was currently prosecuting her cousin for felonies. Defense counsel when given the opportunity stated he would not argue to the contrary her excusal (R 582 - 583).

event", that the trial be "the main event, so to speak rather than a tryout on the road for what will later be the determinative federal habeas hearing" 53 L.Ed.2d at 594. Of course, capital litigation has demonstrated that the foregoing hope is not the reality -- which helps explain that appellant, after acknowledging that asserted errors in the jury selection process "were not adequately preserved for appeal" (Brief, p. 30) nonetheless seeks to "preserve them for purposes of a motion under rule 3.850" (Brief p. 31).

The short answer to all of this is that the admission of the procedural default by failure to complain below should preclude appellate review on the substantive issue. Steinhorst v. State, 412 So. 2d 332 (Fla. 1982). The reasons why trial counsel acted as he did in the jury selection process are simply not relevant in this proceeding. This Court well knows it is not as convenient as it seems to remand for a partial evidentiary hearing on a claim of ineffective assistance of trial counsel (if that is what is being suggested by appellate counsel sub judice) during the pendency of an appeal. See Nixon v. State, 527 So. 2d 1336, 1340 (Fla. 1990). (We recognize the confusion resulting from our remand for these atypical proceedings and decline to dispose of this claim on the present state of the record which we view as less than complete).

In summary, the substantive claim of jury selection error has not been preserved for appellate review and is, therefore, procedurally barred. Should appellant in the future raise a

claim of ineffective assistance of trial counsel, the 3.850 motion to vacate vehicle is available.

ISSUE II

WHETHER THERE WAS SUFFICIENT EVIDENCE TO SUSTAIN A VERDICT OF GUILTY.

Appellant has cited a number of decisions by this Court which relate to the circumstantial evidence standard. In Cochran v. State, 547 So. 2d 928, 930 (Fla. 1989), this Court opined:

> [1] Appellant correctly points out that in order to prove a fact by circumstantial evidence, the evidence must be inconsistent with any reasonable hypothesis of innocence. *McArthur v. State*, 351 so. 2d 972, 976 n. 12 (Fla. 1977). Where the element of premeditation is sought to be established by circumstantial evidence, the evidence relied upon by the state must be inconsistent with every other reasonable inference. *Wilson v. State*, 493 So.2d 1019 (Fla. 1986); *Hall v. State*, 403 So. 2d 1321 (Fla. 1981).
>
> [2, 3] But the question of whether the evidence fails to exclude all reasonable hypotheses of innocence is for the jury to determine, and where there is substantial, competent evidence to support the jury verdict, the verdict will not be reversed on appeal. *Heiney v. State*, 447 So. 2d 210, 212 (Fla.), *cert. denied*, 469 U.S. 920, 105 S.Ct. 303, 83 L.Ed.2d 237 (1984); *Williams v. State*, 437 So.2d 133 (Fla. 1983), *cert. denied*, 466 U.S. 909, 104 S.Ct. 1690, 80 L.Ed.2d 164 (1984); *Rose v. State*, 425 So. 2d 521 (Fla. 1982), *cert. denied*, 461 U.S. 909, 103 S.Ct. 1883, 76 L.Ed.2d 812 (1983). The circumstantial evidence standard does not require the jury to believe the defense version of facts on which the state has produced conflicting evidence, and the state, as appellee, is entitled to a view of any conflicting evidence in the light most favorable to the jury's verdict. *Buenoano v. State*, 478 So. 2d 387 (Fla. 1st DCA 1985), *review dismissed*, 504 So. 2d 762 (Fla. 1987).

Appellee has no quarrel with the principles discussed in Cochran. The significant point that must be made is that the

instant case is not a circumstantial evidence case. Rather, appellant was identified in court as the perpetrator by an eyewitness to the crime Debbie Santos -- who knew the defendant -- and was able to identify him both by seeing him and hearing his voice (R 923 - 925, 935).

Essentially, appellant now asks this Court to substitute itself for the jury and to disbelieve Debbie Santos. This Court should not do so. As poetically observed in Creamer v. Bivert, 214 Mo. 473, 113 S.W. 1118, 1120 - 1121 (Mo. 1908):

> "We well know there are things of pith that cannot be preserved in or shown by the written page of a bill of exceptions. Truth does not always stalk boldly forth naked, but modest withal, in a printed abstract in a court of last resort. She oft hides in nooks and crannies visible only to the mind's eye of the judge who tries the case. To him appears the furtive glance, the blush of conscious shame, the hesitation, the sincere or the flippant or sneering tone, the heat, the calmness, the yawn, the sigh, the candor or lack of it, the scant or full realization of the solemnity of an oath, the carriage and mien. The brazen face of the liar, the glibness of the schooled witness in reciting a lesson, or the itching overeagerness of the swift witness, as well as honest face of the truthful one, are alone seen by him. In short, one witness, may give testimony that reads in print, here, as if falling from the lips of an angel of light, and yet not a soul who heard it, nisi, believed a word of it; and another witness may testify so that it reads brokenly and obscurely in print, and yet there was that about the witness that carried conviction of truth to every soul who heard him testify."

See also Tibbs v. State, 397 So. 2d 1120 (Fla. 1981), affirmed Tibbs v. Florida, 457 U.S. 31, 72 L.Ed.2d 652 (1982):

> [4, 5] As a general proposition, an appellate court should not retry a case or reweigh conflicting evidence submitted to a jury or other trier of fact. Rather, the concern on appeal must be whether, after all conflicts in the evidence and all reasonable inferences therefrom have been resolved in favor of the verdict on appeal, there is substantial, competent evidence to support the verdict and judgment. Legal sufficiency alone, as opposed to evidentiary weight, is the appropriate concern of an appellate tribunal.

(text at 1123)

Accord, Demps v. State, 462 So. 2d 1074 (Fla. 1984); Sireci v. State, 587 So. 2d 450 (Fla. 1991).

In a different context the United States Supreme Court has similarly identified the superior posture available to a trial court in Wainwright v. Witt, 469 U.S. 412, 434, 83 L.Ed.2d 841, 858, 105 S.Ct. 844 (1985):

> As we stated in Marshall v. Lonberger, supra, at 434, 74 L.Ed.2d 646, 103 S.Ct. 843:
>
> > "As was aptly stated by the New York Court of Appeals, although in a case of rather different substantive nature: 'Face to face with living witnesses the original trier of the facts holds a position of advantage form which appellate judges are excluded. In doubtful cases the exercise of his power of observation often proves the most accurate method of ascertaining the truth . . . How can we say the judge is wrong? We never saw the witnesses . . . .. To the sophistication and sagacity of the trial judge the law confides the duty of appraisal.' Boyd v. Boyd, 252 NY 422, 429, 169 NE 632, 634."

To the extent appellant seeks to rely on defense counsel's closing argument below, appellee, in the interest of brevity will rely on the prosecutor's closing and rebuttal arguments which emphasize that the state's witnesses should be believed and that Larkins' proposed alternative argument was unworthy of belief (R 1190 - 1204; R 1242 - 1259).

Appellant continues, after rejection of his theory by the fact-finder to hypothesize that the real perpetrator of the crime was "Nukie" (Thomas Gibson). In addition to requiring this Court to disbelieve the testimony of eyewitness Debbie Santos, appellant's scenario requires an acceptance of the notion that Gibson attempted to rob the convenience store although he was already carrying $4,200 to $4,500 in cash (R 976), ignore the testimony of Ovieda Berrien that appellant was asking for money to get out of town following the Circle K shooting (R 1060), reject the testimony of Timothy Burkes who stated that appellant admitted shooting the victim and was unconcerned that the police had the wrong shoes (R 1105), forget Blandon's testimony that Larkins expressed his concern at getting the electric chair (R 1031) as well as the testimony of all those who saw appellant carrying the gun that night.

Appellant's claim is meritless.

ISSUE III

WHETHER THE INTRODUCTION, WITHDRAWAL AND ARGUMENT ON SURGICAL GLOVES CONSTITUTES FUNDAMENTAL ERROR.

Surgical gloves, Exhibit 26, were admitted into evidence during the testimony of deputy Shumard (R 799 - 802). Thereafter, following the testimony of Officer Hall the defense requested that Exhibit 26 be removed from evidence and the jury instructed to disregard any testimony on it. The prosecutor did not object; he explained that Shumard testified he got the gloves from Hall. Hall said he didn't seize the gloves and Hall returned to his office and learned he had forgotten about the gloves -- he did in fact seize them. The prosecutor chose not to recall Hall (R 1178). The defense said a written instruction was not necessary but the jury should be told to disregard it and testimony about it. The court agreed to do so (R 1177). The court then informed the jury:

> THE COURT: Ladies and gentlemen, you will remember at the early part of my preliminary instructions I told you that it may be necessary from time to time during the course of this trial for me to tell you that you are to disregard a particular matter that has occurred during the course of the trial. Well, I'm getting ready to do that right now.
>
> In reference to exhibit number twenty-six, which were a pair of surgical gloves that were introduced into evidence, I have now excluded those gloves from evidence and from your consideration. And you are to disregard any testimony regarding that particular exhibit, and you say may not use that exhibit or any testimony relating to that exhibit in your deliberations. (R 1189)

Subsequently, the <u>defense</u> during closing argument reminded the jury of that which they were instructed to forget:

> "Now, how are you going to go about doing that is up to each and every one of you individually. But you will remember, and I go over this because I have to, the bell was rung; you heard it, and I have got to talk about it. Then I'm going to tell you to follow the Judge's instructions please.
>
> You heard there was a pair of rubber gloves in there. But you clearly heard the testimony under oath of Officer Hall that: I did not get any rubber gloves from Mr. Larkin. You heard that.
>
> Those gloves are not to be associated, and His Honor has instructed you, with this case. Disregard it. Don't consider it. You're going to have that temptation in the back of your mind to say: Gosh; no wonder there's no fingerprint, he had gloves. That's not true.
>
> What I'm saying is it has been excluded; it's not in evidence; they're not there; they're not associated with this trial, and you have to take it out of your mind.
>
> You've heard in fact the testimony of both witnesses who witnessed the robbery. Neither one identified any rubber gloves as being worn by anybody; being on the hands.
>
> Follow the judge's instructions; put it out of your mind. It was what I'm going to refer to as a mistake.

(R 1230 - 31)

In rebuttal, the state responded to the defense invitation:

> "Rubber gloves, you should disregard them. Detective Shumard testified who he got the rubber gloves from. Eddie Hall told you he couldn't remember. He said he did not remember getting those gloves and didn't remember --

MR. ALCOTT: Objection, Your Honor misquoting the evidence.

MR. HOUCHIN: Pardon me?

MR. ALCOTT: I would object to counsel misquoting the evidence.

MR. HOUCHIN: I apologize if I have misquoted. I ask the jury to rely upon their own memory.

THE COURT: All right. You may continue.

MR. HOUCHIN: My recollection is that Eddie Hall did not remember getting those gloves there. You rely upon your own memory. You may recollect something different."

(R 1244)

In State v. Belien, 379 So. 2d 446 (Fla. 3d DCA 1980), the Court opined that "gotcha" maneuvers will not be permitted to succeed in criminal any more than in civil litigation. The instant case is a clear example of the kind of sandbag tactic this Court has previously condemned in Castor v. State, 365 So. 2d 701 (Fla. 1978) and Clark v. State, 363 So. 2d 331 (Fla. 1978). Here, the trial court gave the defense exactly what it requested and the defense did not ask for further relief and complains now, having been unsuccessful in the tactic he suggested and urges fundamental error in the trial court's failure to declare an unrequested mistrial.[2] Appellant received the desired jury instruction, then chose to remind the jury about

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[2] And if the Court had done so he could argue that a mistrial was not necessary and that the double jeopardy clause precluded retrial.

something they were not to consider and concludes fundamental error was present. There is no fundamental error.

ISSUE IV

WHETHER IT WAS REVERSIBLE ERROR TO ADMIT A PHOTOGRAPH OF THE VICTIM AND A SMOCK.

The record reflects that the prosecutor asked for a court ruling on the admissibility of Exhibits 7 and 8 and he explained:

> MR. HOUCHIN: Your Honor, we would offer one or the other of those photographs, not both, to show the condition of the victim as she looked after the body was rolled over.
>
> We would offer those as evidence in support of what other anticipated evidence is going to show that the officers and the paramedics looked for a head wound due to the nature of the bleeding in this case and could not locate such a wound.
>
> We would offer them as evidence to support the medical examiner's testimony about the nature of the track of the bullet and how blood was found in the throat area of the victim and how it was consistent with the victim throwing up blood.
>
> We would offer those photographs in support -- or one of those photographs in support of the proposition that the victim did -- was in fact shot behind the cash register area, and then massive amounts of blood is coming out of the mouth and nose area due to the lung wound which she threw up on the floor as she staggered behind the counter and fell to her final resting position.
>
> We would suggest to the Court these are not autopsy photographs. The body has not been disturbed in any way by any medical procedures and that what is shown in the photograph is simply the handiwork of the defendant himself.

(R 785)

Over defense objection the trial court permitted the introduction of Exhibit 8, but not Exhibit 7 (R 787).[3] Witness Shumard then explained the photo depicted the body of the victim rolled over on her back; a large mass of blood was present on her front and head (R 788). He was not able to find any wounds to the head (R 789). The smock worn by the victim showed a hole in the right shoulder area consistent with the entry of a small caliber bullet. Such a projectile was recovered from the body (R 805 - 06). By agreement, Dr. Melamud's deposition was introduced into evidence; he explained the bullet struck under the right shoulder and explained its direction through the body (R 832). The instant exhibits were relevant as in Burns v. State, 609 So. 2d 600 (Fla. 1992).

And as this Court observed in Henderson v. State, 463 So. 2d 19, 200 (Fla. 1985):

> Persons accused of crimes can generally expect that any relevant evidence against them will be presented in court. The test of admissibility is relevancy. Adams v. State, 412 So. 2d 850 (Fla.), cert. denied, 459 U.S. 882, 103 S.Ct. 182, 74 L.Ed.2d 148 (1983); Straight v. State 397 So. 2d 903 (Fla.), cert. denied, 454 U.S. 1022, 102 S.Ct. 556, 70 L.Ed.2d 418 (1981). Those whose work products are murdered human beings should expect to be confronted by photographs of their accomplishments.

See also Mordenti v. State, 630 So. 2d 1080 (Fla. 1994).

Appellant's claim is meritless.

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[3] The court also permitted introduction of clothing worn by the victim including a smock (R 804 - 05).

ISSUE V

WHETHER IT WAS ERROR TO DENY APPELLANT THE RIGHT TO IMPEACH RONNIE AND CHARLES BAKER WITH PENDING CHARGES.

The record reflects that during the defense cross examination of Ronnie Baker, appellant sought to question the witness as to bias because at the time of the incident he had charges pending in Polk County (R 1002 - 1006). The court heard a proffer in which the witness testified that there were pending felony prosecutions at the time of the incident about which he was pending but that he had not admitted those offenses to the police and he did not feel he wanted to help police officers hoping that would help him (R 1006 - 1008). The court sustained the prosecutor's objection (R 1008).

Similarly during the testimony of Charles Baker, the defense sought to inquire about pending charges. On a proffer the witness explained that he furnished police this information even prior to charges filed against him and would testify the same even if called by the defense (R 1024 - 25).

Irrespective of whether the trial court made the correct ruling, it is abundantly clear from the proffered testimony that any error was harmless; if the jury heard the testimony it would have been more beneficial to the state and more damaging to the defense. State v. Diguilio, 491 So. 2d 1129 (Fla. 1986).

ISSUE VI

WHETHER INADMISSIBLE HEARSAY WAS INTRODUCED.

The following colloquy occurred during redirect examination of witness Ovieda Berrien:

> "Q. When you saw Robert wearing stone-washed jeans, is that before or after the robbery?
>
> A. After.
>
> Q. And when Eddie Hall came by and when the deputy sheriff came by asking about suspects, was that before or after Robert had asked you for money to get out of town ?
>
> A. The deputy sheriff came by first; Robert came by second, and Hall came by third.
>
> Q. Okay. Did Robert ask you for money to get out of town after the deputy sheriff started asking about a description of the person?
>
> A. Yes.
>
> Q. Did you hear anybody else asking about money about needing to get out of town besides Robert?
>
> A. No.
>
> Q. MR. ALCOTT: Objection to relevancy.
>
> A. THE COURT: Overruled.

(R 1072)(emphasis supplied)

Appellant did not object on hearsay grounds below; he objected on relevancy grounds and that objection was properly denied since it is unquestionably relevant if Larkins and no one else was seeking to get out of town following the instant murder. Appellant may not change the basis for an objection in the appellate court. This claim is procedurally barred. Steinhorst

v. State, 412 So. 2d 332 (Fla. 1982); Occhicone v. State, 570 So. 2d 902 (Fla. 1990).

ISSUE VII

WHETHER THE LOWER COURT FAILED TO FIND MITIGATING EVIDENCE.

Appellant next argues that the trial court failed to consider mitigating evidence presented. He contends the lower court's order reflects both a misconstruction of undisputed facts and a misapprehension of law. Larkins alludes to the trial judge's sentencing order treatment of Dr. Dee and complains that it is not clear whether the court was saying that Dee's testimony established a statutory mitigating circumstance and later the court says it was "substantially outweighed by either aggravating circumstance."

Appellee does not discern the confusion apparent to appellant. The initial paragraph on mitigating circumstance recites:

> "The trial jury was instructed to consider each of the statutory mitigating circumstances and all other non-statutory mitigating circumstances."

(R 156)

The sentencing order explaining Dr. Dee's testimony simply is first rejecting 921.141(6)(f) since Dee did not believe appellant lacked the capacity to appreciate the criminality of his act or to conform his conduct to the requirements of law (R 165), but that even in a light most favorable to the defendant, whatever (non-statutory mitigating) value it might have was substantially outweighed by each of the two aggravators.

Appellant complains that the trial court failed to find mental or emotional disturbance as a mitigating factor but the court was entitled to discredit it because the facts of the crime were inconsistent with Dr. Dee's views. The defense witness opined about Larkins' impulsivity and inappropriate response for example when children scream (R 1318); yet the evidence shows appellant planning the crime ahead of time by putting tape on his face and securing a rifle, approaching and leaving the scene so as not to be detected. And the child of witness Santos began crying after the shooting (R 926).

Even if the trial court erred in his sentencing order, the aggravating outweighed any mitigating. Wickham v. State, 593 So. 2d 191 (Fla. 1992); Schwab v. State, ___ So. 2d ___, 19 Fla. Law Weekly S 113, 114 (Fla. 1992).

Appellant also argues that the trial court erred in failing to find as non-statutory mitigating evidence that Larkins' prior conviction was "only" for manslaughter not murder, his difficulties in school and his age of thirty-eight years, etc. During the penalty phase testimony the state adduced from special deputy United States Marshall George Seper that in 1972 that Larkins shot and killed one victim and shot and wounded another. He also testified and exhibit 34 confirmed that Larkins was convicted of one count of manslaughter and one count of assault with malice (R 1300 - 04; see also R 155A). In light of these two offenses there would be no support for a finding of "mere manslaughter" mitigator.

Even Dr. Dee tended to discount his learning disabilities: "To characterize him as a slow learner would probably be inaccurate in a pedagogical or educational sense" (R 1322 - 23). With regard to age (38), this Court has held that age must be linked with some other factor such as immaturity or senility. Echols v. State, 484 So.2d 568, 575 (Fla. 1985). Neither such factor applies here.

With respect to the now-urged mitigator about drinking, appellee notes that defense counsel did not even argue that as a non-statutory mitigator to the jury (R 1332 - 35). Thus, he cannot now urge error here. Lucas v. State, 568 So. 2d 18, 24 (Fla. 1990) (Because nonstatutory mitigating evidence is so individualized the defense must share the burden and identify for the court the specific nonstatutory mitigating circumstances it is attempting to establish. This is not too much to ask if the court is to perform the meaningful analysis required in considering all the applicable aggravating and mitigating circumstances).

Appellant's claim is meritless.

ISSUE VIII

WHETHER THE TRIAL COURT'S SENTENCING ORDER IS INADEQUATE.

In its sentencing order the trial court declared:

"MITIGATING CIRCUMSTANCES

The trial jury was instructed to consider each of the statutory mitigating circumstances and all other non-statutory mitigating circumstances.

The defense presented the testimony of Dr. Henry L. Dee, a psychologist who has offered expert testimony in numerous proceedings in this circuit and throughout this country. In essence, Dr. Dee is of the opinion that the defendant suffers from organic brain damage and because of this condition, the stresses of the circumstances inside the Circle K during the commission of the robbery somehow caused, or contributed to causing, the defendant to fire his semi-automatic weapon at the victim, resulting in her death. However, Dr. Dee does not believe that this condition is of such a nature that the defendant lacked the capacity to appreciate the criminality of his act or to conform his conduct to the requirements of law.

Viewing Dr. Dee's testimony in the light most favorable to the defendant the Court finds and determines that this mitigating circumstance is substantially outweighed by either aggravating circumstances. Since no other mitigating circumstance can be gleaned from the record, the imposition of the death penalty is the appropriate sanction for the offense of First Degree Murder."

(R 156 - 157)

Appellant contends that the lower court's order did not comply with Campbell v. State, 571 So. 2d 415 (Fla. 1990). As the trial court addressed that which the defense argued at penalty phase (R 1332 - 1335), appellee submits that there has

been substantial compliance with Campbell. See Downs v. State, 572 So. 2d 895, 901 (Fla. 1990); Gilliam v. State, 582 So. 2d 610, 612 (Fla. 1991); Durocher v. State, 604 So. 2d 810 (Fla. 1992).

ISSUE IX

WHETHER THE PECUNIARY GAIN AGGRAVATOR WAS ESTABLISHED BEYOND A REASONABLE DOUBT.

Appellant argues that the state failed to establish that the killing was committed for pecuniary gain, F.S. 921.141(5)(f) because defense witness Dr. Henry Dee -- who only met Mr. Larkins two weeks earlier (R 1322) --- opined that he was irritable and impulsive. But Dr. Dee also acknowledged:

> "Q. Would the fact that the defendant when he committed this crime planned it out ahead of time in that he put tape on his face and secured a rifle; apparently approached and left the scene of the crime by a means so as not to be detected, not coming down the main road but coming through an alleyway, would that show that he basically planned the crime out and simply didn't react improperly to improper, or to a stimulus?
>
> A. That certainly would suggest it."

(R 1324)

Appellant relies on the testimony of inmate Burkes that Larkins told him he shot the lady . . . "not so much of her pleading but because of all the noise and he kept saying: Be quiet." (R 1105). While appellant chooses to interpret the shooting as a product of the stress of noise, it is also equally susceptible of the view that Larkins wanted to silence the victim whose pleading might bring others to her aid. Eyewitness Debbie Santos testified that appellant entered the store with a rifle, demanded the money "now" and then he shot the victim (R 923 - 24). After the shooting Santos' child started crying (R 926).

Appellant went to the cash register (R 927).[4] While appellant would understandably prefer to engage in revisionist history with an exculpatory statement to Burkes the fact finder need not blindly accept it.

Appellant's claim is meritless.

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[4] The cash register was removed from the premises and found abandoned in an alleyway.

ISSUE X

WHETHER DEATH IS DISPROPORTIONATE.

> "Appellant is a good man, except that sometimes he kills people."
>
> Fead v. State,. 512 So. 2d 176, 180 (Fla. 1987) (J. Grimes, concurring in part and dissenting in part).

The trial court found and Larkins does not challenge the aggravating factor of a prior conviction of a felony involving the use or threat of violence -- one count of manslaughter and one count of assault with intent to kill with malice aforethought (R 155a).

As the Court noted in Wickham v. State, 593 So. 2d 191, 194 (Fla. 1992), the instant case does not deal with domestic violence, heat of passion or persons who were severely mentally disturbed at the time of the murder. Even Dr. Dee admitted that appellant's condition "might affect" his ability to appreciate criminality of his conduct (R 1321, R 156).

With two valid aggravators and minimal mitigation the imposition of a sentence of death is not disproportionate.

ISSUE XI

WHETHER THE TRIAL COURT AND PROSECUTOR IMPROPERLY DENIGRATED THE SENTENCING ROLE OF THE JURY.

Appellant does not specify with precision where such error occurred but alludes to his statement of facts. If appellant is complaining about comments at R 230, 246 - 47, 454, 1298 - 99, 1339, suffice it to say there was no objection below and thus the claim has not been preserved for appellate review. Dugger v. Adams, 489 U.S. 401, 103 L.Ed.2d 435 (1989); King v. Dugger, 555 So. 2d 355 (Fla. 1990) (Claims such as Caldwell violations should be raised on appeal if preserved at trial); Provenzano v. Dugger, 561 So. 2d 541, 549 (Fla. 1990).

Additionally, and alternatively, the trial court's instruction at R 1339):

> "Now, ladies and gentlemen, your advisory verdict as to what sentence should be imposed on the defendant is entitled by law and will be given great weight by this Court in determining what sentence to impose in this case. It is only under rare circumstances the court would impose a sentence other than what you recommend."

is the antithesis of denigrating the jury role.

ISSUE XII

WHETHER THE TRIAL COURT ERRED IN DENYING APPELLANT'S "DEATH PENALTY MOTIONS".

Larkins contends without citing specifics that he asserted a number of claims in pretrial motions and reasserts them here. (Brief, pp. 44 - 45). That is insufficient and Larkins is procedurally barred.

In Duest v. Dugger, 555 So. 2d 849, 851 (Fla. 1991), this Court declared:

> "The purpose of an appellate brief is to present arguments in support of the points on appeal. Merely making reference to arguments below without further elucidation does not suffice to preserve issues and these claims are deemed to be waived."

Accord Kight v. Dugger, 574 So. 2d 1066, 1073 (Fla. 1990); Roberts v. State, 568 So. 2d 1255 (Fla. 1990); see also Rodriguez v. State, 502 So. 2d 18 (Fla. 1987); Polyglycoat Corp. v. Hirsch Distributors, Inc., 442 So. 2d 958 (Fla. 4th DCA 1983) (when points, positions, facts and supporting authorities are omitted from the brief, a court is entitled to believe that such are waived, abandoned, or deemed by counsel to be unworthy . . . it is not the function of the court to rebrief an appeal).

Appellant argues that the trial court should have assigned two counsel so that one attorney could valiantly argue that Larkins was not guilty and then second counsel, upon the jury's rejection of that thesis, could come to the forefront and admit the client was guilty but urge that the death penalty was not an appropriate sanction. The "I've lost credibility" wail is absurd

because even if there were a team of defense counsel, the jury is aware that they are a team at guilt and penalty phases and the credibility issue remains whenever a shift in emphasis occurs.

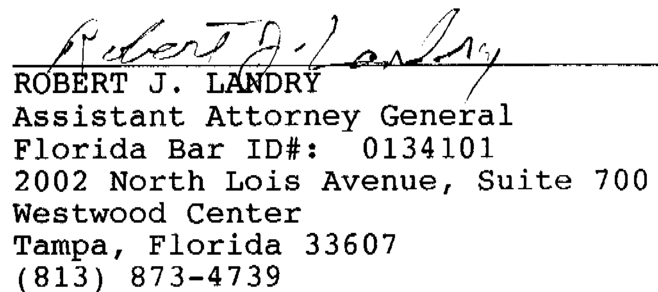
Appellant complains that there were not specific findings of fact made by the jury. None are required. Hildwin v. Florida, 490 US. 638, 104 L.Ed.2d 728 (1989).

CONCLUSION

Based on the foregoing arguments and authorities, the judgments and sentence of death should be affirmed.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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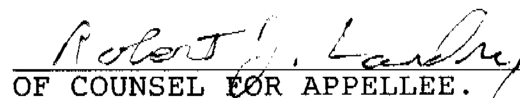
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Robert L. Doyel, Esq., Suite 102, P. O. Box 1476, Bartow, Florida 33830, this 22nd day of April, 1994.



OF COUNSEL FOR APPELLEE.