IN THE SUPREME COURT OF FLORIDA

JOHN RUTHELL HENRY,

Appellant,

v. Case No. 78,934

STATE OF FLORIDA,

Appellee.

BRIEF OF THE APPELLEE

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TABLE OF CONTENTS

PAGE NO.

TABLE OF CITATIONS

PAGE NO.

SUMMARY OF THE ARGUMENT

ISSUE I

The evidence presented at trial concerning Eugene's murder, including a detailed confession Henry gave to the police, was relevant and material and, therefore, was properly admitted by the trial court.

ISSUE II

The testimony of Deborah Fuller and Dr. Wood was properly admitted during the penalty phase because the defendant was provided the opportunity to rebut the evidence and confront the witnesses.

ISSUE III

There was sufficient evidence presented at trial to require the judge to give the instruction requested by the state. Accordingly, the trial court did not err in instructing the jury on this aggravating factor. Furthermore, even if the trial court did err in instructing the jury on this factor, the error was harmless in the instant case.

ISSUE IV

Appellant contends that the trial court erred by failing to consider all nonstatutory mitigating factors for which evidence was presented when it imposed its sentence of death. It is the state's contention that, when read in it's entirety, the sentencing order is clearly sufficient.

ISSUE V

Appellant urges that there were insufficient facts to warrant the trial court instructing the jury on the aggravating factor of especially heinous, atrocious, or cruel and, furthermore, that the trial court erred in finding this factor was established beyond a reasonable doubt. It is the state's contention that the evidence of the brutal stabbing murder of Suzannae Henry clearly supports the trial court's finding of especially heinous, atrocious, or cruel and that this finding should not be overturned.

ISSUE VI

Appellant's final argument concerns the proportionality of his sentence in light of other decisions examining the propriety of the death sentence on comparable facts. A review of the facts in the instant case and similar cases indicates that it is one of the most aggravated and unmitigated first degree murder cases for which the death penalty is appropriate.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED IN ALLOWING TESTIMONY CONCERNING THE CONTEMPORANEOUS HOMICIDE OF APPELLANT'S STEPSON.

Appellant contends that the trial court erred in admitting evidence that on the night of December 22, in addition to murdering Suzanne Henry, he also abducted and murdered her five-year-old son Eugene. Appellant contends that although this Court's previous opinion in the instant case specifically ruled that the evidence may be admissible as an integral part of the entire episode, the evidence should have been excluded because its probative value was outweighed by the potential prejudice to the defendant. Henry contends that the evidence was not relevant because there was no bona fide controversy over the substantive fact that the evidence of a collateral crime was submitted to prove. It is the state's position that the evidence presented at trial, including a detailed confession Henry gave to the police, was relevant and material and, therefore, was properly admitted by the trial court.

Witnesses testified that Henry and Suzanne were married at the time of the murder but Henry was living with another woman, Rosa Mae Thomas (R 309, 429). Shortly before Christmas of 1985 Henry claimed he went to Suzanne Henry's home in Pasco County to talk to Suzanne about Christmas presents for her five-year-old son from a previous marriage, Eugene Christian. (R 503) Henry told Detective Wilbur that Suzanne became angry with him and

asked him to leave several times. (R 503) Henry claimed that she attacked him with a knife. He then overpowered her and she fell onto the couch. The defendant then stabbed her thirteen times. (R 407) The evidence also showed that she was beat in the face and upper body. (R 411 - 412) Henry confessed to covering her body up and then abducting her son Eugene from the home. (R 505) Witnesses testified that they saw Eugene getting into an old blue Chevy with another person. The car was described as having a space-saver tire. (R 302 - 304, 299) Henry told Detective Wilbur that he then drove Eugene to a wooded area where he killed Eugene and threw the knife into a field. (R 505) When Henry took them to the place where Eugene's body was found, the detectives also found a blue Impala with a space-saver tire. The area also had several large trees with briar bushes underneath. (R 500 - 502) Henry claimed to have cuts on him from where Suzanne Henry attacked him but the detective did not believe they were cuts, but rather that they looked like scratches from bushes where Eugene's body was found. (R 509)

In the prior appeal of this case, this Court specifically held that although the evidence concerning Eugene's murder was not admissible as Williams rule evidence,[1] this Court noted:

> "There remains the question of whether the evidence or the killing of Eugene Christian

[1] Williams v. State, 110 So. 2d 654 (Fla.), cert. denied, 361 U.S. 847 (1959).

> was admissible as being part of a prolonged criminal episode. See Smith v. State, 365 So. 2d 704 (Fla. 1978), cert. denied, 44 U.S. 885 (1979). Some reference to the boy's killing may have been necessary to place the evidence in context, to describe adequately the investigation leading up to Henry's arrest and subsequent statements, and to account for the boy's absence as a witness. However, it was totally unnecessary to admit the abundant testimony concerning the search for the boy's body, the details from the confession with respect to how he was killed, and the medical examiner's photograph of the body." Henry v. State, 574 So. 2d 73 (Fla. 1991).

As appellant concedes, the trial court did not allow the state to present any evidence concerning the search for the body or the manner in which Eugene was killed. The trial court also excluded any photographs of Eugene. Nevertheless, appellant contends that even the limited evidence that was admitted should have been excluded as its probative value was substantially outweighed by the prejudice to the defendant. Appellant admits that although the killing of Eugene may have been relevant to explain his absence as a witness or to put the police investigation and appellant's subsequent statements into context, this evidence was not relevant to a material fact in issue because the defendant admitted his presence at the scene of the murder. Thus, appellant contends that there was "no necessity to make any reference to Eugene, his presence at Suzanne's home when the altercation initially took place or his subsequent demise, many miles away and many hours later, at the hands of appellant." (Initial brief of appellant at page 23). This argument is without support in the law.

First, it should be noted that the evidence of Eugene's murder does not constitute similar fact evidence or Williams rule evidence in that the evidence adduced by the prosecution witnesses did not bring before the jury unrelated bad acts of the appellant. Rather the evidence served to link the appellant to the victim circumstantially. Gorham v. State, 454 So. 2d 556 (Fla. 1984). As this Court recognized in its prior opinion in the instant case, the evidence is admissible as inseparable crime evidence.

Further, in Bryan v. State, 533 So. 2d 744 (Fla. 1988), this Court rejected the argument that such evidence must be necessary, not merely relevant. Citing Ruffin v. State, 397 So. 2d 277 (Fla.), cert. denied, 454 U.S. 882 (1981), this Court reiterated that necessity has never been established as an essential requisite to admissibility: "So long as evidence of other crimes is relevant for any purpose the fact that it is prejudicial does not make it inadmissible. All evidence that points to a defendant's commission of a crime is prejudicial. The true test is relevancy." Bryan had argued to this Court that it was not necessary for the state to present evidence of other crimes that established his presence at the scene inasmuch as he took the stand and so testified. This Court noted that as Bryan had pled not guilty and placed all the facts in issue, that the state was required and entitled to prove the facts supporting the charged crimes and was not required to withhold evidence from the jury because the defendant might take the stand and concede the fact. Id. at 747.

Similarly, in the instant case, Henry pled not guilty to the crime as charged. Although Henry admitted his presence at the scene of the crime, it did not relieve the state of its burden to establish all elements of the crime. As this Court noted in Bryan, the state was not required to withhold evidence from the jury simply because the defendant might take the stand and concede the fact. Further, although defense counsel argued that it was self defense, the defense rested without presenting any evidence. Accordingly, although appellant's actual presence at the scene was conceded by counsel, Henry never took the stand and conceded that fact.

Further, the evidence of Eugene's abduction and subsequent murder established more than the defendant's presence at the scene of the crime. The evidence concerning the briar bushes where Eugene's body was found refuted appellant's claim that the cuts on his arms came from Suzanne Henry's attack with a knife. Additionally, the evidence concerning Henry's behavior after the murder was inconsistent with someone who killed in self-defense. The act of covering the body and removing the only witness to the crime shows guilty knowledge and was clearly relevant to whether Henry had acted in self-defense. The evidence concerning the car found at the scene of Eugene's murder also tied the defendant to the scene of Suzanne's murder and established his mental condition at the time of the murder.

Recently, in Padilla v. State, 18 F.L.W. S 181 (Fla. March 25, 1993), this Court rejected Padilla's argument that the trial

court erroneously allowed the state to present evidence that Padilla had fired several shots into his girlfriend's former apartment. This Court noted that the evidence was admissible as "inseparable crime evidence" and was clearly relevant to establish Padilla's mental condition during the course of the incident, which necessarily included the initial obtaining of the firearm and the return in less than an hour to obtain more bullets. This Court noted that the evidence was relevant for the state to establish Padilla's mental state in order to prove premeditation. Id. at S 183. Similarly in the instant case, the defendant's actions subsequent to the murder which included covering up the body, removing Eugene who was the only witness to the crime from the house and subsequently murdering Eugene is evidence of Henry's mental state at the time.

Appellant argues, however, that the state's contention that appellant killed his stepson in order to eliminate a witness falls short because there is nothing in the record herein that indicates that Eugene in fact witnessed the homicide. Appellant questions the inference drawn by the state that Eugene must have heard Suzanne screaming during the instant murder because Suzanne had screamed during a previous altercation with the appellant. The prosecutor is allowed to draw reasonable inferences from the evidence. It is certainly a reasonable inference that Eugene was a witness to the murder as he was present in the home at the time of the murder. This is factual determination to be made by the jury.

In Timulti v. State, 489 So. 2d 150 (Fla. 4th DCA 1986), the court held that:

> " . . . Evidence of the first three smuggling trips and the sale and distribution of the drugs was admissible under §90.402 simply as relevant evidence. It was relevant because it was 'extricably intertwined' in the scenario of the fourth trip to show the context of the crime. It was 'inseparable crime' evidence that explains or throws light upon the crime being prosecuted. In order to present an orderly, intelligible case, the state had to show the relationship between Hoss and Timulti, close personal friends and business associates, supplier and middle man." Id. at 153.

The court then went on to quote Professor Ehrhardt as stating:

> "Professor Ehrhardt discusses 'inseparable crime' evidence and the characteristics distinguishing it from 'Williams Rule' evidence in his work on Florida Evidence (2nd Ed. 1984):
>
> > The Florida opinions have not contained a close analysis of the reasons that inseparable crime evidence is admissible. Professor Wigmore suggests that this evidence is not admitted either because it shows a commission of other crimes or because it bears on character, but rather because they are relevant and an inseparable part of the act which is at issue. This evidence is admitted for the same reason as other evidence which is part of the so-called res gestae; it is necessary to admit the evidence to adequately describe the deed." Id. at 153.

See also, Jackson v. State, 522 So. 2d 802 (Fla. 1988) (evidence established the entire context out of which criminal

action occurred and was probative to material factual issues, placing Jackson at the location where the first victim was encountered.)

And, finally, as was noted in the prior opinion in the instant case, in Smith v. State, 365 So. 2d 704 (Fla. 1978), this Court held that among the purposes for which evidence of other crimes may be admitted is to establish the entire context out of which the criminal conduct arose. As in the instant case, the court found that the testimony concerning a second homicide was relevant to place Smith at the scene of the first murder, since it shows that he was with the people involved in the initial homicide just an hour after it took place. And, also as in the instant case, Smith was placed by this evidence in a car which was directly linked to the scene of the first murder.

Clearly, evidence that the defendant after murdering the helpless victim in the instant case also murdered her helpless five-year-old son was prejudicial. However, as this Court held in Ashley v. State, 265 So. 2d 685, 694 (Fla. 1972), so long as evidence of other crimes is relevant for any purpose the fact that it is prejudicial does not make it inadmissible. All evidence that points to a defendant's commission of a crime is prejudicial. The true test is relevancy. This evidence was relevant and material. It was within the trial court's discretion to admit the evidence and appellant has failed to show an abuse of that discretion.

Furthermore, even if it was error to admit this evidence, it was harmless in the instant case. The defendant conceded that he murdered Suzanne and claimed that it was merely self-defense. The evidence was substantial that he committed this crime and substantial evidence refuted his claim of self-defense. It is beyond a reasonable doubt that even without the admission of the evidence concerning Eugene's murder, the evidence did not support Henry's claim that after having been cut three times by a kitchen knife by Suzanne Henry and then managing to overpower her and sitting upon her, that the defendant in self-defense stabbed her thirteen times in the throat over the course of five to ten minutes. There is simply no support for the claim that this heinous murder was committed in order to defend himself. Accordingly, even if the trial court should not have admitted even the limited evidence that was admitted, the admission is clearly harmless and it is beyond a reasonable doubt that it did not contribute to the instant verdict. The admission is further rendered harmless because the trial court gave a limiting instruction to the jury concerning this evidence. It can be reasonably assumed that the jury followed the court's instructions and did not infer any evidence of the defendant's guilt for Eugene to his murder of the victim Suzanne Henry.

ISSUE II

WHETHER THE COURT ERRED BY ALLOWING THE STATE TO USE A TRANSCRIPT OF THE PRIOR TRIAL TESTIMONY OF DEBORAH FULLER AND ALLOWING DR. WOOD TO TESTIFY FROM AN AUTOPSY REPORT PREPARED BY DR. SHINNER CONCERNING HIS FINDINGS IN THE DEATH OF APPELLANT'S FIRST WIFE DURING THE PENALTY PHASE PORTION OF THE TRIAL.

Appellant initially argues that it was reversible error for the trial court to allow the state to introduce the prior trial transcript of Deborah Fuller's testimony as she was unavailable and incarcerated in another state. Deborah Fuller's testimony consisted of an eyewitness account of the murder of the defendant's first wife. Fuller had stated that in 1975 she was the roommate of Patty Roddy. Roddy and John Henry were getting a divorce at the time. (R 680 - 81) One day in 1975, Mr. Henry came to the house to return a dollar he had borrowed from Fuller's grandmother. Patty and Henry had an argument inside and then Patty followed him outside when he left. Fuller testified that after a few minutes she and her grandmother went to the door and saw John pulling Patty into the car. Her grandmother screamed at him to turn Patty loose or she would call the police. (R. 683) He told her to call the police. Fuller called the police and then ran outside. By that time Henry had pulled Patty into the car and they appeared to be struggling. Patty's kids jumped into the car and began screaming that he was cutting their mother. By the time Fuller got to the car Patty had stopped screaming. (R 685) She could hear Henry hitting Patty in the

chest. She could hear the sound of pounding. Gloria Nix came from across the street and had got to the car at the same time as Fuller. They opened the door on the passenger side and John Henry got out on the driver's side. (R 685) He had jammed Patty down between the seats and when they opened the door her head fell back. Deborah Fuller put her hand on Patty's chest and held it up to the street light. She could see that it was full of blood so she ran inside to get a towel. When the police officer got there and turned a light on Patty's face Fuller could see that her eyes were open, her fist was still balled up like she was trying to fight back and blood was running down her arm. She had six stab wounds in her face that had spread open.

The state also presented the testimony of Dr. Joan Wood, the Medical Examiner. Over defense counsel's objection, Dr. Wood was allowed to testify about the injuries and cause of Patricia Roddy's death using the original autopsy report. Dr. Wood had not performed the autopsy, nor had she personal knowledge of the case. Dr. Shinner who had conducted the autopsy and prepared the report had died and was, therefore, unavailable. Dr. Wood testified that Patricia Roddy had been stabbed numerous times in the neck and chest.

Appellant claims that the testimony of Fuller and Dr. Wood was improperly submitted. Appellant concedes, however, that hearsay evidence is permissible in a penalty phase proceeding and that it is appropriate in a penalty phase of a capital trial to introduce testimony concerning the details of any prior felony

conviction involving the use of violence to a person, rather than just presenting a cold judgment in sentence form. He contends however that the testimony of Fuller and Dr. Wood was impermissible because defense counsel did not have the opportunity to cross-examine either Deborah Fuller or Dr. Shinner. Appellant also argues that because there were other means of presenting this evidence that it was unnecessary to have Fuller and Dr. Wood testify. This argument is simply without basis.

With regard to the testimony of Deborah Fuller, unlike Rhodes v. State, 547 So. 2d 1201 (Fla. 1989), as relied upon by appellant, Henry was not denied his right of confrontation of this witness. Her testimony was read from her prior trial transcript from the instant homicide. Deborah Fuller was available for cross-examination by defense counsel at the initial trial and that defense counsel failed to do so does not make her testimony inadmissible. (Pr 801)

Appellant also contends that Fuller's testimony shouldn't have been admitted because Gloria Jean Nix could have testified to virtually the same information. A review of Gloria Jean Nix' testimony, however, refutes this claim. Gloria Jean Nix lived across the street from the victim Patty Roddy and was not present in the home during the initial confrontation. Nix testified that she was taking a shower when she heard Patty screaming. When Nix looked out the window she saw John Henry across the street. She thought he was in the car with the two kids and Patty. She

thought he was hitting her. When she opened up the door Patty's hand fell out and John Henry got out and walked on the road. Unlike Fuller, Nix did not hear what they were arguing about and was not present during most of the altercation. (R 691) Further, the question of admissibility is not determined by whether the evidence was necessary, but whether it was relevant. Clearly, the evidence was relevant and admissible.

As for the testimony of Dr. Wood, this Court has previously rejected an identical argument in Waterhouse v. State, 596 So.2d 1008 (Fla. 1992):

> "Waterhouse also claims that the trial court erred in allowing the state's pathology expert, Dr. Wood, to explain the New York autopsy report. Dr. Wood testified regarding the autopsy she performed on Deborah Kammerer. The state recalled Dr. Wood later to explain the New York autopsy report to the jury. Waterhouse argues that the state should have been required to call the person who prepared the New York autopsy report. Defense counsel cross examined Dr. Wood and brought up the fact that she did not prepare the autopsy report and had not consulted with the person who prepared the report. The autopsy report was presented at the original penalty phase hearing, so defense counsel should have been well aware of its existence. Under these fact, we find no error in permitting Dr. Woods testimony on the New York autopsy report. Even if the admission of this testimony was error, it was clearly harmless." Id. at 1016

During Henry's original trial on this homicide Dr. Wood explained the contents of the report and testified that her predecessor Dr. Shinner had prepared the autopsy report. (PR 806 - 811) Thus, here, as in Waterhouse, counsel was clearly aware of the report and it's contents.

Furthermore, there was not a hearsay objection to the testimony of Dr. Wood. To the contrary, defense counsel admitted that either doctor could testify to Dr. Shinner's report and talk about the location of the wounds, the fact that the jugular vein was severed and the description of what she believed to be the knife used in the assault. (R 704) The only objection to the testimony of Dr. Wood was on the basis of relevancy. Accordingly, appellant is precluded from now arguing that this testimony was inadmissible as hearsay evidence. Steinhorst v. State, 412 So. 2d 332 (1982). Thus, as the cause of Patty Roddy's death was clearly relevant to the sentencing proceeding, the admission of this evidence was within the court's discretion. Appellant has failed to show an abuse of that discretion.

Assuming, arguendo, it was error to admit either witnesses' testimony the error was clearly harmless. It is beyond a reasonable doubt that the same sentence would have been imposed without either testimony.

ISSUE III

WHETHER THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON THE AGGRAVATING FACTOR OF DURING THE COMMISSION OF A FELONY.

Appellant contends that the trial court should not have instructed the jury on the aggravating factor of committed during the commission of a robbery because there was insufficient evidence to support a finding of the aggravating factor. It is the state's contention that there was sufficient evidence presented at trial to require the judge to give the instruction requested by the state. The evidence adduced at trial showed that prior to the murder the defendant received money from the victim in order to buy cocaine. There was also evidence presented that the defendant did not have any money immediately prior to the murder but that shortly after the murder he had purchased cocaine. He told Rosa Mae Thomas that he had sold some jewelry to get the cocaine. (R 769 - 771) The evidence also showed that the victim had gold jury that she kept in her jewelry box and in her purse and that no jewelry was found after the murder. (R 317 - 18). It was the state's contention that the defendant had gone to the house in order to obtain money for cocaine, as opposed to going to the house to discuss the purchasing of Christmas presents for which he had no money. The state urged that the argument centered on Suzanne's failure to give him money rather than on any issue concerning Christmas presents. This is a permissible conclusion that was reasonably drawn from the evidence as presented. While the evidence may not

have been sufficient to support a finding that the homicide was committed during the course of a robbery, there was sufficient competent evidence presented to warrant the giving of the instruction. Accordingly, the trial court did not err in instructing the jury on this aggravating factor.

Furthermore, even if the trial court did err in instructing the jury on this factor, the error was harmless in the instant case. The trial court's sentencing order clearly rejected the finding of this aggravating factor and, nevertheless, imposed the sentence which is well supported.

Appellant argues that the alleged error cannot be harmless in light of Sochor v. Florida, 112 S. Ct. 2114 (1992) and Espinosa v. Florida, 112 S.Ct. 2926 (1992). Henry urges that it must be presumed that the trial court followed Florida law and gave great weight to the jury's recommendation and by doing so, the trial court indirectly waived the invalid factor that the jury presumably found.

This argument was rejected by the United States Supreme Court in Sochor, and by this Court in Johnson v. State, 608 So. 2d 4 (Fla. 1992), wherein this Honorable Court held:

> But even where the jury is not given the full appellate instruction, the failure to do so does not constitute error where the trial court rejects the aggravating factor. Citing Sochor v. Florida, supra, this Court stated that a jury is "likely to disregard an option simply unsupported by the evidence." Accordingly, this Court found that there is no way the instruction abrogated in Espinosa could have affected the jury's consideration as to what sentence it would recommend.

> Therefore, this Court found that the reading of that instruction to the jury was beyond a reasonable doubt and harmless error.

Even if the jury had found that the aggravating factor was established beyond a reasonable doubt and considered it in their recommendation, this Court can and should find that error, if any, is still harmless beyond a reasonable doubt in light of the heinousness of the instant murder and Henry's prior conviction for murdering his first wife.

ISSUE IV

WHETHER THE TRIAL JUDGE FAILED TO CONSIDER ALL NONSTATUTORY MITIGATING FACTORS URGED BY DEFENSE COUNSEL WHEN HE IMPOSED SENTENCE.

Appellant contends that the trial court erred by failing to consider all nonstatutory mitigating factors for which evidence was presented when it imposed its sentence of death. It is the state's contention that, when read in it's entirety, the sentencing order is clearly sufficient.

During closing arguments defense counsel argued to the judge and jury that the defendant should receive a life sentence because with a twenty-five year mandatory minimum he would die in prison. Counsel also argued in mitigation that Henry was addicted to crack cocaine and that the victim robbed him of his free will by offering him money for the crack cocaine. He also argued that the defendant was a schizophrenic and that the defendant lived with Rosa Mae Thompson for five months or so without any problems. (R 813, 814) Defense counsel also argued that the defendant was operating under a severe emotional disturbance because Suzanne Henry caused problems and that she attacked him with a knife. (R 819) And finally that Henry had pled guilty to the murder of Patty Roddy. (R. 813)

With regard to the mitigating circumstances the trial court's order shows that he considered the following factors:

MITIGATING CIRCUMSTANCES:

A. The Defendant does have a significant history of prior criminal activity, to-wit:

Defendant was convicted of Second Degree Murder in 1976 for stabbing his wife.

B. The capital felony was committed while Defendant was not under the influence of extreme mental or emotional disturbance, to-wit:

Two psychiatrists testified during the penalty phase of this trial that Defendant was not under the influence of extreme mental or emotional disturbance, and there was no medical testimony presented to the contrary.

After killing the victim, Defendant carried her six-year-old son, the only eyewitness, to a spot several miles away and killed him. The killing of this child does not of itself bear upon this circumstance, but the fact that immediately after killing the victim, the Defendant had the presence of mind to try to do something to cover up the killing shows lack of any extreme mental or emotional disturbance.

Defendant claimed he "freaked out" before the killing, but presented no supporting evidence and the neat and orderly appearance of the apartment when the victim was found belies any assertion of a killing during a wild, uncontrollable rampage by a person suffering from an extreme mental or physical disturbance.

Defendant's previous conviction for stabbing his wife to death, clearly shows that he is capable of stabbing a person to death while not under the influence of extreme mental or emotional disturbance, contrary to the inference that may otherwise have been drawn that the mere fact of 33 stab wounds indicates the influence of extreme mental or emotional disturbance.

C. The victim was not a participant in Defendant's conduct or consented to it, to-wit:

> According to the Defendant, uncontradicted by the evidence, the victim came at him with a knife which he was able to wrest from her, at which time he claimed he "freaked out." By his own admission he had taken the knife from her before he was able to stab her, thus terminating her attack and eliminating her participation in the stabbing.
>
> The medical examiner found bruises on the victim's body that were consistent only with the Defendant sitting on the victim's chest with his knees on her shoulder holding her down and pinning her arms down while he stabbed her. These bruises would not have been necessary if she had consented or participated in her stabbing.
>
> The medical examiner found bruises to the victim's face that were only consistent with Defendant holding her head up while he stabbed her in the neck, preventing her from lowering her head to protect her neck form his stabbing knife. This clearly rebuts any consent or participation by the victim.
>
> Even if there was mutual combat, for which there was no evidence, the nature of the stab wounds, being straight in and not slashes, clearly rebuts any assertion that all or any if the stab wounds we incurred while to victim and Defendant were struggling for the knife.

D. The Defendant was not an accomplice in the capital felony committed by another person and his participation was relatively minor, to-wit:

Defendant acted alone and never claimed that anyone else was with him.

E. The defendant did not act under extreme duress or under the substantial domination of another person, to-wit:

The two psychiatrists who testified during the penalty phase clearly supported this finding and there was no evidence to the contrary.

Defendant claimed that he "freaked out" immediately before the stabbing, but no evidence was presented as to what that meant.

Defendant in his confession did intimate that he had smoked crack cocaine before coming to the apartment of the victim, but there was no evidence as to the quantity or quality of the cocaine nor as to how long before the murder that he smoked any. Medical testimony clearly indicated that the cocaine would have had no effect on Defendant's will more than one hour after its use and little effect more than ten minutes after its use.

Defendant in his statement to the psychiatrists did indicate that he was a heavy user of alcohol but he did not claim to be under the influence of alcohol when the murder occurred.

Defendant never claimed that he was under dominion of anyone else or that this fear of anyone else caused him to stab the victim 33 times.

Defendant's claim that the aggressive nature of the victim forced him to kill her is nonsense and not supported by the evidence.

> Defendant's claim that the victim robbed him of his free will by encouraging his cocaine habit and luring him to her apartment on the night of the murder with the promise of giving him cocaine or money to buy cocaine is not supported by the evidence. Even if true, it does not show extreme duress, nor does it show such dominion by the victim over Defendant as to rob him of his free will. To find otherwise would lead to the absurd conclusion that the victim lured Defendant to her apartment so that he might kill her.

F. The capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was not substantially impaired, to-wit:

> All the psychiatric and psychological evidence clearly supported this finding.

G. The age of the Defendant at the time of the crime was not a mitigating factor, to-wit:

> Defendant was in his early forties.

H. No other circumstances in mitigation of Defendant's conduct are found.

(R 961 - 964)

In Lucas v. State, 568 So. 2d 18 (Fla. 1990), this Court set forth the responsibility of the parties under Campbell:

> We have previously held that a trial court need not expressly address each nonstatutory mitigating factor in rejecting them, *Mason v. State*, 438 So. 2d 374 (Fla. 1983), *cert. denied*, 465 U.S. 1051, 104 S.Ct. 1330, 79 L.Ed.2d 725 (1984), and "[t]hat the court's findings of fact did not specifically address appellant's evidence and arguments does not mean they were not considered." *Brown v. State*, 473 So.

> 2d 1267, 1268 (Fla.), *cert. denied, 474* U.S. 1038, 106 S.Ct. 607, 88 L.Ed.2d 585 (1985). More recently, however, to assist trial courts in setting out their findings, we have formulated guidelines for findings in regard to mitigating evidence in *Rogers v. State*, 511 So. 2d 526 (Fla. 1987), *cert. denied*, 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988), and *Campbell v. State*, no. 72,622 (Fla. June 14, 1990). We have even note broad categories of nonstatutory mitigating evidence which may be valid. *Campbell*, slip op. at 9 n. 6. However, "[m]itigating circumstances must, in some way, ameliorate the enormity of the defendant's guilt." Eutzy v. State, 458 So. 2d 755, 759 (Fla. 1984), *cert. denied, 471* U.S. 1045, 105 S.Ct. 2062, 85 L.Ed.2d 336 (1985). We, as a reviewing court, not a fact-finding court, cannot make hard-and-fast rules about what must be found in mitigation in any particular case. *Hudson v. State*, 538 So. 2d 829 (Fla.), *cert. denied,* ___ U.S. ____, 110 S.Ct. 212, 107 L.Ed.2d 165 (1989); *Brown v. Wainwright*, 392 So. 2d 1327 (Fla.), *cert. denied,* 454 U.S. 1000, 102 S.Ct. 542, 70 L.Ed.2d 407 (1981).

Id. at 23

This Court further noted:

> As the state points out, Lucas did not point out to the trial court all of the nonstatutory mitigating circumstances he now faults the court for not considering. 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.

Id. at 23, 24

The court clearly considered all of the relevant mitigating evidence argued by defense counsel. The court cannot be faulted

for not finding any evidence that was not urged by defense counsel. Accordingly, the order was sufficient.

ISSUE V

WHETHER THE TRIAL COURT ERRED IN FINDING THAT THE OFFENSE WAS ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL.

Appellant urges that there were insufficient facts to warrant the trial court instructing the jury on the aggravating factor of especially heinous, atrocious, or cruel and, furthermore, that the trial court erred in finding this factor was established beyond a reasonable doubt. Appellant is obviously asking this Court to reweigh the evidence by arguing that the victim was the one who initiated the attack and that the lack of defensive wounds indicates that the victim became unconscious and died quickly. He argues that the evidence did not support the conclusion that appellant stabbed Suzanne Henry with the intent to torture her or the desire to inflict pain or enjoy her suffering, assuming she even did suffer. It is the state's contention that the evidence clearly supports the trial court's finding of especially heinous, atrocious, or cruel and that this finding should not be overturned. Stano v. State, 460 So. 2d 890, 894 (Fla. 1984), cert. denied, 471 U.S. 1111 (1985).

In reference to this aggravating factor, the trial court's order states:

> "Defendant's commission of this murder was especially heinous, atrocious or cruel, to-wit:
>
> > Defendant stabbed the victim 33 time on or about the neck. The medical examiner clearly stated that five or six wounds would have been enough to effectuate her

death, so all the wounds over five or six would have had no purpose other than cruelty.

It took five to ten minute for Defendant to stab the victim 33 times, during which time the victim would have been alive, conscious and suffering. Since only five or six wounds were enough to kill her, and these could have been administered in two minutes or less, there was an unnecessary period of three to seven minutes of suffering which could have had no other purpose than cruelty.

After the last wound the victim was alive, conscious and suffering for at least two minutes according to the medical examiner. If Defendant had stabbed the victim in the heart, the victim would have avoided this period of suffering. It was cruel of Defendant to stab the victim in the neck, resulting in slow death, rather than in the heart, which would have resulted in quick death.

The 33 stab wounds were the result of plunging the knife almost straight in, resulting in more pain and suffering than if Defendant had sliced with the knife.

This was the second time in ten years that Defendant had stabbed his wife to death in the presence of his wife's child or children. What can be more atrocious?

After he finished stabbing the victim, Defendant covered her still-living body with a rug and placed an ashtray on top of the body with a cigarette butt in it. It is not certain that he smoked a cigarette while waiting for her to die but it is certainly atrocious that he would have so little

> respect for her, that he would use her dying body as a piece of furniture.
> The victim's six-year-old child, whom Defendant later killed that same night, was present during the stabbing, which fact must have been known to the victim and was unnecessarily cruel of Defendant, who could have done something to keep the child from seeing what was going on.

(R 959 -906)

The trial court's order specifically finds that the victim was conscious during the attack and that it was committed in a manner to be particular torturous to the victim.

This Court has consistently upheld findings of especially heinous, atrocious, or cruel where the evidence shows the victim was repeatedly stabbed. See Haliburton v. State, 561 So.2d 248 (Fla. 1990); Nibert v. State, 508 So.2d 1 (Fla. 1987); Johnson v. State, 497 So.2d 863 (Fla. 1896); Wright v. State, 473 So.2d 1277 (Fla. 1985); Lusk v. State, 446 So.2d 1038 (Fla. 1984). The facts of this case are particularly close to those in Floyd v. State, 569 So.2d 1225 (Fla. 1990) where this Court upheld the finding of especially heinous, atrocious, or cruel based upon the following evidence:

> "To the support the contention that this murder was especially heinous, atrocious, or cruel, the state presented the medical examiner's testimony describing the twelve stab wounds Anderson received to the abdomen, the chest, and to her left wrist. Although the medical examiner could not establish a sequence of those wounds, the wound to the chest was fatal 'within a matter of minutes at the most,' whereas the other wounds to her

> abdomen were 'potentially fatal, [from which she] would take a longer time to die'. The jury also heard that Anderson received a bruise to her nose that was consistent with a fight or struggle." Id. at 1232.

In addition to the multiple stab wounds, the evidence also showed that Suzanne had multiple bruises on her face and chest, indicating that Henry sat upon her and beat her during the attack. This also indicated that Henry took his time in ending Suzanne's life and that it was unnecessarily torturous.

Similarly, in Hansbrough v. State, 509 So. 2d 1081 (Fla. 1987), this Court upheld the finding of especially especially heinous, atrocious, or cruel where the medical examiner identified several of the victim's thirty-some stab wounds as defensive wounds, indicating she was aware of what was happening to her and where the testimony indicated that she did not die or even necessarily lose consciousness instantly.

Accordingly, the evidence is sufficient to support the trial court's finding that the murder was especially especially heinous, atrocious, or cruel.

ISSUE VI

WHETHER THE APPELLANT'S SENTENCE OF DEATH IS PROPORTIONATE ON THE FACTS OF THIS CASE.

Appellant's final argument concerns the proportionality of his sentence in light of other decisions examining the propriety of the death sentence on comparable facts. A review of the facts in the instant case indicates that it is one of the most aggravated and unmitigated first degree murder cases for which the death penalty is appropriate.

The sentencing judge found two aggravating factors: the defendant was previously convicted of a violent felony (murder in the second degree) and the commission of the murder was especially heinous, atrocious, or cruel. (R 958 - 959) The trial court did not find any mitigating circumstances. (R 961 - 64)

Appellant argues that this sentence is disproportionate because of the long-standing domestic dispute that existed between appellant and Suzanne Henry. To support this position appellant relies on Herzog v. State, 439 So. 2d 1372 (Fla. 1983); Chambers v. State, 339 So. 2d 204 (Fla. 1976); Porter v. State, 564 So. 2d 1060 (Fla. 1990); and Fead v. State, 512 So. 2d 176 (Fla. 1977). With the exception of Porter, each of the three other cases were jury overrides. In each of those cases, this Court found that the jury reasonably could have concluded that the relationship between the parties constituted a basis for a

life recommendation.[2] In Porter, however, this Court rejected Porter's argument that the sentence was not proportional because the circumstances of the case depicted a cold-blooded, premeditated double murder. This Court stated:

> "Finally, Porter argues that the death penalty is not proportional in this instance. We disagree. Because death is a unique punishment, e.g., Fitzpatrick v. State, 527 So. 2d 809, 811 (Fla. 1988), it is necessary in each case to engage in a thoughtful, deliberate proportionality review to consider the totality of circumstances in the case, and to compare it with other capital cases. It is not a comparison between the number of aggravating and mitigating circumstances. See, e.g., Hallman v. State, 560 So. 2d 223 (Fla. 1990) (reversing a jury override despite a finding of four valid aggravating circumstances weighed against only nonstatutory mitigating circumstances). The circumstances of this case depict a cold-blooded premeditated double murder. The imposition of the death penalty is not disproportionate to other cases decided by this Court. See, e.g., Turner v. State, 530 So. 2d 45 (Fla. 1987) (on rehearing), cert. denied, ____ U.S. ___ 109 S.Ct. 1175, 103 L.Ed.2d 237 (1989).

Id. at 1064 - 1065

The facts in the instant case do not support appellant's position that this was a result of a long standing abusive domestic relationship which in any way mitigates the commission of the instant murder. The facts adduced at trial showed that Suzanne Henry and the defendant had been separated for approximately six months. Henry's girlfriend at the time of the

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[2] The jury in the instant case recommended death by a vote of 12 - 0.

murder, Rosa Mae Thomas testified at the penalty phase that when John first moved in with her Suzanne didn't like that he was staying there. Rosa Mae testified that Suzanne came over to the house three or four times saying that she wanted to see John, that he was her husband and that she wouldn't let him stay there. (R 760-61) Rosa Mae testified that John told Suzanne that he didn't want to be with her anymore but she wouldn't give up. (R 762) She testified that he had been living with her for about six months prior to December 22, of 1985 (R 759). Rosa Mae Thomas' daughter Stephanie Thomas testified that these incidents had occurred one to two months prior to Suzanne's death. (R 755)

Therefore, Appellant's position that this was just the result of a heated domestic dispute is without basis as there was no evidence that John Henry acted out of any 'passionate obsession'. Rather, the evidence showed that the defendant John Henry and the victim Suzanne Henry had a stormy relationship which had ended with her begging him to come back and him telling her he didn't want her anymore and even these confrontations had ended months prior to the murder in question. At the time of the murder Suzanne Henry was in her own home minding her own business when John Henry went over there and brutally stabbed her to death in front of her small child. In light of Henry's prior conviction for brutally murdering his first wife, the sentence was clearly proportionate and is not mitigated by the legal relationship between the parties.

As there was no competent evidence that this heinous murder was the result of a heated domestic dispute, and as the jury recommended the death sentence by 12 - 0, the trial court properly imposed the sentence of death and this court should find, as it did in Porter, that the sentence is proportionate to other similar cases.

CONCLUSION

Based on the foregoing argument and citation to authority, The State urges this Honorable Court to affirm the judgment and sentence.

Respectfully submitted,

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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 Allyn Giambalvo, Assistant Public Defender, Polk County Courthouse, P.O. Box 9000, Drawer PD, Bartow, Florida 33830, this 21 day of September, 1993.

OF COUNSEL FOR APPELLEE.