IN THE SUPREME COURT OF FLORIDA

ANDREW LEE GOLDEN,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 78,982

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant, Andrew Lee Golden, was the defendant in the trial court and will be referred to herein as "Defendant." Appellee, the State of Florida, was the prosecution in the trial court and will be referred to herein as "the State." References to the record will be by the symbol "R" followed by the appropriate page number(s).

STATEMENT OF THE CASE AND FACTS

On September 13 of 1989, the body of Ardelle Gordon was found floating in Lake Hartridge (R 1499-1500). Officer Heiman who discovered the victim saw her body as he turned onto the road 180 feet away (R 1511-12). A rental car leased by the defendant, her husband, was also found submerged in the lake about 32 feet from the end of the dock (R 1639). Lake Hartridge is only a few blocks from the victim's home (R 1625-29, 1786-88).[1]

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[1] Detective Hopwood, the lead investigator, outlined a path from the victim's house to Lake Hartridge during the trial (R 1910).

The medical examiner determined that the cause of death was drowning (R 1701). The victim's body did not have any injuries consistent with a car accident (R 1701). All wounds but one were post-mortem and consistent with fish bites. The only antemortem wound was a small abrasion to the back of her neck (R 1696). No skid marks were found to indicate sudden braking (R 1684, 1759). The dock at Lake Hartridge is 62 feet long (R 1642).

An expert in accident reconstruction testified that the impact of the car hitting water, even at a low speed of twenty miles per hour, would have caused injuries. Such injuries would occur even if the victim was wearing a seat belt (R 1749) and if she was not wearing a seat belt, the injuries would be worse as she would have hit the interior of the car even harder (R 1749-50).

Mrs. Golden's purse was found in the lake about 10 feet behind the car (R 1639). Inside her purse, the police found both sets of her prescription glasses.[2] Both glasses were inside their respective cases (R 1607, 1610, 1913).[3] Mrs. Golden's

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[2] The defendant now suggests that Mrs. Golden may have owned another pair of glasses. (See Appellant's Brief, page 86 n.29). The evidence at trial, however, established that Mrs. Golden only owned two pairs of eyeglasses. There was never an indication to the police that she may have owned a third pair (R 1948). The defendant himself was questioned on several occasions about this and stated, once under oath, that his wife only owned two pairs of glasses (R 1810-11, 1913, 1917, 1935).

[3] Both Detective Nelson, the crime scene technician and Detective Hopwood, the lead detective, testified that the victim's non-tinted prescription glasses were in a case. Only Detective Colburn thought they may have been folded up in her purse. Detective Colburn, though, was not certain of this observation nor was he responsible for inventorying the victim's purse and listing all the items found within. Detective Nelson was in charge of collecting the evidence and testified that he

vision was 20/400 (R 1864). She never drove or ventured anywhere without her glasses (R 1538, 1569). Her vision deteriorated at night (R 1866).

When found, Mrs. Golden's body was floating eight to ten feet from the shoreline, a significant distance away from the car (see State's Exhibit No. 64). Her sandals were found laying side by side near the shoreline (R 1806, 1825). Mrs. Golden could not swim (R 1818, 1897).

Mrs. Golden was reported missing by the defendant on the morning of September 13 of 1991 (R 1890). When the police arrived at the defendant's house he told them that he last saw his wife when she left about midnight the night before to find her missing cigarette case and to buy more cigarettes (R 1796, 1802) and milk (R 1929). The defendant volunteered the information that his wife could not swim (R 1818, 1897) or see well (R 1805) and that she was allegedly borderline retarded (R 1831, 1925). He also told the police that he and his wife had been at Lake Hartridge the night before.[4] He said that after she refused to have sex with him, he went for a swim while his wife waded in the water (R 1800, 1897). He then jogged over to the local boys club to dry off while his wife drove there to meet him (R 1801, 1900, 1911).

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was positive that both of the victim's glasses were in their respective cases (R 1673).

[4] Darin, the Golden's older son, went looking for his mother that morning. The defendant never told him that they had been at Lake Hartridge (R 1945).

According to the defendant, Mrs. Golden met him at the boy's club and they then drove home together. It was after they got home that she realized she had lost her cigarette case and left to find it (R 1801). Neither of the Golden boys saw their parents return together (R 1559). The older boy Darin was sleeping in his room (R 1560), the younger one, Chip, was sleeping in the living room (R 1536). According to the defendant, Mrs. Golden was "just going crazy" because she couldn't find her case and he "tried to calm her down" (R 1801-02). He stated that they looked "all over" for it (R 1802, 1901). Neither boy woke up from all this activity (R 1933)

Inside the victim's pocketbook, the police found her "lost" cigarette case with still one cigarette in it (R 1606). They also found an unopened pack of cigarettes (R 1606). No milk was found in the victim's car (R 1942).

The police returned on September the 13th in the afternoon to speak again to the defendant. When asked whether there was any insurance on his wife's life, he answered no (R 1811, 1914). It was later learned by the police that at the time of her death, Mrs. Golden life was insured for $153,000.[5] Of that amount, $125,000 was obtained by the defendant between March and May of 1989. The defendant lied about the life insurance on two more occassions (R 1915-21).

In the months preceding Mrs. Golden's murder, the Golden family was nearing financial ruin. The defendant owed in excess

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[5] This amount excludes the $200,000 automatic American Express policy that the defendant filed a claim on.

of $130,000[6] and had sought legal advice from a bankruptcy attorney. He had not worked for two years (R 1577, 1919) and had no prospects of getting a job. The defendant told the police that he had "minor" financial problems (R 1917).

During the last months of her life, the victim was torn between her job and the defendant's desire to move back to Minnesota. In fact, she took leave from work between August 7-21 to go up north with the defendant and their sons to visit the area (R 2095). It was only when she came back that she told her supervisor that she would be staying as the job prospects for the defendant were bleak up north also (R 2098). Within weeks after her death, the defendant took the boys and went back to Minnesota (R 1535, 1569).

As indicated already, at the time of his wife's death, the defendant was the beneficiary of several life insurance policies. One was through her job from Florida Combined Life Insurance for a total of $28,000; $14,000 representing group term life and $14,000 additional benefits for accidental death. The claim form to collect this policy was signed by the defendant on September 15, 1989 (R 1872).

On October 3, 1989, Florida Combined Life sent the defendant a letter requesting a copy of the police and autopsy reports (R 1871). This request was repeated on October 25 and November 15 (R 1876). The autopsy report was obtained from the victim's

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[6] According to the defendant's credit record as of February 1 of 1991 , he still owed about $93,000 (R 2262-63) to various creditors. However, in August of 1989, his debts exceeded $130,000. This figure is arrived at by simply adding all of the debts testified to at the defendant's trial.

employer on November 22 (R 1876). The police report was never forwarded and was again requested on November 28, January 25 and February 8, 1990. It was never sent. The defendant did, however, send the company a letter on February 5, 1990 to tell them he had moved to Minnesota (R 1876).

The defendant had also applied for life insurance on his wife through Signa from Life Insurance Company of North America (R 2114-5) for the amount of $50,000 (R 2116). The application date for this policy was April 10, 1989 (R 2117). The return address was 204 8th Street, S.E., Winter Haven (R 2116) an apartment building owned by the Goldens. (See, State's Exhibits No. 38,40) The defendant spend quite a bit of time at the apartments allegedly remodeling them.[7] A $25,000 increase in benefits was applied for in May of 1989 (R 2120). There was no corresponding policy on the defendant's life, just on the life of his wife (R 2151).

Documents analyst James Outland testified that Argelle Golden's purported signatures on the initial application form as well as the enhancement form were not signed by her. Based on his analysis he further determined that there was a strong probability that her signature was signed by the defendant (R 2303-04). The defendant was the only listed beneficiary.

The defendant called to get claim forms on September 15, 1989, two days after his wife's death. He gave the date of death as September 12, 1989. In the form filed by the defendant, he

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[7] When Dectective Hopwood went to look at the apartments, he found them to be in poor condition and in the process of being condemned (R 1942).

reported no other life insurance and used his home address as a return address (R 1143-4). This claim was denied because of medical misinformation on the application (R 2161-62).

The defendant was also the beneficiary of a life insurance policy through AAA for the total amount of $100,000 (R 2165). The application for this insurance was filled out on March 23, 1989 (R 2165).

Analyst Outland again testified that the victim's purported signature was not signed by her and that there was a strong probability it was signed by the defendant (R 2305). With the application, the defendant enclosed a full year's premium (see State Exhibit No. 37).

A claim form was submitted by the defendant on September 27, 1989. In it he claimed that the victim always wore her seat belt (R 2170-72).[8] The defendant again omitted requested information regarding other life insurance policies (R 2174). The company only paid $5,000 to the defendant (R 2178-9). The maximum amount would have been $50,000 (R 2179). There was no corresponding policy on the defendant's life, just on the life of his wife (R 2188, 2191).[9]

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[8] The wearing of a seat belt increased the amount of the benefit (R 2170).

[9] The victim's life was also insured by Continental Casualty Company. One thousand dollars of that insurance was free through the Golden's account with Southeast Bank. On December 15 of 1988, additional coverage of $20,000 was requested (R 2221). The actual benefit in case of death, however, would be $10,000 per family member for a maximum of $20,000. Though the enrollment form bore both the victim's and the defendant's signatures, the victim's signature was not authentic (R 2304-05). Analyst Outland testified that the defendant possibly executed his wife's signature on this form as well. The beneficiary on this policy

The defendant also filed for benefits from American Express. The defendant's American Express card carried a life insurance policy providing $200,000 coverage for drivers of a car leased with the card (R 2194). The defendant requested claim forms by phone on September 26, 1989 (R 2194, 2206). The claim itself though was not signed by him until March 5, 1990 (R 2196). Again the defendant did not supply requested information regarding other life insurance policies (R 2197). To the inquiry as to whether an autopsy was performed, he represented that he did not know (R 2197).

Despite the defendant's financial condition, he payed his American Express bill for $1,715.77 on October 13, 1989 (R 2213). During the year of 1989, the defendant had only used this card to charge a hotel room and the rental car (R 2213-14). The defendant had been sent materials with his bill advising him that he's entitled to the above coverage (R 2218). So at a time when the defendant owed in excess of $130,000, he chose to pay his American Express bill in full (R 2263-65).

The defendant commenced bankruptcy proceedings on September 28, 1989.[10] American Express was not listed as a creditor. His petition was granted and the defendant's debts were excused. In the petition, the defendant denied the expectation of any future assets that would offset his debts.

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was Darin Golden (R 2231). The expiration date was October 31 of 1989) (R 2228).

10 The actual petition is dated October 10, 1989 (R 2323).

On September 13, 1989, the day of his wife's murder, the defendant had a pre-scheduled appointment with the credit union (R 2463). He called them during business hours on September 13, 1989 to tell them that he could not make the appointment due to his wife's death (R 2464). He then called the next day to make a new appointment for September 15. On September 14, the defendant told the credit union that he expected life insurance benefits that would pay off his debts (R 2275). At trial, the defendant denied these calls.

Dan Smith the Vice President for Collections who met the defendant on September 15 was impressed by how unconcerned he was about his wife's death (R 2468). According to Mr. Smith, the defendant was more concerned about his car and in eliminating his debts. The defendant told Mr. Smith on September 15 that he wanted to move back to Minnesota (R 68). The defendant denied returning his car on the 15th or meeting Mr. Smith.

The Golden family owned three cars: the victim's LTD, the defendant's van and Darin's Dodge. According to the defendant, he leased the Grand Am because the van was unreliable. The defendant, however, chose to drive the van to and from Minnesota during their summer trip there while the rental car sat in the driveway (R 2535). This is the same van that he returned to the credit union on September the 15th, two days after his wife's death. [11]

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[11] The credit union accepted the van back in lieu of payment of the debt (R 2465).

The Grand Am was leased with the defendant's American Express card even though the defendant had available credit on other credit cards (R 1369). The American Express card requires payment in full whereas the other credit cards would have accepted a minimum payment of a small percentage of the total bill. This was during a time when the defendant was facing financial ruin and owed in excess of $130,000 to various financial institutions.

The American Express gold card used by the defendant carried a life insurance policy on the life of the driver in case of accidental death while driving a leased car when other coverage is declined (R 2193). The amount of the benefit is $200,000. Mrs. Golden was listed as a driver on the defendant's lease agreement with Enterprise Leasing (R 2194). The defendant had declined other coverage in the agreement. American Express had notified the defendant that this benefit was available to him.[12]

According to her coworkers, Ms. Golden was very unhappy about the prospect of moving to Minnesota (R 2007, 2015, 2089). Even though she did not specifically talk about her problems at work, she was visibly unhappy (R 2102) and very concerned about her husband's unemployment and attendant financial problems (R 2019-2021, 2085-89, 2102). It was only after the Minnesota trip proved fruitless in terms of job prospects for the defendant that he allegedly changed his mind about moving.

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[12] Despite the defendant's contention, the flyer sent did not specify an exclusion for vehicles leased longer than one month. (See State Exhibit No. 89). That may explain why the company often payed these claims.

Mrs. Golden was murdered within a few weeks of the Golden's return from Minnesota. Two days after her death, the defendant, while returning his van to the credit union, told them that he was going to move back to Minnesota. This the defendant did around November 1 of 1989, only six weeks after his wife's murder (R 1946). This is despite the fact that the job prospects up north were bleak just eight weeks ago.

Prior to leaving for Minnesota, the defendant gave a voluntary sworn statement to the Winter Haven Police Department. During that statement, he again denied the existence of insurance on the victim's life. When the police reinterviewed him back in Minnesota, he admitted that he lied about the insurance to protect himself and his sons (R 1947). He had also instructed the boys to lie on his behalf (R 1948). At trial, the defendant changed his story and testified that he lied in order to protect his wife's reputation so that no one could say that she took her own life.

The Grand Jurors of Polk County returned a first-degree murder indictment against the defendant for the murder of his wife. The defendant was arrested in Minnesota. He fought extradition for several months until he was finally brought to Florida to stand trial (R 1948, 2480).

The defendant's trial lasted about three weeks. He was found guilty as charged on October 25 of 1991. The jury then recommended a death sentence by a vote of 8 to 4. The death penalty was subsequently imposed by Judge Pyle. This appeal followed.

SUMMARY OF ARGUMENT

ISSUE I: There was substantial competent evidence on which the jury could base its guilty verdict. The evidence against the defendant was consistent with guilt and inconsistent with every reasonable hypothesis of innocence.

ISSUE II: The trial judge's excusal for cause of prospective juror Brown was not an abuse of discretion. Judge Pyle's findings that Ms. Brown could not vote for the death penalty and that serving on the jury would cause her great hardship are fairly supported by the record.

ISSUE II: The trial judge did not err by admitting evidence of motive as it was circumstantial evidence of guilt. Evidence of collateral crimes was also properly admitted as it was relevant and preceded by sufficient evidence of corpus.

ISSUE IV: The trial judge properly admitted Williams Rule evidence against the defendant. The evidence admitted was highly relevant to the defendant's motive and intent.

ISSUE V: The trial judge did not commit fundamental error by comments he made during the trial. There is no requirement that the judge remain mute during the trial. The remarks complained of were nothing more than rulings on objections and the judge's exercise of his responsibility to conduct a fair trial. Moreover, this issue was not preserved for appeal as no objection was raised or curative instruction requested.

ISSUE VI: The trial judge did not abuse his discretion by denying the defendant's motion for a jury view of the scene as the scene had substantially changed since the murder. Moreover, the evidence admitted at trial sufficiently depicted the scene for the jury.

ISSUE VII: The trial judge did not err by admitting hearsay evidence. The evidence challenged was either not hearsay or admissible under the state of mind and business records exceptions.

ISSUE VIII: The prosecutor's remarks were not improper as they were invited by the defense. Moreover, the defendant failed to preserve this issue for appeal as he did not object to these remarks at trial.

ISSUE IX: The jury was not improperly influenced during its deliberations. The bailiff's communications with the jury involved scheduling and other ministerial details and were done with the agreement of defense counsel. Moreover, no objections were raised to the admonitions given by the judge to the jury after the defense waived sequestration.

ISSUE X: The trial judge did not abuse his discretion in curtailing defense cross-examination. The judge properly sustained State objections to improper questions as it is his responsibility to preclude repetitive or otherwise improper cross-examination.

ISSUE XI: The trial judge did not exclude defense mitigation evidence. The defendant was permitted to develop mitigation evidence that he was a good father and appeared to be a good husband.

ISSUE XII: The prosecutor's argument during the penalty phase of the defendant's trial was not improper. Moreover, the issue was not preserved for appeal as no objection was made at trial.

ISSUE XIII: The trial judge did not err by not specifically finding that the defendant was non-violent as this non-statutory mitigating factor was not proposed by the defense.

ISSUE XIV: There was substantial competent evidence presented to support the trial judge's finding that the defendant killed his wife for pecuniary gain. The only evidence of motive for Mrs. Golden's murder was insurance proceeds.

ISSUE XV: There was substantial competent evidence to support the trial judge's finding that the murder was cold, calculated and premeditated. The circumstances of the killing, along with the defendant's actions and motive provided the sufficient proof required for a finding of enhanced premeditation.

ISSUE XVI: The trial judge was correct in allowing the jury to consider the aggravating circumstance of heinous, atrocious or cruel. There was sufficient evidence offered to present a jury question on the issue.

ISSUE XVII: The trial judge did not improperly double aggravating circumstances. The factors of pecuniary gain and enhanced premeditation are separate and distinct do not merge because the same set of facts supports both.

ISSUE XVIII: The death penalty is not disproportionate under the facts of this case. There is sufficient competent evidence to support the jury's and judge's conclusion that the death penalty is the appropriate punishment for this defendant. Moreover, this Court has upheld the imposition of the death penalty in other pre-planned homicides of family members for financial gain.

ISSUE XIX: The standard jury instructions did not improperly shift the burden of proof to the defendant. Moreover, this issue cannot be raised on appeal as it was not properly preserved.

ISSUE XX: Florida's capital sentencing schemes is not unconstitutional.

ARGUMENT

ISSUE I

THERE WAS SUFFICIENT EVIDENCE ON WHICH THE JURY COULD BASE ITS GUILTY VERDICT

A jury of his peers found the defendant guilty of the First Degree Murder of his wife and recommended that he be sentenced to death (R 2876, 2959). The defendant claims that there was insufficient evidence to convict him and that therefore the trial judge erred in denying a motion for judgment of acquital. A review of the record, however, reveals that there is more than sufficient evidence to support the jury's verdict.

There was no direct evidence of the defendant's guilt. The case against him was circumstantial. Consequently, the defendant's guilt had to be established by evidence consistent with guilt and inconsistent with every reasonable hypothesis of innocense.[13]

Whether the evidence fails to exclude every reasonable hypothesis of innocense is a question for the jury. Rose v. State, 425 So.2d 521, 523 (Fla. 1983). A jury's verdict will not

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[13] The defense asked for and was given a jury instruction on circumstantial evidence. Prior to excusing the jury, the judge instructed them that:

> When the only proof of guilt is circumstantial, no matter how strongly the evidence may suggest guilt, unless the evidence is inconsistent with any reasonable hypothesis of innocence, you should find the Defendant not guilty. You are the sole judge of whether the evidence fails to exclude all reasonable hypotheses of innocence.
>
> It is your duty to determine whether the evidence is sufficient to exclude every reasonable hypothesis of innocence beyond a reasonable doubt. (R 2859-60).

be disturbed when there is substantial competent evidence to support it. Id. On appeal, the state 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, 390 (Fla. 1st DCA 1985) review dismissed 504 So.2d 762 (Fla. 1987).[14]

"Circumstantial evidence alone is sufficient to convict in a capital case in the absence of a reasonable alternative theory." Huff v. State, 495 So.2d 145, 150 (Fla. 1986). "The reasonableness of a hypothesis of innocence is a question for the jury." Id. A jury could properly conclude that a defendant's theory is unreasonable. Id.

By its verdict, it is obvious that the jury in the instant case rejected the defendant's theory as unreasonable and his testimony as untruthful. It is up to the jury that heard the case and had the opportunity to access the defendant's testimony to resolve conflicts in the evidence.

A review of the record reveals that the defense theory is patently unreasonable. According to the defense, the victim unwittingly drove her husband's leased car into the lake they had just returned from. Realizing what happened, she had the presence of mind to take off her glasses and put them in a case in her purse. She then somehow managed to open the car door[15] as

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[14] This Court in dismissing the petition to review Buenoano stated that it found Buenoano fully in accord with legal precedent setting forth the standard of review for the sufficiency of evidence in circumstantial evidence cases. Buenoano, 504 So.2d at 762.

[15] Because of the water pressure, it would be extremely difficult to open the car door until the car filled up with water (R 2762).

the car was filling with water and swam out, despite the fact that she couldn't swim. She did all this of course with purse in hand. And if you believe the defendant that she always wore her seatbelt, she also managed to undo that as well.

One must also believe that she survived hitting the water without sustaining any injuries and managed to accomplish all of the above outlined heroics despite the panic and terror that must have seized her seeing as she could neither swim nor see.[16]

The purpose of this midnight excursion was to find her allegedly lost cigarette case as well as to buy more cigarettes (R 1796, 1802) and milk (R 1929). In her pocketbook, however, the police found the lost case with still one cigarette in it and a crumpled but unopened pack of cigarettes (R 1606). No milk was found (R 1942).

The defense argued that she may not have realized that her case was still in her purse despite the fact that the defendant himself told the police that they allegedly looked "all over" for it before his wife decided to go hunt it down (R 1801-02, 1901). To explain the unopened pack of cigarettes in her purse the defense proffered the theory that the victim must have purchased it that night. There was, however, no evidence to support that theory and in fact, the evidence presented at trial contradicted it. [17]

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16 For a detailed rendition of the facts, see Statement of the Case and Facts.

17 No one recognized the victim's photograph at any of the convenience stores near her home (R 1856). It should also be noted that if the victim purchased these cigarettes that night, she would have had to go into her purse to get money to pay for them and of course she had to have put them in her purse as well.

The defense atlernatively suggested that the defendant may have lost her cigarette case at the apartments earlier that day and therefore may have found it there. Of course this makes no sense because if she had found her cigarette case at the apartments she would have had no reason to go to the lake looking for it. Moreover, if she had in fact lost her case at the apartments, she would have realized it was lost well before midnight.

According to the defendant, he and his wife went to the apartments earlier in the evening before they went to the lake (R 2544, 2585-86). Mrs. Golden was a smoker. Her son Darin testified that she smoked one to one and one half packs a day (R 1569). That comes to about two cigarettes during each waking hour. It is not reasonable to believe that a person who averaged two cigarettes an hour did not realize she had lost her cigarette case until several hours later.[18]

The appellant now alleges that another possible explanation for his wife's death was suicide. He further implies that this defense was not raised by his attorney because of some conflict of interest.

First it should be noted that the possibility of suicide was brought to the jury attention on several occassions (R 1781,

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The even further stretch of the imagination required by the defense theory is that she did all this without noticing her cigarette case.

[18] The prosecutor brought out this point in his cross-examination of the defendant. (R 2589).

2157, 2565, 2616, 2617, 2784). There was however, no evidence to support this theory, from which the defense could argue.

The defense tried to portray Mrs. Golden as a happy woman. To suggest that she was so despondent that she would take her own life would be counterproductive to this strategy. Moreover, factually, the suicide theory is even less credible than the accident theory.

As already mentioned, there was no evidence that the victim was despondent. The one cause of unhapiness for Mrs. Golden, the prospect of leaving her job, was removed by her husband's decision to remain in Florida. Also, her sons had not noticed anything unusual about their mother's behavior prior to her death.

If Mrs. Golden had committed suicide, the police would have found her body and her purse inside the car, not floating several feet from shore.[19] Also, she certainly would not have bothered to take off her glasses for safekeeping as she would not have needed them later. [20]

No matter how one examines the defense theory it comes up short. The reasonableness of a hypothesis of innocense is for the jury to decide. This jury rejected it. Therefore, on appeal, the evidence and any conflicts in it must be viewed in

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19 The defense suggests that her body could have "reflexively" gone out of the car. How that would happen of course is a mystery. Moreover, the fact that her purse was also found outside the car may also suggest that the purse developed reflexes too.

20 If Mrs. Golden wanted to kill herself, she certainly could have found an easier and less terrifying way to do it. Mrs. Golden worked in a Nursing Home and could have had access to all types of medications by virtue of working in such a facility.

the light most favorable to the jury's verdict. As there was substantial competent evidence to support the jury's rejection of the defense theory the conviction must be upheld.

ISSUE II

THE TRIAL COURT'S EXCUSAL FOR CAUSE OF PROSPECTIVE JUROR BROWN WAS NOT AN ABUSE OF THE TRIAL JUDGE'S DISCRETION.

The defendant claims that the trial court abused its discretion by improperly excusing prospective juror Brown for cause. In so excusing Ms. Brown, the trial judge found that she could not vote for the death penalty (R 462). Ms. Brown was excused over defense objection.

The standard for review on appeal for juror exclusion is abuse of discretion. Trotter v. State, 576 So.2d 691, 694 (Fla. 1990). Therefore, it is the defendant's burden to establish that the trial judge abused his discretion by excluding Ms. Brown. Wainwright v. Witt, 469 U.S. 412, 435 (1985).

During jury selection, a trial judge must determine whether a prospective juror's views would prevent or substantially impair her ability to perform her duties. Trotter, 576 So.2d at 694. This determination of impartiality is no different in a capital case. Wainwright, 469 U.S. at 423. The fact that the defendant committed a crime possibly punishable by the death penalty does not entitle him to a standard that will allow the seating of a juror who may likely be biased in his favor. Id.

"On appeal the question is not whether a reviewing court might disagree with the trial court's findings, but whether these findings are fairly supported by the record." Trotter, 576 So.2d at 694. In reviewing the record, deference must be payed to the findings of the trial judge. Wainwright, 469 U.S. at 426. That is because bias need not and often cannot be proved with clarity. Id. at 424-25. The trial judge's findings are not just based on

what's evident from the cold record but rather on determinations of demeanor and credibility that are peculiarly within the trial judge's province. Id. at 428.

In reviewing the fitness of a particular juror it is necessary to consider the record as a whole not just excised portions of it. Trotter, 576 So.2d at 694. The fact that a juror ultimately agrees that he could follow the law is not dispositive when he had previously equivocated or appeared unsure of his answers. Id.

A review of the entire colloquy in this case supports the trial court's finding that Ms. Brown should not serve on a jury involving the imposition of the death penalty.[21] During the prosecutor's early inquiry, Ms. Brown stated that she had "mixed feelings" about the death penalty and that she did not feel comfortable about it. (R 451) After the prosecutor explained the purpose of the penalty phase to Ms. Brown and asked her the hypothetical question of whether she could vote for the death penalty under the most egregious circumstances possible in this case, that is that all three aggravating factors were proved beyond a reasonable doubt and no mitigating factors established, Ms. Brown's best response was "a shaky yes." (R 455).

At the close of the prosecutor's inquiry, he asked Ms. Brown if in considering the death penalty she would be inclined to vote against it as a result of her personal feelings she said that she probably would (R 457). It was only after a lengthy speech by

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[21] The entire colloquy involving juror Brown covers pages 448-464 of the record.

the defense attorney (R 457-460) that she said that she would try to follow the law to the best of her ability (R 460).

The trial judge who presided over the colloquy found that Ms. Brown could not vote for the death penalty (R 462). The judge made a point of explaining that it was his "impression" as he perceived that juror that she could not vote for death under any circumstances (R 462-463).[22] It is precisely these impressions that can only be arrived at from the entire interaction between this juror and the court that should not be disturbed on appeal.

Furthermore, it is important to note that Ms. Brown indicated that serving on this jury would cause her great hardship. (R 449) Ms. Brown teaches nursing at Polk Community College which at the time was short of staff. Consequently, her absence for two to three weeks would have caused a great hardship for her and her students (R 450).

In assessing her ability to sit on the jury, the trial judge also considered this factor and found that as a result of this situation, Ms. Brown would not be mentally present during the trial anyway (R 464). Because of that additional reason, the trial judge found that Ms. Brown would not be able to sit on the jury and granted the cause challenge (R 464). As either reason would have been sufficient to exclude Ms. Brown, the defendant

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22 THE COURT: Counselor, my impression is that she could not vote for the death penalty under any circumstances. That's what I perceived in her answers, and I will grant the motion to challenge for cause. (R 463)

has not met his burden of establishing that the trial judge abused his discretion in so striking her.

Moreover, any error in this case would be harmless as the State still had several peremptory challenges left. In fact, at the end of jury selection both the State and the defense each had two challenges left (R 1412). Consequently, the prosecutor could and would have stricken Ms. Brown regardless of the trial judge's ruling on his cause challenge. See, Hitchcock v. State, 578 So.2d 685 (Fla. 1990).[23]

A review of the record supports the trial court findings involving Ms. Brown's ability to serve on this jury. The defendant has not met his burden of establishing that the trial judge abused his discretion. Consequently, he is not entitled to relief under this claim.

ISSUE III

THE TRIAL JUDGE DID NOT ERR BY ADMITTING EVIDENCE OF MOTIVE

The defendant claims that the trial court erred by admitting evidence of motive and collateral crimes as the State failed to present sufficient proof of corpus delicti. A review of the record as well as the law reveals that this issue is without merit.

First, it should be noted that there is no requirement that motive evidence be presented in any particular order in the State's case in chief. The cases cited by the defense are all

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[23] In Hitchcock, this Court applied harmless error analysis in a situation involving juror competency where there was an available peremptory challenge to strike the objectionable juror. Hitchcock, 578 So.2d at 689.

confession cases and deal with the specific issue of the admissibility of a confession as it relates to evidence of a corpus.

Motive evidence should also be distinguished from evidence of collateral crimes as not all collateral crimes evidence goes to motive. For example, in one of the Buenoano cases, this Court stated that evidence of corpus must precede evidence of collateral crimes. Buenoano v. State, 527 So.2d 194, 197 (Fla. 1988). In Buenoano, the State sought to introduce similar crimes evidence concerning the poisoning deaths of the defendant's former husband and fiancee. This Court held that the evidence was admissible finding that it was sufficiently similiar to the crime charged to point to the defendant as the killer. Id. at 197.

In the instant case, the evidence of alleged "forgeries" was not collateral crimes evidence. The defendant's signing of the victim's name to life insurance enrollment forms was circumstantial evidence of guilt. As such it could have been introduced at any point in the trial. Nevertheless, the State introduced this evidence at the end of its case, after the corpus had already been established.

The corpus delicti in a murder case is: (1) the fact of death, (2) the existence of the criminal agency of another, and (3) the identification of the victim. Bassett v. State, 449 So.2d 803, 807 (Fla. 1984); Farinas v. State, 569 So.2d 425 (Fla. 1979), cert. denied, 449 U.S. 986 (1981); Davis v. State, 582 So.2d 695, 699 (Fla. 1st DCA, 1991). Proof of the corpus is sufficient if the evidence "tends to show that the crime was

committed." Davis, 582 So.2d at 699 citing Farinas, 569 So.2d at 807. Finally, this proof can be met by circumstantial evidence. State v. Allen, 335 So.2d 823, 825 (Fla. 1976).

In Davis v. State, the First District Court of Appeals affirmed the defendant's conviction for first degree murder even though the victim's body was never found. In rejecting the defendant's corpus delicti argument the court said the following:

> A causal connection between the defendant and the crime is not required to be shown. Nor is the discovery or production of a dead body necessary to establish the corpus delicti. See Sochor v. State, supra; State v. Snowden, 345 So.2d 856 (Fla. 1st DCA 1977); State v. Quillin, 49 Wash. App. 155, 741 P.2d 589 (Wash.App. 1987). Moreover, the foundational evidence necessary to prove corpus delicti need not eliminate all possible noncriminal explanations of a victim's dissappearance. Thus, the confession of one charged with homicide is admissible, even though remains of the victim are not found, where evidence is adduced that "tends" to show that a homicide was committed or allows a reasonable inference that the alleged victim could be dead due to a criminal agency. It is unnecessary to negate all noncriminal explanations of the event prior to the admission of the confession. See People v. Bolinski, 2600 Cal. App.2d 705, 67 Cal.Rptr. 347 (1968).

The reasoning of the First District Court of Appeals in Davis is sound. To require the State to negate all noncriminal explanations of the victim's death before evidence of motive is introduced is not just unfeasible, it is unjust. If that was the case, the State would never be able to prosecute a murder case where the cause of death was not evidently violent unless it had eye witnesses.

In the first Buenoano case, the defendant was convicted of drowning her son. Buenoano v. State, 478 So.2d 387 (Fla. 1st DCA

1985). In Buenoano as in the instant case, there was no evidence of "foul play", i.e. no bruises or injuries to the victim or the defendant to indicate a struggle of any kind. The manner of death was equally consistent with an accident except for the suspicious circumstances of the death.

The same is true in the instant casee. When one looks at the circumstances of Mrs. Golden's death, it becomes evident that her demise was the result of another's actions.[24] There was more than sufficient evidence to establish the corpus delicti requirement in this case. Consequently, the defendant's is not entitled to relief.

Finally, the defendant alleges that the trial court's error was aggravated by the fact that no motive instruction was given to the jury. The defendant, however, did not request any such instruction during the trial. Having failed to object to the instructions as given or request any additrional instruction, he cannot now complaint of its absence on appeal. Ponticelli v. State, 18 FLWS 133 (Fla. 1993); Florida Rule of Criminal Procedure 3.390(d).

ISSUE IV

THE TRIAL JUDGE PROPERLY ADMITTED WILLIAMS RULE EVIDENCE AGAINST THE DEFENDANT

The defendant claims that the trial judge erred in allowing evidence of other crimes, wrongs or acts to be admitted in the State's case in chief. He maintains that the relevance of this evidence, was negligible and therefore substantially outweighed

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24 See, Statement of the Case and Facts for details.

by its prejudicial impact. A review of the record reveals that this claim is without merit.

The defendant's first complaint goes to evidence of "forgeries" introduced against him. These "forgeries" were the purported signatures of the victim on life insurance enrollment forms. The State's expert testified that the victim's signatures were not signed by her and there was a strong probability that they were signed by the defendant (R 2303-05).

The defendant's second complaint goes to the evidence of bankruptcy introduced by the State. The defendant had sought legal advise on this matter prior to his wife's murder. One month after her murder, he filed a petition in federal court which was granted discharging all his listed debts. In that petition, he denied the expectation of any assets that could offset his debts and failed to list American Express as a creditor.[25] (R 2321-25).

The test for admissibility of evidence is relevancy. Heiney v. State, 447 So.2d 210, 213 (Fla. 1984). Evidence of other crimes, wrongs or acts is admissible if it tends to establish motive, intent, absence of mistake or common scheme. Id. Ashley v. State, 265 So.2d 685, 693 (Fla. 1972).[26] Evidence which has a

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25 The American Express card is the one that carried the $200,000 life insurance policy in case of accidental death while driving a leased car (R 2194). A request for a claim form was made by the defendant on September 26, of 1989 (R 2194).

26 Florida Statute 90.404(2)(a) provides:

> Similar fact evidence of other crimes, wrongs, or acts is admissible when relevant to prove a material fact issue, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of

reasonable tendency to establish the crime charged is not inadmissible simply because it points to other possible crimes. Ashley, 265 So.2d at 693.

Nothing could be more relevant to motive in this case than evidence that the defendant signed his wife's name to life insurance enrollment forms just a few months before her murder. This is especially true when he was the beneficiary and had not purchased any such insurance on his own life.[27] The fact that signing her name, if done without her permission, may point to another crime does not diminish the relevance of this evidence.

The same is true for the bankruptcy evidence. The fact that the defendant sought legal advice and filed a bankruptcy petition does not only confirm his desperate financial condition but also highlights his awareness of the seriousness of his plight. Moreover, the omission of American Express as a creditor is highly relevant to motive as American Express carried the automatic $200,000 life insurance policy for accidental death.[28]

"All evidence that points to a defendant's commission of a crime is prejudicial. The true test is relevancy." Ashley, 265

> mistake or accident, but it is inadmissible when the evidence is relevant solely to prove bad character or propensity.

[27] The defendant could have purchased life insurance on his life at the same time by filling out a section on the same form (R 2151, 2191).

[28] Despite appellant's contentions to the contrary, the testimony was clear that he did request a claim form from American Express on September 26 of 1989 (R 2194).

So.2d at 694. The Williams Rule evidence was properly admitted against the defendant as it was highly relevant.[29]

Additionally, the defendant complains that the prejudice was aggravated as the jury was not given cautionary instructions during the admission of this evidence. A review of the record reveals that this issue was not preserved for appeal.

It is incumbent upon the defendant to request such an instruction. Id. The defendant here did not make any such request. Therefore, he may not complain now on appeal about the court's alleged failure to give such an instruction. Id.

Finally, it should be noted that the defendant failed to properly preserve his objections to the introduction of the Williams Rule evidence during the trial. The record reveals that no contemporaneous objections were made to the introduction of this evidence. Consequently, he is now procedurally barred from complaining about its admission. Lawrence v. State, Supreme Court Case No. 76,399 (Fla. 3/11/93). Relief should be denied.

ISSUE V

THE TRIAL COURT DID NOT COMMIT FUNDAMENTAL ERROR BY COMMENTS MADE DURING TRIAL.

The defendant claims that the trial judge and his attorney committed fundamental error by repeatedly chastising him in the

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29 The defendant also challenges the reference to false statements by the defendant on loan applications. This questioning was proper impeachment during cross-examination of the defendant. By taking the stand, the defendant put his credibility at issue and cannot now complain about valid attacks on it. Moreover, despite the appellant's contention, there was no false intimation that the defendant had other pending cases (R 2321 - 22).

presence of the jury. A review of the record reveals that this claim is without merit.

The trial took almost three weeks and covers eighteen volumes of transcripts. During the defendant's testimony, the prosecutor objected on two complained of occasions. In the first instance, the court sustained the objection and instructed the defendant to not answer the question, as he was starting to do, while the objection was pending (R 2535). In the second instance, the defendant started testifying to inadmissible hearsay. The court sustained the State's objection and instructed the defendant to respond to the questions as nearly as he could (R 2575-76).

On cross-examination, the defendant again continued speaking during an objection. The court again instructed him to stop speaking until the objection was ruled on (R 2587). Finally, in response to one of the prosecutor's questions, the defendant sarcastically replied "Watch my mouth. No Sir" (R 2592). The Court interrupted the cross-examination and instructed the defendant to answer the questions posed without sarcasm.

The trial judge has the obligation to conduct a fair trial. In conducting a trial, the judge must rule on objections, oversee the admission of evidence, including testimony, and otherwise make certain that the trial is conducted properly.

There is no requirement that the trial judge remain mute during the proceedings. What is improper is for a trial judge to comment on the weight of the evidence, the credibility of the witnesses and the guilt of the accused. See, Section 90.106, Florida Statutes (1992). The remarks referred to in the record

are nothing more than rulings on objections made and the trial court's exercising its responsibility to conduct a fair trial. Jackson v. State, 545 So.2d 260, 264 (Fla. 1989).[30]

If the defense had felt that the defendant was prejudiced as a result of these remarks, a curative instruction could have been requested. Huff v. State, 495 So.2d 145, 148 (Fla. 1986). As no curative instruction was requested or objection raised, this issue has not been preserved for appeal. Lusk v. State, 446 So.2d 1038, 1042 (Fla. 1984).[31]

Even if this issue had been preserved, these remarks would not constitute grounds for reversal. The complained of remarks should not be considered in isolation but rather in context. Lister v. State, 226 So.2d 238, 239 (4th DCA 1969). In relation to the trial, they are at best incidental to the overall record and therefore harmless. Lusk, 446 So.2d at 1042. Harmless error has been applied to excuse even improper judicial comments made in front of the jury. Millett v. State, 460 So.2d 489, 493 (Fla. 1st DCA 1984).

Finally, a review of the entirety of the defendant's testimony reveals a pattern of evasiveness and unresponsiveness.

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30 The appellant complains in his brief about a statement made by the trial judge to the first venire panel that "this case is about a lady who was drowned in an automobile." (R 134). What the appellant fails to mention is that the defense did not object to this remark as it obviously suited their theory that this drowning was an accident. It was the prosecutor who raised an objection and asked for a curative instruction to which the defense agreed (R 136-37, 144).

31 The defendant now complains that the trial judge improperly emphasized the first degree murder form by reading it in full (R 2862-63). This claim has not been preserved for appellate review as no objection was raised or curative instruction requested.

It is evident that defense counsel tried to minimize the impact of his client's evident hostility towards the prosecution by having him apologize in the presence of the jury. This obvious strategy gave the defendant the opportunity to explain his poor attitude to the jury. He should not now be allowed to complain about problems he caused.

ISSUE VI

THE TRIAL JUDGE DID NOT ABUSE HIS DISCRETION BY DENYING THE DEFENDANT'S MOTION FOR A JURY VIEW OF THE SCENE.

The defendant claims that the trial court erred in denying his motion for a jury view of the crime scene. A review of the record, however, reveals that this claim is without merit.

The scene in the instant case is the boat ramp leading to Lake Hartridge. It was the defense theory that the victim accidentally drove off the ramp not realizing that there was a lake there. They maintained this theory even though the defendant himself testified that the victim had been at the lake that same night with him. In pursuing its theory, the defense alleged that a view of the scene by the jury was imperative.

The record, however, shows that the scene had substantially changed since the night of the murder. In the two intervening years, the water level alone had risen almost two feet. In addition, the evidence established that on the night of the murder, the sky was clear and the moon nearly full (R 1499). Witnesses testified that they had no difficulty seeing the water upon approaching the ramp (R 1652). In fact, Rick Heiman, the officer that discovered the victim testified that he actually saw the floating body from the time that he turned onto the roadway

leading to the ramp, 180 feet away (R 1499, 1511-12). Officer Heiman also testified that he could see the submerged car when he was about 40 feet away (R 1505).

The defense had the opportunity to cross-examine these witnesses as well as present any type of evidence it felt was helpful. There were also numerous photographs of the scene introduced into evidence. These photographs were taken from various angles and depicted the crime scene as it appeared on the day of the murder. Also introduced into evidence was a videotape filming the scene and the removal of the car from the lake.

The decision of whether to allow a jury view of the crime scene is in the discretion of the trial judge. Bundy v. State, 471 So.2d 9, 20 (Fla. 1985); Rankin v. State, 143 So.2d 193, 195 (Fla. 1962). The trial judge in this case thoughtfully considered this request and in fact visited the scene himself on two separate occasions (R 105). For comparison, he took with him several photographs that were later introduced into evidence (R 105).

Based on legal argument and his observations[32] he ultimately denied the defense request (R 2696-2700). It was his opinion

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[32] After viewing the scene, the trial judge made the following observations:

> Its something that I don't know until -- put it this way: I need to put it in perspective. I don't know if there's any reason to go out there or not. I really won't know that until I see or hear the proofs of where we're going with the case. I must say I've drawn certain conclusions from having visited the place. I went yesterday afternoon when I left the courthouse. I went last night around 10:00 or 10:30 again. And I have some questions. I'm not sure my impressions are material at this time in the

that the scene had changed since the 1989 murder. "Such a determination is left to the discretion of the trial judge and there is a presumption as to the correctness of his rulings in the absence of a demonstration to the contrary. Bundy, 471 So.2d at 20.

The defendant cannot demonstrate an abuse of discretion by the court. Consequently, he is not entitled to relief on this claim.

ISSUE VII

THE TRIAL COURT DID NOT ERR BY ADMITTING HEARSAY EVIDENCE

The defendant claims that the trial judge improperly admitted the introduction of inadmissible hearsay. He then points to three such instances from the trial. A review of the record, however, reveals that this argument is without merit.

The first complaint involves Detective Smith's testimony about his investigation. The night after the murder, Detective Smith showed the victim's photograph to clerks at five convenience stores near her home in an effort to determine if she had purchased cigarettes there the night before[33]. He testified

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> absence of some motion supported by some testimony or evidence of why we should do this. (R 105).

At the appropriate time, he denied the motion (R 2700).

[33] An unopened pack of cigarettes was found in the victim's purse (R 1606). According to the defendant, the victim had gone out on the night she was killed to look for her cigarette case and to purchase more cigarettes and milk. (R 1796, 1802, 1929).

at trial that none of the clerks were able to identify Mrs. Golden.

The trial judge allowed the testimony finding that it was not hearsay. The actual question asked by the prosecutor and Detective Smith's answer are as follows:

> Q. Yes or no, Detective did you find any person who has seen Mrs. Golden in any of those convenience stores the night before?
>
> A. No, sir.
>
> (R 1856).

The court's ruling that this testimony was not hearsay is correct.

The State did not ellicit any hearsay as it did not introduce any out of court statements. The evidence introduced was the results of Detective Smith's investigation, i.e., that no one at the stores canvassed recognized the victim's photo. The State did not introduce the actual statements of any of those people nor did it argue that as a result it had proved that Mrs. Golden had not purchased cigarettes on September 13. The defense had ample opportunity to cross-examine Detective Smith as to this procedure and point out its inherent weakness (R 1856-1860).

Moreover, the evidence introduced was not offered for the truth of the matter asserted, i.e., that the victim had not purchased cigarettes the night she was killed but rather that none of the clerks recognized Mrs. Golden's photograph. It should be noted that when the state elicited this testimony, the defense did not make the required contemporaneous objection or ask that the testimony be stricken. Consequently, this issue was not properly preserved for appellate review. Leonard v. State, 423 So.2d 594, 595 (Fla. 3rd DCA 1982).

Nevertheless, even if deemed improper, this evidence was at best harmless. The defense theory was that when the victim went looking for her lost cigarette case, she accidentally drove the defendant's leased car into the lake and drowned. It was of no consequence to this defense when the victim purchased her cigarettes as the purchasing of cigarettes would not have caused or prevented this alleged accident. Moreover, the prosecutor did not focus on this evidence in closing argument nor did he argue that it established that Mrs. Golden had not purchased cigarettes that night (R 2814-15).

The second instance of error according to the defendant occurred when the State introduced statements the victim made to her co-workers about not wanting to relocate to Minnesota or leave her job. A review of the record reveals that this claim is also without merit.

The first such statement cited in the defendant's brief was not objected to (R 2007). The same is true of other such statements the defendant now finds objectionable (R 2016, 2023). As there were not contemporaneous objections to these statements or motions to strike their contents, the issue was not preserved for appeal. Leonard, 423 So.2d at 595.

The second objectionable statement cited in the defendant's brief was actually brought out on cross-examination and was in direct response to a question by defense counsel (R 2021). This is also true of statements cited on page 131 of the appellant's brief (R 2102, 2018-20).

The only cited statement properly objected to was that of Mr. Hauth, the victim's supervisor, who testified about Mrs.

Golden's sadness about the prospect of relocating to Minnesota and leaving her job. (R 2089-2090). First, it should be noted that this statement is simply cumulative to the other unobjected or defense ellicited statements. Second, this statement is admissible under the state of mind exception to the hearsay rule. Section 90.803(1)(a) 1, Florida Statutes (1991).

A victim's state of mind is not generally admissible as it is not of issue in a criminal case. Downs v. State, 574 So.2d 1095, 1098 (Fla. 1991). Rather, it is generally the defendant's state of mind that is at issue. Id. Victim statements, however, have been found admissible when the victim's state of mind is relevant to an issue in the case as for example when the issue of consent is raised in sexual battery, Bedford v. State, 589 So.2d 245, 252 (Fla. 1991), or claims of self-defense or accident are raised in murder, Kingery v. State, 523 So.2d 1199 (Fla. 1st DCA, 1988); Kelley v. State, 543 So.2d 286, 288 (Fla. 1st DCA, 1989).

In the instant case, the victim's state of mind was made an issue in the case by the appellant. The defense claimed throughout the trial that the Golden marriage was happy and that there was no conflict between the victim and the defendant. Consequently, the victim's state of mind is relevant as it rebutted this claim of marital bliss.

Moreover, even if improper, this statement was merely cumulative to what the jury already knew through other competent evidence: that the victim was happy at her job and did not want to relocate to Minnesota. Brunelle v. State, 456 So.2d 1324 (Fla. 4th DCA 1984). Furthermore, the State did not argue that this was the motive for the murder. It was the State's position

from the beginning that the defendant killed his wife in order to collect life insurance money and save himself from financial ruin.

It is interesting to note that it was the defendant himself who changed his mind about moving to Minnesota as, according to his testimony, the job prospects did not look good up north either (R 2536). This was confirmed by the victim upon her return to work. Whatever conflict existed between them on this issue therefore ended as a result of his decision to stay in Florida. To now argue that this evidence is harmful error is not credible.

The third instance cited in the defendant's brief is the admission into evidence of the credit union's telephone log. According to the credit union's records, the defendant called on the day of his wife's murder to cancel a preexisting appointment. The defendant gave his wife's death as the reason for not making his appointment.

This statement is admissible as a business record under §90.803(6), Florida Statutes. Hawthorne v. State, 399 So.2d 1088, 1090 (Fla. 1st DCA 1981). The credit union manager properly authenticated this record as required by statute. See, Medlock v. State, 537 So.2d 1030, 1031 (Fla. 3rd DCA 1988). Its admission, therefore, was not error.

The defendant has failed to meet his burden of establishing that the trial judge abused his discretion in admitting this evidence. He is not entitled to relief under this claim.

ISSUE VIII

THE PROSECUTOR'S REMARKS WERE NOT IMPROPER

The defendant claims that the prosecutor repeatedly commented on his failure to produce evidence and witnesses. As support for this position, the defense points to three instances from the defendant's trial. A review of the record, however, reveals that this claim is without merit.

First, it should be noted that the defendant testified on his own behalf during this trial thereby waiving his right to remain silent. In his opening statement, the defense proffered evidence that could only have come from the defendant's own testimony. When the defendant testified at trial he denied any involvement in his wife's demise claiming that he was home asleep at the time. In closing, defense counsel attacked the sufficiency of the State's case.

At none of the instances complained of did the defense object on the grounds now raised[34] or request a curative instruction by the trial court. As this issue was not properly preserved for appellate review, it has been waived. Brown v. State, 473 So.2d 1260, 1264 (Fla. 1985); White v. State, 446

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[34] In the first instance, where the prosecutor objected to defense counsel's question as being beyond the scope of his direct pointing out that the defense could call this witness, there was a defense objection. The objection, however, addressed the scope of direct. The objection was sustained and the defense was then permitted to pursue on cross-examination the objected to line of questioning. The prosecutor's remark was not objected to, nor did defense counsel ask for a curative instruction. In light of the entire record this remark, even if improper, was at best innocuous.

So.2d 1031, 1035 (Fla. 1984); State v. Jones, 204 So.2d 515, 519 (Fla. 1967).

Moreover, a review of the law reveals that there is no error in the prosecutor's remarks. The defendant brought his own credibility into issue by (1) testifying and (2) through his attorney in opening and closing statements. Also the defendant repeatedly challenged the sufficiency of the State's case intimating that the State's evidence was insufficient as well as unreliable thereby inviting the comments of the prosecutor.

All but one of the cases cited by the defense are inapplicable to the case at bar as in those cases the defendant did not testify. In Romero v. State, 435 So.2d 318 (Fla. 4th DCA 1983), a case in which the defendant did testify, the Fourth District Court of Appeals held that the prosecutor's remarks on the defendant's failure to put on evidence did not cause reversible error. In so holding, the court remarked that a prosecutor has the right to challenge by comment the defendant's position that he either did not commit the crime or that some witness has exonerating information. Id. at 320.

Even when the defendant does not testify the prosecutor is permitted to comment on the absence of evidence to support the defendant's position. White v. State, 377 So.2d 1149, 1150 (Fla. 1980) cert. denied, 449 U.S. 845.[35] Jones, 204 So.2d at 516. The defense by its argument and questioning during the trial can invite such remarks making the prosecutor's comments "fair

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[35] In White, the prosecutor said "You haven't heard one word of testimony to contradict what she has said, other then the lawyer's argument." Id.

reply." State v. Mathis, 278 So.2d 281, (Fla. 1973). When defense counsel comments on the insufficiency of the State's case intimating that more evidence could have been presented it is fair comment for the prosecutor to point out to the jury that the defense has the same subpoena power as the State. Cook v. State, 391 So.2d 362, 363 (Fla. 1st DCA 1980).

In the instant case, the comments in the prosecutor's closing remarks were all invited by the defendant's argument (R 2735-2789).[36] It was the defense that complained that the State did not introduce sufficient photographs (R 2758) and challenged without any corroboration the handwriting expert's testimony (R 2785). It was the defendant himself who claimed in his testimony that he hired a lawyer to set up a trust for his sons from the insurance proceeds.

The remarks complained of are not improper when reviewed in context. Moreover, any possible error was waived by the defense as no objections were made. The defendant is not entitled to relief.

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[36] The issue involving the availability of Ms. Cave was raised by the defense not the state. On cross-examination of Mr. Wyser, a state witness, defense counsel in referring to a loan application that Mr. Wyser had identified, asked the witness who Ms. Cave was (R 2418). Later, on cross-examination it was brought out that Ms. Cave was the one that had taken and reviewed the information on that loan application (R 2421). By his line of questioning the defendant was trying to establish that the victim had signed that document in Ms. Cave's presence (R 2418-21). It was only on redirect that the prosecutor inquired as to Ms. Cave's availability (R 2428).

ISSUE IX

THE JURY WAS NOT IMPROPERLY INFLUENCED DURING ITS DELIBERATIONS.

The defendant claims that the trial judge committed fundamental error when (1) he failed to sequester the jury, (2) allowed the bailiff to communicate with the jury and (3) failed to adequately admonish the jury. A review of the record reveals that these claims are either meritless or barred.

In the instant case, the jury was allowed to separate for the weekend after having begun deliberations on the defendant's guilt. The defense not only agreed to this procedure but expressed its preference for it. (R 2379, 2702).[37] Upon discharge on Friday evening, the jury was admonished to not discuss the case or expose itself to any media reports (R 2868-69). On Monday morning, the jurors confirmed that they had abided by the court's admonition. (R 2873).

Failure to sequester a jury is not a denial of due process when defense counsel agrees to the separation. Brookings v. State 495 So.2d 135, 141 (Fla. 1986). This Court in Pope v. State, 569 So.2d 1241 (Fla. 1990) said that the per se reversible rule announced in Livingston v. State, 458 So.2d 235 (Fla. 1984)[38] "is merely prophylactic in nature and must be invoked by contemporaneous objection at trial." Pope, 569 So.2d at 1244.

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[37] Defense counsel stated that sequestering the jury "would be an insult to them and to the system." (R 2379).

[38] In Livingston just as in the instant case, the jury was permitted to separate after deliberations had already begun and sent home for the weekend. In Livingston, however, defense counsel objected to this procedure and requested a mistrial. Livingston, 458 So.2d at 236, 239. This Court granted a new trial holding that the separation of jurors after deliberation have begun will generally be grounds for mistrial. Id. at 239.

"A defendant cannot acquiesce to such a procedure and then claim reversible error upon appellate review." Brookings, 495 So.2d at 142. Where defense counsel consents to separation and the trial court properly admonishes the jury upon separation, the sequestration issue is deemed waived. Pope, 569 So.2d at 1242; Brookings, 495 So.2d at 141. Engle v. State, 438 So.2d 803, 808 (Fla. 1983). Holding thusly, this Court has taken into account that for tactical or other reasons, defense counsel may prefer that the jury be permitted to separate. Pope, 569 So.2d at 1242.

Moreover, despite appellant's wishes, sequestration is not a personal right that attaches to the defendant. Consequently, there is no requirement that he make a personal waiver as, for example, in the waiver of the jury trial. Rule of Criminal Procedure 3.260. The issue of sequestration is a decision involving trial strategy and therefore left up to defense counsel.[39]

The second alleged fundamental error: the bailiff's communications with the jury, were done with the agreement and at the behest of defense counsel (R 2865-69, 2873-75). As there were no objections to these communications, they cannot be properly challenged now. This claim is barred from appellate review.

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[39] The defendant as well as his counsel waived sequestration (R 2379, 2702). The defendant did not simply accede to his attorney's wishes as suggested but rather acknowledged that it was his choice to not sequester the jury. This defendant is a well educated individual: he has two masters degrees and has done substantial work towards a doctorate degree. To now suggest to this Court that he was somehow duped into this waiver is not believable.

Moreover, the actual communications merely involved scheduling and other such ministerial details. Crews v. State, 442 So.2d 432 (Fla. 1983). They certainly did not involve improper influence upon the panel and do not constitute grounds for a new trial. Rule of Criminal Procedure 3.600.

There is no evidence that his jury was improperly influenced Trotter, 576 So.2d at 693. It is obvious from the record that even when jurors that smoked were out of the jury room, the other jurors stopped deliberating (R 2872). Moreover, this jury was admonished not to discuss the case or expose itself to media reports about it. They were thusly admonished throughout the trial not just during deliberations. (R 2865 - 69, 2873). All jurors indicated that they had abided by the admonitions.

In the absence of evidence that this jury was improperly influenced, the defendant is not entitled to relief. Moreover, there were no objections to the deliberations of this jury. Consequently, these claims are without merit.

ISSUE X

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN CURTAILING DEFENSE CROSS-EXAMINATION.

The defendant claims that the trial judge abused his discretion when he sustained State objections to defense counsel's cross-examination. The defendant points to two such instances in support of his argument. A review of the record, however, reveals that this argument is without merit.

The defendant complains that the trial judge improperly limited defense counsel's cross-examination of witness Tuil, the victim's brother. Mr. Tuil was called for the very limited

purpose of establishing that the victim smoked and that she always wore glasses since she was a child (R 2050-2051). On cross-examination, the defense was permitted, over the State's objections, to delve into the victim's personality and demeanor. Mr. Tuil was allowed to testify that his sister's personality had not changed and that she appeared to be happy when he saw her in Minnesota, one month before the murder (R 2056).

The "limitation" the defense complains of was the trial judge's ruling finally sustaining the State's objection to defense counsel's question as to how long the victim and the defendant were married (R 2055), a question well outside the scope of direct examination.[40] After the trial judge sustained the state's objection to that particular question, the defense was nevertheless allowed to continue with its line of questioning thereby eliciting the favorable information that Mrs. Golden seemed happy shortly before her murder (R 2056).

Similarly, defense counsel was permitted to question Detective Hopwood on the paucity of physical evidence in this case (R 1988-1991).[41] The prosecutor finally objected on the

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40 The length of the marriage was not in dispute and of no consequence to the issue of the defendant's guilt. Moreover, the jury already knew how long the victim and the defendant had been married from the testimony of other witnesses.

41 Q. OK. Now, other than your conversation with Mr. Golden, did you find any evidence that Mrs. Golden's death was other than by accident?

A. Yes, we did.

Q. What was that?

A. If I can explain. When most people think about it, about evidence, most people think about physical evidence. A case like this, as far as physical evidence goes, you're not looking at a smoking gun or a bloody knife or latent fingerprints or shoe impressions along that line. When we started from point A to point Z, we went back and go over all the evidence that we

recovered at the scene, through Mr. Golden's statements, yes, there is evidence that she died by drowning, and that's what the cause of death was.

Q. And you're saying that's evidence of a crime?

A. Yes, sir, it is when you put all those things together that we discussed earlier.

Q. Well, I'm really interested in knowing how you go from a drowning, an accidental drowning, to a homicide based upon conversations.

A. Well, the cause of death was drowning, there's no dispute there.

Q. Was there any evidence of foul play involved in that drowning?

A. No, there's no evidence of any violent death there. The cause of death was drowning.

Q. Let me ask you this, Detective Hopwood: You've got a five foot five, 170-pound woman. You have no evidence of how she drowned. You don't have any evidence of foul play. You have no evidence of skin scrapings under her fingernails or evidence that she was forcibly held in the water; correct?

A. The only other marking that was on the body, according to the autopsy report, there was a scratch on the back of her neck.

Q. Right. Which was nothing.

A. Well -----

Q. According to the doctor.

A. I wouldn't say it was nothing.

Q. According to what the doctor said, it had nothing to do with her death.

MR. AGUERO: Judge, I object. Mr. Smith can argue at the appropriate time. He can ask witness questions. Asking him about the doctor's testimony is an improper question.

THE COURT: Sustained, Counselor.

Q. Detective Hopwood, other than the scratch on her neck, did you have any evidence of foul play?

A. As far as evidence of foul play, again, there is no violent markings, no, on her. She did drown. She did die by drowning.

Q. Is that evidence of foul play?

A. When you put everything together that we found out, yes, it is.

Q. Well, I'm hoping that you can explain what you're talking about. You're saying because he lied to you about the insurance, because he lied to you about where she went or how she went, that that's some kind of a crime?

MR. AGUERO: I have another objection, Judge. May we approach the bench?

THE COURT: Approach the bench, gentlemen.

(The attorneys approached the bench and there was a discussion as follows:)

MR. AGUERO: Mr. Smith is going to argue with this one all day. He's asking the witness to be a juror and tell him the answer to that question. He can ask the witness, as he has, and

grounds that the questions had been asked four or five times and answered. The trial judge sustained the objection.

The trial judge has broad discretion in making evidentiary rulings and can preclude repetitive or otherwise improper cross-examination. Davis v. Alaska, 415 U.S. 308, 316-18 (1974). Absent a showing of abuse of discretion, such evidentiary rulings will not be disturbed. Maggard v. State, 399 So.2d 973, 975 (Fla. 1981); Hoy v. State, 353 So.2d 826, 831 (Fla. 1977) cert. denied, 439 U.S. 920 (1978).

The trial judge properly curtailed the defendant's cross-examination.[42] The Appellant cannot demonstrate that these rulings amounted to abuse of discretion. Consequently, he is not entitled for relief.

ISSUE XI

THE TRIAL COURT DID NOT EXCLUDE DEFENSE MITIGATION EVIDENCE

The defendant claims that the trial judge improperly excluded defense mitigation evidence. A review of the record reveals that this claim is without merit.

The defense called Darin Golden, the Golden's older son, as a witness during the penalty phase. Through Darin, the defense

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he's asked it now four or five times, I think it's been fairly basic, what physical evidence there is and what other evidence there is. He's told him that he thinks with these insurance policies and so forth that that's evidence. That's his answer.
MR. SMITH: OK. Judge ---

[42] The defendant claims that this as well as other alleged errors claimed in Issues V, VIII and IX denied him the right to a fair trial. An analysis of these issues as well as a review of the record reveal that this claim is without merit. The defendant is entitled to a fair trial not a perfect one. Bruton v. United States, 391 U.S. 123, 135 (1968).

established that the defendant was a good father and appeared to be a good husband (R 2906-2909).

During Darin's direct testimony, the Judge sustained the state's objection to possible testimony about the victim's "feelings." The complete exchange was as follows:

> Q. Would you tell the jury from your perspective the relationship between your father and your mother as far as their attitude toward each other?
>
> MR. AGUERO: Judge, I have an objection. Anything with regard to Mr. Golden's character is admissible in this proceeding. Anything about his mother's feelings is not part of this proceeding.
>
> THE COURT: Sustained, Counselor.
>
> Q. You can discuss the part of my question concerning the relationship your father had with your mother from your observations of your father's behavior and his character.
>
> A. Well, in the same respect, whenever Mom had a problem, Dad came to her aid. I remember -- I remember when I -- it was probably four years ago, my brother's skateboard was in the carport. She walked around, getting out of the car, tripped, fell, and I believe she broke her arm. She had a cast or it was in the sling or something for several weeks. He -- he was a wreck. Just always he would call her, are your OK, how's your arm. He was -- no matter what happened, he, to my knowledge, thought of her first or my brother and I. And --
>
> Q. Did you ever see your father in any selfish behavior where he was being selfish about himself?
>
> A. Not really, no. No. No, sir.
>
> MR. SMITH: I have no further questions of this witness. (R 2908-09)

Despite the defendant's allegations, he was permitted to develop the evidence that he was a good husband. In fact, any

complaint he may now have was waived as defense counsel himself instructed the witness to limit his answer to what was at issue in sentencing: the defendant's behavior and his character (R 2908).

Judge Pyle in his order found that the defendant and the victim were "best friends" and weighed that factor in during his sentencing determination. Even if it was error to sustain the State's objection, such error was harmless as the defense was permitted to develop the desired testimony. Relief should be denied.

ISSUE XII

THE PROSECUTOR DID NOT MAKE IMPROPER ARGUMENTS AT THE PENALTY PHASE

The defendant claims that the prosecutor committed reversible error by making improper arguments during the penalty phase of the trial. A review of the record reveals that this claim is procedurally barred as well as without merit.

The defendant now claims that the prosecutor erred by excluding mitigation evidence and by minimizing juror responsibility. During the prosecutor's closing argument, however, the defense did not object to what it now claims is reversible error. As this claim was not properly preserved, it cannot now be raised on appeal.

Moreover, a review of the prosecutor's argument reveals that it was proper. The prosecutor did not commit error by asking the jury to place little weight on the mitigation evidence presented, nor did he minimize juror responsibility by telling them that the defendant is responsible for the consequences of his actions and therefor deserving of the ultimate penalty.

Any possible error was cured by Judge Pyle's instructions to the jury. Judge Pyle instructed the jury on all applicable aggravating and mitigating circumstances. He also enhanced the jury's sense of responsibility by giving them a special instruction on the importance and finality of their verdict (R 2953). Relief should be denied.

ISSUE XIII

THE TRIAL COURT DID NOT ERR BY NOT SPECIFICALLY FINDING THAT THE DEFENDANT WAS NON-VIOLENT

The defendant now claims that the trial judge committed reversible error by failing to specifically find in his sentencing order that the defendant was a nonviolent person A review of the record reveals that this claim is without merit.

"When addressing mitigating circumstances, the sentencing court must expressly evaluate in its written order each mitigating circumstance proposed by the defendant..." Campbell v. State, 571 So.2d 415, 419 (Fla. 1990). The non-violent nature of the defendant was not proposed as a mitigating circumstance (R 3329-3333). The trial judge did find and weigh the nonstatutory mitigating circumstances proposed by the defendant (R 3350-51) as well as the statutory mitigating circumstance of no history of prior criminal activity (R 3348). No objection was entered to his order.

Moreover, any error on the part of the trial judge is harmless as it is evident from his order that the aggravating circumstances of this murder heavily outweighed any evidence of

mitigation presented (R 3350-51).[43] The defendant has not shown reversible error and is not entitled to relief.

ISSUE XIV

THERE WAS SUFFICIENT PROOF PRESENTED TO SUPPORT THE TRIAL JUDGE'S FINDING THAT THE MURDER WAS COMMITTED FOR PECUNIARY GAIN

The defendant claims that there was insufficient evidence to support the trial judge's finding that the murder of Mrs. Golden was committed for pecuniary gain. A review of the record and Judge Pyle's Order reveals that this claim is without merit.

There is substantial competent evidence to support Judge Pyle's finding. The State did not present any additional evidence on this factor during sentencing but rather relied on the evidence presented at trial. On this evidence, a jury of his peers found the defendant guilty beyond a reasonable doubt.

For purposes of this claim, the defendant's guilt has to be accepted as established. By its verdict, the jury embraced the State's theory and rejected the defendant's "accident" explanation. The defense argument is an effort to reraise sufficiency of the evidence claims inappropriate at this juncture.

This Court has held that lingering doubt is not to be considered in sentencing. King v. State, 514 So.2d 354, 358 (Fla. 1987) cert. denied, 487 U.S. 1241 (1988). So long as there is substantial competent evidence to support the trial judge's

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43 It is interesting to note that in this case, the defendant's docile nature adds more credence to the aggravating factors presented as it highlights the truly cold, calculated and premeditated nature of this murder.

finding that the defendant killed his wife for his own financial gain, his finding must be upheld.

The only evidence of motive for Mrs. Golden's murder was insurance proceeds.[44] There was no other attendant benefit to the defendant in killing his wife. He himself testified that they were happily married. Both sons testified that there was no evident conflict between their parents.[45] The trial judge himself found that they were "best friends."

The evidence of motive along with the defendant's financial condition and actions: (1) signing the wife's name to insurance forms; (2) lying to the police and the bankruptcy court about the existence of this insurance; (3) using the address of the apartments on the enrollment forms[46] (4) using his American Express card to lease the car used in the murder when he had available credit on other cards[47], was more than sufficient evidence that the reason behind the murder of Mrs. Golden was pecuniary gain. Judge Pyle was correct in so finding.

This Court has upheld the finding of this aggravating factor in similar cases. Reichmann v. State, 581 So.2d 133, 135-136, 141 (Fla. 1991); Zeigler v. State, 580 So.2d 127, 129 (Fla. 1991); Byrd v. State, 481 So.2d 468, 469, 474 (Fla. 1985) cert.

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44 Defense counsel himself characterized the State's evidence of monetary motive as substantial (R 2503).

45 The only evidence of conflict presented by the State was the victim's desire to stay in Florida. The defendant himself alleviated that concern by agreeing to remain in Florida.

46 The defendant had access to the apartments all day long while his wife worked. Consequently, he had the opportunity to remove any mail he did not wish her to see.

47 (R 1369).

denied 476 U.S. 1153 (1986); Buenoano v. State, 527 So.2d 194, 196, 199 (Fla. 1988) habeas corpus denied, 559 So.2d 1116 (1989). As the evidence in the instant case supports the trial judge's finding, relief should be denied.

ISSUE XV

THERE WAS SUFFICIENT PROOF PRESENTED TO SUPPORT THE TRIAL JUDGE'S FINDING THAT THE MURDER WAS COLD, CALCULATED AND PREMEDITATED.

The defendant claims that there was insufficient proof presented to support the trial judge's finding that the murder was cold, calculated and premeditated. A review of the record reveals that this claim is without merit.

Between March and May of 1989, the defendant purchased an additional $125,000 of insurance on his wife's life. At the same time, while he was unemployed and facing financial ruin, he leased a fourth car[48]. To lease this car, he used his American Express card even though he had available credit on other cards that would not require payment in full.

At the time that the defendant purchased the additional insurance on his wife's life, he did not buy any on his own life (R 2151, 2191).[49] By listing Mrs. Golden as a driver on the rental car, he automatically insured her life for accidental death through his American Express card. It should be noted that

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48 The Golden family already owned three cars. The defendant allegedly leased the Grand Am because his van was unreliable. However, when the Golden family took a trip to Minnesota in July of 1989, the defendant chose to drive the van while the rental car sat in the driveway (R 2535).

49 Mrs. Golden was neither sick nor old to justify this disparate treatment.

Mrs. Golden had her own car and did not need access to the rental car.[50]

As with pecuniary gain, for purposes of this claim, the defendant's guilt has to be accepted as established. The defendant's claim that the trial judge improperly considered the evidence that the defendant made the murder look like an accident is inappropriate as it is simply an effort to reraise sufficiency claims from the guilt phase on the defendant's case.

It is precisely to the circumstances of the killing that the trial judge is to look to determine whether the state established enhanced premeditation. The circumstances of the murder along with the evidence of motive and the defendant's actions provided more than sufficient proof that Mrs. Golden's murder was cold, calculated and premeditated.[51]

This Court has upheld the finding of this aggravating factor in similar cases. Reichmann v. State, 581 So.2d 133 (Fla. 1991); Zeigler v. State, 580 So.2d 127 (Fla. 1991); Byrd v. State, 481 So.2d 468 (Fla. 1985) cert. denied, 476 U.S. 1153 (1986); Buenoano v. State, 527 So.2d 194 (Fla. 1988) habeas corpus denied, 559 So.2d 1116 (1989). As there is substantial competent

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50 There is no evidence that Mrs. Golden's car had any mechanical problems. In fact, her son testified that she only drove her car (R 1565). Moreover, the defendant did not likewise list his older son as an additional driver on the lease even though he was licensed.

51 Despite the appellant's contention, the fact that the defendant and the victim were best friends is further proof that the murder was cold, calculated and premeditated. The lack of conflict between the defendant and his wife dispels any argument that this murder was the result of rage or unleashed passions. The only motive for this murder was money. Consequently, its execution required the enhanced planning evident in the defendant's actions.

evidence to support the trial judges finding, relief should be denied.

ISSUE XVI

THE TRIAL COURT DID NOT ERR BY ALLOWING THE JURY TO CONSIDER THE AGGRAVATING CIRCUMSTANCE THAT THE MURDER ESPECIALLY WAS HEINOUS, ATROCIOUS OR CRUEL

The defendant claims that the trial judge erred in allowing the jury to consider whether the aggravating circumstance of heinous, atrocious or cruel had been established. A review of the law and the record reveals that this claim is without merit.

"The trial court is required to instruct the jury on all aggravating and mitigating circumstances for which evidence has been presented." Stewart v. State, 558 So.2d 416, 420 (Fla. 1990). The fact that the trial judge does not find that the state established an aggravating circumstance beyond a reasonable doubt does not amount to error in the giving of the instruction. Id. Haliburton v. State, 561 So.2d 248, 252 (Fla. 1990); Lara v. State, 464 So.2d 1173, 1179 (Fla. 1985).

In Haliburton, the defendant claimed that the trial court erred in allowing the jury to consider whether the murder was heinous, atrocious or cruel. Id. at 252. In that case, the trial judge ultimately found that this aggravating factor was not established but he nevertheless allowed the jury to consider it. Id. at 249 n.1. This Court held that it was not error to so instruct the jury as there was sufficient evidence offered to present a jury question on the issue. Id. at 252.[52] A review of

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[52] In Haliburton, the victim was stabbed to death. There was evidence that he did not die instantly or provoke the attack.

the record in the instant case reveals that there was sufficient evidence presented to allow the jury to consider this factor.

The medical examiner testified that the cause of death was drowning. No other injuries were found on Mrs. Golden to indicate that she would have been unconscious when she drowned. The medical examiner testified that a person deprived of oxygen in this way would be conscious and struggling for minutes (R 2903-04).[53]

Other evidence introduced at trial established that Mrs. Golden could not swim and was afraid of the water. The medical examiner testified that a person who was afraid of water would be even more panic stricken in such a situation. Add to that, Mrs. Golden's inability to see ten inches past her nose and the terror and desperation of her last few minutes becomes evident.

There are many ways in which the defendant could have killed his wife. The only reason to chose the method he did was his desire to make her death look like an accident. To subject her to a drowning death and leave her gasping for breath under these circumstances justifies the trial judge's decision to present this issue to the jury.[54] Relief should be denied.

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[53] A drowning death is akin to strangulation in its impact and effect upon the victim. In either case, the cause of death is asphyxiation: deprivation of oxygen. In Keen v. State, Supreme Court Case No. 71,258, a case currently before this Court, the defendant was also convicted of drowning his wife for insurance money. The trial judge found that the murder was especially heinous, atrocious and cruel because the victim was left to drown after being pushed off a boat.

[54] The two cases cited by the defendant are inapplicable. In both cases, this Court found that there was no evidentiary support for the given instruction. Omelus v. State, 584 So.2d 563, 566-67 (Fla. 1991); Jones v. State, 569 So.2d 1234, 1238-39 (Fla. 1990). In Omelus, this Court held that the instruction was

ISSUE XVII

THE TRIAL JUDGE DID NOT IMPROPERLY DOUBLE AGGRAVATING CIRCUMSTANCES

The defendant claims that the trial judge improperly doubled aggravating circumstances in imposing the death penalty. A review of the record reveals that this claim is without merit.

The trial judge found that the evidence supported two aggravating factors: (1) that the murder was committed for pecuniary gain and (2) that the murder was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification (R 3345-47). The defendant now claims that these two factors should somehow merge because evidence of their existence emanates from the same set of facts. The applicable law reveals that this argument should be rejected.

In Echols v. State, 484 So.2d 568 (Fla. 1985), this Court entertained and rejected the very same argument. Echols was convicted of first degree murder and sentenced to death. He had been solicited to kill the victim by the victim's business partner who wanted to gain control of the victim's estate. The two of them were then to use these assets to promote business enterprises and share in the profits. Id. at 570.

On appeal, the defendant claimed that since the killing was committed for pecuniary gain, it was improper to also find that it was cold, calculated and premeditated because doing so doubled

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not supported by the evidence when someone other than the defendant killed the victim and the manner of the killing was not anticipated by the defendant. In Jones, this Court held that there was no evidentiary support for the instruction as the acts that would render the murder especially heinous were committed after the victim was dead.

up the aggravators on the same facts. Id. at 574. This Court rejected this argument finding that both circumstances had been proven:

> There is no doubt that appellant was motivated by a desire for pecuniary gain. There is also no doubt that the murder was planned and carried out in a cold, calculated and premeditated manner without any pretense of moral or legal justification well above that required to prove premeditation. There is no reason why the facts in a given case may not support multiple aggravating factors provided the aggravating factors are themselves separate and distinct and not merely restatements of each other as in a murder committed during a robbery and murder for pecuniary gain, or murder committed to eliminate a witness and murder committed to hinder law enforcement. Squires v. State, 450 So.2d 208 (Fla.) cert. denied, ___ U.S. ___, 105 S.Ct. 268,. 83 L.Ed.2d 204 (1984); Combs v. State, 403 So.2d 418 (Fla. 1981), cert. denied, 456 U.S. 984, 102 S.Ct. 2258, 72 L.Ed.2d 862 (1982).

Id. at 575.

The two aggravating factors in the instant case are separate and distinct. The fact that they are supported from the same set of facts reflects the heinousness of the defendant's crime not a mistake in the judge's order. Relief should be denied.

ISSUE XVIII

THE DEATH PENALTY IS NOT DISPROPORTIONATE UNDER THE FACTS OF THIS CASE

A jury of his peers convicted the defendant of the premeditated murder of his wife. The same jury recommended that he be sentenced to death by a vote of eight to four. The trial judge followed the jury's recommendation and imposed the death penalty.

The jury and the trial judge listened to evidence of aggravation as well as mitigation. The defense presented evidence of the defendant's otherwise peaceful existence. His children and brother testified that he was a good father, appeared to be a good husband and helped out his family. The State argued that the evidence established three aggravating factors: (1) the crime was committed for pecuniary gain; (2) the murder was committed in a cold, calculated and premeditated manner; and (3) the crime was especially heinous, atrocious or cruel.

After considering all the evidence, the trial judge found that two aggravating factors had been established: (1) that the crime was committed for pecuniary gain and (2) that the murder was committed in a cold, calculated and premeditated manner. The court stated that even though probably true, the circumstance of heinous, atrocious or cruel was not established beyond a reasonable doubt.

In mitigation, Judge Pyle found one statutory factor: no prior criminal history and three non-statutory factors: (1) the defendant helped raise his younger brother; (2) the defendant had been married to the victim for 24 years, with whom, according to his older son, he was "best friends" and (3) the defendant was in some respects, a role model for his children.

In evaluating the evidence, the trial judge concluded that "The cold, calculated and premeditated murder of his wife of twenty-four years and the exaltation of his own natural wealth over the very life of his wife sets this murder apart from others." (R 3350-51). After weighing the aggravating and

mitigating circumstances the trial judge concluded that the mitigating circumstances were heavily outweighed by the aggravating.

The weight to be given to aggravating and mitigating circumstances is within the province of the trial judge. Campbell v. State, 571 So.2d 415, 419-420 (Fla. 1990). The trial judge's final decision in the weighing process will be upheld if supported by sufficient competent evidence. Id. This defendant planned and executed the murder of his wife of twenty four years for his personal financial gain. There was no evidence that the defendant was angry with his wife or in some way provoked into killing her. Mrs. Golden simply became expendable as she became worth more to the defendant dead than alive.

This Court has upheld the imposition of the death penalty in pre-planned homicides of family members, Byrd v. State, 481 So.2d 468, 474 (Fla. 1985); Zeigler v. State, 580 So.2d 127, 131 (Fla. 1991) (jury override); Buenoano v. State, 527 So.2d 194, 199 (Fla. 1988), or companions, Riechmann v. State, 581 So.2d 133, 141 (Fla. 1991), for financial gain.

The killing of one's lifelong companion for material gain sets these cases apart from other murders. The defendant did not kill his wife out of rage, derangement or provocation. He killed her for money. In light of that, Judge Pyle was correct in giving his mitigation evidence little weight.

Moreover, the mitigation evidence itself gives additional credence to the aggravating factors in the case. The fact that the defendant was otherwise a docile individual highlights the cold, calculated and premeditated manner of this murder. The

finding that he and the victim were "best friends" further emphasizes that the only motive for this murder was his own material gain.[55]

The determination of whether or not to impose the death penalty is not a counting process. The fact that the mitigating factors found outnumber the aggravating does not end the inquiry. The enormity of the aggravating factors under the facts of this case more than justify the trial judge's conclusion that the death penalty is the appropriate punishment. As there is substantial competent evidence to support Judge Pyle's findings, relief should be denied.

ISSUE XIX

THE TRIAL COURT PROPERLY INSTRUCTED THE JURY IN THE PENALTY PHASE

The defendant now claims that the standard penalty phase jury instructions read by the trial Judge to the jury improperly shifted the burden of proof to him by requiring him to prove that death was not appropriate. A review of the record and the law reveals that this claim is without merit as well as barred.

The trial judge instructed the jury in accordance with the standard jury instructions (R 2952-57). This Court has consistently rejected claims that the standard instructions improperly shift the burden of proof to the defendant to establish that the mitigating factors outweigh the aggravating ones. Bush v. Dugger, 579 So.2d 725, 728 (Fla. 1991); Brown v.

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55 One has to wonder how much weight should be given to the finding that the defendant was a good father when by his actions, he orphaned his own children and subjected them to the attendant psychological consequences of losing a parent under these circumstances.

State, 565 So.2d 304, 308 (Fla. 1990); Jackson v. State, 502 So.2d 409, 411 (Fla. 1986); Kennedy v. State, 455 So.2d 351, 354 (Fla. 1984).

This issue was recently raised before the Eleventh Judicial Circuit in Bertolotti v. Dugger, 883 F.2d 1503, 1524-25 (11th Cir. 1989). The Eleventh Judicial Circuit upheld the validity of the complained of jury instructions holding that the standard instructions properly focused the jury's attention. Id. The United States Supreme Court subsequently denied the defendant's petition for certiorari. Bertolotti, 883 F.2d at 1524-25, cert. denied, ___ U.S. ___, 110 S.Ct. 3296, 111 L.Ed.2d 804 (1990).

Moreover, this issue was not preserved for appeal. It is incumbent upon the defendant to object to allegedly improper instructions at trial. Sochor v. State, 580 So.2d 595, 602-603 (Fla. 1991); Bush, 579 So.2d at 728. In the instant case, there was no contemporaneous objection to these instructions. (R 2957). Consequently, this claim is procedurally barred. Relief should be denied.

ISSUE XX

FLORIDA'S CAPITAL SENTENCING SCHEME IS NOT UNCONSTITUTIONAL

The defendant complains that Florida's capital sentencing statute is unconstitutional because (1) it fails to assign weight to aggravating and mitigating circumstances and (2) it does not require special verdict forms. A review of the law reveals that this claim is without merit.

The constitutionality of the Florida sentencing scheme has been upheld by the United States Supreme Court, Proffitt v.

Florida, 428 U.S. 242 (1976); Furman v. Georgia, 408 U.S. 238 (1972), as well as this Court. Sochor v. State, 580 So.2d 595, 604 (Fla. 1991); Gunsby v. State, 574 So.2d 1085, 1090 (Fla. 1991).

Additionally, these same two claims were raised and rejected in Jones v. State, 569 So.2d 1234 (Fla. 1990). As here, Jones claimed that the death penalty is unconstitutional because it is arbitrarily applied and that special verdict forms should be required. Both claims were rejected by this Court. Id. at 1238.[56] Moreover, in the instant case, the defendant did not request special verdict forms. To now complain of their absence is improper. As this issue was not properly preserved, it is procedurally barred. Relief should be denied.

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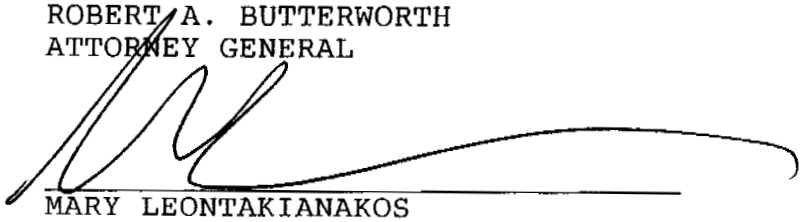
[56] Despite appellant's contention, the death penalty is not arbitrarily applied. Each defendant is evaluated individually based on his character and the facts of his case. The fact that reasonable jurors may differ as to how much weight to assign relative factors is the reason why a majority vote from a twelve person jury is required to render an advisory vote for death. In addition, this Court's proportionality review ensures that the death penalty is reserved for the most deserving murders.

CONCLUSION

Based on the foregoing arguments and authorities, the State respectfully requests that this Honorable Court affirm Appellant's conviction and sentence.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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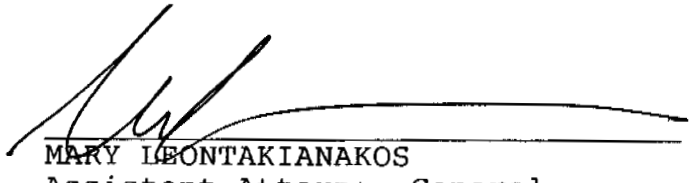
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Gwendolyn Spivey, Esquire, Post Office Box 14494, Tallahassee, Florida 32317, this 22nd day of March, 1993.



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