IN THE SUPREME COURT OF FLORIDA

CASE NO. 79, 139

KENNETH WATSON,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

****

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

****

ANSWER BRIEF OF APPELLEE

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INTRODUCTION

The Appellee, **THE STATE OF FLORIDA**, was the prosecution in the trial court. The Appellant, **KENNETH WATSON**, was the defendant. The Appellant will be referred to as "Watson" and the Appellee will be referred to as it stood in the lower court. The symbols "R" and "ST" will designate the record on appeal and the supplemental transcript, respectively.

STATEMENT OF THE CASE AND FACTS

On August 1, 1990 a three (3) count indictment was filed charging Watson with the following crimes: (I) first degree murder of Ella Hickman; (II) armed burglary with an assault; and (III) armed robbery of Ella Hickman. (R. 1-3A).

Voir dire commenced on October 2, 1991, before the Honorable Juan Ramirez, Jr. (R. 538). During voir dire, Watson made motions to strike Jurors Vento, Webster, and Benton for cause; the motions were denied. (R. 244-45, 247). The jury was sworn on October 2, 1991 and opening statements were made by both parties. (R. 799-809, 809-12; ST. 265). On October 3, 1991, the State began presentation of its case. (R. 828). The following testimony was presented to the jury.

Reverend Donnie L. Hickman testified that he had been married to Ella Hickman, the victim, for seventeen years and that

they lived at 6524 Northwest 26th Avenue with his son, Christopher, and their goddaughter, Yolanda. (R. 828-30). Hickman stated that, in addition to being the minister for the New Hope Missionary Baptist Church, he worked for a cabinet company as a plant manager. (R. 833-34). Hickman recalled that on October 31, 1988 he woke up at five a.m. and went to work at the cabinet company. (R. 833). He gave a co-worker a ride after work and returned home at 4:30 p.m. (R. 835, 1413). An officer later confirmed Hickman's whereabouts on October 31, 1988. (R. 1168-69).

When he arrived home, Hickman saw Ella's car parked across the street. (R. 835). He noticed that the gate to the driveway had not been unlocked. (R. 842). As he approached the house, Hickman observed that the glass in the front door was broken and that a chair on the porch had been moved. (R. 844-45). He proceeded to walk around the house, called his wife's name, and heard no response. (R. 847). Hickman entered the house through the front door and discovered Ella's purse on the floor with its contents emptied on the floor. (R. 849). He continued through the house into his son's bedroom where he discovered a glass container, with money missing from it, lying on the floor. (R. 850). Hickman also observed a cigarette butt on the floor which had not been there that morning. (R. 854). Hickman stated that he smoked Winston Light and his wife smoked Salem cigarettes. (R. 854). In his son's room, Hickman also noticed a paper bag and box out of place and thought this was unusual because his wife

was "very tidy" and kept everything in a particular place. (R. 857-58).

Thereafter, Hickman went into his bedroom and observed that the bedspread and a container holding cuff links and tiepins had been moved. (R. 859-61). Hickman then proceeded to his wife's room where he discovered her body lying face down on the floor. (R. 891). He saw that the victim was unconscious, her feet and legs were bound together, and there was blood on the floor. (R. 892-93). Hickman went to the phone in the kitchen, called "911", and asked for help because his wife was "sick or injured". (R. 893-94). Then he walked next door and told the neighbor that he needed help with his wife. (R. 894).

In addition to the money he noticed missing from Christopher's bedroom, Hickman discovered that the victim's gold necklace and a kitchen knife were also missing. (R. 909-10, 914). Hickman testified that not only was a glass cylinder in the northwest bedroom out of place, but the following items in the house had also been moved: jewelry box; red box; telephone; radio; sewing box; nightstand drawer; bedspread; glass ball; chair; rock; and stamps. (R. 900-26).

Metro Dade Officers Holt and Hicks were dispatched to 6524 Northwest 26th Avenue at approximately 4:30 p.m. (R. 998). Officer Joanne Holt testified that she spoke to Donnie Hickman who told her that he had found the victim in the house. (R.

1000). Officer Holt described Hickman as very upset and distraught when she spoke to him. (R. 1000). The victim was observed lying on the bedroom floor with a cord around her feet and blood around her head. (R. 1001-2). The officers secured the crime scene, called the homicide division, and maintained the scene until the homicide detectives arrived. (R. 1002).

Rafael Pozo, emergency medical technician, told of being dispatched to respond to the 911 call. (R. 1016-17). He entered the house and proceeded to the northwest bedroom where he observed the victim face down on the floor with a pool of blood around her face and a telephone cord tied around her neck and ankles. (R. 1019). Pozo turned the victim over onto her back and determined that she had no pulse. (R. 1019). He used electric paddles to establish that the victim had no pulse and then declared her dead. (R. 1020, 1027).

Yolanda Davis, the Hickman's goddaughter, was a student at Florida State University and was away at school when Ella was murdered. (R. 1250). Christopher Hickman, Donnie Hickman's son, testified that he came home from work at about 4:45 p.m. on October 31, 1988 and saw several police officers and rescue workers at the house who informed him that his stepmother was dead. (R. 1225-26). Christopher does not know Watson and never gave Watson permission to go in his parent's house. (R. 1221). Christopher stated that Ella Hickman smoked Salem cigarettes, his father smoked Winston cigarettes, and he never saw them smoke each other's cigarettes. (R. 1227-28).

Crime scene technician Tom Stokes recounted being dispatched to the scene of the murder arriving at approximately 5:40 p.m. (R. 1041). With the assistance of two other officers, Stokes took photographs, drew sketches of the scene, lifted latent fingerprints, and collected physical evidence. (R. 1042-43). He collected a cigarette butt and Diet Coke bottle from the living room which was sent to serology for further testing. (R. 1051, 1081). Blood samples were retrieved from the front door, closet doors, living room rug, hallway outside the bathroom, and the northwest bedroom. (R. 1055-60). Latent prints were lifted from the glass cylinder found in the northwest bedroom and from numerous other items within the house. (R. 1092, 1132-44).

Dr. Jay Barnhart from the Dade County Medical Examiner's Office stated that he had been asked to review the records and testify for the physician who had performed the autopsy of Ella Hickman. (R. 1093-96). The autopsy revealed that the victim had sustained six stab wounds about her head and neck. (R. 1099). The wounds were identified using six letters A to F. (R. 1099). Wound A was located immediately in front of the left ear and measured 3/8 of one inch in length and was one inch deep. (R. 1099). The stabbing which resulted in wound A caused cutting of the soft tissues in and around the victim's ear with some hemorrhaging into the surrounding tissues. (R. 1100). Wound A was a nonfatal wound and the presence of blood in the nearby tissues indicated that the victim was still alive at the time it was inflicted. (R. 1100).

Wound B was on the left side of the victim's neck and measured 1/2 inch in length and one and 1/4 inch in depth. (R. 1100-1). This nonfatal wound damaged the skin, soft tissue, and muscle of the neck. (R. 1101). An internal examination revealed hemorrhaging around the inside of the wound which again indicated that the victim was alive at the time of infliction. (R. 1101). The lowest of the three wounds on the victim's right side was identified as wound D. (R. 1101). It was a nonfatal wound measuring 3/8 inch long on the surface and one inch deep. (R. 1102). No vital organs were struck, however, bleeding in the internal tissues indicated that the victim was alive when stabbed. (R. 1102).

The second wound on the victim's right side measured between 1/2 inch to 3/4 in length and was one inch deep and was labelled wound E. (R. 1102). Wound E was not fatal, however hemorrhaging in subcutaneous tissue beneath the wound proved that the victim was alive when it was inflicted. (R. 1103). Wound F was very close to the base of the victim's skull and was the uppermost of the three wounds on her neck. (R. 1103). It measured 7/16 of one inch in length and one and 1/4 inch in depth and was not a fatal cut. (R. 1103). Again, the victim was alive when the wound was inflicted. (R. 1103).

The fatal wound was identified as wound C and was on the right side of the victim's neck. It was 1/2 inch in length and

four inches in depth. (R. 1104). The injury had blunt characteristics on one side and fishtail characteristics on the other side which were consistent with their infliction by a single-edged blade with a flat side and a sharp side. (R. 1105). The blade had cut through skin and subcutaneous tissues before ultimately severing the victim's carotid artery. (R. 1105). This severing of the carotid artery caused rapid loss of blood, with the victim eventually bleeding to death. (R. 1105-6).

All of the wounds were inflicted with a long slender sharp object and were consistent with having been inflicted with one weapon. (R. 1106). Additionally, the results of the autopsy were consistent with the victim having been murdered between two and four p.m. on October 31, 1988. (R. 1106).

Forensic serologist Teresa Merritt testified about her analysis of the physical evidence. (R. 1179). The victim had type O blood with an enzyme analysis of 1+, 1-. (R. 1196). The sample of blood recovered from the hallway floor, outside of the bathroom, was tested and found to be consistent with the victim's blood. (R. 1196). Watson gave a blood sample which was tested and found to be type B, with an enzyme analysis of 1+, 1-. (R. 1170-75, 1197). The blood found on the front door and the blood found on the hallway closet door were both type B and therefore consistent with Watson's blood. (R. 1194-95). Analysis of Watson's saliva revealed that he is a secretor who exhibits B and H blood group substances in his saliva. (R. 1170-75, 1197). The

saliva on the Salem cigarette butt recovered from the living room floor was tested and found to have B and H blood group substances which were consistent with Watson's saliva (R. 1190, 1198).

William Miller testified as an expert in fingerprint identification. (R. 1264). He examined the fifty-one (51) latent fingerprints lifted from the scene of the crime and determined that thirteen (13) of them were of comparison value. (R. 1279). Two prints recovered from the glass container in the northwest bedroom were identified as Watson's right thumb print and his left ring fingerprint. (R. 1287-89). The latent print lifted from the crystal bowl found in the living room floor was made by Watson's left middle finger. (R. 1289-90). The latent print found on the outside of the victim's automobile could not be identified and the remaining latent prints of value were made by Hickman family members. (R. 1282-87).

After Watson's fingerprints were identified from the scene of the murder, Detective Mike Decora contacted the victim's family to inquire whether they knew Watson or had allowed him in their house. (R. 1369). Based on their negative responses, the detective obtained an arrest warrant and went to Watson's mother's house and asked for Kenneth Watson. (R. 1370). The individual who answered the door, later identified as Watson, stated that Kenneth Watson no longer lived at that address. (R. 1374).

Subsequently, it was learned that Watson was in custody in Georgia. (R. 1380). Homicide Detective Nicholas Fabregas met with Watson in Georgia and discussed the murder of Ella Hickman. (R. 1418-20). After being advised of his Constitutional rights, Watson stated that he had entered the victim's house with the intent to do something other than kill her. (R. 1429). Watson said that he did not kill the victim, that another person had been with him, but that he would not "snitch" on anybody. (R. 1429-30). Although he stated he had not killed the victim, Watson said he knew he was going to jail for the rest of his life. (R. 1430). Thereafter, Detective Decora brought Watson back to Florida and observed that Watson smoked cigarettes on the trip from Georgia to Miami. (R. 1397).

After the State rested, Watson stated that he did not wish to testify, and closing arguments were given. (R. 1509-1612). The jury was instructed and retired to deliberate. (R. 1637-59). The jury found Watson guilty of all three (3) counts as charged. (R. 192-94, 1662). Watson was adjudicated guilty on all counts and the cause was passed for sentencing. (R. 195-96, 1665-68).

On October, 1991, the jury reconvened for the sentencing phase and the trial court gave them preliminary instructions. (R. 1754-56). Opening statements were not made by either side.

Initially, the State presented the testimony of Georgia Police Detective Larry Bruce. (R. 1756). Bruce arrested Watson

in Case #89-00503 in which Watson was ultimately found guilty of kidnapping. (R. 1757-60).

Next, the State called fingerprint expert William Miller who testified that he had compared Watson's fingerprints to the prints on a 1982 Judgment and Sentence and concluded that the prints on the prior conviction were made by Watson. (R. 1765-67). Watson's Judgment and Sentence for aggravated assault with a firearm on May 20, 1982 was admitted into evidence. (R. 1766). Thereafter, the State rested. (R. 1767).

Watson presented the testimony of forensic psychologist Jethro Toomer. (R. 1768). Toomer stated that he had been retained by the defense to evaluate Watson's mental status functioning and had conducted a clinical interview with him. (R. 1771). Watson told Toomer that he had grown up in a family of five girls and seven boys and that his father was absent most of the time. (R. 1774).

Based on his interview, Toomer opined that Watson's insight, judgment, and abstract reasoning were impaired and that Watson was unable to bring the appropriate judgment to different situations. (R. 1778). Toomer administered a Revised BETA examination to Watson to test his intelligence quotient (IQ). (R. 1784). Watson's IQ score was seventy-three (73) which indicated that he was borderline mentally retarded. (R. 1786). Although Toomer did not review anything about the crime, e.g. police

reports, autopsy report, photographs, depositions, or statements, he concluded that Watson committed the murder while under the influence of extreme mental disturbance. (R. 1787, 1815). Further, Toomer never questioned Watson about the murder, yet he determined that Watson's ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired. (R. 1789, 1824).

At the conclusion of Toomer's testimony, the defense rested. (R. 1842). The State called Dr. Leonard Haber to testify in rebuttal because Watson had placed his mental state in issue. (R. 1842-59). Dr. Haber described the meeting he had with Watson. (R. 1876). Watson did not have any difficulty carrying on conversation during their meeting. (R. 1876). Additionally, Dr. Haber concluded that Watson did have cognitive processing ability and is capable of processing information. (R. 1879).

As an expert in forensic psychology, Dr. Haber stated that he was familiar with the Revised BETA examination, had administered the test, and knew the procedures for giving the test. (R. 1861-62). Dr. Haber reviewed Watson's Revised Beta test and concluded that, not only was it improperly scored by Toomer, but the correct score indicated that the test was invalidly administered. (R. 1866-74). The corrected score reflected that Watson's I.Q. was under sixty (60). (R. 1874). While Dr. Haber acknowledged that Watson was intellectually dull and below average, Dr. Haber found that Watson did not have a

severe mental deficiency which rendered him incapable of functioning. (R. 1874, 1890).

In addition to meeting with Watson and reviewing the Revised Beta test, Dr. Haber also looked at a variety of reports including police reports, autopsy reports, depositions, Watson's statements and prior record, and crime scene reports. (R. 1876-77). Based on his interview and review of the evidence, Dr. Haber concluded that Watson was able to appreciate the criminality of his conduct when he murdered Ella Hickman, and also concluded that Watson did not commit the crimes while under the influence of extreme mental or emotional disturbance. (R. 1879).

After both sides rested, closing arguments were given. (R. 1932-61). The State argued that the following aggravating factors were applicable: (1) prior conviction for a violent felony; (2) pecuniary gain; (3) during commission of a felony; and (4) heinous, atrocious, or cruel. (R. 1940-41).

Defense counsel contested the applicability of the four aggravating factors. (R. 1951-53). In mitigation, he argued that the jury should consider the following: (1) Watson did not kill the victim; (2) Watson lived his life in poverty; (3) Watson's capacity to conform his conduct to the requirements of the law was impaired; and (4) Watson suffered from extreme mental or emotional disturbance. (R. 1954-58).

Thereafter, the jury received the penalty phase instructions. (OR. 243-55, 1961-66). The jury returned an advisory sentence on Count I, the murder of Ella Hickman, of death with a vote of 10 to 2. (R. 256, 1967).

On October 22, 1991, Watson presented additional evidence to the trial court. (R. 1975). Watson's mother, Cora Lee Watson, testified that she had eleven children and that she worked day and night to provide for them because their father was always absent due to his job as a truck driver. (R. 1992-93). She was aware that as a child Watson could read and write very little and that he abused drugs when he got older. (R. 1996). Mrs. Watson described how her son had once stolen her car and used it for rental purposes to raise money to supply his drug habit. (R. 1996-97).

Patricia Watson, Watson's older sister, testified that he was shy as a child because classmates teased him about not being able to read and write. (R. 2009). She was also aware that Watson had a drug problem. (R. 2010).

In addition to family member testimony, defense counsel asked the trial court to take judicial notice of Watson's arrest for possession of cocaine which had occurred ten (10) days before the murder of Ella Hickman. The trial court agreed to take notice of the arrest and to include the transcript from Watson's

pretrial competency hearing in the sentencing record. (R. 2024). The matter was passed for imposition of sentence on November 6, 1991. (R. 2028).

Sentence was imposed on November 6, 1991. (R. 2030). On the two counts of armed burglary and armed robbery, Watson was sentenced to life imprisonment. (R. 277-79, 2049). Both sentences were ordered to be consecutive to each other and consecutive to the sentence imposed on Counts I. (R. 277-79, 2049).

The trial court entered a written sentencing order on November 6, 1991. (R. 280-89). The following aggravating factors were found for the murder of Ella Hickman:

> 1. The defendant was previously convicted of another capital felony or of a felony involving the use of, or threat of, violence to the person. (R. 281).
>
> 2. The capital felony was committed while the defendant was engaged in the commission of, attempt to commit, or flight after the commission of a robbery and/or a burglary. (R. 281).
>
> 3. The capital felony was committed for pecuniary gain. However, this aggravating factor refers to the same aspect of the crime as #2, thus the court did not consider this aggravating circumstance separately. (R. 282).
>
> 4. The capital felony was especially heinous, atrocious, or cruel. (R. 282).

The trial court considered all of the mitigating circumstances and rejected the following statutory mitigating factors as not being supported by the evidence:

> 1. The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance. (R. 283).
>
> 2. The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired. (R. 284).
>
> 3. The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor. (R. 285).

The trial court specifically addressed the proposed nonstatutory mitigating circumstances, to-wit: poverty, illiteracy, and drug abuse, and concluded that they were insufficient to lessen Watson's moral culpability for this brutal homicide.

The sentencing order concluded with the following additional findings of fact:

> In conclusion, the court having reviewed the testimony and evidence presented during the sentencing hearing, finds that there are sufficient aggravating circumstances to justify the sentence of death which outweigh any mitigating circumstances that may be present. The court, therefore, agrees and concurs with the advisory sentence and recommendation entered by the sentencing jury.
>
> (R. 288).

Notice of appeal was filed on December 6, 1991. (R. 320). This appeal then followed.

POINTS ON APPEAL

I.

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING DEFENSE CHALLENGES FOR CAUSE MADE DURING VOIR DIRE AGAINST PROSPECTIVE JURORS WEBSTER, BENTON, AND VENTO?

II.

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN FINDING THAT THERE HAD BEEN NO JUROR MISCONDUCT WHICH WOULD DEPRIVE WATSON OF HIS RIGHT TO A FAIR AND IMPARTIAL JURY?

III.

WHETHER THE TRIAL COURT PROPERLY DENIED WATSON'S REQUEST TO STRIKE THE PANEL WHERE DEFENSE COUNSEL ELICITED STATEMENTS FROM A JUROR REGARDING HIS KNOWLEDGE OF THE CASE?

IV.

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN ALLOWING THE JURORS TO SUBMIT WRITTEN QUESTIONS FOR THE WITNESSES?

V.

WHETHER THE TRIAL COURT CORRECTLY DENIED WATSON'S MOTION FOR MISTRIAL WHERE THE PROSECUTOR MADE NO IMPROPER COMMENTS DURING OPENING STATEMENTS?

VI.

WHETHER THE TRIAL COURT PROPERLY FOUND THAT THERE WAS NO PREJUDICE TO THE DEFENSE DUE TO DR. HABER'S REBUTTAL TESTIMONY AT SENTENCING?

VII.

WHETHER WATSON PRESERVED ANY OBJECTION TO THE JURY INSTRUCTIONS GIVEN DURING THE SENTENCING PHASE?

VIII.

WHETHER WATSON PRESERVED ANY OBJECTION TO THE STATE'S OPENING STATEMENT DURING THE GUILT PHASE AS IT AFFECTED HIS SENTENCING PHASE?

IX.

WHETHER THE TRIAL COURT PROPERLY CONSIDERED EACH MITIGATING FACTOR PROPOSED BY WATSON?

X.

WHETHER THE DEATH PENALTY STATUTE IS UNCONSTITUTIONAL?

SUMMARY OF ARGUMENT

The trial court did not abuse its discretion in denying challenges for cause against Jurors Webster, Benton, and Vento where the court discussed the burden of proof and Watson's right to remain silent and they indicated they would follow the law. The questions propounded by defense counsel were not accurate statements of the law and the jurors' answers did not justify striking them for cause. Furthermore, Watson did not challenge Juror Vento for cause on these grounds below and did not preserve the issue for appellate review.

Watson has not shown that the trial court abused its discretion in responding to an allegation of juror misconduct where a juror commented that the trial would be short. The individual voir dire of the juror was sufficient to establish that she had not formulated any opinions about the case and that Watson was not denied his right to a fair trial by an impartial jury.

After a juror stated that he was aware of the facts of the murder, and had been instructed not to discuss them with the other jurors, defense counsel invited comments from the juror regarding the appropriateness of the death penalty. The trial court did not err in denying Watson's request to strike the panel where the juror's statements were provoked by defense counsel, concerned admissible evidence, resulted in no prejudice, and affected only the sentencing phase.

It was not an abuse of discretion for the trial court to allow the jurors to propound written questions for witnesses. Watson has failed to show that he was prejudiced by the procedure where the questions were reviewed and screened by the trial court and trial counsel prior to being asked of the witnesses. Moreover, Watson only objected to the procedure, not to specific questions, and he was not prejudiced by either the procedure or the questions presented.

Watson's motion for mistrial made in response to the State's opening statement was properly denied where the statement was an outline of the relevant evidence to be presented. However, if the non-evidentiary comments were improper they did not vitiate the entire proceeding and did not affect the verdict.

The trial court correctly ruled that Dr. Haber's testimony did not constitute a discovery violation where he had not prepared a report pursuant to Florida Rule of Criminal Procedure 3.220(b)(1)(J). Furthermore, if Dr. Haber's testimony was a discovery violation, Watson was not prejudiced by its presentation.

Watson is procedurally barred from asserting error with respect to the sentencing phase jury instructions where he did not present written jury instructions and did not renew his objection at the conclusion of the jury charge. His claims are

also without merit where a constitutionally sound instruction on heinous, atrocious, or cruel was given and where the jury was properly instructed regarding mitigating circumstances.

Watson's claim that the statements of the prosecutor in opening statement of the guilt phase deprived him of a fair sentencing hearing was not presented below and is not properly before this Court. Moreover, the comments were proper remarks regarding relevant evidence about the victim.

The trial court properly found the mitigating evidence presented by Watson to be insignificant and this decision is supported by competent substantial evidence. The trial judge correctly rejected the proposed statutory mitigating factors where they were not supported by the evidence and the nonstatutory factors where they were contradictory and did not diminish Watson's culpability for the brutal homicide. Furthermore, any mitigation was outweighed by the substantial uncontroverted aggravation.

Watson's final claim that the death penalty statute is unconstitutional due to the lack of guidance given to the jury has been rejected by both this Court and the United States Supreme Court.

ARGUMENT

I.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING DEFENSE CHALLENGES FOR CAUSE MADE DURING VOIR DIRE AGAINST PROSPECTIVE JURORS WEBSTER, BENTON, AND VENTO.

Initially, Watson maintains the trial court erred in denying his challenges for cause of prospective Jurors Webster, Benton, and Vento who stated their concerns about the defense attorneys not presenting a defense. Watson has failed to show that the trial court abused its discretion in concluding that the three jurors could follow the law as instructed and be fair and impartial jurors.

The trial court correctly concluded that Jurors Vento, Webster, and Benton should not be dismissed for cause, thereby leading Watson to exercise peremptory strikes to remove the three jurors. (ST. 244-46, 250, 254). This Court has set forth the following parameters for evaluating challenges for cause:

> 'The test for determining juror competency is whether the juror can lay aside any bias or prejudice and render his verdict solely upon the evidence presented and the instructions on the law given to him by the court.' *Lusk v. State*, 446 So. 2d 1038, 1041 (Fla.), cert. denied, 469 U.S. 873, 105 S.Ct. 229, 83 L.Ed.2d 158 (1984). Determining a prospective juror's competency to serve is within a trial court's discretion. Davis v. State, 461 So. 2d 67 (Fla. 1984), *cert. denied*, 473 U.S. 913, 105 S.Ct. 3540, 87 L.Ed.2d 663 (1985).
>
> Pentecost v. State, 545 So. 2d 861, 863 (Fla. 1989).

This Court has repeatedly held that the question of whether a juror should be excused for cause is soundly within the discretion of the trial court.

> There is hardly any area of the law in which the trial judge is given more discretion than in ruling on challenges of jurors for cause. Appellate courts consistently recognize that the trial judge who is present during voir dire is in a far superior position to properly evaluate the responses to the questions propounded to the jurors. In fact, it has been said:
>
> > There are few aspects of a jury trial where we would be less inclined to disturb a trial judge's exercise of discretion, absent clear abuse, than in ruling on challenges for cause in the empaneling of a jury. [citations omitted].
>
> Cook v. State, 542 So. 2d 964, 969 (Fla. 1989), appeal after remand, 581 So. 2d 141 (Fla. 1991); cert. denied,

Watson has failed to meet his heavy burden of showing an abuse of judicial discretion.

The trial court initiated the discussion regarding Watson's burden of proof and his right to remain silent. The entire venire responded that they would follow the law when questioned about the following correct statements of the law:

> **THE COURT:**...The defendant, Mr. Watson, is presumed to be innocent. That presumption will stay with Mr. Watson throughout the trial until the point if and until the State proves his guilt beyond and to the exclusion of every reasonable doubt.

Does anybody have any problem looking at Mr. Watson and seeing an innocent man at this point?

****

Does anybody, given the nature of the charge and the accusation that he's facing, do any of you have any problem looking at Mr. Watson and still seeing an innocent man at this point?

As I mentioned briefly, that presumption will stay throughout the trial until, if and until the State proves his guilt beyond and to the exclusion of every reasonable doubt. That is the high burden that the State has to meet. On the other hand, it's not proof beyond all doubt, it's not proof beyond a shadow of a doubt, these are terms that you may have heard on television. The standard is beyond a reasonable doubt. Anybody going to hold the State to that higher burden or beyond a shadow of a doubt or beyond all doubt? None of you are going to hold the State to a higher burden, is that correct? Yes, no? Hope you're all listening.
Can you all hear me in the back?

THE JURY VENIRE: Yes.

THE COURT: Okay. On the other hand, none of you are going to hold the State to a lower burden. The standard is a high burden, it's not enough that the State proves that the defendant is probably guilty, that is not enough. They have to in fact to prove that he is guilty beyond and to the exclusion of every reasonable doubt.

Do any of you have any problem, or any of you going to hold the State to a lower burden or a higher burden? All of you agree to hold the State to that burden?

****

You have to follow the law as I give it to you and as I've already explained to you, a defendant is presumed to be innocent, that's something you have to accept and if any of you have any reservation, now is the time to state them, not if you are selected when you're deliberating, that would be a bad time

to find out that you have some reservations about that or anything I tell you.

So, at this point can all of you assure me and promise me that you will follow the law as I give it to you?

Can I get you to say verbally?

THE JURY VENIRE: Yes.

THE COURT: Good. That's reassuring.

Now, I know it may not be human nature if you see a defendant in the back of a police car to say well, there goes another innocent man, your human nature would tend to say well, he must have done something or he wouldn't be here and that may of course carry into this court and you may look over there and say well, he must have done something or he wouldn't be here. Well, that would be wrong because you have to presume him innocent at this point.

Can all of you go against your human nature and do that at this point and presume him innocent? Any of you have any problem or reservation about that? If you do now's the time to speak up.

Now, you cannot decide this case based upon any sympathy or prejudice either for the State or against the State, for the defendant or against the defendant, that would be improper. Do all of you agree to do that?

THE JURY VENIRE: Yes.

****

THE COURT:...Now, the other principle that I want to address with you and it's a very important constitutional right that the defendant has, is that he does not have to prove anything. The defendant does not have to prove anything, that burden is entirely on the State and again, it may be human nature for you to want to hear both sides, and that's how we go through life and we believe that we're being fair only if we hear both sides. In fact, if you have two kids I'm sure you've run into a situation where they're fighting, you want to hear what one has to say and then you ask the other one what happened and you hear both sides before

you decide who to punish. Well, in a criminal case when you walked in through those doors here you have to abide by a different standard and that's the rule of the Constitution and the rules of criminal procedure and under those rules the defendant has the absolute right to remain silent and if he exercises that right you cannot use that against him in any way.

Do all of you promise that you will do that?

THE JURY VENIRE: Yes.

(R. 554-57, 561-62).

When the trial court continued to discuss Watson's right to remain silent, the following discussion occurred:

THE COURT: Does anybody still want to hear both sides? Right? Somebody said right? You still want to hear both sides? I don't know who said right.

You may have to decide this case solely upon what the State presents to you.

Mr. Berdion, do you have any problem with that?

MR. BERDION: No.

THE COURT: Okay.

Does anybody have any problem with that?? A lot of times I go through that and I ask and everybody says they have no problem and then the attorney asks the same thing and all of a sudden they get a different answer, I don't know if it's the robe or that I'm up here, maybe I should come down. I heard this judge up in the northern part in the state I guess talk to the jurors, maybe I ought to get down there and get a different answer.

You can tell me, I mean there's nothing wrong if you have certain feelings for you to share them. I told you that once you're selected that you have to follow the law. At this point, at this stage we want to get your feelings about these questions.

Does anybody still want to hear both sides? [Mena][1] is it? Yes, ma'am, how do you feel?

MS [MENA]: I believe I have to hear both sides of the story.

THE COURT: How do you reconcile that with the defendant's right to remain silent?

MS. [MENA] I'm sorry?

THE COURT: How do you reconcile that with the defendant's right to remain silent? In other words, he has the absolute right under the Constitution--

MS. [MENA] But it be coming from him, from his attorneys.

THE COURT: All right, well, the attorneys don't have to do anything either, they could sit there and do cross word puzzles and if the State doesn't meet the burden of proof, proving the defendant guilty beyond and to the exclusion of every reasonable doubt, the fact that the attorneys didn't do anything cannot play a part, cannot say well, they didn't do anything so he must be guilty. I anticipate that they will do something, ask questions during the trial and they're going to present arguments to you during the trial. Is that what you're looking for?

MS. [MENA] Yes.

(R. 562-63).

As demonstrated by the trial court's thorough discussion of the concepts of burden of proof, presumption of innocence, and right to remain silent, the jurors did not have problems comprehending the concepts or following the law.

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[1] In the voir dire transcript the name initially appears as "Ms. Muina" and later as "Ms. Mena".

However, when defense counsel framed the principles as nebulous questions which were not correct statements of the law, the jurors responded with equally vague answers. During defense questioning of Jurors Webster and Benton the following questions and answers were presented:

> **[Defense Counsel]:** Right. Who feels the same way as Ms. Mena, that it would concern them if we didn't prove anything by bringing witnesses or bringing evidence?
>
> Ms. Webster, that would concern you?
>
> **MS. WEBSTER:** Yes, that would.
>
> **[Defense Counsel]:** Why would it concern you? Same reason or for a different reason, you wonder why what we're doing here?
>
> **MS. WEBSTER:** I think he should have the opportunity to have witnesses come in and testify for him.
>
> **[Defense Counsel]:** Let's say we do have the opportunity but we choose not to do it, would it concern you?
>
> **MS. WEBSTER:** Yes, it would because I think of that he was not being fairly represented in the criminal justice system.
>
> **[Defense Counsel]:** Would it cause you to wonder whether or not Mr. Watson was guilty if we didn't put on any evidence?
>
> **MS. WEBSTER:** I can't say that I would think that in my mind because in my mind I think he's innocent until proven guilty.
>
> **[Defense Counsel]:** Okay. Let's say that they present their evidence and they rest their case and then the judge says to us what evidence do you have to present and we say none, would that concern you, would you think that Mr. Watson's probably guilty because we did that?
>
> It's a hard question.

MS. WEBSTER: It is.

[Defense Counsel]: What do you think? The reason I'm asking you this is because there's a rule that says we're not required to do anything and if it would be difficult for you to follow the rule, as I said, the worst that happens is that you're not on the jury in this case. And if that rule is--

MS. WEBSTER: I don't think I could accept the fact that he did not present any evidence.

[Defense Counsel]: Mr. Benton, what do you think about that?

MR. BENTON: I believe if you didn't defend him you're not doing your job.

You need some defense, you don't just sit there.

[Defense Counsel]: What about Mr. Watson, what would you be thinking if we did that with Mr. Watson?

MR. BENTON: Where is the alibi or whatever.

[Defense Counsel]: Okay.

(ST. 164-65).

When defense counsel continued to present incorrect statements of the law to Juror Vento the following transpired:

[Defense Counsel]: The jury's still out on that one. Every jury panel has a man with cliches. Mr. Vento, how about that?

MR. VENTO: I don't think nothing, it's a very hard question.

[Defense Counsel]: I know it is, I don't ask easy questions.

MR. VENTO: You have to present something.

[Defense Counsel]: Well, what if we didn't present any witnesses or didn't put on any evidence and the judge told you we don't have

> to, would you say well, the judge told me they don't have to, but it bothers me and I'm thinking about it. You see, it's tough to try to juggle those two things.
>
> **MR. VENTO:** Would bother me.
>
> **[Defense Counsel]:** Could you follow the law if the law said we didn't have to?
>
> **MR. VENTO:** I don't know.
>
> **[Defense Counsel]:** That would cause you some problem?
>
> **MR. VENTO:** Yes.
>
> (ST. 169-70).

Thereafter, Defendant's requests to strike Jurors Benton, Webster, and Vento for cause were denied, so peremptory challenges were used to remove them. (ST. 244-45, 246-47, 250, 254, 256).

Contrary to Watson's assertions, Jurors Webster, Benton, and Vento did not state that they had difficulty with the concept of the presumption of innocence or a defendant's right to remain silent. Rather, as noted by the prosecutor below, the jurors were responding to questions regarding the failure of defense counsel to present a defense for their client:

> **[Prosecutor]:** What they did was, rather than going into the presumption of innocence, defendant's right to remain silent, they took it to another step which is them not doing anything and they didn't question them on defendant's right to remain silent, the fact that he may not testify.
>
> (R. 244-45).

The questions presented to the three jurors inquired whether they would be "concerned" or "bothered" if no defense was presented at trial. The inquiry was not a correct statement of the law regarding the burden of proof and right to remain silent. Jurors Webster and Benton were asked what they would do if the State presented their case and the defense presented none. The question may reasonably be interpreted as what would they do once the State met its burden of proof and no defense or reasonable doubt was presented to refute their case in chief. Accordingly Jurors Webster and Benton appropriately expressed concern for the defendant in such a scenario. And Juror Vento acknowledged that he would be bothered by the absence of a defense, but he did not state that he would not be able to follow the law. (ST. 169-70). Furthermore, Juror Webster unequivocally stated that she would think Watson was innocent until proven guilty. (ST. 164). The statements of the three jurors were honest, but confusing, responses to the absurd and limitless questions posed by defense counsel. After evaluating the responses of Jurors Webster, Benton, and Vento within the context of the entire voir dire the trial court determined that they could be fair and impartial jurors. Watson has not shown the manifest error necessary to overturn the trial court's findings. Mills v. State, 462 So. 2d 1075, 1079 (Fla. 1985).

On appeal Watson asserts that Juror Vento should have been removed for cause because he stated he would be bothered if the

defense did not present any evidence. However, this issue was not presented below and is not properly before this Court for review. At trial defense counsel moved to strike Vento for cause, due to his status as a victim of a burglary, with the following:

> **THE COURT:** All right. Vento, State?
>
> **[Prosecutor]:** We accept.
>
> **THE COURT:** Defense?
>
> **[Defense Counsel]:** Move to challenge him for cause, he had a burglary last night.
>
> **THE COURT:** He said he'd listen to the facts of the case.
>
> (ST. 246-47).

Thereafter, defense counsel exercised a peremptory strike against Vento "for the reason that we moved for cause". (ST. 256). Watson's argument that Juror Vento should have been excused for cause due to his inability to accept the state's burden of proof is barred from review because he did not object at trial on the specific legal ground now advanced. See Hitchcock v. State, 578 So. 2d 685, 689 (Fla. 1990)(Argument regarding application of *Singer v. State*, 109 So. 2d 7 (Fla. 1959) barred where specific legal objection not made below); Harper v. State, 549 So. 2d 1121 (Fla. 1st DCA 1989)(Defendant's objection to systematic exclusion of women from jury was not properly preserved by objection to use of peremptory challenges on basis of race).

Furthermore, the trial court did not abuse its discretion in denying Watson's request for additional peremptory challenges. After exhausting his peremptory strikes, Watson requested three additional challenges and stated that he would use them on Jurors Ochoa, Arbenott, and Sellers. (ST. 262). The trial court gave Watson one additional peremptory which was used to strike Juror Sellers. (ST. 262). Thereafter, Watson renewed his request for additional peremptory strikes and "put on the record" that they would be used against Jurors Ochoa and Arbenott. (ST. 263). However, Watson has failed to demonstrate that either juror was objectionable. It is well settled that the trial judge has discretion to grant or deny additional peremptory challenges and Watson has not shown any abuse of discretion in granting him one, rather than three, additional peremptory strikes. Parker v. State, 456 So. 2d 436, 442 (Fla. 1984); Trotter v. State, 576 So. 2d 691, 693 (Fla. 1990).

II.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN FINDING THAT THERE HAD BEEN NO JUROR MISCONDUCT WHICH WOULD DEPRIVE WATSON OF HIS RIGHT TO A FAIR AND IMPARTIAL JURY.

In his next argument, Watson alleges juror misconduct which deprived him of a fair trial. Specifically, he raises a comment that a juror made during the recess after opening statements. Watson has not shown that the trial court abused its discretion in its treatment of the allegation of juror misconduct or bias.

After opening statements had been made and a recess taken, defense counsel's wife overheard a juror making a telephone call to a co-worker. (R. 870-71). The wife heard the juror state that, "It looks like an open and shut case." (R. 874). The juror was identified as Juror Arbenott and was questioned by the trial court and defense counsel as follows:

> **THE COURT:** [Ms. Arbenott][2], apparently, accidentally, somebody overheard you talking on the telephone. Were you calling your work around 9:30?
>
> **[JUROR ARBENOTT]:** I was, yes.
>
> **THE COURT:** We're not concerned with you calling your work or telling them you're on a jury, but apparently you also made a remark to them, it appeared like an open and shut case.
>
> **[JUROR ARBENOTT]:** Oh.

---

[2] Although written as "Mrs. Arbineau" in the transcript, the juror's correct name was "Arbenott".

THE COURT: One of the things I instructed you on is that you shouldn't form any definite or fixed opinion until you have heard all the evidence, argument of counsel and my instructions.

Now, I hope, if you did form an opinion, that it was not a definite or fixed opinion because you haven't heard all the evidence yet or argument of counsel or my instructions.

Have you formed any definite or fixed opinion?

[JUROR ARBENOTT]: What I meant is--I was talking to them--I didn't think I would be here for weeks because of what you said about going--

THE COURT: So when you were talking about open and shut, was that talk about the length of the trial?

[JUROR ARBENOTT]: Yes.

THE COURT: Not about the strength of the evidence?

[JUROR ARBENOTT]: We have not seen any evidence, so I had no opinion of the evidence at all.

THE COURT: Anybody else want to question?

[Defense Counsel]: Yes.

Did you say that, ma'am? Did you say that to somebody, that it appeared to be an open and shut case?

[JUROR ARBENOTT]: I said it to my coworker, yes.

THE COURT: Okay. What you meant is it was a short duration?

[JUROR ARBENOTT]: That's entirely what I meant.

THE COURT: Thank you.

Please don't form any definite or fixed opinion.

[JUROR ARBENOTT]: I'll be more careful.

THE COURT: The fact you're on jury, how long you think it's going to take, don't talk about the actual trial itself.

[Defense Counsel]: Judge, are you going to instruct--

THE COURT: Please, wait a minute.
Don't discuss with the other jurors anything that we talked about here in court and, obviously you're also instructed not to discuss the case.

[JUROR ARBENOTT]: Of course.

[Defense Counsel]: Can I ask her one more question? Did you discuss what you've just said to one of your coworkers with any of the other jurors?

[JUROR ARBENOTT]: No, sir.

THE COURT: Thank you.

(R. 875-77).

The individual voir dire of Juror Arbenott was sufficient to ensure that Watson's right to a fair trial by an impartial jury had not been abridged.

After the juror was questioned, defense counsel asked for an additional peremptory strike or for a mistrial. (R. 877). Both requests were properly denied by the trial court. (879). Unlike the situation in Medina v. State, 466 So. 2d 1046, 1049 (Fla. 1985), where the juror indicated he had formed an opinion and was prejudiced against the defendant, Juror Arbenott indicated that she still had an open mind and had no opinion about the case.

In Doyle v. State, 460 So. 2d 353, 356 (Fla. 1985), an unidentified juror encountered the defense attorney in a corridor and stated, "Good luck. You're going to need it." A curative instruction was given, but the defense motion for mistrial was denied. This Court stated:

> The determination of whether substantial justice warrants the granting of a mistrial is within the discretion of the trial court. *Evers v. State*, 280 So. 2d 30 (Fla. 3d DCA 1973). Dealing with the conduct of jurors is likewise left to the sound discretion of the court. *Walker v. State*, 330 So. 2d 110 (Fla. 3d DCA), *cert. denied*, 341 So. 2d 1087 (Fla. 1976). We find no abuse of that discretion here.

Similarly, there was no abuse of discretion in the instant case. The responses of Juror Arbenott were unequivocal that she had not formulated any opinion about the case. Her definition of the phrase "open and shut" concerned the length of the trial and this isolated comment did not warrant excusal by the trial court.

III.

THE TRIAL COURT PROPERLY DENIED WATSON'S REQUEST TO STRIKE THE PANEL WHERE DEFENSE COUNSEL ELICITED STATEMENTS FROM A JUROR REGARDING HIS KNOWLEDGE OF THE CASE.

In his third argument, Watson alleges reversible error due to a statement by Juror Moss that he was aware of the heinous nature of the crime. Watson has failed to establish that any harm was caused by the statement.

During voir dire Juror Moss informed the trial court that he remembered reading about the case in the newspaper. Thereafter a side-bar was conducted and Juror Moss described his knowledge of the murder for the trial court and trial counsel. (R. 602-5). Juror Moss stated that he recalled "that the crime itself was kind of heinous". (R. 604). Subsequently, the trial court instructed Juror Moss not to discuss his knowledge of the case and instructed the other jurors not to question Moss about his knowledge. (R. 606-7). After the lunch break, and despite his awareness of Moss' knowledge of the case, defense counsel elicited the following statements:

> **[Defense Counsel]:** Okay. What about the question to the second row, does anybody feel that because the crime of first degree murder is proven and someone's convicted, that the death penalty is the only penalty. Now you've been told that there are two in Florida, but you have the right to have your own opinion and I want to know what your opinion is, that's the only penalty.
> Mr. Moss?
>
> **MR. MOSS:** Okay, knowing a little bit about what happened, the crime itself, and the

> violent nature of it, the heinous nature of it and my opinion, I think I would have a lot of trouble trying to find mitigating circumstances if, the defendant was convicted, I would have trouble finding mitigating circumstances against the death penalty in this particular case.
>
> **[Defense Counsel]:** We need a side bar.
>
> **MR. MOSS:** That's my personal opinion.
>
> **THE COURT:** Save it.
>
> **[Defense Counsel:** What about my question about the death penalty being the only penalty?
>
> **MR. MOSS:** Oh, no, no, in general? General.
>
> **[Defense Counsel]:** Right?
>
> **MR. MOSS:** I believe that there are situations where perhaps life, a life sentence would be in order.
>
> (ST. 205-6).

After defense counsel invited these responses from Juror Moss, a juror who had stated at side-bar that the crime was violent and heinous, he asked the trial judge to strike the entire jury panel with the following:

> **[Defense Counsel]:** Your Honor, I'm moving at this time to strike the panel. Mr. Moss, when inquired by [defense counsel] was asked a question about would you be able to look at the facts of the crime or him look at the defendant, what he said after being admonished by this court not to disclose--
>
> **THE COURT:** You asked--
>
> **[Defense Counsel]:** Judge, he did not respond to the question.
>
> **THE COURT:** Can you respond to this crime and he responded, no, not this case.

> **[Defense Counsel]:** The question was would you look at the facts of the crime and the facts of the defendant and--
>
> **THE COURT:** Maybe he thought that you were talking about this crime after this court had told him that he's not to speak to the jurors, that he was not allowed to speak--I think you opened the door.
>
> **[Defense Counsel]:** He was not to speak about what he was told about this.
>
> **THE COURT:** I'm going to deny the motion.
>
> (ST. 240-41).

Under the invited error doctrine, defense counsel may not create error at trial and then take advantage of the error on appeal. Czubak v. State, 570 So. 2d 925, 928 (Fla. 1990).

After eliciting the statements from Juror Moss, defense counsel moved to strike him for cause and the trial court granted the request. (ST. 246). The trial court did not abuse its discretion in denying Watson's request to strike the venire panel where the statements of Juror Moss were provoked by defense counsel, duplicated evidence which was properly presented at the trial, and did not result in any prejudice to Watson.

Although, defense counsel did not request either a mistrial or curative instruction the venire had previously been instructed not to discuss the case with Juror Moss and there has been no showing that they were prejudiced by his isolated comment. Moreover, after objectionable comments have been made, curative

instructions admonishing the jurors to disregard such comments are routinely deemed sufficient to cure any error arising out of such comments. See Ferguson v. State, 417 So. 2d 639 (Fla. 1982); Greer v. Miller, 483 U.S. 756, n. 8, 107 S.Ct. 3102, 97 L.Ed.2d 618 (1987).

Additionally, given the isolated nature of the statement and the corrective action taken by the trial court, there is no reasonable possibility that the single statement of Juror Moss affected the verdict. The comment regarding the heinous nature of the crime was made in response to questions regarding the sentencing phase. Juror Moss' opinion of the crime as heinous was relevant to sentencing, not as to Watson's guilt or innocence. Consequently, any error arising from the statement applies only to the penalty phase and not to the guilt phase of trial. Furthermore, there is no prejudice where the information conveyed by the statement merely duplicated evidence which was presented during trial. Bottoson v. State, 443 So. 2d 962, 966 (Fla. 1984).

IV.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING THE JURORS TO SUBMIT WRITTEN QUESTIONS FOR THE WITNESSES.

As his next point, Watson claims that he was denied his right to a fair and impartial jury where the trial court allowed the jurors to present questions to be asked of the witnesses. There has been no affirmative showing by Watson that the procedure operated to his detriment or that the trial court abused its discretion.

It is undisputed that the trial court has discretion in allowing jurors to ask questions of witnesses during trial. Strawn v. Sate ex. rel. Anderberg, 332 So. 2d 601 (Fla. 1976); Shoultz v. State, 106 So. 2d 424 (Fla. 1958); Ferrara v. State, 101 So. 2d 797 (Fla. 1958); Scheel v. State, 350 So. 2d 1120 (Fla. 3d DCA 1977); Pierre v. State, 601 So. 2d 1309 (Fla. 4th DCA 1992); DeBenedetto v. Goodyear Tire & Rubber Co., 754 F.2d 512 (4th Cir. 1985).

Watson objected to the procedure of allowing the jurors to ask questions out loud. (R. 993). The trial court instructed the jurors that the questions would have to be written down, and defense counsel did not object to the format, but only to the procedure of allowing the questions. (R. 994). Furthermore, Watson failed to object to the competency or substance of the particular questions asked and did not properly preserve this issue for review. As for the procedure, it did not abridge

Watson's right to a fair trial. The questions were written down, submitted to the trial judge, screened by the judge and trial counsel, and the relevant questions were asked of the witnesses. (R. 995-96, 1038, 1126-28, 1213-14, 1343-45, 1410).

Of the three questions identified in appellant's brief as improper, none of them were prejudicial or argumentative. Nor were they irrelevant to the issues or indicative of a juror becoming prejudiced against Watson. Contrary to Watson's assertions, the questions posed to the expert fingerprint examiner were not prosecutorial in nature. As proof, he submits that they prompted the prosecutor to ask follow-up questions. However, both the prosecution and defense were motivated to ask additional questions of the fingerprint expert after the jury questions were presented. (R.1346-49).

Watson has failed to show that the trial court abused its discretion in allowing juror questions. There is nothing to suggest that the jurors who posed questions had become incompetent to discharge their duty as jurors. His claim that he was denied his right to a fair and impartial jury is unfounded and unsupported by the record.

V.

THE TRIAL COURT CORRECTLY DENIED WATSON'S MOTION FOR MISTRIAL WHERE THE PROSECUTOR MADE NO IMPROPER COMMENTS DURING OPENING STATEMENTS.

Watson contends that the trial court abused its discretion in denying his motion for mistrial made in response to the prosecutor's opening statement. However, the opening statement was a proper description of the relevant evidence to be presented and any alleged error was waived by defense counsel's rejection of the trial court's offer to give a curative instruction to the jury.

Opening remarks are not evidence, and the purpose of opening statement is to outline what an attorney expects to be established by the evidence. Whitted v. State, 362 So. 2d 668 (Fla. 1978). Accordingly, the jury in this case was instructed that the opening statements were not evidence and were not to be considered by them as such. (R. 794). The control of prosecutorial statements is within the trial court's discretion and Watson has not shown an abuse of discretion in the trial court's denial of his motion for mistrial. Durocher v. State, 596 So. 2d 997 (Fla. 1992).

During opening statement, the prosecutor stated that the victim was married to Reverend Hickman, that they had been away from home the weekend prior to her murder, that she was a fastidious housekeeper, that she shopped for groceries on Monday,

and that she was known as either "Sister Ella" or "Mama". (R. 799-804). This evidence was relevant to establish that the victim's stepson had stayed in the house and observed the scene prior to the commission of the murder. The evidence of her cleaning and shopping habits was relevant to establish that she had been performing her daily routine when she was killed. The victim's housecleaning habits were important to explain why few latent prints were discovered at the scene as well as to demonstrate how unusual it was for items to be out of place in her home.

Watson argues that these statements constituted improper victim impact evidence designed to evoke sympathy from the jury. However, the jury was instructed by the trial court, as well as told by the prosecutor, that they were not to be affected by feelings of sympathy for either the victim or the defendant. (R. 660, 1654). Further, in Payne v. Tennessee, 501 U.S. ____, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991), the United States Supreme Court receded from its holdings in Booth v. Maryland, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987), and South Carolina v. Gathers, 490 U.S. 805, 109 S.Ct. 2207, 104 L.Ed.2d 876 (1989), regarding admission of evidence about the victim.

When the prosecutor described Watson's actions in entering the house and arming himself with a long thin blade before beginning the "torture", a defense objection was sustained. (T. 805). Additionally, the trial court instructed the jury to

disregard the statement and again reminded them that opening statements were not evidence. (T. 805). Watson has not shown that this comment was such grave error as to vitiate the entire proceeding and merit a mistrial. Cobb v. State, 376 So. 2d 230 (Fla. 1979).

Although Watson's objections, to Hickman's life being shattered and what the victim went through, were sustained, he rejected the trial judge's offer of a curative instruction, thereby waiving his right to raise these comments as error on appeal. (R. 826-28). As stated by this Court with the following:

> The proper procedure to take when objectionable comments are made is to object and request an instruction from the court that the jury disregard the remarks.
>
> Duest v. State, 462 So. 2d 446 (Fla. 1985).

If improper, the opening statement was not sufficiently prejudicial in its content to require reversal. The limited comments were not sufficiently prejudicial to vitiate the entire proceeding and require reversal. Valle v. State, 581 So. 2d 40, 48 (Fla. 1991), cert. denied 112 S.Ct. 597, 116 L.Ed.2d 621.

The unrebutted evidence established that Watson burglarized the victim's house, tied the victim up with a cord, stabbed her at least once in the hallway, continued to stab her in the bedroom, took jewelry, money and personal property, left three fingerprints inside of the house, and admitted that he entered

the house without the intent to kill. Given this unequivocal evidence of guilt, there is no reasonable possibility that the comments of the prosecutor contributed to the jury's verdict. Watts v. State, 593 So. 2d 198 (1992), cert. denied 112 S.Ct. 3006, 120 L.Ed.2d 881; State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986).

VI.

THE TRIAL COURT PROPERLY FOUND THAT THERE WAS NO PREJUDICE TO THE DEFENSE DUE TO DR. HABER'S REBUTTAL TESTIMONY AT SENTENCING.

In his next point, Watson argues that the trial court should have conducted an inquiry, pursuant to Richardson v. State, 246 So. 2d 771 (Fla. 1971), or granted a mistrial due to Dr. Haber's opinion testimony which was presented in rebuttal to Toomer's testimony. This argument is without merit.

Upon receipt of reciprocal discovery from the defense which listed Toomer as a witness, the State listed Dr. Haber as a rebuttal witness for the sentencing phase. (R. 1853). However, the defense did not depose Dr. Haber or inquire until immediately prior to his testimony about the substance of his opinions. (R. 1852). Just as Dr. Toomer, the defense expert had done, Dr. Haber did not prepare any written, and therefore, discoverable, reports of his opinions and conclusions. (R. 1902).

This was not a discovery violation and the trial court properly ruled that there had been no discovery violation. (R. 1856). Dr. Haber's opinions were not written or recorded "statements" or "reports" within the purview of Fla. R. Crim. P. 3.220(b)(1)(J), and accordingly no discovery violation occurred and no Richardson inquiry was necessary. See Johnson v. State, 545 So. 2d 411 (Fla. 3d DCA 1989)(Disclosure of an oral, unrecorded statement of a state witness to the prosecuting attorney was not required under Fla. R. Crim. P. 3.220(a)(1)(ii)

and was not a discovery violation); State v. Lewis, 543 So. 2d 760, 767 (Fla. 2d DCA 1989)(Personal observation of lighting conditions by investigating officer did not constitute a scientific test within the meaning of Rule 3.220 and was not a discovery violation).

However, in an abundance of caution, the trial court conducted a hearing pursuant to Richardson v. State, 246 So. 2d 771 (Fla. 1971), and established that there had been no prejudice to the defense by allowing the rebuttal testimony of Dr. Haber. (R. 1898-1908). Dr. Haber's name was furnished to the defense as a rebuttal witness for the sentencing phase and the defense elected not to depose him. The trial court did abuse its discretion in determining that no discovery violation had occurred, and if one did occur that Watson was not prejudiced or affected in his ability to prepare for trial

Moreover, the trial court stated that it did not reject the proposed statutory mitigating circumstances due to Dr. Haber's testimony, rather it rejected them due to the lack of a factual basis for Toomer's conclusions. (R. 284). Accordingly, there is no reasonable possibility that any error created by the admission of Dr. Haber's opinions contributed to the sentence. State v. DiGuilio, supra.

VII.

WATSON FAILED TO PRESERVE ANY OBJECTION TO THE JURY INSTRUCTIONS GIVEN DURING THE SENTENCING PHASE.

Appellant's final claim is that the jury instructions for the sentencing phase were insufficient. Specifically, Watson contends that the instructions were defective in three areas: (1) aggravating circumstance of heinous, atrocious, and cruel (HAC) instruction was unconstitutionally vague; (2) and (3) the absence of instructions regarding the doubling of aggravators and the consideration of nonstatutory mitigators deprived him of a fair sentencing proceeding. However, this claim has been waived because Watson failed to preserve his objection to the instructions in the trial court. Sochor v. Florida, 504 U.S. ____, 112 S.Ct. ____, 119 L.Ed.2d 326 (1992).

Defense counsel did not file a written request for special instructions on HAC, doubling, or nonstatutory mitigation pursuant to Fla. R. Crim. P. 3.390(c), and did not object to the instructions given after the jury was instructed and prior to their deliberations, pursuant to Fla. R. Crim. P. 3.390(d). (R. 1966). See Walker v. State, 473 So. 2d 694 (Fla. 1st DCA 1985)(Issue not properly preserved where defendant failed to object to failure to give instructions prior to the time the jury retired to consider its verdict); Harris v. State, 438 So. 2d 787 (Fla. 1983)(Because no objection was made in accordance with Rule 3.390(d), appellant waived his right to challenge the instruction on appeal.).

In addition to being barred from appellate review, Watson's objection to the HAC instruction is without merit. The instruction which was given was constitutional under Espinosa v. Florida, 505 U.S. ____, 112 S.Ct. ____, 120 L.Ed.2d 854 (1992). The jury was instructed as follows:

> The crime for which the defendant is to be sentenced was especially heinous, atrocious and cruel--or cruel. Heinous means extremely wicked or shockingly evil. Atrocious means outrageously wicked and vile; and cruel means designed to inflict a high degree of pain with utter indifference to or even enjoyment of the suffering of others.
>
> What is intended to be included are those capital felonies where the actual commission of the capital felony is accompanied by such additional acts as to set the crime apart from the norm of capital felonies, that is the conscienceless or pitiless crime which is unnecessarily torturous to the victim.
>
> (R. 1962).

As conceded by Appellant, the instruction in this case has been held by this Court to be constitutional. Lucas v. State, 18 Fla. L. Weekly S15 (Fla. December 24, 1992); Hall v. State, 18 Fla. L. Weekly S63 (Fla. Jan. 14, 1993).

Moreover, the facts show the murder of Ella Hickman to have been heinous, atrocious, or cruel. Her murder was a brutal slaying and was accompanied by additional facts that set it "apart from the norm of capital felonies". Dixon v. State, 283 So. 2d 1, 9 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S.Ct.

1950, 40 L.Ed.2d 295 (1974). This factor is supported by the record as demonstrated by the sentencing order of the trial judge:

> Ella Hickman, a 53-year-old woman, was found laying dead in her bedroom. Her ankles and neck had been tied by a telephone cord that had been pulled from a wall. She had five stab wounds to her neck, and one to her throat. The one to the throat severed her carotid artery and penetrated her windpipe, causing her either to suffocate or bleed to death. Dr. Jay Barnhardt, the Medical Examiner, testified that her death would have taken anywhere from thirty seconds to a few minutes. He also testified that Ella Hickman was alive when she received all six stab wounds.
>
> The evidence also showed that there were two drops of the victim's blood that were found in the hallway, outside the bathroom, that her shoes were under her purse in the living room, and that her groceries were still in her car. This indicated that she was surprised while in her home, and was forcibly taken into the bedroom. She was obviously tied with the telephone cord prior to her murder, as it would have made no sense to have tied her up after she was dead. This would also explain the lack of defensive wounds.
>
> There can be no doubt that Ella Hickman, who was murdered in her own home, was terrorized and knew that her death was imminent. This was the kind of crime intended to be included in this aggravating circumstance, as it was accompanied by such additional acts which set this homicide apart from the norm of capital felonies. These facts show an utter indifference by the defendant to the suffering he caused. [citations omitted]. It was a conscienceless or pitiless crime, which was unnecessarily torturous to the victim, Ella Hickman. [citations omitted]. There can be little argument that this murder was especially heinous, atrocious and cruel.

(R. 282-83).

The State would also add that any error with respect to the absence of an instruction regarding the doubling of aggravating factors is harmless where the trial court expressly stated that separate weight was not being given to the aggravating circumstance of pecuniary gain. (R. 282). There is no reasonable possibility that a procedurally proper request for such an instruction would have affected the sentence recommendation.

In addition to being procedurally barred, Watson's argument regarding an instruction on nonstatutory mitigation is also without merit. This Court has previously rejected this argument with the following:

> The standard jury instruction on nonstatutory mitigating evidence is not ambiguous and allows jurors to consider and weigh relevant mitigating evidence. *Robinson v. State*, 574 So. 2d 108 (Fla.), *cert. denied*, ____ U.S. ____, 112 S.Ct. 131, 116 L.Ed.2d 99 (1991).
>
> Dougan v. State, 595 So. 2d 1, 5 (Fla. 1992).

VIII.

WATSON DID NOT PRESERVE ANY OBJECTION TO THE STATE'S OPENING STATEMENT DURING THE GUILT PHASE AS AFFECTING HIS SENTENCING PHASE.

Watson contends that the opening statement of the prosecutor during the guilt phase deprived him of a fair sentencing hearing. As previously discussed in Argument V, the opening statement of the prosecutor was not improper and did not deprive Watson of a fair trial. Furthermore, Watson did not raise this claim regarding an unfair sentencing trial below and did not properly preserve it for appellate review by this Court.

IX.

WHETHER THE TRIAL COURT PROPERLY CONSIDERED EACH MITIGATING FACTOR PROPOSED BY WATSON?

As his next point, Watson argues that the sentencing order is deficient because the trial court concluded that the proposed mitigating factors were insignificant and did not lessen Watson's culpability for the brutal homicide of Ella Hickman. There is competent substantial evidence to support the trial court's rejection of the mitigating circumstances and this argument fails. Watson requested, and the trial court gave, jury instructions on two statutory mitigating factors: (1) the crime was committed under extreme mental or emotional disturbance; and (2) Watson's capacity to appreciate the criminality of his conduct was impaired. (R. 1963). The jury was also instructed on nonstatutory mitigation and defense counsel argued as nonstatutory factors that Watson was illiterate and was raised in poverty. (R.1957-59). It is presumed that the judge followed his own instructions to the jury regarding the consideration and weighing of mitigating evidence. Johnson v. Dugger, 520 So. 2d 565 (Fla. 1988). As in Johnson, "When read in its entirety, the sentencing order, combined with the court's instructions to the jury, indicates that the trial court gave adequate consideration to the evidence presented." Id. at 566.

In Rogers v. State, 511 So. 2d 526, cert. denied 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988), this Court enunciated the following three-part test for consideration of mitigating evidence:

> [T]he trial court's first task in reaching its conclusions is to consider whether the facts alleged in mitigation are supported by the evidence. After the factual finding has been made, the court then must determine whether the established facts are of a kind capable of mitigating the defendant's punishment, i.e., factors that, in fairness or in the totality of the defendant's life or character may be considered as extenuating or reducing the degree of moral culpability for the crime committed. If such factors exist in the record at the time of sentencing, the sentencer must determine whether they are of sufficient weight to counterbalance the aggravating factors.
>
> Rogers, 511 So. 2d at 534.

The well reasoned sentencing order demonstrates that the trial court adhered to the procedure required by Rogers. In its written order the trial court expressly evaluated each mitigating circumstance proposed by Watson. The first of the proposed statutory mitigators, committed under the influence of extreme mental or emotional disturbance, was rejected by the trial judge as not being supported by the evidence, with the following:

> The court finds that this mitigating circumstance, that Mr. Watson was under the influence of extreme mental or emotional disturbance at the time that he broke into Ella Hickman's home, robbed and killed her has simply not been established by the greater weight of the evidence. In making this finding, the court has not relied upon the rebuttal testimony of Dr. Haber who contradicted Dr. Toomer's findings. The court has instead relied upon the fact that Dr. Toomer never discussed with the defendant any of the details of the offense and that Dr. Toomer never reviewed any of the evidence, police reports, depositions or any other

> testimony. He never spoke with anyone other than Mr. Watson. Dr. Toomer seems to equate impaired insight and judgment with extreme mental or emotional disturbance.
>
> (R. 284).

The opinion of Dr. Toomer that Watson committed the murder while disturbed was speculative and properly rejected by the trial court as unsupported by the evidence. Furthermore, although not relied upon by the trial court in rejecting this mitigator, the testimony of Dr. Haber corroborates the conclusion that Watson was not under extreme mental or emotional disturbance. After reviewing the police reports, depositions, autopsy report, Watson's statements, Watson's prior criminal history, and meeting with Watson, Dr. Haber concluded that the crime was not committed while under the influence of extreme mental or emotional disturbance. (R. 1876-79). The record supports the trial court's conclusion that this mitigating circumstance was not established.

The trial court properly rejected the mitigating circumstance that Watson's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired. Facts to support this statutory circumstance consisted of Watson's self-serving statements to Dr. Jacobson, regarding his use of drugs, and Toomer's conjecture, again formulated without review of the evidence. (R. 2077-86). In contradiction to the baseless opinion of Toomer, the State presented the expert opinion of Dr. Haber that Watson's capacity was not impaired, as well as evidence of Watson's actions in

fleeing to Georgia upon learning that the police had a warrant for his arrest. Rejection of this mitigator was correct where there was no evidence that Watson's ability to conform his conduct was impaired or that he did not know that killing Ella Hickman was wrong. Pardo v. State, 563 So. 2d 77, 80 (Fla. 1990); Ponticelli v. State, 593 So. 2d 483, 491 (Fla. 1991), vacated on other grounds 113 S.Ct. 32 (1992).

As a final statutory mitigating circumstance, the trial court rejected the position that Watson was an accomplice because there was no evidence to support such a finding. (R. 285). In Watson's statement to the police he claimed that a second person was present during the murder, however the physical evidence did not support this allegation.

The trial court specifically addressed each of the proposed nonstatutory mitigators as required by Campbell v. State, 571 So. 2d 415 (Fla. 1990). Testimony was presented that Watson was illiterate, grew up in poverty, and had used drugs. (R. 285-86). However, the testimony was controverted by evidence that Watson was "street smart" and that there was no indication he was under the influence of drugs at the time of the murder. (R. 286). The contradictions in the evidence diminished its forcefulness and the trial court properly found that it did not reduce Watson's culpability for the brutal homicide with the following:

> Clearly, Mr. Watson came from a poor family, and his father was not around very much. He

> can barely read or write, his IQ is low, and he has an intellectual deficit. Dr. Haber testified to these factors. However, as Dr. Toomer and Dr. Mutter stated, the defendant is street smart. Mr. Watson may have had a drug problem around the time of the crime, but no one testified that they saw the defendant take drugs or be under the influence of drugs at the time of the homicide. In addition, the file in case number 88-36441, shows only that ten days prior to the homicide, Mr. Watson was arrested for possession of twenty bags of cocaine, and that he ran from the police when they tried to arrest him. The twenty bags were apparently not for personal use, but rather to sell.
>
> All of these circumstances unfortunately describe many people in our society. In a juvenile[3] offender with a minor transgression, they may indicate the need for leniency. They do not, however, rise to the level of a non-statutory mitigating circumstance so as to excuse this brutal homicide.
>
> (R. 286-87).

Resolution of such factual conflicts is entirely the responsibility and duty of the trial court and such credibility determinations should not be conducted on appeal. Jones v. State 580 So. 2d 143, 146 (Fla. 1991), cert. denied, 112 S.Ct. 221, 116 L.Ed.2d 179.

In conclusion, the trial court found "that there are sufficient aggravating circumstances to justify the sentence of death which outweigh any mitigating circumstances that may be present." (R. 288). The record supports the conclusion that the mitigating factors were either not established or were outweighed by the

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[3] At the time of trial, Watson was twenty-eight (28) years old.

aggravating factors. Hall v. State, 18 Fla. L. Weekly S63 (Fla. Jan. 14, 1993). Because the substantial aggravating factors outweigh any nonstatutory mitigating evidence, the death penalty is the appropriate sentence.

X.

THE DEATH PENALTY STATUTE IS CONSTITUTIONAL.

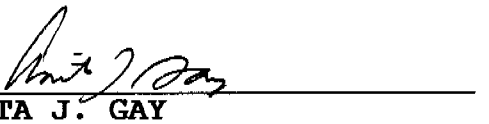
Lastly, Watson alleges that the imposition of the death penalty is unconstitutional where insufficient guidance is given to the jury. However, the constitutionality of the death penalty has been upheld on multiple occasions by both this Court and the United State Supreme Court. Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976); Walton v. Arizona, 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511; Hildwin v. Florida, 490 U.S. 638, 109 S.Ct. 2055, 104 L.Ed.2d 728; Ferguson v. State, 417 So. 2d 631 (Fla. 1982); State v. Dixon, 283 So. 2d 1 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974); Patten v. State, 598 So. 2d 60 (Fla. 1992); Diaz v. State, 513 So. 2d 1045 (Fla. 1987), cert. denied, 484 U.S. 1079, 108 S.Ct. 1061, 98 L.Ed.2d 1022 (1988); Thomas v. State, 456 So. 2d 454 (Fla. 1984).

CONCLUSION

Based upon the foregoing points and authorities the State respectfully urges this Court to affirm Appellant's convictions and sentences.

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 **ANSWER BRIEF OF APPELLEE** was furnished by mail to **ROBERT KALTER,** Assistant Public Defender, 1351 N.W. 12th Street, Miami, Florida 33125 on this 23rd day of April, 1993.

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