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IN THE SUPREME COURT OF FLORIDA

CASE NO. 79,245

THOMAS WYATT,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

****

ON APPEAL FROM THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT, IN AND FOR INDIAN RIVER COUNTY, FLORIDA

****

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

Appellee accepts appellant's summary of the facts and case to the extent that they represent an unbiased nonargumentative account of the facts developed at trial. Appellee would include the following additions:

The medical examiner testified that Ms. Nydegger's body had been dragged from a car prior to being dumped. (R 617, 664-665).

The evidence establishes that Ms. Nydegger was probably in kneeling in position when shot. (R 653-654). The gun was in actual contact with the skull when it was fired. (R 643).

Appellant gave Freddie Fox a .38 caliber gun to hold from him. Fox pawned the gun, which upset appellant. Appellant told Fox the gun was used to kill people. (R 846-848).

SUMMARY OF THE ARGUMENT

The trial court did not err in instructing the jury as to flight. This issue is not preserved for appeal as there was no objection to the instruction. Furthermore, such an instruction was permissible at the time of appellant's trial. Appellant's reliance on Fenelon v. State, 549 So. 2d 292 (Fla. 1992) is misplaced as Fenelon, is prospective only.

The state did not engage in any impermissible cross-examination of appellant. This issue is not preserved for appeal as no objection to any of the questions was ever made.

Appellant was not precluded from conducting any meaningful or timely discovery.

The trial court properly limited appellant's questioning of the venire. Specific questions regarding how a jury would vote when faced with the actual facts of the case is improper.

The trial court properly allowed the state to submit a photograph of the victim during the testimony of the medical examiner.

The trial court properly precluded appellant from cross-examining a state witness as same was beyond the scope of direct.

The trial court's comment about appellant during his testimony was proper given appellant's conduct.

The state did not admit any impermissible character evidence of appellant. This issue was not preserved for appeal.

The prosecutor's closing arguments during the guilt phase were proper comments on the evidence. This issue was not preserved for appeal.

The standard jury instruction regarding reasonable doubt is constitutional. This issue is not preserved for appeal.

The trial court properly found the existence of the following aggravating factors: the crime was committed to avoid arrest, the crime was committed during the course of a robbery, the crime was committed in a cold, calculated, and premeditated manner.

The trial court properly considered all the mitigating evidence.

The trial court properly instructed the jury regarding all of the aggravating factors. Furthermore, the jury was properly instructed regarding their role in the sentencing process. This entire issue has not been preserved for appeal.

The state was properly allowed to admit evidence of appellant's prior violent felonies.

The prosecutor's penalty phase closing argument was permissible. The issue was not properly preserved for appeal.

Florida's death penalty statute is constitutional. This issue has not been preserved for appeal.

ISSUE I

THE TRIAL COURT DID NOT ERR IN INSTRUCTING THE JURY ON FLIGHT

Relying on Fenelon v. State, 549 So. 2d 292 (Fla. 1992), appellant claims that the trial court erred by giving the jury an instruction regarding flight. Prior to this Court's decision in Fenelon such an instruction was permissible. Appellant is not entitled to the benefit of Fenelon as his trial was conducted several months before Fenelon was rendered. Given that Fenelon should be applied prospectively, appellant's argument is without merit. Furthermore, this issue has not been preserved for appeal. Although appellant objects to the court's instruction, the specific ground or grounds were never articulated. (R 1619-1620). Fla. Rule of Crim. Pro. 3.390 (d); Steinhorst v. State, 412 So. 2d. 332, 338 (Fla. 1982).

If this Court determines that the trial court erred in giving the instruction, it must be considered harmless given the strength of the evidence of appellant's guilt. Appellant admits to being with the victim the night before she was murdered. He was in possession of her car and the murder weapon immediately subsequent to the murder. (R 850, 1446-49, 1456, 811, 843). He disposed of both the following day. (R 864, 844, 857). He confessed the murder to two different people. (R 848, 1499). He elicited the advice of one of those people regarding a possible attempt to kill his co-defendant Michael Lovette. (R 1497, 1499, 1516). Appellant has failed to demonstrate any harmful error. Fenelon.

ISSUE II

THE STATE DID NOT ENGAGE IN ANY IMPROPER CROSS-EXAMINATION OF APPELLANT

Appellant claims that the prosecutor impermissibly elicited appellant's opinion regarding the veracity of the state's witnesses. Review of this issue is precluded given that there was no objection to any of the questions asked of appellant. Wasko v. State, 505 So. 2d 1314, 1317 (Fla. 1987). Irrespective of the procedural default, appellant has failed to establish any error.

When reviewing a claim regarding the scope of permissible cross-examination, the trial court has wide discretion, appellant must establish an abuse of that discretion. Gilbert v. State, 407 So.2d 1007, 1009 (5th DCA 1981). A review of the record reveals that the prosecutor was simply pointing out inconsistencies in the testimony of various witnesses. For instance, appellant's version of what happened to the bullets, the murder weapon and the victim's car is in complete contradiction to Freddie Fox's version. Likewise on specific points, appellant's version of what happened in Club 92 the night before the murder is inconsistent with what Jennifer Oler stated. The prosecutor was merely pointing out the obvious inconsistencies. Kramer v. State, 18 Fla. L. Weekly S 266, 267 (Fla. April 29, 1993); Wasko, supra. Any error must be considered harmless given that the jury was already aware of the inconsistent testimony. Furthermore, on direct-examination,

appellant was asked repeatedly about the inconsistencies on the testimony. (R 1643, 1645, 1650, 1652). At one point during the direct examination of Patrick McCoobs, appellant called him a liar. (R 1496). In summary, the questions on cross-examination were proper, and the jury was already aware of the inconsistent testimony as appellant himself had already pointed same during his testimony. This claim is both not preserved and without merit.

ISSUE III

APPELLANT WAS NOT PRECLUDED FROM CONDUCTING RELEVANT AND TIMELY DISCOVERY

Appellant claims that the trial court erred in refusing to order a state witness, Jennifer Oler, to answer a question regarding her drug usage. The specific question was who was her drug supplier. (R 592-593). Ms. Oler had already answered questions regarding her drug consumption around the night in question. (R 592-593). Defense counsel conceded that the identity of Ms. Oler's' drug supplier was not relevant nor admissible. (R 595, 597-598). He wanted it for discovery purposes only. (R 595). However, Ms. Oler already answered questions in her deposition regarding her drug consumption on or about the time of crime. (R 592-593). Defense counsel chose not to bring that out during cross-examination. (R 739-747). Edwards v. State, 548 So. 2d 656 (Fla. 1989). The identity of Ms. Oler's drug supplier was not proper discovery, nor was it relevant to any issue at trial. Boshears v. State, 371 So. 2d 725 (1st DCA 1979); Lane v. State, 457 So. 2d 586 (3rd DCA 1984).

ISSUE IV

THE TRIAL COURT DID NOT ERR IN PREVENTING APPELLANT FROM ASKING SPECIFIC QUESTIONS TO THE VENIRE

Appellant claims that the trial court erred in precluding defense counsel from asking specific questions about the instant case to the venire. Given that the trial court possess discretion in deciding what is the proper scope of questions on voir dire, appellant has failed to establish an abuse of that discretion. Stano v. State, 473 So. 2d 1282, 1285 (1985) cert. denied, 106 S. Ct. 869, 474 U.S. 1093, 88 L. Ed. 2d 907, stay granted 828 F. 2d 10 denied habeas corpus affirmed in part reversed in part, 901 F. 2d. 892 (1989).

Throughout the course of voir dire, both sides questioned the jury about general characteristics of the case. For instance, the state asked the prospective panel whether they could keep an open mind even though there were no eyewitnesses to the crime and if they could understand the concept of the law on principals. (R 91, 102, 103, 110, 111, 122, 129, 135, 153, 154, 158). The defense asked questions regarding whether or nor the jury would be bothered if the defendant did not testify, (R 182), and whether they would be effected by gruesome photographs (R 176, 203). Appellant was also allowed to ask questions regarding whether or not they could follow the law and not view death as an automatic sentence. (R 440). The trial court prevented appellant from asking the panel under what circumstances they would vote to impose the death penalty (R 439-440), and also precluded him

from attempting to characterize the state's case as one of circumstantial evidence. (R 2541-253). The trial court's ruling was correct. Smith v. State, 253 So. 2d 465, 470 (1st DCA 1971). Appellant claims that he was not allowed to inquire into a juror's predisposition regarding the death penalty. The record belies that contention. Immediately after the trial court precluded the improper questioning, defense attorney counsel was able to ascertain from the panel whether they would automatically vote for death or would they listen to the case and follow the law. (R 440, 467-468, 474, 497). Given that a juror's competency is determined from one's ability to lay aside any prejudice or bias and judge the case on the evidence and the law, Stano, supra, appellant has failed to demonstrate any prejudice.

ISSUE V

THE TRIAL COURT DID NOT ERR IN ADMITTING A PHOTOGRAPH OF THE VICTIM

Appellant claims that the trial court erred in allowing the admission of a photograph of the victim. Specifically, appellant claims that the picture should have been excluded because it depicted blood on the victim's face. He concedes that it was admissible for identification purposes, but due to the blood, it was gory. (R 633). The trial court ruled that the photograph was not gruesome and was relevant for identification. (R 634). The trial court's ruling was correct. Blake v. State, 156 So. 2d 511 (Fla. 1963); Halliwell v. State, 323 So. 2d 557, 560 (Fla. 1975).

If this Court finds error it must be considered harmless given the testimony of medical examiner, the other witnesses and the other photographs. Thompson v. State, 17 FLW S 342 (June 4, 1992).

ISSUE VI

THE TRIAL COURT PROPERLY PRECLUDED APPELLANT FROM CROSS-EXAMINATION OF MATERIAL OUTSIDE THE SCOPE OF DIRECT

Appellant claims that the trial court impermissibly limited the scope of cross-examination of state witness Leo Schlemer. Schlemer. testified that appellant was at the Glen Ellen apartments. (R 808-810). Defense attorney asked Schlemer if Freddie Fox was under the influence of alcohol. (R 815). The trial court sustained the state's objection based on the fact that the question was beyond the scope of direct. (R 815). The trial court's ruling was correct. Jones v. State, 440 So. 2d 570, 576 (1983) habeas corpus denied, 928 F. 2d 1020, cert. denied, 112 S. Ct. 216, 116 L. Ed. 2d 174, reversed on other grounds, 591 So. 2d 911 (1991).

In any event, appellant was able to elicit the desired evidence through Freddie Fox himself. (R 852, 855, 868, 869). Furthermore, appellant and others testified that appellant was there at Glen Ellen apartments. (R 822, 841-842, 1663, 1670). Appellant has not established any prejudicial error. Morgan v. State, 415 So. 2d 6, 10 (1982) cert. denied, 459 U.S. 1055, 74 L. Ed. 2d 621, 103 S. Ct. 473 (1983).

ISSUE VII

THE TRIAL COURT DID NOT ENGAGE IN ANY JUDICIAL MISCONDUCT

Appellant claims that the trial court engaged in judicial misconduct when he stated that the defendant was being kind of smart. (R 1759). This issue is precluded from review as there was no objection to the judge's statement. Jones v. State, 18 Fla. L. Weekly S11, 12 (Fla. December 17, 1992).

When taken in its proper context, the trial court's comment was not improper. During cross-examination the prosecutor asked appellant if Jennifer Oler was mistaken when she testified that appellant left the bar with the victim. Appellant's counsel objected claiming that the question had previously been asked and answered. (R 1759). The trial court overruled the objection and asked appellant to answer the question. (R 1759). The trial court's comment was a part of the following exchange:

> Prosecutor: "Was she incorrect when she said that?"
> Appellant: "For the upteenth time, yes, she was incorrect."(R 1759).
> Prosecutor: "Are you getting tired of answering these questions, Mr. Wyatt?"
> Defense counsel: "I object, I think his badgering the witness."The Court: "No he isn't. The witness is being kind of smart, he brought that on himself."

The trial court was merely ruling on a defense objection, and stated that he was denying same given that the defendant gave a sarcastic response to the prosecutor. There was no comment on the evidence, no vouching for any state

witness. The judge's remark did not deprive appellant of a fair trial. Jones, supra.

ISSUE VIII

THE TRIAL COURT DID NOT ERRONEOUSLY ALLOW THE ADMISSION OF IMPROPER CHARACTER EVIDENCE

Appellant cites to several instances of alleged collateral crime evidence which he alleges was impermissible. The first instance involves appellant's statement to Officer Robinson that he is glad he did not have a gun when the officer stopped him otherwise he would have shot him. The trial court admitted the statement as evidence of flight and consciousness of guilt. (R 1250-1262). That ruling was proper. Straight v. State, 397 So. 2d 903, 908 (1981) cert. denied, 102 S. Ct. 556, 454 U.S. 1022, 70 L. Ed. 2d 418 reh. denied, 102 S. Ct. 1043, 454 U.S. 1165, 71 L. Ed. 2d 323 stay denied 491 So. 2d 281 (1981); Padilla v. State, 18 Fla. L. Weekly S181, 183 (Fla. March 25, 1993).

Appellant next complains about a statement that appellant had hit someone in the head. This has not been preserved for appeal as no objection was made to the admissibility of the evidence. (R 1213, 1226-1227). Lawrence v. State, 614 So. 2d 1092, 1094 (Fla. 1993). The evidence regarding appellant's argument with his employer was offered to illustrate appellant's repeated attempts to flee the police. (R 1208-1234). Bundy v. State, 471 So. 2d 9, 20 (Fla. 1985); O'Connel v. State, 480 So. 2d 1284, 1285 (Fla. 1986). Tumulty v. State, In any event any error in admitting the testimony must be considered harmless given that it was only mentioned once in passing. (R 1213). Carter v. State, 15 Fla.L. S255 (Fla. 4/26/90). The only

other reference to the argument was brought out on redirect after defense counsel referred to it on cross. Lucas v. State, 568 So. 2d 18 (Fla. 1990). Appellant's argument is without merit.

Next appellant complains that the jury heard appellant's confession where he referred to someone named "Jim", and that Jim had hurt many people. It is clear that the statement's regarding "Jim's" activities were offered as inculpatory evidence relevant to the murder of Ms. Nydgger rather than reference to other bad acts. (1338-1340).

Appellant also complains that the state was allowed to bring out the fact that appellant feigned a conversion to christianity. (R 1359-1361). This was admitted via the testimony of Officer Robinson. Prior to its admission, defense brought out the fact that Robinson and his finance went to visit appellant in jail. The state then introduced the now objected to evidence. The trial court allowed same since appellant implied that Robinson considered appellant a good person, thereby opening the door to anything contrary. (R 1359-1360)). Lucas, supra. Any error in its admission must be considered harmless. Carter, supra.

Lastly, appellant argues that reference to a convict code made by state witness Patrick McCoombs amounts to collateral crime evidence. A review of the record illustrates that this issue is not preserved for appeal as the objections made at trial are different than the ones advanced on appeal. The objection made by counsel regarding this evidence was that the evidence was

not relevant, there was no proper predicate for its admission, and there is no evidence that such a code exists. (R 1482-1482). Sapp v. State, 411 So. 2d 363 (4th DCA 1982). In any event appellant cannot establish any error as McCoomb's reference to a convict code was made in reference to McCoomb's prior extensive criminal record, not appellant's. (R 1483-1485). McCoomb's knowledge or acceptance of a criminal code does not implicate appellant in any collateral bad acts. Appellant's argument is totally void of any merit. If it was error to admit same, it must be considered harmless. Carter.

ISSUE IX

THE PROSECUTOR'S CLOSING ARGUMENT INCLUDED PERMISSIBLE COMMENTS ON THE EVIDENCE

Appellant claims that the prosecutor's closing argument amounted to unwarranted attacks on appellant, improper assertions regarding the veracity of state's witnesses, and impermissible references to appellant's constitutional rights. None of the complained remarks were objected to, consequently, this issue is not preserved for appeal. Stewart v. State, 18 Fla. L. Weekly S294 (Fla. May 13, 1993); Crump v. State, 18 Fla. L. Weekly S331, 334 (Fla. June 10, 1993).

As for the merits, appellant has failed to establish that any fundamental error occurred. Furthermore, a review of the record reveals that the prosecutor's comments were simply a comment on the evidence or fair reply to appellant's closing argument. Defense counsel told the jury that appellant admitted to various facts that the state sought to prove. (R 1889-1900). Counsel also informed the jury that although appellant did not have to testify, he did so to show the truth. (R 1899-1900). In response, the prosecutor challenged appellant's characterization of his cooperation and truthfulness. He pointed out that appellant admitted to facts that were already proven by the state, i.e., appellant's presence in the hotel and in the victim's car.(R 1906, 1921). The prosecutor also pointed out that appellant vigorously challenged various witness's regarding the points he claims to have been so forthright about. (R 1911,

1913, 1925, 1981). The prosecutor's comments were permissible. Stewart; Kramer v. State, 18 Fla. L. Weekly S266,267 (Fla. April 29, 1993); Craig v. State, 510 So. 2d 857, 865 (Fla. 1987); Wasko v. State, 505 So. 2d 1314, 1317 (Fla. 1987).

ISSUE X

THE STANDARD REASONABLE DOUBT INSTRUCTION WAS CORRECT

Appellant claims that the reasonable doubt instruction misstates the burden of proof. This issue is not preserved for appeal as no objection was made at trial regarding the reasonable doubt instruction. Sochor v. State, 18 Fla. L. Weekly S273 (Fla. May 6, 1993). Appellant's claim is also without merit. In Woods v. State, however, the Fourth District recently rejected an identical claim:

> Nothing in the Cage opinion . . . causes us to question a reasonable juror's ability to properly interpret the Florida instruction as requiring that the jury find the defendant not guilty if there is a reasonable doubt as to guilt. Nor does Cage place in doubt the effort in the Florida instruction to assist a juror in evaluating the circumstances in which a doubt may not be reasonable. We also note that just prior to the U.S. Supreme Court opinion in Cage, Florida's reasonable doubt instruction was again examined and upheld by the Florida Supreme Court in Brown v. State, 565 So.2d 304 (Fla.), cert. denied, ___ U.S. ___, 111 S.Ct. 537, 112 L.Ed. 547 (1990).

596 So.2d 156, 158 (Fla. 4th DCA 1992). As noted in Woods, this Court recently rejected a challenge to the "reasonable doubt" instruction in Brown: "According to Brown the standard instruction dilutes the quantum of proof required to meet the reasonable doubt standard. We disagree. This Court has previously approved use of this standard instruction. The standard instruction, when read in its totality, adequately defines 'reasonable doubt,' and we find no merit to this point."

565 So.2d at 307. In keeping with Brown and Woods, this Court should affirm Appellant's conviction and sentence of death.

PENALTY PHASE

ISSUE XI

THE TRIAL COURT CORRECTLY FOUND THAT THE EXISTENCE OF ALL THE AGGRAVATING FACTORS RELIED UPON IN THE SENTENCING DETERMINATION

Appellant claims that the trial court erred in finding that the murder was committed to avoid arrest. A review of the record indicates that the evidence establishes a reasonable inference that Ms. Nydegger was murdered to avoid detection. Swafford v. State, 533 So. 2d 270, 276 (Fla. 1988).

It is apparent that after Ms. Nydegger was raped, she was driven to a desolate area, executed and her body was dumped in a ditch. Ms. Nydegger had spent a considerable amount of time with appellant that evening, consequently, she could have identified him. Furthermore, given that her car could have been taken from her without killing her[1], the logical inference is that she was killed to avoid detection. Bryan v. State, 533 So. 2d 744, 748-749 (Fla. 1988); Harmon v. State, 527 So. 2d 182, 188 (Fla. 1988).

Further evidence to justify the finding of this aggravating factor is that appellant was involved in an extensive crime spree that included the murder of three people two days prior to the

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[1] The medical examiner testified that Ms. Nydegger's body contained seventeen times the lethal amount of cocaine. The logical inference is that she would not have been in any condition to resist the taking of her car.

killing of Ms. Nydegger. Appellant confessed to a another inmate that those three people were killed to eliminate any witnesses. (R 2171).[2] It can reasonably be inferred that the same motive still existed when appellant encountered Ms. Nydegger. Appellant had engaged in and continued to go to great lengths to avoid apprehension prior to and subsequent to the murder of Ms. Nydegger. He used several different aliases, he kept stealing and disposing of cars as he moved around, and he attempted to flee/escape the police at every turn. (R 806, 822, 833, 1092, 1201, 1377, 1214, 1380, 1235, 1236, 1511, 1512).

Given appellant's behavior through this criminal episode along with the fact that Ms. Nydegger was executed and dumped along a desolate highway, the judge properly found this aggravating factor. Routly v. State, 440 So. 2d 1257 (Fla. 1983). If this Court determines that the evidence is insufficient to sustain this factor, any error must be considered harmless given the strength of the remaining aggravating factors along with the weak non-statutory mitigating evidence. Kennedy v. State, 455 So. 2d 351, 355 (Fla. 1984).

The trial court also was correct in finding that the murder was committed during the course of a robbery. Appellant was seen arriving at Club 92 in a cab. (R). He was seen leaving the bar with the victim. (R 879). He admits to being in her car. (R 729, 1659). Shortly after her death he is seen driving her car, which

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[2] The judge and jury were aware of this fact. (R 2171, 2479).

he suspiciously abandons later that day. (R 811, 844, 857, 863). Duest v. State, 462 So. 2d 446, 449 (1985) vacated other grounds, F. 2d. (1992), cert. granted, U.S. S. Ct. case no. (1993).

If this court should determine that the evidence is insufficient to sustain this factor, any error must be considered harmless given the strength of the remaining aggravating factors.

Appellant also claims that there was insufficient evidence to sustain the finding that the murder was "cold calculated and premeditated". Appellant left the bar with the victim and then returned several minutes later. Appellant spoke to his co-defendant, Michael Lovette, and the two left together. Appellant drove the victim across the state to a desolate area, executed her a point blank range and dumped her body in a ditch on the side of the road. There clearly was no justification for the killing. Parker v. State, 476 So. 2d 134 (Fla. 1985); Durocher v. State, 596 So. 2d 997 (Fla. 1992); Stano v. State, 460 So. 2d 890, 892-893 9 (Fla. 1984). If this Court should determine that there is insufficient evidence to sustain this factor, any error must be considered harmless. Durocher; Capehart v. State, 583 So. 2d 1009, 1015 (Fla. 1991); Gore v. State, 599 So. 2d 978, 987 (Fla. 1992).

ISSUE XII

THE TRIAL COURT PROPERLY CONSIDERED ALL THE MITIGATING EVIDENCE THAT WAS PRESENTED

Appellant alleges that the trial court failed to consider or give the appropriate weight to unrebutted mitigating evidence. A review of the record belies that the contention.

The judge instructed the jury on the applicable statutory mitigating factors that were requested by appellant.[3] (R 2359). He also instructed the jury to consider: "any other aspect of the defendant's character, or record and any other circumstance of the offense." (R 2359). The jury was also instructed to consider all the evidence that was presented at both phases of the trial. (R 2357). The court specifically listed each statutory mitigating factor proposed and stated why each was not proven to exist. (R 2480-2481). Regarding non-statutory mitigating factors the order stated:

> "The defendant presented as non-statutory mitigating circumstances the testimony of his mother, his brother, his sister-in-law and his uncle.
> His mother testified concerning her long continuing bout with mental illness that stretched through the period of her marriage to defendant's father and step-father. This necessitated defendant's grandmother's substitution in large part as the mother figure for the children.

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[3] Appellant waived various statutory mitigating factors due to their inapplicability. (R 2063, 2480). Irrespective of same, the trial court conducted an independent analysis of those factors. The court concluded that there was no evidence to support them and they were therefore rejected. (R 2380).

> She further testified that defendant had a bad relationship with his stepfather, although, the uncle said that the step-father tried to be strict with the defendant but was unsuccessful and defendant started to do drugs and alcohol, after which defendant experienced troubles with the law. His mother testified vaguely that there was talk that defendant was sexually abused by a teacher in school but no facts or follow-up were given.
>
> The mother further testified that she left her 2nd husband and took defendant where she left him in Columbia, S.C., the city where his natural father resided and she took off.
>
> The sister and brother both agreed generally that the step-father provided an unstable home but both survived well enough.
>
> Defendant also offered the testimony of a cellmate on death row in Starke, Norberto Pietri, who had known defendant for about two months on death row. Pietri, convicted of 44 felonies and on death row for killing a police officer, said he considered that he could recognize good character and that defendant had good character.
>
> The court finds as a non-statutory mitigating circumstance that defendant in his early youth resided in a broken home and unstable home provided by his step-father while his mother required constant attention to her mental illness." (R 2482-2483).

As evidenced above, the trial court did consider all of appellant's mitigating evidence. The fact that some instances of non-statutory mitigating evidence were not listed in the judge's order does not indicate that they were not considered. Lucas v. State, 613 So. 2d 408 (Fla. 1992). The judge specifically mentioned each of appellant's witness's in his order. Appellant's claim that the judge did not properly consider same

is without merit. Floyd v. State, 569 So.2d 1225, 1233 (Fla. 1990). Lastly any dissatisfaction with the trial court's findings does not warrant reversal. Sochor v. State, 18 Fla. L. Weekly S273, 276 (Fla. May 6, 1993). The trial court's order demonstrates that the judge thoroughly assessed the mitigating evidence. Although appellant's father and step-father were emotionally abusive, appellant spent most of his time with his grandmother. (R 2268, 2283). Appellant was a bright child. (R 2283). Appellant's step-father tried to dissuade him from spending time with the wrong crowd. (R 2285-2286). Appellant has failed to establish any abuse of discretion in the trial court's findings. Sochor.[4]

[4] Given the strength of the aggravating factors coupled with the weakness of the mitigating factors, appellant's death sentence is proportionate. Stewart v. State, 588 So. 2d 972 (Fla. 1991); Jones v. State, 580 So. 2d 143 (Fla. 1991); Stano v. State, 460 So. 2d 890 (Fla. 1984).

ISSUE XIII

THE JURY WAS PROPERLY INSTRUCTED REGARDING THE PENALTY PHASE

Appellant claims that the trial court erred in instructing the jury regarding the aggravating factor of "heinous, atrocious and cruel".[5] The state was relying on the fact that Ms. Nydegger was taken on a death ride to some remote area of a highway. The evidence indicates that she was executed and the gun shot was a contact wound to the head. That evidence reasonably suggests that she was well aware of her impending death. (R 2327-2328, 653-654). Parker v. State, 476 So. 2d 34 (Fla. 1985). Simply because the trial curt did not find the existence of same, does not amount to reversible error. Haliburton v. State, 561 So. 2d 248, 252 (Fla. 1991); Stewart v. State, 558 So. 2d 416, 420-421 (Fla. 1990). Furthermore, it cannot be assumed that a jury will find the existence of an aggravating factor that is not supported by the record. Sochor v. Florida, , 112 S. Ct. 2114 119 L. Ed. 2d 326 (1992); Johnson v. State, 612 So. 2d 75 (Fla. 1993). Appellant's claim is without merit.

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[5] To the extent appellant claims that the instruction given was unconstitutionally vague, that claim has not been preserved for appeal. The only objection advanced by counsel was that the aggravator itself did not apply to the facts of this case. (R 2203). Review is precluded.

In any event Appellant cannot establish any error. The instruction given satisfies the dictates of Dixon v. State, 283 So. 2d 1 (Fla. 1982) and Espinosa v. Florida, 112 S. Ct. 2926 (1992).(R 2358).

Appellant also claims that the trial court erred in giving the standard instructions on the aggravating factors of "avoid arrest" "pecuniary gain" and " CCP". This issue is not preserved for appeal as there was no objection nor was there any request for a limiting instruction. Vaught v. State, 410 So.2d 147 (Fla. 1982); Valle v. State, 474 So. 2d 796 (Fla. 1985) reversed other grounds; Sochor v. State, 18 Fla. L. Weekly 274 (Fla. 1993). In any event appellant's claim is without merit as the standard instructions do not require judicial refinement. Brown v. State, 565 So. 2d 304 (Fla. 1990).

Appellant's attack regarding the instruction on the jury's role is not preserved for appeal as there was no objection to the standard instruction. Sochor, supra. (R 2356-2357). In any event, any violation of Caldwell v. Mississippi, 472 U.S. 320 (1985) is without merit. Simply because the United States Supreme Court found unconstitutional the jury instruction regarding "HAC" does not render's this Court's interpretation of Florida's capital sentencing scheme as inaccurate. The jury's role is still advisory regardless of the defect in a particular instruction. Combs v. State, 525 So. 2d 853 (Fla. 1988).

Appellant takes issue with the standard instructions regarding the jury's balancing of aggravating and mitigating factors. Again this issue is not preserved for appeal as there was no objection to the instructions at trial. Sochor, supra. In any event the claim lacks merit as this Court has repeatedly upheld the propriety of the standard instructions. Jones v.

State, 612 So. 2d 1370, 1373 (Fla. 1993); Robinson v. State, 574 So. 2d 108, 113 (Fla. 1991); Thompson v. State, 18 Fla. L. Weekly S212, 214 (Fla. April 1, 1993).

Lastly, appellant claims the jury should have been told not to double the aggravating factors of felony murder and pecuniary gain. This issue is not preserved for appeal as no objection was made at trial. Sochor. Furthermore at the time of appellant's trial such an instruction was not required. Suarez v.State, 481 So. 2d 1201 (Fla. 1985), cert. denied, 476 U.S. 1178 (9186). In any event there was no error as the trial court only considered the two factors as one. (R 2479). Jones, 612 So. 2d at 1375.

ISSUE XIV

ADMISSION OF EVIDENCE REGARDING APPELLANT'S PRIOR VIOLENT FELONIES DOES NOT VIOLATE THE CONFRONTATION CLAUSE

Appellant alleges that the trial court erroneously admitted evidence of appellant's prior violent felonies. This issue is not preserved for appeal as the original objection to this testimony was based on the fact that the evidence was inflammatory. (R 2064-2065). Now appellant's claims that the testimony was inadmissible because of hearsay. Review is precluded. Sapp v. State, 411 So.2d 363 (4th DCA 1982).

In any event this issue is without merit, as such testimony is admissible. The witnesses were available for cross-examination. Waterhouse v. State, 596 So. 2d 1008 (Fla. 1992); Clark v. State, 613 So. 2d 412 (Fla. 1992); Long v. State, 610 So. 2d 1268 (Fla. 1992).

ISSUE XV

THE PROSECUTOR'S PENALTY PHASE ARGUMENT WAS PERMISSIBLE

Appellant claims that the prosecutor made numerous impermissible comments during his penalty phase closing argument. This issue is not preserved for appeal as there was no objection to any of the comments. Crump v. State, 18 Fla. L. Weekly S331 (June 10, 1993). Given that the remarks did not amount to fundamental error, this issue is precluded from review.

Wide latitude is permitted when arguing to a jury. Breedlove v. State, 413 So. 2d 1, 8 (Fla.), cert. denied, 459 U.S. (1982). The first five instances of alleged prosecutorial comment, A through E, involve accusations concerning sympathy for the victim and lack of remorse by the defendant. The comments were made in reference to the existence of the aggravating factors of "HAC" and "CCP". (R 2327-2329). The prosecutor explained the mental torture Ms. Nydegger must have experienced prior to her death. (R 2329). The facts of her death include the execution style killing at point blank range. The evidence also demonstrated that appellant had killed Ms. Nydegger to watch her die. He did so simply for the thrill of it. (R 2329-2330). The prosecutor was permitted to comment that such a motivation for a murder does not demonstrate any moral justification to minimize the coldness of same. Breedlove.

The next two comments complained about involve the evidence to establish pecuniary gain and to avoid arrest. The comments were permissible. (R 2325). Breedlove.

The remainder of the remarks involve comments on appellant's testimony, reference to the other murders, lack of sympathy for the defendant, or lack of credible mitigating evidence. The remarks were prefaced with a question to the jury, does appellant's childhood excuse or mitigate his responsibility? (R 2340). The comments were all permissible. (R 2335-2338, 2341-2342). Freeman v. State, 563 So. 2d 73, 76 (Fla. 1990); Craig v. State, 510 So. 2d 857, 865 (Fla. 1987); Valle v. State, 581 So. 2d. 40, 46 (Fla. 1991).

To the extent that any of the comments were impermissible, any error must be considered harmless given the strength of the aggravating factors balanced against weak mitigating evidence. Hodges v. State, 595 So. 2d 929 (Fla. 1992); Pope v. Wainwright, 496 So. 2d 798 (Fla. 1986); Valle.

ISSUE XVI

FLORIDA'S DEATH PENALTY STATUTE IS CONSTITUTIONAL

Appellant challenges several aspects of Florida's death penalty statute. This entire issue is not preserved for appeal a no objection was made to the trial court. Johnson v. Singletary, 18 Fla. L. Weekly S90 (Fla. Jan. 29, 1993). His first claim that the death penalty in Florida is both arbitrary and capricious has previously been rejected by this Court. Jones v. State, 569 So.2d 1234 (Fla. 1991); Young v. State, 579 So.2d 721 (1990), cert. denied, 117 L.Ed.2d 112 S.Ct. 1198 (1992).

Appellant next attacks the constitutionality of the jury instructions regarding the aggravating factors of "heinous, atrocious, and cruel"[6], "cold, calculated, and premeditated", and "committed during the course of a felony". This issue has not been preserved for appeal, consequently review is denied. Sochor v. State, 580 So.2d 595, 605 n.10. (Fla. 1990), remanded on other grounds, 504 U.S. __, 119 L.Ed.2d 326, 112 S. Ct. __ (1992).[7]

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[6] The jury instruction given regarding this factor was not the same one as struck down in Espinosa v. Florida, 112 S. Ct. 2926 (1992).

[7] Appellant also attacks the constitutionality of several aggravating factors; "heinous, atrocious and cruel", "cold calculated and premeditated", "committed during the course of a robbery", and hinder government function or enforcement of law". All aggravating factors have been upheld as constitutional. Preston v. State, Sochor v. Florida, ; Klokoc v. State, 589 So. 2d 219 (Fla. 1991); Hodges v. State, 595 So. 2d 929 (Fla. 1992); Mills v. State, 484 So. 2d 172 (Fla. 1985); Lowenfield v. Phelps, 484 U.S. 231 (1988); Jones v. State, 569 So. 2d 1234 (Fla. 1991).

Appellant claims that the sentencing scheme is also unconstitutional because the jury's recommendation of death need not be unanimous, and a death recommendation need only be by a bare majority. This argument has been explicitly rejected in Spaziano v. Florida, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984).

The jury's role in Florida's sentencing scheme is accurately described in the standard instructions. Combs v. State, 525 So. 2d 853 (Fla. 1988).

Appellant's general attack on the quality of attorneys that represent capital defendants is without merit. If appellant wishes to attack the effectiveness of his counsel, the proper standard is articulated in Strickland v. Washington, 466 U.S. 668, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984), and the appropriate forum is in a collateral proceeding. McKinney v. State, 579 So.2d 80, 82 (Fla., 1991).

Next appellant attacks the role and quality of the trial court in Florida's capital sentencing scheme. The actual sentencer in Florida's scheme is the judge. Smalley v. State, 546 So.2d 720 (Fla. 1989); Grossman v. State, 525 So.2d 833 (Fla. 1988); Section 921.141 (3), Fla. Stat. (1989). A sentence of death can be upheld regardless of either the jury's recommendation or their written findings. Grossman, supra; Hildwin v. Florida, 490 U.S. 638, 104 L.Ed.2d 728, 109 S.Ct. (1989).

Appellant has also failed to establish that this Court does not conduct a proper appellate review. The United States Supreme Court has recently stated that this Court continues to narrowly construe aggravating factors. Sochor v. Florida, 119 L.Ed.2d at 339-49 (1992).

Florida's sentencing scheme does not presume death to be the appropriate penalty. Robinson v. State, 574 So.2d 108, 113, n.6 (Fla. 1991); Boyde v. California, 494 U.S. 370, 108 L.Ed.2d 316, 110 S.Ct. 1190 (1990); Blystone v. Pennsylvania, 494 U.S. 299, S.Ct. 1078, 108 L.Ed.2d 255 (1990). A capital defendant has the opportunity to present any and all relevant mitigating evidence. Hitchcock v. Florida, 481 U.S. 393, 95 L.Ed.2d 347, 107 S.Ct. 1821 (1987); Jackson v. State, 530 So.2d. 269, 273 (1988), cert. denied, 488 U.S. 1051, 109 S.Ct. 882, 102 L.Ed.2d 1008 (1988). There is no constitutional requirement to a jury's unfettered discretion. Boyd, supra. Likewise there is no constitutional requirement to special verdict form. Schad v. Arizona, 111 S. Ct. 2491 (1990). Death by electrocution is not unconstitutional. Buenoano v. State, 565 So.2d 309 (Fla. 1990). Appellant's claim is without merit and should be denied.

CONCLUSION

WHEREFORE, based on the above articulated facts and relevant law, appellant's conviction for first degree murder and sentence of death should be **AFFIRMED.**

Respectfully submitted,

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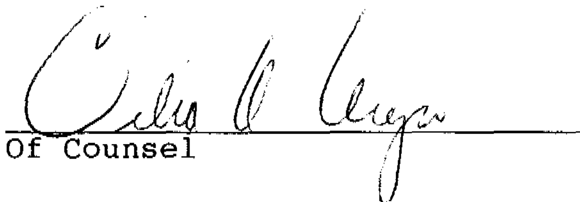
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing "Answer Brief of Appellee" has been forwarded by courier to: **GARY CALDWELL, ESQUIRE,** Assistant Public Defender, 421 Third Street, West Palm Beach, Florida 33401, this 12th day of July, 1993.



Of Counsel

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