IN THE SUPREME COURT OF FLORIDA

ROBERT HAYES,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

Case No. 79,997

ON APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTEENTH JUDICIAL CIRCUIT,
IN AND FOR BROWARD COUNTY, FLORIDA

AMENDED NSWER BRIEF OF APPELLEE

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	)	
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PRELIMINARY STATEMENT

Appellant, Robert Hayes, was the defendant in the trial court below and will be referred to herein as "Appellant." Appellee, the State of Florida, was the prosecution in the trial court below and will be referred to herein as "the State." Reference to the pleadings will be by the symbol "R," reference to the transcripts will be by the symbol "T" and reference to the supplemental record will be by the symbol "SR[vol.]" followed by the appropriate page number(s).

STATEMENT OF THE CASE AND FACTS

The State accepts Appellant's statement of the case and facts to the extent they are not argumentative.

SUMMARY OF ARGUMENT

Issue I - Defense counsel opened the door to comments by the State that defense counsel had equal access to the evidence and equal opportunity to test the hair found in the victim's hand. If the comments were improper, however, they were harmless beyond a reasonable doubt given the trial court's limitation of the State's closing argument on this issue and its curative instruction to the jury, and given the overwhelming evidence of guilt in this case.

Issue II - The State's comments during closing argument were fair response to defense counsel's argument. If not, they were harmless beyond a reasonable doubt.

Issue III - The trial court did not have jurisdiction to hear Appellant's motion for new trial based on allegedly newly discovered evidence.

Issue IV - Appellant failed to object timely to the admission of collateral crime evidence at the trial; thus, this issue has not been preserved for appeal. Regardless, the collateral crime evidence sufficiently similar to the charged offense and was admissible to show a general pattern of criminality and, in turn, identity.

Issue V - This Court has previously held that collateral crime evidence is admissible in the guilt phase even though the charge was ultimately dismissed. As for the penalty phase, there is no

evidence that the trial court considered such evidence as nonstatutory aggravation or to support the HAC and "felony murder" aggravating factors found in this case.

Issue VI - The State laid a proper predicate for the admission of the DNA test results. Appellant has failed to show that the trial court abused its discretion in admitting those results.

Issue VII - Appellant failed to preserve two of the three bases for reversal he claims in this appeal. Regardless, the trial court did not abuse its discretion in limiting defense counsel's cross-examination of a collateral crime witness. Even if it did, such error was harmless in light of the overwhelming evidence of guilt.

Issue VIII - Appellant has failed to preserve this issue for appeal. Regardless, any error in the admission of Ms. Santariello's testimony was harmless beyond a reasonable doubt.

Issue IX - Defense counsel failed to specifically request inquiry into racial bias during jury selection as required. Because defense counsel's questions were not clearly related to such an inquiry, the trial court did not abuse its discretion in limiting defense counsel's questions to the panel.

Issue X - The State's reasons for striking a black juror from the panel were not pretextual in nature. This Court has previously held that the fact that a juror has a relative who has been charged with a crime is a race-neutral reason.

Issue XI - Appellant has failed to preserve this issue for appeal. Regardless, the record supports the trial court's denial

of Appellant's motion to suppress his statements to the police. Appellant was not in custody when he made some initial statements. Then, after waiving his Miranda rights, Appellant was not coerced into making additional statements. Were Appellant's admissions improperly admitted, however, such error was harmless beyond a reasonable doubt given the overwhelming evidence of Appellant's guilt.

Issue XII - The evidence supports a verdict of guilt for both premeditated and felony murder. Thus, the trial court did not abuse its discretion in denying Appellant's motion for judgment of acquittal as to premeditated murder. Regardless, Appellant was equally guilty of felony murder.

Issue XIII - The trial court's order clearly shows that the trial court did not give improper weight to the jury's recommendation.

Issue XIV - The trial court's order clearly shows that the trial court did not presume automatically that the death penalty was appropriate once if found the existence of two aggravating factors. It properly weighed both the aggravating and mitigating factors.

Issue XV - Lingering or residual doubt does not constitute mitigating evidence. Thus, the trial court properly rejected Appellant's claim that he committed the murder with little or no premeditation.

Issue XVI - The record amply supports the trial court's finding of the HAC aggravating factor. Appellant beat, raped, and

then manually strangled the victim to death.

Issue XVII - The "felony murder" aggravating factor is not unconstitutional on its face or as applied.

Issue XVIII - Appellant's sentence was not disproportionate.

Issue XIX - Florida's death penalty statute is constitutional.

ISSUE I

WHETHER THE TRIAL COURT ERRED IN ALLOWING THE STATE TO COMMENT ON APPELLANT'S FAILURE TO TEST SCIENTIFIC EVIDENCE (Restated).

During opening statements, defense counsel made the following assertions:

> I will promise you that you will be provided with probative evidence that Mr. Hayes did not commit the crime.
>
> You will be provided with solid physical evidence that this terrible crime was committed by another person. In fact, you will receive evidence that the murderer was not a black man but was a white person.
>
> You heard Mr. Kern tell you that no probative evidence was found on Miss Albertson's body or in the room. You will be given probative evidence.
>
> * * * *
>
> When I first addressed you, I said there would be probative physical evidence that Robert Hayes did not commit the crime. While that poor woman, Pamela Albertson, was being murdered she grabbed on to something and when her hand was opened at the autopsy, her closed hand, not two or three strands of hair as Mr. Kern would like you to believe, but a clump of black hair was in her hand. Black hair belonging to a white person, not a black person. It was not her hair. And it was not Mr. Hayes' hair. You will learn that they did absolutely nothing with this evidence. They had the evidence. They did nothing. They knew it was Caucasion hair but they had already decided Mr. Hayes was the one that murdered Pamela Albertson and that was it. They ignored the evidence that it was a white person with black hair that committed this crime.

(T 1024, 1029). During the State's case-in-chief, both of the crime scene technicians testified regarding the collection of the

hair found in the victim's hand, as did the medical examiner. (T 1169, 1181-82, 1326). Sandra Watson, a lab analyst, testified extensively on cross-examination to all of the evidence, including hairs and fibers, that she did or did not test, and whether she was directed by anyone to test certain items as opposed to others. (T 1525-48). On redirect, Ms. Watson testified, over defense counsel's objection, that she gave a pretrial deposition and provided all of her reports and notes to defense counsel, and that counsel never requested her to test any particular items. (T 1550-51).

During the defense case, counsel called Howard Seiden, a hair analyst with the Broward County Crime Lab, who testified that he made a visual inspection of the hair found in the victim's hand and excluded Appellant because the hair was not of Negroid origin. Because he excluded Appellant, he did not test the hair further. (1678-79). On cross-examination, Mr. Seiden testified that no one asked him to test the hair in the victim's hand with the victim's hair or with any other known hair sample. (T 1684-87). Generally, because of the volume of evidence collected, he usually asks the detectives what is significant and what, in particular, needs to be tested. In this case, he was told to look for Negro hair in the evidence collected from the victim and her room. (T 1687-88). When the State asked Mr. Seiden whether he gave a deposition in this case, defense counsel objected on the ground that the State was shifting the burden of proof. The objection was overruled and the witness responded affirmatively. (T 1688). Mr. Seiden then

testified that defense counsel never asked him to test the hair further. (T 1688-93).

The next day, defense counsel requested a curative instruction and, in the alternative, moved for a mistrial regarding the State's questions about defense counsel failing to have the hair in the victim's hands tested. The trial court denied the motion for mistrial, but gave the following curative instruction:

> Mr. Kern yesterday asked some witnesses as to whether Ms. Heyer had asked them to test these hairs that were allegedly found in the hand of Miss Albertson and I just want you to understand that she does have a right to ask for things to be tested but she's under no burden or obligation to do that. She's under no obligation or burden to do anything and I didn't want by the questioning or by Mr. Kern's questioning or anything that went on for you to imply in any way that she has the responsibility to do that but she does have the right if she wishes. She has no burdens.

(T 1746).

Later that day, during the charge conference, defense counsel sought to prohibit the State from arguing that she failed to have the hair tested, since she had no burden of proof. The trial court counseled the State not to argue that defense counsel should have had the hair tested, but allowed the State to argue that counsel had an opportunity to test it. (T 1874-78).

The next day, defense counsel claimed that the trial court's curative instruction was not sufficient and renewed her motion for mistrial as to the State's questions to the witnesses relating to counsel's failure to have the hair tested. The motion was denied, but the State was again cautioned not to shift the burden of proof.

(T 1888-91). During the State's closing argument, defense counsel objected to the following:

> Counsel told you that she was going to prove that there were caucasion hairs in Pamela Albertson's right hand, tightly closed right hand, that were not hers, were not Pamela Albertson's. There's not evidence of that, whatsoever. They weren't examined. And counsel had every opportunity to have them examined, as I do.
>
> [DEFENSE COUNSEL]: Objection, Your Honor. The burden is not mine. I move for mistrial.
>
> THE COURT: Overruled. Continue, Mr. Kern and explain that to the jury.
>
> [THE STATE]: No burden to prove anything in the case whatsoever. No question about that. That's our law but I do submit in her opening statement counsel said that those hairs in her hand were not Pamela Albertson's because they were black hairs. They were color different.
>
> That's not what Howard Seiden said who looked at them. He said I can't tell one way or the other. He also stated as far as hairs go unless you took every hair of her head he can say two hairs compared but not much can be made of it. Because if they don't match it doesn't mean they are not her head hairs and if they do match it doesn't mean they are her head hairs because other people could have similar hairs.

(T 2013-14).

In response, defense counsel made the following arguments:

> Is it reasonable to doubt that Robert Hayes committed the crime? There were no eye witnesses. No fingerprints. No blood. No hair. No skin. No clothing. No scratches. Nothing of that nature to tie Mr. Hayes to the crime. But there was the hair of a black person in Pamela Albertson's sleeping bag. Not Robert Hayes'.

There were fingerprints in the room. Not Robert Hayes'.

There was hair found clutched in Pamela Albertson's right hand. The prosecutor has suggested to you that it could have been her own hair. I put these baggies in so that you could look at them and look at them carefully. Mr. Kern, the prosecutor, whose job it is to seek justice, did not do that. The hair found in Pamela Albertson's hand is not her own hair. Look at it. Nothing that man has said can change that. Nothing.

* * * *

Doesn't not checking out the hair clutched in the victim's hand present reasonable evidence? In a case such as this, any one of these present reasonable doubt. Mr. Kern has suggested that I had the opportunity to have the hair in Pamela Albertson's hand tested. He brought that out knowing full well he is the prosecutor. He has the full and complete burden. Not me. Not Mr. Hayes. It's his duty. He has to prove beyond every reasonable doubt that Robert Hayes is guilty.

The prosecutor left the reasonable doubt in your minds. Not me or anyone else.

Just take a look at the hair. It doesn't take a PHD in molecular biology to see that it's not her hair. If you sit back there and wonder why the hair wasn't tested, why it looks different from the hair of Pamela Albertson, why the blood wasn't checked, why a possibly bloody fingerprint wasn't checked, then you have reasonable doubt. Nothing Mr. Kern says can change that. Nothing. None of the people who took the stand can change that.

The hair, My God, it's clear evidence that someone else committed the crime. It it [sic] wasn't even tested, that's not just reasonable doubt. It's clear and convincing evidence that there was someone else that committed the murder. Not Robert Hayes.

Ladies and gentlemen, this is the bottom line, there are only two reasons that the hair wasn't tested. First, maybe it was a mistake,

> and if it was a mistake a man who is not guilty should not pay for someone else's crime.
>
> Second, and the only possible other possibility is that it wasn't a mistake. Either it was or it wasn't.
>
> Now you may ask why would someone consciously not choose to test this hair? All I can tell you is I don't know. But it wasn't done. And whatever the result, whatever the reason, the result is the same.
>
> You cannot be sure beyond every reasonable doubt that Robert Hayes is guilty of murdering Pamela Albertson.

(T 2030, 2031-32, 2042-43).

In this appeal, Appellant makes a blanket claim that "[t]he references and arguments concerning the defense's failure to request scientific tests are reversible error." **Brief of Appellant** at 19-23. As the record reveals, however, defense counsel opened the door to such "references and arguments." Defense counsel made it perfectly clear that the defense was one of reasonable doubt based on the State's failure to have certain pieces of evidence tested, in particular the hair found in the victim's hand. Identity was the primary element at issue, and counsel specifically alleged that the hair was probative evidence that someone else committed the murder.

In Love v. State, 569 So.2d 807 (Fla. 1st DCA 1990), the defendant elicited testimony on cross-examination from which the jury could have inferred that other psychiatrists would disagree with the state's experts regarding the defendant's sanity. The First District found no error in the State's comments on the

defendant's failure to call the witnesses where the defense opened the door: "In light of the fact that the defense interjected the previous opinion of the other psychiatrists, they cannot now complain about the prosecutor's comments on the doctors' failure to testify concerning defendant's current sanity." Id. at 810-11. The court also held that "[t]he issue may be interjected into the proceeding either in opening remarks or through testimony." Id.

Similarly, in Highsmith v. State, 580 So.2d 234 (Fla. 1st DCA 1991), vacated on other grounds, 617 So.2d 825 (Fla. 1993), the defendant was convicted of possession of a firearm by a convicted felon. At trial, the defendant took the stand and testified that circumstances surrounding his arrest occurred in the presence of two other people. The defendant denied placing anything under the seat as recounted by the police officer, and testified to unprovoked police harassment. In affirming the conviction, the First District held that the defendant's testimony regarding the presence of other persons, and his denial the events occurred as recounted by the police, "[made] it appear" that the witnesses could support his version of the story. Therefore, the State had a right to comment on the defendant's failure to call his companions as witnesses. Id. at 236.

Finally, in Kramer v. State, 619 So.2d 274 (Fla. 1993), the defendant told the police that the victim pulled a knife on him immediately prior to the murder. In its argument to the jury, the Stated "called upon the defense to produce the knife." Id. at 277. This Court found no error, finding that the state was entitled to

highlight inconsistencies in evidence and testimony. Id.

As in these case, Appellant opened the door to the State's argument when it asserted in opening statement that the jury "[would] be provided with solid physical evidence that this terrible crime was committed by another person." (T 1024). Although Appellant's confession to Ronald Morrison constituted direct evidence of Appellant's guilt, the State's case was largely based on circumstantial evidence. As a result, it was incumbent upon the State to rebut Appellant's hypothesis of innocence that someone else committed the murder based on the hair in the victim's hand that did not match Appellant's hair. The State's comments, which were limited by the trial court, and for which the jury was given a limiting instruction, were properly admitted to rebut Appellant's hypothesis of innocence. See Dunbar v. State, 458 So.2d 424, 425 (Fla. 2d DCA 1984) (state's response to defendant's comment that state failed to call witnesses equally accessible to defendant was not prejudicial).

Even were they improper, however, they were harmless beyond a reasonable doubt. Defense counsel sought and was given a cautionary instruction emphasizing that Appellant had no burden of proof, but had equal access to the evidence. Defense counsel also sought and received a restriction on the State's closing argument relating to Appellant's burden of proof and defense counsel's opportunity to have the evidence tested independently. The State abided by the trial court's admonition and argued only that defense counsel had an equal opportunity to test it, but chose not to. In

response, defense counsel vehemently disclaimed a burden to test the evidence and argued extensively that the hair provided the reasonable doubt necessary to acquit Appellant. Given Appellant's confession to Ronald Morrison, the DNA evidence, Appellant's repeated sexual harassment of the victim, Appellant's previous attack on the victim, Appellant's presence outside of the victim's room around the time of the murder, and Appellant's previous collateral attack, there is no reasonable possibility that the verdict would have been different had the State been precluded from commenting on defense counsel's equal access to the evidence and her ability to have the evidence tested. See State v. DiGuilio, 491 So.2d 1129 (Fla. 1986); U.S. v. Alvarez, 837 F.2d 1024, 1029 (11th Cir. 1988) (government's response that defendants could have tested evidence for fingerprints not prejudicial).

ISSUE II

WHETHER THE STATE'S COMMENTS DURING ITS GUILT-PHASE CLOSING ARGUMENT DEPRIVED APPELLANT OF A FAIR TRIAL (Restated).

During closing argument, defense counsel entreated the jury several times to look at the sample of the victim's hair and compare it to the hair found in her hand, assuring the jury that it was not the same. (T 2030, 2033, 2042). In response, the State argued, over Appellant's objection, that Howard Seiden, the hair analyst, could not visually compare the two samples on the witness stand and say whether or not the hairs matched; thus, defense counsel's entreaty to the jury to compare the two samples was a "challenge to [their] intelligence." (T 2047-49).

In this appeal, Appellant claims that the State's argument was improper and denied him a fair trial. **Brief of Appellant** at 23-24. The State's argument, however, was a fair response to defense counsel's argument. See Breedlove v. State, 413 So.2d 1, 8 (Fla. 1982); Mann v. State, 603 So.2d 1141 (Fla. 1992). Even were they improper, they were harmless beyond a reasonable doubt. The jury was provided both hair samples and, regardless of the State's argument, had an opportunity to look at the evidence if they so desired. Given the quantity and quality of evidence of Appellant's guilt, there is no reasonable possibility that the verdict would have been different had the prosecutor not made the complained-of comments. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986); Breedlove, supra. Therefore, Appellant's conviction should be affirmed.

ISSUE III

WHETHER THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR NEW TRIAL (Restated).

Appellant was convicted on October 29, 1991. (R 2624; T 2099-2100). On November 4, 1991, Appellant filed a motion to release the hair evidence for independent testing by Professor Walter Rowe of George Washington University. (R 2627-28). At a hearing on that motion, the trial court expressed a willingness to do so, but took the motion under advisement. (T 2105). On November 6, 1991, Appellant timely filed a motion for new trial, claiming, among other things, that the trial court erred in denying several motions relating to comments by the State about counsel's failure to have the hair tested. (R 2629-30). The trial court denied the motion at a hearing on November 13, 1991. (R 2631; T 2193-94, 2211-15). The following day, while the jury was deliberating its sentencing recommendation, the trial court authorized Howard Seiden to compare the victim's hair with the hair found in the victim's hand. (T 2264-66). A written order granting Appellant's motion was filed on January 9, 1992. (R 2758-59).

On February 12, 1992, Appellant filed a renewed motion for independent testing by Professor Rowe because Howard Seiden's results were inconclusive. (R 2760-61). At a hearing on February 20, 1992, the trial court took Appellant's motion under advisement because Mr. Kern was not present at the hearing, but granted the motion on March 16, 1992. (R 2765; T 2281-83). At Appellant's sentencing hearing on March 18, 1992, defense counsel renewed her

motion for new trial, claiming that Howard Seiden's report supported her motions for mistrial relating to the State's comments about counsel's failure to have the evidence tested. The motion was denied. (T 2286-89). Appellant was sentenced to death on June 5, 1992, and defense counsel filed a notice of appeal at that hearing. (T 2301-10).

Over six months later, on December 24, 1992, defense counsel filed a "Continuation of Defendant's Motion for a New Trial and Notice of Hearing." (SR3 64-76). At the hearing on the motion on January 6, 1993, the State argued that the trial court lacked jurisdiction, and the trial court took the motion under advisement, ordering memoranda of law. (SR3 2-8). On February 3, 1993, Appellant filed a motion to relinquish jurisdiction in this Court to permit the trial court to rule on the continuation of the motion for new trial. This Court denied said motion on February 23, 1993. (SR3 87). On March 10, 1993, the trial court denied Appellant's continuation of the motion for new trial, finding that it lacked jurisdiction to consider the motion. (SR3 10-11, 95).

In this appeal, Appellant claims that the trial court erred in denying his motion for new trial based on newly discovered evidence that the hair in the victim's hand was found to be inconsistent with the victim's head hair. **Brief of Appellant** at 25-26. As indicated above, however, Appellant's alleged newly discovered evidence was not discovered until after Appellant had filed his notice of appeal, which divested the trial court of jurisdiction. Appellant makes no claim, however, that the trial court had

jurisdiction and erred in denying the motion. Rather, in a single paragraph, Appellant merely asserts that "[i]n the interests of justice, the trial court should have granted Mr. Hayes' motion for new trial." Id. at 26. He makes no legal argument and cites no legal authority for such a proposition.

The merits of Appellant's original motion for new trial are discussed in Issue I, supra. The trial court lacked jurisdiction to consider Professor Rowe's report. Thus, this claim has not been preserved for review. Since appellant has failed to explain how this Court can review an issue that the trial court had no jurisdiction to consider and did not consider on the merits, this claim should be denied.

ISSUE IV

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING COLLATERAL CRIME EVIDENCE (Restated).

Prior to trial, the State filed its notice of intent to present evidence of collateral crimes, listing five separate incidents involving alleged sexual batteries and strangulations perpetrated by Appellant. (R 2322-24). Appellant then filed a motion in limine, seeking to prevent introduction of such evidence. (R 2332-36). Two days later, the State amended its Williams Rule notice, deleting two of the incidents previously listed and adding one. Specifically, the State intended to present evidence that Appellant (1) sexually battered and murdered Leslie Dickinson in her room at the Vernon Downs Harness Race Track in New York on March 15, 1987; (2) sexually battered and choked Deborah Joseph at the Garden State Park Harness Race Track in New Jersey on September 25, 1988; (3) attempted to sexually batter and choked Lillian Sheppard at the Brandywine Harness Race Track in Delaware on June 26, 1989; and (4) attempted to sexually assault Pamela Albertson (the victim in the present case) at the Pompano Harness Race Track three or four weeks prior to her murder. (R 2337-38). The State later responded to Appellant's motion in limine. (R 2539-52).

On March 19, 1991, the trial court held a hearing on Appellant's motion in limine and determined that an evidentiary hearing was warranted. (T 51-67). On October 11 and 14, 1991, twenty-three witnesses testified regarding the facts underlying each of the four incidents. (T 74-337, 348-84). The trial court

took Appellant's motion under advisement and, after much debate (T 773-82, 829-35, 889-96, 970-89), decided after jury selection to exclude the Vernon Downs murder and the Brandywine assault, and allow the Garden State Park assault and the prior assault against the victim in this case. (T 995-98). After the trial court gave the jury a limiting instruction and the State presented all of its witnesses regarding the Garden State Park assault, defense counsel renewed her objection to the evidence. (T 1603). Appellant now claims that the trial court abused its discretion in admitting the evidence of the Garden State Park assault because there were insufficient similarities between the collateral incident and the present offense, because this evidence became a feature of the trial, and because it was more prejudicial than probative. **Brief of Appellant** at 26-36.

Initially, the State submits that Appellant has failed to properly preserve this issue for appeal. It is well-established that Appellant must object to the admission of collateral crime evidence at the time of its admission at trial. Correll v. State, 523 So.2d 562, 566 (Fla. 1988) ("Even when a prior motion in limine has been denied, the failure to object at the time collateral crime evidence is introduced waives the issue for appellate review."); Lawrence v. State, 614 So.2d 1092, 1094-95 (Fla. 1993) (same). Here, defense counsel objected to the Garden State Park evidence, but only after the trial court gave a limiting instruction and after all three witnesses had testified. Such an objection was not sufficiently timely to allow the trial court to reconsider the

issue and prevent its admission. Thus, Appellant has failed to preserve his objection to the admission of this evidence. See Jackson v. State, 451 So.2d 458, 461 (Fla. 1984).

Even if Appellant has preserved his objection to this evidence, his complaints are without merit. The law is well-settled that collateral crime evidence is admissible to show motive, intent, absence of mistake, common scheme, identity, or a system or general pattern of criminality. Lawrence, 614 So.2d at 1094. In the trial court, the State consistently maintained that the collateral crime evidence was relevant to prove a general pattern of criminality and, in turn, identity. In essence, the State argued that the collateral incidents showed a general pattern of Appellant targeting white, female grooms who lived at the various race tracks where Appellant worked and lived, pressuring them for sex, and then attacking them and choking them when they rebuffed his advances. (T 335-36, 385, 565-83).

In the present case, Appellant targeted Pamela Albertson, a white, female groom who lived and worked at Pompano Harness Race Track where Appellant lived and worked. Appellant sexually harassed her almost daily, attacked her in a barn several weeks before the murder, then raped her and strangled her to death when she rebuffed his advances. (T 251-83, 304-311, 316-33, 348-50, 351-84).

At the Garden State Park Harness Race Track, Appellant targeted Deborah Joseph (now Deborah Lesko), a white, female groom who lived and worked at the track, as did Appellant. Ms. Joseph

agreed to go to dinner with Appellant, and Appellant commented to others that he was hoping to have sexual intercourse with her that night. After dinner, Appellant and Ms. Joseph went back to her room to talk, and Appellant attacked her, knocked her to the floor and choked her while sitting on her back. When Ms. Joseph promised to do what he wanted, Appellant let her up and then let her go to the restroom, which was outside of her dorm room. She immediately reported the incident to security. (T 213-24, 243-47).

When ruling on the admissibility of the evidence, the trial court commented that it had carefully scrutinized all of the evidence and concluded that there was sufficient similarity between the Garden State Park assault and the present offense. Appellant wanted to have sex with Ms. Joseph, and Appellant strangled her to get it. When she agreed to it, he let her go, and she managed to get away. (T 775-76, 974).

Regarding the admission of evidence, the trial court has broad discretion and, unless Appellant can show an abuse of that discretion, its rulings should not be disturbed. Welty v. State, 402 So.2d 1159, 1163 (Fla. 1981). Here, Appellant has failed to show an abuse of discretion. The similarities between the Garden State Park assault and the present case "establish[ed] 'a sufficiently unique pattern of criminal activity' to justify the admission of [the] evidence on the disputed, material issue of identity." Rivera v. State, 561 So.2d 536, 539 (Fla. 1990) (quoting Chandler v. State, 442 So.2d 171, 173 (Fla. 1983)). In both cases the victims were white females and were both grooms at

the same track where Appellant was also working as a groom. In both cases, Appellant had publicly professed a desire to have sex with them. In both cases, Appellant got into their dorm rooms and physically subdued them. In both cases, Appellant strangled them. In the Garden State Park assault, the victim agreed to do what Appellant wanted, but managed to escape before she was sexually assaulted. In the present case, the victim was sexually assaulted and then strangled to death when she screamed for help. Based on these facts, the trial court correctly found sufficient similarity to justify the admission of the Garden State Park assault. Duckett v. State, 568 So.2d 891, 895 (Fla. 1990) (evidence that defendant picked up petite, young women and made passes at them while in his patrol car at night and in uniform was sufficiently similar to evidence that defendant picked up petite, young girl at convenience store while in his patrol car at night and in uniform, sexually assaulted her, strangled her to death, then threw her body in nearby lake); Holsworth v. State, 522 So.2d 348, 352-53 (Fla. 1988); Kight v. State, 512 So.2d 922, 927-28 (Fla. 1987).

Appellant also complains that the collateral crime evidence became a feature of the trial. The record reveals, however, that the State called twenty-seven witnesses in its case-in-chief over a five-day period, only three of which pertained to the Garden State Park assault. The State's case consumed approximately six hundred pages of the transcripts, only twenty pages of which related to this collateral crime. Such evidence could hardly be considered a "feature" of the trial.

Finally, Appellant complains that the collateral crime evidence was more prejudicial than probative. **Brief of Appellant** at 35-36. Contrary to Appellant's assertion, however, the evidence of his guilt was not "weak." Appellant sexually harassed the victim almost daily, often in the presence of others. (T 1350). The victim had complained of such to Alfred Grenier, a trainer; to George Goebel, an owner of one of the horses; and to Charles Bakley, Anne Santariello, Clyde Tate, and Tracey Marchant, grooms at the track. (T 1209-10, 1247, 1255, 1350, 1473, 1507). Several weeks before the murder, Appellant attacked the victim in one of the barns, but was interrupted by Clyde Tate. (T 1351-54). Around 5:00 to 6:00 on the night of the murder, Appellant had been drinking and told Verlin Grey that he was going to find a woman to have sex with that night. (T 1225-26). Sometime between 8:00 and 9:00 p.m., he asked Dianne Fields if he could come over to her room, but she declined his offer. (T 1236-37). Between 9:00 and 9:30, Appellant was at Elijah Owens' dorm, which was next to the victim's, and asked him for a cigarette. When Appellant saw the victim come out of her room, he yelled to her that he wanted to tell her something and then went over to where she was standing. (T 1367-70). Several people saw the victim talking to Appellant, or someone fitting Appellant's description, outside of her room around that time. (T 1263-65, 1566-72, 1575-77). Appellant admitted to the police that he was talking to the victim outside of her room. (T 1436-38). Around 10:00 p.m., several people heard a scream emanating from the victim's room. (T 1255, 1267-68, 1488).

Semen recovered from the victim's vagina and from a white tank top found near the bed in the victim's room matched Appellant genetically. (T 1123-24). Finally, while awaiting trial, Appellant told Ronald Morrison, a fellow inmate, that he was talking to a woman in her doorway, trying to get a date, and she said that she only wanted to be friends and did not date black men. At that point, he shoved her in her room and locked the door. When she screamed, he hit her and told her that he would kill her if she did not do what he told her to do. He then sexually assaulted her. When she screamed again, Appellant strangled her to death to shut her up. He then left through a window and went to Gate 5. (T 1616-17). Such evidence hardly constitutes a "weak" case.

Were this Court to determine, however, that the collateral crime evidence should not have been admitted, such error was harmless beyond a reasonable doubt. Based on the evidence recited above, there is no reasonable possibility that the verdict would have been different had the collateral crime evidence not been admitted. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). Therefore, this Court should affirm Appellant's conviction.

ISSUE V

WHETHER THE TRIAL COURT ERRED IN ADMITTING EVIDENCE OF A COLLATERAL CRIME FOR WHICH OFFICIAL CHARGES WERE DISMISSED (Restated).

Appellant claims that the collateral crime evidence admitted in his trial denied him due process because the charge was ultimately dismissed. He acknowledges that this Court has rejected this argument in Holland v. State, 466 So.2d 207 (Fla. 1985), a noncapital case, but claims that this Court left the issue open in Burr v. State, 550 So.2d 444, 446 n.1 (Fla. 1989), cert. granted, 110 S.Ct. 2608, 110 L.Ed.2d 629 (1990), a capital case. **Brief of Appellant** at 37-38. The State disagrees.

In affirming Burr's conviction, which was based in part on collateral crime evidence, this Court specifically held that it was irrelevant that Burr had not been convicted for three of the collateral offenses. 550 So.2d at 446. This Court vacated Burr's sentence, however, because two of the three aggravating factors were based entirely on the collateral crime evidence, some of which was improperly admitted because Burr had been acquitted of one of the offenses. Thus, this Court could not say that the consideration of this inadmissible evidence did not contribute to the sentence, especially since the jury recommended life. Id. See also Burr v. State, 576 So.2d 278 (Fla. 1991) (reaffirming its reversal upon remand based on consideration of impermissible collateral crime in sentencing).

In a footnote, this Court declined to decide what weight, if any, collateral crime evidence should be given in establishing

aggravating factors. Id. at n.1. This does not mean, however, that the issue of using collateral offenses for which formal charges were dismissed has been left open. This Court clearly decided in Burr that such evidence could be used during the guilt phase. As for the penalty phase, there is no evidence in the record to show that the trial court used the Garden State Park assault to establish the "felony murder" and HAC aggravating factors found in this case. Moreover, other than a conclusory statement that the collateral crime evidence constituted nonstatutory aggravation, Appellant has failed to show that such evidence was considered in determining the appropriate sentence in this case. Regardless, "[t]he fact that evidence might prejudice the defendant during the sentencing procedure is not a ground for excluding it during the guilt phase of the trial, as long as the evidence is relevant and admissible." Randolph v. State, 463 So.2d 186, 189 (Fla. 1984). Appellant's conviction and sentence should be affirmed.

ISSUE VI

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING DNA TEST RESULTS (Restated).

Prior to trial, defense counsel filed a motion in limine seeking to prohibit the admission of DNA evidence on two grounds: relevance and reliability. Specifically, counsel claimed that such evidence was irrelevant because Appellant had not been charged with sexual battery. Moreover, even if the evidence established that Appellant had had sex with the victim, it did not prove that he murdered her. Counsel also claimed that the test results were not reliable because the "procedures for testing do not utilize simple quality assurance steps that would avoid the possibility of human error." (R 2534-38).

At the hearing on the motion, the State presented the testimony of Joanne Sguelgia, the forensic scientist from Lifecodes, Inc., who tested the evidence submitted; Kevin McElfresh, the Director of Identity Testing at Lifecodes, who reviewed Ms. Sguelgia's procedures for error; Donna Watson, a serologist from the Broward County Crime Laboratory, who initially analyzed the evidence for the presence of seminal fluid and semen; and George Duncan, another serologist from the Broward County Crime Laboratory, who sent the evidence to Lifecodes. (T 386-434, 538-55). Defense counsel admitted by stipulation the deposition of Dr. Dan Garner, the director of the laboratory at Cellmark Diagnostics. (T 435). Defense counsel then argued the same grounds for exclusion that she alleged in her motion. (T 556-62). The State

responded that the evidence was relevant to prove felony murder and to prove circumstantially that Appellant was at the scene of the murder. As for the reliability of the results, the State argued that the procedures were scientifically accepted and produced reliable results. (T 562-64). Thereafter, the trial court ruled that DNA testing was a generally accepted scientific theory that could produce a reliable result. In addition, the trial court found that Lifecodes "performed generally accepted scientific techniques without error in either performing or testing the [evidence]." As a result, it denied defense counsel's motion in limine. (T 564-65).

During the trial, the State immediately began proving the chain of custody for the evidence to be tested. First, the State called the two crime scene technicians who recovered the tank top from the scene and the vaginal swab from the autopsy. (T 1030-38). Next, the State called the two serologists from the Broward County Crime Laboratory who initially tested the evidence for the presence of seminal fluid and sperm and who sent the evidence to Lifecodes for testing. (T 1042-65). Then, the State called Joanne Sguelgia, the forensic scientist from Lifecodes who tested the evidence. After she had been declared an expert in the field of DNA testing, the State sought to admit the documents showing the chain of custody of the testing samples. At that point, defense counsel interjected, "Judge, I have an objection I previously made to all of this." (T 1080). The trial court admitted the documents.

In this appeal, Appellant abandons his relevance claim, but

renews his reliability claim, asserting that "the prosecution failed to lay a proper predicate as to the laboratory procedures in this case." **Brief of Appellant** at 38-51. Initially, the State submits that Appellant has failed to preserve this issue for review. Correll v. State, 523 So.2d 562, 566 (Fla. 1988) ("Even when a prior motion in limine has been denied, the failure to object at the time [the] evidence is introduced waives the issue for appellate review."); Lawrence v. State, 614 So.2d 1092, 1094-95 (Fla. 1993) (same). Here, defense counsel waited until the entire chain of evidence had been established and the forensic scientist had been qualified as an expert before vaguely referring to her prior objections. Such does not preserve this issue for appeal.

Were this Court to find, however, that Appellant properly preserved the issue, it is nevertheless without merit. Appellant does not challenge the scientific basis for the DNA test. Even his expert testified that the validity and reliability of the test are widely accepted by the scientific community. (Depo. at 15-16). Rather, Appellant challenges the method in which the test was administered. Since Appellant's expert could not testify, however, that either of the results in this case were inaccurate, his objections to the testing methods relate to the weight and credibility of the evidence rather than its admissibility. See Troedel v. State, 462 So.2d 392, 396 (Fla. 1984), vacated on other grounds, 828 F.2d 670 (11th Cir. 1987). Appellant's expert even thought so himself. (Depo. at 27).

Even if they do relate to admissibility, however, Appellant

has failed to show that the trial court's ruling was in error. In Robinson v. State, this Court held the following:

> In admitting the results of scientific tests and experiments, the reliability of the testing methods is at issue, and the proper predicate to establish that reliability must be laid. If the reliability of a test's results is recognized and accepted among scientists, admitting those results is within a trial court's discretion. When such reliable evidence is offered, 'any inquiry into its reliability for purposes of admissibility is only necessary when the opposing party makes a timely request for such an inquiry supported by authorities indicating that there may not be general scientific acceptance of the technique employed.

610 So.2d 1288, 1291 (Fla. 1992) (emphasis in original).

In this case, Appellant presented the deposition testimony of Dr. Garner to challenge the reliability of Lifecodes' testing procedures. In response, the State offered the testimony of Joanne Sguelgia, who detailed the exact procedures she used to process the DNA evidence. (T 387-414). Her supervisor, Keven McElfresh, then testified that he reviewed all of her procedures and found no evidence of contamination. He also ran a mathematical computation which verified the matches. (T 418-34). Dr. Garner, however, believed that Lifecodes lacked the following quality assurance procedures: Cellmark, unlike Lifecodes, processes only one case at a time, processes the evidence samples at a different time than the known samples, and employs a second scientist to witness every step of the primary scientist to see if the samples are taken from and put into the correct pipettes. According to Dr. Garner, these procedures were implemented to lessen the chances of contamination,

since contamination can cause a false reading. (Depo. at 23-26). Dr. Garner also disagreed that there was a match regarding the tank top; in his opinion a three-band match would be inconclusive. (Depo. at 31-33).

In this appeal, Appellant claims that the State failed to lay a proper predicate as to the laboratory procedures used by Lifecodes in this case because it relied exclusively on the testimony of Lifecodes employees. However, "the correct manner of review is a de novo review of whether the evidence in question is generally accepted in the relevant scientific community, encompassing expert testimony, scientific and legal writings, and judicial opinions." Vargas v. State, 19 Fla. L. Weekly D1187, 1189 (Fla. June 1, 1994). Contrary to Appellant's contention, the State did not rely exclusively on the self-serving testimony of Lifecodes employees. At the motion hearing, in addition to relying on judicial opinions, the State called George Duncan, a DNA specialist in the Broward County Crime Laboratory. Mr. Duncan testified that his lab adopted Cellmark's policy of having a second scientist witness the process; his lab and Cellmark are the only labs that have this procedure. (T 548-49). On the other hand, his lab adopted a procedure from Lifecodes whereby they place the pipettes into every other well, instead of every well as is done by Cellmark. (T 549). In essence, the Broward County lab has adopted different procedures from different labs in creating its own lab. (T 550). Mr. Duncan also testified that in 1988 or 1989, the Orange County (California) Crime Laboratory conducted a quality

assurance test of both Cellmark and Lifecodes. Cellmark made an error and changed its testing procedures to correct for weakness in that area. Lifecodes, however, did not make a testing error. (T 554).

In addition to the testimony of these witnesses, the State relied heavily upon Andrews v. State, 533 So.2d 841 (Fla. 5th DCA 1988). In Andrews, the defendant primarily attacked "the methods used by Lifecodes as opposed to the admissibility of DNA evidence in general." Id. at 843. In that case, the Fifth District made the following conclusions:

> There was extensive testimony as to the precise methods used by Lifecodes in performing the instant test. . . . There was also testimony that various controls were used in the testing process. . . . The evidence reveals that if the gel is not properly prepared or if it is bad, the test will ordinarily not work rather than leading to an incorrect result. Indeed, if there were any voltage fluctuations or problem with the solutions ordinarily no result is received as opposed to an erroneous result. Use of control samples is also a check as they would also be affected by any error. The scientific testimony indicates acceptance of the testing procedures. The probative value of the evidence is for the jury.

Id. at 849. In rejecting the defendant's assertion that the State's witnesses possessed a built-in bias, the district court stated, "Neither Frye nor our evidence code require impartiality. Further, the point would not appear substantial here given that unlike voiceprints, DNA comparison work has a number of uses in fields other than forensic medicine such as diagnosis or treatment of disease." Id. at 849 n.9. In conclusion, the district court

held, "Given the evidence in this case that the test was administered in conformity with accepted scientific procedures so as to ensure to the greatest degree possible a reliable result, appellant has failed to show error on this point." Id. at 851. See also Vargas v. State, 19 Fla. L. Weekly D1187, 1189 (Fla. 1st DCA June 1, 1994) ("There appears to be little question that the technology used in determining whether there is a match . . . is generally accepted in the scientific community.").

Notwithstanding this case law, Appellant claims Lifecodes' testing procedures were unreliable. First, without any citation to the record, he relies on Dr. Garner's testimony that contamination could account for the seven band match on the tank top. **Brief of Appellant** at 48. Dr. Garner testified, however, that contamination will cause a false negative, not a false positive. (Depo. at 36). Similarly, Joanne Sguelgia testified that contamination would result in a nonmatch, and Dr. McElfresh testified that contamination would be immediately detectible. (T 414, 421).

Next, Appellant challenges Lifecodes' use of band shifting. **Brief of Appellant** at 48. Appellant's expert, however, specifically testified that Lifecodes' use of a monomorphic probe to correct band slippage "seems to be adequate." He could not "find fault with it." (T 32). Thus, this claim is not supported by the record.

In sum, Appellant failed to preserve this issue for review by failing to make a contemporaneous objection to its admission at trial. Even were it preserved, however, Appellant's objections to

Lifecodes' procedures relate to the weight rather than the admissibility of the results. Even were admissibility the issue, Appellant has failed to show that the trial court abused its discretion in admitting the results of the DNA tests. Finally, were this Court to conclude that the results should not have been admitted, such error was harmless beyond a reasonable doubt. See State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). Based on the quality and quantity of permissible evidence, including Appellant's confession to Ronald Morrison, upon which the jury could have relied to reach a guilty verdict, there is no reasonable possibility that the verdict would have been different had the DNA test results not been admitted. Therefore, Appellant's conviction should be affirmed.

ISSUE VII

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN RESTRICTING THE CROSS-EXAMINATION OF A STATE WITNESS (Restated).

During the trial, the State presented the testimony of Clyde Tate, a groom at the Pompano Harness Race Track. Mr. Tate testified to an incident three or four weeks before the murder in which Appellant accosted the victim in one of the barns at the track. (T 1346-55). Prior to his testimony, the parties discussed the manner in which Mr. Tate could be impeached regarding his prior felony convictions. (T 1312-13). During his direct examination, the State asked him if he had ever been convicted of a felony. When Mr. Tate responded that he had, the State asked him how many times, and Mr. Tate responded twice. The State then asked him how many years ago, and he testified that they occurred in 1981. (T 1354-55).

During cross-examination, defense counsel asked Mr. Tate if he had ever been ruled off of the track, and the State's objection was sustained. (T 1355). At sidebar, defense counsel explained that Mr. Tate failed to admit his convictions on an application to the Racing Commission and was then ruled off of the track when the Commission discovered it. She did not believe that a conviction for perjury was required for the admission of such testimony since it related to his veracity and credibility. (T 1356-60). The State argued that defense counsel could not impeach on a collateral matter where there was no conviction for perjury. (T 1357-59). After extensive discussion, the trial court sustained the State's

objection, concluding that Mr. Tate's being ruled off of the track for lying on the application did not relate to bias, motive, or self-interest in testifying. (T 1394-99).

In this appeal, Appellant claims that the trial court abused its discretion in limiting his cross-examination of Mr. Tate as the evidence (1) constituted a prior inconsistent statement, (2) related directly to his credibility, and (3) related to his motive for testifying. **Brief of Appellant** 51-56. As the record reveals, however, defense counsel argued only the second of these claims as the basis for admission of the testimony; thus, Appellant is precluded from raising the other two for the first time on appeal. Tillman v. State, 471 So.2d 32, 35 (Fla. 1985) ("In order to preserve for review an issue arising from a trial court's ruling of a question of admissibility of evidence, the specific ground to be relied upon must be raised before the court of first instance."); Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982) ("[I]n order for an argument to be cognizable on appeal, it must be the specific contention asserted as legal ground for the objection, exception, or motion below.").

To the extent defense counsel's arguments below could be construed to encompass all three of these arguments, the State nevertheless submits that they are without merit. As for Appellant's claim that Mr. Tate's failure to report his convictions constituted a prior inconsistent statement, defense counsel failed to lay a proper foundation for the prior inconsistent statement. In order to impeach a witness with a prior inconsistent statement,

the witness must be confronted with the prior inconsistent statement and given an opportunity to explain or deny it. Fernandez-Carballo v. State, 590 So.2d 1004, 1004-05 (Fla. 3d DCA 1991). Whether Mr. Tate had been ruled off of the track did not relate to a specific prior inconsistent statement; thus, the State's objection to the question was properly sustained. Id.

As for Appellant's claim that the testimony was directly related to Mr. Tate's veracity and credibility, it is well-established that "[e]vidence of particular acts of misconduct cannot be introduced to impeach the credibility of a witness. The only proper inquiry into a witness' character, for impeachment purposes, goes to reputation for truth or veracity." Farinas v. State, 569 So.2d 425, 428-29 (Fla. 1990). In Farinas, this Court found error, though harmless, in the State's questioning of a defense expert witness regarding allegations by the witness' former employer of unethical conduct. Similarly, in State v. Pettis, 520 So.2d 250, 253-54 (Fla. 1988), this Court found error, though not fundamental, in the defense's questioning of a police officer regarding unrelated reprimands. In DeSantis v. Acevedo, 528 So.2d 461 (Fla. 3d DCA 1988), a civil negligence case, the Third District found reversible error in the defense's questioning of (1) the plaintiff, a police officer, "about an incident he was involved in while employed at another police department, which insinuated that DeSantis had been dishonest," and (2) a witness for the plaintiff, and a former police officer, about charges the police department had brought against him for insubordination, failure to comply with

orders, and absences without leave: "'We think these unfair character assassinations could have done nothing but inflame the jury against these witnesses, who were so essential to the plaintiff's case, and in so doing, denied the plaintiff the substance of a fair trial below.'" Id. at 462 (quoting Simmons v. Baptist Hosp. of Miami, 454 So.2d 681, 682 (Fla. 3d DCA 1984)). As in these cases, Appellant's impeachment evidence was improper, and thus the trial court did not abuse its discretion in limiting defense counsel's cross-examination.

As for Appellant's claim that such evidence was admissible to show bias or a motive to testify, this alleged incident of falsifying an application did not result any in charges, nor was there any evidence that charges were forthcoming. Even if Mr. Tate's actions were under investigation, "the ability to cross-examine on such investigation is not absolute. Instead, any investigation must not be too remote in time and must be related to the case at hand to be relevant." Breedlove v. State, 580 So.2d 605, 608-09 (Fla. 1991). In Breedlove, the defendant claimed that he was precluded from impeaching several police officers with evidence of criminal activity. This Court held, however, that such evidence was not relevant to show bias or motive when the conduct or investigations are not related to the facts of the case. "Evidence of bias may be inadmissible if it unfairly prejudices the trier of fact against the witness or misleads the trier of fact. Therefore, inquiry into collateral matters, if such matters will not promote the ends of justice, should not be permitted if it is

unjust to the witness and uncalled for by the circumstances." Id. at 609. As in Breedlove, the allegations against Mr. Tate were wholly unrelated to the facts of the case, and thus were properly excluded as evidence of bias or motive to testify falsely.

Were this Court to find, however, that defense counsel should have been allowed to question Mr. Tate regarding his application to the Racing Commission, such error was harmless beyond a reasonable doubt. Mr. Tate was not a key state witness in that he did not testify to any events directly surrounding the murder. Rather, Mr. Tate related a prior incident in which Appellant accosted the victim. Even were his testimony wholly discredited based on the impeachment evidence, there is no reasonable possibility that the verdict or sentence would have been different given the other evidence, including Appellant's confession to Ronald Morrison, of Appellant's guilt. Breedlove, 580 So.2d at 607 (no reasonable possibility that evidence of officers' criminal activity would have changed the outcome); Derrick v. State, 581 So.2d 31, 36 (Fla. 1991) (improper restriction of cross-examination regarding witness' prior inconsistent statement relating to number of convictions was harmless error). Consequently, Appellant's conviction and sentence should be affirmed.

ISSUE VIII

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN ALLOWING A STATE WITNESS TO EXPRESS HER OPINION AS TO APPELLANT'S GUILT (Restated).

During the trial, Anne Santariello, a groom at the race track who lived above the victim, testified that she heard a scream around 10:00 on the night of the murder and some "rumbling, banging or something like that" possibly coming from the victim's room, but did not hear anything more so she did not investigate it further. (T 1254). The following colloquy then occurred:

> Q [By the State] When was it you found out that Pamela Albertson had been murdered?
>
> A [By Ms. Santariello] I didn't find out until like it was about noon, somewhere around there.
>
> Q The police came to you? The detectives came to you and asked you ultimately what you had heard?
>
> A No, no. What happened was somebody told me that works for the track that Pamela has been murdered and I called John Beatrice, which is security, and told him I know who did it.
>
> Q Okay.
>
> [DEFENSE COUNSEL]: Your Honor, I'm going to move to strike as being unresponsive to the question.
>
> THE COURT: Overruled.
>
> Q You gave Bob [sic], a name of the defendant; is that correct?
>
> A Yes.
>
> Q Had Pamela Albertson spoken to you of Robert Hayes prior to her death?
>
> A Yes. A lot.

Q What did she say?

A She told me how afraid she was of him. How he kept threatening her. He was going to get her one way or another and I heard a lot of that. She told me that.

Q That's why you called when you heard that Pamela Albertson had in fact been killed?

A Yes.

(T 1254-55).

In this appeal, Appellant claims that the trial court abused its discretion in allowing this testimony because (1) "this witness had no personal knowledge of who committed this offense, but was solely based on hearsay," and (2) "[t]his was also improper opinion testimony by a lay witness." **Brief of Appellant** at 56-59. As the above excerpts reveal, defense counsel objected that the witness' answer was not responsive to the question. She did not raise either of the two grounds raised here as a basis for her motion to strike. Thus, Appellant has failed to preserve this issue for appeal. Tillman v. State, 471 So.2d 32, 35 (Fla. 1985); Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982). Regardless, any error in its admission was harmless beyond a reasonable doubt given the quality and quantity of permissible evidence upon which the jury could have relied in reaching a guilty verdict. See Capehart v. State, 583 So.2d 1009, 1013 (Fla. 1991), cert. denied, 117 L.Ed.2d 122 (1992); Gonzalez v. State, 511 So.2d 703, 704 (Fla. 3d DCA 1987); Hill v. State, 459 So.2d 434 (Fla. 3d DCA 1984); Huff v. State, 495 So.2d 145, 149 (Fla. 1986).

In this issue, Appellant also claims that the State elicited

"improper hearsay that the deceased had supposedly said that she was scared of Robert Hayes." **Brief of Appellant** at 58. Because Appellant failed to provide a record cite to such testimony, the State assumes he is referring only to Ms. Santariello's testimony. The record reveals, however, that no objection was made to such testimony. Thus, Appellant has also failed to preserve this issue for appeal. Steinhorst, supra. Regardless, such testimony, if error, was harmless beyond a reasonable doubt. See Correll v. State, 523 So.2d 562, 565-66 (Fla. 1988). Consequently, Appellant's conviction should be affirmed.

ISSUE IX

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN RESTRICTING QUESTIONING IN VOIR DIRE (Restated).

During jury selection, defense counsel asked the following question of Juror Barrett: "I think you were present when the one juror that was excused made the comment that because Mr. Hayes is black and he's here on the charge of murder he's guilty in her view. What did you think about that comment?" (T 921). Mr. Barrett responded that he thought the comment was inappropriate. Defense counsel then asked Juror Rubin what she thought about the comment, and Ms. Rubin also did not appreciate it: "It's not fair to judge somebody because of their race." (T 921). Thereafter, defense counsel asked the panel if anyone had watched the confirmation hearings of Clarence Thomas, and most everybody responded affirmatively. (T 921). Defense counsel then asked Ms. Rubin whether she thought that race was an issue, but Ms. Rubin responded that she had not seen the hearings, so counsel asked Ms. Foss. The State objected, and the trial court sustained it, saying, "I don't see what this has to do with it." (T 922). Defense counsel then asked, "How many of you watch 60 Minutes? Mr. Rafferty, there was a program I think --," at which point the trial court interrupted: "I don't want to go into any of that." Defense counsel said, "Okay" and moved on to questions regarding DNA testing. (T 922).

In this appeal, Appellant claims that the trial court improperly restricted defense counsel's questioning regarding

racial attitudes. **Brief of Appellant** at 59-61. To support this contention, Appellant principally relies upon Turner v. Murray, 476 U.S. 28 (1985), in which the Supreme Court held that a capital defendant accused of an interracial crime is entitled to have prospective jurors informed of the victim's race and questioned on the issue of racial bias.[1] In Turner, however, the Court specifically required counsel to affirmatively request such an inquiry: "[A] defendant cannot complain of a judge's failure to question the venire on racial prejudice unless the defendant has specifically requested such an inquiry." 476 U.S. at 37. The Court also held that the trial court retains discretion over the form and number of questions and whether the jurors should be questioned individually or collectively. Id.

In the present case, the record reveals that defense counsel questioned two jurors about a racial remark made by another prospective juror who had been excused for cause. When counsel attempted to question individual jurors about the Clarence Thomas hearings and whether they believed race was an issue in his confirmation, the State's objection was sustained. At that point, counsel made no request for a sidebar conference and made no attempt otherwise to advocate her desire for an inquiry into racial bias. From the record, it is obvious that the trial court did not see a connection between the facts of this case and whether racial

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[1]The Court limited any harm in failing to do so to the penalty phase of the trial. Thus, Appellant's plea for a new trial is misplaced.

bias was an issue in Clarence Thomas' confirmation hearings. Defense counsel did nothing to explain the connection. Based on Turner, defense counsel had a duty to specifically request such an inquiry, thereby giving the trial court the opportunity to decide the manner in which such an inquiry should be undertaken. Because counsel failed to do so, she has failed to preserve this issue for review.

ISSUE X

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN ALLOWING THE STATE TO EXCUSE A BLACK JUROR FROM THE VENIRE (Restated).

During jury selection, the trial court generally began the process with questions related to biographical information, prior arrests, prior victimization, prior jury service, etc. When Marie Williams moved from the general pool to the panel, the trial court engaged in the following colloquy with her:

> MS. WILLIAMS: I work at Holiday Inn, Pompano. I have no husband, no children.
>
> THE COURT: Have you ever been married?
>
> MS. WILLIAMS: Yes.
>
> THE COURT: Have you ever been a juror?
>
> MS. WILLIAMS: Have I ever been what?
>
> THE COURT: A juror.
>
> MS. WILLIAMS: No.
>
> THE COURT: Would you like to be?
>
> MS. WILLIAMS: No.
>
> THE COURT: You wouldn't like to be?
>
> MS. WILLIAMS: No.
>
> THE COURT: Why is that?
>
> MS. WILLIAMS: Because I don't think my boss will pay me for the days I have off.
>
> THE COURT: Your boss isn't going to pay you? Did you already talk to him?
>
> MS. WILLIAMS: No.
>
> THE COURT: If you don't get paid, you won't be able to eat? That sounds silly but some

people might not be able to eat. I'm just asking. You tell me how bad. Is it going to be bad?

MS. WILLIAMS: It wouldn't be bad.

THE COURT: You will be able to eat?

MS. WILLIAMS: Yes.

THE COURT: How bad of a hardship will that be on you?

MS. WILLIAMS: Not at all.

THE COURT: Not at all?

MS. WILLIAMS: No.

THE COURT: It wouldn't be a hardship. Does that mean you can stay here and be a juror?

MS. WILLIAMS: I don't want to.

THE COURT: You don't want to?

MS. WILLIAMS: No.

THE COURT: How about the case? Is that bothering you at all?

MS. WILLIAMS: No.

THE COURT: It's just the work; is that it?

MS. WILLIAMS: Yes.

THE COURT: Okay. We'll talk to you about that a little bit more.

MS. WILLIAMS: Okay.

THE COURT: If you did sit on the case, if both lawyers wanted you to sit on the case, could you sit here and pay attention?

MS. WILLIAMS: Yes.

THE COURT: Make a decision that you think speaks the truth?

MS. WILLIAMS: Yes.

THE COURT: Put your problems about work on the side?

MS. WILLIAMS: Yes.

THE COURT: Have you or anybody in the family ever been arrested?

MS. WILLIAMS: Yes, I have a nephew.

THE COURT: You have a nephew arrested for what?

MS. WILLIAMS: Drugs.

THE COURT: For drugs. When was that?

MS. WILLIAMS: I think it was last month.

THE COURT: Last month. What's his name?

MS. WILLIAMS: Freddie Brown.

THE COURT: Has he been arrested more than once?

MS. WILLIAMS: Yes, more than once.

THE COURT: A lot of times; always drugs?

MS. WILLIAMS: About three drugs, I'm sure.

THE COURT: For drugs all the time?

MS. WILLIAMS: For drugs.

THE COURT: Anything else?

MS. WILLIAMS: No.

THE COURT: Anybody else in the family been arrested?

MS. WILLIAMS: No.

THE COURT: How about Freddie; has he been treated fairly every time he got arrested or not?

MS. WILLIAMS: I don't really know because I never went to court.

THE COURT: Would any of that affect you in

deciding the case?

MS. WILLIAMS: No.

THE COURT: Have you ever been the victim of a crime?

MS. WILLIAMS: No.

THE COURT: Anybody else in the family?

MS. WILLIAMS: No.

THE COURT: So if it wasn't for work you'd really want to sit here then?

MS. WILLIAMS: I wouldn't mind.

THE COURT: But because of work you really don't want to sit?

MS. WILLIAMS: No.

THE COURT: You haven't talked to your boss about it?

MS. WILLIAMS: Yes.

THE COURT: You have not talked to him?

MS. WILLIAMS: No.

THE COURT: All right. Thanks.

(T 738-42).

Later, during the State's questioning, Ms. Williams indicated that her nephew had been convicted before and had been to prison, that he was in the hospital at the time, and that she was very close to her nephew. (T 747-50). The following day, defense counsel asked Ms. Williams if she had had an opportunity to ask her employer whether she would be paid or not, but she responded that she had not done so. (T 877). Just prior to the parties' exercising their peremptory challenges, the State expressed concern

about Ms. Williams: "I'm concerned about her nephew arrested last month for drug charges, having been to prison, this being the third time and she caring very much for him. . . . Those are the reasons I'm stating for a peremptory challenge." (T 930-31). Defense counsel responded, "[The prosecutor] in fact asked her whether the fact that her nephew had been arrested and convicted would cause any problems and she said no. I don't see anything about her other than the fact that she is black." (T 931). The trial court found, however, that the State's challenge was "definitely not a racially motivated strike. I think she's given all the answers." (T 931).

In this appeal, Appellant claims that the State's reason for striking Ms. Williams was pretextual. To support his contention, Appellant notes that the reason the State gave did not relate to the facts of this case, and points to the fact that the State did not attempt to excuse several jurors who had even closer relations arrested. **Brief of Appellant** at 61-64.

The record reveals that numerous jurors responded affirmatively when the trial court asked them if they, or anyone in their family, had been arrested. For example, Ms. Delin's son was arrested for fighting when he was 18 or 19 years old and put on probation. (T 468-69). Ms. Celona's stepson was serving time in federal prison for a drug offense. (T 473-76). Mr. Rafferty's son was arrested for driving under the influence. (T 478-79). Ms. Osborn's son was arrested in Texas for possession of marijuana. (T 480). Ms. Lakin's son was arrested for some kind of traffic offense. (T 488). Mr. Flemke's son was arrested as a juvenile for

sexual battery. (T 501). Mr. Tornari's sister-in-law pled guilty to a drug charge and was sentenced to probation. (T 508). Ms. Shapland's husband was arrested for driving under the influence. (T 516). Mr. Caldwell was convicted of Grand Theft 12 years previously. (T 522). Ms. Field's husband was arrested twice for driving under the influence and was currently on reporting probation. (T 523). Ms. Crawford's daughter was arrested twice in North Carolina for driving under the influence. (T 694). Mr. Muller had been charged with sexual battery two years previously, but the charges were dropped. (T 796-97). Mr. Horton's brother was in prison for some kind of sexual assault on a child under the age of twelve. (T 817-18). Mr. Smith's brother was arrested for driving under the influence in Alabama. (T 839). Ms. Jalbert's brother went AWOL while in the Army, and another brother was arrested for shooting a dog when she was about six years old. (T 840). Of these persons, the following served on the jury: Mr. Tornari, Ms. Fields, Ms. Delin, Ms. Crawford, Mr. Rafferty, and Ms. Osborn. (T 949).

During the selection process, the State made several comments regarding jurors whose family members had been arrested. For example, regarding Mr. Flemke, the State commented, "I'm going to [strike] Mr. Flemke. . . . I don't like someone who has a son who was arrested on a serious crime even though he was a juvenile." (T 935). Regarding Mr. Horton, the State commented, "Obviously, I'm not going to have a man whose brother is in prison for nine years." (T 939). The State also excused Mr. Muller, who had been arrested

for sexual battery. (T 937-38).

Obviously, the State was not concerned about the juror's relationship to the person arrested or whether the arrest was for drugs. Rather, the State was concerned about any person who had been arrested for a serious offense and/or had spent time in prison. The only people that qualified were Ms. Williams, Mr. Muller, Mr. Horton, Mr. Flemke, and Ms. Celona, none of whom served on the jury.

This Court has held that "[t]he fact that a juror has a relative who has been charged with a crime is a race-neutral reason for excusing that juror." Fotopoulos v. State, 608 So.2d 784 (Fla. 1992). Since the State excused every juror not otherwise excused who had been, or had a relative who had been, charged with a serious crime and/or been incarcerated, its reason for excusing Ms. Williams was not pretextual. Consequently, this Court should affirm Appellant's conviction and sentence.

ISSUE XI

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION TO SUPPRESS HIS STATEMENTS TO THE POLICE (Restated).

Prior to trial, defense counsel filed a motion to suppress Appellant's statements to the police, claiming that Appellant was not read his rights prior to making certain statements and was coerced into making other statements when the officers "changed their approach" and when they failed to continue taping the questioning. (R 2529-33). In conjunction with the hearing on the admissibility of the collateral crime evidence, the trial court held a hearing on the motion to suppress. At the hearing, Detectives Greg Flynn and Kevin Butler of the Pompano Beach Police Department testified on the State's behalf. Detective Flynn initially testified that he went to the Pompano Harness Race Track on February 20, 1990, to investigate the murder. Based on information that Appellant had been sexually harassing the victim, Detective Flynn wanted to interview Appellant. As part of the investigation, he asked Appellant to go to the police station for questioning. At that point, Appellant was only a potential witness and was not under arrest. Appellant agreed to go to the station voluntarily. (T 264-68, 302). At the station, Detective Butler interviewed Appellant. Initially, Appellant stated that he had spoken to the victim around 5:00 p.m. the day before about an employee that had just quit. At that point, Detective Butler read Appellant his rights, which he waived. (T 273-74, 275, 291-93). Appellant, however, was still free to leave. (T 273). Thereafter,

Appellant stated that he was with his girlfriend, Doris, until around 7:30 p.m., then went to Bob Johnson's room and had a beer, then went to Gate 5 until about 9:30 p.m. (from the third race to the ninth), then went back to Bob's, and then went to his room around 10:00 p.m. (T 275-76, 293-94). Appellant stated that he had had sex with the victim approximately three months prior to her murder. (T 294).

Based on information they had received from other witnesses, the detectives confronted Appellant with inconsistencies in his story, but Appellant denied talking to the victim in her doorway that night. (T 295). At 10:24 a.m., the detectives took a taped statement from Appellant in which Appellant maintained his prior story. (T 302). The detectives then told Appellant that they realized he would not want to admit to talking to the victim in her doorway because he might then be a suspect. Appellant admitted that he was afraid of the implication and admitted talking to the victim outside of her room. Appellant maintained, however, that he never went inside her room. (T 296). Appellant refused to make another taped statement admitting same. (T 303). Following the witnesses' testimony, defense counsel renewed her arguments from the written motion (T 337-39), and the trial court denied the motion. (R 2581; T 341).

At trial, Detective Butler recounted Appellant's statements without objection. (T 1408-10). When the State sought to introduce and publish the taped statement, defense counsel merely renewed her previous objection, which was overruled. (T 1415-16).

Following Detective Butler's direct examination, the trial court recessed for the day. (T 1426). The following day, defense counsel argued that Appellant's refusal to give a second taped statement constituted an invocation of his right to remain silent, and thus any statement made thereafter was inadmissible. Defense counsel also argued that any reference to Appellant's refusal to make a second taped statement constituted a comment on his silence. (T 1431-35). The trial court overruled counsel's objections and found that the testimony was not a comment on Appellant's silence. (T 1435).

In this appeal, Appellant claims that he should have been read his rights immediately upon being contacted because he was a suspect rather than a witness. Because he was not read his rights, his statements made prior to them were inadmissible. Second, Appellant claims that the statements he made after his Miranda warnings were not voluntary because "all of the techniques of the police were designed to delude [him] as to his true position." **Brief of Appellant** at 66-67.

Initially, the State submits that Appellant has failed to preserve this issue for appeal. As the record reveals, defense counsel did not object to the introduction of Appellant's statements before they were elicited from Detective Butler. Counsel's dilatory objection to the admission and publishing of the taped statement came too late, as did defense counsel's objection the day after Detective Butler's testimony. The trial court had no opportunity to reevaluate his prior ruling. Thus, Appellant has

not sufficiently preserved this point for review. Buchanan v. State, 575 So.2d 704, 707 (Fla. 3d DCA 1991) ("[An] objection must be made before the evidence is admitted and it must be renewed, notwithstanding a prior ruling on a motion to suppress.").

Regardless, the record supports the trial court's ruling. It is well-established that the test for determining whether a person is in custody is whether a reasonable person would have felt free to leave under the circumstances. Roman v. State, 475 So.2d 1228, 1231 (Fla. 1985), vacated on other grounds, 528 So.2d 1169 (Fla. 1988). In Roman, this Court held that, because an interrogation takes place at the police station does not by itself transform a noncustodial interrogation into a custodial one. Id. at 1231. As in Roman, Appellant voluntarily agreed to go to the police station; he was not arrested and was free to leave at any time. There is no indication that he was under duress or prolonged interrogation, nor was he threatened or promised anything in return for his statements. Thus, there is nothing in the record to indicate that Appellant's initial remarks, prior to being given his Miranda warnings, were inadmissible. See Perry v. State, 522 So.2d 817, 819 (Fla. 1988); Correll v. State, 523 So.2d 562, 564-65 (Fla. 1988).

As for Appellant's statements made after waiving his Miranda warnings, Appellant has failed to establish that they were coerced. As for Appellant's low IQ (a fact which was not raised below), the record reveals that Detective Butler read the rights card to Appellant, that Appellant understood his rights, and that Appellant

signed the rights card, acknowledging his understanding of, and decision to waive, them. There is nothing in the record to show that he lacked the capacity to knowingly waive his rights. Thus, the trial court's denial of Appellant's motion to suppress should be affirmed. See Richardson v. State, 604 So.2d 1107, 1108 (Fla. 1992) (although expert testified that defendant was mildly mentally retarded, record strongly supports conclusion that defendant voluntarily and knowingly confessed); Kight v. State, 512 So.2d 922, 926 (Fla. 1987) (same).

Were this evidence admitted in error, however, such error was harmless beyond a reasonable doubt. The evidence at trial established the following: Appellant had previously attacked and choked a white, female groom at another track where Appellant worked. Appellant had been sexually harassing the victim almost daily prior to the murder, and had physically attacked her several weeks before the murder. Several witnesses saw Appellant standing outside the victim's door between 9:30 and 10:00 p.m. and heard a muffled scream around 10:00 p.m. coming from the victim's room. Appellant's semen was found inside the victim's vagina and on a tank top found on the floor next to the bed. In addition to the sexual battery, the victim had suffered blunt trauma to her head and face and had been manually strangled to death. While awaiting trial, Appellant told Ronald Morrison that, when the victim rebuffed his advances, he pushed her into her room and locked the door. When she screamed, he hit her. He then threatened to kill her if she did not do what he told her to do. After he raped her,

she screamed, and he choked her to quiet her down. He then crawled out a window. Based on this evidence, there is no reasonable possibility that the verdict would have been different had Appellant's admissions to the police not been admitted. See Pericola v. State, 499 So.2d 864, 868 (Fla. 1st DCA 1986) ("While it is true that, when the error affects the constitutional rights of the appellant, the reviewing court may not find it harmless if there is a reasonable possibility that the error may have contributed to the accused's conviction or if the error may not be found harmless beyond a reasonable doubt, even such constitutional error may be treated as harmless where the evidence of guilt is overwhelming."), rev. denied, 509 So.2d 1118 (Fla. 1987). Consequently, Appellant's conviction should be affirmed.

ISSUE XII

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL AS TO PREMEDITATED MURDER (Restated).

At the close of the State's case, defense counsel moved for a judgment of acquittal, claiming that the State's circumstantial evidence of guilt failed to prove every element of the crime and failed to rebut every reasonable hypothesis of innocence. Contemporaneously with her oral motion, defense counsel also filed a memorandum of law, the arguments in which formed the basis of her oral motion. (R 2583-94). Specifically, defense counsel asserted that no one saw Appellant go inside the victim's room, that the DNA evidence only proved that the Defendant had sex with the victim sometime before her murder, and that there was no physical evidence to corroborate Ronald Morrison's testimony which related Appellant's confession to him. (T 1628-32). The trial court, having read the memorandum, denied the motion. (T 1632). Defense counsel renewed her motion at the close of all of the evidence, reiterated the arguments previously made, and sought to make the State elect as to premeditated or felony murder. The motion was again denied. (T 1947-48).

In this appeal, Appellant claims that the trial court abused its discretion in denying his motion for judgment of acquittal as to premeditated murder. **Brief of Appellant** at 67-70. Contrary to Appellant's assertion, however, the State's case was not based entirely on circumstantial evidence since Appellant confessed to

Ronald Morrison. See Hardwick v. State, 521 So.2d 1071, 1075 (Fla. 1988) ("A confession of committing a crime is direct, not circumstantial, evidence of that crime."). Besides the confession, the State presented the following evidence which supports a verdict of premeditated murder: Appellant had previously attacked and choked a white, female groom at another track where Appellant worked. Appellant had been sexually harassing the victim almost daily prior to the murder, and had physically attacked her several weeks before the murder. Several witnesses saw Appellant standing outside the victim's door between 9:30 and 10:00 p.m. Appellant admitted to talking to the victim outside of her room the evening of the murder. Several witnesses heard a muffled scream around 10:00 p.m. coming from the victim's room. Appellant's semen was found inside the victim's vagina and on a tank top found on the floor next to the bed. In addition to the sexual battery, the victim had suffered blunt trauma to her head and face and had been manually strangled to death. Such evidence, when taken in a light most favorable to the State, clearly creates a question of fact for the jury. Moreover, it clearly supports a verdict of guilt for first-degree premeditated murder. Deangelo v. State, 616 So.2d 440, 441-42 (Fla. 1993); Holton v. State, 573 So.2d 284, 289 (Fla. 1990); Huff v. State, 495 So.2d 145, 150 (Fla. 1986); Buford v. State, 403 So.2d 943, 945 (Fla. 1981), sentence vacated, 841 F.2d 1057 (11th Cir. 1988).

Even if the trial court erred in denying Appellant's motion as to premeditated murder, there is no reasonable possibility that the

verdict would have been different. Appellant committed the murder during the commission of a sexual battery. Thus, he was equally guilty of felony murder. See Jackson v. State, 498 So.2d 406, 410 (Fla. 1986), sentence vacated, 547 So.2d 1197 (Fla. 1989). Consequently, this Court should affirm Appellant's conviction.

ISSUE XIII

WHETHER THE TRIAL COURT GAVE UNDUE WEIGHT TO THE JURY'S RECOMMENDATION (Restated).

Appellant claims that the trial court gave undue weight to the jury's recommendation. In support of his claim, Appellant cites to instructions and comments to the jury which stressed the importance of their recommendation. **Brief of Appellant** at 70-73. Appellant fails to acknowledge the trial court's sentencing order, however, which first discusses the applicability of the aggravating and mitigating factors and then concludes: "After evaluating all of the evidence presented, it is this Court's reasoned judgment that the mitigating circumstances do not outweigh the aggravating factors." (T 2784). Citing to Tedder v. State, 322 So.2d 908 (Fla. 1975), the trial court stated that it must give great weight to the jury's recommendation, but then it stated that "[t]he ultimate decision as to whether the death penalty should be imposed rests with the trial judge. Additionally, the sentencing scheme requires more than a mere counting of the aggravating and mitigating circumstances. It requires the Court to make a reasoned judgment as to what factual situations require the imposition of the death penalty, and which can be satisfied by life imprisonment, in light of the totality of the circumstances." (T 2784-85) (citation omitted). Viewed as a whole, the trial court's sentencing order belies Appellant's contention. While the trial court may have overly stressed the importance of the jury's recommendation, it is clear that the trial court independently

weighed the evidence as required by law. Thus, Appellant's sentence of death should be affirmed.

ISSUE XIV

WHETHER THE TRIAL COURT ERRONEOUSLY APPLIED A PRESUMPTION OF DEATH (Restated).

In this appeal, Appellant claims that the trial court failed to weigh the aggravating and mitigating factors as required by law and, instead, automatically presumed that death was the appropriate punishment when it found the existence of two aggravating factors. **Brief of Appellant** at 73-75. The sentencing order reveals, however, that the trial court first discussed the applicability of the aggravating and mitigating factors and then determined whether the mitigating factors outweighed the aggravating factors: "After evaluating all of the evidence presented, it is this Court's reasoned judgment that the mitigating circumstances do not outweigh the aggravating factors." (T 2784). Although the trial court cited the statement in White v. State, 403 So.2d 330 (Fla. 1981), that Appellant finds offensive,[2] it then stated that "the sentencing scheme requires more than a mere counting of the aggravating and mitigating circumstances. It requires the Court to make a reasoned judgment as to what factual situations require the imposition of the death penalty, and which can be satisfied by life imprisonment, in light of the totality of the circumstances." (T 2784-85). Viewed as a whole, the trial court's sentencing order belies

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[2]This Court has continued to apply White when performing proportionality analysis. E.g., Jackson v. State, 502 So.2d 409, 413 (Fla. 1986). This Court has also held that Florida's sentencing scheme does not carry a presumption of death upon the finding of a single aggravating factor. Sochor v. State, 619 So.2d 285, 291 n.10 (Fla. 1993).

Appellant's contention. Appellant's sentence of death was not presumed once at least one aggravating factor was found. Rather, the trial court performed the weighing that is required before imposing a sentence of death. As a result, this Court should affirm Appellant's sentence.

ISSUE XV

WHETHER THE RECORD SUPPORTS THE TRIAL COURT'S REJECTION OF APPELLANT'S NONSTATUTORY MITIGATING EVIDENCE THAT HE COMMITTED THIS MURDER WITH LITTLE OR NO PREMEDITATION (Restated).

Appellant claims that the trial court failed to consider as nonstatutory mitigating evidence that he committed this murder with little or no premeditation. **Brief of Appellant** 75-77. This Court has consistently held, however, that lingering or residual doubt does not constitute mitigating evidence. Preston v. State, 607 So.2d 404 (Fla. 1992); White v. Dugger, 523 So.2d 140 (Fla. 1988); King v. State, 514 So.2d 354 (Fla. 1987). Regardless, the record refutes such a claim. Appellant told Ronald Morrison that he pushed the victim in her room and locked the door. When she screamed, he hit her. Appellant then told the victim that if she did not do as he told her that he would kill her. After he raped her, she screamed again, and he carried out his threat by choking her to death. (T 1617). Such evidence hardly constitutes little or no premeditation. Thus, it was properly rejected.

Even were it not, there is no reasonable possibility that the sentence would have been different had the trial court considered such evidence. Appellant committed this murder during the course of a sexual battery and in a heinous, atrocious, and cruel manner. Given this level of aggravation, and the scant amount of mitigation otherwise, there is no reasonable possibility that Appellant would have received a life sentence. Thus, Appellant's sentence of death should be affirmed. See Rogers v. State, 511 So.2d 526 (Fla.

1987); Capehart v. State, 583 So.2d 1009 (Fla. 1991), cert. denied, 117 L.Ed.2d 122 (1992).

ISSUE XVI

WHETHER THE RECORD SUPPORTS THE TRIAL COURT'S FINDING OF THE HEINOUS, ATROCIOUS, OR CRUEL AGGRAVATING FACTOR (Restated).

In its sentencing order, the trial court made the following findings regarding the HAC aggravating factor:

> This Court finds that the capital felony for which the defendant was convicted was especially heinous, atrocious, or cruel. Unless the victim was semi-conscious or unconscious at the time she was strangled, strangulations are per se heinous, atrocious, and cruel. Hitchcock v. State, 578 So.2d 685 (Fla. 1990). In this case, the evidence establishes that Pamela Albertson was conscious when the defendant strangled her to death.
>
> It is a reasonable interpretation of the evidence that the defendant beat the victim so severely that it caused her to defecate while she was still clothed. He then raped her after her clothing was removed. Thereafter, she hastily dressed herself (discarding the previously soiled panties) screamed, and was strangled to death.
>
> The evidence established that the victim was found wearing her Levis which were stained with fecal matter. Her underpants, however, were found in the corner of the room also containing fecal matter.
>
> The Pathologist, Dr. Nelson, testified that defecation is a predictable consequence of severe head trauma. It is also evidence of extreme anxiety and fear. The doctor further testified that the victim suffered contusions and abrasions to the right temple area and to the mouth from blunt trauma. She also suffered bilateral subarachnoid hemorrhage caused by blunt trauma to both sides of her head.
>
> Dr. Nelson also testified that the victim died from manual strangulation, but that death was not instantaneous. A substantial amount

> of foam and mucus was projecting from the victim's nasal passages. Due to this evidence, Dr. Nelson concluded that she lingered 20 to 30 minutes after the strangulation before dying.
>
> Joan Schmidt stated that after she saw the victim at her door being bothered by the defendant, she passed by the victim's room later on to go to the bathroom. At that time she heard moans coming from the victim's room. The witness initially attributed the moaning to sexual conduct. When combined with Dr. Nelson's evidence, however, the sounds Joan Schmidt heard were most likely Pamela Albertson gasping for air in pain after being strangled by the defendant.
>
> Dr. Nelson's findings and Joan Schmidt's testimony are consistent with the defendant's admission to Ronald Morrison that the victim was alive after the defendant beat and raped her. The defendant thereafter strangled her when she started screaming.
>
> The fact that the victim had been subjected to a severe physical beating, which, according to Dr. Nelson, was life threatening itself, and then raped before death was deliberately inflicted, is sufficient evidence to establish this aggravating circumstance. See Grossman v. State, 525 So.2d 833 (Fla. 1988) (where the victim, a wildlife officer, was shot in the back of the head after being viciously beaten), and Brown v. State, supra. (where the victim was beaten, raped, and killed by asphyxiation).

(T 2779-81).

In this appeal, Appellant claims that this aggravating factor should be stricken because "there was no evidence that the killing was designed to be extraordinarily painful." **Brief of Appellant** at 77-80. This Court has previously held, however, that "'strangulation, when perpetrated upon a conscious victim, involves foreknowledge of death, extreme anxiety and fear, and that this

method of killing is one to which the factor of heinousness is applicable.'" Sochor v. State, 619 So.2d 285, 292 (Fla. 1993). The fact that Appellant did not intend the killing to be unnecessarily torturous does not mean that it was not. As outlined by the trial court, the record clearly supports the trial court's finding. Thus, Appellant's conviction should be affirmed.

ISSUE XVII

WHETHER THE "FELONY MURDER" AGGRAVATING FACTOR IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED TO APPELLANT (Restated).

Prior to trial, Appellant filed numerous motions challenging the aggravating factors on constitutional grounds. He specifically challenged the "felony murder" aggravator as factually overbroad and as an "automatic" aggravator. (R 2346-53, 2720-26). The trial court denied the motion during the penalty phase charge conference. (T 2165-67). Appellant now renews his challenge to this aggravating factor. **Brief of Appellant** at 80-84. This issue, however, has long-since been resolved against Appellant, a fact he fails to even acknowledge. See Lowenfield v. Phelps, 484 U.S. 231 (1988); Parker v. Dugger, 537 So.2d 969, 973 (Fla. 1988); Bertolotti v. State, 534 So.2d 386, 387 n.3 (Fla. 1988); Taylor v. State, 638 So.2d 30 (Fla. 1993). Based on these cases, this Court should affirm Appellant's sentence of death.

ISSUE XVIII

WHETHER APPELLANT'S SENTENCE IS DISPROPORTIONATE (Restated).

Appellant claims that the death penalty is not proportionally warranted in his case because the murder was "an irrational reaction to the deceased's screaming" and was a "rather standard felony-murder." **Brief of Appellant** at 84-85. To support this contention, Appellant principally relies upon Livingston v. State, 565 So.2d 1288 (Fla. 1988), Morgan v. State, 639 So.2d 6 (Fla. 1994), Fitzpatrick v. State, 527 So.2d 809 (Fla. 1988), and Wilson v. State, 493 So.2d 1019 (Fla. 1986). These cases, however, are easily distinguishable. In Livingston, this Court found that the defendant's severe abuse and neglect as a child, his youth (17 years old), inexperience and immaturity, his low intellectual functioning, and his extensive use of cocaine and marijuana outweighed the "prior violent felony" and "felony murder" aggravating factors. 565 So.2d at 1292. In Morgan, this Court found that both statutory mental mitigators were applicable, as well as the "no significant history" mitigator. Coupled with the defendant's age (16 years old), marginal intelligence, extreme immaturity, learning disorder, inability to read and write, ingestion of gasoline for years and at time of murder, and brain damage outweighed the HAC and "felony murder" aggravating factors. 639 So.2d at 14. In Fitzpatrick, this Court found that the defendant's actions "were those of a seriously emotionally disturbed man-child, not those of a cold-blooded, heartless

killer." Finally, in Wilson, this Court found that the defendant's murder of his father "was the result of a heated, domestic confrontation." 493 So.2d at 1023.

In the present case, the trial court found the existence of two aggravating factors (HAC and "felony murder") and very little in mitigation (disadvantaged childhood, lack of education, and low IQ). Unlike the defendants in the cases cited to by Appellant, Appellant was 26 years old and functioned well in society, he was neither abused nor neglected by his parents, he did not abuse drugs or alcohol, and no statutory mitigating factors were found to be applicable. To support its position that Appellant's sentence is proportionately warranted, the State relies upon Taylor v. State, 630 So.2d 1038 (Fla. 1993), Johnston v. State, 497 So.2d 863 (Fla. 1986), and Quince v. State, 414 So.2d 185 (Fla. 1982).

In Taylor, the defendant broke into an elderly woman's home and surprised her when she returned home. Taylor beat, raped, stabbed and strangled the victim. The trial court imposed the death penalty, finding three aggravating factors (HAC, "felony murder," and "pecuniary gain") and little in mitigation (Taylor was mildly mentally retarded). This Court found the sentence proportionately warranted. 630 So.2d at 1043. In Johnston, the defendant stabbed and strangled his grandmother in her home. The trial court imposed the death penalty, finding three aggravating factors (HAC, "felony murder," and "prior violent felony") and nothing in mitigation. This Court found the sentence proportionately warranted. 497 So.2d at 872. Finally, in Quince,

the defendant beat, raped, and strangled an elderly woman in her home. The trial court imposed the death penalty, finding three aggravating factors (HAC, "felony murder" and "pecuniary gain") and one statutory mental mitigating factor. This Court found the sentence proportionately warranted. 414 So.2d at 188. Based on these cases, this Court should affirm Appellant's sentence of death.

ISSUE XIX

WHETHER FLORIDA'S DEATH PENALTY STATUTE IS UNCONSTITUTIONAL (Restated).

Prior to trial, Appellant filed numerous motions attacking the constitutionality of the death penalty statute. Only some of which relate to the arguments being made on appeal. To the extent they were not raised below, they have not been preserved for appeal. Fotopoulos v. State, 608 So.2d 784, 794 & n.7 (Fla. 1992). Regardless, in Fotopoulos, this Court specifically rejected each of the numerous grounds raised by Appellant for challenging Florida's death penalty statute. See also Thompson v. State, 619 So.2d 261, 267 (Fla.), cert. denied, 114 S.Ct. 445, 126 L.Ed.2d 378 (1993). Appellant has provided no additional reasons upon which to find the statute unconstitutional. Thus, this Court should affirm Appellant's sentence of death.

CONCLUSION

Wherefore, based on the foregoing arguments and authorities, the State submits that this Honorable Court should affirm Appellant's conviction and sentence of death.

Respectfully submitted,

ROBERT A. BUTTERWORTH
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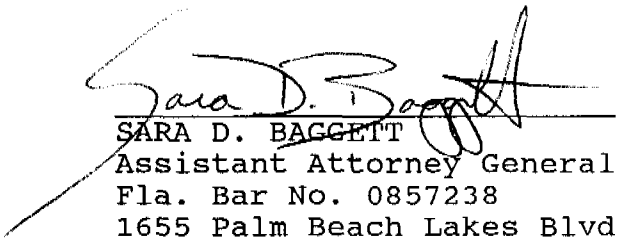

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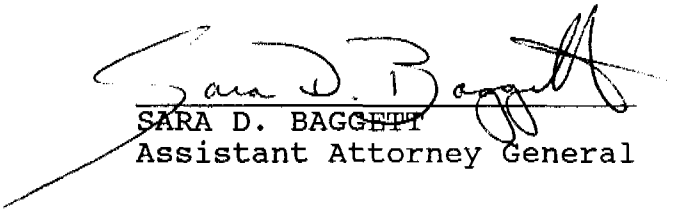
CERTIFICATE OF SERVICE

I hereby certify that the above document was sent by U.S. mail to Richard B. Greene, Assistant Public Defender, Criminal Justice Building, 421 Third Street, Sixth Floor, West Palm Beach, Florida 33401, this 1st day of November, 1994.



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