IN THE SUPREME COURT OF FLORIDA

MARK D. SCHWAB,

Appellant,

v. CASE NO. 80,289

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE EIGHTEENTH JUDICIAL CIRCUIT
IN AND FOR BREVARD COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

KELLIE A. NIELAN
ASSISTANT ATTORNEY GENERAL
Fla. Bar #618550
210 N. Palmetto Avenue
Suite 447
Daytona Beach, FL 32114
(904) 238-4990

COUNSEL FOR APPELLEE

TABLE OF CONTENTS

PAGES:

TABLE OF AUTHORITIES

CASES: PAGES:

OTHER AUTHORITIES

SUMMARY OF ARGUMENTS

POINT 1: The trial court was correct in denying Schwab's motion to disqualify the state attorney's office where Schwab failed to set forth any legal grounds requiring disqualification. Schwab was well aware of Chris White's role as prosecutor, and White never rendered legal advice to Schwab and Schwab never revealed any confidences to White.

POINT 2: Schwab was not denied the effective assistance of counsel when five staff members of the public defender's office were called to establish the chain of custody of a piece of evidence. The underlying facts constituting the chain of custody were uncontested, and in fact were set forth in counsel's motion to withdraw. Even if the letter had not been admissible the outcome would have been the same, so prejudice cannot be demonstrated.

POINT 3: The trial court correctly determined that the state had independently proved the corpus delicti of all crimes charged. The circumstantial evidence "tended to show" that the death was due to the criminal agency of another, that the victim was held against his will, and that a sexual battery had been committed upon the victim.

POINT 4: Collateral crimes evidence was properly admitted as it was relevant to prove motive, opportunity, intent, plan, knowledge, identity, and absence of mistake or accident. The evidence did not become a feature of the trial and unfairly prejudice Schwab. Error, if any, is harmless.

POINT 5: The trial court correctly denied Schwab's motion to suppress. Schwab's statement cannot be construed as an unequivocal request for counsel. Schwab initiated all contact with law enforcement, and his leading the police to the body was not the result of interrogation. Error, if any, is harmless.

POINT 6: Death is the appropriate penalty. The aggravating factors are supported by competent, substantial evidence. The trial court's rejection of certain mitigating factors is supported by competent, substantial evidence. Error, if any, is harmless.

POINT 7: The claim has been waived by failure to present it to the trial court. Error has not been demonstrated.

POINT 1

THE TRIAL COURT WAS CORRECT IN DENYING SCHWAB'S MOTION TO DISQUALIFY THE STATE ATTORNEY'S OFFICE OF THE EIGHTEENTH JUDICIAL CIRCUIT.

Schwab was returned to Florida on April 23, 1991 by Sergeant Blubaugh of the Brevard County Sheriff's Office, who was accompanied by assistant state attorney Chris White (R 2529). During the drive from the Orlando airport to Cocoa Beach, the three stopped at a convenience store so that Schwab could use the rest room (R 2529). White accompanied Schwab, while Blubaugh contacted his office (R 2529). At one point Schwab said to White, "Mr. White, I know you're a prosecutor but you're also an attorney. Do you think I'm doing the right thing?". White responded that the only thing he could tell Schwab was that the victim's parents would certainly appreciate it if he could help find the body (R 2611-12).

On the basis of these facts, Schwab filed a motion to recuse the state attorney's office of the eighteenth circuit, and a motion to dismiss (R 4418-27). As grounds for recusal, Schwab alleged that White was going to be called as a witness, and that a prosecutor cannot act as prosecutor and witness (R 4419). Schwab also cited cases which held that an attorney cannot prosecute a person he previously defended in a criminal case (R 4419). At the hearing on the motions, the trial court stated:

> I cannot conclude that under any circumstances that Mr. Schwab had ever concluded that Mr. White could possibly be construed to be his attorney under any strained construction of the facts.

> Mr. White was there with law enforcement, participated in discovery, was present at various times from when Mr. Schwab gave statements to law enforcement in and out of the room or around the room. His position was clearly that of law enforcement...
>
> ...
>
> Mr. Schwab's statement to Mr. White was voluntarily made. His question to him was kind of out of the blue. It wasn't the result of any type of prompting, and all Mr. White did in response to that at that time was to do nothing more than in my judgment tell Mr. Schwab what he already knew, and I just don't construe that to be any form of legal advice at all, and the way the facts came down, you know, the way it came down, it dispelled any problem I have with the circumstance because just a few minutes after that Mr. Schwab was fully instructed of his rights once again and elected to cooperate as he had done from the beginning at the time of his arrest.

(R 3978-79). The trial court later stated:

> Just disqualifying him [White] based upon his participation and investigation process of the case would certainly not be a legal basis for that, and as I said, if Mr. White, through his investigation or any other member of the State, finds out that someone is coming up here giving a totally different story or significantly changing his or her testimony from sworn testimony they gathered or that they knew about, it would be their obligation to come forward and advise the defense of this and not sit back and accept perjured testimony obviously. They would not do that I don't believe.
>
> I think we're speculating on some of this argument that you made here. You're speculating on what could happen and not giving any specific instances to really rely upon or to make some sort of intelligent ruling on in terms of disqualification. From what I heard

> today and what I've seen in your motion, I can see no legal basis at all or ethical basis to require the State Attorney at this juncture to be disqualified from the prosecution of this case, and that will be the ruling of this court.

(R 3992-93). The court also determined that since the state would not be calling White as a witness that issue was no longer important (R 3991).

The record supports the trial court's finding that there was no legal basis for recusal of the state attorney's office. There were no allegations that White held himself out as a counselor and encouraged Schwab to confide in him, and no allegations or evidence that Schwab did in fact reveal any confidences. Schwab never phrased his question as a request for advice, but rather appeared to be soliciting approval of his actions in assisting in the investigation. White never offered any legal advice to Schwab, but simply, as the trial court stated, told Schwab something that he already knew, which was that the victim's parents would be very happy if Schwab would direct the police to their son's body. As such, the facts of the instant case are readily distinguishable from those in the cases cited by Schwab. *See, Castro v. State,* 597 So. 2d 259 (Fla. 1992) (assistant state attorney who previously represented defendant on same charge was consulted on state's responses to defense's pleadings); *Reaves v. State,* 574 So. 2d 105 (Fla. 1991) (prosecutor previously represented defendant as an assistant public defender in another case which involved many of the same issues as the instant case).

It is undisputed that Schwab was well aware of the fact that White was a prosecutor. Even if Schwab's statement could somehow be construed as soliciting advice, appellee submits that a suspect who is thoroughly familiar with the criminal justice system and who has been advised of his rights on numerous occasions, yet asks the person responsible for prosecuting him "whether he is doing the right thing", should certainly expect that any response is not going to be in his best interest. A defendant has no Fifth Amendment right to consult with the state attorney, *see, e.g., Owen v. State*, 596 So. 2d 985 (Fla. 1992), but when he elects to do so of his own free will he should not be permitted to circumvent justice by claiming that he was given bad advice.

It would seem that if White did in fact render legal advice to Schwab, and that it was so contrary to his interests, that the appropriate remedy would have been to seek suppression of any fruits of the advice pretrial on the basis that Schwab had received ineffective assistance of counsel. Schwab did in fact claim that his due process rights had been violated by this advice, but since he has not pursued this issue on appeal it is apparent that he too sees its lack of merit. Further, as the trial court found, Schwab was again advised of his rights before he did finally lead the police to the victim's body. In addition, while Schwab may have "indicated his desire to assist law enforcement in finding the body" shortly after this exchange, he first led the police on several wild goose chases before he actually showed them where the body was several hours later. In

sum, the trial court correctly denied Schwab's motion to recuse the state attorney's office.

POINT 2

SCHWAB WAS NOT DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL WHERE FIVE EMPLOYEES OF THE PUBLIC DEFENDER'S OFFICE WERE CALLED TO ESTABLISH THE CHAIN OF CUSTODY OF A PIECE OF EVIDENCE.

Schwab claims that he was denied the effective assistance of counsel when the trial court denied defense counsel's motion to withdraw on the basis of a conflict where members of defense counsel's firm (the Public Defender's Office) were called as witnesses by the state. Schwab claims that his attorneys were placed in a position of discharging their duty of advocacy on behalf of their client at the risk of alienating people they work with on a daily basis. Schwab contends that this "conflict" resulted in ineffective assistance of counsel which became even more substantial at trial when defense counsel announced that he was unable to conduct any cross examination of the witnesses. Appellee contends that the trial court was correct in denying counsel's motion to withdraw and that Schwab has failed to demonstrate any actual conflict or that any of his rights were impaired.

An attorney called as a witness may continue representation until it becomes apparent that the testimony is or may be prejudicial to his client. *Ray v. Stuckey*, 491 So. 2d 1211 (Fla. 1st DCA 1986). Testimony is prejudicial only where it is sufficiently adverse to the factual assertions or account of events offered on behalf of the client. *Id.* Prejudice that might result must be more than *di minimus*; it must be substantial enough that an independent attorney might seek to cross examine the

witness and question his credibility. *Cazares v. Church of Scientology of California, Inc.*, 429 So. 2d 348 (Fla. 5th DCA 1983). A lawyer is not required to withdraw from a case because the lawyer will be a witness where the testimony relates to an uncontested matter which is not prejudicial to the client. *Beth S. v. Grant Associates, Inc.*, 426 So. 2d 1008 (Fla. 3d DCA 1983). Finally, where one lawyer in the firm is called as a witness, another lawyer in the firm may act as advocate pursuant to rule 4-3.7(b), Rules Regulating the Florida Bar. *Estate of Gory*, 570 So. 2d 1381 (Fla. 4th DCA 1990).

Appellee contends that the staff members of the public defender's office testified to uncontested matters which were not adverse to the position taken by the defense. Even if another attorney had been appointed to represent Schwab there would have been no basis to test the credibility of the witnesses. Shiela King, the secretary supervisor in the Rockledge office, testified that on March 23, 1992 she opened the letter, stamped it, copied it, and put it in the box to go to the Titusville office (R 1359-69). Donna Estadt, a secretary in the Titusville office, testified that the letter arrived at her office in the courier pack on March 24, 1992, and that she gave it to James Hatfield (R 1394-99). James Hatfield testified that he picked up the letter at the Titusville office and took it to the Rockledge office (R 1418-21). Norm Channel, an investigator, testified that he received the letter from Hatfield, locked it in his car over night and gave it to Gene Stevenaus the next day (R 1424-27). Gene Stevenaus testified that he received the letter, left it in

his credenza over night, and turned it over to Agent Lee Wenner (R 1429-36).

In his motion to withdraw, Schwab's attorney alleged that a letter was received at the Rockledge office on March 23, and was opened by Shiela King who placed it in the courier for Titusville (R 4443). Hatfield took possession of the letter in Titusville on March 24 and returned it to the Rockledge office. The letter was inspected by Brian Onek, Norman Channel, James Hatfield, Gene Stevenaus, and Kenneth Rhoden (R 4443). Stevenaus took possession of the letter, and on March 26 turned the letter over to Lee Wenner (R 4443-44). As the trial court observed, this pleading filed by Schwab's attorney established almost in the form of a stipulation what had occurred (R 1381). The trial court further observed that the public defender was well aware of where the letter came from and what was done with it, and that a lawyer is bound by ethics to ask only appropriate questions and not ask questions he knows to be false (R 1382).

The record demonstrates that the underlying facts constituting the chain of custody were not in dispute, and Schwab has set forth nothing that could have been brought out to test the credibility of these witnesses. In fact, if the witnesses had testified any differently, it would have been in conflict with the facts set forth in the motion to withdraw, so prejudice could not be demonstrated and the trial court was correct in denying the motion to withdraw. *Cazares, supra; Beth S., supra; Ray, supra.* The testimony was not adverse to the account of events offered on behalf of the client. *Allstate Insurance Co. v. English,* 588 So. 2d 294 (Fla. 2d DCA 1991).

For the same reasons, reversal is not warranted on the basis that counsel refused to cross examine these witnesses. As demonstrated, the facts underlying the chain of custody of the letter were not in dispute; the witnesses testified to the same facts set forth in counsel's motion to withdraw. While Schwab now claims that the trial court forced counsel into this "ethical bind" (refusing to cross examine), appellee submits that counsel (or substitute counsel) would have been in a much greater "ethical bind" had he attempted at trial to dispute the same facts that he had alleged in his motion as a basis for withdrawal. Schwab has set forth nothing nor can appellee ascertain anything from the record that counsel could have done which would have in any way affected the outcome on this issue. In other words, the letter would have been admitted in any event.

The facts of this case are readily distinguishable from those in the case relied upon by Schwab. *See, Jennings v. State,* 413 So. 2d 24 (Fla. 1982). In *Jennings,* the testimony of the witness that the defendant's attorney refused to cross examine was critical in that it was the only direct evidence of premeditation. As demonstrated, in the instant case the witnesses' testimony went to the collateral matter of establishing chain of custody, and as also demonstrated, those facts had already been set forth by Schwab's attorney in his motion to withdraw. Credibility simply was not at issue as to any of these witnesses. Further, the letter which was admitted pursuant to the testimony of these witnesses was but one small piece of evidence in a case where the remainder of the evidence

was overwhelming. *See,* Point 4, *infra.* Consequently, even if counsel had been able to successfully challenge the chain of custody and admission of the letter into evidence, the outcome would have been the same. Reversal is not warranted.

POINT 3

THE TRIAL COURT CORRECTLY DETERMINED THAT THE STATE INDEPENDENTLY PROVED THE CORPUS DELICTI OF ALL CRIMES CHARGED SO SCHWAB'S STATEMENTS WERE ADMISSIBLE AND HIS CONVICTIONS ARE PROPER.

Schwab contends that the state failed to prove the corpus delicti of the crimes for which he was on trial, so his statements should not have been admitted. Schwab further claims that the trial court erred in convicting him since the corpus delicti was not proved independent of the statements. As to the murder charge, Schwab claims that the state failed to prove that the death was due to the criminal agency of another. As to the sex battery charge, Schwab claims that there was no evidence other than his statement. As to the kidnapping charge, Schwab claims that there was no evidence that the victim accompanied Schwab against his will. The record demonstrates that there was independent circumstantial evidence sufficient to show that the crimes had been committed.

"To warrant trial, corpus delicti need not be proven beyond a reasonable doubt, but merely by evidence tending to show that a crime has been committed." *Thomas v. State,* 531 So. 2d 708, 711 (Fla. 1988). The state is not "obligated to rebut conclusively every possible variation...or to explain every possible construction in a way which is consistent only with the allegations against the defendant." *State v. Allen,* 335 So. 2d 823, 826 (Fla. 1976). The evidence must at least show the existence of each element of the crime, but it need not be uncontradicted or overwhelming. *Id.* at 823. *See also, Burks v. State,* 18 Fla. L.

Weekly S71 (Fla. January 21, 1993). Circumstantial evidence is all that is required to establish a preliminary showing of the necessary elements of the crime. *Allen, supra.*

The corpus delicti in a homicide consists of: (1) the fact of death; (2) the existence of the criminal agency of another; and, (3) the identity of the deceased. *Bassett v. State,* 449 So. 2d 803 (Fla. 1984). "Expert medical testimony as to the cause of death need not be stated with reasonable certainty in a homicide prosecution and is competent if the expert can show that, in his opinion, the occurrence could cause death or that the occurrence might have or probably did cause death." *Buenoano v. State,* 527 So. 2d 194, 197-98 (Fla. 1988). The medical examiner testified that there was no indication that the victim's death was accidental, and it was his opinion that the cause of death was smothering or strangulation (R 260). He further testified on redirect that no other possibilities rose to the level of medical certainty (R 288). The opinion was based on medical factors revealed during the autopsy, as well as the circumstances under which the body was found, including the facts that it was nude, in a trunk that was tied with rope, and there were torn clothes in the trunk with the body (R 251). Additional evidence presented by the state demonstrated: the nude body was found in a trunk that was partially open with rope tied around it; palm fronds had been placed up against the trunk; the victim's torn clothes were in the trunk; duct tape containing Schwab's fingerprint which had been in contact with skin was found in the trunk; and receipts for a trunk and a motel room were recovered from Schwab's car (R 84, 93-95, 111, 182, 1499, 1532).

Appellee submits that this evidence was sufficient to establish that the death was caused by the criminal agency of another. *Bassett, supra* (medical examiner rendered an opinion that within a reasonable medical certainty the victims died as a result of another's criminal act; two decomposed bodies found in remote area, skeletons had fractured bones, neither body had identification, shoes, wallets or belts, and victims had stable state of mind before death); *Buenoano, supra* (medical experts testified that arsenic concentrations in victim's organs were high enough to determine that cause of death was chronic arsenic toxication; victim healthy upon return from Vietnam, defendant refused to take victim to hospital when he began to hallucinate, and defendant collected proceeds from life insurance upon victim's death); *Stano v. State,* 473 So. 2d 1282 (Fla. 1985) (medical examiner could not pinpoint cause of death but ruled out natural causes; victim's body found covered with palm fronds in remote area thirty miles from her home, details mentioned in crime scene correlate well with crime scene and physical appearance of victim and her belongings). Further, Schwab never contested the fact that the victim had been murdered, but rather claimed that "Donald" was responsible for the murder. *See, e.g., Sochor v. State,* 18 Fla. L. Weekly S273 (Fla. May 6, 1993) (defendant did not contest fact that victim was dead, but based theory of defense on theories of involuntary intoxication or mistaken identity). Finally, since the state also proved the corpus delicti of kidnapping and sexual battery, the murder conviction is supported under a felony murder theory.

Likewise, the state presented sufficient evidence to prove the corpus delicti of kidnapping, despite the fact that the victim may have initially willingly accompanied Schwab. This court recently found that evidence very similar to that presented in the instant case was sufficient to support a kidnapping conviction, *Sochor, supra,* and appellee submits that if such evidence is sufficient to support a conviction it is certainly sufficient to establish corpus delicti. In *Sochor,* the evidence adduced at trial showed that although the victim may have entered the defendant's truck voluntarily, at some point she was held unwillingly. This court found that the victim's removal from the lounge parking lot to a secluded area facilitated Sochor's acts, avoided detection, and was not merely incidental to, or inherent in, the crime.

Similarly, in the instant case, the evidence shows that even if the victim accompanied Schwab voluntarily, at some point he was held unwillingly. The victim's removal to a motel room, binding with duct tape, and the forcible removal of his clothes facilitated Schwab's acts, avoided detection, and was not inherent in the crime. Appellee submits that such evidence was sufficient to prove the corpus delicti of a kidnapping. *See also, Bedford v. State,* 589 So. 2d 245 (Fla. 1991) (victim's body found bound and evidence of numerous injuries along with evidence that victim transported to isolated area where there would be no possibility of meaningful contact with members of the public tended to show each element of the crime charged); *Justus v. State,* 438 So. 2d 358 (Fla. 1983) (evidence that victim found miles from

store at which she intended to deliver sunglasses and that she was the victim of deadly force).

The state also presented sufficient evidence "tending to show" each element of a sexual battery. The medical examiner testified that there was evidence of possible bruising in the victim's anus (R 267, 270). While the medical examiner testified that this also could have resulted from decomposition, appellee submits that in terms of corpus delicti, all reasonable hypotheses of innocence need not be excluded. *Hester v. State*, 310 So. 2d 455, 457 (Fla. 2d DCA 1975). It is unnecessary to negate all noncriminal explanations of the event prior to the admission of the confession. *Davis v. State*, 582 So. 2d 695 (Fla. 1991). *See also, Allen, supra* (state not obligated to rebut conclusively every possible variation or to explain every possible construction in a way consistent only with the allegations against the defendant). The medical examiner further testified that it was not unusual that there was no trace of semen in light of the decomposition (R 265), and that he would have been surprised to find such in light of the decomposition (R 277).

It is enough if the evidence tends to show that the crime was committed. *Frazier v. State*, 107 So. 2d 16 (Fla. 1958). The victim's body was nude, and his clothes had been forcibly removed. There was a length of duct tape in the trunk with the body which showed "mass reaction" to being in contact with human skin, and there was no hair on the tape, which indicates that the victim had been bound with the tape (R 182-83). The medical examiner's testimony in conjunction with this circumstantial

evidence tends to show that a sexual battery was committed upon the victim. *See, e.g., Dailey v. State,* 594 So. 2d 254, 258 (Fla. 1992) (detective permitted to testify that because victim's body found nude and her clothing scattered it was highly likely that a sexual battery or attempt had occurred).

Even if this court determines that the corpus delicti as to any one of the crimes was not independently established, but at least one or two of the others were, appellee submits that the entire statement was properly admitted. Appellee recognizes that a majority of this court recently reaffirmed its prior holdings that corpus delicti must be proved before a confession is admitted, but submits that in a case such as this, where the defendant has led the police to the body and his statements correlate so well with the evidence, and the corpus delicti has been established as to one or two of the crimes admitted to in the defendant's statement, the "trustworthiness" test should be utilized as to other admissions where corpus delicti has not been established. *Burks, supra* (Shaw, J., concurring and dissenting). Since the details Schwab mentioned in his statements to the police and in his conversations with his aunt correlate well with the surrounding facts, the crime scene, the physical appearance of the victim, and the remaining evidence, there is no danger that Schwab was convicted out of "derangement, mistake or official fabrication". *Allen, supra* at 825.

POINT 4

COLLATERAL CRIMES EVIDENCE WAS PROPERLY ADMITTED AS IT WAS RELEVANT TO PROVE MOTIVE, OPPORTUNITY, INTENT, PLAN, KNOWLEDGE, IDENTITY AND ABSENCE OF MISTAKE OR ACCIDENT, AND SUCH EVIDENCE DID NOT BECOME A FEATURE OF THE TRIAL.

Schwab contends that the trial court erred in permitting the state to present evidence of collateral crimes since it was irrelevant and became a feature of the trial. This court has long held that evidence of collateral crimes is admissible to prove motive, opportunity, intent, identity, state of mind, and common plan or scheme. §90.404(2), Fla. Stat. (1991); *Williams v. State*, 110 So. 2d 654 (Fla. 1959); *Phillips v. State*, 476 So. 2d 194 (Fla. 1985); *Bundy v. State*, 455 So. 2d 330 (Fla. 1984); *Jackson v. State*, 522 So. 2d 802 (Fla. 1988). The test for admissibility of evidence is relevancy and not necessity, and collateral crime evidence is admissible to establish the entire context out of which the criminal episode occurred. *Smith v. State*, 365 So. 2d 704 (Fla. 1978); *Ruffin v. State*, 397 So. 2d 277 (Fla. 1981); *Heiney v. State*, 447 So. 2d 210 (Fla. 1984); *Craig v. State*, 510 So. 2d 857 (Fla. 1987). *See also, Tumulty v. State*, 489 So. 2d 150 (Fla. 4th DCA 1986); *Austin v. State*, 500 So. 2d 262 (Fla. 1986). Even if the evidence reveals the commission of a collateral crime, it is admissible if found to be relevant for any purpose, save that of showing bad character. *Randolph v. State*, 463 So. 2d 186 (Fla. 1986). Appellee contends that the testimony of Ben Tawny, Than Meyer, and Dale Marsh was properly admitted as it was relevant to motive, opportunity, intent, identity, state of mind, common plan

or scheme, and lack of mistake. Further, the testimony, which covers less than 85 pages of a 1900 page transcript,[1] did not become a feature of the trial and unfairly prejudice Schwab.

Tawney testimony

Ben Tawney was sixteen years old when he encountered Schwab, and was smaller and blonder than when he testified at trial (R 1160, 1262). Tawney met Schwab through a friend the Saturday night before the victim disappeared (R 1160-63). Schwab had picked Tawney up at his home around midnight, had taken him to the friend's house, and after the group drove around and drank some beers Schwab offered to drive Tawney back home (R 1164-65). Schwab asked Tawney if he wanted to check out some "party spots" by Pine Island Road on Merritt Island, but they could not find any parties (R 1166, 1176). Tawney thought that Schwab was driving him home, but Schwab grabbed him by the hair and pulled a knife on him, and offered Tawney $1,000 to "suck his dick" (R 1181). Tawney jumped out of the car and Schwab left (R 1181-83). Tawney walked for about twenty minutes until he arrived at a gate at the Kennedy Space Center (R 1182). Tawney arrived at the gate at 3:25 p.m. (R 1256).

During a phone conversation with his aunt prior to his capture and arrest, Schwab stated that the Saturday night before the victim disappeared he had encountered a man named Donald as

---

[1] The state's case took over 1700 pages, and there is no voir dire since this was a bench trial. The trial court specifically stated that the state had presented a significant amount of other evidence, and that the probative value versus prejudicial effect would be considered. The court further stated that he was aware of the law and was capable of accepting the testimony for the limited purposes for which it was offered (R 1634-35).

he was leaving a bar on Merritt Island at around 2:00 a.m. Donald threatened Schwab at that point, and later forced Schwab to kidnap and rape the victim (R 644-48). In two statements to Detective Blubaugh, Schwab repeated his story that he had encountered Donald at a bar on the Saturday night/Sunday morning prior to the victim's disappearance, and that it was Donald who forced him to kidnap and rape the victim (R 731, 867-70). The trial court found that Tawney's testimony was relevant for timing, to rebut Schwab's alibi/defense, and was also relevant to demonstrate motive (R 1185-88).

For evidence to be relevant, it must have a logical tendency to prove or disprove a fact which is of consequence to the action. *Amoros v. State*, 531 So. 2d 1256, 1259-60 (Fla. 1988), quoting C. Erhardt, *Florida Evidence* §401.0 (2d ed. 1984). Appellee first submits that there were sufficient points of similarity to demonstrate Schwab's motivation and method of operation, which involves taking young blonde boys under seemingly innocent circumstances, into his vehicle, then taking them to secluded areas and threatening them for sex. *See, e.g., Duckett v. State*, 568 So. 2d 891 (Fla. 1988) (evidence established defendant's tendency to pick up young, petite women and make passes at them while in his patrol car at night on duty relevant to establish method of operation, identity and common plan).

Even if the evidence was not sufficiently similar, it was still admissible as it was relevant to rebut Schwab's anticipated defense. *Williams, supra* (collateral crimes evidence was relevant to establish anticipated defense of consent). Collateral crimes

evidence need not meet the rigid similarity requirement where it is used to prove something other than identity. *Craig, supra. See also, Gould v. State*, 558 So. 2d 481, 485 (Fla. 2d DCA 1990; *Calloway v. State*, 520 So. 2d 665, 668 (Fla. 1st DCA 1988). The introduction of evidence of other crimes which are factually dissimilar to the charged crime is not barred so long as the evidence is relevant. *Bryan v. State*, 533 So. 2d 744 (Fla. 1988). While Schwab states that this incident occurred five days before the instant offenses, any connection between it and his alibi is attenuated at best, he has omitted the fact that in three separate statements, he claimed to have met and been threatened by "Donald" on that day and time five days before the offenses. As such, this evidence certainly tended to disprove a fact that was of consequence to the action. *Amoros, supra.* The Tawney incident was not wholly independent of the crimes at issue, but was an integral part of the entire factual context in which the charged crimes took place. *Craig, supra.* Since Tawney's testimony was relevant to rebut Schwab's alibi/defense, it was properly admitted.

Meyer testimony

Than Meyer met Schwab when he was thirteen years old, small and blonde (R 1591, 1616). Schwab had adopted the Meyers' dog, and called the Meyer home (R 1594). Schwab then came over to the Meyer home several times, and wanted to take Meyer and his brother to Wet 'n Wild, but their mother would not let them go (R 1594). Within a month of meeting Meyer, Schwab called him when he was home alone one day and asked him if he wanted to help

Schwab paint (R 1595). Meyer agreed to go, and as they were driving, Schwab asked Meyer if he wanted to see his house (R 1597). Meyer said "sure", and Schwab took him to a duplex where he put a knife to Meyer's throat, had him remove his clothes, tied his hands behind his back, wrapped something around his head and anally raped him (R 1598-1612). Schwab told Meyer that if he did not tell he would put $200 in his mailbox the next day (R 1612). The trial court determined that the facts were "strikingly similar", and found that this evidence was relevant to show identity, intent, and knowledge, i.e., he has done it before so he knows how to do it.

Schwab first claims that since he did not kill Meyer, this evidence was not admissible as to the murder charge. The fact that the instant case resulted in a murder while the other incidents did not is not dispositive, particularly where the evidence is relevant to issues other than identity. *Gore v. State,* 599 So. 2d 891 (Fla. 1992); *Duckett v. State,* 568 So. 2d 891 (Fla. 1990); *Chandler v. State,* 442 So. 2d 171 (Fla. 1983); *Randolph v. State,* 463 So. 2d 186 (Fla. 1984); *Mason v. State,* 438 So. 2d 374 (Fla. 1983). As the trial court found, this evidence was relevant to show intent and knowledge as well as identity, and appellee further submits it was also relevant to prove motive and plan.

In *Gore,* the evidence of a previous rape was admitted to establish identity of the murderer and to show the defendant's intent in accompanying the victim the evening she was killed. This court determined that the two crimes had pervasive similarities; the victim was a small female with dark hair; Gore

introduced himself as "Tony"; he had no automobile of his own; he was with the victim for a lengthy amount of time before the attack began; he used or threatened to use binding; the attack had both a sexual and pecuniary motive; the victim suffered trauma to the neck area; the victim was transported in the victim's car; the victim was attacked at a trash pile on a dirt road and then left; Gore stole the victim's car and jewelry; he pawned the jewelry shortly after the theft; and he fled the state after the crimes in the victim's automobile and stayed with a relative or friend and represented the car as a gift. This court determined that the similarities were pervasive, the dissimilarities insubstantial, and that the few dissimilarities seemed to be the result of differences in opportunities rather than differences in modus operandi. This court further found that while the common points between the two crimes may not have been sufficiently unusual when considered individually, they established a unique pattern of criminal behavior when all of the common points were considered together, so as to establish a unique modus operandi.

Likewise, the similarities between the Meyer incident and the instant crimes are pervasive. Both victims were young, male, small and blonde; Schwab made contact with both victims through their families and over several weeks established a relationship with both; both victims were lured away from their families under false pretenses after the parents had not permitted Schwab to take the victims on an outing alone with him; both victims hands were bound (Meyer was bound with electrical and Junny with duct

tape, but Schwab stated that the only thing missing from his motel room after he returned and "Donald" had left was the electrical cord from his razor); both victims' faces were covered; both were placed face down before being anally raped; a knife was used in both incidents (Meyer was threatened with a knife, and Junny's clothes were cut off of his body with a knife). As in *Gore*, the similarities establish a unique method of operation and clearly point to Schwab as the perpetrator of both crimes.

In *Duckett*, the evidence established the defendant's tendency to pick up young, petite women and make passes at them while he was in his patrol car at night, on duty, in his uniform. Duckett argued that the incidents involved no force or violence and involved women who were older than the victim, but this court concluded that the evidence was relevant to establish Duckett's method of operation, his identity, and a common plan, and that there were sufficient points of similarity to conclude that no *Williams* Rule violations occurred as to two of the incidents. *Duckett, supra* at 895. In the instant case, the evidence shows Schwab's tendency to acquaint himself with young, blonde boys through their families, then after establishing a certain amount of trust with the youngsters he abducts them, binds them, covers their faces and anally rapes them. As in *Duckett*, the evidence establishes Schwab's method of operation, his identity, and a common plan, and was properly admitted.

In *Chandler, supra*, the similar fact evidence was admitted solely to establish identity, and consisted of a Texas conviction

seven years prior to the murder in Florida, where the victim had been abducted, beaten and robbed, but not killed. This court determined that the similarities, considered one against the other, established a sufficiently unique pattern of criminal activity to justify admission of the evidence, and that the dissimilarities only suggested differences in opportunity rather than significant differences in method of operation. *Id.* at 173. Similarly, in the instant case, the similarities establish a sufficiently unique pattern of activity, and the one dissimilarity only suggests a difference in opportunity or state of mind.

Mason, supra, also involved similar fact evidence which was used solely to establish identity. This court noted that there were several dissimilarities, including the fact that one of the crimes was a homicide and the other a rape. This court went on to acknowledge that there were many similarities between the crimes, including: the attacker entering the home through the window; arming himself with a knife; and assaulting the woman in her bedroom. It held that there were enough identifiable points of similarity and that they were unusual enough to warrant the admission into evidence. *Id.* at 376-77. In *Kight, supra,* the two offenses occurred on the same day, both victims were black cab drivers, they were taken to the same general area of town, a knife was used in both incidents, both victims were robbed, and the defendant was picked up outside a Main Street bar. This court acknowledged the major dissimilarity that one of the victims fortuitously escaped with his life, but further noted

that under the facts, the evidence was relevant not only to identification, but also to show motive and intent, and was therefore admissible. *Id.* at 928. Again, in the instant case, there are numerous points of similarity, which made the evidence relevant to identity, motive, intent, and method of operation.

Schwab next claims that the evidence was inadmissible as to the sexual battery since there was no proof of a sexual battery against the victim in the instant case. As demonstrated in the previous point, the state presented sufficient evidence to establish corpus delicti, and in combination with Schwab's statements that he had sex with the victim, there was sufficient evidence that a sexual battery occurred. Finally, Schwab claims that even if a sexual battery occurred, identity was not an issue since he admitted the offense. As stated, the test for the admissibility of evidence is relevancy and not necessity. *Craig, supra.* The state certainly had the right to present evidence of identity as to the sexual battery, and the evidence was not only relevant as to the sexual battery, but also as to the kidnapping and murder. Meyer's testimony was properly admitted.

Marsh testimony

Dale Marsh was a high school sophomore, 4' 10" tall, weighed 85 pounds, and had blonde hair when he encountered Schwab as he was walking to school in 1986 (R 1641). Schwab was in a bank parking lot with the hood of his truck up, and called Marsh over to help him start the truck (R 1642). The truck started right up, and Schwab asked Marsh if he wanted a ride to school (R 1642). Schwab pulled out of the parking lot, grabbed Marsh by

his hair, pulled his head into his lap, put a knife to his throat and began driving toward the Kennedy Space Center (R 1644). At the Pine Island section of Merritt Island, Schwab pulled the truck next to a tree so that the passenger door could not be opened, and told Marsh to take his shorts off (R 1645). Schwab had Marsh masturbate himself, then Schwab unsuccessfully attempted fellatio on Marsh, and after a half hour or so told Marsh to put his shorts back on (R 1645). Schwab told Marsh he would kill him if he told anybody, then dropped Marsh back off at school (R 1646). Two days later Schwab pulled up as Marsh was walking down the street, gave him twenty dollars, and thanked him for not telling (R 1647).

The trial court stated that this evidence was not similar for identification purposes, but was relevant to show intent, lack of mistake/lack of duress, knowledge and motive. Again, this evidence, i.e., Schwab's luring of a small, young, blonde male into his vehicle under seemingly innocent circumstances, for the purpose of obtaining sexual gratification through force, is certainly relevant to Schwab's method of operation, motivation and lack of mistake. As the trial court found, it was also relevant to rebut Schwab's duress defense, as it shows that Schwab is capable of formulating and carrying out such actions on his own initiative.

Even if the admission of any of this testimony was error, appellee contends that it was harmless at worst, where the other evidence was overwhelming and the trial court specifically acknowledged the limited uses of collateral crimes evidence.

State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). Schwab had fabricated a scenario in order to gain the trust of his victim and the victim's family (R 317-387). On April 18, 1991, the victim received a message at school to meet his dad at the ball fields (R 1331-36). The victim was last seen April 18 with a tall thin man getting into a U Haul truck (R 1353-54). Schwab's mother's telephone credit card bill reflected two calls from the ball field to the Martinez home. Schwab had rented a U Haul at 1:00 p.m. on April 18, and it was returned the next day with 153 miles on it (R 1279, 1286-88). On April 17, 1991, Schwab rented a room at a Motel 6 and paid for two nights (R 1245-46, 1499). A receipt found in Schwab's car reflected the purchase of a footlocker on April 18, 1991 (R 1547-65). The victim's body was found in a footlocker (R 84). A piece of duct tape in the trunk with the body contained Schwab's fingerprint (R 190-95). Schwab left the state, and contacted his aunt once on April 20 and twice on April 21 (R 469-88). Schwab admitted involvement in the victim's disappearance and sexual battery, but claimed he was forced to participate by "Donald" (R 469-88). Schwab's attorney received a letter from "Donald" which contained Schwab's fingerprints (R 1719-22). After he was arrested in Ohio, Schwab gave several statements admitting involvement but again implicating Donald (R 526, 542-43). After returning to Florida, Schwab led the police on several searches for the victim's body, which was located on the third search (R 550-52). In light of this overwhelming evidence, the erroneous admission of any similar fact evidence must be considered harmless at worst.

POINT 5

THE TRIAL COURT CORRECTLY DENIED SCHWAB'S MOTION TO SUPPRESS WHERE SCHWAB INITIATED ALL CONTACT WITH LAW ENFORCEMENT OFFICERS.

Schwab contends that the trial court erred in not suppressing his last statement to Sergeant Blubaugh, since he had invoked his right to counsel during the ride from the Orlando Airport to the police station in Brevard County. Schwab claims that his statement to assistant state attorney Chris White was an "outright" request for counsel, and that everything that occurred after that should have been suppressed. Appellee contends that the trial court was correct in denying the motion to suppress, and even if error occurred it was harmless at worst.

A trial court's ruling on a motion to suppress is presumed to be correct. *Jones v. State,* 612 So. 2d 1370 (Fla. 1992). The trial court found that the brief conversation between Mr. White and Schwab had been initiated by Schwab, and that Mr. White did not attempt to advise Schwab (R 4381). The court found that at no time during the trip from Orlando to Cocoa did Schwab ever make an unequivocal request for counsel, and that even if Schwab's statement to White amounted to a "request" for counsel, it was "equivocal" at best (R 4382). The trial court stated that there can be no better method of clarifying a defendant's intent than by reading him his rights again, which is precisely what Sergeant Blubaugh did, and Schwab expressed his desire to continue cooperating with the police (R 4382). The trial court found that this waiver was voluntarily made (R 4382). The trial

court also found that any possible "taint" from Mr. White's response was removed by Schwab's own voluntary actions, and that there was no effort to interrogate Schwab at that time (R 4381). The trial court found that Schwab's statements to Sergeant Blubaugh on April 24 were made after Schwab voluntarily signed a waiver of rights form (R 4383).

Schwab acknowledges that he had voluntarily waived his rights on two prior occasions in Ohio, but contends that his statement to White was an outright request for counsel, and that everything occurring after that should have been suppressed. Schwab also acknowledges that no further interrogation occurred after his conversation with White (IB 51). Schwab does not contest any of the other facts found by the trial court, and appellee contends that under these facts, which are fully supported by the record, Schwab's last statement to Sergeant Blubaugh was properly admitted, as was all of the other evidence.

Appellee first contends that it is not even necessary to determine whether or not Schwab requested counsel for several reasons. As to the fact that Schwab led police to the body, the record clearly demonstrates that Schwab initiated all conversations on this issue, and further demonstrates that there was no interrogation on this issue. At the last toll booth before Cocoa Beach, Schwab told Blubaugh that he wanted to talk further about the incident (R 548). Blubaugh read Schwab his rights again, and Schwab indicated that he wanted to talk (R 548). Schwab said that he wanted to check a place on Merritt Island for the victim's body (R 548). Blubaugh took Schwab to

that location, but nothing was found so they returned to the police station (R 549). Schwab then said he thought the body could be located in Canaveral Groves, so he was given a map and they searched the Canaveral Groves area for about an hour but found nothing (R 551). They returned to the police station, and Blubaugh told Schwab that he was leaving (R 552). Schwab asked for one more chance, and said he could help them locate the body (R 552). On this third search, that Schwab requested after Blubaugh attempted to leave for the evening, the body was found (R 553). Blubaugh and Schwab returned to the police department, Blubaugh again advised Schwab of his rights, and Schwab signed another (his third) waiver (R 55-56).

Schwab initiated contact and volunteered all information after his conversation with White. In *Edwards v. Arizona,* 451 U.S. 4777 (1981), the Court held that a suspect who has expressed a desire to deal with the police only through counsel is not subject to further interrogation unless he himself initiates further communication, exchanges, or conversations with the police. *Edwards* does not foreclose finding a waiver of Fifth Amendment protections where the accused initiates the discussions with authorities. *Minnick v. Mississippi,* 111 S.Ct. 486 (1990). This court has recognized that volunteered statements not made in response to an officer's questioning are not barred by the Fifth Amendment. *Christopher v. State,* 583 So. 2d 642 (Fla. 1991). This court has also recognized that nothing prevents an accused from changing his mind and volunteering information after previously invoking the right to counsel. *Durocher v. State,* 596 So. 2d 997 (Fla. 1992).

As in *Durocher* and *Christopher*, it was Schwab who initiated the contact and volunteered the information. As stated, Blubaugh even attempted to leave and go home, but Schwab insisted that if given just a little bit more time he could lead them to the body. Consequently, even if it could somehow be said that Schwab's conversation amounted to an unequivocal request for counsel, all evidence flowing from his subsequent statements was properly admitted where Schwab initiated the contact, was again informed of and waived his rights, not merely volunteered but insisted on the opportunity to provide information, was again informed of and waived his rights, and voluntarily gave another statement.

Appellee further submits that Schwab's statement to White certainly cannot be construed as an unequivocal request for counsel. Schwab certainly knew who White was, since he prefaced his statement with the fact that he knew White was a prosecutor, and Schwab had previous contact with the criminal justice system so he was well aware of the role of the prosecutor. Blubaugh testified at the suppression hearing that he made sure Schwab knew who White was (R 2577). Schwab also was well aware of the gravity of the situation he was in, since he remarked to his aunt on several occasions that this was a capital offense and he was facing either life in prison or the death penalty (R 616). As the trial court noted, Schwab's statement was at best an equivocal request, and since he was again advised of all of his rights and waived them, the evidence was properly admitted.

Even if the trial court erred in admitting Schwab's statement, it is harmless in light of Schwab's other statements

which were properly admitted and the other evidence that was overwhelming. *See*, Point 4, *supra*. *See*, *Mendyk v. State*, 545 So. 2d 846 (Fla. 1989) (where several confessions were properly before jury, admission of one or more confessions to same act, even if erroneous, must be deemed harmless beyond a reasonable doubt).

POINT 6

DEATH IS THE APPROPRIATE PENALTY.

Schwab contends that his death sentence must be vacated because the trial court found an improper aggravating circumstance, made certain erroneous factual determinations, and rejected highly relevant and appropriate mitigating circumstances. Appellee contends that death is clearly the appropriate penalty for this brutal and torturous kidnap, rape and murder. The aggravating factors are supported by the record and outweigh the mitigating factors.

Aggravating Factors.

When there is a legal basis to support an aggravating factor, a reviewing court will not substitute its judgment for that of the trial court. *Occhicone v. State,* 570 So. 2d 902 (Fla. 1990). The resolution of factual conflicts is solely the responsibility and duty of the trial judge and an appellate court has no authority to reweigh that evidence. *Gunsby v. State,* 574 So. 2d 1085 (Fla. 1991) In arriving at a determination of whether an aggravating circumstance has been proved, the trial judge may apply a "common-sense inference from the circumstances". *Swafford v. State,* 533 So. 2d 270, 277 (Fla. 1988); *Gilliam v. State,* 582 So. 2d 610, 612 (Fla. 1991). When a trial judge, mindful of the applicable standard of proof, finds that an aggravating circumstance has been established, this finding should not be overturned unless there is a lack of competent substantial evidence to support it. *Bryan v. State,* 533 So. 2d 744 (Fla. 1988). The facts of this murder and precedent demonstrate that there is

a factual basis for each of the aggravating factors found by the trial court and contested by Schwab, and that each is supported by competent, substantial evidence.

Heinous, atrocious and cruel

In finding that this circumstance was established, the trial court stated that he accepted the expert medical opinion of the medical examiner that the homicide was the result of strangulation or suffocation (R 4646). The trial court also found that the murder was accompanied by additional acts that set this crime apart from the norm of capital felonies, specifically:

> Junny Rios Martinez left Stradley ballfield with the defendant thinking he was with a trusted friend. The defendant drove the victim in a rented U-haul truck to his motel room. Once inside the room the defendant physically overcame the child and bound his hands with duct tape and placed the tape over his mouth. The defendant then violently cut the child's clothes off with a knife, rendering him naked and terrified. At the time, Junny Rios Martinez was five feet tall and weighed approximately 76 pounds. He was eleven years old. During this crime scenario, the defendant punched the child twice in the stomach. His head was covered for part of the time with a bed sheet or mattress cover. The child continued to cry and began to physically shake. He was subjected to being raped anally by the adult defendant. The defendant admitted that this rape caused the child pain. The rape continued until the defendant climaxed.
>
> At no time did the defendant state that this child lost consciousness. In fact the contrary is shown. The defendant said that the child continued to cry even with the duct tape on his face. By the defendant's own account, this crime sequence involved a

> significant amount of time. At some point after the rape, the child was either strangled or smothered to death by the defendant.
>
> It is impossible for this Court to contemplate another crime that would be more heinous atrocious and cruel than the death of Junny Rios Martinez. The terror of the abduction and rape followed by the slow death of strangulation or suffocation was extreme.

(R 4647-48).

Schwab first contends that it was not proven beyond a reasonable doubt that the victim died as a result of strangulation since the medical examiner testified that the death could also have been accidental. Schwab has omitted the fact that the medical examiner also testified that there was no indication that this was an accidental death, and that aside from smothering or strangulation, no other possibility rose to the level of a reasonable medical certainty (R 260, 288). This court has consistently held that the heinous, atrocious and cruel aggravating factor is applicable to those crimes where the defendant strangles or smothers a conscious victim. *Sochor v. State*, 18 Fla. L. Weekly S273 (Fla. May 6, 1993) (victim choked); *Capehart v. State*, 583 So. 2d 1009 (Fla. 1991) (victim sexually assaulted and smothered); *Happ v. State*, 596 So. 2d 991 (Fla. 1992) (victim kidnapped, anally raped and strangled); *Hitchcock v. State*, 578 So. 2d 685 (Fla. 1990) (victim strangled); *Dudley v. State*, 545 So. 2d 857 (Fla. 1989) (victim strangled and stabbed); *Mendyk v. State*, 545 So. 2d 846 (Fla. 1989) (victim kidnapped, raped and strangled); *Tompkins v. State*, 502 So. 2d 415 (Fla. 1986)

(strangulation perpetrated upon a conscious victim involves foreknowledge of death, extreme anxiety and fear).

Schwab next contends that although this court has consistently applied the HAC aggravator to strangulation murders, it has never ruled that all strangulation murders are *per se* heinous, atrocious and cruel, and that in this case there was not a prolonged period of time in which the victim was anticipating his impending death. It would have taken the victim a minimum of thirty seconds to become unconscious if strangled and up to five minutes if smothered (R 262), plus he undoubtedly experienced fear and emotional strain over his impending death prior to that time, so this factor is applicable in any event. *Hitchcock, supra; Mendyk, supra; Preston v. State,* 607 So. 2d 404 (Fla. 1992); *Douglas v. State,* 575 So. 2d 165 (Fla. 1991); *Swafford, supra; Hildwin v. State,* 531 So. 2d 124 (Fla. 1988); *Adams v. State,* 412 So. 2d 850 (Fla. 1982).

Schwab next contends that the trial court failed to consider a causal relationship between the aggravating and mitigating circumstances, specifically that his sexual dysfunction is directly related to the offenses that occurred. The trial court did consider in mitigation the fact that Schwab is a mentally disordered sex offender, but as the trial court also found, Schwab is a predator of young male children who clearly knows right from wrong (R 4654). Further, the fact that Schwab is a mentally disordered sex offender certainly does not diminish the anguish experienced by Junny Rios Martinez in the last few hours of his short life. *See, e.g., Hitchcock, supra* (HAC aggravator pertains more to victim's perception of the

circumstances than to the perpetrator's). In fact, according to expert testimony in the penalty phase, Schwab is increasingly aroused by inflicting pain and suffering on children which causes them fright and humiliation (Deposition of Dr. Berlin, defense exhibit 12).

Finally, Schwab contends that the trial court's findings as to this aggravator make much of the fact that a sexual battery occurred, but there was no physical evidence of any sexual battery. As demonstrated in Point 3, *supra,* there was sufficient evidence of a sexual battery. In any event, the basis of the finding of this factor is the anguish suffered by the victim over the entire course of this crime. The trial court rejected Schwab's "Donald" duress defense, but determined that much of Schwab's story as to how the crime occurred was supported by indicia of reliability,[2] so the truth could be found in the fiction of the "Donald" defense (R 4647). This "common-sense inference", *Gilliam, supra,* is fully supported by the record, and the facts demonstrate that this murder was indeed heinous, atrocious and cruel.

During the course of a felony

Schwab claims that since the verdicts on the counts of sexual battery and kidnapping were dependant on his statements which were improperly admitted, they cannot be sustained and these aggravators must fall with them. As previously

---

[2] The trial court observed that Schwab assumed that law enforcement would find certain pieces of physical evidence at the scene of the crime, such as fingerprints, footprints and body fluid samples, and that he knew his story must account for what he believed the physical evidence would show (R 4647).

demonstrated, there was sufficient evidence to admit the statements and to support these convictions. Further, appellee is aware of no corpus delicti rule as to penalty phase proceedings, so even if for some reason one or both of the convictions were vacated, it does not necessarily follow that the aggravating factors based upon them must also be vacated. Schwab's statements, which are corroborated by the physical evidence in this case, demonstrate beyond a reasonable doubt that the murder of Junny Rios Martinez occurred during the course of a kidnapping and sexual battery.

Mitigating Factors.

Schwab contends that the trial court applied the wrong standard in analyzing the mitigating evidence he proffered and improperly rejected numerous mitigating circumstances. The decision as to whether a particular mitigating circumstance for a capital murder has been established is within the trial court's discretion; reversal is not warranted simply because an appellant draws a different conclusion. *Preston v. State,* 607 So. 2d 404 (Fla. 1992). It is the trial court's duty to resolve conflicts in the evidence and where there is competent, substantial evidence to support the trial court's rejection of mitigators, that rejection will be upheld. *Johnson v. State,* 608 So. 2d 4 (Fla. 1992). Likewise, the weight given to a mitigating factor is within the trial court's discretion. *Mann v. State,* 603 So. 2d 1141 (Fla. 1992).

In *Campbell v. State,* 571 So. 2d 415 (Fla. 1990) and *Rogers v. State,* 511 So. 2d 526 (Fla. 1987), this court formulated

guidelines for findings in regard to mitigating evidence. *Lucas v. State*, 568 So. 2d 18, 23 (Fla. 1990). In *Lucas*, the court stated that in *Campbell* it had noted broad categories of nonstatutory evidence that *may* be valid, but reiterated that "[m]itigating circumstances must, in some way, ameliorate the enormity of the defendant's guilt." *Id.* at 23, quoting *Eutzy v. State*, 458 So. 2d 755, 758 (Fla. 1984). This court, as a reviewing and fact finding court, cannot make hard-and-fast rules about what must be found in mitigation in a particular case, and because each case is unique, determining what evidence might mitigate each individual defendant's sentence must remain within the trial court's discretion. *Id.* The trial court must first onsider whether the facts alleged in mitigation are supported by the evidence, and if so determine whether the established facts are of a kind capable of mitigating the defendant's punishment,[3] then determine whether or not they outweigh the aggravating factors. *Rogers* at 534. *See also, Hall v. State*, 614 So. 2d 473 (Fla. 1993). The trial court correctly analyzed the proffered mitigating evidence under these standards and was correct in rejecting certain mitigating circumstances.

Schwab first claims that with regard to the two statutory mental mitigating factors, the evidence was overwhelming that he suffered serious mental disorders which affected his ability to act in a normal law abiding fashion, and that while the trial

---

[3] These are "factors that, in fairness or in the totality of the defendant's life or character may be considered as extenuating or reducing the degree of moral culpability for the crime committed."

court recognized this in finding one (substantially impaired ability to conform conduct to requirements of law), he apparently ignored this evidence in rejecting the other (under influence of extreme mental or emotional disturbance). Appellee would first point out that Schwab has pointed to no evidence in the record to support a finding of the mitigating factor that he was under the influence of extreme mental or emotional disturbance. Schwab simply takes issue with Dr. Samek's diagnosis that he is an antisocial rapist and murderer, since Dr. Samek did not interview him personally. Schwab has apparently overlooked his own expert's testimony that he exhibits antisocial beliefs and tendencies (R 3274, 3276, 3281). Schwab's expert further testified that there was no evidence of psychosis, no evidence of formal thought disorder, no evidence of major mood disorder, no evidence of mental retardation, no evidence of an organic mental disorder, dementia or organic brain syndrome, and no history of learning disorder (R 3262-63).

The trial court based its rejection of this factor on evidence that Schwab is not psychotic, schizophrenic or paranoid, and that he is above average intelligence and was in touch with reality (R 4650-51). As demonstrated, these findings are supported by the record, specifically by the testimony of Schwab's own expert. The trial court further based rejection of this factor on the basis of testimony regarding Schwab's actions before and after the murder. Schwab visited his mother on his way to kidnap the victim, and she testified that he appeared relieved and calmer than he had been over the previous several

days (R 1111-12). The court noted that in conversations after the crimes, Schwab was clear thinking and articulate, aware of the fact that the police were looking for him and that he was in serious trouble, and he was able to fabricate and communicate the "Donald defense" in great detail to family and law enforcement (R 4651). The court also noted that Schwab had been able to gain the confidence and trust of the victim's family (R 4651).

Further, the trial court found and weighed as a nonstatutory mitigating factor that Schwab is a mentally disordered sex offender with an antisocial personality and also found that Schwab's ability to conform his conduct to the requirements of the law was impaired (R 4653-54, 4656). As such, it is apparent that this evidence was not ignored. *See, e.g., Gaskin v. State*, 591 So. 2d 917 (Fla. 1991) (trial court did not err in concluding that defendant committed murder under extreme mental or emotional disturbance even though psychiatrist testified that proper mitigating factor was unable to conform conduct to normal human behavior). Appellee submits that the record contains competent, substantial evidence to support the trial court's rejection of this factor, particularly where Schwab has pointed to no evidence which *supports* this factor. No abuse of discretion has been demonstrated. *See, e.g., Patten v. State*, 598 So. 2d 60 (Fla. 1992) (rejection of nonstatutory mental mitigation supported by testimony that defendant is simply antisocial).

Schwab next claims that the trial court's rejection of evidence that he was raped at gunpoint as a child was clearly erroneous. Appellee submits that the trial court, as fact

finder, is certainly free to reject evidence he finds is not credible, particularly where, as here, that finding is articulated and based on tangible facts. As the trial court noted, Schwab is capable of significant fabrication (R 4657), which is certainly supported by Schwab's concoction of the "Donald defense". The trial court also noted that Schwab never told anyone of this incident prior to the instant case,[4] and while not noted by the trial court, appellee submits that it is significant that such incident never came to light after Schwab's previous arrest and application for the mentally disordered sex offender program.

Further, while Dr. Bernstein testified that there was a "likelihood" that the sexual assault story was valid, he also acknowledged that there were a lot of self seeking behaviors involved in this case (R 3289). He also testified that Schwab told him he "possibly makes up false memories to change the past" (R 3264). Appellee submits that the trial court did not abuse its discretion in rejecting this "fact", and consequently rejecting it as a mitigating factor.

Even if for some reason this court determines that the trial court erred in rejecting this evidence on the basis of a credibility determination, any error is harmless at worst since the finding of this factor would not have altered the sentencing outcome. As stated earlier, mitigating factors must in some way

---

[4] Schwab states that in the summer of 1986 he told a friend's mother that he had been sexually abused (IB 61), but this is far different from relating a specific incident of having been raped at gunpoint in a corn field a a youngster.

reduce the degree of moral culpability for the crime. Dr. Samek testified that even assuming that incidents of abuse were true, it was mild to moderate abuse and most children abused as such do not grow up to do what Schwab did (R 3377-80). Dr. Berlin testified that a possible cause of problems such as Schwab's is early traumatic life experiences, such as serious and significant sexual abuse as a child (Deposition of Dr. Berlin, defense exhibit 12). This one incident could not be termed "serious and significant" so as to cause Schwab's problems and thus mitigate his culpability, so even if such factor is applicable it is entitled to little weight and is far outweighed by the aggravating factors.

Schwab next claims that the trial court erred in rejecting nonstatutory mitigating factors 7-10 on the basis that the evidence was in conflict. Number 7 states:

> The defendant's father beat the defendant's mother and the defendant's attempts to intercede on his mother's behalf were futile as his father tossed him aside and continued the assaults on his mother.

(R 4658). Viewing this factor in the conjunctive, there is conflicting evidence. While virtually every witness did testify that there were violent incidents between the parents, Schwab's father testified that it was kept away from the children (R 3028), and related only one incident where Mark was present and he had restrained his wife on the floor and she screamed out to Mark to run to the neighbor and call the sheriff (R 3031). Schwab's brother Mike testified that while the parents were

violent toward each other, they were never violent toward the children (Mike Schwab deposition, defense exhibit 4). On cross examination, Schwab's mother acknowledged that after pushing Mark out of the way, the father never further abused him during these incidents (R 3170). The trial court did find that Schwab grew up in an unstable home environment (R 4658), which would certainly take into account the difficulties between the parents, so the trial court did not err in rejecting the factor that Schwab was physically involved in these altercations where the evidence was conflicting.[5]

Number 8 states:

> The defendant was punished by his father beating him on his burns.

(R 4658). Schwab's aunt, Shirley Muhs, testified that the father's attitude about the burns was that Schwab should "get up and go", and when asked if the father was ever abusive to the child, she replied "Maybe verbally in how he would speak with him" (R 3071). Schwab's aunt, Beverly Kinsey, testified that she never observed any physical abuse (R 3098). As stated, Schwab's brother stated that there was never any violence toward the children. When Schwab's mother first related the burn incident, she never mentioned anything about the father hitting Schwab's burns, although she did relate other incidents where the father had hit Schwab (R 3119-22). Defense counsel later asked, "Going

---

[5] Appellee would point out that the proposed mitigating factor was that Schwab's attempts to intercede on his mother's behalf were futile as his father tossed him aside and continued the assaults on his mother (R 4607). As demonstarted, the evidence was conflicting on Schwab's attempts to intercede and any resulting violence against him as opposed to the mother.

back to the burns, ma'am, did Paul during his discipline ever take any note of those burns?", and she replied "What do you mean?" (R 3140-41). After defense counsel further prompted, "Did he ever touch or hit Mark on them after they had healed?", she finally replied, "Yes. He had spanked Mark on them with a strap before they had healed" (R 3141). It certainly would seem that this would have been a rather memorable incident that would have been related during the earlier testimony regarding the burns and any abuse. Appellee would also point out that Schwab's mother appeared to be very open with her family regarding her domestic problems, yet both of her sisters testified that they were not aware of any child abuse. Appellee submits that the testimony was controverted and that the trial court did not abuse its discretion in rejecting the version set forth by Schwab's mother.

Number 9 states:

> The defendant's father would punish and humiliate the defendant by pulling down his pants and would laugh at him. The defendant's mother was not allowed to comfort her son following these incidents.

(R 4658). Again, the only testimony on these specific incidents came from Schwab's mother, and as demonstrated, all other testimony was that there was no abuse of the children by the father. The trial court did not abuse its discretion in rejecting this as fact.

Number 10 states:

> The defendant dressed up in his mother's clothes, the defendant's older brother held the defendant down, took his picture, and would tease the defendant with the photograph.

(R 4658). Only Schwab and his brother Mike were present during this alleged incident. According to Mike, Mark put on his mother's lipstick and teased his hair and Mike took a picture. Mike said that they were being "silly and goofy" as children can be. The trial court did not abuse its discretion in accepting Mike's version of the incident. Even if this court determines that the trial court erred in rejecting any of this as mitigating evidence, appellee submits that it would not have changed the outcome, as it simply is not sufficient to outweigh the aggravating factors present in the instant case. Reversal is not warranted.

Schwab next claims that while the trial court accepted the evidence that he adapted well to prison life, he improperly rejected this as mitigating evidence. As previously stated, mitigating factors must somehow ameliorate the enormity of the defendant's guilt. *Lucas, supra.* By all accounts, Schwab has no potential for rehabilitation (R 3286, 3369). Dr. Bernstein testified that Schwab apparently does not learn from his past experience and it is likely that he will continue to repeat his mistakes (R 3274). He further testified that based on test results Schwab would be a difficult person and a challenge to the criminal justice system, is likely to show a history of violence, assaultive behavior and be problematic; it suggested that he may need to be separated from the general prison population (R 3276). Dr. Samek opined that there was a possibility that Schwab would end up killing somebody in prison (R 3406). Appellee contends that there was no abuse of discretion in rejecting this as a mitigating factor.

Even if the trial court should have found this as a mitigating factor, it is entitled to little weight. The only purpose Schwab's good behavior in prison served was to allow him to be released earlier and begin victimizing children again. As the trial court stated, "..had the defendant remained in prison for the entire length of his sentence, Junny Rios Martinez would be alive today" (R 4664).

Schwab next claims that the trial court erred in rejecting factors 32-39, which all relate to help for his problem. The fact remains that Schwab never did seek help on his own, and as the trial court noted, he continued to associate with young boys, and in fact planned the instant kidnapping, sexual battery and murder while he was allegedly in therapy. Further, as the trial court found, it was pure speculation that even if the mentally disordered sex offender program had continued that Schwab would have benefitted, particularly given the 80% failure rate for those who had been accepted into the program (R 3354). Dr. Samek testified that he never met a nonpsychotic sex offender who did not know he was sick (R 4010), and it would seem that if Schwab was so intent upon getting help for his problem, he could have privately sought it, or at the very least not plan a situation where he would be alone with a young boy, instead of blaming the State of Florida for his problem. The trial court did not abuse its discretion in rejecting Schwab's excuses as mitigating factors.

As stated, even if the trial court erred in rejecting any of the foregoing as mitigating factors, reversal is not required

where it can be said beyond a reasonable doubt that the outcome would not have been affected. *See, e.g., Stewart v. State,* 18 Fla. L. Weekly S294 (Fla. May 13, 1993) (trial court's failure to consider nonstatutory mental mitigating evidence harmless error). The trial court in the instant case found three very compelling aggravating factors, and the now proffered mitigation simply does not outweigh these factors. This cruel cold-blooded killing clearly falls within the class of murders for which the death penalty may be properly administered.

POINT 7

THE ISSUE HAS NOT BEEN PRESERVED FOR APPELLATE REVIEW; FLORIDA'S HEINOUS, ATROCIOUS AND CRUEL AGGRAVATOR IS CONSTITUTIONAL.

Schwab contends that this court's inconsistent application of its heinousness circumstance results in unguided death sentencers, a class of death eligible as wide as the class of all murderers, and provides no rational basis for review of death sentences. Prior to sentencing, Schwab filed a motion to declare Florida Statute 921-141(5)(h) unconstitutional, and simply alleged that the language of this section "is unconstitutionally void and its application has been overbroad" (R 4628). Schwab presented no argument, but simply quoted from a case which he did not cite.[6] Appellee contends that this summary motion, without argument or case cite, was insufficient to preserve the instant claim for appellate review and that this court must find the issue procedurally barred. *See, Trushin v. State,* 425 So. 2d 1126 (Fla. 1983) (the constitutional application of a statute to a particular set of facts is a matter which must be raised at trial before it can be considered on appeal.

Even if the claim has been preserved, relief is not warranted. There was no advisory jury in the instant case, and the sentencer in this case, the trial judge alone, is presumed to know the law. While Schwab cites a variety of factual situations wherein he alleges that the HAC aggravator has allegedly been inconsistently applied, the fact remains that it has been

---

[6] It would appear that the quote is from *Sochor v. Florida,* 112 S. Ct. 2114 (1992).

consistently applied in factual situations similar to the one in the instant case. *See,* Point 6, *supra; Sochor v. Florida,* 112 S. Ct. 2114 (1992).

CONCLUSION

Based on the foregoing arguments and authorities, appellee requests this court affirm the judgment and sentence of the trial court in all respects.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

KELLIE A. NIELAN
ASSISTANT ATTORNEY GENERAL
Fla. Bar #618550
210 N. Palmetto Ave.
Suite 447
Daytona Beach, FL 32114
(904) 238-4990

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing answer brief has been furnished by delivery to the Public Defender's box at the Fifth District Court of Appeal to Michael S. Becker, Assistant Public Defender, this 22nd day of June, 1993.

Kellie A. Nielan
Of Counsel