IN THE SUPREME COURT OF FLORIDA

DUSTY RAY SPENCER,

Appellant,

v. CASE NO. 80,987

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE NINTH JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

The appellee accepts the statement of the case of the appellant. The appellee would add the following facts:

Karen and Dusty Ray Spencer had problems and Dusty moved out of the home on Lesser Drive in December of 1991. (T 452,453) Dusty moved back in the house at Christmas for four or five days. (T 453) After he moved out of the house, it was just Ben Abrams and Karen Spencer conducting business. (T 456) Karen would get up, let the dog out, and start coffee. (T 460) She would use the back door, which was a sliding glass door. (T 460) Her morning routine would start around 7:00. (T 461) On January 4, 1992 Timothy Johnson was awakened by the screams of his mother. (T 462) He ran into her bedroom where he saw Spencer on top of his mother hitting her. (T 462) Sepncer hit Timothy on the left side of the face with the iron. (T 463) He hit him about four times. (T 464) Timothy did not see Spencer hit Karen with the iron. (T 464) Timothy saw blood on Karen. (T 464) Timothy retreated to his bedroom. Spencer stated, "you're going to be next". (T 465) He also said, according to Timothy "that my mother fucked up his life, now he is going to fuck her's up." (T 466) Timothy was bleeding when Spencer left his room. (T 466)

As Spencer was pulling away in his Grand Prix, Mr. Elmore, a neighbor, was walking up the street. (T 468) Mr. Elmore could have seen Spencer leaving. (T 468) Karen Spencer's face was full of blood and she required stitches. (T 469) Timothy Johnson was x-rayed and given something for his headache. (T 469) Timothy advised the police that Spencer was the person who had beaten him with an iron. (T 470)

Timothy tried to call the police from his room, but Spencer yanked the phone out of the wall (T 470). Timothy did not see Spencer between January 4, 1992 and January 18, 1992. (T 471) There was a .22 rifle in the house. (T 472) The rifle was being kept in Karen Spencer's room. (T 476)

Timothy was awakened on January 18, 1992 by the screams of his mother. (T 478) Timothy grabbed the gun that was on Karen's bed. (T 478) He ran out the front door facing the street. (T 478) He went around the side of the house where he saw Spencer hitting Karen with a brick. (T 479) Karen was lying down on the ground and Spencer was over top of her. (T 480) It looked like Spencer was hitting Karen in the face with the brick. (T 480) Karen had blood on her face. (T 481) Timothy ran up and hit Spencer with the rifle. (T 481) Spencer stated that Timothy's mother had "fucked up his life." (T 481) Karen sat up a little bit, kind of up against the wall. (T 481) Spencer then lifted up Karen's nightgown and said, "here, show your boy your pussy", and then he slapped her head against the outside wall of the concrete block house. (T 481-482) Timothy heard his mother say, "stop". (T 482) At the time Spencer was hitting the back of Karen's head against the wall, her face was full of blood. (T 483) Spencer pulled a knife out of his back pocket. (T 484) It looked like a steak knife. (T 485) He did not normally carry a pocketknife. (T 491) None of the knives were missing from the block in the kitchen. (T 492) Spencer walked towards Timothy with the knife out in front of him, while Timothy was picking up Karen. (T 492) Spencer got within a couple of feet of Timothy

(T 493) Timothy put Karen down and grabbed the gun. (T 493) He was scared when Spencer approached him with the knife. (T 495) Timothy thought that Spencer was going to stab him. (T 495) Timothy tried to fire the rifle, but it did not go off. (T 497) He used the rifle to hit Spencer. (T 497) The stock shattered. (T 497) Karen Spencer was making gurgling sounds, choking on her blood. (T 498) As Timothy left the yard he was calling out for anyone to call 911. (T 498) Timothy left the same way he had come. (T 500) Timothy headed to Nancy Elmore's house. (T 500) He did not notice Spencer's car. (T 500) Spencer was wearing surgical gloves the whole time Timothy saw him. (T 501) Spencer wore these type of gloves in his paint business. (T 502) When Timothy approaced Nancy Elmore, he told her that "Dusty is trying to kill my mom." (T 503) Timothy also asked Nancy Elmore, if she had a gun. (T 503) Timothy still had part of the rifle with him. (T 503) Timothy ran across the street to Jerry's house to ask for a gun. (T 504) Not being able to get a gun, Timothy ran back over to Nancy Elmore's house. Timothy and Nancy walked back up to Karen Spencer's house. (T 505) The police were there when Timothy and Nancy Elmore arrived. (T 506) The police prevented Timothy from going into the back yard to see his mother. (T 506)

Timothy left the bedroom on January 4, 1992 first, so he could not see what happened to his mother. (T 556) Spencer told Timothy in his bedroom, "you're next, you're next, I don't want any witnesses." (T 558) This statement was made before the Spencer ripped the phone out of the wall. (T 559)

Karen Spencer went to Mr. Elmore's house, which is about seventy yards from hers, on January 4, 1992. (T 568) Mr. Elmore was still in bed when he heard her "frantic knocking" at his front door between seven and seven-thirty. (T 569) Mr. Elmore noticed the amount of blood on Karen Spencer. (T 570) It was everywhere, all over her hands, face, down the side of her neck, and on the front of her gown. (T 570) She was hysterical. (T 570) She kept saying, "please help Timmy. He is trying to kill us." (T 571) She also indicated that Dusty had tried to kill her and was going to kill Timmy. She asked Mr. Elmore to "please go help him." (T 571) Mr. Elmore headed for Karen's house. (T 572) When you stand outside Mr. Elmore's door, you can see Karen Spencer's house. (T 572) Mr. Elmore could see Spencer's Grand Prix in Karen's yard. (T 572) Mr. Elmore headed towards her house with a "purpose". (T 572) When he was seventy-five feet away, Mr. Elmore saw Spencer leave the house and enter his Grand Prix. (T 573) Spencer then backed up and took off. (T 573) Mr. Elmore took off running towards Karen Spencer's house. (T 573) The front door of the house was open, but the screen door was closed. (T 573) He knocked on the door. Timothy Johnson was coming down the hallway. (T 573) He was shaking so badly he was having trouble putting on his shirt. (T 574) There was blood on him. (T 574) He went to Mr. Elmore's house. (T 575) The police arrived about five minutes after Tim and Mr. Elmore made their way to Mr. Elmore's house. (R575) Mr. Elmore pulled Karen Spencer's car around the back of his house because he feared that Spencer would come back. (T 576) Karen Spencer and Tim Johnson gave statements to the police. (T 576)

On January 4, 1992, Karen Spencer banged on the door. She stated, "Nancy, you have to help me, Dusty is down there, he beat me and he is beating Tim with an iron." (T 586) She was pale and shaky, and had a cut on her left eye. (T 586) She had blood all down the front of her, and her eye was milky looking. (T 586) Nancy Elmore was standing outside her door, when she spotted Spencer walk fast across his yard and get in his car. (T 587) Tim Johnson had the outline of the iron on his face. (T 588) Around seven-thirty on January 18, 1992, Tim came to Nancy Elmore's house. (T 589) He asked, "do you have a gun?" (T 589) He was very upset, and begged for help. (T 589) He said, "you have to help me." (T 590) "He is back down there, and he is killing my mom." (T 590) Nancy Elmore asked who "he" was, and Tim Johnson replied, "Dusty". (T 590) Nancy Elmore told Tim to go across the street to the neighbor's house, because she didn't have a gun. (T 590) Jerry Hart was the neighbor. (T 590) Nancy Elmore called 911. (T 590)

Kimberly Lizzi lived next door to Karen Spencer. (T 600) There is a six foot wooden fence that separates the yards. (T 601) Lizzi was awakened on the morning of January 18, 1992 by the sound of someone screaming. (T 602) She got out of bed and went to the back door and heard someone say "call 911." (T 602) Lizzi then called 911. (T 603) She waited inside her home until the police arrived. (T 603)

On January 4, 1992, Lizzi saw Karen Spencer in her car. (T 604) Her face was all bloody and she acted nervous. (T 604) Karen said to call 911 as she was afraid that Dusty was going to

kill her son, Timmy. (T 606) After seeing Karen, Ms. Lizzi came inside and called 911. (T 606)

Responding to a 911 call on January 4, 1992, Deputy Weyland came into contact with Karen Spencer. (T 618) When Deputy Weyland arrived at Karen Spencer's house, he found that nobody was home. (T 620) He entered the home at this point and found the telephone off the hook. (T 620) After talking with dispatch, Deputy Weyland was advised that they had received a second call about the same incident from another location. (T 620) Deputy Weyland proceeded down to the Elmore's residence where he was met by Nancy Elmore. (T 621) Karen Spencer was lying on the sofa, and Tim was on another sofa. (T 621) They both had visible injuries. (T 621) Statements were taken by Deputy Weyland. (T 621) Deputy Weyland then proceeded back to the Karen Spencer's house. (T 624) In Tim Johnson's bedroom, Deputy Weyland found a hand steam iron laying on the floor, and he also found a hand receiver with no cord attached and with what appeared to be blood on the back of it. (T 624) In Karen Spencer's bedroom Deputy Weyland found what appeared to be blood stains on the lower part of the wall. (T 624) Deputy Weyland found blood on the bed itself, the comforter, and on the foot of the bed. (T 624)

On January 18, 1992, Deputy Weyland was on patrol. (T 636) He heard a call and responded to Karen Spencer's house. (T 636) When he arrived at the house, Deputy Hoster, Deputy Blume, and Sergeant Peaden were already there. (T 637) Deputy Weyland went around the neighborhood checking to see if anyone had seen or

heard anything unusual. (T 637) A statement was taken from a man named Walt Smith. (T 638)

Dr. Bowman treated Karen Spencer who had two lacerations around the left eye, and bruising in the whole area of the left side of her head. (T 643) She said she was beaten with an iron. (T 648) Her injuries were consistent with having been beaten with an iron. (T 648)

If someone were hit in the face with an iron repeatedly that could be capable of causing death or great bodily injury. (T 650) Timothy Johnson had bruising and scrapes on the left side of his head and cheek. (T 652) He also said he was beaten with an iron. (T 654) The injuries Timothy sustained were consistent with someone beating him with an iron. (T 654) If someone were hit in the face area with an iron, it could cause great bodily harm, including blindness. (T 655)

Dr. Anderson is the medical examiner for District 9 in Florida, which encompasses Orange and Osceola Counties. (T 702) Dr. Anderson was received as an expert witness in the area of forensic pathology. (T 704) When Dr. Anderson arrived at the scene he found a fully clothed female on the ground, with a lot of blood around her face area. (T 722) On the adjacent wall were some bloody imprints. (R722) There was also some blood on the grass surrounding her and on some bricks she was lying near. (T 722) The wounds to Karen Spencer's face are consistent with a sharp force injury, from a knife. (T 728) The injuries to the back of the head would consistent with having been hit up against wall in the area where the blood was found. (T 732) There was a

stab wound of the lateral aspect of the right breast area. (T 735) The evidence was that the brain and the head were in motion when that impact occurred. (T 737) In other words, it was consistent with her head being moved or forced into some object, striking it, and then causing these injuries. (T 737) Karen had defensive wounds on her right arm. (T 738) Dr. Anderson testified "I think we really have -- We have three different patterns of injuries, two of which were both life threatening. The wound of the face, the stab wound or slash wound of the face caused significant soft tissue damage, would have been possibly life threatening in of themselves. The other two things we have, we have penentrating stab wound of the heart and the lung, which caused significant amount of bleeding, caused her to get blood in her airway, which she breathed back out into her lung, phpenomenon we call aspiration of blood, and the third thing is that she had, which was significant in of itself, may have been, certainly if not fatal, would have caused serious neurological damage, the blunt force trauma to the head, and all bruising of the brain that she had, and these contributed together to her demise." (T 742) It was Dr. Anderson's opinion that the wounds all occurred during the time that Karen Spencer was alive: "In all of the injuries, which we have bleeding, we have bleeding in the soft tissues around the wounds, bleeding into the brain, bruising, bleeding into the heart, bleeding into the lung, we have evidence of aspiration of blood, which requires breathing. We have evidence of defense wounds, which clearly indicates the individual had to be not only alive, but able to put up her arm

as a defensive measure. So all injuries are associated with hemorrhage, and for hemorrhage to take place you have to have circulation, and for circulation to take place, you are at least alive, if not conscious." (T 745) Karen Spencer would probably have lived ten or fifteen minutes after receiving the stab wounds in the chest. (T 747)

Mr. Smith knew that Spencer normally drove a maroon Pontiac. (T 772) On the morning before Karen Spencer was murdered, Mr. Smith noticed Spencer drive up in his car. (T 776) Spencer parked along the curb in front of Mr. Smith's house. (T 776) Mr. Smith was outside in his yard. (T 776) Spencer looked at Mr. Smith, then he looked down towards his house. (T 777) Spencer "looked like he was mad". (T 778)

Mr. Abrams worked for the Spencers as a foreman in their painting business. (T 903) In the mornings Mr. Abrams would come over to the Spencer house and pick up the van. (T 903) Karen would give Mr. Abrams job assignments in the morning. (T 904) Spencer turned a briefcase over to Mr. Abrams which contained a set of keys to the warehouse and a lot of papers. (T 904) Mr. Abrams turned the papers over to Karen, except for the business license. (T 906) Spencer told Mr. Abrams, "you are going to run the show now." (T 906) Spencerindicated that he had gone over to the house and asked Karen for the money back that she had taken from the bank but she wouldn't give it back. Spencer said he beat her up. (T 909) There were maps in the briefcase, which Spencer used to mark houses off after they had been painted. (T 912)

On January 1, 1992, Spencer told Mr. Abrams that he "would like to take her out on the boat, and throw her overboard." (T 914) On January 3, 1992, Spencer also told Mr. Abrams, "she said that she would never go out in the boat again, or she didn't never want to go out in the boat again". (T 915) Mr. Abrams was at Karen Spencer's house the morning of January 18, 1992, to get the van for work. (T 917) Mr. Abrams spoke with Karen before coming over on January 18, 1992, and she told him that she would warm up the van. (T 918) The police would not let Mr. Abrams enter the yard that morning. (T 919) Mr. Abrams had given Spencer a Optima color wheel hat before Karen Spencer's murder. (T 919)

In Dr. Anderson's opinion, Karen Spencer was alive when she received her injuries. (P 99) She would have experienced pain and suffering due to the infliction of wounds she received. (P 100) Dr. Anderson testified that, "we know she was conscious during the infliction of some of the stab wounds, because of the defense wounds on her hand and her arm." (P 101) The wound on the neck area indicates that she was alive. (P 100) The stab wounds and the slash wounds themselves wound not have really altered consciousness at all. (P 102) At the time of her neck wound, Karen Spencer was in a semi-upright or upright position, in order to get the knife that far back into the neck. (P 103) The wounds Karen Spencer received in the chest would have caused her to lose consciousness within a few minutes. (P 106) The blood Timothy Johnson testified to seeing on Karen Spencer's face was consistent with being caused by a facial wound. (P 103, 105)

In Dr. Anderson's opinion, using the criteria to determine post-mortem and anti-mortem injuries, the presence or absence of circulation at the time of the injury, there were no post-mortem injuries. (P 107) Defense wounds will not occur on an unconscious person. (P 111) Dr. Anderson could not tell in which sequence the wounds occurred. (P 115) He testified, that "the only indication to me as to her level of consciusness at the time of the knife wounds are the fact that she has a number of defense wounds on the arm, indicating that she was defending herself against the knife". (P 116) Bleeding occurs right after the knife is out of the way, so there would not necessarily have to be any visible blood on the knife. (P 119) Dr. Anderson did not find bruising or see any fractures of underlying bones that would have been expected with a blunt force trauma like being hit with a brick in the face. (P 120)

On December 10, 1991, Deputy Hughley responded to a call at Karen Spencer's house. (P 125) Karen indicated that they had been arguing about money in their painting business account. (P 125) Spencer told her that "he wanted her to get some money, or else he was going to kill her". (P 125) On Karen's way to the bedroom, Spencer put his right hand around her throat, choking her, and put his left hand over her mouth and nose, so she could not breathe. (P 126) He told her "this is only a sample of what you are going to get. I'm going to kill you if you don't get the money from the account." (P 126) Karen then indicated she could get the money and Spencer let her go. (P 126) When Karen got outside the door, Spencer said, "if you scream, I'll kill you".

(P 126) Spencer also stated, "you have one hour to go to the bank, and get the money, or I'm going to do more than thirty-three hundred dollars damage to the house". (P 126) Deputy Hughley observed an abrasion under Karen Spencer's nose; a cut under her nose; and her nose was swollen. (P 127) Spencer was arrested. (P127) On December 11, 1991, Karen Spencer told Deputy Hughley, that Dusty had called her from jail and said he was going to finish what he had started as soon as he was out of jail. (P 128)

On January 4, 1992, Karen Spencer told Deputy Weyland, "she was in her bedroom, when she heard a noise and called out to her son". (P 137) However, the person was Spencer and he stated, "It's not Rodney. You have messed up my life, I'm going to kill you". (P 137) Karen met Spencer coming in the bedroom door, but he knocked her to the floor. (P 137) Karen Spencer gave a written statement to Deputy Weyland. (P 137)

Dr. Burch testified during the penalty phase portion of the trial. He has a Doctorate of Psychology degree. (P 150) Dr. Burch conducted an examination of Spencer on September 13 and 14 of 1993. (P 154) The neuropsychological test battery did not provide evidence of any kind of significant problem in the brain. (P 159) According to the results of the Minnesota Multi-phasic Personality Inventory test, Spencer has not successfully developed internal controls. (P 164) He has vulnerability under extreme stress to explode. (P 164) The Rorschach test gave a picture of someone who has a personality disorder. (P 168) A personality disorder refers to a constellation of traits, and

behaviors, that are enduring. (P 186) A personality disorder is different from an acute psychiatric or a mental illness. (P 168) Spencer is not someone who is chronically or acutely psychotic. (P 186) The third test given Spencer was the Thematic Apperception Test. (P 169) This test gave more indication of his passivity, suspiciousness, and of the social alienation. (P 170) According to Spencer's history, he was forced to wear a dress as a child because he was not toilet trained. (P 172) He had an alcohol abuse problem. (P 173) When he was between the ages of twelve and fourteen his father would come into his bedroom and masturbate him. (P 173) In Dr. Burch's opinion, Spencer suffers from chronic alcohol abuse, chronic marijuana abuse, and paranoid personality disorder. (P 177) Dr. Burch indicated that Spencer was able to appreciate the difference between right and wrong at the time of the killing. (P 178) Dr. Burch also indicated that because of the severe stress, and the alcohol abuse, Spencer was deficient in his ability to conform his conduct to the law. (P 178)

The neuropsychological evaluation took approximately seven hours. (P 180) Dr. Burch spent about three hours actually talking to Spencer. (P 180) Dr. Burch did not have the police reports, or copies of the written statement that contained the verbal threats of the December 10, 1991 incident. (P 187) Dr. Burch was not aware of the phone call from jail in which Spencer told Karen that "when he got out, he would finish what he had started". (P 187) Dr. Burch testified that being put in jail would have given Spencer a message that his conduct was wrong.

(P 190) Spencer's basic problem is that he is impulsive and insists upon his own way, regardless of law or feelings of other people. (P 195) Spencer would have had this basic character or personal profile since he was a young adult. (P 197) The other test data indicates very strongly that Spencer is not an impulsive person who insists on his way. (P 197) Dr. Butcher's findings on the MMPT results included a characterization that Spencer is often hostile, resentful, rebellious and denies culpability, blaming others instead. (P 199) Spencer's ability to appreciate the criminality of his conduct was not impaired on the date of Karen Spencer's murder. (P 203) Dr. Burch indicated that Spencer knew that killing Karen was wrong and Spencer would have understood the possible consequences. (P 204) Dr. Burch stated that when Spencer parked away from the house, that to some extent, that would indicate that he had a sufficient mental state to think ahead. (P 209) Spencer scored average on his IQ scores, except his performance IQ, which relates to hands-on problem solving tasks, in which he scored low high average. (P 216) Dr. Burch disagreed with Dr. Butcher's report that Spencer may act aggressively towards other inmates, or towards individuals in authority. (P 220) Dr. Burch believed that Spencer fits into the characteristics of paranoid personality disorder. (P 245)

Cheryl Dobbins is Spencer's sister. (P 282) Ms. Dobbins was sexually molested by her father. (P 282) Spencer told Ms. Dobbins that he had been sexually molested by their father. (P 283) Spencer wrote in a letter that their father would come into

his room at night and masturbate him. (P 284) Ms. Dobbins does not know specific details of the sexual abuse. (P 284) The first time Ms. Dobbins told about her father's sexual abuse was last November. (P 286) The last time Ms. Dobbins had visited Spencer was seven or eight years ago. (P 286) Ms. Dobbins has allowed her teenage son to be alone with her father. (P 287)

Mr. Marancek a childhood friend of Spencer's testified that Spencer started drinking at thirteen. (P 293) Mr. Marancek smoked pot with Spencer and did diet pills to stay awake. (P 293) Spencer used drugs and alcohol in junior high and high school. (P 294) Mr. Faber was stationed with Spencer in the Marine Corps and he testified that Spencer smoked pot daily. (P 315)

Mr. Abrams worked for Spencer in his painting business. (P 318) Spencer was a very good boss, who cared about his employees. (P 319) Mr. Abrams did not think Spencer's behavior was strange or out of the ordinary. (P 321) He did not think Spencer was emotionally ill. (P 321) Mr. Abrams was able to observe Spencer about five days a week, working with him. (P 320) The days Spencer was drinking on the job did not seem to affect him at all. (P 322)

Mr. Cleaves was an employee of Spencer in 1990. (P 323) He worked as a foreman on one of his jobs at a subdivision painting houses. (P 324) Spencer was a good worker. (P 324) He would help out Mr. Cleaves financially. (P 325) Mr. Bryant has known Spencer for the last ten years. (P 327) There was incident at a birthday party where Timmy Meyers was injured and Spencer and Mr. Bryant provided emergency treatment. (P 329)

Dr. Lipman was accepted as an expert in the area of neuropharmacology. (P 338) Dr. Lipman conducted a clinical interview of Spencer. (P 339) Dr. Lipman also conducted some type of personality profile measures. (P 339) Dr. Lipman believed that it was necessary to conduct a clinical interview to understand what was happening in the person's life when they were using drugs. (P 344) Spencer's blood alcohol concentration ten to fourteen days prior to the killing was .36 at night and .60 milligrams per deciliter in the morning. (P 349) In Dr. Lipman's opinion, Spencer's blood alcohol concentration was zero at the time of the killing but he would have been suffering a biochemical intoxication. (P 351) Dr. Lipman opined that Spencer was under the influence of extreme emotional or mental disturbance at the time of the killing. (P 355) Dr. Lipman further testified that Spencer knew the difference, generally speaking, between right and wrong; however, Spencer was not able to control his actions. (P 356)

Spencer was not under oath when he provided Dr. Lipman the information concerning his drinking ten to fourteen days before the killing, and this information was not corroborated. (P 357) Dr. Lipman did not have an opinion as to Spencer's blood alcohol concentration level on December 10, 1991. (P 358) In Dr. Lipman's opinion, Spencer was impaired on December 10, 1991. (P 359) Dr. Lipman stated that Spencer thought he was being covert in parking the car away from the house. (P 373) If, in fact, a witness placed Spencer back in town before Spencer told Dr. Lipman, then the doctor stated that fact may influence his idea about how many amnestic episodes there were. (P 381)

SUMMARY OF ARGUMENT

I. The motion for judgement of acquittal is not properly preserved. Even if this issue is properly preserved, then there is competent, substantial evidence to support the jury verdict. The jury simply rejected the defendant's hypothesis. The state produced sufficient evidence of appellant's premeditation. Spencer parked his car away from Karen's, the victim, house, he wore gloves, and brought the murder weapon with him. Further, Spencer was stopped in his attack by Timothy Johnson, but he resumed the attack.

II. The appellant has failed to show the trial court abused its discretion in not severing the charges. All four of the charges are episodically connected. Even if the trial court erred in not granting the motion to sever, the joinder did not cause actual prejudice by having a damaging effect or influence on the jury's verdict.

III. The trial court properly used the standard jury instructions on premeditation and reasonable doubt. The trial court followed the substance of McCutchen v. State, infra, in the premeditation instruction. Further, Brown v. State, infra, held that the standard reasonable doubt instruction was proper.

IV. The appellant's trial counsel failed to properly preserve this issue at trial. The counsel objected to the prosecutor's comment, which the trial court sustained, however, counsel did not ask for a curative instruction. Even if this issue is preserved, the error committed was no so prejudicial and fundamental that it denied the appellant a fair trial.

Furthermore, the appellant has failed to show under Lopez, infra, that a new trial is appropriate. Finally, the prosecutor's statement was rendered harmless considering the overwhelming amount of evidence of guilt.

V. The trial court relied upon other statements than what the apppellant alleges in his brief. This testimony was an exception to hearsay either under the then existing state of mind or under the res gestae exception. Even if this court determines that this testimony was hearsay, that is allowed under the statute, and case law. Finally, the trial court did two weighings in this case one with this aggravator, and one without it, and in both cases determined death was the proper penalty. Even if there were error, it was harmless and did not result in prejudice to the appellant's case requiring a new sentencing.

VI. The trial court listened to the expert testimony presented by the appellant's witnesses. The trial court set out the pertinent testimony in its sentencing order. However, the trial court rejected their testimony. The experts based their findings on "mere speculation" and there was substantial evidence which contradicted there testimony. The appellant went to Karen's house that morning parked his car away to avoid detection. Spencer wore gloves to avoid detection. Spencer brought the murder weapon with him. All this shows that the trial court could have found the aggravating factor of cold, calculated, and premeditated. The trial court may accept or reject the testimony of an expert witness just like any other witness. Relying upon the facts already stated the appellee would submit that Spencer

had a well thought out plan to kill Karen, his wife. He may have been going through some emotions, but this was not a crime of passion. Spencer's actions do not fit into the line of cases where this court has determined that in a husband and wife killing this aggravator should not be found. The appellant argues that the heinous, atrocious, or cruel aggravator should not be found in this case. However, the murder itself was committed to torture Karen. Karen was beaten, she had her head slammed against a wall, she was cut in five places on her face with a knife, she had defense wounds, she was stabbed in the chest area. During the murder, Timothy Johnson tried to stop Spencer, however, Spencer picked up Karen's gown, and said, "show your pussy to your boy". Karen responded "don't Dusty". Karen Spencer went through fear and humiliation, and torture as she was killed. The appellant further argues that the trial court rejected unrefutted testimony of statutory mitigators. The appellee would submit that there was plenty of evidence that contradicted the experts. The trial court in its sentencing order found that these experts had given conclusions not facts. The experts had based their opinions on "mere speculaltion". The trial court followed the criteria set forth in Campbell. The trial court did not base its finding, as the appellant asserts, only on the fact that the appellant could differentiate between right and wrong. This was one of the considerations which is proper under Ponticelli. The trial court can reject or accept the testimony of experts just like any other witness. Finally, the decision as to whether a mitigating factor has been

established is within the trial court's discretion. Reversal is not warranted simply because an appellant draws a different conclusion. The trial court considered Spencer's drug and alcohol abuse. The trial court listed it as a nonstatutory mitigator, but gave it very little weight. Just because the trial court did not find it as the basis for a statutory mitigating factor, does not require reversal. The decision as to whether a mitigating circumstance has been established, and if established, the weight afforded it is within the trial court's discretion. The appellant next argues that the trial court listed several aspects of the appellant's character, but did not give them appropriate weight. Additionally, because they were lumped together in one factor the court failed to properly weigh them. The court listed each nonstatutory factor in its sentencing order. The appellant is arguing over a matter of semantics. The trial court considered these factors and gave them very little weight. The decision concerning the weight to give a mitigating factor is within the trial court's discretion. Even if there were error, it would be harmless in light of the strong aggravating factors found in this case.

VII. The various attacks now raised on the constitutionality of section 921.141, Florida Statutes (1991), and the jury instructions were either not raised below and are procedurally barred, or such claims have previously been rejected and are without merit.

ARGUMENT

I. THE TRIAL COURT PROPERLY DENIED THE DEFENDANT'S MOTIONS FOR JUDGMENT OF ACQUITTAL.

The appellant argues that the trial court erred in denying his motions for judgment of acquittal because the evidence surrounding the killing was insufficient as a matter of law to establish premeditation.

This issue is not properly preserved. The appellant at trial based his motion for a judgment of acquital on the failure of the State to present a prima facie case. (T 1008,1014) Now, he is arguing that as a matter of law the trial court should have granted his motion for judgment of acquital. The purpose for a contemporaneous objection at the trial court is to allow the judge to review the particular objection and rule appropriately. The trial court never had the opportunity to rule on this issue. Where a motion for judgment of acquital is made on one ground and different grounds are argued on appeal, the issue of sufficiency of the evidence based on the new grounds has not been preserved for appellate review. Johnson v. State, 478 So. 2d 885 (Fla. 3d DCA 1985); Estrada v. State, 400 So. 2d 562 (Fla. 1982)(argument presented for first time on appeal not preserved for appellate review); Rosemond v. State, 489 So. 2d 1185 (Fla. 1st DCA 1986).

Even if this issue was preserved for appeal, there is competent, substantial evidence to support the jury verdict. The following facts may shed additional light on this issue. On January 4, 1992, Timothy Johnson, Karen Spencer's son, was awakened by the screams of his mother. (T 462) He went into her

bedroom where he saw Spencer hitting her. (T 463) Spencer then grabbed an iron and began hitting Timothy with it. (T 463) Timothy retreated to his own bedroom. (T 465) Spencer came into Timothy's bedroom and said, "your mother fucked up my life, now I'm going to fuck her up". (T 465-466) Timothy tried to call the police from his room, but Spencer yanked the phone out of the wall. (T 470) Spencer told Timothy in his bedroom, "you're next, you're next, I don't want any witnesses". (T 558) Karen Spencer ran to a neighbor's house to seek help. (T 568) She told Mr. Elmore that Timothy was still back at the house with Spencer. (T 571) Although Mr. Elmore did not remember Karen's exact words, he remembered that she said Spencer had used the word "kill". (T 585) Deputy Weyland investigated the crime and found blood on Karen Spencer's bed, the comforter, and blood on the foot of the bed. (T 624)

Dr. Bowman was the doctor at the emergency room who treated Karen Spencer. Karen told Dr. Bowman that she was beaten with an iron. (T 648) Dr. Bowman testified that her injuries were consistent with having been beaten with an iron. (T 648)

Timothy Johnson was awakened on January 18, 1992 again by the screams of his mother. (T 478) When Timothy saw his mother, she had blood on her face. (T 481) Spencer told him that his mother had fucked up his life. (T 481) Spencer lifted up Karen's nightgown and said, "here, show your boy your pussy", and then he slapped her head against the wall. (T 481) Karen asked Spencer to stop. (T 482) At the time Spencer was hitting the back of Karen's head against the wall, her face was full of

blood. (T 483) Spencer pulled a steak knife out of his back pocket. (T 484,485) He was wearing gloves. Timothy had never seen him wear gloves in three years. (T 549)

Dr. Anderson, the medical examiner for District 9 in Florida, testified that the wounds to Karen Spencer's face were consistent with a sharp force injury, from a knife. (T 728) The injuries to the back of her head were consistent with her head having been hit against a wall. (T 732) There was a stab wound of the lateral aspect of the right breast area. (T 735) She had defensive wounds on her right arm. (T 738) In Dr. Anderson's opinion, all the wounds occurred during the time she was alive. (T 745)

Mr. Smith was a neighbor of Karen Spencer. (T 771) On the morning before Karen was murdered, Mr. Smith noticed Spencer drive up in his car. (T 776) He parked along side the curb in front of Mr. Smith's house. (T 776) He looked at Mr. Smith, then he looked down towards his house. (T 777)

Mr. Abrams worked for Spencer in the painting business. (T 903) During the time Spencer and Karen were living apart, Spencer turned over a briefcase to Mr. Abrams. (T 904) In the briefcase were papers concerning the business. (T 904) As Spencer turned over the briefcase, he told Mr. Abrams, "you are going to run the show now". (T 906) Mr. Abrams also testified to a statement that Spencer made on January 1, 1992, that, "he would like to take her out of the boat, and throw 'her' overboard," referring to Karen Spencer. (T 914) On January 3, 1992, Spencer told Mr. Abrams that, "she said that she would

never go out in the boat again, or 'she' didn't want to go out in the boat again" again, referring to Karen Spencer. (T 915)

Deputy McCann, of the Orange County Sheriff's Office, testified that they found Spencer's car hidden in a wooded area with palm fronds on it. (T 951)

When moving for judgment of acquittal a defendant admits the facts adduced at trial, as well as every conclusion which may be inferred from the evidence which is favorable to the state. State v. Law, 559 So. 2d 187 (Fla. 1989). A judgment of acquittal should be granted only if the state fails to produce evidence from which the jury could exclude every reasonable hypothesis except that of guilt. Id. Where the state produced competent, substantial evidence from which the jury could have reasonably rejected the defendant's hypothesis of innocence, the judgment of acquittal should be denied. Id.

> The state is not required to "rebut conclusively every possible variation" (footnote omitted) of events which could be inferred from the evidence which is consistent with the defendant's theory of events. (citations omitted).

Id. at 189.

The concern on appeal is whether, after all conflicts in the evidence and all reasonable inferences from the evidence have been resolved in favor of the verdict, there is competent substantial evidence to support the verdict and judgment. Holton v. State, 573 So. 2d 284, 289 (Fla. 1990).

The appellee would submit that the State produced competent, substantial evidence from which the jury could have

reasonably rejected the appellant's theory. The appellant would have us believe that in a blind rage he killed Karen Spencer. However, all the evidence shows a well thought out plan to murder her in cold blood. When Spencer attacked Karen Spencer on January 4, 1992, the attack was stopped by the entry into the bedroom of Timothy Johnson. Spencer stated to Timothy that he did not want to leave any witnesses. Spencer was hitting Timothy with the iron on his face. Additionally, Spencer ripped the phone out of the wall as Timothy Johnson was trying to make a phone call for help. The appellee would argue that this attack was stopped because Karen Spencer was able to get out of the house and go for help. Spencer was not so out of control that he did not realize that if he killed Timothy Johnson there would be witnesses.

Spencer was thinking about killing Karen Spencer on January 1, 1992, when he told Mr. Abrams, that, "he would like to take her out on the boat and throw her overboard". (T 914) He was still thinking about killing her on January 3, 1992, when he told Mr. Abrams, "she said that she would never go out in the boat again, or she didn't never want to go out in the boat again". (T 915)

Circumstances which show the appellant's intentions were the fact that he parked the car away from the house the day of the murder. He did not want neighbors identifying his car at the scene. Spencer wore gloves to the house the day of the murder. He also carried a steak knife in his pocket. This murder was not committed, as the appellant indicates, as the result of a

spontaneous, blind and unreasoning reaction to the circumstances leading up to the murder. Rather, Spencer, remembering how his first wife left him bankrupt, was going to get even with Karen Spencer. He was going to make her pay for taking his painting business. The brutal manner in which the murder was committed was indicative of his intent to make Karen Spencer suffer for what she had done to him. He meant to make her feel pain that day. Spencer slashed her face with a knife; slammed her head against a wall; stabbed her in the chest area; and she received defense wounds trying to protect herself. Spencer lifted Karen's nightgown, telling her to "show her boy her pussy". Spencer meant to humilate and make Karen Spencer pay for "fucking up his life".

The appellant cites Hoefert v. State, 617 So. 2d 1046 (Fla. 1993). In that case this Court found the following facts:

> Hunt accompanied Hoefert to his apartment several days later; the cause of Hunt's death was asphyxiation; Hoefert had strangled several other women while either raping or assaulting them; and Hoefert attempted to conceal his crime by failing to report Hunt's death to the authorities, by digging a large hole in his yard where he planned to bury Hunt's body, and by fleeing to Texas.

Id. at 1049

In the instant case the evidence shows premeditation. There was nothing spontaneous about this murder. Spencer had been thinking about killing his wife for a number of days. He did not just accidentally wear gloves the day of the murder. He did not

just accidentally park his car away from the house the day of the murder. He did not just accidentally have a steak knife in his pocket the day of the murder. The evidence in this case is much stronger for premeditation. Most of the evidence in Hoefert is circumstantial. In the instant case, however, Timothy Johnson saw first hand the gloves, the steak knife, and saw part of the attack upon his mother. Timothy also heard Spencer's remark "show your boy your pussy", and his mother's response to "stop". The evidence presented is inconsistent with the appellant's theory of the case, and the trial court properly denied his motion for judgment of acquittal.

In Ross v. State, 474 So. 2d 1170 (Fla. 1985), the evidence revealed that the defendant was angry with the victim, his wife, and that he brutally beat her about the face, head, torso, and extremities, with fist, feet, and an unknown blunt instrument while she attempted to defend herself. This Court found the record contained sufficient evidence from which the jury could have rationally inferred the existence of premeditation.

In the instant case the appellant slashed Karen Spencer's face with a knife; slammed her head into a wall; cut her breast with a knife; and stabbed her several times in the chest area. As in Ross there was sufficient evidence presented from which the jury could have rationally inferred the existence of premeditation.

Finally, appellee would submit that Spencer was stopped during his attack by Timothy Johnson. At this time Spencer would have had the opportunity to stop his attack if it was just the

result of a blind rage. The defendant in Sochor was stopped in his attack on the victim by a third party, and this Court found the defendant's claim that the offense was a heat-of-passion type homicide insufficient to preclude a finding of premeditation. Sochor v. State, 619 So. 2d 285 (Fla. 1993). The victim was still alive at this time because as part of his plan not only to kill Karen Spencer, but to torture her, he lifted her nightgown and said, "show your pussy to your boy". Karen said "don't" at this point indicating she was still alive. Timothy Johnson did not see any chest wounds at this time, which were the cause of death, so perhaps Karen would still be alive if the attack had stopped at this point.

II. THE TRIAL COURT PROPERLY DENIED THE DEFENDANT'S MOTION TO SEVER CHARGES.

The appellant argues that count one, first degree premeditated murder and count two, aggravated assault, which happened on January 18, 1992, should have been severed from count three, attempted murder, and count four, aggravated battery, which happened on January 4, 1992, as these offenses were not episodically connected.

The standard of review used in cases involving consolidation or severance of charges is one of abuse of discretion. State v. Vasquez, 410 So. 2d 1088 (Fla. 1982). The appellant has failed to show how the trial court abused its discretion. All four counts charged involve the same three parties, the appellant, Karen Spencer, and Timothy Johnson. All four counts involve crimes committed at the same geographic location, Karen Spencer's house. All four counts show a common plan or scheme to punish Karen Spencer because she left the appellant. The offenses committed on January 4, 1992 were the attempted murder of Karen Spencer, and the aggravated battery of Timothy Johnson. The offenses committed on January 18, 1992 were the first degree premeditated murder of Karen Spencer, and the aggravated assault of Timothy Johnson. The appellee would submit that if Karen Spencer had not been able to flee the house on January 4, 1992, then on that date she would have been murdered. Both of these encounters are episodically connected. The trial court properly denied the appellant's motion to sever Counts one and two from Counts three and four.

Even if the trial court erred in not granting the appellant's motion to sever, the joinder did not cause actual prejudice by having a damaging effect or influence on the jury's verdict. Livingston v. State, 565 So. 2d 1288 (Fla. 1988), (quoting United States v. Lane, 474 U.S. 438, 106 S.Ct. 725, 88 L.Ed.2d 814 (1986)). There was overwhelming evidence of the appellant's guilt. He was seen wearing gloves during the murder of Karen Spencer. He pulled a steak knife from his pocket, which Timothy Johnson witnessed. Timothy watched as Spencer slammed his mother's head, against the wall. Spencer left a shoe imprint in Karen Spencer's blood. Harmless error may properly be applied to the misjoinder of offenses. Beltran v. State, 566 So. 2d 792 (Fla. 1990).

III. THE TRIAL COURT PROPERLY USED THE STANDARD JURY INSTRUCTIONS ON PREMEDITATION AND REASONABLE DOUBT.

The appellant argues that the trial court erred by giving the Florida Standard Jury Instruction for first degree murder.

The Florida Standard Jury Instructions in Criminal Cases, Florida Statutes, section 782.04(1)(a), was given in this case. (T 1074) That instruction correctly states the law concerning premeditation.

The appellant relies upon McCutchen v. State, 96 So. 2d 152 (Fla. 1957), pulling the word "deliberation" out of a passage. In McCutchen a wife killed her husband with a gun some five minutes after he had slapped her. Id. at 153. This Court found that there was sufficient time between the act of slapping and the act of killing to form a premeditated design. Id. at 153. In determining premeditation, the period of time did not matter so much as if there was reflection and deliberation on the part of the defendant, and the defendant at the time of the killing was fully conscious of a settled and fixed purpose to take a life.

In the instant case the jury was read "killing with premeditation" as follows:

> ... is killing after consciously deciding to so. The decision must be present in the mind at the time of the killing. The law does not fix the exact period of time that must pass between the formation of the premeditated intent to kill and the killing. The period of time must be long enough to allow reflection by the defendant. The premeditated intent to kill must be formed before the killing.

(T 1074)

The word "deliberation" is not used in the instruction. However, the standard jury instruction used in the instant case covers the requirements of McCutchen. "Killing after consciously deciding to do so" is semantically the same thing as "deliberation." The standard jury instruction requires the jury to determine that the appellant had deliberated about killing Karen Spencer. Furthermore, under the instruction given, the appellant's decision to kill Karen Spencer must have been present before he killed her. The standard jury instruction further states that the period of time, between the formation of the intent to kill and the killing, must be long enough to allow reflection by the defendant. The appellee would submit that the appellant's claim is meritless because the instruction given covers what the appellant claims was not given to the jury. Accordingly, the trial court properly gave the standard jury instruction.

The appellant also claims that the standard jury instruction on reasonable doubt is unconstitutional because it confuses the jury and equates the word "reasonable" with such condemned terms as "substantial" and "real".

The appellant quite properly points out in a footnote the case of Brown v. State, 565 So. 2d 304 (Fla. 1990). In Brown this Court held that the standard reasonable doubt instruction did not improperly dilute the quantum of proof required to meet the reasonable doubt standard. This Court further stated that the standard instruction, when read in its totality, adequately defines "reasonable doubt".

The appellant's claim is without merit. The trial court properly used the standard jury instruction on reasonable doubt.

IV. THE TRIAL COURT PROPERLY DENIED THE DEFENDANT'S MOTION FOR MISTRIAL.

The appellant contends that the prosecutor argued something that was not testified to in court, and his motion for mistrial should have been granted. The prosecutor stated in closing argument, "Karen answered the door with the rifle in her hand". (T 1040)

The appellee would concede that during the trial the testimony was not allowed concerning Karen Spencer carrying a rifle around with her the night before her murder. However, the appellee would submit that this issue has not been properly preserved. The appellant's trial counsel objected when this comment was made, and the trial court sustained his objection, but denied the motion for mistrial. The appellant's trial counsel did not ask for a curative instruction, and therefore he did not preserve this issue for appeal. Ferguson v. State, 417 So. 2d 639 (Fla. 1982).

Even if this issue is preserved for appeal, the appellee would submit that the trial court properly denied the motion for mistrial. A motion for mistrial is appropriate and should be granted only when the error committed was so prejudicial and fundamental that it denies the accused a fair trial. Buenoano v. State, 527 So. 2d 194 (Fla. 1988); Duest v. State, 462 So. 2d 446 (Fla. 1985); Breedlove v. State, 413 So. 2d 1 (Fla. 1982); Cobb v. State, 376 So. 2d 230 (Fla. 1979). Furthermore, a motion for mistrial is directed to the sound discretion of the trial judge. Doyle v. State, 460 So. 2d 353 (Fla. 1984); Ferguson v. State,

417 So. 2d 639 (Fla. 1982); Salvatore v. State, 366 So. 2d 745 (Fla. 1978). The appellant has failed to show that the trial court abused its discretion. The trial court sustained the objection, and the appellant's trial counsel failed to ask for a curative instruction. Perhaps the appellant's trial counsel did not feel that the statement required a curative instruction. The trial court properly denied the motion for mistrial.

In order for a prosecutor's commments to merit a new trial, the comments must be of such nature:

> (1) so as to deprive appellant of a fair and impartial trial;
>
> (2) materially contribute to his conviction;
>
> (3) be so harmful or fundamentally tainted so as to require a new trial; or
>
> (4) be so inflammatory that they might have influenced the jury to reach a more severe verdict than that which they would have reached otherwise.

Lopez v. State, 555 So. 2d 1298 (Fla. 3d DCA 1990), citing Darden v. State, 329 So. 2d 287 (Fla. 1976).

The prosecutor's statement, "Karen answered the door with the rifle in her hand", did not meet any of the requirements in Lopez to merit a new trial. The statement goes towards Karen Spencer's fear. The jury had heard plenty of testimony that would cause anyone to have fear. Spencer and Karen were separated during the month of January. The jury knew that Spencer had attacked Karen with his fists and an iron on January 4, 1992. Karen knew that Spencer had also attacked her son,

Timothy Johnson on January 4, 1992. That Spencer was not taking the divorce well would be an understatement. The comment was not so harmful or inflammatory as to deprive the appellant of a fair and impartial trial. The trial court properly denied the motion for mistrial.

Finally, the appellee would submit that the prosecutor's statement was rendered harmless considering the overwhelming amount of evidence of guilt. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). The appellee relies upon the facts previously cited.

V. THE TRIAL COURT PROPERLY ALLOWED OFFICER HUGHLEY'S TESTIMONY IN THE PENALTY PHASE.

Officer Hughley was called in the penalty phase by the state. He investigated an incident between Karen Spencer and the appellant on December 10, 1991. (P 123) Spencer wanted money in the business bank account. (P 125) Karen said that Spencer said he was going to get the money or he was going to kill her. (P 125) Karen moved from the kitchen area to the bedroom because the bedroom door had two locks on it. (P 125) Spencer was right behind Karen and put his hand around her throat, choking her, and put his other hand over her mouth and nose. (P 126) Spencer stated that this was just a sample of what she was going to get, and he further stated that, "I'm going to kill you if you don't get the money from the account". (P 126) While Spencer was in jail, Karen reported to Officer Hughley that Spencer had called her and said that, "I'm going to come back and finish what I started as soon as I get out of jail". (P 128)

The appellant argues that this testimony was hearsay and should not have been allowed, and secondly, that this is the only testimony the trial court relied upon in the sentencing order concerning the finding of cold, calculated, and premeditated.

First, the appellee will address the second part of the argument. Factually, the appellant is incorrect. (R 1235) The trial court not only relied upon the December 10, 1991, altercation, but also the trial court relied upon the January 4, 1992, altercation between Karen Spencer and the appellant. (R 1235) In addition the trial court also relied upon the January

1, 1992, statement appellant made to Mr. Abrams that, "he would like to take the victim out on the boat and throw her overboard". (R 1235)

Furthermore, the trial court did two weighings in this case, one with the aggravating factor of cold, calculated, and premeditated, and the second weighing without that factor. (R 1243) Both weighings resulted in the imposition of the death penalty. This claim is without merit.

The appellant, as a side argument, states that this testimony was too remote in time. As the trial court stated, the announced intention to kill Karen Spencer began on December 10, 1991. (R 1236) This was not a typical domestic killing. The loving couple was not sitting around one day then entered into an argument, which resulted in the death of one party. Spencer knew what he wanted accomplished and that was the death of his wife, Karen. Spencer first verbalized this to the victim on December 10, 1991, and carried out his intended result on January 18, 1992, only thirty-nine days later. This testimony was not remote, and it was very relevant. The trial court properly allowed the introduction of this testimony.

Concerning the appellant's first argument, the trial court properly allowed the testimony. This testimony was relevant to the then existing state of mind of Karen Spencer and the appellant. Karen's then existing state of mind was relevant to the aggravating factor of heinous, atrocious, or cruel, showing her fear. Spencer's then existing state of mind is relevant to show the aggravating factor of cold, calculated, and premeditated

manner without any pretense of moral or legal justification. The state of mind exception to the hearsay rule relates to a statement showing the declarant's state of mind, and not someone else's, and that statement is admissible to prove declarant's state of mind at the time of the statement when that is at issue, or may be offered to prove that the plan or intention stated by declarant was subsequently acted upon. Van Zant v. State, 372 So. 2d 502 (Fla. 1st DCA 1979). Since this testimony is relevant to the then existing state of mind, this testimony would be an exception to the hearsay rule. Additionally, appellee would submit that Karen's statements to Officer Hughley were part of the res gestae also an exception to the hearsay rule. Garcia v. State, 492 So. 2d 360 (Fla. 1986); rev'd on other grounds, Garcia v. State, 622 So. 2d 1325 (Fla. 1993).

Even if the court determines that this testimony was hearsay, then appellee would submit that hearsay is allowed under the death penalty statute. If a defendant could, in fact, have rebutted hearsay testimony, the evidence is admissible. King v. State, 514 So. 2d 354 (Fla. 1987). The appellant's attorney cross examined Officer Hughley concerning the statements. Spencer could have rebutted this testimony. All he would have had to have done is take the witness stand, and say it is not true; that he never threatened Karen on December 10, 1991, nor on December 11, 1991. In Buenoano v. State, 527 So. 2d 194, 198 (Fla. 1988), this Court found that hearsay testimony in the penalty phase was susceptible to fair rebuttal where defense counsel represented Buenoano in the prior felony cases, of which details were solicited.

Even if there was error, it was harmless and did not result in prejudice to the defendant's case requiring a new sentencing proceeding. State v. DiGuillo, 491 So. 2d 1129 (Fla. 1986) The state during the guilt phase produced other witness testimony indicating Spencer had made threats to Karen. The jury was exposed to threats that Spencer made on Karen's life, in any event.

VI. THE TRIAL COURT PROPERLY IMPOSED THE APPELLANT'S DEATH SENTENCE AFTER WEIGHING THE AGGRAVATING CIRCUMSTANCES AND THE MITIGATING CIRCUMSTANCES.

1. Cold, Calculated, and Premeditated

The appellant's first argument is that the aggravating circumstance of cold, calculated, and premeditated manner without any pretense of moral or legal justification was not established beyond a reasonable doubt. First, because the trial court ignored the evidence presented by the expert witnesses. Secondly, this aggravating factor should be stricken because this is a husband killing his wife.

Dr. Lipman, a neuropharmacologist, and Dr. Burch, a clinical psychologist, testified that the appellant's ability to appreciate the criminality of his conduct was not substantially impaired but that in their expert opinions, the appellant's capacity to conform his conduct to the requirements of law was substantially impaired, and that he was under the influence of extreme mental or emotional disturbance.

In this case, there was substantial evidence which contradicted this in the appellant's intentionally thought out acts. First, the appellant came to the scene wearing gloves to conceal his identity. This shows a pre-existing and continuing thought process on the appellant's part. The appellant is altering his conduct ahead of time to try and avoid the consequences of the law by avoidance of detection. This was further supported by the fact the appellant parked away from view, not in the visual view of the house, where he would

normally park. Again, this shows a pre-existing and continuing thought process of altering his actions to avoid the consequences of the law by avoidance. It contradicts the testimony that his actions reflected confusion and mental impairment. The defense experts testified in their opinions that the way the appellant committted the murder, he would have such obvious expectations of being caught that this reflected his confusion. To the contrary, the evidence showed his actions were almost effective in successfully committing the crime and avoiding detection.

The appellant went to commit the crime at a time when people were not on the street and Timothy Johnson, the son of the victim, was asleep. When the appellant parked away from the house, no one ever did see him come or go. Neighbors never saw him at the crime scene. Because the appellant wore gloves, despite careful crime scene processing, no prints of the appellant were ever found. The appellant did not leave the murder weapon, the knife at the scene, nor was it found in his car or on his person at the time he was arrested. Timothy Johnson, the only living eye witness, did not awaken because he heard the appellant; he heard the screams of his mother. The defense experts testified that the fact that the appellant would go to the house, begin to commit the crime after probably realizing the son, Timothy Johnson, must be home was a ridiculous thing for the appellant to do and reflected mental confusion on his part. This testimony was properly rejected by the trial court. Criminals do not always choose no risk, no witnesses, and this risk shows the appellant's determination and resolution to carry out his decision to kill Karen Spencer.

The appellant, according to both expert witnesses, knew the difference between right and wrong at the time he murdered Karen Spencer. The trial court in its sentencing order stated:

> The Court has considered the Defendant's use and abuse of drugs and/or alcohol prior to the murder of Karen Spencer. The Court finds that there is no evidence of any type of alcohol or drug impairment of the Defendant at the time of the murder. The Court also finds that there is no strong evidence of any mental or emotional impairment or disturbance at the time of the murder, other than mere speculation. Despite suffering from a paranoid personality disorder, chronic substance abuse and biochemical intoxication the Defendant ran a very successful business and was a great employer according to the testimony of Mr. Abrams. The Defendant, according to both Doctors knew the difference between right and wrong at the time he brutally murdered Karen Spencer.

The trial court may accept or reject the testimony of an expert witness, just as the Court may accept or reject the testimony of any other witness. Bates v. State, 506 So. 2d 1033 (Fla. 1987) The trial court heard the appellant's expert's testimony, and the trial court rejected that evidence. The trial judge rejected emotional disturbance and any sort of diminished mental capacity as mitigating factors. It is clear Spencer's mental state did not negate his ability to formulate a careful plan or design to kill his wife.

The second part of the appellant's argument is that this aggravating circumstance should not be applied where a husband kills his wife. The appellee submits that this was not your

normal husband wife killing. In a situation where a heated argument gets out of hand and one party is killed then appellee would agree with the appellant. However, this is not such a situation. Here Spencer decided to kill Karen. When he decided this, no one but he knows. Then the morning of the murder, the appellant parked his car away from the house, the appellee would submit for two reasons; one, that he wanted to avoid detection by Karen Spencer, and two, that he wanted to avoid detection by the neighbors. The appellant wore gloves that day to avoid leaving finger prints. The appellant took the murder weapon with him, which was never found.

All this evidence shows a calculated plan by Spencer to kill Karen. Spencer intended to kill Karen for a number of days. This murder was the product of a careful plan or prearranged design. Rogers v. State, 511 So. 2d 526,533 (Fla. 1987), cert. denied, 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988).

The appellant cites Santos v. State, 591 So. 2d 160 (Fla. 1991), where this court found that the killing arose from a domestic dispute, negating cold, calculated, and premeditated. In Santos the defendant had been in a long stormy relationship with the victim. The victim left him and he could not deal with the break up. Id. at 161. Santos had made threats towards the victim, and on the day that he murdered her, he got out of a taxi, chased her down, and killed her. Id. at 161. There was strong evidence that Santos was suffering from some mental illness. The trial had to be postponed for a year because he became "psychotic". Id. at 161.

However, in the instant case we do not have a similar factual situation. Even Spencer's expert witnesses testified that he could distinguish right from wrong. Mr. Abrams who worked with him daily did not notice any change in his behavior. In fact when Spencer made the comment about wanting to take his wife out on the boat and throw her overboard, Mr. Abrams thought he was joking. Spencer was not exhibiting the same distress that Santos had. Any divorce may have an effect on the mental processes of those involved, however, this does not mean that people cannot carefully plan the demise of the other individual.

In Williams v. State, 437 So. 2d 133 (Fla. 1983), the defendant killed his live in girlfriend. Earlier that night the victim had received a number of upsetting phone calls from Williams. Williams borrowed a gun from a friend, and when the victim arrived back at the apartment, Williams shot her. Id. at 134. The court determined this was a premeditated murder. Id. at 134. Williams argued that he should not receive the death penalty because this was domestic dispute, however, this court held otherwise. Id. at 137. Although this case does not concern the aggravating circumstance directly, it does show that in situations where emotions run high, if prior planning is involved such as in the instant case, then the death penalty is proper.

In Way v. State, 496 So. 2d 126 (Fla. 1986), this court stated the following:

> Here, appellant called the victim into the garage and struck her twice in the head with a blunt instrument. He poured gasoline over her and doused the rest of the garage,

> setting the area ablaze. Appellant then returned to the house to smoke a cigarette and, after being alerted to the fire by a younger daughter, he impeded subsequent rescue attempts by denying knowledge or possession of a key to a locked garage door. These acts warranted characterization by the trial court as "the highest degree of calculation and premeditation."

Id. at 129.

In Way, this court found the aggravating circumstance of cold, calculated, and premeditated, and in the instant case this court should also find this aggravating circumstance. The appellee will rely upon the previously stated facts.

In Porter v. State, 564 So. 2d 1060 (Fla. 1990), this court found that the case did not involve a sudden fit of rage. Porter previously had threatened to kill Evelyn Williams, the victim and former live-in lover, and her daughter. He had watched Evelyn's house for two days just before the murder. He stole a gun from a friend just to do the killing. Id. at 1064. He had told another friend that she would be reading about him in the newspaper. This court stated, that "while Porter's motivation may have been grounded in passion, it is clear that he contemplated this murder well in advance". Id. at 1064. The state did meet its burden in proving beyond a reasonable doubt that the murder was committed in a cold, calculated, and premeditated manner without any moral or legal justification. Id. at 1063.

The instant case is very similar to Porter. Spencer had made previous threats on Karen's life. He was seen the day before the murder watching her house. He brought a murder weapon

with him to the scene. He wore gloves and parked away from the house to avoid detection. The appellee would submit that even if Spencer's motivation was grounded in passion as the appellant claims, it is clear that he contemplated this murder well in advance. The appellee does not however believe that this murder was one of passion, rather what prompted Spencer to act the way he did was the loss of his business and financial ruin. The trial court properly found this aggravating factor to exit.

2. Heinous, Atrocious, or Cruel

The appellant argues that because of his mental impairment and state of stress and rage, there can be no showing that he intended for the victim to suffer or even intended the method of killing.

Spencer relies upon Porter v. State, 564 So. 2d 1060 (Fla. 1990), and Clark v. State, 609 So. 2d 513 (Fla. 1992), as cases supporting his argument that this aggravating circumstance is not appropriate. However, these cases can be distinguished factually. Both cases involved shootings where the victims died rather quickly. In the instant case Karen Spencer, the victim, was in fear of Spencer. He had made threats against her life on previous occasions. Fear and emotional strain may be considered as contributing to the heinous nature of the murder, even where the victim's death was almost instantaneous. Hitchcock v. State, 578 So. 2d 685 (Fla. 1990). The manner in which the murder was committed was intended to torture Karen. Spencer somehow gained entrance to the home and attacked Karen. They both ended up in the backyard where Spencer used a knife to slash her face four or

five times. In addition he also slammed her head against a wall. The attack was interrupted by Timothy, Karen's son, but after time for reflection, Spencer again started the assault. Karen was stabbed four or five times in the chest area, and she received defense wounds trying to protect herself. The medical examiner testified that she would have been alive when she received her injuries. Finally, during the attack, Spencer lifted her nightgown and told her to "show your pussy" to your boy. Karen pleaded with him "don't". This murder was accomplished in such a way to torture Karen and to inflict a great deal of pain. This factor has been found applicable where the commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies, "the conscienceless or pitiless crime which is unnecessarily torturous to the victim". Douglas v. State, 575 So. 2d 165 (Fla. 1991) quoting Herzog v. State, 439 So. 2d 1372,1380 (Fla. 1983).

Karen Spencer was beaten, knifed, slammed against a wall. Randolph v. State, 562 So. 2d 331 (Fla. 1990) (The victim repeatedly hit, kicked, strangled, and knifed); Perry v. State, 522 So. 2d 817 (Fla. 1988) (victim was choked and repeatedly stabbed and was severely beaten while warding off blows); Campbell v. State, 571 So. 2d 415 (Fla. 1990) (victim was stabbed twenty-three times over the course of several minutes and had defensive wounds). The trial court properly found this aggravating factor.

Appellant argues that expert testimony shows that Spencer was unable to control his actions. The trial court heard this testimony and all the other testimony in this case. The trial court rejected this testimony. In determining whether a mitigating circumstance is applicable in a given case, the trial court may accept or reject the testimony of an expert witness, just as the court may accept or reject the testimony of any other witness. Bates v. State, 506 So. 2d 1033 (Fla. 1987).

B. Mitigating Factors, Both Statutory and Non-Statutory, Are Present Which Outweigh any Appropriate Aggravating Factors.

The appellant argues that the trial court rejected unrebutted evidence of statutory mitigating factors without explanation. The appellee would submit that the appellant is factually incorrect.

The trial court in its sentencing order discussing whether the statutory mitigating circumstance of under extreme mental or emotional disturbance exists went through the relevant testimony of Spencer's experts. The court, however, in reviewing all the evidence presented stated in its order:

> The court has considered the defendant's use and abuse of drugs and/or alcohol prior to the murder of Karen Spencer. The court finds that there is no evidence of any type of alcohol or drug impairment of the defendant at the time of the murder. The court also finds that there is no strong evidence of any mental or emotional impairment or disturbance at the time of the murder, other than mere speculation. (emphasis supplied) Despite suffering from a paranoid personality disorder, chronic

> substance abuse and biochemical intoxication the defendant ran a very successful business and was a great employer according to the testimony of Mr. Abrams. The defendant, according to both doctors knew the difference between right and wrong at the time he brutally murdered Karen Spencer.

(R 1239).

The sentencing court must expressly evaluate in its written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence. Campbell v. State, 571 So. 2d 415 (Fla. 1990). The trial court in this case has followed the criteria set out in Campbell. The appellant argues that the trial court relied upon the wrong standard citing Ferguson v. State, 417 So. 2d 631 (Fla. 1982). However, in Ponticelli v. State, 593 So. 2d 483 (Fla. 1991) this court stated:

> Next, we reject Ponticelli's contention that it was error to allow the state to elicit Dr. Mill's opinion that Ponticelli had the ability to differentiate between right and wrong and to understand the consequences of his actions. While this testimony is clearly relevant to a determination of a defendant's sanity, it is also relevant in determining whether mitigating circumstances exist under section 921.141(6)(b) (the defendant was under the influence of extreme mental or emotional distrubance), or section 921.141(6)(f) (defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired). Further, while the trial court below referred to the "M'Naghten criteria" in

> rejecting these mitigating factors, it specifically considered these mental mitigating factors in its sentencing order and used M'Naghten criteria as but one consideration leading to their rejection, unlike the courts in Ferguson v. State, 417 So. 2d 631 (Fla. 1982), and Mines v. State, 390 So. 2d 332 (Fla. 1980), cert. denied, 451 U.S. 916, 101 S.Ct. 1994, 68 L.Ed.2d 308 (1981).

Id. at 490.

The trial court complied with the above-mentioned criteria. The trial court considered the appellant's ability to differentiate between right and wrong as only one consideration in its rejection of this statutory mitigating circumstance. As in Ponticelli, the trial court in the instant case found the experts testimony in support of this factor "mere speculation". The experts did not support their opinions with factual testimony but rather with conclusions. The evidence of the crime itself as noted in prior points of this appeal does not lead to the conclusion drawn by the experts. In determining whether a mitigating circumstance is applicable in a given case, the trial court may accept or reject the testimony of an expert witness, just as the court may accept or reject the testimony of any other witness. Bates v. State, 506 So. 2d 1033 (Fla. 1987) The decision as to whether a mitigating circumstance has been established, and if established, the weight afforded it is within the trial court's discretion. Reversal is not warranted simply because an appellant draws a different conclusion. Sireci v. State, 587 So. 2d 450 (Fla. 1991); Stano v. State, 460 So. 2d 890 (Fla. 1984).

In Preston v. State, 607 So. 2d 404 (Fla. 1992) this issue was raised. In that case the trial court determined that the mitigating factors of under the influence of an extreme mental or emotional disturbance and that his capacity to appreciate the criminality of his conduct or to conform his conduct his requirements of law was substantially impaired did not exist. Even though the defendant's expert testified that Preston suffered from poly-substance abuse and was under the influence of PCP at the time of the offense. The court did take into account the fact that the defendant had told someone else about his intent to to commit a robbery to obtain money. He robbed a convenience store taking the store employee, the victim, with him. He drove her to another location and forced her to walk some distance. He required her to disrobe first and then inflicted a fatal wound. All this showing his capablity to plan and deliberate. In the instant case the trial court relied upon evidence pointed out in prior points, and rejected the expert's testimony. The evidence did not point to a heated domestic confrontation, but rather the evidence demonstrated a cold, well planned, murder. The trial court properly rejected both statutory mitigating factors. See Nibert v. State, 574 So. 2d 1059,1062 (Fla. 1990), (trial court may reject defendant's claim that a mitigating factor exists if the record contains competent substantial evidence to support rejection).

The appellant argues that intoxication and alcoholism have been accepted as a basis for the statutory mitigating circumstance of extreme emotional or mental disturbance. The

appellee would submit that the trial court considered Spencer's testimony concerning consumption of alcohol and drugs. In fact the trial court listed these in its sentencing order as non-statutory factors. The evidence showed that Spencer was not intoxicated at the time of the murder. The trial court found these non-statutory factors present, but gave them very little weight. The decision as to whether a mitigating circumstance has been established, and if established, the weight afforded it is within the trial court's discretion. Reversal is not warranted simply because an appellant draws a different conclusion. Sireci v. State, 587 So. 2d 450 (Fla. 1991); Stano v. State, 460 So. 2d 890 (Fla. 1984).

Non-statutory Mitigating Circumstances.

The appellant argues that the trial court correctly listed several aspects of Spencer's character and background, but failed to give them appropriate weight. The court considered them only as one factor, rather than giving them separate weight. (IB 59) This argument is one of semantics. The trial court did consider these non-statutory circumstances, as reflected in its sentencing order, however, it did not give them the weight that appellant would like.

The trial court considered Spencer's service in the Marine Corps. There was testimony presented that while Spencer was in the Marines, he was using drugs and alcohol.

The trial court considered Spencer's employment record and even made a comment that the business was well run.

The trial court considered the fact that Spencer can function in a structured environment that does not contain women, witihout being a danger to himself or others.

The trial court considered Spencer's drug and alcohol abuse from an early age that continued throughout his adult life.

The trial court considered Spencer's sexual abuse at the hands of his father.

The trial court heard testimony about Spencer helping to save a life, but did not find this as a non-statutory factor. Spencer was only one of three people who helped take a man from the woods out to a location where a helicopter could fly him to the proper medical facility. Spencer's life was never at risk during this crisis.

The appellant incorrectly argues that the trial court did not properly perform its duty. However, the trial court considered each and everyone of these factors, and gave each one of them the weight the court determined was proper. Just because the appellant is not happy with the result does not mean an error occurred. The trial court properly determined the applicability of non-statutory factors in this case, and also determined what weight to give each one. The decision as to whether a mitigating circumstance has been established, and if established, the weight afforded it is within the trial court's discretion. Sireci v. State, 587 So. 2d 450 (Fla. 1991); Stano v. State, 460 So. 2d 890 (Fla. 1984).

If there was error in failing to evaluate or find nonstatutory mitigation it is harmless in light of the very

strong case for aggravation and in view of the fact that any error could not reasonably have resulted in a lesser sentence. Wickham v. State, 593 So. 2d 191 (Fla. 1991); See also, Cook v. State, 581 So. 2d 141 (Fla. 1991) (Despite failure of the trial court's sentencing order to specifically address certain nonstatutory mitigating circumstances this court afffirmed the death sentence where it was convinced that the trial court would have imposed the death sentence even if the sentencing order had contained findings that each mitigating circumstance had been proven.

VII. SECTION 921.141, FLORIDA STATUTES IS CONSTITUTIONAL.

Heinous, Atrocious or Cruel Jury Instruction

This issue was not properly preserved at trial. In fact, the appellant requested that the standard jury instruction be read (P 258,259). Where the instruction itself is not attacked either by submitting a limiting instruction or making an objection to the instruction as worded, this issue is procedurally barred. Beltran-Lopez v. State, 626 So. 2d 163 (Fla. 1993). In any event, this court upheld the full State v. Dixon, 283 So. 2d 1 (Fla. 1973), instruction in Preston v. State, 607 So. 2d 404 (Fla. 1992). In the instant case the instruction contained the appropriate language, "the conscienceless or pitiless crime which is unnecessarily tortuous to the victim".

Majority Verdicts.

No argument on the grounds now raised was made below. This issue is barred. A simple majority recommendation is sufficient to recommend the death penalty. Brown v. State, 565 So. 2d 304 (Fla. 1990).

Aggravating Factors as Elements of Crime found by Majority of Jury.

This issue was never argued and is procedurally barred. The argument that aggravating factors are elements of the crime is without merit. See, Hildwin v. State, 490 U.S. 638 (1989).

Advisory Role of Jury.

This claim was not argued befow and is barred. It is without merit in any event. The jury was instructed that "It is

only under rare circumstances that this court could impose a sentence other than what you recommend." in accordance with Tedder v. State, 322 So. 2d 908 (Fla. 1975).

Counsel.

The appellant has failed to show in this case that appointed counsel were in any manner deficient in their representation, and further, appellant can make any such attacks in a collateral proceeding.

Trial Judge.

This claim was never argued below and is barred. This judge was aware of the Tedder standard and acted in accordance with it. Any error is harmless.

Aggravating Circumstances.

As to CCP.

Appellant's argument that Florida's death penalty statute is unconstitutional because this statutory aggravating factor, as applied, does not adequately limit the class of persons eligible for the death penalty is susceptible to undue arbitrary and capricious application has been rejected previously. Shere v. State, 579 So. 2d 86 (Fla. 1991). Applying prior cases of this court to the facts established in this case establishes the cold, calculated and premeditated aggravating factor under any construction of this aggravator.

As to HAC.

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As to Felony Murder.

There was no evidence presented during the trial to instruct the jury on this aggravating factor and therefore it would be improper for this court to address this issue.

As to Hinder Government Function or Enforcement of the Law.

There was no evidence to present this factor to the jury, and it would be improper for this court to address this issue.

Appellate Reweighing.

Apellate reweighing is not required. See, Espinosa v. Florida, 112 S.Ct. 2926 (1992). A harmless error analysis is sufficient to cure errors. Reweighing is also unnecessary where this court undertakes a proportionality analysis.

Procedural Technicalities.

The practice of procedurally defaulting claims not properly raised is authorized by the United States Supreme Court. See, Wainwright v. Sykes, 433 U.S. 72 (1977).

Tedder.

Tedder has been consistently applied. The trial court followed the jury's recommendation in this case.

Lack of Special Verdicts.

This argument has already been answered in prior parts of this point. See, Patten v. State, 598 So. 2d 60 (Fla. 1992)(no constitutional or statutory requirement that mandates the use of a special verdict form in death penalty cases.)

No Power to Mitigate.

The penalty phase in a capital murder trial is where mitigating factors are presented. Both the judge and the jury take these mitigating factors into account when determining the proper sentence. After the trial is over, the appellant can file a post-conviction collateral motion. This court also undertakes a proportionality analysis. Appellant has numerous chances at securing a sentence less than death and this claim is without merit.

Florida Creates a Presumption of Death.

In Blystone v. Pennsylvania, 108 L.Ed.2d 255 (1990), the Supreme Court affirmed the constitutionality of the Pennsylvania death sentence scheme whereby the death penalty is mandatory if the jury, the ultimate sentencer, finds at least one aggravating circumstance and no mitigating circumstances are found. This point is without merit.

Florida Unconstitutionally Instructs Juries Not to Consider Sympathy.

This issue was not properly preserved below. It is proper to instruct the jury that it is to avoid any influence of sympathy. Saffle v. Parks, 494 U.S. 484, 110 S.Ct. 1257 (1990); California v. Brown, 479 U.S. 538, 107 S.Ct. 837 (1987).

Electrocution is Cruel and Unusual.

This claim was not preserved for appeal. In Booker v. State, 397 So. 2d 910 (Fla. 1981) this court rejected the defendant's contention that death by electrocution is cruel and unusual punishment. See, Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976).

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,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been furnished by Delivery to James R. Wulchak, Chief, Appellate Division, Assistant Public Defender, 112-A Orange Avenue, Suite A, Daytona Beach, Florida 32114, this 24th day of January, 1994.

Dan Haun

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