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IN THE SUPREME COURT OF FLORIDA

JACK DEMPSEY FERRELL,

Appellant,

v. CASE NO: 81,668

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 state relies upon the Statement of the Case and Facts as stated by Ferrell in his brief.

SUMMARY OF ARGUMENT

POINT 1: The trial court properly allowed into evidence statements indicating Ferrell's intent. Certain statements such as "I've killed one bitch, and I will kill another" were introduced into evidence. Contrary to Ferrell's argument that this was "Williams Rule" evidence, these statements were introduced under the state-of-mind exception to the hearsay rule because premeditation was an issue. Also these statements demonstrated a future intent to perform an act by Ferrell. Finally, the state would submit that even if these statements fit "Williams Rule" evidence, that the trial judge listened to arguments from both sides concerning admissibility, thus fulfilling the hearing requirement for not giving notice.

POINT 2: The trial court properly denied Ferrell's motion to appoint co-counsel. Ferrell's trial counsel in a pretrial hearing said that motion was merely to protect himself in a future 3.850 hearing. Trial counsel stated that he could handle this trial alone. This particular trial was not unusually complex, in fact, it was simple compared to most death penalty trials. There is no current requirement that states co-counsel are required. This is an issue that is properly suited for a 3.850 motion because the real issue is did Ferrell have effective assistance of counsel. Finally, Ferrell has failed to show an abuse of discretion by the trial court in denying the motion.

POINT 3: The trial court properly denied Ferrell's requested jury instructions. The standard jury instructions properly cover the weighing of aggravating and mitigating circumstances. There

is no requirement in Florida to give an instruction that the jurors had to individually consider the evidence presented in mitigation regardless of the view of the fellow jurors. The standard jury instruction on weighing of aggravating and mitigating factors has been held sufficient by this court. Finally, this court has held that a court is not required to list the nonstatutory mitigating circumstances in its instructions to the jury.

POINT 4: The trial court found the requisite findings of fact to support the sentence. The trial court had a written order prepared at sentencing. When reading the written order in conjunction with the oral pronouncement of sentence, you can determine what aggravating and mitigating factors the judge considered. There was a very complete record of trial in this case and the trial judge thoroughly reviewed it before deciding the sentence.

POINT 5: The death sentence is proportionate. Ferrell previously murdered another woman. The previous murder was similar in many respects to the murder in the instant case. Contrary to Ferrell's allegations the mitigation in this case is far from compelling. This court has affirmed the death sentence where only one aggravating factor was present, and has affirmed the death sentence under express proportionality review where the defendant has been convicted of a prior similar violent offense.

ARGUMENT

I. THE TRIAL COURT PROPERLY ALLOWED INTO EVIDENCE STATEMENTS INDICATING FERRELL'S INTENT.

Ferrell asserts that certain statements used by the prosecution indicate prior crimes and fall under the Williams Rule, thus the state was required to give a ten day notice, which they did not. Ferrell additionally asserts that at trial the court did not hold a hearing concerning the lack of notice.

The state disagrees that these statements are Williams Rule evidence, and even if they are the ten day notice rule does not preclude their admission at trial.

The state-of-mind exception to the hearsay rule permits the admission of extrajudicial statements to show the declarant's state of mind at the time the statement is made when it is an issue in the case. Morris v. State, 456 So. 2d 471 (Fla. 3d DCA 1984). Furthermore, the state-of-mind exception allows the introduction of the declarant's statement of future intent to perform an act, if the occurrence or performance of that act is at issue Mutual Life Ins. Co. v. Hillmon, 145 U.S. 285 (1892). Ferrell's intent became an issue in the trial because he was trying to raise a defense of accidentally shooting Mary Williams, the victim. The state introduced the statement, "I've killed one bitch, and I will kill another" for the purpose of demonstrating Ferrell's premeditation. Ferrell did not accidentally shoot Mary, but he announced his past killing and his intent to kill again. Ferrell was very aware of his past behavior in killing another woman. The jury properly was allowed to hear this testimony.

Additionally this statement demonstrates a future intent to perform an act. Wells v. State. Ferrell announced to a third party that he intended to kill and he performed that act by killing Mary.

Even if this testimony was Williams Rule evidence, the trial court properly allowed its admission. The state would concede that the state did not give ten days notice. However, this lack of notice does not per se keep the statements out. The trial court heard arguments by both sides during the trial concerning the admission of these statements. Ferrell's counsel pointed out the lack of notice and the prejudicial effect of allowing these statements, but the court ruled for the state. Just because the trial court ruled against Ferrell does not mean that relief is appropriate.

Second, Ferrell argues that the statement concerning the prior murder is totally inadmissible. The state disagrees with this assertion.

The state relies upon the previously made arguments concerning the use of the statements. Ferrell argues that at least the statements could have been redacted. The state submits that it would have been impossible to have done this. For example, "I've killed one bitch and I'll kill another" makes no sense unless it is used in its entirety. The reference to the prior murder was used to show premeditation on the part of Ferrell. Since Ferrell raised an accidental death defense, his state of mind was at issue. The trial court properly allowed these statements.

Third, Ferrell argues that if these statements are relevant, then such relevance is greatly outweighed by the enormous prejudicial effect. The state agrees with Ferrell that these statements were relevant, however, the state disagrees with Ferrell concerning there prejudicial effect. The state did not make these statements a feature of this trial. Ferrell's argument that there was no physical evidence is meritless. There was evidence concerning the fact that the murder weapon was the weapon taken from Ferrell when he was arrested. There was testimony that Ferrell had contacted a mutual friend of his and Mary's concerning the purchase of a weapon, and, when this friend asked why he needed it, Ferrell indicated to kill Mary. The friend would not sell him a weapon because he liked Mary. Neighbors heard Ferrell and Mary arguing at different times. In fact the day Mary was murdered, one lady indicated she saw Ferrell carrying a flower and thought it was for Mary as a means of making up for an earlier quarrel. Ferrell had struck Mary in the past. Ferrell left the murder scene without trying to get any medical treatment for Mary. He just left her lying there in the apartment and left the door locked. Neighbors were able to gain access by a pass key. There was plenty of evidence, other than the statements complained of Ferrell, to convict Ferrell for the death of Mary. Even if the admission of these statements was error, it has not been shown that the verdict could have been affected by the error.

II. THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION TO APPOINT CO-COUNSEL.

Ferrell asserts that because the issues in this case were complex and the defense had to prepare for both the guilt and penalty phases that co-counsel should have been appointed. Ferrell has not stated a claim that entitles him to relief, and, even if his claim had some basis in law, the true facts established no error occurred.

Ferrell's trial counsel presented a motion for appointment of co-counsel. He indicated, "I've specifically made this motion as protection against a motion for 3.850 in the future." Ferrell's counsel went further to say:

> No, this isn't a motion for incompetency or finding of incompetency by the court, judge. I don't consider this case to be complicated at all. I don't feel incapable in handling it by myself, but in looking through the best interest of my client, I feel I should make the motion.

(R 6).

Ferrell's trial counsel did not think this trial was complicated. In fact he thought he was capable of representing Ferrell's interests by himself. In essence this was a simple case -- Ferrell murdered his live-in girlfriend. There was little technical evidence presented by either side during the course of the trial, and few witnesses testified for either side. Ferrell is entitled to competent representation, and that is what he received. The prosecutor stated that, "we do not have a lengthy witness list, we don't have a high volume of discovery

material. So as they go, it is not a complex or voluminous case." (R 6).

There was about four weeks between the guilt phase and the sentencing phase in this trial. Counsel had an adequate opportunity to prepare himself. Ferrell's trial counsel did put different expert testimony on in both the guilt phase and the sentencing phase. Just because the jury came back guilty and voted for death, does not mean that counsel did not perform adequately. Ferrell's trial counsel made a telling statement in regards to another motion pending before the court, he said, "It (motion) came from another circuit. And once again, it's precautionary. We file everything we can think of in these cases." (Pretrial motion hearing, p. 6). This motion was filed to present an issue in the appellate process, not because co-counsel was required in this case.

Really this matter should be raised in a 3.850 hearing anyway. Because the real issue is not whether the motion was granted or not, but did Ferrell receive effective assistance of counsel.

ABA Standards not binding on Florida -- no statutory or case law authority that requires co-counsel -- the state submits that only if an abuse of discretion has been shown should the judge's decision be reversed. Ferrell has failed to show an abuse of discretion because of counsel's statement that he did not need co-counsel and only presented the motion as a precautionary measure for any future post-conviction 3.850 hearings.

Finally, it should be left to the legislature to determine whether there should be two counsels in every capital case. The trial court properly denied Ferrell's motion for appointment of co-counsel.

III. THE TRIAL COURT PROPERLY DENIED APPELLANT'S REQUESTED JURY INSTRUCTIONS.

Ferrell argues that the trial court did not properly instruct the jury. He argues that four specially requested jury instructions should have been given. Appellant contends that the trial court committed reversible error in denying Proposed Instruction Numbers 2, 11, 12, and 13.

Ferrell contends that the standard instructions did not clearly tell the jury that the death penalty is reserved only for the most aggravated and least mitigated of all first degree murders, and therefore proposed instruction number 2 should have been given. The standard jury instructions properly cover the weighing of aggravating and mitigating circumstances. See, Kennedy v. Dugger, 933 F.2d 905 (11th Cir. 1991). Those instructions properly inform the jury as to the finding and weighing of aggravating and mitigating circumstances and the jury need not be incorrectly told that the death penalty is reserved for only the most aggravated and unmitigated murders. Such a definition is too subjective and detracts from the proper standard instructions.

Ferrell further contends that the jury was never informed that the jurors had to individually consider the evidence presented in mitigation regardless of the view of the fellow jurors. There is no requirement in Florida law to give such an instruction. Waterhouse v. State, 596 So. 2d 1008 (Fla. 1992).

Ferrell argues that while the jury was told what constitutes an aggravating circumstance they never were

adequately informed as to what a mitigating circumstance was and how they were to consider the evidence in mitigation. The standard jury instruction on weighing of aggravating and mitigating factors has been held sufficient by this court. Stewart v. State, 549 So. 2d 171 (Fla. 1989); Arango v. State, 411 So. 2d 172 (Fla. 1982).

Finally, Ferrell argues that although the jury was given the catch-all instruction on mitigation, the Proposed Jury Instruction Number 13 delineated the nonstatutory mitigators which were present in the instant case and which have been found by this Court as mitigating factors. The standard jury instruction on nonstatutory mitigating circumstances was given in this case. The jury was instructed that they could consider "any other aspect of the Defendant's character, record or background and any other circumstance of the offense." (P 99). No special proposed instruction on "mitigation" was required. This court has previously determined that a court is not required to list the nonstatutory mitigating circumstances in its instructions to the jury. Jackson v. State, 530 So. 2d 269 (Fla. 1988); Robinson v. State, 574 So. 2d 108 (Fla. 1991). The jury was hardly precluded from considering valid mitigation. Defense counsel was allowed to mention nonstatutory mitigating factors in his closing argument. (P 12).

Any error in the court's instructions is harmless since the result of the sentencing hearing would have been the same had the jury been instructed as appellant now contends it should have been. See, Steinhorst v. State, 574 So. 2d 1075 (Fla. 1991).

IV. THE TRIAL COURT FOUND THE REQUISITE FINDINGS OF FACT TO SUPPORT THE SENTENCE.

Appellant argues that the findings by the trial court are totally deficient to afford any kind of meaningful review by this Court and therefore the sentence of death must be vacated and the cause remanded with instructions to sentence Appellant to life.

Ferrell relies on Van Royal v. State, 497 So. 2d 625 (Fla. 1986) a jury override case where the trial court failed to comply with Section 921.141(3) Florida Statutes. The trial court failed to make written findings until after the court lost jurisdiction. Id. at 628. There were no specific findings concerning aggravating and mitigating circumstances. Finally, the record was inadequate. Id. at 628. Appellee also relies on Bouie v. State, 559 So. 2d 1113 (Fla. 1990) where this Court held that the trial court failed to sufficiently state reasons for imposing a death sentence. Id. at 1113. In that case the findings were totally deficient. There was no indication of which aggravating circumstances and which mitigating circumstances, if any, were deemed applicable. Id. at 1116. Also, neither the oral nor the written findings recite any facts upon which the trial court based Bouie's sentence. Id. at 1116.

Appellee submits that in the present case the trial court had a written order prepared at sentencing. This was not a jury override case and the court gave proper consideration to ten to two jury vote for death. The trial court, between the written order and the oral pronouncement of sentence, indicated which aggravating circumstances and which mitigating circumstances it

considered. In the present case the record is very complete. This was not an extraordinarily complex murder requiring days of transcription. It is clear from the record that the trial court found one aggravating circumstance and seven mitigating circumstances. Contrary to Ferrell's assertions it is clear from the record which mitigating circumstances the trial court found as follows:

> Although defense counsel delineated six mitigating circumstances, the court has found seven mitigating circumstances. Perhaps defense counsel felt that the belief that the defendant was under the influence of alcohol at the time of the killing was included under the capacity of the defendant to appreciate the criminality of his conduct. But I submit that as a seventh mitigating circumstance to be considered by the court in its decision as to what sentence to impose.

(R 152,153)

The trial court went further to state orally:

> The penalty phase commenced on March 9, 1993, and the jury returned an advisory sentence, recommending the court to impose the death penalty by a vote of ten to two. In deciding upon the sentence to impose in this case, the court has considered all the testimony and evidence introduced at both the guilt and penalty phase of the trial, as well as having given the advisory opinion of this jury great weight. The court has examined and carefully based each of the elements of aggravation and mitigation presented by both the state and the defense, as set forth in section 921.141 subsection 6 of the Florida Statute. Further, court has examined and

> carefully weighed all the non-statutory mitigating factors presented by the defense.... The aggravating factors that were presented, defendant has been previously convicted of another capital offense, or a felony involving the use or threat or violence to some person. Court has thoroughly examined the record in this case, does find the date (sic) has proven beyond a reasonable doubt that the defendant has previously been convicted of a felony involving the use or threat of violence of some person. On December 12, 1981, in Orange County, the defendant committed the crime of murder in the second degree on Bertha May Lyon (PH). Court has considered and reviewed all the circumstances surrounding the prior felony involving the use of threats or threat of violence.
>
> Mitigating factors, the defendant has presented evidence for the court in the jury's consideration of seven mitigating circumstances. One, that the defendant was under the influence of extreme mental or emotional disturbance at the time of the killing. Two, that the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. Three, the age of the defendant at the time of the crime. Four, the defendant was a good , dependable, and capable employee. Five, the defendant's prior record is a model prisoner. Six, the defendant's remorsefulness, and seven, the defendant was under the influence of alcohol at the time of the killing.

(R 155,156).

The trial court went further in its oral pronouncement to indicate that it had considered the similarity in the case

involving the only aggravator and the murder in the present case. The trial court in its written order stated that it had reviewed all the evidence in this case, and considered the jury's advisory recommendation. The court considered the one aggravating factor and seven mitigating circumstances, and even though it did not list each mitigating factor in the written order, it did mention them in the oral pronouncement. The court stated that it had weighed the one aggravating factor against the seven mitigating factors. (R 583). The trial court thoroughly and meticulously went through the record in this case. The trial court found the evidence proved one aggravating factor existed and seven mitigating factors. The trial court gave very little weight to the mitigating factors. Deciding whether particular mitigating factors have been established and, if established, the weight afforded it, lies with the trial court, and a trial court's decision will not be reversed because an appellant reaches the opposite conclusion. Sireci v. State, 587 So. 2d 450 (Fla. 1991); Stano v. State, 460 So. 2d 890 (Fla. 1984), cert. denied, 471 U.S. 1111 (1985). Perhaps the written order could have been more artfully drawn, but any failings are made up for in the oral pronouncement during sentencing.

V. APPELLANT'S DEATH SENTENCE IS APPROPRIATE.

Ferrell contends that the death penalty cannot stand since it is disproportionate to the crime and constitutes cruel and unusual punishment. Ferrell argues that this case is not the "most aggravated" nor "unmitigated". Ferrell previously murdered another person and contrary to Ferrell's allegations, mitigation is far from compelling.

Death may be the appropriate penalty if at least one statutory aggravating factor is established. Dougan v. State, 595 So. 2d 1 (Fla. 1992). As Ferrell recognizes, this court has affirmed death sentences where only one aggravating circumstance has been found. Although many of the cases cited by Ferrell involve the heinous, atrocious or cruel aggravating factor, this does not mean that a death sentence cannot be upheld where the single aggravating factor is prior violent felony conviction, particularly where one of those convictions is for murder. This court has affirmed the death sentence under express proportionality review where the defendant has been convicted of a prior "similar violent offense". Lemon v. State, 456 So. 2d 885 (Fla. 1984) (death sentence "is not comparatively disproportionate" for stabbing death of girlfriend where defendant had prior conviction for assault with intent to commit first degree murder for stabbing another female victim); King v. State, 436 So. 2d 50 (Fla. 1983) (death penalty affirmed as comparable where defendant had prior manslaughter conviction for axe-slaying of woman victim). See also, Harvard v. State, 414

So. 2d 1032 (Fla. 1982). Similarly, this court has affirmed a death sentence in cases where the only aggravator in addition to prior violent felony is during the course of a felony. See, Hamblen v. State, 527 So. 2d 800 (Fla. 1988); Rogers v. State, 511 So. 2d 526 (Fla. 1987); Jackson v. State, 502 So. 2d 409 (Fla. 1986).

In Duncan v. State, 619 So. 2d 279 (Fla. 1993) this court upheld a death sentence with only one aggravator of a prior conviction for violent felony. Factually, there are some similarities to the present case. Duncan killed his girlfriend. Duncan was previously convicted of another murder. The state cross-appealed some of the mitigating evidence and this court ruled there was no evidence to support such evidence. As will be argued later, the state submits in the present case that there were some mitigating factors that should not have been found. In the present case there was no evidence of a heated domestic disturbance as Ferrell contends.

The cases where this court has affirmed the death sentence where only one aggravating factor was present also demonstrate that Ferrell's sentence is proportionate. These cases involved the shooting of a friend, a crime of passion in a marital setting, a man shooting his former female companion's husband, and the rape and murder of a child. In Arango v. State, 411 So. 2d 172 (Fla. 1982), the victim was beaten and shot in the head in his bedroom. The sole aggravating factor was heinous, atrocious or cruel, and the mitigation was no prior criminal history. This court stated the death penalty does not contemplate a tabulation

of aggravating and mitigating factors to arrive at a sum, but places upon the trial judge the task of weighing all of these factors. Gardner v. State, 313 So. 2d 676 (Fla. 1975), an override case, involved a "crime of passion in a marital setting in which the excessive use of alcohol was a material factor resulting in the homicide." Id. at 679 (Ervin, J., dissenting). The sole aggravating factor was heinous, atrocious or cruel, and the trial court found no mitigation, but, as the dissent noted, mitigation existed. Justice Ervin stated that in his opinion, a "drunken spree" does not warrant the death penalty, but if there had been a calculated design and premeditation to rid one of his spouse, death would be warranted. In Douglas v. State, 328 So. 2d 18 (Fla. 1976), another override case, this court affirmed the death sentence solely on the basis on one aggravating factor (heinous, atrocious or cruel), where the victim was the husband of the defendant's former companion. In LeDuc v. State, 365 So. 2d 149 (Fla. 1978), the defendant raped and murdered a young girl, and while a substantial amount of mental mitigation was proffered, the death sentence was affirmed on the basis of one aggravating factor and nothing in mitigation.

Ferrell claims that "heinous, atrocious or cruel" and "cold, calculated and premeditated" are Florida's most serious aggravating factors, and that it would be fundamentally incongruous to affirm when the only extant aggravating circumstance does not reflect an additional bad part of the actual killing, but instead reflects a condition or status of the defendant. The fact that Ferrell previously murdered another

person certainly reflects more than his "status" or "a condition", and is entitled to great weight. This court has stated that the purpose of considering aggravating and mitigating circumstances is to engage in a character analysis of the defendant, Elledge v. State, 346 So. 2d 998 (Fla. 1977), and the fact that a defendant has previously committed a murder does not weigh heavily towards good character. See, e.g., Demps v. State, 395 So. 2d 501 (Fla. 1981) (nothing prohibits trial judge from taking into consideration the quality of aggravating circumstances, and defendant had "loathsome distinction" of having previously been convicted of murder and attempted murder). The state submits that when the prior violent felony is a prior murder, this is the most serious and weightiest aggravating factor.

In this respect, appellee would point out that one of the reasons death is a unique punishment is its total rejection of the possibility of rehabilitation of the convict as a basic purpose of the criminal justice system. State v. Dixon, 283 So. 2d 1 (Fla. 1973); Furman v. Georgia, 408 U.S. 238 (1972). Ferrell murdered another woman and served time for that crime, which indicates his own rejection of rehabilitation. In addition, there was nothing proffered in mitigation to lessen the weight of this factor, such as a causal relationship or extensive brain damage. See, e.g., Fitzpatrick v. State, 527 So. 2d 809 (Fla. 1988); Huckaby v. State, 343 So. 2d 29 (Fla. 1977).

Likewise, there was nothing proffered in mitigation to outweigh this aggravating factor. As Ferrell notes, this court,

in reversing on proportionality grounds, has placed heavy emphasis on mitigation due to the offender's addiction to and/or intoxication from drugs or alcohol. See, Livingston v. State, 565 So. 2d 1288 (Fla. 1988); Proffitt v. State, 510 So. 2d 896 (Fla. 1987). However, the state would submit that this factor is either not present, or should be given little weight. Empty liquor bottles were found in the apartment, but both Ferrell and Mary drank, so those bottles could have been there any length of time. Also, according to Ferrell's own testimony, he drank everyday, yet was able to maintain full time employment. Ferrell's employer even testified that if he could, he would like to have Ferrell back. Willie Cartwright testified as follows:

> Q: Okay. When you saw him come down the steps when he made that statement to you, you may as well call the police, I just killed my old lady, was he able to walk down the stairs fine?
> A: Yes, he did.
> Q: Did he walk fine as he left to his car?
> A: Yes, he did.
> Q: Was there anything you noticed about him that looked like he wasn't in physical control of his body?
> A: To my notice, he wasn't.
> Q: Did he slur his words?
> A: No.
> Q: To you?
> A: No, he did not.

(T 445). There is no reasonable evidence whatsoever to provide a basis for the conclusion that Ferrell was under the influence of alcohol when he murdered Mary.

Likewise, there was no evidence that Ferrell was under the influence of extreme mental or emotional disturbance at the time

of the killing or that his ability to conform his conduct to the requirements of the law was substantially impaired. The only testimony by Dr. Upson was that Ferrell had "subtle damage" and that would lead to Ferrell having trouble controlling his behavior without "impulse". (T 683,700). Dr. Upson testified, "I would say I think those two factors, his alcoholism, the conditions, or those three things, the conditions, the relationship and his mental brain damage, I think place him in a position that his judgments were critically impaired when he was heavily drinking and his behavior was very impulsive and I don't think he was that time capable of making very rational decisions." (P 82). This is not evidence of extreme mental or emotional disturbance. When asked about Ferrell's ability to conform his conduct to the requirements of law, Dr. Upson responded, "I think due to the conditions, I have only mentioned a moment ago, I think it was difficult for him to conform his behavior. I do not feel that Mr. Ferrell did not know that his behavior was inappropriate or wrong." (P 83). Even Dr. Upson is saying that Ferrell was aware that his behavior was wrong, and furthermore, he said it was "difficult" for Ferrell to conform his behavior, not impossible. If these factors exist at all, then little weight should be given to them.

The remaining mitigating evidence simply does not render the death sentence disproportionate in this case. The fact that Ferrell was a good, dependable, and capable employee is likewise entitled to little weight, as it does nothing to extenuate or reduce his moral culpability for this murder. See, Rogers v.

State, 511 So. 2d 526 (Fla. 1987). Also, Ferrell asserts in mitigation that he was a model prisoner. The fact that Ferrell committed another murder against another woman after his release does not show his stay was successful in terms of rehabilitation. Ferrell's asserts in mitigation his age, however, his age is not worthy of any weight.

The cases relied upon by Ferrell for reversal on proportionality grounds are readily distinguishable. In Fitzpatrick, supra, the record was replete with evidence of substantially impaired capacity, extreme emotional disturbance, and low emotional age. The defendant had an emotional age between nine and twelve years, had extensive brain damage, had been described as "crazy as a loon", and his actions were those of a "seriously disturbed man-child" Id. at 810-11. None of those factors are present in the instant case. In Livingston, supra, this court found that the mitigating factors of severe childhood beatings; youth, inexperience, and immaturity; minimal intellectual functioning as a result of the beatings; and extensive use of cocaine and marijuana, outweighed the remaining aggravating factors of prior violent felony and during the course of a robbery. In Penn v. State, 574 So. 2d 1079 (Fla. 1991), the defendant had no significant history of prior criminal activity, and was also acting under the influence of extreme mental or emotional disturbance. In Songer v. State, 544 So. 2d 1010 (Fla. 1989), the defendant's reasoning abilities were substantially impaired by addiction to hard drugs, his remorse was genuine, and he had exhibited a positive change while in prison. There was no

evidence that Ferrell's reasoning abilities were impaired; he shot Mary twice and left her in the apartment, without trying to help her. Then Ferrell told a neighbor, "call the police I just killed my old lady". Ferrell just left the scene and ended up at a bar.

As stated, the procedure to be followed by the jury and judge is not a mere counting process of aggravating and mitigating circumstances, but rather a reasoned judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances presented. Dixon, supra. On review of a death sentence, this court's role is not to cast aside the careful deliberations of the jury and judge, unless there has been a material departure by either of them from their proper prescribed functions, or unless it appears that, in view of other decisions concerning imposition of the death penalty, that punishment is too great. Hargrave v. State, 366 So. 2d 1 (Fla. 1978). The jury weighed the aggravating factor against the proffered mitigation and by a vote of ten to two recommended the death penalty, and that recommendation is entitled to great weight. Grossman v. State, 525 So. 2d 833 (Fla. 1988). The trial court likewise weighed the evidence, and determined, in accordance with the jury's recommendation, that death was the appropriate penalty. Death is not too great a punishment in this case. Ferrell previously killed a woman, and the main thing he wanted to know when arrested was "is the bitch dead". Ferrell was given a tremendous break, and because of that break Mary is dead today.

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 in his box at the 5th DCA to Michael S. Becker, Assistant Public Defender, 112-A Orange Avenue, Daytona Beach, Florida 32114, 15th day of April, 1994.

Dan Haun

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Of Counsel