IN THE SUPREME COURT OF FLORIDA

HORACE MELVIN POPE,

Appellant,

v.

Case No. 81,797

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE TENTH JUDICIAL CIRCUIT
IN AND FOR POLK COUNTY

BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

The following is offered to supplement and/or clarify the statement of the case and facts recited by the appellant:

In December, 1991, Donnie Pope's house burned in a fire (T. 1328, 1353-1354, 1697, 1807, 1839).[1] Donnie, his wife Wanda, daughters Marsha and Deborah, and Marsha's baby Brittany moved into a trailer that belonged to their friend, Lawrence Reynolds (T. 1328, 1353-1354, 1696-1697, 1807, 1837-1839). Reynolds' trailer was next door to his house in Eagle Lake, Florida, a subdivision near Eloise, where the Popes had lived (T. 1696-1697, 1808). The Popes were repairing the house themselves, with help from family and neighbors (T. 1329, 1354, 1813, 1839). The appellant, Donnie's brother, was living at the house on and off while it was being repaired, so that he could keep an eye on the tools they were using (T. 1328, 1814, 1839).

In January, 1992, Marsha began dating a boy named Randy Sellers, who lived with his parents and his sisters Trudy and Phyllis Eubanks near Alturas outside of Bartow, on Citrus Highland Drive (T. 1386, 1842). Just across the street from Randy lived Brandy Humes with her mother, Nancy, and their family (T. 2003, 2027-2028, 2058-2059). The Humes' had also recently met Marsha (T. 2040, 2070).

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[1] References to the record on appeal will be cited with the designation "R." and references to the transcript of the trial, which begins in Volumne 8 of the record on appeal, will be cited with the designation "T."

The Pope family had planned on moving back into their house on Sunday, February 16, 1992 (T. 1824, 1844). Marsha had spent that Saturday night at a slumber party at Brandy's house with Trudy and Phyllis (T. 1882, 2030, 2060). The next day, Marsha went to church with Brandy, Brandy's mother, Trudy and Phyllis (T. 1841, 1882). Another Pope brother, Calvin, was the pastor of the church, which held a daylong appreciation lunch and program on February 16 (T. 1387, 1841, 2060).

Marsha left church late, about 5:00 Sunday afternoon, planning to meet her family back in their house in Eloise (T. 1842). Randy and Marsha went with their friend Larry, in Larry's truck, on several errands, including going by a house where a friend gave Marsha a small dog (T. 1388-1389, 1843-1844). However, Marsha's parents had not been able to get the house ready to live in, so they stayed in the trailer that night (T. 1813, 1824). When Larry and Randy took Marsha to the house in Eloise, she had to stay there because she couldn't take the dog to the trailer and Larry and Randy wouldn't take her to Eagle Lake anyway (T. 1889-1890). They dropped her off about 9:00 p.m. and she pulled the mattress from her bedroom into her parents' bedroom, which was closer to the street, so she could hear if anyone pulled up (T. 1844, 1846).

Marsha wasn't quite asleep when the appellant, her uncle Horace, came to the house with Alice (T. 1846). Marsha recognized Alice, as Alice and the appellant had previously come over to listen to Marsha's group play gospel music (T. 1840).

They were in Alice's car, as they always were when they were together, and brought a twelve pack of beer which Alice took to the kitchen (T. 1841, 1847-1848). While Alice was putting up the beer, the appellant told Marsha that he was going to kill Alice (T. 1848). She asked him why he would do that, and he told her it was for Alice's car and money (T. 1849). Marsha did not take him seriously, and told him that he was drunk (T. 1849). Marsha, Alice and the appellant went into the bedroom and sat on the mattress, talking (T. 1850). Marsha testified that the appellant and Alice were getting along fine, everything was friendly (T. 1851). Marsha and Alice left at one point to run up to Allen's Discount Store, where Alice bought some beer and made a phone call (T. 1898-1899). After they came back, Marsha was headed to her bedroom when her cousin Wayne and a friend of his came by (T. 1894, 1899, 1902). Marsha took some beer back to Alice and the appellant and told Wayne and his friend they needed to leave, because her father did not want anyone in the house (T. 1869-1870). Wayne asked Alice for money, $10 or $15 dollars, but she didn't let him have it and left upset (T. 1899). Marsha didn't expect her to return, but before Marsha fell asleep she heard a car and then heard Alice come in, talking to the appellant (T. 1899, 1903).

Marsha was dozing off when she heard screaming, and ran into the other bedroom to find the appellant having sex with Alice (T. 1853-1854). She was embarrassed and went back to her bedroom (T. 1854). She was still not asleep when her uncle came into her

room, and told her to come watch (T. 1905). She went to the bathroom, and saw Alice sitting on the toilet with the appellant over her as he hit her and used her hair to beat her head on the sink and wall (T. 1855, 1856). Alice told the appellant that she loved him, and asked him for help (T. 1872). Marsha tried to run, but the appellant came after her, hit her head on the wall and told her that if she didn't stay and watch he'd kill her too (T. 1855). She went back to the bathroom with him, and he started hitting Alice again (T. 1856). Alice was laying on her stomach, face down, and the appellant was straddling her "like a horse," and stabbing her with a knife (T. 1857-1858). After he had stabbed Alice, the appellant told her that he loved her, too (T. 1872).

Marsha recognized the appellant's knife as one she had used to peel potatoes, that was usually kept in the kitchen (T. 1858). She stated that she did not see the appellant get the knife, but she noticed the bathroom cabinet door was open (T. 1857). She tried to run again, but the appellant caught her, banged her head against the wall, held a knife up by her throat, and told her he'd kill her if she got away again (T. 1858-1859). This was a different knife than the one he was using on Alice (T. 1860). The appellant went into the kitchen and washed his hands, and as they started to leave he told Marsha to go see if Alice was dead (T. 1959). Marsha went back to the bathroom and knelt to speak to Alice (T. 1859). She heard a noise and told Alice to act dead, and Marsha would tell the appellant that she was dead (T.

1859). Marsha then went and told the appellant Alice was dead, and he believed her (T. 1859).

The appellant told Marsha that they were going to Missouri (T. 1860). Marsha didn't want to go with him, but she didn't feel like she had a choice (T. 1860). The appellant told her to drive, but she could only get to the first stop sign because she was shaking too much to drive (T. 1861). The appellant took over driving and they followed a route which Marsha later showed Det. Smithkey (T. 1763-1765, 1862). Somewhere along the way they stopped by a bridge over a little creek, where the appellant told Marsha that he was going to kill her (T. 1862). She talked him out of it by reminding him that her little daughter would be left without a mother (T. 1863). As they talked, the appellant "snapped out of it" and put his arm around Marsha, told her he would never hurt her, and asked her where she wanted him to take her (T. 1863). The closest place she could think of was Randy Sellers' house, and the appellant dropped her off there and drove away (T. 1863).

Randy testified that Marsha was crying, upset and shaking when she arrived at his house (T. 1395). She wanted to use a phone, but Randy didn't have one and sent her across the street to the Humes' (T. 1400). Marsha ran over there quickly and Randy followed her a few minutes later (T. 1401). He stayed a little while as Marsha was on the phone trying to call an ambulance and the police (T. 1402). She was still crying and shaking (T. 1401).

By this time, Alice had managed to crawl out of the bathroom and across the street to one of Donnie Pope's neighbors' house (T. 1350, 1358). The neighbor, William Tice, had not met Alice formally but recognized her as she had been to his home in the past, in order to borrow his telephone, since the Popes did not have a phone (T. 1355-1356). Tice testified that Alice was covered in blood from head to toe and noted she was not very coherent (T. 1359, 1361). Alice told Tice that her boyfriend had beaten her up (T. 1379).

When Sheriff's Deputy Ronald Wright arrived a few minutes later, he interviewed Alice and she told him that her boyfriend had beaten and kicked her, taken her car keys, and left her for dead (T. 1720-1721). The paramedic and her assistant arrived shortly and began to examine Alice (T. 1651-1653, 1658, 1665, 1668). The paramedic, Mary Witcher, recalled Alice saying that someone had hit her and kicked her and as Mary started cutting off Alice's clothes, Alice said that she had been stabbed in the back (R. 230). Witcher and her assistant Venetia Giger were not able to stop the bleeding from Alice's back and from her nose (T. 1671). Alice told Giger that her boyfriend had beaten her and kicked her with his cowboy boots, and that he had stabbed her (T. 1657-1658). Giger denied that she had told Alice that she had been stabbed before Alice mentioned it (T. 1662).

After dropping Marsha off, the appellant drove to the trailer where Donnie was staying and asked Donnie and Wanda if they had some money he could borrow (T. 1819). They said no and

the appellant told them "Well, I've killed a woman in your house and your bathroom's a mess" and then left in Alice's car (T. 1820). The appellant was driving out of Eagle Lake when he was spotted by Eagle Lake Police Officer Aaron Kennedy (T. 951-953). Kennedy followed the appellant, and eventually stopped Alice's car (T. 956). The appellant started to get out, but Kennedy motioned him to wait until other officers arrived (T. 957-958). Deputy Ronald Wright came and saw the appellant sitting behind the wheel, with no shirt, wearing blue jeans and cowboy boots, and covered in blood from the knees down (T. 1716). He placed the appellant under arrest (T. 1455-1456, 1681). When Wright told the appellant he was being charged with aggravated battery, the appellant said calmly "I hope I killed the bitch" (T. 1718). As Wright completed an inventory on Alice's car, the appellant was sitting in Wright's cruiser, complaining that his handcuffs were too tight (T. 1456). Deputy Hicks took the appellant out of the car to loosen the cuffs, and, as the officers were discussing Alice's condition, the appellant said loudly "I hope I didn't go through all that for nothing. I hope she's dead as a doornail" (T. 1457, 1682-1683). The appellant was described as being "kind of carefree" about everything (T. 1458).

The officers that observed the appellant at the time of his arrest testified that he did not appear to be intoxicated or impaired (T. 962, 1683-1684, 1718). The appellant's brother, Lester, testified that the appellant had not been drinking the day of the stabbing, until Alice arrived at Lester's house about

6 or 7:00, and brought beer which was shared by Alice, the appellant, and Wayne (T. 1335, 1336, 1341).

The evidence presented by the defense focused on impeaching the credibility of Marsha Pope (T. 1993-2180). Calvin Pope, Trudy Eubanks, Gary Ellis, Brandy Humes and Nancy Humes all testified that Marsha had made prior inconsistent statements to them about the incident which indicated that she had participated to a greater extent than she described in her trial testimony (T. 1994, 2004-2010, 2023-2024, 2033-2037, 2066-2068). However, these witnesses also stated that Marsha was only involved because the appellant was forcing her to participate against her will (T. 2019, 2023, 2056, 2075).

Defense counsel suggested that Marsha had been the one to actually stab Alice, and argued that since the jury could not believe anything Marsha said, they must acquit the appellant on all the charges (T. 2376, 2390-2391, 2396-2398). The defense also argued voluntary intoxication and that the medical treatment was an intervening cause of death, absolving the appellant of liability (T. 2366, 2368-2372).

SUMMARY OF THE ARGUMENT

Issue I: The trial court did not err in admitting statements made by the victim, Alice Maheffey, following her stabbing. The court below properly found these statements to be admissible as excited utterances and dying declarations.

Issue II: The trial court did not err in admitting photographs from the crime scene and from the autopsy of the victim. The pictures were relevant evidence to assist the jury in determining how the attack on Alice occurred, and the nature and extent of her injuries.

Issue III: The appellant's Williams Rule argument has not been preserved for appellant review, since most of the testimony now challenged was admitted without objection. In addition, the trial court did not err in permitting the state to introduce collateral crime evidence of the appellant's prior battery on Alice. This evidence was necessary to establish the context of the crime and the relationship between the appellant and Alice, and was admissible to prove the appellant's state of mind. Since the evidence was not admitted as similar fact evidence, no limiting instruction was required.

Issue IV: The trial court did not err in denying jury instructions requested by the defense as to accomplices or the lesser offenses of third degree murder, aggravated battery and battery. There was no evidence that Marsha was an accomplice in this offense or that the appellant was guilty of one of the

lesser offenses. In addition, any error in failing to instruct on these lesser offenses is harmless since they are all at least two steps removed from the offense of which the appellant was convicted.

Issue V: The trial court did not err in denying the appellant's motion for mistrial during voir dire, based on the prosecutor's alleged comment on the defendant's right to remain silent. The prosecutor's question was not reasonably susceptible of being interpreted as a comment on silence and it did not vitiate the fairness of the appellant's trial so as to require the granting of a mistrial.

Issue VI: The appellant's argument as to the shifting of the venire during the selection of the alternate jurors has not been preserved for appellate review, since the move was taken to accommodate defense counsel and there was no objection when the jury was actually sworn. In addition, the trial court did not err in moving jurors to the end of the venire list after the defense had objected to having them on the jury. Finally, there can be no harmful error as to the procedure used in selecting the alternate jurors since none of the alternates ever participated in the guilt or penalty phase deliberations.

Issue VII: The court did not err in rejecting three of the nonstatutory mitigating factors proposed by the defense. Since these factors did not extenuate the circumstances or reduce the appellant's moral culpability for the crime, they did not have to be weighed in mitigation.

Issue VIII: The sentence of death imposed upon the appellant is not disproportionate when compared to other capital cases. Even if the murder in this case is gratuitously characterized as "domestic," the appellant's prior violent felony conviction and his statements indicating that his motive in this case was pecuniary gain support the imposition of the death penalty.

Issue IX: This Court has repeatedly and consistently rejected the appellant's arguments as to the constitutionality of the death penalty statute.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED IN ADMITTING "EXCITED UTTERANCES" AND "DYING DECLARATIONS"

The appellant's first issue challenges the trial court rulings allowing some of the victim's statements to be admitted into evidence. Specifically, the court below permitted a neighbor, William Tice, to testify that Alice told him that her boyfriend had beaten her up; an emergency medical technician, Venetia Giger, to testify that Alice stated that her boyfriend had beaten her, kicked her with his cowboy boots, and stabbed her; and the first police officer on the scene, Deputy Ronald Wright, to testify that Alice said her boyfriend had beaten her up and kicked her repeatedly in the head (T. 1379, 1657-1658, 1720). According to Officer Wright, Alice identified her boyfriend as Horace Pope, said that Pope had taken her car keys and left in her car, and provided descriptions for Pope and the car (T. 1720). Alice also told Wright that Pope had left with a young female relative of his; that he had left her for dead; and that Alice had to kick down the bathroom door to get out (T. 1721). The statements to the neighbor and the officer were admitted as excited utterances; the statements to the EMT were allowed as dying declarations (R. 456; T. 1368, 1377, 1608).

Prior to trial, the question of admissibility as to statements that Alice made to emergency medical technician

Venetia Giger was considered.[2] The court ruled that Alice's statement to Giger could be admitted as a dying declaration, but not an excited utterance (R. 456).

According to Mary Witcher, the paramedic with Giger, they found Alice covered in blood and having trouble breathing. She was able to talk and breathe but her vital signs were critical because she was "shocking" (R. 229). As Witcher cut her shirt away to examine her, Alice told Witcher that she had been hit, kicked, and stabbed in the back (R. 230). Giger heard Alice say that her boyfriend had beaten her and kicked her with his boots (R. 233). Alice had bruises and lacerations, including one wound on her back which was bubbling air, and she was complaining of chest pain. As they wheeled her out to the ambulance, she repeated incessantly "I'm going to die" at least two dozen times, and Witcher told her she needed to save her strength or she would die (R. 223-224). Witcher said Alice had been crying, was very distraught and upset, weak and getting weaker (R. 227).

With this predicate, Giger was permitted to testify at trial that Alice told her that her boyfriend had beaten her up, and kicked her with his cowboy boots (T. 1627). When Giger asked about the wounds to her back, Alice added that he had stabbed her, too (T. 1658).

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[2] Other statements were considered at that time, but the prosecutor represented that the state did not intend to use them during its case in chief, and the court below ruled them inadmissible for rebuttal purposes as well (R. 214-215, 457-458).

The sufficiency of a predicate for a dying declaration is a mixed question of law and fact, and a trial court's determination of the issue will not be disturbed unless clearly erroneous. Henry v. State, 613 So. 2d 429, 431 (Fla.), cert. denied, ___ U.S. ___, 114 S. Ct. 699 (1992); Teffeteller v. State, 439 So. 2d 840 (Fla. 1983), cert. denied, 465 U.S. 1074 (1984). The appellant has failed to demonstrate any error in the trial court's determination that this testimony was admissible as a dying declaration.

The question before the court in the consideration of the applicability of this hearsay exception is whether, under the totality of the circumstances, "the deceased knew and appreciated his condition as being that of an approach to certain and immediate death." Henry, 613 So. 2d at 431. In Henry, this Court reiterated that it is not necessary for the declarant to expressly acknowledge his belief of impending death, but in the instant case the paramedic stated that Alice had been repeating incessantly that she was going to die as they wheeled her out to the ambulance, just after having told Giger that her boyfriend had beaten her (R. 223-224). Given Alice's condition of being stabbed, bruised and beaten, covered in blood, having difficulty breathing, and going into shock, there is no error in the trial court's ruling finding Alice's statement to be admissible as a dying declaration. See, Teffeteller, 439 So. 2d at 842-843 (robbery victim's statement to police describing robbery and perpetrator properly admitted; victim made comment "I'm going"

and was consoled and told not to worry by attending doctors prior to statement). Statements made by severely injured victims to police and medical personnel are commonly admitted as dying declarations. Henry; Teffeteller; Price v. State, 538 So. 2d 486 (Fla. 3d DCA 1989).

The facts cited by the appellant to argue these statements were not dying declarations do not withstand much scrutiny. For example, the appellant claims Alice had time for reflective thought and did not believe she was dying because she selectively went to the Tice's house across the street when there were nearer neighbors with telephones and because Alice told Marsha that Marsha could be charged with "battery" as opposed to murder (Appellant's Initial Brief, pp. 29, 33). However, Alice had a logical reason to head to the Tice house instinctively, as she had been there previously to use the phone (T. 1355-1356). And although Marsha testified that at one point during the incident Alice told her that she could be charged with battery, it appears from the testimony this was early in the attack and certainly before Alice was stabbed and bleeding profusely (T. 1961-1962). The appellant also makes much of the allegation that Marsha didn't know she had been stabbed until she was asked who stabbed her, but the testimony refutes this allegation. Mary Witcher stated that she was starting to cut off Alice's clothes and look at her back when Alice volunteered that she had been stabbed, and Mary's assistant, Giger, denied telling Alice that she had been stabbed before Alice said her boyfriend stabbed her (R. 230; T. 1662).

The other statements by Alice were admitted as excited utterances. As to statements made to Deputy Ronald Wright, it must be noted initially that no issue has been preserved for appellate review, since there was no objection at the time that the statements were offered to the jury (T. 1720). During trial, the parties took a deposition to perpetuate Wright's testimony before Judge Roberts (R. 635, 642; T. 1606, 1708). When the parties later edited the deposition to exclude inadmissible testimony, defense counsel made a standing objection to any statements made by the victim to Wright (T. 1606, 1609). The court found the statements to be admissible as excited utterances (T. 1608). After the editing, five state witnesses were called, including the paramedic and EMT that treated Alice at the scene, before Wright's deposition was read to the jury (T. 1645, 1651, 1665, 1676, 1696, 1708). Defense counsel did not object to Wright's testimony of Alice's statements at the time that the deposition was read (T. 1720). Thus, this case presents the same situation as when a defendant has failed to object to in court testimony following a pretrial ruling by the trial judge, where this Court has consistently found that the question of admissibility has not been preserved for appellate review. See, Lindsey v. State, 636 So. 2d 1327 (Fla. 1994); Correll v. State, 523 So. 2d 562 (Fla. 1988). Where there was intervening testimony presented, particularly about Alice's condition at the scene just after her statements to Wright, the defense should have renewed any objection to this testimony in order to challenge these statements on appeal.

In addition, it is not possible to review this aspect of the appellant's argument because the basis for the trial court's determination that the statements to Officer Wright were admissible is not included in the record on appeal. In considering this issue below, the parties had a copy of Wright's deposition, and the prosecutor directed the judge's attention to "Page 19, Line 10" as the beginning of testimony she should review in considering the admissibility of these statements (T. 1607). The prosecutor later agreed that the predicate questions offered in support of the testimony were too inflammatory to present to the jury, so black lines were drawn through page 19 from line 10 to the end and through half of page 20 (R. 659-660, T. 1616). When the deposition was read to the jury, those lines were omitted; and that particular testimony does not appear anywhere else in the record. Therefore, it is not even possible for this Court to review the testimony which the judge below heard and considered in ruling that Alice's statements to Wright were admissible as excited utterances.

Even if the statements to Wright are reviewed, there was no abuse of discretion in the ruling to permit this testimony. Wright's deposition reveals that he arrived on the scene about 1:40 a.m. and found Alice inside the Tice residence, laying on the couch (R. 646, 648). We know at least that Alice was covered in blood and complaining of severe pain (T. 1608, 1610). William Tice had described Alice as moaning and incoherent (T. 1365-

1366).[3] Wright interviewed Alice for a few minutes before the EMS team arrived, by which time he could not talk to Alice because she was too short of breath (R. 650). During the interview, Alice related the statements which Wright testified to before the jury (R. 657-659).

During trial, William Tice testified that his houseguest woke him up very late Sunday night or early Monday morning after finding Alice at the door (T. 1356). Tice recognized her, as Alice had been to his house before to borrow the telephone (T. 1355). She was slumped on the sofa, covered in blood, and when he saw her Tice told the guest to call 911 (T. 1359-1360). In a proffer, Tice stated that Alice was incoherent, and her speech was slurred (T. 1365). She was moaning continuously and had difficulty breathing (T. 1366). Within a minute of the time Tice first saw her, Alice started talking about what had happened (T. 1367, 1375-1376). Tice thereafter testified before the jury that Alice told him that her boyfriend had beaten her up (T. 1379).

Once again, no abuse of discretion has been shown with regard to the trial court's rulings. In order to be admissible under this exception to the hearsay rule, a statement must relate to a startling event or condition and be made while the declarant is under the stress of excitement caused by the event or

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[3] The appellant's reliance on Tice having described Alice as "coherent," (Appellant's Initial Brief, p. 29), is mistaken. Tice told the jury that Alice was "not too coherent" and testified in the proffer that she was incoherent and her speech was slurred (T. 1361, 1365).

condition. § 90.803(2), Fla. Stat. The appellant suggests that too much time elapsed between the startling event and Alice's statements, but many authorities recognize that the "excited state may exist a substantial length of time after the event." Ehrhardt, Florida Evidence, § 803.2 (2d ed. 1984). Furthermore, factors for consideration in determining whether the necessary stress or excitement is present include the age, physical, and mental condition of the declarant; the characteristics of the event; and the subject matter of the statement. Id. There is no requirement that the statements be made contemporaneously with or immediately after the event. State v. Jano, 524 So. 2d 660, 663 (Fla. 1988). In Jano, this Court noted "It would be an exceptional case in which a statement made more than several hours after the event" would qualify for admissibility as an excited utterance. This is clearly not a case where an inordinate amount of time passed between the event and the statement, and the circumstances of the event belie any suggestion that Alice had any real opportunity for reflective thought. The fact that Alice had to leave the immediate crime scene in order to save her own life does not impugn the reliability of Alice's spontaneous statements to William Tice and Officer Wright.

In Garcia v. State, 492 So. 2d 360 (Fla. 1986), this Court approved the trial court's ruling that statements by a crime victim, made to an officer at the crime scene while the victim's survival was still in doubt, were admissible as excited

utterances. The instant case is factually similar and the appellant has failed to establish that Alice's statements to Tice and Wright should not have been admitted.

Finally, it is important to recognize that any possible error in the admission of any of Alice's statements could not be deemed harmful. Even if the trial court's characterization of Alice's statements to Giger as dying declarations is mistaken, no harm can be identified since, in any event, these statements could have been admitted as excited utterances. The description of Alice provided by the witnesses clearly demonstrates that Alice was still under the stress of her attack at the time she told Giger that her boyfriend had beaten her up. In addition, for the most part, all the statements involved was an identification of the appellant as the one that beat and stabbed Alice. Although the appellant presented several defenses, none of them tried to convince the jury that he was not involved in Alice's beating. In fact, the appellant concedes that identity was never an issue in this case (Appellant's Initial Brief, p. 36). The defense attorney reminded the jury of Alice's statements in his closing argument, noting that Alice had not implicated the appellant in the stabbing until she was asked about it (T. 2396). On these facts, it is impossible to conclude that the statements made by Alice to Tice, Giger and Wright affected the jury verdict in this case. Therefore, any possible error in the admission of this testimony must be found to be harmless, and the appellant is not entitled to a new trial on this issue.

ISSUE II

WHETHER THE TRIAL COURT ERRED IN ADMITTING INFLAMMATORY PHOTOGRAPHS AND OTHER EVIDENCE

The appellant also challenges evidentiary rulings as to the admissibility of crime scene and autopsy photographs. Although the appellant's brief makes a conclusory reference to "other evidence" as objectionable, the brief only specifically discusses ten pictures of bloody clothes and the bathroom where the stabbing took place, none of which depicted the victim (Ex. 5WW, 5XX, 5YY, 5ZZ, 5FFF, 5GGG, 5III, 5S, 5T, and 5U), and five of the autopsy photos (Ex. 52A, 52B, 52C, 52F, and 52H). Clearly, the trial court did not abuse its discretion in admitting these exhibits into evidence. Therefore, the appellant is not entitled to relief on this issue.

The appellant claims that these pictures were not relevant and served only to inflame the jury. That claim is without merit. The photographs in the instant case were relevant to establish the manner in which the murder had been committed. The jury heard Marsha describe the appellant hitting Alice's head against the sink and "the bathtub thing, the wall up above the thing, bathtub" and straddling Alice as she lay on the floor, stabbing her (T. 1856). They had a right to see pictures of the bathroom in order to better visualize the circumstances of the crime. Since the appellant's intent to kill was an issue for the jury, it was certainly relevant for the jury to understand how the crime occurred.

The appellant also claims that no pictures of the bathroom should have been admitted since he never produced evidence to counter the state's theory that Alice had been stabbed in the bathroom (Appellant's Initial Brief, p. 36). This fact does not make the photographs irrelevant. This Court has repeatedly recognized that the test of admissibility of photographs in a situation such as this is relevancy and not necessity. Meeks v. State, 339 So. 2d 186 (Fla. 1976); State v. Wright, 265 So. 2d 361, 362 (Fla. 1972); Henninger v. State, 251 So. 2d 862, 864 (Fla. 1971).

In Henderson v. State, 463 So. 2d 196 (Fla. 1985), the defendant argued that the trial court erred by allowing into evidence gruesome photographs which he claimed were irrelevant and repetitive. This Court found that the photographs, which were of the victim's partially decomposed body, were relevant.

> Persons accused of crimes can generally expect that any relevant evidence against them will be presented in court. The test of admissibility is relevancy. Those whose work products are murdered human beings should expect to be confronted by photographs of their accomplishments.

463 So. 2d at 200. This Court further held that it is not to be presumed that gruesome photographs so inflamed the jury that they will find the accused guilty in the absence of evidence of guilt, but presumed that jurors are guided by logic and thus, that pictures of the murder victims do not alone prove the guilt of the accused. 463 So. 2d at 200.

In Gore v. State, 475 So. 2d 1205 (Fla.) cert. denied, 475 U.S. 1031 (1985), this Court disagreed with Gore's contention that the trial court reversibly erred in allowing into evidence two prejudicial photographs, one depicting the victim in the trunk of Gore's mother's car and the other showing the hands of the victim behind her back. This Court held that the photographs placed the victim in Gore's mother's car, showed the condition of the body when first discovered by police, and showed the considerable pain inflicted by Gore binding the victim, met the test of relevancy, and were not so shocking in nature as to defeat their relevancy. Id. at 1208. The law is well established that the admission of photographic evidence is within the trial court's discretion and that a court's ruling will not be disturbed on appeal unless there is a clear showing of abuse. Wilson v. State, 436 So. 2d 908 (Fla. 1983). The appellant has failed to show an abuse of that discretion.

The appellant recites comments from the trial judge and prosecutor recognizing that the pictures were gory, and attacks the court's ruling to admit the pictures by noting that the pictures were not enlarged at the time of the pretrial hearing (Appellant's Initial Brief, p. 37). As to these arguments, it must be noted that the judge did exclude many of the pictures, including some of the ones she discussed as gory at the pretrial hearing (R. 470-480, 575-600). In addition, the judge was told at the time of the hearing that some of the pictures would be enlarged, and she reviewed the larger prints during the trial and

again excluded some at that time (R. 601; T. 986-991, 1069-1090). The reason for the enlargement was so that the witness could hold the pictures up for the jury as the exhibits were published, rather than have the jury pass around each picture individually during the trial (T. 993, 1106).

The autopsy photos were also relevant and therefore properly admitted. The photographs show close up views of Alice's face, neck and back. These pictures helped illustrate Dr. Melamud's testimony relating to the autopsy and the injuries he noted on Alice. The appellant's claim that the exhibits depicting Alice's bruises were not relevant since the bruises themselves did not contribute to her death is not persuasive. Certainly the other injuries she sustained during the attack are properly considered by the jury in determining the appellant's intent, a major issue in this case, and to corroborate Marsha's account of how this offense occurred. Although the photographs show bruises and the stab wounds, they are not unduly gruesome in that Alice's body was not horribly scarred or disfigured. This Court has approved the admission of autopsy and other relevant photos under similar circumstances. Burns v. State, 609 So. 2d 600 (Fla. 1992); Marshall v. State, 604 So. 2d 799 (Fla. 1992); Nixon v. State, 572 So. 2d 1336 (Fla. 1990).

All of the photographs introduced were relevant, they were not unduly prejudicial and therefore, the trial court did not err in admitting them into evidence. The appellant is not entitled to a new trial on this issue.

ISSUE III

WHETHER THE TRIAL COURT ERRED IN ADMITTING EVIDENCE OF OTHER CRIMES AND BY NOT GIVING ANY JURY INSTRUCTION LIMITING THE USE OF THE EVIDENCE

The next issue concerns the admission of testimony that the appellant had committed a battery on Alice several months prior to the stabbing. However, much of this argument is procedurally barred, since defense counsel did not object when the evidence was elicited at trial.

The evidence was presented through several different witnesses. Ernestine Swallows testified that she had seen Alice at Allen's Discount Store around Labor Day, 1991, and that Alice was crying and upset, had lost her glasses, and had a swollen nose (T. 1284-1286). Swallows was not sure of the date but recalled that it was during the time that the appellant and Alice were seeing each other more or less regularly (T. 1287). Lt. Terry Young and Officer Mary Dicks of the Florida Fresh Fish and Game Commission testified they were at Lake Shipp on Labor Day, September 2, 1991, and they saw the appellant and Alice sitting around among the pine trees waiting for the sheriff's office to arrive (T. 1291-1293, 1301-1307). Mary stated that Alice had come toward her in the parking lot, holding her face, upset and crying (T. 1304). Alice had a bloody lip and nose (T. 1304). The appellant was angry, and his knuckles were skinned (T. 1305). Sheriff's Deputy Robert Barnes testified that he was dispatched to Lake Shipp on Labor Day, 1991, and found Alice sitting on the

ground, upset and bleeding, and the appellant sitting nearby, angry and sweating (T. 1416-1420). Finally, Wanda Pope testified that she saw the appellant strike or hit Alice one time when they were at Lake Shipp (T. 1813).

The only objection to any of the above testimony at trial was directed at Wanda Pope's statement that she saw the appellant strike Alice (T. 1812). Although the other testimony was the subject of a pretrial hearing, the lack of a contemporaneous objection when the statements were actually disclosed to the jury precludes appellate review. Lindsey, 636 So. 2d at 1334; Correll, 523 So. 2d at 565. Therefore, this Court should specifically find the appellant's argument as to this evidence to be procedurally barred. Since Wanda's statement was cumulative to the Williams Rule testimony to which the appellant did not object, it could not have possibly prejudiced him.

Even if the evidence is considered, the appellant has failed to demonstrate any error in the trial court's ruling. The appellant claims that this testimony was not admissible because it was not relevant to prove motive, it was too remote in time to be probative, it was factually dissimilar to the charged offense, and it impermissibly became a feature of the trial. However, the testimony was relevant to establish the context of the crime, including the relationship between the parties. It is true that the prosecutor intended to argue that the appellant's jail time resulting from this battery led to ill will, until the judge changed her mind and reversed her ruling to permit testimony that

the appellant had been arrested and incarcerated due to the battery (R. 272-294, 317-318, 510-514; T. 1296-1299). Nevertheless, the jury could permissibly consider evidence about the previous battery in contemplating the appellant's state of mind and particularly in evaluating the appellant's statements to Marsha.

The fact that the battery occurred several months before Alice's murder and that there was no direct evidence of a causal connection between the battery and the murder does not vitiate the relevance of this testimony. Because relationships are defined by evolving circumstances, it is probative of one party's state of mind to describe a situation or event experienced in the course of the relationship, even if not temporally associated with the charged crime. Therefore, even if remote in time, a significant event may be relevant, as in this case.

The argument that this evidence was not admissible due to its factual dissimilarity is also unavailing. The defense suffers from a misconception that similar fact evidence constitutes the only type of relevant evidence permissible under Williams v. State, 110 So. 2d 654 (Fla. 1959). However, similar fact evidence, as codified in Section 90.404(2), Florida Statutes, describes only one form of evidence permitted by the Williams Rule. As stated by Professor Ehrhardt:

> Evidence which is admissible under this theory is frequently called 'similar fact evidence'. However, evidence of collateral crimes or acts is admissible under section 90.404(2)(a) not because it is similar to the

> crime or act in issue, but because it is relevant to prove a material fact or issue in the instant case other than the defendant's propensity or bad character. Thus, it can be misleading to refer to this evidence as 'similar fact evidence' because the similarity of the facts involved in the collateral act or crime does not insure relevance or admissibility. Similarly, evidence of collateral crimes may be relevant and admissible even if it is not similar.

Ehrhardt, Florida Evidence, § 404.9 (2d ed. 1984).

As this Court explained in Bryan v. State, 533 So. 2d 744, 746 (Fla. 1988):

> Evidence of 'other crimes' is not limited to other crimes with similar facts. So-called similar fact crimes are merely a special application of the general rule that all relevant evidence is admissible unless specifically excluded by a rule of evidence. The requirement that similar fact crimes contain similar facts to the charged crime is based on the requirement to show relevancy. This does not bar the introduction of evidence of other crimes which are factually dissimilar to the charged crime if the evidence of other crimes is relevant.

See also Gould v. State, 558 So. 2d 481, 485 (Fla. 2nd DCA 1990); Calloway v. State, 520 So. 2d 665, 668 (Fla. 1st DCA 1988) (similar fact evidence relevant to prove a material fact other than identity need not meet the rigid similarity requirement applied when collateral crimes are used to prove identity), rev. denied, 529 So. 2d 693. Among the legitimate purposes for which Williams Rule evidence is admissible are to show the defendant's intent, motive, and when the acts are so linked that one cannot be shown without proving the other (inseparable crimes). See, e.g., Nickels v. State, 90 Fla. 659, 106 So. 479 (1925); Hall v.

State, 403 So. 2d 1321, 1324 (Fla. 1981); Ruffin v. State, 397 So. 2d 277, 280 (Fla. 1981); and Jackson v. State, 522 So. 2d 802, 806 (Fla. 1988).

In Layman v. State, 20 Fla. L. Weekly S141 (Fla. March 23, 1995), this Court approved the admission of evidence, and the denial of a limiting instruction, on facts quite comparable to the instant case. Layman shot his girlfriend after planning her murder and stalking her. Evidence of a battery that Layman had perpetrated on the victim months before killing her was admitted to show Layman's motive and intent. This Court found that no limiting instruction was necessary because the evidence was admitted as relevant evidence under Section 90.402 rather than as Williams Rule evidence under Section 90.404(2). Despite the time interval, the battery was seen as integrally connected with the murder, and relevant to show Layman's motive and premeditation. See also, Padilla v. State, 618 So. 2d 165, 169 (Fla. 1993) (approving admissibility of evidence that the defendant had fired shots at his girlfriend's former apartment prior to the murder, and holding that no instruction was necessary); Tumulty v. State, 489 So. 2d 150, 153 (Fla. 4th DCA) (relevant because evidence was inextricably intertwined with the facts to show the context of the crime), rev. denied, 496 So. 2d 144 (Fla. 1986); United States v. Martin, 794 F.2d 1531, 1533 (11th Cir. 1986). The state is entitled to present an orderly, intelligible case, and the evidence of the earlier battery on Alice in this case was necessary to such a presentation.

The appellant's suggestion that this evidence became a feature of the trial is without merit. The testimony about the battery was brief and paled in comparison to the lengthy accounts of the attack which led to Alice's death. Five of the state's 28 witnesses offered very brief testimony about the Lake Shipp battery; there are more than four times as many pages in the transcript taken up for defense counsel's cross examination of Marsha Pope than all of the evidence about the battery combined (T. 1284-1287, 1291-1293, 1301-1307, 1416-1420, 1813, 1881-1978). Furthermore, testimony about the Lake Shipp incident was neither detailed nor emotionally charged, especially when compared to the gut wrenching, eyewitness description of the appellant's later, more serious attack on Alice.

The appellant also claims that the Williams Rule evidence was exacerbated by Lt. Young's comment that the sheriff's office took "custody" of the appellant following the Lake Shipp incident. The court below noted the statement could have simply referred to the sheriff's office taking control of the situation (T. 1297). Defense counsel did not even object to Young's testimony initially, since it was consistent with the trial court's earlier ruling to allow the state to present evidence that the appellant was incarcerated as a result of the battery (T. 1296-1297). Furthermore, as to Lester Pope's vague reference to the appellant's arrest for beating Alice, the trial court made a specific finding that Lester was recalling the arrest for the charged offense, and there was no Williams Rule implication in

the context of Lester's response (T. 1333, 1463-1465). On these facts, none of this testimony warranted the granting of a mistrial or aggravated any possible error in the admission of evidence about the battery.

This Court has routinely approved the admission of relevant evidence of dissimilar acts which, while possibly tarnishing a defendant's reputation as a moral, upstanding citizen, are probative of a particular fact in issue. In addition, because such evidence is admissible as relevant evidence under Section 90.402 rather than Williams Rule evidence under Section 90.404(2), no limiting instruction is necessary. Layman; Padilla. However, it must also be noted that any error in the trial court's admission of evidence that the appellant and Alice had a spat on Labor Day is clearly harmless. The evidence had limited probative value, as it simply placed this crime in the context of the lives involved. There was overwhelming evidence of the appellant's guilt, as the victim and an eyewitness both identified the appellant as the person that beat and stabbed Alice. The appellant was apprehended shortly after the incident, still drenched in Alice's blood (T. 1716). He had made incriminating statements and was driving Alice's car (T. 951, 953, 1716, 1718). On these facts, the appellant is not entitled to a new trial on this issue.

ISSUE IV

WHETHER THE TRIAL COURT ERRED IN FAILING TO GIVE DEFENSE COUNSEL'S REQUESTED INSTRUCTIONS ON THIRD DEGREE MURDER, ACCOMPLICES, AND OTHER ISSUES

Appellant also challenges the trial court's denial of requested jury instructions on lesser offenses of third degree murder, aggravated battery, and battery, as well as the instruction on accomplices. However, the court below properly refused to instruct the jury as requested, since there was no evidence to support the giving of any of the instructions.

The appellant's request for a third degree murder instruction at trial was premised on a theory of felony murder with grand theft as the underlying felony (R. 683; T. 2206-2209). Thus, to the extent that the appellant suggests that this instruction should have been given with aggravated battery as the underlying felony and relies on the case of Garcia v. State, 574 So. 2d 240 (Fla. 1st DCA 1991), his argument is not cognizable. McKinney v. State, 579 So. 2d 80, 83-84 (Fla. 1991); Jackson v. State, 575 So. 2d 181, 187 (Fla. 1991).

The trial court rejected the appellant's grand theft/felony murder theory under the prosecutor's sound reasoning that no such offense can exist, at least on the facts of this case. Because robbery is defined as a grand theft involving the use or threat of force or violence, a grand theft in which a death occurred as a result of the perpetrator's use of violence would, by law, be elevated to a robbery, and the murder would therefore be first

degree felony murder. If the jury found that the assault and the car theft were so unrelated that they could not form a robbery, these acts could not support a third degree murder verdict, since such a definitive break between the violence and the taking would preclude application of the felony murder doctrine.

In addition, the trial court's failure to instruct the jury on third degree murder with grand theft as the underlying felony would certainly amount to no more than harmless error, since the jury was given the option of convicting the appellant of grand theft rather than robbery, and it did not do so (R. 769-778). The jury's specific finding of guilt as to the robbery clearly refutes any suggestion that the appellant was prejudiced by the trial court's failure to instruct on third degree murder.

As to the other offenses, the general rule holds that aggravated battery and battery are not given as lesser included offenses in homicide cases. Martin v. State, 342 So. 2d 501 (Fla. 1977). There is a recognized exception to this rule when there is an issue in the case as to whether the defendant's act caused the victim's death, as opposed to "some other unconnected cause." In Re: Standard Jury Instructions in Criminal Cases, 543 So. 2d 1205, 1233 (Fla. 1989). This exception clearly does not apply in this case, and therefore the trial court properly denied the appellant's request for jury instructions on aggravated battery and battery.

The appellant claims that, because Marsha was involved in Alice's murder, there was a jury issue as to whether the

appellant's acts caused Alice's death. He asserts that "there was evidence presented that Marsha stabbed Alice," and therefore this case is controlled by Rossi v. State, 602 So. 2d 614 (Fla. 4th DCA 1992). However, there was no competent, substantive evidence admitted that Marsha stabbed Alice. Although witnesses stated that Marsha had told them she stabbed Alice, this testimony was only offered to impeach Marsha's testimony, and cannot be used as a basis for arguing that Marsha's participation entitled the appellant to these instructions. In addition, even under the testimony presented, any question as to the extent of Marsha's involvement is not significant, as Marsha only participated because the appellant was forcing her to do so (T. 2019, 2023, 2056, 2075). Therefore, Marsha's participation could not amount to an "unconnected" cause of Alice's death, and the exception permitting aggravated battery and battery as lesser offenses in homicide cases does not apply.

In addition, as to all of the arguments relating to the trial court's refusal to instruct on lesser included offenses, any possible error would necessarily be harmless beyond any reasonable doubt. All of the lesser offenses sought are at least two steps removed from the charge for which the appellant was convicted, first degree murder, and therefore any error in the failure to give these instructions is harmless. Jackson, 575 So. 2d at 187; State v. Abreau, 363 So. 2d 1063 (Fla. 1978).

The defense also requested an instruction for the jury to use great caution in relying on the testimony of a witness who

claims to have helped the defendant commit a crime (T. 2236). The state objected, as there had been no testimony by anyone suggesting that Marsha had been helping the appellant other than against her will (T. 2236). The defense conceded there was no such testimony (T. 2236). The court decided not to give the instruction, finding that it would be too confusing and did not make sense in the context of this case (T. 2238).

It is proper to refuse to instruct the jury on accomplice testimony when the witness was not a willing participant in the charged crime. See, Smith v. State, 344 So. 2d 915, 921 (Fla. 1st DCA) (proper to refuse instruction for witness that assisted in concealing crime, but did not help commit), cert. denied, 353 So. 2d 679 (Fla. 1977). And in Robinson v. State, 574 So. 2d 108, 110 (Fla. 1991), cert. denied, ___ U.S. ___, 112 S. Ct. 131, 116 L. Ed. 2d 99 (1992), this Court ruled that there was no abuse of discretion in the denial of this instruction during penalty phase where the codefendant was less culpable than Robinson. Of course, there is no question that Marsha was less culpable than the appellant in this case.

Once again, however, any error in the refusal of this instruction was harmless. The appellant claims that without the instructions discussed in this issue, the jury was not able to decide the factual issue of Marsha's involvement. However, the standard jury instructions on weighing the evidence and credibility of the witnesses, as well as the instruction on independent acts which was given in this case, clearly guided the

jurors in judging and weighing Marsha's testimony (T. 2441-2442, 2445).

On these facts, the appellant has failed to demonstrate any error in the denial of his jury instructions on third degree murder, aggravated battery, battery, and accomplices. Therefore, he is not entitled to a new trial on this issue.

ISSUE V

WHETHER THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S MOTION FOR MISTRIAL AFTER PROSECUTORIAL COMMENT ON HIS RIGHT TO REMAIN SILENT

The next issue attacks the trial court's denial of a motion for mistrial based upon a prosecutor's question during voir dire. The prosecutor was exploring the prospective jurors' experience with alcohol abuse and domestic violence (T. 390-393). Prospective Juror Rhoades indicated that his life had been impacted by alcohol, and that he had been the victim of domestic violence (T. 392). Rhoades believed that he could fairly judge the case, and stated that he did not drink personally (T. 393). The prosecutor asked

> But your feelings concerning the use of alcohol wouldn't be so strong that you would -- assuming someone takes the stand and they're testifying and they admit to using alcohol and maybe using a lot of alcohol, or there's testimony about someone having used alcohol, would you just sort of automatically become prejudiced towards that person to the point that you would form an opinion about their truthfulness or their guilt or anything of that nature?

(T. 393-394).

Defense counsel "reluctantly" moved for a mistrial "Because of what Mr. Wallace said about using alcohol and then can you rule on his guilt or innocence" as an improper comment on the defendant's right to testify (T. 395). The trial judge concluded

> The only bad work you used was "admits" because every witness that takes the stand --

> if you left off the word "admits" I think we'd be home free. ... I'm going to take it as it needs to be at this point, I think it's harmless because of the way you asked.

(T. 396-397).

The appellant has failed to demonstrate any error in the trial court's denial of his motion for a mistrial. This comment is not "fairly susceptible" of being construed as a comment on the appellant's right to testify. Although such a comment may be analyzed as such upon review of the cold transcript, the context in which the prosecutor's question was asked indicates that the prosecutor was simply trying to detect any difficulty the juror might have in weighing the testimony by or about a person that admits using or having used a lot of alcohol.

The trial judge's concern with the use "admits" was misplaced because any witness, not just a defendant, can take the stand and be asked to admit many things. In this case, Marsha was asked to admit many things, and she was asked about her drinking (T. 1850). Since the prosecutor in this case was not even attempting to focus attention on whether or not the appellant would be testifying, and the question would not reasonably arise in the jurors' minds simply from hearing the prosecutor's question, this comment should not be deemed an impermissible comment on the appellant's right to testify.

Furthermore, any true concern with this comment does not suggest error in the denial of the motion for mistrial because, as the trial court found, the innocuous nature of the comment and

the context in which it was made render any impropriety to be harmless beyond any reasonable doubt. The comment did not explicitly relate to a defendant's right to testify, and was a brief, isolated remark made during jury selection and then forgotten. It could not possibly have affected the jury verdict in this cause, and must therefore be found harmless under State v. DiGuilio, 493 So. 2d 1129 (Fla. 1986).

ISSUE VI

WHETHER THE TRIAL COURT ERRED IN CHANGING THE ORDER OF THE VENIREMEN AND EXAMINING THE VERDICT BEFORE THE JURY DELIBERATIONS WERE COMPLETED

The appellant's next issue is procedurally barred. Defense counsel did not object to the court's procedure of shifting the remaining venire members during the selection of the alternate jurors, a move actually done to accommodate the defense, nor did counsel object prior to the jury actually being sworn (T. 755-757). See, Joiner v. State, 618 So. 2d 174, 176 (Fla. 1993) (acceptance of jury prior to being sworn waived earlier objection not renewed). Moreover, since the procedure only related to the selection of an alternate, and no alternate was used for any deliberations, there is no reason for this Court to consider this issue, since any possible error could not have prejudiced the defense.

A close scrutiny of the record reveals that defense counsel's momentary desire to have Juror #302 seated as an alternate was based on counsel's reluctance to accept either #305 or #4 as alternates. On what should have been the last day of jury selection, the parties thought they had twelve people selected for a jury, and there were three people left on the venire panel (T. 560). The court suggested using all three for alternates, and then the parties mistakenly believed they only had eleven jurors selected (T. 560). The court asked about the next juror up, Juror #302, and the defense excused #302

peremptorily (T. 560). The court started to ask about Juror #303, but then realized they actually had selected twelve jurors (T. 560). The court asked defense counsel if he wanted "to take back your strike on 302 as an alternate and start over again?" But defense counsel wanted to know how many alternates and how many strikes would be allowed (T. 561). The prosecutor wanted to strike 303, and defense counsel responded that he would strike the other two, 302 and 305 (T. 561). The parties agreed that if they were to select one alternate, they would each be entitled to one challenge, so with three of the venire left they should each be able to use one strike and have a remaining juror to use as an alternate (T. 562-563). The defense protested that the prosecutor was getting "rid of the one remaining good juror" and counsel stated that he could not decide whether to strike 302 or 305 (T. 564). Then counsel complained that it wasn't fair, since he had already indicated what he wanted to do (T. 564). Defense counsel then struck 305, and stated he was not "consciously" trying to mess up the trial by striking 302 and then coming back and taking 302 over 305, "It's just between the two of them I would rather have -- if I'm stuck with having to pick among those, and I think I am, I would rather have 302 than 305" (T. 565). The judge indicated that defense counsel was not "stuck" with this, they could bring in a new venire panel the next morning (T. 565). Defense counsel stated to that "I don't really know how to respond to that. I don't like either 302 or 305." (T. 566). The judge said that she did not want to have to retry

this case, so in an abundance of caution she would order a new venire for the next day to join the three remaining from this panel, and they could pick two alternates (T. 567).

The following day, the parties questioned a new panel of prospective jurors, and the court started asking for excusals on Juror #4 (T. 749). Defense counsel indicated that he was confused, and the court explained

> I thought neither one of you wanted that third juror from last night and that we'd start with number 4 and pick up those three later on after we get through with these that you want. If you don't want me to do it that way, we'll talk about number 305.
>
> * * *
>
> MR. DOYEL: Your Honor, I really feel like I'm being rushed to do something that I don't understand. I would rather accept number 302, knowing what's ahead of me and how many strikes I've got, I would rather to accept number 302 unless the Court is striking both the first and the second one from last night.
>
> THE COURT: You struck them last night. You exercised the challenge, and you exercised it two or three times. I don't want to pressure you into taking 302, I'm not going to do it.
>
> MR. DOYEL: I feel like I'm being pressured into not taking 302 when I think 302 is the best of some of the alternatives that are available to me.
>
> THE COURT: I don't want you to take 302. I think you're going to queer the trial and we're going to wind of [sic] doing it over again. You objected to that person twice last night.
>
> MR. DOYEL: I would -- if I'm going to be restricted to two challenges --

THE COURT: Yeah.

MR. DOYEL: I don't choose to exercise one of them on 302.

(T. 748-749).

The court took a ten minute recess, and upon her return, the judge announced that the only alternates from the evening before which she would allow the parties to revisit was 305. She suggested that they not discuss 305 until they finished with the new panel, but she would allow them to put 305 first if that's what they wanted (T. 750).

MR. DOYEL: And is it my understanding now that I've only one challenge and we're starting with --

THE COURT: We're going to pick two alternates out of this group.

MR. DOYEL: Oh, we're picking two out of this group, including number 305?

THE COURT: Right.

MR. DOYEL: Okay.

THE COURT: And I suggest --

MR. DOYEL: But starting with Bruszer [#4]?

THE COURT: I suggest you use 305 last.

MR. DOYEL: Okay.

THE COURT: Can ya'll accept that, or do you want to talk about 305 first?

MR. DOYEL: Oh, I can accept that.

MR. WALLACE: That's fine with the State, Your Honor.

THE COURT: The State already told me their position on number 4.

MR. DOYEL: Okay. We'll strike number 4.

(T. 751-752).

Thus, defense counsel only wanted #302 as a way to keep numbers 4 and 305 off of the jury. Once counsel realized that he could avoid 4 and 305 without having to accept 302, he no longer expressed any desire for 302 to remain as an alternative. He had no objection to the two alternates actually selected, declined a final offer for any backstrikes, and did not protest when the jury was announced and sworn (T. 752-753, 756-757). Under these facts, no purported error in this procedure has been preserved for appellate review.

Even if the issue is considered, however, trial courts have traditionally been afforded wide discretion in conducting voir dire. Mu'Min v. Virginia, 500 U.S. ___, 111 S. Ct. ___, 114 L. Ed. 2d 493, 504 (1991). The appellant's reliance on cases finding reversible error when trial courts have refused to permit backstriking is misplaced, as that is not what occurred herein. There is never an absolute right to have one identified venireperson sit on a jury, simply because there remains the right to challenge an objectionable venireperson up until the time that the jury has been sworn.

The appellant's concern that error may have occurred when the trial judge inadvertently viewed one of the verdict forms

during a break in deliberations is not justified. Although the appellant does not provide any details about this incident, it was a result of the fact that the trial was being conducted in the temporary Polk County Courthouse, and the jury was having to use the same courtroom to conduct its deliberations (T. 2451-2452, 2455-2456). When the jury was ready to recess for the night, the trial judge advised the jury to leave all of their papers face down on their chairs, with their juror numbers identifying them as all of the papers would be collected (T. 2480-2481). One of the jurors advised the judge that two of the verdict forms were already completed, and they were on the juror's chair (T. 2484). The judge told the juror that no one would be looking at them (T. 2484). After the jury left, the judge advised all of the parties on the record that she had inadvertently turned over the verdict forms in picking up the papers, and that the kidnapping verdict forms were not signed (T. 2486). The judge stated that she did not look any further, because she did not want to see anything else (T. 2486). A later defense motion for a mistrial based on the judge having invaded the secrecy of the jury deliberations was denied (T. 2502).

The trial court's having seen and commented upon the unsigned verdict forms does not warrant any further consideration by this Court. The judge did not invade the jury's secrecy, and she was not a party to any privileged information during deliberations. The appellant's suggestion that this amounted to an improper announcement of the verdict was never presented to

the trial judge for consideration and therefore is not preserved for appellate review. In addition, the court was not disclosing any verdict but rather the lack of a verdict as to the kidnapping charge. No error is shown on these facts.

No abuse of discretion has been established in this case. Therefore, the appellant is not entitled to a new trial on this issue.

ISSUE VII

WHETHER THE TRIAL COURT ERRED BY NOT FINDING THAT THREE NONSTATUTORY MITIGATORS EXISTED AND BY REFUSING TO CONSIDER THE MITIGATORS IN DETERMINING THE SENTENCE

The appellant next challenges the trial court's refusal to consider several aspects of this case to mitigate against the application of the death penalty. He suggests that the fact that he did not know Alice was alive when he left the area; the fact that Alice's death was directly attributable to the infection she contacted while in the hospital rather than the actions of the appellant; and the fact that people suffering the same wounds inflicted in this case can typically recover are all circumstances of the offense which should have been weighed against the aggravating factors found by the court. However, none of these considerations reduce the appellant's moral culpability or extenuate the circumstances of the crime. Therefore, they were properly rejected as mitigating by the trial judge.

As to the fact that Marsha told the appellant that Alice was dead as they left the scene, the appellant claims that he may have harbored a humanitarian motive to end Alice's suffering which he refrained from demonstrating only because he believed Alice to be dead. This claim is born of speculation and is not supported by any evidence whatsoever that the appellant cared anything about Alice's suffering. To the contrary, the appellant's curiosity about Alice's welfare suggests only that

the appellant would not have left the house until he was certain that he had killed Alice. The appellant's statements and actions in this case establish that he planned to kill Alice, he tried to kill Alice, and when it was over he hoped he had killed Alice. The fact that Marsha lied to the appellant in an attempt to protect Alice cannot in any way mitigate the circumstances of this offense.

As to the suggestion that Alice's death from surgical complications rather than the appellant's actions reduces the appellant's culpability, the appellant's argument is again not persuasive. The fact that Alice did not bleed to death in the bathroom, as the appellant would have had her done, but fought for her life for a week after the stabbing does not extenuate this crime. The appellant relies on an implication in Hallman v. State, 371 So. 2d 482 (Fla. 1979) to suggest that medical malpractice could be considered mitigating, and argues proper medical treatment which gives rise to an intervening cause of death should also mitigate an offense. The only reason that the seriousness and treatment of a crime victim's wounds might be relevant, in Hallman as in this case, would be as an indicator of the perpetrator's intent. Certainly, if a defendant did not intend to kill, and inflicted a non-fatal wound which indirectly led to the victim's death following negligence by another party, these facts would be mitigating. In the context of the instant case, however, where the appellant's intent to kill was ultimately fulfilled despite proper and necessary medical intervention, they are not.

The appellant's argument is analogous to the idea that you should not be considered responsible for killing someone when you throw them off the roof of a building, because it is not the fall but the landing that kills them. Certainly his actions were directly responsible for injuring Alice so severely that she had to face surgery and she ultimately died from the complications involved in the treatment of her injuries. His intent was not to maim Alice, hoping she would recover, but to kill her. Therefore, the fact that he almost failed to do so does not reduce his culpability or extenuate his guilt.

For the same reasons, the claim that there may be people that typically recover from injuries similar to those inflicted on Alice is not mitigating in nature. Certainly if the appellant did not intend to kill Alice, and her death was an unanticipated consequence of the appellant's actions, the fact that the injuries are not necessarily fatal might be significant. However, where, as here, there is substantial evidence of the intent to kill and the attempt to inflict fatal injuries, the fact that the injuries were not as severe as they could have been is of no moment.

On these facts, the trial court properly rejected the consideration of these circumstances as mitigating. The appellant is clearly not entitled to relief on this issue.

ISSUE VIII

WHETHER THE SENTENCE IS DISPROPORTIONATE COMPARED WITH OTHER CAPITAL PENALTY DECISIONS OF THIS COURT

The appellant next claims that his sentence must be vacated on proportionality grounds. He argues that this was a domestic situation, a "passionate obsession," for which the death penalty was never intended and does not apply under a string of cases culminating with Santos v. State, 629 So. 2d 838 (Fla. 1994). However, the facts of this case do not demonstrate that any passion or obsession was involved, and a review of the aggravating and mitigating circumstances clearly establishes that the death penalty is the proper sentence and that this case is proportional to other cases in which death has been imposed.

Although the appellant and the victim had dated for a few months prior to the incident, there is absolutely no evidence which could even give rise to an inference that the relationship itself was a contributing factor in Alice's death. There was no testimony that the appellant and Alice were experiencing difficulties in the relationship; that the appellant was distraught over the relationship; or that the attack on Alice was motivated by blind passion or anger. To the contrary, Marsha testified that the appellant and Alice were getting along fine and there was no argument which preceded the attack (T. 1975). The appellant told Marsha when he first arrived with Alice that he had already decided to kill her for financial reasons (T. 1849).

The aggravating factors in this case were strong and convincing. The prior violent felony conviction demonstrates that the appellant has the propensity to commit serious, violent and inexcusable crimes. The jury heard a very mild version of the appellant's prior conviction, since the trial court wouldn't let the victim testify that he took her across state lines, repeatedly raped her, and told her of men he claimed to have killed (T. 2523-2528, 2531-2533). His motivation of pecuniary gain was established through his own statements to Marsha as well as through his actions in taking her keys and car (T. 1716, 1720-2721, 1849, 2649).

On the other hand, the mitigating evidence to which the trial judge gave weight is inconsequential. Although a psychologist testified that the appellant was impaired from his history of alcohol abuse, he would not speculate on the appellant's state of mind at the time of the offense (T. 2748-2749). This was obviously not the most mitigated of crimes.

The appellant suggests that this sentence would be disproportionate if the proposed mitigation discussed in Issue VII was considered, but this Court has consistently noted that it will not reweigh mitigating evidence in making a proportionality determination. Hudson v. State, 538 So. 2d 829 (Fla.), cert. denied, 493 U.S. 875 (1989). Of course, a proportionality determination is not made by the existence and number of aggravating and mitigating factors, but this Court must weigh the nature and quality of the factors as compared with other death cases. Kramer v. State, 619 So. 2d 274, 277 (Fla. 1993).

When compared to similar cases where the death penalty has been ordered and upheld, this case clearly involves the necessary aggravation to set it apart from other capital murders, warranting the extreme sanction of death. In Duncan v. State, 619 So. 2d 279, 281 (Fla.), cert. denied, ___ U.S. ___, 126 L. Ed. 2d 385 (1993), the defendant stabbed his fiancee six times with a kitchen knife. The only aggravating factor was Duncan's prior violent felony convictions, and the trial court found fifteen mitigating factors. This Court struck reliance on three of the mitigating factors, and otherwise upheld the sentence as proportional.

In Freeman v. State, 563 So. 2d 73, 75 (Fla. 1990), cert. denied, ___ U.S. ___, 111 S. Ct. 2910 (1991), the defendant beat a man that came in as he was trying to burglarize the man's house. Freeman had prior violent felony convictions of a similar nature that had been committed three weeks prior to this murder, and the trial court also found as one aggravator that it was committed in the course of a burglary/pecuniary gain. In mitigation, the trial court found low intelligence, abuse as a child, artistic ability, and enjoyed playing with children. This Court determined the sentence to be proportional, noting that the nonstatutory mitigating evidence was not compelling.

In Hudson, 538 So. 2d at 829, the defendant took a knife into his girlfriend's apartment and stabbed the girlfriend's roommate. The aggravators were Hudson's prior violent felony conviction and committed during the course of an armed burglary.

Although the trial court also found three statutory mitigating factors, little weight was given to the mitigation and this Court upheld the sentence. See also, Clark v. State, 613 So. 2d 412 (Fla. 1992) (aggravators of prior violent felony conviction and during course of robbery; mitigating evidence presented but not found), cert. denied, ___ U.S. ___, 126 L. Ed. 2d 79 (1993); Watts v. State, 593 So. 2d 198 (Fla.) (prior convictions, during course of sexual battery, and pecuniary gain outweighed mitigation of defendant's age and low IQ), cert. denied, ___ U.S. ___, 120 L. Ed. 2d 881 (1992).

A review of the aggravating and mitigating factors established in this case clearly demonstrates the proportionality of the death sentence imposed. The circumstances of this murder and the defendant's propensity for violence compel the imposition of the death penalty. The instant case was not a passionate, heated act directed at the victim, but was the result of a prearranged plan. See, Turner v. State, 530 So. 2d 45 (Fla. 1987); Porter v. State, 564 So. 2d 1060 (Fla. 1990). Therefore, the appellant's claim that the death sentence is disproportionate must be rejected, and this Court should not disturb the appellant's sentence in this appeal.

ISSUE IX

WHETHER FLORIDA'S CAPITAL SENTENCING SCHEME IS UNCONSTITUTIONAL

The appellant's final challenge addresses the constitutionality of Florida's death penalty statute. Specifically, the appellant asserts that the statute's failure to assign particular weight to the aggravating and mitigating circumstances results in the arbitrary and inconsistent application of these factors and that the failure to require a special verdict creates a risk that invalid or inapplicable aggravating factors will be considered. It must be noted initially that these arguments were not presented to the trial court and are therefore barred in this appeal.

Furthermore, even if considered, no constitutional infirmity has been established. The Constitution does not require that death penalty statutes proscribe specific instructions for the weight and consideration of the sentence calculation. In Harris v. Alabama, 513 U.S. ___, 115 S. Ct. ___, 130 L. Ed. 2d 1004 (1995), the United States Supreme Court rejected the claim that Alabama's death penalty statute was unconstitutional for failing to specify how much weight a judge should assign to a particular jury recommendation. The Court reiterated that "the Constitution does not require a State to ascribe any particular weight to particular factors, either in aggravation or mitigation, to be considered by the sentencer." 130 L. Ed. 2d at 1014. See also, Proffitt v. Florida, 428 U.S. 242, 257-258, 96 S. Ct. 2960, 49 L.

Ed. 2d 913 (1976). Thus, there is no constitutional requirement that jurors be limited as to the way in which they consider and weigh the aggravating and mitigating circumstances presented.

The argument that the Constitution is offended by the statute's failure to require a special penalty phase verdict has also been consistently and repeatedly rejected by this Court as well as the United States Supreme Court. See, Wuornos v. State, 19 Fla. L. Weekly S503, S506, n. 5 (Fla. October 6, 1994); Ponticelli v. State, 593 So. 2d 483, 487, n. 4 (Fla. 1991), vacated, ___ U.S. ___, 121 L. Ed. 2d 5 (1992), affirmed, 618 So. 2d 154 (Fla.), cert. denied, ___ U.S. ___, 126 L. Ed. 2d 316 (1993); Hildwin v. Florida, 490 U.S. 638, 109 S. Ct. 2055, 104 L. Ed. 2d 728 (1989).

The appellant also refers to the motions challenging the constitutionality of the statute which were filed in the trial court and attempts to incorporate those motions without presenting further argument in his brief. This Court has previously recognized that any issues not briefed to an appellate court are waived. Duest v. Dugger, 555 So. 2d 849, 851-852 (Fla. 1990). Since the appellant has not argued these motions in his brief, but only incorporated the arguments presented therein by reference, this claim is not properly before this Court and an express finding of a procedural bar as to these arguments must be made in this appeal.

The appellant has failed to demonstrate any conflict between Florida's death penalty statute and the state or federal constitutions. He is not entitled to relief on this issue.

CONCLUSION

Based on the foregoing arguments and citations of authority, the appellee respectfully requests that this Honorable Court affirm the judgment and sentence of the trial court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to WENDY E. FRIEDBERG, Aidif & Friedberg, P. O. Box 1935, Orlando, Florida, 32802-1935, this 15th day of May, 1995.

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