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IN THE SUPREME COURT OF FLORIDA

GUY GAMBLE,

Appellant,

v. CASE NO: 82,334

STATE OF FLORIDA,

Appellee.

______________________________/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIFTH JUDICIAL CIRCUIT
IN AND FOR LAKE COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

Appellee would accept Appellant's statement of the facts with the following additions:

Stacy Ash testified that Gamble intended to "take out" Mr. Kuehl, which she thought meant to kill him, by strangling him. (T 981). Gamble in an interview stated that Stacy probably thought "take out" meant I was going to hill him. (T 1332). Gamble also stated in an interview with police that he had first brought up robbing Mr. Kuehl because he had a fairly new car and must have money because of the house. (T 1281). Donna Yenger, Love's girlfriend, testified that Love had told her that Gamble wanted to "take out" Mr. Kuehl. (T 765) Ms. Ash asked Gamble to talk with Mike Love, codefendant, hoping Love would persuade him to abandon the plan. (T 1043). After talking with Love, Gamble changed his mind, however, later Gamble again brought up the subject of "taking out" victim. (T 1044,1045). Ms. Ash tried to talk Gamble out of his plan to "take out" Mr. Kuehl. (T 981). Gamble suggested, before the day of the murder, that they would be using the victim's car to ride to Vegas. (T 983). Before Gamble and Love entered the workshop, they discussed that if Gamble could not get the cord around the victim's neck, then there would be some other weapons available in the workshop such as a hand carved walking stick. (T 1285). According to Gamble, Love had stated that if Mr. Kuehl was in the workshop, they may have to kill him. (T 1306). On the day of the murder, Gamble entered the apartment with blood on his pants. (T 998). There was testimony that the pants Gamble was wearing during the murder

had blood concentrations on three places indicating that three different blows caused the concentrations. (T 955). Gamble also told police that he had held one end of the cord and Love held the other end with the hammer claw as they pulled the cord around the victim's throat. (T 1295). Gamble told Ms. Ash in the motel room after the murder that he had hit the victim in the head with the hammer. (T 1014). Appellee objects to the use of the word "extensively" by Appellant describing Gamble's mother's use of marijuana. (T 1717-1725). Also Appellee would submit that Gamble stole his mother's marijuana and diet pills once according to the testimony. (T 1704).

SUMMARY OF ARGUMENT

I. Gamble cut a piece of cord from the blinds and practiced putting it around Stacy Ash's throat. Gamble told Stacy Ash that he intended to "take out" the victim, Mr. Kuehl. Gamble also told Stacy Ash that they would be heading out to Vegas in Mr. Kuehl's car. The cold, calculated and premeditated factor is established where evidence shows Gamble planned the robbery, planned to meet the victim when he would be alone in his workshop, brought a weapon, the cord, with him, picked another weapon out while the victim was retrieving a receipt for the "supposed payment of rent" and concealed the body. Appellant did not properly preserved the jury instruction objection below. Appellant's attorney cannot be faulted for failing to foresee the Jackson opinion, and the 3.850 issue is not ripe at this time. Finally, appellee would submit that under any instruction this aggravator would have been found. Even if this aggravating circumstance were stricken, the result would be the same.

II. Appellant does not concede that this court will not find the cold, calculated and premeditated factor. However, even if this were the case, death may be the appropriate penalty if at least one statutory aggravating factor is established. This court has 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. Death is not too great a punishment in this case.

III. Appellant argues that the trial court did not properly instruct the jury. Appellee submits that the law in Florida

provides that when even one aggravating circumstance is found and no mitigating circumstances are found, that the appropriate sentence is death. Furthermore, the standard jury instructions have been determined by this court to be sufficient. The standard jury instruction on weighing of aggravating and mitigating factors has been held sufficient by this court. Appellant argues that the jury was not aware that they could consider "mental impairment" in mitigation even if they determined it was not extreme. The jury was instructed that they could consider "any other aspect of the Defendant's character, background or record and any other circumstance of the offense." (P 1851). In addition counsel was allowed to argue this to the jury. Any error in the court's instruction 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.

IV. The various attacks now raised on the constitutionality of section 921.141, Florida Statutes (1993), and the jury instructions were either not raised below and are procedurally barred, or such claims have previously been rejected and are without merit.

CROSS/APPEAL

I. The trial court erred by not allowing the introduction of victim impact evidence. The state wanted the victim's family to speak concerning the loss to the "community" in which Mr. Kuehl lived.

II. The trial court erred by not allowing Donna Yenger's testimony. Ms. Yenger was going to testify to statements made in front of Gamble by Love, which were the kind that someone would have protested their correctness. Admissions by silence are admissible. Additionally, hearsay testimony is admissible during the penalty phase. Finally, appellee would submit that this testimony was admissible to give the jury a broad picture of what was happening at the time of the murder.

III. The trial court erred by not allowing the state to introduce redacted portions of an interview between Gamble and a polygraph examiner. Even though the trial court ruled that this evidence was admissible during the state's case in chief, the court would not allow its admission during the penalty phase. The court did not believe this evidence applied to either of the state's aggravators. Appellee would submit that under section 921.141 Florida Statutes (1993) evidence bearing upon the nature of the crime is admissible, and that this evidence did have a bearing upon the nature of the crime. Additionally, appellee would submit that this evidence did apply towards the cold, calculated and premeditated factor because it is relevant to show heightened premeditation on Gamble's part not only to rob but to kill Mr. Kuehl.

ARGUMENT

I. THE TRIAL COURT PROPERLY FOUND THAT THE MURDER WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER.

Appellant argues that there was insufficient evidence to establish the cold, calculated and premeditated aggravating factor. He maintains that there was evidence of premeditated robbery, but not a preplanned murder. Appellee submits that this argument is refuted by Gamble's very own words and actions.

Procuring a weapon before the murder supports the heightened premeditation required for cold, calculated and premeditated. See, Brown v. State, 565 So. 2d 304 (Fla. 1990); Lamb v. State, 532 So. 2d 1051 (Fla. 1988); Huff v. State, 495 So. 2d 145 (Fla. 1986); Eutzy v. State, 458 So. 2d 755 (Fla. 1984). There is no evidence to reasonably suggest Gamble had any motive other than to kill the victim. He obtained a piece of cord from the window blinds, practiced sneaking up behind his girlfriend with it, used a hammer which was picked out while Mr. Keuhl left the workshop, beat the victim on the head and used the cord around his neck. See, Shere v. State, 579 So. 2d 86 (Fla. 1991); Jones v. State, 569 So. 2d 1234 (Fla. 1990); Hardwick v. State, 521 So. 2d 1071 (Fla. 1988). The cold, calculated and premeditated factor is established where evidence shows Gamble planned the robbery, planned to meet the victim when he would be alone in his workshop, brought a weapon, the cord, with him, picked another weapon out while the victim was retrieving a receipt for the "supposed payment of rent" and concealed the body. See, Lamb v. State, 532 So. 2d 1051 (Fla. 1988); Lambrix v. State, 494 So. 2d 1143 (Fla. 1986).

Cold, calculated and premeditated is not limited to execution-style murders. Rutherford v. State, 545 So. 2d 853 (Fla. 1989). This aggravating circumstance has been upheld even where there was no definite plan to kill the victim, but murder was "considered" or the need evolved during the commission of a robbery or burglary. See, Walton v. State, 547 So. 2d 622 (Fla. 1989); Brown v. State, 565 So. 2d 304 (Fla. 1990). Gamble told Stacy that they would be going out west towards Vegas. Since they had neither a car nor any money, he then located a vulnerable victim who he could eliminate and steal his car. Once Gamble had killed the victim in the workshop, he found a blank check in his wallet and in the car found a statement indicating how much money was in the account If the only motive had been robbery, Gamble could have abandoned the murder when the struggle began. Gamble pursued his goal of murder and robbery by continuing to hit Mr. Kuehl with the hammer even after he had started falling down. See, Jackson v. State, 498 So. 2d 406 (Fla. 1986). The trial court's findings were supported by substantial competent evidence. See, Asay v. State, 580 So. 2d 610 (Fla. 1991); Shere v. State, 579 So. 2d 86 (Fla. 1991); Jones v. State, 569 So. 2d 1234 (Fla. 1990); Craig v. State, 510 So. 2d 857 (Fla. 1987). The record shows Gamble carefully planned the murder and this aggravating circumstance is appropriate.

Appellant relies upon Vining v. State, 19 Fla. L. Weekly S253 (Fla. April 28, 1994) where premeditation to commit a robbery was present, but this court did not find the cold, calculated, and premeditated aggravating circumstance. The

defendant answered an ad placed by the victim to sell jewelry. The defendant and the victim went to a gem lab and had the diamonds appraised. The victim was accompanied by an employee, who returned to work and never saw the victim again.

Appellee would submit the present case is distinquishable. Gamble made a threat on the victim's life to his girlfriend the week before the murder. Gamble indicated that he was going to "take out" the victim. Stacy Ash, the girlfriend, believed this to mean that Gamble was going to kill the victim. Miss Ash asked Gamble to speak with Mike Love hoping that Gamble would change his mind. Gamble never refuted Miss Ash's belief that he meant to kill the victim, in fact he indicated that he meant to "take him out" by strangling him. (T 981) Love told Gamble that, "if he's in his garage working, we may have to kill him." (T 1208). Gamble and Love also talked about another weapon, if necessary in the workshop, they talked about a carved walking stick. (T 1285). Before the murder occurred Gamble had cut a piece of cord from the window blinds, and was practicing sneaking behind Miss Ash and putting the cord around her neck. Gamble had also indicated that week that he would like to go out west towards Vegas using the victim's car. (T 983) Gamble had no money nor car. The day before the murder Gamble told Miss Ash to pack their stuff in the apartment. The day of the murder Gamble went to Winn Dixie to receive his last pay check. When he got back to the apartment he and Love went into the workshop with the victim. Under the pretense of paying rent, they asked the victim for a receipt which required him to go into the house to retrieve one.

While Mr. Kuehl, the victim was in the house, Gamble and Love prepared for his return. Gamble testified that Love placed the hammer in an available position. Regardless of whether Love placed the hammer there or not, Gamble is the one who picked it up and hit the victim in the head. According to Appellant's initial brief Gamble hit Mr. Kuehl at least three times. (IB 19). Gamble exhibited the "heightened" premeditation necessary to find this aggravating circumstance. Furthermore, this court in Vining held the finding of the aggravating circumstance harmless.

Appellant attacks the jury instruction. Appellee agrees that the instruction given was not in accordance with the standards later enunciated in Jackson v. State, 19 Fla. L. Weekly S215 (Fla. April 21, 1994). Appellant argues that at the charge conference Gamble objected that there was insufficient evidence of the heightened premeditation required for the application of the aggravating circumstance. Appellee submits that this issue was not properly preserved below. James v. State, 615 So. 2d 668 (Fla. 1993). The objection was to the sufficiency of evidence, not directed to the instruction given. A claim is not preserved unless the specific legal argument was previously presented to the trial court. Bertolotti v. Dugger, 514 So. 2d 1095 (Fla. 1987); Roberts v. State, 568 So. 2d 1255 (Fla. 1990).

Appellant argues that if the issue was not properly preserved below, then Gamble is entitled to a new penalty phase. Appellant contends that his attorney cannot be expected to object

because raising the issue was an exercise in futility. Appellee submits that as in every phase of a capital murder trial, counsel is expected to object and preserve the record concerning issues risible on appeal. Appellant's counsel objected to the lack of sufficient evidence to give the cold, calculated, and premeditated aggravating circumstance perhaps he had no problem with the instruction because he certainly objected to other instructions.

Appellant also argues that in subsequent 3.850 proceedings that counsel will be found ineffective for failing to object to the standard instruction. This argument is not ripe. The proper time to decide that issue is when the 3.850 proceeding takes place. Alternatively, appellee would submit that counsel was not ineffective for failing to look into the future and see this court's decision in Jackson. Counsel cannot be ineffective for failing to anticipate a change in the law and objecting, thereby preserving the record for appellate review. Stevens v. State, 552 So. 2d 1082 (Fla. 1989).

Even if this aggravating circumstance were stricken, the result would be the same. See, Clemons v. Mississippi, 110 S.Ct. 1441 (1990); Holton v. State, 573 So. 2d 284 (Fla. 1991); Young v. State, 16 F.L.W. S192 (Fla. Feb. 28, 1991); Reed v. State, 560 So. 2d 203 (Fla. 1990); Rivera v. State, 561 So. 2d 536 (Fla. 1990); Hardwick v. State, 521 So. 2d 1071 (Fla. 1988); Jackson v. State, 530 So. 2d 269 (Fla. 1988); Mitchell v. State, 527 So. 2d 179 (Fla. 1988); Smith v. State, 515 So. 2d 182 (Fla. 1987); Rivera v. State, 545 So. 2d 846 (Fla. 1989); Rogers v. State, 511 So. 2d 526 (Fla. 1987).

II. THE TRIAL COURT PROPERLY SENTENCED APPELLANT.

Gamble contends that the death penalty cannot stand since it is disproportionate to the crime and constitutes cruel and unusual punishment. Gamble argues that this case is not the "most aggravated" nor "unmitigated". The trial court found two aggravating factors and little mitigation.

Appellee does not concede that this court will not find that this murder was committed in a cold, calculated and premeditated fashion. Evidence exists to find this point as enumerated in point one of this brief. However, even if this were the case, 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 Gamble recognizes, this court has affirmed death sentences where only one aggravating circumstance has been found. Although many of the cases cited by Gamble 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 pecuniary gain. 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).

The cases where this court has affirmed the death sentence where only one aggravating factor was present also demonstrate that Gamble'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.

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). 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).

Appellant argues that this case is not "the sort of unmitigated case contemplated by this court in Dixon." The trial court found one statutory mitigating factor and that was appellant's age, which was given some weight. The trial court lumped together the neglect and abuse suffered by Gamble as a child, and gave substantial weight to this factor. The trial court gave substantial weight to Gamble's emotional problems. However, the rest of the nonstatutory factors were either given some or little weight. The evidence in mitigation does not outweigh the aggravating factors.

The cases relied upon by Gamble 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.

Appellant argues that because his codefendant, Love, was given a plea bargain with a life sentence after the penalty phase in his own trial, the jury would have given Gamble a life sentence as well. Appellee disagrees with this reasoning. The trial court was aware of Love's life sentence, in fact, he considered it as a nonstatutory factor. However, it did not

cause the trial court to give Gamble a life sentence. It is pure speculation on Gamble's part to state that the jury would have given a life sentence. The jury was well aware that Gamble struck the first blows to Mr. Kuehl's head. They heard testimony that Gamble was practicing sneaking up behind his girlfriend and applying the cord to her neck. Finally, Gamble was the one with blood all over his clothes.

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 two aggravating factors 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. Gamble killed Mr. Kuehl for no other reason than to steal his car to head out west and steal any money or other valuables he had.

III. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY.

Appellant argues that the trial court did not properly instruct the jury. He argues that specially requested jury instructions should have been given. Appellant contends that the trial court committed reversible error in denying Proposed Instruction Numbers 9, 11B, 14, special instruction regarding nonstatutory mitigation, and a special instruction regarding mental impairment.

Appellant argues that the standard instructions did not clearly tell the jury that even if an aggravating circumstance were proven beyond a reasonable doubt, that they were still entitled to recommend life imprisonment. Appellee submits that the law in Florida provides that when even one aggravating circumstance is found and no mitigating circumstances are found, that the appropriate sentence is death. State v. Dixon, 283 So. 2d 1 (Fla. 1973) Furthermore, the standard jury instructions have been determined by this court to be sufficient. Alternatively, appellee would submit the instruction read to this jury, "If you find the aggravating circumstances do not justify the death penalty, your advisory sentence should be one of life imprisonment without possibility of parole for twenty five years" allows the jury the option of finding an aggravating circumstance and recommending a life sentence.

Appellant 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, Appellant argues that the standard instructions did not inform the jury that they could still find mental impairment in mitigation even if they did not conclude that such impairment was extreme. 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, background or record and any other circumstance of the offense." (P 1851). No special proposed instruction on "mental 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.

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. SECTION 921.141, FLORIDA STATUTES IS CONSTITUTIONAL.

Appellant objects to the amalgamation of these various and sundry points gathered into one boilerplate "issue", with no cites to the record to show if they were even preserved. However, appellant will address them in the manner listed.

Felony Murder.

Neither the circumstance or the instruction was challenged below and this issue is waived. The language of this circumstance could not be more precise, in any event.

Majority Verdicts.

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

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

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

Advisory Role of Jury.

This claim was not argued below and is barred. It is without merit in any event. The jury was instructed that "your recommendation as to what sentence should be imposed on this defendant is entitled by law to be given great weight by this court in determining what sentence to impose in this case. It is only under rare circumstances that I could impose a sentence

other than what you recommend. I assure you that I will give your recommendation the great weight to which it is entitled," in accordance with Tedder v. State, 322 So. 2d 908 (Fla. 1975).

Counsel.

The appellant has failed to show in this case that appointed counsel were in any manner deficient in their representation. Specifically, since the public defender's office handled the trial.

Trial Judge.

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

The Florida Judicial System.

This claim was never argued below and is procedurally barred. The notion that justice should be suspended for Gamble until there is parity in the election of judges is ludicrous in any event. He has no entitlement to any particular judge. Society is hardly benefitted when a condemned murderer is utilized as a vehicle for social change.

Aggravating Circumstances.

CCP.

Appellant's argument that Florida's death penalty statute is unconstitutional because this statutory aggravating factor, as applied, does not adequately limit the class of persons eligible for the death penalty is susceptible to undue arbitrary and capricious application has been rejected previously. Jackson v. State, 19 Fla. L. Weekly S215 (Fla. April 21, 1994); Shere v.

State, 579 So. 2d 86 (Fla. 1991). The facts in this case establish the cold, calculated and premeditated aggravating factor under any construction of this aggravator.

HAC.

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

Appellate Reweighing.

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

Procedural Technicalities.

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

Tedder.

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

Lack of Special Verdicts.

This argument has already been answered in prior parts of this point. See, Patten v. State, 598 So. 2d 60 (Fla. 1992)(no

constitutional or statutory requirement that mandates the use of a special verdict form in death penalty cases.)

No Power to Mitigate.

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

Florida Creates a Presumption of Death.

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

Florida Unconstitutionally Instructs Juries Not to Consider Sympathy.

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

Electrocution is Cruel and Unusual.

In Booker v. State, 397 So. 2d 910 (Fla. 1981) this court rejected the defendant's contention that death by electrocution

is cruel and unusual punishment. See, Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976).

CROSS/APPEAL

I. THE TRIAL COURT ERRED IN PROHIBITING THE STATE FROM INTRODUCING VICTIM IMPACT EVIDENCE IN THE PENALTY PHASE.

The State wanted to introduce testimony from the victim's family. The trial court after listening to arguments from both sides ruled against the admission of such evidence. (T 1486). The state would submit that such ruling is in error.

In Hodges v. State, 595 So. 2d 929 (Fla. 1992), this court indicated that evidence regarding the impact of the victim's death on the family was admissible at the penalty phase, so long as the victim's family members did not characterize or give an opinion about the crime, defendant, or appropriate sentence. The state wanted the victim's family to speak concerning the loss to the "community" in which Mr. Kuehl lived. This testimony should have been allowed. Victim impact evidence in capital cases is permissible under the long tradition of criminal law that allows the sentencer to consider the effect the crime had on the victim and his family in determining the proper sentence. Payne v. Tennessee, 115 L.Ed.2d 720 (1991).

II. THE TRIAL COURT ERRED IN PROHIBITING THE STATE FROM INTRODUCING DONNA YENGER'S TESTIMONY.

Admissions by silence are admissible based on the rule that a person's silence can constitute an admission where the circumstances and nature of the statement are such that it would be expected that the person would protest such statement as being untrue. Tresvant v. State, 396 So. 2d 733 (Fla. 3d DCA 1981). If the circumstances are such that one would expect the person accused to make a denial at the time, if the person is in position to hear what's being said, and under the circumstances it would be logical that if it was untrue, the person would object, then that kind of statement is admissible. Privett v. State, 417 So. 2d 805 (Fla. 5th DCA 1982).

Appellee would submit that the trial court erred when it did not allow Donna Yenger's testimony concerning a conversation which occurred in the car after the murder. (P 67) Ms. Yenger would have testified that Mike Love answered her question about what happened in the garage with, "Guy hit him in the head with the hammer and he was still standing up and hit him again and again and then choked him with the string." (S 16). Gamble was sitting next to Love at the time and did not deny his statement. (S 17).

Hearsay evidence is admissible during the penalty phase. Buenoano v. State, 527 So. 2d So. 2d 194 (Fla. 1988), also Section 921.141 Florida Statutes (1993). Ms. Yenger's testimony was admissible as hearsay testimony. The trial court indicated

that the testimony was not allowed because it did not "deal" with the aggravating circumstances that the state was pursuing. (P 67). Appellee would submit that this testimony did apply towards the cold, calculating, and premeditated aggravating circumstance because it shows Gamble's intent was not merely to rob Mr. Kuehl, but to kill him. Additionally, appellee would submit that this testimony was admissible to give the jury a broad picture of what was happening at the time of the murder.

III. THE TRIAL COURT ERRED IN PROHIBITING THE STATE FROM INTRODUCING THE DEFENDANT'S STATEMENT, STATE'S EXHIBIT DD.

The trial court allowed redacted portions of a typed script from a tape recording of Gamble when he had a polygraph examination during the case in chief. (P 39). The state chose not to use this evidence during the case in chief. However, in the penalty phase the state wished to use this evidence, and the trial court ruled that it was not admissible because it was not relevant to the two aggravators the state was pursuing. (P 39).

Appellee would submit that the trial court erred because section 921.141 Florida Statutes (1993) states, "In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant." contra Floyd v. State, 569 So. 2d 1225 (Fla. 1990) (to be admissible in a penalty phase proceeding, the evidence presented by the state must go to show a specific aggravating factor.) This evidence had direct bearing on the nature of the crime. Gamble was trying to make himself look as though he wanted merely to tap Mr. Kuehl on the head and tie him up, but Love was a raving madman who grabbed two hammers and finished the victim off. Gamble was given a polygraph examination because the state was not going to seek the death penalty if Gamble passed it. Gamble's story was that Love was responsible for the murder. Gamble's attorney in closing argument said that, "Michael Love is the one who changed how this robbery went down and resulted in Mr. Kuehl's death. He was under Mike Love's domination." (P 316). However, in between

sessions, Gamble admitted to the examiner that he did not remember how many blows he struck the victim, it could have been more than three. (P 34). This evidence, appellee would submit, was relevant pertaining to the cold, calculated, and premeditated aggravating circumstance, and the jury should have had it before them.

CONCLUSION

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, 9th day of August, 1994.

Dan Haun
Dan Haun
Of Counsel