IN THE SUPREME COURT OF FLORIDA

NEIL WILSON WILDING,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 82,696

ON APPEAL FROM THE CIRCUIT COURT
OF THE NINETEENTH JUDICIAL CIRCUIT,
IN AND FOR INDIAN RIVER COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant, Neil Wilson Wilding, was the defendant in the trial court and will be referred to herein as "Appellant." Appellee, the State of Florida, was the prosecution in the trial court and will be referred to herein as "the State." References to the transcripts will be by the symbol "R" followed by the appropriate page number(s).

STATEMENT OF THE CASE AND FACTS

Appellee accepts the statement of the facts to the extent they represent an accurate rendition of the facts adduced at trial.The following additions are required for this Court's appellate review. The victim's mother, Emma Dickenson, testified that her daughter lived alone. (R 477). The last time Ms. Ross was seen by her parents was on August 27, 1988. Ms. Ross had dinner at her parents home. (R 479). Ms. Ross left there at 10:30 P.M. Mrs. Dickenson attempted to reach her daughter by phone the following murder around 11:00 A.M. (R 482). She became concerned and went to her daughter's home that evening around 8:00 P.M. (R 484). She and her husband found their daughter dead. Mr. Dickenson attempted to call the police from his daughter's apartment. The phone did not work, so he went for help. Mrs. Dickenson remained in the house until the police arrived. She did not touch anything. (R 486).

Officer Timothy Left, was the first to respond to the scene. (R 490). He observed a knife and a white towel on the floor. (R 492). No one other than authorized personnel were allowed into the apartment. (R 494-496).

Sergeant Kevin Martin from the Vero Beach Police Department was in charge of the crime scene. (R 499). Martin observed a knife and a wash clothe on the floor. (R 503). A larger towel was seen next to a cushion seat. (R 503).Cigarette butts and grape stems were found in an ashtray. (R 503). Point of entry was through a screen in a window. (R 505). Photographs were taken of the victim, the knife and the towel on the floor. (R 515-519). Evidence was collected including a towel found next to the victim which had a stain on it and the second smaller towel was also collected. (R 522). Martin testified that it appeared that a struggle had taken place. A rug on the floor was

disrupted, cushions from the couch were knocked off, streak marks were found on the wall behind the couch. (R 534-535, 540).

Samuel Pascal, Ms.Ross' employer testified that although Ms. Ross suffered from narcolepsy, the condition did not cause any problems at work. (R 552).

Beverly Skinner, crime scene technician also testified. She observed a blue towel, a wash clothe and a knife on the floor. (R 557). Both towels were collected, one contained a stain. (R 566, 561, 575). Cushions from the couch were scattered from the couch. (R 557). The lamp cord that was tied around the victim's neck was still connected to the lamp. (R 560). The only fingerprint found on the phone belonged to the victim's father. (R 562). The television was still on. (R 574). On cross-examination, Skinner testified that no prints of evidentiary value were found. (R 582).

Detective Frank DeVencenzo was the lead investigator. (R 603). Ms. Ross was found face down on the couch. (R 604). He found an open package of red grapes at Ms. Ross' apartment. Initially there were three potential suspects, eventually they were all eliminated. (R 609-620). After the police received an anonymous tip, the investigation focused on appellant. (R 623). The police spoke to friends and family of appellant. (R 623). Appellant's wife, Linda Manuel and his daughter, Toshia Wilding, were located. (R 625). Blood was drawn from both of them in July of 1991. (R 627, 661-663, 666-669). Appellant was located in 1992. (R 626). Appellant's blood was drawn in July of 1992. (R 645). Information released to the press in the first two months regarding the facts of the crime were very general. (R 628). The fact that the victim was strangled with a cord was released to the public, however, the fact that it was a telphone cord was not revealed until sometime later. (R 629). Also not revealed was the fact that the phone was a Princess phone. (R 629).

Daniel Nippes, chief criminalist at the Regional Crime Lab at Indian River Community College was next to testify. (R 675). Nippes conducted a PCR analysis on the semen found at the scene. (R 689-690). Nippes explained the procedures that are conducted at the lab to protect against contamination. (R 694-695). Appellant objected to Nippess' testimony on the grounds that he is not an expert in statistics and the field of DNA testing is too new. (R 697). The court recognized Nippes as an expert and found DNA testing to be a recognized and generally accepted in the science community. (R 699-700). The towel found near the couch contained blood and semen. (R 709, 712). A PCR analysis was conducted on the towel. (R 720). There was a sufficient amount of material to do a RFLP DNA so Nippes prepared the samples and sent them for further testing to Life Codes. (R 722). Nippes again described the precautions taken to avoid contamination. (R 724). Stains on the towel contained both semen and blood. In certain areas the two fluids are separated and in some they are not. (R 725). The fluids are both tested. (R 725). 99.8 % of the population was eliminated as being a possible contributor of the semen on the towel. (R 726). The evidence was then sent to Life Codes in an attempt to further narrow the percentage. (R 727). All the blood stains found at the scene belonged to the victim. (R 727). Appellant could not be eliminated as a possible donor of the semen. (R 730). The DNA from the semen was then tested to see if the donor of that semen could be the father of Toshia Wilding. The results were positive. (R 730-732).

Dr. Raul Villa, the medical examiner testified to the injuries received by the victim. (R 751). The body was already starting to decompose. (R 753). There were ligature marks around the victim's neck and hands. (R 753). She had a contusion behind her right ear that was fresh. (R 754). There was also trauma to the scalp and eyes. The injuries to the eyes indicated that they could have been caused by a fist to the eyes. (R 754). There were bruises and contusions around the neck in

addition to the injuries caused by the ligature. (R 755). The cord around her neck was tied very tightly and knotted several times. (R 757). There was a scrape to the thumb on the right hand. There was also trauma to the vaginal area. (R 759). Both hands suffered from ligature marks. (R 760). Cords were wrapped several times around her wrists. (R 762). There was a laceration on the vagina as well as redness on the superior aspect of the vagina. (R 763-764). The injuries were consistent with trauma. (R 764). Time of death was early morning on August 28, or late evening on August 27th. (R 764). Grapes were found in her stomach. (R 766). The cause of death was asphyxiation. Death occurred in five to eight minutes. (R 769).

Elizabeth Lowden lived with appellant and her boyfriend, appellant's brother during the time of the murder. (R 798-799). They lived at the Dolphin Motel right behind the victim's apartment. Normally appellant did not go out at night a lot. He did go out the weekend of the murder either on August 26th or 27th. Lowden got home that evening around 10:30-11:00 P.M. Appellant woke her up when he came in later that night. Appellant asked Lowden if she wanted any grapes. (R 797-805). Krisken Robinson worked with appellant at Treasure Coast Masonry during the time of the murder. (R 828). Appellant had been working for Treasure Coast Masonry for approximately eight months. (R 828). Robinson saw appellant about two days after he had heard about the murder. (R 830). At that time Robinson noticed that appellant had four deep scrapes on his forearm. (R 831). Three were long and one was short. (R 832). Robinson though the cuts look fingernail claws, so he asked appellant if a girl had scratched him? (R 831). Appellant told him that he had cut himself on a concrete block. (R 831, 832). One of two days after the time that Robinson noticed the scratches appellant did not show up for work for a couple of weeks. (R 833).

Appellant's mother, Sandy Schmidt testified. Prior to the murder, Mrs. Schimdt saw her son in June of 1988. He visited her in Montana. (R 869). Appellant lived in Vero Beach with his ½ brother Gerald Sturgis. (R 870). In September of 1988, appellant called his mother and told her that he though he was in trouble. (R 871). He told her that he meet a girl at a Burger King, and she invited him back to her hotel room. The girl asked him to untangle a phone cord. Appellant said he picked up the phone and untangled the wire. (R 873-874). He put it down. He told her that he did not see anyone else touch the phone. He described the phone as one not normally seen in a hotel room, it was a Princess phone. (R 874). He then explained to his mother that there had been a murder and he felt that this woman was trying to get his prints on the phone cord. (R 875). This woman knew appellant's brother. (R 874). She told appellant to tell his brother that were even. (R 875). Appellant told his mother that he was being framed for murder. (R 877). A year later Mrs. Schimdt heard from the FBI. They told her that appellant was wanted for murder. She told her son to go and clear it up. He told her that he would. (R 880-882). Mrs. Schimdt did not hear from her son until he was arrested in Oklahoma. (R 883).

Appellant was arrested for a traffic violation in Oklahoma in April of 1992. While the police officer was checking appellant's name he told the officer that he was wanted in Florida for murder. (R 905).

Lisa Bennett from Life Codes Corporation received from the Regional Crime Lab evidence from the crime scene two towels, (one contained blood and semen) and a bed sheet which contained blood. (R 951). Ms. Bennett explained in detail the protocol or procedures that are practiced at Life Codes to ensure against contamination. (R 942-945, 967-968, 975-976). She also explained how the semen was separated from the blood on the towel.(R 956-960). DNA was obtained from one of

the towels but not from the other one. (R 960-961). There was not enough DNA on the second towel. (R 961). She described the towel as white. (R 977).

Richard Cunningham, forensic scientist from Life Codes also testified. He too discussed the protocol and procedures to ensure proficiency of the testing methods at Life Codes. (R 980-982). Cunningham preformed the DNA testing on appellant's ex-wife and daughter. (R 983-990). He also received appellant's blood sample after he was arrested. The results indicated that the semen left at the crime scene could have been contributed by the father of Toshia Wilding, appellant's daughter. (R 985-987).

The last witness to testify was Dr. Baird a molecular geneticist from Life Codes. (R 1014-1015). He explained the DNA testing is 100% for exclusion of suspects and a very high probability for inclusion. (R 1019-1020). Baird interpreted the work done by both Bennett and Cunningham. (R 1022). Baird testified that the there is 99.96% probability that the donor of the semen found at the crime scene is appellant, the father of Toshia Wilding. (R 1031-1043). Baird also testified that a control was also used to ensure reliability. (R 1032-1033). The frequency of this particular DNA code is only one in twelve million. (R 1048). In other words there is one in twelve million chance the DNA found at the crime scene belonged to someone other than Neil Wilding. (R 1048, 1052). Life Codes does not utilize the ceiling principle. Barid testified that no laboratory uses the ceiling principle including the FBI. (R 1054-1055). The state rested. (R 1055).

After the jury rendered their verdict but before commencement of penalty phase, a juror called the clerk's office inquiring into appellant's ability to obtain jurors' questionnaires. (R 1225-1226). The juror stated that if appellant had access to that information they would want something done about it if it was not normal procedure for him to have such access. (R 12226). If it were

normal procedure then they would not be concerned. (R 1226). Eventually the trial court conducted a hearing and interviewed the entire panel. (R 1241-1299). No one indicated that the question of appellant's access to the questionnaires was ever an issue in their deliberations. The state and defense agreed that this panel had to be discharged. (R 1299). Appellant moved for a mistrial with respect to the guilt phase. The court denied the motion and stated that it was clear to him after listening to their responses that none of the concerns expressed played a part in their deliberations. (R 1300).

The first few witnesses at the penalty phase partially recounted some of the guilt phase testimony. Officer Left, Sergeant Martin and Frank DeVencenzo. (R 1679-1747). The medical examiner also testified. He again detailed the injuries to Ms. Ross; bruised lip, bruising to head and the area over ear, swollen eyes, scratches on neck not associated with those injuries that were caused by the strangulation. (R 1764- 1772, 1776). There was also a cut or laceration in the vagina consistent with the insertion of a penis or other object The injury is consistent with trauma and the injury was recent. (R 1772). Cause of death was strangulation, death occurred within five to eight minutes. (R 1773). Death by strangulation requires exertion of a lot of pressure, (R 1774), death was agonizing. There appeared to be a struggle. (R 1780).

Daniel Nippes also testified regarding the DNA results. (R 1801-1817). The state rested.

Appellant presented the following testimony. Six police officers testified about appellant's behavior. All the officers at different times were involved in the transporting of appellant during his stay in jail. They all testified that he did not pose any problems to any of them and that he generally behaved well. (R 1821-1848).

Della Wooten testified that appellant worked for her father on their farm. He cut tobacco for them. He was a hard worker, never late and never caused problems. (R 1850-1855). She knew appellant as John Sturgis. (R 1856).

Jean Hensley, Della Wooten's mother repeated the testimony of the Wooten. (R 1852-1861). She also stated that appellant helped her and her husband rebuild their house even though he did not get paid for it. (R 1860). Hensley has not had any contact with appellant since 1991 (R 1866).

Appellant's mother testified. Appellant's father died when he was an infant. (R 1867). Appellant was the middle of seven kids. (R 1867). Mrs. Schmidt worked two jobs. John Sturgis married appellant's mother when he was six. Strugis stayed married to Schimdt until appellant was fifteen. (R 1875). While she was at work, appellant's step-father would watch the children. (R 1868). Appellant left school at sixteen. He had no desire to work or go to school. (R 1872). Prior to marrying Sturgis the children were raised in a proper home. (R 1876). Appellant told his mother after her divorce, that Sturgis abused him. She was totally unarare of the abuse until then. (R 1882). Mrs. Schimdt never saw any marks on appellant yet she believed he was abused because he told her so and her son would not lie. (R 1869).. (R 1876-1877). Sturgis also abused the family pets. That was not done in front of anyone. (R 1877).

Paul Wise, manager at Treasure Coast Masonry testified that appellant worked for him for one year. He was a good and dependable worker. (R 1894-1895).

William Holland, a minister and director of a halfway house for recovering alcoholics testified about appellant's participation in a therapy group faciitated by Holland. (R 1897). Appellant participated in the twelve step program while in prison. (R 1898). He had extended

conversations with appellant. Appellant achieved some personal growth from the program. He was very active in classes and interacted well with others. (R 18-99-1901).

Dr. Mary Hicks a Ph.D. psychologist was the final witness to testify. She interviewed appellant for four hours, but did not administer any tests. (R 1905). She also interviewed appellant's mother twice for ½ hour at a time. Hicks did not talk to any of appellant's siblings. (R 1905, 1922). Appellant was beaten by his step-father approximately twice a month. (R 1908). Nothing in the home life encouraged him to be more interested in school. (R 1910). Appellant did not discuss the night of the crime except to say that he smoked marijuana that was laced with something else. It caused him to blackout. (R 1914). Drug use during adolescence contributed to his lack of identity and sense of community. (R 1917). Appellant's potential for rehabilitation is high. (R 1919). He possess a lot of good qualities including compassion,artistic and mechanical skills (R 1919). His family was not unstable. (R 1922)

During cross-examination, Hicks admitted that she has not interviewed a convicted killer before. (R 1934-1935). She did not know about the facts of the crime. (R 1931). All her opinions are based on her interview with appellant and his mother. (R 1934). Her goal was to find nonstatutory mitigating evidence. Since she was unaware of the facts she had no opinion regarding the statutory mitigators. (R 1937-1938). Appellant''s potential for rehabilitation includes his ability to obtain his GED. He could also become a responsible, contributing citizen. (R 1945). Hicks maintained that she did not need to know more about the murder in order to render an opinion reading appellant's potential for rehabilitation. (R 1956).

SUMMARY OF ARGUMENT

1. The trial court properly allowed he officer to mention that appellant became a suspect after the police received an anonymous tip. The contents of the tip were never revealed.

2. Appellant's challenge to the prosecutor's remarks regarding the relevance of DNA evidence is not preserved for appeal. In any event the remarks were entirely proper.

3. The trial court properly limited the cross-examination of a state DNA expert. The quesitosn were beyond the scope of direct examinaiton. In any event, the information was elicited during redirect and recross.

4.The trial court properly denied a motion for judgement of acquittal to the charge of sexual battery.

5. The charging document properly charged the crime of sexual battery. Appellant was aware of the specific charges against him.

6. The admissibility of DNA was proper.

7. The trial court properly denied appellant's motion for a mistrial as there was no evidcene that any of the jurors were influenced in their verdict because of fear of the defendant.

. 8. The state was allowed to elicit testimony regarding generally what is the common practice in other homicide investigations since appellant opened the door to such inquiry.

9. and 10. The indictment properly charged the crime of first degree murder.

11. Brief mention by state witness that appellant was mentioned on the show "America's Most Wanted" was not harmfull error.

12. The trial court properly denied appellant's request for release of grand jury testimony.

13. The trial court properly denied appelant's motion for a mistrial as there was sufficient evidenec that the evidence presented at trial came from this crime scene.

14. There was sufficient evidence to establish the aggravating factor of "HAC".

15. Appellant's challenge to the prosecutor's comments during penalty phase are not preserved for appeal. In any event the comments were proper.

16.The sentencing phase of appellant's trial did not contain any inadmissible or any improper nonstatutory aggravating factors.

17. Appellant's death sentence is proportionally warranted.

18. The trial court properly precluded the defense from arguing that there is an initial presumption for life.

19. The trial court properly considered appellant's drug abuse as a mitigatig factor. The significance and weight attached to the alleged mitigation is within the trial court's descretion.

20. The trial court did not rely on any nonstatutory aggravating factors.

21. The trial court properly denied appellant's objection to the jury instruction regarding sexual battery.

22. The trial court did not give undue weight to the jury's recommendation of death.

23. Appellant's challenge to the jury instructiuon regarding "HAC" is not preserved for appeal. In any event the instruction was proper.

24. The trial court properly denied appellant's request to alter the jury instructions regarding the statutory mitigating factors.

25. The trial court's written order of death was filed contemporaneously with the oral pronouncement of sentence.

26. The state did not impermissibly present its version of guilt at the penalty phase in front of a new jury panel.

27. The trial court properly allowed the admission of hearsay evidence at the penalty phase.

28. The felony murder aggravating factor is constitutional on its face and as applied.

29. The trial court properly denied appellant's request for special jury instructions relating to each nonstatutory mitigator.

30. The trial court also properly denied apellant's request for a special jury instruction that thier recommendation need not be unanimous.

31.Florida's death penalty stautute is constitutionally sound

ARGUMENT

ISSUE I

THE TRIAL COURT DID NOT ERR IN ADMITTING TESTIMONY AS IT WAS NOT HEARSAY, OR IF ERROR IT WAS HARMLESS.

Appellant alleges that the trial court incorrectly overruled a defense objection during the testimony of Detective DeVencenzo. A review of challenged statement taken in its proper context demonstrates that the trial court's ruling, denying the hearsay objection was proper.

Detective DeVencenzo was the lead investigator in the homicide of Marsha Ross. (R 603). Without objection, DeVencenzo explained how various suspects were eventually eliminated. (R 609-620). The prosecutor then asked:

> Q. Did you receive an anonymous tip?
>
> A. Yes ma'am, we did.
>
> Q. Did that anonymous tip give you the name of Neil Wilding?
>
> Mr. Harllee: Objection, hearsay.
>
> The Court: Overruled.
>
> Q. Did the anonymous tip give you the name of Neil Wilding?
>
> A. Yes, ma'ma, it did.
>
> Q. From that tip, where did you begin your investigation concerning Neil Wilding?
>
> A. Yes ma'am, we did. We verified a lot of information that we received in the tip and developed additional information.

(R 622-623). From this exchange, it is evident that the Detective's remark, simply verifying the identity of the person named in the tip, is not hearsay. Reference to the tip was relevant to show the logical sequence of events regarding the murder investigation. This information was especially relevant given the fact that no one was arrested for this murder for four years.

Relying on Postell v. State, 389 So. 2d 851 (Fla. 3rd DCA 19981 appellant claims that the mere reference to a tip even without revealing contents is inadmissible hearsay. Appellant's argument is incorrect. In State v. Baird, 572 So.2d 904, 905-906 (Fla. 1990) this Court found the following statements to be inadmissible hearsay; "I had received information that he [Baird] was a major gambler and operating a major gambling operation in the Pensacola area." The Court held that when the only relevance of such a statement is to show a logical sequence of events the rationale of the Fourth District Court of Appeals in Harris v. State, 544 So. 2d 322 (Fla. 4th DCA 1989) is applicable:

> the better practice is to allow the officer to state that he acted upon a "tip" or "information received" without going into the details of the accusatory information".

Harris, 544 So. 2d at 324. In all the cases relied upon by appellant, there was information regarding the content of the tip. Even in Postell, although the actual contents of the statements were not revealed, the jury was well aware that the caller was an eyewitness to the robbery. Id. at 851. No such information was revealed, nor can any inference be made in the instant case.

All that is known is that a tip was given and the appellant's name was mentioned. Obviously common sense dictates that the name of the defendant would be apart of the tip, considering that the testimony relates to the logical sequence of how appellant became a suspect. The Detective simply

stated that as a result of the tips, leads were followed. The specific information in those leads was never revealed, (R 623) consequently the dictates of Harris and Baird have been adhered to.

Unlike the situation in the cases relied upon by appellant, he was not left in the untenable position of being unable to attack a specific allegation that formed the basis of his guilt.Davis v. State, 493 So. 2d 11 (3rd DCA 1986)(inadmissible hearsay referred to 15-20 witnesses who were in the vicinity of crime and lead police to defendant's car); Beatty v. State, 486 So. 2d 59 (4th DCA 1986);(police officer stated that they received several anonymous tips all claiming that the defendant fired the gun); Thomas v. State, 581 So. 2d 993 (Fla. 2nd DCA 1991)(jury heard tape recording of an anonymous tip describing the defendant and stating that he was carrying drugs).

If this Court determines that the mere reference to the appellant's name constitutes details of the accusatory information and therefore was inadmissible hearsay, any error must be considered harmless beyond any reasonable doubt under State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). Dailey v. State, 594 So. 2d 254 (Fla. 1991)(reference to defendant's extradition to show consciousness of guilt was harmless error since the statement was brief and undeveloped).

The statement was not focused upon nor was it brought to the jury's attention again. Baird. The admissible evidence at trial consisted of the following; appellant lived within one block of Marsha Ross at the time of the murder, appellant told his mother an incredible story that he was going to be framed for murder, after the murder he began using aliases, he knew two specific facts about the murder that were not known by the general public and DNA testing revealed that there is a very high probability that the semen left at the scene belonged to him. DeVencenzo's naming of appellant did not contribute to the verdict. Hayes v. State, 581 So. 2d 121 (Fla. 1991)(out-of-court

statement by eyewitness regarding how police came to regard defendant as a suspect was harmless error given that the fact proven by the erroneous statement was established through other witnesses).

ISSUE II

APPELLANT'S CLAIM THAT THE PROSECUTOR PRESENTED MISLEADING ARGUMENT REGARDING DNA EVIDENCE IS NOT PRESERVED FOR APPEAL; IN THE ALTERNATIVE THE CLAIM IS WITHOUT MERIT.

Appellant accuses the prosecutor of misleading the jury regarding the meaning/interpretation of the DNA evidence. The prosecutor's use of the word "match" and "identified" when describing the statistical probability that the DNA evidence found at the crime scene was that of appellant's, gave the false impression that such technology is capable of identifying the source to the exclusion of all others. A review of the challenged remarks reveals that no objections were made regarding any of the alleged statements, consequently review is precluded. Occhicone v. State, 570 So. 2d 902 (Fla. 1990), cert. denied, 500 U.S. 938, 11 S. Ct. 2067, 114 L. Ed. 2d 471 (1991); Ross v. State, 386 So. 2d 1191 (Fla. 1980); Bertollotti v. State, 565 So.2d 1343 (Fla.) cert. denied, 497 U.S. 1032, 110 S.Ct. 3296, 111 L. Ed.2d 804 (1990). Secondly the comments when taken as a whole in conjunction with the testimony presented, as well as the remarks of both counsel at opening and closing reveal that the isolated comments were proper and were not in any way misleading.

As stated above the comments must be viewed in the context of the entire trial. Arguing logical inferences that can be drawn from the evidence is permissible. Mann v. State, 603 So. 2d 1141 (Fla. 1992). In opening statement the prosecutor stated that there was a one in twelve million chance that the semen at the scene was not that of the appellant. (R 463). The defense explained in opening that at best the evidence only indicated that appellant cannot be eliminated as a suspect. (R 465). During the testimony of one of the state's DNA experts, the jury heard the following explanation regarding the relevance of DNA evidence; the PCR test is designed to eliminate possible

donors, (R 716), appellant cannot be eliminated as a potential contributor of the semen, (R 730, 738, 1021), exclusion of possible contributors is 100% (R 1021), inclusion of possible contributor's is a very high percentage and is not absolute. (R 1021, 739). A comparison of appellant's semen found at the scene coupled with a paternity determination of appellant's child reveal that there is a 99.96% chance that appellant is the contributor of the semen at the crime scene. (R 726, 1031, 1122). There is a one in twelve million chance that someone other than appellant is the contributor of that semen. (R 1048, 1052).

During closing argument, defense attorney stated that the evidence was not a match and there were possibly 600-2,000 other men who could have been the donor of the semen. (R 1106, 1136-1137, 1140, 1198). A match is only equal to the technical capability of the testing. Since 2,000 other men could have contributed the semen, a reasonable doubt exists as to appellant's guilt. (R 1140). Defense counsel again emphasized that at best the state's evidence could not exclude appellant. (R 109). The state's emphasis on the high probability that it was appellant's semen that was found at the scene was permissible.. The prosecutor's use of the words "match" and identification" were logical explanations of the statistical evidence. Mann.

The prosecutor's comparison regarding the statistical probabilities to the odds of drowning in your bathtub is also not impermissible. Given there was no objection at trial, appellant must demonstrate that any error was fundamental. Jones v. State, 612 So. 2d 1370 (Fla. 1992)(absent objection, appellate court will not reverse a conviction unless error was fundamental).. It cannot be said that the isolated reference to drowning in your bathtub is so prejudicial that it vitiated the entire trial. Jones.

ISSUE III

THE TRIAL COURT PROPERLY LIMITED CROSS-EXAMINATION OF STATE WITNESS.

Appellant claims that the trial court reversibly erred when it limited cross-examination regarding DNA analysis. Appellant must establish that the trial court abused its discretion in sustaining the state's objection to the questions. Maggard v. State, 399 So. 2d 973, 975 (Fla.1981). Appellant has failed to meet his burden. Appellant's right to full and fair cross-examination is not without limits. The inquiry on cross must be related to matters of credibility or germane to issues brought out on direct. Steinhorst v. State, 412 So. 2d 332, 337 (Fla. 1982).

During cross-examination, appellant asked the witness to describe certain bands on the autorad. The state objected on the grounds that the question was beyond the scope of direct. (R 1007). The objection was properly sustained.. Appellant argued that the question was "basically" about sizing of the band, however it is clear that such was not the case. (R 1007 lines 7-15). A review of the direct testimony reveals that a visual description of the bands is not a part of the procedure of sizing. (R 994). A visual examination of the bands is done to exclude someone as a source of the material. The next procedure would be sizing. (R 989). Appellant was never precluded from questioning the witness regarding the sizing of the autorad. (R 989, 994, 1005-1009). The witness's description of other bands on the autorad is irrelevant to the sizing procedure and was not discussed on direct examination. (R 989, 994, 1001-1003, 1005). A discussion of the bands itself was not germane to the issue of seizing consequently it was properly limited. Kramer v. State, 619 So. 2d 274, 276 (Fla.) (no improper limiting of cross-examination on defense's theory of the murder since no evidence to support that theory.) In any event on redirect and recross, the number

of bands on the different ladders was addressed. (R 1008). On recross appellant inquired into the accuracy of the new ladder used since it contained less bands. (R 1009), consequently, if error it was harmless. Morgan v. State, 415 So. 2d 6, 10-11 (Fla 1982)(since defendant was permitted to ask question that had earlier been disallowed, error was harmless). Pace v. State, 596 So. 2d 1034, 1035 (Fla. 1992)(error to limit cross-examination on point is harmless given the lack of significance and appellant could have presented evidence through means other than cross-examination). Appellant was afforded the expertise of various DNA experts, consequently if the area of concern was so important, appellant could have pursued that line of inquiry.(R 80, 95, 292-294).

ISSUE IV

TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION FOR JUDGEMENT OF ACQUITTAL TO CHARGE OF SEXUAL BATTERY.

Appellant alleges that the trial court erred in not granting his motion for judgement of acquittal for the charge of sexual battery. He claims that the state's evidence consisted of a laceration to the inside of Ms. Ross's vagina, presence of semen on a towel found near Ms. Ross and semen found on her housecoat. He further relies on the medical examiner's testimony on cross-examination that the injury could have been caused something other than sexual battery.

On appeal, the Court must review the evidence in the light most favorable to the state. Spinkellink v. State, 313 So. 2d 666, 670 (Fla. 1975), cert. denied, 428 U.S. 911 (1976). The state is not required to rebut conclusively every possible variation of the facts. Nor is the jury required to believe the defense's version of the facts as long as the state has introduced evidence which is inconsistent with the defendant's theory of events.State v. Law, 559 So. 2d 187, 189 (Fla. 1989). All that is required is substantial competent evidence to support the jury's verdict. Holton v. State, 573 So. 2d 284 (Fla. 1990).

With these principles in mind, appellant has failed to demonstrate that the trial court erred in denying his motion for judgement of acquittal. The relevant evidence upon which the jury could have relied is the following. Ms. Ross was bound with cord around her neck and hands. (R 504). Her housecoat was open at the front. (R 504). Semen was found on the hem of her housecoat as well as on a towel found near the body. (R 705, 709). Ms. Ross had a contusion behind her right ear and bruising to her lips and eyes that are consistent with being hit in the face. (R 754). In addition to the ligature marks around her neck that were caused from strangulation, there was also bruising and

scraping around her neck. (R 755). There was a laceration on the inside of the vagina as well as redness to the superior aspect of the wall of the vagina. Both injuries were recent and fresh indicating that they occurred shortly before death. (R 758, 763, 773).[1] The injuries were consistent with sexual battery. (R 773). Appellant's reliance on the fact that there was no semen in the vagina nor external injuries to the vagina is of no moment. The medical examiner testified that semen could have decomposed and it is not uncommon not to see external injuries. (R 767, 774). The evidence established that Ms. Ross received recent internal injuries to the vagina, semen was present on the hem of her housecoat, as well as on a towel near her body. Her housecoat was open revealing her nude body. She was obviously beaten in the head and face. This evidence was more than sufficient to establish that a sexual battery occurred. Holton, supra.

[1] A microscopic examination revealed a chronic inflammation in the vagina. This does not negate the findings regarding the two recent injuries.

ISSUE V

APPELLANT'S CHALLENGE TO THE INDICTMENT REGARDING THE CHARGE AND CONVICTION FOR SEXUAL BATTERY IS NOT PRESERVED FOR APPEAL; IN ANY EVENT THE INDICTMENT SUFFICIENTLY TRACKED THE LANGUAGE OF THE STATUTE

Appellant alleges that the indictment fails to allege an essential element of the crime of sexual battery because the definition of sexual battery does not appear in the indictment. Appellant also claims that he is not procedurally barred from raising this issue, irrespective of his failure to raise it below because the error is fundamental. State v. Gray, 435 So. 2d 816 (Fla. 1983). Appellant is incorrect on both assertions.

Under Florida law, it is fundamental error to convict under an indictment that fails to allege one or more of the essential elements of the crime. Gray. However in the instant case, the indictment did not omit any essential element of the crime. Identical to the facts in Gray, the offense was charged in the language of the statute and the indictment referenced the appropriate section of the statue.(R 13). Consequently even if there is error it cannot be deemed to be fundamental, review is precluded. Debose v. State, 520 So. 2d 260, 264-265 (Fla. 1988).

Secondly there was no deficiency in the indictment. Again Debose is dispositive. Identical to the facts of Debose, appellant was on notice as to the charges against him. The definition of "sexual battery" appears in the applicable portion of the statute under which he was charged. Appellant cannot demonstrate that any actual prejudice occurred.[2] The issue is without merit Id.

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[2] The jury was properly instructed on the elements of sexual battery. (R 1146).

ISSUE VI

THE TRIAL COURT PROPERLY ALLOWED THE ADMISSION OF DNA EVIDENCE

Appellant alleges the admission of DNA evidence during the guilt phase denied him due process and a fair trial. Appellant identifies several areas of concern regarding admission of this type of evidence. On appeal the main thrust of appellant's attack centers on the procedures and statistics employed by the laboratory which conducted the DNA testing, Life Codes Corporation. Specifically appellant attacks the following: 1). statistical frequencies used by Life Codes did not contain a substructure database for Hispanics;.[3] ; 2). Life Codes has not instituted a procedure or criteria for matching or identifying sample patterns; 3). Life Codes will rely on tests results even when bandshifting occurs in the DNA evidence;[4] 4). Life Codes has been cited for using contaminated probes in a specific case.[5] The entire basis for this indictment against Life Codes Corporation is a report authored by the National Research Council's Committee on DNA Technology in Forensic Science, DNA Technology in Forensic Science (1992) (referred to as "NRC

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[3] Testimony was presented using a Caucasian database and an African American database. Using both databases, the statistics eliminated 99.8 percent of the population as being a possible contributor of the semen left at the crime scene. Wilding was in the remaining .021 percent of the population that could have contributed the semen.(R 726).

[4] This Court agreed with Hayes that the "band-shifting" technique is not generally accepted in the scientific community. Hayes v. State, 20 Fla. L. Weekly S296 June 22, 1995) However, the band-shifting problem which lead to the exclusion of specific evidence in is not present in the instant case.

[5] Other courts have found that Life Codes procedures and protocol have proven to be generally accepted by the scientific community. People v. Wesley, 633 N.E. 2d 451, 456 (N.Y. 1994); Caldwell v. State, 393 S.E. 2d 436, 442 (Ga. 1990).

report"). Lastly relying on Ramirez v. State, 542 So. 2d 352 (Fla. 1989), appellant alleges that the scientific predicate for the admission of DNA must be established through independent evidence. [The state disagrees with appellant's claim that Ramirez requires that a sufficient predicate must be laid through an independent source. Although such a predicate is necessary, the status of that person need not be impartial. Ramierez, 542 So. 2d at 355.] As will be demonstrated below, this issue has not been preserved for appeal. This Court must decline review.

The specific challenges mentioned above as well as the authority for those challenges were never raised at trial, consequently review by this Court must be denied. Correll v. State, 523 So. 2d 562, 567 (Fla. 1988)(objection to expert testimony untimely when made for the first time during the witness' testimony); Pope v. State, 441 So. 2d 1073, 1076 (Fla. 1983)(a party may not invite error and then be heard to complain on appeal); Gunsby v. State, 574 So. 2d 1085, 1088 (Fla. 1991)(failure to object to procedure used by trial judge along with failure to make proper inquiry waives issue on appeal). To the extent that there was a general objection to the admissibility of this evidence, review is still precluded given the fact that appellant's argument's argument on appeal is different than that which was presented to the trial court. Occhicone v. State, 570 So. 2d 902 (Fla. 1990)(raising different argument on appeal then that which was raised at trial waives appellate review).

Appellant, relying upon the NRC report, asks this Court to reverse his conviction based on argument that was never presented to the trial court. In a recent case this Court adopted the opinions and recommendations of the NRC regarding the need for procedures to prevent contamination of evidence and the Council's rejection of the "band-shifting" technique. Hayes v. State, 20 Fla. L. Weekly S296 (Fla. June 22, 1995). This Court relied upon that report irrespective of the fact that

the trial court made its ruling without the benefit that information.. Hayes, 20 Fla L. Weekly at S299. Appellant is not entitled to the same consideration that this Court afforded Hayes. In Hayes, the appellant filed a motion in limine challenging the procedures and reliability of the DNA testing. The defendant presented expert testimony in support of all his challenges to the DNA testing. A review of the record in the instant case reveals that appellant never filed a motion in limine, never challenged the reliability of the tests during voir dire and cross-examination of the states' witnesses, and never presented evidence either through direct testimony or during cross-examination that would call into question the reliability of the DNA testing. Now on appeal, appellant relies on information that was never presented at trial and makes factual allegations in the initial brief that were never presented at trial let alone litigated to a factual conclusion. Furthermore, those factual allegations are a misrepresentation of the record[6]. In Hayes this Court overlooked the fact that the trial court did not have the benefit of the NRC report[7]. However, in the instant case, appellant had

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[6] In his initial brief, appellant claims that there was evidence of contamination. **Initial brief pg. 40.** Appellant's accusation is belied by the record. Defense counsel never made any allegation or in any way challenged any of the state's witnesses regarding alleged contamination of the evidence in the instant case. The fact that the semen stain on the towel contained other fluids and at times such fluids are not separated does not indicate there was a contamination problem in the instant case. (R 724-725). At both phases of trial,, it wsa determined that the semen stain was easily separated from the blood stain on the towel. (R 956-960, 1806). The appropriate forum to resolve the issue was at trial during examination of the witness. Appellant's attempt to create an issue now on appeal must be meet with skepticism. Appellant's 11th hour claim of contamination does not warrant relief.

[7] Although the NRC's report has meet with this Court's approval, there have been numerous studies and articles since publication of that report which call into question it's results. The reports recommendation regarding a ceiling principle and the need for substructure groups has been criticized by many authorities.

Recent articles published refute the notion that substructure has any appreciable affect on the analysis of DNA. The conclusion of one study on individual subgroups and frequency calculations was that subdivision either by ethnic group or by U.S. geographic region within a major population

the benefit of the report as evidenced by the fact that he made a reference to it during cross-examination of Dr. Baird. (R 1052-1053). Appellant requested and was granted the assistance of the following DNA experts, Dr. Ronald Acton, Dr. Seymour Geiser (R 292-294), Dr.. Martin Shapiro and Dr. Diane Lavett. (R 80, 95). Appellant then requested and was provided additional discovery from the state regarding DNA testing. (R 21-41). Yet with all that information, appellant never presented the argument now being made on appeal to the trial court. This Court cannot

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group does not substantially affect forensic estimates of the likelihood of occurrence of a DNA profile., The Assessment of Frequency Estimates of Hae III-Generated VNTR Profiles in Various Reference Database, Journal of Forensic Sciences, JFSCA, Vol. 39, No. 2 p. 349 (Mar. 1992). Other studies have reached similar conclusions. See Budowle, B., Monson, K., Guisti, A., Brown, B., Evaluation of Hinf I-Generated VNTR Profile Frequencies Determined Using Various Ethnic Databases," 39 Journal of Forensic Sciences, 988-1008 (July 1994);Bulowle, B. Monson, K.L. and Guisti, A.M., "A Reassessment of Frequency Estimates of Pull-generated VNTR Profiles in a Finnish, an Italian, and a General U.S. Caucasian Database: No Evidence for Ethnic Subgroups Affecting Forensic Estimates," 55 Am. J. Hum. Gent., 533-539 (June 1994); Monson, K. and Budowle, B., "A Comparison of the Fixed Bin Method with the Floating Bin and Direct Count Methods: Effect of VNTR Profile Frequencies Estimation and Reference Population," 38 Journal of Forensic, 1037-1050 (Sept. 1993). United States v. Bonds, 12 F. 3d 540, 564 (6th Cir. 1993)(substructure argument goes to weight of the evidence rather than its admissibility).

With respect to the NRC's approach regarding the ceiling principle, many scholars have rejected same as unsound. See Devlin, Risch & Roeder, "Statistical Evaluation of DNA Fingerprinting: A Critique of the NRC's Report," Vol. 259 Science 748 (Feb. 1993). The ceiling principle does not always produce the conservative results for which it was proposed. See, Cohen, J., "Ceiling Principle is Not Always Conservative In Assigning Genotype Frequencies for Forensic DNA Testing," 51 Am. J. Hu. Genet. 1165-1168 (1992); Slimowitz, J., and Cohen, J., "Violations of the Ceiling Principle: Exact Conditions and Statistical Evidence" 53 Am. J. Hum. Genet., 314-323 (1993). Some experts have indicated that the ceiling principle is only a minority recommendation and that estimates of genotype probability are reliable. "A Critique of the NRC's Report," supra at p. 837; Alfous, P. The chairman of the committee who authored the NRC report conceded that critics are correct in their attack on the ceiling principle to the extent that the committee should have included a population geneticist See"Geneticists Attack NRC Report as Scientifically Flawed," 259 Science pgs. 755-756 (1994). Another member of the committee acknowledged that the ceiling principle was not intended to preclude experts from providing their own estimates based on the product rule. See Lander and Budowle, "DNA Fingerprinting Dispute Laid to Rest," 371 Nature 735 (Oct. 1994). See also People v. Soto, 35 Cal. Rptr. 2d 846 (4th Dist. 1994).

overlook appellant's attempt to sandbag the state. The wherewithal to present this challenge before the trial court was in his possession yet he chose not to do so. Zeigler v. State, 654 So. 2d 1162, 1164 (Fla. 1995)(availability of DNA testing and its admissibility was known before the filing of defendant's first postconviction motion, consequently issue is procedurally barred in successive motion). The state was prepared to present further argument if need be to rebut any challenge made be appellant.. Dr. Martin Tracey was available and ready to testify for the state. (R 690). Given appellant's failure to do so at the appropriate time and in the appropriate forum must preclude review in this Court. Pope; Correll; Zeigler.

It is clear that appellant did not raise these challenges before the trial court. However to the extent that there was some attempt to raise the issue below, appellant has failed to establish that admission of the DNA tests results was erroneous. Although appellant made an amorphous objection to the admissibility of the DNA testing, appellant did not present any testimony/evidence to demonstrate that DNA testing was inadmissible. Robinson v. State, 610 So. 2d 1288, 1291 (Fla. 1992)(in order to successfully challenge the reliability of a scientific method, defendant must introduce authority to establish that the procedure called into question is not generally accepted in the scientific community).

Although the area of DNA testing is relatively new, courts in Florida have held the evidence to be admissible. Robinson; Ziegler ;Washington v. State, 653 So. 2d 362, 365 (Fla. 1995), Martinez v. State, 549 So. 2d 694 (Fla. 5th DCA 1989); Andrews v. State, 533 So. 2d 841, 849 n.9 (5th DCA 1988) and most recently Hayes, (DNA tests results are generally accepted in the scientific community provided that the procedures protect against false readings and contamination). In order for an expert's testimony to be admissible , the scientific principle upon which it is based

must have gained general acceptance in the particular field. This standard has been commonly referred to as the *Frye* test.[8] Ramierz v. State, 651 So. 2d 1164, 1167 (Fla. 1995). And although the burden is on the proponent of the evidence to establish admissibility, the defendant must make a timely request for such an inquiry into the reliability of the evidence. Correll v. State, 523 So. 2d 5562 (Fla. 1988). Significant in the determination regarding admissibility is whether or not the opponent of the evidence presents contradictory testimony. Id.

With these principles in mind, appellant has failed to demonstrate that the trial court 's ruling admitting the DNA tests results was erroneous. In the instant case, appellant did not present any evidence to contradict the state's experts that the DNA procedures employed by Life Codes was in anyway flawed.

The sum and substance of appellant's challenge to the admissibility of DNA evidence was as follows. The first DNA expert to testify for the state was Daniel Nippes , chief criminologist for the regional crime laboratory. (R 675). Nippes conducted the PCR DNA testing regarding the paternity test on appellant's daughter. (R). During vior dire defense counsel asked very general questions regarding testing at the regional laboratory:

> DEFENSE ATTORNEY: Mr. Nippes, what type of outside proficiency testing is preformed on your laboratory on a regular basis?
>
> NIPPES: As far as PCR DNA is concerned--
>
> DEFENSE ATTORNEY: yes, sir.

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[8]Frye v. United States, 293 F. 1013,1014 (D.C. Cir.1923).

> NIPPES:--we subscribe to the Serological Research Institute, Cedars Corporation of California, for external samples of proficiency. That's one area. We also collaborate with a virology laboratory in Fort Myers on exchanging of samples for proficiency testing. Also, as I've indicated, on outside laboratories, I have participated by typing samples and having other DNA specialists in laboratories in, I've already mentioned Palm Beach, Miami, Tallahassee, Pensacola, and I'm currently involved with the one in Jacksonville.
>
> As far as applying proficiency testing and other requirements for guidelines, I've been submitted to blind proficiency tests. One of these related to the murders at the University of Florida in Gaineville, which I successfully completed that blind proficiency. And another related to a sexual assault murder in Miami.
>
> DEFENSE ATTORNEY: What do you mean be successfully completing and what are the percentages, what was the accuracy rate?
>
> MR. NIPPES: The accuracy rate was a hundred percent. There were no mistypings of any of the samples that were provided to our laboratory or sent from our laboratory to other laboratories.
>
> On the blind proficiency samples, I was sent, for example, some materials--I have to be careful, I testified before the grand jury, not to reveal too much here, I guess. I was provided some samples. I did not know these samples, they were unknown specimens and we treated them as unknowns.

(R 688-689). Nippes further testified that the regional crime laboratory had not seen any cross-over contamination even though that laboratory has conducted in excess of 1200 forensics stains. (R 695). Defense counsel never challenged the answers or provided the witness or the court with any other evidence to rebut or undermine the testimony. Counsel then made somewhat of an objection to admissibility of the evidence but conceded that the caselaw was against his position. He never attempted to present authority t the contrary:

COURT: Well, do you object on the question of the, whether PCR DNA testing is a recognized and accepted scientific method of testing?

DEFENSE ATTORNEY: I think that depends on who you talk to, Judge. Obviously the courts have agreed with Mr. Nippes, that it is a recognized area. Nothing further.

COURT: All right. Anything else by the State?

(R 696-697). The state relying on Robinson, pointed out the deficiency in the defendant's challenge,as the defense did not present any evidence to contradict Nippes or to establish unreliability. (R 697). The trial court *sua sponte* asked Nippes to explain the scientific basis for the PCR DNA testing. The trial court then made the following findings

COURT: The Court will recognize Mr. Nippes as an expert in the PCR DNA analysis and will find that this sort of testing is scientifically reliable, that it is recognized and accepted by scientists, and I'll permit the testimony in this particular area.

DEFENSE ATTORNEY: Judge, would you allow the defense to have a running objection then as to PCR DNA analysis so as not to disrupt the testimony?

COURT: And the running objection is?

DEFENSE ATTORNEY: Reliability, expertise.

COURT: The objection is --well, I don't know that it has to be a standing. You object to the witness's expertise to give opinions?

DEFENSE ATTORNEY: Correct.

COURT: And you object, so that we're clear, to the reliability of the testing method.

DEFENSE ATTORNEY: Correct.

COURT: Okay. Your objections are noted. Overruled.

(R 699-700).

On cross-examination of Nippes, again appellant failed to address the issue. Nippes was asked general questions about the Caucasian database as well as a question about the number of people who along with appellant could not be excluded from the group of possible contributors of the semen (R 735-739). There was absolutely no challenge to the procedures employed by the regional crime lab.(R 735-745). The regional crime laboratory is responsible for providing prophecy testing standards for other laboratories in the state. (R 686). Interestingly appellant's argument on appeal does not include any challenge to the methods or procedures practiced at the regional crime lab, consequently, the results from Nippes remain unassailed and admissible. Consequently even if this Court were to find that Life Codes did not preform the proper testing, the DNA testing and results obtained from the regional crime laboratory make any error with respect to the results from Life Codes Corporation harmless.

The remainder of the DNA evidence introduced by the state was presented through the testimony of three employees from Life Codes Corporation. Ms. Lisa Bennet performed DNA analysis on the forensic samples in this case. (R 940). During direct examination she was asked if there were any procedures in place to safeguard against contamination during the extraction process. (R 968). Ms. Bennet explained what those precautions were and testified that such precautions were taken in the instant case. (R 968, 975-976). Appellant did not challenge the testimony in any way during voir dire or during cross-examination (R 969-971, 977).

Next to testify was Richard Cunningham, a forensic scientist at Life Codes. (R 978). On direct examination, Cunningham explained what different proficiency testing is conducted at Life Codes:

> PROSECUTOR: And during the time that you worked for Life Codes, have you participated in any type of proficiency testing, where your work is checked?
>
> CUNNINGHAM: Yes. Before I even was transferred into forensics department, we would be required to test mock forensic cases of known results, and our results have to accurately reflect the known results. In addition for that, also we have in-house proficiencies, as well as blind proficiencies that we are subjected to on a yearly basis.
>
> PROSECUTOR: And what exactly does that mean, blind proficiencies and in-house proficiencies?
>
> CUNNINGHAM: Well, a blind proficiency comes in and is unknown to me as being a proficiency. An unknown as to whether or not it was going to a reflection of the accuracy of my work,
>
> An in-house proficiency is more someone hands me something and says, "This is a proficiency, this is going to be a test of your abilities to get accurate results." You know, "process it and tell what the results are." Whereas a blind proficiency is submitted as a mock case, unknown to me it is not actually a case, and I process it.
>
> PROSECUTOR: Okay. For the purpose of checking your work or seeing how you do?
>
> CUNNINGHAM: That's right.
>
> PROSECUTOR" And how many times have you participated in these types of tests where you're aware you're given an item and asked to process it and see what the results?
>
> CUNNINGHAM: It's right now on an annual basis.
>
> PROSECUTOR: And have you ever participated in one of these and been given an item to process and been told that you misprocessed it or did it wrong?

CUNNINGHAM: No, I have not.

PROSECUTOR: Have you always gotten a correct answer to each item that you processed?

CUNNINGHAM: To my knowledge, yes.

(R 981-982). Appellant never challenged Cunningham's testimony regarding the reliability of the testing procedures at Life Codes, never challenged the results of Cunningham's proficiency tests either during voir dire or cross-examination. (R 1005-1009)..

The final witness to testify from Life Codes was the vice-president of laboratory operations, Dr. Baird. (R 1015). Baird's expertise is in the area of molecular genetics, (R 1015-1016). On direct, Dr. Baird explained generally the type of work that is done at Life Codes. (R 10201023). He then explained that in this particular case, that he reviewed the work done by Cunningham and Bennett. (R 1022). With respect to the reliability of the testing done at Life Codes, Baird also testified that controls are done along side every tests to make sure the tests are done correctly. (R 1033). Baird also discussed the general principles involved and procedures utilized for the testing. (R 1033-1048). Baird's testimony concluded with the finding that appellant's DNA could not be excluded as the source of DNA that was found at the murder scene. (R 1048). The probability that the DNA collected from the murder scene, could have been contributed by someone other than Wilding was one in twelve million. (R 1048). The testing methods and procedures of Life Codes in general or the specific testing done in the instant case was never challenged on cross-examination. The reliability of DNA testing was never challenged . This despite the fact that appellant could have made such a claim if he so desired:

DEFENSE ATTORNEY: "Are you familiar with the treatise "DNA Technology in Forensic"?

DR. BAIRD: Yes I am.

DEFENSE ATTORNEY: In fact, you were one of the authors in one of the chapters, correct?

DR. BAIRD: Not one of the authors. I presented some information to the committee that ultimately generated that report.

DEFENSE ATTORNEY: Are you familiar with the ceiling principle discussed in the treatise?

DR. BAIRD: Yes I am.

DEFENSE ATTORNEY: And in fact, your firm did not abide by the ceiling principle in achieving this one in twelve million frequency, did you?

DR. BAIRD: That's correct.

DEFENSE ATTORNEY: In fact, the ceiling principle says, recommendation by this publication that would lead to a much more conservative and lower number that one you arrived at, isn't that correct?

DR. BAIRD: It would, yes.

DEFENSE ATTORNEY: Nothing further.

(R 1052-1053). At no point was Dr. Baird's results ever challenged or called into question. Appellant has failed to preserve this issue for appeal. Furthermore, the state has meet its burden in demonstrating that DNA testing is generally accepted in the scientific community and the evidence in the particular case is reliable. Washington; Robinson; Hayes..

ISSUE VII

TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION FOR NEW TRIAL AS THERE WAS NO FINDING THAT THE JURY WAS IMPERMISSIBLY INFLUENCED DURING DELIBERATIONS

Appellant claims that the trial court's denial of a motion for a new trial was erroneous. The motion for mistrial was predicated on the allegation that some jurors were improperly influenced by fear of the defendant. As explained below, appellant has failed to demonstrate that the trial court's ruling was an abuse of discretion. Gore v. State, 475 So. 2d 1205 (Fla. 1985, reversed on other grounds.(determination of whether substantial injustice requires that a court grant a motion for mistrial and a determination regarding conduct of jurors is based on the discretion of the court).

Prior to commencement of the penalty phase, the trial court advised all the parties that a juror had called the clerk's office earlier that morning. The juror, later identified as Ms. Tresman, asked the clerk if it was normal procedure for the defendant to have access to the questionnaires that were filled out by venire. (R 1221). The defendant moved to dismiss the panel based on the possibility that this jury would not be able to render a fair recommendation at the penalty phase. Given that the juror may be afraid of reprisal, they would more likely recommend death rather than risking appellant being released from prison. (R 1222).

The clerk, who took the call, Shelia Long, testified. She stated that a woman identifying herself as a juror wanted to know what was the normal procedure regarding access to jurors' questionnaires. (R 1225). Long told her that it was normal for the attorneys to read the questionnaires. The caller did say that she would want something done about it if it was not normal for him to have that access. (R 1226). The clerk never answered any question regarding whether it

was normal or not for the defendant to have access to the material. (R 1226). The clerk told her to call back in forty minutes while she checked with the clerk who actually handled the case. The caller never called back. (R 1227). Recognizing the potential problem, the judge was correct in conducting a hearing. (R 1229). Powell v. Allstate Insurance Co., 20 Fla. L. Weekly S37 (Fla. January 19, 1995)(racial slurs made by various jurors during deliberations constituted overt acts requiring an evidentiary hearing into the prejudicial affect of comments). The state bears the burden of eliciting evidence demonstrating that the conduct/unauthorized material did not effect the verdict. State v. Hamilton, 574 So. 2d 124, 129 (Fla. 1991). This Court has adopted the test and procedure used by the Fifth Circuit and successor Eleventh Circuit in United States v. Howard, 506 F.2d 865 (5th Cir. 1975) and Paz v. United States, 462 F. 2d 740 (5th Cir. 1972). Hamilton, 574 So. 2d at 130. This test also comports with section 90.607 (2)(b) of the Florida Evidence Code which forbids inquiry into the thought processes of the jury. Id. A juror may testify to any facts which have relevance to the existence of any extraneous influence. Howard, 506 F. 2d at 868. In Howard, the jury was exposed to various law books that were in the jury room. The permissible questions centered on how the books reached the jury room, who saw them, and for how long; and the extent to which the books were seen, read, discussed and considered by the jury.

In the instant case, the judge appropriately inquired as to whether or not any discussions regarding the questionnaires occurred; if so when did they take place and who was involved. Appellant's main focus is on the testimony of juror Tresemar as she is the one who called the clerk's office. (R 1241). Her concern was that it was a breach of security if appellant had the questionnaires. (R 1244). Contrary to appellant's assertions otherwise, Tresemar did not state that the subject came up during jury deliberations. She stated that the subject never came up during

deliberations. (R 1254 line 11). She stated that during the trial there may have been a mention of it while at a lunch break. The only other time she discussed it was after she made the call to the clerk's office. (R 1251). She testified:

> "I think it was only three of us in the room that talked about it even on the jury now. And it was just-- I told them when I came in this morning that I had called to find out about it. And they said, 'Well, if it bothered you, I'm glad you called." That's the way they put it to me. You know, 'If it's going to bother you, you should know about it.'" (R 1251)

All remaining eleven jurors stated that they heard the subject mentioned one time after the jury was sworn. (R 1258-1259, 1263, 1267, 1272, 1276, 1279, 1281-1282, 1285, 1289, 1292, 1296, 2197). No one said it was discussed during deliberations let alone that it was ever discussed among them as a group. (R 1297). Tresman's testimony makes it clear that only three people on the jury even discussed it. (R 1251). At best the jury may have heard the subject mentioned one time after the trial began. The general description of the comments were "it was no big deal" (R 1276), the subject was mentioned in a cursory fashion, (R 1296), or the matter was quickly dismissed. (R 1292).

Appellant's reliance on Keen v. State, 639 So. 2d 597 (Fla. 1994) is of no moment. In Keen, there was extrinsic proof that two jurors read material during deliberations. One juror highlighted a section he found interesting. As stated above, the evidence in the instant case reveals that the question of whether appellant had access to the questionnaires was not even mentioned during deliberations. There is absolutely no indication that anyone was influenced by same.

The facts of the instant case are also distinguishable from Cappadona v. State, 495 So. 2d 1207 (Fla. 4th DCA 1986). The impermissible information considered by the jury was extremely prejudicial. The jury found out the appellant was tried for the same offense once before and claimed he that he did not commit the crime. At the retrial he claimed self- defense. Consequently,

appellant's credibility was severely challenged in the eyes of the jury. In the instant case, the fact that appellant might have had access to the jury questionnaires is not the same type of prejudicial material. In actuality, if the jury were afraid of reprisal from appellant they would have acquitted him rather that found him guilty. A point made by one of the jurors.

The court was well aware of the fact that it could not ask the jurors specifically if this information affected their verdict. (R 1232). Although the trial court should not have asked the ultimate question, i.e., did this possibility affect your deliberations, there was sufficient evidence demonstrating that the jury did not consider that possibility. A case directly on point is United States v. Watchmaker, 761 F. 2d 1459, 1466 (11th Cir. 1985). Simply because jurors discuss their fear of a defendant, does not mean that the jury has been improperly influenced. In Watchmaker, the 11th Circuit concluded that the fact the jury convicted the defendant on most of the counts against him, is hardly evidence that they feared retribution. Any error in delving into the juror's thought processes was harmless. As outlined above, there was sufficient admissible testimony upon which to find that the jury was not improperly influenced. Unlike the facts in Keen, this jury did not then make a determination as to sentencing, as they were excused immediately after the hearing. The facts adduced at the evidentiary hearing clearly establish any concern mentioned regarding a possible breach of security did not influence the jury. The trial court properly denied the motion for mistrial. Watchmaker; Trotter v. State, 576 So.2d 691 (Fla. 1990)(presence of law books in a jury room without evidence that the jury was improperly influenced by same does not require a new trial).

ISSUE VIII

THE TRIAL COURT PROPERLY OVERRULED APPELLANT'S RELEVANCY OBJECTIONS REGARDING TESTIMONY OF WHAT OCCURS IN OTHER CASES AS THE QUESTIONS WERE "FAIR REPLY" TO APPELLANT'S ARGUMENT

Appellant cites to four instances of alleged impermissible and irrelevant testimony. The focus of the challenged testimony was a comparison as to what occurred in other cases. Appellant claims that such testimony was an impermissible attempt to bolster the state's case. Generally speaking the state agrees with the proposition posed by appellant that a defendant should be tried by the evidence against him and not based on what occurs in other cases. However, when the defendant himself makes an issue of the absence of certain evidence, the state is then allowed to explain the alleged deficiency. United States v. Cruz, 981 F. 2d 659 (2d Cir. 1992)(cannot bolster fact-witness testimony by arguing that expert version is consistent unless witness version is attacked as unexplainable or ambiguous). As demonstrated below, appellant opened the door to the objected testimony.

The first such instance occurred during the testimony of Beverly Skinner the crime scene specialist. On redirect, the assistant state attorney asked Ms. Skinner if it were unusual not to find any finger prints at the crime scene. Appellant objected based on lack of relevancy. The trial court overruled the objection. (R 592). A review of the defense attorney's opening statement and questions on cross-examination demonstrate that counsel opened the door to this testimony. The very first word out of the defense attorney's mouth in opening statement were the following:

DEFENSE ATTORNEY:Good morning, ladies and gentleman.

> You heard what the government feels the evidence will be presented to you. There's a lot of things that they will not present to you, such as fingerprints at the scene from Neil Wilding. They're going to tell you there was a struggle, there was a long time period involved, there was a point of entry. There were things moved about in the apartment. And yet there is no fingerprints whatsoever."

(R 465). During cross-examination Ms. Skinner was asked how many sets of latent prints were lifted. (R 579). She was also asked if she dusted various items in the apartment for prints. (R 581-582). The defense attorney them pointed out that even though the entire apartment was dusted, no prints of value were discovered. (R 582). Defense counsel again seized upon that testimony to make the following point:

> "So if somebody's prints appear on a wall or a refrigerator or something fixed to that apartment, you could assume that the person was there, is that right?
> That's correct.
> And if the prints are not found there, then you can't assume that they were there."

(R 585). Defense attorney again confirmed that there were no prints found on the lamp beside the victim. (R 586).

The above exchange clearly demonstrates that appellant opened the door for the state's inquiry on redirect. It was appellant's repeated emphasis of the fact that his fingerprints were not found at the scene that made the state's question relevant. The trial court's ruling was correct. Ferguson v. State, 417 So. 2d 639, appeal after remand, 474 So.2d 208, affirmed denial of postconviction, 593 So. 2d 508(Fla. 1994)(appellant's emphasis on the guilt of his co-defendant opened the door to prosecutor's comment comparing the relative guilt of both); Hall v. State, 614 So. 2d 473, (Fla.) cert. denied, 114 S.Ct. 109 (1994)(defendant's comparison of his sentence to a lesser

crime than that of his co-defendant entitled the state to further explain the disparity); Stewart v. State, 620 So. 2d 177, 179 (Fla.), cert. denied, 114 S.Ct. 478 (1994)(state's inquiry not improper comment on defendant's right to remain silent since defendant opened the door by claiming that it was too difficult for him to testify regarding the details of his life and of the murders). . Appellant also challenged the following question and answer

> Q. "Have you come across other cases where that has occurred, where you know that there was a sexual assault involved but not been able to find that particular sample?"
> "Yes. One specific case as example--
> DEFENSE ATTORNEY: "objection, relevance, Judge."
> COURT: "Overruled".

(R 708-709). This issue is not preserved for appeal as the identical information had already been elicited without objection. Farinas v. State, 569 So. 2d 425 (Fla. 1990)(failure to object to improper line of questioning precludes review on appeal). Prior to the challenged inquiry above the following testimony was admitted:

> Q."You indicated that there was swabbing done in the vaginal area and the anal area that you also examined and nothing was found containing semen, neither one contained semen."
> A. "No semen stains. There were some blood stains in the vaginal sample, but there were no semen stains in any of the samples."
> Q. "Again, is that unusual to find that given the state of Marsha Ross's body as you observed it on August 28th?"
>
> A. "No not in my judgement. You have some deterioration, particularly of an open cavity like the vaginal area or anal area, it would not be unlikely, if it was there in the first place. But I mean, it's not unusual to have these sperm samples deteriorate."

(R 708). Given the admissibility of the above, appellant has waived any subsequent challenge to the identical testimony.

As for the merits, it was appellant who made the testimony relevant. In his opening argument defense counsel stated:

> "The evidence of any sexual battery is tenuous. There was no semen that could be matched to Mr. Wilding in the body of the deceased."

(R 465). Appellant's initial inquiry permitted the state's fair reply. The prosecutor was simply attempting to explain why there was no semen found in the victim.. Appellant also objected to the following inquiry
:

> And I believe that there was another investigation, a rape investigation going on at the same time, is that correct?
> A. "Yes, ma'am. There was, I believe that was either in March or April. There was a rape investigation that myself and Sergeant Martin had investigated and subsequently made an arrest on."
> DEFENSE ATTORNEY: "Objection, relevance, Judge.
> COURT: "Overruled".

R 610). Appellant claims that reference to another rape investigation improperly implied that appellant committed other crimes. When the statement is viewed in it's proper context, it becomes apparent that appellant's characterization is erroneous. Detective Frank Devecenzo explained how leads were developed and suspects eliminated. (R 609). The first two suspects, Robert Williams and Dean Johnson lived near Ms. Ross. Both were eliminated after blood and hair samples were compared to crime scene evidence. (R 609-610). A third suspect, Danny Asburg, was investigated because he was arrested for a rape that occurred around the same time as the murder. (R 610, 618). Only Asburg was implicated in the other crime, Wilding was never mentioned in that context. Appellant's claim is not supported by the record. . Lastly appellant objects to the state's alleged bolstering of it's DNA results through the testimony of the state's DNA expert. Defense attorney asked Dr. Baird, if his laboratory used a ceiling principle when computing the statistical probabilities of a DNA "match". (R 1053). He was also questioned about the existence and use of a numerical

criteria or a margin of error that is considered when making such a "match". (R 1049). On redirect, over objection, Dr. Baird was allowed to explain that other laboratories do not use the ceiling principle referred to by defense counsel and other laboratories do use similar numerical criteria as well. (R 1054-1055). Given that the defense counsel opened the door to such inquiry by referring to the procedures utilized by Life Codes, the state was allowed to explain/defend those procedures.

ISSUES IX AND X

THE JURY WAS PROPERLY INSTRUCTED ON BOTH PREMEDITATED AND FELONY MURDER FOR THE SINGLE OFFENSE OF FIRST DEGREE MURDER

Appellant alleges that the state's reliance on a felony murder theory without specifically charging it in the indictment was constitutionally impermissible on two grounds. First of all, instructing the jury on felony murder amounted to a constructive amendment of the indictment. Secondly, the state's reliance on a felony murder theory deprived appellant of notice of the charge against him.

Appellant's arguments rely on the faulty premise that premeditated murder and felony murder must be specifically charged for the single offense of first degree murder. Such is not the law. Knight v. State, 338 So. 2d 201 (Fla. 1976); Schad v. Arizona, 115 L. Ed. 2d 555 (1991). Appellant's argument has been repeatedly rejected by this Court. Armstrong v. State, 642 So. 2d 730 (Fl.a 1994); Lovette v. State, 636 So. 2d 1304 (Fla. 1994); Bush v. State, 461 So. 2d 936 (Fla. 1994), cert. denied, 475 U.S. 1031, 106 S.Ct. 1237, 89 L. Ed. 2d 345 (1986); O'Callaghan v. State, 429 So. 2d 691 (Fla. 1983).

ISSUE XI

THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION FOR MISTRIAL AS THE BRIEF MENTION THAT APPELLANT WAS THE SUBJECT OF A NATION WIDE SEARCH WAS AT MOST HARMLESS ERROR

Appellant claims that the trial court erred in denying a motion for mistrial, when Detective DeVencenzo made reference to the TV show "America's Most Wanted". The challenged statement was made in response to the following exchange:

> "Q. And based upon your investigation of Mr. Wilding, did you attempt to locate Mr. Wilding?
>
> A. Yes ma'am, we did.
>
> Q. Okay. What type of steps did you go through in order to locate Mr. Wilding?
>
> A. We did a Crime Stoppers, not only local Crime Stoppers, but we did a Crime Stoppers 800 which goes nationwide. And we also did off-line searches, checked social security records. We had gotten the FBI involved and they did some off-line searches. They also interviewed friends and family out of state that we didn't. And they also checked with past employers. We also secured air time with 'America's Most Wanted.'"
>
> DEFENSE ATTORNEY: Objection, your honor.
>
> DEFENSE ATTORNEY: This was the subject of my motion in limine, Judge, this morning about the 'America's Most Wanted'. I don't feel it's relevant whatsoever to this case. It's elevated this crime to a proportion which it should not be receiving.

(R 624).

Appellant complains that the mentioning of the program "America's Most Wanted" is prejudicial because it "elevates the crime to a position which it should not be receiving". (R 624). Yet without objection DeVencenzo discussed the assistance received by them from other prominent organizations; the national Crime Stoppers organization and the FBI.. The content of those statements are similar to the content of the objectionable statement regarding "America's Most Wanted". Consequently appellant cannot establish prejudice. The video of the program was not played for the jury, therefore no prejudicial information regarding the facts of the crime were revealed. State v. Baird, 572 So. 2d 904, 908 (Fla. 1991). Secondly, the program was mentioned only in connection with efforts made to locate appellant. Dailey v. State, 594 So. 2d 254, 257 n.3 (Fla. 1991). His identity as well as his status as a suspect had already been established. (R 624). The single reference to the TV show was harmless error beyond a reasonable doubt under State v. Diguillio, 491 So. 2d 1129 (Fla. 1986).

ISSUE XII

THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION FOR RELEASE OF GRAND JURY TESTIMONY

Appellant's request for release of grand jury testimony was denied by the court for the following two reasons: the proceedings were not recorded and the motion was insufficient. (R 9-10). Practically speaking the trial court cannot order the release of material that does not exist. Appellant does not address that fact in his brief.

Secondly even if the proceedings were recorded appellant would not be entitled to same given that the motion was legally insufficient. He requests release of grand jury testimony "because it may reveal the names of favorable witnesses and exculpatory evidence." (R 197). Appellant's attempt to embark on a fishing expedition does not entitle him to the requested material even if it existed. Jent v. State, 408 So. 2d 1024 (Fla. 1982); Brookings v. State, 495 So. 2d 135 (Fla. 1986); Section 905.27 Florida Statutes.

Appellant's reliance on Pennsylvania v. Ritchie, 480 U.S. 39 (1987) is not dispositive. Appellant must still establish a predicate that the testimony contains material evidence. Ritchie, supra. Nor does Butterworth v. Smith, 494 U.S. 624 (1990) warrant the requested relief. The only portion of Section 905.27 that was held to be unconstitutional was that which precluded a witness from disclosing his or her own testimony. Smith.

Appellant's request for an in camera inspection does not transform his deficient demand into any legal entitlement. State v. Gillespie, 227 So. 2d 550 (Fla. 2nd DCA 1969)(trial court not authorized to release grand jury testimony merely upon the demand of the defendant); Minton v.

State, 113 So. 2d 361 (Fla. 1959)(defendant must make a proper showing that release of grand jury testimony is warranted in the interest of justice). The trial court's ruling was proper.

ISSUE XIII

THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION FOR A MISTRIAL AS THERE WAS SUFFICIENT EVIDENCE TO ESTABLISH THAT THE EVIDENCE PRESENTED TO THE JURY CAME FROM THE CRIME SCENE

Appellant alleges that the state failed to properly link a semen stained towel containing appellant's DNA to the crime scene. The basis for this claim is that the towel was described as blue by most of the state witnesses, however, one witness described it as white. Appellant's motion for mistrial based on the color discrepancy was properly denied.

Relevant physical evidence is admissible unless there is some indication of tampering with the evidence. given the lack of evidence to establish any tampering); In the instant case, the evidence revealed an unbroken chain of custody of the towel since it was found near the victim's body until it was tested for DNA evidence. (R 522, 560-561, 565-566, 709, 721, 734, 951-953). When defense counsel called into the question the color of the towel, the prosecutor noted that the towel was bluish white. (R 1060-1061). The towel introduced at trial with appellant's semen on it, was the same towel found at the crime scene. Appellant has failed to demonstrate any indication otherwise. Everett v. State, 579 2d 394 (Fla 3rd DCA 1991)(unbroken chain of custody sufficiently linked evidence to defendant).Peek v. State, 395 So. 2d 492 (Fla. 1980), cert. denied, 451 U.S. 964, 101 S.Ct. 2036, 68 L. Ed. 2d 342 (1981)(trial court did not abuse its discretion in admitting hair comparison analysis since there was no evidence of tampering).

ISSUE XIV

THE TRIAL COURT PROPERLY FOUND THE EXISTENCE OF THE AGGRAVATING FACTOR THAT THE CRIME WAS ESPECIALLY HEINOUS, ATROCIOUS AND CRUEL

Appellant challenges the trial court's finding that the murder of Ms. Ross was heinous, atrocious and cruel.[9] He claims that there was insufficient evidence to establish that Ms. Ross was conscious at the time of her murder. The basis for this claim is the testimony of Ms. Ross's mother who testified that her daughter suffered from narcolepsy; there was a full bottle of pills found in the apartment; and there was no sign that the Ms. Ross ever moved from the couch when appellant broke into her home. Given the alleged deficiency in the proof of the victim's consciousness, the trial court erred in finding the "HAC" factor. Rhodes v. State, 547 So. 2d 1201, (Fla. 1989); Herzog v. State, 439 So. 2d 1380 (Fla.). A review of the evidence demonstrates that there was sufficient evidence to establish this factor.

When reviewing the evidence, common sense inferences gleaned from the evidence is appropriate. Gilliam v. State, 582 So. 2d 610, 612 (Fla. 1991). The following evidence adduced at trial sufficiently rebuts appellant's assertions that Ms. Ross was semiconscious at the time of her murder The medical examiner testified that Ms. Ross was beaten about the face and head, which was evidenced by the fact that her eyes and lips were swollen. The injuries were consistent with having been hit in the face with an object or fist. (R 754-759). She had a contusion on the back of her head, scrapes on her neck[10] and an abrasion to the back of her hand. (R 753-754, 758-759).

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[9] Section 921.141 (5)(h), Florida Statutes

[10] These scrapes were in addition to those injuries to the neck caused by the act of the strangulation itself. (R 755).

Death was caused by strangulation, which takes approximately five to eight minutes to occur. (R 768). The medical examiner also testified Ms. Ross sustained an injury to the vagina which was consistent with sexual battery and occurred shortly before death. (R 759, 763). When found, Ms. Ross's hands were bound with eletrical cord.[11] Her nightgown was open in the front leaving her nude body exposed. The trial court properly found sufficient evidence to establish that the murder was especially heinous, atrocious and cruel. (R 538-540); Gilliam; Sochor v. State, 619 So. 2d 285 (Fla.), cert. denied, 114 S.Ct. 638 (1993); Capehart v. State, 583 So.2d 1009 (Fla.), cert. denied, 112 S.Ct. 955 (1991); Holton v. S State, 573 So. 2d 284 (Fla.), cert. denied, 113 S.Ct. 2275 (1990).

Appellant also claims that the facts of this murder do not establish that he intended to cause unnecessary and prolonged suffering. All the cases relied upon by appellant; Bonifay v. State, 626 So. 2d 1310 (Fl.a 1993); Chesire v. State, 568 So. 2d 908 (Fla. 1990);Santos v. State, 591 So. 2d 160 (Fla. 1991); Lloyd v. State, 524 So. 2d 396 (Fla. 1988) and Poter v. State, 564 So. 2d 1060 (Fla. 1990) are distinguishable. They all involve shootings which occurred in quick fashion. None of the victims suffered any additional injuries beyond the initial and fatal gun shot. This Court has stated on numerous occasions that under Florida law[12] in order to establish "HAC" the evidence must demonstrate either a desire to inflict a high degree of pain or demonstrate utter indifference to or the

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Appellant's claim that Ms. Ross somehow slept through this viscious attack is rebutted by the fact that Wilding took the time to use a separate cord and tie Ms. Ross's hands together. The common sense inference would be that he had to tie her hands to render her helpless, otherwise why would you tie up an unconscious person before murdering him or her

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Appellant's reliance on cases outside of Florida are totally irrelevant to the determination of what constitutes an aggravating factor under Florida law. Sochor v. Florida, 112 S.Ct. 2114 (1992)(Florida Supreme Court consistently upholds heinousness factor if defendant strangles a conscious victim).

enjoyment of suffering of another. Chesire, 568 So. 2d at 911. Ms. Ross was beaten, raped, and strangled while she lay partially naked and helplessly bound with electrical cord. Wilding's actions demonstrate nothing but his desire to inflict high degree of pain on her, or at the very least his actions demonstrate a total indifference or enjoyment of Ms. Ross's suffering at his hands. The common sense inference is that Ms. Ross was conscious during this fatal and painful ordeal. Capehart, supra; Sochor, supra; Holton, supra; Gilliam, supra. The fact that Ms. Ross suffered from narcolepsy does not mean that she slept through her this attack. Appellant's speculation is nothing more than that and is not based on medical or scientific evidence.

Appellant also asserts that the invalidation of this factor warrants imposition of a life sentence. Clark v. State, 609 So. 2d 513 (Fla. 1992); McKinney v. State, 579 So. 2d 80 (Fla. 1991); cert v. State, 574 So. 2d 1059 (Fla. 1990); Songer v. State, 544 So. 2d 1010 (Fla. 1989); Smalley v. State, 546 So.2d 710 (Fla. 1989); Rembert v. State, 445 So. 2d 337 (Fla. 1984); Lloyd v. State, 524 So. 2d 396 (Fla. 1988). The dispositive fact in all of these cases, was that there existed substantial statutory and nonstatutory mitigation to be balanced against one remaining aggravating factor. This Court has said that when there exists one aggravating factor to be weighed against very little or no mitigating evidence, death is still the appropriate penalty. Songer; LeDuc v. State, 365 So. 2d 149 (Fla. 1978).

Although appellee asserts that the murder of Martha Ross was heinous, atrocious and cruel, the following harmless error argument will be made. In the instant case, there was a total absence of statutory mitigating evidence. (R 541-542). The following nonstatutory mitigating evidence was considered by the judge; 1). physical and mental abuse of defendant by step-father; 2). poor rural upbringing; 3). good employment background; 4). drug use; 5). mental and emotional problems not

rising to the level of statutory mitigation; 6). good conduct in jail; 7). potential for rehabilitation. The trial court discussed the mitigation presented and assigned either some, little or no weight to all of the evidence except for Wilding's potential for rehabilitation. (R 543-544). He gave that factor "substantial weight". (R 544). The state contends that appellant's potential for rehabilitation in prison does not outweigh the aggravating factor that this crime was committed in the course of a sexual battery.

Wilding broke into Martha Ross's apartment while she lay sleeping in front of her television. Ms. Ross's was rendered helpless by being bound with electrical cord and beaten about the head and face and then raped. Rather than leaving her alive after committing the sexual battery he decided to strangle her to death. There was no evidence that Ms. Ross ever knew appellant or in any provoked this vicious attack. The brutal rape and strangulation of an innocent person in the supposed safety and sanctuary of one's home sufficiently outweighs the mitigating factor that Wilding has a potential for rehabilitation in the very regimented and structured environment of a prison setting.LeDuc.

If this Court is unable to determine that the striking of the "HAC" factor is not harmless error beyond a reasonable doubt, remand for resentencing is appropriate. Appellant's request that this Court impose a life sentence is not warranted given the absence of substantial mitigating evidence. All that appellant would be entitled to is a new sentencing phase. Cooper v. State, 526 So. 2d 900 (Fla. 1988); Hill v. State, 549 So. 2d 179 (Fla. 1989); Rhodes v. State, 547 So. 2d 1201 (Fla. 1989). However given that there was no error which effected the jury's recommendation, the proper remedy would be to remand for reweighing before the trial court. Crump v. State, 622 So. 2d 963,973 (Fla. 1993). Simply striking an aggravating factor based on insufficiency of the evidence

does not warrant a whole new sentencing process. The jury was properly instructed regarding "HAC", consequently, it cannot presumed that the jury found the existence of a factor not supported by the record. Sochor v. Florida, 112 S.Ct. (1992). Given the fact the error did not extend to the recommendation, resentencing before the trial judge is the appropriate remedy. Lamb v. State, 532 So. 2d 1051 (Fla. 1988); Schaffer v. State, 537 So. 2d 988 (Fla. 1989); Cook v. State, 542 So. 2d 964 (Fla. 1989).

ISSUE XV

THE PROSECUTOR'S COMMENTS TO THE JURY DURING PENALTY PHASE WERE NOT IMPERMISSIBLE

Appellant makes several challenges to the prosecutor's comments during the penalty phase closing arguments. The first five alleged instances of prosecutorial misconduct are not preserved for appeal. (R 2026-2034). The trial court sustained the objection to all five comments, however, before requesting a mistrial, appellant never requested that a curative instruction be given. Review is precluded. Parker v. State, 641 So. 2d 369, 376 n. 8 (Fla. 1994).

Even if the comments had been properly preserved for this Court's consideration, relief is not warranted. Appellant has failed to demonstrate that any reversible/fundamental error was committed. A trial court's ruling with regard to prosecutorial comments are within the court's discretion. An appellate court will not disturb that ruling unless an abuse of discretion is shown.Durocher v. State, 596 So. 2d 997 (Fla. 1992); Occhicone v. State, 570 So. 2d 902 (Fla. 1990). Reversal is only required if the comment is so prejudicial that it vitiates the entire trial. Jones v. State, 612 So. 2d 1370 (Fla. 1993). Wide latitude is permitted in arguing to a jury. Breedlove v. State, 413 So. 2d 1, 8 (Fla.), cert. denied, 459 U.S. 882, 103 S.Ct. 184, 74 L. Ed. 2d (1982). A prosecutor's comments must be examined in the context of the entire record. Muheleman v. State, 503 So. 2d 310, 317 (Fla. 1987). With these principles in mind, appellant has failed to establish his claim. The first comment to be challenged was the prosecutor's statement that Ms. Ross's purse was in plain view on her counter. (R 2026). The appellant objected that the comment was an improper reference regarding statutory aggravators that were not to be considered by the jury. The objection was sustained. (R 2016). However any error must be considered harmless since the

prosecutor stated during open argument without objection that Ms. Ross' purse could be seen from the window and her missing wallet was found sometime later. (R 1669, 1672). Furthermore, there was evidence presented at the penalty phase, without objection, regarding the location of Ms. Ross' purse and the fact that her empty wallet was found in a dumpster outside her apartment. (R 1695, 1696, 1704, 1706, 1707-1708, 1710, 1713, 1717, 1738, 1751). Sireci v. State,. 587 So. 2d 450, 453 (Fla. 1991)(reference to prior death sentence not reversible error since logical inference is that jury already knew that defendant had received previous death sentence). Furthermore, there is nothing emotionally charged about a comment referring to a purse or wallet. Any improper reference to a collateral crime must also be considered harmless error. Wyatt.

The next remark objected to was the prosecutor's comment on the fact that the defendant wiped away all the fingerprints from the crime scene.[13] Again appellant argues that the state was relying on impermissible aggravators. Any reference to the fact that there were no fingerprints at the scene must be considered harmless as this evidence was introduced at the penalty phase without objection. (R 1691-1692, 1698, 1715, 1710). During closing argument, the prosecutor stated that appellant knew the difference between right and wrong because he wiped away his fingerprints at the scene. The comment was a proper rebuttal to appellant's presentation of mitigating evidence. Hayes v. State, 581 So. 2d 121, 124 (Fla. 1991)(inadmissible hearsay harmless error where contents of statements already properly admitted through other witnesses); State v. Baird, 572 So. 2d 904, 905

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The legal correctness of the trial court's ruling sustaining the objection must be questioned due to the court's inconsistency regarding this line argument. The prosecutor repeated the statement. This time the prosecutor explained the context in which it was said. The state was attempting to rebut the defendant's mental mitigating evidence. (R 2040). The trial court overruled the objection.

(Fla. 1990)(error to admit inadmissible hearsay not prejudicial as statements would be properly admitted otherwise).

Any claim that the jury relied upon impermissible aggravators is rebutted by the fact that the jury was properly instructed regarding which aggravating factors were applicable to appellant's case. They were also clearly instructed regarding each factor. (R 2069-2074). It cannot be presumed that a jury would ignore those instructions. Sochor , Florida, 504 U.S. __, 119 L. Ed. 2d 326, 114 S. Ct. 2114 (1992).

In the initial brief, appellant also accuses the prosecutor of screaming and pointing at the defendant during closing argument. The record does not reflect that the prosecutor screamed at appellant:

> DEFENSE COUNSEL: Judge, I'm going to object to the State walking in front of my client and pointing in his face and being aggressive, coming over to counsel's table.

(R 2029, lines 2-4). However even if this Court were to interpret the record as supporting appellant's contention appellant cannot establish harmful error. Crump v. State, 622 So. 2d 963 (Fla. 1994)(no reversible error occurred when prosecutor referred to defendant as an octopus who slithers away).

Also without merit is appellant's challenge to the prosecutor's statement that the rape and murder of Marsha Ross took some time commit.(R 2032-2033). Appellant states that the comment was an impermissible reference to an inapplicable aggravating factor. The court sustained the objection, assuming that the prosecutor was arguing the aggravating factor of "cold, calculated and premeditated". (R 2034). The prosecutor explained that she was attempting to argue that the crime

took a substantial amount of time, which is relevant for "heinous, atrocious and cruel." (R 2034).[14] The amount of time it took to rape and murder Marsha Ross is very relevant to the aggravating factor of "HAC". Capehart v. State, 583 So. 2d 1009, 1015 (Fla. 1991)("HAC" established where death is not instantaneous and victim had time to experience foreknowledge of death as well as anxiety and fear); Burns v. State, 609 So. 2d 600, 609 (Fla. 1993)(short struggle and rapid unconsciousness precludes finding "HAC").

Lastly the prosecutor's comment that the sentencing procedure was about the victim and not the defendant was not erroneous. Although an objection was sustained, appellee asserts that the comment was proper. A review of the entire comment demonstrates that it was not a misstatement of the law:

> Now you have the task of weighing the aggravators and the mitigators. One of those mitigators is the age of the Defendant. I'm telling you that he was twenty-seven when he committed this crime. He was not a child, he was an adult, capable of knowing the difference between right and wrong. Nothing about his age should be used as a mitigator.
>
> And the fact that his father used to whip him? Everybody's father used ti whip them. They don't all grow up to be killers. They want you to use that as a mitigator.
>
> And most importantly of all, they don't want you to remember what and why we are here today. Why are we here today? Is it because of Neil Wilson Wilding or is it because of Marsha Ross? This sentencing is not about Wilding, this is about Marsha Ross and what Wilding did to Marsha Ross

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[14] Moments later the trial court overruled an objection to the prosecutor's identical statement that the crime took a long time to commit. When reviewing the prosecutor's uninterrupted argument it becomes clear that her argument was a permissible as it related to the aggravating factor of heinous, atrocious and cruel. (R 2035).

(???) DEFENSE ATTORNEY: Judge, that's a misstatement of the law. I object.

THE COURT: Sustain the objection.

PROSECUTOR: Binding her, raping her, strangling her for five to seven minutes. This is why we are here. Don't forget it.

(R 2041). The remark in context of the entire statement was proper. Wyatt, 641 So. 2d 1340.

Appellant next objects to the prosecutor's comment that the jury should contemplate the death of Marsha Ross. Appellant claimed that the comment was an impermissible attempt to ask the jury to put themselves in the place of the victim. The trial court denied appellants' motion for a mistrial. The court's ruling was proper given that the prosecutor's comment taken in it's proper content was a relevant argument regarding "HAC". The prosecutor, relying on the evidence presented was trying to establish how the murder was tortuous, protracted and brutal:

PROSECUTOR: You're going to have to weigh the aggravators, the heinous, atrocious, and cruel, against the mitigators if they are established. But first of all, you have to determine whether or not those mitigators have been established. And if they have been established, then you need to weigh them against the aggravators. The aggravators of heinous, atrocious, and cruel, and the fact that he was engaged in the commission of sexual battery and burglary when this crime was committed. And just because there might be more mitigators than aggravators does not necessarily outweigh the aggravators. You have to give them the appropriate amount of weight. This is the aggravator. This is it. This should be given the greatest weight.

The mitigators, if they even get established __ and I think if you examine the evidence, they're not even established. There is nothing to outweigh that, nothing. The taking of a human life in such a brutal and protracted and tortuous manner. Nothing. What I'm asking you to do is contemplate the death of Marsha Ross, how it happened.

(R 2042). Asking the jury to think about the manner of Ms. Ross's death is exactly what the jury must do in deciding the existence vel non of "HAC". The pain and fear of the victim is relevant to the jury's consideration. Wyatt, 641 So. 2d at 1340. This is unlike the comments in Jennings v. State, 453 So. 2d 1109, 115 (Fla.) vacated on other grounds, Jennings v. Florida, 470 U.S. 1002 (1984) or Bertollotti v. State, 476 So, 2d. 130 (Fla. 1985). There was no comparison between the defendant's ability to call his attorney and the inability of the victim to beg for her life. The prosecutor was merely asking the jury to find and weigh that aggravating factor against the evidence presented as mitigating. (R 2043). The comments were not improper. Jones v. State, 612 So. 2d 1370, 1374 (Fla. 1993)(prosecutor asking jury to think about the effect that the period of time for firing the three fatal shots had on the life of the victim was not improper). Appellant for the first time on appeal challenges the prosecutor's final comment to the jury asking the jury to impose the same penalty that appellant did. (R 2043) There was no objection to this statement, consequently review is precluded. Wyatt. In any event any error is harmless. Hodges v. State, 595 So. 2d 929 (1992), cert. granted and vacated, 113 S. Ct., on remand, 619 So. 2d 272, cert. denied, 114 S.Ct. 560(comments that since defendant did not give the a victim the choice of life or death, the jury should not give that choice to defendant is harmless error); Jackson v. State, 522 So. 2d 802 (1988), cert. denied, 109 S. Ct. 183, 488 U.S. 871 (1988). Appellant's reliance on Rhodes v. State, 547 So. 2d 1201, 1205 (Fla. 1989) is of no moment. Unlike the facts of Rhodes, there was no objection to the remark. Furthermore, this Court reversed the sentence in Rhodes because of multiple errors at the sentencing phase. The isolated comment does not warrant reversal of appellant's sentence. Davis v. State, 604 So. 2d 794, 797 (Fla. 1992).

Appellant also claims that the state improperly argued as an aggravating factor that his mother was also a victim. (R 2037-2038). A review of the penalty phase testimony of appellant's mother as well as the proper context in which the prosecutor's statement was made reveals that the remark was a permissible comment on the evidence. At the penalty phase appellant's mother testified that appellant was physically abused by his step-father when the mother was at work. (R 1867-1868). Appellant's mother stated that she determined that her son was actually abused because: "I knew Neil wouldn't lie to me." (R 1869). In response to her assertions that appellant would not lie to her, the prosecutor was permitted to argue against the presence of mitigation:

> PROSECUTOR: He had no choice but to fit in and be a good worker. But again, he had the choice to be something else on August 28, 1988.
>
> What also do we know about his life in North Carolina? He used a fictitious name.
>
> Mitigation. They also want to let you believe or lead you to believe that he was acting under extreme mental or emotional disturbance. Now, you heard Dr. Mary Hicks. There was no extreme mental or emotional disturbance taking place in Neil Wilding's mind.
>
> You also heard from Neil Wilding's mother, another victim of Neil Wilson Wilding. She's done what any mother would do, believe her son. But recall that Mrs. Schmid also testified against her son and told you about the phone conversation, about how he was trying to set up an alibi. Neil Wilson Wilding used his mother, a feeble attempt at making an alibi.
>
> DEFENSE ATTORNEY: Judge, I object, This particular argument has nothing to do with arguing any mitigating circumstances or arguing towards any aggravating circumstances. I object.
>
> THE COURT: Overruled.
>
> PROSECUTOR: Using his mother as a feeble attempt to establish an alibi that somebody else had committed this murder. She believes her son. I'm asking you not to believe him.

(R 2037-2038). The above passage demonstrates that the prosecutor was arguing against the proposed mitigating evidence offered by appellant's mother. The comment was made in the context of trying to rebut or discredit the alleged mental mitigating evidence. Appellant's mother testified at the penalty phase regarding alleged abuse he suffered by his step-father. The mother never witnessed same but is relying on what her son told her. Such argument is permissible. Randolph v. State, 562 So. 2d 331 (Fla. 1990)(state is allowed to present evidence that either proves an aggravating factor or rebuts a mitigating circumstance). The prosecutor's statement was a fair comment on the evidence. Mann v. State, 603 So.2d 1141, 1143 (Fla. 1992).

Lastly, appellant challenges the prosecutor's reference to the Ms. Ross' children and grandchildren. The statement was not made during the penalty phase. Given that a new jury was empaneled for the penalty phase, there is no error. In any event the isolated comment is not impermissible victim impact. Hodges.

ISSUE XVI

APPELLANT'S SENTENCING PROCEDURE DID NOT CONTAIN IMPROPER NONSTATUTORY AGGRAVATING FACTORS

Appellant claims that his penalty phase proceedings were impermissibly tainted with the introduction of nonstatutory aggravating factors. The state's first witness at the penalty phase was Officer Left.(R 1678). Left was the first police officer to arrive at the murder scene. (R 1680). He testified that the victim's mother was hysterical and crying. An ambulance was called due to her condition. (R 1681). Appellant objected to the officer's testimony based on a claim that the officer was testifying about improper victim impact evidence. (R 1680-1682). Relying on Bertollotti v.State, 476 So. 2d 130 and Burns v. State, 609 So. 2d 600, (Fla. 1993), appellant claims that this was reversible error. Although the objection was sustained, appellant did not request a curative instruction or ask for a mistrial. Review is precluded. Parker v. State, 641 So. 2d 369, 375-376 (Fla. 1994).

As for the merits, appellant cannot establish error. A review of the officer's testimony indicates that the testimony was proper. First of all this jury did not sit at appellant's guilt phase, consequently presentation of the facts of the crime were relevant. Chandler v. State, 534 So. 2d 701, 703 (Fla. 1988)(jury does not sit in a vacuum, they must be made aware of the underlying facts). Officer Left was explaining his actions and what he encountered when he entered the Ross apartment. The officer's testimony was not impermissible. To the extent that Left should not have mentioned the mental state of Ms. Ross' mother, relief is not warranted. Appellant's reliance on Burns is misplaced. In Burns this Court found error in the state's presentation of testimony about

the victim's (a police officer) character and background. This Court found the testimony to be inadmissible because it was irrelevant. Burns, 609 So. 2d at 605. This Court rejected the defendant's argument that the testimony was improper victim impact evidence. The sentence in Burns was reversed however, because one of the two aggravating factors was struck for lack of evidence. That left one statutory aggravating factor and one statutory mitigating factor. Given that the irrelevant testimony was extensive and frequently referred to by the prosecutor, this Court reversed. Id.

In the instant case, there is no extensive testimony about the background or character of the victim. The challenged testimony consists of very short responses that the victim's mother was extremely upset about finding her daughter dead. (R 1680-1682). The comments were not relied upon by the prosecutor in closing argument. Furthermore, Left's brief description of the victim's mother is information about which a jury would already be aware. The obvious reaction of a mother upon finding her child dead in her apartment is something that a jury would already know. Bush v. Dugger, 579 So. 2d 725, 727 (Fla. 1991). Any error must be considered harmless.Bertolotti.

ISSUE XVII

THE DEATH PENALTY IS PROPORTIONALITY WARRANTED IN THE INSTANT CASE

Appellant claims that the death penalty is disproportionate in the instant case. He starts from the erroneous assumption that the aggravating factor of "heinous, atrocious, and cruel" is invalid. See Issue XIV. As demonstrated in Issue XIV, there is more than sufficient evidence to support the trial court's finding that the rape and strangulation murder of Mrs. Ross was "heinous, atrocious and cruel". Consequently his reliance on McKinney v. State, 579 So. 2d 80 (Fla. 1991); Clark v. State, 609 So. 2d 513 (Fla. 1992); Nibert v. State, 574 So. 2d 1059 (Fla. 1990); Songer v. State, 544 So. 2d 1010 (Fla. 1989); Rembert v. State, 445 So. 2d 337 (Fla. 1984); Lloyd v. State, 524 So. 2d 396 (Fla. 1988) and Smalley v. State, 546 So. 2d 710 (Fla. 1989) is misplaced given that all of these cases contain only one aggravating factor. More importantly theses cases are also distinguishable because they all involve substantial mitigating evidence unlike what was presented in the instant case.

Appellant describes the evidence in mitigation as significant and substantial. Based on that characterization, appellant claims that his death sentence is disproportional. The court found and weighed all the evidence presented for mitigation. Wickham v. State, 593 So. 2d 191, 194 (Fla. 1991). Well within its discretion, the court did not find attach substantial or significant weight to the bulk of appellant's mitigating evidence. Mann v. State, 603 So. 2d 1141, 1144 (Fla. 1992)(no relief warranted to defendant who complains that judge did not give greater weight to mitigation; weight to be given is within the courts' discretion). All the evidence was considered and given the weight deemed appropriate by the court. A review of the trial court's detailed sentencing order

illustrates that the trial court properly carried out its duty. A review of the quality of the evidence presented, demonstrates that the trial court's findings are more than supported by the record. Wickham.

The first category of non-statutory mitigation evidence presented was the abuse appellant experienced at the hands of his step-father. Appellant's "poor" rural upbringing was also considered. Appellant's mother testified that her second husband physically abused appellant while she was at work. This abuse occurred from the time appellant was six years old to the time he was fifteen. (R 1875-1876).

The forcefulness of this evidence however is diminished by the following. Mrs. Schmid never witnessed the abuse nor did she testify that she ever saw any physical injuries on appellant. As a matter of fact she was totally unaware of the abuse until her children told her after she divorced her husband. (R 1870-1871). Consequently the severity of this abuse must be questioned given that Mrs. Schmid was never aware of same. Furthermore Mrs. Schmid also testified that she was a loving and dedicated parent. Appellant's childhood was good before the arrival of the step-father. (R 1873, 1876). [There has been no testimony to the contrary]. Consequently appellant did receive the love and nurturing of one parent.

The most negative/debilitating consequence offered by appellant's expert regarding the abuse was that the experience affected appellant's transition into adulthood, including his sense of identity. (R 1917). This abuse contributed to the drifting appellant did as an adult and is responsible for his inability to establish long-term relationships. (R 1918). The trial court gave this evidence some weight. (R 543). Appellant's evidence of abuse pales in comparison to the magnitude of the evidence presented in the cases relied upon be appellant. Furthermore Dr. Hicks' opinion does not

demonstrate that the rape and murder of Marsha Ross was significantly influenced by Wilding's childhood experience. Kight v. State, 512 So. 2d 922, 933 (Fla. 1987).

In Livingston v. State, 565 So.2d 1288 at 1292, the evidence of abuse included "severe beatings by mother's boyfriend who enjoyed the abuse. The defendant's mother neglected the him. The evidence demonstrated that the beatings led to a decline in the defendant's intellectual functioning. In Clark v. State, 609 So.2d 513, 516 (Fla. 1993) the defendant was abused both emotionally and sexually. The defendant's parents were both alcoholics. After they divorced, the defendant was shuffled back and forth between them. The defendant was also sexually abused by his mother's lesbian lover. In Fitzpatrick v. State, 527 So. 2d 809 this Court characterized the record as replete with evidence of the defendant's mental problems. The extensive mental illness including schizophrenia formed the basis for the finding of three statutory mitigating factors. In contrast the severity and magnitude of those cases, the extent of the evidence offered in the instant case is not compelling.

The next category of mitigation was appellant's good employment background. (R 542). Relying on Smalley, appellant claims that the trial court should have given more weight to this type of evidence. Mrs. Hensley and her daughter testified that appellant worked for them as fruit picker and he helped rebuild their house. (R 1853, 1859). The only contact they had with appellant was for two or three fruit picking seasons. Each season lasted approximately two months. (R 1862-1866). Their contact with appellant remained superficial evidenced by the fact that Mrs. Hensley and her daughter never knew Wilding's real name. (R 1861). Given the very weak nature of this evidence, the trial court properly gave this evidence little weight. (R 543). In Smalley, this Court noted that one or two factors standing alone may not warrant imposition of a life sentence.

The combined effect of three statutory mitigators and additional nonstatutory mitigation compelled a life sentence. Id, 546 So.2d at 723. No such evidence is present in this case.

The next category of mitigation was appellant's drug use. This information was introduced through Dr. Hicks, however, there was never any connection made between that aspect of appellant's background and the murder of Mrs. Ross. There was no testimony offered how this drug use either affected appellant on the day on the murder or how it impaired his every day life. Given the absence of any evidence to extenuate or reduce the degree of moral culpability, the court properly gave this information no weight. (R 544). As a matter of fact, the trial court did note that appellant's drug use certainly did not negatively impact on his work performance. (R 544). Bruno v. State, 574 So. 2d 76, 82-83 (Fla. 1991)(trial court properly refused to consider defendant's drug history as mitigation, since it did not impair his ability to work nor was it a factor on the night of the murder); Johnson v. State, 608 So. 2d 4, 13 (Fla. 1992)(drug use is a self-imposed disability that does not necessarily amount to mitigation in a given case); Kight, supra.

The next category of mitigation was Dr.Hick's opinion that appellant possessed a high potential for rehabilitation. The trial court gave Dr. Hick's testimony substantial weight. (R 544). Dr. Hicks opined that rehabilitation includes the ability to become a better student, artist and mechanic. (R 1919, 1920). He also has the ability to follow through with the completion of a task. (R 1920). After reviewing the entire testimony of Dr. Hicks, appellee asserts that the trial judge was very generous in giving substantial weight to her opinion. Dr. Hicks specializes in family therapy and addiction. (R 1913, 1927-1930). Her previous expert testimony/opinion have dealt with child custody matters. She has never interviewed a criminal before let alone a convicted killer. (R 1934, 1935). Dr. Hicks did not perform any tests on appellant. Her opinion is based solely on a four hour

interview with him and two one-half hour interviews with appellant's mother. (R 1905, 1934). Although Hicks discusses her belief that appellant has a high potential for rehabilitation, she knows nothing about the facts of this case. She did not review police reports, photographs or discuss the case with appellant, yet she is able to form an opinion about his potential for rehabilitation. (R 1932).[15] Given the questionable forcefulness of this evidence, the death sentence is proportional. Wickham. Appellant also presented the testimony of several prison guards. On direct examination they all testified that appellant exhibited good behavior while being transported for court hearings. Good behavior was tantamount to not causing trouble. (R 1824, 1831). At all times appellant was either handcuffed and or schakled. He was always accompanied by at least two officers. (R 1824, 1832, 1833, 1839). They also testified that Wilding's behavior was normal and was similar to 70%-75% of other inmates. (R 1824, 1827, 1874). The average length of time that anyone guard spent with appellant at any one time was approximately three to fifteen minutes. (R 1828, 1831). Given the fact that appellant "behaved" himself while physically unable to do anything but what he was told to do was appropriately given little weight by the court. (R 544).

. The evidence offered in mitigation is minimal in comparison to the case for aggravation. Late one night Neil Wilding, broke into the home of a woman he did not know. The victim, Marsha Ross was asleep on her couch clad in only her housecoat. The evidence sadly demonstrates that Ms.. Ross' attempts to protect herself resulted in a vicious beating to her face. Her eyes were blackened and her lip was swollen. Her hands were bound with a telephone cord. Another cord was wrapped

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Dr. Hicks could not render an opinion regarding the statutory mental mitigators. She had no information or insight into appellant' s state of mind at the time of the crime. (R 1937-1938).

tightly around her neck. Mrs. Ross was then raped and strangled. Appellant's reliance on Kramer v. State, 619 So. 2d 274 (Fla. 1993) and Jackson v. State, 575 So. 2d 181 (Fla. 1991). are misplaced. This is not the result of a struggle between two drunken people, nor is it a robbery gone bad, where the identity of the "shooter" is not know. Jackson. Wilding broke into the home of Marsha Ross with the intent to sexually assault her. He beat her, raped her and strangled her while she was helplessly tied up. The death sentence is proportionate in the instant case. Quince v. State, 414 So. 2d 185 (Fla. 1982); Kight v. State, 512 So. 2d 922 (Fla. 1987); Davis v. State, 648 So. 2d 107 (Fla. 1994).

ISSUE XVIII

THE TRIAL COURT PROPERLY SUSTAINED THE STATE'S OBJECTION TO APPELLANT'S ARGUMENT THAT THERE IS AN INITIAL PRESUMPTION OF LIFE.

Appellant asserts that the trial court erred in sustaining the state's objection to a portion of his penalty phase closing argument. The court ruled in favor of the state because appellant's argument was a misstatement of the law. (R 2046). A review of the record reveals that the trial court's ruling was proper.

During closing argument, appellant was emphasizing the difference in the burden of proof attached to the aggravating and the mitigating factors:

> DEFENSE COUNSEL: Now, the difference in these burdens initially should go to show you that the law in a way has a presumption for life, not for death--
>
> PROSECUTOR: Judge, I'm going to object. That's a misstatement of the law.
>
> DEFENSE COUNSEL: because the burdens are so different.
>
> THE COURT: Sustain the objection.

(R 2046). As illustrated above, defense counsel was trying to persuade the jury that given the disparity in the burdens of proof, one can argue that there is a presumption of life. Attempting to create such an inference for argument sake, does not translate into a correct statement of the law. The standard jury instructions do not include a reference or acknowledgment of any such presumption. This Court has repeatedly rejected a challenges to the standard jury instructions. Robinson v. State, 574 So. 2d 108, 113 (Fla. 1991). This Court has recognized and approved

Florida's death penalty statute and the instructions because they "set out a clear and objective standard for channeling the jury's discretion. Dougan v. State, 595 So. 2d 1, 4 (Fla. 1992). Finally even if the trial court erred in sustaining the state's objection, any error was harmless given that the jury was properly instructed. (R 2069-2074). No relief is warranted.

ISSUE XIX

THE TRIAL COURT'S REJECTION OF APPELLANT'S ALLEGED DRUG ABUSE AS MITIGATING EVIDENCE WAS PROPER.

Appellant states that the trial court erroneously rejected as mitigating evidence, his alleged history of drug abuse. He complains that the trial court used the wrong standard in rejecting his drug abuse as mitigation. He further contend that the trial court's determination amounts to a finding, as a matter of law, that drug abuse is not mitigating in nature unless it is directly connected to the crime. Also it is alleged that the trial court impermissibly rejected as mitigating evidence, appellant's alleged drug use on the day of the murder. Appellant misinterprets the court's order.

Appellant correctly argues that a history of drug abuse does not necessarily have to be directly related to the crime itself in order to be considered relevant mitigating evidence. Mental mitigation or impairment is relevant if it has some bearing on the crime or on the defendant's character. Walls v. State, 641 So. 2d 381, 389 (Fla. 1994). "Evidence is mitigating if, in fairness or in the totality of the defendant's life or character, it may be considered as extenuating or reducing the degree of moral culpability for the crime committed". Rogers v. State, 511 So. 2d 526, 534 (Fla. 1987), cert. denied, 484 U.S. 1020, 109 S.Ct. 733, 98 L. Ed. 2d 681 (1988). With these principles in mind, the record demonstrates that appellant failed to establish that his drug use should be viewed as evidence which would in some way reduce his culpability. With respect to appellant's drug use, the trial court found:

> The only evidence of the defendant's drug use came from statements he made to Dr. Hicks. The defendant told Hicks that he smoked marijuana regularly. Dr. Hicks testified that marijuana in combination with other drugs could cause problems. There was no testimony that the defendant used other

> drugs or that his marijuana use affected his activities of daily living. In fact the evidence showed that whatever the level of the defendant's marijuana usage it did not interfere with his ability to work. There is no evidence that the defendant's marijuana use had any particular effect on his personality or how he acted. The court recognizes that drug use may be considered as a non-statutory mitigating circumstance however in this case there is no connection between the defendant's use of marijuana and his actions in committing this murder.

(R 544). The trial court's refusal to find any meaningful connection between Wilding's drug use and his general character or circumstances of the crime was proper.[16]

As noted by the trial court, Dr. Hicks was the only witness to testify regarding appellant's drug use. Dr. Hicks, is a licensed psychologist who practices in the area of marriage and family therapy. (R 1902). She has no background in clinical psychology, chemical addiction or the affect it would have on the brain. (R 1915-1916). Nor has she ever interviewed a convicted killer before. (R 1935).

Dr. Hicks interviewed appellant for four hours but did not conduct any tests. (R 1905). She conceded that very little of her interview with appellant was devoted to the facts on the night of the murder, (R 1914), consequently that she knew very little about the facts of the crime. (R 1930-1933). The data from which her opinion is based, comes mostly from appellant and his mother. (R 1933-1934). The sum and substance of what appellant told her about his drug abuse is that he smoked marijuana regularly and he smoked on the day of the murder. He also told her that

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Hicks conceded that she had no information regarding any of the statutory mental mitigators, consequently there was no evidence presented with respect to the effect of marijuana on appellant on the day of the murder. (R 1937-1938).

there had to be some other substance in the marijuana because it made his tongue numb and at some point he blacked out. (R 1914). Based on this information Hicks offered the following opinion:

> But when I talked to Neil, he said that he smoked marijuana regularly and that it was not addictive.Marijuana is addictive. It is an addictive drug. And the major effects of just marijuana would be to contribute to a kind of lack of motivation. If marijuana mellows you out, it also mellows out a lot of good things as well as lot of unfortunate things. And that in combination with other drugs could have almost any affect that you'd care to mention.

(R 1916). In response to a question regarding Wilding's drug use as an adolescence., Dr. Hicksopined:

> Primarily for the same reason that I've just said, that if in early adolescence you begin to use drugs, then you don't do the kind of things that you need to do to grow up. You don't establish a sense of identity, you don't establish a sense of community, you don't establish a lot of things, because a lot of the time you're on drugs. And so I don't know that I know how old he was when he first began to use drugs, but it would certainly interfere. Any time an adolescent uses drugs it interferes with their developmental behavior.

(R 1917). Although appellant characterizes his drug consumption as drug abuse, Hicks apparently did not find any long term damage or debilitating effects. To the contrary she stated:

> My final conclusion on the basis of the data that I had was that his potential for rehabilitation was very high. Though he was a C, D student, he has the potential to be a much better student than that. He has a lot of good qualities in terms of care and compassion. Everybody that apparently knows him talks about his concern for other people. He has a number of skills. He talked about his mechanical skills, he talked about his artistic skills. He talked about his spatial skills.

(R 1919). In support of his attack on the judge's findings, appellant relies on several cases which recognize as relevant mitigating evidence, a history of drug abuse. In Scott v. State, 603 So. 2d 1275, 1277 (Fla. 1994) there was evidence presented of brain damage, borderline intelligence,

mental impairment and long term drug and alcohol abuse. In Parker v. State, 643 So. 2d 1032 (Fla. 1994) there was testimony from both defense and state witnesses regarding appellant's consumption of a large amount of alcohol and drugs, including LSD on the day of the crime. In Caruso v. State, 645 So. 2d 389 (Fla. 1994), there was evidence of defendant's three hospitalizations for drug overdoses as well as evidence of prior suicide attempts. A psychologist testified that the violent nature of the murders indicated that they were committed by someone under the effects of profound drug use. Id. As already noted the state is aware of the fact that a history of drug abuse does not necessarily have to be connected to the facts of the crime itself in order to be considered mitigating. Unlike the cases mentioned above however, nothing was presented in the instant case that would offer any insight to appellant's drug use and how it relates to his character or background. It is clear that whatever affect appellant's drug use had on his development it was not compelling. Hicks emphasized that appellant possessed a great deal potential for rehabilitation. Given the total lack of any relevant connection to either appellant's character or the circumstances of the crime, the trial court did not abuse its discretion in failing to give this alleged mitigation any weight. A general opinion that marijuana impedes development and inhibits motivation is not compelling mitigating evidence. Jones v. State, 608 So. 2d 4, 13 (Fla. 1992)(whether voluntary intoxication is mitigating evidence depends on the facts of the case); Sochor v. State, 619 So. 2d 285, 293 (Fla.)(within trial court's discretion to determine whether family or personal history establishes a mitigating circumstance), cert. denied, __ U.S.__, 114 S.Ct. 638, 126 L. Ed. 2d 596 (1993); Jones v. State, 652 So. 2d 346, 352 (Fla. 1993)(trial court need not speculate as to mitigation that is not apparent from the record); Bruno v. State, 574 So. 2d 76, 83 (Fla.1991)(trial court has discretion to reject expert testimony regarding mitigation when the facts demonstrate a contrary result).

ISSUE XX

APPELLANT WAS NOT DENIED DUE PROCESS AS THERE IS NO EVIDENCE TO INDICATE THAT THE JUDGE RELIED UPON ANY NONSTATUTORY AGGRAVATING INFORMATION

Appellant claims that the trial court's receipt of petitions and letters urging that the court to impose death, amounted to ex parte nonstatutory aggravating factors. Many of the letters were from relatives of Ms. Ross. Appellant assumes that mere receipt of this information proves that the trial court considered the information in making its sentencing determination. Appellant is in error. The jury's recommendation was received on September 10, 1992. (R 539). Sometime after, that the judge received several letters from various family members and the community at large. (SR 23-47). The record shows that appellant was aware that the court received this information. The trial court made a notation on each separate piece of correspondence that a copy of same was sent to both the prosecution and the defense. Several days later on October 1, 1992, the court gave both sides an opportunity to present further argument. (R 51-80, 539). The state mentioned that all parties were in receipt of those letters. (R 62). Appellant had the opportunity to raise any concern or question regarding those letters on that day. He chose not to. The court then held the sentencing hearing on October 4, 1992. (R81-95, 539). Appellant was provided with a second opportunity to raise any objection or concern at that time. Again he remained silent. (R 81-95). Review is now precluded. Gunsby v. State, 574 So. 2d 1085, 1088 (Fla. 1991)(failure to object to the trial court's procedure for excusing jurors at trial precludes review on appeal); Watts v. State, 593 So. 2d 198, 202 (Fla. 1992)(failure to bring to trial court's attention its failure to comply with a statutory requirement bars review on appeal); Pope v. Stat, 441 So. 2d 1073, 1076 (Fla. 1983)(failure to question sufficiency

of state's assertion regarding unavailability of a witness at a time when the state could have presented additional evidence forecloses inquiry now); Brown v. State, 596 So. 2d 1026, 1028 (Fla. 1992)(failure to timely object at trial to improper victim impact precludes review on appeal).

As for the merits, appellant has not established that any ex parte communications occurred. As noted above, the trial court forwarded whatever correspondence he had received to both the state and the defense. (SR 23-48). Simply because a judge receives letters from the community at large or from a victim's family does mean that the court is participating in any ex parte communications. An ex parte communication involves any conversation between the judge and only one of the parties. Rose v. State, 601 So. 2d 1181, 1183 (Fla. 1992). Letter or petitions from the community at large or the victim's family do not fall into that category.

Furthermore, appellant cannot demonstrate that the trial court relied upon any information he received from Ms. Ross' family. The judge' sentencing order explicitly outlined the information that was considered in the sentencing determination and the weight given to that evidence.(R 81-95, 539-545). There is nothing in the record to indicate that the court considered any impermissible victim impact information. This Court has previously stated:

> Judges are routinely exposed to inadmissible or irrelevant evidence but are disciplined by the demands of the office to block out information which is not relevant to the matter at hand.

Grossman v. State, 525 So. 2d 833, 846 n. 9 (Fla. 1988), cert. denied, 489 U.S. 1071, 109 S.Ct. 1354, 103 L. Ed. 2d 822 (1989); Mann v. State, 603 So. 2d 1141, 144 (Fla. 1992); Davis v. State, 586 So. 2d 1038, 1040-1041 (Fla. 1991).

ISSUE XXI

THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S OBJECTION TO THE JURY INSTRUCTION ON SEXUAL BATTERY

Appellant claims that the trial court erred in denying his request to modify the standard jury instruction for one of the applicable aggravating factors. Appellant was convicted of sexual battery as well as first degree murder. Consequently, the jury was instructed regarding the aggravating factor of committed during the course of a sexual battery[17] . Over appellant's objection, the trial court instructed the jury as follows:

> First, that the crime for which the Defendant is to be sentenced was committed while he was engaged in the commission of the crime or crimes of sexual battery and/or burglary.
>
> I now instruct you that sexual battery is defined as oral, anal, or vaginal penetration by or union with the sexual organ of another, or the anal, oral, or vaginal penetration of another by any other object, perpetrated on a person twelve years of age or older and without the person's consent.

(R 2070). Appellant argues that the jury should not have been instructed on the theory of sexual battery by oral or anal penetration. Given the lack of evidence of either theory, the jury would be confused or mislead by the standard instruction. The trial court ruled that the standard instruction correctly stated the law and denied the request. (R 1970). Appellant has failed to demonstrate that the trial court's ruling was erroneous. Guzman v. State, 644 So. 2d 999 (Fla. 1994)(standard jury instructions are presumed to be correct). Relying on O'Brien v. State, 206 So. 2d 217 (Fla. 2d DCA 1968)(other grounds receded from 376 So. 2d 1026), appellant presumes that the jury would be

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[17] 921.141 (5)(d).

mislead by the instruction. Appellant is in error. In O'Brien, the defendant was charged with buying stolen property. Over the defendant's objection, the jury received an instruction regarding possession of the stolen property. If the defendant had been in possession of the property, the jury was permitted to presume that the defendant knew that the property was stolen. The facts indicated without question that the defendant had never been in possession of the property. Consequently the instruction was completely inapplicable to the facts of the case and would tend to cause juror confusion. O'Brien, 217 So. 2d at 220. In the instant case, the jury was instructed regarding the felony murder aggravator and the specific underlying felony applicable to this murder. There is no question that sexual battery was applicable to the facts of the instant case. As noted above, appellant had been convicted of sexual battery. The jury was instructed that sexual battery may include any one of three different factual theories (R 2070). The evidence presented at trial related solely to one of the three theories. There was absolutely no question that the circumstances surrounding the sexual battery of Ms. Ross involved only vaginal penetration. (R 1772-1775, 1781, 1792-1797). The opening and closing arguments of the state and the defense centered solely on that fact. (R 1671, 2029, 2035-2036, 2048-2049). Juror error/confusion cannot be presumed. A jury is likely to disregard an option unsupported by the record. Sochor v. Florida, 504 U.S. __, 119 L. Ed. 2d 326, 340, 114 S.Ct 2114. (1992); Occhicone v. State, 618 So. 2d 730 (Fla. 1993). There is no evidence to even suggest that this jury was or even could be confused regarding what was required to find the existence of this factor. This claim is without merit.

ISSUE XXII

THE TRIAL COURT DID NOT GIVE UNDUE WEIGHT TO THE JURY'S DEATH RECOMMENDATION

Appellant alleges that the trial court gave undue weight to the jury's death recommendation. The factual predicate for this allegation is a jury instruction given by the judge during voir dire and penalty phase. The court told the jury that "it was only under rare circumstances that the court would impose a sentence other than what they recommended." Relying on Ross v. State, 386 So. 2d 1191 (Fla. 1980), appellant claims that reversal is required. In Ross the trial court felt bound by the jury's recommendation. This Court determined that the sentencing order reflected a lack of any independent weighing of the factors. Id. Although this issue does not include a specific challenge regarding the instruction, the trial court's reading of the instruction forms the sole basis for appellant's claim against the trial court. As presented this claim is unpreserved, invited error ,and without merit. First of all appellant never objected to the giving of the instruction, consequently review is precluded. (R 1538, 2069). Watson v. State, 651 So. 2d 1159, 1164 (Fla. 1994)(failure to object to instruction or failure to submit alternative instruction renders issue waived for appellate review). More to the point, appellant requested that the jury be given the instruction:

> COURT: Does the Defense object to the proposed instruction I'm giving?
>
> DEFENSE ATTORNEY: Judge, in light of the additions that the Court's added, we have no objections to the additions that the Court has added. I guess the only objection would be that it didn't add everything in our requested first paragraph after the evidence. Inasmuch as the statement of -- excuse me, Your Honor. I'm sorry. We don't have an objection to that as far as the Court's additions. And I think it sufficiently states what we had requested, though in a

> briefer version. in our initial paragraph. So as to that initial paragraph after the evidence, we don't have any objections to the Court's reading of the particular instruction.

(R 1968-1969).

Given the fact that appellant requested the very instruction upon which he is now relying to demonstrate error , review should be denied.[18] Pope v. State, 441 So. 2d 1073, 1076 (Fla. 1983). (R 121-122, 201). A review of the sentencing order dispels any notion that the trial court gave any undue weight the jury's recommendation. The sentencing order contains detailed factual findings regarding each aggravator and mitigator. (R 539-545). The court specifically listed each category of non-statutory mitigators and discussed the findings for each one. (R 542-544). Prior to imposition of the death sentence the court stated:

> The court has very carefully considered and weighed the aggravating and mitigating circumstances found to exist in this case. The court finds as did the jury, that the aggravating circumstances present in this case outweigh the mitigating circumstances.

(R 545). The trial court's order clearly indicates that the court understood its role and did undertake an independent weighing of all of the factors. In Floyd v. State, 569 So. 2d 1225, 1233 (Fla. 1990), this Court rejected a claim that the trial court misapprehended its role in considering mitigating evidence. The Court, relying on the fact that the sentencing order specifically addressed each of the mitigators coupled with a statement that it had considered all the evidence presented, determined that the court properly weighed all the evidence. Floyd, 569 So. 2d at 1233. The

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[18]In an attempt to further emphasize the jury's role, appellant unsuccessfully sought to preclude any reference to the fact that the jury's role was advisory. (R 121-122, 201).

sentencing order in the instant case clearly demonstrates that the trial court conducted an independent weighing of the circumstances before imposing sentence.

ISSUE XXIII

APPELLANTS CHALLENGE TO THE JURY INSTRUCTION REGARDING "HEINOUS, ATROCIOUS AND CRUEL" IS PROCEDURALLY BARRED, IN THE ALTERNATIVE IT IS WITHOUT MERIT

Appellant alleges that the trial court erred when it denied his requested jury instruction regarding the "HAC" factor. At trial , appellant proposed a jury instruction based on this Court's opinion in Bonifay v. State, 626 So. 2d 1310 (Fla. 1993). The state argued that the Court should not deviate from the standard instruction approved by this Court in light of Espinosa v. Florida, 112 S.Ct. 2926 (1992). (R 1979-1981). The state pointed out that Bonifay did not address the propriety of the "HAC" instruction. The concern in Bonifay, centered on the applicability of the factor to that case and the sufficiency of the evidence to establish the factor. The holding of Bonifay, addresses the requirement that there must be evidence of the murderer's intention to torture the victim in a specific way. Appellant's proposed instruction reflects that holding. (R 497).

On appeal, appellant raises two totally different challenges to the instruction than that which was raised before the trial court. As presented, appellant's argument is procedurally barred. Occichone v. State, 570 So. 2d 902, 906 (Fla. 1990)(issue waived for appellate review when specific legal raised on appeal is different from argument raised at trial).. On appeal , appellant claims that the instruction failed to define the term "atrocious". This argument was not presented to the trial court[19]. The second argument now raised is that, the instruction does not limit the type

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Although appellant now complains that the instruction given did not include a definition of the term "atrocious", the proposed jury instruction presented by Wilding also failed to include a definition of the term. Furthermore, the proposed instruction did not define "heinous" or "cruel".(R 497).

of murder to be included in this factor. Specifically appellant objects to the term, "the kind of crime intended to be included". He claims that it implies that there exits other types of crimes that would be included other than those which are conscious less or pitiless, or unnecessarily tortuous to the victim. This argument was never raised below, consequently, review is precluded. Occhicone.

The new standard instruction has been approved by this Court on numerous occasions.. Hall v. State, 614 So. 2d 473, 478 (Fla. 1993). In the instant case, the standard instruction was given to the jury however, the jury was not instructed regarding the definition of the term "atrocious". The state asserts that even without being advised that "atrocious" means wicked or vile, the jury was still properly instructed. Application of this factor has been limited to those murders which can be described as"conscienceless or pitiless crime which is unnecessarily tortuous to the victim." Sochor v. Florida, 112 S.Ct. 2114 (1992). This jury was instructed in those terms. (R2070-2071). Given that the jury was aware of the limitation regarding application of this factor, there was no error.

To the extent that there was error in failing to include the words "outrageously wicked and vile" any error must be considered harmless.Thompson v. State, 619 So. 2d 261 (Fla. 1993); Slawson v. State, 619 So. 2d 259 (Fla. 1993)(insufficient instruction harmless error where murder was heinous, atrocious or cruel under any definition of those terms). As noted in another section of this brief, there was more than sufficient evidence to establish that this murder was "heinous, atrocious and cruel". Sochor v. State, 619 So. 2d 285 (Fla. 1993).

ISSUE XXIV

THE TRIAL COURT PROPERLY DENIED APPELLANT'S REQUEST TO DELETE THE WORDS "EXTREME" AND "SUBSTANTIAL" FROM THE STATUTORY MITIGATING FACTORS

Appellant claims that the trial court erred in failing to delete the modifiers "extreme" and "substantial" from the statutory mitigating factors. Appellant claims that the modifiers impermissibly restrict the jury's consideration of unrebutted mitigating evidence. The trial court's ruling was correct. This Court has repeatedly upheld the trial court's denial of similar requests. Stewart v. State, 558 So. 2d 416, 420 (Fla. 1990); Walls v. State, 641 So. 2d 381, 389 (Fla. 1994); Jones v. State, 652 So. 2d 346, 351 (Fla. 1995)

In support of this position, appellant relies on Chesire v. State, 568 So. 2d 908 (Fla. 1990). Reliance on Chesire is misplaced. In Chesire this Court was concerned with the trial court's refusal to consider nonstatutory mitigating evidence. Id. .There is no such concern in the instant case. The jury was properly instructed regarding nonstatutory mitigating factors. (R 2017). The trial court listed the nonstatutory mitigators in the sentencing order.(R 545). There is no error. Johnson v. State, 20 Fla. L. Weekly S343 (Fla. July 13, 1995; .Jones.

ISSUE XXV

THE TRIAL COURT PROPERLY FILED A WRITTEN SENTENCING ORDER CONTEMPORANEOUSLY WITH ORAL PRONOUNCEMENT OF APPELLANT'S SENTENCE.

Appellant alleges that the trial judge failed to file a written sentencing order contemporaneously with the oral pronouncement of sentence. This alleged failure by the sentencing court, requires imposition of a life sentence. Grossman v. State, 525 So. 2d 833 (Fla. 1988). As factual support for this claim, appellant relies on a stamped date of October 7, 1993 , which appears on the sentencing order. It is clear from the record that sentencing occurred on October 4, 1993. (R 545, 95). Pursuant to a motion field by the state, this Court relinquished jurisdiction in order to explain the confusion over the two dates. (SR 90-94). What was clear before the relinquishment is the following; Judge Kanarek was well aware of the requirement that the sentencing order must be filed contemporaneously with the oral pronouncement of the sentence. (R 2081, 78-79, 85, 95). Three separate hearings in connection with sentencing were held; the penalty phase before the jury was held on September 7-10, 1993; additional arguments were heard on October 1, 1993; and pronouncement of sentence was held on October 4, 1993. (R 85). The trial court read the sentencing order into the record on October 4, 1993. He then stated that he was filing the written order in open court at that time. He provided copies of his order to counsel at that time. (R 95).

Pursuant to relinquishment, the trial court held a hearing. The state presented the testimony of, Kim Durell, the clerk of the court who was assigned to this case. She testified that Judge Karanek handed the sentencing order to her in open court for filing. (SR 111-114). She did not stamp the order with that date of October 4th. She testified that it was standard procedure not to stamp the date on the document at the time it is filed in open court because the judge had already

affixed the date along with his signature at the end of the document. (SR 114, 115). Right after court, Ms. Durell took the document to the clerk's office. (R114). The date of October 7th was the date the document was recorded. Recording is a separate from filing. This document was fled on October 4, 1993. (SR 115). Appellant did not cross-examine the witness. No other testimony was presented. The trial court made the following factual findings:

> COURT: Well, based on the undisputed evidence presented here, the Court finds that this Defendant, Mr. Wilding, was sentenced by the Court on October the 4th, 1993; that immediately following his sentence in open court the Judge handed the sentencing order which had been read from to the clerk to be filed in open court. The clerk then took that document that was given, handed to the clerk in open court, the clerk accepted that document into the record at that time, and then at some later date it was recorded, which was the date of October 7th, in the recording department.

(SR 117). The record clearly shows that the sentencing judge complied with the requirements of Grossman. It is clear that the sentencing decision was made after thoughtful reflection and it was based on reasoned judgement. This order was prepared prior to oral pronouncement, and well after the court held two sentencing hearings. Appellant's attempt to create error must fail. The record belies any claim that the written order was not filed contemporaneously with oral pronouncement. The fact that the standard operating procedure of the clerk's office is to rely on the date already affixed to the document for purposes of filing in no way undermines or calls into question the integrity of the judge's sentencing determination. Appellant's attempt to elevate form over substance must be rejected.

ISSUE XXVI

APPELLANT WAS NOT DENIED DUE PROCESS AS THE STATE DID NOT IMPERMISSIBLY PRESENT ITS VERSION OF GUILT AT THE PENALTY PHASE BEFORE A NEW SENTENCING JURY

Appellant claims that the state was allowed to present its version of his guilt at sentencing even though the trial court would not allow appellant to present his version. Prior to the sentencing phase before a new jury, the state filed a motion in limine, in an attempt to preclude the defense from arguing lingering doubt. (R1319, 1334). Appellant conceded that the law prevented such a presentation in the name of mitigating evidence:

> DEFENSE ATTORNEY: But in light of the statements in those cases I'd like to ask the Court if they'd limit the State in terms of possible any repetitive evidence by numerous police officers, in light of the statements that were made in some of the cases cited.
> Also, we would just like to not have, you know, the repetitive evidence, but just purely for unduly prejudicial effect in terms of testimony solely relating to the aggravating circumstances. I don't know how many officers or ID techs the State intends to recall. But we just want to make that statement at this time.
> But we don't have any problem limiting any of our testimony or evidence to what is allowed by the case law.

(R 1319). During the testimony of Officer DeVencenzo, appellant objected to the state's presentation of evidence as it related to guilt. (R 1722-1729). The state argued that the jury was entitled to hear how appellant became a suspect. The state has a right to show the jury what this man did before they recommend an appropriate sentence. (R 1726). The trial court overruled the objection and allowed the state to proceed. (R 1729). On appeal appellant fails to identify any specific evidence that was improperly admitted. A review of the evidence presented by the state, demonstrates that the trial court's ruling was proper.

Since this jury must make a sentencing determination, they are entitled to listen to the underlying facts of the case. The admission of evidence is within the trial court's discretion. Provided the evidence is relevant and appellant is afforded a fair opportunity to rebut hearsay, evidence of the underlying facts are admissible. Teffeteller v. State, 495 So. 2d 744 (Fla. 1986). Chandler v. State, 534 So. 2d 701 (Fla. 1988); state that the trial court abused his discretion. Furthermore, he fails to cite to any specific testimony that was unduly prejudicial.

The state presented the testimony of three police officers who were involved in the investigation. Ms. Ross' mother also briefly testified. All four witnesses testified about the general facts of the crime. All the witnesses were subject to appellant's cross-examination. The state also presented the testimony of the medical examiner and Mr. Nippes, the DNA expert. (R 1676-1819). Again, appellant had the ability to cross-examine the witnesses. Appellant has failed to establish that admission of testimony regarding the underlying facts was error. Chandler v. State, 534 So. 2d 701, 703 (Fla. 1988); Valle v. State, 581 So. 2d 40, 45 (Fla. 1991).

ISSUE XXVII

THE TRIAL COURT DID NOT ERR IN ALLOWING ADMISSION OF HEARSAY AT THE PENALTY PHASE

Appellant claims that the trial court erred in allowing Officer Devecenzo to repeat the results of DNA testing preformed by Life Codes laboratory. The officer made an isolated reference to the fact that semen found at the crime scene was linked to appellant. (R 1736). Appellant objected, but the trial court found the testimony admissible. (R 1736). Relying on Rhodes v. State, 547 So. 2d 1201, 1204 (Fla. 1989) appellant claims, that the ruling was erroneous. As noted by this Court on may occasions, evidence excluded at the guilt phase is often times admissible at the penalty phase. Hodges v. State, 595 So. 2d 929, 933 (Fla. 1993). Devencenzo was available for cross-examination, consequently his testimony was admissible. Clark v. State, 613 So. 2d 412, 415 (Fla. 1992). However if admission of the officer's statement regarding DNA tests results was erroneous, any error must be considered harmless. Dan Nippes, who conducted the DNA testing for the state regional crime, testified at the penalty phase (R 1801-1811, 1817). Appellant was afforded the opportunity to cross-examine Nippes regarding his testing procedures, consequently any error must be considered harmless. Clark.

ISSUE XXVIII

FLORIDA'S FELONY MURDER AGGRAVATING FACTOR IS CONSTITUTIONAL ON ITS FACE AND AS APPLIED.

Appellant claims that the aggravating factor ,921.141 (5)(d) is unconstitutional on its face and as applied. Appellant claims that this aggravator does not narrow the class of people eligible for the death penalty. Appellant's argument has been repeatedly rejected by this Court and the United States Supreme Court. Loewnfied v. Phelps, 484 U.S. 231, 108 S.Ct. 546, 98 L. Ed. 2d 568 (1988); Jones v. State, 648 So. 2d 669 (Fla. 1994); Stewart v. State, 588 So. 2d 972 (Fla. 1991); Engle v. State, 576 So. 2d 696 (Fla. 1991); Johnson v. State, 20 Fla. L. Weekly S345 (Fla. July 13, 1995).

ISSUE XXIX

THE TRIAL COURT PROPERLY DENIED APPELLANT'S REQUEST FOR SPECIAL INSTRUCTIONS RELATING TO EACH NONSTATUTORY MITIGATING FACTOR.

Appellant claims that the trial court erred in denying his request for individual jury instructions regarding each nonstatutory mitigator. The trial court properly denied appellant's. request. The standard instruction applicable to nonstatutory mitigators sufficiently instructs the jury regarding what may be considered in reaching their recommendation. Jones v. State, 612 So. 2d 1370 (Fla. 1992); Robinson v. State, 574 So. 2d 108 (Fla. 1992); Finney v. State, 20 Fla. L. Weekly S400 (Fla. July 20, 1995); Jones v. State, 652 So. 2d 346 (Fla. 1995). Appellant presented evidence at the penalty phase and argued the applicability of nonstatutory .mitigators. (R 2054-2065). The jury was properly instructed regarding nonstatutory mitigation. (R 2071).

ISSUE XXX

THE TRIAL COURT PROPERLY DENIED APPELLANT'S REQUESTED INSTRUCTION THAT A FINDING OF MITIGATION NEED NOT BE UNANIMOUS

Appellant claims that the trial court should have instructed the jury that their findings as to mitigation need not be unanimous. The standard instructions adequately inform the jury regarding what is required in the weighing process. The trial judge properly rejected the instruction. Waterhouse v. State, 596 So. 2d 1008 (Fla. 1992).

ISSUE XXXI

THE AGGRAVATING FACTORS FOUND TO EXIST IN THE INSTANT CASE ARE CONSTITUTIONALLY SOUND

Appellant claims that the aggravating factors found to exist in the instant case do not serve the limiting function that is constitutionally required.[20] As documented in another section of this brief, there was sufficient evidence to establish the existence of both aggravators. This Court has repeatedly upheld the constitutionality of Florida's sentencing statute as well as the constitutionality of the specific factors applicable in this case. Johnson v. State, 612 So. 2d 575 (Fla. 1993); Gamble v. State, 20 Fla. L. Weekly S242 (Fla. May 25, 1995); Thompson v. State, 619 So. 2d 261, 267 (Fla. 1993); Walls v. State, 641 So. 2d 381, 389 (Fla. 1994); Sochor v. Florida, 504 U.S. __, 119 L. Ed. 2d 326, 112 S. Ct. 2114 (1992); Lowenfied v. Phelps, 484 U.S. 231 (1988); Stewart v. State, 588 So. 2d 972 (Fla. 1991).

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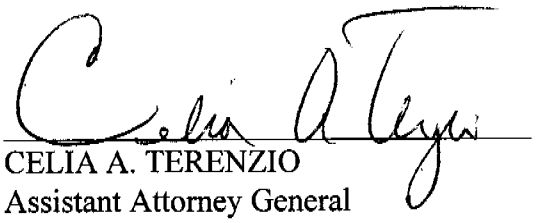
[20] The aggravating factors found in the instant case are; the capital felony was committed during the course of a felony, 921.141 (5)(d) and the capital felony was heinous, atrocious and cruel, 921.141 (5)(h).

CONCLUSION

Based on the foregoing arguments and authorities, the State respectfully requests that this Honorable Court affirm Appellant's conviction and sentence of death.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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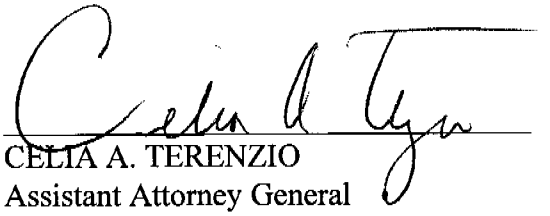
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Jeffrey L. Anderson, Assistant Public Defender, Criminal Justice Building, 421 Third Street, Sixth Floor, West Palm Beach, Florida 33401, this 30th day of October, 1995.



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