IN THE SUPREME COURT OF FLORIDA

KENNETH M. TERRY,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 83,002

ON APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR VOLUSIA COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

BARBARA J. YATES
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 293237

DEPARTMENT OF LEGAL AFFAIRS
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(904) 488-0600

COUNSEL FOR APPELLEE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES — PAGES

STATUTES AND RULES PAGES

STATEMENT OF THE CASE AND FACTS

Contrary to Terry's blunt statement, the "only undisputed fact in this case" is not "that Mrs. Joelle Franco died on July 14, 1992 from a bullet wound to the head." (Initial Brief at 9). The state, therefore, sets out the following short statement regarding what the state proved and what happened at trial.

The Daytona Beach Police Department responded to a murder/robbery complaint at the Francos' Mobil station shortly before 2:00 a.m. on July 14, 1992. (T 861).[1] The police found a white mask/cap with "Down with O.P.P." on it in the station's office (T 865) and a red mask/cap two blocks from the scene. (T 856-58). A green and white plastic bag with the words "Foot Action" printed on it was also found at the scene. (T 878). The surviving victim testified that two armed black men committed the crimes. (T 826-34).

After Terry and his companion, Demon Floyd, committed another armed robbery, the brother-in-law of Floyd and of Terry's girlfriend told the police about their involvement in a series of armed robberies. (E.g., R 273-74). On the basis of the brother-in-law's information the police arrested Terry and Floyd and obtained a warrant to search Terry's apartment. (R 52, 276). During the search, the police seized numerous items, including a mask/cap similar to those connected to the instant crimes, an inoperable .25 caliber handgun, and an operable .38 caliber

---

[1] "R" refers to the record on appeal, pages 1-1337, volumes 1-8. "T" refers to the transcript of the trial, pages 1-2110, volumes 10-22. Volume 9 contains numerous depositions. "SR" refers to the two volumes of supplemental record.

handgun. (R 258). Testing proved that the fatal shot came from the .38 caliber weapon. (T 1436).

Demon Floyd confessed after being arrested. He told the police that he and Terry were riding around looking for places to rob and that Terry had the guns and masks in a green and white "Foot Action" bag. (T 1011-12). Floyd wore the red mask at the Mobil station and had the .25 caliber handgun (T 1012-13), and Terry wore the white "O.P.P." mask and used the .38 caliber handgun. (T 1012-13, 1017). Floyd held Mr. Franco in the garage while Terry went to the office to rob Mrs. Franco. (T 1019).

The police seized Terry's shoes after arresting him. (T 1121). Testing showed that blood on those shoes matched the victim's. (T 1494-1500).

The state charged Terry with first-degree murder, armed robbery, and being a principal to aggravated assault (R 107-08, 790), and the jury convicted him as charged. (R 582, 798). Following the presentation of witnesses and argument in the penalty phase, the jury recommended that Terry be sentenced to death. (R 706). The trial judge found that the prior violent felony aggravator had been established and also merged the felony murder (robbery) and pecuniary gain aggravators for a total of two aggravators. (R 748-50). The judge found that Terry had established no mitigators and sentenced him to death. (R 750-53).

SUMMARY OF ARGUMENT

Issue 1: There is no merit to Terry's argument that the trial court erred in denying his motion to suppress items seized pursuant to a search warrant. The trial court correctly held that, after excising an erroneous statement from the warrant affidavit, sufficient facts remained to demonstrate probable cause for issuing the search warrant. Terry has shown no error in the trial court's ruling.

Issue 2: The state showed probable cause to support its request for a sample of Terry's blood. Terry has demonstrated no error in the trial court's granting that request.

Issue 3: While FDLE analysts' reports are discoverable before trial, the notes from which those reports are prepared are not. The trial court did not err in denying Terry access to such notes.

Issue 4: There is no merit to Terry's claim that the trial court erred in allowing the medical examiner to express his opinion on the position of the victim when she was shot. The medical examiner was qualified to express such an opinion, and the trial court correctly held this to be a credibility issue for the jury.

Issue 5: Terry has shown no reversible error in the trial court's refusal to grant a mistrial after a defense witness inadvertently mentioned that Terry was a suspect in other robberies. Any error was invited by the defense, and the comment was a fair response to a question asked by the defense.

Issue 6: Terry had no standing to raise his codefendant's personal claims, and the trial court did not err in denying his

suggestion of conflict regarding his codefendant's representation.

Issue 7: Terry did not preserve for appeal his complaint that the trial court erred in allowing his codefendant to testify. There is also no merit to this issue.

Issue 8: The claim that the court erred in allowing his codefendant's impeachment testimony to be used as substantive evidence has not been preserved for appeal. Also, there is no merit to this issue.

Issue 9: Contrary to Terry's assertions, his convictions are supported by competent substantial evidence and should be affirmed.

Issue 10: There is no merit to Terry's argument that the trial court improperly limited his closing argument. When a witness is equally accessible to both parties, one party may not comment on the other's failure to call that witness.

Issue 11: This issue is procedurally barred and also has no merit. It is not error to allow a jury to consider both the felony murder (robbery) and pecuniary gain aggravators where, as here, the jury is given a limiting instruction on the application of those aggravators.

Issue 12: Terry failed to preserve this issue for review, and it also has no merit. When more than one victim is involved, a contemporaneous conviction supports the prior violent felony aggravator. The court did not err in instructing the jury on and in finding the prior violent felony aggravator based on the contemporaneous assault on the murder victim's husband.

Issue 13: Terry argues both that the prior violent felony aggravator is unconstitutional because contemporaneous convictions can be used to establish it and that the instruction on that aggravator is unconstitutional. These claims are procedurally barred.

Issue 14: Terry's claim that the trial court erred in denying his motion for mistrial when the prosecutor referred to the victim's children was not preserved for appellate review. There is also no merit to the claim.

Issue 15: There is no merit to Terry's argument that the trial court improperly limited his penalty-phase argument. The sentences that Terry could receive for his other convictions are irrelevant to the question of whether he should have been sentenced to death.

Issue 16: The trial court considered all of the possible mitigators and did not err in finding that none had been established.

Issue 17: The challenges to the constitutionality of Florida's death penalty statute are waived for lack of argument on appeal. They are also procedurally barred and have no merit.

Issue 18: When set beside other death cases that are truly comparable, it is obvious that Terry's death sentence is both appropriate and proportionate.

ARGUMENT

ISSUE 1

WHETHER THE TRIAL COURT ERRED IN DENYING THE MOTION TO SUPPRESS.

Pursuant to a warrant, the police searched Terry's apartment and seized numerous items. Terry moved to suppress the seized items, but the trial court denied the motion. Now, Terry argues that the court erred in doing so. As the state will show, there is no merit to this issue.

The Daytona Beach Police arrested Terry on July 27, 1992 as a suspect in the armed robbery of two people at a BP Food Mart on July 23, 1992. (R 51). Detective Flynt filed an arrest report on this incident that included the following information:

> On the date of this incident a concerned citizen came to this officer and told me that the Def. [Kenneth Terry] had confessed to him of this robbery. The concerned citizen stated this confession took place approx 8 hours after the event. He described the event in such a manner that the information could only be known to someone involved in this incident. The concerned citizen appeared before Judge Hutcheson on this date and was sworn in and gave his statement before the Judge. Based on this information Judge Hutcheson issued a search warrant for the residence of the Def.

(R 52). On July 28, 1992 Judge R. Michael Hutcheson issued a warrant to search Terry's's apartment under the affidavit of Detective John Ladwig of the Daytona Beach Police Department. (R 276).

Ladwig's affidavit stated that "a concerned citizen who identified himself to the affiant" came to the police department on July 23, 1992 with information about a series of armed robberies. (R 273-74). The affidavit went on to claim that the

> citizen has intimate contact with the suspect(s) mentioned within and has actually viewed evidence, tools, and fruits of the crimes, in addition to being advised of these crimes by at least one of the suspect(s). This concerned citizen has provided the following information in not only the initial contact date of July 23, 1992, but also on meetings with law enforcement on 7/24/92, 7/27/92, and 7/28/92. This citizen has provided crucial information about crimes in the past which has been useful in the solving of crimes and has provided truthful statements in open court concerning the past information provided.

(R 274). The affidavit went on to state that "this citizen has provided details of these crimes not available to the public and in such depth and detail as to assure his credibility and knowledge of these crimes." (R 274). The affidavit then described five armed robberies that the concerned citizen claimed Terry committed: Second Avenue Pawnshop, November 18, 1992; Pearson's Grocery, December 16, 1992; Union 76 gas station, June 27, 1992; Ace Pawn Shop, June 29, 1992; and B & P Food Mart, July 27, 1992. (R 274-76). The affidavit then contained the following statement: "The facts related were such that only someone involved in this event could have known and related them to concerned citizen. This information is contained in the police report and has not been made public." (R 276). An affidavit from the concerned citizen stated that the contents of the affidavit for search warrant were "true as stated." (R 278). Judge Hutcheson wrote on the bottom of that second affidavit: "Both the concerned citizen and this police officer were present and argued the above in my presence," and Detective Leo Ewanik signed that he personally knew the concerned citizen. (R 278).

The police searched Terry's apartment on July 28, 1992 and seized two handguns, an empty magazine, a cap, a plastic bag, a Florida driver's license, and a Florida license plate. (R 258). On January 22, 1993 Terry moved to suppress the seized items and disclosed that the concerned citizen was Audron[2] Butler, the brother-in-law of both Terry's girlfriend, Valerie Floyd, and his codefendant, Demon Floyd. (R 259). The motion to suppress claimed that the affidavit contained information not known by Ladwig personally (R 265) and that the affidavit contained false assertions (R 266), among other contentions. The motion argued that the seized items should be suppressed because Ladwig "misled Judge Hutcheson with information in the affidavit that the affiant either knew was false or would have known was false except for his reckless disregard of the truth." (R 268).

The trial court heard the motion to suppress on March 1, 1993. (SR2 Suppression Hearing at 1).[3] Terry first called Valerie Floyd, who testified that she willingly let the police enter the apartment Terry shared with her. (Id. at 8). She said she refused to give permission to search, but then admitted that the police read the search warrant to her. (Id. at 9-10).

As the second witness, Terry called Detective Ladwig. (Id. at 11). Ladwig stated that he did not know Butler before Butler gave the information for the affidavit and that he ran a records

---

2 Butler's first name is spelled both "Audron" and "Audrin" throughout the record. At the suppression hearing he spelled his name "Audron" (R 874), so the state will use that spelling in this brief.

3 The first part of the suppression hearing is located in the second volume of supplemental record; the second part begins on page 171 of the record.

check on Butler. (Id. at 12-13). He confirmed that Butler had provided information for only one prior case that was solved, a homicide, and did not know if Butler testified in that trial. (Id. at 15-16). Ladwig interviewed Butler several times. (Id. at 20-22). Butler told him that he had seen ski masks the same color as those connected with this crime at Terry's apartment and that Terry had two handguns, one of which was inoperable. (Id. at 23). Butler asked if the woman had been shot with a large or small caliber weapon because Terry's inoperable handgun was a small caliber. (Id. at 23-24). When asked if the dates in the affidavit were correct, Ladwig said it looked like the dates for the first two robberies (Second Avenue Pawnshop and Pearson's Grocery) should have been 1991 rather than 1992. (Id. at 28). Terry questioned Ladwig extensively about what information in the affidavit came from Butler and what came from police reports. (Id. at 35-40). Ladwig could not remember the specific questions Judge Hutcheson asked him and Butler, nor could he remember what other officers were present before the judge. (Id. at 42-43). On cross-examination, Ladwig confirmed that the warrant and affidavit were connected with other armed robberies, not the instant robbery and murder, and that the term "law enforcement" in the affidavit meant himself and other officers. (Id. at 43-44). The state guided Ladwig through the affidavit, separating the information given by Butler from that in the police reports. (Id. at 45-50). Ladwig confirmed that not all the details of the crimes were released to the public. (Id. at 58).

Detective Steve Wright testified that he sat in on an interview with Butler and that Butler thought Terry and Floyd

might be involved in the instant murder and robbery. (Id. at 71-72). Wright was then questioned about what information Butler gave the police and what details they gave him. (Id. at 72-79).

The hearing resumed on March 26, 1993. (R 871). Audron Butler testified about his knowledge of and relationship with Terry. (R 875-77). Butler confirmed that he provided information to the police in another homicide, but that he did not testify in that case. (R 882-83).

Terry argued that Butler's information was the foundation of the affidavit, but that Butler was unreliable. (R 893-95). He also argued that Ladwig's reliance on information he did not know personally resulted in reliance on recklessly false information. (R 895-99). The state argued that, although some errors had been made in the affidavit through negligence, there had been no per se recklessness. (R 899-903). The prosecutor also argued that Butler's information corroborated facts that had not been made public. (R 904-08). Among other things, Terry then argued that the mistakes in Ladwig's affidavit were misrepresentations, not typographical errors. (R 914-15). The judge stated that he would rule after researching the law. (R 917). On May 17, 1993 the court issued a seven-page order denying the motion to suppress. (R 400-06).

Illinois v. Gates, 462 U.S. 213, 238-39, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983), sets out the roles of a magistrate and a reviewing court in determining whether probable cause for a search warrant exists:

> The task of the issuing magistrate is simply to make a practical, common sense decision whether, given all the circumstances set

> forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a "substantial basis for . . . conclud[ing]" that probable cause existed.

(quoting Jones v. United States, 362 U.S. 257, 271, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960)). However, the deference to be given "to a magistrate's finding of probable cause does not preclude inquiry into the knowing or reckless falsity of the affidavit on which that determination was based." United States v. Leon, 468 U.S. 897, 914, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984); Franks v. Delaware, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978). If a knowing or reckless falsity is established, it must be determined if sufficient allegations remain to demonstrate probable cause after the false statement is removed. E.g., Esty v. State, 642 So.2d 1074 (Fla. 1994); Power v. State, 605 So.2d 856 (Fla.), cert. denied, 113 S.Ct. 1863, 123 L.Ed.2d 483 (1992); State v. Panzino, 583 So.2d 1059 (Fla. 5th DCA 1991).

Terry ignores the fact that the trial court applied these principles correctly in denying the motion to suppress. In his order, the trial judge first determined that describing Butler as a "concerned citizen" was not false or misleading. (R 401). Then, because nothing indicated that Butler signed the affidavit to obtain a reward, the court held: "The failure of the affidavit to reveal the possibility of a reward if it indeed was a possibility at the relevant time cannot herein be considered misleading, false, or a reckless disregard for the truth." (R 402). The court also found that the police's failure to ask

Butler about his prior convictions "cannot be herein considered misleading, false, or a reckless disregard of the truth . . . when a records check revealed nothing of relevance." (R 402).

The court found that the affidavit contained one recklessly false statement.

> The affidavit clearly implies that affiant Ladwig had personal knowledge that Butler had provided crucial information and testified in court about other crimes. Such is not the case. Testimony revealed that information was provided in only one case and that there was no in court testimony. . . . The affiant's statement is at least recklessly false. The false information must be excised from the affidavit in considering whether probable cause existed to issue the warrant.

(R 402-03, citations omitted).

The court went on to hold that Terry's contention that Butler's information came from newspapers or the police was incorrect. The court stated:

> There was no evidence that the police provided Butler with any information with regard to the robberies which formed the basis for the search warrant issued herein. The only evidence is contrary. The only information revealed by the police was the size (large caliber) of the handgun used in the Mobil robbery/homicide. . . . The above described information evidently provided Butler with the nexus he needed to provide the information he had on the robberies that were the subject of the warrant.

(R 403-04, emphasis in original, citations omitted). The court also held that the misstated date for the first two robberies, 1992 rather than 1991, did not make the warrant defective because it was "obvious that the intended year was 1991." (R 405-06). The court then concluded that, "after setting aside the erroneous statement, there remains sufficient facts alleged in the

affidavits to demonstrate probable cause" and denied the motion to suppress. (R 406).

A trial court's denial of a motion to suppress is presumed correct. Trepal v. State, 621 So.2d 1361 (Fla. 1993), cert. denied, 114 S.Ct. 892, 127 L.Ed.2d 85 (1994); Henry v. State, 613 So.2d 429 (Fla. 1992), cert. denied, 114 S.Ct. 699, 126 L.Ed.2d 665 (1994); Jones v. State, 612 So.2d 1370 (Fla. 1992), cert. denied, 114 S.Ct. 112, 126 L.Ed.2d 78 (1994); Johnson v. State, 608 So.2d 4 (Fla. 1992), cert. denied, 113 S.Ct. 2366, 124 L.Ed.2d 273 (1993). An appellate court must interpret the evidence, reasonable inferences, and deductions in a manner most favorable to sustaining the trial court's ruling, Trepal, Johnson, and should defer to the fact-finding authority of the trial court rather than substituting its judgment for the trial court's. Gilbert v. State, 629 So.2d 957 (Fla. 3d DCA 1993); see Wasko v. State, 505 So.2d 1314 (Fla. 1987). Finally, appellate review is limited to determining if the trial court's ruling is supported by competent substantial evidence. Tibbs v. State, 397 So.2d 1120 (Fla. 1981), aff'd, 457 U.S. 31, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982).

As set out above, the record supports the trial court's findings. Terry makes the same arguments and complaints to this Court as he did to the trial court. He has not, however, demonstrated any error in the trial court's denial of the motion to suppress, and that denial should be affirmed.

ISSUE 2

WHETHER THE COURT ERRED IN ALLOWING THE STATE TO TAKE A SAMPLE OF TERRY'S BLOOD AND TO PRESENT EVIDENCE ABOUT THAT BLOOD AT TRIAL.

The trial court granted the state's request for a sample of Terry's blood so that it could be compared with blood found on his shoes. Terry argues that the court erred because the state did not establish a chain of custody and that tampering did not occur. Besides not being preserved for appellate review, there is no merit to this argument.

On September 15, 1992 the state asked the trial court to order Terry to submit to the taking of blood samples pursuant to Florida Rule of Criminal Procedure 3.220(c) and argued as grounds therefor:

> 1. That the sampling requested is an obligation of the defendant as a disclosure to prosecution under the above rule.
> 2. Other grounds to be argued ore tenus.

(R 116). In response Terry argued that the state's motion should be denied because it failed to show probable cause to justify taking a blood sample. (R 117-19). The court agreed with Terry and denied the motion. (R 134).

The state filed an amended motion to take blood, on March 23, 1993, arguing that it needed a sample of Terry's blood to compare with the victim's because:

> 1. That human blood was found on the shoes worn by the defendant, and seized herein, upon his arrest.
> 2. That the victim herein was shot in the head and bled profusely prior to dying.
> 3. That the scene in the immediately [sic] vicinity was fairly covered with blood as a result of the victim being shot.

> 4. That the fatal wound inflicted upon the victim was, in the medical examiner's opinion, a "contact" wound, that is, the firearm was in contact with her head when fired. Thus the shooter was in very close proximity to the victim when she was shot.
>
> 5. That the FDLE crime lab serologist, Charles Badger, has determined that the blood stains on defendant's shoes are suitable for DNA testing.
>
> 6. That the FDLE crime lab requires a sample of defendant's blood for comparison purposes in order that a scientifically valid test be conducted.
>
> 7. That FDLE uses the RFLP (Restriction Fragment Length Polymorphisms) analysis method for DNA testing, which is a conservative methodology. All successful DNA testing returns a statistical value based upon a data base of the known population. Depending on the "condition" of the genetic material, this methodology may return a statistical value as low as 1 in a 1000 [under that scenario, in the Daytona Beach metropolitan area there may be 155 persons who would have the same DNA test results (155,000/1000)]. DNA results do not return a "fingerprint" of an individual. Therefore, it is important to consider if the defendant may be within the population that produced the blood stain found on the shoes.

(R 359, citation omitted). Terry responded by asking for a stay so that a DNA expert could be appointed to assist the defense. (R 361-63). The court heard the parties on April 27, 1993. (R 920). After Terry and the prosecutor argued back and forth about whether probable cause existed to compel Terry to provide a blood sample (R 932-40), the court questioned whether the request was premature because, if the blood on Terry's shoes were not consistent with the victim's, the motion might well be moot. (R 940-41). The court then suggested the state proceed to determine if the blood stains on the shoes were from the victim. (R 941-42). Thereafter, the court denied the motion to take blood without prejudice (R 944, R 398) and granted Terry's motion for appointment of a DNA expert. (R 385).

On June 21, 1993 the state filed its second amended motion to take a blood sample. (R 504). The state changed the fifth paragraph of its prior motion to read as follows:

> 5. That FDLE crime lab serologist, Nancy Rathman, has conducted DNA testing since April 23, 1993, on the stains obtained from the defendant's shoe and from stains obtained from the murder scene against standards and the victim's blood. In the ensuing seven weeks she has obtained three (3) probes which have been processed. Both the stains obtained from the murder scene and the stain obtained from the "tongue" of defendant's shoe are consistent at this point and the rough results are that this "match" might be seen in 1 out of 14,000 caucasian and 1 out of 19,000 black individuals. Two additional probes remain to be processed which Ms. Rathman estimates will take an additional five weeks, or until the end of July, 1993.

(R 504). The court held an evidentiary hearing on the second amended motion on July 26, 1993. (R 1166).

The state called Dr. Ronald Reeves, the medical examiner for Volusia County, who testified that the victim's wound was "a close-range wound, probably a loose-contact or even possibly a contact wound." (R 1173, 1180). Detective Ladwig testified that he received a pair of blue leather Buffalino tennis shoes from Terry that were tagged and placed in the police property and evidence section and then sent to the Florida Department of Law Enforcement (FDLE) crime laboratory for examination after being assigned the exhibit number "Q-30." (R 1181-82). Detective Steven Barres testified that there was a large amount of blood at the murder scene. (R 1186-87). As its last witness, the state called Nancy Rathman, the FDLE serologist referred to in the second amended motion. Rathman testified that DNA tests showed

that one of two samples of blood removed from exhibit Q-30 matched exhibit Q-10, a sample of the victim's blood. (R 1191-93). Cross-examination established that Rathman had only hearsay knowledge that exhibit Q-30 was a pair of tennis shoes. (R 1196-97).

The state argued that it had established probable cause for allowing it to obtain a sample of Terry's blood. (R 1206-08). Terry argued that there was a break in the chain of custody between Ladwig and Rathman and that the state had not established probable cause. (R 1208-11). The state then argued that "the identity of Exhibit Q-30 is sufficient for the purposes of this hearing to establish the chain, absent a showing by the defense that there has been some misconduct or negligence in the chain that would call for precaution or concern on the Exhibit." (R 1211-12). The state argued again that it had demonstrated probable cause. (R 1212-14). Terry objected to the burden-shift argument and claimed to have presented more than a mere allegation. (R 1214-16). After more argument (R 1216-18), the state asked the court to take into account the deposition of Charles Badger, an FDLE analyst, who gave the samples from the tennis shoes to Rathman. (R 1218-20). The court listened to further argument (R 1220-34) and then granted the motion to take blood. (R 1235, R 565).

To preserve a complaint about evidence or testimony for appellate review, an appropriate objection must be made when that evidence or testimony is offered at trial. Feller v. State, 637 So.2d 911 (Fla. 1994); Capehart v. State, 583 So.2d 1009 (Fla. 1991); Correll v. State, 523 So.2d 562 (Fla.), cert.

denied, 488 U.S. 871, 109 S.Ct. 183, 102 L.Ed.2d 152 (1988). During the trial testimony of Badger and Rathman, Terry did not renew his motion to suppress the blood sample, made no objections to the chain of custody, and did not complain that any tampering had occurred. Terry's current complaints therefore are procedurally barred.

If this Court addresses this issue on the merits, it should hold that no relief is warranted. Florida Rule of Criminal Procedure 3.220(c) provides in pertinent part:

> (1) After the filing of the charging document and subject to constitutional limitations, a judicial officer may require the accused to:
>
> * * *
>
> (G) permit the taking of samples of the defendant's blood, hair, and other materials of the defendant's body that involves no unreasonable intrusion thereof;

A warrant for taking a defendant's blood must be supported by probable cause. Brown v. State, 493 So.2d 80 (Fla. 1st DCA 1986); Jones v. State, 343 So.2d 921 (Fla. 3d DCA 1977); see also Washington v. State, 19 Fla. L. Weekly S647, S648 (Fla. Dec. 8 1994) (in discussing the motion to suppress a blood sample the Court stated that "a warrantless search is per se unreasonable under the Fourth Amendment"). Contrary to Terry's argument and the trial court's conclusion, however, the state presented probable cause in its original motion to take a blood sample. When the state filed that motion, Terry was imprisoned under an indictment, and the state sought the sample in connection with the crimes for which it indicted Terry. Thus, the state met the

requirements of rule 3.220(c)(1) and, thereby, established probable cause for taking a sample of Terry's blood.[4]

Even if this Court disagrees with the state's claim that the original motion provided probable cause, there is still no merit to Terry's claim that his blood sample should have been suppressed. As the trial court held, the state's second amended motion provided probable cause for sampling Terry's blood. Terry's reliance on Saracusa v. State, 528 So.2d 520 (Fla. 4th DCA 1988), is misplaced both because this Court overruled Saracusa in Doe v. State, 634 So.2d 613 (Fla. 1994), and because it is factually distinguishable. The state sought a blood sample from Saracusa in connection with crimes unrelated to those for which he was being held. Here, on the other hand, the state sought the sample in connection with the crimes charged against Terry in the indictment.

While the chain of custody and tampering claims should have been raised at trial rather than in the motion to suppress, there is also no merit to those claims. The trial court stated that Detective Ladwig marked Terry's shoes as exhibit Q-30 and that Nancy Rathman analyzed two pieces of material taken from exhibit Q-30. (R 1234-35). Terry has shown no error in the court's findings. It appears that his claim of "tampering" comes from Rathman's having tested two pieces of material taken from the shoes, rather than the shoes themselves. At trial, however, Charles Badger, another FDLE serologist, identified Terry's shoes

---

[4] This interpretation of the probable cause required under rule 3.220(c)(1) appears to be an issue of first impression for this Court. Neither the state nor, apparently, Terry could find a case from this Court discussing the issue.

and the pieces he cut from them (T 1443-44, 1449-51) and testified that he placed the cuttings in marked envelopes and put the envelopes in a freezer to await further testing. (T 1447-50). Rathman testified that she received the envelopes containing the cuttings from Badger and that they had not been tampered with. (T 1465-66). Thus, it is obvious that any "tampering" with the shoes was done to enable the FDLE analysts to perform their scientific tests.

Even though Terry showed no nexus between his chain of custody and tampering claims and the state's request for a blood sample, he also showed no probability that the evidence had been tampered with while the state demonstrated an adequate chain of custody. The court's finding that probable cause existed to compel Terry to give a blood sample is amply supported by the record. Terry has demonstrated no error, and, besides being procedurally barred, this issue has no merit.

ISSUE 3

WHETHER THE COURT ERRED IN DENYING ACCESS TO THE FDLE ANALYSTS' NOTES.

Although Terry received copies of the reports prepared by FDLE analysts, he also sought copies of the notes from which the analysts prepared their reports. Now, Terry argues that the trial court erred in denying him access to those notes. As the state will demonstrate, this issue has not been preserved for appeal. There is also no merit to this argument.

In April 1993 Terry filed a motion asking the court to compel the state to turn over copies of the laboratory notes made by FDLE analysts. (R 395). On May 5, 1993 the court cancelled a

hearing on that motion because the prosecutor told the court that the matter had been resolved and that the state would give copies of the laboratory notes to the defense. (R 955). The court then granted the motion to compel. (R 399). Shortly thereafter, however, FDLE moved for rehearing, arguing:

> 1. That an Order was entered by this court directing an FDLE Crime Laboratory Analyst to provide notes to the defense in this case.
> 2. That the Florida Department of Law Enforcement is not a party to this cause.
> 3. That no notice was furnished to the Florida Department of Law Enforcement regarding the hearing in this matter.
> 4. That the Florida Department of Law Enforcement was not represented at said hearing.
> 5. That the Florida Supreme Court, in Geralds v. State, 601 So.2d 1157 (1992), ruled that FDLE Crime Laboratory Analyst's notes are not discoverable.

(R 480). Terry responded, arguing that FDLE had no standing to challenge the motion to compel and asking that FDLE be held in contempt. (R 491-94).

The court heard the motion for rehearing on July 8, 1993. (R 1119). Steven Brady, counsel for FDLE, argued that, under Geralds, reports, but not notes, are discoverable through Florida Rule of Criminal Procedure 3.220(b)(1)(B) and (J).[5] (R 1121). Brady also argued that Geralds made FDLE analysts the functional equivalent of police officers for the purpose of rule 3.220(b)(1)(B) and that, while the analysts' reports were subject to discovery, the notes from which they prepared the reports were not. (R 1122-24). The prosecutor acknowledged that he did not

---

[5] Geralds v. State, 601 So.2d 1157 (Fla. 1992), dealt with Florida Rule of Criminal Procedure 3.220(b)(1)(ii) and (x). Those paragraphs are now (b)(1)(B) and (J), respectively.

check with FDLE before telling the court and the defense that the notes would be disclosed. (R 1124-25). He then stated that he now agreed with FDLE's position. (R 1125). Terry argued that FDLE had no standing, tried to distinguish Geralds on the facts, and asked the court not to entertain the motion for rehearing. (R 1125-28).

After more argument on the interpretation and application of Geralds (R 1130-34), the prosecutor stated that the analysts' reports had been given to the defense. (R 1135). The court then asked "where is the prejudice to the defense by not obtaining the lab notes when, number one, the defense has the lab reports, number two, they have access to discovery depositions, and number three, they had access to their own expert to allow them to properly cross-examine the state's expert." (R 1136-37). In response to the court's questions Terry argued that FDLE was a scientific laboratory rather than an investigating agency. (R 1137-41). Brady then argued that personal notes, rather than reports, are only discoverable if used to refresh a witness' recollection either at a deposition or at trial. (R 1142). The court went through the provisions of rule 3.220(b)(1)(B) and (J) and held that the analysts' notes were not discoverable. (R 1143-44). The court concluded that Terry had shown no prejudice "because we have full discovery here. Not only are the reports themselves given, but we have discovery depositions and certainly the defense has access to experts, to properly cross-examine the state's experts so my previous order allowing those notes is rescinded and I will not allow those notes." (R 1144). The court then suggested that the copies of the FDLE notes that Brady

had brought to court be sealed and put into the appellate record, to which the parties agreed. (R 1144-46).

At trial the state called four FDLE analysts, the first of whom was Terrell Kingery. (T 1363). During direct examination, Kingery could not recall details concerning a plastic bag recovered at the crime scene that he examined. (T 1389). The prosecutor asked if referring to his notes would refresh his recollection. (T 1390). Terry objected to any FDLE analyst referring to his or her notes. (T 1390-91). The prosecutor argued at side bar that the witness was entitled to use his notes on the stand and stated: "By the same token, [the defense] is entitled to production of them at this time." (T 1391-92). When it was established that the witness could answer the question by looking at the bag and that his notes were not needed, Terry withdrew his objection. (T 1392-94).

None of the FDLE analysts referred to their notes while testifying, and, after the above-noted objection that was withdrawn, Terry never objected, when those witnesses testified, that he did not have copies of their notes. As this Court has long held, if writings have been used to refresh the recollection of a witness while testifying, they should be shown to the defense "on demand." Williams v. State, 74 So.2d 797, 800 (Fla. 1954). Because Terry did not renew his objection to not being provided the notes when each FDLE analyst testified, he has not preserved this issue for review.

Even if preserved, however, the issue has no merit. As noted above, none of the analysts referred to his or her notes

while testifying.[6] Because the analysts did not refer to their notes at trial, those notes did not have to be disclosed. Rule 3.220(b)(1)(B) and (J) provide for the disclosure of reports and statements, not personal notes. Geralds. The trial court correctly held that, under Geralds, the analysts' notes did not have to be disclosed. Terry's reliance on Downing v. State, 536 So.2d 189 (Fla. 1988), is misplaced because that case dealt with the discovery of reports, not notes.

This claim, therefore, should be denied.

ISSUE 4

WHETHER THE TRIAL COURT ERRED IN DENYING THE MOTION IN LIMINE REGARDING THE MEDICAL EXAMINER'S TESTIMONY.

In this issue Terry argues that the trial court should not have allowed the medical examiner to testify that he thought the victim was kneeling when she was shot. As the state will show, there is no merit to this claim.

Dr. Terrence Steiner, associate medical examiner for Volusia County,[7] testified on behalf of the state. (T 902). Prior to trial Terry filed a motion in limine seeking to prevent Steiner from testifying as to his opinion on the position of the victim when she was shot because he was not a blood-spatter expert. (R 570). At a hearing on the motion the court decided that it would need to hear testimony to decide the issue. (R 1278-79). The state suggested that the court not rule until Steiner's testimony

---

[6] Terry did ask Kingery to refer to his report. (T 1407).

[7] Dr. Steiner testified because the regular county medical examiner, who conducted the autopsy on the victim, was ill at the time of trial. (T 904).

could be proffered at trial, and the court agreed with that course of action. (R 1279-80). The court then heard the motion when Steiner took the stand and the state proffered his testimony.

During the proffer, Steiner stated that he had examined around 2,000 gunshot injuries (T 914) and that, based on the photographs of the victim and the scene, the type of bleeding, and the position of the victim, the victim had been kneeling when shot. (T 915-16). On cross-examination Steiner confirmed that he based his opinion on the lack of blood on the front of the body from the knees down and on blood spray on the counter. (T 918). Steiner admitted that he was not a blood-spatter expert, but stated that forensic pathology training included training in blood smears and spatters. (T 923). The victim weighed 175 pounds, and, during redirect examination, Steiner said that if she had been standing when shot, he would expect to find bruises. (T 930). He took the lack of bruises into consideration in concluding that she had been on her knees. (T 930).

Terry argued that Steiner was not qualified to testify as to the victim's position. (T 937). The state, on the other hand, argued there was no evidence that the photographs did not support Steiner's conclusion and that the jury should be allowed to weigh his opinion. (T 938-39). The court acknowledged Steiner's qualification as a forensic pathologist. (T 942).

The court then went on to state:

> Gentlemen, the issue here deals with whether or not the position of a body is something for which a medical examiner normally reaches conclusions. And frankly, it is, when capable of doing so, and it's

> clear that Dr. Steiner is using a number of items, factors: The photos, the bleeding, the position of the body, the blood spatter, lack of bruises, trajectory, the damage to the nose, among a number of factors, and the, the issue really is whether or not his testimony and his conclusions are proper, and frankly, that is a weight issue, not an admissibility issue.

(T 942-43). The court went on to hold:

> Clearly, he's not a blood spatter expert, but he does have the expertise with regard to forensic pathology and one of the issues, as he testified to in forensic pathology, is cause of death and circumstances surrounding the death, and based upon that, I will allow his opinion. It will be up to the jury to determine whether it's a proper opinion, and certainly cross-examination will be a factor in that issue.

(T 943-44). The jury was returned to the courtroom, and Steiner was allowed to testify.

Terry now argues that the prejudice caused by Steiner's testimony outweighed any relevance it might have had and that Steiner was not qualified to give an opinion on the position of the victim when shot. As the court stated, the position of a victim's body is something that a medical examiner normally draws conclusions about. It is, therefore, relevant and admissible. The state did not dwell on Steiner's testimony, and it did not become a feature of the trial. Terry has not demonstrated how the medical examiner's opinion prejudiced the jury against him. The trial court did not commit reversible error by denying the motion in limine and allowing Dr. Steiner to express his opinion. Moreover, the medical examiner's testimony was relevant. Even if this Court holds that the trial court should have restricted his testimony, any error would be harmless beyond a reasonable doubt.

The trial court also did not err in holding that Steiner did not have to be a blood-spatter expert to be able express his opinion. As this Court has previously held: "The trial court has broad discretion over the admissibility of expert testimony and its determination will not be disturbed on appeal unless there is a clear showing of error." Way v. State, 496 So.2d 126, 127 (Fla. 1986); Ramirez v. State, 542 So.2d 352 (Fla. 1989); Johnson v. State, 393 So.2d 1069 (Fla. 1983), cert. denied, 465 U.S. 1051, 104 S.Ct. 1329, 79 L.Ed.2d 724 (1984). Terry has not made a clear showing of error.

The trial court held that a medical examiner would normally form an opinion on the position of a victim and that Dr. Steiner was qualified as a forensic pathologist. Steiner had been a forensic pathologist for almost twenty-four years. (T 903). The court correctly found that his experience enabled him to interpret the physical evidence.

This case is a far cry from cases such as Gilliam v. State, 514 So.2d 1098 (Fla. 1987), where a medical examiner slapped a colleague on the back with a sneaker and concluded that it made certain marks found on the victim's body. This Court properly held that conclusion to be neither reliable nor scientific. Id. at 1100. Instead, this case is more like cases such as Johnston v. State, 497 So.2d 863 (Fla. 1986), and Dragon v. Grant, 429 So.2d 1329 (Fla. 5th DCA 1983). In Johnston this Court agreed that a police officer who administered a luminal test to discover the presence of blood was qualified to testify through his working knowledge of the testing even though he was not an expert in the detection of blood. Similarly, in Dragon the district

court found that a police officer could testify about a car accident, even though not an accident-reconstruction expert, because his experience qualified him to form an opinion.

As did the trial court in this case, both Johnston and Dragon recognized that the jury ultimately determines the credibility of witnesses and that any deficiencies in a witness's testimony can be explored on cross-examination. Terry did just that. He questioned Dr. Steiner closely (T 964-71, 975-77, 978-79) and established that he was not a blood-spatter expert. (T 966).

Terry has failed, however, to show how the trial court committed any error, let alone reversible error, in allowing Dr. Steiner's testimony. Even if this Court were to find the court's rulings to be error, such error would be harmless because there is no indication that the testimony improperly influenced the jury.

ISSUE 5

WHETHER THE TRIAL COURT ERRED IN DENYING A MOTION FOR MISTRIAL WHEN A DEFENSE WITNESS MENTIONED THAT TERRY WAS A SUSPECT IN OTHER ARMED ROBBERIES.

In this issue Terry claims that the trial court should have granted his motion for mistrial when a defense witness mentioned that Terry was a suspect in several armed robberies. There is no merit to this issue.

Detective John Ladwig of the Daytona Beach Police Department[8] was the head detective in the this case. (T 1135).

---

[8] At the time of the trial Ladwig had left the police department and was employed by the state attorney's office as an investigator. (T 1120).

Terry called him as a witness during the guilt phase and asked him about other suspects in the case. (T 1134-37). The following exchange then occurred:

> Q [defense counsel] Do you know Audron Butler?
> A Yes, I do.
> Q And how do you know Audron Butler?
> A Audron Butler provided information in several armed robberies that had been going on at that time, that developed Mr. Terry and Mr. Floyd as suspects in this case also.

(T 1137). At a side bar conference defense counsel objected to Ladwig's answer and stated: "Your Honor, at this time I not only object to his answer, and I realize it's in response to my question, but I move for a mistrial because it's tied Mr. Terry into a series of armed robberies." (T 1138). The prosecutor responded that, if the answer were error, it was invited error and stated that Ladwig "answered him in exactly the manner that Mr. Morgan knows Mr. Ladwig knows Audron Butler." (T 1138-39). Defense counsel stated that the answer surprised him. (T 1139). After listening to both sides, the court held:

> Counsel, the issue is the reference to other collateral crimes, the armed robberies, and first of all, the record should clearly reflect that everyone was on notice as to this particular issue. I mean we have talked about it really before this trial got started, about the potential pitfalls, and so the issue was there for everybody, and something else is that Investigator Ladwig was called in the defense case by Mr. Morgan and asked the question: How do you know Audron Butler? And the response was that Butler provided information in several armed robber[ies] that were going on in the area that developed Floyd and Mr. Terry as suspects here.
>
> And I guess what I needed to do is to determine if that was a fair response to the question and whether or not Investigator

> Ladwig intentionally tried to get something in front of this jury that he shouldn't have.
>
> The conclusion that I reached, knowing about this case - we've all been through the pretrial motions. We know that the information employed by Mr. Butler was based on the armed robberies and the search warrant that eventually led to Mr. Floyd and Mr. Terry.
>
> The long and the short of it is, it was, if error, defense invited error, and secondly, it was a fair response to the question asked, and based upon that, . . . the objection is overruled and I do not get to a cautionary instruction. Motion for Mistrial is denied on that basis.

(T 1140-42). After more discussion on whether Ladwig should be allowed to speak to defense counsel and the extent of direct examination (T 1142-45, 1161-64), the court reiterated its earlier ruling "that the question asked was invited error and, number two, that the response was a direct response to the question asked and it did not go beyond the question asked." (T 1163). All parties then agreed not to talk about any crimes other than those at issue in the trial. (T 1164). Thereafter, defense counsel continued with his direct examination of Ladwig.

Terry does not set out the facts concerning this issue and ignores the court's finding Ladwig's answer to be both invited error and a fair response to the question asked of him. Instead, he cites numerous cases that, while they may have been decided correctly on their facts, are distinguishable on the facts from the instant case. Terry does nothing more than recite general rules, without tying those rules to this case, and has failed to demonstrate error.

A motion for mistrial is addressed to the sound discretion of the trial court and should be granted only when necessary to insure a fair trial. E.g., Gorby v. State, 630 So.2d 544 (Fla. 1993), cert. denied, 114 S.Ct. 99 (1994); Power v. State, 605 So.2d 856 (Fla. 1992), cert. denied, 113 S.Ct. 1863, 123 L.Ed.2d 483 (1993); Sireci v. State, 587 So.2d 450 (Fla. 1991), cert. denied, 112 S.Ct. 1500, 117 L.Ed.2d 639 (1992). Terry has demonstrated no abuse of discretion.

As this Court stated in Pope v. State, 441 So.2d 1073, 1076 (Fla. 1983): "A party may not invite error and then be heard to complain of that error on appeal." The trial court correctly pointed out that everyone connected with this case knew that Terry and Floyd were suspects in other crimes. In spite of that, the defense elicited an answer, but then complained that the answer prejudiced Terry. The court properly found any error, if there were any because the court also found the answer to be a fair response, to have been invited. Terry has shown nothing to the contrary, and the trial court did not err in denying the motion for mistrial.

If, however, this Court decides that error occurred, it should find such error harmless. The erroneous admission of collateral crime evidence is subject to harmless-error analysis. Rhodes v. State, 638 So.2d 920 (Fla. 1994); Castro v. State, 547 So.2d 111 (Fla. 1989); State v. Lee, 531 So.2d 133, 136 (Fla. 1988); Robinson v. State, 520 So.2d 1 (Fla . 1988). Here, the single, slight reference to other crimes was ever mentioned again and did not become a feature of the trial. If any error actually occurred, it was harmless beyond a reasonable doubt.

ISSUE 6

WHETHER THE TRIAL COURT ERRED IN DENYING TERRY'S MOTION FOR SUGGESTION OF CONFLICT.

Terry filed a motion alleging that the public defender's office had a conflict of interest in its representation of his codefendant, Demon Floyd. The trial court held that Terry did not have standing to raise the issue of Floyd's representation and denied the motion. There is no merit to Terry's current claim that the court erred in denying the motion.

On November 24, 1992 Terry filed a motion suggesting that Floyd's counsel had a conflict of interest. According to Terry, after Floyd confessed, implicating Terry, and pled guilty, Floyd recanted and wanted to withdraw his plea. (R 142-43). Terry claimed that interference by the state attorney's office in the conduct of Floyd's case by his assistant public defenders reduced them to rendering ineffective assistance. (R 147-50). Terry also argued that he had standing to raise Floyd's claim because he would be injured if Floyd testified against him and because he was a "next friend" of Floyd. (R 151-53). The court heard the motion on February 1 and 2, 1993. (R 822, 863).

Prior to Terry's opening statement on the motion, the prosecutor objected that Terry had no standing to raise the issue. (R 825). The court asked for case law on why a third party is able to raise someone else's conflict of interest and ineffective assistance claims. (R 826-28). Terry could provide none (R 828), and the court pointed out that Floyd was competent, that Terry was not dedicated to Floyd's best interest, and that he was not a next friend. (R 830-31). After hearing more

argument (R 831-46), the court again expressed its doubts about the claims, but decided to proceed with the hearing. (R 846-47). Terry had four witnesses present - assistant public defenders Ray Cass, Don Jacobson, and Larry Powers and Detective Ladwig. (R 852). After discussion about attorney-client privilege (R 853-59), Floyd refused to waive the privilege. (R 858). The court then continued the hearing until the following day so that it could consider the standing issue. (R 859-60). When the hearing reconvened on February 2, 1993, the trial court denied the motion and stated: "I know of not a single case that has dealt with this situation. But I've considered the arguments. And the hurdle that I cannot get over is a standing hurdle. I do not - I simply don't find that Mr. Terry has the standing to raise ineffective assistance in Mr. Floyd's case under any theory that the defense has suggested." (R 867). Terry renewed his suggestion of conflict when Floyd was called to testify. (T 997-98).

Terry argues that the court erred in denying the instant motion, but has failed to demonstrate that he had standing to raise claims for Floyd and, thus, that the court erred. Terry relies on Volk v. State, 436 So.2d 1064 (Fla. 5th DCA 1983), Whitmore v. Arkansas, 495 U.S. 149, 110 S.Ct. 1717, 109 L.Ed.2d 135 (1990), and the comment to Rule Regulating The Florida Bar 4-1.7, but that reliance is misplaced. Volk held that an assistant public defender, as well as the elected public defender, can certify a conflict of interest where public defenders in the same circuit are appointed to represent codefendants who have adverse interests. Rule 4-1.7(a) provides: "A lawyer shall not represent a client if the representation of that client will be

directly adverse to the interests of another client." According to the comment, rule 4-1.7(a) means that "a lawyer ordinarily may not act as advocate against a person the lawyer represents in some other matter, even if it is wholly unrelated." In the instant case the public defender's office represented Floyd, while Terry had appointed counsel. It is obvious that Volk and rule 4-1.7 are factually distinguishable from the instant case and that neither supports Terry's argument.

Whitmore also offers no support for Terry's argument. The United States Supreme Court held that Whitmore, an inmate on Arkansas' death row, did not have standing as a next friend to prevent the execution of another death row inmate. To establish next-friend status,

> one "must provide an adequate explanation - such as inaccessibility, mental incompetence, or other disability - why the real party in interest cannot appear on his own behalf." Moreover, a next friend has the burden "to establish the propriety of his status and thereby justify the jurisdiction of the court."

Durocher v. State, 623 So.2d 482, 485 (Fla. 1993) (quoting Whitmore, 495 U.S. at 163, 164). Terry did not and cannot meet this standard.

Terry did not demonstrate to the trial court that he had standing to raise Floyd's personal claims, and his current argument suffers from the same failure. The trial court did not err in denying the suggestion of conflict, and this Court should hold this issue to have no merit.

ISSUE 7

WHETHER THE TRIAL COURT ERRED IN DENYING TERRY'S MOTION TO EXCLUDE DEMON FLOYD'S TESTIMONY.

Terry filed a motion seeking to keep his codefendant Demon Floyd from testifying as a state witness. The trial court denied the motion, and Terry now complains that the court erred in doing so. This issue, however, has not been preserved for appeal.

On April 26, 1993 Terry filed a motion in limine asking the court to prohibit the state from calling Demon Floyd as a witness. (R 442). Terry claimed that, because he had made several inconsistent statements and because he might be mentally impaired, Floyd's testimony would be unreliable and unduly prejudicial. (R 442-44). The court heard the motion on July 2, 1993. (R 1028).

Terry argued that Floyd's counsel wanted to have Floyd examined by a mental health expert because counsel thought that Floyd had "severe emotional problems" and that until Floyd's competency was determined his testimony would be "inherently unreliable." (R 1029). Terry agreed with the court that mental or emotional problems do not necessarily equal incompetency. (R 1029). The prosecutor argued that the motion was both unfounded and premature. (R 1030). The judge then deferred ruling on the motion, but stated he was leaning toward denying it and that Floyd's competency would be relevant only when he took the stand. (R 1031). The court denied the motion on July 8, 1993. (R 547).

The state called Floyd as a witness on the second day of trial. (T 996). Terry renewed his suggestion of conflict (issue 6 supra) and asked that Floyd's testimony be excluded on the

basis of that suggestion and argued that he had standing to raise the issue. (T 997-98). The court stated its ruling would remain the same. (T 998). On direct examination Floyd admitted that he pled guilty to first-degree murder and armed robbery in exchange for the state's not seeking the death penalty, but then stated that he had nothing to do with the robbery and murder at the Mobil station. (T 1003-04). The state then impeached Floyd through his prior statements and deposition. (T 1006-44).

When Floyd took the stand, Terry moved to suppress his testimony based on his suggestion of conflict, not on his motion to exclude Floyd's testimony of April 26, 1993. To be cognizable on appeal, the same argument must be presented to the appellate court that is presented to the trial court. Steinhorst v. State, 412 So.2d 332 (Fla. 1982). Because Terry did not challenge Floyd's testimony on the basis presented to the trial court in his April 1993 motion, unreliability and incompetency, he did not preserve this issue for appeal, and it is procedurally barred. Additionally, Terry never claimed, by objection or otherwise, that the state called Floyd only to impeach his testimony.

While this Court should not reach the merits of this issue, if it does so it should find the issue to have no merit. An otherwise competent witness has the ability to testify. Unreliability goes to a witness' credibility, which is for the trier of fact to decide. Moreover, Terry did not challenge Floyd's competency when he took the stand, so he cannot complain about it now. A trial court's admission of evidence will be affirmed unless an abuse of discretion is shown. Blanco v. State, 452 So.2d 520 (Fla. 1984), cert. denied, 469 U.S. 1181,

105 S.Ct. 940, 83 L.Ed.2d 953 (1985). Terry, however, has not demonstrated an abuse of discretion.

ISSUE 8

WHETHER THE TRIAL COURT ERRED IN ALLOWING FLOYD'S TESTIMONY TO BE USED AS SUBSTANTIVE EVIDENCE.

Terry voluntarily stipulated that the court could instruct the jury that the evidence given by Demon Floyd could be considered for substantive purposes as well as for impeachment purposes. Now, however, he claims that the court erred in doing what he asked. This issue has not been preserved for appeal and should be denied.

Floyd confirmed, during direct examination, that he told the police the following: 1) he and Terry robbed the Mobil station on July 14, 1992 (T 1010); 2) Terry had the guns in a green and white Foot Action U.S.A. bag (T 1011-12); 3) there was a red mask and white one with "O.P.P." on it (T 1012-13); 4) he used the .25 caliber handgun and Terry used the .38 caliber handgun (T 1013, 1017-18); 5) Floyd wore the red mask and Terry the white one (T 1018-19); 6) he held Mr. Franco at gunpoint while Terry went to the office where Mrs. Franco was (T 1019-20); 7) how they fled from the station (T 1020-23); and 8) they got $160 from the robbery. (T 1023).

The day after Floyd testified, the prosecutor announced that he wanted David Damore, the assistant state attorney who presented the case to the grand jury, to testify to what Floyd said to the grand jury as substantive evidence. (T 1307). Terry objected on the basis of hearsay and agreed that the matter should be put off until the following week when Damore would be

available. (T 1308). The court heard the parties on this matter on December 9, 1993.

The prosecutor cited numerous cases regarding what can be introduced as substantive evidence under section 90.801, Florida Statutes. (T 1528-29). Terry argued that grand jury testimony did not qualify. (T 1530). The prosecutor argued that the hearsay exception in subsection 90.801(2)(a) applied (T 1533), and, after further argument, Terry agreed that Floyd's testimony was not hearsay. (T 1451). The court then held that the state could do what it wished. (T 1549-51). Terry then stated:

> Without waiving any objections, the Defense would stipulate to an instruction by the Court to the jury that the evidence given by Demon Floyd can be considered as substantive purposes as well as for impeachment purposes. That would give the State what it wants and it would not unfairly prejudice Mr. Terry by having Mr. Damore up there saying something that he doesn't know the truth or falsity of.

(T 1551-52). The prosecutor still wanted to call Damore to testify, but, after acknowledging that Floyd would have to be recalled, accepted the stipulation. (T 1553-59). The following exchange then occurred:

> The Court: Mr. Morgan, are you agreeing to that?
>
> Mr. Morgan [defense counsel]: My understanding is that he can argue to them that they can consider Demon Floyd's testimony both substantively and for impeachment purposes, and so long as Mr. Damore is not going to testify, the Defense would not object to that.
>
> The Court: Are you waiving any previous objections to - -
>
> Mr. Morgan: Yes, the previous objections were to Mr. Damore testifying. I

> agree that it's appropriate to get it in through Demon Floyd. This way it serves judicial economy.

(T 1560, emphasis supplied). The parties then agreed that there need not be an announcement from the court and that the state could argue that the impeachment evidence was the truth. (T 1560).

Thus, it is readily apparent that Terry withdrew his objection and agreed that the impeachment testimony could be used as substantive evidence. By waiving his objection Terry waived this issue for appeal. This Court, therefore, should hold it to be procedurally barred.

Even if the court reaches the merits, no relief is warranted because the court made a correct ruling. The state properly impeached Terry:

> Any party, including the party calling a witness, may attack the credibility of a witness by:
>
> (1) Introducing statements of the witness which are inconsistent with his present testimony;

§ 90.608, Fla. Stat. (1993). Floyd testified inconsistently with his prior statements, and the state properly impeached him. Furthermore, his prior statements did not constitute hearsay under the facts of this case because, pursuant to Terry's stipulation:

> (2) A statement *is not hearsay if* the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement and the statement is:
>
> (a) Inconsistent with his testimony and was given under oath subjected to the penalty of perjury at a trial, hearing, or other proceeding or in a deposition.

§ 90.801, Fla. Stat. (1993).

In Moore v. State, 452 So.2d 559, 562 (Fla. 1984), this Court held that "the prior inconsistent statement of a witness at a criminal trial, if given under oath before a grand jury, is excluded from the definition of hearsay and may be admitted into evidence not only for impeachment purposes but also as substantive evidence on material issues of fact." See also Ellis v. State, 622 So.2d 991, 997 (Fla. 1993) ("the courts have shown a marked unwillingness to include types of information-gathering activities less formal than a grand jury hearing or deposition"). Terry's reliance on State v. Clark, 614 So.2d 453 (Fla. 1992), and State v. Delgado-Santos, 497 So.2d 1199 (Fla. 1986), is misplaced because neither of those cases concerned grand jury proceedings. Thus, the trial court did not err in holding that prior inconsistent statements before the grand jury could be used as substantive evidence, and Terry waived review of this issue by his stipulation and the withdrawal of his objections.

ISSUE 9

WHETHER TERRY'S CONVICTIONS ARE SUPPORTED BY THE EVIDENCE.

Terry argues that the trial court should have granted his motions for judgment of acquittal because the evidence did not support his convictions. As the state will show, however, there is no merit to this issue.

As this Court has long recognized, an accused "'is presumed innocent until proven guilty beyond and to the exclusion of a reasonable doubt.'" Cox v. State, 555 So.2d 353, 354 (Fla. 1989) (quoting Davis v. State, 90 So.2d 629, 631 (Fla. 1956)). On

appeal the reviewing court's concern "must be whether, after all conflicts in the evidence and all reasonable inferences therefrom have been resolved in favor of the verdict on appeal, there is substantial, competent evidence to support the verdict and judgment." Tibbs v. State, 397 So.2d 1120, 1123 (Fla. 1981), aff'd 457 U.S. 31, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982) (footnote omitted); Spinkellink v. State, 313 So.2d 666 (Fla. 1975), cert. denied, 428 U.S. 911, 96 S.Ct. 3227, 49 L.Ed.2d 1221 (1976). As Terry admits, moving for a judgment of acquittal "admits not only the facts stated in the evidence adduced, but also admits every conclusion favorable to the adverse party that a jury might fairly and reasonably infer from the evidence." Lynch v. State, 293 So.2d 44, 45 (Fla. 1974). Therefore, judgments of conviction come to reviewing courts with a presumption of correctness, Spinkellink, and any conflicts in the evidence must be resolved in the state's favor. Holton v. State, 573 So.2d 283 (Fla. 1990), cert. denied, 500 U.S. 960, 111 S.Ct. 2275, 114 L.Ed.2d 726 (1991); Williams v. State, 437 So.2d 133 (Fla. 1983), cert. denied, 466 U.S. 909, 104 S.Ct. 1690, 80 L.Ed.2d 164 (1984); Tibbs.

As set out elsewhere in this brief, the state produced the following, among other, evidence against Terry: Floyd's testimony[9] setting out his and Terry's part in this murder/robbery, finding the handguns used in this episode, including the one with which the victim was shot, in Terry's apartment, and finding the victim's blood on Terry's shoes.

---

[9] As explained in issue 8, supra, Floyd's testimony was properly submitted as substantive evidence.

Additionally, Robin Morgan, AKA Joe Garca, testified that Terry told him he shot the victim. (T 1205). Contrary to Terry's claim, applying the above-stated principles to this case shows that his conviction of first-degree murder is supported by competent substantial evidence.

The state charged Terry alternatively with first-degree premeditated or felony murder. (R 107). The jury convicted him as charged. (R 582). The verdict need not specify premeditated or felony murder, Haliburton v. State, 561 So.2d 248 (Fla. 1990), cert. denied, 501 U.S. 1259, 111 S.Ct. 2910, 115 L.Ed.2d 1073 (1991), but the evidence supports both. Floyd stated that he and Terry were riding around looking for a place to rob (T 1011) and they took $160 from the station (T 1023). The victim's husband confirmed that money was missing. (T 837). Thus, the felony-murder theory is amply supported.

The state also proved premeditated murder. As Terry recognizes, "[p]remeditation does not have to be contemplated for any particular period of time, and may occur a moment before the act." Sireci v. State, 399 So.2d 964, 967 (Fla. 1981), cert. denied, 456 U.S. 984, 102 S.Ct. 2257, 72 L.Ed.2d 862 (1982). Terry had two handguns, an inoperable .25 caliber and an operable .38 caliber. He gave the .25 to Floyd to hold Mr. Franco in the service bay and took the other, functioning weapon to where Mrs. Franco and the money were. If he had no intention to shoot the victim, he did not need the handgun that worked.

Terry's conviction of principal to Floyd's aggravated assault of Mr. Franco is also supported by the evidence. "In order to be guilty as a principal for a crime physically

committed by another, one must intend that the crime be committed and do some act to assist the other person in actually committing the crime." Staten v. State, 519 So.2d 622, 624 (Fla. 1988). Moreover, as this Court has stated: "'One who participates with another in a common criminal scheme is guilty of all crimes committed in furtherance of that scheme regardless of whether he or she physically participates in that crime.'" Lovette v. State, 636 So.2d 1304, 1306 (Fla. 1994) (quoting Jacobs v. State, 396 So.2d 713, 716 (Fla. 1981)).

Terry and Floyd knew that both Mr. and Mrs. Franco were in the Mobil station. Terry gave Floyd a handgun with which to restrain Mr. Franco in the service-bay area while he went into the store to effect the robbery. Even though Floyd's handgun was inoperable, Mr. Franco did not know that. Therefore, while Floyd committed the actual aggravated assault, Terry assisted by providing the handgun, and the assault furthered the robbery and murder by keeping the two victims separated.

Thus, there is no merit to the instant claims, and Terry's convictions should be affirmed.

ISSUE 10

WHETHER THE TRIAL COURT ERRED IN LIMITING TERRY'S CLOSING ARGUMENT REGARDING AUDRON BUTLER.

Terry argues that the trial court gutted his theory of defense when it refused to allow him to comment, during closing argument, on the state's failure to call Audron Butler as a witness. There is no merit to this argument.

As discussed in issue 1, supra, Butler provided information that led to a warrant to search Terry's apartment. The state did

not call Butler as a witness, but Terry did. (T 1615). Butler, however, did not answer the call. (T 1616). Butler had been subpoenaed, and the state asked the court to issue a bench warrant for him. (T 1616). Terry, however, did not want a warrant issued. (T 1618). The state made a motion in limine prior to guilt-phase closing argument asking that Terry not be allowed to mention Butler's failure to appear. (T 1705). After hearing the parties, the court held that the defense could not comment on Butler's nonappearance and stated "that if I were to allow what Mr. Morgan is requesting, it would produce an unfair and unlevel playing field for the State, which both sides ought to have, the motion in limine is granted, and I will not permit any testimony with regard to that." (T 1742).

During the penalty-phase closing argument, however, defense counsel, talked about Butler - that he broke his wife's arm, had a criminal record, had been involved in robberies, and had been arrested - and stated: "We don't know about Audrin Butler. Even though he was the foundation of the state's case right from day one, we don't know about him. The state did not call Audrin Butler as a witness." (T 2033). The state objected that Terry was commenting on the failure to call an equally accessible witness and argued that the court's ruling did not change merely because they had entered the second phase of the trial. (T 2033). The state asked the court to sustain the objection, which the court did. (T 2034).

In Haliburton v. State, 561 So.2d 248, 250 (Fla. 1990), cert. denied, 501 U.S. 1259, 111 S.Ct. 2910, 115 L.Ed.2d 1073 (1991), this Court held that, when a witness is equally available

to both sides, one side cannot comment on the other's failure to call that witness. That Butler was equally available to Terry is evidenced by Terry's calling him as a witness. Butler's failure to appear does not mean that he was not available, and Terry has shown no error in the court's ruling.

Terry relies on Amos v. State, 618 So.2d 157 (Fla. 1993), but that case is distinguishable. In Amos the defense called an eyewitness that the state did not call and, in closing argument, commented that the state did not call him because it wanted to tailor the evidence to fit its theory of the crime. The trial court then asked the state if it wanted to object, sustained the solicited objection, and, on its own motion, instructed the jury about calling equally accessible witnesses. This Court found this egregious set of facts to constitute reversible error.

No such combination of events occurred in the instant case. Also, the court did not instruct the jury to ignore the comment on the state's failure to call Butler. Thus, Terry was, in fact, allowed to comment on that failure. If this Court disagrees that no error occurred, any error was harmless beyond a reasonable doubt because Terry did tell the jury that the state failed to call Butler.

ISSUE 11

WHETHER ALLOWING THE JURY TO CONSIDER BOTH THE FELONY MURDER (ROBBERY) AND PECUNIARY GAIN AGGRAVATORS RENDERED TERRY'S DEATH SENTENCE UNCONSTITUTIONAL.

Terry argues that the jury's recommendation of death should be disregarded because the jury made no specific findings of fact and may have accorded the felony murder (robbery) and pecuniary

gain aggravators undue weight. By not objecting when the court instructed the jury, Terry has not preserved this issue. There is also no merit to this issue.

The day the penalty phase began Terry filed a motion asking the court not to instruct the jury on the pecuniary gain aggravator. (R 662). The court heard argument on the motion (T 1933-40) and agreed with the state that both aggravators could be instructed on if a limiting instruction were given as provided in Castro v. State, 597 So.2d 259 (Fla. 1992). (T 1938-39). The court then denied the motion (T 1940; R 665).

The court instructed the jury, in pertinent part, as follows:

> The aggravating circumstances that you may consider are limited to any of the following that are established by the evidence: . . . two, the crime for which the defendant was to be sentenced was committed while he was engaged in the commission of the crime of robbery; three, the crime for which the defendant is to be sentenced was committed for pecuniary gain.
>
> The state may not rely upon a single aspect of the offense to establish more than a single aggravating circumstance; therefore, if you find that two or more of the aggravating circumstances are supported by a single aspect of the offense, you may only consider that as supporting a single aggravating circumstance. The commission of a capital felony during a robbery and done for financial gain relates to the same aspect of the offense and may be considered as being only a single aggravating circumstance.

(T 2036-37). In his sentencing order the judge followed this instruction when he found that both the felony murder and pecuniary gain aggravators had been established: "These two aggravating circumstances are found to exist but merge and are

considered herein as a single aggravating circumstance." (R 750).

Terry did not renew his objection when the court instructed the jury. He has not, therefore, preserved this issue for appellate review. See Freeman v. State, 563 So.2d 73 (Fla. 1990), cert. denied, 501 U.S. 1259, 111 S.Ct. 2910, 115 L.Ed.2d 1073 (1991).

If this Court addresses the merits of this claim, no relief is warranted. This Court addressed this issue in Castro and stated: "When applicable, the jury may be instructed on 'doubled' aggravating circumstances since it may find one but not the other to exist." 597 So.2d at 261. Then the Court went on to explain: "A limiting instruction properly advises the jury that should it find both aggravating factors present, it must consider the two factors as one." Id. Thus, instructing on both the felony murder (robbery) and pecuniary gain aggravators is not error. E.g., Derrick v. State, 641 So.2d 378 (Fla. 1994).

Therefore, the judge correctly instructed the jury and properly merged these aggravators in deciding Terry's sentence. Juries are not required to make specific findings as to aggravators and mitigators. E.g., Randolph v. State, 562 So.2d 331 (Fla.), cert. denied, 498 U.S. 992, 111 S.Ct. 538, 112 L.Ed.2d 548 (1990). Because the jury received a correct instruction this Court should not assume that it ignored the instruction and considered these aggravators separately. Instead, it should presume that the jury followed the instructions given to it.

This issue is procedurally barred, and no error or constitutional violation occurred regarding to this issue. It should be denied.

ISSUE 12

WHETHER THE COURT ERRED BOTH IN INSTRUCTING THE JURY ON THE PRIOR VIOLENT FELONY AGGRAVATOR AND IN FINDING THAT AGGRAVATOR.

The jury convicted Terry of the first-degree murder and armed robbery of Mrs. Franco and of being a principal to the aggravated assault of her husband. Terry argues that the contemporaneous violent felony conviction as to Mr. Franco cannot be used to support the prior violent felony aggravator. Terry admits that this issue has been decided adversely to his contentions, but asks the Court to reconsider its position. This issue has not been preserved for appeal. Moreover, there is no merit to Terry's argument, and this Court should not revisit this issue.

Just prior to the penalty phase, Terry filed a motion asking that the prior violent felony aggravator be declared unconstitutional as to contemporaneous convictions, that the state not be allowed to argue in favor of this aggravator, and that the court not instruct the jury on it. (R 624). After hearing argument on the motion, the judge took it under advisement so that he could research the issue and rule on the following day. (T 1941-65). Subsequently, the judge denied the motion. (T 1973). Later, the court instructed the jury on this aggravator as follows:

> The aggravating circumstances that you may consider are limited to any of the following that are established by the evidence: One,

> the defendant has been previously convicted of another capital offense or of a felony involving the use and/or threat of violence to some person. The crime of principal to aggravated assault is a felony involving the use and/or threat of violence to another person. The defendant's contemporaneous convictions of principal to aggravated assault may be considered - and that should be conviction, singular - of principal to aggravated assault may be considered to determine whether this aggravating circumstance has been established;

(T 2036-37). The court later found that this aggravator had been established. (R 748).

Terry did not renew his objection when the trial court instructed the jury. This failure waived the issue, and it has not been preserved for appellate review. See Freeman v. State, 563 So.2d 73 (Fla. 1990), cert. denied, 501 U.S. 1259, 111 S.Ct. 2910, 115 L.Ed.2d 1073 (1991).

If this Court considers this issue, however, it should find no merit to Terry's claims. This Court has long held that contemporaneous convictions can be used to establish the prior violent felony aggravator. "The legislative intent is clear that any violent crime for which there was a conviction at the time of sentencing should be considered as an aggravating circumstance." King v. State, 390 So.2d 315, 320 (Fla. 1980), cert. denied, 450 U.S. 989, 101 S.Ct. 1529, 67 L.Ed.2d 825 (1981). This issue has been refined by the Court's holding that the contemporaneous conviction must be for crimes committed on a person or persons other than the murder victim. E.g., Stein v. State, 632 So.2d 1361 (Fla.), cert. denied, 115 S.Ct. 111 (1994); LeCroy v. State, 533 So.2d 750 (Fla. 1988), cert. denied, 492 U.S. 925, 109 S.Ct. 3262, 106 L.Ed.2d 607 (1989); Wasko v. State, 505 So.2d 1314

(Fla. 1987). Regardless of this modification, cases such as Stein, LeCroy, Wasko, and Turner v. Dugger, 614 So.2d 1075 (Fla. 1992), have always held the current argument to have no merit.

Terry claims that his situation is analogous to that in Tison v. Arizona, 481 U.S. 137, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987). Unlike the Tisons, however, Terry does not present the intermediate case between the two extremes of "the minor actor in an armed robbery, not on the scene" and "the felony murderer who actually killed, attempted to kill, or intended to kill." Id. at 149, 150. Instead, Terry was the actual killer. Any reliance on Tison is misplaced, and Terry presents no valid reason that would require this Court to reconsider its previous rulings.

This issue is procedurally barred. Additionally, the trial court did not err in instructing the jury on the prior violent felony aggravator or in finding that the aggravator applied in this case. This issue should be denied.

ISSUE 13

WHETHER THE PRIOR VIOLENT FELONY AGGRAVATOR AND THE JURY INSTRUCTION THEREON ARE UNCONSTITUTIONAL.

Terry argues that using a contemporaneous violent felony conviction to establish the prior violent felony aggravator renders that aggravator unconstitutional. He also claims that the jury instruction on this aggravator is unconstitutional. These issues are procedurally barred.

After referring to the separation of powers clause, Terry argues that the phrase "previously convicted" in subsection 921.141(5)(b), Florida Statutes, does not mean "contemporaneous conviction." Thus, this argument continues, this Court's

opposite construction violates the principle of strict construction and is contrary to the legislature's intent regarding the prior felony aggravator. Terry did not object when the court instructed the jury on this aggravator, so this claim has not been preserved for appeal.

Even if preserved, this argument ignores this Court's statement of the legislature's intent in King, 390 So.2d at 320: "The legislative intent is clear that any violent crime for which there was a conviction at the time of sentencing should be considered as an aggravating circumstance." It also ignores Turner v. Dugger, 614 So.2d 1075 (Fla. 1992), and Daugherty v. State, 419 So.2d 1067 (Fla. 1982), cert. denied, 459 U.S. 1228, 103 S.Ct. 1236, 75 L.Ed.2d 469 (1983), in which this Court reiterated that King properly assessed the legislative intent regarding the prior violent felony aggravator. This Court's construction of the aggravator has been consistent and of long duration. If the legislature were displeased with this construction, it could remedy the situation. Cf. State v. Chapman, 625 So.2d 838, 839 (Fla. 1993) (statutory amendment "was intended to limit the rule of lenity and to override Carawan v. State, 515 So.2d 161 (Fla. 1987)"). The legislature's failure to override this Court's case law on the prior violent felony aggravator indicates that it does not disagree with this Court's rulings.

Terry also argues that the instruction on the aggravator at issue is unconstitutionally vague. To be cognizable on appeal, however, complaints about jury instructions must be raised at trial. E.g., Davis v. State, 20 Fla. L. Weekly S55 (Fla. Feb. 2,

1995); Heath v. State, 648 So.2d 660 (Fla. 1994); Pietri v. State, 644 So.2d 1347 (Fla. 1994); Wuornos v. State, 644 So.2d 1012 (Fla. 1994); Armstrong v. State, 642 So.2d 737 (Fla. 1994); Hannon v. State, 638 So.2d 39 (Fla. 1994). Terry did not object to the wording of the instruction on the prior violent felony aggravator. (T 1975). He did not, therefore, preserve this claim for appeal, and it is procedurally barred.

This issue should be denied summarily.

ISSUE 14

WHETHER THE COURT ERRED IN DENYING A MOTION FOR MISTRIAL AFTER THE PROSECUTOR REFERRED TO THE VICTIM'S CHILDREN.

Terry argues that a question posed by the prosecutor to Terry's girlfriend during the penalty phase constituted both a nonstatutory aggravator and impermissible victim impact evidence. No relief is warranted on this issue.

Valerie Floyd testified during the penalty phase, and defense counsel questioned her about Terry's relationship with their son and her daughter. (T 2010-13). On cross-examination the following exchange occurred:

> Q [prosecutor] Okay. And you've testified to this jury about the loving relationship that this father has with his child and that your daughter, who really isn't his child, calls him Daddy.
> A [Floyd] Yes.
> Q What do you think Joelle Franco's children called her?

(T 2016). The court immediately sustained Terry's objection to the prosecutor's question and held a side bar conference. (T 2017). Defense counsel moved for a mistrial "because it is so prejudicial it cannot be undone." (T 2017). The prosecutor

argued that the defense opened the door to the question and stated that "the victims in this case have rights, too." (T 2017). Defense counsel responded that he did not open the door and stated: "The feelings of the Francos or the Franco children is immaterial, irrelevant and as to any aggravating factor highly prejudicial." (T 2017). The court agreed that the question should not have been asked, and defense counsel argued that a curative instruction would be insufficient, while the state disagreed with that contention. (T 2018). The court denied the motion for mistrial after observing:

> Gentlemen, Abel Franco and the Franco family have been here throughout this trial. It is also clear that members and people concerned with Mr. Terry's fate have also been here during the trial. It is very clear that there is a victim here and people who care about the victim. And while the question was inappropriate, it is not something that this jury did not already realize.

(T 2019). The court then gave a curative instruction: "Ladies and gentlemen, Mr. Zolezzi's last inquiry was inappropriate, the objection was sustained and the question should be disregarded by you." (T 2019).

As this Court has long held, "for an argument to be cognizable on appeal, it must be the specific contention asserted as legal ground for the objection, exception, or motion below." Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982). At trial Terry argued that the prosecutor's question was prejudicial, not that it constituted a nonstatutory aggravator or impermissible victim impact evidence. The current complaints are not the specific claim made to the trial court, and, thus, the current claim has not been preserved for appeal.

If this Court chooses the consider this issue on the merits, however, it should hold that the trial court did not err in denying a mistrial. A motion for mistrial is addressed to the trial court's discretion and should be granted only when a new trial is the only means of assuring a defendant a fair trial. Gorby v. State, 630 So.2d 544 (Fla. 1993), cert. denied, 115 S.Ct. 99 (1994). In other words, a mistrial is not warranted when an error causes no substantial harm. Esty v. State, 642 So.2d 1074 (Fla. 1994); Breedlove v. State, 413 So.2d 1 (Fla.), cert. denied, 459 U.S. 882, 103 S.Ct. 184, 74 L.Ed.2d 149 (1982). Terry states that he should be resentenced before a new jury, but makes no attempt to show that he suffered any harm. This may be because the question caused no harm. The trial court gave a cautionary instruction, telling the jury to disregard the question. The subject of the question was never mentioned again, and it certainly did not become a feature of the trial. Cf. Stein v. State, 632 So.2d 1361 (Fla.), cert. denied, 115 S.Ct. 111 (1994). Terry has failed to demonstrate that the court abused its discretion by denying the motion for mistrial, and this claim should be denied.

ISSUE 15

WHETHER THE COURT ERRED IN LIMITING TERRY'S PENALTY-PHASE ARGUMENT.

Terry argues that the trial court's refusal to allow him to argue that he could be sentenced to life imprisonment for his noncapital convictions improperly precluded his presentation of mitigating evidence. There is no merit to this issue.

At the end of the penalty-phase charge conference defense counsel asked for permission "to argue in front of the jury the sentencing options on the other cases." (T 1975-76). In other words, counsel wanted to tell the jury that, on the noncapital offenses, "the court may impose a natural life sentence outside of the guidelines and that if it's outside of the guidelines there's no eligibility for parole." (T 1977). The court then stated: "Number one, I don't know that to be the case. Number two, are we going to start telling the jury all the factors that the court will take into consideration to depart?" (T 1977). The state argued that Nixon v. State, 572 So.2d 1336 (Fla. 1990), cert. denied, 112 S.Ct. 164, 116 L.Ed.2d 128 (1991), precluded such an argument. (T 1978-79). The court agreed with the state's argument and stated: "I will not allow argument with regard to potential penalties on the noncapital offenses. Defense will be allowed to argue in mitigation that Mr. Terry stands convicted of two other offenses. And I would take that a step further and let the defense argue that the court will impose sentences on those." (T 1982). Defense counsel agreed to the court's ruling and argued to the jury as follows:

> The ultimate penalty the state is asking each and every one of you to recommend is that Kenny Terry be sentenced to die. The alternative is life behind bars, no possibility of parole for twenty-five years. That does not mean that Kenneth Terry, who will be almost fifty at the time, will get out in twenty-five years, folks. It means he's eligible for parole.
>
> There is something else to consider. You've convicted him of three counts. The judge will also sentence him on the other two counts separately from whatever he sentences him upon the murder charge.

(T 2029).

As the state argued, this Court addressed this issue in Nixon. Nixon's counsel wanted to inform his jury of the maximum penalties Nixon could receive for his noncapital convictions. The trial court noted that counsel could "argue in mitigation that Nixon stood convicted of other serious felonies," 572 So.2d at 1344, but refused to instruct the jury on the maximum penalties for those crimes. This Court found no error and held: "The fact that Nixon was convicted of three other offenses each of which carried lengthy maximum penalties is irrelevant to his character, prior record, or the circumstances of the crime." Id. at 1345.

Terry, of course, does not cite Nixon or attempt to distinguish that case. He has not demonstrated any improper limitation on the presentation of mitigating evidence, and this issue has no merit.

ISSUE 16

WHETHER THE TRIAL COURT ERRED IN ITS CONSIDERATION OF THE PROPOSED MITIGATING EVIDENCE.

In this issue Terry argues that the trial court erred by ignoring the mitigating evidence and that numerous mitigators should have been found and given substantial weight. As the state will show, however, there is no merit to this issue.

In the penalty phase the prosecutor stated that the state would rely on the evidence previously presented and would call no witnesses. (T 1993). Terry called two witnesses, an aunt and his girlfriend. The aunt, Bonnie Hawlsey, testified that Terry lived with her for eight or nine months after his mother was sent

to prison, that Terry's older brother went to live with another aunt, and that Terry was fifteen when he returned to Florida. (T 1993-2001). On cross-examination Hawlsey admitted that Terry had a good upbringing until his mother started having problems when Terry was thirteen. (T 2003). She also stated that she had not seen Terry since he left her home until the day she testified and that she really knew nothing about him during that time. (T 2006-07). Valerie Floyd, Terry's girlfriend, testified that she and Terry lived together for several years, that he told her he had lived on his own since the age of fifteen or sixteen, and that Terry treated her and their children well. (T 2009-13). On cross-examination Floyd admitted that Terry did not tell her he could have gone back to his aunt, that she received welfare payments for the children because neither she nor Terry had a job, that she could not remember when Terry had a job, and that Terry and her brother Demon spent a lot of time playing video games at the mall. (T 2013-16).

Both in argument before sentencing (T 2075-79, 2013-06), and in a sentencing memorandum (R 723) Terry urged the court to find that he had established the following items in mitigation: age; emotional and developmental deprivation; poverty; good family man; and the circumstances of the crime made death a disproportionate penalty. The prosecutor argued that the possible mitigators had not been established and that the proposed aggravators had. (T 2082-2103). In his sentencing order the judge noted that the only statutory mitigator Terry asked for an instruction on was age, that Terry waived the no significant criminal history mitigator, and that there was no

evidence of the other statutory mitigators. (R 750-51). The judge then analyzed the proposed mitigators and found that none had been established. (R 751-53).

Terry argues that he presented uncontroverted mitigating evidence and that, therefore, the trial court erred in refusing to find that all of his proposed mitigators had been established and were due substantial weight. As the state will demonstrate, there is no merit to this argument.

In Rogers v. State, 511 So.2d 526 (Fla. 1987), cert. denied, 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988), this Court set out the way in which trial courts should address proposed mitigating evidence. Under the Rogers procedure a trial court must "consider whether the facts alleged in mitigation are supported by the evidence[,] . . . must determine whether the established facts are of a kind capable of mitigating the defendant's punishment[, and] . . . must determine whether they are of sufficient weight to counterbalance the aggravating factors." Id. at 534. A trial court "must expressly evaluate" each proposed mitigator and "must find as a mitigating circumstance each proposed factor that is mitigating in nature and has reasonably been established by the greater weight of the evidence." Campbell v. State, 571 So.2d 415, 419 (Fla. 1990) (footnotes omitted). Whether the greater weight of the evidence establishes a proposed mitigator, however, "is a question of fact." Id. at n.5; Lucas v. State, 613 So.2d 408 (Fla. 1992), cert. denied, 114 S.Ct. 136, 126 L.Ed.2d 99 (1993).

The trial court followed the dictates of Rogers and Campbell. In discussing the statutory mitigator of age the trial court stated:

> Evidence (state's exhibit number 20; the defendant's driver's license) showed the defendant was twenty-one years ten (10) months of age on July 14, 1992, the date of the murder. There was no evidence to suggest that the defendant's mental or emotional age did not match his chronological age. The fact that the defendant was twenty-one years ten (10) months of age, without more, is not significant. The circumstance found not to exist.

(R 751, emphasis supplied). The court listed the possible nonstatutory mitigators (R 751) and discussed each in turn. As to the alleged mental and emotional deprivation as an adolescent, the court stated and found:

> Evidence showed that the defendant had a "pretty good/normal upbringing" for his first approximate thirteen years. During the next approximate year the defendant's mother had a miscarriage, obtained a divorce, lost her job, and eventually went to prison on a drug offense. This necessitated the defendant and his brother moving to Maryland and each living with a separate aunt. The defendant while living with his single aunt did well in school and maintained a job after school. The defendant being unhappy in Maryland, after eight or nine months, at age fifteen (15) moved back to Florida and lived with a male friend of his mother's. It is unknown what kind of life the defendant had living with his mother's male friend. The defendant's girlfriend testified, that the defendant had told [her] that he has been on his own since age fifteen (15) or sixteen (16) and at some point lived on the street sleeping in abandoned cars.
>
> Hearsay testimony showing that the defendant was living on his own since age fifteen and at some point lived on the street and slept in abandoned cars does not amount to a reasonable quantum of competent proof of a non-statutory mitigating circumstance of emotional and developmental deprivation in adolescence (even when considered in conjunction with the defendant's age).

(R 751-52). Regarding the alleged mitigator of poverty, the court found:

> The fact that the defendant's girlfriend and mother of his child was receiving Aid to Family's with Dependent Children, i.e., evidence of existence at a poverty level of the child and his mother and by implication the defendant, does not amount to a nonstatutory mitigating factor. While the defendant's girlfriend testified that the defendant provided financial support when able there were extended periods when the defendant had no job. She couldn't recall when the defendant's last job was. She also testified, on cross examination, that the defendant played video games at the mall for long periods of time (the logical inference being, and argued by the state, was that the defendant could have been working or at least looking for a job to support his family and combat any poverty).

(R 752). In rejecting Terry's allegedly being a good family man as a mitigator, the court stated: "Evidence did show that the defendant loved his girlfriend and young son and treated them well and treated his girlfriend's daughter by another man as his own daughter. If the above makes the defendant a 'good family man' it does not amount to a non-statutory mitigating circumstance." (R 753). Finally, in regards to proportionality, the court stated:

> Lastly the defendant urges as a non-statutory mitigating circumstance that the "circumstances of the crimes do not set this murder apart from the norm of other murders". Based on the two above described aggravating circumstances and no mitigating circumstances, the death penalty is the appropriate sentence. The defendant's proportionality argument is properly presented to the Florida Supreme Court when it reviews this sentence and considers the circumstances in the light of other decisions determining whether the death penalty is appropriate. See for example: Clark v. State, 613 So.2d 412 (Fla. 1992); Freeman v.

State, 563 So.2d 73 (Fla. 1990); Maxwell v. State, 443 So.2d 967 (Fla. 1983); Shriner v. State, 386 So.2d 525 (Fla. 1980); and Cook v. State, 581 So.2d 141 (Fla. 1991).

(R 753).

Except for proportionality, a component of appellate review, the proposed mitigators are, as Terry argues, the type of things that can constitute mitigation if the facts really show that they exist. The decision on whether the facts establish a particular mitigator, however, lies with the trial court and will not be reversed merely because an appellant, or this Court, reaches a different conclusion. Wyatt v. State, 641 So.2d 355 (Fla. 1994); Preston v. State, 607 So.2d 604 (Fla. 1992), cert. denied, 113 S.Ct. 1619, 123 L.Ed.2d 178 (1993); Sireci v. State, 587 So.2d 450 (Fla. 1991), cert. denied, 112 S.Ct. 1500, 117 L.Ed.2d 639 (1992). A trial court's finding that a proposed mitigator is not supported by the facts "will be presumed correct and upheld on review if supported by 'sufficient competent evidence in the record.'" Campbell, 571 So.2d at 416 n.5 (quoting Brown v. Wainwright, 392 So.2d 1327, 1331 (Fla. 1991)); Lucas; Johnson v. State, 608 So.2d 4 (Fla. 1992), cert. denied, 113 S.Ct. 2366, 124 L.Ed.2d 273 (1993); Ponticelli v. State, 593 So.2d 483 (Fla. 1991), aff'd on remand, 618 So.2d 154 (Fla.), cert. denied, 114 S.Ct. 352 (1993). Resolving conflicts in the evidence is the trial court's duty, and its resolution is final if supported by competent substantial evidence. Parker v. State, 641 So.2d 369 (Fla. 1994); Lucas; Johnson; Sireci; Gunsby v. State, 574 So.2d 1085 (Fla.), cert. denied, 112 S.Ct. 136, 116 L.Ed.2d 103 (1991).

The trial court's findings are supported by the facts. As this Court has long held: "There is no per se rule which pinpoints a particular age as an automatic factor in mitigation. The propriety of a finding with respect to this circumstance depends on the evidence adduced at trial and at the sentencing hearing." Peek v. State, 395 So.2d 492, 498 (Fla. 1980), cert. denied, 451 U.S. 964, 101 S.Ct. 2036, 68 L.Ed.2d 342 (1981). At the time of this murder Terry was an adult and, as the trial court pointed out, nothing in the record supports any claim that his mental or emotional age did not match his chronological age. Everyone has an age, and Terry presented nothing to show that his age of almost twenty-two years was relevant to the commission of this murder. The record also supports the conclusion that emotional and developmental deprivation had not been established. The state's cross-examination rebutted Terry's claims, and, as the trial court held, hearsay, if controverted, does not have to be accepted as supporting a possible mitigator. Wuornos v. State, 644 So.2d 1012 (Fla. 1994). As set out in the findings of fact, the record supports the trial court's conclusion that poverty had not been established as a mitigator. Terry has shown no abuse of discretion in the trial court's refusal to find his possibly being a good family man as a mitigator, especially in light of Terry's failure to support that family.

Thus, because Terry has shown no error and no abuse of discretion in the trial court's findings, those findings should be affirmed. Even if this Court holds that the record supports some of Terry's alleged mitigators, no relief is warranted. Error in not finding mitigators can be harmless. Wickham v.

State, 593 So.2d 191 (Fla. 1991), cert. denied, 112 S.Ct. 3003, 120 L.Ed.2d 878 (1992). The proposed mitigators are inconsequential when compared to the aggravators in this case, so any error in not finding them to have been established is harmless beyond a reasonable doubt.

ISSUE 17

WHETHER SECTION 921.141, FLORIDA STATUTES, IS UNCONSTITUTIONAL.

Terry lists nineteen alleged infirmities and deficiencies in Florida's death penalty statute. He claims that these items were preserved for appeal and states that "motions, arguments and Constitutional violations are hereby incorporated herein for the sake of brevity" because this Court has rejected them previously. (Initial brief at 76). There are several problems with Terry's raising this point on appeal.

First and foremost, Terry has waived this issue by failing to include argument on it. "The purpose of an appellate brief is to present arguments in support of the points on appeal. Merely making reference to arguments below without further elucidation does not suffice to preserve issues, and these claims are deemed to have been waived." Duest v. Dugger, 555 So.2d 849, 852 (Fla. 1990). Merely listing alleged constitutional problems without argument precludes appellate review.

Terry filed numerous pretrial motions raising constitutional concerns. (R 407-49). He lists several of these motions on page 76 of his initial brief and refers to record cites regarding them. The items are, however, waived because Terry includes no argument as to how these issues affected any action or ruling in

the trial court. Duest. Also, they were not preserved for appeal, and several have nothing to do with Terry's case. For example, he did not object to the "burden-shifting" instruction or propose an alternative instruction, and the heinous, atrocious, or cruel and cold, calculated, and premeditated aggravators played no part in this case. Thus, the first seven items are waived and also procedurally barred.

The remaining twelve issues, listed on pages 77 through 79 of the initial brief, are also both waived and procedurally barred. Not only is there no argument regarding them, the lack of record citations shows that they were not presented at trial. As this Court wrote in a similar situation:

> Finally, Swafford presents a number of challenges to the constitutionality of the Florida capital sentencing law. This broadside attack on the sentencing law is not related . . . to any action or ruling in the lower court that affected his sentencing. Moreover, Swafford did not raise or preserve these issues for appeal by motion or objection in the lower court. For these reasons we are unable to provide appellate review of the issues raised.

Swafford v. State, 533 So.2d 270, 278 (Fla. 1988) (citation omitted, emphasis supplied), cert. denied, 489 U.S. 1100, 109 S.Ct. 1578, 103 L.Ed.2d 944 (1989).

Thus, the only correct part in this point is that the items Terry lists have been rejected previously. Indeed, this Court uniformly rejects, in summary fashion, the challenges raised by Terry. E.g., Wuornos v. State, 644 So.2d 1012 (Fla. 1994); Thompson v. State, 619 So.2d 261 (Fla.), cert. denied, 114 S.Ct. 445, 126 L.Ed 378 (1993), and cases cited therein.

The summary disposal of such claims, however, presents a problem. The only reason for this boilerplate issue is the hope that the manner in which this Court disposes of it can be construed as a ruling on the merits so that it can be reviewed in the federal courts. The state, therefore, asks this Court to hold that the claims listed in this point have been waived for lack of argument and that they are procedurally barred as untimely and improperly raised. Duest; Swafford.

ISSUE 18

WHETHER TERRY'S DEATH SENTENCE IS PROPORTIONATE.

In this issue Terry argues that his death sentence is disproportionate. He bases this claim both on his contention that only one valid aggravator exists and on cases that are factually distinguishable from this one. As the state will demonstrate, there is no merit to this issue.

The trial court found that two aggravators had been established beyond a reasonable doubt, i.e., the merged factor of committed during a felony (robbery)/pecuniary gain and prior violent felony. (R 749-50). As the state showed in issues 11 and 12, supra, the evidence supports both of these aggravators. Also, as shown in issue 16, supra, the trial court correctly found that no mitigators had been established. Because two valid aggravators exist, Terry's reliance on cases where this Court reduced death sentences supported by a single aggravator and where at least some mitigation existed is misplaced. E.g., White v. State, 616 So.2d 21 (Fla.), cert. denied, 114 S.Ct. 214, 126 L.Ed.2d 170 (1993); Klokoc v. State, 589 So.2d 219 (Fla. 1991);

McKinney v. State, 579 So.2d 80 (Fla. 1991). The following cases, included with multiple-aggravator cases on pages 82 through 84 of the initial brief, are also single-aggravator cases with substantial mitigation: Knowles v. State, 632 So.2d 62 (Fla. 1993); Jackson v. State, 575 So.2d 181 (Fla. 1991); Douglas v. State, 575 So.2d 165 (Fla. 1991); Penn v. State, 574 So.2d 1079 (Fla. 1991); Nibert v. State, 574 So.2d 1059 (Fla. 1990); Smalley v. State, 546 So.2d 720 (Fla. 1989); Songer v. State, 544 So.2d 1010 (Fla. 1989); Lloyd v. State, 524 So.2d 396 (Fla. 1988); Proffitt v. State, 510 So.2d 896 (Fla. 1987); Ross v. State, 474 So.2d 1170 (Fla. 1985); Caruthers v. State, 465 So.2d 496 (Fla. 1985); Rembert v. State, 445 So.2d 337 (Fla. 1984); and Menendez v. State, 419 So.2d 312 (Fla. 1982). These cases are distinguishable due to the absence of aggravators and the presence of mitigators and do not support Terry's disproportionality argument.

The cited multiple-aggravator cases also do not support Terry's argument. Several of these cases are "domestic" killings, a peculiar type of case where this Court frequently finds a death sentence unwarranted. E.g., Farinas v. State, 569 So.2d 425 (Fla. 1990); Cheshire v. State, 568 So.2d 908 (Fla. 1990); Blakely v. State, 561 So.2d 560 (Fla. 1990); Irizarry v. State, 496 So.2d 822 (Fla. 1986). Cheshire and Irizarry are both jury overrides as well, and all of the "domestic" cases are factually distinguishable from and inapposite to the instant case. Welty v. State, 402 So.2d 1159 (Fla. 1981), is also distinguishable because it is a jury-override case. In Morgan v. State, 639 So.2d 6 (Fla. 1994), this Court found the death

sentence disproportionate when based on two aggravators and eight mitigators, including Morgan's age of sixteen years. Similarly, the death sentence was deemed disproportionate, even though there were two aggravators, because of the mitigation of "alcoholism, mental stress, severe loss of emotional control, and potential for productive functioning in the structured environment of prison" in Kramer v. State, 619 So.2d 274, 278 (Fla. 1993). In an apparently unique case, Tillman v. State, 591 So.2d 167 (Fla. 1991), this Court could not perform a proportionality review because of the lack of facts in the record. After noting the presence of two aggravators and several mitigators, the Court stated: "We simply cannot determine the issue [proportionality] on this record. Thus, all doubts must be resolved in favor of Tillman." Id. at 169. In Livingston v. State, 565 So.2d 1288, 1292 (Fla. 1988), this Court reduced the death sentence because the mitigators "effectively outweighed" the two aggravators. Finally, in Fitzpatrick v. State, 527 So.2d 809 (Fla. 1988), this Court held that three statutory mitigators (both mental mitigators and age) rendered the death penalty disproportionate in spite of five aggravators.

The facts of this case show the inappropriateness of comparing it with the cases Terry relies on. This case is neither a jury override nor a domestic killing. Terry presented inconsequential possible mitigating evidence and established no mitigators. This is in contrast to the substantial, and sometimes overwhelming, mitigation present in the cases he relies on. E.g., mental mitigators - Nibert, Morgan, Fitzpatrick; age - Morgan, Livingston; substance abuse - Kramer, Nibert. Moreover,

Terry's trial court correctly found the aggravators established in his case entitled to "solid" and "strong" weight. (R 749, 750).

Instead of the cases Terry relies on, armed robbery cases such as the following are more appropriate for a proportionality comparison. In each the state established the same two aggravators as in this case, i.e., prior conviction of a violent felony and felony murder (robbery)/pecuniary gain. Like Terry, some of these defendants established no mitigators; others demonstrated that mitigators existed, but they were insufficient to overcome the aggravators. Lowe v. State, 20 Fla.L.Weekly S121 (Fla. Nov. 23, 1994) (little or nothing in mitigation); Brown v. State, 644 So.2d 52 (Fla. 1994) (mitigators worth little weight); Smith v. State, 641 So.2d 1319 (Fla. 1994) (one statutory and several nonstatutory mitigators did not outweigh aggravators); Melton v. State, 638 So.2d 927 (Fla. 1994) (noncompellling nonstatutory mitigators); Clark v. State, 613 So.2d 412 (Fla. 1992) (no mitigators), cert. denied, 114 S.Ct. 114, 126 L.Ed.2d 79 (1993); Freeman v. State, 563 So.2d 73 (Fla. 1990) (noncompelling nonstatutory mitigation), cert. denied, 501 U.S. 1259, 111 S.Ct. 2910, 115 L.Ed.2d 1073 (1991); Jackson v. State, 502 So.2d 409 (Fla. 1986) (no mitigators), cert. denied, 482 U.S. 920, 107 S.Ct. 3198, 96 L.Ed.2d 686 (1987); Blanco v. State, 452 So.2d 520 (Fla. 1984) (no mitigators); White v. State, 446 So.2d 1031 (Fla. 1984) (no mitigators).

This was a well-planned criminal episode. Terry provided the masks with which he and Floyd concealed their identities from the victims. He also provided the weapons with which Floyd

rendered Mr. Franco helpless and with which he effectuated the robbery and murder of Mrs. Franco. The aggravators of prior violent felony conviction and felony murder (robbery)/pecuniary gain are well supported by the record. Moreover, Terry presented inconsequential evidence to support his claims of mitigation. This case contains none of the substantial mitigators, such as mental or emotional disturbance or drug or alcohol abuse, present in the cases he presents as "proportionate" to his case. Thus, when the nature and quality of the aggravators in this case are weighed against the lack of mitigation and truly similar cases are used for comparison, it is obvious that Terry's death sentence is both appropriate and proportionate. That sentence, therefore, should be affirmed.

CONCLUSION

Therefore, the State of Florida respectfully requests that this Court affirm Terry's convictions and sentences.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

Barbara J. Yates

BARBARA J. YATES
Assistant Attorney General
Florida Bar No. 293237

DEPARTMENT OF LEGAL AFFAIRS
The Capitol
Tallahassee, FL 32399-1050
(904) 488-0600

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Ms. Barbara C. Davis, 220 S. Ridgewood Avenue, #210, Daytona Beach, Florida 32114 this 31 day of March, 1995.

Barbara J. Yates

BARBARA J. YATES
Assistant Attorney General