IN THE SUPREME COURT OF FLORIDA

CASE NO. 83,612

MERRIT ALONSO SIMS,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

AN APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA CRIMINAL DIVISION

BRIEF OF APPELLEE

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

FARIBA N. KOMEILY
Assistant Attorney General
Florida Bar No. 0375934
Office of Attorney General
Department of Legal Affairs
Post Office Box 013241
Miami, Florida 33101
(305) 377-5441

TABLE OF CONTENTS

TABLE OF CONTENTS
(Continued)

TABLE OF CONTENTS
(Continued)

TABLE OF CITATIONS

TABLE OF CITATIONS
(Continued)

TABLE OF CITATIONS
(Continued)

TABLE OF CITATIONS
(Continued)

TABLE OF CITATIONS
(Continued)

TABLE OF CITATIONS
(Continued)

TABLE OF CITATIONS
(Continued)

CASES — PAGE

TABLE OF CITATIONS
(Continued)

CASES — PAGE

OTHER AUTHORITIES

STATEMENT OF THE CASE AND FACTS

Merrit Alonso Sims was charged, by indictment, with one count of first degree murder of a law enforcement officer, armed robbery and unlawful possession of a firearm by a convicted felon. (R. 1).

A. Trial Testimony

On June 8, 1991, Sims spent the day with his cousin, Sam Mustipher. (T. 908-12). Mustipher owned a white Cadillac, which he let the defendant borrow at the end of the day. (T. 906, 914-15). Sims stated that he would return the car the next day. (T. 914-15). When the defendant failed to return the car by June 10th, and Mustipher could not locate the defendant, Mustipher called the police and reported the car as stolen. (T. 915-16). Mustipher told the police that the defendant had been driving the car. (T. 918-19). Mustipher stated that he never carried drugs in the car; the same held true for his sister and mother. (T. 920-21).

On the evening of June 11, 1991, at approximately 8:45 p.m., Charlene Navarro, a dispatcher for the Miami Springs Police Department, received a call from Officer Charles Stafford, the victim, asking her to run a check on a license tag for him. (T. 946). Navarro did and told Stafford that the vehicle was stolen. (T. 949-50). Navarro asked for, and received, Stafford's location, and, upon reporting that the car was stolen, one other unit in the area responded that it would assist. (T. 952-53). Stafford then asked Navarro to confirm, once again, that the vehicle was stolen, and Navarro complied, reiterating that the vehicle was, in fact, stolen. (T. 953). The last thing which Navarro heard was Stafford reporting that he was now on the 27th Avenue exit ramp on State Road 112 and that the vehicle is stopping. (T. 957). At

8:54 p.m., Sgt. Pessolano called for assistance, stating that Officer Stafford was down. (T. 959).

The tape of the above dispatch was played for the jury and entered into evidence. (T. 947-9). The tape was established to be accurate as to the actual passage of time between the communications on it. (T. 950-1). The tape reflects that only approximately 75 seconds had elapsed between the time that the victim stated he was on the ramp and when another officer asked for assistance as Stafford was down.[1] The actual time between the victim stopping and being shot was even less, as a civilian motorist had observed the officer on the ground, stopped, and was assisting the victim, before the arrival of other officers who then reported the victim was down and requested assistance on said tape. (T. 998-9; 1001).

Several motorists in the vicinity, observed the Cadillac and some of the events leading up to the shooting of Officer Stafford. Kenneth Bruener had seen the white Cadillac parked at a Subway restaurant, around 8:30 p.m., located at N.W. 36th Street and LeJeune Road, near the entrance to State Road 112. (T. 930, 933-36). After Bruener left the restaurant, he observed the Cadillac, being followed by a Miami Springs police officer's vehicle, proceed to get onto State Road 112. (T. 933-34). Bruener then lost track of the Cadillac and police vehicle. (T. 934-35).

Fred Batule had been driving on State Road 112 and exited at N.W. 27th Avenue, when he observed a police car, on the roadway side of exit ramp, with its emergency red and blue lights on, parked behind another vehicle. (T. 961-

---

[1] The appellee is supplementing the record on appeal with said tape, which when played reflects the above timing.

64). The second vehicle was a white Cadillac. (T. 970). Batule slowed down, going at approximately 10-15 miles per hour. (T. 965). His windows, both the driver's and passenger's sides, were open.

Batule observed the officer was in uniform and there was a black male with him. (T. 965-66). The black male was standing next to the Cadillac, with his hand on top of it; the officer had his left hand on the back (not front) of the neck of the black male. (T. 966-67, 974). The officer had his gun in his right hand and had it aimed at the black male's head. (T. 968). Batule heard the black male state, once, "Okay, you got me, man." (T. 969, 976). Batule then observed the officer put his gun back into his holster. (T. 969, 975). The officer was not saying anything. (T. 976). The officer did not hit the black male or strike him in any way. (T. 969). At this time, the officer had a "dot" on his forehead and his face was covered with blood. (T. 969). Batule did not observe any injuries on the black male. (T. 970).

Having observed the above for approximately twenty seconds, Batule continued off the exit ramp, towards the traffic light on 38th Street. (T. 970). The light was red and Batule stopped. (T. 971). While still stopped at this red light, Batule saw the same white Cadillac approach him at a high speed and go through the red light. (T. 970-1).

Gilda Castano was also driving in the same vicinity, a passenger in the car driven by her mother-in-law, as she was going to pick up her husband from work. (T. 992-4). She, too, saw Officer Stafford's car, with its emergency lights flashing, off of State Road 112 at the 27th Avenue exit. (T. 993-4). The Cadillac was still there, and the officer's car door was wide open, while

the officer was on the ground. (T. 995-97). Ms. Castano got out of her vehicle to see whether she could help. (T. 997-9). She saw the officer had been shot, covered in blood, laying on the ground with the upper part of his body in the grass and his legs on the roadway. Id. The officer was mumbling, but could not speak, due to the blood coming out of his mouth. (T. 999). Castano looked towards the Cadillac, as she was wondering why it was not helping; she made eye contact with the driver of the Cadillac. (T. 997-9). Shortly thereafter, another police vehicle arrived and she heard that officer saying "he is hurt, he is hurt," going over to the police car and asking for assistance. (T. 1000-2). A few days later, Castano picked the defendant's photograph out of a photo lineup, and identified him as the man she observed in the Cadillac. (T. 1004, 981-84).

Several police officers responded to the scene immediately after the shooting. Officer Sharon Kumm responded to the call at 8:54 or 8:55 p.m., and Officer Stafford had already been shot and was on the ground. (T. 1008-9). Officer Jeff Clark heard the radio dispatcher's report about the stolen vehicle. (T. 1015-16). Clark then heard Stafford report that he was getting off of State Road 112 at the N.W. 27th Avenue exit. (T. 1017). At that time, Clark was in the immediate vicinity, as he was getting onto State Road 112 at the N.W. 42nd Avenue ramp. (T. 1018). He proceeded directly to the location reported by Stafford. (T. 1018). By the time Clark arrived, Stafford had already been shot and was on the ground, and another officer, Sgt. Pessolano had already arrived. (T. 1018-19).

Carol Mustipher, Sam's sister and the defendant's cousin, stated that after learning about the shooting of the officer, she received a phone call

from the defendant, who wanted to speak to Sam. (T. 1031-32). After Ms. Mustipher advised the defendant that Sam was out, she asked where the car was, and the defendant stated that it was "right here" and that he would bring it over. (T. 1032-33). Ms. Mustipher specifically referred to the shooting in her conversation with the defendant, but he said nothing in response. (T. 1034). Ms. Mustipher also stated that neither she nor her mother used any drugs. (T. 1015).

Otis Robinson, a cab driver, stated that on June 12, 1991, between 7:00 and 8:00 a.m., he went to pick up a fare at 2755 N.W. 42 Street, in the Hampton House Apartments. (T. 1039-40). The defendant got into the cab and told Robinson where he wanted to go. (T. 1040-41). At that time, the defendant asked Robinson if he had heard about the killing of a police officer and if Robinson had noticed a car. (T. 1041-42). The defendant continued to talk about the car, and told Robinson that the police had found it in that apartment complex and that it had blood on it. (T. 1042-43). As Robinson was leaving the parking lot with the defendant, Robinson observed police cars coming in. (T. 1043). Robinson drove the defendant to the requested area and dropped him off. (T. 1041). In addition to identifying the defendant, in court, as the fare whom he picked up (T. 1042), Robinson had also identified the defendant in a photo lineup. (T. 1036-37, 1045). The defendant had not complained of any injuries, and Robinson did not observe any signs of injury on him. (T. 1052-3).

Several officers participated in the investigation of the murder scene and related what they found. Officer Stafford's gun belt was found at the site, with his holster unsnapped. (T. 856-57). The officer's firearm was

missing. (T. 857). Stafford's handcuff case was unsnapped, and the handcuffs were missing. (T. 857). The officer's police radio, which would normally be attached to his belt, was found on the ground in the vicinity of the murder. (T. 873-74). The officer's flashlight, which would also normally be attached to his belt, was found in the officer's vehicle. (T. 874-76). Casings were retrieved from the ground in the vicinity of the murder. (T. 851).

On June 12, 1991, Officer Karl Barnett participated in the search which located the Cadillac at the Hampton House Apartments, the complex where Otis Robinson had picked up the defendant. (T. 1054-55). This complex was in the immediate vicinity of State Road 112 and N.W. 27th Avenue. (T. 1056). The Cadillac, which was located in the complex's parking lot, had blood on several locations - the handle of the driver's door; the back of the car; and the trunk. (T. 1060). The car was processed for fingerprints. (T. 1067). Officer Stafford's vehicle was also processed for prints. (T. 1071-76). Of the latent prints which had value, several prints from the Cadillac matched the defendant's prints, and several prints from Officer Stafford's car matched the prints of the victim. (T. 1123-32).

After the Cadillac was located, Detective Silva, with the narcotics K-9 unit, subjected the car to a search by the trained dog. Officer Silva detailed the training of the dog and how the dog alerts to the scent of several drugs. (T. 1080-81). The search was conducted on June 13th. (T. 1082). During the exterior search of the car, the dog did not alert. (T. 1084). Silva then placed the dog inside the car and the dog alerted in the area of the passenger seat. (T. 1085). The drugs which the dog alerts to are marijuana, cocaine, heroin and hash. (T. 1086). The officer then

conducted a hand search, but did not discover any contraband. (T. 1086-87). He pointed out, however, that the dog is trained to respond to the odor of the drugs. (T. 1087). It should be noted that all of the foregoing testimony regarding the dog's detection of the scent of drugs was admitted into evidence without any objection from the defense.

After the completion of Detective Silva's testimony regarding the detection of the scent of drugs, the prosecution sought to call its next witness, Essie Lynn, the defendant's community control officer in June, 1991. (T. 1090, et seq.). Defense counsel complained that Ms. Lynn was not listed as a witness. (T. 1090). The prosecutor stated that she had been listed and proceeded to search through various discovery documents, without finding any reference to Ms. Lynn. (T. 1090-91). The judge then stated that if she was not listed, the court would conduct a Richardson inquiry. (T. 1091). Immediately after the judge's statement, the prosecutor responded, "that's fine, we can have the Richardson hearing." (T. 1091). The judge then proceeded to conduct a full inquiry into the reasons for the failure to list the witness, the nature of her anticipated testimony, defense counsel's prior awareness of the witness and the essence of her testimony:

> **THE COURT:** Tell me what she is going to testify. Tell me why her name isn't on the list first.
>
> **MR. ROSENBERG [prosecutor]:** It's not on the discovery sheet, but it has to be by inadvertence.
>
> **THE COURT:** What list are you talking about that her name is on?
>
> **MR. ROSENBERG:** I get a list prior to trial, witness list of every witness, through the computer, of discovery that's listed in the office. Witness No. 127 is Essie Lynn on my sheet. I have looked through my discovery and I don't see her name, but it's so long that something -- that I don't have my additional discovery or I fail to list her name or I gave it

to my secretary to put it on the additional discovery sheet and it was not handed out.

THE COURT: What would she testify to?

MR. ROSENBERG: The defense, months ago, listed a witness by the name of Linda Vestman (phonetic), who is a probation officer with Essie Lynn. I took Linda Vestman's deposition. She told both myself and Mr. Carter [defense counsel] that it's not her that was the control officer for the defendant, it's Essie Lynn.

THE COURT: Okay.

MR. ROSENBERG: Along with that, Mr. Carter and Mr. Pitts [defense counsel] were provided in discovery all the community control -- I should say all the controlled release papers signed by Ms. Lynn and the defendant.

So apparently it was inadvertence by me by not putting her name on additional discovery, but both counsel have known for months about Ms. Lynn. In fact, Ms. Lynn was the control officer who did the arrest warrant for the defendant when he was in California.

So as far as the Richardson hearing goes, it is clear that I provided all discovery with her name and it's clear that inadvertently I failed to place her name.

MS. LEHNER [prosecutor]: The defense has also been aware since sometime last week that the state will be establishing in this case that the defendant was a parolee. In fact, that's in the third paragraph of the state's motion in limine. So as of last week when I provided them with this motion in limine, they knew we were going to prove the defendant was on parole.[2]

(T. 1092-93). Defense counsel never objected to any of the foregoing assertions by the prosecution. The judge then proceeded to inquire into the relevancy of the testimony that the defendant was on parole or community control at the time of the murder, and the prosecution explained that it provided a motive for the murder - the fear of the defendant of going back to

---

[2] The prosecutor was referring to the Motion for Order in Limine, which was filed on January 3, 1994, prior to the commencement of the trial. In that motion, the prosecution had stated: "The defendant is charged with the shooting death of Officer Charles Stafford that occurred at approximately 8:55 p.m., on June 11, 1991. The State will establish that on that occasion, the defendant, a parolee, in possession of drugs, shot and killed Stafford and then escaped." (R. 230).

jail, by having community control revoked, as a result of his possession of drugs in the vehicle. (T. 1093-95). The judge deferred ruling on this evidence pending further briefing and argument regarding its admissibility at the start of the next day's proceedings. (T. 1095). The judge also announced that he was satisfied that the State's omission was inadvertent. (T. 1097). When the prosecutor addressed the issue of prejudice to the defense, the judge concurred with the prosecutor's assertion that there was no procedural prejudice. (T. 1097).

At the commencement of the next day's proceedings, defense counsel argued that the evidence as to the defendant's parole status was irrelevant to the question of motive. (T. 1103). The judge overruled defense counsel's objection and permitted the State to present the testimony. (T. 1104).

Ms. Lynn then took the stand and simply stated that she was a probation and parole officer for the Department of Corrections and that the defendant had been put on controlled release from State prison on April 19, 1991. (T. 1106-07). She had reviewed the guidelines with the defendant, including the fact that it was a violation to possess or use drugs, and that such a violation could result in revocation of controlled release. (T. 1108-09).

Officer Stafford's gun was never retrieved. At one point, the defendant, subsequent to his arrest, advised Detective Diaz that he was willing to show the police where the gun was. (T. 1188). The defendant took the police to a location by the Miami River, but a search by the police did not locate the weapon. (T. 1190).

The officer's weapon was a Glock 17, a 9 mm semiautomatic weapon. (T. 1139). According to a firearms technician, the casings which were found at the scene were consistent with having been fired from a Glock 17. (T. 1148). Similarly, the projectiles which were retrieved were consistent with having come from the same gun. (T. 1151). The projectiles were recovered by the medical examiner, during the course of the autopsy. (T. 1208). According to the firearms technician, the stippling patterns indicated that one of the two gunshots had been fired with the gun muzzle a distance of 6-12 inches from the victim; the second wound had been inflicted from a distance of 12-18 inches. (T. 1156-59).

The cause of death was multiple gunshot wounds. (T. 1210). One of the two wounds was to the front, left side of the neck, at the bottom of the neck. (T. 1203). This wound entered from the left of the neck, as the bullet went back and then down, for approximately 5 inches. (T. 1209). The downward path of the bullet indicated that the shooter had to be above the victim. (T. 1217-18). The victim herein was six feet and one inch tall (T. 1218); the defendant is five feet eight inches tall. (T. 1233). The second gunshot wound was to the upper chest area on the right side of the body. (T. 1203). After entering, the bullet went towards the right and then downward. (T. 1209-10). A laceration found on the top of the officer's head was consistent with his having been struck on the head with his police radio, due to the wavy pattern of the injury. (T. 1215). The doctor also observed some scraping on the left hand. (T. 1206).

A background check of the defendant led the police to search for him, after the murder, in Sacramento, California. (T. 1162-63). Sacramento police

tracked the defendant down to the apartment of a woman in California. (T. 1166-70). The defendant was found there, and arrested in that apartment, on June 17, 1991. (T. 1167-70). In a search incident to that arrest, the arresting officers discovered a Greyhound bus ticket in the possession of the defendant. (T. 1171). The ticket was introduced into evidence; it was purchased on June 12, 1991, in Coral Gables, Florida, for approximately $158. (R. 429-30).

Detective Chapman, who participated in the arrest, noted that when some of the officers knocked on the front door, Chapman observed the defendant and his girlfriend trying to escape through a sliding glass door at the back of the apartment. (T. 1177). Neither Detective Chapman, nor Detective Tanini, who also participated in the arrest, observed any injuries on the defendant. (T. 1172, 1179-80). Neither heard any complaints of any injuries from the defendant, either. (T. 1183, 1172, 1179). The defendant was also fully photographed after this arrest, including photos of his head/neck and wrist areas; there were no signs of any injuries. (T. 1180-4).

After the State rested, and the defendant's motion for judgment of acquittal was denied (T. 1221-23), the defendant testified on his own behalf. (T. 1224, et seq.). The defendant stated that his cousin had given him the car with no time limit as to its return. (T. 1227). Shortly prior to the crimes, he had driven to the Subway Shop to purchase some sandwiches. Id. He did not have enough money on him to pay for the sandwiches, so he went to the car and got "some change", out of the passenger side, to complete his purchase. (T. 1228). He then proceeded on State Road 112, in the far left lane, when he saw a police car behind him. (T. 1229). The defendant moved

over to let the police car pass, but it did not do so and was still behind him. Id. As the defendant moved to the right lane, he heard a "noise" from the police car. Id. The defendant then decided to proceed to the next exit, 27th Avenue. Id. As he was thus exiting the expressway, he again heard the "sound" from the police car and saw lights. Id. He came to a stop on the ramp.

According to Sims, he then got out of his car and started walking between the two vehicles, towards the officer, and before the latter had gotten out of his car. (T. 1229-30, 1280). Sims had his thumbs in his pockets as he was approaching the officer's car. (T. 1227-9). The victim told Sims to put his hands on the car. (T. 1230). Sims backed up towards the car, still facing the officer. (T. 1230-1). The officer, according to Sims, stepped out of his car with his gun drawn and stated, "I thought you was going to run, you going to run? You want to run?" (T. 1230). Upon Sims' protestations that he did not want to run, the officer "continued, he stepped around the door and he begun to come at me. And he was looking at me and pointing the gun in an angry manner; he had a look on his face that was like frightening me." Id. The officer then stated, "you niggers like to steal Cadillacs." (T. 1230-1). Sims began protesting, as the officer came towards him. (T. 1231). Sims then began to step back and "back up" towards the rear of the Cadillac, as the officer was "frightening" him. Id.

Sims, at this time, was trying to explain the reason why he didn't stop and that the car belonged to his cousin, but the officer was accusing him of lying and telling him to "shut up". Id. As Sims backed up towards the rear of the Cadillac, he put his hands behind him on top of the car, still facing

the officer. (T. 1231, 1287-8). Due to the "look" on the officer and "his attitude", Sims then turned away and "looked up in the sky, because "I didn't want to see him." (T. 1231).

According to Sims, he then began "praying out loud," and the officer kept saying "shut up", when Sims felt a "blow" to his mouth and a hand around his throat. (T. 1232). The blow to the mouth "split" Sims' lip. (T. 1296). The officer was also trying to "choke" him. (T. 1232-33). Sims began moving and pushing to stop the choking, but could not. (T. 1233). He reached for "something" which he could not see, and which he later understood to be the officer's radio. Id. Sims then "swung over hand" and hit the officer somewhere in his head. Id. The officer let him go, and Sims then turned around, with his back to the officer, and his hands in the air, as he did not want to be shot. (T. 1234). Sims was still holding the radio and either dropped it or had it taken away, by the officer. Id.

Sims stated that he then felt the officer's hand "squeezing" his neck. (T. 1234). He also felt "something" touching him in the back of the head. (T. 1235). The officer was choking him. (T. 1235, 1291). The officer was repeatedly saying, "you're fucking dead", and, the defendant was crying, saying, "Sir, you know, don't kill me. Just take me to jail. The only reason I hit you is because you was choking me, I couldn't breathe. I was saying, take me to jail. I wasn't trying to hurt you or anything". Id.

As a car passed them, Sims was still "crying" and "hollering" not to be killed and to be taken to jail, as the officer continued to say, "you fucking dead." Id. Once the car had passed by, Sims felt a handcuff on his hand. (T. 1235).

The officer then began to squeeze and shake Sims' hand, as if "trying to put as much pressure as he could." (T. 1236). These actions hurt so much that Sims dropped down to his knee. Id. Sims' hand was subsequently sore and swollen. (T. 1331). The officer then lifted Sims off the ground, and began shaking and choking him at the same time. (T. 1236-7). Sims tried to get the officer's hand away from his neck but could not. (T. 1237). He thus once again tried to reach for something to hit the officer with. (T. 1237-8). He then grabbed something, which although he did not realize it at the time, happened to be the officer's gun. (T. 1238). When he grabbed the gun, the officer let him go and Sims turned around. Id. Before Sims could say anything, the officer "stepped back" and "charged" at him. Id. The victim "was in a down position coming at me with his hands up." (T. 1238). The victim was approximately five (5) feet in front of Sims when he "lunged." (T. 1313-4, 1317-18). Sims put his hand "out to try and stop" the victim, when he "heard an explosion and the gun went off." (T. 1238, 1315-16). The gun was in Sims' right hand, in front of him, with his hand up and as he happened to have his finger on the trigger. (T. 1315-17, 1239). The victim "just kept coming" and the gun "went off again one or two more times." (T. 1238). The victim fell back and to the side. (T. 1239, 1317).

Sims then got back into the Cadillac and left. (T. 1240). He tried his cousin's house, but there was no answer, and he left. (T. 1241). He then drove around for a while, parking the car in the vicinity of 36th Street. (T. 1241). The officer's gun was in the Cadillac. (T. 1242). Sims disposed of the gun by throwing it in a river behind a pool where he used to swim. (T. 1242). Sims also got a change of clothing from the car and threw out the clothes he had been wearing in a dumpster. (T. 1243, 1274).

After he parked the car in the lot of the apartment complex near 27th Avenue, Sims called his cousin's house, but his cousin Carol answered and would not tell him if Sam was home. (T. 1243). Carol kept asking if the car was all right, and, after Sims responded that it was, he hung up. (T. 1243). Sims' version of this call was considerably different from Ms. Mustipher's, as Sims denied that Carol ever told him that the car had been used in the killing of the police officer. (T. 1274-75).

The defendant stated that he proceeded to walk around, eventually running into someone whom he knew. (T. 1244). As Sims was still handcuffed, he happened to ask this acquaintance whether he had a hacksaw, and the acquaintance happened to have one. (T. 1244). The handcuffs were thus cut off. (T. 1244-5). The acquaintance also took Sims to the bus station, from which Sims went to the residence of his girlfriend in California. (T. 1245, 1247).

Sims also stated that he left for California in order to see his children prior to dying (T. 1249-50);[3] he felt Dade County police would kill him. (T. 1249-50, 1269, 1272, 1328). He intended to turn himself in to the police when he reached California. (T. 1249). Sims never got around to that, however, as the police found him first. (T. 1250). The very same Sims who intended to turn himself in to the California police (T. 1249), however, tried to escape through the back door of his girlfriend's apartment when California

---

[3] The defendant had two children in Miami and two children in California.

police arrived; the latter had knocked on the door so loudly that he was fearful they would kill him. (T. 1249-50, 1335).

After Sims' testimony, the defense rested (T. 1337), and the prosecution presented its rebuttal case. The firearms technician was recalled, and explained that casings from a Glock 17, the murder weapon, eject to the right of the shooter. (T. 1340-1). The location of the casings found, which was to the left of the location at which Mr. Sims had placed himself on cross examination, was thus inconsistent with his version of the shooting. (T. 1341-3; 1320, SR. 12). Similarly, the medical examiner stated that the defendant's account of the officer having "lunged" at the defendant, was inconsistent with the downward path of the bullets in the victim's body. (T. 1350-1; 1353). The downward path which the bullets followed, was consistent with the victim being shot while his body was lower than the defendant's hand and arm. (T. 1351-2). On cross-examination, the medical examiner acknowledged that the path was also consistent with the officer being in a bent over position. (T. 1352). On redirect, the medical examiner stated that, in light of the five inch height difference between the defendant and the victim, the bent over position was not consistent with lunging. (T. 1353).

After the completion of the prosecution's rebuttal case, the case was presented to the jury and the defendant was convicted on charges of first degree murder of a law enforcement officer and robbery. (R. 495-96).

B. Penalty Phase Proceedings

Prior to the commencement of the penalty phase proceedings, the prosecution presented a motion in limine, asserting, inter alia, that the defense be precluded from arguing lingering doubt during the penalty phase proceedings. (R. 542). The prosecution presented brief argument on the motion. (T. 1487). When the judge inquired whether defense counsel wished to be heard, defense counsel responded negatively, and the court granted the State's motion. (T. 1488).

The prosecution then presented its sentencing case. Testimony from a fingerprint examiner linked the defendant's fingerprints to those of the person convicted for a prior armed robbery in 1990. (T. 1489-93; R. 512-18). Additionally, the defendant's parole officer, Essie Lynn, established that the defendant was on controlled release at the time of the murder of Officer Stafford. (T. 1493-95). She stated that controlled release is basically the same as parole. (T. 1494). The defendant had been sentenced to a two and one half year term of imprisonment; he had served approximately six months. (T. 1495-96).

The defendant then presented background testimony from his friends and family members. Mervin Simmons, a friend of the defendant, with whom he attended school, testified that everybody liked him. (T. 1498). Both he and the defendant had previously used drugs, but the defendant had not gotten into any trouble. Id.

The defendant's three sisters testified that he had been a good child, who did not cause the family any trouble, and who did not use drugs. (T. 1502,

1514-16, 1521). The defendant had not suffered any emotional or psychological problems when growing up. (T. 1506, 1518). The family members also stated that the defendant was a good father to his children, both in California and in Miami. (T. 1516, 1522). The defendant's mother presented similar testimony. (T. 1526-27). Despite the court's earlier ruling, the family members testified that they were opposed to the imposition of the death penalty because they believed the killing was either accidental or committed in self-defense. (T. 1505, 1524, 1532). The defendant's girlfriend, Tranae Rogers, who is the mother of two of his children in Miami, similarly stated that the defendant was good with the children and that she did not believe the death penalty should be imposed. (T. 1508-11).

Minister Johnny Cooper testified that he had baptized the defendant in 1989, and defendant had previously gone to church "off and on." (T. 1536-38). After his baptism, the defendant had not attended church regularly and, in fact, shortly after that event he left to go to California. (T. 1541-2). The minister could not speak as to what kind of a person Sims was, was not familiar with the instant case, and did not believe in the death penalty in any case. (T. 1540-2, 1538). Several family members had similarly referred to the defendant as someone who sporadically went to church. (T. 1524, 1532).

The defendant also again testified on his own behalf. (T. 1542). His age, at the time of the trial, was 27 (T. 1543), which made him 24 at the time of the murder. (T. 1543). Notwithstanding the court's earlier ruling, the defendant again testified that he did not intend to kill Officer Stafford, and that he was acting to save his own life. (T. 1543). He stated that, "Everything I did was out of reaction. I was not acting, I was reacting, from

stopping, from the lights being behind me, to the attack that came upon myself." (T. 1543). The defendant added that, "When you're under strain, under arrest, it was too much for anyone to bear. It's too much of a mental strain and emotional strain. There is too much going on in your mind." (T. 1545). The defendant also stated that he "did not break the law" from his point of view, and he did not act with malice or illegality. (T. 1547).

During the charge conference, in discussions about statutory mitigating factors, defense counsel sought an instruction on the defendant's age, which request was denied. (T. 1561-62). Defense counsel also sought an instruction on the statutory mitigating factor that the victim was a participant in the defendant's conduct or that the victim consented to the act. (T. 1562). That request was also denied. (T. 1565). Upon request by the defense, the trial judge, however, agreed to give an instruction on the statutory mitigating factor that the defendant acted under extreme duress or the domination of another. (T. 1562, 1565).

During defense counsel's closing argument, notwithstanding the prior limitation on lingering doubt, defense counsel repeatedly emphasized that: the defendant did not intend to kill the officer; the defendant was in fear of being attacked and was afraid for his own life; the defendant was not committing a robbery at the time of the killing; the defendant was under "extreme duress", "emotional duress" and "emotional stress." (T. 1585, 1588, 1590-91, 1593). He also argued that the defendant's lack of intent to kill reflected remorse, that the defendant was a good father, and a good child, and that he had worked "construction" and at McDonald's while in high school. (T. 1586-88).

The jury recommended the sentence of death by a vote of eight (8) to four (4). (T. 1600). Prior to the imposition of sentence, the defense submitted a written sentencing memorandum. (R. 543-45). In this memorandum, the defense simply listed 25 proposed non-statutory mitigating circumstances. (R. 543-5). The list referenced the defendant being a good, loving person, who went to church and showed remorse, in addition to enumerating circumstances such as: "1. The defendant's unwavering declarations of innocence"; "15. The defendant is a human being"; "19. The court can impose a life sentence", etc. Id. The memorandum, in addition to the above list, also stated that, "there is no evidence showing that the homicide was anything but the results of a fear in the mind of the defendant." (R. 545).

At the subsequent sentencing hearing before the trial judge, immediately prior to the imposition of sentence, defense counsel was asked if there was anything else that the defense wished to present, and the defense referred only to the defendant's age at the time of the offense. (T. 1609). The trial court then imposed the sentence of death for the murder of Officer Stafford. (T. 1611). The defendant was also sentenced to a term of 75 years imprisonment for the armed robbery of Officer Stafford. (T. 1611; R. 546-50).

The trial court, in its written sentencing order, found the following aggravating factors: (1) the murder was committed by a person under sentence of imprisonment, as the defendant was under conditional release at the time; (2) the defendant was previously convicted of another felony involving the use of violence - a 1990 armed robbery; (3) the murder was committed during the course of a felony-armed robbery; (4) the murder was committed for the purpose

of avoiding or preventing a lawful arrest or effecting an escape from custody; (5) the murder was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws; and (6) the victim was a law enforcement officer engaged in the performance of his official duties. (R. 551-53). The last three factors were found to be based on the same facts, and were thus merged and treated as a single factor. (R. 552).

The court found there was no evidence of, and rejected, the statutory mitigating circumstances. (R. 553-54). In addressing nonstatutory mitigating factors, the court's order first addressed the defendant's contention that the murder was committed in self-defense:

> The defendant presented evidence that he did not premeditate the killing of Charles Stafford and that he committed the murder in self defense.
>
> The Court finds these factors are examples of a "lingering doubt" argument and as such are invalid mitigating circumstances.

(R. 554). The order then summarized the penalty phase background evidence presented, referring to the defendant's children, his attendance at church, the fact that he was never expelled from school, and the fact that the defendant stated he felt remorse, while maintaining that he killed in self-defense. Id. Having noted the aforementioned list, as detailed in the defendant's sentencing memorandum, the order stated: "The court has considered each of them carefully. The Court finds little to no weight as to each of them." (R. 555). The trial court concluded that the aggravating circumstances "far outweigh" the mitigating circumstances. Id.

SUMMARY OF THE ARGUMENT

I. The trial court conducted a full Richardson inquiry into the State's failure to list the defendant's parole officer as a potential witness and properly concluded that the witness could testify, as there was no prejudice to the defense, where the defense was fully aware of the witness and the nature of her testimony, as well as the State's intention to use the witness, prior to trial. Furthermore, evidence of the drug possession/parole revocation motive for the murder was both relevant to the trial and properly established. The refusal to permit the defense to elicit testimony about a prior incident in which the police stopped the defendant was proper, as the issue was not properly presented to the court, and factual dissimilarities between the instant case and that prior incident established that the prior incident had no relevancy to the instant case.

II. The prosecutor's summary of evidence, as presented to two state experts, was properly based on evidence in which the defendant and prosecutor previously had demonstrated the manner in which the murder was committed. Portions of this claim are not preserved for review.

III. As the defendant's self-defense claim was refuted by expert testimony, physical evidence, inherent improbabilities, and numerous contradictions of the defendant, that claim does not preclude a conviction for either premeditated or felony murder.

IV. Claims regarding improper prosecutorial comments were not preserved for appellate review and, furthermore, do not reveal any improprieties.

V. Venireperson Hightower was properly excluded for cause, as her knowledge of the defendant's sister resulted in uncertainty on her part as to

whether she could impose the death penalty in this case, even if the evidence warranted it.

VI. The defense sought an instruction on what amounts to lingering doubt in the sentencing phase, and such instructions are not required. The defense theory was, additionally, fully covered by other instructions given during the penalty phase proceedings. Furthermore, the imposition of the death sentence in this case is proportionate with death sentences imposed and approved in other similar cases.

VII. An instruction on the defendant's age, 24, where there was no evidence to demonstrate that he had a mental or emotional age which was less than his chronological age, was not required.

VIII. There was no duplication of the avoid arrest/murder of a law enforcement officer factors, where the anti-doubling instruction was given and the trial judge treated the factors as a single aggravator. The factor was properly defined for the jury and the trial judge's findings were proper.

IX. This Court has repeatedly rejected the Appellant's claim regarding the alleged impropriety of the aggravating factor that the murder was committed during the course of a felony.

X. The trial court's sentencing order adequately addresses the aggravating and mitigating factors. Mitigating factors were addressed, in the order and in the manner which the defense addressed them in its argument to the jury and the Court.

XI. The Appellant's miscellaneous attacks on the constitutionality of Florida's death penalty sentencing procedures have repeatedly been rejected by this Court.

ARGUMENT

I.

THE TRIAL COURT DID NOT ERR IN ADMITTING THE TESTIMONY OF THE DEFENDANT'S PAROLE OFFICER.

Testimony from the defendant's parole officer was properly admitted after the trial court conducted a full Richardson inquiry and determined that the failure of the prosecution to list this witness did not prejudice the defendant's ability to prepare for trial. The subsequent limitation on cross examination of the witness was proper, as the defense not only sought to exceed the scope of direct examination, but sought to engage in cross-examination which was not intended to impeach the witness, but was intended solely to elicit evidence of the defendant's alleged good character. It will further be seen that, contrary to the Appellant's arguments herein, the evidence adduced by the State was not Williams[4] rule evidence.

A. The Trial Court Conducted An Adequate Richardson Inquiry With Respect To The State's Failure To List The Parole Officer As A Possible Witness.

"At a minimum the scope of [a Richardson] inquiry should cover such questions as whether the state's violation was inadvertent or willful, whether the violation was trivial or substantial, and, most importantly, whether the violation affected the defendant's ability to prepare for trial." State v. Hall, 509 So. 2d 1093, 1096 (Fla. 1987). That is precisely what the trial judge did in this case, after learning that the prosecution had failed to list the defendant's parole officer, Ms. Lynn, as a possible witness in the case.[5]

---

[4] Williams v. State, 110 So. 2d 654 (Fla.), cert. denied, 361 U.S. 847, 80 S.Ct. 102, 4 L.Ed.2d 86 (1959).

[5] The Appellant maintains that the unlisted witness constituted both a discovery violation and a violation of the notice requirements of section 90.404(2)(b), Florida Statutes. As the State, at trial, acknowledged the

After the judge indicated an intention to conduct a Richardson inquiry if the witness had not been listed by the prosecution, the prosecutor responded, "that's fine, we can have the Richardson hearing." (T. 1091). Immediately thereafter, the judge conducted a full inquiry into the reasons for the failure to list the witness and the nature of the testimony. As previously detailed herein, the prosecutor explained how the failure had been inadvertent and the judge subsequently made a finding that the failure was, indeed, inadvertent. T. 1092-93, 1097; See also pp. 7-8 herein.

During the course of the ensuing discussion regarding the nature of the evidence, the judge learned the following: (1) the witness was going to be called solely for the purpose of establishing that the defendant was on controlled release at the time of the murder; (2) as the State had already adduced evidence of the police dog alerting to the presence of drugs in the Cadillac, Ms. Lynn's testimony would establish a possible motive for the murder - i.e., avoiding a revocation of parole by virtue of being arrested by Officer Stafford while possessing drugs; (3) the defense had previously listed as a potential witness another woman whom they thought was the parole officer; (4) that witness was deposed by the prosecution, with defense counsel present, and she stated at that deposition that Ms. Lynn was the defendant's control officer; (5) that the prosecution, during discovery, furnished to defense counsel all of the defendant's controlled release papers signed by Ms. Lynn; and (6) the prosecution, in a pretrial motion in limine, stated that it

---

violation of the discovery rules, section 90.404(2)(b) is academic with respect to this portion of the argument. The State, however, does not concede the applicability of section 90.404(2)(b), and for reasons relevant to, and developed in, argument II.B, infra, it will be seen that section 90.404(2)(b) has no applicability herein.

intended to prove, at trial, that the defendant, while on parole, had been in possession of drugs when the officer was murdered. (T. 1092-97). In that pretrial motion, the State asserted: "The defendant is charged with the shooting death of Officer Charles Stafford that occurred at approximately 8:55 p.m., on June 11, 1991. The State will establish that on that occasion, the defendant, a parolee, in possession of drugs, shot and killed Stafford and then escaped." (R. 230).

In light of the foregoing, the trial judge determined that prejudice, under Richardson, did not exist. Contrary to the Appellant's arguments herein, there was nothing ambiguous about the judge's finding:

> **MS. LEHNER:** If your Honor could also get to the prejudice part, I haven't heard any argument as to any --
>
> **THE COURT:** There would be no prejudice except in another sense, which means the admissibility from a legal point of view.
>
> **MS. LEHNER:** But as far as procedural, there is no argument and the Court finds there is none?
>
> **THE COURT:** No.

(T. 1097). Thus, the court clearly found that there was no procedural prejudice regarding the defendant's ability to prepare for trial; the only possible prejudice the court referred to was in terms of the substantive value of the evidence.

The absence of prejudice is a finding which is clearly supported by the record. Such findings must be upheld on appeal in the absence of an abuse of discretion on the part of the trial court. See, e.g., Lowery v. State, 610 So. 2d 657, 659 (Fla. 1st DCA 1992). Defense counsel clearly knew that the defendant was on controlled release at the time of the murder. Not only did

the defense know of the defendant's status, but the defense was provided all of the controlled release papers, and the name of Ms. Lynn was additionally elicited through the deposition of the witness whom the defense had included on its own list. Furthermore, the prosecution had indicated in its pretrial motion in limine that it intended to prove that the murder was committed while the defendant was on parole and was in possession of drugs. Moreover, the prosecution did list as a witness the officer who established that the dog alerted to the drugs in the car. Indeed, that witness testified without objection by the defense. The defense was therefore clearly aware that the State intended to prove that there were drugs in the car at the time of the murder. Such testimony would have no legitimate purpose unless it were linked to the State's effort to prove a motive for the murder - i.e., the desire to avoid revocation of parole by virtue of possession of drugs.

The Appellant attacks the finding of an absence of prejudice by asserting that "only after calling Ms. Lynn as a witness did the prosecution make clear that its theory of the case was that Mr. Sims killed Officer Stafford to prevent the revocation of his parole." Brief of Appellant, p. 22. That, however, was clearly evident from both the State's pretrial motion in limine and from the pretrial notice that the State intended to use testimony regarding the dog's alert to the presence of drugs in the car.

The Appellant then proceeds to argue that had Ms. Lynn been listed as a witness, the defense could have decided to bring in witnesses to contest the reliability of the dog-alert evidence. Brief of Appellant, p. 23. It should be noted that such an argument was not raised by defense counsel at the Richardson hearing, where it should have been. Insofar as the police officer

who testified about the dog alert had been listed prior to trial, and had already presented his evidence prior to Ms. Lynn, without any objection, the defense not only knew about the dog-alert testimony, but the defense clearly could have made an adequate determination, prior to trial, as to whether it wished to attack the dog-alert testimony through other expert witnesses.

Furthermore, contrary to the implications of the Appellant's argument, the parole status testimony does not relate merely to the possession of drugs. The parole status/revocation argument is equally related to the fact that the defendant was in possession of a stolen vehicle, and that, too, separate and apart from the drug testimony, furnishes the same motive for murder - i.e., avoiding revocation.

The prosecution has the burden of demonstrating an absence of prejudice. Cumbie v. State, 345 So. 2d 1061, 1062 (Fla. 1977). That burden was clearly met in the instant case. Particularly significant is this Court's decision in Cooper v. State, 336 So. 2d 1133, 1138-39 (Fla. 1976), where the prosecution had inadvertently left off its witness list the name of a ballistics expert. At the trial court's inquiry in Cooper, just as in the instant case, it became evident that there were reasons why the defense should have been aware of the existence of the witness. Additionally, the prosecution had previously advised the defense of the substance of the expert's testimony, just as the prosecution had, in the instant case, previously advised the defense of its intention to prove that the defendant was on parole at the time of the murder. Once again, in Cooper, just as in the instant case, the court offered a recess for the defense to depose the

witness.[6] In view of the foregoing, it was concluded, in Cooper, that the trial court had acted properly.

Finally, as noted previously, after the prosecution presented numerous reasons to demonstrate the absence of prejudice, defense counsel remained silent, failing to assert any matters which would either dispute the prosecution's assertions or proffer alternative matters which would show why prejudice might exist, notwithstanding the prosecution's assertions. Such silence from defense counsel, in the aftermath of the prosecution's demonstration of non-prejudice, is highly significant. See, e.g., Johnson v. State, 461 So. 2d 1385, 1389-90 (Fla. 1st DCA 1994) ("As a practical matter, in this case only the defense counsel was in a position to identify for the trial judge any prejudice which would befall the defendant."); Stone v. State, 547 So. 2d 657, 659 (Fla. 2d DCA 1989) ("The defendant did not suggest that this testimony had any significant effect upon his ability to prepare for trial when he was fully aware of the witness and was given the opportunity to depose the witness."); Sireci v. State, 399 So. 2d 964, 969 (Fla. 1981) ("The

---

[6] It should also be noted that the Richardson inquiry was conducted at the end of the day's proceedings on a Friday, immediately prior to a weekend recess. The judge expressly asked defense counsel if the defense wished to depose the witness, who was present, and defense counsel expressly rejected the offer. (T. 1097). When proceedings resumed on the following Monday morning, the judge heard further legal arguments regarding the relevancy and substantive admissibility of Ms. Lynn's testimony, ultimately ruling that the evidence was relevant. (T. 1105-1107). Immediately prior to that colloquy, defense counsel again reiterated that he did not want to depose Ms. Lynn, but just wished to speak with her for a few minutes before she testified. (T. 1105). The judge permitted defense counsel to talk with the witness right then, as the witness was already available. (T. 1105). The opportunity to depose or question an unlisted witness has often been held sufficient to remedy any prior discovery violation. See, e.g., Stone, supra, 547 So. 2d at 659; Cooper, supra, 336 So. 2d at 1138-39.

defendant has failed to show that there was an abuse of the trial judge's discretion and has further failed to show that any prejudice resulted. . .").

In view of the foregoing, the trial court's inquiry should be deemed sufficient in scope. Hall, supra. Furthermore, for the reasons detailed above, the trial court's conclusions were well within the court's discretion. Hall, supra.

B. Testimony Of The Parole Officer Was Relevant To The Motive For Killing The Victim And Was Properly Admitted.

The Appellant argues that evidence of his parole status was not admissible because the State failed to prove by clear and convincing evidence that the defendant possessed drugs when he was stopped by Officer Stafford. The Appellant's argument, while purporting to be an attack on the admissibility of the evidence regarding his parole status, is essentially an attack on the admissibility of the evidence regarding the narcotics dog's alert to the presence of the odor of drugs. See, Brief of Appellant, pp. 25-27, 31-32. Not only is such an argument unpreserved for appellate review, but, when viewed substantively, it is clearly evident that the Appellant's treatment of such evidence as Williams rule evidence is unwarranted.

The predicate of the Appellant's argument is that collateral offense evidence, under Williams, supra, is admissible only through clear and convincing evidence that the collateral offense was committed. Furthermore, the Appellant asserts that the defendant's possession-of-drugs is such a collateral offense. It is therefore readily apparent that the focus of this portion of the Appellant's argument is the admissibility of the possession-of-drugs testimony; not the admissibility of the testimony of the parole officer.

That is highly significant, as defense counsel never objected to the admissibility of the testimony regarding the dog-alert to the odor of drugs in the Cadillac. (T. 1079-89). Not only did defense counsel not object to Detective Silva's testimony regarding the dog alert, but, even when it became apparent that the trial court was going to permit the subsequent testimony of the parole officer, Ms. Lynn, defense counsel did not seek to strike the prior testimony of Detective Silva.

Thus, as the drug testimony, which the Appellant treats as collateral offense evidence, came in without any objection, it cannot be maintained, on appeal, for the first time, that the alleged collateral offense evidence was inadmissible because it did not satisfy the clear and convincing evidence standard. See, e.g., Harmon v. State, 527 So. 2d 182 (Fla. 1988) (defendant's contention that testimony regarding defendant's drug use was improper collateral offense evidence was not preserved for appellate review); Esty v. State, 642 So. 2d 1074 (Fla. 1994) (contemporaneous objection rule applies to collateral offense evidence); Feller v. State, 637 So. 2d 911 (Fla. 1994).

Furthermore, even if this claim were considered on the merits, it must be rejected. The Appellant's argument regarding the predicate of clear and convincing evidence for the collateral offense would have merit only if the drug possession testimony were a collateral offense under Williams. That, however, is not the case. This Court has made it clear that Williams and its progeny apply only to "similar fact evidence." Griffin v. State, 639 So. 2d 966, 968 (Fla. 1994). See also, Williams v. State, 621 So. 2d 413, 414-15 (Fla. 1993). When the evidence of another offense is adduced for some relevant purpose other than the use of "similar fact evidence," the evidence

is not Williams rule evidence, and neither the principles of Williams nor the requirements of section 90.404, Florida Statutes, are applicable. The sole test for the admissibility of collateral offense evidence which is not adduced as similar fact evidence is the standard test of relevancy. See, Griffin, 639 So. 2d at 969, n. 2. See also, Padilla v. State, 618 So. 2d 165, 169 (Fla. 1993) (collateral offense evidence properly admitted under relevancy criteria of section 90.402 does not require limiting instruction as to how it should be considered); Erickson v. State, 565 So. 2d 328, 333 (Fla. 4th DCA 1990) (notice requirements of section 90.404(2)(b), Florida Statutes, not applicable when evidence is adduced as inseparable crime evidence as opposed to similar fact evidence); Platt v. State, 551 So. 2d 1277 (Fla. 4th DCA 1989) (same); Austin v. State, 500 So. 2d 262, 265 (Fla. 1st DCA 1986).

Thus, it is readily evident that the drug-possession testimony was not offered as similar fact evidence and was therefore not subject to the requirement, applicable to Williams rule evidence, that the collateral offense be established by clear and convincing evidence.[7] As noted in Griffin, supra, 639 So. 2d at 969, n. 2, the test for the admissibility of collateral offense evidence which is not similar fact evidence is simply the test of relevancy. "Relevant evidence is evidence tending to prove or disprove a material fact." Section 90.401, Florida Statutes. Furthermore, "[t]he determination of relevancy is within the discretion of the trial court." Sims v. Brown, 574 So. 2d 131, 133 (Fla. 1991) (quoting Trees v. K-Mart Corp., 467 So. 2d 401, 403 (Fla. 4th DCA), rev. denied, 479 So. 2d 119 (Fla. 1985). "To be legally relevant, evidence must pass the tests of materiality (bearing on a fact to be

---

[7] Numerous cases cited by the Appellant, such as State v. Norris, 168 So. 2d 541 (Fla. 1964), and cases included in the Brief of Appellant, p. 25 at n. 17, pertain to similar fact evidence, and the reliance on the clear and convincing standard is therefore erroneous.

proved), competency (being testified to by one in a position to know), and legal relevancy (having a tendency to make the fact more or less probable) . . . ." Id. at 134.

Thus, the substantive question is simply whether the dog-alert testimony tended to establish that the defendant possessed drugs at the time of the murder. If it did, the motive for murder obviously exists - i.e., avoiding parole revocation.[8] While drugs were not actually found in the Cadillac, the dog-alert testimony does not exist in a vacuum. First, the owner of the car, Sam Mustipher, testified that he did not use drugs or keep drugs in the car. He added that the same held true for his mother and sister, who had previously utilized his car. Ms. Mustipher furnished similar testimony. Thus, it is clearly reasonable to conclude that the odor of drugs detected in the car shortly after the murder is attributable to the defendant herein, who was the only other person in continuous possession of the car. Furthermore, Detective Silva explained the dog's training, and further detailed that he had worked with the dog for about six years, using the dog on thousands of occasions to detect the scent of narcotics. (T. 1080-81). As the connection between other users of the vehicle and contraband was negated; as the odor of drugs was detected shortly after this defendant had taken and used the car for several days; as the dog detects the odor of drugs, as opposed to the actual presence of drugs; as this defendant was on a form of parole at the time of the murder; and as drug possession provides a plausible explanation for the commission of the murder and the desire to avoid a return to prison for parole revocation, the defendant's connection to the narcotics

---

[8] The Appellant herein concedes that evidence of drug possession is relevant to establish motive, if such possession is established. See, Brief of Appellant, p. 25.

which caused the detected odor was established and was relevant to the question of motive.

The Appellant presents a variety of arguments which go, not to the admissibility of the drug evidence, but to reasons why a fact-finder should not give it weight. Thus, the Appellant argues matters such as the possibility that someone else had drugs in the car or that the dog gave a false alert. No testimony was adduced to support any such theories. Other likely occupants of the car were accounted for. Given the time frame, the defendant herein was the only party accountable for the drug scent. While the defense was free to argue any of these matters to the jury, they do not undermine the relevancy and admissibility of the evidence.[9]

As the State adduced evidence from which the finder of fact could conclude that the defendant possessed drugs in the Cadillac, the parole officer's testimony was therefore relevant to establishing a motive for the murder. However, even if it were concluded that Detective Silva's testimony did not sufficiently establish a connection between the defendant and the presence of drugs in the Cadillac, the parole officer's testimony was still relevant to establishing motive. As noted previously, even if it is accepted that the defendant neither possessed nor knew of the presence of any drugs in the car, he was, nevertheless, occupying a vehicle which had been reported stolen, and his parole could just as easily have been revoked for his theft of

---

[9] The Appellant appears to believe that parole revocation can provide a motive for murdering an officer only if there is no dispute as to the existence of the basis for the possible parole revocation. See, Brief of Appellant, p. 30 and n. 29. Such reasoning has no basis in the law and defies logic. By virtue of such logic, any defendant could simply dispute the alleged basis for revocation and then assert that his denial must preclude the admission of the parole status evidence. Such reasoning effectively makes the defendant the judge and arbiter of admissibility.

the vehicle. While the defendant did, initially, legitimately borrow the car, and while he denied that any deadline for its return existed, Sam Mustipher testified to the contrary. Mustipher testified that the car was supposed to be returned at least two days prior to the murder, and, Mustipher, in fact, reported the car as stolen. A fact finder who accepts Mustipher's testimony, could therefore conclude that the defendant knew that the car should have been returned previously, and that the defendant could therefore reasonably believe he was in unlawful possession of the vehicle - an act which could trigger a parole revocation just as readily as the possession of narcotics.

Lastly, the Appellant argues that the parole status evidence, even if relevant, was unduly prejudicial, as the prejudice outweighed the probative value. One of the effects of evidence adduced by the prosecution is that it is typically going to be highly prejudicial, as it is intended to demonstrate that a defendant committed a criminal act. Notwithstanding the prejudicial effect of parole status evidence, when linked to a motive for murdering a police officer who has legally stopped the defendant, such evidence has routinely been deemed both relevant and admissible. See, e.g., State v. Escobar, 570 So. 2d 1343, 1344-46 (Fla. 3d DCA 1990); McVeigh v. State, 73 So. 2d 694, 696 (Fla. 1954); Mackiewicz v. State, 114 So. 2d 684, 687-88 (Fla. 1959); Grossman v. State, 525 So. 2d 833 (Fla. 1988); Craig v. State, 510 So. 2d 857 (Fla. 1987); Heiney v. State, 447 So. 2d 210 (Fla. 1984); Washington v. State, 432 So. 2d 44 (Fla. 1983); Reddish v. State, 167 So. 2d 858 (Fla. 1964). Indeed, in assessing the probative value vis-a-vis prejudice, what is significant about many of the foregoing cases is that the underlying offenses, which were going to cause the possible revocation (or have a similar effect, such as capture for a prior crime), were frequently extremely violent

offenses - matters which would contribute to a much higher degree of prejudice than the fact that the jury hears about the possession of narcotics.

C. The Trial Court Did Not Err In Precluding The Defense From Introducing Testimony Regarding A Prior Incident In Which The Defendant Had Been Stopped By The Police.

Prior to trial, the prosecution filed a motion in limine seeking to preclude the defense from introducing evidence "pertaining to a traffic stop of the defendant that occurred one week before the homicide." (R. 230). According to said motion, the defendant was seeking "to introduce evidence of a prior unrelated encounter with two other police officers that occurred one week prior to the death of Officer Stafford." (R. 230). The prosecution argued, inter alia, that (1) introduction of such evidence by the defense would constitute improper evidence of a character trait of the defendant; and (2) evidence of this prior incident was factually dissimilar to evidence of the instant confrontation with Officer Stafford and was therefore irrelevant. (R. 230-33).

The prosecution's motion emphasized the factual discrepancies which made the two incidents incomparable:

> Additionally, the defendant may seek to introduce evidence of the Garcells-Simmons encounter to establish that since on that occasion he did not kill the officers in order to effectuate his escape, he did not do so to Stafford. The two circumstances, however, are so dissimilar so as to render any comparison meaningless and thus render this evidence irrelevant. During the first encounter, the defendant was stopped by two officers, who quickly cuffed him, and there is no evidence that he possessed drugs. The events leading up to the killing of Officer Stafford present a totally different set of facts. Stafford, alone, stopped the defendant at dusk. There is evidence that drugs were in the car. Thus, the defendant's motive and opportunity to kill Officer Stafford was clear. Neither existed on the prior occasion with Garcells and Simmons. Based upon the glaring disparities

between the two encounters, the first incident is irrelevant and inadmissible. . . .

(R. 232-33). At the pretrial hearing on this motion in limine, the prosecution reiterated the two grounds of the motion:

> **MS. LEHNER [prosecutor]:** The thrust of the motion goes to the fact that this is character evidence; and as character evidence, it should only be elicited through reputation testimony. Additionally, we also said that, at the end of the motion, it is not relevant because there is no relevance between the two acts.
>
> **THE COURT:** Okay.
>
> **MR. PITTS [defense counsel]:** I can agree with that.

(T. 384). Thus, defense counsel expressly concurred with the prosecution's assertion that the two incidents were factually dissimilar, even after the written motion in limine expressly referred to the possibility that the defense might argue that the prior incident proved that the defendant would not kill officers to effect an escape.

During cross-examination of Ms. Lynn, the parole officer, defense counsel sought to question her about the parole revocation affidavit she filed in this case. (T. 1113). After the prosecution objected to that inquiry on grounds of relevancy (T. 1113), the court heard argument of counsel, and defense counsel asserted that he was going to question Ms. Lynn as to whether the defendant "also knew that he could be revoked for driving while his license was suspended," and further, "we are going to go in the affidavit where she has alleged . . . that there is a driving without a valid driver's license." (T. 1114). After hearing further argument, the judge abided by his prior ruling on the motion in limine. (T. 1115-16). The State also argued that the questioning was beyond the scope of cross-examination.

The Appellant now argues that the limitation on the cross-examination of Ms. Lynn was erroneous because it would repudiate that State's theory that the defendant murdered Officer Stafford to avoid having his parole revoked. Brief of Appellant, pp. 35-36, and n. 37.

The first, and primary problem, with the Appellant's argument regarding the prior confrontation between two officers and the defendant, is that Ms. Lynn, the parole officer, was not a witness to it and had no personal knowledge of it. The only proffer made regarding the incident is that contained in the prosecution's motion in limine, and that refers solely to two officers and the defendant. It is axiomatic that a witness can not testify to matters of which she has no personal knowledge. Section 90.604, Florida Statutes ("Except as otherwise provided in s. 90.702, a witness may not testify to a matter unless evidence is introduced which is sufficient to support a finding that he has personal knowledge of the matter."). Thus, Ms. Lynn could not testify about the prior incident. The fact that she prepared an affidavit of violation of controlled release, predicated on information furnished by the officers involved in that prior incident, would not entitle her to testify about the incident, as it would be hearsay for her to relate what the officers told her.

Furthermore, Ms. Lynn, had testified about the conditions of release form signed by the defendant. That form was admitted into evidence. (R. 408-9; T. 1110). That form was going to go to the jury, for its consideration, along with all other evidence, and, among its provisions was the condition that "I shall obey all laws, ordinances and statutory conditions of control

release." (R. 409). Thus, the only matter as to which Ms. Lynn could possibly testify - i.e., the defendant's conditions of controlled release - was fully and irrefutably in evidence. Further cross-examination would not have elicited anything more.

Additionally, specific questioning about the prior incident was properly excluded for the independent reason that it was factually dissimilar to the confrontation with Officer Stafford. As the prosecution's motion alleged, the defendant, in the prior traffic stop incident, was quickly apprehended and cuffed by two officers. Thus, any attempted violence directed by Sims against one of the two officers would have been counteracted by two officers; not just by a single officer, as in the case of Officer Stafford. While the defendant might have been willing to take risks in confronting a single officer, there is no reason to treat an incident with two arresting officers as comparable. That is all the more true since, in the instant case, the fear of potential revocation is triggered by two serious underlying offenses - drug possession and theft of a car.

As noted in the preceding arguments herein, relevancy does require a connection between the prior incidents and the instant prosecution. Here, at the pretrial hearing, defense counsel expressly concurred with the prosecution's assertion that the prior incident was irrelevant. (T. 384). Defense counsel never made any subsequent proffer of any additional facts which would result in a dispute with the prosecution's summary of the incident. As such, further cross-examination of Ms. Lynn was properly limited because it was irrelevant.

Cross-examination of Ms. Lynn was also properly limited insofar as it constituted improper cross-examination. Not only was it beyond the scope of direct examination, which in no way touched on the defendant's prior arrest for driving without a license, but, even more significantly, it was inconsistent with the purposes of cross-examination:

> The proper purposes of cross-examination are: (1) to weaken, test, or demonstrate the impossibility of the testimony of the witness on direct examination and, (2) to impeach the credibility of the witness, which may involve, among other things, showing his possible interest in the outcome of the case. . . . Therefore it is held that questions on cross-examination must either relate to credibility or be germane to the matters brought out on direct examination. . . . If the defendant seeks to elicit testimony from an adverse witness which goes beyond the scope encompassed by the testimony of the witness on direct examination, other than matters going to credibility, he must make the witness his own. Stated more succinctly, this rule posits that the defendant may not use cross-examination as a vehicle for presenting defensive evidence.

Steinhorst v. State, 412 So. 2d 332, 337 (Fla. 1982). It is readily apparent, from the foregoing, that the attempted cross-examination had nothing to do with the legitimate functions of cross-examination. The attempted cross-examination would not in any way, weaken, test or demonstrate the impossibility of the testimony of Ms. Lynn on direct examination. On direct examination, the witness simply stated that the defendant was on controlled release at the time of the murder, and that one of the conditions thereof stated that he would not use intoxicants to excess or possess narcotics, drugs or marijuana, unless prescribed by a physician. (T. 1111). Furthermore, none of the attempted cross-examination of Ms. Lynn would in any way have effected an impeachment of her credibility. The defense was simply trying to use Ms. Lynn "as a vehicle for presenting defensive evidence," of which Ms. Lynn had no personal knowledge.

For all of the foregoing reasons, it must be concluded that cross-examination of Ms. Lynn was not improperly limited. In an apparent recognition of the faulty premises of the argument relating to Ms. Lynn, the Appellant attempts to assert that the defendant, Mr. Sims, himself, was improperly precluded from presenting testimony regarding the prior confrontation with the two police officers. This argument fails for both similar and additional reasons.

Prior to the defendant's testimony, the prosecutor brought up the status of the pretrial ruling on the motion in limine:

> **MR. ROSENBERG [prosecutor]:** I don't know, and this is probably premature, but if the defendant takes the stand, I will renew my motion in limine. The defendant cannot put in testimony of his previous arrest, two weeks previous, for any defense. I don't know if he's going to testify or not, but I would renew that and --
>
> **MR. PITTS:** He can testify that he talked -- talked to the detectives two weeks earlier. He just can't say what he said.
>
> **MR. ROSENBERG:** I am talking about his driver's license arrest. That's my motion in limine.
>
> **THE COURT:** That will be granted.

(T. 1194). Initially, it is clear from the foregoing that defense counsel did not argue that the evidence of the prior incident was relevant. Defense counsel, having concurred, prior to trial, with the prosecutor's assertion that the incident was irrelevant, did not argue to the contrary when the prosecutor, towards the end of the trial, reasserted that the defendant should not be able to testify about that incident. Having failed to argue the relevancy of the defendant's testimony regarding the incident, the claim cannot be deemed preserved for appellate review. Tillman v. State, 471 So. 2d 32, 34-35 (Fla. 1985).

Second, for the same reasons that the prior incident was irrelevant when defense counsel sought to cross examine Ms. Lynn, so too, it remained irrelevant even when the defendant was the one who would testify. The dissimilarities between the two incidents were sufficient to preclude any comparison - i.e., the fact that there were two officers in the first incident during the course of a traffic stop; the lack of similar opportunities to engage in violence; etc.

Third, and in conjunction with the prior reason, it is further significant that the defense did not make any proffer as to what he would have said about the incident. When a defendant claims that evidence was improperly excluded, "[a] proffer is necessary to preserve a claim such as this because an appellate court will not otherwise speculate about the admissibility of such evidence." Lucas v. State, 568 So. 2d 18, 22 (Fla. 1990). See also, Woodson v. State, 483 So. 2d 858, 859 (Fla. 5th DCA 1986); section 90.104(1), Florida Statutes. Thus, this Court, on appeal, has been provided with no proffer from which any factual similarities can be discerned. There is no proffer that the defendant even had the slightest opportunity to engage in violence in the prior incident. There is no proffer that the defendant believed that driving with a suspended license could have resulted in parole revocation. The only proffer was that provided by the prosecution, and that proffer asserted the significant dissimilarities, an assertion that defense counsel expressly concurred with during the pretrial hearing.

Accordingly, it must be concluded that the trial court did not err, either as to the cross-examination of Ms. Lynn, or as to the defendant's ability to testify about the prior incident.

D. Disclosure Of The Defendant's Parole Status Did Not Deprive The Defendant Of A Fair Trial.

The Appellant appears to be arguing that the parole-revocation motive for the murder became the prosecution's principal theory of the case, and that this claim was "wholly unsupported by the evidence." Brief of Appellant, p. 40. As a result, the Appellant seems to be asserting that the prosecution's arguments constituted a "deliberative obfuscation of the facts of this case," and that the motive theory improperly became the focus of the case. Neither of these contentions has any merit.

As can be seen from the foregoing, the drug testimony was introduced without any objection by the defense. As the owner of the car and his family members did not bring drugs into the car, and as the dog alerted after the defendant had had possession of the car for several days, it is clearly a reasonable inference that the dog alerted to the odor of drugs which had been brought into the car by the defendant. Furthermore, as is also seen from the prior arguments herein, the defendant's parole status was properly introduced into evidence.

The "State is free to argue to the jury any theory of the crime that is reasonably supported by the evidence. . . ." Garcia v. State, 622 So. 2d 1325, 1331 (Fla. 1993). The Appellant's reliance on Garcia for the proposition that the prosecution "may not subvert the truth-seeking function of the trial by obtaining a conviction or sentence based on deliberate obfuscation of relevant facts," 622 So. 2d at 1331, is inapplicable to the instant case. In Garcia, the defendant had made statements attributing the shooting to an accomplice known as Joe Perez. Although the defendant subsequently indicated that Joe

Perez was also known as Urbano Ribas, one of the named codefendants, the prosecution argued that "Joe Perez was a nonexistent person created by Garcia during questioning." Id. The prosecution's argument was deemed to constitute an impropriety which had no basis in the evidence. By contrast, as noted above, there was ample evidence linking the defendant herein to the possession of illegal drugs in the vehicle at the time of his detention. That, coupled with the defendant's parole status at the time, provides a legitimate basis for the prosecution to link the drug possession and parole status to a motive for the murder. There is no "obfuscation of relevant facts."

The Appellant's argument relies, in large part, on five prosecutorial comments, in closing argument, which refer to either the dog's alert to the drugs or to the defendant's parole status. Not only were those comments entirely appropriate, for the reasons detailed above, but, of equal significance is the fact that defense counsel never objected to any of those comments; counsel never asserted, in the lower court, that the prosecutor's closing argument either misrepresented the evidence or misled the jury. As such, the entire predicate for the instant argument herein is unpreserved for appellate review. See, e.g., Garcia v. State, 644 So. 2d 59, 62-63 (Fla. 1994); Crump v. State, 622 So. 2d 963, 971-72 (Fla. 1993); Marshall v. State, 604 So. 2d 799, 804 (Fla. 1992). The Appellant's argument herein is little more than an indirect attempt to attack the prosecutorial comments in question while attempting to avoid the standard preservation requirements.

The further argument advanced by the Appellant is that the drugs/parole revocation theory became the entire theory of the case, going beyond just a mere "feature" of the case. Once again, no such argument was advanced below

and is thus not properly presented herein. Beyond that, however, the argument clearly has no merit. The combined testimony regarding the dog's alert to the odor of drugs and the defendant's parole status consisted of approximately 20 pages, in the instant record. The references to drugs and parole in closing argument similarly consisted of a mere five brief references out of an argument which exceeded thirty pages. Such evidence and arguments do not, under any stretch of the imagination, elevate the drugs/revocation theory to a feature, let alone to the principal focus of the case. See, e.g., Snowden v. State, 537 So. 2d 1383 (Fla. 3d DCA 1989) (and numerous cases summarized therein); Wilson v. State, 330 So. 2d 457 (Fla. 1976) (extremely extensive similar fact evidence that spanned over 600 pages approached but did not reach over boundary where prejudice begins to outweigh probative value); Burr v. State, 466 So. 2d 1051 (Fla. 1985) (evidence of three other incidents); Dean v. State, 277 So. 2d 13 (Fla. 1973) (no error where four other victims used to prove one rape charge); Rogers v. State, 511 So. 2d 526 (Fla. 1987) (detailed evidence of two other robberies did not become feature of case).

Finally, proof of motive was not an essential aspect of the case. The firing of two shots could, in and of itself, suffice to establish premeditation for first degree murder. As detailed in point III of this brief, the defendant's self-defense claim was thoroughly refuted. Additionally, and alternatively, the parole revocation/motive theory is independently tied in to the defendant's fear of being caught in a stolen car. Although the defendant denied that the car was stolen, as previously argued herein, a jury could accept evidence before it which would permit the conclusion that the car had been reported stolen and a person in the position of the defendant would know that he was driving a stolen vehicle.

II.

THE PROSECUTOR DID NOT MISREPRESENT THE DEFENDANT'S TESTIMONY DURING THE STATE'S REBUTTAL CASE.

The Appellant contends that the prosecutor misrepresented the defendant's testimony during its rebuttal examination of the medical examiner and firearms examiner. The Appellant's arguments are not preserved and are without record support.

Initially, the Appellant argues that the prosecutor mischaracterized the defendant's testimony, by a) depicting the victim "standing upright" when he was shot, and b) depicting the position of the defendant's hand on the gun. The Appellant states that the defendant testified that the victim was in a "down position coming at me with his hands up," and adds that the defendant testified he could not remember the position of his own hands or the gun at the time of the shooting. The prosecutor's rebuttal examination, at issue herein, is as follows:

> **Q.** The defendant who took the stand, Doctor, testified that after he gained possession of the officer's firearm, he turned, facing the officer, and they were approximately five feet apart, as I am now. The defendant claimed that his hands were in this position and the officer, from this position, lunged at him. Are you with me so far?
>
> **A.** Yes.
>
> **Q.** You got this position.

(T. 1350). (emphasis added).

Defense counsel objected to this hypothetical, asserting that it was "not the defendant's testimony that his arm was out like this. He said he

didn't know where his arm was, but he was in front of him." (T. 1350). The prosecutor responded that the defendant had earlier demonstrated the positions. Id. There was no objection whatsoever, nor any suggestion by the defense that the prosecutor's depiction of the victim's position was in any way inaccurate. As such, the Appellant's argument with respect to this issue is not preserved for review.

Moreover, as seen in the above cited questioning, the prosecutor expressly referred to the victim having "lunged", in accordance with the term agreed to by the defendant in the course of his own testimony. (T. 1316-18). It should be noted that during cross-examination, the defendant had demonstrated the positions of the parties:

> **Q.** In your story, that's his reaction. You're holding his gun on him and he lunges at you. Right?
>
> **A.** That's what happened.
>
> **Q.** Come on down, because I want to make sure the ladies and gentlemen of the jury get every exact position on this. Why don't you stand about here. He was about this far from you?
>
> **A.** Once I turned around, he was somewhere in this distance.[10]
>
> **Q.** You have the gun in which hand?
>
> **A.** My right hand.
>
> **Q.** Okay. He is this far from you. He is going to lunge at you. How does he lunge at you?
>
> **A.** Like this here.
>
> **Q.** Let me do it so we make sure we are correct. He comes at you like this?
>
> **A.** Yes sir.

---

10 The defendant had previously agreed that the distance between him and the victim was 5 feet. (T. 1313).

Q. This position?

A. Yes sir.

Q. This is it?

A. Uh-huh.

(T. 1316-17).

There was no objection to the above earlier demonstration by the defendant and prosecutor, and, as noted previously, there was no suggestion, by the defense, that the prosecutor was mischaracterizing the victim's position. It is abundantly clear that the prosecutor was not misrepresenting the victim's position. As to the defense argument that the prosecutor could not demonstrate the position of the defendant's hand or the gun, as the defendant had stated that he could not remember this, again the defendant was demonstrating the position of the parties. Moreover, on direct examination, defendant had stated that at the time of the lunge, he put his hand out to try and stop the victim when the gun went off. (T. 1238). While on cross examination the defendant initially stated he could not remember, he subsequently stated that he had the gun in his "right hand" (T. 1317), in "front" of him (T. 1315), "with his hand up" (T. 1315, 1316). Again, it is clear that the Appellant's argument as to mischaracterization of evidence during the State's rebuttal examination of the medical examiner is unpreserved and without merit.

The Appellant similarly argues that the prosecutor engaged in mischaracterization, during its rebuttal case, when questioning the firearms expert. The prosecutor sought to question the expert on the issue of whether the defendant's version of events was consistent with the location at which

the casings were found. (T. 1341-42). The prosecutor questioned the witness as follows:

> Q. Now, let's look at what I have drawn up here. The defendant has stated to the ladies and gentlemen of the jury that on [this] diagram, he is in a position of "F" here at the rear of the Cadillac. We will put a triangle for the defendant. He stated he is facing in this direction and our victim, Officer Charles Stafford, is in front of him here. I am putting a "V" for the victim. Now, in that position, when Officer Stafford comes at the defendant here, the defendant is facing the roadway. Which position -- where would those casings eject to on State's Exhibit No. 32 [sic]?
>
> A. I would expect those casings to end up somewhere in this area.
>
> Q. Over to the shooter's right?
>
> A. Yes, to the shooter's right.

(T. 1341-42). The casings, in fact, had ended up, not to the right, which would have placed them in the middle of the roadway on which the cars had exited SR 112, but, to the left, on the grass area off of the roadway. (T. 851; SR. 12). Based on the foregoing, the witness concluded that the location of the casings was inconsistent with the version of events which the prosecutor represented as having been stated by the defendant. (T. 1342-43).

At no time did defense counsel ever object, in any way, to the prosecution's questions or characterizations to the above witness, or to the witness's opinions. Under such circumstances, the claim that the prosecutor's questions improperly characterized the defendant's version of events is again not preserved for appellate review. See, e.g., Troedel v. State, 462 So. 2d 392, 396 (Fla. 1984) (where defense claimed, on appeal, that neutron activation test results should have been excluded, as unreliable, based on manner in which officer took samples, issue deemed unpreserved for appellate review in absence of any objection in trial court).

Appellant's assertions of mischaracterization are also refuted by the record. The Appellant argues that a) again the defendant could not remember how the gun was held, and, b) the prosecutor's depiction of Sims as standing at the rear corner of the Cadillac was erroneous as he had subsequently stated that he had stumbled backwards between the two cars. The defendant's testimony as to the position of the hand and gun has been detailed above, and refutes the Appellant's argument. The Appellee would also note that the complained of question in the instant case was premised on the defendant's location, not how the gun was being held, as seen in the above cited questioning. With respect to the defendant's location, the prosecutor, during cross examination, ascertained that the defendant, at the time of the shooting, had his back to the rear driver's corner panel of the Cadillac; the vehicle was to his right side, the defendant's back was not quite touching the vehicle. (T. 1313). The defendant also stated that he was facing the officer five feet in front of him. Id. Indeed, the defendant, on his own accord, stood up and demonstrated his position. Id. Upon further cross examination, the defendant began to add to his version, stating that he had stepped back and stumbled at the time of the shooting. (T. 1319). The prosecutor, noting the change, expressly asked if the defendant wished to change his previously marked position, but the defendant declined:

> **Q.** You're still at the rear of this car where you told me before or do you want me to change the X? Do you want me to move the X? Forty-five minutes ago, you told me this was the proper position. Tell me now, do you want me to move it or not?
>
> **A.** No, you don't have to move it.
>
> **Q.** It that right or not?

A. When I explained to you how I turned around, you asked me in relation to where I was standing, was I facing the car, the front of the hood of the Cadillac or was I facing the officer. I said, when I turned around, I was not on the side of the Cadillac. You asked me where I was. I said I was toward the back.

Q. Don't you remember you got up? Don't you remember you just got up and demonstrated for the jurors, you turned around to the right and you ended up on the side of the car?

A. Yes. I was on the side in between the two cars.

Q. You start adding things. Do you want to add that you stumbled back further or keep you original story that you're where the X is? Do you want to keep the original story or do you want to change it to a new story?

A. I am not going to change anything.

(T. 1320).

As is abundantly clear from the foregoing, despite various additions to his account as questioning proceeded, the defendant clearly agreed with the prosecutor's depiction of his location on the diagram, which was subsequently shown to the firearm examiner. The Appellant's argument that the prosecutor mischaracterized Sims' testimony in this regard is thus entirely without merit.

Finally, the Appellee would note that the defense had the opportunity to cross-examine the witnesses based on any version of facts which it believed the evidence had shown. The jury was instructed to base its decision on the evidence, and that counsel's statements were not evidence. Thus, not only are the instant claims not preserved, and not only was the prosecutor's questioning consistent with what the defendant had stated, but, even if it is assumed that any error existed in the prosecutor's questioning, such error must be deemed harmless.

III.

THE EVIDENCE IS SUFFICIENT TO SUSTAIN THE CONVICTIONS FOR FIRST DEGREE MURDER AND ROBBERY.

A. Premeditation Was Sufficiently Established, As The State Adequately Refuted The Defendant's Claim Of Self-Defense.

The Appellant argues that the evidence herein failed as a matter of law to disprove Sims' explanation of self defense. This claim is without merit, as the defendant's account of the crimes was thoroughly discredited by the evidence presented herein.

As noted by the Appellant, the State is not required to rebut conclusively every possible variation of events which could be inferred from the evidence. State v. Law, 559 So. 2d 187, 189 (Fla. 1989). Moreover, even uncontroverted factual evidence is not necessarily binding upon a court or jury and may be rejected, if it is inherently improbable, unreasonable, inconsistent with other circumstances established in evidence, or contradictory within itself. Brannen v. State, 94 Fla. 656, 114 So. 429, 430-1 (1927); Walls v. State, 641 So. 2d 381, 390 (Fla. 1994).

As previously noted in the Statement of Facts herein at p. 3, the dispatch tape in the instant case reflects only approximately 75 seconds elapsed between the time the victim stated he was on the ramp, and when another officer asked for assistance as the victim had been shot. The actual encounter between the defendant and the victim was less than a minute, as the victim initially had to stop and exit his car, and as a civilian motorist first observed the victim on the ground, shot, and was assisting him prior to the arrival of other officers who then radioed for assistance. Another

civilian witness, Batule, was also observing the encounter between the victim and the defendant in the interim, for approximately twenty seconds. In light of the narrow time frame established at trial, the Appellee first respectfully submits that the defendant's account of the protracted series of arguments, threats, pleadings, hittings, chokings and other attacks, detailed in the Statement of the Facts herein, at pp. 11-13, is inherently improbable and unreasonable. Brannen, Walls, supra.

Second, the physical evidence was inconsistent with the defendant's account of the events. As noted previously, the medical examiner, on rebuttal, stated that Sims' account of the officer having been shot while lunging from five feet away at the defendant, was inconsistent with the downward path of the bullets in the victim's body. (T. 1350-51, 1353). The downward path of said bullets, and the stippling reflected that the gun would have to have been held, with the top of the barrel facing at a downward angle, from a height above the officer's upper chest and neck, at a distance of 6-18 inches away. It should be noted that the victim was five inches taller than the defendant. Contrary to the Appellant's assertions herein, and as detailed in point II of this brief, the medical examiner's testimony was not based upon any inaccurate demonstration of the evidence. The Appellee would, however, note that the Appellant's reliance upon the medical examiner's acknowledgment, on cross examination, that the path was also consistent with the officer in a bent over position, as demonstrated by defense counsel (T. 1352), is misplaced. On redirect examination, the medical examiner stated that the bent-over position would be inconsistent with the victim having lunged at the defendant.

Likewise, the firearms technician stated that casings from the murder weapon eject to the right of the shooter. The location of the casings, which were found to the left of the location at which Mr. Sims had placed himself, was thus also inconsistent with his version of the shooting. Appellant's reliance upon evidence which in part is directly contrary to the defendant's testimony and, in part never presented at trial, is unwarranted. See Brief of Appellant at pp. 51-53. The defendant's express agreement with the prosecutor's placement of him on the diagram presented at trial has been quoted in point II of this brief. Indeed, in light of that testimony and agreement at trial, the defense sought to establish that the casings were not found in their original location, and had instead been inadvertently moved by the many officers and witnesses on the scene. (T. 1344-6).[11] The Appellant can not now, for the first time on appeal, directly contradict the defendant's testimony at trial, by moving his location on the diagram and thus claim consistency with the location of the casings. Similarly, Appellant's explanation of the location of the victim's body, by asserting that it was consistent with the officer "regaining his footing, and making his way back towards the police car - as he would logically try to do - before falling there" (See Brief of Appellant at p. 53), is raised for the first time on appeal and without any evidence in the record. Sims repeatedly testified that the officer, after being shot, simply fell back and to the side. There was no testimony that the victim thereafter moved elsewhere. Indeed, the first civilian who saw the victim shot and fallen stated that the defendant was still on the scene at this time. If the victim had attempted to move after he was shot, in the manner now described by the Appellant, the defendant was certainly in a position to observe the alleged movement, and could have so

---

[11] The firearms technician, however, testified that the casings had not been disturbed due to the lack of any markings or debris on them. (T. 1348).

stated during his extensive testimony at trial. In sum, the physical evidence was inconsistent with the defendant's version of the events as presented at trial,[12] and the Appellant's reliance at this juncture upon evidence not grounded in the record is without merit.

Third, apart from the inherent improbability due to the time frame, and inconsistency with the physical evidence, Sims' account was also refuted by the various witnesses presented below. The defendant began his version by stating that there were no limits on his possession of the Cadillac. This was directly refuted by the owner's statement that Sims knew he had to bring the vehicle back at least two days before the crime.

Similarly, Sims' account of the attacks by the victim began with statements that due to the victim's looks and "attitude" he was so frightened that he turned his back toward the victim and was praying, when the officer allegedly punched him in the mouth so as to "split" his lip and began choking him. According to Sims, this was what prompted him to reach back for the victim's radio and swing it over the top of the victim's head. Motorist

---

[12] The location at which the officer's radio was found - location B on Exhibit 7 (SR. 12) - is a further form of physical evidence which undermines the defendant's testimony. The defendant testified that after he grabbed the radio and struck the victim with it, the defendant either dropped it or the officer took it back. Neither explanation makes any sense. The area in which it was found was not at the location of the struggle; thus, it could not have been "dropped" there. Similarly, as the defendant claimed that the officer simply fell back after he was shot, the officer, in the defendant's version, could not have taken the radio and brought it over to location B, a location devoid of bloodstains and thus an improbable location for the officer to be venturing, with the radio, after having been shot. The only reasonable explanation for the radio's presence at that location was that the defendant threw it there, to prevent the officer from calling for prompt assistance.

It should also be noted that the defendant's version of the "accidental" shooting is inherently improbable. According to the defendant, not only did the gun just happen to go off once, but it just happened to go off another one or two times, without any evidence of malfunction in the gun.

Batule, who was passing by within seconds after the punch splitting Sims' lip, testified that he only saw injuries to the officer's head and no sign of injury to the defendant. Moreover, the defendant testified that after injuring the victim, he again turned his back and the victim had one hand on his neck squeezing and choking him, the other hand holding something to the back of his head. A car passed them at this point as the victim was allegedly repeatedly threatening the defendant's life, and the latter was crying and hollering not to be killed, in the midst of various protracted explanations. (T. 1234-5). The motorist in the passing car, Batule, however, did not hear the victim threatening anything. The defendant was not being mistreated: the officer merely had his hand on the back of the defendant's neck and was putting his gun back in his holster. Batule did not hear the various pleas and explanations by the defendant either; he merely heard the defendant state, "Okay, you got me, man." (T. 969). Batule's failure to see and hear what, according to the defendant, was transpiring contemporaneously with Batule's arrival also refutes the defendant's account. See, State v. Henderson, 521 So. 2d 1113 (Fla. 1988) (this Court concluded that the testimony of a witness who did not see the defendant's alleged facts of self-defense, while the witness was in a position from which he presumably would have seen those facts if they had transpired, constituted a sufficient contradiction of the self-defense claim so as to preclude a judgment of acquittal in favor of the defendant).

Batule's testimony in the instant case is further significant, as Batule heard the defendant tell Officer Stafford, "Okay, you got me, man." (T. 969). Such words from the defendant are consistent with, and indicative of, someone who had been trying to elude the police officer. Those are not the words of a scared defendant who is allegedly being attacked and beaten by an officer.

The defendant claimed that Officer Stafford next engaged in another violent, unprovoked attack, further choking the defendant, shaking him, lifting him off of the ground, using such excessive force to handcuff him that his wrists were subsequently swollen, etc. For all of Stafford's alleged choking and excessive force, however, neither the cab driver, Robinson, who observed the defendant approximately twelve hours after the encounter, nor any of the arresting officers in California, observed the slightest injury on the defendant.

Other witnesses also explicitly contradicted the defendant's testimony in several other aspects: (a) the cab driver repudiated his claim that he did not call for the cab; (b) his cousin Carol contradicted him as to the fact that she questioned him about the involvement of the car in the officer's murder; (c) testimony previously summarized refuted his denial of having possessed drugs in the car; and (d) his cousin Sam contradicted him regarding the obligation to return the car. Having been contradicted on so many significant points, the defendant was utterly lacking in credibility as to the remainder of his testimony.

The defendant's testimony had other problems as well. The defendant stated that he intended to turn himself into the California police. Apart from the improbability of anyone travelling 3,000 miles in order to turn himself in to the police, when the same could have been done in Florida, the defendant's own subsequent testimony establishes that when the California police located him, his initial effort was to try to escape from the back door of the apartment, so as to avoid capture by the very same police he intended to turn himself in to.

Just as the defendant attempted to flee the arresting officers in California, so too, his flight from the scene of the crime in Miami evinces consciousness of guilt.[13] While the defendant professes that he was in fear and panicked, that claim is undermined by the testimony of Gilda Castano. Before the police arrived at the scene of the killing, Ms. Castano and her mother-in-law passed by and stopped their car. Ms. Castano related how she saw the defendant, sitting in the Cadillac, and stared at him, making eye contact with him. (T. 997-998). Whatever alleged fear the defendant claims to have had with respect to being captured by Miami police after having shot an officer, is undermined by the fact that two civilian witnesses were now at the scene, thus making it highly unlikely, even to the defendant's overactive imagination, that responding officers would attack, rather than arrest, the panicking defendant. The defendant's decisions to flee, to take the officer's weapon with him and dispose of it, minimizing the likelihood of matching the defendant's prints to those on the weapon, and his disposal of the clothes worn at the time of the crime, are all decisions which are consistent with a consciousness of guilt; not with someone who believes he has just acted legally and in self-defense.

In view of the foregoing, no jury, and no court, is compelled to accept the defendant's version of the events. As that version has been effectively repudiated, the Appellant's argument is without merit.

---

[13] See, Straight v. State, 397 So. 2d 903 (Fla. 1981) (evidence of flight as consciousness of guilt); Bundy v. State, 471 So. 2d 9 (Fla. 1985) (same).

B. The Evidence Adduced At Trial Was Sufficient To Establish Both Felony Murder And The Underlying Felonies Of Robbery And Escape.

The prosecution's case against the defendant was presented, in the alternative, as premeditated murder or felony murder, with the underlying felonies being robbery and/or escape. The Appellant argues that since the defendant acted in self-defense, the requisite intents for the offenses of robbery and escape were not satisfied. As seen from the foregoing argument, however, the claim of self-defense was amply repudiated. As neither the court nor jury was obligated to accept the defendant's claim of self-defense, the requisite intents for robbery and escape clearly exist. See, Kearse v. State, 20 Fla. L. Weekly, S300 (Fla. June 22, 1995). In Kearse, this Court affirmed a conviction for the murder of a police officer, based on alternative theories of premeditated murder and felony murder, where the defendant forcibly took the officer's pistol during a confrontation and proceeded to kill the officer with that weapon. As the Court also upheld the aggravating factor that the murder was committed during the course of a robbery, and the robbery referred to the forceful taking of the officer's weapon, this Court was clearly viewing the similar evidence in Kearse as sufficient to establish felony murder.

As the self defense claim was repudiated, the jury could obviously find that the defendant, through the use of unjustified force, took the weapon from the officer for the purpose of effecting an escape from the officer. This is all the more compelling insofar as the defendant did not leave the weapon at the scene of the offense, as would someone who believed he acted in self-defense. Rather, he took it with him, so he could dispose of it in a manner which would render it difficult to retrieve, and similarly difficult to link to the defendant.

IV.

PROSECUTORIAL COMMENTS DURING CLOSING ARGUMENT DID NOT DEPRIVE THE DEFENDANT OF A FAIR TRIAL.

The Appellant complains about numerous instances of alleged improper prosecutorial comments during closing arguments. None of the comments at issue were the subject of any form of an objection or motion for mistrial. The Appellant asserts that the comments improperly call the defendant a liar, that the comments improperly attack defense counsel, by accusing defense counsel of misleading the jury, and that the comments improperly vouch for the prosecutor's own credibility. In the absence of any objections or a request for mistrial, these issues have not been properly preserved for appellate review. See, e.g., Craig v. State, 510 So. 2d 857, 964 (Fla. 1987) (where objections to closing argument were "not specifically made to the trial court," same can not be raised for the first time on appeal and will not be considered); Holton v. State, 573 So. 2d 284 (Fla. 1991); Ferguson v. State, 417 So. 2d 639 (Fla. 1982); Steinhorst v. State, 412 So. 2d 332, 339 (Fla. 1982) (alleged error in prosecutor's comments, which, inter alia, expressed his opinion as to appellant's guilt and misstated evidence, not preserved when not objected to at trial); Maggard v. State, 399 So. 2d 973, 976 (Fla. 1981) (alleged error due to prosecutor's comment about his personal beliefs waived on appeal where not objected to at trial); Garcia v. State, 644 So. 2d 59, 63 (Fla. 1994); Carter v. State, 560 So. 2d 1166 (Fla. 1990) (claim unpreserved for appellate review where defense counsel failed to object to comment impugning defense counsel; and where comment vouched for truthfulness of state's chief witness); State v. Cumbie, 380 So. 2d 1031 (Fla. 1980) (claim based on comment that police would have cleared defendant if he were innocent, thereby referring to nonexistence of any other evidence and non-record matters, was not preserved for appellate review).

With respect to the several instances in which the Appellant asserts that the prosecutor referred to the defendant as a liar, or in which the defendant's testimony was referred to as lies, the principles enunciated by this Court in Craig v. State, 510 So. 2d 857, 864 (Fla. 1987), are controlling:

> Appellant argues that the prosecutor improperly made repeated references to defendant's testimony as being untruthful and to the defendant himself as a 'liar.' It may be true that the prosecutor used language that was somewhat intemperate but we do not believe he exceeded the bounds of proper argument in view of the evidence. When counsel refers to a witness or a defendant as being a 'liar,' and it is understood from the context that the charge is made with reference to testimony given by the person thus characterized, the prosecutor is merely submitting to the jury a conclusion that he is arguing can be drawn from the evidence. It was for the jury to decide what evidence and testimony was worthy of belief and the prosecutor was merely submitting his view of the evidence to them for consideration. There was no impropriety.

The same principles apply in the instant case. The prosecutor's arguments make it clear that when he is referring to the defendant as a liar, or to the defendant's testimony as lies, he is doing so in the context of arguments that other evidence in the case demonstrates the falsity of the defendant's testimony. Thus, the prosecutor repeatedly contrasted the defendant's "lies" to the physical evidence, which does not lie and which refutes the defendant's account. (T. 1416, 1419, 1424-25, 1430, 1438). The prosecutor's comments are clearly consistent with this Court's pronouncement in Craig, as the defendant is referred to as lying because the evidence demonstrates the falsity of the testimony.

Many of the remaining comments of which the Appellant complains involve assertions, or implications, that defense counsel was misleading the jury, or

that the prosecutor himself was not misleading the jury. See, Brief of Appellant, pp. 58-59. What is most significant in evaluating these comments, which form the bulk of the Appellant's argument, in addition to the lack of preservation, is that the prosecutor's closing argument was subsequent to defense counsel's initial closing argument. Defense counsel's prior closing argument was one endless, personal attack on the prosecutors. The entire theme of defense counsel's argument was that the prosecution had acted in a personally and professionally unethical manner.

Defense counsel started out his closing argument with the theme which pervades the rest of the argument - i.e., that the prosecution did not have a case against the defendant, so the prosecution resorted to an endless series of "smokescreens" to divert the jury's attention away from the real evidence in the case:

> Ladies and gentlemen, what I caution you at this time to be very leery of, be extremely leery of smoke screens. Smoke screens are something that's used to divert you away from the facts of the case. And in combat you use them to divert the enemy away if your actual position -- or if you're going to attack from a different angle, then you would use a smokescreen.
>
> I suggest to you, ladies and gentlemen, that's what the State of Florida, through Mr. Rosenberg and Bagley did to you in this trial.

(T. 1381-82). Having planted the notion that the prosecution's case was one endless series of smokescreens, the remainder of defense counsel's closing argument proceeded to identify and detail the alleged "smokescreens" presented at trial. (T. 1382-7). As if that weren't enough, defense counsel then ventured to predict that the prosecution was going to resort to yet another smokescreen in its as yet unpresented closing argument. Defense counsel predicted that the prosecution was going to set up a straw man, so that the

prosecution could then proceed to knock down that nonexistent straw man. Thus, defense counsel argued that the prosecution was going to try to create a smokescreen, in which it would assert, for its own devious reasons, that some additional, unidentified person, was at the scene of the killing with the defendant. (T. 1408-9).

Thus, when the prosecutor's remarks in closing argument are assessed, in which the prosecutor asserts that (1) he did not mislead the jury (T. 1441), and (2) that defense counsel, in several respects, did mislead the jury (T. 1423-24; 1437), those comments must be placed in an appropriate context, as set forth above. In view of the foregoing, the prosecutor's comments must be deemed to constitute a fair response to defense counsel's prior assertions. See, e.g., Garcia v. State, 644 So. 2d 59, 64 (Fla. 1994) ("these comments must be considered as a response to defense counsel's direct comments against the prosecutor, whom defense counsel had accused of using this prosecution to attain her ambitions and build a reputation for herself."); Ferguson v. State, 417 So. 2d 639, 642-43 (Fla. 1982); Brown v. State, 367 So. 2d 616 (Fla. 1979).

Turning to some of the details of the prosecutor's closing argument, it will be seen that of the multitude of objections now raised, few improprieties can be found, and certainly none of a fundamental nature. The prosecutor had argued that he did not recall either Castano or Robinson stating that they had seen the defendant's photograph prior to the photo lineups in which they identified the defendant. (T. 1423-24). Defense counsel, in the prior closing argument, had asserted that the day after the murder, there were newspaper articles and television shows showing the defendant's picture. (T. 1385).

While there was evidence that Robinson, prior to the photo lineup (conducted several days after the murder), had seen the defendant's picture (T. 1046), and the prosecutor's recollection was erroneous as to that, the prosecutor was entirely correct that defense counsel had told the jury about "evidence which has not even been brought out in the trial. . . ." (T. 1423-24). That latter comment was correct, as no witness ever stated that there had been articles or news shows displaying the picture on the day after the murder. Furthermore, as to the prosecutor's comment about Castano and Robinson not having seen pictures prior to photo lineups,[14] the prosecutor prefaced that comment by stating that "I don't recall any witness during this trial" testifying about seeing the defendant's picture. (T. 1423). As the prosecutor was clearly basing the comment on his own recollection, and the jury was previously advised that lawyers' comments are not evidence, and was subsequently advised to decide the case solely on the basis of the evidence (T. 783, 1471), comments about the lack of news coverage can hardly be deemed fundamental error.

The next principal focus of the Appellant concerns arguments about the defendant turning his back towards the officer in the middle of the alleged struggle. Defense counsel's prior closing argument had asserted that "the reason why he [the defendant] turned his back to him, because if he was going to shoot him, he was going to have to shoot him in the back, and Officer Stafford is going to have a problem explaining that. That's why he turned his back to him." (T. 1393). While the defendant did claim to have turned his back on the officer (T. 1234, 1301), the defendant never gave any reason for such action during his testimony. Thus, when the prosecutor argued, "He never

---

[14] The prosecutor's comment was correct as to Castano.

said -- he never said, 'I turned around so I wouldn't be shot in the back,'" the prosecutor's argument was entirely correct; defense counsel was attributing motives to the defendant as to matters which the defendant himself never undertook to explain.

The Appellant tries to bolster the significance of the foregoing matters by asserting that the prosecution's entire theory of the case, based upon the location of the casings and the angle of the bullet wounds, was not established by the evidence. These matters have already been addressed at great length, in points II and III herein, where it was shown that the testimony of the medical examiner and firearms expert was fully consistent with the in-court demonstrations.

Lastly, the Appellant focuses on a comment in which the prosecutor stated that Officer Stafford should have shot the defendant when the officer was attacked with the radio. (T. 1428). The prosecutor's comment is consistent with the evidence supporting the conclusion that Officer Stafford did not overreact; that he did not act in any excessive capacity. Thus, witness Batule testified, that when he drove by, the officer, who already had a wound on his head, from having been hit by the radio, was proceeding to cuff the defendant, while the officer was putting his gun back into his holster. The officer was no longer even holding his gun on the defendant; that is hardly a portrait of an officer intent upon killing or attacking the defendant. While the prosecutor's comment may be somewhat exaggerated, it clearly serves a legitimate purpose - responding, based on the evidence, to the erroneous portrait of Stafford which the defendant had presented.

In view of the foregoing, the prosecutorial comment claims are not preserved, and any errors contained therein certainly do not amount to fundamental error.

V.

THE TRIAL COURT DID NOT ERR IN EXCUSING VENIREPERSON HIGHTOWER FOR CAUSE.

During the course of voir dire, the bailiff reported to the court that two of the jurors, Ms. Mitchell and Ms. Hightower, were friendly with one of the defendant's sisters. (T. 742-43). Both Ms. Mitchell and Ms. Hightower had worked together in HRS, with the defendant's sister. (T. 743, 745). It had also previously been elicited that Ms. Hightower was personally acquainted with defense counsel, having had contact with him through her job. (T. 702-03, 623). After it became known that Ms. Hightower knew the defendant's sister, a brief colloquy ensued regarding how this would affect her deliberations. (T. 743-44). During that brief colloquy, consisting of five questions, Ms. Hightower twice expressed uncertainty. When questioned as to whether her knowing the defendant's sister had an effect on her ability to determine whether the defendant was guilty, she initially responded, "I don't think so." (T. 743). Subsequently, when questioned as to the effect of her knowing a family member on her ability to vote in favor of the death penalty, she responded, "I am not sure." (T. 744). Defense counsel declined to ask any questions. Id.

Shortly thereafter, the prosecution challenged Ms. Hightower for cause:

> She should have been struck for cause. Knowing the family members, her answers to me now that she doesn't think that she could vote for death knowing a family member, even if she could

> find him guilty of first-degree murder. The Court well knows there is case law that we have here where a juror says, "I don't think so" is enough for being struck for cause on the death penalty. She should be removed at this point.

(T. 779-80). The Appellant places extensive weight on Ms. Hightower's preliminary responses in voir dire, in which she did not appear to have any problems with the death penalty. (T. 629-33, 649-51). Those responses, however, are of little significance, as they preceded her awareness that she knew the defendant's sister, and the only issue is the effect of her knowledge of the sister on her ability to impose the death sentence. In the aftermath of that knowledge, her primary responses were responses of uncertainty.

The standard for determining when a prospective juror may be excluded for cause because of views on capital punishment "is whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" Wainwright v. Witt, 469 U.S. 412, 424, 105 S.Ct. 844, 83 L.Ed. 2d 841 (1985), quoting Adams v. Texas, 448 U.S. 38, 45, 100 S.Ct. 2521, 65 L.Ed. 2d 581 (1980). See also, Gray v. Mississippi, 481 U.S. 648, 658, 107 S.Ct. 2045, 95 L.Ed. 2d 622 (1987). The standard "does not require that a juror's bias be proved with 'unmistakable clarity.'" Witt, 469 U.S. at 424.

A trial court's determination on this issue is one which rests within that court's discretion and must be upheld in the absence of an abuse of discretion. See, e.g., Mitchell v. State. 527 So. 2d 179, 180 (Fla. 1988). The reasons for the trial court's discretion and the lack of a requirement of proof of bias by unmistakable clarity, are set forth in Witt:

> . . . determinations of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism. What common sense should have realized experience has proved: many veniremen simply cannot be asked enough questions to reach the point where their bias has been made "unmistakably clear"; these veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings. Despite this lack of clarity in the printed record, however, there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law. For reasons that will be developed more fully, infra, this is why deference must be paid to the trial judge who sees and hears the juror.

469 U.S. at 424-26.

Thus, this Court has reiterated that "[t]o prevail on this issue, a defendant must show that the trial court, in excusing the prospective juror for cause, abused its discretion." Hannon v. State, 638 So. 2d 39, 41 (Fla. 1994). "The inability to be impartial about the death penalty is a valid reason to remove a prospective juror for cause." Id. In light of the narrowed standards in capital sentencing schemes, a prospective juror's views regarding capital punishment need not be made "unmistakable clear." Witt, 469 U.S. at 424. Thus, where a prospective juror's responses are equivocal, conflicting or vacillating with respect to the ability to be impartial about the death penalty, this Court has upheld the decision of the trial judge on whether such a juror was properly excludable. See, Randolph v. State, 562 So. 2d 331, 335-37 (Fla. 1990); Trotter v. State, 576 So. 2d 691, 694 (Fla. 1990); Taylor v. State, 19 Fla. L. Weekly S344 (Fla. 1994); Hannon, supra (juror Ling vacillated on question and was uncomfortable with the issue).

In view of the foregoing, there was no abuse of discretion in the instant case. Juror Hightower twice expressed uncertainty, when confronted with the fact of her knowledge of a close family member of the defendant.

This is clearly the type of matter for which the discretion of a trial judge, who observes the demeanor of the juror and the facility or difficulty with which she responds, should be respected.

Alternatively, the State would assert that the issue is not properly preserved for appellate review. Although defense counsel did initially object to the cause challenge, when the jury was subsequently sworn, defense counsel did not renew any objection or accept the jury subject to any prior objections. (T. 781-82). See, Joiner v. State, 618 So. 2d 174, 176, n. 2 (Fla. 1993). The same reasoning applied by Joiner, requiring defense counsel to renew prior objections to the prosecution's peremptory challenges when the final jury is sworn, should be similarly applied in the context of the prosecutor's cause challenges.

Lastly, the State submits that any error with respect to the granting of the challenge for cause must be deemed harmless. At the time of the challenge for cause, immediately prior to the completion of jury selection, the prosecution had utilized only four peremptory challenges, leaving it with six unused challenges. (R. 13-18). See Rule 3.350, Florida Rules of Criminal Procedure. After a cause challenge is denied, it is permissible for the prosecution to utilize a peremptory challenge based on the juror's views regarding the death penalty. Williams v. State, 622 So. 2d 456, 462-63 (Fla. 1993). With six remaining peremptory challenges, and jury selection virtually complete, there can be little doubt that the prosecution would have used a remaining challenge on Ms. Hightower had the situation arisen.[15]

---

[15] Notwithstanding the plurality opinion in Gray v. Mississippi, 481 U.S. 648, 107 S.Ct. 2045, 95 L.Ed.2d 622 (1987), the State submits that pursuant to Arizona v. Fulminante, 499 U.S. 279, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991), a harmless error analysis as to this type of issue is permissible.

VI.

THE TRIAL COURT DID NOT ERR IN ITS TREATMENT OF EVIDENCE OF IMPERFECT SELF-DEFENSE AS A MITIGATING CIRCUMSTANCE.

The jury, during the guilt-phase proceedings, heard and rejected the defendant's claim of self-defense. The Appellant argues that an "imperfect" claim of self-defense should nevertheless have been considered as a mitigating circumstance, by the jury, through a proper instruction, and by the court, in its written order. Notwithstanding Appellant's protestations to the contrary, this argument is nothing more than a "lingering doubt" argument. The jury considered the self-defense claim; the jury rejected it. It was not a proper subject for either reconsideration or instruction. See, e.g., Aldridge v. State, 503 So. 2d 1257, 1259 (Fla. 1987) (residual doubt is not an appropriate nonstatutory mitigating circumstance); King v. State, 514 So. 2d 354, 358 (Fla. 1987); Burr v. State, 403 So. 2d 943 (Fla. 1981); White v. Dugger, 523 So. 2d 140 (Fla. 1988); Downs v. State, 572 So. 2d 895, 900 (Fla. 1990); Bogle v. State, 20 Fla. L. Weekly S77, S78 (Fla. Feb. 16, 1995). All of the foregoing cases involve situations where the defendant was seeking to argue, in the penalty phase, that residual doubt exists as to his guilt for the underlying offense. That is exactly what the defendant herein was seeking to do, by arguing that the murder was an act of self-defense.

A. The Trial Court Did Not Err In Refusing To Instruct The Jury On The Statutory Mitigating Factor That The Victim Was A Participant In The Defendant's Conduct Or Consented To The Act.

In the first variation of this claim, the Appellant asserts that the trial court erred in failing to instruct the jury on the statutory mitigating factor that "[t]he victim was a participant in the defendant's conduct or consented to the act." The Appellant's argument is without merit.

Sims presented additional testimony at the penalty phase. He stated that although he had been convicted, he had done nothing "illegal," and "did not break the law. I did not do nothing, from my standpoint." (T. 1547). Family members also expressed their belief that defendant had shot Officer Stafford in self-defense. (T. 1505, 1524). At the charge conference, the defense, in reliance upon Chambers v. State, 339 So. 2d 204, 208-9 (Fla. 1976) (England, J., concurring), stated that the victim participant/consent mitigator was applicable. In Chambers, the concurring opinion (which is without precedential value), in the context of asserting that the jury's life recommendation should have been adhered to, found evidence that the victim consented to the act of causing death, and that the statutory mitigator was thus applicable. "The jury had evidence in abundance that appellant and Connie Weeks had voluntarily shared a long-standing sado-masochistic relationship which included severe and disabling beatings. They also knew that Connie Weeks had herself obtained appellant's release from jail on the very day he had beaten and dragged her through the streets in an unholy rage." Chambers, 339 So. 2d at 209.

The State respectfully submits that the notion of Officer Stafford having consented to his own murder, or voluntarily participated in a relationship in which the defendant took his weapon and murdered him, after the officer stated that he was stopping a reportedly stolen vehicle, is utterly without merit. Equating an officer's act in arresting a suspect to voluntary participation in a sado-masochistic relationship such as that in Chambers is unwarranted.

Insofar as the Appellant has relied upon "self-defense," the jury already heard and rejected the claim of self defense. This meant that the jury already concluded that the officer acted in a lawful manner and that the defendant acted without justification. To instruct the jury, after it has rejected a self defense claim, that it can find that the arresting officer was a participant in his own murder, is thus unwarranted.

The jury could only find that Officer Stafford somehow caused his own death if the jury accepted the self-defense claim. That, however, obviously was not done. The Appellant attempts to circumvent the obvious by asserting that the jury might not have rejected the self-defense claim, as the case went to the jury on the alternative theories of premeditated murder and felony murder. Brief of Appellant, pp. 71-72. The jury was instructed that self defense was not applicable if, at the time of the killing, the defendant was attempting to commit a robbery. (T. 1463). Thus, the Appellant argues that the jury could have found the defendant guilty of felony murder, while not rejecting the self-defense testimony. That, however, is circular reasoning. Assuming, for the moment, that the jury did proceed on a felony murder theory, it would then have to be concluded that the defendant was attempting to commit the robbery of taking the officer's weapon. If the defendant was in the act of forcefully taking the officer's weapon, while either threatening the officer or placing the officer in fear, it inherently means that self-defense could not have existed, as the defendant was using force for the purpose of taking the property. A self-defense claim thus would not be consistent with a felony-murder verdict.

Insofar as the Appellant is relying on an "imperfect" claim of self-defense based upon a lesser degree of provocation by the victim, the Appellant has entirely ignored the fact that the trial judge instructed the jury on the extreme duress statutory mitigating factor. As noted by this Court, the extreme duress factor is applicable in the event there is evidence of "external provocation." Toole v. State, 479 So. 2d 731, 734 (Fla. 1985). "Duress is often used in the vernacular to denote internal pressure, but it actually refers to external provocation such as imprisonment or the use of force or threats." Id. Likewise, defense counsel was allowed to fully argue provocation:

> He acted under extreme duress. You heard testimony that he felt he was being attacked by Officer Stafford. He was in fear of his life. This is what he told you. I wasn't there. I don't know.
>
> You did hear one witness tell you that he passed by and he was being held behind the neck with a gun to the back of his head. Mr. Batule, I think, told you that. The only other person who saw anything was Mr. Batule.
>
> Now, did he act under extreme duress? I would say yes. Was Officer Stafford a participant in this conduct? If you believe what he said -- and we have to believe some of it anyway, because no one else was there but him. What did Officer Stafford to do participate in this thing?

(T. 1588-9). Although the prosecution's objection to the last sentence, as to Officer Stafford's participation was sustained,[16] the defense again continued:

> . . . Was he acting under extreme duress when this happened? Was he under some type of emotional duress? Think back to the testimony of Merrit Sims along with that of Mr. Batule. And think as to how he got the gun from the officer and what was going on at that time. Was he under some kind of emotional stress at that time? I think you can find that he was at the time under some type of emotional duress. Even though in your mind you may have done something different, you may have thought something different. It's what was in his mind at the time that

---

[16] The prosecutor stated, "I object to this too." (T. 1589).

counts. Did he feel his life was in danger? And he told you that he felt that way.

Now, was the officer somehow a participant in all of this? Did he in any way instigate anything? Do you believe Merrit Sims? He did. It doesn't excuse him, but it sure mitigates as to what sentence you would recommend.

(T. 1593).

The State would also note that the jury was instructed that it could consider, as nonstatutory mitigation, "any other circumstance of the offense." (T. 1597). In light of the instructions given in this case, and as the defendant was permitted to reiterate his notions of self defense during the penalty phase, and defense counsel was free to and did argue same, the State fails to see any error or prejudice. Even when there is an erroneous failure to instruct the jury on a statutory mitigating factor, this Court has concluded that the giving of the catchall instruction has sufficed to cure any error. See, e.g., Cave v. State. 476 So. 2d 180, 187-88 (Fla. 1985) (no error in failing to instruct on age as mitigation, where the jury was instructed that among the mitigation it might consider were any aspects of the defendant's character and any other circumstances of the offense, and, the defendant was not precluded from arguing his age as mitigating).

B. The Trial Court Did Not Err In Treating The Self-Defense Evidence As Lingering Doubt Evidence.

The Appellant's next variation of this claim is that the "imperfect self-defense" theory is not the same as lingering doubt evidence, and the trial court erred in refusing to consider same. This argument is also without merit.

As noted in section A of this argument (see p. 71), at the penalty phase Sims and his family members testified that the defendant had not done anything illegal. Sims was still maintaining innocence based upon the same self-defense claim presented at the guilt phase. Residual doubt, or lingering doubt, arguments are those which reassert the same evidence which was proffered as a defense against the conviction. Aldridge, supra, 503 So. 2d at 1259; White, supra; 523 So. 2d at 140; King, supra, 514 So. 2d at 358; Downs, supra, 572 So. 2d at 900. In the instant case, contrary to the appellant's current argument, there was no distinction between the self-defense claim adduced in the guilt-phase proceedings, and the alleged "imperfect self-defense" claim advanced in the penalty phase.[17]

The Appellant cites a series of cases for the proposition that claims of violence by the victim, which fall short of a valid self-defense claim, can nevertheless provide relevant mitigation. The Appellant's reliance on these cases is unwarranted. For example, the Appellant cites Eddings v. Oklahoma, 455 U.S. 104, 113, 102 S.Ct. 869, 71 L.Ed. 2d 1 (1982), for the proposition that "the trial judge did not evaluate the evidence [of self-defense] in mitigation and find it wanting as a matter of fact; rather he found that as a matter of law he was unable even to consider the evidence." The foregoing quotation, with the bracketed reference to self-defense evidence, appears in the Brief of Appellant, p. 79. A review of the Court's opinion, however,

---

[17] The State would also note that distinctions between a legal self-defense claim and an "imperfect" one would result in a never-ending guilt phase. A defendant, whose self-defense claim failed in the guilt phase would claim, in the penalty phase, that he thought he was acting in self-defense, even if he were not actually acting in self-defense. The defendant whose entrapment claim failed would nevertheless proceed to argue, in the penalty phase, that he thought that he had been entrapped, even though his belief was erroneous. The defendant, convicted of felony murder, would continue to argue in the penalty phase that he did not really intend to commit the underlying felony. The penalty phase would effectively become guilt phase: act two.

makes no reference to self-defense as potential mitigating evidence. Indeed, self-defense was not even remotely at issue in Eddings. The mitigating evidence referred to by the Supreme Court was evidence of the defendant's violent family background - i.e., an alcoholic mother who was a prostitute; an overreacting father who used excessive physical punishment; etc. 455 U.S. at 107. Eddings never claimed self-defense, either in conjunction with his no contest plea at the guilt phase, or in the sentencing proceedings.

Appellant's reliance on Gilvin v. State, 418 So. 2d 996, 999 (Fla. 1982), is similarly misstated. The Appellant portrays Gilvin, a jury override case, as one in which the defendant's testimony about the victim's homosexual overtures to Gilvin constituted the mitigating evidence which supported the jury's life recommendation. This Court's opinion makes no such statement. This Court, in reversing the jury override, simply stated that "[t]here was evidence of nonstatutory mitigating factors, however, upon which the jury could have based the life recommendation. . . ." 418 So. 2d at 999. This Court's opinion never identifies that nonstatutory mitigating evidence. Banda v. State, 536 So. 2d 221 (Fla. 1988), also relied upon by the Appellant, reflects a situation where the cold, calculated, and premeditated aggravating factor was found to be negated by testimony of the instantaneous killing, after the victim jumped at the defendant. As the CCP factor was negated, and improperly found by the trial court, and as CCP was the sole aggravating factor, the death sentence, in the absence of any aggravating factors, had to be reversed. In Christian v. State, 550 So. 2d 450 (Fla. 1989), another jury override case, the defendant, a prison inmate, attacked and murdered another inmate who had, on prior occasions, engaged in violent attacks on Christian. There was no claim that Christian's murder of the other inmate was an act of

self-defense. Indeed, it was an intentionally planned act of revenge, as Christian repeatedly stabbed the other inmate, who was in handcuffs, and was being escorted through the prison by two unarmed guards. Christian's sole defense was that his mental condition precluded him from forming the requisite specific intent for premeditated murder. This Court concluded that the victim's prior violent acts against Christian formed a sufficient basis to provide mitigation which would support the jury's life recommendation. That conclusion is considerably different from the principles pertinent to the instant case. Most significantly, as the prior violent acts involved in Christian were not part of a self-defense claim, they were neither accepted nor rejected by the jury's guilt-phase verdict. Those prior violent acts could have existed, even while the specific intent defense was rejected. By contrast, the self-defense claim proffered in the instant case, for reasons previously delineated, was rejected by the jury. Lastly, Cannady v. State, 427 So. 2d 723 (Fla. 1983), is another jury override case in which evidence of a murder committed when a victim jumped at the defendant resulted in the CCP factor being negated. 427 So. 2d at 730-31. The victim's alleged violence, which did not undermine the murder conviction, did not contribute to the mitigation upon which this Court concluded the jury's life recommendation could have rested. This Court identified the mitigation upon which the life recommendation could have rested: evidence of the defendant's mental or emotional disturbance; evidence of his inability to conform his actions to the requirements of law; evidence of the appellant's lack of significant criminal activity; evidence of the defendant's age. 427 So. 2d at 731. The alleged jumping of the victim at the defendant is conspicuously omitted from this Court's list of mitigating evidence upon which the jury's life recommendation could have rested. While that act negated the CCP factor, it did not, in any way, contribute to the mitigation upon which the jury's recommendation rested.

The trial court's rejection of the self-defense claim, asserted in the penalty phase in the instant case as a lingering doubt argument, was entirely proper.

C. The Court's Treatment Of The Self-Defense Evidence Had No Impact On The Weighing Process.

The Appellant argues that the lower court's improper treatment of the self-defense evidence adversely affected the weighing process. As seen from the foregoing arguments in sections A and B herein, that claim has no merit, as there was no error in the jury instructions or the trial court's treatment of the claim.

The Appellant, in conjunction with this argument, also asserts that the imposition of the death sentence herein is disproportionate, when compared to other cases.[18] Several cases involving murders of police officers during the course of their official duties present analogous aggravating and mitigating circumstances. Those cases have all resulted in the affirmance of the death sentences. For example, in Pietri v. State, 644 So. 2d 1347 (Fla. 1994), an officer was shot after the defendant escaped from a work release center and committed a burglary and car theft. Aggravating factors included murder by one under a sentence of imprisonment; murder during flight from the burglary; murder committed to avoid arrest or disrupt lawful enforcement of laws, where

---

[18] Aggravating factors in the instant case included: (1) murder committed by person under sentence of imprisonment; (2) prior conviction for violent felony; (3) murder committed during course of armed robbery; (4) murder committed to avoid arrest or effect escape; (5) victim was law enforcement officer engaged in performance of official duties (merged with prior factor and treated as single factor). There were no statutory mitigating factors and nonstatutory mitigation consisted of evidence of good background, i.e., that defendant was a good father, person who went to church, and person who expressed some remorse.

the victim was a law enforcement officer; and the CCP factor, which was stricken on appeal. While no statutory or nonstatutory mitigation was found, this Court stated, on appeal, that "[e]ven if the trial court had found mitigators including a deprived childhood, we cannot say there is a likelihood that the trial court would have imposed a different sentence." 644 So. 2d at 1354. By contrast, the instant case presented even greater aggravating circumstances, with the additional factor of the defendant's prior violent felony.

Armstrong v. State, 642 So. 2d 730 (Fla. 1994), also presents similar circumstances. A police officer was murdered during the robbery of a restaurant. Aggravating factors were the defendant's prior violent felony; murder during the course of a robbery; murder to avoid arrest or effect escape; murder of an officer engaged in official duties. There was no statutory mitigation. With respect to nonstatutory mitigating factors, this Court noted: physical problems/dyslexia during youth; the defendant helped out other family members; the defendant was a good father; he helped out an abused mother; he was productive in prison; he had prospects for rehabilitation; a codefendant received a life sentence; the defendant was religious and attended church; and the defendant's lack of adequate medical care as a child. By contrast, the instant case presents the additional aggravating factor, that the murder was committed by a person under a sentence of imprisonment, while the nonstatutory mitigation was considerably less than that which this Court, in Armstrong, concluded could not outweigh Armstrong's aggravating factors.

Other cases alsos compel the same conclusion regarding the Appellant's proportionality argument. See, e.g., Valdes v. State, 626 So. 2d 1316 (Fla. 1993) (defendant participated in effort to aid prison inmate's escape effort and officer was shot during that effort; aggravating factors were: prior convictions for violent felonies; creation of great risk of death to other persons; murder committed to effect escape from custody and to disrupt or hinder lawful exercise of governmental function; CCP, which factor was stricken on appeal; mitigation consisted solely of nonstatutory factors, including family background evidence; an alcoholic, abusive father; an injury from a car accident while defendant was a child; experience in a military boarding school; a broken home; a difficult birth); Hill v. State, 643 So. 2d 1071 (Fla. 1994) (defendant shot officer after bank robbery, as police were attempting to arrest accomplice; aggravating factors included conviction for prior violent felony; creation of risk of death to others; murder committed during course of robbery; mitigation, which the federal district court, in habeas corpus proceedings, concluded that the trial court had erroneously not given weight to, was considered by this Court, after the federal habeas proceedings; mitigation included: defendant was caring, nonviolent person; he helped other disabled acquaintances; trouble-free youth; steady employment; helped out in household; attended school until 12th grade, with minimal reading level; after evaluating those mitigating factors, this Court still found that death was appropriate, as trial court's nonconsideration of those factors was harmless in light of aggravating circumstances); Young v. State, 579 So. 2d 721 (Fla. 1991) (In a case where self defense was rejected during guilt phase, aggravators of committed during burglary/pecuniary gain and avoid arrest, weighed against little mitigation of church activities and ability to conform to prison rules, deemed proportional.)

The Appellant seeks to assert that cases such as the foregoing ones are distinguishable because they typically involved murders of law enforcement officers when defendants were fleeing from "independent felonies." See Brief of Appellant, p. 83, n. 80. That, however, is a distinction without substance or significance. The instant defendant's felony, robbery of the officer and officer's weapon, is every bit as much of a felony as the felonies involved in the foregoing cases. See Kearse, supra. The aggravating factors in the instant case, if anything, are more compelling than those of the foregoing cases, as a much stronger collection of factors is present in this case than in the others. The mitigating evidence, in the instant case, is just as minimal as in the foregoing cases. Thus, based on the foregoing cases, the death sentence is proportionate to death sentences imposed and upheld in other cases.

VII.

THE LOWER COURT DID NOT ERR IN FAILING TO INSTRUCT THE JURY ON AGE AS A STATUTORY MITIGATING FACTOR OR IN FAILING TO FIND AGE AS A MITIGATING FACTOR.

The defendant was 24 years old at the time of the murder. There was no evidence that the defendant's mental, emotional or intellectual age was lower than his chronological age. His family members testified that he had not suffered any emotional or psychological problems when growing up. Under such circumstances, the trial court did not err in failing to instruct the jury on age as a mitigating factor or in failing to find that age was a mitigating factor. The judge expressly rejected age as a factor, stating:

> . . . Furthermore, defendant was 24 years old at the time of the killing. The defendant's age, education and maturity were apparent to the Court from the defendant's testimony. Cooper v. State, 492 So. 2d 1059 (Fla. 1986).

(R. 554).

The finding of age as a mitigating factor is a decision which rests within the discretion of the trial court, and numerous decisions have upheld the refusal to treat ages of 20 or more as mitigating. See, e.g., Cooper v. State, 492 So. 2d 1059 (Fla. 1986) (trial judge acted within discretion in rejecting age of 18 as mitigating factor); Kokal v. State, 492 So. 2d 1317, 1319 (Fla. 1986) (no abuse of discretion in not finding age of 20 as mitigating); Garcia v. State, 492 So. 2d 360 (Fla. 1986) ("The fact that a murderer is twenty years of age, without more, is not significant, and the trial court did not err in not finding it as mitigating."); Scull v. State, 533 So. 2d 1137, 1143 (Fla. 1988) ("This Court has frequently held that a sentencing court may decline to find age as a mitigating factor in cases in which the defendants were twenty to twenty-five years old at the time their offenses were committed."); Mills v. State, 476 So. 2d 172, 179 (Fla. 1985) (defendant 22 at time of offense).

While ages between 20 and 25 have occasionally been accepted as mitigating, as noted in Garcia, supra, that is true only when there is something more to explain why the age should be treated as mitigating. As explained in Eutzy v. State, 458 So. 2d 755, 759 (Fla. 1984), "age is a mitigating circumstance when it is relevant to the defendant's mental and emotional maturity and his ability to take responsibility for his own acts and to appreciate the consequences flowing from them." Thus, ages between 20 and 25 require some form of a showing a mental or emotional disturbances, or impaired intelligence, as those showings suggest that a defendant's mental or emotional age is less that his chronological age. Thus, in Randolph v. State,

463 So. 2d 186, 193 (Fla. 1984), when the defendant's age of 24 was treated as mitigating, that was done in the context of other mitigating evidence which suggested that his capacity to appreciate the criminality of his conduct was impaired due to drug use. Similarly, in Scull, supra, this Court, while accepting the age of 24 as mitigating, found that the age "alone could not establish a mitigating factor, but that factors which were observable by the judge during the trial and sentencing proceeding support his finding that Scull's emotional age was low enough to sustain this mitigating circumstance." 533 So. 2d at 1143. Likewise, in Smith v. State, 492 So. 2d 1063, 1067 (Fla. 1986), where the age of 20 was treated as mitigating, there was also evidence that the defendant had a reduced capacity and extreme emotional disturbance, matters which suggest a lower emotional age.

The instant case presented no evidence to suggest that the mental or emotional age was lower than 24. The evidence, and the judge's observations, all suggested the contrary. The defendant went to high school; he was not a troubled child; there was no evidence of emotional or psychological problems; the defendant testified, at great length, and demonstrated that he was quite articulate. There was thus no error in failing to instruct or find age as a mitigator.

Assuming arguendo that there was any error in not instructing the jury on age, any such error must be deemed harmless in light of the following: (a) the catchall instruction permitting the jury to consider the factor; (b) the defense was not prevented from arguing age to the jury;[19] (c) the additional

---

19 Defense counsel did argue age as mitigation, asserting, inter alia, that "you have to give some consideration to his youth also." (T. 1588). When he further argued that "That also is a mitigating factor [age 25 at time

instruction advising the jury that it could give any mitigating evidence "such weight as you feel it should receive"; (d) the strength of the aggravating factors herein; (e) the de minimis nature of the mitigating evidence, as set forth herein; (f) the de minimis nature, at best, of age 24, with no mental or emotional impairment, as a mitigating factor. See, Cave v. State, 476 So. 2d 180, 187-88 (Fla. 1985)

VIII.

THE LOWER COURT DID NOT ERR IN REFUSING TO GIVE A REQUESTED INSTRUCTION WHICH WOULD HAVE QUALIFIED THE AGGRAVATING FACTOR REGARDING COMMISSION OF THE MURDER FOR THE PURPOSE OF AVOIDING ARREST.

The jury was instructed on the two aggravating factors under sections 921.141(5)(e) and 921.141(5)(j):

> (e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.
>
> . . .
>
> (j) The victim of the capital felony was a law enforcement officer engaged in the performance of his official duties.

With respect to the prevent-arrest aggravator, defense counsel requested an instruction which would have advised the jury that "[t]he mere fact of the death of a law enforcement officer is not sufficient to establish this factor without proof of requisite intent to avoid arrest and detection." (R. 541; T. 1559). The trial court declined to give this requested instruction.

---

of murder]", the prosecutor's objection was sustained. Defense counsel's affirmative statement that age was a mitigating factor could have misled the jury into believing that the law required them to treat age 25 as mitigating. The sustaining of an objection to such language did not, however, preclude the defense from urging age as mitigation under the catchall instruction if the jury chose to find mitigating value even though it could not be required to do so.

The Appellant contends that the failure to give the requested instruction unfairly skewed the weighing process, as the avoiding arrest aggravator is merely duplicative of the aggravating circumstance for killing a law enforcement officer. This contention is without merit. First, the instruction on factor (e) already has language in it which requires proof of intent as to that factor: that factor requires proof that the murder was committed for the purpose of avoiding or preventing lawful arrest or effecting escape from custody. Section 921.141(5)(e), Florida Statutes. (T. 1596). Moreover, as noted by the Appellant, the trial court gave an additional anti-doubling instruction to prevent the jurors from duplicating the foregoing factors; the jurors could only rely on one or the other. (T. 1596). There was thus no error in the jury's deliberations.

The Appellant's contention that the trial judge's findings do not establish the motive necessary for the avoiding arrest aggravator is without merit. The trial judge found that the victim knew of the stolen status of the defendant's car and was in the process of arresting the defendant, when the latter attacked him and prevented the arrest:

> Charles Stafford was a sworn police officer with the Miami Springs Police Department. While on duty, in full uniform and driving a clearly marked police vehicle he encountered the efendant [sic]. The defendant was driving a car belonging to his cousin. His cousin had previously reported the car as stolen, since the defendant did not return it as he promised. By computer and radio response Officer Stafford was informed of the stolen status of defendant's car.
>
> As Officer Stafford was handcuffing the defendant, he struck the officer in the head with his police radio, robbed him of his police pistol, and shot him in the chest. The officer died of his wounds.
>
> The defendant's obvious purpose was to either prevent his arrest or to escape.

(R. 552). Moreover, the trial judge merged this factor with the murder of a law enforcement officer circumstance and treated them as a single aggravator,

without attributing any additional weight. (R. 552). Thus, no error has been demonstrated.

IX.

THE LOWER COURT PROPERLY INSTRUCTED ON THE AGGRAVATING FACTOR THAT THE MURDER WAS COMMITTED DURING THE COURSE OF A FELONY.

The Appellant argues that the felony-murder aggravating factor was improperly presented to the jury, for its consideration, since it merely duplicates an element of the underlying offense. This claim has repeatedly been rejected by this Court. See, e.g., Squires v. State, 450 So. 2d 208 (Fla. 1984) (trial court's use of underlying felonies as aggravating circumstance did not violate due process or equal protection principles); Mills v. State, 476 So. 2d 172, 178 (Fla. 1985) (rejecting argument that this factor renders a finding of aggravation automatic); Menendez v. State, 419 So. 2d 312, 314-15 (Fla. 1982); Stewart v. State, 588 So. 2d 972, 973 (Fla. 1991) (rejecting defendant's claim "that it was double-dipping for the trial court to use robbery as an aggravator when the same robbery served as the basis for the felony murder conviction."); Parker v. State, 641 So. 2d 369, 377, n. 12 (Fla. 1994); Kearse v. State, 20 Fla. L. Weekly, S300, 5301-5304 (Fla. June 22, 1995) (rejecting claim 20, in which Kearse attacked constitutionality of felony-murder aggravating factor); See also, Lowenfield v. Phelps, 484 U.S. 231, 108 S.Ct. 546, 98 L.Ed. 2d 568 (1988).

X.

THE SENTENCING ORDER COMPLIES WITH THIS COURT'S REQUIREMENTS.

The Appellant contends that the sentencing order contains errors in the evaluation of the aggravating and mitigating factors. Initially, the Appellant argues that the lower court's sentencing order "suggests a lack of

care", because it erroneously found the existence of the aggravating factor that the murder was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws (R. 552), as the State did not argue to and the jury was not instructed on this factor. Brief of Appellant at p. 91. The Appellee respectfully submits that there was no error nor any carelessness in this regard. The trial judge has the duty to conduct independent review of the evidence and to make his own findings regarding aggravating and mitigating circumstances. There is no error in finding an aggravating circumstance merely because the jury was not instructed thereon. Hoffman v. State, 474 So. 2d 1178, 1182 (Fla. 1985). The trial judge stated that the facts supporting this aggravator were the same as those he had previously enunciated in addressing the prevent-arrest aggravator. (R. 552). He thus stated that he was considering this circumstance along with the prevent-arrest factor as a single aggravator. Id. No error has thus been demonstrated.

The Appellant then argues that the trial judge erroneously stated that the defendant had alleged only one statutory mitigating factor, i.e., extreme mental or emotional disturbance, whereas he had instructed the jury on the extreme duress mitigator. As noted previously, during the charge conference, based upon defense counsel's arguments that self-defense was relevant, the trial judge rejected the request for the victim participation/consent mitigator instruction, but agreed to instruct the jury on the extreme duress mitigator. See, e.g., Toole v. State, 479 So. 2d 731, 734 (Fla. 1985) ("Duress is often used in vernacular to denote internal pressure, but it actually refers to external provocation such as imprisonment or the use of force or threats.").

During closing argument, the defense repeatedly asked the jurors to consider whether defendant was acting under some form of "emotional duress" or "emotional stress":

> . . . Was he acting under extreme duress at the time this happened? Was he under some type of emotional duress? Think back to the testimony of Merrit Sims along with that of Mr. Batule. And think as to how he got the gun from the officer and what was going on at that time. Was he under some kind of emotional stress at that time? I think you can find that he was at the time under some type of emotional duress. Even though in your mind you may have done something different, you may have thought something different. It's what was in his mind at the time that counts. Did he feel his life was in danger? And he told you that he felt that way.

(T. 1593). Likewise, in its sentencing memorandum to the court, the defense stated, "there is no evidence showing that the homicide was anything but the result of a fear in the mind of the defendant." (R. 545)(There was no mention of the duress mitigator).

In light of the above confusion of the extreme mental or emotional disturbance and the extreme duress mitigators by the defense, the trial court can not be faulted for stating that the defense alleged only one statutory mitigating factor, i.e., extreme mental or emotional disturbance. In any event, the trial court properly addressed and rejected both factors. The trial court found no evidence of extreme mental or emotional disturbance, relying upon Duncan v. State, 619 So. 2d 279, 283-84 (Fla. 1993). (R. 553). In Duncan, this Court, citing State v. Dixon, 283 So. 2d 1, 10 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed. 2d 295 (1974), defined the factor as less than insanity but more than the emotions of an average man, however inflamed. This Court thus found that Duncan's statement that he "went nuts" after arguing with the victim was insufficient to establish the

existence of the mental mitigator. Sims' testimony at the penalty phase hearing was comparable. He testified, "I was not acting, I was reacting, from stopping, from the lights behind me, to the attack that came upon myself." (T. 1543). He had added, "when you're under strain, under arrest, it was too much for anyone to bear. It's too much of a mental strain and emotional strain. There is too much going on in your mind." (T. 1545). The trial judge's rejection of this factor, in reliance upon Duncan, was thus proper. Likewise, with respect to the extreme duress factor, the sentencing order subsequently addressed same and found that there was no evidence to support it. (R. 553-54). That conclusion was also proper in light of the thoroughly repudiated self-defense claim as previously detailed, and Sims' above-cited penalty-phase statements.

Lastly, the Appellant contends that there was a conclusory evaluation of the list of 25 nonstatutory mitigating circumstances submitted by the defense. The list was as follows:

1. The defendant's unwavering declarations of innocence.
2. The defendant's behavior at trial was acceptable.
3. Aspects of the defendant's character as testified to by family members.
4. Not known by family as a violent man.
5. The defendant had love and affection of his family.
6. The defendant's church through his minister urging against the death penalty.
7. The defendant testified to and showed sincere and heartfelt remorse.
8. The defendant gave a voluntary statement following his arrest.
9. The defendant is the father of four children he loves.

10. The defendant's mother testified he was a good son.

11. The defendant cooperated with the police and confessed freely.

12. The defendant believes in God as evidenced through his joining the church.

13. The defendant has continued contact with and concern for his family.

14. The defendant worked while in High School.

15. The defendant is a human being.

16. The defendant is rehabilitated and not antisocial.

17. The defendant for (12) years of schooling showed good conduct.

18. The death of the defendant's father devastated the defendant.

19. The Court can impose a life sentence.

20. The circumstances of the shooting i.e., the time passing between any decision to cause the victim's death and the time of the killing was insufficient under the circumstances to allow the defendant's cool and thoughtful consideration of his conduct.

21. Prior to this killing, the defendant had never fired a gun at anyone.

22. The crime committed by the defendant was out of character for him.

23. It is unlikely that the defendant will be a danger to others while serving a sentence of life in prison.

24. The defendant has displayed good conduct while in custody.

25. The murder was not premeditated but an act borne of sudden combat.

(R. 554-55; 543-45).

It is clear that the thrust of those legitimate factors listed above is no more than garden-variety family background mitigation; that which is

typically given minimal weight, especially when not accompanied by any claims or evidence of an abusive childhood or serious mental or emotional problems, or drug or alcohol abuse. The trial court summarized the background mitigation supported by the evidence: "The defendant presented evidence that he had two children with a woman in California, that he had two children in Miami, that he attended church, that he was never expelled from school, and that he felt remorse over the officer Stafford's death but maintained he killed him in self defense." (R. 554). It is obvious that the trial judge gave this background and remorse mitigation little weight, when stating that he found "little to no weight" as to each of the proposed circumstances listed by the defense. (R. 555). It is equally obvious that the court's statement of "no weight" referred to the defense list's factors which are either not valid mitigation or as to which no evidence was presented. (See, e.g., #'s 1, 2, 4, 6, 8, 11, 15, 16, 18, 19, 21, etc., in the list above). Addressing the defense list, in more detail, would add little in this case, and it is readily evident that the extensive aggravating factors clearly outweigh such nonstatutory mitigation.

If this Court does conclude that there was any error in not further addressing the defense list, any such error must be deemed harmless. In Armstrong v. State, 642 So. 2d 730, 739 (Fla. 1994), the trial court's sentencing order summarized evidence of several nonstatutory mitigating factors presented. The order then stated that, "as to mitigating circumstances, none may be applied to this case." The order then referred to the trial court "weighing the aggravating and mitigating circumstances." Id. While this Court was troubled by the trial court's contradictory statements that no mitigating factors existed, but that some were weighed, this Court proceeded to find that any error was harmless:

> . . . Although the trial judge's articulation of how he considered the mitigating circumstances and aggravating circumstances is somewhat less than a model of clarity, we believe that he properly considered all nonstatutory mitigating circumstances in imposing the death sentence. In any event, however, we find that any error was harmless beyond a reasonable doubt because, as indicated above, the three valid aggravating circumstances in this case strongly outweigh the negligible mitigating evidence submitted by Armstrong.

642 So. 2d at 739. The same conclusions are applicable to the instant case if any error is found in the sentencing order.

XI.

FLORIDA'S CAPITAL SENTENCING STATUTE IS NOT UNCONSTITUTIONAL.

A. Recommended Sentence Based on Bare-Majority

The Appellant argues that Florida's capital sentencing statute is unconstitutional because it permits the imposition of the death sentence based upon a bare majority vote. This argument has previously been rejected by this Court and there is no reason for revisiting it. Wuornos v. State, 644 So. 2d 1012, 1020 n. 5 (1994); James v. State, 453 So. 2d 786, 791-92 (Fla. 1984); Alvord v. State, 322 So. 2d 533, 536 (Fla. 1975); Fotopoulos v. State, 608 So. 2d 784 (Fla. 1992); Brown v. State, 565 So. 2d 304 (Fla. 1990). The State would further note that this issue is not properly before this Court. The defendant's death sentence was imposed, by the trial court, subsequent to an 8-4 jury recommendation for death. This case does not involve a bare majority recommendation.

B. Absence of Written Findings by Jury

The Appellant next argues that Florida's sentencing scheme is constitutionally invalid because it does not require that the jurors set forth

their findings as to various factors, and it does not require that the jurors be advised as to how many jurors must concur as to the applicability of any individual factor. These arguments have also been previously rejected. Wuornos v. State, 644 So. 2d 1012, 1020 n. 5 (Fla. 1994); Hildwin v. Florida, 490 U.S. 638, 109 S.Ct. 2055, 104 L.Ed.2d 728, (1989); Mills v. Maryland, 486 U.S. 367, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988).

C. Presumption/Burden of Proof

Lastly, the Appellant argues that the sentencing statute is unconstitutional because it does not require the state to prove beyond a reasonable doubt that aggravating circumstances outweigh mitigating circumstances. The Appellant asserts that the statute creates a presumption that death is appropriate when aggravating factors have been established. These arguments have also been previously rejected by this Court. See, e.g., Robinson v. State, 574 So. 2d 108, 113, n. 6, and n. 7 (Fla. 1991); Preston v. State, 531 So. 2d 154, 160 (Fla. 1988); Wuornos, supra 644 So. 2d at 1020, n. 5.

CONCLUSION

Based on the foregoing, the Appellee respectfully submits that the convictions and sentence of death should be affirmed.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

FARIBA N. KOMEILY
Assistant Attorney General
Florida Bar No. 0375934
Office of Attorney General
Department of Legal Affairs
Post Office Box 013241
Miami, Florida 33101
(305) 377-5441

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing **BRIEF OF APPELLEE** was furnished by mail to **CHRISTINA A. SPAULDING,** Assistant Public Defender, 11th Judicial Circuit of Florida, 1320 Northwest 14th Street, Miami, Florida 33125, on this 7th day of September, 1995.

FARIBA N. KOMEILY
Assistant Attorney General

/blm