IN THE SUPREME COURT OF FLORIDA

KEN ELDON LOTT,

Appellant,

v. CASE NO. 86,108

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE NINTH JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

The appellee accepts the statement of the case and facts as recited by appellant, subject to the following inclusions and corrections.

The written findings in support of the death sentence reflect that the sentencing judge found in aggravation that (1) the defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person (2) the capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any burglary and/or kidnaping (3) the capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody (4) the capital felony was committed for pecuniary gain (5) the capital felony was especially heinous, atrocious, or cruel, and (6) the capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. Victim impact evidence was not considered as an aggravator, and was given no consideration by the lower court (R 574-580). In mitigation the court found the two statutory mental health mitigators that (1) the capital felony was committed while the defendant was under the

influence of extreme mental or emotional disturbance and (2) the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirement of law was substantially impaired (R 580-583). The lower court indicated that it had given these two mitigators considerable (more than some but less than great) weight and consideration (R 581). The court considered and found, as well, nonstatutory mitigation: (1) drug addiction (Ken Lott used cocaine heavily up to the time of his arrest), which, coupled with organic brain damage was given considerable weight by the court (2) physical abuse by his stepfather (3) contribution to the community (4) family background (Lott was helpful to his parents as a child and as an adult and maintained his parents' property and (5) employment background (Lott maintained steady and gainful employment as a truck driver and landscaper) (R 584-584).

Deputy Griffis also processed a table in the breakfast nook, and a massager found in the nook (T 379;395). The footwear impression processed by Deputy Griffis was not located in the dirt outside the victim's house but at a house next door under construction, where the dumpster was located (T 381). The red stain on the back of the sofa the deputy processed with developer then cut out to take into evidence tested positive for blood in a

presumptive test (T 396). The fibers found in the victim's home that were consistent with fibers found in a T-shirt taken from Lott's home were found on the master bedroom floor (T 500). The T-shirt, State's Exhibit 37, was similar to the T-shirt worn by a person in photos removing money from an ATM machine (T 844).

The medical examiner, Dr. William R. Anderson went to the scene and observed the victim in the back bedroom (T 511). She was completely unclothed (T 515). She was bleeding for some period of time and lost a lot of blood. It soaked into the mattress and down the side of the bed, as a result of a wound to the jugular vein (T 513). It was a large, deep, incised or cutting type wound of the throat on the right side and a great deal of blood was in that area (T 513). This was the most critical and severe of all the injuries (T 520). The bleeding was around the head, neck, and chest area (T 515). There was a second stab wound in the back (T 521). This was the last of the wounds inflicted (T 530). The duct tape on the wrists prevented blood from getting to the skin (T 515). The bleeding pattern suggests that duct tape had been circled around and that her arms were taped together (T 524). There were duct tape lines on the ankles and legs (T 526-527). The duct tape wrapped around the legs and feet (T 527). The victim also had fresh bruises on her arms (T 521). The scrapes to the victim's

elbow and knee probably came from the stucco walls which had disruptions (T 522). There were abrasions on the knee consistent with contact with a rough surface like a rough rug (T 525). The bruising on the thigh was consistent in size with a hand having tried to force the victim's legs apart (T 527). The blunt force injury to the temporal area would have stunned the victim (T 528). She was at least stunned and after a minute or so of blood loss she would have become unconscious, anyway (T 528). There was no injury to the genitalia but the overall pattern of her injuries, specifically the bruising in the leg area and inner thighs, would cause some concern as to whether the attack was sexually related, or had sexual overtones (T 537). If there was lack of resistance due to fear there would be no vagina or labial injury (T 534).

Sergeant Corriveau found the column behind the front door, where the front door swings out, was damaged. There was also some damage to the front door of the victim's home (T 590). A silver purse was found without the wallet in it (T 591). The panties with fecal matter were found in bedroom #2 (T 596). In bath #2 the shower curtain was knocked down and laying on the floor. In bath #3 a paper towel spool was laying on the floor (T 597). He also collected a pair of pliers from bedroom #1 (T 595). The only light in the house found on was in the master bath in the toilet area (T

596).

After Rose Connors murder her sister Ann Tighe went through her belongings. She noticed the tennis bracelet missing (T 662). She did not see the ring until it was shown to her by the police (T 663).

Lott also told Robert Whitman that they arrived at the victim's house early in the morning (T 728). The plan was not only to tie and gag the victim but blindfold her, as well (T 727). Lott said she fought like a mad dog when he grabbed her and took her back into the house (T 782). In reference to the necessity of killing the victim Whitman testified that Lott said he could not take the chance. "He said he had to kill the bitch because she knew him and she would send him to prison." (T 731-732) Lott did not tell Whitman that he beat the victim because she was "frightening" him. He said he beat her because she was "fighting" him (T 728). Lott told Whitman he cut the victim's throat with a boning or fillet knife (T 727). Lott also told Whitman that they tied her up (T 731). Whitman told Lott if he had raped the victim or anything like that there could be evidence in her or on her hair (T 729). Lott said he took care of that and returned to the house that night and poured disinfectant on the victim, washed her down, and cleaned up the scene (T 730).

When Lieutenant Johnson requested that Whitman try to get some of the jewelry from Lott the plan was that Whitman was to tell Lott that he could sell it for him (T 733). Lott also told Whitman that he had the tennis bracelet appraised for more than $5,000.00 (T 780). Whitman gave a set of fingerprints to the police (T 745). Whitman further testified that for a few years after Lott had snitched on him he harbored bad feelings toward Lott but after they got together again and talked he felt that Lott was sorry and he had no more resentments (T 751). Whitman testified that on the day Lott came to his trailer to get the $600.00 there was a "possibility" Lott had asked him about getting marijuana (T 755). When Whitman stated to Lott's wife in the April 22nd or 23rd phone call "Oh you know him", in reference to Ray Fuller, Whitman testified that he could have been asking her a question. She knew a lot of Lott's associates and may have heard of him (T 786). The entries Whitman made on his calendar were made after the events had happened (T 792).

Volusia County Deputy Sheriff Laurence Josepa testified also that State's Exhibit 42, a photo of Lott, portrayed Lott the way he actually looked at the time of his arrest (T 806). At the time of his arrest Lott was driving a dark colored Nissan pickup (T 810-811). Lott had a black hat on when he was arrested (T 822). It was

admitted into evidence as State's Exhibit 47 (T 825).

Aside from taking prints from Royce Pipkin, the victim's boyfriend, prints were also taken from Whitman, Tammy Lott and Ann Ferguson, who had discovered the body (T 826). The police simply did not have samples to test Pipkin's prints until December 1994 (T 833). Pipkin was not a suspect (T 834). Whitman was excluded as a source of all thirty-three fingerprints found in the victim's house, and was not matched to the thirty-four latent palm prints (T 881).

The screams Juan Briones heard sounded like they were coming from inside the house (T 1010).

Libby Coleman thought it was only good natured ribbing when Robert Whitman said he had been trying to get even with Lott for twenty-three years (T 1028). As far as Coleman knew, Lott's work was strictly outside landscaping. Lott gave it up in the early part of February (T 1055). Coleman's phone bill did not reflect her 8:45 a.m. call to Lott on March 27th, as it was not a long distance call (T 1056).

In the penalty phase the State called Patricia Richardson to testify to the circumstances of a prior violent felony, an armed robbery, committed by Lott (T 49). Ms. Richardson testified that in December 1984 she worked at the Shop and Go convenience store on

Galloway Road in Lakeland, on the midnight shift (T 50). On December 2, 1994, Sunday morning, at three o'clock, she was robbed by Lott. She was the only person in the store. She was outside cleaning up. He drove up and got gas (T 51). She went back in the store. The phone was ringing (T 52). Eventually Lott came in and walked up to the counter. She laid the phone down. He asked for a pack of cigarettes. She started to ring up the gas and cigarettes (T 53). When she opened the register, he pulled a butcher knife from his pants, pointed it at her chin and told her he wanted the money (T 54). She handed him the bills first. She wasn't going fast enough for him and he told her he would kill her (T 54). After retrieving the money, Lott told her to lie down and put her nose on the floor. After he left, she screamed. She reached the phone. The person on the end of the phone had heard the conversation and had called for help (T 55-56). Later that morning she identified Lott as the man that robbed her (T 57). On cross-examination she indicated that Lott appeared to be under the influence of drugs because his hair was so wild looking. He could not distinguish between food stamps and cashiers' checks (T 58).

PENALTY PHASE

When Lott and Ashley Clark stole the car at a hospital, they were subsequently arrested. The arrest scared Clark to death but

Lott kept on doing it (T 123). Lott went to prison for it at age seventeen (T 123). Clark then had no contact with Lott for twenty years (T 123). Clark knew nothing of Lott's convictions for armed robbery and attempted escape in which a guard was taken hostage. His assessment of Lott's character was based only on his involvement with Lott as a teenager and for the last four to five years (T 124).

David Pratt's testimony was also based on his knowledge of Lott in his teenage years and the last few years (T 129). He also was not aware of many of the crimes Lott committed except car thefts (T 131).

Ray Delong's contact with Lott was in a business, not social, context (T 136). Nothing in his contact with Lott would lead him to believe that Lott had any kind of brain damage or mental infirmity (T 136). Lott seemed quite normal. He had no memory problems (T 137). DeLong was not aware of Lott's prior crimes (T 137).

Farris Davis only saw Lott once or twice a year at family functions (T 140).

Corrections' officer Larry Ridner has had no relationship with Lott for twelve or fourteen years (T 156).

Lloyd Coleman, Lott's stepfather testified that Lott never had

mental problems (T 164). In contrast to the testimony of Lott's mother, he testified that Lott never had any ill affects from the motorcycle accident and had no mental problems. The head injury did not seem to change him in any way (T 164).

Lott's mother testified that the head injury Lott sustained in the motorcycle accident was "like a concussion." (T 194). She never knew her son to have mental problems, although he would get upset easily, but he would talk to her and that was the end of it (T 196). She would not describe Lott as impulsive and never noticed Lott to have any difficulties with memory. She never noticed anything that would indicate her son had mental defects (T 197). She indicated that he did not have any lingering affects from the accident (T 198). Lott had trouble in school at age fourteen before the accident (T 208).

Dr. Dee "guessed" that Lott's frontal lobe damage or organic brain syndrome originated with the motorcycle accident at age sixteen but he could not get the hospital records (T 289). It was the Department of Corrections records that indicated that Lott had been physically and psychologically abused by his stepfather (T 292).

Other than Lott's criminal acts and statements to Dr. Dee, Dr. Dee had no other evidence of impulsive acts by Lott. Assuming

Lott's family and friends' testimony as to Lott's nonaggressive personality is true, Dr. Dee's test results as to impulsiveness may be wrong (T 297). Looking for a car with keys in it to steal would not be an impulsive act (T 298). Lott told Dr. Dee he was under the influence of cocaine when he committed a prior robbery. He did not tell the doctor that he had actually committed three such robberies (T 298). An alternative diagnosis of psychopathy could explain Lott's criminal history (T 299). Such persons could appear normal in conversation, laid back, and very nice, but they commit crimes without a feeling of guilt (T 300). Lott's history is consistent with a diagnosis of psychopathy except for the brain damage, but the brain damage is not even inconsistent with such diagnosis, as Lott could be a psychopath who also happens to have brain damage or possibly doesn't even have brain damage (T 301). Lott told Dr. Dee that he had been convicted of approximately five crimes. When Dr. Dee looked at the records, he found that Lott had grossly understated the number (T 303). Since the motorcycle accident occurred at age sixteen the two prior vandalizations of churches at age fourteen would not have been affected or caused by any head injury and such acts would not be atypical for a psychopath (T 306). There would not be extreme emotional disturbance if those observing Lott day-to-day saw no difficulties

in his functioning (T 307). Dr. Dee had no evidence Lott used cocaine close in time to the crime (T 308). In fact, Lott actually denied involvement in the crime to Dr. Dee (T 309). If the facts showed the crime to be planned and premeditated then Lott's capacity to conform his conduct to the requirements of the law was not impaired. Dr. Dee admitted that Lott appreciated the criminality of his conduct but just didn't care (T 312). The P.C.L.R. test determines psychopathy (T 319). A score of thirty indicates a person is more likely to be a psychopath. Lott scored thirty (T 320).

SUMMARY OF ARGUMENT

I. The State presented evidence from which the jury could exclude every reasonable hypothesis except that of guilt. Physical evidence linked Lott to the murder scene. Lott admitted his culpability to Robert Whitman. The details in Lott's admissions to Whitman were descriptive of the physical evidence found at the crime scene. There was sufficient time for Lott to premeditate and after deliberation he concluded the victim must die because she knew him and could send him to prison. A person resembling Lott used the victim's ATM card and arrived in a truck that resembled Lott's. Lott and his wife were in possession of the dead victim's jewelry. The theory this jewelry was given to Lott by Whitman was never presented to the jury and does not hold water. Whitman would then not be selling it for Lott. Whitman was never linked to the scene.

II. The trial court did not abuse its wide discretion in excluding the testimony of defense witness James Whitman as to the reputation of his brother, State's witness Robert Whitman, for untruthfulness in the community, where it was clear the majority of the conversations indulged in by the witness were pursuant to a family feud and in the only non-family conversation the witness could recall, it was the witness, not a member of the community,

who had made allusions to the untruthfulness of Robert Whitman. Appellant failed to make a preliminary showing that the reputation was sufficiently broad based. The proffer demonstrates only the biased opinion of the prospective witness and his family.

III. The trial court properly excluded the testimony of Lott's mother than he had told her that the victim had been a landscaping client of his. A party cannot offer evidence of his or her own exculpatory hearsay statements under section 90.803(18), Florida Statutes (1996).

IV. Where the victim may have been stunned by a blow to the head or possibly strangled into unconsciousness so that she was not conscious for the final coup de grâce, a slash to the throat, the heinous, atrocious or cruel aggravator was, nonetheless, still properly found since the victim suffered enormous preceding physical torture and mental anguish and begged for her life.

V. In view of (1) the heinous, atrocious, and cruel facts of this crime, where a helpless victim was bound with duct tape, suffered all manner of indignities, both physical and mental, begged for her life, was hit, strangled, and finally had her throat slit (2) the cold and deliberate manner in which the crime was carried out (3) the fact of six aggravating factors, once of which is the commission of a prior violent felony (4) the existence of a

significant criminal history and (5) mental health mitigation that is not particularly weighty since appellant's psychological testing is consistent with a diagnosis of psychopathy, it can hardly be demonstrated that the death sentence is this case is disproportionate.

VI. The photographs in this case reflected the condition of the victim when found, demonstrated the manner in which she died, by bleeding to death from a knife wound to the throat, and assisted the medical examiner in his testimony, were relevant, not unduly gruesome, and properly admitted into evidence by the trial court.

VII. The cold, calculated, and premeditated aggravating factor was properly found by the sentencing judge and the jury was properly instructed on the same, where the evidence reflected that the crime and robbery took some period of time, due to binding with duct tape, questioning as to money, and torture of the victim with pliers, providing adequate time to appellant to deliberate, and coldly decide he must kill the victim since she knew him and could send him to jail, and to choose the manner in which he would carry out the murder.

VIII. The trial court did not admit letters from a jailer and Lott into evidence to demonstrate that the prior felony of attempted escape was violent but allowed such violent facts to come

before the jury through the reading of an edited PSI. No timely objection was interposed to the prosecutor's questions to appellant's stepfather concerning appellant's vandalism of a church as a youth and such issue is waived on appeal.

IX. The sentencing court did not err in allowing victim impact evidence that referenced only the uniqueness of the victim pursuant to the dictates of *Payne v. Tennessee*.

X. The trial court did not abuse its discretion in not imposing sanctions when state witnesses inadvertently violated the rule of sequestration where such violation was wholly inadvertent and appellant could not demonstrate that the witnesses' testimony was any way changed as a result of the violation.

XI. Appellant's challenges to the constitutionality of Florida's death penalty statute are not preserved and have previously been found to be meritless.

ARGUMENT

I. THE EVIDENCE IS LEGALLY SUFFICIENT TO SUPPORT THE GUILTY VERDICT.

At the conclusion of the State's case the defense moved for judgment of acquittal, arguing that (1) there was no proof of premeditation (2) there was nothing to physically tie Lott to the crime scene, other than a few prints, which can last indefinitely, and Robert Whitman testified that Lott was previously employed by the victim, which would put him on the property and inside, if he went in to speak to his employer, and there were two people at the victim's house at the time of the murder, all creating a reasonable hypothesis of innocence and (3) venue had not been proven (T 934-936;938).

The trial judge's notes reflected that Deputy Gillespie had testified that the murder had occurred at Sweetwater West, Orange County, Florida so as to establish venue (T 937). The trial court also ruled that there was sufficient evidence to go to the jury, finding that there was sufficient time for Lott to have located the weapon he was going to use and slice the victim's throat, and that the manner in which it was done indicated that Lott had time to anticipate and reflect upon what he was going to do. The prosecutor also pointed out that Lott's confession demonstrated both premeditation and felony murder (T 936). The court concluded

that premeditation had been established. In regard to the hypothesis of innocence the judge stated:

> The business about him being at the scene working in the yard does not put him in the master bathroom, which is one of the places, or in the second bedroom. So I think there is evidence he's in the house and it's not to do the yard work. And then, of course, the jewelry that's in the defendant's possession very soon after the death was just that information that's been provided and the jury will consider all of this and there is sufficient evidence to go to the jury.

(T 939).

The State argued that the fingerprints placed Lott at the scene and there was no evidence that Lott had ever been in the victim's house on any other occasion (T 938). The JOA motion was denied (T 940).

At the close of all the evidence the defense moved for judgment of acquittal, renewing the venue, and premeditation arguments. (T 1091). The defense also argued a new ground as a reasonable hypothesis of innocence in that Juan Briones heard six screams from the victim's house on Sunday morning at the alleged time of death and there was testimony that at that time Lott was in a residence in Deland, in Volusia County, Florida and could not have committed the murder within that time frame (T 1092). The State responded that Mr. Briones identified Ann Ferguson's vehicle as being in the victim's driveway. Ferguson's testimony put her at the victim's house around eleven o'clock. What Briones heard was,

in all likelihood, Ms. Ferguson. Even if Lott was in Deland at 8:45 a.m. it would not take two hours to get to Sweetwater, from Deland to Apopka. Briones testified that he heard the screams between 9:30 and 10:30 a.m. (T 1093-1094).

The court denied the motion for JOA indicating that the weight of the testimony and credibility of the witnesses was a decision for the jury (T 1095).

In a case such as this involving circumstantial evidence, a conviction cannot be sustained--no matter how strongly the evidence suggests guilt--unless the evidence is inconsistent with any reasonable hypothesis of innocence. *McArthur* v. State, 351 So.2d 976 (Fla.1977). But a defendant's motion for judgment of acquittal should only be granted in a circumstantial-evidence case "if the state fails to present evidence from which the jury can exclude every reasonable hypothesis except that of guilt." ***State*** v. ***Law,*** 559 So.2d 187, 188 (Fla.1989). The circumstantial evidence rule also does not require the jury to believe a defendant's version of events where State has produced conflicting evidence. *Holton* ***v. State,*** 573 So.2d 284, 289-90 (Fla.1990).

In the case at bar, the State presented evidence from which the jury could exclude every reasonable hypothesis except that of guilt and Lott presented no version of events that would constitute

a reasonable hypothesis of innocence.

Mrs. Coleman hardly established an alibi for her son by virtue of her phone call to his house at 8:45 a.m. on Sunday, March 27, 1994, in which she did not actually speak to Lott. The phone bill also did not reflect this call. Lott still had time to travel from Deland to Apopka to commit the murder by 10:30 a.m., within the time frame of the screams heard by Briones, and the fact that Lott did not speak to his mother on the phone would indicate a lack of time to do so. Since Briones also identified Ann Ferguson's car as being at the scene, it is possible he had his days confused and what he heard was Ferguson's screams, upon finding her dead friend.

Although the trial court properly excluded testimony by Lott's mother that the victim had been a landscaping client of Lott's prior to the murder, the mother did testify that Lott had three landscaping clients in the Sweetwater area where the victim lived. Robert Whitman testified that Lott told him that he *used* to work for the victim, landscaping, and he knew she was pretty well off. This is consistent with Coleman's testimony that Lott had given up such work in the early part of February. Lott's mother also testified that Lott's work was strictly outside landscaping. No reasonable hypothesis was ever offered as to how the palm prints of a landscaper would come to be found in the bedrooms of a murdered

client's home. Having a glass of water or collecting one's fees in the course of one's job would put prints in a foyer or kitchen at best. The lack of fingerprints and evidence of sexual activity at the crime scene would be consistent with Lott's statement to Whitman that he had returned to the scene with disinfectant and wiped down the scene and the victim. Nevertheless, three palm prints from Lott were found at the scene. There was evidence the palm prints were left at the time of the commission of the crime. Lott admitted to Whitman he committed the murder, was present at the time of the crime, and returned to clean up the scene. From Lott's mother's testimony that he gave up landscaping, Lott would not have been in the victim's house since early February and prints placed there then would hardly have survived cleaning and overprinting. Whitman was excluded as a source of all thirty-three fingerprints found in the victim's house and he was not matched to the thirty-four latent palm prints. Fibers found at the scene were consistent with fibers found on a shirt taken from Lott. Shoe impressions at the scene were consistent with shoes worn by Lott. Lott was placed at the murder scene by his own admissions and the State did not rely on fibers, shoe comparisons or physical evidence, alone. A white male in a photograph using the victim's ATM card resembled Lott. The truck in the photo resembled Lott's

truck. Lott confessed to Whitman and the details of his admissions paralleled physical evidence found at the crime scene. The security system was not tampered with and no pry marks were found, consistent with the victim's having known her murderer and Lott having worked for her and having sized her up as a likely victim. The victim **was** found completely unclothed, and there was bruising on one leg and her inner thighs, consistent with Lott's insinuations to Whitman that sexual activity had occurred. The victim **was** secured with duct tape, consistent with Lott's statement to Whitman that he had bound the victim. A shower curtain was knocked to the floor in bath #2, a paper towel spool was found on the floor in bath #3, fecal matter was found on the floor in the foyer as well as on torn panties found underneath the bed, and the victim had fresh bruises on her arms and scrapes on her elbows and knees and a blunt force trauma to the temporal area, consistent with Lott's statement to Whitman that the victim fought like a mad dog. The victim was found on the bed, surrounded by a large quantity of blood which had soaked into the mattress and down the side of the bed, consistent with Lott's statement to Whitman that he could not understand why no blood spurted out when he cut her throat with a boning knife. The man and truck in the ATM transaction photos resembled both Lott and his vehicle, also

consistent with Lott's statement to Whitman that the victim had begged him not to kill her and offered to take him to the bank and get money. Lott also tried to sell the gold ring and tennis bracelet to David Pratt. Lott's wife was seen wearing the tennis bracelet by others. Lott gave Whitman three rings to sell and a transaction over the phone concerning such details was recorded. Police gave Whitman money to give to Lott for the rings. When Lott went to Whitman's residence to get the money he was spooked by a police van outside and refused to enter the living room. When arrested the same bills were found under Lott's car. The theory that Whitman gave Lott the ATM card and jewelry hardly constitutes a reasonable hypothesis of innocence. Such a claim was not even fashioned until the Spencer hearing. If Whitman had given the card and jewelry to Lott there would be no reason for Whitman to be in possession of the jewelry to sell on Lott's behalf then turn the proceeds of the sale over to Lott. Furthermore Lott's wife would not relinquish the tennis bracelet to Whitman, which would be somewhat audacious, had Whitman given it to the Lott's in the first place, especially since Lott represented it its worth to be more than five thousand dollars. Moreover, since Lott's statements matched the details of the crime scene, there would be no way Whitman would know all such details to frame Lott unless he had

been there, of which there was no evidence, especially since Whitman had an alibi, or the police had taken Whitman to the scene or briefed him on the same. There was absolutely no evidence of that. The hypothesized motive for Whitman to frame Lott is more than a little attenuated: the fact that Lott snitched on Whitman twenty years earlier, when they were juveniles, for which Whitman, a three or four time convicted felon, received the onerous punishment of probation. Lott is also a convicted felon and it was within the province of the jury to resolve the issue of Whitman's credibility.

The State presented sufficient evidence of premeditation by virtue of Lott's statements to Whitman which would indicate that the victim was questioned as to her valuables, possibly tortured with pliers in connection with such questioning, and that there was sufficient time for such premeditation, and for the victim to beg for her life and for Lott to deliberately and coldly conclude that the "bitch" had to be killed because she knew him and would send him to prison.

II. THE TRIAL COURT PROPERLY EXCLUDED THE TESTIMONY OF DEFENSE WITNESS JAMES WHITMAN AS TO THE REPUTATION OF HIS BROTHER, STATE'S WITNESS ROBERT WHITMAN, FOR UNTRUTHFULNESS IN THE COMMUNITY.

In a proffer, James T. Whitman, the brother of previous State's witness Robert Whitman, testified, on behalf of the

defense, that he was familiar with Robert Whitman's reputation for truthfulness in his community. When asked how he became familiar with his brother's reputation the witness responded "Well, being his brother, you should know the fellow and truth normally is not in him." The witness **was** certain that he had spoken to someone else concerning Robert's truthfulness or lack thereof, "but to point to it, to be able to say I spoke to thus and such, no, Sir, I haven't." (T 941). The witness has a neighbor who is a banker, to whom he had spoken, "but to specifically say that he is a truth giver or a liar, I specifically cannot say that we've spoken about the lying portion of his life." (T 942). Nevertheless, the witness felt that he could honestly say that he was familiar with Robert Whitman's reputation in Deland, where he was raised (T 942-943). His brother's reputation was that he does not tell the truth (T 943). The witness further indicated that he had discussed his brother's reputation for truthfulness with his father, wife, mother and son, who were members of the community, and the general consensus was that they would not believe anything he had to say (T 944-945).

On cross-examination the witness admitted there hostility in his family and that his brother was the black sheep (T 945) . There were also a lot of things going on between the witness and his

brother. The witness admitted further that he could not remember speaking to anyone outside the immediate family regarding Robert's truthfulness (T 946). On redirect he reiterated that he had discussed it with his father, stating, "Yes Sir, that would be probably the only people we would discuss our dirty laundry." (T 946). When asked if the topic came up with the banker the witness responded "Probably so. I couldn't say specifically, yes, it did. More than likely, yes, sir." (T 947).

Defense counsel then informed the court that he wanted to call the witness back, since he didn't think he "got" the question (T 963). Counsel stated "I want to know if he knows of Robert Whitman's reputation in the community." The trial judge responded "We've asked him that every way from Christmas. He hasn't even said he knows similar people or people that know his brother. He hasn't given me much." Nevertheless, the court indulged counsel in a valiant effort to receive reputation testimony and the witness was called back to 'give him another shot." (T 964). The witness was asked if he learned of Robert Whitman's reputation from others outside of his family. He responded 'Personal experience. That's the best way." (T 965). The witness indicated that some of his information came from people outside the family but he couldn't say specifically identify anyone. He indicated "I'm fifty years old.

It's been going on since I can remember." When asked by the court "What has been going on?" he responded "The lying and family turmoil from one individual, from this one individual." (T 967). On further cross-examination by the State, the witness indicated that he was having trouble with his brother and volunteered that they have a terrible rapport (T 968). The potential witness was sure someone had come up to him and said something nice about his brother but "Nowadays, I'd laugh in their face." He admitted it was unlikely that he would ever hear anything good about his brother since people who would have something nice to say about his brother probably wouldn't be talking to him, in the first place (T 969).

The reputation debacle continued, as demonstrated in the following colloquy:

> THE COURT: He keeps going back to his family. I don't see anybody else.
>
> MR. SPECTOR: But he testified that there are people outside of the family that --
>
> THE COURT: Well, who outside the family? What kinds of people do you all associate with that are --
>
> THE WITNESS: Bankers, lawyers.
>
> THE COURT: You have talked to some lawyers and some bankers and they have told you that he is one lying whatever?

THE WITNESS: Specifically, I can't say, no Ma'am.

THE COURT: Well he can't say.

FURTHER REDIRECT ON PROFFER

MR. SPECTOR: What about members of the church?

THE WITNESS: He doesn't go to church.

MR. SPECTOR: But you do?

THE WITNESS: Yes, sir, we don't. I mean drug dealers and--

MR. SPECTOR: Before we let you go, I want to make sure you understand the question and then we'll settle it for all time. Is your information from people outside the family about his reputation, whether you know specifically who they were over the past forty years or is it just because you're having, you've had trouble with him internally within the family that you know of, that you think he has a reputation? You understand the difference? It's not a trick question. I'm not asking you to name who you've talked to over forty years.

THE WITNESS: I understand that.

THE COURT: Do you all run in the same circles?

THE WITNESS: No Ma'am, absolutely not.

MR. SPECTOR: You live in the same community?

THE WITNESS: We have lived on the same property but we do not run in the same circles. We live in the same community but we do not run in the same circles.

MR. SPECTOR: You see the dilemma here. Have you or have you not received information from members of the community, other than your family about Robert's reputation for truthfulness? That's the ultimate question here, whether you remember their names or not?

THE WITNESS: Yes.

MR. SPECTOR: Yes?

THE WITNESS: Yes.

MR. SPECTOR: On more than one occasion?

THE WITNESS: Yes.

MR. SPECTOR: From a broad spectrum of the community?

THE WITNESS: From a broad spectrum.

MR. SPECTOR: Okay. Thanks.

THE WITNESS: From citrus caretakers to attorneys.

FURTHER RECROSS ON PROFFER

MR. ASHTON: Mr. Whitman, you're right now in the process of a battle of evicting your brother?

THE WITNESS: He is evicted. He's gone.

MR. ASHTON: He's gone. And a lot of this inner family turmoil right now is related to that?

THE WITNESS: We have slept very nicely for the last two weeks, Sir.

MR. ASHTON: Tell me one thing you remember that some lawyer has ever told you, even if you can't remember who it is, about your brother's truth and voracity [sic]? Do you remember anything any lawyer has ever said to you about Robert Whitman's truth and voracity [sic]?

THE WITNESS: Just that he has trouble telling the truth.

MR. ASHTON: In what context would this lawyer have said this?

THE WITNESS: I couldn't tell you. I couldn't tell you.

MR. ASHTON: I don't have any other questions, Judge.

THE COURT: Do you know Lieutenant Johnson?

THE WITNESS: Yes.

THE COURT: Have you talked to him about him?

THE WITNESS: No. We talked to him about our problems and we got zero help, zero.

THE COURT: So you can't think of a soul or any specific thing that anyone has ever said, other than your family-- do you talk about him very often with people?

THE WITNESS: We try not to.

THE COURT: So when was the last time you talked to anybody in the whole world about your brother -- let's narrow that down to Deland, the community you live in?

THE WITNESS: You're speaking about the subject of lying? I can't say about the subject of --

THE COURT: How do you know that the community thinks he's a liar?

THE WITNESS: Well, we have -- How do I know the community thinks he's a liar?

THE COURT: Right. What do you base it on?

THE WITNESS: My -- and there again my family, my personal experiences that I have spoken to certain individuals in the community.

THE COURT: Who and what have they said?

THE WITNESS: I can't tell you what they've said.

THE COURT: Have you talked to people about his reputation about lying, other than your family? Have you actually said things about he lies all the time? Did they say he

lies all the time or is it something you told them or did this subject ever come up?

THE WITNESS: This subject has arisen.

THE COURT: With whom?

THE WITNESS: I really can't tell you I really -- to specifically say --

THE COURT: Would it be drug dealers? Would it be people in the church? You say he doesn't go to church. **You all** don't know the same people there. Who do you know in common?

THE WITNESS: I just said some bankers, a banker, an attorney.

THE COURT: What bankers? **YOU** said your next door neighbor?

THE WITNESS: Next door neighbor. I have an attorney for a next door neighbor.

THE COURT: Attorney and the attorney knows your brother?

THE WITNESS: Yes.

THE COURT: And he -- has he ever said anything about him?

THE WITNESS: Yes, specifically **I** can't say.

THE COURT: Was this, was this an attorney who represented him on a drug case?

THE WITNESS: No, he's a family attorney that does our legal work.

THE COURT: So what does he have to do with your brother?

THE WITNESS: Just as part of the community.

THE COURT: How does he know your brother?

counsel persisted:

> MR. SPECTOR: Whether you remember what exactly was said was the gist of it Robert's untruthfulness?
>
> THE WITNESS: Yes.
>
> THE COURT: Who said that, you or him?
>
> THE WITNESS: Probably me.
>
> THE COURT: Okay. Thanks a lot.

(T 976-977).

The court then indicated to defense counsel that "it was no better the second shot" and the court would not let the witness testify as to the reputation of Robert Whitman based on what **had** been brought out (T 977).

It is obvious that the trial judge allowed counsel extreme leeway in trying to establish the admissibility of this potential witness' anticipated testimony and even assisted in questioning. A trial judge has wide discretion in admitting or excluding reputation testimony. ***Gamble v. State,*** 492 So.2d 1132 (Fla. 5th DCA 1986). The trial court certainly did not abuse its discretion in excluding this testimony. In order to prove reputation, it is necessary to lay the foundation that the witness is aware of the person's reputation in the community. Reputation is the composite description of what people in a substantial segment of a particular

community have said or are saying about an individual. The evidence is thought to be reliable because it is a distillation of those views. Therefore, in order for the testimony to be admissible, the trial court must find that the witness is, in fact, aware of the person's reputation and not the impression of one or two individuals or the personal opinion of the witness. Ehrhardt, Florida Evidence sec. 609.1 (1996 Edition). In *Rogers v. State,* 511 So.2d 526 (Fla. 1987), this court indicated that the trial court must find that the witness has sufficient knowledge to give a reliable assessment based on more than mere personal opinion, fleeting encounters, or rumor. In *Wisinski v.* State, 508 So.2d 504 (Fla. 4th DCA 1987), the Fourth District held that reputation must be based on more than the opinions of three of four persons. When many people in the community discuss and compare an issue, it is felt that the resulting community opinion is trustworthy. *Fine v. State,* 70 Fla. 412, 70 So. 379 (1915). Since reputation is the product of what is generally discussed in the community, the witness' personal experiences and observations are excluded. Pursuant to Section 90.105(1), Florida Statutes (1996), the trial court must find as a preliminary fact that the reputation is sufficiently broad based. The reputation must be based on discussions among a broad group of people so that it accurately

reflects the person's character, rather than the biased opinions or comments of two or three persons or of a narrow segment of the community. Ehrhardt, Florida Evidence sec. 405.1 (1996 Edition).

In the case at bar, the machinations of a family feud were unsuccessfully passed off as reputation evidence. The witness more than once indicated that his "personal experience" with his brother was "the best" barometer. What was sought to be placed before the jury was simply the witness' own biased opinion. The reputation in this case was hardly sufficiently broad based. The evidence, at best, demonstrated only that the witness' immediate family members, who hardly constituted even a narrow "community," harbored the same biases as the witness. Unlike the situation in *Gamble* ***v. State,*** 492 So.2d 1132 (Fla. 5th DCA 1986), where the conviction was reversed because the witness could only recall two conversations regarding the victim's reputation, the witness in the present case could not only not indicate sufficiently what a segment of the community **was** saying about Robert Whitman or even recall a conversation, but when pressed further actually admitted that the derogatory comments regarding truthfulness were probably made by the prospective witness himself, and not a member of any community.

If there was error in not allowing such "reputation" evidence, it was, at most, harmless, since Lott's own mother was allowed to

testify that Robert Whitman had a reputation in his community for untruthfulness. It was also brought out on cross-examination of Whitman that he was a three or four time convicted felon and had previously harbored ill feelings for Lott, who as a juvenile, had snitched on Whitman. *See, Larzelere v.* State, 1996 WL 137097, p.4 (Fla. *1996); Espinosa* v. State, 589 So.2d 887, **a94** (Fla. 1991).

III. THE TRIAL COURT PROPERLY EXCLUDED TESTIMONY OF APPELLANT'S MOTHER THAT APPELLANT HAD TOLD HER THAT THE VICTIM HAD BEEN A CLIENT.

The appellant complains that the testimony of his mother that he made statements to her that the victim had been a landscaping client of his should have been admitted as substantive evidence as admissions by a party-opponent, which is an exception to the hearsay rule pursuant to section 90.803(18), Florida Statutes (1996) . Appellant further argues that under the statute there is no requirement that the admissions actually be against the party's interest.

An exculpatory statement of a party is admissible against the party making the statement under section 90.803(18). *State v. Elkin, 595* So.2d 119 (Fla. 3d DCA 1992). However, a party cannot offer evidence of his or her own statements under this exception, contrary to appellant's assertions. *Christopher v. State, 583* So.2d **642,645** (Fla. 1991).

The error, if any, in excluding this evidence was harmless beyond a reasonable doubt since appellant had also stated that the victim was a client to Robert Whitman and Whitman actually testified to that fact (T 726). ***State v.*** *DiGuilio,* ***491*** So.2d 1129 (Fla. 1986).

IV. THE SENTENCING COURT DID NOT ERR IN INSTRUCTING THE JURY ON THE HEINOUS, ATROCIOUS, OR CRUEL AGGRAVATING CIRCUMSTANCE OR IN **FINDING THE SAME IN AGGRAVATION.**

The appellant complains first that the sentencing court erred in instructing the jury on the heinous, atrocious, or cruel aggravating circumstance and in finding the same as there was insufficient evidence of the aggravator. The appellant accuses the lower court of ignoring the medical examiner's testimony (which appellant contends supports the proposition that the victim was unconscious at the time of the fatal attack) in finding that the victim suffered unspeakable humiliation, terror and pain.

The written findings of fact in support of the death sentence indicate the sentencing judge found the HAC aggravator based on the following:

> Based on the evidence, this crime occurred over a period of time. From the minute the Defendant entered the home until the victim was choked into unconsciousness (hopefully), she suffered unspeakable humiliation, terror, and pain. She was so afraid she defecated on herself, her panties with feces on them were removed in one bedroom, she was completely nude and died in the

> master bedroom. Her mouth, wrists, and ankles were taped making her totally defenseless. Plier marks were on her arm. The State suggests the pliers were used to get her to tell her attacker(s) her ATM number. That is a reasonable possibility and perhaps the **least** onerous. There is no **way** of knowing how long this tortuous assault lasted, but common sense dictates it could not have been brief. Once the Defendant got everything he needed from Rose Conners, he deliberately slashed her throat, and to be sure she was dead, he stabbed her in the back. These acts were definitely conscienceless, pitiless, and unnecessarily tortuous.

(R 579).

Distilled to its essence, appellant's argument is that because the victim may have been unconscious during the coup de grâce all preceding violence and terror is a nullity and she should be deemed to have suffered no humiliation, terror or pain up until the time that her throat was sliced.

The heinous, atrocious or cruel aggravating factor is generally appropriate when the victim is tortured, either physically or emotionally. ***Cook v. State,*** 542 So.2d 964 (Fla. **1989).** The victim in this case clearly suffered physical torture. She fought for her life, **was** physically bound with duct tape, tortured with pliers, had her legs spread, suffered **a** blunt force trauma to the head, and was strangled, which is per se HAC in itself, ***see, Sochor v. Florida, 112*** S.Ct. 2114 (1992), before she met her final fate, Fear and emotional strain may be considered,

as well, as contributing to the heinous nature of a capital murder. *Preston v. State,* 607 So.2d 404 (Fla. 1992); *Cf. Melendez v. State, 498* So.2d 1258 (Fla. 1986) (the aggravating factor of the murder being heinous, atrocious and cruel was supported by the record, even though the defendant only fired a gunshot to the victim's head and his accomplice slit the victim's throat where the defendant ignored the victim's pleas for mercy, and the victim had knowledge of his impending doom). The victim was clearly aware of her impending doom. Lott revealed to Robert Whitman that the victim begged him not to kill her and offered to take him (them) to the bank and get money. She even offered to sign over cars to him. She not only pled for mercy, her knowledge of her impending doom was such, and her terror so great, that she defecated in her pants. The physical evidence in this case leaves no doubt as to the mental trauma and pain experienced by the victim. The medical examiner even testified that defecation or urination is usually seen in situations where someone is frightened, under a lot of stress, or is in a 'life fighting" type of situation (T 516). The fact that the victim may have mercifully lapsed into unconsciousness upon either head trauma or strangulation or shortly after the fatal slash does not negate the physical torture and mental anguish she suffered beforehand. *Cf. Mills v.* State, 462 So.2d 1075 (Fla.

1985) (the finding that the capital felony was especially heinous, atrocious or cruel was properly based on evidence of mental anguish suffered by the victim who knew that he would be killed once abductors reached their destination, and the fact that the victim died almost immediately after an execution style shotgun blast to the face did not negate the mental anguish he suffered beforehand).

Since the HAC aggravating factor was supported by the evidence and properly found by the sentencing court in aggravation, there **was** certainly no error in instructing the jury on this aggravating circumstance.

The appellant complains secondly that the HAC aggravator violates the Eighth Amendment because it fails to adequately channel the discretion of the jury since no capital crime might appear to be less than heinous to a layman. To date this argument has been roundly rejected. ***See, Washington v. State, 653*** So.2d 362 (Fla. 1994); Lucas v. ***State,*** 613 So.2d 408 (Fla. 1992). Furthermore, the jury in this case was read an instruction which contained language approved in ***Proffitt v. Florida, 428*** U.S. 242 (1976), that "the kind of crime intended to be included as heinous, atrocious or cruel is one accompanied by additional acts that show that the crime was conscienceless or pitiless and was unnecessarily torturous to the victim," so any statutory vagueness problem was

cured. This crime was, in any event, heinous, atrocious and cruel under any possible definition. *State v. Diguilio, 491* So.2d 1129 (Fla. 1986).

V. THE DEATH SENTENCE IS PROPORTIONATE; THE SENTENCING COURT PROPERLY NEIGHED THE MITIGATING CIRCUMSTANCES.

Appellant makes the novel argument that this court recognizes some aggravators, namely the heinous, atrocious or cruel and cold calculated and premeditated aggravators as more weighted than others, based on dictum in *Fitzpatrick v. State, 527* So.2d 809,812 (Fla. 1988), in which the court noted simply that the aggravating circumstances of heinous, atrocious or cruel, and cold, calculated and premeditated were conspicuously absent. Appellant reasons that because HAC and CCP are also absent in this case and there are three aggravating circumstances weighed against substantial statutory and nonstatutory mitigation his sentence, like Fitzpatrick's, should be vacated. Appellant also cites *Proffitt v.* State, 510 So.2d 896 (Fla. 1987), in which this court found the sentence to be disproportionate to other capital cases in Florida. Appellant concludes that his case is no more aggravated than *Fitzpatrick* and *Proffitt* and equally mitigated and the same result should obtain.

First, the case at bar is distinguishable from Fitzpatrick

since the HAC and CCP factors are "conspicuously present" and properly so. Appellee is correct that such aggravation is extremely weighty. But the reason Fitzpatrick's sentence was found to be disproportionate was because of his substantially impaired capacity, extreme emotional disturbance, and low emotional age. The court noted that the HAC and CCP factors were absent only as a corollary to the presence of strong mental health mitigation and concluded "Fitzpatrick's actions were those of a seriously emotionally disturbed man-child, not those of a cold-blooded, heartless killer." 527 So.2d 812. At the time of the murder Fitzpatrick was psychotic, high, spacey, panicky and wild. *Id.* At 811. Fitzpatrick had a plan to take hostages from a real estate office to use in a bank robbery which was thwarted. Deputies responded to the real estate office where he held three hostages. One of the deputies pointed his gun at Fitzpatrick's head through a partition near where Fitzpatrick was standing. Surprised, Fitzpatrick whirled around and fired, hitting the deputy in the head and mortally wounding him. ***Id.*** At 810. Fitzpatrick's actions were not cold-blooded, deliberate, savage and ruthless as were the acts of appellant. Appellant's mental and emotional state nowhere approaches Fitzpatrick's, Judge Russell was very charitable to appellant in finding and giving considerable weight to the

statutory mental health mitigating factors and drug abuse considering the fact that the evidence just as easily demonstrated that Lott was simply a psychopath, who functioned normally with family, friends, and associates, and had no memory problems, who in his youth sustained a head injury, as have most of the population. Such mitigation was not entitled to great weight. The mental health mitigation in this case does not, in terms of weight, approximate the compelling mitigation present in Fitzpatrick. In the punishment phase of a capital murder trial, the relative weight given to aggravating and mitigating factors is a question entirely within the discretion of the fact finder. *Johnson* v. State, 660 So.2d 637 (Fla. 1995).

Proffitt v. State, 510 So.2d 896 (Fla. 1987), is also clearly distinguishable. Proffitt, while burglarizing a house, killed an occupant with only one stab wound to the chest while the victim was lying in bed. Proffitt had been drinking. He made no statements on the night of the crime regarding any criminal intentions. Only two aggravators were found: the murder occurred during the commission of a burglary and the murder **was** committed in a cold, calculated, and premeditated manner. The trial court found in mitigation that Proffitt had no significant history of criminal activity. He **was** described by co-workers as nonviolent and happily

married. In contrast, appellant contemplated a robbery of the victim in her home. Lott had pre-murder criminal intentions and was not so impaired that he could not formulate a plan to incapacitate the victim so she would not recognize him or, in the absence of a co-defendant, simply planned to kill her all along. Lott stabbed the victim more than once, to ensure her death, after hitting her in the head and strangling her. Lott has six aggravating circumstances, compared with Proffitt's two. Lott had also previously been convicted of a violent felony. Lott also has a significant criminal history.

The death sentence in this case is clearly not disproportionate in view of six aggravating factors and mitigation that is not particularly weighty. *Cf. Johnson v. State,* 660 So.2d **648** (Fla. 1995)(death penalty was proportionately warranted where defendant had prior violent felony, committed murder for pecuniary gain, and where murder was heinous, atrocious, or cruel as defendant choked victim, stabbed her several times, robbed her, then later saw her stagger out of her residence **and** again stabbed her repeatedly, and where case for mitigation was relatively weak); *Jones v. State,* **652** So.2d 346 (Fla. 1995) (death penalty for defendant's violent murder and armed robbery of elderly couple who had employed defendant **was** proportionately warranted in comparison

with other death penalty cases); ***Walls v. State, 641*** So.2d **381** (Fla. 1994) (imposition of death penalty was proportionate for execution-style slaying of helpless woman who already had been bound and gagged, who had been terrorized by hearing her boyfriend's murder, who was helpless and in tears, and who obviously posed no threat whatsoever to defendant)

VI. **THE TRIAL COURT PROPERLY ADMITTED RELEVANT PHOTOGRAPHS *OF* THE VICTIM.**

Appellant launches **a broad based attack on the admission of** photographs into evidence below but fails to identify objectionable photographs and states no grounds for reversal, other **than to label** the photos in their entirety as "gruesome." Appellee submits that such argument demonstrates no appropriate ground of reversal.

Generally, the admission of photographic evidence is within the trial judge's discretion and a trial judge's ruling on this issue will not be disturbed on appeal unless there is a clear showing of abuse. ***Wilson*** v. ***State,*** 436 So.d. 908 (Fla.1983). The test for the admissibility of a photograph is whether the photograph is relevant to a material issue either independently or by corroborating other evidence. ***Straight v. State, 397*** So.2d 903, 906 (Fla. **1981).** Under the relevancy test of admissibility photographs are admissible where they assist the medical examiner

in explaining to the jury the nature and manner in which the wounds were inflicted. *Bush v. State, 461* So.d. 936, 939 (Fla.1984). The photographs in this case were relevant to demonstrate the manner in which the victim died, the nature of her injuries and the method by which they were inflicted.

The fact that photographs are gruesome does not render their admission an abuse of discretion. *Thompson v.* State, 565 So.d. 1311,1315 (Fla. 1990). *In Young* v. State, 234 So.d. 341, 347 (Fla.1970), receded from on other grounds, *State v. Retherford, 270* So.d. *363* (Fla.1972), the court ruled that the fact that the photographs are gruesome is insufficient by itself to constitute reversible error. If the photographs have some relevancy, independently or as corroborative of other evidence, they may be properly admitted. *Id.* at 347-48. This court has consistently upheld the admission of allegedly gruesome photographs where they were independently relevant or corroborative of other evidence. *See, e.g., Jackson v. State,* 545 So.d. 260 (Fla.1989) (photographs of victims' charred remains admissible where relevant to prove identity and circumstances surrounding murder and to corroborate medical examiner's testimony); *Bush v. State, 461* So.d. 936 (Fla. 1984) (photographs of blowup of bloody gunshot wound to victim's face admissible where relevant to assist the medical examiner in

explaining his examination); ***Wilson v. State, 436*** So.d. 908 (Fla.1983) (autopsy photographs admissible where relevant to prove identity, nature and extent of victims' injuries, manner of death, nature and force of the violence, and to show premeditation); ***Straight*** v. State, 397 So.d. 903 (Fla. 1981) (photograph of victim's decomposed body admissible where relevant to corroborate testimony as to how death was inflicted); ***Foster v. State, 369*** So.d. 928 (Fla.1979) (gruesome photographs admissible in guilt phase to establish identity and cause of death). Juries are not expected to make their recommendations in a vacuum. "[It is within the sound discretion of the trial court to allow the jury to hear or see probative evidence which will aid it in understanding the facts of the case in order that it may render an appropriate advisory sentence." *Teffeteller* ***v. State, 495*** So.d. 744,745 (Fla. 1986). While the photographs, of course, prejudice Lott's case, they are not unduly gruesome and they did have probative value in supporting the state's case of premeditated murder and the heinous, atrocious or cruel aggravating circumstance.

This court has also previously held that the admission of gruesome photographs may be improper when they are not only irrelevant but when other photographs are adequate to support the State's contentions. See, e.g., ***Thompson v. State, 619*** So.d. 261

(Fla. 1993) (autopsy photographs were improperly introduced when they were not essential given that other photographs introduced were more than adequate to support the claim that the murder was heinous, atrocious, or cruel); Czubak v. State, 570 So.d. 925 (Fla.1990) (gruesome photographs improperly introduced when not relevant to any issue). That is not the case here. The photographs introduced below were not cumulative and were both relevant and necessary to explain the manner in which the victim died.

The court has further cautioned that trial judges should carefully scrutinize photographs for prejudicial effect, especially when less graphic photographs are available to illustrate the same point. Marshall v. State, 604 So.d. 799 (Fla.1992). That admonition was followed in the case at bar and no unnecessarily inflammatory photos were introduced into evidence or viewed by the jury. As was the case in *Pangburn* v. State, 661 So.d. 1182, 1187 (Fla. 1995), the trial judge personally viewed the pictures, after defense counsel objected to their introduction, and determined that the pictures could be admitted. The medical examiner confirmed that the pictures were necessary to his testimony and assisted him in explaining to the jury the multiple injuries observed on the deceased (T 402-457;511). Even though the photographs may have depicted gruesome sights, the relevance of such photographs to the

case was not outweighed by the danger of unfair prejudice and were admissible in evidence. *Cf. Maret* v. State, 605 So.d. 949, 950 (Fla. 3rd DCA 1992). Where a victim is terrorized to the point of defecation, bound with duct tape, tortured with pliers, then has her throat slit and is stabbed in the back, it is not likely that the State's proof would be to the liking of the defendant. A defendant, however, suffers no undue prejudice when true details of his crime are rendered to the jury considering his punishment. *Hill v. Black, 891* F.2d.89, 91-92 n.1 (5th Cir. 1989). The photos were simply not so shocking in nature as to outweigh their relevancy. Given the relevance of the photographs to this testimony, it cannot be said that the trial judge abused his discretion in admitting them.

Applying the above standards to the instant case, leads inevitably to the conclusion that the trial judge did not abuse his discretion in admitting the photographs.

Moreover, even if the court found that the trial court erred in admitting one or several of the photographs into evidence, the error would **be** harmless. *Peterka v. State, 640* So.d. 59, 69-70 (Fla. 1994); State *v. DiGuilio,* 491 So.2d 1129 (Fla. 1986).

VII. *THE* SENTENCING COURT DID NOT ERR IN INSTRUCTING ON THE COLD, CALCULATED AND PREMEDITATED AGGRAVATING FACTOR.

The appellant argues that a jury must be instructed only on those aggravating and mitigating factors that are supported by the evidence and that a jury instruction on an improper statutory aggravating factor skews the analysis in favor of the death penalty. The appellant further states that the jury in this case was instructed on the cold, calculated and premeditated aggravating factor, the prosecutor argued for it, and the jury applied it in rendering an advisory verdict. The appellant concludes that the State cannot show beyond a reasonable doubt that the instruction on this inapplicable statutory aggravating factor did not affect the jury recommendation, so the death penalty must be vacated.

The appellant neglects to point out that, unlike the case in *Omelus* v. State, 584 So.2d 563 (Fla. 1991), the coldness factor was actually found by the sentencing court in aggravation:

> Although this crime began as a caprice, it escalated over the period of time it took for all the activity described above to take place. From the moment Rose Conners saw Ken Lott, her fate was sealed. Although it appears the original plan was to take money or valuables, once the victim saw the Defendant the decision was made that she would have to die. It was too much of a chance she would send him to prison if left alive. The evidence shows a heightened level of premeditation indicating a plan to kill the victim. A sufficient amount of time was necessary to account for things that were done to Ms. Conners -- more than enough time to formulate the plan to kill. The duct taping, the search for valuables, ascertaining the PIN to withdraw money from the ATM, removing her clothes. This murder was not just

> incidental to the burglary and theft. It was the result of a deliberate, separate, conscious decision.

(R 579-580).

Since the CCP factor was found in aggravation and no argument is even made as to why it is not applicable, the appellant has failed to demonstrate any error in instructing on the CCP aggravating circumstance.

Any implicit argument that the factor should not have been found must be rejected. Ordinarily evidence that a defendant killed a victim, whom he knew, during the course of another felony alone is insufficient to show the aggravating factor of a cold, calculated and premeditated murder. See, ***Perry*** v. State, 522 So.2d 817 (Fla. 1988). However, Lott's statements to Mr. Whitman that since the victim knew him and would send him to prison he could not take the chance and had to kill her support the fact that the killing was, in effect, an execution which demonstrates the kind of heightened premeditation that supports the finding of this aggravating circumstance. ***Cf.*** *Pardo* ***v. State, 563*** So.2d 77 (Fla. 1990). Lott had ample time during the series of events leading up to the murder to reflect on his actions and their consequences and his statement shows that he did so reflect and chose to murder the victim. This aggravating circumstance focuses on the perpetrator's

state of mind. *Johnson v.* State, 465 So.2d 499 (Fla. 1985).

The fact that a defendant plans to leave no witnesses has been found to support the finding of the CCP factor. *Remeta v. State,* 522 So.2d 825 (Fla. 1988); *cf. Kokal v. State, 492* So.2d 1317 (Fla. 1986)(imposition of the death penalty on the ground that the murder was committed in a cold, calculated, and premeditated manner was supported by the defendant's decision to eliminate the victim as a witness by beating him into unconsciousness prior to the execution-type killing); *Stein* v. State, 632 So.2d 1361 (Fla. 1994) (the trial judge properly found that the murders were cold, calculated, and premeditated where the record reflected that the defendant and an accomplice planned to eliminate any witnesses to avoid arrest, a murder weapon was procured in advance, there was a lack of resistance or provocation, and the killing appeared to have been carried out as a matter of course).

The plan in this case, according to Lott's statements to Mr. Whitman, was for a co-perpetrator, unknown to the victim, to go to the door and incapacitate the victim and put a blindfold on her so Lott, whom the victim knew, could then come in and help rob her. Clearly, even the original plan encompassed leaving no witnesses. When the victim ran out of the house, Lott still chose to relieve her of her valuables and came out of the bushes, grabbed the victim

and brought her back into the house. At this point the parameters of the plan, not the plan itself, changed. A witness still had to be eliminated, not by subterfuge, but now by murder. Lott made a conscious decision to eliminate this witness. Under any scenario, there is no other reasonable explanation for the murder. The victim was completely incapacitated and defenseless by virtue of duct tape and her death could not have occurred during a struggle. *Cf. Lockhart v. State, 655* So.2d 69 (Fla. 1995)(finding of the cold, calculated, and premeditated factor was supported by evidence that the victim was bound and tortured). Lott's words to Whitman ring true.

Omelus v. State, **584** So.2d 563 (Fla. 1991), is inapposite, as in *Omelus* the actions of a hit man which resulted in a heinous murder were improperly attributed to the contractor of the murder. Here there is no middleman, and Lott's intent was clear.

Even if this court finds that this aggravator was improperly found, the elimination of this aggravating circumstance would not have resulted in imposition of a life sentence, given the other aggravating factors and the death sentence is ,nonetheless, proper. *See, Hamblen v. State, 527* So.2d 800 (Fla. 1988).

VIII. THE TRIAL COURT PROPERLY ALLOWED THE STATE TO INTRODUCE RELEVANT EVIDENCE IN THE PENALTY PHASE PERTAINING TO *A* PRIOR VIOLENT FELONY CONVICTION.

In the penalty phase the State introduced into evidence a certified copy of a judgment and sentence for an attempted escape (R 19). On April 14, 1974, jailer Robert Muerer of the Volusia County Jail was pushed against cell bars of cell number 307 by trustees. While he was held up against the bars Lott and Wayne Rice grabbed the jailer, held him around the throat, removed the keys and opened the cell block. Rivers and Lott put a cover over the jailer's head. **He was** carried into a cell and told not to move. Rivers and Lott then left the jail. Lott was charged as a result of those offenses with escape and attempt to escape and assault and battery. He pled guilty to the felony of attempted escape (T 21). Lott was sentenced to three years in the Department of Corrections concurrent with another sentence.

After Lott returned to D.O.C., the chief corrections officer of the Volusia County Jail wrote a letter to D.O.C. The letter does not reference the attempted escape. The prosecutor offered the letter into evidence because Lott, in response to that letter, wrote a letter to Mr. Carter, referencing the attempted escape and indicated:

> I wish it would have been you upstairs instead of Bob Muerer, it just about killed you when I didn't get a day out of what happened. I have to admit I had fun with your guard and he was crying and begging me to let him go and he puts on a smiley face. I will be back to see you

> again, but it won't be in jail. I miss the old jail but I can't tell you what I think of you in this letter, but you are a low life person and, of course you know this anyway.

(R 22). Defense counsel, Mr. Spector, objected to the admission into evidence of the letter from William Carter which described unacceptable behavior on the part of Lott in jail and the letter back signed "Sparky." Counsel argued this was not admissible as part of a judgment and sentence, which is already in evidence, or of a prior conviction of a felony involving force or threat of violence but was supplemental, negative, prejudicial information (R 20-26). Counsel felt that the judgment for attempted escape could be put in because it would be an inherently forceful kind of a crime but that this additional evidence was calculated to inflame the jury (R 27). The State indicated that if the factual background of the crime involves violence, then it is a factual issue for the jury to determine whether the prior violent felony aggravator has been proven (R 24). The State also felt that this evidence was relevant to the character of the defendant (R 25).

Appellant complains that the sentencing court erred in allowing the State to introduce irrelevant, prejudicial evidence of nonstatutory aggravating factors.

The record actually reflects that the letters complained of

were excluded from evidence. What was admitted into evidence was an edited version of the post sentence showing only violence involved in the escape attempt and the judgment and sentence, which was published to the jury (T 113-115). The contents of the PSI were read to the jury:

> On April 14, 1974, Robert W. Muerer, jailer at the Volusia County Jail, Deland, Florida, while in the process of distributing medication in cell 307 was pushed against the bars of the cell 307. While the jailer was up against the bar Wayne Rice and Ken Lott grabbed the jailer and removed the keys from the guard and opened cell lot 307. The jailer was told not to move. The attempt to leave the jail floor cell failed and the keys were returned and . . . allowed to leave and summons help. William Carter stated that the victim in the escape attempt was Robert W. Muerer, jailer, and that he is no longer employed by Volusia County. Mr. Carter did state that Mr. Muerer was not injured in the escape attempt.

(T 116).

This evidence was clearly admissible. Attempted escape is not normally a per se crime of violence. The circumstances of a particular crime, however, may show it to have been violent so as to support the aggravating circumstance of a prior violent felony. ***See, Sweet v. State, 624*** So.2d 1138, 1143 (Fla. 1993) (trial court did not err in finding prior conviction for possession of a firearm by a convicted felon qualified as a prior violent felony where the circumstances of the crime were shown to have been violent, as Sweet used the firearm to hit someone in the face and ribs). This

evidence, while prejudicial, was not irrelevant, and supported the statutory aggravation and did not interject nonstatutory aggravation into the sentencing matrix. No separate nonstatutory aggravation was found by the sentencing judge. Any error was harmless. *State v. DiGuilio, 491* So.2d 1129 (Fla. 1986); *Cf. Owen v. State,* 596 So.2d 985, 989 (Fla. 1992).

The record reflects that in regard to the cross-examination of Lloyd Coleman, Lott's stepfather, that no timely objection was interposed to the question concerning church vandalism (T 165). This issue is waived . *Clark v. State,* 363 So.2d 331 (Fla. 1978); *Randolph v. State, 463* So.2d 186, 192 (Fla. 1984).

Even if the issue could be entertained, no relief would be warranted. This court has long held that aggravating circumstances must be limited to those provided for by statute. *E.g. Wike v. State, 596* So.2d 1020 (Fla. 1992); *McCampbell* v. State, 421 So.2d 1072, 1075 (Fla. 1982); *Miller* v. State, 373 So.2d 882, 885 (Fla. 1979). However, in order to "humanize" the accused, defense counsel frequently seek to have the accused (or other witnesses) testify to a variety of personal circumstances involving family, employment and involvement in the community, which reflect positively upon the accused. If this technique is employed, the accused may well open the door to otherwise inadmissible cross-

examination or the introduction of otherwise inadmissible evidence which refutes his account of his background. Ehrhardt, Florida Evidence sec. 404.5 (1995 Edition). In the case at bar, Lott's stepfather testified and portrayed Lott as a typical teenager who was not unusually troublesome, was always honest, and had respect (T 160-161). Lott's vandalism of churches hardly made him a respectful, typical teenager. The jury had a right to know the truth.

Any error was harmless. Considering the extensive aggravation in this case the jury did not have to rely on church vandalism to determine that death was the appropriate sentence - they had more recent violent felonies and the awful facts of the crime. State v. *DiGuilio,* 491 So.2d 1129 (Fla. 1986). Also, Dr. Dee relied upon Lott's criminal history in forming his opinion and Lott's convictions prior to his motorcycle accident were explored on cross-examination to demonstrate that the organic brain damage alleged to have resulted from the motorcycle accident was not the cause of Lott's early criminal activity (T 306). This information was ultimately properly before the jury anyway. See, ***Parker v. State,*** 476 So.2d 134, 139 (Fla. 1985).

IX. THE TRIAL COURT DID NOT ERR IN PERMITTING VICTIM IMPACT EVIDENCE.

Ann Tighe, sister of the victim, prepared and read a victim impact statement to the jury and sentencing judge concerning the uniqueness of her dead sister. She stated as follows:

> I was seven years old when Rose was born. My sister Grace was ten. Rose was the most beautiful baby; she had a mass of red curly hair. My mother told us she had come from a rose bush and that was why she was called Rose, and, of course, we believed her. We were really proud of our baby sister. We had all the kids on our street lined up to see her. She was always happy and laughing, and you remember her crying when she was little. Grace and I helped look after her when we were kids. We taught her to walk and, in fact, she took her first steps for us on her first birthday. We knew because we were older than Rose that we should look after her, although she was a strong child and sometimes I wondered who was looking after who. I remember once when we were older she came with me for an interview and persuaded the manager to give me the job. Rose was fifteen when she left school and started her first full-time job. She was assistant librarian at our local library and she worked there for several years. She was very bright and did well and she wrote a historical review with a work colleague about her hometown, Salford, which was published. She did a postal course on how to write a book, as this was her ambition, but unfortunately it wasn't fulfilled. She was a good mimic and could always make us laugh by impersonating other people. Life was never dull or quiet when our Rose was around. When we all grew older and married we stayed close to each other until Rose's second marriage. In fact, at one time, Rose and I lived next door to each other for several years. Rose and Mike, second husband, came to Florida to set up a business selling computer hardware. Rose was to run the business here and she rented office accommodation and got the whole thing going herself. We were all amazed at her determination and business sense and she was well pleased with herself. When her marriage to Mike ended she decided she would live in Sweetwater in the house that they had bought. We didn't want her to live so far away but she loved her

home and her life here and my father had died before Rose left England and my mother worried about her being on her own and so far away from her family. She was always trying to persuade her to come back home. Even though she came back regularly to see us she stayed with us a couple of weeks, just six weeks before she died. We also visited her so we saw each other quite often, and we spoke on the phone two or three times a week. We grew very close to each other during the last four years of her life. My mother died just a year before Rose's death. Rose had one son, Simon, and he was the apple of her eye. He never caused her a moment's worry. He did well at college and gained a honor's degree at university, and he was thrilled to bits when he met Lucy and looked on her as daughter. When Simon got a job designing computer programs, she phoned us all to tell us she was so proud of him. Rose phoned me the night before she died. I was watching a T.V. movie about Marvin Gaye and she called at the most interesting part. She seemed to have a knack for doing that. I nearly kept that call short because I wanted to get back to the film and Rose wanted to chat. Before long, she had me in stitches laughing. Before long, Marvin Gaye was forgotten. And I am glad I didn't cut the call short. I didn't know then that that would be the last time we would talk together. I have often wondered since what I would have said to her had I known, but on reflection I know we had said all the good things we wanted to say to each other, one hundred times over the years. She once wrote in a letter to me just after she had left England, "I am to be baptized next Sunday and although I am a little nervous, I wish you could be here. I'm also looking forward to it. I think it may be a turning point in my life. I thank God for Simon. He has certainly blessed us with our kids. I certainly don't deserve Simon, but God is good to me." I am thankful that my parents died before Rose. I am grateful that they were spared the heartbreak of her death. We had a rose planted in the garden of the church where Rose was baptized. Her friend Ann Ferguson took us to see it last month when we were here. It reminded me of all those years ago when she was born. She looked like a rosebud, and I understood why my mother had told us that she had come from a rose bush. Part of

> my life has gone with Rose. It can never be replaced. I haven't been to work since she died and my employers have now pensioned me off. All of our lives have changed: Grace, Simon and Lucy, all our family and all Rose's friends; however, one thing comforts me. In the same letter that I mentioned Rose also wrote 'Give my love to everyone and tell them I'm doing fine. Thank you for keeping me in your prayers, and you are also always in mine. I love you and miss you but the Lord is keeping you together in our hearts and that's what counts. It is true Rose will always be with me in my heart. The Lord has kept us together and that is what counts.

(T 76-81).

The United States Supreme Court has held that:

> If the State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no per se bar. A State may legitimately conclude that evidence about the victim and the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed. There is no reason to treat such evidence differently than other relevant evidence is treated.

Payne v. Tennessee, 501 U.S. 808, 827 (1991).

In ***Payne*** the Court receded from holdings in ***Booth v. Maryland, 482 U.S.*** 496 (1987), and ***South Carolina v.*** Gathers, 490 U.S. 805 (1989), that victim impact evidence was inadmissible in capital sentencing proceedings. ***Payne,*** 501 U.S. at 830 n.2. The only part of ***Booth*** that ***Payne*** did not overrule **was** "that the admission of a victim's family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence violates the

Eighth Amendment." *Id.; Farina v. State, 21* Fla. L. Weekly S173, S175 (Fla. April 18, 1996).

Subsequent to *Payne* v. Tennessee, 501 U.S. 808 (1991), this court has held victim impact testimony to be admissible as long as it comes within the parameters of the *Payne* decision. *See, Stein* v. State, 632 So.2d 1361 (Fla. 1994); *Hodges v. State, 595* So.2d 929 (Fla.), vacated on other grounds, U.S. , 113 S.Ct. 33, 121 L.Ed.2d 6 (1992). Both the Florida Constitution in Article I, Section 16, and the Florida Legislature in section 921.141(7), Florida Statutes (1993), instruct that in this state, victim impact evidence is to be heard in considering capital felony sentences. This court has found that the procedure for addressing victim impact evidence, as set forth in the statute, does not impermissibly affect the weighing of the aggravators and mitigators or otherwise interfere with the constitutional rights of the defendant. The court has rejected the argument which classifies victim impact evidence as a nonstatutory aggravator in an attempt to exclude it during the sentencing phase of a capital case. Rather, section 921.141(7) indicates clearly that victim impact evidence is admitted only after there is present in the record evidence of one or more aggravating circumstances. The evidence is not admitted as an aggravator but, instead, as set forth in section

921.141(7), allows the jury to consider "the **victim's** uniqueness as an individual human being and the resultant loss to the community's members by the victim's death." Sec. 921.141(7), Fla.Stat. (1993). In the case at bar the victim impact evidence was not considered at all by the lower court, and certainly not as an aggravator. Victim impact evidence must be limited to that which is relevant as specified in section 921.141(7). *Windom v. State,* 656 So.2d 432, 438 (Fla. 1995). The testimony in this case clearly was and spoke only to the victim's uniqueness and loss to the members of the community or family.

The defendant did not object below to the specific testimony now complained of on appeal, and underlined in the text above, and, thus, his objection on appeal is procedurally barred. *Hardwick v. Dugger, 648* So.2d 100 (Fla.1994); *Brown v. State, 596* So.2d 1026 (Fla.1992); *Engle v. Dugger,* 576 So.2d 696 (Fla.1991). Even if the defendant's general objection to the testimony, made prior to her testimony before the jury, was found to reach this specific **testimony,** error in admitting it is harmless on this record, considering the extensive and weighty aggravation, as well as the fact that such evidence was not considered at all by the judge below, who was a check on jury whim and the ultimate sentencer. *State v. DiGuilio,* 491 So.2d 1129 (Fla.1986).

X. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN NOT IMPOSING SANCTIONS WHEN STATE WITNESSES INADVERTENTLY VIOLATED THE RULE OF SEQUESTRATION.

During the direct examination of the medical examiner one of the prosecutors went discovered Sergeant Corriveau, Detective Dana Griffis and Kristen Hayes in the back witness room, looking through their evidence list. They informed the prosecutor that two sets of pliers, instead of one, had been discovered at the scene. The prosecutor then realized they had not been told that the rule of sequestration had been invoked and informed the court of the violation and conversation (T 540). Detective Griffis had already testified (T 542). Sergeant Corriveau and Kristen Hayes had not testified and were to be the State's next two witnesses (T 541). The defense moved for sanctions (T 542).

Detective Griffis was questioned in depth by the lower court as to the content of the conversation (T 542). He indicated that one of them had asked him how it went (T 544). He responded that he had described the crime scene (T 543). He mentioned the duct tape that was in the dumpster and the house (T 544). He said he was asked about the duct tape but wasn't asked about the other duct tape that Sergeant Corriveau had collected. Kristen was trying to refresh her memory and asked about her processing the walls with ninhydrin. Detective Griffis thought that he did that and did not

recall her doing any of it (T 545). Prior to the rule being invoked, the prosecutor discussed pliers and both Corriveau and Griffis indicated that they had collected a pair of pliers (T 546). That conversation was continued. Detective Griffis simply mentioned to Sergeant Corriveau that he needed to get with the prosecutor on it to clear it up. Kristen Hayes mentioned something about their camera filters and Detective Griffis indicated that he had used one of her filters to photograph latents on the walls (T 547). Detective Griffis indicated he had done nothing to help them with their testimony or to coordinate his testimony (T 547). He did not recall Sergeant Corriveau and Kristen Hayes coordinating their testimony (T 549). He advised Hayes that he had to unpackage the prints and identify which were his and which were hers (T 552).

Upon questioning by the court Kristen Hayes, a forensic analyst with the sheriff's office, indicated that she only recalled discussing the pliers (T 555). She had not been sitting in the room very long (T 556). She was looking through her report and they were looking through property receipts because they said something about two pairs of pliers. She said she only knew that she processed one set of pliers (T 557). On cross-examination she indicated that Detective Griffis told her about some of the negatives he had submitted to the laboratory. She asked how he

knew they were her negatives. He indicated that she had written on the envelopes. It didn't concern her very much because she already knew she had made those envelopes for the negatives. She asked how he had testified to her negatives and he said because he looked at the envelopes (T 558). She heard Sergeant Corriveau and Detective Griffis discussing duct tape, i.e., who found what duct tape at the scene. She did not think they were coordinating who found it (T 560). She did not hear Detective Griffis say anything about getting Corriveau's latent prints in (T 561). She did not hear anything mentioned about chain of custody. No one tried to offer her any assistance in terms of her testimony (T 562).

Detective Robert Corriveau told the court that they were back there talking about pliers. He was discussing with Hayes whether the pliers were one and the same on the property form (T 563). Earlier there had been a question whether Detective Griffis had used the pliers Corriveau had collected or ones he had collected, i.e., whether they were one and the same. He did not know Detective Griffis had collected some. Earlier in the morning there was a conversation concerning duct tape at the office. He had collected some duct tape (T 565). Investigator Chavis had also collected duct tape after he did (T 564). They asked where the other duct tape came from. He was not sure where she had gotten it.

She met him out in the front yard of the residence and told him about the duct tape (T 565). He indicated that he did not discuss anything about evidence that might have come in or anything he did with the fingerprints (T 565). The most recent discussion with Detective Griffis occurred an hour before, with Kristen Hayes present (T 565). He didn't learn anything from the discussion except that he collected a pair of pliers, which he already knew, and that Griffis collected a pair later (T 567). He had done work on the case, then was promoted, and Detective Griffis came in and substituted for him. He had collected some pliers and he learned that there was another pair of pliers Griffis thought he had collected and he wanted to make sure that they were not talking about the same pair on the property forms (T 569). The fact that Sergeant Corriveau had collected a pair of pliers and where he collected them was documented long before the hearing (T 569). He further indicated that Griffis did not mention to him that there was an issue raised about chain of custody and did not tell him what the nature of his testimony had been (T 569). He did not overhear Detective Griffis discussing having placed into evidence latent fingerprints lifted by Kristen Hayes (T 571).

At the conclusion of the inquiry the defense asked for the sanction of excluding the witnesses and anything else the court

deemed appropriate (T 573). Counsel argued that there must be some presumed prejudice and the defense did not have to prove prejudice (T 574).

The trial judge indicated on the record that:

> As the State says there is a record of all this stuff that they do and there are I don't know how many exhibits. It's up into the three digits already. So that means there's at least 60 or so exhibits already in evidence. I can see how they might be confused.

(T 576).

The court then concluded:

> From what I hear, not much has been changed. These guys aren't going to -- he doesn't remember a conversation about duct tape and I don't see where it's going to make a difference and secondly, the pliers, all he learned is that he wanted to make sure, it sounds like, that when he learned this guy had found some pliers, he knew he had found some pliers and all he was doing was trying to find out if they were talking about the same pliers. That's about the worst thing I see in all of this. And I'm not **real --** 1 don't see there's any indication this guy is going to lie now and change his story. The pliers, they **are** collected, we know they collected two pairs of pliers.. .and nothing changes that fact. They can talk all day but one of those pairs of pliers is not going to disappear. The State may not want to introduce it, may not care about it but they're there. So I don't think anything that they have done -- and unfortunately, it's not their fault that he got into this mess or fortunately probably that they got in this. And that's the bad part about trials when you don't have all the witnesses here **at** one time so we can **swear** them all in like we do in a short trial. We've got them coming in over a period of four days, five, hopefully not, and there's no way for these lawyers to be in there telling them. Maybe you need **a** big old sign on the door that says the rule is

> invoked; do not discuss this case. But so far I have seen nothing to base any sanctions on. I'm certainly not going to exclude crime scene technicians and people that comb the area and processed the evidence when there's no indication there's anything done deliberately to change any testimony. I don't see that it happened that way. I agree if they were eyewitnesses changing their story about what they saw there'd be a serious problem. I'd be throwing the witnesses out. But I don't see it in this case. Unless we see something that would indicate that somebody has changed their story resulting in this, I would not want to do any more than this.

(T 577-579).

The appellant complains on appeal that there was contradictory testimony among the three witnesses, it is not clear whether their testimony was changed by the violation, and it is certain that the discussion refreshed memories thereby bolstering witness credibility. The appellant concludes that "the trial judge erred in failing to exercise her discretion to determine whether exclusion of testimony in the area of fingerprint collection and processing was warranted under the circumstances." IBA p. 74.

There is no record basis for appellant's claim that the three witnesses provided conflicting accounts of what was discussed. The conversations took place, alternately, among three people, with one simply observing or overhearing part of the time, perhaps with little interest, while two others conversed, and there is no reason why all three should have exact recall.

The State would point out that it is clear from the above excerpt that the trial judge did make a determination and that determination was that exclusion of the testimony, including testimony concerning fingerprints, was unwarranted under the circumstances of this case.

Since such evidence had long been precisely documented, appellant's theory of bolstered witness credibility through refreshed memories does not hold water.

The appropriate remedy for violation of a trial court's order of exclusion or sequestration is a matter for the sound discretion of the court. ***Lang v. State, 137*** Fla. 128, 187 So.786, 787 (1939). The most extreme remedy, that of disqualification of the witness, may be imposed only after the trial court conducts a hearing and determines that "the witness acted with the knowledge, consent, procurement or connivance" of the party calling the person as a witness. *Dumas* v. **State,** 350 So.2d 464, 466 (Fla. 1977). This requirement is justified because 'often a prospective witness will be confused or will not understand what the court said or he may come into the courtroom after the court has made its order. Counsel is often so busy and intent on trial problems that he will not be aware that one of his witnesses is in the courtroom. This possibility of confusion is one reason that courts are sometimes

reluctant to order witnesses not to speak to each other. They inadvertently do from time to time and then the trial degenerates into ugly accusations of bad faith that becloud the central issues." See 3 Weinstein, Evidence sec. 615[03] (1996 Edition). It was certainly never demonstrated below that these witnesses acted with the knowledge, consent or connivance of the State. Even where a court determines that the rule violation did occur with the knowledge or connivance of a party or counsel, it may then exclude the witness only if it finds that "the testimony of the challenged witness was substantially affected by the testimony he heard, to the extent that his testimony differed from what it would have been had he not heard testimony in violation of the rule." *Steinhorst* v. ***State, 412*** So.2d 332, 336 (Fla. 1982).

The lower court properly determined that the testimony of these technical witnesses, which was substantiated by a plethora of exhibits, would not change from what it would have been had this conversation not taken place. As the State pointed out 'evidence technicians, more so than any other law enforcement officers or witnesses document what they do. Every single word of testimony that we're going to hear from these two people has been documented months ago." (T ***573).*** The appellant admits that "it is not clear that their testimony was changed." It was appellant's burden below

to demonstrate that the testimony of the challenged witnesses was substantially affected by what they heard to the extent that their testimony differed from what it would have been had they not heard testimony or had a discussion in violation of the rule. See Ehrhardt, Florida Evidence sec. 616.1 (1996 Edition). Appellant failed to meet such burden, Even on appeal, appellant can reference no testimonial change.[1]

This court has also indicated that exclusion is a drastic step when less drastic steps are appropriate. ***Dumas v. State, 350*** So.2d **464, 465** (Fla. 1977). Since the violation was inadvertent, less drastic remedies were also inappropriate. No abuse of discretion on

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[1] Corporal Griffis had previously testified that he had collected a pair of pliers and a plastic bag from underneath the desk in the first bedroom (T 392-94). Sergeant Corriveau subsequently testified that he collected a pair of pliers from bedroom #1 (T 595). He then turned the pliers over to Corporal Griffis (T 602). Sergeant Corriveau was thoroughly cross-examined by defense counsel (T 601-**603)**. A photograph of the pliers and ripped bag was admitted into evidence as State's Exhibit 29, with no objection interposed by the defense (T 603). Forensic analyst Kristen Hayes subsequently testified that she prepared ninhydrin for **use** in bedroom #2 and directed where it should **be** used by Corporal Griffis who actually performed the procedure (T 618). She testified that the photographs and negatives all had her signature on them (T 621;627-629). The photos and negatives were objected to only on grounds of relevance, based on the argument that there **was** no way to determine when the prints were deposited (T 622;626-627;629-630). She was cross-examined by the defense and no argument based on testimonial change was raised (T 634-638).

the part of the trial court is apparent in this case.

XI. CONSTITUTIONALITY OF SECTION 921.141, FLORIDA STATUTES

The crux of appellant's constitutional challenges has been previously rejected by this court in *Hunter v. State, 660* So.2d 244 (Fla. 1995), and *Fotopoulos v. State,* 608 So.2d 784, 794 n.7 (Fla. 1992).

The appellant contends that the standard jury instruction on the aggravator of "heinous, atrocious, or cruel," which was given in his case, is constitutionally infirm. Such argument is without merit. *See, Fennie v. State, 648* So.2d 95 (Fla.1994). The issue is procedurally barred, in any event, for failure to present a true alternative. *Castro v. State,* 644 So.2d 987, 991 n. 3 (Fla.1994). Moreover, the strangulation-stabbing murder in the case at bar qualified as heinous, atrocious, or cruel under any definition, and any conceivable error thus would be harmless. See, *Johnson v. State, 660* So.2d 637 (Fla. 1995).

The appellant complains that the jury recommendation of death is unreliable due to inadequate jury instruction on the cold, calculated, and premeditated factor. The instruction did not at all track the statute, as appellant claims:

> The crime for which Kenneth Lott is to be sentenced was committed in a cold, calculated and premeditated manner

> without any pretense of moral or legal justification. In order for you to consider this aggravating factor, you must find the murder was cold calculated and premeditated and that there was no pretense of moral or legal justification. Cold means that the murder was the product of calm and cool reflection. Calculate means Kenneth Lott had a careful plan or prearranged design to commit the murder. Premeditated means Ken Eldon Lott exhibited a higher degree of premeditation than that required for premeditated murder. A pretense of moral or legal justification is any claim of justification or excuse that though insufficient to reduce the degree of homicide, nevertheless, rebuts the otherwise cold, calculating nature of the homicide.

(T 410).

Claims that the instruction on the cold, calculated, and premeditated aggravator is unconstitutionally vague are procedurally barred unless a specific objection is made at trial and pursued on appeal." ***Jackson v. State, 648*** So.2d 85, 90 (Fla. 1994). The record clearly shows that Lott's objection was premised on his belief that the evidence was insufficient to prove premeditation (T 350-359). Since Lott failed to raise the objection he now asserts, this issue is procedurally barred. Considering the appropriate instruction actually given, an objection was have been baseless.

Appellant has failed to demonstrate that his argument as to the victim impact statute was anywhere preserved. Since section 921.141(7), Florida Statutes (1996) tracks the language of Payne v. Tennessee, *501* U.S. 808 (1991), and prohibits discussion of those forbidden matters in Booth v. *Maryland,* 482 U.S. 496 (1987), that survived the *Payne* decision the statute is in no manner vague or constitutionally infirm, and is properly a matter of substantive law for the state and its legislature.

CONCLUSION

Based on the above and foregoing argument, the judgment and sentence should be affirmed.

Respectfully submitted,

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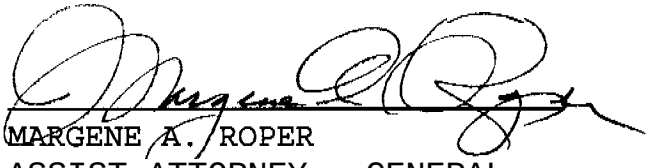
ATTORNEY GENERAL



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by delivery to George D. E. Burden, Assistant Public Defender, 112 Orange Avenue, Suite A, Daytona Beach, Florida 32114, via his basket at the Fifth District Court of Appeal on this 1st day of July, 1996.

MARGENE A. ROPER