IN THE SUPREME COURT OF FLORIDA

BOBBY L. STEVERSON,

Appel1ant,

vs.

CASE NO. 86,590

STATE OF FLORIDA,

Appellee.

_____/

ANSWER BRIEF OF THE APPELLEE

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SUMMARY OF THE ARGUMENT

As his first claim of error Steverson alleges that 'structural error occurred in his case because of juror misconduct." This argument is based on his contention that juror Mathis concealed or failed to disclose material information about his history and his beliefs about life versus death. He contends that Mathis not only omitted crucial information in his juror questionnaire and in voir dire, but that he improperly revealed this information as a reason for imposing the death penalty. It is the state's position that the trial court properly denied the motion to interview Mathis and the motion for new trial based on the allegation of juror misconduct.

Appellant contends that the collateral crime evidence concerning his attempted murder of the investigating detective, Detective Rall, was erroneously admitted and that it became a feature of the crime. It is the state's position that this evidence was relevant and properly admitted as inextricably intertwined evidence. Further, the evidence did not become a feature of the trial.

Appellant also complains that jurors were improperly exposed to prejudicial newspaper accounts or headlines immediately prior to the penalty phase. He contends also that the trial court conducted

an insufficient inquiry into the matter and, therefore, he is entitled to a new penalty phase. The trial court conducted an adequate inquiry and no reversible error has been shown.

Appellant contends that Florida Statute 921.141(5)(d)(capital felony committed while engaged in the commission of a burglary or robbery) is unconstitutional because it is an automatic aggravator. This Court has repeatdly rejected this claim and should reject the contention again.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR A NEW TRIAL WHEN HE ALLEGED A DENIAL OF HIS RIGHT TO A FAIR AND IMPARTIAL JURY.

As his first claim of error Steverson alleges that 'structural error occurred in his case because of juror misconduct.!! This argument is based on his contention that juror Mathis concealed or failed to disclose material information about his history and his beliefs about life versus death. He contends that Mathis not only omitted crucial information in his juror questionnaire and in voir dire, but that he improperly revealed this information as a reason for imposing the death penalty. It is the state's position that the trial court properly denied the motion to interview Mathis and the motion for new trial based on the allegation of juror misconduct.

When an appellate court considers the granting of a new trial, the test is whether the trial judge abused his discretion. Files v. State, 613 So.2d 1301 (Fla. 1992); Baptist Memorial Hosp., Inc. v. Bell, 384 So.2d 145 (Fla. 1980); Castlewood Int'l Corp. v. LaFleur, 322 So.2d 520 (Fla. 1975). Under Florida law, a trial court has wide discretion in deciding whether or not to grant a new

trial. The granting of a mistrial should be only for a specified fundamental or prejudicial error which has been committed in the trial of such a nature as will vitiate the result. When an alleged error is committed, which does no substantial harm and the occurrence has not materially prejudiced the defendant, the court should deny the motion for a mistrial. State v. Hamilton, 574 So.2d 124 (Fla. 1991).

In the instant case, the trial court held a hearing on Steverson's claim that juror Mathis concealed or failed to disclose material information. The court denied the claim after consideration. The trial court made the following factual findings in the Order on Motion for New Trial:

> On May 26, 1995, Defendant Bobby Steverson was convicted of first degree murder. Six days later the jury recommended the death penalty by a vote of nine to three. After the jury returned its sentence recommendation but before sentencing, a juror, Roger Davis, contacted the court with details of possible juror misconduct. (see attached memorandum A) First, he said that a few of the other jurors had been exposed to a newspaper account which included the defendant's confession to a corrections officer. This took place after the defendant had been found guilty in the guilt phase but prior to beginning the penalty phase. Further, that another juror, Robert Mathis, may have swayed the jury during the penalty phase by telling them about an uncle who was beaten to death.

> Juror interviews were granted and a hearing was held on June 23, 1995. Each juror was asked the same two questions: one, prior to deliberations, were you aware of the post-conviction confession? Two, was there any discussion in the jury room about Steverson's confession to the corrections officer? All ten jurors interviewed said that there was no discussion of the confession during the deliberations in the jury room. There was evidence that one juror had seen a headline in a newspaper, but had not read the article. Also, that at most, two other jurors had heard about the headline from this juror, but had received no details about the article.
>
> (R 367-68)

Before a new trial may be granted based on juror nondisclosure, as distinguished from a false response, the complaining party must prove three things: (1) the facts must be material, (2) the facts must be concealed by the juror during voir dire, and (3) the failure to discover the concealment was not due to the complaining party's lack of diligence. Blaylock v. State, 537 So.2d 1103 (Fla. App. 3 Dist. 1988), citing, Perl v. K-Mart Corp., 493 So.2d 542 (Fla. 3d DCA 1986); Schofield v. Carnival Cruise Lines, 461 So.2d 152 (Fla. 3d DCA 1984), rev. denied, 472 So.2d 1182 (Fla. 1985); Skiles v. Ryder Truck Lines, Inc., 267 So.2d 379, 380 (Fla. 2d DCA 1972), cert. denied, 275 So.2d 253 (Fla. 1973). A party seeking a new trial based on a claimed false response by a juror during voir dire must show, inter alia, (1) a

question propounded was straightforward and not reasonably susceptible to misinterpretation; (2) the juror gave an untruthful answer; and (3) the inquiry concerned material and relevant matter to which counsel may reasonably have been expected to give substantial weight in the exercise of peremptory challenges. Blaylock v. State, 537 So.2d 1103 (Fla. App. 3 Dist. 1988), citing, Mitchell v. State, 458 So.2d 819, 821 (Fla. 1st DCA 1984).

After applying the foregoing standard to the facts before it, the trial court made the following findings in the Order on Motion for New Trial:

> Defendant alleges that he should receive a new trial, both guilt and penalty phase, because during voir dire Mathis failed to disclose the fact that he had an uncle who was beaten to death and that the killer was later released from prison and killed again. In Florida, before a new trial may be granted based on juror nondisclosure, the complaining party must prove three things: (1) the facts must be material, (2) the facts must be concealed by the juror during voir dire, and (3) the failure to discover the concealment was not due to the complaining party's lack of diligence. See Blaylock v. State, 537 So.2d 1103 (Fla. 3d DCA 1988), Skiles v. Ryder, 276 So.2d 379 (Fla. 2d DCA 1972). The record of the voir dire reveals that Mr. Mathis gave candid answers to questions. In response to questions by the prosecutor, he volunteered information concerning his being an eyewitness to a stabbing at a nightclub where he had worked (p. 5-8). He testified that he did not know either the assailant or the victim, but

> that he knew of plenty of situations where members of his community had been the victims of violence (p. 14). At no point in the record is Mathis questioned regarding whether he knew any other individuals who were the victims of violence. Further, when the Defendant's attorney asked questions of Mathis later in voir dire, he chose not to follow-up on this line of inquiry. Any nondisclosure in this case resulted from the defense counsel's decision not to pursue the matter. The requirements of Blaylock and Skiles have not been established and the Defendant is not entitled to relief. Additionally, section 90-607(2)(b) of Florida Evidence Code, like that of many other jurisdictions, absolutely forbids any judicial inquiry into emotions, mental processes, or mistaken beliefs of the jurors. State v. Hamilton, 574 So.2d 124 (Fla. 1991). This rule rests on a fundamental policy that litigation will be extended needlessly if the motives of jurors are subject to challenge. Branch v. State, 212 So.2d 29, 32 (Fla. 2d DCA). Whatever Mathis' motives were, or whether he may have influenced other jurors with his life experiences, these were clearly matters which inhered in the verdict of the jury and are not subject to judicial inquiry.
>
> (R 367-69)

This finding by the trial court was within its discretion and appellant has failed to show an abuse of that discretion.

Appellant relies on several cases where appellate court's have found that jurors concealed information and ordered new trials. In each of those cases, however, the facts withheld were material and were the subject of inquiry. In Mitchell v. State, 458 So.2d 819

(Fla. 1st DCA **1984),** a new trial was ordered because a juror, who was the aunt of a Cross City correctional officer, failed to respond positively during voir dire to court's question whether any of the jurors had any family member, relative or friend employed at the Cross City Correctional Institution. In Marshall v. State, 664 So.2d 302 (Fla. 3d DCA 1995) reversal was based not only on a juror's failure to disclose that she was a volunteer at jail where defendant was housed and that she had escorted a defense witness to talk to the defendant on the eve of trial, but largely because she had contact with the defendant and a witness despite the court's instructions to the jury not to "conduct any investigation of their own," not to "visit any of the places that are described, in the evidence" and not to "read or listen to any news reports" about the case. Furthermore, unlike the instant case, counsel had inquired as to her employment and she had failed to reveal her job at the jail. Likewise, in Mobil Chemical Co. v. Hawkins, 440 So.2d *378* (Fla. 1st DCA 1983), the juror withheld information that had been the subject of a specific question. Accord, Skiles v. Ryder Truck Lines, Inc., 267 So.2d **379** (Fla. 2d **DCA** 1972), cert. denied, 275 So.2d **253 (1973)** (Juror failed to respond truthfully).

As the trial court in the instant case found, juror Mathis gave candid answers to questions. (T **393-417)** In response to

questions by the prosecutor, he volunteered information concerning his being an eyewitness to a stabbing at a nightclub where he had worked. (T 394-96) He also testified that he knew of plenty of situations where members of his community had been the victims of violence, including homicides. (T 404-407) At no point was Mathis questioned regarding whether he knew any other individuals who were the victims of violence. Further, when the Defendant's attorney asked questions of Mathis later in voir dire, he chose not to follow-up on this line of inquiry. (T 582-616) Any nondisclosure here resulted from the defense counsel's decision not to pursue the matter.

Appellant also urges that the trial court should have allowed inquiry as to the nondisclosure pursuant to Wilding v. State, 674 So.2d 114 (Fla. 1996). In Wilding, this Court reviewed a claim that jurors had phoned the court clerk to make sure the defendant did not have access to their personal information. As for the inquiry conducted by the trial court, this Court held that:

> The trial court clearly erred by asking the jurors whether the expressed concern factored into their decision-making process and by relying on their assurances as a basis for denying Wilding's motion for mistrial. See Sec. 90.607(2)(b), Fla.Stat. (1993); Powell v. Allstate Insurance Co., 652 So.2d 354, 356-57 (Fla. 1995); Keen v. State, 639 So.2d 597, 599 (Fla. 1994); Baptist Hospital of Miami, Inc.

> V. Maler, 579 So.2d 97, 101 (Fla. 1991). Any inquiry into juror misconduct must be limited to objective demonstration of overt acts committed by or in the presence of the jury or jurors which reasonably could have affected the verdict. Powell, 652 So.2d at 356; Maler, 579 So.2d at 101; State v. Hamilton, 574 So.2d 124, 128-29 (Fla. 1991). Much like the open discussion of racial bias by jurors that occurred in Powell, a discussion among jurors about their fear that the defendant may have access to their personal information is an "overt act" that may be a proper subject of inquiry.
>
> Like racial bias, if an individual juror fears that the defendant might have access to the juror's personal information, such concern inheres in the verdict and is not the subject of inquiry. However, when such concern is discussed by jurors or otherwise openly brought to the attention of other jurors, the concern becomes an overt act of misconduct that may be inquired into. Powell, 652 So.2d at 357. As in any case dealing with jury misconduct, proper inquiry is limited to objective facts, such as whether the matter was discussed by or brought to the attention of other jurors, when this occurred, and the number of jurors involved.
>
> Wilding at 115-117

In the instant case, the judge accepted as true the defense assertion that Mathis had an uncle who was murdered and that he had mentioned it during penalty phase deliberations. Consistent with this Court's decision in Wilding, the trial court properly refused to explore the thought processes of the jurors or the impact Mathis' revelation had on the deliberations.

Juror Mathis made it clear to all concerned that he had extensive knowledge of crime, criminals and victims. As such it should come as to no surprise to anyone that they called these life experiences into play in the decision making process. Steverson has presented no support for the proposition that this is error. To the contrary, our system of jurisprudence relies on jurors bringing their collective intelligence and experience to the courtroom. Griffin v. United States, **502 U.S. 46, 59, 112** S.Ct. **466, 474, 116** L.Ed.2d 371 (1991). This is especially true in a penalty phase where we rely upon the jury's recommendation reflecting the conscience of the community. Hernandez v. State, **621 So.2d 1353, 1356** (Fla. 1993). Accordingly, the state submits that no inquiry was necessary and Steverson has shown no abuse of discretion.

Furthermore, error if any is harmless beyond a reasonable doubt. Steverson's murder of Lucas was of such a nature that there is no reasonable possibility that Mathis' uncle's murder contributed to the verdict in the instant case. State v. Hamilton, 574 So.2d **124,** 131 (Fla. 1991).

ISSUE II

WHETHER THE PROSECUTOR ERRONEOUSLY MADE COLLATERAL CRIME EVIDENCE A FEATURE OF THE TRIAL, THEREBY DENYING APPELLANT A FAIR TRIAL AND DUE PROCESS.

Appellant contends that the collateral crime evidence concerning his attempted murder of the investigating detective, Detective Rall, was erroneously admitted and that it became a feature of the crime. It is the state's position that this evidence was relevant and properly admitted as inextricably intertwined evidence. Further, the evidence did not become a feature of the trial.

Generally, evidence of other crimes or acts may be admissible if it is relevant to prove a material fact in issue. Bryan v. State, 533 So.2d **744, 746** (Fla. 1988), cert. denied, **490** U.S. 1028, **109** S.Ct. **1765, 104** L.Ed.2d 200 (1989); Williams v. State, 110 So.2d **654** (Fla.), cert. denied, 361 U.S. **847, 80** S.Ct. **102, 4** L.Ed.2d **86 (1959);** Pittman v. State, 646 So.2d 167, **170-171** (Fla. **1994).** *Relevance,* not necessity, is the standard for admissibility. The evidence need not prove the defendant's guilt of the charged offense if 'it is in the nature of circumstantial evidence forming part of the web of truth" proving the defendant to be the perpetrator, Bryant v. State, 235 So.2d 721 (Fla. **1970)** or

would "cast light" upon the character of the act under investigation. The State may intend to establish the prior crime or bad act for one or more of several purposes. At a hearing on the defense motion in limine in the instant case, the state asserted that the evidence was inextricably intertwined admissible as to show Steverson's consciousness of guilt and to support evidence that Steverson had told witnesses that he was not going to stop for a police officer, that he was not going to be taken into custody. (R 140-146) The trial court agreed and the evidence was introduced in the guilt phase. It is the state's position that this was a matter within the trial court's discretion and appellant has failed to show an abuse of that discretion.

This Court has repeatedly held that "evidence that a suspected person in any manner endeavors to evade a threatened prosecution by any ex post facto indication of a desire to evade prosecution is admissible against the accused where the relevance of such evidence is based on consciousness of guilt inferred from such actions." Sireci v. State, 399 So.2d 964, 968 (Fla. 1981), cert. denied, 456 U.S. 984, 102 S.Ct. 2257, 72 L.Ed.2d 862 (1982); Bundy v. State, 471 So.2d 9 (Fla. 1985). Before Fenelon v. State, 594 So.2d 292, 294 (Fla. 1992), evidence of flight was not only admissible but, also, was the basis for a special jury instruction on the inference

of guilt created by the flight. Whitfield v. State, 452 So.2d 548, 549 (Fla. 1984). The rejection of the instruction in Fenelon in no way affects that admissibility flight evidence. In considering the relevance of such evidence, this Court in Pietri v. State, 644 So.2d 1347, 1354 (Fla. 1994), stated:

> In addition, although Pietri objected to giving the flight instruction, he did not object to the actual evidence that he fled to avoid prosecution. The evidence includes: Pietri's own testimony that he shot Officer Chappell "to get away"; the fact that he immediately enlisted his nephew's aid in disposing of the stolen pickup truck; that he escaped after threatening a non-uniformed police officer; and that he stole another car and led police on another chase. A jury could reasonably draw the inference that Pietri fled to avoid arrest and prosecution. The flight instruction does not, as Pietri argues, bear on his defense that he did not form the requisite intent to kill Chappell.
>
> Pietri, at 1354

Accord, Green v. State, 641 So.2d 391, 395 (Fla. 1994); Taylor v. State, 630 So.2d 1038, 1042 (Fla. 1993).

This evidence is also admissible as inextricably intertwined evidence, Consalvo v. State, 21 Fla. Law Weekly S423 (Fla. 10/12/96). This Court in Consalvo held that evidence of a subsequent burglary was admissible in Consalvo's murder trial though it may not have qualified as similar fact evidence as it established how law enforcement discovered Consalvo's part in the

murder and the context in which Consalvo made certain inculpatory statements.[1] This Court specifically stated:

> The evidence was also admissible as inextricably intertwined. As we noted above, claim three relating to the admission of evidence of the Walker burglary was not preserved for appeal. Nevertheless, even if it were preserved, it would be. In Florida, evidence of other crimes, wrongs and acts is admissible if it is relevant (i.e., it is probative of a material issue other than the bad character or propensity of an individual). Charles W. Ehrhardt, Florida Evidence § 404.9, at 156 (1995 ed.). See Hartley v. State, No. 83,021, slip op. at 7 (Fla. Sept. 19, 1996) (citing Griffin v. State, 639 So.2d 966 (Fla. 1994), cert. denied, 115 S.Ct. 1317, 131 L.Ed.2d 198 (1995)) (both stating that evidence of other crimes which are "inseparable from the crime charged" is admissible under section 90.402).
>
> The Walker burglary was closely connected to the murder of Pezza and was part of the entire context of the crime. When the police caught appellant burglarizing the Walker residence, they found Pezza's checkbook on his person. It was also as a result of the Walker burglary that police placed appellant in custody. Furthermore, appellant was in jail for this burglary when he placed the incriminating call to his mother and stated

[1] In Consalvo this Court found that while it was improper for the prosecutor to argue the Walker burglary as similar fact evidence because it was not admitted for that purpose, it was harmless error because the evidence was properly admitted as inextricably intertwined.

that the police were going to implicate him in a murder.

Consalvo v. State, 21 Fla. Law Weekly S423 (emphasis added)

Similarly, in Henry v. State, 649 So.2d 1361 (Fla. 1994) this Court held that the facts of the prior murder of the victim's mother were so inextricably intertwined with murder of her son that to separate them would have resulted in disjointed testimony that would have led to confusion. See, also, Henry v. State, 649 So.2d 1366, 1368 (Fla. 1994) (facts relating to son's murder inextricably intertwined with facts pertaining to mother's murder and to try to totally separate the facts of both murders would have been unwieldy and likely have led to confusion.)

In ' , 447 So.2d 210 (Fla.), cert. denied, 469 U.S. 920 (1984), this Court was faced with a similar situation. Heiney had fled to Florida after killing his roommate in an argument in Texas. He later robbed and killed an individual who had given him a ride. In rejecting Heiney's contention that evidence of the shooting in Texas should not have been admitted, this Court held that the evidence was properly admitted to show Heiney's motive for the subsequent crime and to provide the entire context of the crimes charged. 447 So.2d at 214.

In Bryan V. State, 533 So.2d 744 (Fla. 1988), this Court approved the admission of a prior crime as relevant to the issue of ownership and possession of the murder weapon by appellant.

> Appellant first argues that evidence of other crimes was introduced contrary to section 90.404 (2), Florida Statutes (1983), and Williams v. State, 110 So.2d 654 (Fla.), cert. denied, 361 U.S. 847, 80 S.Ct. 102, 4 L.Ed.2d 86 (1959). During its case-in-chief, the state introduced evidence which revealed that appellant had committed a bank robbery in late May 1983, approximately three months prior to the crimes here, and had stolen a boat in Gulf Breeze, approximately one week prior to the instant crimes.
>
> * * *
>
> In the case at hand, the evidence surrounding the bank robbery was relevant to the issue of ownership and possession of the murder weapon by appellant. The state was able to match the registration number of the murder weapon to a shotgun which appellant had pawned and redeemed prior to the bank robbery. It was also able to show that the residue from the modification of the murder weapon had been seized in appellant's home immediately following the bank robbery. Further, it was able to show that appellant used a sawed-off shotgun similar in appearance to the murder weapon in the bank robbery.
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> Bryan v. State, 533 So.2d 744 (Fla. 1988)

Because the evidence was highly probative, the danger of unfair prejudice did not preclude its admission. This Court has repeatedly approved the admission of highly prejudicial evidence, such as the defendant's commission of other murders, when

sufficient probative value has been shown. See, Fotopoulos v. State, 608 So.2d 784 (Fla. 1992); Heiney; Henry v. State, 649 So.2d 1361, 1365 (Fla. 1994), cert. denied, ___ U.S. 116 S.Ct. 101, 133 L.Ed.2d 55 (1995); Henry v. State, 649 So.2d 1366, 1368 (Fla. 1994), cert. denied, ___ U.S. ___, 115 S.Ct. 2591, 132 L.Ed.2d 839 (1995); Wuornos v. State, 644 So.2d 1000, 1007 (Fla. 1994) (finding relevance of six similar murders committed by Wuornos "clearly outweighs prejudice" of their admission), cert. denied, ___ U.S. , 115 S.Ct. 1705, 131 L.Ed.2d 566 (1995); Buenoano v. State, 527 So. 194 (Fla. 1988); Smith v. State, 365 So.2d 704 (Fla. 1978), cert. denied, 444 U.S. 885 (1979).

The appellant's reliance on Henry v. State, 574 So.2d 73 (Fla. 1991), is misplaced. In Henry, this Court reversed Henry's conviction for murder of his common law wife, due to evidence admitted in his trial relating to the fact that after killing his wife, Henry kidnaped her five-year-old son and murdered him as well. The reason that the evidence of the son's murder was *unfairly* prejudicial is that the state admitted many unnecessary details about the son's death, including photographs taken at the son's autopsy. In the instant case, no such unnecessary details

were admitted. The collateral evidence included only those facts necessary to explain to place the facts in the context.

Furthermore, the record does not support the appellant's assertion that this evidence became a feature of the trial. The state strongly takes issue with the appellant's description as to both the quality and quantity of this evidence. Appellant's claim that the only evidence presented in support of the Lucas murder was "only disputed evidence that Mr. Steverson, in his blue car, was at Mr. Lucas's trailer the night of the Lucas murder.'' (Brief of Appellant, pg. 50) To the contrary, the evidence included confessions of guilt for the homicide to Anne Dzublinski, Tony Fisher, Sylvester Johnson and Sandra Pinkham. **(T 1771-79, 1886-93, 1907-08, 1978-81, 2137-46)** Dzublinski also testified that Steverson had blood on him when he arrived at her house after the murder. Additionally, the evidence shows that Steverson took a television and VCR from the victim and, coincidentally, Houle saw a television and a VCR in Steverson's car when it was parked at Lucas' on the night of the murder. **(T 1210, 1405-06, 2076-77, 2091-92)**[2]

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[2]Appellant asserts that Houle testified that it was a TV and a VCR and/or a microwave and a stereo. Houle stated that the TV and the VCR stood out but the other item could have been a microwave or a

On these facts, the appellant has failed to establish any abuse of discretion in the trial court's admission of evidence about prior collateral crimes and other bad acts by the appellant. The trial court's conclusion that the probative value of this testimony was not substantially outweighed by the danger of unfair prejudice was correct. The evidence was clearly relevant, highly probative, limited in scope, and was not a feature of the trial. *Any* possible error in the admission of some of the less prejudicial, less probative testimony would be harmless beyond any reasonable doubt. Therefore, the appellant is not entitled to a new trial.

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stereo. (T 2076-77) "The TV and VCR definitely were obvious." (T 2091)

ISSUE III

WHETHER DEATH PENALTY WAS PROPORTIONATE.

Appellant's final claim is that the death penalty is disproportionate in the instant case in light of the totality of circumstances. He contends that the two statutory and two nonstatutory mitigating circumstances outweighed the three aggravating circumstances and that the judge's weighing process improperly relied on the collateral conviction. It is the state's contention that the sentence was properly imposed and should be affirmed by this Court. A review of the record and the trial court's order imposing the death sentence establishes that the sentence in the instant case is proportionate.

The court below found three aggravating circumstances; 1) three prior **violent felonies** -battery on a law enforcement officer (1982), armed robbery (1985) and attempted murder of a law enforcement officer (1994); **2)** during **the commission of a robbery;** and **3)** heinous, atrocious, **or** cruel. (R 361-2) In mitigation the court found the two "mental" mitigators, as well as nonstatutory mitigating based on Steverson's family history and his drug addiction. The jury recommended death by a vote of 9-3. (R **364)**

Of course, proportionality review is not a recounting of aggravating versus mitigating but, compares the case with similar

defendants, facts and sentences. Tillman v. State, 591 So.2d 167 (Fla. 1991). This Court must weigh the nature and quality of the factors as compared with other death cases. Kramer v. State, 619 So.2d 274, 277 (Fla. 1993). The judge's order reflects that Robert Lucas' body was discovered sitting in a chair with a plastic bag duct-taped over his head and neck. Steverson had tied an electrical cord around his neck and attached to the lower portion of the chair. His feet were bound. His hands and arms were duct-taped to the legs of the chair. Steverson had stabbed him twelve times in his chest, back and neck with two different types of instruments. A screwdriver and a bloody broken kitchen knife were found near the body. Additionally, the assailant fractured the cartilage of Lucas' larynx, presumably because of the ligature around the neck, The cause of death was asphyxiation with multiple stab wounds. (R 362) The jury convicted Steverson of first degree murder, armed burglary and armed robbery. (R 366)

Under circumstances similar to the instant case, this Honorable Court has upheld the imposition of the death penalty. See, Atwater v. State, 626 So.2d 1325 (Fla. 1993) (sentence upheld where defendant entered victim's apartment and repeatedly stabbed victim); Bowden v. State, 588 So.2d 225 (Fla. 1991) (sentence affirmed where the evidence shows that the victim was brutally

beaten to death with a rebar and the trial court imposed death after finding HAC and prior violent felony balanced against Bowden's abused childhood), ~~cert. denied~~, ___ U.S. ___, 112 S.Ct. 1596, 118 L.Ed.2d 311 (1992); Hayes v. State, 581 So.2d 121 (Fla. 1991) (two aggravating factors weighed against minor mitigating factors of age, low intelligence, learning disabled, a product of deprived environment); Freeman v. State, 563 So.2d 73 (Fla. 1990) (death penalty not disproportionate where two aggravating factors weighed against mitigating evidence of low intelligence and abused childhood), cert. denied, ___ U.S. ___, 111 S.Ct. 2910, 115 L.Ed.2d 1073 (1991); Kight v. State, 512 So.2d 922 (Fla. 1987) (death penalty proportionally imposed with two aggravating factors despite evidence of mental retardation and deprived childhood), cert. denied, 485 U.S. 929, 108 S.Ct. 1100, 99 L.Ed.2d 262 (1988), disapproved on other grounds, Owen v. State, 596 So.2d 985 (Fla. 1992); Watts v. State, 593 So.2d 198 (Fla.) (prior convictions, during the course of sexual battery, and pecuniary gain outweighed mitigation of defendant's age and low IQ), cert. denied, ___ U.S. ___, 120 L.Ed.2d 881 (1992).

A review of the facts established in the instant case clearly demonstrates the proportionality of the death sentence imposed. The circumstances of this murder and the defendant's propensity for

violence compel the imposition of the death penalty. The appellant's prior violent felony convictions, even standing alone in aggravation, outweighs the mitigation evidence presented and found in this case. Therefore, this Court should not disturb the appellant's sentence in this appeal.

Robert Lucas' murder was the result a totally unprovoked attack by Bobby Steverson, who has a significant history of prior violent felonies. Lucas was unarmed and in his own home when he was subjected to a tortuous murder at the hands of Steverson.

Based on the foregoing, the state urges this Honorable Court to find that the sentence imposed in the instant was properly imposed.

ISSUE IV

WHETHER THE TRIAL COURT CONDUCTED A SUFFICIENT INTERVIEW OF JURORS TO DETERMINE IF THEY WERE EXPOSED TO PREJUDICIAL NEWSPAPER ACCOUNTS.

Appellant also complains that jurors were improperly exposed to prejudicial newspaper accounts or headlines immediately prior to the penalty phase. He contends also that the trial court conducted an insufficient inquiry into the matter and, therefore, he is entitled to a new penalty phase. It is the state's position that no reversible error has been shown.

This claim was the subject of a hearing below. Defense counsel asserted that jurors were aware of news accounts which stated that Steverson had made incriminating statements to a corrections officer after the guilt phase and before penalty phase. Judge Maloney interviewed 10 of the 12 jurors about whether the information was known and/or considered in the jury room in the deliberation process. Only three jurors expressed knowledge of the article, stating only that two of them had seen the headline and a third had overheard a reference to it. (T 271-72, 273, 283) Each juror interviewed said the information had not been considered during deliberations. (T 272-85)

Based on the foregoing Judge Maloney entered the following Order:

On May 26, 1995, Defendant Bobby Steverson was convicted of first degree murder. Six days later the jury recommended the death penalty by a vote of nine to three. After the jury returned its sentence recommendation but before sentencing, a juror, Roger Davis, contacted the court with details of possible juror misconduct. (see attached memorandum A) First, he said that a few of the other jurors had been exposed to a newspaper account which included the defendant's confession to a corrections officer. This took place after the defendant had been found guilty in the guilt phase but prior to beginning the penalty phase. Further, that another juror, Robert Mathis, may have swayed the jury during the penalty phase by telling them about an uncle who was beaten to death.

Juror interviews were granted and a hearing was held on June 23, 1995. Each juror was asked the same two questions: one, prior to deliberations, were you aware of the post-conviction confession? Two, was there any discussion in the jury room about Steverson's confession to the corrections officer? All ten jurors interviewed said that there was no discussion of the confession during the deliberations in the jury room. There was evidence that one juror had seen a headline in a newspaper, but had not read the article. Also, that at most, two other jurors had heard about the headline from this juror, but had received no details about the article.

* * *

Defendant also claims he is entitled to a new penalty phase because some members of the jury were exposed to a newspaper account of a confession that the Defendant made to a corrections officer prior to their deliberations. If the defendant can show that unauthorized material as considered by the jury, he is entitled to a new trial "Unless it

can be said that there is no reasonable possibility that the [unauthorized material] affected the verdict." Hamilton, at 129 (quoting Rodriquez y Pax v. United States, 473 F.2d 662, 663-64 (5th Cir.), *cert denied*, 414 U.S. 820, 94 S.Ct. 115, 38 L.Ed.2d 52 (1973)). The harmless error test places the burden on the state, as the beneficiary of the error, to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict. State v. DiGulio, 491 So.2d 1129 (Fla. 1986).

A close examination of the facts shows that the state has proven that there is no reasonable possibility that the error contributed to the death recommendation. Interviews with ten of the twelve jurors revealed the following. Prior to commencing the evidentiary portion of the penalty phase, Juror Davis overheard one juror tell another that Steverson had confessed. Juror Ward said that he saw a headline in a newspaper which read "Steverson Confesses." He did not read the accompanying article. All [sic]

The facts of this case are analogous to Amazon v. State, 487 So.2d 8 (Fla. 1986). In Amazon, the defendant alleged that he was prejudiced when one of the jurors watched news accounts of the trial on television with the sound turned off, The Court held that, though this establishes a prima facie case of potential prejudice, the presumption was rebutted by the nature of the occurrence. Id. at 12. Since the sound was off, the jurors were not exposed to prejudicial verbiage. Id.

Another case which is instructive is U.S. v. Bollinger, 837 F.2d 436 (Ct. App. 11th Cir. 1988). In that case, the Defendant offered sufficient evidence of jury contamination to warrant interviews of the jurors. At the post-trial hearing, one of the jurors testified that another juror had made reference to a prejudicial article about the

defendant in the newspaper. Approximately nine other jurors were made aware of the article. The other jurors also testified that the article was not discussed during the jury's deliberations. The court held that the introduction of this extrinsic evidence was harmless, in part because of the strength and nature of the evidence presented by the state. Id. at 440.

The strength of the state's case during the guilt phase of this trial centered on four witnesses who testified that the Defendant had confessed to each of them. All that the newspaper headline could have related to jurors was that the Defendant had confessed to another person. This new confession occurred after the guilt phase had been concluded, and its only effect could be the elimination of any residual doubt in the minds of the jury as to the Defendant's guilt. In Florida, residual doubt is not an appropriate nonstatutory mitigating circumstance. Preston v. State, 607 So.2d 404 (Fla. 1992). As the Florida Supreme Court stated in Buford v. State, 403 So.2d 943 (Fla. 1981), "A convicted Defendant cannot be "a little bit guilty." It is unreasonable for a jury to say in one breath that a defendant's guilt has been proved beyond a reasonable doubt and, in the next breath, to say someone else may have done it, so we recommend mercy." Id. at 953.

This court finds that at least two of the jurors were aware of the Defendant's post-conviction confession, Clearly it would be improper for the jury to consider this information when deliberating a sentence recommendation. But the uncontroverted testimony of all interviewed jurors was that the post-conviction confession was never mentioned during deliberations. While it was improper for any of the jurors to receive unauthorized information, under the facts of this case such information was harmless beyond

a reasonable doubt.

(R 307-11)

This finding by the trial court is well supported by the facts and was within the court's discretion. As appellant has failed to show an abuse of that discretion, this claim should be denied. U.S. v. Bolinger, 837 F.2d 436 (11th Cir. 1988); Pietri v. State, 644 So.2d 1347 (Fla. 1994); Jennings v. State, 512 So.2d 169, 174 (Fla. 1987). The trial court also properly refused the extensive inquiry into the jurors' deliberation process as requested by defense counsel and urged on appeal. (R 255-57) The questions asked by Judge Maloney sufficiently focused on the overt actions as to give all concerned an accurate and complete picture of any material action. , 574 So.2d 124, 131 (Fla. 1991); Compare, Marshall v. State, 604 So.2d 799, 805 (Fla. 1992).

Finally, error, if any, is harmless beyond a reasonable doubt. State v. Hamilton, 574 So.2d 124, 131 (Fla. 1991). Only a few jurors saw the headline and only after guilt phase. Steverson had already been found guilty as charged[3]. Additionally, the state had

[3]Appellant faults the court below for his reference to the fact that lingering or residual doubt is not a consideration in guilt phase. The court's reference is entirely appropriate when the harmfulness of a guilt phase issue is considered when the allegedly prejudicial material goes only to the question of guilt which has already been resolved. Thus, the only possible effect is to remove any residual doubt, which as the court stated, is not a proper

presented substantial evidence in the guilt phase that Steverson had made similar statements to at least four people. Knowledge that he may have done so again, clearly could not have affected the outcome of the proceeding. This is especially true considering the jurors' unanimous representation that the jury had not considered the evidence in deliberations and only three jurors knew about the headline.

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consideration in penalty phase. Therefore, the headline concerning Steverson's guilt could not have prejudiced Steverson in the penalty phase.

ISSUE V

WHETHER FLORIDA'S FELONY MURDER AGGRAVATOR *AND* CORRESPONDING *JURY* INSTRUCTION CREATES *AN* UNCONSTITUTIONAL PRESUMPTION IN FAVOR OF IMPOSING THE DEATH PENALTY.

Appellant contends that Florida Statute 921.141(5)(d) (capital felony committed while engaged in the commission of a burglary or robbery) is unconstitutional because it is an automatic aggravator. This Court has repeatdly rejected this claim. See Clark v. State, 443 So.2d 973 (Fla. 1983); Bertolotti v. State, 534 So.2d 386 (Fla. 1988); Taylor v. State, *638* So.2d 30 (Fla. 1994), cert. denied, 130 L.Ed.2d **424 (1994); ,Stewart v. State, 588** So.2d 972 (Fla. 1991). This Court should reject the contention again.

CONCLUSION

Based on the foregoing arguments and authorities, the judgment and sentence should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Jennifer Y. Fogle, Assistant Public Defender, P. O. Box **9000** -- Drawer PD, Bartow, Florida 33831, this 20 day of December, **1996**.

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