IN THE SUPREME COURT OF FLORIDA

GARY BOWLES,

Appellant,

v. CASE NO. 89,261

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

STATE STATUTES

STATEMENT OF THE CASE AND FACTS

Appellee generally accepts Bowles' Statement of the Case and Facts, subject to the below supplementation and additions:

As to the procedural history of the case, the record reflects that, although Appellant filed a number of motions in limine, such motions did not expressly seek to preclude the admission of evidence to the effect that the victim in this case was homosexual, Appellant had "hustled" gays in the past or that he had expressed hatred of gays and blamed them for the loss of his unborn child (RII 253-263, 340-341, 369-372). Likewise, as to the pretrial motions on the aggravating circumstances and/or the jury instructions thereon, the record reflects that Bowles' Motion to Preclude Instruction on the Heinous, Atrocious or Cruel and Cold, Calculated and Premeditated Aggravating Circumstances was not predicated upon any deficiency in the standard jury instructions *per se*, but rather upon his contention that the aggravating factors themselves were vague, had not been applied consistently, and should not apply to the facts of this case (RI 99-101); likewise, although Bowles attacked the constitutionality of the heinous, atrocious or cruel jury instruction in his motion attacking the constitutionality of the underlying factor (RI 110-136), he made no comparable attack upon the CCP jury instruction, when he attacked that factor (RI 171-188). Bowles submitted three proposed jury instructions in regard to the HAC aggravating factor - one to the

effect that an intention to torture had to be proven (RII 374), one to the effect that the defendant must have deliberately inflicted or consciously chosen a method of death with the intent to cause extraordinary mental or physical pain to the victim in order for the circumstance to apply (RII 377-377A), and another, to the effect that the events which occurred after the victim's death could not be considered (RII 397); as to the CCP instruction, Bowles submitted a proposed instruction to the effect that the State was required to prove that the defendant planned or arranged to commit the murder before the crime began and that there had been a careful, prearranged plan (RII 375).

As to the facts of this case, the record reflects that, accordingly to Bowles' statements to Officer Collins, Appellant had met the victim, Walter Hinton, in late October of 1994 at the pier in Jacksonville Beach (RIX 1006, 1016). Bowles shared a joint with Hinton, and then went with him to a motel (RIX 1016). Hinton then left for Atlanta but gave Appellant his phone number there, and, after a couple of days, Bowles called him; when the victim returned to Jacksonville Beach, he picked up Appellant and transported him to Macon, where Appellant assisted him in packing up his belongings and transporting them back to Jacksonville Beach (RIX 1006-1007, 1016). In exchange for this assistance, Appellant was allowed to stay at Hinton's trailer in Jacksonville Beach (RIX 1007, 1016). Bowles stated that he stayed with the victim for approximately two weeks, and the victim's sister and neighbors testified that Hinton

often let persons, men and women, stay with him (RIX 1016; RVIII 840; RIX 922). Several witnesses met Appellant at this time, and stated that he was then using the name "Timothy Whitfield," during his residence at Hinton's trailer (RVIII 835-836; RIX 922, 930).

Around November 11, 1994, Hinton invited a young woman named "Sharon Ann" or "Jo Ann" to reside in the trailer as well, and the next day, Bowles "made a pass" at her in Hinton's presence (RIX 1007, 1016). According to Bowles, the victim became "upset" and asked Appellant to leave (RIX 1007-1008, 1017). Hinton dropped Appellant off by a Burger King, and Bowles was later arrested for disorderly intoxication (RIX 1008, 1017). On Monday, November 14, 1994, Appellant was released from jail, and returned to the trailer to pick up his clothes (RIX 1008-1009, 1017). At this time, Bowles came into contact with one of the victim's neighbors, Sandra Teays, and told her, "I just got out of jail. The son of a bitch had me arrested"; according to the witness, Appellant stated that Hinton had had him arrested for "fooling around with Jo Ann" (RIX 924). When Miss Teays saw Appellant and Hinton later that day, however, she stated that everything "seemed okay" (RIX 924). Bowles told Officer Collins that Hinton had informed him that he could stay at the trailer through the end of the month (RIX 1017).

Miss Teays' counsin, Richard Smith, was a frequent visitor to Jacksonville Beach and was acquainted with the victim (RX 1124-1127). He testified that he was staying with his cousin in November of 1994, and met Appellant at that time (RX 1127-1128).

Smith stated that he returned to Maryland on Wednesday, November 16, 1994, and Hinton was to drive him to the railroad station to catch the 8:30 p.m. train (RX 1129-1130). As they left the trailer park at around 6:00 p.m., they encountered Appellant walking along the road, and picked him up (RX 1130); Smith testified that Appellant appeared as if he had been drinking "moderately" by this point (RX 1130-1131). The three picked up some fried chicken and beer, and also smoked two to three joints (RX 1132). When Smith exited the car at around 7:45 p.m., he stated that Appellant was drunk, but coherent (RX 1133-1134).

On Friday night, two nights later, Appellant picked up Ginger Moye, an acquaintance of his, at the Ritz bar in Jacksonville Beach (RIX 945). At this time, he was driving the victim's Cadillac, and invited Miss Moye to spend the night "at his roommate's trailer" (RIX 945). When they arrived at the trailer, Bowles told Miss Moye that they had to keep the noise down because his roommate "was probably asleep," and the two proceeded to one of the bedrooms, where they drank vodka and smoked cigarettes (RIX 946-948). The witness spent the night, and, in the morning, Bowles dropped her off back at the bar (RIX 948). The next night, the process repeated itself, with Appellant inviting Moye to again spend the night at the trailer (RIX 948-949). When they arrived there, Bowles told her not to mind the odor, which he stated was coming from a "backed up septic tank" (RIX 950). The two again proceeded to the back bedroom, where they drank and smoked, and, at this

time, Bowles asked her how she liked the new watch which his roommate had "given" to him; Appellant had not been wearing this watch the night before (RIX 941). Moye described the watch as a "Rolex" with a blue face (RIX 951), and Hinton's sister testified that he had owned a fake Rolex watch (RVIII 845). Appellant dropped Moye off at the Ritz bar the next morning (RIX 952).

Later that day [Sunday, November 20, 1994], the victim's sister, Belinda Abner, and her companion, William Logan, arrived at Hinton's trailer (RVIII 827). They had become concerned, as the victim had not shown up at work on Thursday or Friday, and had missed his sister's birthday party on Friday night (RVIII 841). Logan had stopped by the trailer on Thursday night at around 8:00 p.m.; he stated that the lights were on, but that no one had answered his knock, and the victim's car had been gone (RVIII 825). On Saturday, Abner and Logan had returned again to the trailer, and found no one home, and the Cadillac likewise was missing (RVIII 842). At this time, the victim's car was still not there, and no one answered Logan's knock on the door (RVIII 827-828); he stated that all of the doors were locked. Logan entered the trailer through a window, and immediately noticed a very strong odor (RVIII 830). He said that he saw trash on the kitchen floor, which was unusual (RVIII 830). The witness checked the back bedroom, and then opened the door to the victim's bedroom (RVIII 831). He testified that he saw Hinton's wallet on the floor and "papers strewn everywhere on the left side of the bed." (RVIII 831).

Logan stated that the bed had been stripped , and noticed a large pile of bedding between the bathroom and the bedroom (RVIII 832). When the witness reached over and “pressed into the covers,” he discovered the victim’s body underneath (RVIII 833). The police were immediately notified (RVIII 834).

The evidence technician, Michael Laforte, testified that he recognized the odor of decomposing flesh when he first entered the trailer (RIX 860). Laforte also stated that a concrete stepping stone had been found on top of the bed in the master bedroom (RIX 873). The stepping stone had been taken from outside the trailer, and at one point had rested on the end table in the den, inasmuch as some dirt had been left behind in such location (RIX 874, 996-998). The stone weighed between forty and fifty pounds, and was stained with something “that appeared to be blood” (RIX 874-876). Blood stains were also found on the bed clothes covering the body (RIX 878). Another officer present testified that he noticed some stereo equipment missing from the trailer, and found a knife and some wires nearby on the floor (RIX 992-993); the victim’s sister testified that Hinton had shown her some stereo equipment, which had previously been located in the “empty spot” (RVIII 846-847). A search of the trailer turned up a pay stub for “Timothy Whitfield” from the Ameri-force Labor Pool, and Appellant’s fingerprints were also found on the plastic bag containing toilet paper rolls (RIX 999). A BOLO was issued for the victim’s vehicle, a 1984 Cadillac, as well as for “Timothy Whitfield” (RIX 1001); the

Cadillac was recovered on November 22, 1994, in a parking lot on Beach Boulevard (RIX 1001-1002).

The medical examiner, Dr. Arruza, was likewise dispatched to the scene, and later conducted the autopsy of the victim's body (RIX 892). At the scene, she examined the concrete block and noted the presence of blood stains (RIX 894). The witness testified that Hinton had been dead for between three and six days, and identified the injuries caused by the stepping stone (RIX 906-909). She stated that the skull had been fractured, and that the victim had been hit in the right side of the face with the concrete block (RIX 909). Dr. Arruza noted a fracture line which went all the way across the victim's face to his jaw, and further noted abrasions on the right side of his face (RIX 909). Due to the absence of contusions to the skull, the doctor stated that Hinton's brain had not been injured, and that she would not have expected him to have been rendered unconscious by the blow (RIX 909). Dr. Arruza also testified that the abrasions to Hinton's forearm and knee were consistent with having been inflicted during a struggle (RIX 909-910), and likewise noted that five of his ribs had been fractured (RIX 911). The cause of death, however, was strangulation, and the medical examiner noted that this process could have been prolonged, the longer that Hinton had struggled or resisted (RIX 910-911). She expressly noted that the hyoid bone in his neck was fractured and that the neck muscle on the right side was hemmoraghed (RIX 910). In addition to manual strangulation, the doctor testified

that toilet tissue had been stuffed into the victim's mouth all the way to the back of his throat, and that a bloody rag or towel had likewise been placed into his mouth (RIX 907-909). Dr. Arruza testified that, although strangulation could lead to unconsciousness within thirty to forty-five seconds, the process could take up to twenty minutes or so if the victim had struggled or resisted, as Hinton apparently had done (RIX 918-919).

On November 22, 1994, Bowles was arrested at the Ameri-force office in Jacksonville Beach (RIX 965-972). After Appellant was advised of his rights, he provided both oral and written statements, and in the course of doing so, revealed his true identity (RIX 1011); at that time, Bowles had in his possession a driver's license in the name of Timothy Whitfield with his own picture on it, as well as Whitfield's social security card and birth registration (RIX 1012). According to Appellant, he had stayed up drinking Magnum beers after Smith had been dropped off at the train station (RIX 1018). Then, at some point on Wednesday night, "something snapped" inside of him, and he went outside and picked up a concrete block (RIX 1018). Bowles stated that he put it down on a table and "thought for a few minutes"; he then took the stone into the victim's bedroom and dropped it on Hinton's head, as he lay asleep (RIX 1018). The victim fell off the bed, and Bowles choked him as he struggled (RIX 1018). Bowles then admitted stuffing a rag into the victim's mouth, and covering him

with bedsheets (RIX 1018). Appellant stated that he had been living in a motel the last couple of days (RIX 1018).

Bowles also stated that he "hustled" gay men for a living, in exchange for food, shelter and money, but denied having any sexual relationship with the victim. There was testimony that the victim had been homosexual (RIX 1019-1020, 928). Bowles told Officer Collins that he felt that homosexuals had "ruined his life with women" and were responsible for the loss of his unborn child (RIX 1032); a former girlfriend terminated her relationship with Bowles, and had an abortion, because of "what he was doing with men" (RIX 1033). Bowles also spoke with an FBI agent that day, and told him that he had expected to find money on the victim or in his possession in the trailer, and that he had planned to use such to flee the city of Jacksonville (RX 1081). Appellant later admitted to a cellmate that he had taken the victim's car, as well as a Rolex watch, which he believed to be worth $6,000.00; according to Bowles, the watch was then hidden in some bushes outside of a beachside bar (RIX 1047-1048).

The State also introduced evidence as to Bowles' prior convictions (RX 1083-1111). Corporal Edenfield with the Tampa Police Department testified that he had investigated a sexual battery and aggravated battery which had occurred in June of 1982. He stated that he had interviewed the victim, Leslie Blease, in the hospital, as she recuperated from her injuries, a process which took two weeks (RX 1083-1085). The victim had been sexually

battered, both vaginally and rectally, and severely beaten; her eyes, nose and mouth were swollen, and there was bruising around her neck “where you could see finger impressions” (RX 1085). Edenfield went to the scene of the beating, and found “blood all over the place” (RX 1091). Appellant admitted beating the victim, and pled guilty to aggravated battery and sexual battery (RX 1093-1094); there was testimony to the effect that the victim had been a prostitute, and that Bowles had likewise been a male prostitute at the time (RX 1100-1101). Officer Currie testified as to Bowles’ Daytona Beach conviction for strong-armed robbery (RX 1101-1111). According to this witness, Appellant and a female acquaintance had left a bar, and Bowles had then pushed her down, grabbed her purse, removed her wallet and a pair of sunglasses, and then run away (RX 1106).

SUMMARY OF ARGUMENT

Bowles pled guilty to the murder of Walter Hinton, and presents ten (10) points on appeal in regard to his sentence of death. Several - challenges to the standard jury instructions on the heinous, atrocious or cruel and cold, calculated and premeditated aggravating circumstances, as well as a claim that the felony murder aggravator is "automatic" - merit summary discussion. Appellant's primary claim is that the State erred in introducing evidence below to the effect that the victim had been a homosexual and that Bowles had expressed hatred for homosexuals. This claim is procedurally barred, given the lack of objection below, and, in any event, it was entirely proper for the State to present evidence relating to the circumstances of the murder and the nature of the crime. As to Bowles' next claim, the denial of two motions for mistrial, the record is clear that an abuse of discretion has not been demonstrated, and in each instance, the court sustained the defense objection and instructed the jury to disregard the isolated remark at issue.

Bowles' attacks upon the findings in aggravation and mitigation are likewise meritless. Given the fact that Bowles struck the sleeping victim with a concrete block and then manually strangled him as he resisted, this murder was heinous, atrocious or cruel; likewise, given Bowles' statement that he "expected" to find money on the victim, and given the fact that he took the victim's watch, vehicle and stereo after the murder, the robbery/pecuniary

gain aggravating circumstances were properly found. As to mitigation, the trial court afforded weight to Bowles' substance abuse problem, history of child abuse and alleged intoxication at the time of the murder; the fact that these factors were found as nonstatutory, as opposed to statutory, mitigation is no basis for relief. Finally, the instant death sentence is proportionate in all respects and should be affirmed.

ARGUMENT

Issue I

APPELLANT HAS FAILED TO DEMONSTRATE FUNDAMENTAL ERROR IN REGARD TO THE TRIAL COURT'S ADMISSION OF EVIDENCE RELEVANT TO BOWLES' MOTIVE FOR THE MURDER

As his first point on appeal, Bowles contends that he should receive a new sentencing hearing, because the jury was allowed to hear evidence to the effect that the victim in this case had been a homosexual, that Bowles made a living "hustling" gay men, that he disliked them and that he held them responsible for the loss of his unborn child. Appellant contends that admission of this type of evidence is contrary to such precedents as Flanagan v. State, 625 So.2d 827 (Fla. 1993), State v. Stalder, 630 So.2d 1072 (Fla. 1994), Dawson v. Delaware, 503 U.S. 159, 112 S.Ct. 1093, 117 L.Ed.2d 309 (1992), as well as §90.404, Fla.Stat. (1996). Appellee disagrees, and initially questions the preservation of the vast majority of the matters asserted by Bowles. Reversible error has not been demonstrated, and the instant sentence of death should be affirmed in all respects.

Although Appellant asserts that Bowles had filed pretrial motions seeking to prevent the State from raising the victim's "sexual proclivities" (Initial Brief at 11), the record does not support this assertion, and it is clear that Bowles' trial and appellate counsel have diametrically opposing views as to the admissibility of this type of evidence. Accordingly, the following

procedural history is set forth. The record indicates that, while defense counsel did file pretrial motions in limine, none of them sought to exclude evidence as to the victim's status as a homosexual, Bowles "hustling" of gay men or his expression of dislike or hatred for them (RII 253-263, 340-341, 369-372). Rather, these motions in limine were specifically focused and sought to exclude, *inter alia*, testimony from a state witness to the effect that Bowles had stated that he had killed six gay men (RII 340-341), testimony concerning Bowles' actions in this case after the murder (RII 369-370), testimony concerning the fact that Dennis Regan, to whom Bowles had confessed, was an FBI agent (RII 370-371), and testimony concerning a letter in which Bowles admitted to killing six gay men (RII 371-372).

An extensive hearing was held concerning these matters on June 13, 1996 (RIV 687-779; RV 780-809). The court announced that the State would not be allowed to present any evidence concerning Bowles' admission to having killed six gay men, and the State indicated that it had no intention of doing so (RV 931-934). The court deferred ruling as to the admissibility of evidence concerning Bowles' actions after the murder or Regan's status as an FBI agent, but did hold that this witness should not expressly testify as to how he came to be involved in this case (RV 934-946).

The penalty proceeding in this case began on July 15, 1996, and during his portion of the voir dire, Bowles' counsel

specifically asked the prospective jurors how they would feel if they heard evidence that Appellant "had engaged in a practice of allowing homosexual men to perform oral sex on him for money." (RVIII 758). Defense counsel also told the jury that there would be evidence in this case "that my client met the victim in a gay bar in Jacksonville Beach" (RVIII 759-760). In his opening statement to the jury the next day, the prosecutor told them that the victim in this case had been a homosexual, that Bowles did not like homosexuals, and that the defendant had lost two girlfriends because of his "lifestyle" (RVIII 802). Defense counsel objected, and moved for a mistrial, claiming that there were pending motions concerning the admissibility of Bowles' statements concerning his dislike of homosexuals (RVIII 802-803). The prosecutor responded that there were no such pending motions, and contended that this evidence was relevant to the CCP aggravator, pointing out that the defense had mentioned Bowles' hustling of gay men during voir dire (RVIII 803-804). The objection was overruled (RVIII 804). During the defense opening statement, Bowles' counsel advised the jury that Appellant had met the victim "in the area of a number of bars, gay bars," and stated that Appellant had been "frequenting" these bars "during the months previous to his meeting with Mr. Hinton." (RVIII 820).

Although Bowles complains in the Initial Brief that the prosecutor asked a witness whether the victim had been a homosexual (Initial Brief at 12), the record in fact reflects that it was

defense counsel who asked this question (RIX 928). During the examination of Officer Collins, the State elicited testimony, without objection, to the effect that Bowles had made a living "hustling" gay men, in exchange for food, shelter and money (RIX 1019-1020). The State then proffered further testimony from the witness concerning Bowles' statements evincing hatred for homosexuals and the fact that he held them responsible for ruining his relationships with women and for the fact that one of his girlfriends had an abortion (RIX 1020-1031). At the conclusion of the proffer, the court ruled that the State could elicit testimony from the witness concerning any statement that Bowles had made "regarding his feeling toward homosexuals." (RIX 1031). Without objection, the witness then testified that Bowles had made the statement that he felt that homosexuals had ruined his life with women and were responsible for the loss of his unborn child (RIX 1032-1033). During the State's examination of the next witness, Timothy Daly, the witness gave a non-responsive answer, when asked whether Bowles had given an explanation for the instant murder; the witness stated that Bowles had been living with a girl in Daytona and "rolling fagots" (RIX 1045). The court sustained defense counsel's objection, and specifically instructed the jury to disregard the witness's answer (RIX 1045-1047).[1] The next witness,

[1] Bowles has raised this matter in both Point I and Point II in the Initial Brief (Initial Brief at 13, 16, 20-26). Appellee will address it at this time.

Dennis Regan, testified without objection that Bowles had admitted being a hustler to generate income, that he did not consider himself a homosexual and disliked having sex with men, and that he was upset that his prior girlfriend, Mary Beth Pearson, had had an abortion without his knowledge or consent (RX 1062-1063).

As noted in the Initial Brief, the prosecutor, during his closing argument, contended, without objection, that Bowles' dislike of homosexuals constituted a motive for the crime and a basis for the CCP aggravator (RXI 1263-1264, 1288-1289, 1303). In the defense closing argument, Bowles' attorney specifically drew the jury's attention to Appellant's past as a "hustler", stating:

> So, he learns to hustle. He learns that there are men who will pay him. That will pay to abuse him. He learns to hustle, that is, to pick up men and to allow them to perform oral sex on him for money.
>
> But occasionally he finds a place to stay for a while. He once had the love of a woman. She was going to have a child. And she completely didn't agree with his lifestyle on the streets. And that was in 1985 that that situation happened. 1985. 23 years old. Not even 23 years old. Gary Bowles has a relationship. And it looks like it might develop into something. And he loses the baby. But he had for a while some relationship.

(RXI 1311).

It should be clear from the above that Bowles' trial counsel (as opposed to his appellate counsel) did not regard as objectionable such matters as the victim's homosexuality, Appellant's status as a hustler, his dislike of homosexuals and/or

his belief that they were responsible for the abortion of his unborn child. Not only did defense counsel fail to object below to testimony concerning these matters, but, on occasion, it was the defense itself which brought up the subject. Accordingly, no claim of error in this regard has been preserved for appeal. See, e.g., Terry v. State, 668 So.2d 954, 961 (Fla. 1996) (". . . In order for an argument to be cognizable on appeal, it must be the specific contention asserted as the legal ground for objection, exception or motion below."); Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982). This Court has specifically held that contemporaneous objection is necessary to preserve for appeal a claim of error involving the admission of evidence concerning the victim's personal characteristics, see Capehart v. State, 583 So.2d 1009, 1013 (Fla. 1991), as well as to preserve claims involving admission of evidence relating to the defendant's character or collateral crimes. See, e.g., Esty v. State, 642 So.2d 1074, 1078 (Fla. 1994). This latter ruling applies even when, as opposed to the situation *sub judice*, a prior motion in limine has been filed and denied. See, e.g., Correll v. State, 523 So.2d 562, 566 (Fla. 1988); Lawrence v. State, 614 So.2d 1092, 1094 (Fla. 1993). Likewise, this Court has consistently held that claims involving prosecutorial argument must be preserved through contemporaneous objection, including prosecutorial argument relating to collateral crimes. See Kilgore v. State, 688 So.2d 895, 898 (Fla. 1996); Sims

v. State, 681 So.2d 1112, 1116-1117 (Fla. 1996); Finney v. State, 660 So.2d 674, 683 (Fla. 1995) (claim in regard to prosecutorial argument on collateral crimes procedurally barred, in absence of objection on grounds asserted on appeal). Accordingly, the vast majority of this claim, if not the entire claim, is procedurally barred.

The only objections interposed below were raised in regard to the prosecutor's opening statement and the testimony of witness Daly. The basis for defense counsel's objection during opening statement was his belief that a motion in limine was then pending, and was not based upon any view that Bowles' opinions of homosexuals should not be admitted (RVIII 802-804). As the State pointed out, however, there was no such pending motion, and, in any event, the defense's failure to contemporaneously object when the testimony at issue was ultimately admitted waives any claim of error. Cf. Correll, supra; Lindsey, supra. Defense counsel did contemporaneously object to witness Daly's statement that Appellant had "rolled fagots" while living in Daytona Beach, and such objection was sustained, and a curative instruction given. The State does somewhat question the preservation of this point, however, given the fact that following the curative instruction, defense counsel did not indicate any continued desire for a mistrial. Cf. Holton v. State, 573 So.2d 284, 288, n.3 (Fla. 1990); Riechmann v. State, 581 So.2d 133, 138-139 (Fla. 1991). To the extent that this Court deems this matter preserved, Appellee

would contend that the trial court did not abuse its discretion in denying Bowles' motion for mistrial.

It is well established that a motion for mistrial is addressed to the sound discretion of the trial court, and should only be granted in order to prevent manifest injustice. See, e.g., Ferguson v. State, 417 So.2d 639, 641 (Fla. 1982); Gorby v. State, 630 So.2d 544, 547 (Fla. 1993). Although it was defense counsel who advised the jury that Bowles had been a "hustler", and, in fact, later contended that such fact constituted mitigation (RXI 1311), the witness's reference to Bowles' "rolling" homosexuals could be regarded as a reference to robbery, cf. Duest v. State, 462 So.2d 446, 448 (Fla. 1985), and the trial court properly sustained objection to the testimony. This matter, however, was never raised again, and the jury was immediately instructed to disregard it. Under all of the circumstances of this case, reversible error has not been demonstrated. See, e.g., Walker v. State, 22 Fla.L.Weekly S537, 541-542 (Fla. Sept. 4, 1997) (isolated reference to unrelated pending charge against defendant not grounds for mistrial, in light of court's curative instruction); Gudinas v. State, 693 So.2d 953, 964 (Fla. 1997) (same); Buenoano v. State, 527 So.2d 194, 198 (Fla. 1988) (gratuitous reference to uncharged criminal conduct not sufficient to merit mistrial, in light of curative instruction). No relief is warranted as to this claim.

As to the rest of the matters discussed in the Initial Brief, Bowles would likewise merit no relief, even if he had not waived

this claim through his failure to object. As this Court held in Wike v. State, 22 Fla.L.Weekly S483, 484 (Fla. July 17, 1997), "The basic premise of sentencing procedure is that the sentencer is to consider all relevant evidence regarding the nature of the crime and the character of the defendant to determine appropriate punishment." This Court specifically held in Wike that the test for admission of evidence is relevancy as to the nature of the crime, "and not just as to whether the evidence was admissible to prove any aggravating or mitigating factor." Id. Wike was a resentencing proceeding, and this Court has often observed in such context that it is unfair to expect a jury to make their sentencing recommendation in a vacuum, without knowledge of the factual circumstances surrounding the murder. See, e.g., Willacy v. State, 696 So.2d 693, 695 (Fla. 1997); Bonifay v. State, 680 So.2d 413, 419 (Fla. 1996); Preston v. State, 607 So.2d 404, 410 (Fla. 1992); Teffeteller v. State, 495 So.2d 744, 745 (Fla. 1986). Because Bowles pled guilty, there was no trial in this case, and the State was entitled to present evidence which familiarized the jury with the underlying facts of the case and the circumstances surrounding the murder.

Certainly, the the fact that the victim was a homosexual and that the defendant had evinced a dislike or hatred of homosexuals was relevant, and went towards the establishing motive and/or the existence of the CCP aggravating factor; the fact that this aggravating circumstance was not ultimately found is simply not

determinative. This Court has allowed comparable evidence in other capital prosecutions. See Alvord v. State, 307 So.2d 433, 436-437 (Fla. 1975) (fact that defendant had attempted to engage in homosexual acts immediately prior to murder of thirteen year old girl, properly admitted to show defendant's state of mind and motive); Washington v. State, 362 So.2d 658, 660-661 (Fla. 1978) (evidence presented to the effect that defendant's motive for murder was his belief that victim, a minister, violated religious and moral precepts by engaging in homosexual activities; defendant pled guilty and proceeding determined sentence only); Michael v. State, 437 So.2d 138, 141-142 (Fla. 1983) (letter which detailed defendant's homosexual preferences properly admitted where relevant to other issues); Toole v. State, 479 So.2d 731, 732-733 (Fla. 1985) (fact that defendant and victim had homosexual relationship relevant to prove motive). Other courts have reached similar results, see Guthrie v. State, 637 So.2d 35 (Fla. 2nd DCA 1994), and the fact that the abortion of Bowles' unborn child may have occurred years before this murder does not detract from its admissibility. See State v. Statewright, 300 So.2d 674 (Fla. 1974) (evidence of homosexual act committed by defendant five years prior to crime properly admitted where such fact relevant to motive). Further, this Court has allowed the admission of other evidence relevant to motive or credibility, where such has related to such allegedly prejudicial matters as a prior murder committed by a

defendant or the volatile subject of abortion. See Williamson v. State, 681 So.2d 688, 694-696 (Fla. 1996); Walker, supra.

Contrary to the impression created by the Initial Brief, the prosecution in this case did not set out to indiscriminately besmirch Bowles' character or titillate the jury with such matters as the victim's sexual preferences and/or Bowles' relationship with homosexuals. Rather, the State simply introduced evidence relevant to the circumstances of the crime, and Bowles' trial counsel recognized the relevancy of this evidence, as demonstrated by his failure to object. The mere fact that the jury was aware that Bowles had previously been a "hustler" hardly so tainted the proceedings that no reliable sentencing verdict could result. In contrast to the situation in Hitchcock v. State, 673 So.2d 859 (Fla. 1996), the evidence at issue was introduced for a proper purpose and was relevant to the sentencing considerations of the judge and jury, and the other cases relied upon by Bowles are simply inapposite. As then-Justice Kogan observed in Stalder, "Criminal motive is not and never has been a protected form of expression", 630 So.2d at 1078, and Appellant had no right to expect that his sentencing proceeding would be sanitized beyond recognition. Cf. Asay v. State, 580 So.2d 610, 612, n.1 (Fla. 1991) (defendant's views on race, including evidence of tattoos, properly admitted in case where racial hatred was motive for killing). The instant sentence of death should be affirmed in all respects.

Issue II

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING BOWLES' MOTION FOR MISTRIAL DURING THE TESTIMONY OF WITNESS REGAN

In his next point on appeal, Appellant contends that Judge Schemer abused his discretion in denying the defense motions for mistrial during the testimony of witnesses Daly and Regan; the former claim has already been addressed in Point I, *infra*. The record indicates that when Regan was asked why Bowles drank regarding this murder, he answered that Appellant had told him that he drank "to make it easier to kill" (RX 1068). Defense counsel objected, contending that this answer could be read to refer to Bowles' motivation for all of his murders, and moved for mistrial (RX 1068-1077). The court found this evidence to be possibly relevant to rebut Bowles' assertion of intoxication as mitigation, but sustained the objection, and denied the motion for mistrial, instructing the jury to disregard this testimony (RX 1077-1078); subsequently, the court allowed the State to proffer and ruled that the statement would not be admissible in rebuttal (RX 1228). On appeal, Bowles contends that he is entitled to a new sentencing hearing. Appellee disagrees.

As noted in Point I, *infra*, motions for mistrial are directed toward the sound discretion of the trial court, and should be granted only in cases of manifest necessity; any error in the sentencing proceeding must be of such magnitude as to render the

entire proceeding fundamentally unfair. See, e.g., James v. State, 695 So.2d 1229, 1234 (Fla. 1997); Gorby, supra; Ferguson, supra. In this case, Bowles has simply failed to demonstrate that the isolated remark at issue had such devastating effect upon the proceedings. This matter was never referred to again in closing argument, and the trial court expressly instructed the jury not to consider it. See Walker, supra; Gudinas, supra. Further, Appellee would respectfully suggest that the prosecutor was correct in contending that this evidence was relevant, given the testimony presented by a defense witness, and elicited through Bowles' own statements, concerning his consumption of alcohol and drugs prior to the murder (RX 1130-1134). Appellee respectfully submits that no reasonable juror would have read this remark as relating to additional crimes on Bowles' behalf. See, e.g., Cole v. State, 22 Fla.L.Weekly S587, 589 (Fla. Sept. 18, 1997). If in fact Bowles consumed alcohol as a means of preparation for this murder, such would undoubtedly be relevant to the CCP aggravator, although, as noted, this aggravating circumstance was not ultimately found. The cases relied upon in the Initial Brief (Initial Brief at 22-25), simply have no relevance to capital sentencing proceedings, and there is no reason to conclude that this one statement precluded the judge and jury from reaching a reliable sentencing result. It must be noted that Judge Schemer expressly found as nonstatutory mitigation Bowles' intoxication and diminished ability to appreciate the consequences of his actions at the time of the

offense (RIII 461-462). Reversible error has not been demonstrated, and the instant sentence of death should be affirmed in all respects.

Issue III

REVERSIBLE ERROR HAS NOT BEEN DEMONSTRATED IN REGARD TO THE SENTENCER'S FINDINGS IN MITIGATION

In sentencing Bowles to death, Judge Schemer found the existence of five (5) aggravating circumstances - that the homicide had been committed by one under sentence of imprisonment, under §921.141(5)(a), Fla.Stat. (1996); that the homicide had been committed by one with prior convictions for crimes of violence, under §921.141(5)(b), Fla.Stat. (1996); that the homicide had been committed during an enumerated felony, to-wit: robbery, under §921.141(5)(d), Fla.Stat. (1996); that the homicide had been committed for pecuniary gain, under §921.141(5)(f), Fla.Stat. (1996), and that the homicide had been especially heinous, atrocious or cruel, under §921.141(5)(h), Fla.Stat. (1996). The sentencer expressly merged those findings under 921.141(5)(a) & (b), as well the findings under 921.141(5)(d) & (f), to result in a total of three (3) aggravating circumstances (RIII 454-460). In his sentencing order, the judge also expressly discussed the two statutory mitigating circumstances, as well as the twelve items of nonstatutory mitigation, proposed by the defense in its sentencing memorandum (RIII 444-449; 460-468). The judge found to be

established all of the nonstatutory factors proposed by Bowles, with minor exceptions, and assigned varying degrees of weight to them. The judge found, however, that Bowles' drug and alcohol use at the time of the murder, as well as his prior experience of child abuse, proposed as the basis for the statutory mitigating circumstances, constituted only nonstatutory mitigation (RIII 460-462). On appeal, Appellant contends that this latter ruling constitutes reversible error. Appellee disagrees, and would contend that the record fully supports the sentencer's findings in this regard.

In his sentencing order, Judge Schemer found, as to the emotional disturbance mitigator under §921.141(6)(b), Fla.Stat. (1996), that although argument was made that Bowles was an alcoholic and that his actions indicated an emotional disturbance, evidence had not been presented from which the court could reasonably find that Appellant suffered from an extreme emotional disturbance (RIII 460). The court did expressly state that it had considered Bowles' drug addiction and alcoholism as a nonstatutory factor and had given such "some" weight (RIII 460); indeed, the sentencing order subsequently indicates that the judge expressly found as nonstatutory mitigation and assigned weight to, such facts as Bowles' "serious substance abuse problem" beginning at age ten, as well as the physical and emotional abuse which he had suffered at the hands of his stepfathers (RIII 462). As to the statutory mitigating factor under §921.141(6)(f), Fla.Stat. (1996), relating

to competency to appreciate the criminality of one's conduct, the court found:

> 2. The capacity of the Defendant to appreciate the criminality of his acts, was at the time of the homicide, substantially diminished.
>
> The Defendant contends that his level of intoxication at the time of the murder substantially reduced his ability to appreciate the criminality of his conduct. On the day of the murder, he had been drinking heavily. He drank six beers on his way to the train station with Mr. Hinton and Mr. Smith. He also smoked marijuana. When he returned to Mr. Hinton's home, he continued to drink. Although the Court finds that the Defendant was under the influence of drugs and alcohol at the time of the murder, the greater weight of the evidence does not sustain a finding that his ability to appreciate the criminality of his acts was substantially diminished.
>
> To commit this crime, the Defendant needed a hard object to overpower Mr. Hinton to facilitate his death. The Defendant had to determine that the stone would satisfy his intended purpose. He then had to remove the stone which was embedded in the soft ground. Then it was necessary to lift this heavy object and bring it inside. He had to aim it so it fell on Mr. Hinton's head. He had to fend off Mr. Hinton's efforts to save his life. He was able to think, act, and react in order to commit this murder, despite being under the influence of drugs and alcohol. When he was arrested approximately six days later, he was able to relate with clarity and detail how he killed Mr. Hinton. His only omission as how he stuffed toilet paper down his throat. He was also able to tell of events leading up to and following the murder. These facts prove to the Court that although he was under the influence of alcohol and drugs, his ability to appreciate the criminality of his conduct was not substantially diminished.

> The Court has also considered the Defendant's intoxication and any diminished ability to appreciate the consequences of his acts at the time of the offense as a non-statutory mitigating factor, but has given it little weight.

(RIII 460-462).

Appellant's contention that reversal of his death sentence is mandated, under such precedents as Nibert v. State, 574 So.2d 1059 (Fla. 1990), Knowles v. State, 632 So.2d 62 (Fla. 1993), Morgan v. State, 639 So.2d 6 (Fla. 1994), and/or Spencer v. State, 645 So.2d 377 (Fla. 1994), is simply unpersuasive, and his reliance upon Farr v. State, 656 So.2d 448 (Fla. 1995), and Ferrell v. State, 653 So.2d 367 (Fla. 1995), is simply puzzling. In contrast to the first four named cases, this case does not represent an instance in which a sentencing court failed to afford any weight to unrebutted expert testimony concerning the application of the statutory mental mitigating factors. Rather, this is a case in which the sentencer properly concluded that the evidence relating to defendant's abused childhood, history of substance abuse and alleged intoxication at the time of the murder most properly constituted nonstatutory mitigation, to which weight was afforded. None of the cases cited by Bowles stand for the proposition that such a ruling constitutes legal error or an abuse of discretion, and, indeed, precedent would seem to be to the contrary. See, e.g., Whitfield v. State, 22 Fla.L.Weekly S558, 560 (Fla. Sept. 11, 1997) (trial court's conclusion that evidence of defendant's addiction and depression

constituted only nonstatutory mitigation not grounds for relief); James, 695 So.2d at 1237 (trial court's conclusion that evidence of defendant's drug usage constituted nonstatutory mitigation not an abuse of discretion). In James, this Court reiterated its prior holdings to the effect that the decision whether a mitigating circumstance has been established is within the trial court's discretion, and that, so long as the trial court considers all of the evidence, its subsequent determination of a lack of mitigation will stand absent a palpable abuse of discretion. See also Sireci v. State, 587 So.2d 450, 453-454 (Fla. 1991); Foster v. State, 679 So.2d 747, 755-756 (Fla. 1996). Appellant has failed to demonstrate reversible error, in light of these precedents.

Although Appellant seems to suggest that the trial court erred in its disposition of the evidence concerning Bowles' childhood and prior problems with substance abuse (Initial Brief at 29-30), no abuse of discretion has been demonstrated, in that, as noted, the court expressly found all of these matters to constitute nonstatutory mitigation to which "some" weight was afforded; it should be noted that Bowles was thirty two (32) years old at the time that he committed this crime. Cf. Sochor v. State, 619 So.2d 285, 293 (Fla. 1993).[2] As to the evidence of any intoxication on

[2] Appellant also seems to suggest that the sentencer should have found in mitigation the fact that Bowles had, for years, "traded . . . beatings from a known drunk for the abuse of being a male prostitute from unknown homosexuals." (Initial Brief at 29). Of course, Appellant contended in Point I of the Initial Brief that no evidence of this kind should have been permitted below.

Bowles' part at the time of the murder, the only testimony presented in that regard was from defense witness Smith, who stated that, as of 7:45 p.m., on Wednesday night, Bowles was "drunk" but "coherent" (RX 1133-1134), as well as the testimony concerning Bowles' statements to the authorities, in which he claimed that after the victim had gone to bed, he had stayed up "drinking quart Magnum beers" (RX 1018); Bowles also told Regan that he had consumed one quart of beer on the way back from the train station, after dropping off Smith, and two more at the trailer (RX 1080). There is, of course, no direct testimony as to the exact time of the murder or how much time passed between Bowles' last consumption of alcohol and the killing. The sentencer, however, did not abuse his discretion in concluding that any intoxication suffered by Bowles at the time of the incident, through drugs or alcohol, constituted only nonstatutory mitigation, entitled to little weight, given the evidence, largely from Bowles' statement, of the purposeful conduct which had been required for the murder.

Thus, according to Bowles, he had gone outside to obtain the stepping stone or concrete block to crush the victim's skull, picked it up, carried it inside, rested it on an end table, and then "thought for a few minutes" (RX 1018). Bowles then picked up the stone, proceeded to the victim's bedroom and dropped it on him, as he slept. When the victim awoke and resisted, Bowles manually

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(Initial Brief at 11-19).

strangled him, and then stuffed a rag and toilet paper into his mouth, as the victim continued to struggle, prior to helping himself to the victim's watch, money, car keys and stereo. As Judge Schemer noted, Bowles had sufficient recollection of this incident to be able to recount the details days later to the authorities. Under all of these circumstances, it is clear that, under this Court's precedents, reversible error has not been demonstrated. See, e.g., Banks v. State, 22 Fla.L.Weekly S521, 522-523 (Fla. August 28, 1997) (trial court did not abuse its discretion in finding insufficient evidence of intoxication, so as to constitute mitigation, where, despite evidence of defendant's consumption of alcohol, he displayed no visible signs of drunkeness, and circumstances of murder, including shooting of victim while asleep, showed purposeful conduct); Johnston v. State, 608 So.2d 4, 13 (Fla. 1992) (defendant's self-imposed disability of intoxication through drug abuse properly found not to constitute mitigation, given defendant's purposeful conduct in committing murders); Preston v. State, 607 So.2d at 411-412 (evidence of defendant's drug and alcohol usage on night of murder did not constitute mitigation, given his actions in committing murder). The instant sentence of death should be affirmed in all respects.

Issue IV

THE SENTENCER'S FINDING THAT THE INSTANT HOMICIDE HAD BEEN COMMITTED DURING A ROBBERY AND/OR FOR PECUNIARY GAIN WAS NOT ERROR

Bowles next contends that Judge Schemer erred in finding, and merging, the aggravating circumstances relating to commission of the homicide during a robbery and pecuniary gain, in that, according to Appellant, the taking of the victim's possessions was an "afterthought" and no pecuniary motive for the crime was established; Appellant relies primarily upon Hill v. State, 549 So.2d 179 (Fla. 1989), and Allen v. State, 662 So.2d 323 (Fla. 1995). Appellant made this same argument below, and the court specifically rejected it in the sentencing order:

> The Defendant admits that property of Mr. Hinton was taken but argues that it was an afterthought and not the motivation for the murder. He suggests that his subsequent abandonment of the automobile and watch proves that he was not motivated by pecuniary gain. However, his statements prove otherwise. Agent Dennis Regan of the FBI, testified to the following statements given by the Defendant after his arrest:
>
> > He said that he expected to find -- what he really thought he would find was money on the victim or in the possessions in the trailer. And when he didn't find any, he was almost stuck. He believed that he would flee the City of Jacksonville, but since he had no money he had no place to go.
>
> This evidence proves beyond a reasonable doubt that the murder was done in the course of an attempted robbery and that the motivation was pecuniary gain. It is not a defense to this aggravator that money was not there to be taken.

(RIII 456-457).

Appellee respectfully suggests that the court below correctly rejected this matter, and that the finding of these aggravating circumstances should be affirmed.

As this Court recently held in Jones v. State, 690 So.2d 568, 570 (Fla. 1996), the pecuniary gain aggravator is properly found where the murder was "motivated, at least in part, by a desire to obtain money, property or other gain." See also Fennie, 660 So.2d at 680; Clark v. State, 609 So.2d 513, 515 (Fla. 1992). The evidence presented below indicated that at the time the victim's body was found, his wallet was nearby and papers had been "strewn around everywhere" (RVIII 831). Bowles was seen in possession of the victim's car and Rolex watch after the murder, and stereo equipment had been removed from the trailer. As the trial court noted, Bowles told Agent Regan that he had "expected" to find money on the victim when he killed him (RX 1081). Obviously, this "expectation" indicates a previously-formed pecuniary motive, which existed prior to the actual killing, and the subsequent takings of the victim's possessions were not "afterthoughts." See, e.g., Lawrence v. State, 691 So.2d 1068, 1075 (Fla. 1991) (sentencer not required to accept defendant's contention that he killed convenience store clerk due to anger alone, where defendant had made statements indicating pecuniary motive); Wuornos v. State, 644 So.2d 1012, 1019 (Fla. 1994) (sentencer not required to accept defendant's contention that taking of victim's property was an

"afterthought," where State prevailed on pecuniary gain theory and State's theory was more consistent with the facts of the case).

Further, it would not be reasonable to believe that the taking of the victim's vehicle was simply to facilitate escape, given the fact that Bowles utilized the car for several days in Jacksonville Beach, cf. Allen, supra, and the fact that he later abandoned it does not contradict his prior intent. See, e.g., Porter v. State, 429 So.2d 293, 296 (Fla. 1983) (fact that defendant later gave away, threw away or abandoned property stolen from murder victims did not preclude finding of pecuniary gain factor; no requirement that defendant "profit" from murders); Wyatt v. State, 641 So.2d 355, 359 (Fla. 1994) (finding that murder occurred during robbery proper, where defendant was seen driving victim's car on day that body was found, even though such car was later abandoned). Hill is distinguishable *sub judice*, and the fact that the victim in this case may not have actually possessed the wealth which Bowles "expected" to find is simply not determinative of the applicability of these aggravating circumstances. See, e.g., Shellito v. State, 22 Fla.L.Weekly S554, 556 (Fla. Sept. 11, 1997) (finding of attempted murder/pecuniary gain factor proper, despite claim that defendant killed victim after knowing that he did not possess any money). The finding of these merged aggravating circumstances was not error, and the instant sentence of death should be affirmed.

Issue V

THE SENTENCER'S FINDING OF THE HEINOUS, ATROCIOUS OR CRUEL AGGRAVATING CIRCUMSTANCE WAS NOT ERROR

Appellant next contends that Judge Schemer erred in finding that the instant homicide was heinous, atrocious or cruel, under §921.141(5)(h), in that the State allegedly failed to demonstrate that Bowles "intended" to torture the victim or that Hinton had a "foreknowledge of his impending death." (Initial Brief at 37). Citing to such precedents as Rhodes v. State, 547 So.2d 1201 (Fla. 1989), and Herzog v. State, 439 So.2d 1372 (Fla. 1983), Bowles maintains that this aggravating factor was not shown, as, "the evidence shows that Hinton, who had been drinking and smoking the evening of his death, literally never knew what hit him, and he lost consciousness, if he ever fully awoke from his sleep, at most only seconds later." (Initial Brief at 38). Appellee respectfully contends that the above is contradicted by the record, and that the sentencer's finding of this aggravating circumstance is in accord with this Court's precedent.

In finding this aggravating circumstance, Judge Schemer found as follows:

> The crime for which the Defendant is to be sentenced was especially heinous, atrocious, or cruel.
>
> While Mr. Hinton was sleeping, the Defendant, a guest, went outside the tailer and lifted from the ground a 40 pound cement stepping stone and brought it inside. He placed the stepping stone on a table in the living room area, sat down, and gathered his thoughts. He then entered Mr. Hinton's bedroom and dropped

> the cement stepping stone on Mr. Hinton's face fracturing his skull. Mr. Hinton sustained a facial fracture which extended on the right side across his cheek to the jaw. Despite the force of this blow, Mr. Hinton did not die nor lose complete consciousness. In an effort to save his life, Mr. Hinton struggled with the Defendant. The medical examiner observed on Mr. Hinton's body five broken ribs, scrapes and abrasions on his right forearm, linear abrasions on the inside of his arm, and more abrasions on the outside of his left knee. These findings corroborate the Defendant's statement that Mr. Hinton continued to struggle for his life after the Defendant dropped the 40 pound stone on his face.
>
> The findings of the medical examiner also corroborate the Defendant's statement that he then choked Mr. Hinton with his hands. Mr. Hinton had hemorrhaging on the right side of his neck. A u-shaped bone found at the base of the tongue, and cartilage underneath his adam's apple, were fractured. Toilet paper had been stuffed down his throat and a rag had been placed over the paper which protruded from his mouth. The cause of death was asphyxia, although it cannot be determined whether Mr. Hinton asphyxiated due to being strangled, having toilet paper and a rag stuffed down his throat, or both. However, it is not necessary to make this determination in order to find that this murder was consciousless, pitiless, and cruel. This aggravating circumstance was proved beyond a reasonable doubt.

(RIII 457-458) (footnote omitted).

In light of these findings, it is clear that error has not been demonstrated.

Appellant's reliance upon Herzog and Rhodes is completely misplaced, in that no evidence was presented below to the effect that the victim in this case was unconscious or intoxicated during

Bowles' attack upon him. As to the latter, defense witness Smith expressly testified that the victim had not been drinking at the time that he encountered him, inasmuch as he was the designated driver (RX 1139), and Bowles never offered any evidence to the effect that Mr. Hinton was intoxicated at the time of the fatal attack. As to the former, the evidence is clear that the victim was awakened, rather than rendered unconscious, by the attack with the cement block. Although Bowles did state that Hinton struggled "a little", during the strangulation (RX 1018), the judge was not obliged to accept this self-serving account, in light of the evidence presented as to the defensive wounds suffered by the victim - five fractured ribs and abrasions to the arm and knee; the medical examiner expressly testified that these wounds were consistent with a struggle (RIX 910-911). Likewise, although the victim could have lost consciousness in less than a minute if pressure had been consistently applied to his windpipe, Dr. Arruza testified that the process could have taken as long as twenty minutes, should a struggle have ensued; the witness affirmatively stated that such struggle did in fact ensue (RX 911, 918-919). Certainly, the presence of the rag and toilet paper stuffed far into the victim's throat suggests that he resisted Bowles' attempts to murder him up until the last, and was conscious of his impending doom. Under this Court's precedent, this aggravating circumstance was unquestionably properly found. See, e.g., James, 695 So.2d at 1235 (HAC factor properly found where victim manually strangled and

was conscious of impending death); Gudinas, 693 So.2d at 965-966 (record provided sufficient evidence to support rejection of defendant's claim that victim was unconscious during fatal assault, given presence of defensive wounds, despite additional presence of alcohol in victim's bloodstream and fatal head injury); Orme v. State, 677 So.2d 258, 268 (Fla. 1996) (strangulation creates a *prima facie* case for HAC aggravating factor); Bogle v. State, 655 So.2d 1103, 1109 (Fla. 1995) (where victim murdered by repeated blows to the head with piece of cement, court not obliged to accept defendant's claim that he did not intend to cause unnecessary suffering); Jones v. State, 648 So.2d 669, 679 (Fla. 1994) (factor properly found in drowning murder, given presence of victim's fractured ribs, indicative of premortem defensive wounds and struggle). The instant sentence of death should be affirmed in all respects.

Issue VI

DENIAL OF APPELLANT'S REQUESTED JURY INSTRUCTION REGARDING THE HAC AGGRAVATING FACTOR WAS NOT ERROR

As his next claim, Bowles contends that his death sentence should be vacated because the court below denied his requested jury instruction to the effect that the State was required to prove that Bowles had intended and desired to murder the victim in an outrageously depraved and especially painful manner. Appellant maintains that this instruction was necessary because, without it,

the jury would not have had an adequate vehicle to consider his alleged intoxication at the time of the offense, and particularly how his "diminished capacity" could prevent his ability to form the requisite mental state for this aggravating circumstance. Despite opposing counsel's vehemence on this subject, it is clear that reversible error has not been demonstrated.

Defense counsel below did indeed request an additional jury instruction to the effect quoted by Bowles (RII 374), and, after hearing argument of counsel (RV 919-921), the circuit court denied the request, instead instructing the jury in accordance with the standard instruction approved by this Court in Hall v. State, 614 So.2d 473, 478 (Fla. 1993) (RXI 1352). Defense counsel below, however, never contended that this particular instruction was necessary in order to allow the jury to fully consider mitigation, and Appellee would contend that this portion of Appellant's argument on appeal is procedurally barred. See, e.g., Terry, supra; Steinhorst, supra; Rodriguez v. State, 609 So.2d 493, 499 (Fla. 1992) (the specific legal ground upon which a claim is based must be raised at trial and a claim different from that raised will not be heard on appeal); Bertolotti v. State, 565 So.2d 1343, 1345 (Fla. 1990) (same). Additionally, it is axiomatic that the trial court does not err in denying a proposed instruction which does not accurately state the law. As this Court held in Orme, supra, in rejecting a comparable claim of error, a defendant's mental state "figures into" the sentencing equation solely as a mitigating

factor, as opposed to a basis for rejecting an aggravating circumstance. See, e.g., Michael v. State, 437 So.2d at 142 (a defendant's mental or emotional problems do not affect the application or applicability of the HAC aggravating factor, but rather the weight afforded to it); Spencer v. State, 691 So.2d 1062, 1064 (Fla. 1996) (no merit to defendant's claim that his mental impairments negated any intent to inflict pain or suffering upon the victim, so as to preclude application of the aggravating factor). Further, despite the absence of the specific requested jury instruction, defense counsel did argue to the jury that this aggravating factor was inapplicable due at least in part to Bowles' intoxication (RXI 1321-1328), and the jury was told that they could consider in mitigation any factor "in the defendant's background that would mitigate against imposition of the death penalty." (RXI 1354). As argued in Point III, *infra*, the sentencing judge fully considered all proffered mitigation. No relief is warranted as to this claim, and the instant sentence of death should be affirmed in all respects.

Issue VII

THE INSTANT SENTENCE OF DEATH IS PROPORTIONATE

Bowles next contends that his sentence of death is disproportionate, and states that, when this Court reviews the instant sentence, it should look to its "alcoholic haze genre" of

precedents (Initial Brief at 46), as the most persuasive. For analogy, Appellant cites to Voorhees v. State, 22 Fla.L.Weekly S357 (Fla. June 19, 1997), Sager v. State, 22 Fla.L.Weekly S381 (Fla. June 26, 1997), Kramer v. State, 619 So.2d 274 (Fla. 1993), Nibert, supra, Knowles, supra, and White v. State, 616 So.2d 21 (Fla. 1993), and maintains that this case is simply one involving a "lifelong alcoholic" who murdered "his drinking buddy and benefactor," additionally contending that "the uncontradicted evidence shows Bowles and Hinton as being intoxicated." (Initial Brief at 49, 47, n.7). Because, in Appellant's view only one aggravating circumstance exists, and allegedy substantial mitigation, the death sentence should be vacated. Appellant's arguments are simply untenable, and the cases he relies upon are clearly distinguishable.

As previously demonstrated, this is not a "single aggravator" case. Bowles murdered his own unlucky "benefactor," so that he could steal various items which he coveted, *i.e.*, Hinton's Rolex watch, his Cadillac, his stereo and whatever cash he happened to possess, and Appellant murdered this benefactor in a particularly cold-blooded and pitiless fashion; Bowles smashed the victim's face with a 40 to 50 pound cement block, and then manually strangled him as he struggled for his life, ultimately shoving toilet paper and a rag down his throat. Further, this was not Bowles' first crime of violence; in 1982, he brutally beat and sexually assaulted a

woman with whom he had been living, and a witness testified to having seen bruises around her neck "where you could see finger impressions." (RX 1085). In contrast to the cases cited by Bowles, this was not a murder which occurred "spontaneously" "for no discernable reason," see Kramer, supra. Rather, it was one which occurred for purposes of pecuniary gain (Bowles having stated he had "expected" to find money on the victim), and, likewise, according to Bowles' own statement, the defendant "thought for a moment" before he initiated the murderous attack with the stepping stone. The aggravation in this case is considerable, to say the least.

By contrast, the mitigation is not, and opposing counsel grossly overstates any evidence presented as to the intoxication of either the defendant or the victim. As to the latter, the most that can be said is that the victim joined Appellant and Richard Smith in smoking two to three "joints" between 6:00 p.m. and 7:45 p.m., on Wednesday night (RX 1132); Smith expressly testified that Hinton did not consume any alcohol at this point, and Bowles never offered any testimony to this effect (RX 1139). Thus, evidence of the victim's "intoxication" is hardly "uncontroverted," and this case is clearly distinguishable from those in which evidence has been presented as to the victim's blood alcohol level. See, e.g., Voorhees (victim had .24 blood alcohol level); Sager (same); Kramer (victim had .23 blood alcohol level). As to Bowles himself, the only evidence presented below was Smith's testimony that, when he

last saw Appellant at 7:45 p.m., he had been "drunk" but "coherent" (RX 1133-1134), and Bowles' own statements that, after returning to the trailer, he had consumed additional beer (RIX 1018; RX 1080). Significantly, Appellant himself never offered any statement to the effect that he had been intoxicated at the time of the murder, cf. Voorhees (defendant makes statement that he was "pretty drunk"), nor did the defense present any expert testimony concerning Bowles' alleged intoxication at the time of the crime and/or any longstanding substance abuse problem. Cf. Nibert (expert testimony presented that statutory mitigating circumstance existed due to defendant's alcohol use); White (expert testimony presented concerning defendant's problems with cocaine and marijuana); Knowles (expert testimony presented concerning defendant's neurological impairments and intoxication). It should be noted that defense counsel *sub judice* asked for, and received, the appointment of a mental health expert, Dr. Elizabeth McMahon, but chose not to utilize her testimony (RI 20-21; RIII 495-497). As previously argued, Bowles' purposeful conduct at the time of the murder is inconsistent with any claim of intoxication, see Johnson, supra, and this Court has rejected claims of disproportionality in cases in which significantly more substantial evidence has been presented regarding the alleged intoxication of the defendant, victim or both. See, e.g., Merck v. State, 664 So.2d 939, 943 (Fla. 1995) (death penalty not disproportionate in case in which

defendant stabbed victim, despite evidence that both had been intoxicated); Whitton v. State, 649 So.2d 861, 867 (Fla. 1994) (death penalty not disproportionate, despite victim's blood alcohol level of .34, where defendant beat and stabbed victim to death and defendant's alcoholism was found as nonstatutory mitigation).

While Appellee continues to question whether it was ever demonstrated that, as opposing counsel represents, Bowles was a "lifelong alcoholic," it must be noted that the sentencing judge did in fact find as nonstatutory mitigation Bowles' substance abuse problems, and specifically afforded weight to them (RIII 460-462); it should further be noted that Bowles' mother testified that she had only seen him intoxicated once (RX 1163), and that the only testimony presented concerning Bowles' drug or alcohol use between the time he left home at thirteen and the time that he committed the instant murder at age thirty-two, was that from Ginger Moye who did not meet him until 1992 (RIX 934). The most significant mitigation *sub judice* was that found by the sentencer below, relating to Bowles' unhappy early life and the abuse which he suffered at the hands of his stepfathers; the trial court also found as nonstatutory mitigation Bowles' assistance in the prosecution of a prison rape, as well as his confession and plea of guilty in this case (RIII 467-468). Although the judge afforded weight to testimony concerning Bowles' early life, he did note that Bowles' mother and brother had "overstated" the amount of abuse and

violence in the home, and further observed that Appellant's own "uncontrollable conduct may have sparked some of the violence and abuse." (RIII 464); for all intents and purposes Appellant's mother and brother had not seen him since he left home in 1975 at age thirteen (RX 1157, 1162, 1184).

In light of the significant aggravating circumstances found in this case, no reasonable sentencer would have imposed a life sentence, and death is the proportionate and appropriate penalty. See, e.g., Lawrence v. State, 22 Fla.L.Weekly S524, 525 (Fla. August 28, 1997) (death penalty proportionate, in light of three strong aggravating circumstances, which outweighed nonstatutory mitigation); Kimbrough v. State, 22 Fla.L.Weekly S510 (Fla. August 21, 1997) (death penalty proportionate where three aggravating circumstances outweighed nonstatutory mitigation relating to defendant's unstable childhood and alcoholic father); Johnson v. State, 660 So.2d 637, 648 (Fla. 1995) (death penalty proportionate where three strong aggravators outweighed fifteen nonstatutory mitigators); Finney, 660 So.2d at 685 (same, where five nonstatutory mitigators found). Finally, this case is factually comparable to Castro v. State, 644 So.2d 987 (Fla. 1994), in which the defendant, who had previously been convicted of a crime of violence and apparently was also a heavy drinker, murdered the victim, through strangulation, so that he could steal his car, as well as to Gorby v. State, 630 So.2d 544 (Fla. 1993), in which the defendant, who had a prior conviction for a crime of violence and

who was on parole, beat to death the elderly gentlemen who had befriended him, so that he could steal his car and possessions. Reversible error has not been demonstrated, and the instant sentence of death should be affirmed in all respects.

Issue VIII

THE CIRCUIT COURT DID NOT ERR IN UTILIZING FLORIDA'S STANDARD JURY INSTRUCTION ON THE HEINOUS, ATROCIOUS OR CRUEL AGGRAVATING CIRCUMSTANCE

Bowles next contends that his sentence of death must be reversed, because the trial court utilized the current standard jury instruction on the heinous, atrocious or cruel aggravating circumstance. Although Appellant concedes that the instruction *sub judice*, is identical to that approved by this Court in Hall, supra (Initial Brief at 50), he nevertheless contends that this Court should reconsider the issue. Appellee disagrees, and would maintain that Appellant has failed to demonstrate any reason why this Court should recede from Hall.

In the years since Hall has been decided, this Court has consistently adhered to its conclusion that the current standard jury instruction on this aggravating circumstance is not violative of Espinosa v. Florida, 505 U.S. 112, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992), or Shell v. Mississippi, 498 U.S. 1, 111 S.Ct.313, 112 L.Ed.2d 1 (1990). See, e.g., Walker, 22 Fla.L.Weekly at S543; Rolling v. State, 695 So.2d 278, 296-297 (Fla. 1997); Merck v. State, 664 So.2d at 943; Bogle, 655 So.2d at 1109. Appellant has failed to demonstrate that all of the above precedents were wrongly decided, and under the facts of this case, see Point V, *infra*, it is clear that any deficiency in this jury instruction would be harmless under State v. DiGuilio, 491 So.2d 1129 (Fla. 1986), and

Sochor v. Florida, 504 U.S. 527, 112 S.Ct. 2114, 119 L.Ed.2d 346 (1992), as this murder was truly heinous, atrocious or cruel "under any definition." Cf. Thompson v. State, 619 So.2d 261, 267 (Fla. 1993). No relief is warranted as to this claim, and the instant sentence of death should be affirmed in all respects.

Issue IX

THE CIRCUIT COURT DID NOT ERR IN UTILIZING FLORIDA'S STANDARD JURY INSTRUCTION ON THE COLD, CALCULATED AND PREMEDITATED AGGRAVATING CIRCUMSTANCE

Bowles next contends that his sentence of death must be reversed because the judge below instructed the jury on the definition of the CCP aggravating factor in accordance with this Court's decision, Jackson v. State, 648 So.2d 85, 95, n.8 (Fla. 1994), which, according to opposing counsel, is "unconstitutionally vague and misleading." (Initial Brief at 54). Appellant specifically maintains that the definition of "heightened premeditation" promulgated by this Court is "meaningless" (id. at 55), and states that he is entitled to a new sentencing proceeding. Appellee disagrees.

The State initially contends that this claim is not preserved for appellate review. Although Bowles filed a pretrial motion requesting that the jury not be instructed on this aggravating factor, he made no specific attack upon the standard jury instruction at that time (RI 99-101). Similarly, while he filed a pretrial motion attacking the constitutionality of the CCP factor,

he included no attack upon the standard jury instruction thereupon (RI 110-136), although he had included a comparable attack upon the HAC instruction in his motion attacking that factor (RI 171-188). The record reflects that Bowles' counsel interposed no contemporaneous objection to the standard instruction on vagueness grounds at the time of the charge conference (RX 1229-1245), and, while counsel had proposed an alternative instruction on this factor (RII 375), it cannot be said that such proposed instruction would satisfy the concerns now expressed by Bowles' appellate counsel; likewise, at the time that trial counsel presented argument as to this proposed instruction, he never advised the trial court that failing to utilize such would result in an unconstitutionally vague jury instruction (RV 921-922).

The purpose of the contemporaneous objection rule is, of course, to put the trial court on notice that an error may have been committed and to provide that court with an early opportunity to correct it. See Castor v. State, 365 So.2d 701, 703 (Fla. 1978). Here, no fair reading of the record would support the conclusion that Bowles put Judge Schemer "on notice" that he believed that the standard jury instruction on this aggravating circumstance was unconstitutionally vague, and, accordingly, Appellant has waived this point. See, e.g., Street v. State, 636 So.2d 1297, 1303 (Fla. 1994) (defendant did not preserve constitutional challenge to standard jury instruction where his proposed instruction was no better than that which he attacked);

Gamble v. State, 659 So.2d 242, 245 (Fla. 1995) (contemporaneous objection on vagueness grounds necessary to preserve claim that standard jury instruction on CCP aggravating factor unconstitutionally vague). In any event, this claim is without merit, see Walker, 22 Fla.L.Weekly at S543 (challenge to Jackson instruction rejected), and any error would be harmless under State v. DiGuilio, supra, given the other evidence in aggravation, the relatively insignificant evidence in mitigation, and the fact that the record contains substantial evidence in support of this aggravating factor. See, e.g., Banks, 22 Fla.L.Weekly at S522. No relief is warranted as to this claim, and the instant sentence of death should be affirmed in all respects.

Issue X

BOWLES LACKS STANDING TO ATTACK THE CONSTITUTIONALITY OF THE FELONY MURDER AGGRAVATING CIRCUMSTANCE

As his final claim for relief, Bowles contends that his death sentence must be reversed because the felony murder aggravating circumstance, under §921.141(5)(d), is unconstitutional, and its application to him has rendered his death sentence likewise unconstitutional. The gist of Appellant's argument is apparently that this aggravating circumstance is "automatic", because it is found in every instance in which a defendant convicted of felony murder proceeds to a capital sentencing proceeding. Although Bowles did, indeed, raise this matter below (RI 138-147), Appellee

respectfully contends that there are at least three compelling reasons why he merits no relief at this time.

First of all, Bowles was charged with first degree premeditated murder, as well as a separate count of robbery (RI 6). While he did enter a plea of guilty to the murder charge, he refused to do so to the robbery charge, which was ultimately *nolle prossed* (RVI 1015). Although the State included as part of the factual basis for the plea the fact that the murder had been committed during a robbery (RIV 584-593), the prosecutor still was obliged to present evidence at the penalty phase to both the judge and jury to prove beyond a reasonable doubt the existence of this aggravating factor, and there was nothing "automatic" about its finding; this circumstance bears absolutely no similarity to one in which a defendant has proceeded to trial and has been separately convicted of a felony. Further, although this aggravating circumstance was found, it was merged with that relating to pecuniary gain (RIII 456-457), and, indeed, the jury was even instructed that they had to consider these two aggravating circumstances together (RXI 1351-1352). Certainly, Bowles cannot contend that every homicide "automatically" derives from a pecuniary motive, and he simply lacks standing to maintain this attack. Finally, to the extent that this Court disagrees, Appellee would note that this Court has consistently rejected this claim. See, e.g., Blanco v. State, 22 Fla.L.Weekly S575, 576 (Fla. Sept.

18, 1997); Banks, 22 Fla.L.Weekly at S522; Sims, 681 So.2d at 1118; Johnson, 660 So.2d at 647-648 (Fla. 1995); Hunter v. State, 660 So.2d 244, 252-253 (Fla. 1995); Taylor v. State, 638 So.2d 30, 32 (Fla. 1994). No relief is warranted as to this claim, and the instant sentence of death should be affirmed in all respects.

CONCLUSION

WHEREFORE, for the aforementioned reasons, the instant conviction and sentence of death should be affirmed in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to David Davis, Assistant Public Defender, Leon County Courthouse, Fourth Floor North, 301 South Monroe Street, Tallahassee, FL 32301, this 31st day of December, 1997.

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RICHARD B. MARTELL
Chief, Capital Appeals