IN THE SUPREME COURT OF FLORIDA

AKEEM MUHAMMAD,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

_____/

Case No. 90,030
L.T. Case No. 95-12739 CF 10A
Broward County

ANSWER BRIEF OF APPELLEE

ON APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTEENTH JUDICIAL CIRCUIT,
IN AND FOR BROWARD COUNTY, FLORIDA

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PRELIMINARY STATEMENT

Appellant, AKEEM MUHAMMAD, was the defendant in the trial court below and will be referred to herein as “appellant” or "defendant." Appellee, the State of Florida, was the prosecution in the trial court below and will be referred to herein as “appellee” or "the State."

The following symbols will be used:

IB = Appellant’s Initial Brief

SB = Appellant’s Supplemental Initial Brief

R = The pleadings portion of the record on appeal

SR = Supplemental Record

TV = Transcript portion of the record on appeal by volume, followed by the appropriate page number and at times by the line number on the page, i.e. TV 20, 155/20 refers to volume 20, page 155, line 20.

STATEMENT OF THE CASE AND FACTS

The State accepts Appellant's Statement of the Case and Facts to the extent that it represents an accurate non-argumentative recitation of the procedural history and facts of this case, subject to the additions, corrections, clarifications, and/or modifications which follow and which are set forth in the body of this brief:

In regard to the first issue, appellant states that immediately after the in-chambers conference, state witness Aftab Katia took the witness stand and identified appellant as the perpetrator although he had not previously identified appellant (IB 21). It is misleading to indicate that Mr. Katia did not identify appellant before taking the witness stand. Mr. Katia testified that prior to the shooting he had previously seen appellant in his store (TV IX, 1701/6-12). On the day of the incident Mr. Katia gave a statement to the police and although he did not know appellant’s name he nonetheless knew the perpetrator and had seen appellant before in the area (TV IX, 1712/1-1715/6).

SUMMARY OF ARGUMENT

IN RESPONSE TO INITIAL BRIEF OF APPELLANT

POINT I

This issue was not preserved for appellate review. Nonetheless, the trial court did not abuse its discretion by conducting an in-chambers interview of state witness Aftab Katia, who was fearful of testifying due to having received threats, because his presence would not have contributed to the fairness of the trial. Mr. Aftab's anticipated testimony was not discussed and the conference was transcribed. The only matters discussed related to the threats received by Mr. Aftab.

POINT II

The testimony of Sandra DeShields regarding the threat made on her life by appellant was relevant to prove appellant's motive for confronting and killing the victim. Therefore, the trial court did not abuse its discretion in admitting this testimony.

POINT III

This issue has not been preserved for appellate review. However, the trial court did not abuse its discretion in overruling appellant's objection to Mrs. Swanson's testimony that the victim told her that he was going to the courthouse to get an occupational license. This was merely background information and was not

offered for proof of the matter asserted. The comment was also quite harmless in light of the eyewitness testimony.

POINT IV

This issue has not been preserved for appellate review. It was not error for the trial court to conduct portions of voir dire, which pertained to the general jury qualifications, outside the presence of the defendant, because this portion of voir dire is not a critical stage in the proceedings.

POINT V

The trial court did not abuse its discretion by removing Mrs. Ranieri for cause, in that she repeatedly indicated that she did not believe in the death penalty and that the only situations that she might be able to vote in favor of the death penalty would be cases involving serial killers or like the Oklahoma bombing. This case involved neither, so Mrs. Ranieri could not have followed the law as instructed by the trial court. The only time Mrs. Ranieri said she could follow the law was in response to a vague question regarding the use of the electric chair in Florida. She never, however, changed her original position toward the death penalty.

POINT VI

The portion of the State's closing argument, that the

eyewitnesses' perception of the events would have been influenced by *inter alia* the fear and anxiety they were experiencing much like the fear anger and terror experienced by the victim, was a fair comment based on the record facts - Debra Holdren testified that she saw the terror on the victim's face and how frightened he was - and if error was not so egregious as to warrant reversal. The prosecutor's argument, that pictures in a photographic lineup should be selected in such a manner that each of the individuals do not look exactly or almost the same, was also a fair comment on this record, in that Detective Walley testified that to be fair he selected pictures of people with hair variations. Finally, the State's argument that Officer Russell had been given the tag number of the getaway vehicle was also a fair comment on his testimony that when he pulled in behind the suspect vehicle, he called for and obtained additional specific information that confirmed that the vehicle he was following was in fact the suspect vehicle.

POINT VII

There is competent substantial record evidence to support a finding of the "grave risk" aggravating circumstance. The evidence shows that appellant fired numerous shots directly at the Holdren vehicle, which contained four persons. Further, appellant shot twice attempting to hit Curtis Ream. All of these individuals were

placed in great risk of death in addition to the victim.

POINT VIII

Since the statement made by Curtis Ream to Detective Walley was admitted through Detective Walley, and appellant had the opportunity to cross-examine Detective Walley, the statement was admissible in the *Spencer* hearing. Even if it was error to admit, it would be harmless and not amount to fundamental error, because even without the testimony of Mr. Ream the four occupants of the Holdren vehicle were placed in great risk of death by appellant. Mr. Ream is therefore unnecessary to fulfill the requirements of the "great risk" aggravating circumstance.

POINT IX

The record does not show that the trial court refused to consider any mitigation. To the contrary, the sentencing order indicates that the trial court reviewed the PSI and the evidence at trial in determining what mitigation existed. The record shows that the trial court performed a thoughtful and deliberate weighing of the aggravating and mitigating circumstances. The trial court was not obligated to mention in the sentencing order all mitigation in the record, and the fact that he did not mention some possible mitigating circumstances more likely shows that he determined that the evidence did not support a finding of the existence of these

circumstances.

POINT X

Appellant has not provided any adequate reason for this Court to recede from *Hamblen v. State*, 527 So. 2d 800 (Fla. 1988).

POINT XI

The trial court did not abuse its discretion in denying appellant's pretrial motion to compel disclosure of mitigating evidence. To the extent that this motion was a general request for *Brady* material, the decision of what information must be disclosed rests with the State. Appellant has not demonstrated any *Brady* violation, in that the information which he alludes to was in the PSI, all of which appellant was aware of and which was turned over to appellant. To the extent that the motion was a request for discovery, the State is not obligated under Fla. R. Crim. P. 3.220 to provide all information regarding mitigating circumstances.

POINT XII

Death is proportionate. Appellant took two loaded guns in search of Sandra DeShields, who had stolen his money. Appellant went to the victim and asked him where she was located. The victim apparently saw the weapons and started running away. Appellant chased after him, shooting him as they ran, and when the victim finally fell to the ground in the middle of the street with four

gunshot wounds, appellant fired two additional shots at close range into the victim's head. Appellant has a significant criminal history, including two prior attempted murders. One where appellant robbed a victim in a parking lot and shot him with a sawed-off shotgun. The other where appellant robbed and shot a victim who was waiting for a cab in front of his house. Appellant also put at least five people, in addition to the victim, at great risk of death. The mitigation was minimal, most of which was given little weight, except for appellant's difficult childhood, which was given some weight.

POINT XIII

Although appellant waived an advisory jury recommendation, the trial court has the discretion of still requiring one. Appellant has failed to demonstrate how the trial court abused its discretion by requiring the advisory jury recommendation.

POINT XIV

The two innocuous comments made by the prosecutor during the penalty phase related entirely to the guilt phase evidence, were harmless in nature and were not so outrageous as to taint the validity of the jury's recommendation.

POINT XV

This issue was not preserved for appellate review. Be that as it may, the trial court did not abuse its discretion by instructing the jury that appellant had decided to represent himself in the penalty phase and that he still would have to follow the rules of evidence and procedure. Appellant argues that the trial court abused its discretion by acting on a misunderstanding of the law (that the panel had a right to know that appellant had discharged penalty-phase counsel and he had a duty to tell them). However, appellant gives no legal support for this conclusion. Appellant has failed in his burden of demonstrating prejudicial error.

POINT XVI

The sentencing order shows that the trial court did not feel bound to follow the jury's advisory recommendation, and that the trial court carefully performed his own independent weighing of the aggravating and mitigating circumstances.

IN RESPONSE TO APPELLANT'S SUPPLEMENTAL INITIAL BRIEF

POINT I

This issue has not been preserved for appellate review. The record before this court is not sufficient to show that the 1991 presentence investigation report was prepared in violation of Fla. R. Crim. P. 3.711. Moreover, even if it were prepared in violation of the rule, appellant has failed to demonstrate any resulting

prejudice.

POINT II

Assuming that appellant's family relationships and medical records are normally protected under Article I, § 23, Fla. Const., the State nonetheless has a compelling interest in those records for sentencing purposes and Fla. Stat. § 921.231 furthers that interest in the least intrusive means.

POINT III

This issue has not been preserved for appellate review. Fla. Stat. § 921.231 is not void for vagueness, however, because its language is sufficiently certain so that a person of common intelligence need not necessarily guess at its meaning or differ as to its application.

POINT IV

To the extent that issue alleges that Fla. Stat. § 921.231 is unconstitutional as applied, it has not been preserved for appellate review. To the extent that this issue alleges that this statute is facially unconstitutional, the argument in Point II above is incorporated by reference.

POINT V

Although juvenile records are confidential in nature, the Department of Corrections nonetheless is entitled to access to

these records for purposes of preparing the presentence investigation report.

POINT VI

Appellant merely asserts that based on his prior arguments the subject records may not be used by his counsel in argument on appeal. Based on the above, this is an incorrect assertion.

POINT VII

Appellant merely asserts that based on his prior arguments this Court may not consider the information contained in the subject records. Based on the above, this is an incorrect assertion.

ARGUMENT

IN RESPONSE TO INITIAL BRIEF OF APPELLANT

POINT I

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION BY CONDUCTING AN IN-

CHAMBERS INTERVIEW OF A STATE WITNESS WITHOUT DEFENDANT'S PRESENCE.

Appellant argues that his due process rights were violated because he was not present at the in-chambers interview with state witness Aftab Katia.[1] However, appellant did not raise a contemporaneous objection to his exclusion, and absent fundamental error the failure to object at the trial level precludes consideration of this point on appeal. *Gudinas v. State*, 693 So. 2d 953 (Fla. 1977). Therefore, this issue should not addressed by this Court, unless the alleged error amounts to fundamental error. Granted, a defendant has a constitutional right to be present at the critical stages of his trial. *Garcia v. State*, 492 So. 2d 360 (Fla. 1986). However, due process is offended only when the defendant's presence has a reasonably substantial relationship to the fullness of his or her opportunity to defend against the charge. *Synder v. Massachusetts*, 291 U.S. 97, 54 S.Ct. 330, 78 L.Ed. 674 (1934). In other words, a defendant has a due process right to be present, if his presence would contribute to the

[1] Mr. Katia requested the conference with the trial court without the defendant's presence, because Mr. Katia had received threats and was fearful of testifying (TV IX, 1677/22-1678/3). Defense counsel was present during this conference, and this conference was transcribed (TV IX, 1678/20-1695/3). During this conference, Mr. Katia gave no indication of what his substantive testimony would be.

fairness of the proceedings. *Rose v. State*, 617 So. 2d 291, 296 (Fla.); *cert. denied*, 510 U.S. 903 (1993). Further, fundamental error is error which reaches down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error. *Archer v. State*, 673 So. 2d 17 (Fla.), *cert. denied*, 117 S.Ct. 197 (1996).

In the present case the trial court made no rulings during the in-chambers discussion. Furthermore, the trial court received no evidence and was not told the anticipated content of the witness's substantive testimony. Defense counsel was present and had every opportunity to question the witness. The only matters that were discussed related to threats received by the witness and his resulting reluctance to testify. Not only did this conference have no impact on appellant's ability to prepare his defense, it had no impact on the verdict or on the fairness of the proceedings against appellant. Therefore, even if it were error not to have appellant present, it would not amount to fundamental error.

Be that as it may and based in part on the above, it was not error for appellant not to have been present during the interview. In support of his argument, appellant cites only to federal cases

which are not directly on point.[2] However, *United States v. Adams*, 785 F.2d 917 (11th Cir.), *cert. denied Jennings v. State*, 479 U.S. 858, *cert. denied*, 479 U.S. 1009 is directly on point and holds that an *ex parte* conference to discuss threats against a witness is proper so long as it is transcribed and the witness's substantive testimony is not discussed.[3] Both these protective procedures were followed by the trial court in this matter; therefore, due process was not offended as a result of appellant's absence.

Appellant also argues that his absence from this conference denied him his right to consult with counsel. Similar to due process guarantees, the constitutionally protected right to counsel applies to the "critical" states of proceedings. *Michigan v. Jackson*, 475 U.S. 625, 106 S.Ct. 1404, 89 L.Ed.2d 631 (1986). Also similar to the above due process argument, a critical stage for

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[2] In *Synder v. Massachusetts*, 291 U.S. 97, 54 S.Ct. 330, 78 L.Ed. 674 (1934) the Court found that due process did not require the defendant's presence at a jury view, because there was nothing he could do if he were there and there was almost nothing to be gained. Based on the same rationale, in *Kentucky v. Stincer*, 482 U.S. 730, 107 S.Ct.2658, 96 L.Ed.2d 631 (1987), the Court found that due process did not require the defendant's presence at a competency hearing because no question was asked regarding the substantive testimony to be given by the witness. In *United States v. Gagnon*, 470 U.S. 522, 105 S.Ct. 1482, 84 L.Ed.2d 486 (1985) the Court found that the defendant's presence was unnecessary at an *en camera* discussion with a juror because he could have done nothing and there was little to be gained.

[3] See also *LaChappelle v. Moran*, 699 F.2d 560 (1st Cir. 1983).

purposes of analyzing one's right to counsel, is one where counsel's absence might derogate from the accused's right to a fair trial. *Estelle v. Smith*, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981). Based on the above argument, the fact that appellant was not present at the in-chambers meeting had no impact on the fairness of appellant's trial. Moreover, appellant cites to cases, which are again not on point;[4] however, *United States v. Arroyo-Angulo*, 580 F.2d 1137, 1143-44 (2d Cir. 1978) is on point and holds that an *ex parte* conference between a trial judge and a witness does not violate a defendant's right to counsel. It should be noted that in *Arroyo-Angulo*, defense counsel was not even permitted in the conference, while in this case defense counsel not only attended he was invited to ask questions (TV IX, 1693/24-169/1).

Even if this in-chambers interview were considered a critical state of the proceeding, appellant's absence would be harmless beyond a reasonable doubt pursuant to *Garcia v. State*, 492 So. 2d 360, 364 (Fla. 1986). Mr. Katia put appellant at the scene with a weapon; however, Mr. Katia did not witness the killing. Debbie Holdren and Melissa Herndon, on the other hand, were eyewitnesses to the homicide and did identify appellant as the shooter.

[4] None of the cases involve an in-chambers conference as took place in this case.

Granted, Debbie Holdren only testified that appellant looked similar (TV VIII, 1571-74), but Melissa Herndon unequivocally identified appellant as the shooter (TV ix, 1609). Moreover, the victim's mother testified that she was on the phone with the victim moments before the homicide and heard someone else ask her son where the girl was and heard her son respond that he did not know (TV X, 1871-72). Sandra DeShields testified that three or four days prior to the shooting she took several thousand dollars from appellant (TV X, 1841-43); and the day before the homicide she left town with the help of the victim (TV X, 1849), because she heard appellant threaten to kill her and her son (TV X, 1841-42, 1848-49). Ms. DeShields also testified that appellant knew that she and the victim were friends (TV X, 1841).

Appellant finally argues that the method used by the trial court to convince state witness Aftab Katia of the propriety of testifying violated his due process rights. However, this issue has also not been preserved for appellate review, in that defense counsel made no contemporaneous objection to the questions and comments being made by the trial court. Further, the cases cited by appellant are not applicable to this matter. Appellant cites to *Ward v. Village of Monroeville*, 409 U.S. 57, 93 S.Ct. 80, 34 L.Ed. 267 (1972), which generally holds that due process guarantees a trial before a disinterested and impartial judge. However, *Ward*

stands for the more specific notion that due process is offended where the trial court has a direct personal and substantial interest in the outcome of the case. In *Ward*, the judge was also the village mayor with responsibility for the revenue production of the village. Furthermore, a major portion of the village income was from the imposition of fines against violators by this mayor in his dual capacity as judge. There is nothing in this case to suggest that the trial court had any interest in the outcome of the case or in the specific testimony of Mr. Katia, other than that Mr. Katia tell the truth (TV IX, 1686/4, 1688/24, 1689/10 & 17, 1693/13). Appellant also cites to *Webb v. Texas*, 409 U.S. 95, 93 S.Ct. 351, 34 L.Ed.2d 330 (1972), but *Webb* stands for the notion that a trial court cannot deprive a defendant of his or her defense. In *Webb*, the trial court's comments exerted what amounted to duress on the defense witness which in turn caused the witness to refuse to testify. This case is not at all similar. Here the trial court's comments did not deprive appellant of his defense. Further, even if the judge had strayed from neutrality while questioning Mr. Katia, any error would have been harmless in that the questioning was done outside the presence of the jury. *United States v. Stewart*, 820 F.2d 370 (11th Cir. 1987).

Finally, appellant argues that the alleged error is also prejudicial as to the penalty phase, because Mr. Katia's testimony

was presented in support of the great risk aggravating circumstance. Appellant does not demonstrate how this would be prejudicial. To the contrary, even if error it would be harmless, in that there were more than three other persons - namely the four persons in the Holdren vehicle - that were clearly placed at great risk of death by appellant’s conduct.

POINT II

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING THE TESTIMONY OF SANDRA DESHIELDS REGARDING APPELLANT'S THREAT.

Before Sandra DeShields took the stand, defense counsel indicated that based upon his reading of her statement and deposition most of what she knew was hearsay (TV X, 1827-28). The prosecutor indicated that he intended to ask her about statements made by the defendant that she overheard and argued that such statements were admissions (TV X, 1828). Defense counsel then asked that the prosecutor proffer her testimony, so the trial court could rule on his objection (TV X 1828/22). Ms. DeShields indicated that when she was on the phone with Maybel McCoy, she overheard appellant say to Ms. McCoy that he knew who took his "stuff" and that he was going to kill Ms. DeShields and her son (TV X, 1829-30). The trial court ruled that such statement was admissible under a hearsay exception (TV X, 1830/21). Subsequently, defense counsel argued that the statement was not relevant, because the threat was not against the victim Jimmie Lee Swanson (TV X, 1830/23-1831/4). The prosecutor then proffered that this threat was not an isolated matter but was relevant because (1) Ms. DeShields knew both appellant and the victim; (2) Ms. DeShields

stole money from appellant; (3) the victim was aware of the stolen money and actually received some of the stolen money; (4) the victim helped Ms. DeShields flee to North Carolina; and (5) moments before the shooting during a phone conversation with the victim, the victim's mother heard another man ask, "where is the girl" (TV X 1831-32). Based on this proffer, the trial court overruled appellant's objection (TV X, 1832).

Ms. DeShields did in fact testify that (1) she had known appellant for over three years because they were both living at the foster home of Maybel McCoy which was three blocks from Ivory's convenience store (TV X, 1835-38); (2) appellant and the victim knew each other at least by sight (TV X, 1840-41); (3) three or four days prior to the homicide (TV X, 1843/22), she stole around $3,000 from appellant (TV X, 1842); (4) she sought the help of the victim, who took her to stay with his friend for three days (TV X, 1845-46); (5) while at this friend's house and on the phone with Maybel McCoy, she overheard appellant tell Mrs. McCoy that he knew who took his "shit" and that she should tell "Sandra" not to come back because he intended to kill her and her son Tony (TV X, 1848-49); (6) the day before the homicide the victim took her to the bus station so she could leave town (TV X, 1849); and (7) she gave the victim $300 of the stolen money for helping her out (TV X, 1849/14-

21).

Appellant argues that the testimony of Ms. DeShields is not relevant, because it pertained to a threat to her and her son and not to the victim. In support of his argument, appellant cites to *Escobar v. State*, 699 So. 2d 988, 998 (Fla. 1997), where this court found testimony of a threat inadmissible because it was relevant solely to prove bad character. However, threats to a non-victim are admissible if relevant to a material issue such as motive. *Pittman v. State*, 646 So. 2d 167 (Fla. 1994). In *Pittman*, this Court found that threats to the victims' daughter, the defendant's estranged wife, were relevant.

A trial judge's ruling on the admissibility of evidence will not be disturbed absent a clear abuse of discretion. *Kearse v. State*, 662 So. 2d 677, 684 (Fla. 1995); *Blanco v. State*, 452 So. 2d 520, 523 (Fla. 1984). Discretion is abused only where no reasonable person would take the view adopted by the trial court. *Raleigh v. State*, 705 So. 2d 1324 (Fla. 1997); *Huff v. State*, 569 So. 2d 1247 (Fla. 1990).

In this matter, the trial court ruled that this testimony was relevant to prove motive (TV X, 1832/12). Certainly reasonable people would agree. Ms. DeShields' testimony indicates that appellant knew she had taken his money, that he was looking for

her, that he knew that she and the victim were acquaintances and that appellant contemplated homicide for the return of his money. There was no abuse of discretion in admitting this testimony.

Even if error, however, it was harmless pursuant to Fla. Stat. § 59.041, Fla. Stat. § 924.33 and the holding of *State v. Diguilio*, 491 So. 2d 1129 (Fla. 1986), in that there was no reasonable possibility that the alleged error contributed to the conviction. Debbie Holdren and Melissa Herndon both identified appellant as the shooter (TV VIII, 1571-74, 1609-12). Also, just prior to the shooting, Aftab Katia saw appellant walk up to the victim holding a gun and ask where the girl was (TV IX, 1700, 1703-04). Mr. Katia also saw the victim start to run and saw appellant run after him (TV IX, 1700-01). Immediately thereafter, Mr. Katia heard 4-5 shots, ran outside and saw the victim lying in the street and appellant walking to his car (TV IX, 1700-02).

Again appellant argues that the alleged error is also prejudicial as to the penalty phase, because it represents evidence of an improper and invalid aggravating circumstance. However, even if error it would be harmless, because the trial court subsequently instructed the jury that the only aggravating circumstances that they could consider were limited to the prior violent felony conviction, great risk of death, HAC and CCP circumstances (TV XII,

2221-23).

POINT III

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN OVERRULING DEFENDANT'S HEARSAY OBJECTION.

Mrs. Swanson testified that her son, the victim, called her moments before he was killed to tell her that he was going to the courthouse (TV X, 1870/13). The prosecutor then attempted to elicit additional background information by asking her why he was going to the courthouse, and defense counsel interposed a hearsay objection (TV X, 1870/16-24). The prosecutor argued that such a statement fell under the hearsay exception of then-existing mental, emotional, or physical condition (TV X, 1870/25). The trial court overruled the objection without comment (TV X, 1871/3). Mrs. Swanson then responded that appellant was going to the courthouse to get licensed for his car wash (TV X, 1871/8). Subsequently, the following dialogue then took place:

> Q And then what happened?
>
> A Yes.
>
> Q Go ahead. Tell us what happened then.
>
> A We were talking about him getting his license to get it licensed -- the car wash and then in the mean time, he was just talking about it and then, you know, it's like all he was doing was talking to me about that car wash and getting excited and talking about his life and I said when he was down there to make sure that you get that license and he said, Okay, and then at that time I heard someone come up and ask him about a girl.

(TV X, 1871/12-24).

Appellant has failed to preserve for appellate review Mrs. Swanson's comment about her son saying that he was "getting excited and talking about his life." No contemporaneous objection was made to this comment; and no argument was made below, as here, that this comment was objectionable on the basis that its only purpose was to create sympathy for the deceased. The only objection below was to the conversation between Mrs. Swanson and her son about why he was going to the courthouse, and this objection was based on hearsay alone. 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. *Terry v. State*, 668 So. 2d 954 (Fla. 1996); *Rodriguez v. State*, 609 So. 2d 493 (Fla. 1992); § 924.051, Fla. Stat. (1996).

In regard to Ms. Swanson's response that her son was going to the courthouse to get licensed for his carwash, appellant argues that the trial court erred in overruling his objection because such a statement does not fall under the then-existing mental, emotional, or physical condition hearsay exception. However, the statement is not hearsay, because it was not offered in evidence to prove the truth of the matter asserted. § 90.801(1)(c). It was offered merely as background information, which was relevant. *See*

Gillion v. State, 573 So. 2d 810 (Fla. 1991) (Where testimony may not be directly relevant to a specific element of the crimes charged, it is nonetheless proper where relevant to place in context other testimony bearing directly on the legal issues of the case). It should be noted that the trial court did not give his basis for overruling defense counsel's objection. Nonetheless, even if the trial court's ruling may have been entered for an erroneous reason if his ruling is sustainable under any theory revealed by the appellate record affirmance is proper. *Caso v. State*, 524 So. 2d 422 (Fla.), *cert. denied*, 488 U.S. 870 (1988); *Applegate v. Barnett Bank of Tallahassee*, 377 So. 2d 1150 (Fla. 1980).

Additionally, even if it were error to allow this testimony such error would be harmless pursuant to Fla. Stat. § 59.041, Fla. Stat. § 924.33 and the holding of *State v. Diguilio*, 491 So. 2d 1129 (Fla. 1986). The fact that the victim intended to go to the courthouse to get an occupational or other license could not have contributed to the verdict in this case, where there was eyewitness testimony that appellant was the shooter.

POINT IV

WHETHER IT WAS REVERSIBLE ERROR FOR THE TRIAL COURT TO CONDUCT PORTIONS OF THE VOIR DIRE OUTSIDE APPELLANT'S PRESENCE.

Appellant argues that *Carmichael v. State*, 23 Fla. L. Weekly S377 (Fla. Jul 9, 1998), does not apply. While *Carmichael* may not be directly on point, in that *Carmichael* dealt with a critical stage of the proceeding (during juror challenges) while this issue did not, the holding of *Carmichael* is directly on point. That holding is that in order for an argument to be cognizable on appeal, it must be the specific contention asserted as legal ground for the objection, exception, or motion below. This contemporaneous objection rule was in place long before the trial of the instant matter. *See Terry v. State*, 668 So. 2d 954 (Fla. 1996); *Rodriguez v. State*, 609 So. 2d 493 (Fla. 1992); § 924.051, Fla. Stat. (1996). In this matter, appellant made no objection below regarding this issue. *See Shriner v. State*, 452 So. 2d 929, 930 (Fla. 1984). Therefore, it has not been preserved for appellate review.

Be that as it may, appellant argues that since he was not at the bench during portions of voir dire examination there were resulting violations of his due process rights and of Fla. R. Crim. P. 3.180 (a)(5). However, that portion of voir dire which pertains

to general jury qualifications is not a critical stage in the proceedings which requires a defendant's presence. *Henderson v. Dugger*, 925 F.2d 1309 (11th Cir. 1991), *cert. denied*, 506 U.S. 1007 (1992); *Wright v. State*, 688 So. 2d 298 (Fla. 1996).

As this Court pointed out in *Remeta v. State*, 522 So. 2d 825 (Fla. 1988), the general qualifications process is normally conducted by the trial court to determine whether prospective jurors meet the statutory qualification standards or whether they will not qualify because of physical disabilities, positions they hold or other personal reasons; this is distinguished from the process to determine the qualifications of a jury to try a specific case which is accomplished by counsel during individual voir dire. *Id* at 828. Each of the side-bar discussions mentioned by appellant were part of the general qualifications portion of voir dire (see footnote #5 at the end of this section for a summary of the pertinent voir dire); therefore, appellant's right to a fair trial was not violated when he was not at the bench during these side-bar discussions.

Appellant also argues that his lack of presence violated Fla. R. Crim. P. 3.180 (a)(5); however, this rule is applicable only after a jury has been sworn. If any subsection of Rule 3.180 were applicable to this situation, it would be subsection (a)(4) which

requires the presence of the defendant during the examination, challenging, impanelling and swearing of the jury. However, this Court has ruled that excusing jurors for cause is no part of the calling, examination, challenging, impanelling and swearing of the jury. *North v. State*, 65 So. 2d 77 (Fla. 1953), *cert. denied*, 74 S.Ct. 376 (1954). Since each of the side-bar conferences involved the general qualifications of the jury to determine any basis for removal for cause, there was also no violation of Rule 3.180.[5]

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[5] Robert Lawson indicated that due to his prior experience with our court system he could not give either side a fair trial, and consequently he was removed for cause (TV I, 184-186). In response to the trial court's asking who had been the victim of crime (TV II, 219/22), the unnamed venireperson indicated disfavor with law enforcement's slow response time to her place of business and indicated that one brother had been murdered and the other shot in the back and as a result she could not give the defendant a fair trial (TV II, 231-34); she was also removed for cause (TV II, 235/3). Also in response to this question (TV II, 239/12), Mr. Kelly indicated that his two sons were killed by a drunk driver (TV II, 239/40), but he indicated that he could be fair and impartial (TV II, 241/12). The trial court then permitted counsel to voir dire Mr. Kelly (TV II, 244-49), and subsequently defense counsel moved to strike Mr. Kelly for cause (TV II, 250/11). The trial court agreed with defense counsel's logic but also agreed with the prosecutor's suggestion that they be allowed to question Mr. Kelly further (TV II, 250/16-251/9). Counsel did question Mr. Kelly further, but this questioning took place in open court and Mr. Kelly again asserted that he could be fair and impartial (TV II, 261/12-267/18). After this questioning defense counsel did not renew his motion to strike Mr. Kelly for cause, nor did defense counsel subsequently use a peremptory challenge to remove Mr. Kelly. Furthermore, at the end of the jury selection process, appellant indicated that he had ample opportunity to discuss the jury selection process with his attorney (TV VII, 1307/22). In response to the trial court's question regarding the death penalty

(TV II, 301/12), Mr. Voss indicated that under no circumstances could he vote for the death penalty (TV II, 308-10). Mr. Voss was subsequently removed for cause with defense counsels' concurrence (TV II, 362). When the trial court was asking general background questions (TV II, 310/13), Mr. Martin indicated that he was a reserve police officer and had concern that this experience might disqualify him from serving on the jury (TV II, 327/15-329/4). Defense counsel then requested a side-bar conference (TV II, 329/9) during which Mr. Martin indicated that he could be fair and impartial (TV II, 330/18). Subsequently during individual voir dire in open court but outside the presence of the remaining jury panel (TV II, 361/18), Mr. Martin admitted that he knew the lead detective on this case (TV II, 367/23) and that to be fair he would rather not be on the jury of this case (TV II, 369). Consequently, the trial judge struck Mr. Martin for cause (TV II, 369/22). Mr. Hinkle was one of four venirepersons called to replace those excused for cause from the original panel (TV II, 390/24, 391/7). Mr. Hinkle immediately indicated that he is a minister and found it very difficult to serve on the jury (TV II, 391/17). At side-bar, Mr. Hinkle indicated that capital punishment is contrary to his religious beliefs and that he could not under any circumstances vote to impose the death penalty (TV II, 392-94). Therefore, the trial court struck Mr. Hinkle for cause (TV II, 394/5). Mrs. Lapinskas was part of a second large group of potential jurors brought in for voir dire (TV VI, 1022-23). The trial court had asked if anyone or a close friend or family member had ever been arrested (TV VI, 1045/5). Mrs. Lapinskas responded by asking to speak privately to the judge and counsel, so the trial court permitted Mrs. Lapinskas to approach the bench with counsel (TV VI, 1048-49). At this side-bar conference, Mrs. Lapinskas indicated that she was embarrassed to admit that two of her four sons had been arrested (TV VI, 1049/11) but indicated that she could nonetheless be fair (TV VI, 1052/10, 1055/1). Both the prosecutor and defense counsel were permitted to voir dire Mrs. Lapinskas (TV VI, 1055-59), and she again indicated that she could give both sides a fair trial (TV VI, 1057/20). Neither attorney moved to strike Mrs. Lapinskas for cause or used a peremptory challenge to remove her from the jury. Finally, Laura Driskell also asked to speak in private (TV VI, 1065/16) and indicated that she had previously been arrested but not charged (TV VI, 1066) and that it would not effect her judgment in the case (TV VI, 1070). Both the prosecutor and defense counsel subsequently accepted Miss

POINT V

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN GRANTING THE STATE'S CAUSE CHALLENGE TO VENIREPERSON RANIERI.

The judgment of the trial court regarding the validity of a challenge for cause comes to this Court clothed in a presumption of correctness. *Richardson v. State*, 247 So. 2d 296 (Fla. 1971). Moreover, the findings of the trial court regarding challenges will not be set aside absent a showing of manifest error. *Kimbrough v. State*, 700 So. 2d 634 (Fla. 1997); *Smith v. State*, 699 So. 2d 629 (Fla. 1997). Indeed, there is hardly an area of the law in which the trial judge is given more discretion than in determinations of

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Driskell as a member of the jury (TV VII, 1298).

the validity of challenges for cause, because the trial judge is in a far superior position to observe the attitude and demeanor of the juror and to gauge the quality of the juror's responses to the questions propounded. *Johnson v. State*, 660 So. 2d 637 (Fla. 1995); *Cook v. State*, 542 So. 2d 964 (Fla. 1989). Therefore, so long as there is competent support in the record for the trial court's decision the denial of a challenge for cause will be upheld. *Gore v. State*, 706 So. 2d 1328 (Fla. 1997); *Johnson v. State*, 660 So. 2d 637 (Fla. 1995). Further, the courts should not become bogged down in semantic arguments about hidden meanings behind the juror's words. *Johnson*, 660 So. 2d at 644. So long as the record competently supports the trial court's interpretation of those words, appellate courts may not revisit the question. *Id*.

The reason for this formidable standard of review, as is evident in the instant case, is that jurors face a confusing array of procedures and terminology that they may little understand at the point of voir dire. *Id*. It may therefore be quite easy for either the State or the defense to elicit strong responses that jurors would genuinely reconsider once they are instructed on their legal duties and the niceties of the law. *Id*. The trial court is therefore in the best position to decide such matters as a juror's change of heart regarding the death penalty. *Id*.

Clearly, the record evidence supports the trial court's ruling. Appellant only referred to portions of the voir dire of Mrs. Ranieri conducted by counsel. This voir dire, however, was prompted by her following responses to the trial court's questions during the general qualifications process:

> The Court: Ms. Ranieri?
>
> Prospective Juror: I don't believe in the death penalty.
>
> The Court: So you are telling me that you could not think of any certain circumstance whereby you would impose the death penalty?
>
> Prospective Juror: A serial murder, of course, but that might be the only situation where I could see it justified.
>
> The Court: You could carve out an exception for a serial murder?
>
> Prospective Juror: Right
>
> The Court: And hypothetically, if you had a case of a serial murderer that was on trial with us, and the members of the jury found the person guilty of first degree murder, you could recommend to the jury a sentence of death?
>
> Prospective Juror: If I was in that situation, well, I don't know because I really can't tell you whether or not I would or not but that would be the only case that I would ever or could think of doing that. I would have to know what the facts are of that situation, you know.
>
> The Court: Oh, okay. Okay. Thank you,

ma’am. Who else in our first row?

(TV II, 303/8-304/8)

Subsequently, Mrs. Ranieri repeatedly told the prosecutor that she did not believe in the death penalty (TV III, 534/8, 10). Nonetheless, the prosecutor told Mrs. Ranieri that she still may be qualified to sit on the jury if she could follow the procedure under the law (TV III, 534/11-18). When subsequently asked the leading question that she did not believe in the death penalty and could not recommend it, she responded, “Right” (TV III, 538/4-7). Mrs. Ranieri again reiterated that the only situations which might warrant the death penalty were serial murders or the Oklahoma bombing (TV III, 541/3) and explained that she would not be able to sign the paper or make the recommendation other than under these circumstances (TV III, 541/22-542/2) even though there are other circumstances under the law which permit the death penalty (TV III, 542/5-9).

Subsequently, during the discussion that ensued after the trial court entertained further challenges for cause (TV IV, 647/3), the trial court recalled that Mrs. Ranieri had indicated that she could not follow the court’s instructions on aggravators, could not follow the law and did not believe in the death penalty with the limited exception of serial killings (TV IV, 650/20-

651/10). Defense counsel disagreed with the trial court's interpretation of her position and asked to be given the opportunity to rehabilitate Mrs. Ranieri (TV IV, 651/11-25) along with several others (TV IV, 742/16). It is helpful to review the voir dire of those others, in addition to the voir dire of Mrs. Ranieri, to not only show how defense counsel confused the panel but also to put in context Mrs. Ranieri's eventual statement that she could follow the law.

Defense counsel first addressed Mrs. White by indicating that even though the State may prove some aggravating circumstances, the jury was not bound to vote in favor of the death penalty and that each juror had the discretion of voting for life without parole (TV IV, 742/22-743/17). Thereafter, when Mrs. White indicated that she was worried that she was bound to recommend death, defense counsel reiterated that she had another option (TV IV, 744/712). When Mrs. White again indicated that she would have a problem sitting as a juror (TV IV, 744/24), defense counsel asked specifically if Mrs. White could follow the law as instructed and she indicated that she could (TV IV, 745/6-9). The following dialogue then took place:

> Mr. Collins (defense counsel): Even if the Judge instructed you that if you find that the aggravating circumstances outweigh the mitigating circumstances in this case, that you could recommend the death penalty? If that was the law that was read to you, could

you follow that law? Couldn't you?

Mrs. White: Yes, sir. Because I -- I mean, are you saying that I should or are you saying that I don't have to do that?

(TV IV, 745/23-746/7). It was at this time the prosecutor interposed an objection (which was sustained), defense counsel requested a side-bar conference and the trial court told defense counsel that he had not rehabilitated any of the potential jurors and was going in circles (TV IV, 746/8-21). After some discussion, defense counsel asked to be reminded of the basis for the prosecutor's objection, and the prosecutor indicated that it was based on defense counsel's misstatement about aggravators in that if the jury were to find some to exist and they outweighed any mitigation, then contrary to what defense counsel had indicated the jury would be required to recommend death (TV IV, 748/7-14). Subsequently, defense counsel passed over Mrs. White (TV IV, 750/1) and asked Mrs. Randall that if the aggravating circumstances outweigh the mitigating circumstances could she follow the law, and Mrs. Randall responded that she could (TV IV, 751/10-14). He then asked Mrs. White if she also could follow the law, and Mrs. White indicated that she could (TV IV, 751/15-23). When he asked Mrs. Dinitto the same question, she initially responded that she would follow the law but subsequently indicated that she is very opposed

to the death penalty and would have a hard time recommending it under any circumstances (TV IV, 752/4-18).

Thereafter, defense counsel asked the panel if any were disturbed by the fact that the electric chair is used to impose the death penalty in Florida, and Mrs. Ranieri indicated that it disturbed her (TV IV, 761/15-18). Shortly thereafter, however, defense counsel asked the venire whether they could still follow the law knowing that the electric chair is used in Florida (TV IV, 762/1), and among others Mrs. Ranieri indicated that she could follow the law (TV IV, 762/8). Mrs. White indicated that she would have a problem (TV IV, 762/18).

Appellant argues that Mrs. Ranieri should not have been excused for cause, because she was not unalterably opposed to the death penalty, in that she indicated that she would vote for the death penalty in cases involving serial or mass murderers and unequivocally indicated that she could follow the law (IB 38). However, this is not entirely accurate. Mrs. Ranieri initially stated, "I don't believe in the death penalty." She did not state that she would vote for the death penalty in cases involving serial or mass murders but only that those were the only situations that she might see it justified. While being questioned by the prosecutor, Mrs. Ranieri again indicated that she did not believe

in the death penalty, but she did indicate that she would not be able to recommend the death penalty under any circumstances other than serial or mass murders. This of course suggests that she could vote for the death penalty under these circumstances but she certainly was not indicating that she would vote in favor of the death penalty under such circumstances. In reality, her position did not change. She was repeatedly indicating that she is opposed to the death penalty but that she might be willing to vote in favor of the death penalty only in cases involving serial or mass murders. When defense counsel attempted to rehabilitate Mrs. Ranieri and others he clearly confused Mrs. White about whether she was obligated to vote in favor of the death penalty if she believed any established aggravators outweighed any established mitigation. Defense counsel then asked Mrs. Randall and others whether if the aggravating circumstances outweigh the mitigating circumstances they could follow the law, but defense counsel never directed this question to Mrs. Ranieri. Subsequently defense counsel was discussing the use of the electric chair in Florida and asked the potential jurors whether they could still follow the law knowing this (with respect to the electric chair)(TV IV, 762/2, 16), and Mrs. Ranieri indicated at that time that she could follow the law. Appellant argues that this last statement reflects that Mrs.

Ranieri indicated that she would vote in favor of the death penalty if she found that there were sufficient aggravating circumstances which were not outweighed by mitigating circumstances. But this statement does not indicate this at all. Her statement may indicate a position regarding the electric chair but more than likely it just reflects some confusion. Nothing in this record suggests that Mrs. Ranieri's position ever changed from her original position that she does not believe in the death penalty but might be able to recommend the death penalty but only in cases involving serial and mass murders. This case involved neither a serial or mass murder; therefore, clearly Mrs. Ranieri could not have followed the instructions of the court based on her own assertions.

As also noted by appellant, the relevant inquiry is whether a juror can perform his or her duties in accordance with the court's instructions and the juror's oath. *Farina v. State*, 680 So. 2d 392 (Fla. 1996). The trial court eventually instructed the jury that their advisory sentence must be based on a weighing of the aggravating circumstances against the mitigating circumstances (TV XII, 222410-15). Unquestionably, Mrs. Ranieri could not follow this instruction based on her responses. She repeatedly indicated that the only situations in which she would even consider

recommending the death penalty are serial and mass murders. This case is very similar to *Randolph v. State*, 562 So. 2d 331 (Fla.), *cert. denied*, 498 U.S. 992 (1990), where this Court found no abuse of discretion where the trial court excused a juror for cause who indicated that she could only recommend the death penalty in cases like Charles Manson, Adolph Hitler or Ted Bundy.

Based on the above, the record supports the trial court's ruling and the trial court did not abuse its discretion by excusing Mrs. Ranieri for cause. However, should this Court not agree, then only the death sentence and not the conviction should be vacated. *Chandler v. State*, 442 So. 2d 171, 175 (Fla. 1983).

POINT VI

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN OVERRULING DEFENSE OBJECTIONS AND WHETHER FUNDAMENTAL ERROR OCCURRED DURING THE STATE'S GUILT-PHASE FINAL ARGUMENT.

The sole theory of defense was misidentification. Defense counsel argued that neither Debra Holdren nor Melissa Herndon could positively identify appellant (TV X, 1934-39). He also argued that Randy Scharf's identification testimony conflicted with that of Melissa Herndon (TV X, 1939-40); that Robert Graham could not identify anyone (TV X, 1940); and that Aftab Katia's testimony, that he told police he saw appellant at the scene, was wrong (TV X, 1942-43). In response, the prosecutor argued that the unrefuted testimony showed that there was no question that a man carrying two guns approached the victim, demanded that the victim tell him where the girl was, chased the victim and then shot the victim multiple times (TV X, 1960-61). The prosecutor also argued that in addition

to the eyewitnesses, what tied appellant to this case was the motive and appellant's statements to arresting officer Scott Russell (TV X, 1966/12-19).[6] Specifically, in regard to eyewitness accounts discussed by defense counsel, the prosecutor argued that the accuracy of the testimony depended upon several variables (TV X, 1966/20-1967/4). He explained that one variable is the position a witness is in to perceive the event; another variable is a witness's memory in light of the limitations imposed on his ability to perceive; and the last variable is a witness's ability to communicate what he perceived (TV X, 1967/19-1968/2). The prosecutor then talked about perception and explained that one could perceive things against a different backdrop (TV X, 1968/19-21). One such backdrop explained by the prosecutor was the fear, anger and terror experienced by the victim (TV X, 1968/22-1969/3). The prosecutor argued that the eyewitnesses similarly experienced fear and anxiety which could cause them to perceive things differently (TV X, 1969/7-25). He argued therefore that common sense dictates that people see things in large events not minute details (TV X, 1975/4-5) and that it is impossible to have multiple witnesses perceive and recall things in identical minute details (TV X, 1976/915).

[6] That he knew he was wanted for murder (TV IX, 1790/18).

Appellant argues that it was improper for the prosecutor to suggest that the victim's perception might have been influenced by fear, anger and terror, because it injected elements of emotion and fear into the jury's deliberations. In support of his argument, appellant cites to *Garron v. State*, 528 So. 2d 353 (Fla. 1988), *King v. State*, 623 So. 2d 486 (Fla. 1993) and *Urbin v. State*, 714 So. 2d 411 (Fla. 1998). However, in *Garron*, the prosecutor argued that (1) the guilt-phase jury found the defendant guilty to deter others from walking the streets and gunning people down; (2) the jury should imagine the pain the young female victim was going through as she died (a "Golden Rule" violation); and (3) the jury should listen to the victim's screams and desires for defendant's punishment. In this case on the other hand, the argument is not comparable to the comments in *Garron*. Furthermore, the prosecutor's comment in this case regarding the victim's fear is factually supported in the record, in that Debra Holdren testified without objection that she saw fear and terror in his face.[7] Likewise, the closing arguments in *King* and *Urbin* were egregious and not comparable to the argument in this case. In *King*, the prosecutor essentially argued that the jury would be cooperating

[7] Debra Holdren testified that as the victim approached her car there was terror on his face and that she saw how frightened he was (TV X, 1962/7-12).

with evil if they recommended a life sentence. In *Urbin*, the prosecutor (1) invited the jury to disregard the law by arguing that if they sentenced the defendant to life he could still be released one day; (2) asserted that any juror's vote for a life sentence would be irresponsible; (3) like in *Garron* made a "golden rule" argument that went beyond the evidence asking the jury to picture the victim pleading for his life as he was shot; and (4) asked the jury to show the defendant the same mercy that he showed the victim. Furthermore, each of the above cases in regard to this issue involved penalty phase argument, and as noted in *Muehleman v. State*, 503 So. 2d 310 (Fla. 1987) sheds little light on the instant case. In regard to such issues, each case must be considered upon its own merits and within the circumstances pertaining when the questionable statements were made. *Id*. In this case, the statement was relevant to explain why eyewitnesses can have differing perceptions of an event and was responsive to the theory of defense.

The standard of review is whether the trial court abused its discretion in responding to defense counsel's objections, and a trial court's ruling on a discretionary matter such as this will be sustained unless no reasonable person would agree with the view adopted by the court. *Hawk v. State*, 23 Fla. L. Weekly S473 (Fla.

Sep. 17, 1998). As noted in *Garron*, prosecutorial misconduct must be egregious to warrant reversal. The conviction should not be overturned unless the comment is so prejudicial that it vitiates the entire trial. *King v. State*, 623 So. 2d 486 (Fla. 1993); *State v. Murray*, 443 So. 2d 955 (Fla. 1984). This comment would not inflame the minds and passions of the jurors nor cause their verdict to reflect an emotional response to the crime or the defendant rather than the logical analysis of the evidence in light of the applicable law. Any error in prosecutorial comments is harmless if there is no reasonable possibility that those comments affected the verdict. *Watts v. State*, 593 So. 2d 198 (Fla.), *cert. denied*, 112 S.Ct. 3006 (1992).

Appellant also argues that the prosecutor argued outside the record evidence, when he indicated that the pictures in a photographic lineup should be selected so that the different individuals do not look exactly or almost the same (IB 41). However, appellant only reviewed a portion of the prosecutor's pertinent argument. After the prosecutor argued that one should not pick people for a lineup who look exactly or almost the same and defense counsel had interposed an objection which was overruled, the prosecutor continued:

> Mr. Morton: The testimony of Detective Walley. Well, he said it was not fair to do

> that. Well, suppose that he was not the one but he looked very much like the one next to him who was picked and can you see the problem there? And it's because people give different versions -- they perceive things differently. And one witness could say, yeah, he has low cut hair. Well, again, we've talked about this about reconstruction and verbal description of how people perceive things and if you look at these pictures closely, you can see that some of them have a little bit of hair and if you take a look at number 6, see, he's very similar -- he has similar hair in terms of whether you want to call it short or shaved or call it bald and take a look at the shavings and the back of the head, hair. And so when Mr. Hammer says this is scary that Detective Walley set this up this way, well, you heard from the Detective himself as far as his stand point of his policy and his procedures of what he does and one of them does not include identical people because that could be false identification and that is scary.

(TV X, 1983/8-1984/6).

Detective Walley did testify on direct that when he was looking for the photographs for the lineup, he was trying to find photographs that were similar enough to appellant's photograph so that someone would not just focus on appellant independently because he was different looking (TV IX, 1663/14). On cross-examination, Detective Walley reiterated that he did not want defendant's picture to stand out from the other pictures (TV IX, 1669/16). On redirect, Detective Walley testified that all of the people in the lineup had the same general complexion and they could

all appear to be the same age (TV IX, 1670/18). However, Detective Walley continued that when people describe certain characteristics like hair length, they describe it differently; therefore, to be fair he included pictures of people with hair variations, for example #6's hair was short, almost the same as appellant's (#3), while number 4's hair was shaved on the sides and numbers 1 and 2 had extremely short hair on the sides (TV IX, 1670/24-1672/18).

A prosecutor is allowed a considerable degree of latitude in arguing to a jury during closing argument. *Crump v. State*, 622 So. 2d 963, 972 (Fla. 1993); *Breedlove v. State*, 413 So. 2d 1, 8 (Fla. 1982). Prosecutorial comment is proper where it is based on testimony presented to the jury. *Stewart v. State*, 558 So. 2d 416 (Fla. 1990). Logical inferences may be drawn from the evidence, and prosecutors are allowed to advance all legitimate arguments within the limits of their forensic talents in order to effectuate their enforcement of the criminal laws. *Spencer v. State*, 133 So. 2d 729, 731 (Fla. 1961). When the prosecutor argued that in a photographic lineup one does not want people who look exactly the same or almost the same, it was a fair argument based on the testimony of Detective Walley that to be fair to appellant he included pictures of people with different hair styles. Again, the issue is whether the trial court abused its discretion in

responding to defense counsel's objections. *Hawk v. State*, 23 Fla. L. Weekly S473 (Fla. Sep 17, 1998) A trial court's ruling on a discretionary matter will be sustained unless no reasonable person would agree with the view adopted by the court. *Id.* Certainly, reasonable persons would agree that such argument was either a direct reiteration of the testimony or a logical inference therefrom. Consequently, there was no abuse of discretion. Again, even if error it would be harmless, in that Melissa Herndon made an unequivocal in-court identification of appellant.

Finally, appellant argues that the prosecutor argued facts not in evidence when he indicated that Officer Russell had additional information that he used to identify appellant's vehicle, that being the tag (IB 42). This last sub-issue was not preserved for appellate review, in that there was no contemporaneous objection at trial. *Urbin v. State*, 714 So. 2d 411, 418 n. 8 (Fla. 1998). Nonetheless, Officer Russell testified that as he was finishing an alarm call, a car that fit the description of a BOLO passed right in front of him, so he pulled in behind the vehicle and called for additional information (TV IX, 1782). He also testified that after he received that additional information, he then advised dispatch that he was in fact behind the vehicle that was the subject of the BOLO and he requested assistance (TV IX, 1783/3-8). On redirect,

Officer Russell testified that the last BOLO that he received updated the previous BOLO with specific information, and that is why he made the stop (TV IX, 179813-19). Officer Russell testified that on the way to the police station, appellant told him that he had nothing to live for and that he knew he was wanted for murder (TV IX, 1790).

Again, the prosecutor's argument was fair in light of Officer Russell's testimony that he received additional specific information which led him to conclude that the vehicle he was following was the same vehicle that was the subject of the BOLO.[8] Short of some sign or other unique marking, the only specific identification that could be used to identify a moving vehicle would be the license plate.

Be that as it may, even if it were improper for the prosecutor to mention that the additional information was the tag number, it would be harmless pursuant to Fla. Stat. § 59.041, Fla. Stat. § 924.051, Fla. Stat. § 924.33 and the holding of *State v. Diguilio*, 491 So. 2d 1129 (Fla. 1986), in that there was no reasonable

[8] During the suppression hearing, Officer Russell testified that the additional information was the tag number and that it was a Miami Hurricane plate (TV VII, 1324, 1344/19-25). Also during the suppression hearing, Detective Walley testified that they had received a confidential crime-stoppers tip which gave a description of the vehicle used in the offense which included that tag number (TV VII, 1354/8-14).

possibility that the alleged error contributed to the conviction. Officer Russell testified that he did receive additional information which was sufficient to positively identify appellant's vehicle as the same vehicle as in the BOLO. Whether this additional information was a tag number or some other feature is of no consequence.

Appellant argues that this alleged error amounts to fundamental error; however, fundamental error is error that reaches down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error. *Id*. The fact that the additional information was the tag number would have not affected the outcome in this fashion after Officer Russell had already testified that he did receive additional information that specifically identified the vehicle as the one used as the getaway vehicle.

POINT VII

WHETHER THERE WAS COMPETENT SUBSTANTIAL EVIDENCE TO SUPPORT THE GREAT RISK AGGRAVATING CIRCUMSTANCE.

Appellant argues that the State failed to prove the existence of the "great risk" aggravating circumstance. The standard of review is whether competent substantial evidence in the record supports the trial court's finding. *Hawk v. State*, 23 Fla. L. Weekly S473 (Fla. Sept. 17, 1998); *Raleigh v. State*, 705 So. 2d 1324 (Fla. 1997).

This circumstance is applicable when a defendant knowingly creates an immediate and present risk of death to more than three other persons besides the homicide victim. *Howell v. State*, 707 So. 2d 674, 680 (Fla. 1998). Many of this Court's opinions which address this circumstance involve factual situations similar to the instant case, where persons present at the scene of a crime were at risk of being injured or killed by gunfire. *Id*. These opinions instruct that this circumstance is applicable when people other than the victim are in the line of fire. *Suarez v. State*, 481 So. 2d 1201, 1209 (Fla. 1985), *cert. denied*, 476 U.S. 1178 (1986); *See also Hallman v. State*, 560 So. 2d 223 (Fla. 1990) which cites

to *Suarez* for this authority; *But cf. Bello v. State*, 547 So. 2d 914 (Fla. 1989)(no great risk where others were out of the line of fire). Further, this circumstance is applicable in situations similar to this case, where a shoot-out occurs near a busy thoroughfare where several shots are fired at some distance from the victim and aimed in the direction of other people. *Cf. Hallman v. State*, 560 So. 2d 223, 226 (Fla. 1990).

There is competent substantial evidence to support the trial court's finding of this circumstance, in that the facts show that appellant fired many shots in a busy thoroughfare, with at least five persons being in appellant's line of fire and that much of appellant's gunfire was made at some distance to his target and in the direction of many other people.

Aftab Katia, the manager of Ivory's convenience store (TV IX, 1697/18), testified that the victim was on Katia's cellular phone standing by the ice machine just outside the door of Ivory's, when appellant approached the victim carrying more than one gun (TV IX, 1709/1-7) and asked him where the girl was (TV IX, 1700/5). The victim started to run, and Mr. Katia heard a gunshot (TV IX, 1700/15. Detective Robert White testified that one of the bullets fired by appellant went through the ice machine in a westerly direction (TV VIII, 1522/12-24).

The remainder of this homicide took place in the middle of a busy Fort Lauderdale thoroughfare at high noon where five vehicles and twenty-five pedestrians had congregated prior to the shooting. At least one of those vehicles was in the direct line of fire of appellant's gunfire, and this vehicle contained four individuals. Appellant also fired directly at another witness who chased after appellant to get his license plate number. Moreover, as appellant ran toward this busy thoroughfare, he was firing a weapon from each hand at some distance from the victim and in the direction of the other many people and vehicles.

The facts show that the Holdren vehicle was in appellant's line of fire. Debbie Holdren testified that she was driving a vehicle in which her daughter, her mother and her niece Melissa Herndon were passengers (TV VIII, 1551-52). She testified that there was other traffic on the street and it seemed rather busy (TV VIII, 1553/19-1555/1). Around noon (TV VIII, 1553/19), as she was approaching Ivory's (convenience store)(TV VIII, 1557/21), she heard popping sounds which her niece said were gunshots (TV VIII, 1554/9). She slammed on the brakes, a black man hopped over her car and fell into the road (TV VIII, 1559). Her mother - who was in the front passenger seat (TV VIII, 1552/22) - in fear for their safety pressed on the accelerator (TV VIII, 1566/17-21). As they

pulled away, she looked in her mirror and saw a white man walk out, stand over the black man and shoot him (TV VIII, 1564-66). She also indicated that she heard at least five or six shots (TV VIII, 1559/1).

Her niece Melissa Herndon testified that as they were traveling east on 19th Street (TV VIII, 1591/16-19), she heard two gunshots coming from her right side (TV VIII, 1594) and saw two men coming around the corner (TV VIII, 1595, 1597). The victim stumbled at the corner, got back up and was running toward the road (TV VIII, 1596/2). As the victim was running toward their car, another person, who had a gun, was chasing him (TV IX, 1602). While the victim was running toward the car, the other man shot at least two or three more times (TV IX, 1604/10-16). After her aunt drove away from the scene, she saw the defendant walk up to the victim, stand over him and shoot the victim at least twice (TV IX, 1607/2) with a different gun (TV IX, 1605).

Randy Scharf testified that as he was sitting at the traffic light (TV IX, 1647/25), he heard three or four popping noises coming from his right (TV IX, 1648/7, 1649/5). He subsequently saw a black male run around the corner and a white male with a gun in each hand chasing the black male and firing at him (TV IX, 1648/10-14). During the chase, he heard a lot of firing - too many shots

to count (TV IX, 1649/2-9). He also testified that there were other cars around him (TV IX, 1654/8) and other people in the area (TV IX, 1654/4-6).

During the penalty phase hearing, Detective Walley read portions of the sworn taped statement of Curtis Ream, who was deceased at the time of trial (TV VII, 1360/13-17). Mr. Ream indicated that he also witnessed the shooting (TV XI, 2188-90). He said that there were five or six cars and twenty-five people who watched the incident (TV XI, 2195/1). He also witnessed the shooter drive away. He followed the shooter on his motorcycle. The shooter shot twice at him, so he backed off (TV XI, 2189-91).

Medical Examiner Dr. Lisa Flannigan testified that the victim had six entrance wounds (TV VIII, 1460/19-1461/1). She indicated that the wounds to the chest, back, elbow and shoulder were not made at close range (TV VIII, 1465/16-1466/3, 1467/3), while the two wounds to the head were made within several inches (TV VIII, 1468/16-1472/6). Crime lab specialist Dennis Gray testified that they recovered five 9mm shell casings, one 9mm projectile and two .38 special projectiles from the scene (TV IX, 1622/7, 1629/14, 1630-35).

The evidence shows that appellant fired his weapons at least eight times (six wounds to the victim plus two shots at Curtis

Ream)(nine times assuming that the bullet that went through the ice machine did not hit the victim), but appellant had a .38 special and a 9mm, so he had the firing capability of at least fourteen rounds (6 + 8). Randy Scharf indicated that he heard too many shots to count.

Appellant argues that neither Debbie Holdren nor Melissa Herndon actually testified that appellant fired in their direction. However, Melissa Herndon testified that while the victim was running toward their vehicle, appellant fired at least two or three more times. Randy Scharf testified that after appellant and the victim rounded the corner appellant continued to shoot <u>at the victim</u>. The victim was heading directly toward the Holdren vehicle, evidenced by the fact that he ran into it. Therefore, the facts show that the Holdren vehicle had to be in appellant's line of fire. Debbie Holdren's mother must have perceived that they were in harms way and in immediate and present danger, because while sitting in the passenger seat she somehow hit the accelerator, an imminently dangerous act in itself. Again, the evidence shows that there were at least five people in appellant's line of fire, the four people in the Holdren vehicle and Curtis Ream.

There is also competent substantial evidence which shows that

appellant fired in the direction of many other persons while shooting at some distance from the victim. This is evidenced by the fact that the victim's body wounds, as distinguished from the wounds to the head, were made at some distance. These persons included Randy Scharf, who was stopped at the light in front of the Holdren Vehicle (TV VIII, 1558/20). Furthermore, appellant fired a bullet that went through the ice machine just outside Ivory's entrance where Aftab Katia was located. Mr. Katia had just handed the victim his cellular phone and saw appellant approach with the guns, so Mr. Katia was also in great danger of being killed by appellant's gunfire.

Even if this Court were to find that this circumstance is not supported by the record evidence, any error would be harmless in that elimination of this circumstance would still not have resulted in the imposition of a life sentence. *See Hamblen v. State*, 527 So. 2d 800 (Fla. 1988). The lone remaining aggravating circumstance (prior violent felony) and minimal mitigation, which the trial court gave only little or some weight, would still support imposition of the death penalty. *See Ferrell v. State*, 680 So. 2d 390 (Fla. 1996)(death proportionate in single-aggravator cases despite mitigation where the lone aggravator is especially weighty). *See also Burns v. State*, 699 So. 2d 646 (Fla. 1997) and

Duncan v. State, 619 So. 2d 279 (Fla. 1993). *Burns* is especially instructive in that this Court noted that there was no mental mitigation and the gravity of the single aggravator (prior violent felony) was not reduced by any factual circumstances surrounding the prior felony. Similarly, should the great risk circumstance be struck in this case the remaining aggravator would be prior violent felony; there was also no mental mitigation in this case; and there are no facts surrounding appellant's two prior convictions for attempted murder that would in any way mitigate the gravity of the offenses. In one prior instance, the victim was robbed and shot with a sawed-off shotgun while standing in a parking lot. In the other instance, the victim was robbed and shot while waiting in front of his house for a cab. Clearly, appellant has no respect for human life and will continue to use lethal force in any effort to advance his pecuniary gain.

Certainly the two prior robberies and attempted murders in this matter are especially weighty. This Court acknowledged such in *Chaky v. State*, 651 So. 2d 1169 (Fla. 1995). *Chaky* was a single aggravator case, where the lone aggravating circumstance was a prior violent felony of attempted murder. Although this Court found the death penalty disproportionate, it did so only due to the circumstances surrounding the prior conviction, which "mitigate the

significant weight that such a previous conviction would normally carry." This case involves two prior attempted murders which have no related mitigating factual circumstances.

Based on the above, even should this Court strike the great risk circumstance, the lone remaining aggravating circumstance is especially weighty and sufficiently so when compared to the minimal mitigation to justify imposition of the death penalty.

POINT VIII

WHETHER ADMITTING THE HEARSAY STATEMENT OF CURTIS REAM DURING THE PENALTY PHASE HEARING AMOUNTED TO FUNDAMENTAL ERROR.

Appellant argues that during the penalty phase hearing it was

fundamental error for the trial court to admit through Detective Walley the statement Curtis Ream had made to him. Appellant is forced to argue that the alleged error is fundamental, in that no objection to the testimony was made below and the issue was therefore not preserved for appellate review. *Rhodes v. State*, 638 So. 2d 920 (Fla. 1994).

However, during the penalty phase of capital cases hearsay testimony is permitted at the court's discretion, so long as it has probative value and so long as the defendant is accorded a fair opportunity to rebut the hearsay statement. *Spencer v. State*, 645 So. 2d 377 (Fla. 1994). In *Spencer*, the hearsay statement was offered through a police officer and was probative of aggravating circumstances. This Court found no error in *Spencer*, in that the defendant had an opportunity to cross-examine the testifying officer. This case is very similar to *Spencer*. The hearsay statement, which was probative of an aggravating circumstance, came in through Detective Walley, who appellant had an opportunity to cross-examine but did not (TV XII, 2204/12). In *Spencer*, the detective testified about what the witness had told him, while in this case portions of the actual statement were read by Detective Walley, but of course Detective Walley could have testified to the substance of the statement without reading from the actual

statement itself. Therefore, this slight difference between these cases is of no consequence.

Appellant relies on *Brown v. State*, 471 So. 2d 6 (Fla. 1985), which is not applicable to this situation, because *Brown* involved the use of a deposition at trial, where the State failed to follow the procedure for perpetuating the testimony of the witness. Appellant also relies on *Donaldson v. State*, 23 Fla. L. Weekly S245 (Fla. Apr. 30, 1998), which also is not applicable in this case, because it involved the use of a discovery deposition. Finally, appellant also relies on *Rhodes v. State*, 547 So. 2d 1201 (Fla. 1989), which is not applicable in that in *Rhodes*, as opposed to this case, there was no witness present in the courtroom who could be cross-examined. In this matter, Detective Walley could have been cross-examined regarding the statement made to him by Curtis Ream. Further, The hearsay statement in *Rhodes* involved information that was not directly related to the crime for which the appellant was on trial but was totally collateral in nature. In this case, however, the statement was directly related to the criminal enterprise for which appellant was tried. Based on the above, the trial court did not abuse its discretion in admitting the statement of Curtis Ream.

Be that as it may, even if it were error it would be harmless

and not ground for reversal pursuant to Fla. Stat. § 59.041, Fla. Fla. Stat. § 924.051, Fla. Stat. § 924.33 and the holding of *State v. Diguilio*, 491 So. 2d 1129 (Fla. 1986), in that there was no reasonable possibility that the alleged error contributed to the conviction. Even absent the testimony of Curtis Ream, the record shows that the four occupants of the Holdren vehicle were placed in great risk of death by appellant, as were many other persons who were in the area of Ivory's and the Holdren vehicle, which was sufficient to fulfill the requirements of the "great risk" aggravating circumstance.

POINT IX

WHETHER THE TRIAL COURT FAILED TO CONSIDER MITIGATING EVIDENCE APPARENT IN THE RECORD.

Appellant argues that the trial court failed to consider mitigating evidence which was apparent on the record. Although appellant does not explain his basis for reaching this conclusion, appellant is likely suggesting that if the trial court did not mention a mitigating circumstance in the sentencing order then the trial court did not consider it. The trial court did only list in his sentencing order mitigating circumstances that he found to exist. However, although a trial court has a duty to consider all mitigating evidence, a trial court only has a duty to expressly evaluate in the sentencing order each mitigating circumstance proposed by the defendant. *Ferrell v. State*, 653 So. 2d 367, 371 (Fla. 1995); *Campbell v. State*, 571 So. 2d 415, 419 (Fla. 1990). In this case the defendant proposed no mitigating circumstance. Further, appellant must share the burden of identifying for the court the specific nonstatutory mitigating circumstances he is attempting to establish. Having failed to do so, appellant should not now claim on appeal that additional mitigation existed and should be factored into the proportionality equation. *Lucas v. State*, 568 So. 2d 18, 23-24 (Fla. 1990).

Further, in regard to the mitigation now proposed by appellant and with the exception of emotional rage at the time of the crime[9] and ineligibility for parole, the facts supporting each of the mitigating circumstances now propounded by appellant (IB 55-57) are found in the presentence investigation report and were considered by the trial court (SR 45-54). In his sentencing order, the trial court repeatedly indicated that he reviewed the PSI (and the evidence presented at trial) in determining what mitigation was shown to exist (R 2720-22).

There was also additional potential mitigation apparent in the record. During the *Koon* hearing, defense counsel informed the trial court of the mitigators that he had discussed with appellant, which were age, a potential heart condition and some background information (TV V, 904-5). The trial court then inquired whether defense counsel had informed appellant about childhood mitigators such as neglect, abuse or break down of the family unit (TV V, 905/15-20). Defense counsel indicated that he had but also indicated that appellant did not want him tracking down appellant's mother (TV V, 905/17, 21-25). After some discussion, the trial

[9] The sentencing order specifically addresses this circumstance and indicates that "the evidence clearly rebuts any argument that the murder was committed during a fit of rage or with any legal or moral justification (R 2720).

court inquired whether there were further mitigators that counsel or appellant wished to state on the record as those he would likely present to the jury (TV V, 912/7). Defense counsel responded that there was still an on-going investigation (TV V , 912/13), and appellant responded that he did not care to disclose any further possible mitigation (TV V, 913/7). Appellant again reiterated that he did not wish to present mitigators to the jury (TV V, 914/14).

After the jury reached a verdict and before sentencing phase, the trial court again asked discharged counsel if there were any other mitigators, besides age, background and a possible heart condition, that were being explored (TV XI, 2119/21-2120/11). Counsel explained that he had wanted to investigate appellant's family history, but appellant did not want him to contact his mother (TV XI, 2120/17-25). However, counsel did mention that appellant had been placed in foster care (TV XI, 2121/7). Appellant again indicated that he was waiving all mitigation (TV XI, 2121/16-25). Subsequently, counsel indicated that appellant had an investigator who had been looking into mitigation, and the trial court ordered that the investigator appear to be heard on such matters (TV XI, 2122/9-25). When the investigator appeared in court, he indicated that he had not investigated appellant's background, because appellant told him not to do so (TV XI, 2137-

38). Appellant again indicated that he had no mitigation other than age, and he also explained that he had been examined by a cardiologist who had indicated that his heart was in good condition (TV XI, 2142-42)(R 2675-76). Appellant also indicated that he did not get along with his mother that he did not believe that that was mitigating (TV XI, 2143/9).

In summary, the record (in addition to the PSI) reflects potentially mitigating factors of appellant's age and heart condition, background information generally and more specifically that appellant did not get along with his mother and lived in a foster home. Clearly without more "background information" is not mitigating. Further, the cardiologist concluded that appellant had no heart condition. The trial court found appellant's age mitigating (R 2721). Therefore, the only remaining factors are appellant's relationship with his mother and his living in a foster home. Both of these factors are clearly set forth in the PSI, which the trial court considered (SR 49, 52). Furthermore, the trial court specifically addressed the fact that after appellant was released from the hospital his "...mother refused to take him back home, and he has not seen her since then" (SR 2721). Therefore, of the potentially mitigating factors proffered during the proceeding, the only relevant factor not specifically mentioned

by the trial court in the sentencing order was in regard to appellant's foster care. However again, the trial court indicated that he had also reviewed the PSI in evaluating the mitigation (SR 2721), and the PSI indicated that appellant had lived in a foster home. Moreover, the trial court did find as mitigating appellant's difficult and unstable childhood (SR 2721). Obviously, the fact that appellant lived in a foster home is an aspect of his difficult and unstable childhood. This Court has held that these nonstatutory mitigating circumstances should be dealt with as categories or in groups of related conduct rather than individual acts, and one such group suggested by this Court is for abused or deprived childhood. *Campbell v. State*, 571 So. 2d 415, 419, nn 3 & 4 (1990). The record reasonably shows that this is what the trial court did. Furthermore, several of the mitigators now suggested by appellant (IB 55-57), which were also discussed in the PSI, should have been grouped into the classification, "difficult and unstable childhood." These are (1) appellant's diagnosis of depression neurosis, conduct disorder and borderline personality disorder, which was the manifestation of appellant's troubled childhood; (2) the absence of a strong male role model in appellant's life; (3) the close relationship of the mother's neglect to appellant's juvenile court record and disruptive

behavior; and (4) the lack of parental guidance when appellant was a teenager.

Appellant cites to *Farr v. State*, 621 So. 2d 1368 (Fla. 1993), but *Farr* only holds that the trial court is obligated to consider all mitigation in the record. *Farr* does not obligate a trial court to mention in the sentencing order all mitigation in the record. Furthermore, just because a trial court fails to mention a possible mitigating circumstance in the sentencing order does not mean that the trial court ignored the evidence but more likely means that the trial court either grouped the circumstance with others or determined that the evidence did not support a finding of the existence of the circumstance. *Lucas v. State*, 613 So. 2d 408 (Fla. 1993); *Palmes v. State*, 397 So. 2d 648 (Fla. 1981). This case is not like *Robinson v. State*, 684 So. 2d 175 (Fla. 1996), where in the sentencing order the trial court specifically indicated that he did not consider the proffered mitigators.

This case is more similar to *Hauser v. State*, 701 So. 2d 329 (Fla. 1997), where the defendant refused to present any mitigation and subsequently claimed that the court erred by failing to acknowledge in the sentencing order each possible mitigating circumstance contained in the PSI. It should be noted that in *Hauser*, the trial court did not even mention the PSI in the

sentencing order, while in this case the trial court specifically indicated that he had reviewed the PSI and cited to facts contained in the PSI which supported his finding the existence of appellant's cooperation with authorities and appellant's difficult and unstable childhood mitigators. In *Hauser*, this Court held that although the sentencing court must give a good faith consideration to the mitigation contained in the record, it was not necessary for the sentencing order to list each circumstance so long as the record shows that the trial court performed a thoughtful and deliberate weighing of aggravating and mitigating circumstances.

In this matter, the trial court wrote the following in his sentencing order regarding mitigation:

> The Defendant waived defense counsel's presentation of mitigating factors. Although the defendant refused to present evidence in mitigation during the penalty phase proceedings and further refused to cooperate in the preparation of the Presentence Investigation Report (PSI) as ordered by this Court, a PSI was prepared using information from previous reports. Based on the evidence presented at trial and the information contained in the PSI, the Court considered the following statutory mitigating factors:
>
> 1. The age of the defendant at the time of the offense. §921.141(7)(f), Florida Statutes
>
> The defendant was born on June 22, 1973 and was, therefore, 23 years old when he committed the murder. The Court finds this mitigating circumstance exists but gives is little weight.
>
> The Court finds no other statutory mitigators applicable; however, the following non-statutory mitigators were found to exist as follows:

1. The defendant's good behavior at trial.

The court finds this mitigating circumstance to exist based upon its observations of the defendant, but gives it little weight.

2. The defendant was cooperative when arrested and offered no resistance.

Information made available to the Court in the Presentence Investigation Report reveals that the defendant was arrested without incident or resistance. The Court finds that this mitigating circumstance exists, but gives it little weight.

3. The defendant had a difficult and unstable childhood.

The PSI revealed that the defendant's parents divorced when he was young. In 1988 he was hospitalized at South Florida State Hospital pursuant to the Baker Act. Upon release his mother refused to take him back home, and he has not seen her since then. Based on the foregoing, the Court finds this mitigating circumstance exists and gives it some weight.

(R 2720-2722)

Upon carefully evaluating all of the evidence presented, it is this Court's reasoned judgment that the mitigating circumstances do not outweigh the aggravating circumstances.

(R 2722).

This record does not show that the trial court refused to consider any mitigation. To the contrary, the record shows that the trial court reviewed the entire record, including the evidence presented at trial and the PSI, in weighing the aggravating and mitigating circumstances.

Even if each of the mitigating circumstances now presented on

appeal should have been found to exist by the trial court, it would be harmless, because it is apparent that they would have been ascribed little weight and would not have affected the sentence. Appellant first refers to his diagnosis of depression neurosis, conduct disorder and borderline personality disorder (IB 55). The sentencing order specifically refers to when appellant's mother had him Baker Acted in 1988 (R 2721), which is on page 7 of the PSI (SR 49). Page 8 of the PSI (SR 52) mentions the diagnosis now presented, which was made while he was admitted to the Coral Reef Hospital in May of 1989. However, page 7 of the PSI indicates that less than a year earlier appellant had a psychiatric evaluation which was negative, revealing no problems except behavioral problems and mild depression. Clearly these two entries are inconsistent and would support the trial court's failure to find the existence of the proposed mitigator or support the trial court's ascribing little weight to it. *Whitfield v. State*, 706 So. 2d 1 (Fla. 1997); *Quince v. State*, 414 So. 2d 185 (Fla. 1982).

Appellant also indicates that the trial court should have found his intelligence to be a mitigating circumstance. However, each of the cases cited by appellant indicate that above-average intelligence may be mitigating. The PSI indicates that appellant was a good student academically (SR 52); however, it also reflects

that appellant (1) was suspended three times for disturbing class and fighting (SR 52), (2) only completed the eighth grade in school and had no other special training or skills (SR 48) and (3) quit school in the eighth grade because he did not like getting up in the mornings (SR 52). Nothing in the facts reflect that appellant has above-average intelligence. In fact, appellant initially failed the written driver's test (TV V, 892/11-13). Furthermore, the mere fact that a defendant has above-average intelligent is not mitigating unless it is shown that this condition somehow extenuates or reduces his or her moral culpability. *Rogers v. State*, 511 So. 2d 526, 534 (Fla. 1987). Appellant has not shown how his intelligence in any way reduces his moral culpability for this crime.

Appellant indicates that he subsequently obtained his GED and that this should have been found to be mitigating in nature. In support thereof, appellant cites to *Green v. State*,, 688 So. 2d 301 (Fla. 1996), which merely indicates that a trial court found one mitigating circumstance to be, "Green rehabilitated himself by finding employment and by gaining the trust and confidence of his employers." Clearly, the trial court was looking at more than the fact that Green found a job. Appellant also cites to *Turner v. State*, 645 So. 2d 444 (Fla. 1994), which was a jury override case,

where this Court determined that the jury could have found as mitigating the fact that the defendant, "overcame obstacles during a difficult childhood to graduate from high school, obtain a basketball scholarship, and once showed a lot of promise." Again, this Court was looking at more than the fact that the defendant graduated from high school. This case is not at all similar to *Green* or *Turner*. Appellant could not hold a job more than several months (SR 52); appellant did not stay in school in an effort to obtain a college scholarship; and nothing in the record shows that appellant had a promising future in any endeavor except crime.

Appellant also mentions his strong religiosity. However, there is virtually nothing in the record that reflects his religious beliefs. Before being released, appellant's penalty-phase counsel Brad Collins explained to the trial court what mitigation he had gone over with appellant and religious beliefs was not mentioned (TV V, 902-06). Subsequently, after the verdict and before penalty phase, Brad Collins again explained to the trial court what mitigation had been investigated (TV XI, 2119-24). Again, there was no mention of appellant's religious beliefs. When the trial court subsequently ordered appellant's private investigator to appear prior to penalty phase and to explain what investigation had been made regarding mitigation (TV XI, 2136-40),

religious beliefs was not mentioned. The PSI contains no reference to appellant's religious beliefs. The only references to appellant's religious beliefs are in a written statement appellant filed with the court (R 2703) and an oral statement he made during the *Spencer* hearing. At the *Spencer* hearing, appellant again indicated that he does not beg anyone and said that he put his trust in the Lord and whether or not he died was up to the Lord. In the written statement, appellant indicated that he would never disrespect his God by begging anyone to spare his life, and that whatever happens to him is Allah's destiny for him. However, in the same statement, appellant said that he did not want anyone to think that they had gained a victory over him, because if it were anyone's victory it was his. He also indicated that he did not want anyone to be happy with this situation because it did not faze him, and that no one could ever get him because he would have the last laugh. There is nothing in this record to support appellant's assertion that his religious beliefs are mitigating in nature.

Appellant also mentions the absence of a strong male role model, his mother's neglect and the lack of parental guidance. However, it is apparent that the trial court considered these facts and grouped them with defendant's difficult and unstable childhood mitigating circumstance.

Appellant also indicates that the trial court failed to consider his emotional rage at the time of the crime. However, again the sentencing order refutes this; the trial court stated:

> In the case at bar, the evidence showed that the defendant was carrying two loaded guns when he approached the victim. After the wounded victim fell while trying to flee, the defendant walked up to him and twice shot him in the head execution-style at point blank range. This evidence clearly rebuts any argument that the murder was committed during a fit of rage or with any legal or moral justification.

(R 2720).

Finally, appellant indicates that the trial court failed to consider as mitigating the fact that if sentenced to life he would not be eligible for parole. In support of this argument, appellant cites to *Turner v. State*, 645 So. 2d 444 (Fla. 1994), an override case where the defendant was convicted of two counts of first-degree murder. This Court indicated that the jury could have found as mitigating the fact that an alternative to the death sentence was two life sentences, which the jury knew would have required Turner to serve a minimum of fifty years in prison before he would be considered for parole. Cases like *Turner* involve double homicides and had significance when the alternative to the death penalty was a life sentence without the possibility of parole for twenty-five years. Therefore, in these type cases a defendant was allowed to argue that he could receive a 50-year minimum mandatory

sentence or essentially a life sentence. These cases have no application today, when the alternative to the death penalty is a life sentence without the possibility of parole, where the trial court instructs the jury accordingly.

This record shows that the trial court complied with the dictates of *Farr* and considered all mitigation in the record.

POINT X

WHETHER THIS COURT SHOULD RECEDE FROM *HAMBLEN V. STATE*.

Appellant argues that this Court should recede from its holding in *Hamblen v. State*, 527 So. 2d 800 (Fla. 1988), that a capital defendant may waive mitigation. This Court has repeatedly affirmed its position in *Hamblen*. *Hauser v. State*, 701 So. 2d 329, 331-32 (Fla. 1997); *Allen v. State*, 662 So. 2d 323, 331 (Fla. 1995). Appellant has provided no adequate reason for this Court to recede from its ruling.

POINT XI

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S PRETRIAL MOTION TO COMPEL DISCLOSURE OF MITIGATING EVIDENCE.

Appellant generally argues that the trial court abused its discretion in denying his pretrial motion to compel disclosure of mitigating circumstances pursuant to Fla. R. Crim. P. 3.220 and Fla. Stat. § 921.141 (R 2582)(an apparent discovery motion); however, appellant also now argues that the State violated his rights under *Brady v. Maryland*, 373 U.S. 83 (1963). During oral argument of this motion, both the trial court and the prosecutor acknowledged that the State had a duty under *Brady* to disclose evidence favorable to appellant, but the prosecutor argued that the State was under no additional obligation to investigate the defense's case (TV V, 976-77). The trial court's concern with granting the motion was that the State could be held accountable for determining what evidence was mitigating in nature (TV V, 978/1-9).

The *Brady* issue is really a red herring but, nonetheless, to

establish such a violation, appellant must prove the following: (1) that the Government possessed evidence favorable to the defendant (including impeachment evidence); (2) that the defendant does not possess the evidence nor could he obtain it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different. *Rivera v. State*, 23 Fla. L. Weekly S343 (Fla. Jun. 11, 1998); *Hegwood v. State*, 575 So. 2d 170, 172 (Fla. 1991)(quoting *U.S. v. Meros*, 866 F.2d 1304, 1308 (11th Cir. 1989). Clearly, appellant has failed to prove each of these elements. His only argument is that the PSI reveals mitigation which was in the state's possession (IB 62). Appellant does not detail what mitigating evidence this is, so it is presumed to be the evidence itemized in point IX above. All of this information was either known by the defendant or he could have obtained it with reasonable diligence. Further, the information was not suppressed by the prosecution. This PSI was timely provided to the defendant (TV XII, 2245/24-2246/3).

It also should be noted that appellant's motion was general in nature. This Court had pointed out that when *Brady* requests are general in nature, it is not the trial court but the State that

decides which information must be disclosed, and until defense counsel brings to the court's attention that exculpatory evidence was withheld, the prosecutor's decision on disclosure is final. *Roberts v. Butterworth*, 668 So. 2d 580 (Fla. 1996). Therefore, based on the motion before the trial court, it would have been error to require the State to turn over all information regarding mitigating circumstances.

In regard to the State's discovery obligation, neither Fla. R. Crim. P. 3.220 nor Fla. Stat. § 921.141 obligate the State to provide in discovery all information regarding mitigating circumstances. Moreover, as the prosecutor pointed out to the trial court, the State is under no obligation to investigate or prepare the defense's case (TV V, 976/22). *See Melendez v. State*, 498 So. 2d 1258, 1260 (Fla. 1986); *Perry v. State*, 395 So. 2d 170, 173-74 (Fla. 1980). Based on the above, the trial court did not abuse its discretion in denying appellant's pretrial motion to compel.

Even if the trial court abused its discretion in denying appellant's pretrial motion to compel disclosure of mitigating evidence, it would be harmless for the same reasons set forth in point IX above, which is incorporated herein by reference.

POINT XII

WHETHER THE DEATH SENTENCE IS PROPORTIONATE.

After appellant waived mitigation, the jury recommended death by a 10-2 majority (TV XII, 2236/13). The trial court found the existence of the prior violent felony[10] and great risk of death aggravating circumstances (R 2717). One of his prior convictions was for a robbery where the victim was shot with a sawed off shotgun, while the victim was standing in a parking lot. The other conviction also involved a robbery, where the victim was shot while he was waiting in front of his house for a cab (SR 51; R 2717). As

[10] Appellant was adjudicated guilty of armed robbery and attempted murder on May 26, 1993, and was adjudicated guilty of a separate offense of attempted armed robbery and attempted murder on April 14, 1993 (R 2717).

was previously mentioned, the prior violent felony convictions are extremely weighty. The great risk circumstance is also very weighty and was discussed at length in point VII above.

The trial court only found age as the single statutory mitigating circumstance[11] and gave it little weight. In regard to non-statutory mitigation, the trial court only found appellant's good behavior at trial and his cooperation with authorities when arrested, which he gave little weight (R 2721), and appellant's difficult and unstable childhood which he gave some weight (R 2721-22). The additional evidence now proposed by appellant in point IX above either is not mitigating in nature, for the reasons provided in appellee's prior harmless error argument which is incorporated herein by reference, or was already considered by the trial court and either rejected or given the appropriate weight.

The imposition of the death penalty in this case is proportionate. The death penalty is appropriate if, as here, the jury has recommended and the judge imposed the death sentence, finding that more than one aggravating circumstance outweighed the mitigating evidence. *Freeman v. State*, 563 So. 2d 73 (Fla. 1990). Death is presumed to be the proper penalty when one or more aggravating circumstances are found, in the absence of any

[11] Appellant was 23 at the time of the offense (R 2721).

mitigating factors which might override the aggravating factors. *Davis v. State*, 703 So. 2d 1055, 1061 (Fla. 1997); *White v. State*, 403 So. 2d 331 (Fla. 1981).

In this case, appellant wanted retribution for the theft of his money by Sandra DeShields. Appellant sought out the victim in his effort to locate Ms. DeShields. Appellant took two loaded guns and found the victim at his place of work at around noon. When the victim did not immediately give appellant the location of Sandra DeShields, appellant chased the victim into a busy Fort Lauderdale street while firing multiple shots in the direction of many vehicles and pedestrians. The Holdren vehicle was in the line of fire. This created a great risk that these other persons would be killed. Appellant put several of the shots into the victim's body as they ran, and after the victim had fallen from his wounds appellant walked up to the victim and coldly shot him twice in the head at close range. This was a cold-blooded execution-style murder.

Appellant argues that his death sentence is disproportionate, because there were only two aggravating circumstances but substantial mitigation. However, this case is not similar to those types of case where this Court has found death disproportionate because the trial court found only two aggravators but copious

mitigation. First, in those cases the mitigation many times involves mental mitigation, which was not found in this case, and age where the defendant is much younger than appellant's age of 23 at the time of the offense. *See Hawk v. State*, 23 Fla. L. Weekly S473 (Fla. Sept. 17, 1998). Furthermore, the mitigation in this case is minimal. Also, this Court has repeatedly held that this process is more than a numbers game and requires a careful consideration of the totality of the circumstances and the weight of the aggravating and mitigating circumstances. *Floyd v. State*, 569 So. 2d 1225, 1233 (Fla. 1990), *cert. denied*, 501 U.S. 1259 (1991). Proportionality review also requires a comparison of the factual situations. *Id*.

Here, the motive for this homicide was clearly retribution. Appellant was seeking revenge for the money Ms. DeShields had taken from him. *Archer v. State*, 673 So. 2d 17 (Fla. 1996), was also a retribution killing. Archer had been fired from his job and got his cousin to kill the clerk that Archer held responsible for his having been terminated.[12] In *Archer*, this Court affirmed the death sentence, where the trial court found two aggravating circumstances (CCP and felony murder), one statutory mitigator (no significant

[12] The facts of this case are found at *Archer v. State*, 613 So. 2d 446 (Fla. 1993).

prior criminal history, which it gave significant weight) and one nonstatutory mitigator (being a good family member, which it gave some weight). In this matter, the trial court also found two aggravating circumstances (prior violent felony and great risk), one statutory mitigator (age, which it gave little weight) and minimal nonstatutory mitigation (cooperation with police and good behavior at trial, which it gave little weight, and a difficult childhood, which it gave some weight). Under the totality of the circumstances, appellant's sentence is as proportionally warranted as Archer's. *See also Bonifay v. State*, 680 So. 2d 413 (Fla. 1996); *Pope v. State*, 679 So. 2d 710 (Fla. 1996)(finding the premeditated murder for pecuniary gain proportionally warranted, despite the presence of both statutory mental mitigators and the defendant's intoxication at the time of the offense).

To support his contrary position, appellant cites to *Kramer v. State*, 619 So. 2d 274 (Fla. 1993), where the evidence suggested nothing more than a spontaneous fight occurring for no discernible reason between the defendant, a disturbed alcoholic, and a man who was legally drunk. In this case, the homicide clearly was not the result of spontaneity. Similarly, in *Livingston v. State*, 565 So. 2d 1288 (Fla. 1988), the court found much greater mitigation. First, the defendant was only 17 and was very inexperienced and

immature, while appellant in this case was 23 at the time and there was no evidence regarding any immaturity for his age. In addition, Livingston's unstable childhood included severe beatings, but there was no evidence of such in this case. Moreover, Livingston had marginal intellectual functioning, while there was no such evidence in this case. Finally, Livingston used cocaine and marijuana extensively, and although appellant told the probation specialist that he used cocaine and marijuana, this was never verified, and he admitted that he had initially lied to her about his cocaine use (SR 52). More importantly, the information in the PSI about appellant's alcohol and substance abuse pertains to statements made by appellant in 1991, almost four years before the instant offense (SR 41, 52).

Appellant also cites to *Fitzpatrick v. State*, 527 So. 2d 809 (Fla. 1988), but the defendant's emotional age in that case was between nine and twelve. Again, such is not the case in this matter. Further, both mental mitigators were found to exist in *Fitzpatrick*, where a mental health expert referred to the defendant as "crazy as a loon" and this Court commented that the actions were those of a seriously emotionally disturbed man-child, not those of a cold-blooded, heartless killer. In this case, on the other hand, neither mental mitigating circumstance was established. Again, the

PSI indicates that in 1989 appellant was diagnosed with depression neurosis, conduct disorder and borderline personality disorder (SR 52), but the PSI also indicates that in 1988 appellant had a psychiatric evaluation the results of which were negative, finding that appellant had no problems except behavioral problems and mild depression (SR 49). More importantly, unlike *Fitzpatrick*, this was a cold-blooded homicide.

Finally, appellant cites to *Jackson v. State*, 575 So. 2d 181 (Fla. 1991), but in *Jackson* this Court found death disproportional because the second prong of *Enmund-Tison* was not met. Although the defendant was convicted of felony murder where he was a major participant in the underlying felony, there was no proof of the culpable state of mind required for imposition of the death penalty. This case is in no way related to those issues.

Based on the above, death is proportional in this matter.

POINT XIII

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN REQUIRING AN ADVISORY JURY RECOMMENDATION.

Appellant argues that the trial court abused its discretion by conducting jury sentencing proceedings over appellant's objection (IB 66). Appellant cites to *State v. Carr*, 336 So. 2d 358 (Fla. 1976) which holds that although a defendant validly waives an advisory jury, the trial court in its discretion may still require an advisory jury recommendation. *See also State v. Hernandez*, 645 So. 2d 432 (Fla. 1994). The only bases set forth by appellant to support an allegation of abuse of discretion are that during the sentencing procedure the State introduced Mr. Ream's hearsay statement; the State engaged in improper argument; the State relied on aggravators not found to exist by the judge and on aggravators not supported by the evidence; and therefore, the court improperly placed great weight on an unreliable recommendation. Even if each of these allegations were true, they would not show that the trial court abused its discretion in making a decision that was made before any of these alleged events took place. Further, each of these issues have been discussed above and none form a basis for remanding for resentencing. In an appellate proceeding, the decision of the trial court has the presumption of correctness, and

the burden is on appellant to demonstrate prejudicial error. Fla. Stat. § 924.051(7); *Applegate v. Barnett Bank of Tallahassee*, 377 So. 2d 1150 (Fla. 1980). Appellant has failed to demonstrate how the trial court abused its discretion by requiring an advisory jury recommendation.

POINT XIV

WHETHER FUNDAMENTAL ERROR OCCURRED DURING THE STATE'S PENALTY PHASE ARGUMENT.

Appellant of necessity argues that the two short comments made by the prosecutor amount to fundamental error, because he failed to preserve this issue for appellate review. A contemporaneous objection must be made in order to preserve for appellate review a comment made by the prosecutor during argument in either the guilt or penalty phases. *Crump v. State*, 622 So. 2d 963 (Fla. 1993); *Teffeteller v. State*, 495 So. 2d 744 (Fla. 1986). Defense counsel interposed no objection to the subject comments.

These comments need to be reviewed in context:

> When we talked about this case and the fact that there could be a penalty phase, yes, we've reached the penalty phase trial. And from the very beginning the attorneys were explaining to you a reasonable doubt and how one is presumed innocent until proven guilty beyond a reasonable doubt and certain legal content such as that we have been through that phase which was the guilt phase and we looked at the evidence and the state argued that evidence and he proved to be guilty under the principles and content of the guilt phase, you found him guilty beyond a reasonable doubt. And that mixed with everything of what we are trying to accomplish here is

> we're seeking the truth as to what happened in this case and I do believe that the evidence established the truth.
>
> The State argued that Mr. Muhammad is the person who killed Jimmie Lee Swanson which began with a demand on a woman that he was looking for who had taken money from him and upon refusing he then chased him and shot him multiple times and it was essentially in the road right in the middle, right in the public eye and right in the middle of the day shot and killed Jimmie Lee Swanson and we know there was at least 6 people who were there at the scene or 7 people, 4 people that were in the 4 driving, Curtis Ream, Ivory's and then in addition to that, Curtis Ream chased the Defendant or was following him and the Defendant tries to shoot him in the middle of the public highway while he was trying to get his tag number and that evidence is clearly established. And that is the truth.

(TV XII, 2208/10-2209-17)(emphasis added).

This portion of the prosecutor's summation related entirely to the evidence adduced during the guilt phase of the trial. Evidence which the jury had previously evaluated and from which determined that appellant was guilty as charged. The prosecutor was now merely indicating that this evidence did establish the truth of the event. But clearly the jury already had made that analysis of the evidence and agreed. Therefore, for the prosecutor to now essentially say that he agrees with the jury's prior evaluation of the evidence would not be error. But if it were, it would be harmless, if error, pursuant to § 59.041, Fla. Fla. Stat. § 924.051, Fla. Stat. § 924.33 and the holding of *State v. Diguilio*, 491 So. 2d 1129 (Fla. 1986). Further, even if it were error, a new

sentencing hearing would not be warranted because the comments were not so outrageous as to taint the validity of the jury's recommendation or be fundamental error. *See Bertolotti v. State*, 476 So. 2d 130, 133 (Fla. 1985); *Urbin v. State*, 714 So. 2d 411, 418 n. 8 (Fla. 1998).

POINT XV

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION BY INSTRUCTING THE JURY IN REGARD TO THE ABSENCE OF PENALTY PHASE COUNSEL.

During voir dire, defense counsel informed the proposed jurors that Bradley Collins was responsible for the penalty phase (TV IV, 730/22-732/12). Subsequently, Mr. Collins conducted his own extensive voir dire (TV IV, 738/5-794/1). After penalty-phase counsel had been discharged (TV V, 983/18), the trial court asked appellant if he wished to voir dire the panel regarding penalties, and appellant indicated that he did not (TV VI, 1009/20-23). Immediately thereafter, the trial court indicated that he had handed the parties an instruction he had used in the past to explain counsel’s absence to a panel (TV VI, 1010/9). The trial

court acknowledged that the instruction needed to be modified and that he was open to suggestions (TV VI, 1010/18-24). Guilt-phase counsel suggested that the instruction be modified "slightly" (TV VI, 1011/20).[13] After further discussion, defense counsel indicated that the proposed instruction was "fine" (TV VI, 1015/20-21), with the exception of the last paragraph, which he believed gave a presumption that there would be a penalty phase (TV VI, 1015/23-1016/4).[14] Then as the trial court was explaining that he agreed with defense counsel, appellant interrupted the trial court and indicated that he did not want any instruction given (TV VI, 1016/23). The trial court then indicated that he had to read something, and defense counsel subsequently asked that it be kept as simple as possible (TV VI, 1016/23-1017/4). Thereafter, defense counsel told the trial court:

> Judge, I think in discussing this with my client, Akeem, we are basically requesting that you keep it as simple as possible whereby say that Mr. Collins has been excused and that Akeem Muhammad is going to now take over and he is not requesting anything to be read further than that.

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[13] Although appellant was present during this discussion (TV VI, 1011/9), he let guilt-phase counsel represent his interests in regard to this issue.

[14] In the instruction the court finally gave to the jury, each time he used the words "penalty phase" he followed these words with the words, "if one ever (or should) arise" (TV VI, 1028/15-1030/3).

(TV VI, 1018/8-14). Shortly thereafter, the trial court asked defense counsel what he wanted to be read to the panel (TV VI, 1018/23), and defense counsel responded that Mr. Collins had been excused and that appellant would be representing himself should a penalty phase arise (TV VI, 1019/1). When the trial court subsequently gave the instruction, appellant did not interpose an objection.

Appellant now argues that the trial court abused his discretion by acting on a misunderstanding of the law, when the trial court indicated that the panel had a right to find out about Mr. Collins' whereabouts and that he had a duty to so inform them (IB 75). Appellant has not preserved this issue for appellate review. 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. *Terry v. State*, 668 So. 2d 954 (Fla. 1996); *Rodriguez v. State*, 609 So. 2d 493 (Fla. 1992); § 924.051, Fla. Stat. (1996). At no time did appellant or defense counsel ever raise below the issue now argued before this Court. Moreover, the record shows that appellant acquiesced to the trial court's giving an instruction.

Further, although appellant indicates that the trial court was operating under a misunderstanding of the law, appellant gives no

legal support for this conclusion. The trial court repeatedly indicated that he believed the panel had a right to know that appellant wanted to and was entitled to represent himself but that he would nonetheless have to abide by the rules of evidence (TV VI, 1012, 1014, 1017, 1020). Appellant gives no legal basis for asserting that this is a misunderstanding of the law. Again, the decision of the trial court has the presumption of correctness, and the burden is on appellant to demonstrate prejudicial error. Fla. Stat. § 924.051(7); *Applegate v. Barnett Bank of Tallahassee*, 377 So. 2d 1150 (Fla. 1980). Appellant has failed in this burden.

Further, a trial court's ruling on a discretionary matter will be sustained unless no reasonable person would agree with the view adopted by the court. *Hawk v. State*, 23 Fla. L. Weekly S473 (Fla. Sep. 17, 1998); *Huff v. State*, 569 So. 2d 1247 (Fla. 1990). Certainly, reasonable persons would agree with the trial court's decision to give such an instruction, so there was no abuse of discretion.

Finally, appellant argues that this instruction was improperly worded in a fashion that the jury would anticipate that there would be a penalty proceeding (IB 76). As previously mentioned, after defense counsel raised this issue below, the trial court modified the instruction in such a manner that every time he mentioned the

term “penalty phase” he followed by stating, “if one should or ever arise.” The jury could not have anticipated that a penalty phase was a certainty with this careful language.

POINT XVI

WHETHER THE TRIAL COURT EMPLOYED AN INCORRECT STANDARD IN IMPOSING THE DEATH SENTENCE.

Appellant argues that the trial court gave undue weight to the jury’s advisory opinion, citing to *Ross v. State*, 386 So. 2d 1191 (Fla. 1980). *Ross* holds that when a trial court believes that he or she is bound by a jury’s recommendation of death, then the

matter should be reversed for resentencing. In *Ross*, this Court concluded that the trial court felt compelled or bound to impose the death penalty, because in its sentencing order stated, "This court finds no compelling reason to override the recommendation of the jury. Therefore, the advisory sentence of the jury should be followed."

Nothing in this record suggests that the trial court felt compelled to follow the jury's recommendation. Quite to the contrary, the trial court indicated in his sentencing order that although he must give great weight to the jury's sentencing recommendation, "the ultimate decision as to whether the death penalty should be imposed rests with the trial judge" (R 2722). Subsequently in the sentencing memorandum, the trial court stated, "Upon carefully evaluating all of the evidence presented, it is this court's reasoned judgment that the mitigating circumstances do not outweigh the aggravating circumstances" (R 2722). This record shows that not only did the trial court not feel compelled to follow the jury's recommendation, he carefully performed his own independent weighing of the aggravating and mitigating circumstances.

Appellant also argues that the trial court improperly employed a presumption of death (IB 79). In the sentencing order, the trial

court stated, “Death is presumed to be the proper penalty when one or more aggravating circumstances are found, unless they are outweighed by one or more mitigating circumstances” (R 2722). However, again it is clear from the sentencing order in its entirety that the trial court properly performed its function of independently weighing the aggravating and mitigating factors. *See Elledge v. State*, 706 So. 2d 1340 (Fla. 1997)(finding no error where the trial court allegedly applied a presumption of death, because the record showed that the trial court properly weighed the aggravating and mitigating circumstances).

IN RESPONSE TO APPELLANT’S SUPPLEMENTAL INITIAL BRIEF

POINT I

WHETHER THE PSI USED BY THE SENTENCING COURT WAS PREPARED IN

VIOLATION OF FLA. R. CRIM. P. 3.711 AND SHOULD THEREFORE BE STRUCK.

Appellant argues that the PSI used in this case was invalid, because portions of it were obtained from a 1991 PSI which was lawfully invalid, because it was prepared in violation of Fla. R. Crim. P. 3.711. This issue has not been preserved for appellate review. 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. *Terry v. State*, 668 So. 2d 954 (Fla. 1996); *Rodriguez v. State*, 609 So. 2d 493 (Fla. 1992); § 924.051, Fla. Stat. (1996). The PSI was provided to appellant before sentencing (TV XII, 2245/24-2246/3), but appellant never objected to the use of this PSI on the basis now asserted.

Appellant's position is that the 1991 PSI is invalid because it was ordered before there was a finding of guilt. However, even if this were true the committee notes to this rule of procedure indicate that this rule permits presentence investigations to be initiated prior to a finding of guilt, because the purpose of the rule is to reduce unwarranted jail time by a defendant who expects to plead guilty and who may well merit probation or commitment to facilities other than prison. Appellant indicates that he did in fact plead guilty to that 1991 offense (SB 11), and the record shows that he was sentenced to three years probation (SR 51).

Therefore, the record appears to reflect that the trial court initiated the presentence investigation precisely according to purpose of this rule of procedure.

More to the point, however, nothing in this record actually reflects that the adjudication of April 14, 1993, (SR 51) was the result of a guilty plea on that date or when a finding of guilt was made. Nothing in the record indicates the date that the trial court ordered that PSI, and nothing in this record shows that appellant did not consent to the commencement of that PSI. Where, as here, the record brought forward is inadequate to demonstrate reversible error, the trial court should be affirmed. *Applegate v. Barnett Bank of Tallahassee*, 377 So. 2d 1150 (Fla. 1979).

Even assuming that everything now argued by appellant is true, appellant has still not shown why either the 1991 PSI or the instant PSI should be stricken from the record. In other words, appellant has not shown any prejudice. A judgment or sentence may be reversed on appeal only when the record establishes prejudicial error, and appellant has the burden of demonstrating that prejudicial error occurred. § 924.051, Fla. Stat. (1996). Similarly, any time procedural irregularities are alleged or occur, the emphasis is on determining whether anyone has been prejudiced by that irregularity. *Hoffman v. State*, 397 So. 2d 288 (Fla.

1981); *see also Wuornos v. State*, 676 So. 2d 966, 969 (Fla. 1995). In regard to this issue, appellant has made no effort to show how he was prejudiced.

POINT II

WHETHER FLA. STAT. § 921.231 IS UNCONSTITUTIONALLY VIOLATIVE OF A DEFENDANT'S RIGHT TO PRIVACY.

Appellant argues that Fla. Stat. § 921.231 violates his right to privacy under Art. I, § 23, Fla. Const., because it authorizes the Department of Corrections to investigate a defendant's medical history, family relationships and related matters without the defendant's consent. However, the State can justify an intrusion on an individual's privacy if it can demonstrate that the challenged statute serves a compelling state interest and accomplishes its goal through the use of the least intrusive means. *B.B. v. State*, 659 So. 2d 256 (Fla. 1995); *Shaktman v. State*, 553 So. 2d 148 (Fla. 1989). The zone of privacy covered by Article I, § 23 is an individual's legitimate expectation of privacy which is not spurious or false. *Id*.

Assuming for purposes of this argument that appellant's family relationships and medical records are protected under Article I, § 23, Fla. Stat., § 921.231 nonetheless furthers a compelling state interest through the least intrusive means. The sentencing phase

of a criminal proceeding furthers the State's compelling interest in preventing the conduct proscribed by the criminal statutes. *See J.A.S. v. State*, 705 So. 2d 1381, 1383 (Fla. 1998). Fla. Stat. § 921.231 also furthers the State's compelling interest in maintaining the integrity of the sentencing process. This statute accomplishes these interests in the least intrusive means by limiting the availability of the PSI to only a few persons with a legitimate professional interest in the information. Fla. R. Crim. P. 3.712. One might argue that this rule can have no impact on Fla. Stat. § 921.231; however, quite to the contrary this rule must be read an applied together with Fla. Stat. § 921.231, in that the means of assuring the informed exercise of judicial discretion in sentencing is a procedural matter properly determined by court rules and not the legislative process. *See Huntley v. State*, 339 So. 2d 194 (Fla. 1976).[15]

POINT III

WHETHER FLA. STAT. § 921.231 IS VOID FOR VAGUENESS.

Appellant argues that Fla. Stat. § 921.231 is void for vagueness, because (1) it requires that the report contain a

[15] Although *Huntley* pertains to Fla. R. Crim. P. 3.710, the rationale would be equally applicable to rules 3.711, 3.712 and 3.713.

description of the situation surrounding the criminal activity charged, not the criminal activity for which the defendant was found guilty; (2) it does not give specific guidelines regarding what information this situational description may be prepared from; (3) it does not give specific guidelines regarding what information may be obtained in regard to a defendant's social history; and (4) it does not give specific guidelines regarding what information may be obtained in regard to a defendant's medical records and psychological or psychiatric evaluation.

In regard to the first sub-issue, as mentioned above, Fla. Stat. § 921.231 must be read together with Fla. R. Crim. P. 3.711, which generally precludes commencement of the investigation until after a finding of guilt. Therefore, when read together the statute requires a description of the situation surrounding the criminal activity with which the offender had been charged and found guilty.

In regard to each of the other allegations, appellant is attempting to bootstrap his personal privacy issues into vagueness issues. This argument is more an "as applied" argument than it is a "facial" argument. Therefore, since this issue was not raised below it has not been preserved for appellate review. *Trushin v. State*, 425 So. 2d 1126 (Fla. 1983).

Be that as it may, a statute is unconstitutionally vague only when people of common intelligence must necessarily guess at its meaning and differ as to its application. *Falco v. State*, 407 So. 2d 203 (Fla. 1981). To make a statute sufficiently certain to comply with constitutional requirements, it is not necessary that it furnish detailed plans and specifications of the acts or conduct required or prohibited. *See Smith v. State*, 237 So. 2d 139 (Fla. 1979).

The pertinent portions of Fla. Stat. § 921.231 are as follows:

> (1)(a) A complete description of the situation surrounding the criminal activity with which the offender has been charged, including a synopsis of the trial transcript, if one has been made; nature of the plea agreement including the number of counts waived, the pleas agreed upon, the sentence agreed upon, and additional terms of agreement, and, at the offender's discretion, his version and explanation of the act.
>
> (1)(g) The social history of the offender, including his family relationships, marital status, interests, and related activities.
>
> (1)(I) The offender's medical history and, as appropriate, a psychological or psychiatric evaluation.

Clearly this language of Fla. Stat. § 921.231 is sufficiently certain, so that a person of common intelligence need not necessarily guess at its meaning or differ as to its application. Certainly, the Department of Corrections has prepared numerous PSI's without the specific guidelines suggested by appellant.

Finally, appellant also argues that the statute allows the PSI to contain information that is not related to the instant offense, but this Court has held that mitigating factors are not limited to the facts surrounding the crime, and can be anything in the life of a defendant which might militate against the appropriateness of the death penalty. *Brown v. State*, 526 So. 2d 903 (Fla. 1988).

POINT IV

WHETHER FLA. STAT. § 921.231 IS UNCONSTITUTIONAL AS APPLIED.

Appellant argues that his right to privacy guaranteed under Art. I, § 23, Fla. Const. was violated by the actions of the Department of Corrections in obtaining his medical records and family history for purposes of preparing his PSI. This argument was essentially covered in Point II above. However, now appellant frames the issue in terms of the conduct relative to his specific case performed pursuant to Fla. Stat. § 921.231. In other words, appellant now argues that this statute is also unconstitutional as applied. This issue was not raised at the trial level, so it has not been preserved for appellate review. *Trushin v. State*, 425 So. 2d 1126 (Fla. 1983).

Nonetheless, as mentioned in Point II above, the State does

have a compelling interest in both preventing or deterring the conduct proscribed by the criminal statutes and in maintaining the integrity and fairness of the sentencing process. Fla. Stat. § 921.231 furthers both these interests in the least intrusive means.

POINT V

WHETHER APPELLANT'S JUVENILE RECORDS MAY BE USED IN THE PREPARATION OF HIS PRESENTENCE INVESTIGATION REPORT.

Appellant argues that the Department of Corrections obtained his Foster Care records without his consent for use in the preparation of his 1991 PSI; that those records are confidential; and that therefore any portion of his PSI which contains information obtained from those records is invalid. Appellant admittedly could not locate any law to support his assertion that his Foster Care records are confidential (SB 18). In 1991, when the Department of Corrections prepared appellant's initial PSI, Chapter 39, Laws of Florida pertained to proceedings relating to juveniles. Part V of Chapter 39 [§§ 39.45-39.456, Fla. Stat. (1991)] pertained to children in Foster Care. Nothing in Part Five related to confidential records. Today, Part III [§§ 39.449-39.457, Fla. Stat. (1997)] of Chapter 39 pertains to children in Foster Care and still mentions nothing in regard to confidential records.

However, it is commonly understood that juvenile records are confidential which is mandated by Florida Statute. The statutes relating to juvenile proceedings have changed form considerably over the years. In 1977, Chapter 39 only consisted of one part, and § 39.12, Fla. Stat. (1977) mandated that information obtained under this chapter was privileged and permitted only limited disclosure. Nonetheless, it was found that juvenile records may properly be included in the presentence investigation report and considered by the trial court in the sentencing determination. *Bell v. State*, 365 So. 2d 463 (Fla. 1st DCA 1978). In addition to these records being relevant, the rationale for this holding is that they would still maintain their overall confidentiality since disclosure of the PSI is also limited under Fla. R. Crim. P. 3.712. *Dickens v. State*, 368 So. 2d 950 (Fla. 1st DCA 1979). By 1991, when the Department of Corrections allegedly used appellant's juvenile records in preparing the initial PSI, Part II related to delinquency cases and § 39.045, Fla. Stat. (1991) still mandated the confidentiality of juvenile records; however, subsection 39.045(4) specifically stated that the Department of Corrections shall always have the right to inspect and copy any official record pertaining to the child. Today, matters pertaining to juvenile delinquency are found in Chapter 985, Florida Statutes, and §

985.04, Fla. Stat. (1997) still mandates that juvenile records be confidential but nonetheless may be disclosed to the Department of Corrections.

Therefore, although appellant is correct in his assertion that his juvenile records are confidential, they are nonetheless available to the Department of Corrections for purposes of preparing a PSI and do not lose their confidential nature through this process.

POINT VI

WHETHER THE INFORMATION CONTAINED IN THE PSI MAY BE USED IN ARGUMENT ON APPEAL.

Appellant raises no new legal issue under this point but only asserts that based on his prior argument his appellate counsel should not be permitted to use in argument the information contained in the PSI. The PSI is part of the record. The information in the PSI was lawfully obtained. The information contained in the PSI is therefore properly before this Court and a basis for argument by appellate counsel.

POINT VII

WHETHER THE INFORMATION CONTAINED IN THE PSI MAY BE CONSIDERED BY THIS COURT ON APPEAL.

Appellant raises no new legal issue under this point but only

asserts that based on his prior argument this Court should not consider the information contained in the PSI. The PSI is part of the record. The information in the PSI was lawfully obtained. The information contained in the PSI is therefore properly before this Court and a basis for this Court's consideration.

CONCLUSION

WHEREFORE, based on the foregoing arguments and authorities, the State requests that this Honorable Court **AFFIRM** the trial court's judgment and sentence.

Respectfully submitted,

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_____

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CERTIFICATE OF FONT

I HEREBY CERTIFY that this brief has been prepared in Courier New font, 12 point, and double spaced.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing was furnished by courier to Gary Caldwell, Esq., and by U.S. Mail to Akeem Muhammad, # A-706732, Union Correctional Institution, P.O. Box 221, Raiford, Florida 32083 this _____ day of November, 1998.

_____
DAVID M. SCHULTZ
Of Counsel