IN THE SUPREME COURT OF FLORIDA

SAMUEL L. SMITHERS,

Appellant,

vs. **CASE NO. SC96690**

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE THIRTEENTH JUDICIAL CIRCUIT
IN AND FOR HILLSBOROUGH COUNTY, FLORIDA

ANSWER BRIEF OF THE APPELLEE

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PRELIMINARY STATEMENT

Appellee adopts the method of record citation set forth by appellant. Accordingly, references to the record will be cited as volume number followed by "R" with the appropriate page numbers, i.e., I, R1. The trial transcript will be cited as volume number followed by "T" with the appropriate page numbers, i.e., III, T300. The supplemental record will be cited as "S" and the volume number followed by either "T" or "R" with the appropriate page numbers, i.e., SII, T85. References to the exhibits will be cited as "E" and the volume number followed by "E" with the appropriate page numbers, i.e., EIII, E250.

SUMMARY OF THE ARGUMENT

Appellant's first claim is that the two homicides were improperly charged in the same indictment because they were not connected acts or transactions and that the trial court abused its discretion in denying his motion to sever. The denial or granting of a motion for severance is reviewed for an abuse of discretion. Based on the facts presented to the lower court, the trial court's conclusion that joinder of the offenses was appropriate was within the court's discretion and appellant has failed to show an abuse of that discretion.

The trial court properly denied appellant's Motion to Suppress where appellant freely and voluntarily confessed to the murders of Cristy Cowan and Denise Roach.

Smithers' absence during the motion in limine and the failure to obtain a written waiver was not raised below. Accordingly, the claim is barred and appellant must show fundamental error to obtain relief. As Smithers' absence during the purely legal proceeding was harmless, he has not established that fundamental fairness has been thwarted and is not entitled to relief.

Appellant's next claim is that the sentencing judge erred by finding that the especially heinous, atrocious or cruel aggravating circumstance applied to the homicide of Denise Roach. In both of Smithers' versions concerning Roach's murder, it is clear that she was conscious and struggling for her life. Accordingly, there was

competent substantial evidence to support the trial court's finding that these statements, coupled with the physical evidence established the heinous, atrocious or cruel aggravating factor.

Appellant's next claim is that the trial court erred in finding the cold, calculated and premeditated factor with regard to the murder of the second victim, Cristy Cowan. He contends that there was no proof of a careful prearranged plan to kill the victim when appellant invited her into his truck and that Cowan's death was the result of an angry confrontation over money, which negates the "cold" element of this aggravating factor. It is the state's contention that the evidence refuted appellant's version of the murder and supported a finding that the murder of Cristy Cowan was cold, calculated and premeditated.

Appellant also contends that the trial judge erred by failing to declare a mistrial during the penalty phase testimony of forensic psychiatrist Barbara Stein after she identified lack of remorse as a quality of anti-social behavior. Appellee has no dispute with the proposition that lack of remorse has no place in the consideration of aggravating circumstances. The record here is clear, however, that the prosecutor was not seeking to use lack of remorse as an aggravating factor, either with this witness's testimony or in his closing argument. Rather, the expert was describing the qualities of anti-social behavior. There was no mention of absence of remorse as an aggravator in the prosecutor's

closing argument and, therefore, no error was committed.

Finally, although appellant has not asserted that the sentences imposed in the instant case were disproportionate, the state would note that the sentences are proportionate.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION BY DENYING APPELLANT'S MOTION TO SEVER THE TWO OFFENSES.

Appellant's first claim is that the two homicides were improperly charged in the same indictment because they were not connected acts or transactions and that the trial court abused its discretion in denying his motion to sever. The denial or granting of a motion for severance is reviewed for an abuse of discretion. Fotopoulos v. State, 608 So. 2d 784, 790 (Fla. 1992) (granting a severance is largely a matter within the trial court's discretion); Crossley v. State, 596 So. 2d 447, 450 (Fla. 1992) (noting that the standard of review for cases involving the consolidation or severance of charges is one of abuse of discretion). Based on the facts presented to the lower court, the trial court's conclusion that joinder of the offenses was appropriate was within the court's discretion and appellant has failed to show an abuse of that discretion.

On May 21, 1998, appellant raised the severance issue for the first time in a written motion to sever the offenses. (I, R64-7) The court heard arguments on the motion on June 29, 1998 and August 13, 1998. At both hearings the court sought and received a factual

basis supporting the state's decision to join the offenses.[1] After hearing argument the court invited counsel for both parties to submit written memoranda of law on the issue. (SII, T196-206, 235-71) Upon consideration of written and oral arguments of counsel, the lower court made the following findings in a written order entered on August 24, 1998:

* * *

> The Court has considered a proffer of the State's proof on the relevant issues, and comments of counsel on the practicalities involved in a joined or severed trial.
>
> Based on the memoranda and the factual proffers by counsel, the Court finds that the two homicides, while separated in time by as many as fifteen (15) days, are connected acts or transactions in an episodic sense.
>
> Additionally, it is likely that even if severed, evidence of one homicide would be relevant and admissible in a separate trial of the other homicide, pursuant to section 90.404(2), Florida Statutes, on the issue(s) of motive, opportunity, intent, preparation, plan, or knowledge. See generally Hunter v. State, 550 So. 2d 244 (Fla. 1995). See also section 90.403, Florida Statutes.
>
> Judicial economy is of no moment or concern to the Court, given that the State will seek a death penalty upon a conviction of either count.
>
> It would be illogical to present evidence of the finding of Cristy Cowan's recently deceased body separate from evidence of the finding of Denise Roach's decomposed body. Both bodies were found at the same time and at the same place.
>
> The statements by the Defendant include first, his admission to killing Cristy Cowan, and later his admission to killing Denise

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[1] The motion was not renewed at the close of the state's evidence and appellant has not suggested that the lower court misconstrued the facts before it. (X, T1099-1100)

> Roach. These admissions are separated by several hours. It would be misleading to a jury to suggest to them, or to allow them to infer, that the Defendant was questioned for several hours before he admitted the homicide of Cristy Cowan, when in fact he initially admitted to the homicide of Denise Roach, and then upon further questioning, admitted to the homicide of Cristy Cowan.
>
> The two offense[s] occurred at the same location, within two weeks of each other, and were similar in nature and in the manner in which they were perpetrated. Both offenses involved victims who were prostitutes working in the same area who had sexual relations with the Defendant at the house where each was killed and where the body of each was found. Each was killed in a similar fashion.

(I, R81-5)

In Gudinas v. State, 693 So. 2d 953 (Fla. 1997), this Court reviewed the holding in Ellis v. State, 622 So. 2d 991 (Fla. 1993), where this Court surveyed a number of cases, interpreting joinder based on "two or more connected acts or transactions" within the meaning of rule 3.150(a), Florida Rules of Criminal Procedure.[2] From a review of those cases, the Gudinas Court, quoting Ellis, concluded:

> First, for joinder to be appropriate the crimes in question must be linked in some significant way. This can include the fact that they occurred during a "spree" interrupted by no significant period of respite, Bundy, or the fact that one crime is causally related to the other, even though there may have been a significant lapse of

[2] The cases reviewed included Wright v. State, 586 So. 2d 1024 (Fla. 1991); Crossley v. State, 596 So. 2d 447, 450 (Fla. 1992); Bundy v. State, 455 So. 2d 330 (Fla. 1984); and Fotopoulos v. State, 608 So. 2d 784 (Fla. 1992).

> time. Fotopoulos. But the mere fact of a general temporal and geographic proximity is not sufficient in itself to justify joinder except to the extent that it helps prove a proper and significant link between the crimes. Crossley. Ellis, 622 So. 2d at 1000.
>
> Gudinas, 693 So. 2d at 959-961 (footnotes omitted).

With those rules in mind, this Court found that Gudinas' three separate, unsuccessful attempts to break into the first victim's car after following her from the other parking lot within no more than three hours and in the same proximate area as the rape and murder of the second victim, provided a causal link between the crimes, thus allowing joinder under Fotopoulos.

The Gudinas Court further noted that even if the charges should have been severed, any error would be harmless beyond a reasonable doubt because the testimony still would have been admissible in a severed trial for the second attack as similar fact evidence in establishing Gudinas' motive. Charles W. Ehrhardt, Florida Evidence § 404.14 (1995 ed.).

Subsequently, in Rolling v. State, 695 So. 2d 278, 294-96 (Fla. 1997), this Court also rejected Rolling's claim that the trial court improperly joined three cases under Florida Rule of Criminal Procedure 3.150(a) for purposes of his sentencing trial. This Court reviewed the relevant facts and held that, based on the decisions in Bundy v. State, 455 So. 2d 330 (Fla. 1984), Wright v. State, 586 So. 2d 1024 (Fla. 1991), Fotopoulos v. State, 608 So. 2d

784 (Fla. 1992), Crossley v. State, 596 So. 2d 447 (Fla. 1992), and Ellis v. State, 622 So. 2d 991 (Fla. 1993), the trial court correctly concluded that the Rollings' offenses were connected by temporal and geographical association, the nature of the crimes, and the manner in which they were committed. This Court agreed with the trial court which held:

> From a review of those cases, the [Florida Supreme] Court discerns several rules to be applied to determine whether or not offenses are 'connected' for purposes of the rules of joinder. First, the Court found that 'for a joinder to be appropriate the crimes in question must be linked in some significant way.' Ellis, at [1000]. Two recognized 'links' were mentioned by the Court in its opinion: the fact that one crime is causally related to the other, and the fact that the crimes occurred "during a 'spree' interrupted by no significant period of respite." Id. The Court then added that the general temporal and geographical proximity is not, in and of itself, a link, but is considered insofar as it "helps prove a proper and significant link between the crimes." Citing Crossley.
>
> In this case, based on the testimony present at the hearing, the [trial] [c]ourt finds no causal link between the offenses in the sense that one offense was used to induce someone to commit another. Fotopoulos. The [c]ourt finds, however, that the offenses charged at the three crime scenes are linked by a temporal continuity, not merely a temporal proximity. Temporal continuity is one of the 'significant links' recognized by the Supreme Court in Ellis as found in Bundy--although by a different name. The [c]ourt noted that the offenses in Bundy occurred "during a 'spree' interrupted by no significant period of respite." It is apparent from the context and from the reference to "respite" that the word, "spree," was meant to

> refer to a temporal continuity. From the factual information provided to the court at the hearing, the [c]ourt finds that the events were so linked as to constitute a single prolonged episode during which the deaths of five persons were effected.
>
> Rolling v. State, 695 So. 2d 278, 294-96 (Fla. 1997)

In the instant case, the evidence showed that both Denise Roach and Cristy Cowan were prostitutes who worked the area of Hillsborough Avenue and 40th Street. (VIII, T906-7) Three state witnesses who were prostitutes working that area knew both victims at the time of their disappearance. (VIII, T906-7, 968-74, 983-86) One of these witnesses, Bonnie Kruse, observed Smithers in his black truck at the Luxury Motel. (VIII, T929, 931) She testified that she had "dated" Smithers and that she remembered him because during the date Smithers kept trying to get her to go to his place in Seffner. She did not go even though he insisted. (VIII, T925-27) One witness says Cristy Cowan got into a vehicle. (IX, T974-78) That was the last time she saw her. (IX, T974-78)

Marion Whitehurst owned the home where the two victims were found. It used to be the home of Ms. Whitehurst's mother, and at the time of the murders, Ms. Whitehurst had hired Sam Smithers to do yard work on the property. (V, T388-93, 405-6) Smithers did not have permission to enter the home. On May 28th, 1996, Ms. Whitehurst went to the property to inspect work that was supposed to have been previously completed by Smithers. She was surprised

to find Sam Smithers' black truck parked in the garage and Smithers in the garage washing off an axe near a pool of blood. (V, T406-8) She also saw a streak of blood as if something had been dragged out of the garage and towards the back pond. Sam Smithers told her that a squirrel must have been killed and he would wash the blood up. (V, T414-15) Ms. Whitehurst also saw potato chips lying on the garage floor. When Ms. Whitehurst left she called the Sheriff's Office. (V, T421) Deputies arrived to find both Cristy Cowan and Denise Roach dead and floating in the back pond. (V, T467-70, 472-73) According to the Medical Examiner's Office, Cristy Cowan had died shortly before her body was found and Denise Roach died a number of days earlier. (VII, T698, 721-2)

The Medical Examiner testified that if Denise Roach's blood had been on the garage floor, it would have been dried up at the time Ms. Whitehurst observed the blood. Dried blood was found on the walls of the garage that DNA matched as possibly coming from Denise Roach, however, the blood seen earlier on the garage floor was washed away and the floor was wet when Deputies arrived.

Potato chips were found on the garage floor and in the house. A condom wrapping was found in the house. Fingerprints of Sam Smithers were found in the house and a mixture of secreted fluids was found on the bedroom rug that DNA matches as possibly coming from Sam Smithers and Denise Roach. (VII, T831-9)

A video from a nearby convenience store showed Cristy Cowan

with Sam Smithers shortly before her body was found. She had a bottle drink and chips. A Minute Maid orange bottle was found in the garage. (V, T498-501, EIII, E253-8) Both victims were strangled, bludgeoned in the face, and struck on the top of the skull with some type of tool. Both were placed in the back pond. Upon questioning by law enforcement, Sam Smithers admitted to killing both women in the same garage and putting them in the same pond. (IX, T1046, 1050-52, 1059-64)

The Geographical Link

Smithers concedes the existence of a geographical link between the two offenses. Both victims were picked up from the same motel, killed in the same garage and dumped into the same pond. He contends, however, that joinder was improper because there is neither a temporal link nor a causal link between the two offenses as required by Rolling v. State, 695 So. 2d 278 (Fla. 1997) and Ellis v. State, 622 So. 2d 991 (Fla. 1993). The state disagrees with both contentions.

The Temporal Link

First, while the facts do not show that these murders were committed within three days as the murders in Rolling were, the evidence does establish that both murders were committed within seven to ten days of each other. (VII, T698, 722-3). Moreover, the evidence also establishes that during this same time period Smithers was actively trying to persuade at least one other

prostitute to leave the motel with him. (VIII, T925-7) This is not the six month period of time such as that considered by the Court in State v. Conde, 743 So. 2d 78 (Fla. 3d DCA 1999), as relied upon by appellant. The facts herein establish that Smithers' actions are one continuous episode over the course of little more than a week at most and that joinder was appropriate.

The Causal Link

Furthermore, as appellant recognizes, joinder does not fail even absent the temporal link. Even crimes that are separated by a substantial lapse in time can constitute a single episode if the crimes are causally related to each other. Spencer v. State, 645 So. 2d 377, 381-82 (Fla. 1994); Ellis v. State, 622 So. 2d 991, 1000 (Fla. 1993); and Fotopoulos v. State, 608 So. 2d 784 (Fla. 1992). In Fotopoulos, this Court found that joinder was proper where the first murder occurred in October, the second murder was in November and the evidence showed that a tape of the first murder was used by Fotopoulos to blackmail codefendant Hunt into aiding with second murder. Id. at 790. In the instant case, Smithers' success in persuading a prostitute from the Luxury Motel to go to the estate with him where he was free to beat, strangle and dispose of her body undetected provided the impetus for him to repeat his performance days later. Compounded with the evidence of Whitehurst's discovery of Smithers washing a bloody axe in the bloodstained garage, since the evidence of one crime could not

properly be understood without evidence of the other, there exists a causal link sufficient to permit joinder. Fotopoulos, 608 So. 2d at 790.

Harmless Error

The facts surrounding these murders are so similar, interwoven and connected with one another, any error in admitting this evidence is harmless beyond a reasonable doubt. In Gudinas v. State, 693 So. 2d 953, 961 (Fla. 1997), this Court agreed that even where the charges should have been severed, any error would be subject to a harmless review under the DiGuilio standard where the evidence would have been admissible for other purposes. Finding that the evidence introduced against Gudinas would have also been admissible as similar fact evidence this Court stated:

> Furthermore, we agree with the State that even if the charges should have been severed, any error would be harmless beyond a reasonable doubt. State v. DiGuilio, 491 So.2d 1129 (Fla.1986). Rachelle Smith's testimony still would have been admissible in a severed trial for the McGrath attack as similar fact evidence in establishing Gudinas' motive for raping and murdering Michelle McGrath. Charles W. Ehrhardt, Florida Evidence § 404.14 (1995 ed.). Evidence of Gudinas' unsuccessful attack against Rachelle Smith was relevant to show his motive for another attack later that morning. Thus, even if the charges were severed, Rachelle Smith's testimony regarding her encounter would have been admissible as similar fact evidence in Gudinas' murder trial. For the same reasons, we do not find that inclusion of the Rachelle Smith charges with the charges relating to Michelle McGrath's murder deprived Gudinas of a fair trial.

> Gudinas v. State, 693 So. 2d at 960-961; See, also, Ellis v. State, 622 So. 2d 991, 1000 (Fla. 1993)and Crossley v. State, 596 So. 2d 447, 450 (Fla. 1992).

In Consalvo v. State, 697 So. 2d 805 (Fla. 1996), this Court approved the admission of evidence of other crimes when it served to place the facts in context and was inextricably intertwined. This Court explained:

> In Florida, evidence of other crimes, wrongs and acts is admissible if it is relevant (i.e., it is probative of a material issue other than the bad character or propensity of an individual). Charles W. Ehrhardt, Florida Evidence § 404.9, at 156 (1995 ed.). See Hartley v. State, 686 So.2d 1316, 1320 (Fla.1996) (citing Griffin v. State, 639 So.2d 966 (Fla.1994)) (both stating that evidence of other crimes which are "inseparable from the crime charged" is admissible under section 90.402).
>
> The Walker burglary was closely connected to the murder of Pezza and was part of the entire context of the crime. When the police caught appellant burglarizing the Walker residence, they found Pezza's checkbook on his person. It was also as a result of the Walker burglary that police placed appellant in custody. Furthermore, appellant was in jail for this burglary when he placed the incriminating call to his mother and stated that the police were going to implicate him in a murder.
>
> Consalvo, 697 So. 2d at 813.

The evidence of Smithers' access to the property, the house and the garage, his visits to the Luxury Motel, the discovery of him cleaning up after the second murder and the discovery of both bodies floating in the same pond would be relevant to the issue of

premeditation and would be admissible to establish the entire context out of which these crimes arose including a showing of intent, plan and knowledge as well as refuting any suggestion of mistake or accident on the part of Smithers.

Thus, assuming, arguendo, that joinder was improper, the facts and circumstances surrounding the death of either victim would be relevant, material and competent evidence in the murder of the other victim and would be lawfully and probably necessarily made known to the jury as both similar fact evidence and inextricably intertwined evidence. Accordingly, error, if any, was harmless.

Smithers argues that even if the admission was harmless in the guilt phase, the admission would not be harmless for the penalty phase. Although he recognizes that certain evidence concerning the other murder would be admissible during the guilt phase for both murders, he contends that since the jury would be precluded from considering the prior conviction in both trials that he was prejudiced. This argument ignores precedent from this Court which permits the sentencing judge to consider a conviction that was obtained after the conviction being considered, but before the sentencing for that conviction. Knight v. State, 746 So. 2d 423, 434 (Fla. 1998). Thus, even if one of these convictions predated the other, both could still be considered as an aggravating factor in each case. Accordingly, no prejudice has resulted from the joinder in the instant case.

ISSUE II

WHETHER THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS HIS CONFESSION.

Prior to trial, appellant unsuccessfully attempted to suppress his confession to the murder of Cristy Cowan and Denise Roach. Appellant now seeks to overturn that ruling. However, a trial court's ruling concerning the voluntariness of a confession is presumptively correct and should not be disturbed unless it is clearly erroneous. See Escobar v. State, 699 So. 2d 988, 993-994 (Fla. 1997), cert. den., 523 U.S. 1072 (1998). In fact, where, as here, the trial court relied upon live testimony, rather than transcripts, depositions or other documents, the clearly erroneous standard applies with "full force." See State v. Sawyer, 561 So. 2d 278, 281 (Fla. 2d DCA 1990), citing Thompson v. State, 548 So. 2d 198, 204 n. 5 (Fla. 1989).

Additionally, a reviewing court should defer to the fact-finding authority of the trial court and not substitute its judgment for that of the trial court. See DeConingh v. State, 433 So. 2d 501, 504 (Fla. 1983). The appellate court must interpret the evidence and all reasonable deductions and inferences which may be drawn therefrom in the light most favorable to the trial judge's conclusions. See Shapiro v. State, 390 So. 2d 344, 346 (Fla. 1980).

In view of the applicable standard of review, this Court must

affirm the ruling of the lower court which denied appellant's motion to suppress his confession. The totality of circumstances surrounding appellant's confession demonstrates its voluntary nature and that it was given by appellant's free will. See Traylor v. State, 596 So. 2d 957, 964 (Fla. 1992). As this Court stated in Traylor, "[w]e adhere to the principle that the state's authority to obtain freely given confessions is not an evil, but an unqualified good." Id., at 965.

Appellant's Inquiry About a Lawyer

First, appellant maintains that Detective Flair failed to comply with the dictates of Almeida v. State, 737 So. 2d 520 (Fla. 1999), cert. den., 120 S.Ct. 1221 (2000), regarding the detective's duty to clarify appellant's constitutional right to counsel. At the suppression hearing, Detective Flair testified as follows:

> Q: During that interview in the late hours of May 28th, actually early morning hours of May 29th, 1996, did Mr. Smithers [Appellant] make any inquiries as to his need for an attorney?
>
> A: Yes, he did.
>
> Q: Could you please tell the Court when in the scheme of things did he make inquiry and what inquiry he made?
>
> A: After talking with him for some time and I – I started him – advised him of Miranda at which time he asked, "Do I need a lawyer?" And my response to him was, "Do you think you need a lawyer?" And he says, "No." I said, "Do you want an attorney?" "No." And I said, "Let me do this." I started over again with the Miranda warnings, read it to him again completely. And asked if he then would

> consent to an interview. If he wanted an attorney one could be present, but the answers were yes to the interview. "No, I don't need an attorney present." He signed the consent and continued with the interview."
>
> (SI, T46-47)

Based upon this testimony, the trial court ruled that appellant was "...properly advised of and understood his constitutional right against self-incrimination, and that he knowingly and voluntarily waived those rights." (I, R73).

Nonetheless, appellant maintains that Detective Flair did not respond appropriately to appellant's question. Appellant relies upon the Almeida decision to craft an argument that the police have a duty beyond that exercised by Detective Flair in situations where a defendant inquires about needing an attorney. However, Almeida does not require any more from Detective Flair than the direct response she provided.

The confession ultimately suppressed in Almeida began with the following exchange:

> Q. Do you mind if we call you Ozzie during this, or do you prefer your own name?
>
> A. That is okay.
>
> Q. Ozzie's okay?
>
> A. Okay.
>
> Q. Can you read and write the English language?
>
> A. Can I read English?

Q. Can you read and write the English language?

A. Yes.

Q. Did you graduate high school?

A. No, not yet. I was still finishing.

Q. All right. Prior to us going on this tape here, I read your Miranda rights to you, that is the form that I have here in front of you, is that correct? Did you understand all of these rights that I read to you?

A. Yes.

Q. *Do you wish to speak to me now without an attorney present?*

A. *Well, what good is an attorney going to do?*

Q. Okay, well you already spoke to me and you want to speak to me again on tape?

Q. (By Detective Allard) We are, we are just going to talk to you as we talked to you before, that is all.

A. Oh, sure.

Q. (By Detective Mink) Ozzie, this is a statement taken in reference to an incident that occurred at in front of Higgy's on November 15th, 1993, in the morning hours. Where the night manager by the name of Frank Ingargiola was shot in the parking lot, directly out in front of Higgy's. In your own words can you tell me what took place on this night and your involvement in this?

A. Yes. Me and a couple of friends went to Higgy's after work.

See Almeida, 737 So. 2d 520, 522 (emphasis supplied). Almeida then confessed to three murders. See id.

In suppressing Almeida's confession, this Court set the guidelines for law enforcement to follow when faced with a defendant who makes inquiry concerning his rights.

> [I]f, at any point during custodial interrogation, a suspect asks a clear question concerning his or her rights, the officer must stop the interview and make a good-faith effort to give a simple and straightforward answer. To do otherwise--i.e., to give an evasive answer, or to skip over the question, or to override or "steamroll" the suspect--is to actively promote the very coercion that Traylor was intended to dispel. A suspect who has been ignored or overridden concerning a right will be reluctant to exercise that right freely. Once the officer properly answers the question, the officer may then resume the interview (provided of course that the defendant in the meantime has not invoked his or her rights).
>
> Almeida, 737 So. 2d at 525.

Here, in response to appellant's question concerning his right to counsel, Detective Flair asked him point blank whether he wanted an attorney. Appellant clearly responded that he did not want an attorney. Detective Flair then further clarified appellant's rights by repeating his Miranda rights in their entirety. Appellant then initialed each line of the Miranda form, signed his consent and voluntarily continued the interview. Appellant confirmed that he waived his rights in his testimony at the suppression hearing, adding that he did not feel that he needed an attorney at that point. (SII, T168). Finally, Detective Flair clarified on cross-examination that, had appellant invoked his

right to counsel, she would not have continued questioning. (SI, T73).

The state asserts that Detective Flair's response met the requirements set forth in Almeida. In contrast, the detective questioning Almeida ignored his reference to his right to counsel; thereby, "steamrolling" Almeida into a confession. See Almeida, at 525. No such improper "gamesmanship" occurred in the instant case.

To the contrary, Detective Flair directly asked appellant if he wished to have an attorney, and appellant declined the offer. Under those circumstances, Detective Flair was free to resume the interview where appellant knowingly and voluntarily waived his rights. As such, the trial court properly denied the motion to suppress as it related to appellant's inquiry concerning his right to counsel.

Appeal to Religious Convictions

Appellant argues that Detective Metzgar coerced appellant's confession by mentioning that if appellant was a Christian he might want to tell the truth. (SI, T86-87). However, as in Hudson and Roman, the reference to Christianity failed to render the confession involuntary. See Hudson v. State, 538 So. 2d 829, 830 (Fla. 1989); and Roman v. State, 475 So. 2d 1228, 1232 (Fla. 1985), cert. denied, 475 U.S. 1090 (1986) (both dealing with the Christian burial ploy seeking to elicit a confession by suggesting that the victim deserves a proper Christian burial).

In Hudson, 538 So. 2d 829, 830, the defendant was read his rights at least twice, and indicated that he understood them before waiving them. The only promise made to Hudson was that he would be taken away from the body's location as soon as possible. See Hudson, 538 So. 2d at 830. Under those circumstances, the appellate court agreed with the trial court that this promise did not coerce Hudson's confession. See Hudson, at 830. Moreover, no police overreaching or coercive police conduct rendered Hudson's confession involuntary. Id., at 830.

Similarly, in Roman, the use of this tactic did not directly result in the defendant's statement. See Roman, 475 So. 2d 1228, 1232. The record reflected that the defendant was a forty-five year old man of intelligence within the normal range, albeit at the lower end. He did not appear intoxicated or mentally ill at the time of the confession. He was read Miranda warnings, was capable of understanding them, and indicated that he did, in fact, understand them. He was offered sustenance and not promised or threatened. He was not handcuffed, and despite vomiting and trembling seemed alert and perceptive. See Roman, 475 So. 2d 1228, 1232-1233. Under those circumstances, the appellate court found that the deception was insufficient to make an otherwise voluntary statement inadmissible. See Roman, 475 So. 2d at 1233.

Likewise, Metzgar’s single passing reference to Christianity failed to render appellant’s confession involuntary. The record

reflected that appellant had graduated high school and attended two additional years at a technical school. (SI, T49-50). He was read Miranda warnings, was capable of understanding them, and indicated that he did, in fact, understand them. (SI, T46-50). Moreover, appellant actually testified at the suppression hearing that he understood his rights and that he was "not an idiot in any way." (SII, T154). In view of this testimony, the trial court correctly ruled that the questioning by the detectives could not be characterized as a "blatantly coercive and deceptive ploy" as condemned in Hudson and Roman. (I, R73).

Notably, appellant has failed to identify any Florida case in which the use of the "Christian burial" ploy alone, or coupled with other factors, rendered a confession involuntary. In fact, the only authority presented by appellant regarding the use of religion to induce a confession is readily distinguishable from the case at bar.

In Carley v. State, 739 So. 2d 1046 (Miss. App. 1999), the appellate court suppressed a confession obtained from a fourteen year old boy where evidence of mental disability was presented. The totality of circumstances rendered the confession involuntary because, in addition to the factors involving the juvenile's age, experience, education, background and intelligence, the police used overreaching interrogation tactics. Such tactics included the invocation of the deity, discussion of Heaven and Hell, and the

promise that "the truth sets you free" to induce the confession. The interrogating officer even admitted to telling the juvenile that the only way he could go to Heaven was to "come forward and tell the truth – tell the truth of your sins." See Carley, 739 So. 2d 1046, 1053.

Based upon this evidence, the appellate court determined that the officer's tactic of using the concept of religious salvation improperly induced a confession from the boy who had been resolute in denying involvement in the murder of his adoptive parents. See Carley, 739 So. 2d at 1054. Furthermore, the trial judge had actually expressed "a clearly defined and reasonable doubt regarding the admissibility of Carley's confession." See Carley, at 1055. As such, under the totality of circumstances, the confession had been improperly admitted. Id.

Given the stark contrast between the facts of the instant case and the circumstances of Carley's confession, the Carley decision is not applicable. Consequently, Detective Metzgar's single passing reference to Christianity did not affect the voluntariness of appellant's confession, especially where the additional arguments raised to challenge the confession are without merit.

Need For Renewed Miranda Warnings

Appellant claims that he was not properly re-Mirandized by Detectives Flair and Blake following the polygraph examination administered by Detective Metzgar. Metzgar testified that he gave

appellant a polygraph consent form and a written Miranda form to read prior to the polygraph. Metzgar then observed appellant read and sign both forms before the polygraph began. (SI, T83-85). Nonetheless, appellant maintains that Detectives Flair and Blake should have read Miranda a third time prior to their interview which immediately followed the polygraph examination. However, where the totality of evidence reveals that appellant's confession was freely and voluntarily made without coercion, the motion to suppress was properly denied. See Croney v. State, 495 So. 2d 926, 927 (Fla. 4th DCA 1986), citing United States v. Gillyard, 726 F.2d 1426 (9th Cir. 1984), and Wyrick v. Fields, 459 U.S. 42 (1982).

On the first day that the police discussed the murders with appellant, Detective Flair read appellant his Miranda rights and appellant signed and initialed each line of the form. (SI, T46-48). The next day, prior to the polygraph examination, Detective Metzgar provided appellant with both a Miranda form and a polygraph consent form. Metzgar testified that he observed appellant read and sign both forms. (SI, T83-85). Moreover, appellant actually testified at the suppression hearing that he understood his rights and was not an idiot. (SII, T154). Under this totality of circumstances, appellant's statements were freely and voluntarily made. Contrast Henry v. Dees, 658 F.2d 406 (5th Cir. 1981)(defendant, whose intelligence quotient placed him in educable mental retardate category, could not have understood complex

waivers and their consequences and did not independently waive his constitutional rights).

Sharon Smithers' Presence During Interrogation

Lastly, although appellant claims that his wife's presence during his interrogation rendered his confession involuntary, appellant never invoked his right to counsel and he specifically requested that his wife be present before he would continue the interview. The totality of circumstances support the trial court's ruling to admit the confession. This claim is meritless.

The trial court analyzed the propriety of Mrs. Smithers' presence during appellant's interrogation in accordance with Lowe v. State, 650 So. 2d 969 (Fla. 1994), cert. denied, 516 U.S. 887 (1995). In Lowe, 650 So. 2d 969, 972, the defendant argued against the admission of his confession claiming that the police used his girlfriend as an agent to coerce a confession from him after he had invoked his right to counsel.

Lowe initially waived his Miranda rights and was subjected to some questioning before eventually invoking his right to counsel. After the interrogation ceased, Lowe's girlfriend told investigators she wanted to speak to Lowe to find out what happened, and she agreed to have her conversation with Lowe recorded. The girlfriend then succeeded in convincing Lowe to speak to police. After this conversation with his girlfriend, Lowe confessed that he was the driver of the getaway car involved in the

crime but denied any complicity in the murder, which he blamed on one of two alleged accomplices. See Lowe, 650 So. 2d at 972. This Court, relying upon Arizona v. Mauro, 481 U.S. 520 (1987), ruled that the police did not employ Lowe's girlfriend as an agent to coerce a confession from Lowe and that the trial court did not err in admitting Lowe's incriminating statement. See Lowe, at 974.

In Mauro, 481 U.S. 520, the defendant was arrested for murder and taken to the police station for questioning, which ended after the defendant asked for an attorney. After the defendant's wife persisted in speaking with him, and after obtaining the approval of a supervisor, and with the expressed knowledge that the defendant would possibly incriminate himself, the police allowed the wife to speak with the defendant in the interrogation room.

The admissibility of the taped conversation between the defendant and his wife was addressed by the United State Supreme Court. The Mauro decision noted that there was no express interrogation by the police; there was no evidence of a psychological ploy; and the police did not put the wife in the room in order to seek incriminating responses but merely yielded to her persistent demands. See Lowe, at 973, citing Mauro, 481 U.S. at 528. Thus, the confessions in both Mauro and Lowe were properly admitted.

Here, the circumstances of appellant's confession show no evidence of a psychological ploy and appellant's wife was not

placed in the room to seek incriminating responses. Rather, against their own desire to keep his wife out of the interrogation room, the officers yielded to appellant's persistent demand to have his wife present for any continued questioning. Appellant actually confirmed in his testimony at the suppression hearing that the police did not want his wife to be present. (SII, T182).

None of the detectives wanted Mrs. Smithers to be present during the questioning. (SI, T20). In fact, the detectives did not immediately agree to comply with appellant's request to have his wife present. (SI, T61). After acquiescing to appellant's wish to have his wife present, the interrogation continued. However, no officer directed Mrs. Smithers during the interview nor did any officer ask Mrs. Smithers to assist in the questioning. (SI, T22-23, 63-64).

Under these factual circumstances, the lower court properly found that no improper psychological ploy or coercion caused appellant's confession. As such, where the police did not use Mrs. Smithers as an agent for the purpose of obtaining incriminating statements, the lower court properly admitted appellant's confession. See Lowe, at 974.

Assuming, arguendo, that the trial court erred in denying the motion to suppress, given the limited nature of appellant's statements and the extensive direct on circumstantial evidence establishing that Smithers was responsible for both of the murders,

error, if any, is harmless beyond a reasonable doubt.

The evidence established that Smithers was at the Luxury Motel where the victims worked as prostitutes. Defendant was identified as the man who solicited prostitutes to go to Seffner with him. Smithers had complete and unfettered access to the property and was discovered washing a bloody axe in a bloodstained garage on a day he had no reason to be there and after having locked the entry gate behind him. A mixture of secreted fluids was found on the bedroom rug that DNA matches as possibly coming from Smithers and Roach.

Thus, absent the exclusion of Smithers' statements claiming the deaths were the result of self defense, it is beyond a reasonable doubt that Smithers would have been found guilty as charged.

ISSUE III

WHETHER APPELLANT HAS ESTABLISHED FUNDAMENTAL ERROR OCCURRED WHEN DEFENSE COUNSEL WAIVED APPELLANT'S PRESENCE FOR A PRETRIAL HEARING WHERE A DEFENSE MOTION IN LIMINE WAS HEARD AND DENIED.

Appellant's next claim is that the trial court erred in conducting a hearing on a defense motion to preclude testimony concerning Smithers' involvement with the prostitutes from the Luxury Motel when defendant was not present. He contends that, although counsel waived his presence, since Fla. R. Crim. P. 3.180(a) requires the defendant's presence at all pretrial conferences unless waived by the defendant in writing, this Court should reverse.[3] Smithers' absence during the motion in limine and the failure to obtain a written waiver was not raised below. Accordingly, the claim is barred and appellant must show fundamental error to obtain relief. As Smithers' absence during the purely legal proceeding was harmless, he has not established that fundamental fairness has been thwarted and is not entitled to relief. Kearse v. State, 770 So. 2d 1119, 1124-25 (Fla. 2000).

On December 7, 1998, the court held a hearing on the two

[3] Although most issues are reviewed for abuse of discretion, since this claim was not presented to the court below and there is no trial court ruling to give deference to, the standard of review is de novo. However, since the defendant has received the windfall of a better standard of review, i.e. de novo, by failing to preserve the issue in the lower court, the higher burden for unpreserved error (must be a violation of due process going to the foundation of the case) must be strictly enforced or the result is that the contemporaneous objection rule becomes meaningless on appeal.

defense motions in limine. The defendant's presence was waived on the record before the court conducted legal argument on the motions. (SIII, T346) The first motion addressed at the hearing sought to limit the showing of a video of the crime scene and the medical examiner reviewing the bodies. The state agreed that the video would be redacted and only show the crime scene. (SIII, T346-47). Because the court reserved ruling on this motion, appellant recognizes that no prejudice resulted to Smithers and, therefore no reversible error has been shown.

The second motion addressed at the hearing, concerned testimony about Smithers' involvement with the prostitutes from the Luxury Motel. Defense counsel argued that they were trying to limit the scope of evidence that would be presented through prostitutes that Smithers consorted with them. Defense counsel asserted that the evidence was irrelevant and that relevancy would be outweighed by its prejudicial value. (SIII, T348) The state responded that these witnesses would not only testify about seeing the victims with Smithers but, also, that during dealings with Smithers, he offered one of them money to go to Seffner with him. The state asserted that this evidence was relevant to establishing why the victims were in Seffner and the modus operandi of the defendant. (SIII, T348) Defense counsel responded that the evidence was not admissible to prove propensity and asked that the state not be allowed to introduce the evidence in opening

statements. Counsel also asked that when the state was prepared to present any of these witnesses, to have the jury be taken out and argument be heard on the issue. (SIII, T349) In response to the court's inquiry as to whether the defense was asking to exclude the fact that the witnesses were prostitutes, defense counsel responded that they were seeking to limit any evidence of propensity of Smithers to consort with prostitutes. The court then denied the motion. (SIII, T350)

At trial three witnesses, Bonnie Kruse, Angie Johnson and Sharon Shepherd, testified they were prostitutes. (VIII, T908; IX, T968, 980) Prior to calling the first of these witnesses to the stand, the court held a bench conference to schedule the rest of the witnesses for the day. (VIII, T906) The state noted that two of the ladies were going to testify that day. Defense counsel stated that he wanted to renew his objection to the admission of the testimony concerning his client's sexual conduct. The court denied the motion but told counsel if there were any specific things to feel free to raise them additionally. (VIII, T906-07)

Bonnie Kruse then testified that she was a prostitute who worked streets with Cristy Cowan and Denise Roach at the Luxury Motel. She testified that Cristy was strict about condoms and had a drug problem. Denise also had drug problem and she wore a lot of jewelry. (VIII, T917, 922) Kruse was able to identify the ring found on one of the victims as being Roach's ring. (VIII, T925)

Kruse also identified Smithers. (VIII, T929, 931) She said she had dated him before and remembered him because after she rejected his repeated offer of money for her to leave the room and go to Seffner with him, he got a look in his eye that scared her. (VIII, T926-927) She described Smithers as having a dark truck with a "bad boys" decal. (VIII, T929)

Angie Johnson testified that she was friends with Denise Roach and Cristy Cowan. She identified some jewelry as belonging to Denise Roach. (IX, T968-74) When she last saw Cristy she was getting in a vehicle. Cristy was high, it was just her and another person. (IX, T974-978)

Sharon Sheppard testified that she was a prostitute; she was friends at the Luxury Motel with Cristy and she had seen Denise. The last time she saw Cristy she was wearing a jumper. (IX, 983-86) She gave Cristy $10 and an orange package-non lubricated Trojan condom. She had bought the big package of condoms and was able to give one to police to match to the one found at the scene. (IX, T988-989)

Despite the court's offer to entertain additional objections, defense counsel only found one question which he thought may become objectionable if it got into his client's sexual activities.[4]

[4] Counsel made a total of five objections during the testimony of Bonnie Kruse, but none during the testimony of Sheppard or Johnson. Three were leading question objections, one was a motion for mistrial based on Kruse's testimony that Smithers had a scary look in his eye and the last was to foundation where counsel questioned if the state was getting into sexual activity. (VIII, T920, 927,

During the state's questioning of Bonnie Kruse she was asked if she was familiar with Denise Roach's personal habits and how she would act. (VIII, T920) Smithers objected based on lack of foundation. The objection was overruled. The state then asked if she was familiar with Cristy Cowan as a person, her work habits and her drug habits. Counsel renewed foundation objection and expressed concern that the state was getting into what her habits were with respect to sexual activities. The prosecutor asserted that she was not going after sexual activity and the court overruled the objection "at this time." (VIII, 920-21) At no point did defense counsel object to any evidence actually presented as going to sexual conduct.

Based on this record the state maintains that any error in not having Smithers present during the initial motion in limine conference is harmless as Smithers was not prejudiced by his absence at the hearings.

In Roberts v. State, 510 So. 2d 885, 890-91 (Fla. 1987), this Court addressed Roberts' complaint that he, like Smithers, was not present during, among other things, the court's consideration of several motions to exclude evidence. This Court held:

> Roberts' next point on appeal involves three other instances in which Roberts alleges that he was absent from the proceedings. Roberts argues that these absences violated his right to be present at all crucial stages of the trial. Roberts first points to two

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928, 929, 950)

pretrial conferences claiming that he was not present at the afternoon session of the October 24 conference and was absent from the entire December 2 proceeding. Roberts relies on Florida Rule of Criminal Procedure 3.180(a)(3) which provides that a defendant shall be present "[a]t any pre-trial conference; unless waived by Defendant in writing." The record does not reflect whether Roberts was present or absent during these proceedings. See United States v. Bokine, 523 F.2d 767 (5th Cir.1975) (The burden is upon the appellant to show that he was absent during proceedings before he would have even an arguable complaint.). However, even assuming that Roberts was involuntarily absent on these two occasions, neither absence thwarted the fundamental fairness of the proceedings. See Garcia v. State, 492 So.2d at 363-64. During the afternoon session of October 24, the following motions were considered: (1) The defendant's motion for a daily transcript of the trial--denied; (2) Defendant's motion to strike a/k/a on endictment--denied, later granted; (3) Defendant's motion concerning death penalty questions during voir dire and to empanel a separate sentencing jury--denied; (4) Defendant's motion for psychological evaluation of Michelle Rimondi--granted with limitations; (5) Defendant's request for presentence investigation--ruling withheld; (6) Defendant's motion for list of sentencing witnesses and exhibits--passed with court's comment that defendant had an "absolute right" to that information; (7) Defendant's motion to reopen depositions of Rimondi and others--granted with limitations; (8) Defendant's motion to prohibit dispersal of jury during recess--granted; (9) Defendant's motion to seek sequestration of jury--ruling withheld; (10) Defendant's motion concerning comments on his right to counsel--granted. During the December 2 conference the following motions were heard: (1) The defendant's motion to reopen the deposition of Denise Moon, Rimondi's rape counselor--denied; (2) Defendant's motion to restrict use of other

> crime evidence--granted; (3) Defendant's motion for release of grand jury transcript--denied; (5) State's motion to limit cross-examination of state witness Campbell--granted; (6) State's motion to limit cross-examination of state witness Rimondi--granted; (7) State's motion to limit inquiry into Rimondi's social history--ruling reserved, eventually granted. Although a number of the rulings on these motions were adverse to Roberts, each of the motions heard during these sessions involved matters in which Roberts, if present, could not have assisted defense counsel in arguing. Therefore, we find that the state has met its burden in showing that, if in fact the defendant was not present during these proceedings, he was not prejudiced. See id. at 364.
>
> Roberts v. State, 510 So. 2d 885, 890-91 (Fla. 1987)

To paraphrase this Court's ruling in Roberts, "although a number of the rulings on these motions were adverse to Smithers, each of the motions heard during these sessions involved matters in which Smithers, if present, could not have assisted defense counsel in arguing. Moreover, defense counsel did not assert below or here on appeal that any objectionable evidence was introduced to the jury, despite the trial court's invitation to him to raise any specific objections when the evidence was presented to the jury [in Smithers' presence]. Thus, as Smithers has failed to establish that any prejudice has resulted and "fundamental fairness has been thwarted," this claim should be denied. Kearse v. State, 770 So. 2d 1119, 1124-25 (Fla. 2000); Pomeranz v. State, 703 So. 2d 465,

470-71 (Fla. 1997)(holding that such violations are subject to harmless error analysis and the proceeding will only be reversed on this basis if "fundamental fairness has been thwarted.")

ISSUE IV

WHETHER THE SENTENCING JUDGE ERRED BY FINDING THAT THE ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL AGGRAVATING CIRCUMSTANCE APPLIED TO THE HOMICIDE OF DENISE ROACH.

Appellant's next claim is that sentencing judge erred by finding that the especially heinous, atrocious or cruel aggravating circumstance applied to the homicide of Denise Roach. Whether an aggravating circumstance exists is a factual finding reviewed under the competent, substantial evidence test. When reviewing aggravating factors on appeal, this Court in Alston v. State, 723 So. 2d 148, 160 (Fla. 1998), reiterated the standard of review, noting that it "is not this Court's function to reweigh the evidence to determine whether the State proved each aggravating circumstance beyond a reasonable doubt—that is the trial court's job. Rather, our task on appeal is to review the record to determine whether the trial court applied the right rule of law for each aggravating circumstance and, if so, whether competent substantial evidence supports its finding," quoting Willacy v. State, 696 So. 2d 693, 695 (Fla.), cert. denied, 522 U.S. 970 (1997). It is the state's contention that competent substantial evidence supports the trial court's conclusion that the murder of Denise Roach was heinous, atrocious or cruel.[5]

As the court below recognized in the written sentencing order,

[5] Appellant concedes that the heinous, atrocious or cruel factor was properly applied in the sentence for Cristy Cowan.

this Court has consistently upheld the HAC aggravator where a conscious victim was severely beaten and/or strangled. In Hildwin v. State, 727 So. 2d 193 (Fla. 1998), quoting, Tompkins v. State, 502 So. 2d 415, 421 (Fla. 1986), this Court reiterated that it "'is permissible to infer that strangulation, when perpetrated upon a conscious victim, involves foreknowledge of death, extreme anxiety and fear, and that this method of killing is one to which the factor of heinousness is applicable.'" Similarly, in Mansfield v. State, 758 So. 2d 636 (Fla. 2000), this Court affirmed the heinous, atrocious aggravating factor where the victim was beaten and strangled. See Cole v. State, 701 So. 2d 845, 852 (Fla. 1997), cert. denied, 523 U.S. 1051 (1998); Robertson v. State, 699 So. 2d 1343, 1347 (Fla. 1997), cert. denied, 522 U.S. 1136 (1998).

The trial court, in the instant case, after reviewing the legal standard and the facts surrounding the murder of Cristy Cowan, made the following factual findings with regard to the murder of Denise Roach:

> The evidence established beyond a reasonable doubt that Denise Roach was killed several days before her decomposed body was found on May 28, 1996, and that the cause of her death was blunt trauma to her face, back of her head, and top of her head, including sixteen (16) puncture wound to her skull, and manual strangulation, evidenced by a fractured hyoid bone. Medical Examiner Hair opined that the trauma was consistent with her being punched in the face by a fist, and with forceful contact of her head with a hard wall, and that the puncture wounds were consistent with a screw driver having penetrated her

> skull and brain.
>
> Samuel Smithers confessed that he argued with Denise Roach in the garage and that when she became physically violent with him, he hit her several times and did not know if he killed her, but put her in the pond.
>
> Samuel Smithers testified at trial that he watched another person murder Denise Roach. He testified that she was alive, conscious, and screaming during several of the blows she received from an axe that were inflicted by that person. He testified that he was forced to place her body in the pond, and that on a later date, he was forced to place Cristy Cowan's body in the same pond after she was killed by another person. This testimony was rejected by the jury.
>
> * * *
>
> [citations to authority omitted]
>
> In every respect, the killing of each victim was done by the Defendant without conscience on his part, and without pity, and each homicide was extremely torturous to the victim.
>
> This aggravating factor was proven beyond a reasonable doubt as to both counts and was accorded great weight by the Court in determining the appropriate sentences.
>
> (II, R247-250)

As the lower court noted, the defendant's statements made to law enforcement and his testimony at trial support the conclusion that Denise Roach struggled with her assailant, that she was alive, conscious, and screaming during several of the blows she received from an axe that were inflicted by that person. Detective Flair testified that Smithers' told her Denise Roach came to the house on May 7th and told him she lived there. (IX, T1052) He said he hit her with a tree limb, then they went in the house. (IX, T1053) On

May 13th, he returned to the property, she was still there and she still refused to leave. (IX, T1055) He said she hit him. He got upset and hit her several times with his fist in her face and on her head. He told the detective that because Roach was black, some prejudice may have set in. During their struggle, he claimed that Roach threw a planter at his truck, then he hit her and she fell against the wall where a piece of wood fell and hit her in the face. He said she did not get up after that but that he did not do CPR because she deserved to die. Smithers also admitted having injuries as a result of his struggle with Denise Roach. (IX, T1056-59) Smithers told the detective that at one point he grabbed Roach by the hair and she kicked him on the leg. She also grabbed a mop and hit him with it, then he hit her again. (IX, T1063-64)

At trial, Smithers testified that Denise Roach was killed by a drug dealer who was blackmailing him. He said Roach and the man got into an argument, she was hollering at the man and he was hitting her with a hatchet. (X, T1113) The man hit Roach many times in the head for what seemed like hours, but was probably a few minutes. He testified that Roach was still screaming after the second blow with the hatchet. He did not hear her after the third. He claimed that he did not know how she got the sixteen puncture wounds to her head or how her hyoid bone was broken because his eyes were closed. (X, T1161-64)

This Court in Hildwin v. State, 531 So. 2d 124, 129, Fn 2

(Fla. 1988), upheld the finding of an aggravating factor which was based, in part, on conflicting statements made by the defendant.

> As did the trial judge, we rely in part on appellant's own statement to Investigator Phifer regarding the killing of Vronzettie Cox. While the appellant gave several statements which were somewhat conflicting, this fact alone does not prevent a court from considering those parts of the statement that bear an indicia of reliability. Johnson v. State, 465 So. 2d 499, 506 (Fla.), cert. denied, 474 U.S. 865, 106 S.Ct. 186, 88 L.Ed.2d 155 (1985). The indicia of reliability in the statement given to Investigator Phifer is that it describes the killer as having a cross tattooed on his back, as appellant does. Also, the statement was very detailed.
>
> Hildwin v. State, 531 So. 2d at 129, Fn.2.

Previously, in Johnson v. State, 465 So. 2d 499, 506 (Fla. 1985), this Court had agreed that inconsistent exculpatory statements can be used to affirmatively show consciousness of guilt and unlawful intent and that it was up to the trier of fact to determine whether the statements were inconsistent and exculpatory and whether such facts, if found, had any value in deciding whether there was intent or consciousness of guilt.

In both of Smithers' versions concerning Roach's murder, it is clear that she was conscious and struggling for her life. Accordingly, there was competent substantial evidence to support the trial court's finding that these statements, coupled with the physical evidence established the heinous, atrocious or cruel

aggravating factor.

Despite this evidence, which establishes Roach's consciousness and awareness of her impending death, Smithers also argues that because Roach was a crack addict that "she may very well have been high on crack cocaine at the time she was killed." (Initial Brief of Appellant, pg 70) There is no evidence to support this hypothesis. Not even Smithers' statements or testimony suggested that she was high at the time of the murder or unaware of the torturous nature of her murder.

In Mansfield, supra., this Court rejected a similar argument by Mansfield where the medical examiner testified that although the victim's blood alcohol may have had a calming effect the evidence of a struggle and defensive wounds indicates that the victim was awake and alert enough to struggle. The Mansfield Court noted that it had rejected similar arguments against a heinous, atrocious, or cruel finding based on the purported unconsciousness of the victim because of the victim's blood alcohol level in Guzman v. State, 721 So. 2d 1155, 1160 (Fla. 1998)(rejecting the unconsciousness argument where the victim's blood alcohol level was .34, citing, Whitton v. State, 649 So. 2d 861 (Fla. 1994)), cert. denied, 526 U.S. 1102 (1999).

As the evidence in the instant case establishes that Denise Roach fought for her life and that during this fight managed to inflict injuries upon her attacker and that she was screaming while

being beaten with an axe, the trial court correctly found that she was conscious and aware of the murderous attack.

Accordingly, the state urges this Court to conclude that the trial court was correct in applying the heinous, atrocious, or cruel aggravator to the present case.

Should this Court reject this finding, the state urges this Court to find that under the facts of this case, error, if any, is harmless. Hartley v. State, 686 So. 2d 1316 (Fla. 1996) (error in finding that murder was heinous, atrocious, or cruel (HAC) was harmless); Ferrell v. State, 686 So. 2d 1324 (Fla. 1996) (error in finding that murder was HAC was harmless in view of other aggravating factors.)

ISSUE V

WHETHER THE SENTENCING JUDGE ERRED BY FINDING THAT THE COLD, CALCULATED AND PREMEDITATED AGGRAVATING CIRCUMSTANCE APPLIED TO THE HOMICIDE OF CRISTY COWAN.

Appellant's next claim is that the trial court erred in finding the cold, calculated and premeditated factor with regard to the murder of the second victim, Cristy Cowan. He contends that there was no proof of a careful prearranged plan to kill the victim when appellant invited her into his truck and that Cowan's death was the result of an angry confrontation over money, which negates the "cold" element of this aggravating factor. Whether an aggravating circumstance exists is a factual finding reviewed under the competent, substantial evidence test. When reviewing aggravating factors on appeal, this Court in Alston v. State, 723 So. 2d 148, 160 (Fla. 1998), reiterated the standard of review, noting that it "is not this Court's function to reweigh the evidence to determine whether the State proved each aggravating circumstance beyond a reasonable doubt — that is the trial court's job. Rather, our task on appeal is to review the record to determine whether the trial court applied the right rule of law for each aggravating circumstance and, if so, whether competent substantial evidence supports its finding," quoting Willacy v. State, 696 So. 2d 693, 695 (Fla.), cert. denied, 522 U.S. 970 (1997). It is the state's contention that competent substantial

evidence supports the trial court's conclusion that the murder of Cristy Cowan was cold, calculated and premeditated.

The trial court, in the instant case, after reviewing the legal standard and the facts surrounding the murder of Cristy Cowan, made the following factual findings (in pertinent part):

> 3. The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. Section 921.141(5)(i), Florida Statutes. (250)
>
> * * *
>
> [facts concerning Roach omitted]
>
> Seven to fourteen days later, Samuel Smithers picked up Cristy Cowan at the same Hillsborough Avenue motel at approximately 6:00 p.m. after his work day to have sex for money, and after traveling well out of his normal route to his home in Plant City. He took her to the same secluded property, locked the gate behind him, had sex with her, and then violently killed her as has been previously described, which included inflicting facial and head trauma with an axe and a hoe, strangling her, and possibly drowning her.
>
> (II, R251)
>
> * * *
>
> [citations to authority omitted]
>
> When Samuel Smithers drove Cristy Cowan to the property, he knew that he had killed Denise Roach; he knew that her body was still on the property; he knew that he had only $26.00 on his person to pay for sex; he locked the gate behind him after he drove onto the property. His premeditated design to kill Cristy Cowan was heightened beyond a

> reasonable doubt. His actions demonstrated a cool and calm reflection, and no pretense of legal or moral justification.
>
> The Court concludes that this aggravating circumstance was proven beyond a reasonable doubt as to the homicide of Cristy Cowan, but that heightened premeditation to kill was not proven beyond a reasonable doubt as to the homicide of Denise Roach.
>
> The Court accorded this circumstance great weight in determining the appropriate sentence for the homicide of Cristy Cowan charged in count 1 of the Indictment.
>
> The Court did not consider this circumstance in determining the appropriate sentence for the homicide of Denise Roach charged in count 2 of the Indictment.
>
> (II, R252-253)

Appellant's contention is that this murder was the result of his dispute with Cowan after he offered to help her when her car became disabled and she blackmailed him. The facts do not support appellant's explanation and were reasonably rejected by the court. The court below found that after having successfully picked up Denise Roach from the Liberty Motel, taking her to the Whitehurst estate where he was able to beat and strangle her to death without detection, Smithers' repetition of the crime within a matter of days demonstrates a level of heightened premeditation. Moreover, since Ms. Whitehurst was not expected, Smithers' actions in locking the gate behind him demonstrates his intent to carry out his plans without interruption and is inconsistent with his claim that he only took Cowan to the property to give her money. Smithers' account of the crime could be rejected in that he gave a number of

inconsistent versions of how Ms. Cowan died and the motive for her death. Cf. Bedford v. State, 589 So. 2d 245 (Fla. 1991) (where defendant's versions of events are inconsistent with each other, the jury reasonably could have concluded that each of these accounts was untrue.) See, also, Holton v. State, 573 So. 2d 284, 290 (Fla 1990).

Additionally, the lower court's finding is not undermined by this Court's decisions in Randall v. State, 760 So. 2d 892 (Fla. 2000); Finney v. State, 660 So. 2d 660 (Fla. 1995); Crump v. State, 622 So. 2d 963 (Fla. 1993); and, Power v State, 605 So. 2d 856 (Fla. 1992). Although a prior murder, standing alone, does not establish that the murder at issue was cold, calculated and premeditated, this Court has made it clear that a defendant's previous crimes have to be considered as a factor indicating his premeditation. Zack v. State, 753 So. 2d 9 (Fla. 2000).

In the instant case, the commission of the prior murder was not the sole basis for finding that Cowan's murder was cold, calculated and premeditated, it was merely another circumstance that when added to the other established facts supported the CCP aggravating factor. The facts of this prior murder establish not only that Smithers knew from his prior experience that he could commit this brutal murder against a helpless and unarmed victim undetected, but it also provided him with the murder weapon. Having killed Denise Roach with the axe days before, there was no

need for appellant to procure another weapon, as he knew this weapon would be there when he took Cristy Cowan to the property.

Moreover, this is not a situation where the defendant just happened to be having sex with a prostitute that included strangling for sexual gratification. The evidence establishes that a condom wrapper matching a condom given to Cowan the last time she was seen alive was found in the downstairs bedroom, whereas the blood was in the garage. Thus, the evidence establishes that after taking her into the house for sexual purposes, Smithers later killed the fully clothed Cowan in the garage. (V, T412-14, VI, T523, 549-50, IX, T989-90, XI, T1284, EIII, E232) These facts combined with the very nature of Cowan's death which included not only strangulation but, also, the multiple chop wounds to her head refute any contention that this murder was a result of any sexual impulse or sudden provocation.

Moreover, if sexual gratification was Smithers' only goal, that goal could have been easily accomplished by remaining at the Luxury Motel with his victims. Instead, as evidenced by the testimony of Bonnie Kruse that Smithers offered her extra money to go to Seffner with him, Smithers' method of operation was to induce the women away from the Luxury Motel to a remote location. (VIII, T926-7) Cf. Suggs v. State, 644 So. 2d 64 (Fla. 1994) (cold, calculated, and premeditated aggravating factor affirmed where victim was taken to secluded area and repeatedly stabbed); Hall v.

State, 614 So. 2d 473 (Fla. 1993) (evidence that defendant abducted, raped, beat, and finally killed the victim supported cold, calculated, and premeditated aggravating factor). The fact that Smithers made sure his victims were taken to a remote location before they were beaten, strangled and thrown in the pond on the uninhabited country estate combined with the other evidence of Smithers' heightened premeditation supports the trial courts' findings and should be affirmed.

Based on the foregoing, the state urges this Court to affirm the trial court's findings with regard to the cold, calculated and premeditated factor. In the event, this Court should find that this factor was improperly found, the state urges this Court to find that the sentence was, nevertheless, properly imposed and that, error, if any, was harmless beyond a reasonable doubt. Geralds v. State, 674 So. 2d 96 (Fla. 1996) (erroneous finding of aggravator that murder was committed in cold, calculated, and premeditated manner was harmless); Sochor v. State, 619 So. 2d 285, 293 (Fla. 1993) (affirming death sentence despite the trial court's error in finding the aggravating circumstance of CCP applicable because "if there is no likelihood of a different sentence, the error must be deemed harmless").

Finally, although appellant has not asserted that the sentences imposed in the instant case were disproportionate, the state would note that the sentences are proportionate. Smithers'

sentencing jury recommended death for both murders by a vote of twelve to zero (12-0). (II, R253) The trial court, found three aggravating factors, HAC, CCP and prior violent felony (Roach murder), for the murder of Cristy Cowan and two aggravating factors, HAC and prior violent felony (Cowan murder), for the murder of Denise Roach. These factors were given great weight. Balanced against these factors, the court found both the extreme mental or emotional disturbance and the capacity to appreciate criminality mitigating circumstances. The court also found that Smithers was a good husband and father, close to his siblings, his mother was a religious fanatic, he had religious devotion and faithful church attendance, he was a model inmate, the father of Cristy Cowan recommended a life sentence, contributions to the community and he confessed to the crime but gave conflicting testimony at trial. Each of these circumstances were given moderate weight. The court concluded that it agreed with the jury that after weighing the aggravating and mitigating circumstances, the scale tilts unquestionably to a sentence of death. (II, R245-261)

In deciding whether death is a proportionate penalty, this Court "must consider the totality of the circumstances of the case and compare the case with other capital cases. See, Urbin v. State, 714 So. 2d 411, 416-17 (Fla. 1998). 'It is not a comparison between the number of aggravating and mitigating circumstances.'

Porter v. State, 564 So. 2d 1060, 1064 (Fla. 1990)." Sexton v. State, 2000 WL 1508567, 25 Fla. L. Weekly S818 (Fla. 2000). This Court's function in a proportionality review is not to reweigh the mitigating factors against the aggravating factors; that is the function of the trial judge. See, Reese v. State, 768 So. 2d 1057 (Fla. 2000); Bates v. State, 750 So. 2d 6 (Fla. 1999).

A comparison of similar cases demonstrates that the sentence imposed on Smithers for the strangulation and beating deaths of Cowan and Roach was properly imposed. This Court has affirmed the death penalty in a number of cases where the defendant has been convicted of multiple strangulation, stabbing or beating deaths. Rolling v. State, 695 So. 2d 278 (Fla.1997) (death sentence proportionate where trial court found that four aggravators, including HAC, prior violent felony conviction, murders during commission of burglary or sexual battery, and cold, calculated and premeditated outweighed two statutory mitigators and significant nonstatutory mitigation); Lockhart v. State, 655 So. 2d 69 (Fla. 1995) (affirming death sentence for defendant convicted of multiple strangulation/stabbing deaths). The state urges this Court to find that the sentences imposed in the instant case are proportionate and to affirm same.

ISSUE VI

WHETHER THE TRIAL JUDGE ERRED BY FAILING TO DECLARE A MISTRIAL DURING THE PENALTY PHASE TESTIMONY OF FORENSIC PSYCHIATRIST BARBARA STEIN.

A trial court's ruling on a motion for mistrial is subject to an abuse of discretion standard of review. Goodwin v. State, 751 So. 2d 537, 546 (Fla. 1999); Thomas v. State, 748 So. 2d 970, 980 (Fla. 1999); Hamilton v. State, 703 So. 2d 1038, 1041 (Fla. 1997).

During the testimony of state witness Dr. Barbara Stein, a forensic psychiatrist, the following exchange occurred:

> Q. And what psychiatric diagnosis did you make on Mr. Smithers?
>
> A. Well there really is not a psychiatric diagnosis because there is not a psychiatric disorder. Mr. Smithers based on all the evidence in the case that I reviewed has what we call antisocial personality traits. Those are personality traits that are characterized by a person being likely to be deceptive and to lie, to have lack remorse [sic] for others, to be what we call - -
>
> (XVI, T2174)

The defense objected and asked for a mistrial urging that any testimony concerning lack of remorse is reversible error. The state responded that the witness was describing character traits of antisocial behavior that could be diagnosed, rather than an attempt to use lack of remorse as an aggravating factor. (XVI, T2175-76) The court ruled that the witness should not say anything more about

lack of remorse and indicated that if a curative instruction were required the court would provide it. (XVI, T2176) The court then instructed the witness Dr. Stein:

> THE COURT: Dr. Stein as you know we're in the sentencing phase of this proceeding and I guess one of the responses you made in answer to one of the prosecutor's questions contains some language regarding lack of remorse. Do you recall what I'm talking about?
>
> THE WITNESS: Yes I do.
>
> THE COURT: Lack of remorse as the lawyers know is not anything that can be considered by the jury in aggravation and it's my understanding the way it's being presented is with respect to an attempt for you to define antisocial personality. There's been an objection to it. I'm going to sustain the objection and I've directed Mr. Schmoll to make certain that none of your responses contain the words touching on lack of remorse.
> So with the jury out Mr. Schmoll you may consult with your witness so that everybody can hear anything you want to say.
>
> MR. SCHMOLL: Judge, I believe that - - Does that answer any problems or would you be able to - -
>
> THE WITNESS: No it does not create a problem. There are other characteristics of the disorder that I can talk about.
>
> MR. SCHMOLL: Okay.
>
> THE COURT: All right. Mr. Robbins, anything?
>
> MR. ROBBINS: Other than I guess I need a formal ruling on the motion I made. I need a formal ruling on the record.
>
> THE COURT: Make your motion again.

MR. ROBBINS: I made a motion basically for a mistrial but as I said this is- -

THE COURT: I'll deny it.

MR. ROBBINS: - - clear and it's appropriate that I make a motion in this case.

THE COURT: I'll deny the motion for mistrial based on that so we can proceed with that testimony with that admonition. Bring the jury back in.

(XVI, T2177-2178)

Appellant claim the lower court erred reversibly, citing Jones v. State, 569 So. 2d 1234, 1240 (Fla. 1990) where this Court observed:

> We likewise find merit in Jones's contention that the state improperly commented on his lack of remorse. During closing argument in the guilt phase, the prosecutor impermissibly asked the jury, "Did you see any remorse?" This argument was augmented and highlighted during the penalty phase when the state called a Sheriff's Department officer for the express purpose of testifying that Jones showed no remorse. In each instance, defense counsel's objections were overruled.
>
> This Court has repeatedly stated that lack of remorse has no place in the consideration of aggravating circumstances. Robinson v. State, 520 So. 2d 1, 6 (Fla.1988); Pope, 441 So. 2d at 1078; McCampbell v. State, 421 So. 2d 1072, 1075 (Fla.1982). We emphatically held in Pope that lack of remorse should have no place in the consideration of aggravating factors. Pope, 441 So. 2d at 1078. We again urge the state to refrain from injecting an issue that this Court has unequivocally determined to be inapplicable, causing us to vacate sentences in the past.

Appellee has no dispute with the proposition that lack of remorse has no place in the consideration of aggravating circumstances. But the record is clear that the prosecutor was not seeking to use lack of remorse as an aggravating factor, either with this witness's testimony or in his closing argument. Rather, as stated below, the expert was describing the qualities of anti-social behavior. There was no mention of absence of remorse as an aggravator in the prosecutor's closing argument. (XVIII, T2252-88)

Appellant has failed in his burden to establish that the trial court abused its discretion in denying the motion for mistrial, i.e., reasonable persons could agree with the trial court's ruling. Hamilton v. State, 703 So. 2d 1038, 1041 (Fla. 1997); Huff v. State, 569 So. 2d 1247, 1249 (Fla. 1990). Appellant's claim is without merit and this Court should affirm.[6]

[6] It is highly doubtful that this Court's capital jurisprudence condemning prosecutorial use of lack of remorse as an aggravator either was intended to serve to redact the lack of remorse criterion used by mental health personnel and published in the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV-TR) by the American Psychiatric Association.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Douglas S. Connor, Assistant Public Defender, P.O. Box 9000 - Drawer PD, Bartow, Florida 33831-9000, this _____ day of June, 2001.

_____
COUNSEL FOR APPELLEE

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

_____
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