IN THE SUPREME COURT OF FLORIDA

WYDELL JODY EVANS,	)	
	)	
Appellant,	)	
	)	
vs.	)	CASE NUMBER SC00-468
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
_____	)	

APPEAL FROM THE CIRCUIT COURT
IN AND FOR BREVARD COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE

On November 10, 1998, the grand jury in and for Brevard County returned an indictment charging appellant with one count of first degree premeditated murder in violation of Section 782.04(1)(a), Florida Statutes (1997), one count of kidnapping in violation of Sections 787.01(1)(a)2, (1)(a)3, and (2), Florida Statutes (1997), one count of aggravated assault in violation of Section 784.021(1)(a), Florida Statutes (1997) and one count of possession of a firearm by a convicted felon in violation of Sections 790.23(1) and (3), Florida Statutes (1997). (Vol. III,

451-452) Appellant filed a motion to suppress statements and admissions made by him on the grounds that they were not voluntary and were obtained in violation of his Miranda[1] rights. (Vol. III, 497-504, 529) A hearing on the motion to suppress was conducted July 8, 1999 and October 18, 1999. (Vols. I & II, 1-296) Following testimony and argument of counsel, trial court denied the motion to suppress. (Vol. II, 265-266, 290; Vol. III, 544-545) Upon defense motion, the trial court granted the motion to sever the possession of a firearm by a convicted felon charge from the remaining charges. (Vol. III, 554-555)

Appellant proceeded to jury trial on the charges on October 25, 1999 with the Honorable Jere Lober, circuit court judge, presiding. (Vols. V-XV, 1-2145) Defense counsel made a motion in limine to prevent disclosure that appellant had previously been in jail when a phone conversation between appellant and the victim was overheard by a pod-mate Edward Rogers. (Vol. V, 1633) The trial court denied the motion but agreed to give a limiting instruction. (Vol. V, 33) After the jury was sworn, but before opening statements, defense counsel moved for invocation of the rule of sequestration. Defense counsel asked that appellant's mother be excluded from the rule but the trial court refused to do this. (Vol. IX, 944) However, appellant objected to the trial court's excusal of the victim's father

[1] ***Miranda v. Arizona***, 384 U.S. 436 (1966)

from operation of the rule of sequestration. (Vol. IX, 944-953) During opening statement, defense counsel objected to the prosecutor giving jury instructions in her opening statement. (Vol. IX, 967) The trial court overruled the objection but did give a cautionary instruction to the jury. (Vol. IX, 967) During the testimony of the first state witness, the victim's father caused a courtroom disturbance. (Vol. IX, 1000) Defense counsel moved for a mistrial because of this outburst which was denied. (Vol. X, 1015) Following the testimony of Edward Rogers, the trial court instructed the jury not to infer that appellant was guilty of any other crime simply because he had been in jail when Rogers heard the statements he testified to. (Vol. XII, 1417) Appellant's statement to the police officers were admitted into evidence over objection. (Vol. XII, 1509, 1536-1537) Defense counsel made a motion for judgment of acquittal arguing that the evidence failed to show any premeditation as to the murder charge and that there was no evidence of a kidnapping since the alleged victims could have left at any time. (Vol. XIII, 1738-1754) The trial court denied the motion. (Vol. XIII, 1754) The motion was renewed at the end of all the evidence and again denied. (Vol. XIV, 1886) During the state's rebuttal argument, defense counsel objected and moved for a mistrial when the state suggested that the defendant could have prevented the situation by turning over a gun. Defense counsel argued that such comment coupled with a previous comment improperly

shifted the burden of proof to the defense. (Vol. XIV, 2098-2099) The trial court denied the motion and overruled the objection stating that the state's argument went towards appellant's motivation. (Vol. 15, 2100) Following deliberations, the jury returned verdicts finding appellant guilty as charged on all three counts. (Vol. XIV, 2143-2145)

On November 3, 1999, appellant proceeded with the penalty phase of the trial. (Vols. XV-XVII, 2196-2418) Defense counsel objected to the state presenting the summaries of the prior offenses contained in a presentence investigation report. (Vol. XVI, 2224) The trial court ruled that the summaries were admissible and also noted that the objections to them were preserved for appellate purposes. (Vol. XVI, 2229, 2243) During deliberations in the penalty phase, the jury returned with a question asking "does life in prison without the possibility of parole mean the Defendant will not be released from prison under any circumstances?". (Vol. XVI, 2392) With the agreement of the defense, the trial court responded to the question "the words life imprisonment without the possibility of parole mean no more and no less than what they say." (Vol. XVII, 2414) Following deliberations, the jury returned an advisory recommendation that appellant be sentenced to death by a vote of ten to two. (Vol. XVII, 2418)

On November 8, 1999, appellant filed a timely motion for new trial. (Vol. IV,

606-611) A hearing on the motion for new trial was conducted on December 21, 1999. (Vol. II, 297-337) The trial court ultimately denied the motion for new trial. (Vol. III, 400) On January 4, 2000, the trial court conducted a Spencer[2] hearing. (Vol. II, 338-381)

On February 15, 2000, appellant again appeared before Judge Lober for sentencing. (Vol. III, 398-453) The trial court sentenced appellant to life in prison as a prison releasee reoffender for the kidnapping conviction and a concurrent term of 108.15 months in prison for the aggravated assault conviction. These sentences were to run consecutive to the sentence of death imposed for the first degree murder charge. (Vol. III, 446, Vol. IV, 634-641) The trial court filed written findings of fact in support of his sentence of death. (Vol. IV, 642-662)

Appellant filed a timely notice of appeal on February 17, 2000. (Vol. IV, 668) Appellant was adjudged insolvent and the Office of the Public Defender was appointed to represent him on appeal. (Vol. IV, 665-666)

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[2] ***Spencer v. State,*** 615 So. 2d 688 (Fla. 1993)

STATEMENT OF THE FACTS

A. Guilt Phase Facts.

In October of 1998, appellant and Edward Rogers were both in jail. (Vol. XI, 1386) Rogers heard appellant arguing with someone on the phone. (XI, 1387) After appellant got off the phone, he told Rogers that he was angry with Angel Johnson and said if he got his hands on her he'd "kill the bitch." (Vol. XI, 1386) On a previous occasion, Rogers said under oath twice that appellant said he'd "kill the bitch for what she had done to him." (Vol. XII, 1413) On October 21, 1998, Sammy Hogan picked up appellant and Lino Odenat to give them a ride to Cocoa. (Vol. X, 1058, Vol. XI, 1222) As they drove, they passed a car on the side of the road in which Angel Johnson, Erica Foster, and April Holmes were sitting. (Vol. X, 1064, Vol. XI, 1234, Vol. IX, 988; Vol. XIV, 1827) Appellant had known Angel all of her life. (Vol. XIV, 1827) Angel was appellant's brother's girlfriend. (Vol. IX, 987) Sammy stopped his car and appellant got out and spoke with Angel. (Vol. IX, 989; Vol. XI, 1234; Vol. XIV, 1830) Angel and Erica agreed to ride along to Cocoa. (Vol. IX, 989; Vol. XI, 1234; Vol. XIV, 1830) Sammy was driving the car and appellant was sitting in the front passenger side with Lino sitting directly behind appellant, Erica sitting in the middle of the back seat and Angel sitting directly behind the driver. (Vol. IX, 991; Vol. X, 1066) Erica testified that

when she got in the back seat, Lino had a gun in his lap which was normal for him so Erica did not think anything of it. (Vol. IX, 993) Sammy testified that he never saw any firearm in the car. (Vol. X, 1067) Lino testified that he thought that appellant had a gun although he did not see it. (Vol. XI, 1235) Before continuing to Cocoa, Sammy decided he had to stop and get gas but was directed away from two gas stations by appellant who claimed that there were too many police around. (Vol. IX, 991-992; Vol. X, 1067; Vol. XI, 1245; Vol. XIV, 833) They finally stopped at a Mobil station on Babcock where Sammy pumped gas and Angel went inside to pay for the gas and to buy some chips. (Vol. IX, 995; Vol. X, 1067-1068; Vol. XI, 1245-1247; Vol. XIV, 1833) Sammy drove out of the gas station and proceeded towards Cocoa when all of a sudden an argument began between appellant and Angel about Angel cheating on appellant's brother. (Vol. X, 1068; Vol. IX, 996; Vol. XI, 1253-1255) Sammy told appellant that Angel was not cheating but appellant told him to shut up and to mind his own business and then appellant punched Sammy's windshield and cracked it. (Vol. X, 1068-1069) According to Lino, Erica started to butt in the argument and appellant called Erica a bitch. (Vol. XI, 1253) At some point Angel began to laugh at which time, appellant turned around and said "you think it's funny?" and shot Angel once. (Vol. X, 1069; Vol. IX, 998) Appellant testified that after they left the Mobil station, he

decided to play a tape and happened to feel a hard object on the seat next to him and discovered that it was a firearm. (Vol. XIV, 1836) Knowing that he had just gotten out of jail, appellant did not want this gun near him so he testified that he handed to Angel and told her to put it in the back seat somewhere. (Vol. XIV, 1837-1838) Appellant testified that Angel laughed and pushed the gun away and as she did so it discharged striking her. (Vol. XIV, 1838) Lino also testified that appellant was passing the gun to the back seat when Angel "patted it" and it went off. (Vol. XI, 1259) Erica and Sammy both testified that Angel never touched the gun. (Vol. IX, 999; Vol. X, 1072) However, in a previous statement, Erica testified under oath that appellant and Angel "tussled" over the gun. (Vol. X, 1031) After being shot, Angel fell into Erica's lap and said "Wydell you shot me for real, you shot me for real." (Vol. IX, 999) Appellant told Sammy to drive him to "Big Dick's" in Eau Gallie. (Vol. X, 1073, 1018; Vol. XI, 1267; Vol. XIV, 1839) Sammy claimed that appellant pointed the gun at his and Erica's heads and threatened them. (Vol. X, 1073) On the way to Big Dick's, Erica said that appellant gave the gun back to Lino. (Vol. X, 1018) However, Sammy testified he never saw appellant do anything with the gun after the shooting. (Vol. X, 1071) When they arrived at Big Dick's, Sammy pulled in front of the house and appellant got out and went up to the front porch and knocked on the door. (Vol. X, 1019,

1073-1074, 1138; Vol. XI, 1270; Vol. XIV, 1842) Appellant told Big Dick that he had just shot a girl and asked him to lend him some money. (Vol. X, 1141) Appellant was quite upset. (Vol. X, 1141; Vol. XIV, 1842) While they were waiting at Big Dick's, Lino had the gun and was going to step out of the car so that Sammy and Erica could take Angel to the hospital. (Vol. X, 1020, 1075) However, appellant told Lino to get back in the car and he did. (Vol. X, 1076, 1142, 1020) Erica testified that they were at Big Dick's house 4 to 5 minutes. (Vol. X, 1034) Sammy testified that they were at Big Dick's 1 to 2 minutes. (Vol. X, 1076) Big Dick testified that appellant was at his house for about ten minutes. (Vol. X, 1143) Appellant got back in the car and Sammy drove just a short distance and stopped in a parking lot. (Vol. X, 1020-1021, 1076, 1143, 1271) According to Erica and Sammy, appellant threatened to kill them and their families if they told anyone what had happened. (Vol. X, 1021, 1077) Although Lino originally told the police that appellant had threatened Sammy and Erica, he denied that on the stand. (Vol. XI, 1271-1274) Appellant told Erica and Sammy to take Angel to the hospital. (Vol. X, 1022, 1077; Vol. XI, 1271, 1321; Vol. XIV, 1843) Elijah Fulton, also know as "19", came by and picked up appellant and Lino and took them to appellant's cousin Darryl Little. (Vol. XIV, 1845) Darryll then took appellant to a Days Inn in Palm Bay where he spent the night. (Vol. XIV, 1845)

When they got to the hospital Sammy and Erica both told the police that Angel had been shot by a white man over a bad drug deal. (Vol. X, 1025, 1079) However, both of them ultimately told the police that appellant shot Angel. (Vol. X, 1025) Angel testified that while they were at Big Dick's, Sammy could have simply driven off but he did not. (Vol. X, 1035) On the day before she died, Angel and Sammy came over to appellant's house in the afternoon and stayed for about an hour. (Vol. XIV, 1818) That evening, appellant and Angel visited Erica at her house. (Vol. X, 1036) Erica testified that there was no animosity between appellant and Angel at that time. (Vol. X, 1037) On the morning that Angel died, Sammy took Angel and appellant down to the Viera Courthouse where appellant's brother was to stand trial. (Vol. X, 1105; Vol. XIV, 1829) Once again, there was no animosity shown between appellant and Angel during this time. (Vol. X, 1106; Vol. XIV, 1829)

Officer Johnny Rodriquez of the Melbourne Police Department responded to the hospital at approximately 12:20 a.m. with reference to a shooting. (Vol. X, 1153) Rodriquez interviewed two witnesses, Sammy Hogan and Erica Foster, who were uncooperative at first. (Vol. X, 1157) Sammy Hogan said the victim was shot by a white male in a cream-colored car over a bad drug deal. (Vol. X, 1158) Dennis Nickles of the Melbourne Police Department interviewed Erica Foster who

told him that a white male had shot Angel. (Vol. X, 1171) Officer Wendy Yorkey met with Erica who was quite upset. (Vol. X, 1177) When Erica was confronted with evidence which disputed her original statement, she changed her story although she was reluctant to tell what really happened. (Vol. X, 1168, 1177) Over objection, Yorkey was able to testify that Erica wrote down the name Wydell as being the person who shot Angel. (Vol. X, 1178-1179) Lt. Mark Laderwarg testified that he also met with Sammy Hogan whom he had known all of his life and who was extremely upset. (Vol. X, 1197-1199) When Sammy was confronted by the officers with the information that Erica had changed her story as to what happened, Sammy also admitted that he lied and told the officers that appellant was the one who shot Angel. (Vol. X, 1160; Vol. XI, 1213-1214) A warrant for appellant's arrest was obtained and appellant was arrested at the Days Inn in Palm Bay without incident. (Vol. XII, 1420, 1429, 1434-1435, 1439)

Paul Vasallo, the district medical examiner of Brevard County testified that he conducted an autopsy on Angel Johnson and found a single gunshot wound to the middle of the chest with an exit wound in the back. (Vol. XI, 1332) The bullet severed the aorta and injured Angel's left lung. (Vol. XI, 1344) If she did not get immediate medical attention, Angel would die within minutes but would be unconscious before that. (Vol. XI, 1348) The cause of death was a loss of blood

due to a gunshot wound. (Vol. XI, 1349) Officer Jack Klein of the Melbourne Police Department testified that he conducted a gunshot residue test on appellant. (Vol. XI, 1369-1372) George Morissette of the Melbourne Police Department testified that he attended the autopsy of Angel Johnson and conducted a gunshot residue test on Angel. (Vol. XII, 1456-1457) An analysis of the gunshot residue revealed no gunshot residue present in the sample from appellant and a positive result for gunshot residue on the sample taken from Angel. (Vol. XII, 1487, 1489)

Detective Rory Nelson of the Melbourne Police Department was the lead investigator and conducted an interview shortly after his arrest on October 22, 1998. (Vol. XII, 1531) Appellant was advised of his Miranda rights understood them and agreed to talk to the officers. (Vol. XII, 1533-1535) Originally, appellant stated that he was not present when Angel was shot. (Vol. XII, 1572) Appellant admitted that he was upset with Angel for cheating on his brother but denied trying to hurt her. (Vol. XII, 1575) However, after speaking with Sgt. Larry Carter who is a family friend for over ten years, appellant ultimately admitted that he did fire the gun but that it was an accident and he did not mean to shoot Angel. (Vol. XII, 1511; Vol. XIII, 1691-1694) Consistent with appellant's trial testimony, appellant ultimately told police officers that he discovered the gun in the front seat and was passing it to Angel when Angel hit it and the gun went off. (Vol. XIII, 1691, 1694)

B. The Penalty Phase Facts.

The state presented copies of judgments and sentences which showed that appellant had two prior convictions for battery on a law enforcement officer and a prior conviction for aggravated battery although the presentence investigation summaries revealed little if any injuries as a result of these convictions. (Vol. XVI, 2260, State Exhibits 1-8) Ron Gray, a probation officer, testified that on the day that Angel was shot, appellant was on active probation. (Vol. XVI, 2263) Lilly Evans, appellant's mother, testified that appellant was born in Macon, Georgia in 1971 and they moved to Brevard County in 1973 shortly after appellant's father died. (Vol. XVI, 2276-2277) Evans and her family moved in with Lilly's mother where they stayed until appellant was approximately twelve years of age. (Vol. XVI, 2278) Lilly testified that she was not a big presence in appellant's life because she became a crack addict which she believed caused changes in her children's behavior. (Vol. XVI, 2279-2281) Appellant was a great inspiration to Lilly and helped her to quit her drug habit. (Vol. XVI, 2281) At sixteen, appellant had a child who was placed into foster home because appellant was in jail and the mother was addicted to drugs. (Vol. XVI, 2282, 2346) When appellant got out of prison at seventeen, he actively sought and received custody of his daughter. (Vol. XVI, 2346, 2282) Appellant has five children in all and is very good with them and

spends lots of time with his children. (Vol. XVI, 2289, 2347, 2327-2329)

When appellant's grandmother got sick, appellant helped to take care of her. (Vol. XVI, 2292, 2330, 2352) Several witnesses testified that appellant was a good father and very good with friends, counseling others to stay out of trouble and to stay in school. (Vol. XVI, 2302-2305, 2310, 2327, 2350) Patty Walker, appellant's cousin, testified that appellant was a loving and kind individual who helped her out financially when she needed it and lent her money to pay for her wedding. (Vol. XVI, 2317) Additionally, appellant paid money so that Patty's son could play football and never asked to reimbursed. (Vol. XVI, 2318)

C. Spencer Hearing Facts.

Paul Johnson, the victim's father, testified that although appellant needs to be punished, he did not think that he deserved the death penalty. (Vol. II, 363-364) In the presentence investigation, it was also revealed that several other members of Angel Johnson's family testified that they did not believe that appellant should receive the death penalty. (Vol. II, 355-356, 365) Appellant again testified that he did not intentionally kill Angel although he understands that the jury found him guilty. (Vol. II, 370) Appellant asked Angel's father for forgiveness and told him that he will accept his penalty. (Vol. II, 371-373) The trial court was also presented with a package of letters and petitions signed by numerous community

members asking that appellant receive a sentence of life imprisonment. (Vol. II, 341-342)

SUMMARY OF THE ARGUMENTS

Point I.

It was error to admit hearsay statements of Erica Foster and Sammy Hogan during the guilt phase where such statements did not qualify as excited utterances.

Point II.

It was error to deny a motion for mistrial where the prosecutor in closing argument improperly shifted the burden of proof to the defendant.

Point III.

The instruction on kidnapping given by the trial court was both confusing and legally insufficient. Appellant is entitled to a new trial because of the erroneous instruction.

Point IV.

The evidence is legally insufficient to support a conviction for either first degree murder or kidnapping.

Point V.

The trial court erred in permitting the state to admit into evidence portions of presentence investigations where the defendant was not given any opportunity to rebut the information contained therein.

Point VI.

The imposition of the death penalty is proportionally unwarranted in this case.

ARGUMENTS

POINT I

IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE 1, SECTIONS 9 AND 22 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT ERRED IN PERMITTING THE STATE TO ELICIT HEARSAY TESTIMONY THROUGH ITS POLICE OFFICER WITNESSES.

Erica Foster and Sammy Hogan were the key state witnesses against Appellant. Both of them testified that Appellant killed Angel Johnson. Both of them further testified that when the originally spoke to the police officers they gave a false statement concerning the charge and then later gave another statement identifying Appellant as the perpetrator. (Vol. X, 1025, 1079) The state presented the testimony of Officers Johnny Rodriguez and Dennis Nickels who testified that both Sammy Hogan and Erica Foster were interviewed at the hospital and both gave statements that Angel Foster was shot by a white male over a bad drug deal. (Vol. X, 1158, 1171) The state then presented the testimony of Officer Wendy Yorkey who testified that she knew Erica and continued to talk to her and ultimately Erica told her that Appellant was the person who committed this offense. (Vol. X,

1177-1178) Similarly, Lieutenant Mark Laderwarg testified that he has known Sammy Hogan all his life and when he continued to speak with Sammy about the incident, Sammy ultimately told him that Appellant was the person who committed the offense. (Vol. X, XI, 1199-1214) Defense counsel objected to the testimony of both Officer Yorkey and Lieutenant Laderwarg on the grounds that it was inadmissible hearsay. However, the trial court overruled the objection and ruled that the statements were admissible under the excited utterance exception to the hearsay rule. (Vol. X, 1179, 1199) Appellant asserts that this ruling was error.

A. Standard of Review

Whether the necessary state of mind is present for a court to admit a statement as an excited utterance exception is a preliminary fact for a trial court's determination. The standard of review on appeal is an abuse of discretion. ***Cotton vs. State***, 763 So.2d 437 (Fla. 4th DCA 2000)

B. Argument

Section 90.803(2), Florida Statutes (1997) provides for the admission of "[a] statement or excited utterance relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." This Court has previously held that in order for an excited utterance to be admissible, the following requirements must be met: (1) there must have been an

event startling enough to cause nervous excitement; (2) the statement must have been made before there was time to contrive or misrepresent; and (3) the statement must have been made while the person was under the stress of excitement caused by the startling event. ***State vs. Jano***, 524 So.2d 660, 661 (Fla. 1988) If "the time interval between the event and the statement is long enough to permit reflective thought, the statement will be excluded in the absence of some proof that the declarant did not in fact engage in a reflective thought process." ***Id.*** at 662 (quoting Edward W. Clearly, ***McCormick on Evidence***, Section 297 at 856 (3d ed. 1984))

In the instant case, the statements identifying Appellant as the perpetrator clearly did not qualify as an excited utterance since these statements were made after both individuals had given false statements to the police officers. Thus, there was clearly enough time for each of the individuals to contrive or misrepresent since indeed they did. Additionally, it was the trial court and not the state that claimed these statements were admissible under the excited utterance exception. Such a ruling is clearly erroneous.

C. Harmless Error

The erroneous admission of the hearsay statements cannot be deemed harmless error. The evidence against Appellant came mainly from the witnesses Erica Foster and Sammy Hogan. The question at issue was whether the shooting

of Angel Foster was intentional or accidental. Evidence was presented which supported both of these theories. Thus, the credibility of Sammy and Erica was crucial in the instant case. By allowing police officers who personally knew both of the individuals to testify to the blatant hearsay, served to improperly bolster the credibility of these witnesses. This in and of itself is error. ***See Olsen vs. State***, 26 Fla. L. Weekly D377 (Fla. 5th DCA February 2, 2001) Since the net effect of the admission of this hearsay testimony was to constitute an improper comment on the reliability of the testimony. Appellant is entitled to a new trial.

POINT II

IN VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE I SECTION 9 & 16 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR MISTRIAL BASED ON COMMENTS BY THE PROSECUTOR DURING CLOSING ARGUMENTS IN THE GUILT PHASE WHICH IMPROPERLY SHIFTED THE BURDEN OF PROOF TO THE DEFENDANT.

During rebuttal closing argument, the prosecutor made the following statements:

> When he gets his chance what does he do? For the first two plus hours he's denying it. So I suggest to you, once again, he's not credible. That's not what he intended on doing. He intended to mess up the investigation as much as possible, including him leaving the scene and not providing testimony, including disposing of the gun.
>
> Had we had the gun we could test this theory of how easily it was to fire, whether it was a trigger pull, what the weight of the trigger pull was, whether it had the ability to misfire on occasions like that. We would know all of those things. Those are things that you would know in evaluating this case.
>
> But I suggest to you that the Defendant knew that gun did not have a slight trigger pull, that it didn't have any problems, that the gun didn't

misfire.

Had we had that gun we all would be sitting here with no doubt whatsoever, let alone a reasonable doubt, that the Defendant intended on killing her.

You have to remember that a lot of the things that are missing in this case are from the Defendant intentionally avoiding you from knowing any of those things. And that's all from him. Not from anyone else. (Vol. XVI, 2088-2089)

* * *

And then the Defendant, interest in the case, statement to the police. He admits to lying. It's clear that he was lying.

Once again this is – this is what he wants you to believe. He wants you to believe that because of his bad record, because of his past he was so scared and so paranoid that people were going to blame him, people were going to assume these things, and look, they did. As Defense Counsel said, see he was right.

I suggest to you that had he had those thoughts he could have prevented where we were today. As I suggested to you earlier, we would have the gun. We could've done the test right then and there had he gone to the police department. He could have explained it that night.

Instead he knew exactly what he did and he needed time to formulate his plan, which he said. He needed time to formulate his plan. And that's what he did. That's the truth. Formulate his plan, not of how to avoid this assumption, but formulate the plan of how to avoid – (Vol. XVI, 2098-2099)

At this point, defense counsel approached the bench and objected and

moved for a mistrial on the grounds that the prosecutor was implying that the defendant had some burden of proof. (Vol. XVI, 2099) Without even getting a response from the prosecutor, the court denied the motion and said:

> Okay. I don't think that the argument is going towards the Defendant having to prove anything here. The argument is going to motivation for – to explain the inconsistencies in his testimony.

(Vol. XVI, 2100) Appellant contends that the trial court erred in denying his motion for mistrial.

A. Standard of Proof.

A trial court has discretion to determine the propriety of the remarks and comments of counsel during closing arguments and rulings on such matters will be reversed only on a showing of an abusive discretion. ***Esty v. State***, 642 So.2d 1074 (Fla. 1994)

B. Argument.

It is so clearly established that an accused has a fundamental right to a fair trial, free from improper prosecutorial comments and interrogation that this court, in ***Stewart v. State***, 51 So.2d 494 (Fla. 1951) noted:

> This court has so many times condemned pronouncements of this character in the prosecution of criminal cases that the law against it would seem to be so commonplace that any

> layman would be familiar with and observe it.
>
> * * *
>
> It would seem trite to state that the reason the courts throughout the country have condemned this type of abuse is that we are committed to the principle of fair and impartial trial, regardless of the offense one is charged with... [A defendant] is entitled to a fair and orderly trial in an environment reflecting constitutional guarantees which constitute fair trial. Under our system of jurisprudence, prosecuting officers are clothed with quasi judicial powers and it is consonant that the oath they take to conduct a fair and impartial trial. The trial of one charged with a crime is the last place to parade prejudicial emotions or exhibit punitive or vindictive exhibitions of temperament.

Id. at 494-495. In ***Washington v. State***, 86 Fla. 533, 98 So. 605 (1923), this Court spoke of the high standards which are expected of a prosecutor. The prosecutor is a sworn officer of the government with the great duty imposed on him of preserving intact all the great sanctions and traditions of law:

> It matters not how guilty a defendant in his opinion may be, it is his duty under oath to see that no conviction takes place except in strict conformity to law. His primary consideration should be to develop the facts and the evidence for the guidance of the court and jury, and not to consider himself merely as attorney of record for the state, struggling for a verdict.

98 So. at 609. Similarly, the Fourth District Court of Appeal in ***Kirk v. State***, 227 So.2d 40, 42-43 (Fla. 4th DCA 1969), stated:

> It is the duty of the trial judge to carefully control the trial and zealously protect the rights of the accused so that he shall receive a fair and impartial trial. The trial judge must protect the accused from improper or harmful statements or conduct by a witness or by a prosecuting attorney during the course of a trial. It is also the duty of a prosecuting attorney in a trial to refrain from making improper remarks or committing acts which would or might tend to affect the fairness and impartiality to which the accused is entitled. [citation omitted]. The prosecuting attorney in a criminal case has an even greater responsibility than counsel for an individual client. For the purpose of the individual case he represents the great authority of the State of Florida. His duty is not to obtain convictions but to seek justice, and he must exercise that responsibility with the circumspection and dignity the occasion calls for. His case must rest on evidence not innuendo. If his case is a sound one, his evidence is enough. If it is not sound, he should not resort to a innuendo to give it a false appearance of strength. Cases brought on behalf of the State of Florida should be conducted with the dignity worthy of the client.

The Supreme Court of the United States has observed that the average jury has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, the Court noted, improper suggestions and insinuations are apt to carry much weight against the accused when they should properly carry none. ***Berger v. United States***, 295 U.S. 78, 88 (1935)

Appellant acknowledges that wide latitude is afforded counsel in making a

closing argument. ***Breedlove v. State***, 413 So.2d 1 (Fla. 1982) However as this court noted in ***Gore v. State***, 719 So.2d 1197 (Fla. 1998):

> The standard for a criminal conviction is not which side is more believable, but whether taking all the evidence into consideration, the State has proven every essential element of the crime beyond a reasonable doubt. For that reason, it is error for a prosecutor to make statements that shift the burden of proof and invite the jury to convict the defendant for some reason other than that the State has proved its case beyond a reasonable doubt.

Id. at 1200. In ***Whittaker v. State***, 770 So.2d 737 (Fla. 4th DCA 2000) The court noted that it is error for the state to comment on the defendant's failure to produce evidence to refute an element of the crime. To do so, the court reasons, misleads the jury into thinking that the defendant bears the burden of proving his innocence. It is well-established that the state has the burden of proof in a criminal trial and that this burden cannot constitutionally be shifted to the defendant. ***Mullaney v. Wilbur***, 421 U.S. 684 (1975)

The comments of the prosecutor clearly suggested to the jury that the appellant had some duty to bring to immediately present the gun to the police. Although the defense in the instant case was that the shooting was accidental, the evidence suggesting this was presented by the state in its case in chief through the statement of appellant and through the testimony of Lino Odenat. It is also

important to note that the state's witnesses testified that after the shooting, appellant gave the gun to Lino. Thus, the state's insinuation in its rebuttal argument that appellant somehow disposed of the gun is simply untrue.

Appellant notes that the first offending comment by the prosecutor was not immediately objected to. However, the second offending remark was promptly objected to and in his motion for mistrial, defense counsel referred to the prior comment and included it. As this court noted in ***Ruiz v. State***, 743 So.2d 1 (Fla. 1999) the failure to promptly object to an offending comment is not necessarily a bar to relief:

> When the properly preserved comments are combined with additional acts of prosecutorial overreaching set forth below, we find that the integrity of the judicial process has been compromised and the resulting convictions and sentences irreparably tainted.

Id. at 7. Thus, when the properly preserved objectionable comment is considered in conjunction with the arguably unpreserved objectionable comment, the judicial process herein has been irreparably tainted. The error cannot be deemed harmless. In essence, the state's case was based on the testimony of Erica Foster and Sammy Hogan. These two individuals admitted that they initially gave false testimony. Their version of the events was somewhat contradicted by appellant

and Lino Odenat. Thus, the instant case represented a classic swearing match between the prosecution witnesses and the defense witnesses. Given this situation, the offending comments by the state attorney which certainly could be interpreted by the jury to mean that the defendant had some burden of proof in this criminal case could have been the deciding factor in allocating guilt. The trial court erred in denying the motion for mistrial. This Court must reverse appellant's convictions and remand the cause for a new trial.

POINT III

IN VIOLATION OF THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I SECTIONS 9, 16 & 17 OF THE FLORIDA CONSTITUTION, APPELLANT WAS DENIED DUE PROCESS BECAUSE OF THE INCOMPLETE AND CONFUSING JURY INSTRUCTION GIVEN BELOW.

Appellant was charged with one count of kidnapping which alleged that appellant

> ...did forcibly, secretly or by threat, confine, abduct or imprison another person, ANGEL JOHNSON, ERICA FOSTER, SAMMY HOGAN, against THEIR will and without lawful authority, with intent to commit or facilitate the commission of a felony, to wit: MURDER, or with intent to inflict bodily harm upon or to terrorize ANGEL JOHNSON, ERICA FOSTER, SAMMY HOGAN, or another person,...

(Vol. III, 452) Kidnapping can be committed in several alternative ways. Kidnapping can be committed if a defendant forcibly confines a victim against his will and if the defendant acted with intent to: (1) hold for ransom or reward as a shield or hostage; (2) commit or facilitate commission of a particular felony; (3) inflict bodily harm upon or to terrorize the victim or another person; **OR** (4) interfere with the performance of any governmental or political function. The

charging document alleges kidnapping by either intending to terrorize the victim or with the intent to facilitate the commission of murder. However, the jury instructions that were given below improperly combined the jury instructions on two of these theories and in so doing totally eliminated an essential element. The jury instruction given below provided:

> Before you can find the Defendant guilty of kidnapping, the State must prove the following three elements beyond a reasonable doubt:
>
> Number one: Wydell Jody Evans forcibly, secretly or by threat confined, abducted or imprisoned Angel Johnson, Erica Foster or Sammy Hogan against their will.
>
> Number two: Wydell Jody Evans had no lawful authority.
>
> Number three: Wydell Jody Evans acted with the intent to inflict bodily harm upon or to terrorize the victim or another person.
>
> In order to be kidnapping the confinement, abduction or imprisonment:
>
> A: Must not be slight, inconsequential or merely incidental to the felony;
>
> B: Must not be of the kind inherent in the nature of the felony; and
>
> C: Must have some significance in dependant of the felony in that it makes the felony substantially easier of commission or substantially less since the risk of detection.

(Vol. XV, 2109-2110; Vol. III, 560) Appellant maintains that this instruction erroneously combined elements of two theories and in so doing totally omitted an

essential element of the crime thus rendering the instructions confusing and misleading.

A. Standard of Review.

Trial courts are generally accorded broad discretion in formulating jury instructions. ***Reyka v. Halifax Hosp. Dist.***, 657 So.2d 967 (Fla. 5th DCA 1995). As such, the standard of review to be applied to a decision to give or withhold a jury instruction is abuse of discretion. ***See Barton Protective Servs., v. Faber***, 745 So.2d 968 (Fla. 4th DCA 1999) The trial court's decision to give a particular instruction will not be reversed "unless the error complained of resulted in a miscarriage of justice or the instruction was reasonably calculated to confuse or mislead the jury." ***Fabor***, 745 So. 2d at 974 (citing Reyka). Furthermore, if the jury instructions as a whole fairly state the applicable law, failure to give a particular instruction will not be error. ***See CSX Transp., Inc. v. Whittler***, 584 So.2d 579 (Fla. 4th DCA 1991). Additionally, failure to instruct as to any element of an offense which is pertinent or material to what a jury must consider in order to convict amounts to fundamental error which need not be preserved below. ***Stewart v. State***, 420 So.2d 862 (Fla. 1982); ***Sandstrom v. Montana***, 442 U.S.

510 (1979); ***Harrison v. State***, 743 So.2d 178 (Fla. 3rd DCA 1999)

B. Argument.

As noted above, appellant was charged with kidnapping under two theories: with the intent to terrorize or with the intent to facilitate the commission of another felony. However, the jury instructions given below totally omits an essential element necessary for the theory of facilitating the commission of another felony. In particular, the jury is never told that kidnapping can be committed if the defendant had the intent to facilitate the commission of murder. Rather, the jury was only told that kidnapping was committed if the defendant intended to terrorize the victims. Notwithstanding the failure to instruct the jury on this essential element, the trial court gave the options as to the confinement requirement which is only applicable if the jury is instructed on kidnapping with the intent to commit or facilitate the commission of another felony. The jury instruction below simply put was confusing and misleading. Under this instruction there is no way a jury could adequately know what the state of the law was so as to conclude that appellant was guilty of kidnapping. Certainly the evidence was not overwhelming supporting a conviction for kidnapping. In fact, as appellant argues *infra*, the evidence was insufficient to withstand a motion for judgment of acquittal as to kidnapping. If this Court determines that the evidence was sufficient to proceed to the jury it must

nevertheless reverse for a new trial because of the erroneous jury instructions. The failure to instruct on an essential element of a crime which is contested by the defendant constitutes fundamental error.

> A defendant has the right to have a court correctly and intelligently instruct the jury on the essential and material elements of the crime charged and required to be proven by competent evidence. ***Gerds v. State***, 64 So.2d 915, 816 (Fla. 1953). When an instruction excludes the fundamental and necessary ingredient of law required to substantiate the particular crime, such failure is tantamount to a denial of a fair and impartial trial. ***See Id***.

Chicone v. State, 684 So.2d 736, 745 (Fla. 1996); ***See also Oliver v. State***, 707 So.2d 771 (Fla. 2nd DCA 1998) (failure to instruct jury on essential element of crime charged adversely affects defendant's substantial rights and cannot be regarded as harmless error). Appellant is entitled to a new trial on the kidnapping charge.

POINT IV

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL AS TO PREMEDITATED MURDER AND KIDNAPPING.

At the end of the state's case appellant moved for a motion for judgment of acquittal arguing that the evidence failed to show any premeditation on the part of appellant and that there was no evidence of a kidnapping since the evidence showed that the alleged victims were free to leave at any time. (Vol. XIII, 1738-1754) The trial court denied the motion. (Vol. XIII, 1754) The motion was renewed at the close of all the evidence and again denied. (Vol. XIV, 1826)

A. Standard of Review.

Legal sufficiency of the evidence - that is, whether the evidence adduced by the state, if believed, could constitute proof beyond a reasonable doubt on every element of the crime charged - is a matter equally determinable by trial and appellate courts, and therefore subject to the de nova standard of appellate review. ***Tibbs v. State***, 397 So.2d 1120 (Fla. 1981) A special standard of review of the sufficiency of the evidence applies when a conviction is based wholly on circumstantial evidence. ***State v. Law***, 559 So.2d 187 (Fla. 1989) "Where the only proof of guilt is circumstantial, no matter how strongly the evidence may suggest guilt, a

conviction cannot be sustained unless the evidence is inconsistent with any reasonable hypothesis of innocence." ***Id.*** at 188. If the defense presents evidence, then the appellate court must determine whether the state produced competent substantial evidence to contradict the defense.

B. Argument.

1. Premeditated Murder.

In order to prove premeditated murder, the state must prove the following three elements beyond a reasonable doubt: (1) the victim is dead; (2) the death was caused by the criminal act of the defendant; and (3) there was a premeditated killing of the victim. Unquestionably, the state proved that Angel Johnson was dead. Appellant asserts that the proof offered by the state as to the element of premeditation and the element of criminal agency were not proved beyond a reasonable doubt. As to the element of premeditation, the state presented the testimony of Edward Rogers, a ten-time convicted felon, who testified that while he and appellant were jail mates, he overheard an angry conversation between appellant and someone on the telephone immediately after which appellant stated that if he got his hands on her, he'd kill the bitch. (Vol. XI, 1386) However, appellant was in jail and did not act upon this statement. Appellant was released from jail and spent at least a day and a half with the victim without any show of animosity

between them. This came from the state's own witnesses who observed appellant and Angel together during this time. Thus, the statement made by appellant in jail sometime before cannot translate into a finding of premeditation. On the day in question, although the witnesses testified that there were some words between appellant and Angel concerning appellant's belief that Angel was cheating on his brother, everyone testified that apparently Angel did not take this seriously since she laughed. It was when Angel laughed at appellant, that the witnesses testified that appellant immediately brought out the gun and shot her. Appellant contends that this evidence was woefully insufficient to show proof of beyond a reasonable doubt that the act was premeditated. Rather, it merely shows an impulsive reaction on the part of appellant to Angel's response. As to the element of criminal agency, the evidence is woefully insufficient to prove this beyond a reasonable doubt. The defense at trial was accident. A person's intent is rarely if ever subject to direct proof. The proof offered by the state of the criminal agency was entirely circumstantial. Both Sammy Hogan and Erica Foster testified that there was an argument during which appellant pulled a gun and shot the victim. This evidence was countered by the testimony of Lino Odenat and appellant himself who testified that he was passing the gun to the back seat when Angel hit the gun causing it to discharge. This theory was somewhat supported by the original statement that

Erica Foster made to the police wherein she testified that there was a "tussle" between appellant and Angel over the gun. The evidence also presented by the state showed that gunshot residue tests were conducted on both appellant and on Angel. The results of these tests were negative for appellant and positive for Angel indicating that indeed she touched the gun. The evidence presented by the state to prove criminal agency was entirely consistent with the defense theory of accidental shooting. Because of this, appellant was entitled to a judgment of acquittal as to the charge of first degree premeditated murder. This Court must reverse his conviction and remand for discharge.

2. Kidnapping.

Appellant was charged with kidnapping. The jury instructions on kidnapping that were given below permitted the jury only to consider kidnapping with the intent to terrorize. Under these circumstances, there was no evidence to support a conviction. Initially, the indictment charged appellant in a single count with kidnapping Sammy Hogan, Erica Foster **OR** Angel Johnson. The evidence adduced below is uncontroverted that all three of the individuals were in the car that evening consensually. Appellant at no time forced them to get in the car. Once Angel was shot, it was legally impossible for her to be kidnaped with the intent to terrorize since by all reports she was rendered virtually unconscious after the shot.

However, the jury was given the option of convicting appellant of kidnapping Angel Johnson. As to Erica Foster and Sammy Hogan, the evidence is woefully insufficient as a matter of law to constitute kidnapping. The evidence showed that immediately after the shooting, appellant told Sammy Hogan to take him to Big Dick's house. Sammy complied, drove to Big Dick's and parked outside. At that point, it is uncontroverted, that appellant had given the gun to Lino. Appellant got out of the car and went up on the porch of Big Dick's house and spoke with him. During this time, nothing forced Sammy Hogan or Erica Foster to remain where they were. In fact, Sammy and Erica both testified that Lino, who had the gun, told them that as soon as he got out of the car they should leave. Thus, there is no evidence competent or otherwise, upon which the jury could find that appellant confined and attempted to terrorize Sammy and Erica. Simply put the evidence did not support a conviction for kidnapping with the intent to terrorize. Even after appellant got back in the car, he only directed Sammy to drive him a short distance at which point appellant got out of the car and told Sammy and Erica to take Angel to the hospital. There was no evidence that appellant secretly or forcibly confined either Sammy Hogan, Erica Foster or Angel Johnson with the intent to terrorize them. This Court must reverse appellant's conviction for and sentence for kidnapping and remand the cause for resentencing.

POINT V

IN VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I SECTIONS 9 & 16 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT ERRED IN ALLOWING THE STATE TO PRESENT PORTIONS OF A PRESENTENCE INVESTIGATION DURING THE PENALTY PHASE WHERE DEFENDANT WAS NOT GIVEN ANY OPPORTUNITY TO REBUT THE INFORMATION.

Prior to commencement of the penalty phase, there was a discussion concerning the evidence the state was going to present. (Vol. XVI, 2213-2243) Defense counsel had no objection to the prior judgments and sentences coming in for appellant's prior offenses. However, the state also sought to attach to the prior judgments and sentences, portions of the presentence investigation reports done in those cases which contained a summary of the facts of the offense. Defense counsel objected on the grounds that such evidence was hearsay and it also constituted a discovery violation since he had never been given copies of these before. (Vol. XVI, 2224) The state argued that the PSI, although hearsay was admissible and cited the case of ***Koon v. State***, 513 So.2d 1253 (Fla. 1987) for the proposition that the PSI sections were admissible at the penalty phase. (Vol. XVI, 2228) The trial court ruled that the PSI would be admitted and also noted that

appellant's objections were sufficient to preserve them. (Vol. XVI, 2229, 2243) When the state sought to admit this evidence at the penalty phase, they were admitted over defense objection. (Vol. XVI, 2260) Appellant asserts that this was error.

A. Standard of Review.

The trial judge is afforded broad discretion with the respect of admissibility of evidence and a ruling admitting or excluding evidence will not, generally, be reversed unless there has been a showing of an abuse of discretion. ***Sexton v. State***, 697 So.2d 833 (Fla. 1997); ***Cole v. State***, 701 So.2d 845 (Fla. 1997).

B. Argument.

A presentence investigation report clearly is hearsay. In ***Waterhouse v. State***, 596 So.2d 1008 (Fla. 1992) this Court held:

> Details of prior felony convictions involving the use or threat of violence to the victim are admissible in the penalty phase of a capital trial. [citations omitted] Such testimony "assist the jury in evaluating the character of the defendant and the circumstance of the crime so that the jury can make an informed recommendation as to the appropriate sentence." [citation omitted] Further, hearsay testimony is admissible, provided that the defendant has a fair opportunity to rebut it.

Id, at 1016. Thus, this Court has ruled it is proper for the state to present

testimony of investigating officers regarding prior violent felonies since the accused has the opportunity confront and cross examine the officers. ***Lockhart v. State***, 655 So.2d 69 (Fla. 1995) However, in ***Rhodes v. State***, 547 So.2d 1201 (Fla. 1989), this Court found error in allowing the introduction of a tape recorded statement of the victim of a prior violent felony. Noting that hearsay evidence may be admissible in a penalty phase proceeding, this Court once again reiterated that such evidence is admissible **only if** the defendant is accorded a fair opportunity to rebut any hearsay statements. Noting that the statements from the previous victim came from a tape recording and not from a witness present in the courtroom this Court cited its previous decision in ***Engle v. State***, 438 So. 2d 803, 814 (Fla. 1983) wherein this Court stated:

> The sixth amendment right of an accused to confront the witnesses against him is a fundamental right which is made obligatory on the states by the due process of law clause of the Fourteenth Amendment to the United States Constitution. ***Pointer v. Texas***, 380 U.S. 400, 85 S.Ct. 1085, 13 L.Ed. 2nd 923 (1965). The primary interest secured by, and the major reason underlying the confrontation clause, is the right of cross examination. ***Pointer v. Texas***. This right of confrontation protected by cross-examination is a right that has been applied to the sentencing process. ***Specht v. Patterson***, 386 U.S. 605, 87 S.Ct. 1209, 18 L.Ed.2d 326 (1967).

Since ***Rhodes*** did not have the opportunity to confront by cross examination the prior victim, this Court found that it was error to admit the tape recording into evidence. The same rationale applies in the instant case. The summary of the prior offenses included in the presentence investigation reports were clearly hearsay as they were out of court statements made by the preparer of the document. The preparer was not present in court to be cross examined on the accuracy of this information. The state noted that it could bring in the prior victims but it chose to do it this way. While that may indeed be true, it does not make it any less wrong for the trial court to admit this blatant hearsay into evidence. The trial court in ruling that the evidence was admissible relied upon the state's assertion that this Court had previously ruled that the PSI was admissible into evidence in ***Koon v. State***, 513 So.2d 1253 (Fla. 1987) However, ***Koon*** does not stand for the proposition that a presentence investigation report is admissible into evidence before the jury in a penalty phase of a trial. In ***Koon*** the issue was whether the trial court erred in considering a presentence investigation report which contains certain facts which were disputed by him. This Court noted that at the sentencing hearing the trial court stated that it used the PSI report only for information pertained to prior convictions for violent felonies. The sentencing order relied on the PSI report only to the extent that it detailed the violence which gave rise to the convictions.

Moreover, practically all of the specific facts disputed by ***Koon*** had nothing to do with the recitations in the sentencing order. Therefore, this Court rejected ***Koon's*** issue. Importantly, the issue before this Court in ***Koon,*** was whether a trial court could consider a PSI. There is nothing in ***Koon*** which extends this rationale to permitting a jury to consider a PSI particularly where the defense lodges a timely objection to its admissibility.

Because the admission of the PSI's were critical to the state's proof of the aggravating circumstance of prior violent felony, the evidence cannot be deemed harmless. This is not a case where there were many aggravating factors. The state relied simply on two aggravating factors. While these factors have been proven, there is no way to gauge the prejudicial impact of the offending evidence that was placed before the jury. Appellant is entitled to a new penalty phase.

POINT VI

IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE I SECTION 17 OF THE FLORIDA CONSTITUTION, THE IMPOSITION OF THE DEATH PENALTY IS PROPORTIONALLY UNWARRANTED IN THIS CASE.

A. Standard of Review.

In reviewing a death sentence, this Court must consider and compare the circumstances of the case at issue with the circumstance of other decisions to determine if the death penalty is appropriate. ***Livingston v. State***, 565 So.2d 1288 (Fla. 1988) Thus the standard of review is a *de novo* review.

B. Argument.

In the instant case, the trial court found two aggravating factors, that appellant was on probation at the time that he committed the capital felony and that appellant had previously been convicted of a felony involving the use or threat of use of violence. The trial court found several mitigating factors. This Court has noted that the death penalty, unique in its finality and total rejection of the possibility was intended by the legislature to be applied "to only the most aggravated and unmitigated of most serious crimes." ***State v. Dixon***, 283 So.2d 1, 7 (Fla. 1973); ***Holsworth v. State***, 522 So.2d 348 (Fla. 1988). In comparison of

the instant case to other cases decided by this Court leads to the conclusion that the death penalty is not proportionally warranted in this case. ***Blakely v. State***, 561 So.2d 560 (Fla. 1990) (death sentence was disproportionate despite finding two aggravators: heinous, atrocious and cruel, and cold, calculated and premeditated); ***Livingston v. State***, 565 So.2d 1288 (Fla. 1988) (death penalty disproportionate despite finding two aggravating circumstances: previous conviction of a violent felony and commission of the murder during an armed robbery); ***Farinas v. State***, 569 So.2d 1425 (Fla. 1990) (death sentence not proportionate where defendant convicted of first degree murder of girlfriend even though trial court properly found two aggravating circumstances: capital felony was committed while defendant was engaged in the commission of a kidnapping, and the capital felony was especially heinous, atrocious and cruel); ***Fitzpatrick v. State,*** 527 So.2d 809 (Fla. 1988) (death penalty not proportionate despite finding of five aggravating circumstances and three mitigating circumstances); ***Wilson v. State***, 493 So.2d 1019 (Fla. 1986) (death not proportionately warranted despite trial court's proper finding of two aggravating circumstances and no mitigating circumstances).

In ***Kramer v. State***, 619 So.2d 274 (Fla. 1993) this Court held that the death penalty was disproportionate despite findings by the trial court that the murder was

heinous, atrocious and cruel and that the defendant had a prior conviction for a violent felony. In that case, the evidence demonstrated that ***Kramer*** systematically pulverized the victim as he tried to get away and fend off the blows. ***Kramer*** delivered a minimum of nine to ten blows; none but the final two would have been fatal. The evidence showed that the attack began in an upper portion of an embankment and proceeded down approximately fifteen feet to the culvert, and then further down in the culvert to the final resting place of the victim. The final blows which were delivered with a concrete block, were inflicted while the victim's head was lying against the cement. Additionally, the prior violent felony that ***Kramer*** had was a near identical attack on a previous victim with a concrete block. Despite these facts, this Court had no problem in reducing the penalty to life where these two aggravating factors were offset by the mitigation including ***Kramer's*** alcoholism, mental stress, severe loss of emotional control, and potential for productive functioning in the structured environment of prison.

In the instant case, the aggravating circumstances found by the trial court and conceded by appellant are that he was on probation at the time that the capital felony was committed. This is a status aggravator. The second aggravator that was found and conceded by appellant was that he had a prior conviction for a violent felony. However, these felonies included an aggravated battery, and two

batteries on a law enforcement officer. Interestingly, with regard to these prior offenses, the injuries suffered by the victims were minimal. Additionally, there was no indication that the victim in this case knew beforehand that she was going to be killed or that she suffered as a result of the actions of the appellant. An additional factor, apparently not considered by the trial court since his sentencing order contains no reference thereto, is that members of the victim's family, including the victim's father, were opposed to the death penalty in this case. The wishes of the victim and the right to be heard are constitutionally protected in the State of Florida. ***Article I, Section 16, Florida Constitution***. It would be a hollow right indeed if a trial court could simply ignore the voice of the victims.

The instant case represents one of the least aggravated murders to come before this Court. While there are two valid aggravating circumstances, this capital murder simply does not warrant the imposition of the death penalty. This Court must reduce appellant's sentence to life imprisonment without parole.

CONCLUSION

Based upon the foregoing reasons and authority, appellant respectfully requests this Honorable Court to reverse his judgment and sentences and remand for a new trial, or to reverse his death sentence and remand for a new penalty phase, or to reverse his death sentence and remand for imposition of a life sentence.

Respectfully submitted,

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_____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand- delivered to the Honorable Robert A. Butterworth, Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32118, via his basket at the Fifth District Court of Appeal and mailed to, Mr. Wydell Jody Evans, #113416, Union Correctional Institution, P.O. Box 221, Raiford, FL 32083 this 12th day of March, 2001.

_____
MICHAEL S. BECKER
ASSISTANT PUBLIC DEFENDER

CERTIFICATE OF FONT

I hereby certify that the size and style of type used in this brief is point proportionally spaced Times New Roman, 14 point.

_____
MICHAEL S. BECKER
ASSISTANT PUBLIC DEFENDER