IN THE SUPREME COURT OF FLORIDA

MICHAEL PETER FITZPATRICK,

Appellant,

v. **CASE NO. SC01-2759**
Lower Tribunal No. 97-482

CFAES

STATE OF FLORIDA

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PASCO COUNTY, STATE OF FLORIDA

ANSWER BRIEF OF THE APPELLEE

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PRELIMINARY STATEMENT

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STATEMENT OF THE CASE AND FACTS

Appellee generally accepts and adopts Appellant's Statement of the Case and Statement of Facts.

SUMMARY OF THE ARGUMENT

Issue I: The trial court properly denied Appellant's motion for judgment of acquittal regarding the sufficiency of evidence identifying Appellant as the perpetrator. The jury's verdict was supported by competent, substantial evidence, the most damning of which included DNA evidence identifying Appellant's semen as that taken from the victim, as well as testimony that the amount of semen found inside the victim indicated that the sexual battery had occurred only one to two hours prior to the victim being found brutally stabbed and naked on the side of the road at 3:30 a.m. Additionally, two witnesses testified that the victim was last seen unharmed leaving A.J. Howard's residence with Appellant at about 11:00 p.m., just hours before she was stabbed. This testimony directly contradicted Appellant's only hypothesis of innocence: that he and the victim had consensual sex some fifteen to eighteen hours before she was left for dead, and that he last saw her at approximately 7:00 p.m. the night before she was stabbed. Consequently, when the evidence of identity is viewed in the light most favorable to the State, the motion for judgment of acquittal was properly denied.

Issue II: Appellant also claims his motion for judgment of acquittal should have been granted on the issue of

premeditation. However, the circumstantial evidence presented sufficiently established both theories of premeditation and felony murder. The multiple stab wounds in the victim's neck supported a finding of premeditation. Further, the sexual battery was proven based on the fact that the victim's underwear was found shoved up under her breasts and covered in blood when she was discovered on the side of the road. Additionally, Appellant repeatedly denied having sex with the victim until he was confronted with the results of the DNA testing identifying his sperm. Once Appellant did come up with a story of having sex with the victim the morning before she was found stabbed, the scientific evidence also belied his claim. No semen was found on the victim's underwear, as would be expected if she had sex with him when he claimed, and the motility of the sperm sample taken from the victim indicated that sex between the victim and the Appellant had to have occurred long after Appellant claimed, and just before the victim was found. Under these circumstances, the trial court properly denied the motion for judgment of acquittal with respect to the evidence of premeditation.

Issue III: Appellant's statements to law enforcement, as well as the results of the DNA testing identifying Appellant as the perpetrator, were properly admitted. Appellant's statements

were voluntary. He was never under arrest, thus his Miranda rights were never implicated. Moreover, no unfairly deceptive interrogation techniques were used against Appellant. And, Appellant's parole officer merely informed him that he would benefit from cooperating, which does not constitute coercion. Thus, all of the statements made by Appellant, as well as the DNA test results, were properly admissible.

Issue IV: The victim's nonverbal testimony resulting from her interview by law enforcement while she was in the hospital was properly admitted as impeachment to the excited utterances she made when she was discovered.

Issue V: No abuse of discretion resulted from the trial court's denial of Appellant's motion for mistrial based on Detective Bousquet's testimony that Appellant mentioned needing an attorney during their first interview. First, Appellant's statement was an equivocal request which did not invoke his right to remain silent. Additionally, nothing in Detective Bousquet's testimony improperly suggested that he was guilty. Finally, any possible error would be harmless where the remark was neither repeated nor emphasized, where the evidence against Appellant was overwhelming, and where defense counsel followed up on cross-examination with additional questions concerning Appellant's request for an attorney.

Issue VI: The trial court properly refused to suppress the out-of-court and in-court identifications of Appellant made by A.J. Howard and Melanie Yarborough. Howard's identification involved no substantial likelihood of irreparable misidentification; and, no unnecessarily suggestive procedure was used by the police in obtaining Yarborough's identification. Also, Appellant failed to object to Yarborough's in-court identification of Appellant, thus waiving any challenge thereto.

Issue VII: First, Appellant seeks reversal based on the exclusion of DNA evidence from fingernail scrapings of the victim. The trial court properly excluded this evidence where the DNA could have been under the victim's fingernail for an indeterminate length of time. More importantly, any error was harmless where other evidence allowed Appellant to argue to the jury the possibility that an unknown person was the true perpetrator.

Next, the trial court refused to allow several witnesses to point out Appellant on the surveillance videotape taken at the 7-Eleven store. Again, any error would be harmless where numerous witnesses identified Appellant on the videotape for the jury; and, during closing, defense counsel played the tape and stopped it to point out Appellant and to highlight what he was wearing in the video.

Issue VIII: None of the various issues raised with respect to the imposition of the death penalty merit reversal. Appellant's prior grand theft was admitted to show that he was on parole at the time of the instant murder. Moreover, Appellant's other prior violent felony conviction for aggravated battery supported the relevant aggravating circumstance. The details of the aggravated battery were also properly presented to the jury. Allowing the State to put on available mitigation evidence was not error where Appellant waived his right to do so. The PSI was complete, other than military records which were never provided from federal authorities, despite numerous requests therefor. As such, no error resulted from the exclusion of military records, especially where the sentencing order accurately discussed Appellant's military service. Finally, the evidence sufficiently supported the count of sexual battery so as to allow the trial court to submit it as an aggravator.

Issue IX: First, Appellant failed to preserve any challenge based upon the decision of Ring v. Arizona. More importantly, this Court has repeatedly held that Florida's capital sentencing scheme complies with both Apprendi and Ring.

Issue X: Appellant failed to preserve any challenge regarding the lack of guideline scoresheet for the non-capital

sexual battery count. However, to the extent that reversal may be required for preparation of the scoresheet, remand may be appropriate for that limited purpose.

ARGUMENT

ISSUE I

THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL WHERE THE STATE PRESENTED SUFFICIENT EVIDENCE IDENTIFYING APPELLANT AS THE PERPETRATOR. (AS RESTATED BY APPELLEE).

Appellant argues that the trial court should have granted his motion for judgment of acquittal[1] because the State's circumstantial evidence was allegedly insufficient to prove identity. Admittedly, the evidence against Appellant was circumstantial. However,

> circumstantial evidence is not a bar to conviction:
>
> > 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. The question of whether the evidence fails to exclude all reasonable hypotheses of innocence is for the jury to determine, and where there is substantial, competent evidence to support the jury verdict, [the conviction] will not [be] reverse[d].

State v. Law, 559 So. 2d 187, 188 (Fla. 1989) (citations omitted).

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[1]Although Appellant failed to specifically challenge the State's proof on the issue of identity in his oral motions for judgment of acquittal, (XIX/1137-1145; XX/1288-1289), this argument was raised in the written motion for judgment of acquittal filed after trial. (VI/1041-1045). Thus, this issue is properly preserved for appellate review. See State v. Stevens, 694 So. 2d 731 (Fla. 1997).

See Kimbrough v. State, 700 So. 2d 634, 636-637 (Fla. 1997), cert. denied, 523 U.S. 1028 (1998). Here, substantial, competent evidence supported the jury's guilty verdict.

The most damning evidence against Appellant is the fact that his semen was found in the victim, and, according to the SAVE (Sexual Assault Victim Examination) nurse who examined the victim, the amount of semen found indicated that the sex had taken place only one to two hours prior. (XV/535, 546). This testimony directly contradicted Appellant's only hypothesis of innocence: that he had consensual sex with the victim between 9:00 a.m. and noon the day before she was found stabbed on the side of the road at approximately 3:30 a.m. This evidence should also be considered in light of Appellant's repeated denials of ever having sex with the victim until he was confronted with the DNA evidence confirming it was his semen found in the victim. (XVIII/959, 971-972, 1008-1014). Appellant also tried to get his sister, a nurse, to help him obtain two blood samples other than his own to provide to the police. (XVI/754-755, 757).

The DNA testing done on the victim's underpants also contradicted Appellant's claim of consensual sex, as well as the timing of that sexual encounter. Where no semen was found on the underpants which were found pushed up under the victim's

breasts and covered in blood, consensual sex was ruled out. (XIX/1089, 1132-1133). If Appellant and the victim had consensual sex in the morning hours the day before she was stabbed, his semen would have been found on her underwear. Additionally, if Appellant and the victim had sex, as Appellant claimed, some 20 to 24 hours prior to her SAVE exam which was conducted at 8:00 a.m. on August 18, 1996, (XV/524), the amount of fluid found would no longer have been present. (XIX/1090-1096). Further, the motility of the sperm observed by the serologist suggested that the very longest the sperm cells could have been present in the victim's vagina would have been 15 hours before the sample was removed during the SAVE exam, (XIX/1132-1133), or since 5:00 p.m. on August 17, 1996. Again, this scientific evidence contradicts Appellant's story that he had consensual sex with the victim between 9a.m. and noon on August 17, 1996.

In addition, several eyewitnesses testified that the victim was last seen alive leaving A.J. Howard's residence with Appellant. (XVII/806-809, 844-846). Appellant's former employers, the Degeles, also testified that he regularly carried a knife which they never saw again after the stabbing took place. (XVI/729, 735, 745-746). In fact, when Gene Degele confronted Appellant about the knife, Appellant said he did not

think it would be a very smart idea to carry a knife when there was a murder investigation going on. (XVI/752).

The DNA evidence, the witnesses identifying Appellant as the last person seen with the victim, and the testimony concerning the disappearance of his knife provided sufficient circumstantial evidence to withstand Appellant's motion for judgment of acquittal on the issue of identity. See e.g., Duckett v. State, 568 So. 2d 891, 894, 895 (Fla. 1990) (judgment of acquittal properly denied where circumstantial evidence showed victim last seen with defendant, victim's prints on hood of defendant's car and pubic hair found in victim's underpants consistent with the defendant's).

Moreover, the evidence cited by Appellant in support of his theory of innocence ignores the evidence set forth above. For instance, while the victim initially mentioned someone named Steve, she later indicated to the detectives that Steve was not her assailant. (XV/569, 595). The paramedic who treated the victim at the scene where she was found further testified that she probably did not really "100% understand" what she was saying, that she could have been hallucinating and was a poor historian. (XV/487-489). And, while Cindy Young thought she saw the victim with A.J. Howard, her ability to actually observe the victim was greatly impeached and she said simply that the

person she saw looked similar to the victim. (XIX/1199-1200). Finally, the alibi provided by Appellant's girlfriend is greatly suspect given her bias in favor of Appellant.

More importantly, none of Appellant's assertions make sense in view of the testimony that Appellant's semen had been deposited in the victim for less than two hours. As such, when the evidence is viewed in the light most favorable to the State, the motion for judgment of acquittal on the issue of identity was properly denied. See generally Beasley v. State, 774 So. 2d 649, 657-659 (Fla. 2000) (where State presented competent, substantial evidence inconsistent with defendant's unreasonable theory of innocence, motion for judgment of acquittal properly denied).

ISSUE II

THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL WHERE THE STATE PRESENTED SUFFICIENT EVIDENCE ESTABLISHING THAT THE KILLING OF LAURA ROMINES WAS PREMEDITATED OR OCCURRED DURING A SEXUAL BATTERY. (AS RESTATED BY APPELLEE).

In the alternative to Issue I, Appellant argues that the State failed to present sufficient evidence to establish either premeditation or that the murder was committed while Appellant was engaged in a sexual battery. However, where both premeditation and felony murder can be shown by circumstantial evidence, Woods v. State, 733 So. 2d 980 (Fla. 1999) (premeditation); and Benedith v. State, 717 So. 2d 472 (Fla. 1998) (felony murder), the State presented sufficient evidence to withstand Appellant's motion for judgment of acquittal.

Premeditation

The following competent, substantial evidence supported the jury's finding of premeditation. In this case, the victim was stabbed twice in the neck, one wound penetrating the larynx and the other penetrating the esophagus. (XVI/632). The victim's breasts were deep purple, and there was a penetrating wound in the breast area that was either another stab wound or a bite mark. (XV/529). There was also puffiness around the victim's head, and bruising on her arms. Her legs were covered in scratches and there was a cigarette burn on her leg. (XV/529-

530). Based upon the severe nature of the victim's wounds and the fact that she was left to die in an isolated area, the State presented competent, substantial evidence of premeditation.

Where premeditation can be shown by circumstantial evidence, Crump v. State, 622 So. 2d 963, 971 (Fla. 1993), (citations omitted), the State's evidence sufficiently excluded any reasonable hypothesis of innocence.

Here, Appellant's only hypothesis of innocence was wholly unreasonable. Appellant never put forth any hypothesis of innocence other than he did not commit the murder and was not with the victim in the hours leading up to her death, despite numerous eyewitnesses testifying to the contrary. In other words, he provided no explanation to specifically negate the question of premeditation.

Given Appellant's story that he was not with the victim on the evening of her death, the cases upon which he relies to argue that the State failed to adequately rebut a reasonable hypothesis of innocence are distinguishable. In each case where the State failed to present sufficient circumstantial evidence of premeditation, the defendant provided a reasonable, alternative to negate the possibility that he acted with

premeditated design.[2] Appellant failed to provide such an explanation.

For example, in Kirkland v. State, 684 So. 2d 732 (Fla. 1996), the defendant did not claim he was totally innocent of the murder. Instead, defendant relied upon an insanity defense. See Kirkland, 684 So. 2d 732, 734.

In Coolen v. State, 696 So. 2d 738 (Fla. 1997), the victim was also stabbed to death. However, the defendant did not assert innocence. Rather, the defendant claimed self defense in a fight. See Coolen, 696 So. 2d 738, 740.

Again, in Green v. State, 715 So. 2d 940 (Fla. 1998), the defendant could not claim total innocence. Green told a fellow inmate that he and another individual "did things to the girl" and "the bitch got crazy on us." Green also admitted that they left the victim's body on the highway where she was found. See Green, 715 So. 2d 940, 942.

Finally, in Austin v. U.S., 382 F.2d 129, 133 (D.C. Cir. 1967), overruled in part on other grounds sub nom., U.S. v. Foster, 785 F.2d 1082 (D.C. Cir. 1986)(en banc), although the victim was stabbed repeatedly, the defendant specifically

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[2]In several of the cases cited by Appellant, the State also failed to pursue a theory of felony murder which further distinguishes these opinions from the instant case. See e.g., Kirkland, 684 So. 2d 732, 735; and Austin, 382 F.2d 129, 131.

claimed the act was not premeditated and that he was insane at the time.

In contrast, in the instant case, the stab wounds to the victim's neck sufficiently established premeditated intent. Although multiple stab wounds alone do not prove premeditation, the nature and location of these wounds do support the finding of premeditation. See Perry v. State, 801 So. 2d 78, 85-86 (Fla. 2001), citing Rogers v. State, 783 So. 2d 980, 989 (Fla. 2001). As stated in Jimenez v. State, 703 So. 2d 437, 440 (Fla. 1997) (citing Preston v. State, 444 So. 2d 939, 944 (Fla. 1984)), cert. denied, 523 U.S. 1123 (1998), the deliberate use of a knife to stab a victim multiple times in vital organs is evidence that can support a finding of premeditation. See Perry, 801 So. 2d 78, 85-86. See also Kramer v. State, 619 So. 2d 274, 276 (Fla. 1993) (holding that blood spatter and victim injury evidence can provide a sufficient basis for the conclusion that premeditation existed).

"The circumstances of the crime, including the physical evidence, the nature of the victim's injuries, and the manner of death, provide a sufficient basis for a jury to conclude that [defendant] acted with a purpose to inflict death." See Blackwood v. State, 777 So. 2d 399, 404 (Fla. 2000), cert. denied, 534 U.S. 884 (2001). See also Woods v. State, 733 So.

2d 980, 985 (Fla. 1999), quoting Spencer v. State, 645 So. 2d 377, 381 (Fla. 1994) (Evidence from which the element of premeditation may be inferred includes "the nature of the weapon used, the presence or absence of adequate provocation, previous difficulties between the parties, the manner in which the homicide was committed, and the nature and manner of the wounds inflicted."). And, Appellant failed to provide any reasonable hypothesis of innocence to the contrary. Thus, where Appellant stabbed the victim in the neck and left her to die in an isolated area at approximately 3:00 a.m., the State presented sufficient evidence of premeditation to withstand a Motion for Judgment of Acquittal. Accordingly, no error occurred.

Sexual battery

Appellant also maintains that the State failed to prove that the victim was sexually battered by Appellant. Where Appellant was finally forced to admit to having sexual intercourse with the victim after DNA testing proved that he had, he claimed it was consensual sex in the morning hours the day before the homicide. Appellant's arguments to the contrary, the State specifically disproved this hypothesis of innocence.

The initial evidence that a sexual battery had occurred was demonstrated by the fact that when the victim was found her underwear was shoved up under her breasts and covered in blood.

The scientific evidence which confirmed that Appellant was the perpetrator of the sexual battery found no semen on the victim's underwear. (XIX/1142-1144). Had consensual sex taken place when and how Appellant described, semen should have been found on her underwear. More importantly, the remaining motility of the sperm identified as belonging to Appellant indicated that sex with the victim could not have occurred between 9 a.m. and noon on the day before the murder as Appellant alleged. Further, the amount of seminal fluid found in the victim confirmed that intercourse took place only one to two hours before she was found. (XV/535, 546). As such, the State's evidence sufficiently rebutted Appellant's hypothesis of innocence. See Zack v. State, 753 So. 2d 9 (Fla.) (although evidence of consensual sex existed, such evidence did not negate evidence to the contrary), cert. denied, 531 U.S. 858 (2000). Thus, where a motion for judgment of acquittal should only be granted if there is no view of the evidence from which a jury could make a finding contrary to that of the moving party, the trial court properly denied Appellant's motion for judgment of acquittal.

ISSUE III

THE TRIAL COURT PROPERLY ADMITTED APPELLANT'S STATEMENTS TO LAW ENFORCEMENT, AS WELL AS THE RESULTS OF DNA TESTING PROVING THAT THE SEMEN TAKEN FROM THE VICTIM BELONGED TO APPELLANT. (AS RESTATED BY APPELLEE).

According to Appellant, the trial court erred in admitting the statements Appellant made to law enforcement, as well as the DNA results from the blood sample drawn from Appellant. In order to analyze this claim, the sequence of events regarding Appellant's contact with law enforcement during the investigation of this murder is key.

Appellant first became a suspect in the victim's murder on September 19, 1996. (XVIII/954). On that date, Detective Bousquet went to Appellant's apartment and asked him to come down to the Pasco County Sheriff's Office. (XVIII/955). Appellant agreed to come and drove with his girlfriend, Diane Fairbanks, in their own car to the Sheriff's Office. (XVIII/956). The ensuing interview lasted 30 to 45 minutes. (XVIII/959). Appellant was not under arrest at the time of this interview. (X/1606).

At the station, Appellant initially denied giving the victim a ride. When Detective Bousquet told him that he knew Appellant picked up the victim, Appellant admitted that he had picked her up. Appellant stated that he was afraid because he knew he was

the last one with her.[3] (XVIII/957-958).

Appellant explained that he picked up the victim at the 7-Eleven store and drove her to Sunny Palms Motel. He tried, and failed, to get her a room. Then, he left her there and went back to work delivering pizzas. Appellant claimed he never made contact with the victim again after dropping her at the motel. (XVIII/958).

Appellant denied having any type of sexual intercourse with the victim. (XVIII/959). Appellant denied picking up the victim from A.J. Howard's residence later in the evening. Appellant said he went back to the motel to check on the victim, but she had already gone. Appellant said he was afraid that he might be charged with murder. (XVIII/959).

Subsequently, during this interview, Appellant mentioned he thought he needed an attorney. (XVIII/959). In ruling on the motion to suppress Appellant's statements to law enforcement, the trial judge explained that it was not clear on the tapes whether Appellant asked for an attorney or not. (XI/1808). However, the trial judge noted that it was clear from Detective Bousquet's reaction that Appellant unequivocally asked for an attorney because Bousquet terminated the interview. (XI/1808).

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[3]Interestingly, if Appellant had last seen the victim when he left her at the motel, as he claimed, how would he know he was the last person seen with her before she was found?

Thus, while the trial judge determined that Appellant was not in custody, he suppressed what little remained of the interview conducted on September 19, 1996. (XI/1810).

Appellant's next contact with law enforcement occurred on September 21, 1996. On that date, Detective Bousquet went to numerous locations relevant to the crime to take measurements from all distances to the scene. (XVIII/966). While taking measurements at Pro Pizza, Appellant voluntarily approached Detective Bousquet and provided the following additional information.[4] (XVIII/969, 1037-1038).

Appellant first made contact with the victim during daylight hours at the 7-Eleven. She was crying and he kind of knew her from the Farm Store. Supposedly, she was staying with a security guard and had paid half the rent. Appellant took her to the Sunny Palms Motel where they were told the manager was not there. Appellant knew the victim was from Colorado and that she knew no one in the area. The victim was wearing a white shirt and black pants, and probably black shoes. She had plastic bags and a laundry basket filled with her belongings. (XVIII/969-970).

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[4]Notably, it is clear from defense counsel's cross examination of Detective Bousquet that the defense agreed that Appellant voluntarily approached him in the Pro Pizza parking lot. (XVIII/1037-1038).

Appellant dropped her off at the motel, and she thanked him. She told him she had enough money to stay at the motel. (XVIII/970). Appellant checked on the victim about one or two hours later, and was told that she was gone. (XVIII/971).

Appellant again denied ever having sex with the victim. (XVIII/972). He stated she had been drinking in his vehicle, and that she was in the truck approximately 15 to 20 minutes. (XVIII/972-973). He stated he was at the motel maybe three or four minutes, but didn't recall the exact time. (XVIII/973). That concluded the discussion with Detective Bousquet which took place in the Pro Pizza parking lot at Appellant's instigation.

On September 23, 1996, Appellant left a message for Detective Bousquet who called him back. They had a brief conversation, but the specifics were not related to the jury. (XVIII/974-975). Appellant then left another message for Detective Bousquet later that same day. (XVIII/978). Detective Bousquet returned that phone call on September 25, 1996, and another brief conversation was had, but the details were not provided to the jury. (XVIII/979).

Appellant next met with Detective Bousquet on September 30, 1996, at the Sheriff's Office. (XVIII/985). On this occasion, Appellant was first asked to give a blood sample so that he could be eliminated as a suspect. Appellant also stated, once

again, that he never had sexual intercourse with the victim. (XVIII/986). With respect to giving blood, Appellant asked if his sister, a registered nurse, could draw the blood. He was told it didn't matter who drew the blood, as long as an officer was present. Ultimately, Appellant said he would get back to Detective Bousquet by 5 p.m. about whether or not he would give a blood sample, and he left. (XVIII/986-988). Detective Bousquet never heard from Appellant again on September 30th. (XVIII/990).

On October 2, 1996, Detective Bousquet made contact with Appellant, and asked him if he wanted to give blood. Appellant agreed to provide a blood sample. (XVIII/992). The sample was taken later that day after Appellant executed a consent form for blood samples.[5] (XVIII/993-994). On November 18, 1996, Detective Bousquet was informed that Appellant's DNA matched the semen taken from the victim. (XVIII/1006).

Appellant was then interviewed again on December 5, 1996. (XVIII/1008). He provided the same story - that he simply dropped the victim off at the motel and that he never had sex with her. (XVIII/1009-1010). Appellant claimed he had only seen the victim twice - once at the Farm Store and the next

[5]No challenge has been raised to the validity of the consent form.

night when he drove her from the 7-Eleven to the motel. (XVIII/1010-1011).

Detective Bousquet then informed Appellant that he had DNA evidence against him and that his sister had told about Appellant asking for blood to substitute as his own. (XVIII/1011). Appellant then claimed to have had sex with the victim at the Water's Edge apartments in his apartment between 9:30 a.m. and 12:00 p.m. on August 17, 1996, the morning before she was found naked and stabbed on the side of the road. (XVIII/1012-1013). Appellant denied murdering the victim. (XVIII/1016).

The final conversation between Appellant and Detective Bousquet occurred on February 7, 1997. (XVIII/1020). On that date, Detective Bousquet confronted Appellant at his apartment with a warrant for his arrest for the murder and sexual battery of the victim, and Appellant was taken into custody. (XVIII/1022). The jury did not hear any further statements from the Appellant after his arrest.

Based upon these circumstances, the trial court denied Appellant's motion to suppress with respect to all of the statements he made after the initial interview on September 19, 1996. Where Appellant initiated the additional contacts he made with law enforcement, the trial court found his statements were

voluntary, and, thus, admissible. (XI/1810).

Nonetheless, Appellant raises several challenges to the admissibility of his statements, as well as the DNA evidence against him. First, Appellant complains that he was never advised of his Miranda[6] rights until he was arrested on February 7, 1997. However, where Appellant was never in custody prior to February 7, 1997, no Miranda warnings were required.

"Miranda's safeguards were intended to protect the Fifth Amendment right against self-incrimination by countering the compulsion that inheres in *custodial interrogation*. '[T]he presence of *both* a custodial setting and official interrogation is required to trigger the Miranda right-to-counsel prophylactic.... [A]bsent one or the other, Miranda is not implicated.'" See Sapp v. State, 690 So. 2d 581, 585 (Fla. 1997), cert. denied, 522 U.S. 840 (1997)(emphasis supplied), citing Alston v. Redman, 34 F.3d 1237 (3rd Cir. 1994), cert. denied, 513 U.S. 1160.

Here, Appellant voluntarily accompanied the police to the Sheriff's Office on both occasions that interviews were conducted at that location, he was never handcuffed or otherwise restrained, he was not under arrest, and he was free to leave at any time. Therefore, none of the interviews can be considered

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

custodial for purposes of Miranda. See Davis v. State, 698 So. 2d 1182 (Fla. 1997), cert. denied, 522 U.S. 1127 (1998); Schafer v. State, 537 So. 2d 988 (Fla. 1989); Correll v. State, 523 So. 2d 562 (Fla.) (defendant not in custody for purposes of Miranda; officer asked defendant to go to sheriff's office so that elimination fingerprints could be taken, defendant agreed and was taken to sheriff's office by his brother and sister-in-law, detective interviewed defendant after his arrival for approximately one-half hour to one hour, and defendant was free to leave station at any time), cert. denied, 488 U.S. 871 (1988); and Roman v. State, 475 So. 2d 1228 (Fla. 1985) (station house interrogation of defendant prior to his confession did not constitute "custody" for purposes of requiring Miranda warnings, where defendant voluntarily accompanied officers to station house, he was not handcuffed, and he was interrogated approximately three and one-half hours prior to his confession), cert. denied, 475 U.S. 1090 (1986).

On September 20, 1996, Appellant drove his own car to the station after agreeing to speak to law enforcement at the Sheriff's Office. During this first interview, Appellant asked whether he would be going home that night, and Detective Bousquet answered truthfully that he did not know. As Detective Bousquet testified, at that moment, he did not know whether

Appellant was going to confess or not, so his answer was simply the honest truth. (X/16771678). Moreover, once Appellant mentioned speaking to an attorney, Detective Bousquet ceased questioning him and Appellant actually left the Sheriff's Office. To the extent that Appellant may have invoked his right to counsel at that time, the trial court suppressed the remainder of the interview. Thus, Appellant's challenge to this first interview is without merit.

Appellant next spoke with law enforcement at the Sheriff's Office on December 5, 1996. Again, he arrived in his own car, was never restrained and was free to leave at any time. Appellant now argues that the search which was being conducted on his car at the time of this interview prevented him from being free to leave. However, Appellant neglects to mention that he executed a consent form for the search which Appellant has failed to challenge on appeal. As such, any challenge to this interview is also without merit.

Appellant next challenges the encounter had with Detective Bousquet in the Pro Pizza parking lot on September 21, 1996. On that date, the detective was taking measurements from various locations relevant to the crime to the actual scene where the victim was found. While taking measurements in the parking lot at Pro Pizza, Appellant approached the detective and began a

discussion about the case. No evidence indicates that Detective Bousquet even knew that Appellant would be at Pro Pizza when he went there to take the measurements. Under these circumstances, the trial court reached the only reasonable conclusion - that Appellant initiated further communication with law enforcement. Thus, Appellant's statements to Detective Bousquet on September 21, 1996, were admissible pursuant to Edwards v. Arizona, 451 U.S. 477 (1981). See also Francis v. State, 808 So. 2d 110 (Fla. 2001), cert. denied, ___ U.S. ___, 123 S. Ct. 696 (2002); Lukehart v. State, 776 So. 2d 906 (Fla. 2000), cert. denied, 533 U.S. 934 (2001); and Jones v. State, 748 So. 2d 1012, 1018 (Fla. 1999) (If, after asserting right to counsel, the suspect subsequently voluntarily initiates contact or communication with the police, police interrogation can resume.), cert. denied, 530 U.S. 1232 (2000).

Appellant also challenges the interview conducted on September 20, 1996, with respect to the interrogation method employed by Detective Bousquet. According to Appellant, unfair deception was used against him in the form of purported satellite images of Appellant with the victim at the scene of the stabbing. However, police deception does not render a confession involuntary per se. See State v. Cayward, 552 So. 2d 971 (Fla. 2d DCA 1989)(citing Frazier v. Cupp, 394 U.S. 731

(1969)), rev. dismissed, 562 So. 2d 347 (1990).

With respect to the satellite imaging, Detective Bousquet testified at the suppression hearing that he told Appellant that he had, or could get, satellite imagery of the crime scene on the night of the stabbing and that he knew where Appellant was that night. However, Detective Bousquet never told Appellant that he had actual images of Appellant putting him in that location. (X/1690). And, Detective Bousquet never actually showed Appellant the aerial photograph which he had in his hands during the interview. (X/1689-1690). Cf. State v. Cayward, 552 So. 2d 971 (Fla. 2d DCA 1989) (police action in fabricating laboratory reports and exhibiting them to defendant during interrogation in attempt to secure confession improper). Thus, no improper deception was used in questioning Appellant.[7]

Moreover, any possible error stemming from the mention of satellite imagery must be deemed harmless. In later interviews, Appellant told the same story that he first gave on September 20, 1996. As such, where the same information was provided through other properly admitted statements of Appellant, any error resulting from police techniques used on September 20th

[7]The same analysis applies with regard to the number of people Detective Bousquet told Appellant had identified him from a photopack. Such deception is acceptable. And, more importantly, a number of people actually did identify Appellant.

could not have affected the outcome of the proceedings. See Alfono v. State, 696 So. 2d 442 (Fla. 4th DCA 1997) (error, if any, in admitting the pre-Miranda statement of appellant was rendered harmless by his subsequent confession).

Finally, Appellant challenges the evidence resulting from the blood sample which he voluntarily consented to provide. Appellant argues that he was unduly coerced by his parole officer, George Kranz, to provide the blood sample. According to Appellant, his communications with Kranz amounted to veiled threats to cooperate or risk going back to prison. However, the testimony belies this assertion.

Kranz testified repeatedly at the suppression hearing that he never threatened Appellant with a parole violation if he failed to cooperate with this murder investigation. (X/1639, 1647-1650, 1725, 1728, 1734, 1737). In fact, he stated, "I simply advised him that the best course of action was for him to be truthful in all matters, and that it would be reported. All he needed to do was be truthful." (X/1639). With respect to the blood sample, Kranz told Appellant that providing a sample would be in his best interest to show the parole commission that he was cooperating with law enforcement. (X/1654).

After obtaining his field notes, Kranz further recalled that he was surprised that Appellant was being investigated for this

murder, that he could have violated Appellant during the time of the investigation for testing positive for marijuana, but he did not, and that Kranz recommended Appellant for early termination of his parole. (X/1726-1727).

Under these circumstances, nothing in Kranz's communications with Appellant rendered his statements or his consent to give a blood sample involuntary. Kranz correctly informed Appellant that he would benefit from cooperating with authorities in this investigation.

> A police questioner's indication to a suspect that he or she would benefit from cooperation does not, itself, constitute coercion. Maqueira v. State, 588 So. 2d 221 (Fla.1991), cert. denied, 504 U.S. 918, 112 S.Ct. 1961, 118 L.Ed.2d 563 (1992). A confession is not rendered inadmissible because the police tell the accused that it would be easier on him if he told the truth. Bush v. State, 461 So. 2d 936, 939 (Fla.1984), cert. denied, 475 U.S. 1031, 106 S.Ct. 1237, 89 L.Ed.2d 345 (1986); State v. Mallory, 670 So.2d 103 (Fla. 1st DCA 1996); Bova v. State, 392 So. 2d 950 (Fla. 4th DCA 1980), modified on other grounds, 410 So. 2d 1343 (Fla. 1982); Hawkins v. Wainwright, 399 So. 2d 449 (Fla. 4th DCA 1981).

See Nelson v. State, 688 So. 2d 971, 973 (Fla. 4th DCA 1997), rev. denied, 697 So. 2d 1217 (Fla. 1997). See also State v. Williams, 358 So. 2d 1094 (Fla. 1st DCA 1978) (officer's statement that he would advise defendant's parole officer of defendant's cooperation if contacted by him did not constitute an implied promise of leniency which would vitiate an otherwise voluntary confession). As such, no error occurred.

According a presumption of correctness to the trial court's denial of Appellant's motion to suppress, and reviewing the mixed questions of law and fact, as required by the appropriate standard of review, the lower court's ruling must be affirmed. See Nelson v. State, 27 Fla. L. Weekly S797, S798 (October 3, 2003).

ISSUE IV

THE TRIAL COURT PROPERLY ADMITTED LAW ENFORCEMENT'S INTERVIEW WITH VICTIM LAURA ROMINES WHICH TOOK PLACE AT ST. JOSEPH'S HOSPITAL. (AS RESTATED BY APPELLEE).

According to Appellant, the trial court abused its discretion by allowing law enforcement to testify that the victim first shook her head "yes" and then nodded "no" when asked if Steve was her assailant while she was in the hospital. This testimony was properly permitted as impeachment to the excited utterances the victim made at the scene identifying Steve as her attacker. (VIII/1471). As such, no abuse of discretion occurred.

Section 90.806(1), Fla. Stat., provides as follows:

> When a hearsay statement has been admitted in evidence, credibility of the declarant may be attacked and, if attacked, may be supported by any evidence that would be admissible for those purposes if the declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time inconsistent with the declarant's hearsay statement is admissible, regardless of whether or not the declarant has been afforded an opportunity to deny or explain it.

While this case offers the rare circumstance where a subsequent inconsistent statement is used to impeach the hearsay testimony of an unavailable declarant, Section 90.806(1) allows such a method of impeachment. See State v. Hill, 504 So. 2d 407, 409-410 (Fla. 2d DCA 1987).

In Hill, 504 So. 2d 407, 408, the State's key witness, Munson, later recanted his prior testimony in a suppression hearing with an affidavit executed after the defendant's trial. Hill's first trial was overturned based on a claim involving his competency to stand trial. On remand, the trial judge relied upon Munson's hearsay statements recanting his testimony prior to the first trial. See Hill, 504 So. 2d 407, 408.

On appeal following Hill's second conviction, the Second District discussed the use of inconsistent statements as impeachment.

> Use of inconsistent statements is a recognized method of impeaching a witness. § 90.608(1)(a), Fla. Stat. (1985). In most instances, the witness has made the inconsistent statement prior to the time he has testified. However, there are some circumstances in which subsequent inconsistent statements have been admitted for the purpose of impeachment. D. Binder, Hearsay Handbook § 2.13 (2d ed. 1983). In People v. Collup, 27 Cal.2d 829, 167 P.2d 714 (1946), the prosecution was permitted to introduce at a criminal trial the testimony of Marjorie Nelson who had testified at the defendant's preliminary hearing and who had now left the jurisdiction. Later in the trial, the defendant, Flaten, and her mother testified that Nelson had told them that she had not testified truthfully at the preliminary hearing. On motion of the prosecution, the court struck the testimony of Flaten and her mother, and the defendants were convicted. In reversing the judgments on appeal, the California Supreme Court held that the trial judge had erred in striking the testimony concerning the statements by Nelson which were inconsistent with the testimony she gave at the preliminary hearing. The court rejected the argument that the impeachment testimony could not be introduced because of the failure to lay a proper foundation by first asking

Nelson whether she had made such inconsistent statements. The court pointed out that due to Nelson's absence the defendants could not possibly meet the requirement of laying the proper foundation and held that in the interest of justice the impeaching evidence should have been admitted for what it was worth. Accord People v. Rosoto, 58 Cal.2d 304, 373 P.2d 867, 23 Cal.Rptr. 779 (1962), cert. denied, 372 U.S. 954, 83 S.Ct. 950, 9 L.Ed.2d 978 (1963).

Attacking the credibility of prior testimony which is being introduced at a later hearing by evidence of subsequent contradictory statements seems to have been contemplated by section 90.806(1), Florida Statutes (1985)....

***

C. Erhardt, Florida Evidence § 806.1 (2d ed. 1984) explains this provision as follows:

> Differences in the methods of impeachment obviously arise when the person whose credibility is in issue has not appeared as a witness in the courtroom. A principal distinction between attacking the credibility of a hearsay declarant and the credibility of an actual witness is that an inconsistent statement of a courtroom witness is a prior statement, while an inconsistent statement of a hearsay declarant often will be a statement which was made after the hearsay statement. The absence of the declarant from the courtroom together with the fact that the inconsistent statement was made subsequent to the hearsay statement, practically precludes the opponent from calling an inconsistent statement to the attention of the hearsay declarant. Therefore, it would be impossible to comply with the Section 90.614 requirement that before extrinsic evidence of a prior consistent statement is admissible, the witness must be given the opportunity to admit, deny or explain making the statement.

> Since Munson could not be located, his testimony given at the first hearing could only be introduced at the second hearing as an exception to the hearsay rule under section 90.804(2)(a), Florida Statutes (1985). Because Munson's testimony at the new hearing constituted a hearsay statement, evidence of his subsequent inconsistent statements was admissible regardless of whether he was afforded an opportunity to deny or explain it. Thus, [the trial judge] was then in a position to evaluate Munson's prior testimony and his subsequent inconsistent statements, giving such weight to his recantation as deemed appropriate in light of the fact that Munson did not personally appear at the second hearing.

See Hill, 504 So. 2d at 409-410.

Similarly, in the instant case, the victim was not available to testify at trial. However, the victim's hearsay statements from the scene were admitted. Thus, her subsequent inconsistent statement denying that Steve was her assailant was proper impeachment. Otherwise, the State would be foreclosed from attacking the credibility of the out of court statement in violation of the dictates of Section 90.806(1).

In the same manner that a dying declaration can be impeached with a subsequent inconsistent statement, the victim's excited utterance should also be subject to impeachment. In State v. Weir, 569 So. 2d 897, 900 (Fla. 4th DCA 1990), overturned on procedural grounds, Weir v. State, 591 So. 2d 593 (Fla. 1991) ("The certified question is answered in the negative, and the decision under review is therefore quashed, but its holding on the merits is approved."), the Fourth District discussed the

reasoning behind allowing a dying declaration to be impeached.

> Indeed, the United States Supreme Court, Florida courts and the great majority of other jurisdictions have allowed impeachment and discrediting of dying declaration evidence by admission of other statements contradictory to it, inconsistent or in conflict with it. See Carver v. United States, 164 U.S. 694, 17 S.Ct. 228, 41 L.Ed. 602 (1897); Morrison v. State, 42 Fla. 149, 28 So. 97 (1900); 16 A.L.R. 411, Impeaching or Discrediting Dying Declarations (1922). Impeachment is allowed based on bad testimonial character, by conduct showing a revengeful or irreverent state of mind, by conviction of a crime, or prior or subsequent inconsistent statements. 5 Wigmore, Evidence, § 1445-46, (Chadbourn rev.1974). The reasoning articulated for allowing impeachment is that inasmuch as dying declarations are allowed based largely on public policy grounds to prevent crime from going unpunished, the accused should not be prevented from impeaching them by any lawful means, where cross-examination of the declarant is obviously impossible. The courts uniformly agree in allowing impeachment of dying declarations where the impeachment is directed to a living witness. 16 A.L.R. at 422-23.
>
> In addition to impeachment, evidence showing the declarant did not accurately observe the facts recounted is allowed, and can be the basis for a court's exclusion of the dying declaration altogether. See e.g. Jones v. State, 52 Ark. 345, 12 S.W. 704 (1889) (where declarant could not see who shot him, declaration that defendant shot him properly excluded). See also McCormick, Evidence, § 285 (3d ed. 1984).
>
> Thus, while it may be true that dying declarations are afforded a measure of credibility due to their very nature, it is also true that they are not taken as absolute, to the exclusion of impeachment or other evidence as to their truthfulness or accuracy.

See Weir, 569 So. 2d 897, 900.

Consequently, while an excited utterance is admissible for valid public policy reasons, such a hearsay statement should not be admitted as absolute or to the exclusion of other evidence regarding the statement's truth or accuracy. Moreover, where testimony from the paramedic who treated the victim at the scene established that the victim was a poor historian and could have been suffering from hallucinations, (XV/488-489), the trial court properly allowed the detectives' interview with the victim into evidence. The victim's possible inability to accurately recount what happened to her justified the introduction of the impeachment testimony.

Finally, even if the trial court erred in admitting the challenged hearsay, any resulting error would be harmless. Although the victim initially stated that she was attacked by someone named Steve, the direct evidence at trial exonerated Steve Kirk and identified Appellant as the assailant. The DNA testing of the semen taken from the victim excluded Steve Kirk and identified Appellant's DNA as a match. (XIX/1100, 1105-1107). Thus, the victim's contradictory statements concerning "Steve" could have not have contributed to the verdict.

ISSUE V

THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION FOR MISTRIAL FOLLOWING DETECTIVE BOUSQUET'S TESTIMONY REGARDING HIS INTERVIEW OF APPELLANT. (AS RESTATED BY APPELLEE).

Appellant argues that the trial court improperly denied his motion for mistrial based on Detective Bousquet's testimony stating, "Subsequently he [Appellant] did make mention that he thought he needed an attorney." (XVIII/959). However, a review of the record reveals that the trial court failed to abuse its discretion in denying Appellant's motion for mistrial. See Rodriguez v. State, 753 So. 2d 29, 37 (Fla.), cert. denied, 531 U.S. 859 (2000).

During the bench conference following the defense objection to Detective Bousquet's testimony, the trial court made the following comments:

> I think in light of the context in which the statement was made, I don't see it as being that serious. I'll deny the motion for mistrial. (XVIII/961).

****

> I'll deny the motion for mistrial. I'll give them a cautionary instruction. Of course, I don't think – I barely heard it. Until you made an objection, I didn't even realize it was said. But I don't think it was a feature in this case by any means whatsoever. It was a casual comment, and I don't think it was important. I suspect most of the jury didn't even pick up on it. (XVIII/962-963).

Ultimately, as noted by Appellant, no cautionary instruction was

given. Under these circumstances, the trial court properly denied Appellant's motion for mistrial.

Initially, Detective Bousquet's testimony was properly admissible because Appellant's mention of maybe needing an attorney was an equivocal request which does not constitute an invocation of his right to remain silent. See Sotolongo v. State, 787 So. 2d 915 (Fla. 3d DCA 2001), rev. denied, 816 So. 2d 129 (Fla. 2002). Moreover, these facts are readily distinguishable from the only case upon which Appellant relies, Jones v. State, 777 So. 2d 1127 (Fla. 4th DCA 2001).

In Jones, 777 So. 2d 1127, 1128, several months before his arrest, Jones contacted a law firm which informed the police that it was representing him, and that Jones was invoking his right to remain silent and to assistance of counsel. The law firm later informed the police that it was no longer representing Jones.

Subsequently, Jones was arrested and was advised of his Miranda rights. Jones waived his Miranda rights and agreed to speak with Detective Ghianda, maintaining his innocence throughout the interrogation.

At the trial, Detective Ghianda testified as follows:

> Q. After you had read that to the Defendant, he waived and he agreed to speak with you?
>
> A. Yes, he did.

...

Q. Did you advise him as to why he was in custody when you first talked to him?

A. That was one of my first questions. I advised did he know why he was in custody.

Q. What was his response?

A. He was being accused, as he put it, of doing some shit that he didn't do.

Q. How did you proceed in talking to him?

A. I advised we had been looking for him for several months, his picture was in the paper, his name was in the news and if he knew he was wanted, why didn't he turn himself in.

Q. Did he have any comment to that when you said that?

A. He said he didn't do anything, he was innocent, he didn't feel it necessary to turn himself in.

Q. What did you say in response?

A. I said if you were so innocent why would you obtain an attorney back in September.

See Jones, at 1129 (emphasis supplied).

The trial court sustained Jones' objection to this comment, gave a curative instruction, but denied the motion for mistrial. On appeal, the Fourth District reversed, finding the detective's response totally irrelevant and "highly prejudicial as it clearly suggests that Jones must be guilty because he hired a lawyer before his arrest." See Id., at 1129.

In contrast, the challenged comment made by Detective

Bousquet in no way suggested that Appellant was guilty. The remark made in Jones, "if you were so innocent," is so blatantly prejudicial that it amounted to the detective telling the jury that he thought the defendant was guilty. Such a comment warranted reversal. However, no such error occurred here.

The Fourth District also found the length of time between the objectionable comment and the curative instruction (at least 27 minutes without counting the bench conference), along with the fact that the instruction given was deficient in explaining what was to be disregarded and how important it was that the precise comment play no part in the jury's deliberation, could not cure the prejudicial harm. See id. Again, no such problems occurred in the instant case where the bench conference was brief and no curative instruction was given. (XVIII/959-963).

Alternatively, if the challenged testimony is considered a comment on Appellant's right to remain silent, the denial of Appellant's motion for mistrial on this basis must be deemed harmless. In State v. DiGuilio, 491 So. 2d 1129, 1137-38 (Fla. 1986), the Florida Supreme Court explained that improper comments on a defendant's invocation of his right to remain silent are subject to a harmless error analysis and need not require reversal if the Court is convinced, beyond a reasonable

doubt, that the error did not contribute to the verdict. See Jones v. State, 748 So. 2d 1012, 1021-1022 (Fla. 1999) (improper comment on murder defendant's invocation of his right to silence, which ended the first interrogation, was harmless error, as remark was neither repeated nor emphasized, and evidence against defendant included his confession to crime and facts that victim was last seen alive with defendant before she disappeared, defendant was arrested two days later driving her vehicle with blood on his clothes and scratches on his face, and defendant used victim's automated teller machine (ATM) card after victim was last seen alive).

Here, as in Jones, 748 So. 2d 1012, 1021-1022, the remark of Detective Bousquet was neither repeated nor emphasized in the State's direct examination. Further, as in Jones, 748 So. 2d at 1021-1022, the evidence against Appellant included the fact that the victim was last seen alive with Appellant before she was found naked and stabbed repeatedly in the neck. The evidence also included DNA testing which identified Appellant as having sex with the victim in the time immediately preceding her discovery on the side of the road, despite Appellant's repeated denials of ever having sex with her.

The harmless nature of Detective Bousquet's comment is further supported by Appellant's cross-examination of him. On

cross, the defense pointed out that Appellant had said he would like to talk to a lawyer. (XVIII/1034). Given this question, Appellant cannot be heard to complain that any alleged error in Detective Bousquet's direct testimony could have contributed to the verdict. Accordingly, the trial court properly denied Appellant's motion for mistrial.

ISSUE VI

THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION TO PROHIBIT THE OUT-OF-COURT AND IN-COURT IDENTIFICATION OF APPELLANT MADE BY ALBERT J. HOWARD AND MELANIE YARBOROUGH. (AS RESTATED BY APPELLEE).

Appellant challenges both the out-of-court and the in-court identifications of himself made by Albert J. (A.J.) Howard and Melanie Yarborough.

> The test for suppression of an out-of-court identification is two-fold: (1) whether the police used an unnecessarily suggestive procedure to obtain the out-of-court identification; and (2) if so, considering all the circumstances, whether the suggestive procedure gave rise to a substantial likelihood of irreparable misidentification. See Thomas v. State, 748 So.2d 970, 981 (Fla.1999); Green v. State, 641 So.2d 391, 394 (Fla.1994); Grant v. State, 390 So.2d 341, 343 (Fla.1980). The factors to be considered in evaluating the likelihood of misidentification include:
>
> > [T]he opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.
>
> Grant, 390 So.2d at 343 (quoting Neil v. Biggers, 409 U.S. 188, 199-200, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972)). If the procedures used by the police in obtaining the out-of-court identification were not unnecessarily suggestive, however, the court need not consider the second part of the test. See Thomas, 748 So.2d at 981; Green, 641 So.2d at 394; Grant, 390 So.2d at 344.

See Rimmer v. State, 825 So. 2d 304, 316 (Fla.), cert. denied,

___ U.S. ___, 123 S. Ct. 567 (2002). Here, the trial court found that no substantial likelihood of irreparable misidentification led to Howard's identification of Appellant; (VIII/1411-1413), and, that no evidence indicated that Yarborough's identification of Appellant was the result of any suggestion. (XI/1887). Based on the facts surrounding the circumstances of these two identifications, Appellant cannot demonstrate any abuse of discretion resulting from the trial court's decision to admit the testimony of Howard and Yarborough. See Thomas v. State, 748 So. 2d 970, 981 (Fla. 1999). Thus, where rulings denying motions to suppress evidence come to an appellate court clothed with a presumption of correctness, and a reviewing court must interpret the evidence and reasonable inferences therefrom in a manner most favorable to the trial court's ruling, Johnson v. State, 717 So. 2d 1057, 1062 (Fla. 1st DCA 1998), citing Black v. State, 630 So. 2d 609 (Fla. 1st DCA 1993), review denied, 639 So. 2d 976 (Fla. 1994), this decision must be affirmed.

A.J. Howard's Identification

The victim was found naked, brutally stabbed in the neck and left for dead in the early morning hours of August 18, 1996. She was last seen unharmed leaving A.J. Howard's home with Appellant sometime in the late evening hours of August 17, 1996.

Based upon Howard's encounter with Appellant in his home, he was able to identify Appellant from a photopack conducted on September 23, 1996, and later identified Appellant in court during the underlying trial.

Appellant now challenges Howard's identifications. As stated above, the first inquiry concerns whether the police used an unnecessarily suggestive procedure to obtain the out-of-court identification. In arguing that an improperly suggestive procedure was employed to obtain Howard's identification of Appellant, the defense relies on the fact that Detective Morrison first showed Howard a single driver's license photo of Appellant on September 20, 1996, for 30 to 45 seconds, and Howard was unable to make an identification. (VIII/1301-1307, 1318-1321). According to Appellant, this showing of a single photo tainted Howard's subsequent identifications.

However, while a show-up of a single suspect may be problematic in some cases, "the procedure is not invalid if it did not give rise to a substantial likelihood of irreparable misidentification under the totality of the circumstances." See Blanco v. State, 452 So. 2d 520, 524 (Fla. 1984)(citing State v. Cromartie, 419 So. 2d 757 (Fla. 1st DCA), petition dismissed, 422 So. 2d 842 (Fla. 1982)), cert. denied, 469 U.S. 1181 (1985). Here, the totality of circumstances support the validity of

Howard's out-of-court and in-court identifications of Appellant. Thus, the question of whether the showing of the driver's license photo was suggestive is irrelevant, especially in view of the fact that Howard did not recall ever being shown a single photo.[8] (VIII/1333-1336), and the photo of Appellant included in the photopack was different than the friver's license photo used previously. (XX/1400).

Nonetheless, Appellant attempts to analyze the factors to be considered in evaluating the likelihood of misidentification in favor of excluding Howard's testimony. First, Appellant claims that Howard had only a limited opportunity to observe Appellant. This assertion is contradicted by the evidence. Howard testified that he "definitely" got a good look at Appellant, that his home was very well lit because he was laying floor tiles, and that Appellant was in his home from fifteen to twenty minutes. (VIII/1330-1331). Howard had no problem

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[8]Appellant speculates that the injuries Howard suffered in a car accident caused this memory lapse. However, nothing in the record supports this assertion. To the contrary, the only evidence on point came from Howard's own testimony that the accident did not affect his memory at all. (VIII/1339). Moreover, any accident subsequent to Howard's out-of-court identification of Appellant would not impact the admissibility of that identification. See e.g., A.E.B. v. State, 818 So. 2d 534 (Fla. 2d DCA 2002) (witness' prior identification of defendant admissible even though witness suffered memory loss from stroke and, at trial, could not remember talking to deputy at all).

observing Appellant because Appellant was right in front of him, five to ten feet away. (VIII/1331-1332). In fact, this incident stood out in Howard's mind because he was expecting a pizza delivery when Appellant showed up with a free pizza for the victim. (VIII/1332). Thus, Howard had an excellent opportunity to view Appellant.

Howard's extended opportunity to view Appellant during the 15 to 20 minutes Appellant was in Howard's home also demonstrates his degree of attention. Howard carried on a conversation with Appellant in a well lit room in his own home within a range of five to ten feet. Howard's level of attention to Appellant was further heightened by the surprise he felt when Appellant offered a pizza for free. Howard testified that this was an unusual offer which stood out in his mind. The fact that other people were in the house and that other activities were occurring cannot diminish Howard's testimony that he stopped laying tile, stood up and spoke directly to Appellant. (VIII/1330). This demonstrates a sufficient degree of attention to negate any likelihood of misidentification.

Finally, the remaining relevant factors fail to establish any likelihood of misidentification on Howard's part. Appellant has failed to demonstrate any significant inaccuracy with regard to Howard's description of Appellant. Howard's certainty in

selecting Appellant from the photopack was sufficient. And, the length of time between the crime and the confrontation was not inordinately long.

Moreover,

> The factors set forth in Biggers are not all-inclusive, and other factors may be considered. Macias, 673 So.2d at 181.

As one Florida court has explained,

> In order to warrant exclusion of evidence of the identification, the identification procedures must have been so suggestive and the witness' unassisted ability to make the identification so weak, that it may reasonably be said that the witness has lost or abandoned his or her mental image of the offender and has adopted the identity suggested.
>
> Baxter v. State, 355 So.2d 1234, 1238 (Fla. 2d DCA 1978) (citing Simmons v. United States, 390 U.S. 377, 383-84, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968)).

See Johnson, 717 So. 2d 1057, 1063. Here, the other relevant factors would include Yarborough's identification of Appellant, as well as the DNA evidence identifying Appellant as the perpetrator. See Johnson, 717 So. 2d at 1064 (DNA testing results substantially reduced risk of misidentification), citing Washington v. State, 653 So. 2d 362 (Fla. 1994), cert. denied, 516 U.S. 946 (1995) (when confronted with an unduly suggestive identification, Court noted that other witnesses had identified the suspect which corroborated the witness' identification); Chaney v. State, 267 So. 2d 65 (Fla. 1972) (fingerprint was

found of the Defendant which corroborated the witness' identification); and Baxter v. State, 355 So. 2d 1234 (Fla. 2d DCA 1978) (finding independent evidence of guilt "both direct and circumstantial negates any very substantial likelihood of misidentification"). As such, the trial court properly found that no substantial likelihood of irreparable misidentification led to Howard's identification of Appellant. (VIII/1411-1413).

Melanie Yarborough's Identification

Appellant also attempts to challenge Yarborough's out-of-court and in-court identifications. However, Appellant makes no argument that the police used any unnecessarily suggestive procedure to obtain her out-of-court identification. As such, this Court need not consider the likelihood of misidentification. See Rimmer, 825 So. 2d 304, 316 (citations omitted). Additionally, Appellant failed to object to Yarborough's in-court identification of Appellant; thus, waiving any challenge thereto. See Buchanan v. State, 575 So. 2d 704, 707 (Fla. 3d DCA 1991) (citations omitted) (failure to renew objection to admission of pretrial and in-court identification of witnesses on the grounds that police used unnecessarily suggestive procedures precluded appellate review of issue).

Under these circumstances, the trial court properly held that no evidence indicated that Yarborough's identification of

Appellant was the result of any suggestion. (XI/1887). Therefore, the ruling denying Appellant's motion to suppress Yarborough's identifications of Appellant must be affirmed. See Thomas, 748 So. 2d 970, 981.

ISSUE VII

NO CRITICAL EVIDENCE WAS EXCLUDED BY THE TRIAL COURT WHICH COULD HAVE RESULTED IN DENYING APPELLANT A FAIR TRIAL. (AS RESTATED BY APPELLEE).

Appellant challenges two rulings of the trial court prohibiting the introduction of evidence. The record shows that no abuse of discretion resulted from the trial court's decisions to exclude the challenged evidence as irrelevant. Thus, where the lower court's ruling is clothed with a presumption of correctness, no reversible error has been demonstrated. See Sexton v. State, 697 So. 2d 833, 837 (Fla. 1997).

Fingernail scrapings

First, Appellant seeks reversal based on the trial court's decision to exclude evidence resulting from fingernail scrapings of the victim taken at her autopsy. The results of DNA testing done on the scrapings could not eliminate the victim, Appellant or Stephen Kirk as possible contributors. Further, DNA taken from the victim's right hand came from an unknown person.[9]

At trial, Appellant sought to introduce the testimony concerning an unknown DNA contributor. However, the trial court

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[9]Notably, Dwayne Mercer, one of the individuals who found the victim stabbed on the side of the road, testified that the victim squeezed his arm and her fingernails went into his flesh when the paramedics were applying the dressing to her throat. (XV/461). The scratch was substantial enough that Mercer had the paramedics check it for him. (XV/463).

found the evidence to be irrelevant, immaterial and inconsequential.[10] Where the DNA expert testified that the DNA evidence could have been under the victim's fingernail for an indeterminate length of time, (XIX/1238-1239), the evidence is irrelevant.

More importantly, any error resulting from the exclusion of this evidence must be deemed harmless. See e.g., LaMarca v. State, 785 So. 2d 1209 (Fla.) (erroneous exclusion of relevant evidence harmless), cert. denied, 534 U.S. 925 (2001). In closing, Appellant argued extensively to the jury the possibility that an unknown person was the true perpetrator. Appellant argued that four individuals named Steve lived in Water's Edge apartments, some of which were never accounted for, (XX/1382-1383), that the victim held up two fingers when being questioned in the hospital, possibly indicating there were two attackers, (XX/1393), and that A.J. Howard was a suspect based upon Cindy Young's testimony (XX/1407). Under these circumstances, any error stemming from the exclusion of the

[10]Although the State objected on chain of custody grounds, the trial court allowed the defense to pursue the appropriate witnesses to overcome this objection. (XIX/1157). The fact that Appellant did not do so, is not an error attributable to the State or the trial court. More importantly, the ultimate ruling excluding this evidence was on relevancy grounds. Thus, the chain of custody objection is irrelevant for purposes of appellate review.

fingernail scraping evidence was harmless.

Videotape of Appellant in 7-Eleven store

Next, Appellant urges error resulted from the trial court's refusal to allow several witnesses to point out Appellant on the surveillance videotape taken at the 7-Eleven store where Appellant picked up the victim before taking her to the Sunny Palms Motel.

Again, any possible error would be harmless. Numerous witnesses identified Appellant on the videotape for the jury. (XVI/747-749; XVIII/1049; XX/1255). Moreover, during closing, defense counsel played the tape and stopped it to point out Appellant and to highlight what he was wearing in the video. (XX/1404, 1424-1426). As such, the exclusion of the testimony could not have affected the outcome where nothing precluded Appellant from arguing that he was not wearing the Pro Pizza uniform on the night in question and no one, including the Appellant, disputed that Appellant was at the 7-Eleven that evening or even that he picked up the victim.

ISSUE VIII

THE TRIAL COURT FAILED TO COMMIT ANY ERRORS WHICH COULD HAVE RENDERED APPELLANT'S SENTENCE OF DEATH UNRELIABLE. (AS RESTATED BY APPELLEE).

Appellant raises a number of challenges to the imposition of the death penalty. None of these arguments merit reversal.

Grand theft conviction and hearsay regarding details of aggravated battery conviction

First, Appellant complains that the trial court improperly relied on a previous conviction for grand theft as an aggravating circumstance. As explained by the State at the penalty phase, the grand theft conviction was admitted to prove that Appellant was on parole at the time of the instant murder.[11] (XXI/1520). Thus, the grand theft conviction was not admitted as proof of a prior violent felony as Appellant maintains.

In any event, any error which could have resulted from the admission of the grand theft conviction would be harmless. Where Appellant had a previous conviction for aggravated battery, any error in relying on the grand theft as a possible prior violent felony for purposes of aggravation would be harmless. See Spann v. State, 28 Fla. L. Weekly S293 (Fla.

[11]This evidence properly established the aggravating circumstance the "[t]he capital felony was committed by a person previously convicted of a felony and under sentence of imprisonment or placed on community control or on felony probation," pursuant to § 921.141(5)(a), Fla. Stat.

April 3, 2003), citing Mahn v. State, 714 So. 2d 391, 399 (Fla. 1998).

Appellant also urges error resulting from his probation officer, Kranz's testimony concerning the details of the aggravated battery. According to Appellant, this testimony was inadmissible hearsay. However, "[t]his Court has held that it is appropriate in the penalty phase of a capital trial to introduce testimony concerning the details of any prior felony conviction involving the use or threat of violence to the person rather than the bare admission of the conviction." See Rhodes v. State, 547 So. 2d 1201 (Fla. 1989) (citations omitted). In fact, Appellant concedes this information could have been admitted through either the victim or the investigating officer's testimony. As such, Kranz's testimony was properly admitted as was the officer's testimony concerning the details of the prior violent felony in Rhodes.

Nonetheless, Appellant argues that he could not rebut Kranz's testimony because Kranz had no first-hand knowledge of the crime. In support of this assertion Appellant relies on Rhodes and Gardner v. State, 480 So. 2d 91 (Fla. 1985). Both cases are easily distinguishable.

In Rhodes, in addition to the officer's testimony concerning the prior violent felony, a tape recording of the victim

describing the prior violent felony was improperly admitted. The finding of error was premised on the fact that Rhodes had no opportunity to cross-examine the victim. See Rhodes, 547 So. 2d 1201, 1204. Similarly, in Gardner, error was found where a police officer testified at the sentencing phase about the accomplice's statements incriminating the defendant. Such testimony was inadmissible where the accomplice did not testify at trial, and defendant could not confront or cross-examine her on the statement. See Gardner, 480 So. 2d 91, 94. No such error occurred in the instant case where Appellant was free to cross-examine Kranz. Moreover, Appellant provides no authority for the proposition that the parole officer could not testify to the details of the convictions upon which the parole was based.

Alternatively, any error resulting from the testimony supporting the aggravators involving prior violent felonies and the fact that Appellant was on parole at the time of the murder must be deemed harmless. The trial court also found two other aggravators: that Appellant was engaged in a sexual battery and heinous, atrocious, and cruel. These two aggravators sufficiently outweighed the minor non-statutory mitigation found by the trial court. As such, even without the two challenged aggravators, Appellant's death sentence was appropriate.

State's presentation of mitigation evidence

As was his right, Appellant declined to present mitigation evidence in his penalty phase. Pursuant to Muhammad v. State, 782 So. 2d 343, 364 (Fla.), cert. denied, 534 U.S. 836 (2001), the trial court ordered the State to put on mitigation evidence. In Muhammad, 782 So. 2d 343, 364, this Court held that, in the rare cases where the defendant waives mitigation, a comprehensive PSI must be prepared, including information such as previous mental health problems (including hospitalizations), school records, and relevant family background. Such a PSI was prepared in the instant case. Additionally, the trial court could require the State to place in the record all evidence in its possession of a mitigating nature such as school records, military records, and medical records. See Muhammad, 782 So. 2d at 364. Thus, the trial court's ruling requiring the State to present mitigation on Appellant's behalf comported with the dictates of Muhammad.

Appellant's reliance on Grim v. State, 27 Fla. L. Weekly S805 (Fla. October 3, 2002), is misplaced. Grim deals only with the question of whether a trial court must appoint special counsel to present mitigating evidence to the penalty phase jury notwithstanding the defendant's objection. While the Grim decision notes that a trial court should not be required to appoint special counsel, it does not go so far as to hold that

it constitutes error to do so, or to allow the State to present mitigation as specifically permitted in Muhammad. As such, where the decision as to how available mitigation evidence should be presented to the jury is purely discretionary on the part of the trial court, no error occurred.

Presentence investigation

Appellant complains that his presentence investigation (PSI) was incomplete because it did not contain his military records. However, the trial court noted that several requests were made from the appropriate federal agencies for these records, but no response was received. (XII/2011). While Muhammad does require a "comprehensive" PSI, the absence of military records in this case fails to create error. This is especially true in view of the comprehensive nature of the information that was contained in the PSI.

Appellant's PSI is literally hundreds of pages long. It includes Department of Corrections files, any other pre- and post-sentence investigations, prison records, including mental health issues, school records and family information.

Additionally, although no military records were included in the PSI (simply due to the federal authorities failure to respond to repeated requests), the trial court did discuss Appellant's military service in the sentencing order.

Specifically, the trial court weighed the non-statutory mitigation resulting from Appellant's military service as follows, "Defendant did serve in the military but was given a general discharge under honorable conditions, resulting from his use of hashish while serving in Germany. This factor is established but given no weight because of the reason for his discharge." (VII/1171). Given the trial court's consideration of Appellant's military record, along with the fact that Appellant has offered no indication that any relevant facts of his military service were neglected, no error occurred.

Aggravator involving fact that homicide was committed during a sexual battery

Appellant complains that the evidence was insufficient to support sexual battery as an aggravating circumstance. However, as discussed above in Issue II.B, the evidence sufficiently supported the count of sexual battery so as to allow the trial court to submit it as an aggravator.

Proportionality

While Appellant raises no challenge to the proportionality of his death sentence, the State provides the following in aid of this Court's independent obligation to review the record for proportionality purposes. Here, the aggravators included that Appellant was under a sentence of imprisonment at the time of the murder, that Appellant had a prior violent felony, that the

murder was committed while Appellant was engaged in sexual battery, and that the murder was heinous, atrocious and cruel. In contrast, no statutory mitigation was found and the non-statutory mitigation was mostly given little or no weight. Under these circumstances, Appellant's sentence is proportional. See Grim, 27 Fla. L. Weekly S805 (death sentence proportional; defendant was under sentence of imprisonment, had prior convictions for violent felonies, and was engaged in the commission of a sexual battery), citing Darling v. State, 808 So. 2d 145 (Fla.) (finding death sentence proportional where murder was committed while defendant was engaged in the commission of the crime of armed sexual battery, defendant had been previously convicted of felony involving the use or threat of violence to the person, and record did not support a finding of immaturity or significant mental deficiency), cert. denied, ___ U.S. ___, 123 S. Ct. 190 (2002); Bryant v. State, 785 So. 2d 422 (Fla.), cert. denied, 534 U.S. 1025 (2001) (finding the sentence of death proportional where three aggravators of prior convictions for violent felonies, murder committed while engaged in the commission of a robbery, and avoidance of a lawful arrest or effecting an escape from custody outweighed the nonstatutory mitigator of remorse); Pope v. State, 679 So. 2d 710 (Fla. 1996) (holding death penalty proportional where two aggravating

factors of murder committed for pecuniary gain and prior violent felony outweighed two statutory mitigating circumstances of commission while under influence of extreme mental or emotional disturbance and impaired capacity to appreciate criminality of conduct and several nonstatutory mitigating circumstances), cert. denied, 519 U.S. 1123 (1997); Melton v. State, 638 So. 2d 927 (Fla.) (holding death penalty proportional where two aggravating factors of murder committed for pecuniary gain and prior violent felony outweighed some nonstatutory mitigation), cert. denied, 513 U.S. 971 (1994); Heath v. State, 648 So. 2d 660 (Fla. 1994) (affirming defendant's death sentence based on presence of two aggravating factors of prior violent felony and murder committed during course of robbery, despite the existence of the statutory mitigator of extreme mental or emotional disturbance), cert. denied, 515 U.S. 1162 (1995).

ISSUE IX

THE FLORIDA SUPREME COURT HAS REPEATEDLY HELD THAT THE DECISION IN RING V. ARIZONA IS INAPPLICABLE TO FLORIDA'S CAPITAL SENTENCING STATUTE; THUS, NO ERROR OCCURRED. (AS RESTATED BY APPELLEE).

Appellant next relies upon Ring v. Arizona, 536 U.S. 584 (2002), to challenge the constitutionality of Florida's capital sentencing scheme. However, this Court has recognized that the statutory maximum for first degree murder in Florida is death, and has repeatedly rejected claims similar to those raised herein. See Porter v. Crosby, 28 Fla. L. Weekly S33, 34 (January 9, 2003) ("we have repeatedly held that maximum penalty under the statute is death and have rejected the other Apprendi arguments [that aggravators read to be charged in the indictment, submitted to jury and individually found by unanimous jury]"); see Cox v. State, 819 So. 2d 705 (Fla. 2002), cert. denied, ___ U.S. ___, 123 S. Ct. 889 (2003); Conahan v. State, 28 Fla. L. Weekly S70a (January 16, 2003); Spencer v. State, 28 Fla. L. Weekly S35 (January 9, 2003); Fotopoulos v. State, 27 Fla. L. Weekly S1 (December 19, 2002); Bruno v. Moore, 27 Fla. L. Weekly S1026 (December 5, 2002); Bottoson v. State, 813 So. 2d 31, 36, cert. denied, 536 U.S. 962 (2002); Hertz v. State, 803 So. 2d 629, 648 (Fla. 2001), cert. denied, 536 U.S. 963 (2002); Looney v. State, 803 So. 2d 656, 675 (Fla. 2001),

cert. denied, 536 U.S. 966 (2002); Brown v. Moore, 800 So. 2d 223, 224-225 (Fla. 2001); Mann v. Moore, 794 So. 2d 595, 599 (Fla. 2001), cert. denied, 536 U.S. 962 (2002); Mills v. Moore, 786 So. 2d 532, 536-38 (Fla.), cert. denied, 532 U.S. 1015 (2001). As such, no error occurred.

Moreover, Appellant failed to raise this issue below. Therefore, any claim of error based on Ring is procedurally barred. In view of this procedural bar, Appellant attempts to frame his constitutional challenge as fundamental error. However, allegations involving Ring and/or Apprendi failed to constitute fundamental error.

In Barnes v. State, 794 So. 2d 590 (Fla. 2001), this Court found an alleged Apprendi error had not been preserved for appellate review. The United States Supreme Court has also held that an Apprendi claim is not plain error. United States v. Cotton, 535 U.S. 625 (2002) (holding an indictment's failure to include the quantity of drugs was an Apprendi error but it did not seriously affect fairness, integrity, or public reputation of judicial proceedings, and thus did not rise to level of plain error). These cases confirm that any possible constitutional violation under Apprendi is not "fundamental error" warranting judicial review of an unpreserved claim.

Even if Apprendi error could be deemed fundamental in some

contexts, the present case does not provide the facts for such a conclusion here. Where Appellant had a prior violent felony conviction as an aggravating factor, the trial court was authorized to impose the death penalty. See Bottoson v. Moore, 833 So. 2d 693, 710, 719 (Fla.) (J. Shaw, concurring; J. Pariente, concurring), cert. denied, ___ U.S. ___, 123 S. Ct. 662 (2002). See also Almendarez-Torres v. United States, 523 U.S. 224 (1998) (prior conviction properly used by judge alone to enhance defendant's statutorily authorized punishment). Since the defect alleged to invalidate the statute - lack of jury findings to enhance the sentence - is not implicated in this case due to the existence of the prior conviction, Appellant has no standing to challenge any potential error in the application of the statute on other facts.

ISSUE X

WHETHER THE TRIAL COURT ERRED IN SENTENCING APPELLANT ON THE NON-CAPITAL COUNT OF SEXUAL BATTERY WITHOUT A SCORESHEET. (AS RESTATED BY APPELLEE).

Appellant argues he is entitled to a sentencing guidelines scoresheet for the non-capital count of sexual battery. It appears from the record on appeal that no such scoresheet was prepared. However, where Appellant failed to raise any objection below regarding the lack of scoresheet, the State argues this claim should be procedurally barred.

Alternatively, to the extent that a procedural bar may not suffice, the State agrees that remand is necessary for resentencing on the non-capital offense pursuant to a properly complete guidelines scoresheet. See Lukehart v. State, 776 So. 2d 906, 927 (Fla. 2000), cert. denied, 533 U.S. 934 (2001).

CONCLUSION

Based on the foregoing facts, arguments and citations of authority, the decision of the lower court 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 Robert F. Moeller, Assistant Public Defender, P.O. Box 9000–Drawer PD, Bartow, Florida 33831-9000, this _____ day of May, 2003.

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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