DP

IN THE SUPREME COURT OF FLORIDA

GARY LEE THORP,

Appellant,

v. CASE NO. 91,663

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE EIGHTEENTH JUDICIAL CIRCUIT
IN AND FOR BREVARD COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

KENNETH S. NUNNELLEY
Assistant Attorney General
Fla. Bar #0998818
444 Seabreeze Blvd. 5th FL
Daytona Beach, FL 32118
(904) 238-4990

COUNSEL FOR APPELLEE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

STATEMENT OF THE CASE

The State does not accept the argumentative "Statement of the Case" set out on pages 2-8 of Thorp's brief. The State relies on the following Statement of the Case.

This appeal is from Thorp's conviction and sentence of death following trial by a duly-constituted jury before Judge Tonya Rainwater.

Thorp was indicted on October 16, 1996, for the offense of first-degree murder in connection with the June, 1993, death of Sharon Chase. (R197; 1268-69). Thorp executed an affidavit of indigency, and the Public Defender for the 18th Judicial Circuit was appointed to represent him. (R202-3). Subsequently, the Public Defender asserted the existence of a conflict of interest, and withdrew from the case. (R208-212). Private "conflict" counsel was appointed to represent Thorp. (R212).

The case proceeded through the pre-trial discovery process[1], and, on August 22, 1997, jury selection began. (TR3). A jury was empaneled on August 25, 1997, and trial began. (TR386). On August 28, 1997, the jury returned its verdict finding Thorp guilty of first-degree murder, as charged in the indictment. (R1144).

On August 29, 1997, the penalty phase proceeding began before the jury. (TR650). On August 29, 1997, the jury returned an

[1]Thorp filed a waiver of speedy trial on February 2, 1997. (R422).

advisory verdict which recommended, by a vote of 10-2, that Thorp be sentenced to death. (R1151). On September 27, 1997, the final sentencing hearing was held. (R1286). The trial court followed the jury's recommendation and sentenced Thorp to death, finding the following aggravating circumstances:

> (1) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person; (2) the capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, a sexual battery; and (3) the capital felony was especially heinous, atrocious, or cruel.

In mitigation, the trial court found a disadvantaged childhood and Thorp's family background. (R1201-09).

Notice of appeal was given on October 15, 1997 (R1227), and, on April 30, 1998, the record, as supplemented, was completed. Thorp filed his *Initial Brief* on August 17, 1998.

STATEMENT OF THE FACTS

The State does not accept the argumentative and incomplete "Statement of the Facts" set out on pages 9-16 of Thorp's brief. The State relies on the following Statement of the Facts.

Walter Johnson is an employee of the City of Melbourne Parks Division. (TR46). At about 9:00 AM on June 24, 1993, he went to Bean Park, which is located in Melbourne, Florida, on Melbourne Avenue, North of the river and on the East side of U.S. Highway 1. (TR47-48). Johnson found what appeared to be the body of a white female in the bushes, and, upon making that discovery, contacted

his supervisor who, in turn, contacted law enforcement. (TR48-49). Johnson remained at the scene until officers of the Melbourne Police Department arrived -- no one disturbed the scene while Johnson was present. (TR50).[2] Bill Williams is an officer with the Melbourne Police Department, and, on June 24, 1993, was assigned to the Patrol Division of that department. (TR56). He was the first law enforcement officer to arrive at the scene of the murder in Bean Park, and it was his responsibility to insure that the crime scene was not disturbed, (TR56-57). The victim was obviously dead when Officer Williams arrived -- he secured the scene, and requested that crime scene technicians, detectives, and his supervisor respond. (TR57). No one disturbed the crime scene while Officer Williams was present. (TR58).

Scott Dwyer is a crime scene technician and latent fingerprint examiner with the Melbourne Police Department. (TR69). He was sent to the scene of the murder in Bean Park, and, when he arrived, the scene was secured by other officers. (TR70). Officer Dwyer was briefed on the facts that were known at the time, and began to process the scene. (TR71). A videotape of the crime scene was introduced, which showed, *inter alia*, that the cypress mulch surface upon which the victim's body was found had been disturbed between the victim's legs, and that some of that material had been

---

[2]Through this witness, it was established that the crime occurred in the City of Melbourne, Brevard County, Florida. (TR53).

displaced onto the victim's abdomen. (TR74-76).[3] The victim's shorts, shirt, and shoes, which were recovered from the crime scene, were admitted into evidence. (TR80; 82; 84). Phyllis Clayton identified the victim as Sharon Chase. (TR96).

Leslie Mae Cooper lived in Melbourne in June of 1993. (TR100-101). Late in the evening of June 23, 1993 (or early in the morning of June 24), she saw the victim in the company of a white male walking north across the U.S. 1 bridge. (TR101-102). Ms. Cooper was unable to describe the person she saw with the victim, and did not recognize him. (TR102; 106).

David Gallamore lived in Melbourne in June of 1993, but has since moved to Alaska. (TR107). In 1993, Mr. Gallamore was the third-shift desk manager at the CITA Rescue Mission. (TR107). Mr. Gallamore knows Thorp from his job at the CITA mission. (TR108). On the night of June 23, 1993, Thorp missed the 11:00 PM bedcheck. (TR109). Mr. Gallamore's shift started at midnight, and, at about 12:30 AM, he saw another resident of the mission, William Deering. (TR109). Deering had also missed the 11:00 PM bedcheck and, consequently, was not allowed to spend the night at the mission. (TR110). Deering asked about Thorp, and wanted to know if Thorp was present at the mission. (TR110). After Deering left, Gallamore conducted a "grounds check" around the mission property which took

---

[3]The victim was found lying on her back with her legs spread, nude, but for her shirt which was pulled down about her waist. (TR74).

about 20 minutes. (TR110). During the course of that check, Mr. Gallamore saw Thorp walking down the sidewalk in the area of the mission "thrift store". (TR111). Mr. Gallamore asked Thorp where he had been at bedcheck, and Thorp replied that he had gotten into a fight at the Burger King. (TR111). Thorp had some blood on his shirt and bruises on his knuckles. (TR111)[4]. Mr. Gallamore also observed some scratch marks on Thorp's person. (TR111). Thorp asked if Deering had been to the mission. (TR112).[5] Under the mission's rules, a resident could not stay the night at the mission if he had been drinking or had missed the 11:00 PM bedcheck. (TR115). Thorp had been drinking when Mr. Gallamore encountered him, but Thorp was able to comprehend what Gallamore was telling him. (TR116).

Bob Sarver was, at the time of the investigation into the murder of Sharon Chase, an investigator with the Melbourne Police Department. (TR122-23).[6] Investigator Sarver was in charge of this investigation. (TR123). The initial focus of the investigation was to identify the victim, which was not accomplished until the late evening of June 25, 1993, or the early morning of June 26, 1993. (TR124). The victim was identified by Trina Pauly, who was an

---

[4]Mr. Gallamore emphasized that he saw *small* drops of blood on Thorp. (TR112).

[5]The thrift store was across the street from the mission. (TR112-13). That is in close proximity to the crime scene. (TR87-89).

[6]Investigator Sarver is now, and was at the time of trial, employed by the Brevard County Sheriff's Office. (TR123).

associate of the victim's in the days immediately before her murder. (TR124). Ms. Pauly is dead. (TR125). Ultimately, the crime laboratory developed DNA evidence from the body fluids recovered from the victim's body. (TR127). Thorp came to Investigator Sarver's attention as a potential suspect, and, ultimately, Sarver determined that Thorp was living at the CITA mission at the time of the murder. (TR127). Investigator Sarver interviewed Mr. Gallamore, and, as a result of that interview, sought and obtained a court order to draw blood from Thorp and Deering. (TR128).[7] Investigator Sarver eventually learned of the existence of Timothy Bullock, who knew Thorp. (TR132). Bullock was interviewed on October 27, 1995, (TR134), and, during the course of that interview, gave a sworn statement that Thorp had told him that he "did a hooker" and got messy and bloody in the process. (TR136-7).[8]

Paul Symeon is a bartender/waiter in Melbourne, and has been so employed for about seven years. (TR161-62). Mr. Symeon was so employed in June of 1993. (TR162). He remembers the events of June

---

[7]The chain of custody of the blood evidence was established insofar as this witness was involved. (TR128-9). Thorp was identified as the person from whom the blood was drawn. (TR131). The blood samples were drawn on April 20, 1994. (TR134). Karen Vanderween drew the blood sample from Thorp, and identified him as the person from whom she obtained that sample. (TR157-59).

[8]Investigator Sarver testified at some length about the descriptions in the search warrants of the person seen with the victim shortly before her death. (TR137-151). The descriptions contained in the search warrants are general, and match the description given by witness Symeon, which was, itself, general in nature. (TR151).

23, 1993, and testified that, late that evening (after getting off from work), he went fishing in the area of Bean Park. (TR162). Mr. Symeon saw two people walking over the U.S. 1 overpass heading north, and, when those people came around behind him, he began to pay more attention to them because the area was fairly dark and he did not want to be surprised. (TR164). Those people approached within 20-30 yards, stayed for two or three minutes, and left. (TR165). Mr. Symeon then saw another couple, and, some 10 minutes or more later, heard the bushes rustling and then heard a moan. (TR169). Mr. Symeon then became concerned for his safety, and left. (TR172). This incident took place around midnight on June 23, 1993. (TR174). Mr. Symeon contacted law enforcement the next day after learning of the murder in Bean Park. (TR175). Mr. Symeon later saw the victim's photograph in the paper and recognized her as the woman he had seen in the park. (TR176). Mr. Symeon was not able to identify Thorp. (TR188).

Dennis Wickham was the Medical Examiner for Brevard County, Florida, in June of 1993. (TR197). Dr. Wickham summarized his background, education, and experience, and was accepted as an expert in the field of forensic pathology without objection. (TR198-200). Dr. Wickham went to the crime scene in Bean Park, arriving at about 11:00 AM. (TR200). The victim had sustained multiple ant bites in the area of her face. (TR204). Dr. Wickham conducted a post-mortem examination of the victim, and cataloged

her injuries as follows: a bruise and abrasion to the left side of the nose; an abrasion on the upper lip; an injury by her right eye that was consistent with the victim's glasses striking her face; a bruise on the lower jaw; a bruise on the outer part of the right arm; a bruise on the back over the shoulder blades; an abrasion on the back of the right arm; bruising inside the left knee; an abrasion below the kneecap; a linear abrasion on the lower left leg; bruising to the back of the right knee; bruising to the neck; fractures to the trachea cartilage; fracture of cricoid cartilage; fracture of the thyroid cartilage; and a fracture to the hyoid bone. (TR223-234). In addition, plant material was found in the victim's vagina and in her trachea. (TR215; 235; 237).[9] Dr. Wickham testified that the victim died from asphyxiated strangulation, and that the manner of death was homicide. (TR238).[10] The structures in the victim's neck were compressed, rather than the typical occlusion of blood vessels most frequently seen in strangulation cases. (TR238-39). It takes about 32 pounds of pressure to occlude the trachea. (TR239). Obviously, it takes more pressure to break bones than to occlude blood vessels. (TR241). Testing of the victim's blood revealed the presence of cocaine -- however, the victim died from strangulation, even though, under **different**

---

[9]The presence of plant material in the trachea is very unusual. (TR235).

[10]It was not possible to determine whether the killer used his hands or a ligature to strangle the victim. (TR242).

circumstances (i.e., no fractures to the bony neck structures, etc.), the cause of death **might have been** the presence of cocaine or a narrowing of the coronary artery. (TR260).

Nancy Rathman is a forensic serologist with the Orlando Florida Department of Law Enforcement laboratory. (TR270-73). Ms. Rathman is familiar with, and uses, the RFLP method of DNA typing. (TR274). The Orlando FDLE laboratory is certified and accredited to conduct DNA typing. (TR275-77).[11] Ms. Rathman was accepted as an expert in the RFLP method of DNA typing over Thorp's objection. (TR293-303).[12] Ms. Rathman testified about the evidence that she received[13], and the testing that she conducted. (TR206-327).[14] As a part of the testing process, a known standard is run -- the purpose of the standard is to allow comparison of tests conducted by different laboratories. (TR345-6). Due to contamination, Ms. Rathman was unable to conduct any testing on the vaginal swabs obtained from the victim. (TR349). As a result of the testing she conducted, it was possible to exclude Deering and Carol as the

---

[11]The Orlando laboratory was accredited in 1995, when the certifying organization conducted its 5-year inspection. (R277). Inspections are conducted on a 5-year cycle. *Id.*

[12]Thorp made a *Frye* objection to the RFLP testimony -- he made no such objection to the PCR testimony. (TR293).

[13]Ms. Rathman received blood samples from Thorp, Deering, and an individual named David Carol, in addition to the samples taken from the victim. (TR307-337).

[14]Some samples were sent to the FDLE lab in Indian River County for further testing using the PCR method. (TR323; 350).

donors of the semen found in the victim. (TR353-4). Ms. Rathman testified that, in her professional opinion, it was not possible to exclude Thorp as the donor of the semen because the samples were indistinguishable. (TR355). The frequency of the DNA profile exhibited by Thorp is 1 in 12 million whites, 1 in 32 million blacks, and 1 in 19 million Hispanics. (TR357).[15]

Daniel Nippes is the chief criminalist at the FDLE laboratory in Ft. Pierce, where he has been the chief criminalist for the last 23 years. (TR386-87). Mr. Nippes conducts DNA analysis in that laboratory, and has been trained in the PCR method of DNA typing. (TR387-88). Mr. Nippes was involved in compilation of the FDLE database, and has qualified as an expert in the PCR method of DNA typing approximately 35 times. (TR390). After *voir dire*, Mr. Nippes was accepted as an expert in the PCR method of DNA typing. (TR394-402). Mr. Nippes received various items of evidence from the Orlando FDLE laboratory (including the vaginal swabs taken from the victim), and conducted PCR typing on that evidence. (TR407-418). Based upon the testing he conducted, Mr. Nippes was able to exclude Carol as the donor of the sperm cells found on the vaginal swabs -- he was also able to determine that the sperm cells exhibited the same genotypes as did Thorp's blood. (TR417-418). There was no indication of two sperm cell donors, and, based upon

---

[15]Ms. Rathman testified that her testing revealed no semen on the victim's shorts. (TR359).

the applicable database, it was possible to determine that the sperm cells were consistent with Thorp being the donor. (TR418; 421).

Cecilia Krouse is the supervisor of the serology and DNA sections of the Palm Beach County Crime Laboratory. (TR424-45). Dr. Krouse was offered as an expert in DNA typing, and was accepted as an expert without objection. (TR426-27). Dr. Krouse heard the testimony given by Dan Nippes, and testified that his methodology is accepted by the scientific community, and that his results are scientifically reliable. (TR427-28).

Martin Tracey is a professor of biology at Florida International University in Miami. (TR429-30). Dr. Tracey has done most of his work in the area of population genetics, and has qualified as an expert in that field 100-125 times. (TR431-32). Dr. Tracey was accepted as an expert in population genetics over Thorp's objection. (TR433). Dr. Tracey has reviewed the reports generated by Ms. Rathman and Mr. Nippes concerning RFLP and PCR typing, respectively. (TR434-35). He has also reviewed the calculations done in reaching the statistical results, and is of the opinion that those calculations were done correctly. (TR436-37). When the PCR match is combined with the RFLP match, the statistical frequency of such a match is 1 in 3.6 billion. (TR441).

Timothy Bullock was housed with Thorp in the Brevard County Jail in the Spring of 1994. (TR498-99). Bullock had conversations

with Thorp concerning why he was in jail, and Bullock was aware that a body had been discovered under the Crane Creek Bridge in June of 1993. (TR 500).[16] Bullock and Thorp talked about that murder -- Thorp knew about it and expected to be charged with that offense. (TR500). Thorp said that he knew the victim, and that he took her down by the bridge and "did" her. (TR500). Bullock took that statement to mean that Thorp had killed the victim. (TR501). Thorp said that there was another person involved, and that he got the victim's blood on him in the process of "doing" her. (TR502).[17] Thorp went on to say that he was staying at the CITA mission (near the bridge) and that the mission would not let him in with blood on his clothes -- to explain the presence of blood, Thorp told the CITA people that he got blood on his clothes in a fight at the Burger King. (TR502).[18]

Dr. Cary Clark is a professor of biology at Florida Technological University. (TR508). Dr. Clark has a Ph.D. in "biological sciences", and is an expert in the identification of plants. (TR509). Dr. Clark was offered and accepted as an expert in

---

[16]This is the location where the victim's body was found. (TR70; 101; 164).

[17]Thorp stated several times that he got blood on himself. (TR502).

[18]Bullock has a felony conviction, and had various DUI-related charges pending at the time of trial. (TR503). He has had no discussion with the State Attorney's Office regarding those charges. *Id.* His conversations with Thorp took place over a period of about 5 months. (TR504).

plant identification. (TR510). He examined the various plant samples taken from the scene and recovered from the victim's body, and testified that the plant material found at the crime scene is the same as the plant material found in the victim's mouth and vagina. (TR513-15).

The State rested its case, and the defense rested without presenting any guilt phase witnesses. (TR516; 523). The jury found Thorp guilty as charged in the indictment. (TR622).

On August 29, 1997, the penalty phase of Thorp's trial began.[19] Russell Bausch is a Brevard County Assistant State Attorney who was involved in the March 1995 prosecution of Thorp for the Second Degree Murder of Randy Appleman. (TR654-56). Thorp entered a plea of *nolo contendre* to that charge. (TR658).

George Santiago is a detective with the Palm Bay Police Department, and was the lead investigator in the Appleman murder. (TR659-60). Appleman was killed by a single stab wound to the heart, but that injury was not immediately fatal -- Appleman was able to pursue his killer, who fled into the bathroom and held the door shut until Appleman collapsed and died outside. (TR664). Thorp's bloody handprint was found on the door where he had held it closed. (TR664). Santiago was in Court when Thorp admitted that he was guilty. (TR669). The State rested its penalty phase case with

---

[19]Thorp conceded that none of the statutory mitigating circumstances applied to him. (TR637-38).

the presentation of these witnesses.

Ronald Krout knows Thorp from working at the CITA mission in 1993. (TR671-72). Krout testified that Thorp was a hard worker who worked around the mission and was the director's "right hand man". (TR675-76). Thorp got along well with others. (TR676).

David Thorp, the defendant's father, is retired from Ford Motor Company. (TR677-79). He testified that Thorp suffered from cerebral palsy as a child, and that he ultimately developed a drinking problem. (TR682; 693). Glenda Thorp, the defendant's mother, testified to essentially the same facts. (TR700-710).

The defendant, Gary Thorp, testified about his early life, his cerebral palsy, his difficulties with drugs and alcohol, and his employment history. (TR712-730). Thorp testified that he did not kill anyone, that he has remorse for the way he has lived his life, and that he would like a chance. (TR730-31). During cross-examination, Thorp expressly denied raping or killing Sharon Chase, but did admit to having had sex with her. (TR731). Thorp also denied killing Appleman, but did admit to selling property taken from Appleman, as well as to having forged some of Appleman's checks. (TR732).

The jury recommended that Thorp be sentenced to death by a vote of 10-2. (TR788). Following a sentencing hearing, the trial court imposed a death sentence, finding the following aggravators:

> (1) The defendant was previously convicted of another capital felony or of a felony involving the use or threat

> of violence to the person. (F.S. 921.141(5)(b)); (2) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, a sexual battery. (F.S. 921.141(5)(d)); and (3) the capital felony was especially heinous, atrocious, or cruel. (F.S. 921.141(5)(h)). (R1202-1203).

As mitigation, the Court found the defendant's history as a disadvantaged child and the defendant's family background. (R1205-8).

SUMMARY OF THE ARGUMENT

The trial court's denial of Thorp's motion to suppress the blood and DNA evidence was correct because, based upon the totality of the circumstances, there was a substantial basis for concluding that probable cause to search existed. The standard of review is whether competent substantial evidence exists to support the probable cause finding, and, when that standard is applied to the facts of this case, it is clear that that standard is satisfied. The presumptively correct ruling of the lower court should be affirmed in all respects.

Thorp's challenge to the sufficiency of the evidence is based upon the erroneous premise that this case is entirely circumstantial, and is therefore controlled by the "circumstantial evidence standard." That assertion is incorrect because there is direct evidence of guilt in the form of Thorp's confession, as well as from the DNA evidence. Moreover, Thorp has overlooked the fact

that this case was submitted to the jury on both premeditation and felony-murder theories -- sufficient evidence exists to support a conviction under either theory, while Thorp has only challenged the sufficiency of the evidence of **felony-murder**, thus implicitly conceding the premeditation component.

Thorp's claim that a lay witness was improperly allowed to testify about what Thorp meant when he stated that "We did a hooker" is not a basis for revesal because the objection interposed at trial was insufficient to preserve the issue for appellate review, and because, under the facts of the case, that testimony was not improper. Alternatively and secondarily, any error was harmless.

Thorp's claim that he was prevented from impeaching a witness fails because there is no factual basis to support that claim. Thorp was allowed to proffer the purported "impeachment", and a review of that testimony demonstrates that the most that that testimony would have done would have been to confuse the jury with inaccurate and irrelevant information. Thorp is not entitled, under any theory, to present such information, and there is no basis for his claim.

The claim that the State did not meet the *Frye v. United States* standard for admissibility of testimony concerning the PCR method of DNA typing fails because no *Frye* objection was made at trial. Further, this claim fails because the State satisfied *Frye*.

The juror excusal claim fails because the juror's views of the death penalty were such that they would prevent or substantially impair that juror from performing his duties in accordance with his instructions and oath as a juror. *Voir dire* demonstrated that the standard for excusal was met, and there is no error, particularly in light of the juror's express statement that his opinions about the death penalty would substantially impair his ability to follow the law and his oath as a juror. There is no error.

Thorp's argument that his sentence of death was improperly imposed has no legal basis. The sentencing court found three aggravators, each of which exists beyond a reasonable doubt. Likewise, the court properly considered and weighed the mitigation offered by Thorp, and correctly concluded that the aggravators outweighed the minimal mitigation. Thorp's sentence of death should be affirmed in all respects.

ARGUMENT

I. THE TRIAL COURT PROPERLY DENIED THORP'S MOTION TO SUPPRESS BLOOD AND DNA EVIDENCE

On pages 19-24 of his brief, Thorp argues that the trial court should have suppressed the results of DNA testing conducted on his blood which established that Thorp was the donor of semen found in the victim's body. According to Thorp, "material falsehoods and omissions" were contained in the affidavit supporting the search warrant for his blood, and, therefore, all of the evidence resulting therefrom should be suppressed. For the reasons set out

below, this claim fails.

Under settled Florida law, the trial court's ruling on a motion to suppress is entitled to a presumption of correctness, the facts must be reviewed in the light most favorable to sustaining the trial court's ruling, and the lower court's ruling is reviewed under the abuse of discretion standard. *See, e.g., State v. Van Pieterson*, 550 So.2d 1162, 1165 (Fla. 1st DCA 1989). The probable cause determination is made based upon the "totality of the circumstances" standard set out in *Illinois v. Gates*:

> [A]fter-the-fact scrutiny by courts of the sufficiency of an affidavit should not take the form of de novo review. A magistrate's "determination of probable cause should be paid great deference by reviewing courts." ... "A grudging or negative attitude by reviewing courts towards warrants" ... is inconsistent with the Fourth Amendment's strong preference for searches conducted pursuant to a warrant ...
>
> * * * * * *
>
> The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of the reviewing court is simply to insure that the magistrate had a "substantial basis for ... conclud[ing] that probable cause existed."

State v. Irvine, 558 So.2d 112, 113 (Fla. 4th DCA 1990), *quoting, Illinois v. Gates*, 462 U.S. 213, 236, 238-9 (1983). (emphasis in original).

When a trial court is reviewing the magistrate's determination

that probable cause exists, such review is **not** *de novo* -- instead, the standard of review is whether, based upon the totality of the circumstances, substantial evidence existed to support the finding of probable cause. *Van Pieterson, supra.* The omission of a "material fact" from the affidavit is not a material omission unless there is a substantial possibility that the omission would have changed the magistrate's probable cause determination. *Id.; see also, Buggs v. State,* 693 So.2d 57 (Fla. 5th DCA 1997). When the legal standard set out above is applied to this case, there is no basis for reversal.

The affidavit in support of the search warrant for Thorp's blood is seven typed, single-spaced pages in length, and contains substantial detail regarding the facts establishing probable cause to search. (R852-858). Those facts, taken verbatim from the affidavit, are as follows:

> An autopsy was performed on the victim by the Brevard County Medical Examiner, Dr. Dennis Wickham, on the afternoon of June 24, 1993. Dr. Wickham concluded that the death of the victim was attributed to asphyxia, and the asphyxia was due to strangulation. Dr. Wickham indicated in this autopsy report that the victim had multiple contusions and abrasions about her body and a contusion of the neck muscles and soft tissue of the neck.
>
> On June 25, 1993, the victim was identified as being a white female, named Sharon Chase, Date of Birth: 8/29/56. In learning the identity of the victim, it was found that Chase had been engaged in acts of prostitution during the days preceding her death, in Melbourne. It was also learned that Chase was apparently engaging in these acts of prostitution to provide herself with cocaine. (This information was established through a series of sworn interviews of persons who had contact

with Chase prior to her death, and the criminal history of Chase that was obtained after her identification).

As the investigation progressed, Paul Symeon (who worked in the immediate area of where the murder occurred) contacted Melbourne Police and advised that he had been in the area of where the murder occurred during the night before the discovery of Chase's body. This same citizen provided a sworn statement indicating that he was fishing directly across from the area where Chase's body was found at approximately 12:30 midnight on June 24, 1993. He went on to advise that he observed a female matching the description of the victim walking north on the US 1 overpass with a white male. The two of them were seen walking down to the parking lot of the Melbourne Harbor Motel and then eventually to Bean Park. After the two persons entered the park, there were two other males who walked into the park from the area of Hatt's Dive Shop. Shortly after the four persons were in the middle area of the park, Symeon heard a woman moaning and a rumbling sound in the bushes. The area that Symeon reported hearing the sounds coming from was the exact location where the victim was found. Symeon was not able to describe the two males that were seen walking into the park from the area of Hatt's dive shop in much detail. No one was seen leaving the area of the park by Symeon but the three persons could have easily left the park by going north through the motel parking lot to New Haven Avenue. Symeon described the male that was seen walking with the woman matching Chase's description, in the following manner: a white male, approximately 6'-00" tall, dark complexion, medium to long dark colored hair, and seemingly thin. In his description of the woman that was seen walking with this male, Symeon described the woman in a very similar manner to Chase. Symeon described the victim's clothing that was found at the scene on the morning of June 24 and also gave a physical description that closely matched the physical appearance of Chase. According to Symeon, the male and Chase were talking as they walked down into the park from US 1. No arguing was heard between the two and no signs of a disturbance until the moaning (muffled screams) were heard after they entered the Park.

Over the next several months the investigation centered around persons that frequented the area of Bean Park. During this time period also, it was determined through laboratory testing at the Florida Department of Law Enforcement (FDLE) Lab in Orlando that semen was identified in the vaginal swabbings obtained during a

sexual assault examination of Chase. (This semen being obtained from a sexual assault examination of Chase at the time of her autopsy). According to FDLE Lab DNA expert Nancy Rathmann, this semen evidence is of sufficient quality to obtain a DNA match, if provided with blood evidence from a potential suspect.

As the months progressed from the time of the discovery of the victim's body, numerous persons were interviewed in connection with the death of the victim. It had been established that Chase came to Melbourne about two days prior to her death. Chase had been seen primarily in the area of US 1 and New Haven Avenue during the entire time that she was in Melbourne. At approximately 11:45 p.m. on 6/23/93, Chase was identified as being in the parking lot of the Producer's Lounge, 2225 S. Harbor City Blvd., Melbourne. (This being directly across the street from the CITA Mission). At about 12:30 a.m., on 6/24/93, Chase was seen by Paul Symeon walking with a male on US 1 into the area of Bean Park. Symeon then heard an obvious struggle and moaning of what appeared to be a woman's voice. At approximately 9:00 a.m., on 6/24/93, the body of Chase was found nude and displayed in Bean Park. All of the activities that Chase was involved in were within approximately .3 mile of the intersection of New Haven Avenue and US 1. (Bean Park is also located at the center of this area). With this information in mind, it is believed that the killer of Sharon Chase lived in or regularly frequented the area that Chase's activities took place in. Numerous suspects were eliminated as the investigation progressed. An emphasis was placed on persons that frequented prostitutes and/or had connection with persons involved in the use of cocaine.

On the evening of March 30, 1994, Detective George Santiago of the Palm Bay Police Department called Affiant. In this phone call, Santiago advised that his agency had a recent murder, wherein Gary Lee Thorpe, was the primary suspect in the case. In the case Santiago was investigating, a white male had been killed and there were several items of property belonging to the victim that had been taken. Santiago advised Affiant that the victim in his case had also been found nude and apparently died from a single stab wound to the chest. Through interviews it was learned that Gary Lee Thorpe was commonly associated with the victim of the Palm Bay murder and listed an address of 2304 S. Harbor City Blvd., Melbourne, FL. (This being the address of the CITA Mission). Thorpe was later found in possession of the

Palm Bay murder victim's vehicle and other property. Santiago also advised that during his investigation of the murder in Palm Bay, he learned from several sources that Gary Lee Thorpe was frequently in the area of Melbourne Avenue and Bean Park during past 10-12 months. Santiago had additionally been advised that Thorpe had been heard by numerous persons to say that he (Thorpe) despised prostitutes.

In reviewing the information concerning the murder of Sharon Chase, with the information that was supplied to me by Detective Santiago, I learned that Gary Lee Thorpe had lived at the CITA Mission, 2304 S. Harbor City Blvd., Melbourne, FL, at the time of the murder of Chase. On the night of the murder of Sharon Chase, it had been previously verified that Gary Lee Thorpe and William Walter Deering were the only two residents of the CITA Mission that were out past the 11:00 p.m. bed check time and were therefore not allowed to stay at the CITA Mission on that night.

During the week of April 1, 1994, Melbourne Police Department Sgt. Steve Lyon was called by Ron Krout, an employee of the CITA Mission. Ron Krout advised Sgt. Lyon that he and his father, Dwayne Krout, had seen in the news that Gary Lee Thorpe was a suspect in the murder of the male in Palm Bay. As Dwayne and Ron Krout observed this newscast, they began to discuss Thorpe, as they were both familiar with Thorpe due to both of them having worked at the CITA Mission. During their conversation they remembered that Gary Lee Thorpe and William Walter Deering were residents at the CITA Mission at the time that Sharon Chase was murdered in Bean Park. On the night of the murder of Chase, the Krouts remembered that both Thorpe and Deering were absent from the CITA Mission, and one of them had been seen bloodied at around the time that they had heard the murder of Chase occurred. The Krouts also discussed that David Gallamore, the night desk man of the CITA Mission at the time that Chase was murdered, advised them that Thorpe and Deering advised him (Gallamore) that they had been in a fight at the park at around the time that Chase was said to have been killed. After Sgt. Lyon spoke with Ron Krout, Sgt. Lyon called Affiant and advised of the information that he had learned.

After receiving the phone call from Sgt. Lyon, Affiant checked records concerning the investigation of Chase's death. Affiant verified that Gary Lee Thorpe and William Walter Deering, were the only two occupants of the CITA Mission on 6/23/93, that did not spend the night

there on that date. In reviewing the statement of Paul Symeon, Affiant learned that Symeon advised that the person described by him (as walking with Chase into Bean Park) was wearing a ball cap. After reviewing this statement, I compared the description that was provided of the male to the actual description of Gary Lee Thorpe. Thorpe matched the description that was provided by Symeon, and it was later learned that Thorpe consistently wore ball caps. At the time that Thorpe was arrested on the charges emanating from Palm Bay (March of 1994), Thorpe was bald. Through a series of interviews, it was determined that, during the time of the murder of Sharon Chase, Thorpe had hair a length that was consistent with that described by Symeon.

Gary Thorpe's criminal history was checked and it was found that Thorpe had prior arrests and convictions for felony offenses in the past. During 1987, Thorpe was convicted of burglary and sentenced to three years in the State Prison for that offense. According to the records obtained through the National Crime Information Center (NCIC), Thorpe also had a prior arrest for burglary in 1983, with the disposition of that offense not listed. In addition to checking the criminal history of Thorpe, Affiant spoke with Detective Ron King of the Melbourne Police Department. King had been utilizing Thorpe as a confidential informant for the purposes of purchasing cocaine. King advised that Thorpe was familiar with places where cocaine could be purchased and appeared to have a quite extensive knowledge of cocaine and how and where to purchase it.

The criminal history of William Walter Deering was also checked through the NCIC system, and Deering was found to have several felony arrests as well. Deering's arrest record indicated that he had numerous arrests and convictions for the possession of cocaine and marijuana beginning in 1987. Deering was also indicated to presently be on probation within the State of Florida. Affiant called the Department of Corrections and learned that Deering's probation officer was Chris Olive. In speaking with Chris Olive, it was learned that Deering had a violent past history, wherein Deering was arrested and convicted of several offenses of a violent nature concerning his ex-wife. (This information was also confirmed through phone contacts with the Franklin, Massachusetts, Police Department).

On April 6, 1994, Affiant conducted a sworn interview with Dwayne Krout at the Melbourne Police Department. Krout advised that he was an ex-employee of

the CITA Mission and had worked there until about the beginning of March 1994. Krout said that he was thoroughly familiar with Thorpe and Deering due to his employment at the CITA mission, having personal contact with them for over one year. Krout said that he was employed at the CITA Mission in the capacity of a counselor and he frequently spoke with Thorpe. Thorpe was described as having a severe cocaine problem by Dwayne Krout. Thorpe and Deering were also frequently getting into trouble with each other while they both stayed at the CITA Mission. Dwayne Krout advised that, on the evening of hearing news accounts of the death of Sharon Chase, he had a conversation with Thorpe and Deering at the CITA Mission. The conversation was precipitated by information that he had received from David Gallamore (another employee of CITA mission) that Thorpe and Deering had apparently gotten into a fight on the prior night. When Dwayne Krout spoke with Deering and Thorpe about what had happened on the prior night, they (Thorpe and Deering) told Krout that they had become involved in a fight at the park (Bean Park). Thorpe and Deering explained that they had gotten into a fight with a person that they described to Krout as being a "transient". Dwayne Thorpe [Krout] advised that while he was talking with Thorpe and Deering, that he (Krout) noticed that Deering had some cuts or abrasions on his (Deering's) forearm. Dwayne Krout also advised that he had conversations with Gallamore and Gallamore advised that Thorpe and Deering were apparently in the fight at sometime around 12:30 a.m. on the previous night (6/24/93).

On April 13, 1994, Affiant contacted David Gallamore at the CITA Mission. Gallamore came to the Melbourne Police Department and a sworn taped statement was obtained from him. Gallamore advised that during the time period of June 1993 that he was employed at the CITA mission as the night desk man. On the night prior to hearing news accounts of the murder of a prostitute in Bean Park, Gallamore said that some unusual happenings occurred with Gary Lee Thorpe and William Walter Deering. Gallamore was very familiar with both of the persons and said that at around 12:30 a.m. (the morning of 6/24/94) [1993], William Deering came to the CITA Mission. This was after the 11:00 bed check time that was the latest that a person could arrive at the CITA Mission and be allowed to sleep there. When Deering arrived at the CITA Mission, Deering appeared to have been drinking alcohol. Deering was very apprehensive according to Gallamore and

was insistent on locating Thorpe. When Gallamore told Deering that Thorpe was not present, Deering asked if he could go up stairs at the Mission to obtain a shirt. Deering did so and while doing so, advised that he and Thorpe had become involved in a fight with a third person in the area of the Burger King on US 1. After retrieving the shirt, Deering left the CITA Mission and was again expressing that it was important that he (Deering) get in touch with Thorpe. Gallamore advised that about 45 minutes after the contact with Deering, that Gary Thorpe arrived at the CITA Mission (approximately 1:15 a.m., on 6/24/93). Thorpe was met at the front door of the CITA Mission by Gallamore and Thorpe too was late for check and therefore not allowed to spend the night at the Mission. When Gallamore spoke with Thorpe, Thorpe appeared to also be intoxicated and very apprehensive. Gallamore said that Thorpe was continually looking around as if he were looking for someone and was saying that it was important that he find Deering. Thorpe was told that Deering had left within the hour. Thorpe was also described by Gallamore as having blood on his shirt and pants. Thorpe also was seen to have had bleeding knuckles on one of his hands. Shortly after arriving, Thorpe left the CITA Mission and left to an unknown location. Gallamore said within the next day that he heard news accounts of the murder of a woman in the immediate area of the CITA Mission and at once thought of the contact that he had with Thorpe and Deering.

The Melbourne Police Department records for the time period of Sharon Chase's death on June 24, 1994 [1993] were checked for disturbances. There were no disturbances reported during the time period that Chase was described as most probably being killed in the area of Bean park.

Due to the information listed above, Affiant believes that sufficient probable cause exists to conclude that Gary Lee Thorpe and William Walter Deering played a role in the death of Sharon Chase. Both of these individuals have advised other persons that they were involved in a physical fight with a person in the immediate area of where the victim was found dead. Based on the statements obtained, Thorpe and Deering also have acknowledged that the fight that they were involved in was at the same time as Paul Symeon indicates that the death of Sharon Chase most probably occurred. The activities that Thorpe and Deering were involved in and the location is [in] which they lived, are within a .2 mile radius of the scene of Chase's murder. Sharon Chase was heavily engaged in the use and acquisition of cocaine

during the time period of her death. Thorpe and Deering have well documented histories of being involved in the use and acquisition of cocaine. Thorpe and Deering have been described as having injuries that are consistent with the injuries that were received by Sharon Chase in her death, (there was a probable struggle in the area of where Chase was killed and many articles which either Thorpe or Deering could have fallen on or against to injure themselves in such a struggle). Detective Santiago has documented that Gary Thorpe has made statements to numerous persons that he "hated" prostitutes (Sharon Chase was actively engaged prostitution activity at the time of her murder). According to the observations of Paul Symeon, the description of the male that was seen walking with the female (that was most probably Sharon Chase), prior to the murder, is consistent with the description of Thorpe and Deering. Additionally, according to the statement received from Symeon, there were up to three male persons in Bean Park at the probable time Chase was murdered.

(TR854-858)

Following argument on the motion to suppress evidence, the trial court denied the motion, making the following findings of fact:

> Well, I've carefully reviewed the affidavit for search warrant that was presented to Judge Antoon and while I agree that there are some inconsistencies regarding William Deering's description and Gary Lee Thorp's description as being quite different, and yet the affidavit seems to indicate, or imply that the description given by Mr. Symeon matches Deering and Thorp.
>
> Even if that inconsistency was removed, which I don't find that it was willful, **it was just an inconsistency shown by the face of the affidavit,** even if that was removed I would still find that there was probable cause to issue the search warrant as requested.
>
> So based on those findings, I'm going to deny your motion to suppress the evidence that was obtained from the search warrant, which I believe that consisted of the blood that was taken. . . .

(R169). Under settled law, those findings are presumptively correct.

The core of Thorp's argument seems to be that the description given of the individual seen with the victim cannot match both Thorp and Deering[20]. However, as the trial court found, any inconsistency in the description of that individual is apparent on the face of the affidavits to obtain blood from Thorp and Deering. Both of those warrants were issued at the same time, by the same Judge, and any "inconsistency" was apparent at that time. The trial court resolved this issue adversely to Thorp, and that disposition is supported by competent, substantial evidence, and should not be disturbed.[21] Because any complaint concerning the claimed inconsistency in the descriptions was known to the judge who issued the search warrants, and because the description contained in the search warrant was presented as a general description, anyway, no basis for suppression exists.[22]

---

[20]Symeon stated that the person he saw with the victim had "dark hair and lighter skin", a description that fits Thorp.(R930).

[21]Obviously, the issuing Judge was aware of the content of the two affidavits which were before him simultaneously.

[22]A description of Thorp is contained in the first substantive paragraph of the affidavit. (R852). Any inconsistency between that description and the description given by the witness appeared from the four corners of the affidavit. When the totality of the circumstances are considered, as they must be, there is a "fair probability that . . . evidence of a crime will be found in a particular place", in this case, contained within the defendant's blood. *Illinois v. Gates, supra.*

The other claimed "misstatements" simply do not amount to a basis for suppression of the blood evidence. The fact of the matter is that there is no evidence to even suggest that Thorp's head was shaved at the time of the murder. The statement in the affidavit that Thorp's hair was consistent with the witness's description is simply not a misstatement. (R852 *et seq*). Likewise, the statements in the affidavit that the witness heard "muffled screams" and the sounds of a struggle are not inaccurate -- the witness specifically stated that he heard such sounds. (R907-8). It is true that the witness Gallamore testified that Thorp stated that he and Deering had been in a fight at the Burger King, but it is also true that that location is not far from the scene of the murder. (TR111-14). Further, it is undisputed that Thorp had blood on his clothing when Gallamore saw him. (TR111-12). None of the facts about which Thorp complains are "falsehoods", and, therefore, were properly considered in establishing probable cause to search. The motion to suppress was properly denied.

Thorp also complains about certain "omitted" facts which, according to Thorp, would have "negate[d] probable cause". *Initial Brief,* at 21. When the matters at issue are fairly considered, there is no basis for Thorp's complaints.

The first matter about which Thorp complains is his assertion that "much of the information in the affidavit came from a hypnosis session with the witness [Symeon]", and that that fact was not

disclosed. *Initial Brief,* at 21. There is no legal authority for the proposition that such information must be set out in the affidavit, and, even if there was such a rule of law, it would not affect the result here. The information obtained from Symeon that is set out in the affidavit is consistent with the matters contained in Symeon's initial statement (R922 *et seq*), and, because that is so, the hypnosis component is a non-issue. To the extent that Thorp complains that the affidavit contained the statement that Symeon stated that the person he had seen with the victim was wearing a cap, Symeon did make that statement, even though he later said that he was not sure whether the person he saw was wearing a cap or not. (R902; 915). In any event, whether or not the person seen by Symeon was wearing a cap is not a material fact, nor does the presence or absence of such information from the affidavit affect the existence of probable cause to search. Thorp's claim that Symeon was not able to identify him from a photograph is predicated upon an inaccurate statement in brief. Symeon was never shown a photograph of Thorp (though he did see a photo in the newspaper). Symeon never claimed to be able to provide more than a general description of the person he saw with the victim, and never claimed or implied that he could identify that person. (TR188).

Thorp also claims that the affidavit should have stated that the victim "did not bleed from her minor external injuries", even though Thorp was seen with a "substantial" amount of blood on him.

Initial Brief, at 22. In fact, the affidavit did not allege that Thorp had a "substantial" amount of blood on him. (R856).[23] There were no "material omissions" from the affidavit, and the finding of probable cause was correct.

Thorp also argues that information is contained in the affidavit for which "no reliable source is given." *Initial Brief*, at 22. The assertions that Thorp was often in the area of Bean Park (the scene of the murder)[24], and that Thorp had stated that he "despised prostitutes" are attributed to a law enforcement officer involved in the investigation of Thorp's Palm Bay murder. (R855). No attribution is made with regard to the assertion that Thorp frequently wore "ball caps." This information is stated with enough specificity to justify its inclusion in the affidavit -- the weight given to it is for the magistrate to decide. There is no dispute that Thorp lived very close to the park where the murder took place, and, even if the information concerning his professed distaste for prostitutes and his tendencies toward wearing caps were removed from the affidavit (and the State does not agree that such is necessary), there is still sufficient information contained within the affidavit to establish a fair probability that evidence of a crime will be found as a result of the requested search. That

---

[23]The affidavit did not attempt to quantify the amount of blood seen on Thorp's person or clothing. Moreover, the victim's injuries are described in the affidavit. (R854).

[24]Thorp lived very close to Bean Park. (R855).

is the standard set out in *Illinois v. Gates, supra,* and is all that must be shown. *See also, Schmitt v. State,* 590 So.2d 404 (Fla. 1991). The motion to suppress was properly denied.

To the extent that further discussion of this issue is necessary, it is of particular significance that the trial court made an express finding that there was no willful misrepresentation of any matter contained in the affidavit. (TR169). That finding of fact is also presumptively correct, and is entitled to great deference on review. *Irvine, supra.*

Alternatively and secondarily, even if there is some deficiency in the affidavit, denial of the motion to suppress is still proper under the "good faith" exception announced in *United States v. Leon,* 468 U.S. 897 (1984). As the Fifth District Court of Appeals has stated:

> As in *State v. Wildes,* 468 So.2d 550 (Fla. 5th DCA 1985), we find it unnecessary to determine if the facts before the issuing magistrate were sufficient to provide their own indicia of reliability sufficient for the issuance of the search warrant. *See also State v. Georgoudiou,* 560 So.2d 1241 (Fla. 5th DCA), *rev. denied,* 574 So.2d 141 (Fla. 1990). **It is enough that the search warrant was regular on its face and the affidavit upon which it was based was not so lacking in indicia of probable cause that the officer executing the warrant could not with reasonable objectivity rely in good faith on the magistrate's probable cause determination and on the technical sufficiency of the warrant.** Accordingly, we apply the good faith exception enunciated in *United States v. Leon,* 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984), and reverse the orders suppressing the seized evidence and remand for further proceedings.

State v. Harris, 629 So.2d 983, 984 (Fla. 5th DCA 1993). There is

nothing in this case to indicate that there was any misleading of the magistrate by the affiant, nor do any of the other *Leon* exceptions to the good-faith doctrine exist. See page 31, above. Even if the warrant does not establish probable cause, and the state does not concede that that is so, the motion to suppress was properly denied based upon the *Leon* good-faith reliance exception. There is no basis for relief, and the trial court's denial of the motion to suppress should be affirmed.

II. THE SUFFICIENCY OF THE EVIDENCE CLAIM

On pages 25-32 of his brief, Thorp argues that the evidence is insufficient to sustain the conviction because, he claims, the evidence does not exclude the possibility that someone else killed the victim. According to Thorp, the State's case is entirely circumstantial, and must be reviewed under the "circumstantial evidence" standard[25]. For the reasons set out below, Thorp's claims are meritless.

The linchpin of Thorp's claim is his argument that the State presented only circumstantial evidence of guilt, thereby bringing the case under the standard of review that applies to circumstantial evidence cases. That argument fails, and the rest of Thorp's claim collapses, because this case is not "wholly

---

[25]Thorp's brief focuses on the felony-murder aspect of the case, and ignores the fact that this case was submitted to the jury on **both** premeditation and felony-murder theories. (TR598-600). Sufficient evidence to support a verdict under either theory is in the record. *See, Cole v. State,* 701 So.2d 845 (Fla. 1997).

circumstantial", but rather includes direct evidence of guilt. The true facts are that Thorp discussed the murder with a cellmate and, during the course of those discussions, said he expected to be charged in the murder. (TR500). Thorp stated to his cellmate that he knew the victim, that he "did" her, and that, in the process of "doing" her, got blood on him. (TR501-502). Thorp went on to tell his cellmate that because the CITA mission would not allow him to spend the night because he had blood on his clothes, he told the mission worker that he had gotten into a fight at the Burger King. (TR502). Thorp's confessions are direct evidence, and the "circumstantial evidence standard" does not apply to this case.

This Court addressed a substantially identical issue in *Meyers v. State*, 704 So.2d 1368 (Fla. 1997), and found, on quite similar facts, that the circumstantial evidence standard did not apply. This Court stated:

> We next reject Meyers' claim that the evidence was insufficient to sustain his conviction. Meyers argues that the state's case was entirely circumstantial; therefore, the special standard for sufficiency of the evidence in circumstantial evidence cases applies; i.e., the evidence must not only be consistent with the defendant's guilt but it must also be inconsistent with any reasonable hypothesis of innocence. *Cox v. State*, 555 So.2d 352, 353 (Fla. 1989); *Davis v. State*, 90 So.2d 629, 631 (Fla. 1956). We disagree that the case was entirely circumstantial. Meyers' former cellmates testified that Meyers confessed to the murder. **Because confessions are direct evidence, the circumstantial evidence standard does not apply in the instant case.** *See Hardwick v. State*, 521 So.2d 1071, 1075 (Fla.), *cert. denied*, 488 U.S. 871, 109 S.Ct. 185, 102 L.Ed.2d 154 (1988).

Meyers v. State, 704 So.2d 1368, 1370 (Fla. 1997) (emphasis added). This case is no different from *Meyers*, and does not come within the circumstantial evidence standard.

In addition to Thorp's confession, which by itself renders the circumstantial evidence standard inapplicable to this case, semen, which through DNA typing was linked to Thorp, was present in the victim's vagina, as well as on vegetable matter that was located in the victim's vagina. (TR421).[26] In his brief, Thorp argues that DNA evidence is no different in character than fingerprint evidence, and, in fact, is just a variety of circumstantial evidence. *Initial Brief*, at 28. While that statement can certainly be true in certain circumstances, it is not true under the particular facts of this case.

By way of example, DNA evidence generated from blood found on the floor at a crime scene which demonstrated that the blood came from the defendant is the genetic equivalent of a fingerprint belonging to the defendant which is found at a crime scene. Both pieces of evidence prove that the defendant was present at the scene, and the DNA evidence further proves that the defendant was bleeding **while** present at the scene. Unless proof of the fact that the defendant was bleeding establishes the defendant's presence **at the time of the crime** (and it might or might not have that effect),

---

[26]That vegetable matter was consistent with the vegetable matter found at the crime scene. (TR513-15).

the DNA evidence is essentially the same as a fingerprint -- it establishes presence, but no more.[27]

However, fingerprint evidence **can** be direct evidence, when, for example, the fingerprint could **only** have been left at the time the crime was committed. An example of such a situation would be in the case of a stabbing murder when the knife is found sticking out of the victim's chest, the defendant's fingerprints are found on that knife, and there is no indication that any other person has handled or tampered with that knife. Under such a scenario, when the fingerprint could only have been made at the time the crime was committed, the fingerprint evidence is **direct** evidence of guilt. Likewise, DNA evidence can be direct evidence of guilt when, under a scenario such as the one present in this case, the genetic material can only have been left at the time of the offense. In this case, the semen present in the victim's body was deposited at the time of her death, and at the scene of her death. Vegetable matter was found in the victim's vagina, and the defendant's semen was found thereon. (TR355).[28] That vegetable matter was consistent with the surface on which the victim's body was found. (TR513-14). The evidence shows that Thorp raped the victim at the location where her body was found. (TR74; R1202). The presence of vegetable

---

[27]This hypothetical is for illustration only -- no concession of any fact is implied therein.

[28]This DNA testing was by the RFLP method, which Thorp does not challenge. See pp. 43-46, below.

matter **with Thorp's semen on it** renders his version of events (that he had sex with the victim well before her death) wholly implausible. The semen found in the victim's body was the result of intercourse contemporaneous with her death, and is direct evidence of Thorp's guilt.[29]

The second component of this claim is Thorp's argument that the State did not prove that a sexual battery took place. However, despite Thorp's claim to the contrary, the issue of whether or not a sexual battery took place is a question for the jury. *See, e.g., Taylor v. State,* 583 So.2d 323, 328 (Fla. 1991). Whether or not the victim suffered trauma to her genitalia is not the issue -- the facts are such that the jury could reasonably conclude that the victim did not consent to being subjected to an attack that resulted in cypress mulch being aspirated into her trachea, nor can she reasonably be believed to have consented to being strangled with such force that the various bony structures in her neck were fractured. (TR232-235).[30] Likewise, it is unreasonable to assume that the victim consented to being beaten and dragged through a mulch bed in the course of a voluntary sexual encounter. (TR223-27;

---

[29]The victim's shorts were found some 30 feet away from her body. (TR79-80). No semen was found on them. (TR359).

[30]The medical examiner could not determine whether ligature or manual strangulation had been used to kill the victim. (TR242).

76-77).[31] The evidence presented a jury question, and there was no error. *Taylor, supra; Holton v. State,* 573 So.2d 284 (Fla. 1990).

Finally, the second component of this issue fails because there was sufficient evidence to submit the case to the jury on a premeditation theory as well as on a felony-murder theory[32]. As this Court held in *Taylor*:

> A court should not grant a motion for judgment of acquittal unless there is no view of the evidence which the jury might take favorable to the opposite party that can be sustained under the law. *Lynch v. State,* 293 So.2d 44, 45 (Fla. 1974). In moving for judgment of acquittal, Taylor admitted the facts in evidence as well as every conclusion favorable to the state that the jury might fairly and reasonably infer from the evidence. If there is room for a difference of opinion between reasonable people as to the proof or facts from which an ultimate fact is to be established, or where there is room for such differences on the inferences to be drawn from conceded facts, the court should submit the case to the jury. *Id.* We find competent, substantial evidence of premeditation and lack of consent to submit those issues to the jury. *Hufham v. State,* 400 So.2d 133, 135-36 (Fla. 5th DCA 1981) ("Once competent, substantial evidence has been submitted on each element of the crime, it is for the jury to evaluate the evidence and the credibility of the witnesses.").

Taylor v. State, 583 So.2d 323, 328 (Fla. 1991). In this case, Thorp's victim had a bruise and abrasion on the left side of her nose; an abrasion below that on her upper lip; an injury by her

---

[31]The victim sustained a number of bruises and abrasions at the time of her death. (TR223-27). Those injuries are consistent with the victim having been beaten and dragged before she was strangled to death.

[32]Thorp has not challenged the sufficiency of the evidence to support a conviction under a **premeditation** theory, thus effectively conceding this issue.

right eye that was consistent with her glasses being driven into her face by a blow to the head; a bruise on her lower jaw; a bruise on the outer portion of her right arm; a bruise on her back over the shoulder blades; an abrasion on the back of her right arm; bruising inside her left knee; an abrasion below the left kneecap; a linear abrasion on her lower left leg; and bruising to the back of the right knee. (TR223-24). In addition to those injuries, the victim sustained numerous fractures to the bony structures of her neck, including fractures to the trachea cartilage, the cricoid cartilage, the thyroid cartilage, and the hyoid bone. (TR232-34). Those injuries were more than sufficient to submit the question of premeditation to the jury, and are more than enough to establish that the murder was premeditated. *See, Taylor, supra.*

III. THE "OPINION TESTIMONY" ISSUE

On pages 33-36 of his brief, Thorp argues that the trial court erroneously allowed a state witness to testify as to what Thorp meant when he stated that "We did a hooker". What Thorp attempts to cast as testimony that invaded the province of the jury was, in context, entirely proper. No basis for reversal exists, and this claim is without merit.

In its entirety, the testimony at issue reads as follows:

> Q: Did you ever have any conversations with Gary Lee Thorp about the death of the prostitute under the bridge?
>
> A: Yes, I did.
>
> Q: Did he indicate to you that he knew about this

incident?

A: Yes, he did.

Q: And did he indicate to you that he expected that he might be charged with this?

A: He told me he expected to be.

Q: What did he expect the charge to be?

A: Murder.

Q: What did he say about that incident?

A: He told me that he knew the girl, that he had taken her down by the bridge and did her, that she was a hooker.

Q: Those were his words, that he did her?

A: Yes.

Q: What did you take that to mean?

A: That he had --

Mr. Studstill [defense counsel]: I object. That's not relevant. That's speculation. This gentleman has not been qualified to interpret anything that he thought was said. It's just irrelevant and immaterial.

The Court: Overruled.

Q: You may answer the question. What did you take that to mean?

A: I took it to mean that he was the one that killed her.

(TR500-501). Thorp's complaint about the testimony set out above is not a basis for reversal for the following independently adequate reasons.

The first reason that this claim is not a basis for reversal is because the objection that the testimony was "irrelevant and

immaterial" was insufficient to preserve the specific grounds now argued as grounds for reversal before this Court. *See, Lowe v. State,* 650 So.2d 969, 974 (Fla. 1994); *see also, Tampa Elec. Co. v. Charles,* 69 Fla. 27, 67 So. 572 (1915). Counsel below stated no basis for the irrelevancy or incompetency of the evidence at issue, and, in so doing, did not preserve the issue Thorp has raised on appeal. Moreover, if the statement at issue was, as Thorp now claims, merely a reference to a consensual sexual encounter with a prostitute, the proper objection would have been one based on hearsay. *See,* §90.801, *Fla. Stat.*

The second reason that this claim does not state a basis for reversal is because the testimony at issue was proper. Under §90.701, *Florida Statutes,*

> If a witness is not testifying as an expert his testimony about what he perceived may be in the form of inference and opinion when:
>
> > (1) The witness cannot readily, and with equal accuracy and adequacy, communicate what he has perceived to the trier of fact without testifying in terms of inferences or opinions and his use of inferences or opinions will not mislead the trier of fact to the prejudice of the objecting party; and
> >
> > (2) The opinions and inferences do not require a special knowledge, skill, experience, or training.

§90.701, *Fla. Stat.* Assuming, *arguendo,* that the testimony at issue was, in fact, opinion or inference testimony, the testimony at issue was proper under the Evidence Code. Obviously, the phrase

"[w]e **did** a hooker" is not one of ordinary usage, and the meaning of the word "did" in this context cannot be readily and accurately communicated to the jury unless the witness is allowed to state what he took that phrase to mean in the context in which it was used. Moreover, testimony concerning the meaning ascribed to the word "did" by Thorp cannot have the effect of misleading the finder of fact. The meaning of the phrase is of obvious significance, and any challenge to the accuracy of the witness's testimony was properly the subject of cross-examination.[33] Further, the testimony at issue did not require any special expertise -- it falls squarely within the testimony allowed by § 90.701.

To the extent that further discussion of this claim is necessary, the testimony at issue in this case is not the same as that at issue in *Kight*. In that case, the complained-of testimony consisted of an elaboration on whether Kight was encouraging the murder of the victim by the gesture of drawing his hand across his throat. *Kight v. State,* 512 So.2d 922, 929 (Fla. 1987). The issue of whether Kight was "encouraging" something is obviously an inference -- the meaning of a rather unusual phrase (the accurate interpretation of which is important to the truth-seeking function of a trial) is obviously **not** such an inference. The jury should not

---

[33]In his brief, Thorp opines that the statement "We did a hooker" means only that "we" had sex with her, not that she was killed. That is a matter that could have been inquired into during cross-examination but was not. (TR505-6).

have been encouraged to speculate about the meaning of a phrase that is, to say the least, an unusual grammatical form, and, had such speculation been allowed, it is likely that that would be an issue before this Court. There is no basis for relief, and the conviction and sentence should be affirmed in all respects.

Alternatively and secondarily, without conceding that error of any sort occurred, even if the objection should have been sustained, any error was harmless beyond a reasonable doubt. Even if the objection had been sustained, the State would still have been free to argue (as it did (TR577)) that Thorp's statement to Bullock was an admission that he had murdered the victim. Significantly, Thorp **never** argued that the statement "[w]e did a hooker" meant anything other than what Bullock's testimony reflected. Thorp was free to make the argument advanced in his brief, but did not do so. If he had sought to do so and been precluded, there would be an arguable basis for complaint. However, under the facts of this case, the issue contained in Thorp's brief is nothing more than an effort to make a jury argument to this Court that was not tried below. Whether or not Bullock had testified that he took the statement at issue to mean that Thorp had killed the victim had no effect on the verdict herein. If there was error, it was harmless beyond a reasonable doubt. *Chapman v. California,* 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); *State v. DiGuilio,* 491 So.2d 1129 (Fla. 1986). The conviction and

sentence should be affirmed in all respects.

IV. THE "PRECLUSION OF IMPEACHMENT" CLAIM

On pages 37-42 of his brief, Thorp argues that he should have been allowed to impeach a State expert witness with a decision of this Court from some years earlier that criticized the witness. Specifically, this Court had stated, in *Murray v. State,* 692 So.2d 157 (Fla. 1997), that the witness had misled the Court regarding the general acceptance of the PCR method of DNA typing when he testified in the *Murray* trial. The trial court allowed Thorp to proffer the testimony at issue, and a fair reading of that testimony demonstrates that Thorp was properly prevented from presenting what would have amounted to no more than *ad hominem* abuse under the rubric of "impeachment" when the most that would have been accomplished would be confusing the jury with inaccurate and irrelevant information.

Thorp attempts to present this claim in constitutional terms, asserting that he was denied the right to cross-examine the witness. However, when the claim is stripped of its constitutional pretensions, it fails because the facts simply do not support it. During the proffer of the testimony of Daniel Nippes, it became apparent that the criticisms contained in the *Murray* decision are, at the very least, no longer valid. Specifically, the testimony demonstrated that the 1996 National Research Council report stated: "[w]e affirm the statement of the **1992** report that the molecular

technology [of PCR] is thoroughly sound ...". (TR401). That statement by the NRC is contained within the PCR section of its 1996 report, and, on its face, appears to state that PCR was scientifically sound in 1992, and remains so in 1996. If that is the case (and the plain language of the report so suggests), then it seems that the criticisms contained in *Murray* are no longer valid (if they ever were). In any event, it is clear, beyond any doubt, that the 1996 NRC report reflected general scientific acceptance of the PCR method of DNA typing.

To the extent that further discussion of this issue is necessary, it appears that a different comparison database was at issue in *Murray*. (TR398). In any event, extensive testimony regarding the PCR database was presented, both through the testimony of Nippes and through the testimony of other experts. (TR428; 434; 435-41). There was no "curtailment" of cross-examination -- Thorp was prevented from presenting inaccurate, misleading information to the jury when the Court sustained a proper objection. He should not be heard to complain because his efforts to confuse the jury were found out. The only thing that the proffer established was that this Court's *Murray* decision provided no basis for impeachment.[34] There was no error, and the conviction and sentence should be affirmed in all respects.

---

[34]Another, independent expert testified that Nippes' methodology in conducting PCR typing was correct, and was generally accepted within the scientific community. (TR427-8).

V. THE *FRYE* ISSUE

On pages 43-44 of his brief, Thorp argues that he is entitled to a new trial because the State did not meet the *Frye v. United States* standard for admissibility of the testimony concerning DNA typing conducted by the PCR method. Thorp's claim fails for two reasons, either of which is an independently adequate basis for denial of relief.

The first reason that the *Frye* issue is not a basis for reversal is because there was no *Frye* objection at the time of trial. Florida law is clear that such an objection must be made before the testimony is offered -- if no objection is made, nothing is preserved for appellate review. *See, e.g., Jones v. Butterworth,* 701 So.2d 76 (Fla. 1997). This claim is not preserved for review under well-settled law.[35]

The second reason that this claim fails is because, even ignoring the failure to preserve the issue, the State proved that the PCR method of DNA typing **and** the statistical analysis employed have gained general acceptance within the scientific community. See pp. 9-11, *Brim v. State,* 695 So.2d 268 (Fla. 1997). Specifically, the State established that the National Research Council has found PCR technology to be "thoroughly sound", and that the PCR method itself has been in existence since 1984-85. (TR401;

---

[35]Notably, Thorp's brief does not purport to identify a *Frye* objection anywhere in the record.

428). The State also established that the methodology utilized in this case is that which is generally accepted within the scientific community. (TR427; 435-42). Despite the absence of an objection based on *Frye*, the State clearly demonstrated that the PCR method has attained general scientific acceptance. *See, e.g., Walker v. State*, 707 So.2d 300 (Fla. 1997). The conviction and sentence should be affirmed in all respects.[36] *See also, Henyard v. State*, 689 So.2d 239 (Fla. 1996).

VI. THE JUROR EXCUSAL ISSUE

On pages 45-54 of his brief, Thorp argues that juror Congrove was erroneously excused for cause under *Farina v. State*, 680 So.2d 392 (Fla. 1996). A fair reading of the record demonstrates that, for the reasons set out below, this juror was properly excused for cause because his views concerning the death penalty would have prevented him from following the law.

The standard for evaluating juror excusal claims is set out in *Wainwright v. Witt*, 469 U.S. 412, 424, 105 S.Ct. 844, 852, 83 L.Ed.2d 841 (1985), and is whether the juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath". *Marquard v. State*, 641 So.2d 54, 56 (Fla. 1994). *See also, Kimbrough v. State*, 700 So.2d 634, 638 (Fla. 1997) ("The standard for determining whether

---

[36]None of the cases cited in Thorp's brief compel a different result, and none of them require any discussion.

a prospective juror may be excused for cause because of his or her views of the death penalty is whether the juror's views would prevent or substantially impair the performance of his or her duties as a juror in accordance with the juror's instructions and oath. *Castro v. State*, 644 So.2d 987, 989 (Fla. 1994). It is within the trial court's discretion to determine if a challenge for cause is proper, and a trial court's determination of juror competency will not be overturned absent manifest error. *See Mills v. State*, 462 So.2d 1075, 1079 (Fla. 1985)."); *Johnson v. State*, 696 So.2d 326, 322 (Fla. 1997); *Henyard v. State*, 689 So.2d 239, 246 (Fla. 1996); *Hartley v. State*, 686 So.2d 1216, 1322 (Fla. 1996) ("The juror stated that there were very few, if any, situations in which he would recommend the death penalty. After further questioning, the juror stated that his beliefs regarding the death penalty would substantially impair his ability to impose the death penalty. This constituted sufficient justification to excuse the juror for cause. *Wainwright v. Witt*, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985)."); *Foster v. State*, 679 So.2d 747, 752 (Fla. 1996); *Johnson v. State*, 660 So.2d 637, 644 (Fla. 1995); *Castro v. State*, 644 So.2d 987, 989 (Fla. 1994); *Marquard v. State*, 641 So.2d 54, 56 (Fla. 1994). When the controlling law is applied to the facts of this case, it is clear that the trial court did not abuse its discretion in excusing juror Congrove for cause. Because that is the standard of review, and because Thorp has not demonstrated

error, he is not entitled to relief.

When the record of *voir dire* is fairly considered, it is clear that the juror had stated that he could not recommend a sentence of death and that he had a moral dilemma with the death penalty (TR111); that it would be difficult to convince him to impose such a sentence under all but "extreme situations" (TR111-12); that he would hold the State to a higher standard of proof (at the guilt stage) and would be more inclined to look for a reasonable doubt (TR113); and that he was concerned about his inclination to require a higher degree of proof (TR114). When defense counsel questioned the juror, the responses did nothing to rehabilitate that juror. Instead, the juror stated that his opinion regarding the death penalty would substantially impair his ability to follow the law and his oath (TR115); that it was possible that he could not be a fair and impartial juror because of his views on the death penalty (TR117); and that he had his own opinions as to when the death penalty might be appropriate (TR118).

The State's reasoning for challenging this juror for cause is as follows:

> THE COURT: Are there any cause challenges of this group?
>
> MR. RESPESS: Yes, Judge. We challenge juror number 480, David Congrove, in that he indicated that he believed that his feelings about the death penalty reasonably could affect his ability to fairly go through the guilt phase of the case.
>
> THE COURT: Mr. Studstill?

MR. STUDSTILL: Your Honor, we object to him being excused for cause. He was really wishy-washy around there. He did say one time that he thought it might affect his ability to sit, but he never said that he certainly could not be fair. And he never said -- and he didn't say I don't believe that under certain circumstances the death penalty should not be imposed. And even though he said he thinks it might affect him, we object to him being taken off for cause.

THE COURT: Mr. Respess?

MR. RESPESS: Judge, I think the standard is whether or not the jurors view on the death penalty would prevent or substantially impair the performance of his duties. Now, in this case, the juror indicated that he has strong feelings about the death penalty and his leaning is against the death penalty except in some circumstances that he was not clear on.

And the problem that I have is not with his views on the death penalty, but how he may raise his concerns about the death penalty being applied in a particular case where he may be one of the people voting against the death penalty in this particular case. And that his recognition that he would raise the State's burden, and that's what he was talking about doing in this case, is that he had a real concern about raising the burden of proof in the case because of his concerns that the jury was going to then go -- go back and reflect on the death penalty.

THE COURT: But didn't he indicate that he would follow the law?

MR. RESPESS: He indicated that he would, that he would make every effort. But, Judge, he did, when asked specifically about whether or not his feelings substantially impaired his ability to handle the guilt phase, he indicated yes, that it would, that he saw that as a real possibility. And that's the concern the State has.

THE COURT: Well, I'm concerned that he said it was a possibility. But he said he would try to follow the law, do his best to follow the law.

MR. RESPESS: No, not at that point, Judge. He did

initially, and then and that's when Mr. Craig asked him some more questions about that, and it wasn't until towards the end of Mr. Craig's questioning that he threw that out here and then Mr. Craig turned it around.

THE COURT: I think he volunteered that when he read about the death penalty in various cases he had said he could not have voted to give a death penalty in this case.

MR. RESPESS: That's what he said, that's what he said. And then -- then he started raising his concerns and he expressed his concerns, because Mr. Craig then asked him, well, you felt that way in that case, if you're hearing a case and you know that the death penalty is a potential outcome upon a verdict of guilty, how would that affect your decision making process. And that's the problem. His answer to that question is what causes the State concern. Because that's where he said that he would not be able to follow the law. That's where he felt that he would be impaired.

THE COURT: I see your point. I will grant your challenge for cause at this time of number 470, David Congrove.

(R125-127).

In his brief, Thorp relies almost exclusively on *Farina v. State,* 680 So.2d 392 (Fla. 1996), to support his claim for reversal. However, as this Court stated in that opinion, three factors compelled the result:

> First, as mentioned, it appears from the record that Hudson's views on the death penalty did not prevent or substantially impair her from performing her duties as a juror in accordance with her instructions and oath. Second, the State gave no reason for seeking its challenge and thus shed no light on why it thought Hudson was not qualified to serve. [footnote omitted] And finally the trial court, in granting the State's challenge, indicated that it was doing so because it had just granted a defense challenge.

Farina v. State, 680 So.2d 392, 398 (Fla. 1996). None of those

factors exist in this case. The record, as summarized above, clearly establishes that the juror's views about capital punishment would substantially impair his ability to follow the law and his oath as a juror, given, *inter alia*, his expressed intention to hold the State to a higher standard of proof and his own unequivocal statement that his views would impair his ability to follow the law. That is the standard for granting a cause challenge, and this juror met it. *See, Castro, supra*. The trial court did not abuse its discretion in granting the State's motion.

To the extent that further discussion of this issue is necessary, none of the other *Farina* factors are present. The State's rationale in making the challenge for cause is clear from the record, and it is equally clear that the trial judge, who was able to observe the juror, found the stated reasons sufficient. That determination is not an abuse of discretion, and there is no basis for reversal.[37]

VII. THORP'S DEATH SENTENCE WAS PROPERLY IMPOSED

On pages 55-69 of his brief, Thorp argues that his death sentence should be set aside because it is based on an improper aggravator; because the sentencing court did not consider "relevant and appropriate mitigators"; and because the sentencing court "improperly found that the aggravating circumstances outweighed the

---

[37]The third factor from *Farina*, that a defense cause challenge had just been granted, obviously does not factor into this case.

mitigating factors". *Initial Brief,* at 55. None of those claims have any legal basis for the reasons set out below.

While Thorp's brief opens with the assertion that one aggravator was improperly found, he later argues that the sentencing court improperly found the heinous, atrocious, or cruel aggravator as well as the "during the course of a sexual battery" aggravator. Despite Thorp's protestations, both aggravators were properly found.

Thorp's challenge to the heinous, atrocious, or cruel aggravator is based upon an interpretation of the law that this Court squarely rejected in *Guzman v. State,* 23 Fla. Law Weekly S511 (October 1, 1998), when this Court stated:

> We also reject Guzman's argument that the HAC aggravator should not apply because there is no evidence that Colvin was intentionally made to suffer. The intention of the killer to inflict pain on the victim is not a necessary element of the aggravator.

Id., at S512. *Guzman* is controlling as to this issue, and establishes that there is no error.

To the extent that further discussion of the heinous, atrocious, or cruel aggravator is necessary, Florida law is well settled that strangulation murders are virtually *per se* heinous, atrocious, or cruel. *See, Hitchcock v. State* 578 So.2d 692, 693 (Fla. 1990). Despite Thorp's claims to the contrary, there is competent substantial evidence to support the finding of the sentencing court that this murder was heinous, atrocious, or cruel.

Specifically, the sentencing court found:

> 3. The capital felony was especially heinous atrocious, or cruel. (F.S. 921.141(5)(h))
>
> Sharon Chase was strangled to death with sufficient force to break several bones in her throat. The medical examiner testified that her killer would have had to apply force to her neck for several minutes, after she lost consciousness, to kill her. He found plant debris in her mouth and bronchial tubes. He testified that, normally, coughing or gagging would expel such debris. He testified that it was likely she was gasping for breath when this debris was inhaled, and she was unable to cough or expel it while being choked to death. It is quite clear that the victim was conscious during the initial strangling, and that the death occurred only after a significant period of time while the defendant strangled her. This court has accepted the expert opinion of the medical examiner that the homicide of Sharon Chase was the result of strangulation. Clearly, her death was not instantaneous. The victim had time to experience a foreknowledge of death, and experienced extreme anxiety and fear. Both the Florida Supreme Court and the United States Supreme Court agree that "strangulation when perpetrated upon a conscious victim involves foreknowledge of death, extreme anxiety and fear, and this method of killing is one to which the factor of heinousness is applicable." *Sochor v. State*, 580 So.2d 595, 603 (Fla. 1991), *rev'd on other grounds, Sochor v. Florida*, 504 U.S. 527, 537 (1992). *Sochor v. State*, 619 So.2d 285, 292 (Fla. 1993).

(R1203).

Those findings of fact, which Thorp does not seriously dispute, establish the existence of the heinous, atrocious, or cruel aggravator beyond a reasonable doubt. This aggravator was properly applied by the sentencing court.

Thorp also includes a brief argument that the during a sexual battery aggravator was improperly found. As is set out at pages 32-38, above, the evidence was sufficient to establish that the murder

in this case took place during a sexual battery. Further, in the sentencing order, the court made the following findings of fact:

> The evidence clearly established that the defendant had sexual intercourse with the victim. Scientific evidence was presented during the trial that established beyond any doubt that the semen and sperm found in the victim's vagina matched defendant's DNA. No semen or sperm was found on the victim's shorts, which were found thirty feet away from her body, or anywhere else at the crime scene or on the victim's body. During the penalty phase of the trial, the defendant, admitted he had sexual intercourse with the victim (although he denied raping her). The body of the victim was found in a position with her legs spread apart, and her knees raised slightly and bent. She was on her back in an area of mulch and shrubbery at the western border of a municipal park. The mulch in that area showed evidence of a disturbance between where the shorts were found and the body was found. Between the victim's legs, the ground showed a slight depression that was consistent with the attacker kneeling there while engaging in sexual intercourse with the victim. Mulch and plant debris were found on the victim's body, between her buttocks, and in her vagina. Debris was also found in her trachea and bronchial tubes. The plant debris was identified as the same type of plants that are found there in the park near where the victim's body was discovered. Clearly, the sexual intercourse occurred right there where the body was found. No semen was found on the victims's shorts, or anywhere else except in her vagina. No other semen, other than the defendant's, was found in or on the victim's body. All the evidence indicates that the struggle occurred either before or during the sexual intercourse. Furthermore, the victim was strangled to death. This evidence establishes that the victim did not consent to the sexual intercourse.

(R1202-3). Those findings of fact are supported by competent substantial evidence, and should be affirmed in all respects. Contrary to Thorp's assertions, all of the evidence is consistent with a murder during a sexual battery. This aggravator was proven beyond a reasonable doubt, and was properly applied to this case.

Thorp also argues that there are statutory and non-statutory mitigators that "outweigh any appropriate aggravating factors." Under settled Florida law, the sentencing order is reviewed in the following way:

> The Court in *Campbell v. State*, 571 So.2d 415 (Fla.1990), established relevant standards of review for mitigating circumstances: 1) Whether a particular circumstance is truly mitigating in nature is a question of law and subject to de novo review by this Court; (FN11) 2) whether a mitigating circumstance has been established by the evidence in a given case is a question of fact and subject to the competent substantial evidence standard; (FN12) and finally, 3) the weight assigned to a mitigating circumstance is within the trial court's discretion and subject to the abuse of discretion standard. (FN13)
>
> > FN11. *Campbell v. State*, 571 So.2d 415, 419 n. 4 (Fla.1990).
> >
> > FN12. *Id.* at 419 n. 5.
> >
> > FN13. *See generally Campbell* 571 So.2d at 420. See also *Johnson v. State*, 660 So.2d 637, 647 (Fla.1995), *cert. denied*, 517 U.S. 1159, 116 S.Ct. 1550, 134 L.Ed.2d 653 (1996); *Windom v. State*, 656 So.2d 432, 440 (Fla.), *cert. denied*, 516 U.S. 1012, 116 S.Ct. 571, 133 L.Ed.2d 495 (1995); *Ellis v. State*, 622 So.2d 991, 1001 (Fla.1993). A trial court's end result in weighing aggravating and mitigating circumstances is subject to the competent substantial evidence standard. *Campbell*, 571 So.2d at 420.

Blanco v. State, 706 So.2d 7, 10 (Fla. 1997). The abuse of discretion component of the *Campbell* standard is not met when "[the Court] cannot say that no reasonable person would give this circumstance [little] weight in the calculus of this crime." *See*

Blanco, 706 So.2d at 11 (*citing Huff v. State*, 569 So.2d 1247, 1249 (Fla.1990) ("[D]iscretion is abused only where no reasonable man would take the view adopted by the trial court.")); *Elledge v. State*, 706 So.2d 1340, 1347 (Fla. 1997). When the proper standard is applied to this case, it is apparent that there is no error.

In contrast to the cursory treatment that Thorp implies was given the proffered mitigation, the true facts are that the sentencing court entered an extensive order that evaluated all of the proposed mitigators in great detail. The relevant portions of the sentencing order are set out below:

> (B. MITIGATING FACTORS
>
> . . .
>
> (f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired;
>
> The evidence presented at trial support the contention that the defendant had consumed alcohol the night of the murder. The witness, David Gallamore, testified that he saw the defendant between 12:30 AM and 1:00 AM of the night of the murder, which would have been within one hour of the death of the victim. While he spoke with the defendant he noted that the defendant had alcohol on his breath, and asked if he had been drinking. The defendant replied that he had been drinking. He further explained that he had been a fight to explain the blood that was noticeable on his clothing. At the time, he did not appear to be heavily under the influence, or impaired by the alcohol. The defendant testified during the penalty phase of the trial that he had a problem with alcohol and drugs. He also testified that he was drunk the night of the murder and that he had used cocaine. He said that on occasion he would have blackouts, and would not remember what had transpired during these blackouts. However, he testified that he remembered this particular night, and remembered having sex with the victim, but he continues to deny that he actually killed the victim.

Based on the evidence presented in the penalty phase trial, and the totality of the guilt phase testimony and evidence, this Court is unable to conclude that, at the time of the murder, the defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired. This mitigating circumstance has not been established by the greater weight of the evidence.

. . .

(h) The existence of any other factors in the defendant's background that would mitigate against imposition of the death penalty.

In his sentencing memorandum, the defendant requested the court to consider the following non-statutory mitigation:

1. Defendant's history as a disadvantaged child.

The defendant urges the court to consider the defendant's condition of Cerebral Palsy as a mitigating factor. Ample evidence was introduced during the penalty phase of the trial to establish that the defendant was born three months premature, and spent the first three months of his life in the hospital, in an incubator. Neither of his parents was permitted to touch or hold him during these three months. He suffered from the birth defect of Cerebral Palsy. This caused significant development delays during this early childhood. After he reached school age, he had to utilize leg braces during the school year and he wore leg casts during the summer months, as therapy for his foot muscles. He could not run about as a normal child. He had an operation at age 10 that allowed him to discontinue using the braces by age 12. He was in a great deal of pain from his condition during most of his childhood, and was prescribed pain medication regularly.

The defendant was raised by his parents, who are still married to one another. His mother stayed home with him, and his three siblings, while his father worked. There was no evidence that he was mistreated as a child.

This mitigating circumstance has been established by the evidence, has been considered by the court, and has

been given some weight.

2. The defendant has maintained exemplary work habits.

The defendant began working at the age of 14. By age 17, he had dropped out of school and was working full time. He had been placed on probation for some crime in his early 20's, and after violating that probation was sentenced to a short term in prison. He testified that he always worked. He further testified that he was abusing drugs and alcohol, and would move from state to state and from job to job. He also stated that he started selling drugs to support his drug habit. He had unsuccessfully attempted rehabilitation for his drug and alcohol problem in his early 20's, and then was once again trying to stay off drugs at the CITA Mission where he resided for several months prior to the murder of Sharon Chase.

Based on all the evidence presented during both phases of the trial, this mitigating circumstance has not been established by the greater weight of the evidence. Even if it were found to exist, it would be entitled to very little weight.

3. The defendant contributed to society by his work habits and his willingness to help other people at the CITA Mission, a Christian charitable last-chance organization.

The defendant resided at the CITA Mission during several months prior to the murder of Sharon Chase. The rules of the Mission required residents to work for the mission the next day after spending the night. According to Ronald Krout, who ran the thrift shops for the Mission, most of the people who stated at the Mission were looking for a free handout. Mr. Krout's father was the man in charge of the Mission. The defendant was characterized as Mr. Krout's father's "right hand man" during his stay at the mission, based on his assistance as a handy man and helper. He did more for the mission than a lot of other people who stayed at the mission. Defendant testified during the penalty phase that he ran the maintenance there and worked with the director. He volunteered for work every day and helped with the other people there, "just to stay there and to learn, you know, trying to get myself straightened out."

This evidence does not establish that the defendant contributed to society any more than an ordinary person would. The Court has not considered this as a mitigating circumstance, since it has not been proved by the greater weight of the evidence. Even if it were established, it would be entitled to very little weight.

4. The defendant's family background.

The defendant's father and mother testified during the penalty phase trial. They testified regarding his difficulties in childhood, and his problems with drugs and alcohol. It was clear from their testimony that the defendant's parents loved him, and still love him, despite his shortcomings. He had little contact with his family in the last few years prior to this murder. He left his hometown in 1989, and only visited once in 1992. The murder of Sharon Chase occurred in 1993, and the defendant was in jail and then prison for the murder of Randy Appleman by 1994.

This court has considered this mitigating circumstance, and has given it some weight.

5. The defendant has voiced remorse for his lifestyle and for allowing himself to be addicted to alcohol and drugs.

The remorse that may be considered by the court to establish this mitigating circumstance must be remorse for the crime and for the suffering the defendant caused the victim and the victim's family. This mitigating circumstance has not been established by the greater weight of the evidence, and the court has not considered it.

6. The defendant's prison record has been exemplary.

It can be a mitigating circumstance that the defendant can adapt well to prison life. The evidence established that while the defendant was in prison serving his sentence for the murder of Randy Appleman, there were no disciplinary actions against him. However, after his transfer to the Brevard County Jail awaiting trial for the murder of Sharon Chase, the defendant received disciplinary confinement for making "jailhouse alcohol."

> The fact that the defendant had only one disciplinary problem during his confinement has not been considered by this court as mitigation. This would only be established as a mitigating circumstance if the record had been truly exemplary, with no disciplinary reports whatsoever.

(R1205-8)

When the sentencing order is fairly reviewed, it is apparent that Thorp's real complaint is that the sentencing court did not give as much weight to the "mitigation" as Thorp would have liked. That is not the standard, and, moreover, there is no requirement that a particular mitigator be given a certain weight. *See, e.g., Campbell v.* State, 571 So.2d 415, 420 (Fla. 1990); *Banks v. State,* 700 So.2d 363, 368 (Fla. 1997); *Gudinas v. State,* 693 So.2d 953, 966 (Fla. 1997); *Windom v. State,* 656 So.2d 432, 440 (Fla. 1995). With regard to each proposed mitigator, the weight assigned by the sentencing court was not an abuse of discretion, *Blanco, supra,* and, for that reason, there is no basis for reversal.

To the extent that Thorp argues that certain matters should have been assigned greater weight than they were, the true facts are that there is no proof that Thorp "had been an alcoholic since age 14", that his "drug use and alcoholism" caused an extreme mental or emotional disturbance, and that he worked at the CITA mission "for the satisfaction of helping". The fact is that Thorp was engaged in selling drugs at the time of the murder, and, while that may be gainful employment, it certainly does not qualify as a mitigator. (TR1206). In the final analysis, Thorp's argument is

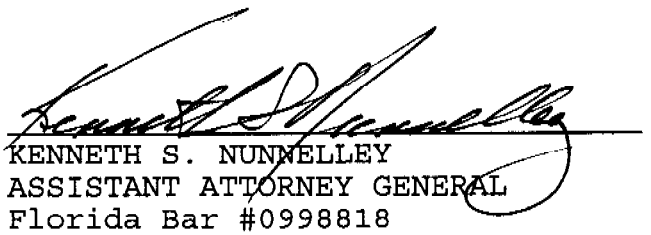
predicated on the erroneous premise that anything that he labels as a mitigator must be found to be such by the sentencing court. That is contrary to settled law, which is that whether or not a matter is truly mitigating is for the finder of fact (the sentencing court), and that "mitigation" can be controverted by facts appearing in the record, as is the case here. *See, Wuornos v. State,* 644 So.2d 1000, 1010 (Fla. 1994). The sentencing order comports with Florida law, and the sentence of death should be affirmed in all respects.

CONCLUSION

Based upon the arguments and authorities presented herein, the judgment and sentence of the trial court should be affirmed in all respects.

Respectfully submitted,

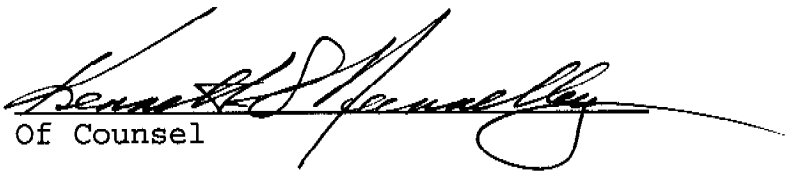
ROBERT A BUTTERWORTH
ATTORNEY GENERAL



KENNETH S. NUNNELLEY
ASSISTANT ATTORNEY GENERAL
Florida Bar #0998818
444 Seabreeze Blvd. 5th FL
Daytona Beach, FL 32118
(904) 238-4990

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above has been furnished by U.S. Mail to James R. Wulchak, Chief, Appellate Division, Assistant Public Defender, 112 Orange Avenue, Suite A, Daytona Beach, Florida 32114, this 16th day of November, 1998.



Of Counsel