IN THE SUPREME COURT OF FLORIDA

DEAN KILGORE,

Appellant,

v. Case No. 83,684

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE TENTH JUDICIAL CIRCUIT
IN AND FOR POLK COUNTY

BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

The following is offered to supplement and/or clarify the statement of the case and facts recited by the appellant:

On Sunday, February 12, 1989, the appellant and the victim, fellow inmate Pearl Jackson, had an argument near the hobby shop area at Polk Correctional Institute (T. 898, 920, 1155, 1159). The appellant and Jackson were lovers, and had fought about Jackson's relationship with other inmates, including Tony Capers, and the way Jackson would play his partners off against each other (T. 881, 898, 902, 920, 1060, 1165-1170). That day, the appellant told inmate Robert Trenary not to take out the trash from the hobby area, saying that he had something stored there (T. 929-930). He also borrowed the murder weapon, a homemade knife, from inmate Timothy Squires (T. 884-885). The next morning, the appellant entered the dorm where Jackson lived, carrying a container under his arm, and asked inmate William McCalop where the security guard was (T. 1063, 1088). The appellant went to the second floor of the dorm, borrowed a cigarette from inmate James Montgomery, and asked Montgomery to light the cigarette (T. 1001, 1003, 1007). When Jackson left his cell to go to work, the appellant approached him in the hallway (T. 850, 852, 947, 1065-1068, 1080).

At that point, the appellant and Jackson got into a verbal argument, then they struggled and the appellant pulled the homemade shank knife out of his pocket and stabbed Jackson (T.

853, 913, 1031, 1034, 1066, 1159). Jackson suffered three wounds: one small stab above the rib cage; a larger stab in the back that hit his shoulder blade; and the fatal wound, a stab to the front that penetrated his chest cavity, went through his left lung, and punctured his aorta (T. 669-671). Then the appellant reached into the shower from the hallway and grabbed a can (T. 1020, 1031-1032). He poured some strong smelling, caustic substance onto Jackson's face and neck, then tried to light some matches (T. 1015, 1017, 1021, 1032, 1069). Inmate Stanley Williams came over to the appellant, told him not to light Jackson on fire, and urged him to leave Jackson alone (T. 1016-1017, 1068, 1177). The appellant then left the dorm, walked to the administration building, and told Corrections Sgt. Robert Smallwood "I stabbed the bitch and I hope he's dead" (T. 735, 783, 785).

At an interview that afternoon, the appellant waived his constitutional rights and told Polk County Sheriff's Det. Robert Ore and Corrections Inspector Dennis Williams that he had not intended to stab or kill Jackson (T. 1096, 1117-1118, 1144, 1152, 1162, 1173, 1176, 1181, 1184, 1193). According to his statement, he'd had the knife for months, and had taken it with him to Jackson's cell because he usually carried it, and he knew Jackson had a knife and he wasn't sure how Jackson would react to seeing the appellant after the argument they'd had the day before (T. 1157, 1180, 1181, 1182). He was pulling the knife out when Jackson grabbed his arm, then when Jackson released his arm it

thrust forward and Jackson was accidentally stabbed (T. 1155-1157, 1159-1160). He didn't realize Jackson was seriously hurt, but thought he was faking it (T. 1161, 1178). Then he poured paint sealer on Jackson, because he wanted to humiliate Jackson for the way Jackson had been treating him, going back and forth between the appellant and Capers (T. 1157, 1179, 1186). The appellant stated that he didn't understand why Stanley Williams had been concerned the appellant was going to light Jackson on fire, because the appellant never brought the matches out from his pocket out or tried to light them (T. 1177-1178, 1191-1192). The appellant also admitted that he had taken the sealer and matches intending to pour the sealer on Tony Capers and then light Capers on fire (T. 1189, 1192).

SUMMARY OF THE ARGUMENT

I. The trial court did not err in denying the appellant's request to give a special instruction to the jury on heat of passion. The instructions given were sufficient to advise the jury on the element of premeditation. In addition, the instruction requested was inconsistent with the appellant's theory of defense, since he testified that he never intended to kill the victim and that the stabbing was accidental.

II. The trial court did not err in failing to secure a new competency evaluation when the appellant disrupted the trial. There were no reasonable grounds to indicate to the court that the appellant's competency might be of concern.

III. The trial court did not err in allowing the appellant to waive his presence during part of the jury selection process. The court conducted an extensive inquiry to insure that the appellant understood his right to be present and that he clearly desired to waive that right.

IV. The trial court's finding that the aggravating circumstances outweighed the mitigation offered in this case and therefore compelled imposition of the death penalty was consistent with all applicable law and constitutional principles. The record does not support the appellant's argument that the court felt that a death sentence was mandatory simply because the appellant was already serving a life sentence for a prior murder conviction.

V. The trial court did not err in its consideration and evaluation of the mitigation evidence presented by the defense. As noted in the sentencing order, the court found the statutory mental mitigators to exist, but declined to accord much weight to this mitigation since the facts of the offense demonstrated that the appellant murdered Jackson in a manner consistent with a deliberate, rational plan. The court also considered the nonstatutory mitigating evidence presented by the defense, but concluded that the aggravating factors outweighed all of the mitigation.

VI. This Court has consistently rejected the appellant's argument that the trial court erred in denying the appellant's request to instruct the jury on the specific nonstatutory mitigating factors identified by the defense.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S REQUESTED JURY INSTRUCTION THAT A MURDER COMMITTED IN THE HEAT OF PASSION COULD NOT BE CONSIDERED PREMEDITATED

The appellant's first issue challenges the trial court's denial of his requested jury instruction on heat of passion. The prosecutor objected to the giving of the instruction, suggesting that a heat of passion defense was already included in the instruction defining excusable homicide (T. 1228). The court agreed, and denied the appellant's request to give the special instruction. The appellant has failed to demonstrate any abuse of discretion in the trial court's refusal to give this instruction, and therefore he is not entitled to a new trial on this basis.

In Kramer v. State, 619 So. 2d 274, 277 (Fla. 1993), this Court rejected Kramer's argument that he was entitled to special instructions on the heat of passion killing. Noting that such instructions are within the discretion of the trial court, this Court found no abuse of that discretion "in failing to give special instructions not required by applicable law." 619 So. 2d at 277. This finding applies equally in the instant case.

It is well settled that the correctness of a jury charge should be determined by the consideration of the whole charge. Barkley v. State, 152 Fla. 147, 10 So. 2d 922 (Fla. 1942); Anderson v. State, 133 Fla. 63, 182 So. 643 (Fla. 1938). The

denial of a requested jury instruction cannot be deemed error where the substance of the charge was adequately covered by the instructions as a whole, and the charges as given are clear, comprehensive, and correct. Bolin v. State, 297 So. 2d 317, 319 (Fla. 3d DCA), cert. denied, 304 So. 2d 452 (1974); Roker v. State, 284 So. 2d 454, 455 (Fla. 3d DCA 1973). In this case, the jury was completely and thoroughly instructed on the definition of premeditation, the necessity of finding that element in order to return a first degree conviction, and that the distinction between first and second degree murder turns, in large part, on the existence of premeditation (T. 1364-1366). This Court has recognized that the standard jury instruction on premeditation is adequate to properly instruct the jury about the element of premeditated design. Spencer v. State, 645 So. 2d 377, 382 (Fla. 1994). Therefore, there is no error shown in the trial court's refusal to give the special heat of passion instruction requested in this case.

Furthermore, the state disagrees with the appellant's contention that any premeditation which is motivated by "passion" based on provocation is not premeditation. Simply because there have been cases which held that the state failed to prove the element of premeditation, and those cases involved crimes of passion, does not give rise to the absolute argument suggested herein that passionate killings can never, as a matter of law, be considered premeditated. "Passages from appellate opinions, taken out of context, do not always make for good jury

instructions." Sarduy v. State, 540 So. 2d 203, 205 (Fla. 3d DCA 1989). The reporters are full of cases upholding first degree, premeditated murder convictions based on killings which were clearly motivated by passion. In fact, this Court has frequently examined crimes of passion when the death penalty has been imposed, and although typically striking the aggravating factor of cold, calculated and premeditated in such cases, consistently affirms the first degree, premeditated murder convictions. See, Kramer, 619 So. 2d at 278; Douglas v. State, 575 So. 2d 165 (Fla. 1991); DeAngelo v. State, 616 So. 2d 440, 442 (Fla. 1993) (while murder itself may have been grounded in passion, murder was clearly contemplated in advance).

Certainly the law recognizes that a person's mind may be so clouded by passion as to defeat the person's ability to premeditate a murder. However, since the jury instructions on premeditation, first degree, and second degree murder adequately conveyed to the jury that no more than a second degree conviction can be found in such instance, the special requested instruction on heat of passion was not necessary.

In addition, even if the requested instruction is accepted as a accurate statement of the law, the failure to give the instruction cannot be deemed error since it was not consistent with the theory of defense offered at trial. In the appellant's statement following the stabbing, the appellant maintained that he never intended to kill Jackson, and that the stabbing was purely accidental (T. 1162, 1173, 1176, 1181, 1184, 1193).

Defense counsel's closing argument emphasized this theory, with counsel noting that appellant's statement was true, and repeatedly asserting that this murder was an accident (T. 1259, 1261, 1265, 1270-1274). Although the appellant's brief now claims that his statement to the police supports either an excusable homicide defense or a defense that the killing was intentional but not premeditated (Appellant's Initial Brief, p. 26), the suggestion of an intentional killing is simply not supported by the statement, in which the appellant repeatedly denies any intent to kill Jackson (T. 1162, 1173, 1176, 1181, 1184, 1193).

In addition, there was no evidence presented of any "adequate provocation" as would be required under the special instruction requested by the appellant. Although he refers to his relationship with Jackson generally as providing provocation for his actions in stabbing Jackson, the relationship had been going on for some time, Jackson's relationship with Capers had been going on for some time, and the most recent argument the appellant had with Jackson was the day before the stabbing. Thus, the appellant had sufficient time to cool off and reflect upon his reaction, unlike those cases cited by the appellant where adequate provocation was found as a matter of law when a defendant, for example, came home to find his wife in bed with the victim. The absence of immediate provocation at the time of the offense supports the conclusion that there was no evidence to support any theory of defense as described in the requested jury

instruction, and demonstrates that the court below could not have committed prejudicial error in the denial of this instruction.

The appellant also suggests that a new trial is warranted due to fundamental error committed by the prosecutor telling the jury, without objection, that heat of passion was only relevant to excusable homicide and a crime of passion could in fact be premeditated murder. This suggestion is without merit. In fact it cannot be reviewed, even for fundamental error, because the appellant has not identified any specific comments as objectionable, but simply cites to eight pages from the transcript of the prosecutor's closing argument. Furthermore, those eight pages are from the prosecutor's comments about the definition of excusable homicide, and the prosecutor later discussed the definition of second degree murder in another part of his closing argument (T. 1337-1343). When viewed in the context of his entire argument, the prosecutor's comments in the pages cited by the appellant were not improper and could not have misled the jury.

The appellant's reliance on Davis v. Zant, 36 F.3d 1538 (11th Cir. 1994), to establish fundamental error in this case is misplaced. In that case, the prosecutor intentionally misrepresented the facts to the jury. In the instant case, the prosecutor did not misrepresent facts, and did not argue that there was no law to support the appellant's theory of defense. Rather, the prosecutor contended that the facts did not support the appellant's theory of defense, since the appellant's theory

was that he did not premeditate the murder and that this case "screams out for premeditation" (T. 1344). The prosecutor went on to outline these facts, including the appellant's getting the murder weapon and paint sealer in advance and taking them into the victim's dorm; asking where the correction officers were located; waiting to catch the victim coming out of his cell by himself; and inflicting three stabs wounds on the victim (T. 1344-1346).

On these facts, the trial court did not err in denying the appellant's special requested jury instruction on heat of passion. The jury was well aware that it must find the murder to have been premeditated in order to convict the appellant as charged. The fact that this premeditation may have been motivated by emotion did not preclude a finding of premeditation as a matter of law. Therefore, the appellant is not entitled to a new trial on this issue.

ISSUE II

WHETHER THE TRIAL COURT ERRED IN REFUSING TO HAVE THE APPELLANT'S COMPETENCY REEVALUATED AFTER THE APPELLANT DISRUPTED THE TRIAL

The appellant's next claim suggests that the appellant was incompetent at the time of his trial, and that the court below should have pursued a reevaluation of his competency after he disrupted the trial. Although the appellant has framed this issue as challenging the trial court's "denying defense counsel's request to reevaluate the appellant's competency," a review of the record demonstrates that no such request was made. It is true that when the appellant, near the end of trial, tried to tip over a table and stormed out of the courtroom in anger, defense counsel told the judge that he was concerned about the appellant's ability to make the decision of whether to remain in the courtroom and commented "I just don't know whether he's even competent" (T. 1249). The appellant is apparently construing this comment as a request for a new competency evaluation, but since the comment was obviously a comment and not a request, this issue should be considered as whether the court erred in failing to suspend the trial and order a new competency evaluation on its own.

Under the rules of criminal procedure, of course, a trial court has a continuing duty to insure that a defendant is competent during the course of the trial. Fla.R.Crim.P. 3.210(b). However, a court will not be found to have violated

this rule unless it ignored clear indications that a competency evaluation was required. Wuornos v. State, 644 So. 2d 1012, 1017 (Fla. 1994); Hodges v. State, 595 So. 2d 929, 932 (Fla.) vacated on other grounds, ___ U.S. ___, 121 L. Ed. 2d 6 (1992). In this case, there was no reasonable basis for suggesting that the appellant was incompetent, and therefore the appellant is not entitled to relief in this issue.

Prior to trial, the appellant had been found competent by Dr. William Kremper and Dr. Gary Ainsworth (T. 1457-1458, 1561). When defense counsel expressed concern about the appellant's competency near the end of the state's case, the judge concluded that he should not second guess this determination (T. 1249). The appellant now argues that the court failed to order a new competency evaluation "because the court was skeptical about the ability of mental health experts to make such determinations" (Appellant's Initial Brief, p. 35). Rather than expressing skepticism, the trial judge appeared to be expressing faith that the pretrial determination of competency remained valid. To support his argument, the appellant outlines "skepticism" which he attributes to the trial judge because the judge questioned Dr. Dee about his penalty phase conclusions, which seemed inconsistent with the judge's personal observations about the appellant. Clearly, the appellant's speculation that the trial judge only refused to order a new competency hearing because the judge did not believe such a determination could be made is unwarranted. Rather, the judge was indicating that there was no

reason, based on the appellant's behavior as observed by the judge during the course of the trial, to question the pretrial determination of competency.

The cases cited by the appellant are clearly distinguishable. In Pridgen v. State, 531 So. 2d 951 (Fla. 1988), this Court remanded for resentencing where the record reflected "reasonable grounds to believe" that Pridgen was not mentally competent to continue to stand trial during the penalty phase of the proceeding. Pridgen's counsel had approached the trial judge prior to the penalty phase proceeding about his concerns regarding Pridgen's competency to stand trial. A medical expert testified that Pridgen was probably incompetent to stand trial though he could not say that to a medical certainty. During the penalty phase, Pridgen exhibited unusual behavior and gave a rambling speech to the jury asking to be executed. This Court concluded that if Pridgen was incompetent during the penalty phase of the trial, his decision not to offer any defense to the state's recommendation of death could not stand. Therefore, this Court held that the judge erred in declining to stay the sentencing portion of the trial for the purpose of having Pridgen re-examined by experts and for refusing to hold a new hearing on Pridgen's competency to continue to stand trial. 531 So. 2d at 955.

In Nowitzke v. State, 572 So. 2d 1346 (Fla. 1990), this Court recognized that the obligation to order a competency examination and conduct a hearing when there are reasonable

grounds to believe that the defendant is not mentally competent is a continuing one. This Court agreed with Nowitzke's claim that the trial court erred in refusing to order a second competency hearing immediately prior to trial, where the record showed that on the Friday before the trial was to begin Nowitzke rejected a plea offer stating that he believed he would be released on July 4, 1989, because it was Independence Day and because of the number of letters in his three names. Nowitzke stated that he obtained this information from a judge in his dreams. He laughed at the possibility of the death sentence, telling his lawyers that the trial was a necessary "step" he must go through; but since he would be spiritually released on July 4, 1989, he could not be executed. Nowitzke's attorney conveyed this information to the judge and moved for a competency hearing. The trial judge summarily denied the motion on the basis of the competency evaluation made three months earlier when Nowitzke had been returned for trial from the North Florida Treatment Center.

The facts involved in Nowitzke and Pridgen are strikingly different than those in the instant case. Beyond the one angry outburst by the appellant which came three pages in the transcript before the state rested its case, there was absolutely no indication that the appellant's competency was an issue. The appellant claims that his behavior during voir dire, such as complaining about the racial composition of his jury and his lack of access to the law library, indicated that he was irrational and possibly incompetent. The undersigned has read many trial

transcripts where defense attorneys offered similar complaints, yet no one characterized them as "self-defeating emotional outbursts" (Appellant's Initial Brief, p. 35) or suggested that these attorneys were irrational or incompetent. It should be noted that the appellant's complaints during voir dire did not come screaming from the defense table, but were directed to the judge, out of the presence of the jury, in response to the judge's questions (T. 132, 206-208, 358-359). Thus, this Court should not look behind these complaints "to manufacture a lack of competency." Wuornos, 644 So. 2d at 1017.

The outburst near the end of trial occurred because the appellant disagreed with the testimony being offered -- that a witness has previously stated that the appellant had matches at the time of the stabbing and was attempting to strike the matches and light Jackson on fire (T. 1244). Rather than demonstrating that the appellant was irrational and out of touch with reality, the anger indicates that the appellant was paying close attention to the testimony, and understood that it was very damaging to his defense. Furthermore, the outburst is entirely consistent with the later penalty phase testimony that the appellant was impulsive, tended to overreact, and had difficulty controlling himself (T. 1468, 1478, 1489, 1516, 1529). This is a far cry from the rambling, disjointed, and irrational statements made by Nowitzke and the medical testimony that Pridgen was probably incompetent which this Court held should have put those trial judges on notice of the need for competency evaluations.

Furthermore, the appellant contends that any error could not have been cured when the court allowed time the following morning for him to be seen by Dr. Kremper, because "[c]ompetency cannot be determined retroactively" (Appellant's Initial Brief, p. 36-37). Under this theory, a court could never satisfy its obligation to insure that a defendant is competent during trial unless there was a mental health expert actually sitting in court, prepared to make an on-the-spot competency evaluation should the need arise. None of the cases cited by the appellant indicate that an evaluation within 24 hours is insufficient as retroactive. Obviously, the fact that the appellant was seen by Dr. Kremper the next day and no further concerns about his competency were directed to the court below supports the conclusion that the trial court did not err in failing to order a reevaluation of the appellant's competency.

In Krawczuk v. State, 634 So. 2d 1070 (Fla.), cert. denied, ___ U.S. ___, 130 L. Ed. 2d 143 (1994), this Court rejected the defendant's argument that his mental state had deteriorated prior to trial and that a further psychiatric evaluation was warranted, finding that "nothing in the record show[ed] a reasonable ground for the court to order such on its own." 634 So. 2d at 1073. Similarly, in the instant case, nothing in the record supports the appellant's argument that a new competency evaluation was indicated. Therefore, there was no error when the trial judge continued the trial following the appellant's angry outburst, and the appellant is not entitled to a competency hearing or a new trial on this issue.

ISSUE III

WHETHER THE TRIAL COURT ERRED IN GRANTING THE APPELLANT'S REQUEST TO LEAVE THE COURTROOM DURING PART OF JURY SELECTION

In his third issue, the appellant argues that a new trial is necessary due to his voluntary absence from the proceedings during part of the voir dire. It must be noted initially that this issue has not been preserved for appellate review. The appellant claims that his waiver of his right to be present during part of the voir dire was not valid because he was leaving to protest the way the trial was being conducted and he may not have been competent at the time. However, any suggestion that the waiver was invalid was never presented to the trial court, and in fact defense counsel asserted to the contrary that the appellant's waiver was "freely and voluntarily made," and that the court could not force the appellant to attend the trial against his will (T. 131). Therefore, the validity of the appellant's waiver cannot now be challenged on appeal. Steinhorst v. State, 412 So. 2d 332 (Fla. 1982).

A review of the trial transcript reveals that this issue was actually foreordained by the prosecutor when the appellant indicated that he wanted to be excused from attending some of the jury selection. A lunch break was taken during the state's questioning of potential jurors, and upon return defense counsel advised the judge that the appellant "has indicated to me that he would just as soon not sit through the jury selection process"

(T. 128). Counsel had explained to the appellant that he had a constitutional right to be present, but that this right could be waived like any other constitutional right (T. 128-129). The prosecutor responded

> But even if the case law does allow him to give up his right to be here, I think this is such a critical stage of the proceedings that I would oppose him being removed from the courtroom unless it becomes absolutely necessary.
>
> One thing I want to point out is simply because of the history this is. Previously when Mr. Kilgore had entered a plea before Judge Strickland and then later was coming back attacking that, the argument that was made at that time was that he was suffering some medical problems, had either had some medication or not had some medication. But because of medical conditions didn't know what he was doing at the time that he entered the plea.
>
> What my concern is is that if he is allowed to absent himself that some later time he will come back and claim that he's not really knowing what he's doing right now by making the decision not to be here and we will be facing that particular challenge. That's my main concern. I just don't want there to be any potential of a court later looking at this, him not being here, and saying that he gets a new trial because of that. That's my only concern.

(T. 129-130). Defense counsel countered that the appellant was not being removed, he was simply asking to waive his right to be present (T. 131). Counsel stated "I think it's a free and voluntary waiver. The Court can satisfy itself it's a free and voluntary waiver." (T. 131). The judge advised the appellant that he would research the issue and make a decision when he had a chance to review the case law, but in the meantime they were going

to go forward with jury selection (T. 131-132). The appellant complained at that time that there were only five black people in the jury group (T. 132).

Following the next recess, the judge addressed the appellant and asked if he still wanted to be excused (T. 204). When the appellant stated he wanted to go, the judge said that he would allow this, but he needed to ask the appellant some questions first (T. 205). The judge then conducted a thorough inquiry to insure that the appellant was aware of his right to be present, the consequences of waiving his right to be present, and his right to come back at any time he desired to come back to court (T. 205-206). When the judge asked the appellant if he was ill, the appellant responded that he was not, but that he just didn't want to sit through it all (T. 206).

The appellant now claims, just as the prosecutor prophesied, that he did not know what he was doing when he asked to be excused, and therefore he should be the beneficiary of a new trial. This claim is without merit. The appellant has not identified any shortcomings in the inquiry conducted by the trial court, and relies only on the suggestion that his reasons for leaving the courtroom -- that he simply didn't want to sit through jury selection, and that he was protesting the racial composition of his jury and the court's refusal to appoint a new attorney -- as evidence that the court's conclusion that "Mr. Kilgore is knowingly, intelligently waiving his right to be present at trial" was mistaken (T. 210).

The appellant has not raised any issue in this appeal regarding the racial composition of his jury venire, or the trial court's failure to appoint a new attorney when the appellant indicated that he did not "feel comfortable" with his representation by Mr. Alcott. Yet while conceding that no new panel or new attorney was required, he apparently believes the judge should have sua sponte declared a mistrial and afforded new counsel in order to keep the appellant happy and in attendance. There is no support in law or in fact for the appellant's suggestion that a waiver of the right to be present is invalid where is it done in protest of the way the trial is being conducted. Since the waiver clearly was valid, as found by the trial court, there was no reason for the court to secure the appellant's personal agreement with the peremptory strikes made during his absence, and there is no reason to remand this cause for a new trial.

The appellant also suggests, without explaining, that he may not have been mentally competent to waive his right to be present (Appellant's Initial Brief, p. 42). The appellant does not even attempt to identify any indications in the record to support his allegation of possible incompetence. Therefore, this claim is also without merit and does not cast doubt upon the trial court's conclusion that the appellant's waiver was knowing and intelligent.

It is well settled that a defendant, even in a capital case, may knowingly and voluntarily waive of his right to be present.

Peede v. State, 474 So. 2d 808. 812 (Fla. 1985), cert. denied, 477 U.S. 909 (1986). The appellant's reliance on Hall v. Wainwright, 733 F.2d 766 (11th Cir. 1984), cert. denied, 471 U.S. 1107, 1111 (1985), to abrogate a defendant's right to waive his right to be present is not persuasive. Hall only suggests that this right cannot be waived during those critical times when a defendant's presence is necessary to contribute to the fairness of the trial, and justice would be thwarted by his absence. In the instant case, the appellant has not established how justice was thwarted by the trial court's granting his request to leave.

Furthermore, other federal courts do not agree with the dicta from Hall upon which the appellant relies. In Campbell v. Wood, 18 F.3d 662, 670-672 (9th Cir. 1994), the court concluded that a capital defendant can waive his right to be present at trial. In doing so, the court carefully analyzed several United States Supreme Court decision, including Snyder v. Massachusetts, 291 U.S. 97, 54 S. Ct. 330, 78 L. Ed. 674 (1934), "a capital case in which the Court observed that the privilege of presence 'may be lost by consent or at times even by misconduct.'" 18 F.3d at 671. See also, Illinois v. Allen, 397 U.S. 337, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970) (criminal defendant may lose right to be present at trial by consent or misconduct).

Having failed to offer any meaningful reason to question the trial court's finding that the appellant's waiver of his right to be present was valid, the appellant is not entitled to a new trial on this issue.

ISSUE IV

WHETHER THE TRIAL COURT ERRED IN DETERMINING THAT THE AGGRAVATING FACTORS OUTWEIGHED THE MITIGATING FACTORS

The appellant's next claim faults the trial judge for feeling "obliged" to impose the death penalty on the facts of this case. According to the appellant, the trial judge believed a death sentence was mandatory since the appellant was already serving a life sentence in prison when the instant murder was committed. However, there is nothing in the transcript of the trial or the judge's written sentencing order which supports the suggestion that the judge misunderstood Florida law or disregarded the evidence presented in mitigation once the two aggravating factors were found to apply. To the contrary, the judge's comments and order reveal that the mitigating evidence was considered and weighed against the aggravating factors in his determination that the death penalty should be imposed.

The sentencing order rendered herein specifically addresses the two statutory aggravating factors proposed by the state, then examines each mitigating factor included in the statutes, then discusses the nonstatutory mitigating evidence offered by the defense (R. 123-127). The appellant seizes upon a statement in the trial judge's conclusion that in some circumstances, the state not only has the right, but the obligation, to execute convicted murders, and that this is one of those cases. This sentence does not, as the appellant claims, indicate that the

judge felt that the death penalty was a mandatory sentence in this case, but only that the judge felt this was a case clearly demanding and deserving of the death penalty. The judge was referring to the state's moral obligation, not legal obligation, to seek the death penalty on the facts of this case. The judge expressly noted that his decision to impose the death sentence was based upon his independent determination that the aggravating circumstances "far" outweighed all of the statutory and nonstatutory mitigating circumstances involved (R. 126).

In Johnson v. State, 593 So. 2d 206 (Fla.), cert. denied, ___ U.S. ___, 121 L. Ed. 2d 75 (1992), this Court recognized as meritless Johnson's claim that the trial court erroneously applied the death penalty as if it was mandatory, apparently based on the judge's statement that under the evidence and law "a sentence of death is mandated." 593 So. 2d at 209. By considering and weighing the mitigating evidence presented, the trial judge in this case insured that the imposition of the death penalty was an individualized sentencing determination as required by the Eighth Amendment. Since the record does not support the appellant's assertion that the trial judge believed that he had no discretion but was mandated by law to impose the death penalty in this case, he is not entitled to a new sentencing hearing. Therefore, this Court must deny relief on this issue.

ISSUE V

WHETHER THE TRIAL COURT ERRED IN ITS CONSIDERATION OF MITIGATING FACTORS

The appellant next attacks the trial court's consideration of the mitigating evidence presented in this case. Specifically, the appellant alleges that the court's findings as to the statutory mental mitigators were inconsistent and contradictory, and that the court ignored some of the nonstatutory mitigating evidence presented. Each of these allegations are clearly refuted by the record.

In his sentencing order, after acknowledging that the expert testimony presented during the penalty phase established that both of the statutory mental mitigating factors existed, the trial judge noted

> Concerning the mitigating circumstances, I have found that both statutory mental health circumstances were proved during the penalty phase. Nevertheless, there is little or nothing about the facts of this case from which one could conclude that at the time of the murder, or during the twenty-four hours preceding the murder, Mr. Kilgore was under the influence of extreme mental or emotional disturbance. Indeed, the accomplishment of this murder necessitated considerable preparation, cunning and stealth which is inconsistent with extreme disturbance. The day before the killing he borrowed the murder weapon from another inmate and prevailed upon a third inmate to refrain from emptying a garbage can which contained the solvent he intended to pour over the victim's body. Immediately before the stabbing it was necessary for Mr. Kilgore to sneak into the victim's dorm without being seen by the guards. In order to accomplish this he asked a resident of the dorm where the guards were

> located. After he secured entry into the dorm, he went to the wing where the victim resided and, seeing that the victim had not come out of his room, smoked a cigarette with another inmate until the victim came into the hall. He then accosted the victim and stabbed him three times with a knife. After the murder, Mr. Kilgore calmly walked to the administration building where he told the guards, "I stabbed the bitch."

(T. 126). The appellant apparently believes that this discussion in the order indicated that the trial judge found, and then rejected, the statutory mental mitigators. However, it is clear from the judge's statements that he found the mitigators to exist, but determined that they were not entitled to great weight because they were minimized by the facts of the case. In explaining how the facts of this murder diminished the existence of the statutory mitigators, the judge was simply defending his conclusion that the mitigation was far outweighed by the aggravating circumstances unquestionably proven by the state.

Similarly, the appellant has not established that the trial judge failed to consider all of the nonstatutory mitigating evidence presented. As to this evidence, the trial judge noted

> In addition to the two statutory mitigating circumstances, the defense offered evidence of non-statutory mitigating circumstances. I considered all of the evidence presented. Specifically, I considered the evidence that Mr. Kilgore was raised in an environment of extreme poverty. I considered the evidence that as a child he was disciplined by being beaten. I considered the evidence that he quit school in the fifth grade. Finally, I considered the evidence that he is in poor physical and mental health.

(T. 125). Thus, the court expressly considered "all of the evidence presented" to establish any nonstatutory mitigating circumstances. Furthermore, the judge clearly found that the evidence supported these factors and that they were truly mitigating in nature, since he expressly weighed the nonstatutory mitigation against the aggravating circumstances (T. 126).

The appellant recites the enumerated factors included in his proposed jury instruction, and faults the trial judge for failing to expressly evaluate each of those factors. However, the court should not be required to comb through requested jury instructions in order to identify potential mitigation. The defendant has the burden of identifying any mitigating factors he would like the court to consider in imposing sentence. Lucas v. State, 568 So. 2d 18, 24 (Fla. 1990). The appellant cannot premise error on the trial court's failure to evaluate factors which counsel failed to argue to the court or otherwise bring to the judge's attention.

In sentencing the appellant to die for the murder of Pearl Jackson, the trial court complied with all applicable law, including the dictates of this Court's decision in Campbell v. State, 571 So. 2d 415 (Fla. 1990). He expressly evaluated the aggravating factors and mitigating circumstances, and insured adequate appellate review of his findings by delineating the reasons for his conclusion that the aggravating factors outweighed the mitigating factors involved. While he did not specifically discuss the nature of the appellant's relationship

with Jackson, this factor was clearly considered since it was a central basis for the expert testimony that the appellant was acting under emotional duress at the time of the stabbing (T. 1490, 1517, 1562). The trial court's failure to outline all of the factual support for the expert opinions that the statutory mitigating factors existed should not be deemed error, since the court expressly acknowledged the existence of the factors.

Finally, even if the sentencing order in this case is found to be insufficient, there is no reason to remand this cause for resentencing since it is clear from the judge's comments that any correction of an inadequate order would not result in the imposition of a life sentence. The appellant was serving a life sentence for murder at the time of the instant stabbing, and had a multitude of other prior violent felony convictions as well. The appellant has not disputed any of the strong aggravation found by the court below in this appeal. The trial judge noted the aggravating factors "far outweigh" all of the statutory and nonstatutory mitigating circumstances (T. 126). On these facts, any error relating to the sentencing order's failure to discuss every possible fact in mitigation is clearly harmless beyond a reasonable doubt, and therefore this Court should affirm the sentence as imposed. See, Wickham v. State, 593 So. 2d 191, 194 (Fla. 1991), cert. denied, ___ U.S. ___, 120 L. Ed. 2d 878 (1992); Cook v. State, 581 So. 2d 141, 144 (Fla.) ("we are convinced beyond a reasonable doubt that the judge still would have imposed the sentence of death even if the sentencing order

had contained findings that each of these nonstatutory mitigating circumstances had been proven"), cert. denied, 502 U.S. 890 (1991).

ISSUE VI

WHETHER THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S REQUESTED JURY INSTRUCTION ON NONSTATUTORY MITIGATING CIRCUMSTANCES

The appellant's final challenge concerns the trial court's refusal to instruct the jury on the particular individual nonstatutory mitigating factors advanced by the defense. This Court has consistently rejected this argument. Finney v. State, 20 Fla. L. Weekly S401, S404 (Fla. July 20, 1995); Jones v. State, 612 So. 2d 1370, 1375 (Fla. 1992), cert. denied, ___ U.S. ___, 126 L. Ed. 2d 78 (1993); Robinson v. State, 574 So. 2d 108 (Fla.), cert. denied, 502 U.S. 841 (1991).

The United States Supreme Court has also rejected the appellant's contention such an instruction is constitutionally required. In Boyde v. California, 494 U.S. 370, 110 S. Ct. 1190, 108 L. Ed. 2d 316 (1990), the challenged jury instruction advised the jurors to consider eleven factors in determining whether to impose a sentence of life or death. The last of these factors was "Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." This was the only factor that even remotely suggested that the jury could consider evidence about the defendant's character or background in mitigation of the offense. Boyde claimed that the jury instructions interfered with the jury's obligation to consider all relevant mitigating evidence, since the factor could be interpreted as limiting the jury's consideration to evidence

related to the crime rather than the perpetrator. The Supreme Court rejected Boyde's claim, holding that there was no reasonable likelihood that the jury applied the instruction in a way that prevented the consideration of constitutionally relevant evidence. 494 U.S. at 380.

The court's instruction in this case is more explicit than the one at issue in Boyde, since it clearly directed the jury to consider the appellant's character in mitigation (T. 1670). The appellant's jury was instructed to consider evidence presented during the guilt trial as well as the evidence presented during the penalty proceedings (T. 1668). And, of course, both the prosecutor and defense counsel had discussed the various nonstatutory mitigating circumstances for the jury to consider (T. 1624-1626, 1634-1644, 1661-1662).

The appellant has failed to demonstrate any error in the trial court's refusal to instruct his jury on the specific nonstatutory mitigating factors asserted by the defense. Therefore, he is not entitled to a new sentencing hearing on this issue.

CONCLUSION

Based on the foregoing arguments and citations of authority, the appellee respectfully requests that this Honorable Court affirm the judgment and sentence of the trial court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to PAUL C. HELM, Assistant Public Defender, Polk County Courthouse, P. O. Box 9000--Drawer PD, Bartow, Florida, 33830, this 25th day of August, 1995.

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