IN THE SUPREME COURT OF FLORIDA

MICHAEL ALAN DUROCHER,

APPELLANT,

-VS-

STATE OF FLORIDA,

APPELLEE.

CASE NO. 74,442

ON APPEAL FROM THE CIRCUIT COURT OF
THE FOURTH JUDICIAL CIRCUIT, IN
AND FOR DUVAL COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

Appellee accepts appellant's statements of the case and facts with the following additions and exceptions:

1. On January 23, 1989, the date of the confession appellant sought to suppress below, appellant was in jail awaiting sentencing on his conviction of the first degree murder of Dwayne Eddie Childers. (T 78-79). The jury had returned a recommendation of life imprisonment, but the judge had not yet imposed sentence. (T 79).

2. Appellant had been represented by the Public Defender's Office in the Childers case. (T 39). He and his public defender had signed a form styled "Edwards Notice" by the Public Defender's Office, and had provided a copy to the State Attorney's Office. (T 40-41)(Defendant's Exhibit 1). The purpose of the "Edwards Notice" was to advise the police that the defendant did not wish to be questioned without counsel present. (T 41).

3. In addition to the "Edwards Notice," the Public Defender's Office had, within a day of appellant's being found guilty of the Childers murder, hand delivered to the police a letter requesting that no one speak to appellant without counsel present. (T 59).

4. On January 17, 1989, Detective John Bradley, who had investigated the Childers murder (T 77), received a telephone call from appellant's mental health counselor. (T 60). She advised him that appellant had asked her to call and that appellant wished to speak with Detective Bradley about another murder. (T 60-61).

5. Detective Bradley testified that he then contacted Assistant State Attorney Jon Phillips because he wanted him to be aware that appellant had initiated this contact. Detective Bradley further testified that he was not seeking the prosecutor's approval and would probably have seen appellant no matter what the Assistant State Attorney said. (T 62-63).

6. Assistant State Attorney Jon Phillips testified that they discussed whether it would be a good idea for Bradley to talk to appellant. He said "once [Bradley] satisfied me that [the contact] was, in fact, initiated by Mr. Durocher rather than by any State action, then I told him it was fine." (T 45). The prosecutor stated:

> [H]e didn't call me to ask me whether he should go . . . he was telling me what had happened and asking me whether I thought the evidence would be suppressed if he talked to Mr. Durocher on the basis of this contact and I said I did not think so.

(T 456).

7. The Assistant State Attorney further testified that although he had not seen the "Edwards Notice" filed in the Childers case, he was aware of the Public Defender's Office policy of filing such notices, but that those notices, in his opinion, did not confer any greater rights on a defendant than they already possessed. (T 50-51). He was also aware of the letter sent by the Public Defender's Office, and suggested that Detective Bradley show the letter to appellant to ensure that appellant was aware of his attorney's request. (T 51).

8. Detective Bradley testified that he went to see appellant on January 18, 1989. Detective Bradley showed appellant the letter and appellant said that although he knew he could have his attorney present, he chose to speak without his lawyer being there. (T 62). He also signed a written statement at the bottom of the letter, which said:

> On January 18, 1989, I contacted Detective Bradley and requested to speak with him. I am aware of the letter above and at this time I wish to speak with Detective Bradley without counsel present. I have not been promised anything or threatened to speak with Detective Bradley. Signed, Michael Durocher, January 18, 1989.

(T 64)(State's Exhibit 1).

9. Detective Bradley advised appellant of his constitutional rights, which he had appellant read back to him and initial. Appellant then signed the rights form. (T 65).

10. In the ensuing discussion, appellant inquired as to whether he could be guaranteed the death penalty if he gave the police information about other murders in which he was involved. (T 66). On learning that no guarantees were possible, appellant said he wanted to think about it. Detective Bradley was to be off for two days (Thursday and Friday) and then work two (Saturday and Sunday), so he told appellant if he changed his mind to call the Homicide Office, otherwise he would come back the following Monday. (T 69).

11. When Detective Bradley returned on Monday, he advised appellant again of his rights and appellant again signed the rights form. (T 70).

12. Appellant told Detective Bradley that he had decided to confess to another murder, and, if he received the death penalty, would give information on three more. (T 70).

13. Detective Bradley, later that afternoon, took appellant to the Homicide Office, where he was again Mirandized, (T 71-72), and gave a recorded confession. (T 76).

14. Detective Bradley compared the information appellant gave him with the information contained in the police file on the murder and found the two to be consistent. (T 74).

15. Appellant reviewed the transcription of the statement and signed and dated the bottom of the page. (T 76).

16. Detective Bradley testified that prior to the confession, appellant could not have been tied to the instant murder. (T 92).

17. Appellant's confession was read to the jury by Detective Bradley and the Assistant State Attorney. (T 472). In it, appellant reiterates that the interview was at his instance, that he had seen the letter from the Public Defender's Office and that he wished to waive his rights. (T 472-476). Appellant was specifically asked if he wanted a lawyer present during questioning and he refused. (T 476).

18. In his confession, appellant stated that he had happened to walk by the back door of a window decorations store on January 12, 1986, and noticed the back door was propped open. (T 479, 482). He decided it would be a good place to get the money and car that he would need to get to his father's house in Louisiana. (T 482). He stated:

> I was going to rob the man but after thinking about it decided it would probably be better to go ahead and kill him then that way the police could not pin it on me.

(T 483). Appellant walked home, got his gun, packed his clothes, and returned to the store. (T 482). When appellant demanded money, the victim told him there was none, the store dealt only in credit, and turned and sat down with his back to appellant. Appellant stated:

> After about -- I don't know, don't know what period of time it was, but after standing there for a while I had pulled the trigger. . . .

(T 485). After the clerk slumped to the floor, appellant took thirty to forty dollars from the victim's pockets and searched the store for money. (T 486). He then wiped fingerprints off the things he had touched, locked the store, and left in the victim's automobile. (T 486-487).

19. Before beginning the sworn statement, appellant told Detective Bradley that he had been very upset with his father and wanted to go to Louisiana and kill his father. (T 74).

20. The murder was committed on January 12, 1986, which was a Sunday. The store hours on that day were 12-4. (T 321).

21. Appellant also appealed his conviction in the Eddie Childers murder. That conviction was affirmed and appellant filed a motion for rehearing which is pending.

SUMMARY OF ARGUMENT

No violation of appellant's Sixth Amendment right to counsel occurred in the instant case because that right had not attached. No charges had been filed in this murder when appellant confessed, and the invocation of the right to counsel in the unrelated murder of which appellant had already been convicted did not operate to preclude appellant from initiating contact with the police and volunteering information on this case. Appellant did have a Fifth Amendment right to counsel of which he was advised, and which he waived.

The Assistant State Attorney's passing reference in his closing argument to appellant "smiling" did not constitute error. While the courts have been critical of comments on a defendant's demeanor, this has always been in the context of remarks which emphasized or unduly criticized a defendant's behavior at trial. This comment was *de minimis* in both nature and scope. Even were it found to be error, it must be found harmless, as appellant had confessed to the murder, and his trial counsel had already pointed out his personal idiosyncrasies to the jury.

The aggravating factor of prior conviction of murder was properly found. It was based on a judgement which was valid at the time of sentencing and has since been upheld by the appeals court.

There was no double consideration of the aggravating circumstances of murder committed in the course of a robbery and murder committed for pecuniary gain. While both are listed on the court's order, this is purely a matter of form. The trial judge made it quite clear that he considered the two factors merged; he also so instructed the jury. The trial judge must be presumed to have followed his own instructions.

The finding that the crime was committed in a cold, calculated and premeditated manner was also proper. Appellant sighted his victim and, deciding to rob and kill him, proceeded to walk home, arm himself, pack his clothes, and effectuate his plan. This evidence of preparation and ample time for reflection demonstrates the "heightened premeditation" necessary to apply this factor.

Finally, there was no error in excusing prospective juror Dorsey for cause. The trial court has broad discretion in such matters and the record supports a finding that Ms. Dorsey's views would have substantially impaired her ability to perform her duties as a juror. Because the trial judge was present and able to observe Ms. Dorsey's demeanor, his ruling is entitled to great deference.

The judgment and sentence of the trial court must be affirmed.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS EVIDENCE. (Restated)

Appellant argues incorrectly that his Sixth Amendment right to assistance of counsel was violated when Detective Bradley spoke with him at his request. This argument must fail. Appellant's rights under the Sixth Amendment had not yet attached in the instant case, and were thus incapable of being violated. The Sixth Amendment right to counsel attaches where adversary proceedings have been initiated. *Brewer v. Williams,* 430 U.S. 387, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977). It is undisputed that no charges had been filed against appellant in the murder of Thomas Underwood. In fact, the testimony at the suppression hearing indicated that appellant was not even under suspicion for this crime. (T 90-92).

At that hearing, Detective John Bradley testified that he had been contacted by appellant's mental health counselor while appellant was in jail awaiting sentencing in the murder of Eddie Dwayne Childers. (T 60, 77). The counselor told Detective Bradley that appellant had asked her to contact him, and that appellant wanted to speak with him about "some other murder case." (T 61). Detective Bradley told appellant that he was in receipt of a letter from the Public Defender's office requesting

that the state not speak with appellant without counsel present, however, appellant advised him that he did not want his attorney present. He signed a statement to that effect at the bottom of the letter. (T 62, 64). He was Mirandized then, (T 64) but because the Detective could not guarantee the death penalty in return for a confession, appellant wanted more time to think about it. (T 67). He was Mirandized two more times four days later when the Detective again spoke with him (T 70), and took his confession. (T 72).

Circumstances such as those presented here are precisely what the United States Supreme court had in mind when it said, in *Maine v. Moulton*, 474 U.S. 159, 106 S.Ct. 477, 88 L.Ed.2d 481 (1985):

> To allow the admission of evidence obtained from the accused in violation of his Sixth Amendment rights whenever the police assert an alternative, legitimate reason for their surveillance invites abuse by law enforcement personnel in the form of fabricated investigations and risks the evisceration of the Sixth Amendment right recognized in Massiah. On the other hand, to exclude evidence pertaining to charges as to which the Sixth Amendment right to counsel had not attached at the time the evidence was obtained, simply because other charges were pending at that time, would unnecessarily frustrate the public's interest in the investigation of criminal activities. Consequently, incriminating statements pertaining to pending charges are inadmissible at the trial of those charges, notwithstanding the fact that the police were also investigating other crimes, if, in obtaining this evidence,

> the State violated the Sixth Amendment by knowingly circumventing the accused's right to the assistance of counsel.

Id., at 180 (emphasis supplied). The Court was careful to note:

> Incriminating statements pertaining to other crimes, as to which the Sixth Amendment right has not yet attached, are, of course, admissible at a trial of those offenses.

Maine v. Moulton, *supra*, at 180, fn. 16.

That view was reiterated by this Court on facts very similar to those presented here, in *Kight v. State*, 512 So.2d 922 (Fla. 1987), *cert. denied*, 485 U.S. 929, 108 S.Ct. 1100, 99 L.Ed.2d 262 (1988). In *Kight*, the defendant was being held on a robbery charge and had been appointed counsel on that charge. He was also under investigation for an unrelated murder. Subsequent to a waiver of *Miranda* rights, Kight gave a detailed account of the murder. The account was read to the jury and Kight was convicted and sentenced to death. This Court, citing *Moulton*, *supra*, rejected Kight's claim that his Sixth Amendment rights were violated, saying:

> Kight had not been formally charged with the Butler murder at the time he made the statements he now seeks to suppress. Therefore, he had no sixth amendment right to counsel in connection with that charge at the time of interrogation.

Id., at 927.

The Sixth Amendment right to counsel had attached in the case upon which appellant had been convicted and was awaiting sentencing. It had not attached in the uncharged case to which he wished to confess. In *Parham v. State*, 522 So.2d 991 (Fla.3rd DCA 1988), the Court held voluntary and admissible a robbery confession which occurred while Parham was in custody and had representation on another, unrelated, crime. The Court found that Parham's Sixth Amendment right to counsel had not been violated because he had not yet been charged with the robbery. The same is true in this case.

Any suggestion that appellant was deprived of his right to counsel under the Fifth Amendment must also fail. Appellant unquestionably had a right to counsel during custodial interrogation. *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). He was advised of that right four times; he waived it four times. (T 62, 64, 70, 72). The Fifth Amendment demands no more than this.

Although the argument is not clearly developed, appellant seems to suggest that the Fifth and Sixth Amendment rights to assistance of counsel operated in concert here to either: 1) extend the Sixth Amendment right in the pending case to the uncharged case, or 2) prevent appellant from waiving his Fifth Amendment right in the uncharged case without first consulting the attorney representing him in the pending case. This suggestion is unsupported by any of the cited authorities and must be rejected.

Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981) stands for the proposition that once an individual has invoked his Fifth Amendment right to have counsel present during custodial interrogation, he may not be subjected to further interrogation "until counsel has been made available to him, unless the accused himself initiates further communication, exchanges or conversations with the police." **Id.**, at 484-485. *Michigan v. Jackson*, 475 U.S. 625, 106 S.Ct. 1404, 89 L.Ed.2d 631 (1986) stands for the proposition that once the Sixth Amendment right to counsel has been invoked the police may not initiate further interrogation, and any waiver of rights connected with a police-initiated interrogation is invalid. In *Arizona v. Roberson*, 486 U.S. 675, 108 S.Ct. 2093, 100 L.Ed.2d 704 (1988) the Court expanded its prior rulings to hold that once a defendant requests counsel, the police may not reinitiate interrogation even on an unrelated charge.

What these case require is the opportunity to consult with counsel, and the cessation of police-initiated interrogation <u>if</u> an attorney is requested. Since the contact here was solicited by the appellant himself and no request for counsel was made, appellee submits that *Edwards*, *supra*, *Michigan v. Jackson*, *supra*, and *Roberson*, *supra*, are inapposite here. See *Patterson v. Illinois*, 487 U.S. 285, 108 S.Ct. 2389, 101 L.Ed.2d 261 (1988) (noting that the essence of *Edwards* and its progeny is the preservation of the integrity of an accused's <u>choice</u> to communicate with police only through counsel.)

Nor do the cited cases even remotely support the proposition that a defendant must receive counsel's permission to waive his Fifth or Sixth Amendment rights, or have counsel voice the waiver for him. The Supreme Court recently spoke to this issue in *Michigan v. Harvey*, 4 FLW Fed S113 (March 5, 1990). There, in holding that a statement taken in violation of *Michigan v. Jackson*, *supra*, could be used for impeachment, the Court addressed the history and purpose of *Edwards*, *supra*, and its progeny. The Court said:

> In other cases, we have explicitly declined to hold that a defendant who has obtained counsel cannot himself waive his right to counsel. . . .
>
> [R]espondent's contention that a defendant cannot execute a valid waiver of the right to counsel without first speaking to an attorney is foreclosed by our decision in Patterson. Moreover, respondent's view would render the prophylactic rule adopted in Jackson wholly unnecessary, because even waivers given during defendant-initiated conversations would be per se involuntary or otherwise invalid, unless counsel were first notified.
>
> Although a defendant may sometimes later regret his decision to speak with police, the Sixth Amendment does not disable a criminal defendant from exercising his free will. To hold that a defendant is inherently incapable of relinquishing his right to counsel once it is invoked would be "to imprison a man in his privileges and call the Constitution."

Id., at S115 (citations omitted)(emphasis in original). Clearly, a defendant may validly and personally waive either the

Fifth or Sixth Amendment right to counsel without acting through or with the agreement of his attorney. See also, *Martin v. Wainwright*, 770 F.2d 918 (11th Cir.1985), *modified and reh. den.*, 781 F.2d 185, **cert.den.**, 479 U.S. 909, 107 S.Ct. 307, 93 L.Ed.2d 281 (1986)(waiver of Sixth Amendment right to counsel valid where defendant continued to press his request to speak to police even after reading and signing a note indicating knowledge that his attorney did not want him to speak without his permission.)

Appellant's final challenge to the trial court's ruling is based on an asserted violation of Rule 4-4.2 of the Rules of Professional Conduct. That rule states:

> In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer.

(Emphasis supplied). The comment to the rule notes:

> This rule does not prohibit communication with a party, or an employee or agent of a party, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between two (2) organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter.

This case differs from *Suarez v. State*, 481 So.2d 1201 (Fla. 1985), upon which appellant relies, in two crucial respects: first, the communication was not made by the prosecutor, (nor

even at his instance) and second, the communication involved a matter outside the scope of appellant's representation by the public defender. There was no ethical violation here.

Since appellant's Sixth Amendment right to counsel had not attached in the instant case, it could not be violated. Moreover, by his initiation of the contact with the police, his explicit rejection of the presence of an attorney, and his waiver of his *Miranda* rights, he validly waived any right to counsel he may have had. There is no requirement that a defendant's attorney agree to such a waiver or voice it on defendant's behalf. The trial court's ruling should be affirmed.

ISSUE II

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION FOR MISTRIAL. (Restated)

The standard of review of a trial court's ruling on a motion for mistrial in abuse of discretion. *DuFour v. State*, 495 So.2d 154 (Fla. 1986), *cert.den.*, 479 U.S. 1101, 107 S.Ct. 1332, 94 L.Ed.2d 183 (1987); *Marek v. State*, 492 So.2d 1055 (Fla. 1986). Abuse of discretion occurs when the trial court's action is arbitrary or capricious, i.e., where no reasonable person would adopt the view taken by the trial court. *Canakaris v. Canakaris*, 382 So.2d 1197 (Fla. 1980).

The same standard governs review of a trial court's ruling on an attorney's closing argument. "The conduct of counsel during the course of a trial is controllable in the discretion of the trial court, and a court's ruling will not be overturned absent a clear abuse of discretion." *Robinson v. State*, 520 So.2d 1 (Fla. 1988); *Davis v. State*, 461 So.2d 67 (Fla. 1984), *cert. denied,* 473 U.S. 913, 105 S.Ct. 396, 83 L.Ed.2d 330 (1984).

In the exercise of this discretion, "[W]ide latitude is permitted counsel arguing to a jury. . . ." *Breedlove v. State,* 413 So.2d 1, 8 (Fla. 1982), *cert. denied*, 459 U.S. 882, 103 S.Ct. 184, 74 L.Ed.2d 149 (1982). (Citations omitted). If, on review, error is found, the conviction should not be reversed unless "the error committed was so prejudicial as to vitiate the entire trial." *State v. Murray*, 443 So.2d 955, 956 (Fla. 1984).

A motion for mistrial should not be granted unless it is necessary to insure that the defendant receives a fair trial (*Marek, supra.*) Appellee submits that appellant was not deprived of a fair trial by the prosecutor's remark.

While it is true that both Florida and federal courts have found comments on a defendant's demeanor to be error, appellee submits that the passing reference made in this case did not begin to approach the critical observations found in the cases cited by appellant, and therefore should not be held error by this Court. When the remarks are compared, the essential difference is obvious. In *United States v. Wright*, 489 F.2d 1181 (D.C. Cir.1973) the prosecutor stated, in closing:

> Mr. Anthony Wright has been present throughout this trial, has found a good part of it humorous, other parts he couldn't stand. And you may definitely consider his demeanor in your deliberations.

Id., at 1186. (Emphasis added).

In *United States v. Pearson*, 746 F.2d 787 (11th Cir. 1984), the comment was:

> You saw him sitting there in the trial. Did you see his leg going up and down? He is nervous. You saw how nervous he was sitting there. Do you think he is afraid?

Id., at 802.

In *Pope v. Wainwright*, 496 So.2d 798 (Fla. 1986), *cert. denied*, 480 U.S. 951, 107 S.Ct. 1617, 94 L.Ed.2d 801 (1987), the prosecutor said:

> I don't know if you saw it; but I saw it, [Pope] was grinning from ear-to-ear. This is supposed to be a wrongful accused man, grinning from ear-to-ear? I don't know why he grins from ear-to-ear.

Id., at 802.

In the instant case, the prosecutor neither criticized nor emphasized appellant's demeanor. Rather, he simply stated:

> ...ladies and gentlemen, you can only reach one conclusion and one conclusion only and that is that Michael Durocher as he sits smiling in the courtroom today used this shotgun to shoot Thomas Underwood in the head, and I am asking you to find him guilty.

(T 580). Appellee submits that this statement is neither of the type nor the scope found to be error in the cited cases.

Even if the comment in this case were to be deemed error, such error would be harmless.

The jury had heard testimony that appellant had confessed to the murder in hopes of receiving the death penalty. (T 464). They had heard his confession. (T 472-496). Appellant's own attorney had already called appellant's improper attire to the attention of the jury at voir dire. (T 249-254). In light of these facts, it is impossible to believe this single adjective

could have been the factor that swayed the jury to return a guilty verdict. In *Williams v. State*, 550 So.2d 28 (Fla. 3rd DCA 1989) the Court found the prosecutor's reference to the defendant's laughing and snickering harmless, in light of the overwhelming evidence against him. Albeit on collateral review, this Court in *Pope* found that the error was not properly preserved for appellate review and did not rise to the level of fundamental error. Significantly, although the Court found several other comments by the prosecutor improper, it nevertheless declined to reverse the conviction, saying, "we find that the comments taken individually or as a whole did not so infect the proceeding as to deprive petitioner of his fundamental right to a fair trial." **Id.**, at 802. Compare, *Hall v. State*, 403 So.2d 1321 (Fla. 1981)(prosecutor's comment that defendant was asleep, while possibly improper, was not so prejudicial as to require a mistrial.)

Appellant's suggestion that he may have confessed to a murder he did not commit is meritless. Appellant clearly believes the evidence presented was sufficient to sustain a conviction, else he would have challenged that sufficiency on appeal.

The assistant state attorney's closing argument covers almost ten transcribed pages. (T 570-580). Appellant would have this Court reverse his conviction based on a single word of that argument. This position cannot prevail. This Court should

uphold the trial court's denial of appellant's motion for mistrial.

ISSUE III

WHETHER APPELLANT'S PRIOR MURDER CONVICTION WAS PROPERLY CONSIDERED AS AN AGGRAVATING FACTOR. (Restated)

A stipulation to the facts of the Dwayne Eddie Childers murder was read to the jury (T 681-83), and is set out in the judge's order. (R 344-345).

Appellant's conviction of that murder which was found to be an aggravating circumstance in this case. (R 344-345). That conviction was affirmed by the First District Court of Appeal on April 6, 1990. (Appendix A). This issue is therefore without merit. Appellee acknowledges that a motion for rehearing has been filed and is pending in the prior appeal, but submits that appellant should not be permitted to indefinitely delay final resolution of the instant case by the filing of challenges to the prior conviction.

The prior judgment was valid when it was cited at trial to support the aggravating factor, and it is valid now. The trial court properly found this aggravating factor and its finding should be upheld.

ISSUE IV

WHETHER THE SENTENCING JUDGE IMPERMISSIBLY CONSIDERED BOTH THE AGGRAVATING FACTOR OF MURDER COMMITTED DURING THE COURSE OF A ROBBERY AND MURDER COMMITTED FOR PECUNIARY GAIN. (Restated)

Appellant correctly indicates that it is improper to consider as aggravating circumstances both that the murder was committed during the course of a robbery and that the murder was committed for pecuniary gain, when both circumstances are based on a single aspect of the crime. *Provence v. State,* 337 So.2d 783 (Fla. 1976), *cert. denied*, 431 U.S. 969, 97 S.Ct. 2929, 53 L.Ed.2d 1065 (1977). However, no such impermissible double consideration occurred in this case.

The format used by the court listed each possible statutory aggravating and mitigating factor, with space beneath for the judge to note whether the factor applies. (R 344-349). While the judge noted that both factors applied here, it is quite plain that he did not consider each of the factors independently. Prior to argument, the judge had indicated that he considered the two factors merged, and would so instruct the jury. (R 674). The prosecutor pointed out the merger of the two factors in his argument. (T 718). Finally, the judge instructed the jury:

> If you find the killing of Thomas J. Underwood was done for pecuniary gain and was done during a robbery you shall

> consider that as only one aggravating circumstance rather than two. Those circumstances are considered to be merged.

(T 750).

In light of these circumstances it is impossible to believe that the judge himself considered the two factors separately. Any error of double recitation of aggravating circumstances is harmless where it is clear that the sentencing judge merely recited both statutory factors without giving improper double consideration to the single aspect in question. *Straight v. State,* 397 So.2d 903, 910 (Fla. 1981), *cert. denied,* 454 U.S. 1022, 102 S.Ct. 556, 770 L.Ed.2d 418 (1981). It must be presumed that the judge followed his own instructions. In *Johnson v. Dugger,* 520 So.2d 565 (Fla. 1988), this Court found that the fact that the trial court had instructed the jury to consider evidence of nonstatutory mitigating circumstances indicated that the court had itself had considered those circumstances, notwithstanding the court's failure to make specific reference to them in its order.

The court below did not give double consideration to both aggravating factors. Its sentence should be upheld.

ISSUE V

WHETHER THE COURT ERRED IN FINDING APPELLANT COMMITTED THE MURDER IN A COLD, CALCULATED AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION. (Restated).

The evidence supporting the aggravating circumstance that the murder was committed in a cold, calculated or premeditated manner without any pretense of moral or legal justification comes from his own confession:

Appellant saw the back door of the store open and "decided it would be a good place to get the money and a car"[1] that he needed to get to Louisiana. He returned to his mother's house, where he was staying, packed his clothes, and got his gun. (T 482). He said, "I was going to rob the man but after thinking about it I decided it would probably be better to go ahead and kill him then that way the police could not pin it to me." (T 483). After the clerk told him there was no money in the store, appellant continued, "standing there for a while" before pulling the trigger. (T 485). He wiped his finger-prints off the things he had touched, and locked up the store before driving the clerk's car to Louisiana. (T 486-487). He

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[1] By his own confession appellant negates the statement in his brief that "Durocher took the clerk's car because it just happened to be there and he found the keys laying on a counter." (IB at 29).

later returned to Jacksonville where he took the car into the woods and set fire to it. (T 489).

In finding this factor applicable, the trial court stated:

> The time between the decision to murder Thomas J. Underwood, III and his actual murder included enough time for Michael Alan Durocher to return home, pack his clothes, get his gun, and return to the place of business which was a walk of approximately two and one-half (2 1/2) blocks each way.

(R 347). The trial court correctly found the murder cold, calculated and premeditated.

This is not the case of *Hamblen v. State,* 527 So.2d 800 (Fla. 1988) where the defendant had no conscious intention of killing the robbery victim until he became angry when she pushed an alarm button. Nor does it compare with *Thompson v. State,* 456 So.2d 444, 446 (Fla. 1984) where "[n]o evidence was produced to set the murder apart from the usual holdup murder in which the assailant becomes frightened or for reasons unknown shoots the victim during an attempt to make good his escape"; *Caruthers v. State,* 465 So.2d 496, 498 (Fla. 1985)(where "[a]ppellant stated that he had not wanted to hurt [the store clerk], but that she jumped and he just started firing. . . ."); or *Rogers v. State,* 511 So.2d 526 (Fla. 1987), cert. denied, 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988), where there was an "utter absence of any evidence that Rogers . . . had a careful plan or prearranged design to kill anyone during the robbery."

Rather, this case is more like *Remeta v. State,* 522 So.2d 825 (Fla. 1988). There, the evidence showed that Remeta had planned the robbery in advance and planned to leave no witnesses. The appellant here located his victim, went home and then returned later to effectuate his plan. In this aspect this case compares well with *Jennings v. State,* 453 So.2d 1109 (Fla. 1984), *cert. granted. vacated on other grounds,* 470 U.S. 1002, 105 S.Ct. 1351, 84 L.Ed.2d 374 (1985); 473 So.2d 204 (Fla. 1985), where this Court found the aggravating factor supported where Jennings located his victim then shortly thereafter kidnapped her from her bed and brutally murdered her.

Most important here however, was the time available to appellant in which to consider and plan his crime.

Appellant initially suggests that time should not be a critical factor in deeming a murder cold, calculated and premeditated. Ironically, he then submits, "the murder was quickly conceived and as quickly done" (IB at 30) as evidence that the murder was not calculated.

Appellant implies, citing *Jackson v. State,* 522 So.2d 802 (Fla. 1988) that some extended period of time is necessary to support this factor.[2] In fact, there is no bright line requirement that a particular amount of time be involved before a

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[2] *Jackson* does not stand for that proposition, although it is indisputable that a considerable period of time was involved under the facts of that case.

murder can be considered to have been committed in a cold, calculated and premeditated manner. In *Jackson v. State,* 498 So.2d 406 (Fla. 1987), this Court found aggravation proper where events unfolded quite rapidly. In that case, police had been called after Jackson was seen vandalizing her own car. After telling the officers that someone else had done the damage, Jackson went to an apartment to retrieve the vehicle's bill of sale. After witnesses told one officer the true story, he then arrested Jackson, who began to kick, scream and strike him. When he placed her in the back seat of his patrol car, she indicated she had lost her car keys. As the officer knelt to look for them, Jackson shot him six times. Jackson challenged the trial court's finding that the murder was committed in a cold, calculated, and premeditated manner, but this Court said:

> We agree with the conclusions of the trial court:
>
> > The evidence indicates this defendant was armed throughout this entire event or armed herself when she went to her home to obtain the papers relating to the car. It further indicates that when she produced the pistol on the unsuspecting officer, she made no attempt to disarm him or escape without the necessity of deadly force, but decided to shoot six (6) times at point blank range into his body. This decision was as coldly and premeditatively done as was her removal of the battery, spare tire and license plate from the just damaged car. For this, there can be no moral or legal justification.

> Further, we point out that appellant had the presence of mind while struggling with the victim to devise a method to catch him off guard, i.e., the statement that she had dropped her keys. This record does not show a woman panicking in a frightening situation, but rather a woman determined not to be imprisoned who fashioned her opportunity to escape and then acted accordingly. We see no error.

Id., at 412. Compare also, *Mason v. State,* 438 So.2d 374 (Fla. 1983), *cert. denied*, 465 U.S. 1051, 104 S.Ct. 1330, 79 L.Ed.2d 725 (1984), (record showing that defendant broke into victim's home, armed himself with a knife from her kitchen and attacked her as she slept was sufficient to find the factor applicable.)

While it is therefore clear that no particular amount of time for reflection is required in order to apply this aggravating factor, the availability of some time for thought and consideration is highly relevant. In *Swafford v. State,* 533 So.2d 270 (Fla. 1988), it was the time necessary to reload the murder weapon. This Court said, "[t]his aggravating factor can be found when the evidence shows such reloading, because reloading demonstrates more time for reflection and therefore 'heightened premeditation.'" **Id.**, at 277 (citations omitted). In *Jackson, supra*, 522 So.2d at 802, the defendant murdered one man, cleaned up his car and disposed of the body prior to picking up the second victim in the same car. In *Card v. State,* 453 So.2d 17 (Fla. 1984), *cert. denied*, 469 U.S. 89, 105 S.Ct. 396, 83 L.Ed.2d

330 (1984), the defendant took the victim from her office (where he had injured her) and drove her eight miles away where he cut her throat. In *Jackson* and *Card* this Court held that the "ample" time the defendant had during the sequence of events to reflect on their actions and the consequences thereof evidenced the heightened premeditation needed to support application of this factor. Appellee posits that the time for thought and reflection afforded by a two and one-half block walk, the packing of one's belongings, and a two and one-half block return trip is conclusive of heightened premeditation present in this case.

Moreover, it must be recalled that even after appellant had walked home, packed, returned, demanded money and been told there was none, he still stood there for "a while" before killing the clerk. In *Middleton v. State,* 426 So.2d 548 (Fla. 1983), this Court upheld the trial court's finding on this aggravating circumstance where "[Middleton's] confession said that he sat with the shotgun in his hands for an hour, looking at the victim as she slept and thinking about killing her," even though he had also stated that the shooting was "a snap decision." **Id.**, at 550, 552-53.

Appellant characterizes his decision to rob the store as "impulsive" (IB at 29). Yet it was only so in the sense that each human thought is, of necessity, spontaneous. Even were that initial decision described in appellant's terms, the murder

could not be so characterized. The word "calculate" means, "to plan the nature of beforehand: think out . . . to design, prepare or adapt by forethought or careful plan." *Rogers, supra*. This is precisely what occurred here, and the trial court's finding should be upheld.

Moreover even in the event this Court finds error such error would be harmless.

The trial court found four statutory aggravating factors.[3] (R 344-347). The judge found no statutory mitigating factors, (R 348-349), and only one nonstatutory mitigating circumstance: "a loving relationship with his mother and with his retarded brother." (R 349). Appellee submits that even were the finding that the murder was cold, calculated and premeditated to be eliminated, there is no possibility that this lone mitigating element could outweigh the aggravating circumstances. Where the elimination of an aggravating circumstance could not compromise the weighing process of the judge or jury the sentence will be upheld. See, *Hill v. State*, 515 So.2d 176 (Fla. 1987), *cert. denied*, 485 U.S. 993, 108 S.Ct. 1302, 99 L.Ed.2d 512 (1988)(given four aggravating and one mitigating circumstance, erroneous consideration of aggravating

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[3] Appellant does not challenge the application of aggravating factor of murder committed to avoid or prevent arrest.

circumstance that murder was committed in cold, calculated and premeditated manner did not require resentencing.)

In *Rogers, supra*, the defendant shot and killed a man who he saw "slipping out the back" of the store Rogers was robbing. The trial court found five aggravating circumstances, three of which this Court found improperly applied. The trial court found a single mitigating circumstance: that Rogers was a good father, husband, and provider. Even though this Court found that in Rogers the factor of cold, calculated and premeditated commission of the crime had improperly been applied, and even though the Court found that the factors of murder for pecuniary gain and murder during the course of a robbery had been improperly doubled, it upheld the sentence. This Court said:

> Based on our analysis, we find no error in the sentence imposed. Reversal of Rogers' sentence is permitted only if this Court can say that the errors in weighing aggravating and mitigating factors, if corrected, reasonably could have resulted in a lesser sentence. If there is no likelihood of a different sentence, the error must be deemed harmless. See State v. DiGuilio, 491 So.2d 1129, 1138 (Fla. 1986). Here, we have determined that the murder was committed by one previously convicted of a violent felony, and that it occurred during flight from an attempted robbery. On the other hand, the trial court may have found that Rogers was a good father, husband and provider. Under these circumstances, we cannot say that there is any reasonable likelihood the trial court would have concluded that the aggravating circumstances were outweighed by the single mitigating factor. Id. We therefore

> find the error harmless beyond a reasonable doubt.

Id., at 535. The Court recently reiterated this standard in *Hamblen v. Dugger,* 546 So.2d 1039, 1041 (Fla. 1989).

Appellee posits that the trial court did not err in applying this aggravating circumstance. Even should this Court disagree, any error must be deemed harmless and the sentence upheld.

ISSUE VI

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN GRANTING THE STATE'S CHALLENGE FOR CAUSE OF PROSPECTIVE JUROR DORSEY. (Restated)

The standard of review to be applied to a trial court's ruling on a challenge for cause is abuse of discretion. *Hooper v. State,* 476 So.2d 1253 (Fla. 1985), *cert. den.*, 475 U.S. 1098, 89 L.Ed.2d 901 (1986); *Ross v. State,* 474 So.2d 1170 (Fla. 1984). This Court has said:

> There are few aspects of a jury trial where we would be less inclined to disturb a trial judge's exercise of discretion, absent clear abuse, than in ruling on challenges for cause in the empaneling of a jury.

Cook v. State, 542 So.2d 964, 969 (Fla. 1989) (citations omitted). See also, *Davis v. State, supra*, ("The competency of a challenged juror is a mixed question of law and fact, the determination of which is within the trial court's discretion. Manifest error must be shown before a trial court's ruling will be disturbed on appeal." (Citations omitted)). Discretion is abused only when a trial court's action is arbitrary or capricious, i.e., where no reasonable person would adopt the view taken by the trial court. *Canakaris v. Canakaris, supra*.

The test for determining whether a prospective juror should be excused because of his negative feelings toward the death penalty is "whether the jurors views would 'prevent or

substantially impair the performance of his duties in accordance with his instructions and his oath.'" *Wainwright v. Witt,* 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985). Great deference is afforded a trial judge in his finding in this regard "because, unlike a reviewing court, he is in a position to observe the juror's demeanor and credibility." *Lambrix v. State,* 494 So.2d 1143, 1146 (Fla. 1986); see also *Valle v. State,* 474 So.2d 796 (Fla. 1985), *cert. granted, vacated on other grounds,* 476 U.S. 1002, 106 S.Ct. 1943, 90 L.Ed.2d 353 (1986). In *Wainwright v. Witt, supra,* the United States Supreme Court stated the principle thusly:

> What common sense should have realized experience has proved: many veniremen simply cannot be asked enough questions to reach the point where their bias has been made 'unmistakably clear'; these veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings. Despite this lack of clarity in the printed record, however there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law. For reasons that will be developed more fully infra, this is why deference must be paid to the trial judge who sees and hears the juror.

Wainwright v. Witt, supra, at 424, 425. The necessity of affording great deference to the trial courts was also very recently reiterated by this Court in the context of peremptory challenges. In *Reed v. State,* 15 F.L.W. S115 (Fla. March 1, 1990), this Court observed "[o]nly one who is present at the trial can

discern the nuances of the spoken word and the demeanor of those involved." **Id.** at 116. This argument of deference is in accord with the Supreme Court's holding in *Witt* that a trial court's determination as to juror bias is a finding of fact entitled, in habeas corpus proceedings, to a presumption of correctness. *Valle,* **supra,** at 804.

In light of the foregoing, it appears that appellant has incorrectly framed the issue to be resolved by this Court. The issue is not "whether the court properly excused juror Dorsey because she was reluctant to sit as a juror." (I.B. at 35). Rather, the issue is whether, in view of the deference to which he is entitled, the trial judge abused his discretion in finding that prospective juror Dorsey's views would substantially impair or prevent her from impartially performing her duties. Appellee submits that the judge acted within the bounds of his discretion.

The voir dire colloquy between the prosecutor and prospective juror Dorsey was as follows:

> MR. PHILLIPS: Thank you, ma'am. Ms. Dorsey, how are doing?
>
> THE VENIREMAN: Fine.
>
> MR. PHILLIPS: Okay. How long have you worked at a Hospice, ma'am?
>
> THE VENIREMAN: About eight years, eight-and-a-half years.
>
> MR. PHILLIPS: And is your work actually involved with taking physical

care of the people who are terminally ill?

THE VENIREMAN: Yes.

MR. PHILLIPS: Well, let me just say that's admirable work.

THE VENIREMAN: Yes, it is.

MR. PHILLIPS: Do you think that the fact that you work in a situation like that may affect your ability to be fair in this case?

THE VENIREMAN: Well, it really would bother me anyway. I just -- I would be afraid that I would -- I wouldn't make the right decision. I couldn't, you know -- it would just bother me if I would cause someone to pay for something that, you know -- I don't know. I am just -- I was brought up like that.

I guess I was raised like that, and all my life I heard these things I shall not steal and all these things and I guess I am a religion freak I guess. It's against my religion and it's against my will that I just don't think I could do it, and I am telling you the truth.

MR. PHILLIPS: I appreciate that.

THE VENIREMAN: I don't really think I could make a decision like that. I wouldn't be of any service to anybody on the jury I don't think because I wouldn't -- it would always bother me did I make the right decision.

MR. PHILLIPS: Yes, ma'am. I take it from what your are saying that you have a moral or religious conviction about not sitting in judgment of your fellow men?

THE VENIREMAN: I don't like judging nobody.

MR. PHILLIPS: Do you think that -- and I think I know the answer to this, but let me make it clear for the record. Would your beliefs interfere with or substantially impair your ability to vote to convict the defendant in this case?

THE VENIREMAN: Yes, it would.

(T 206-208).

Appellant's trial counsel attempted to rehabilitate her:

MR. CHIPPERFIELD: Okay. Ms. Dorsey, you suggested that you thought your beliefs might interfere with your ability to vote for a death penalty. Do you understand that you don't go into it blind, that if we have a second phase Judge Wiggins will give you rules to apply about how to weigh evidence, what to consider in aggravation and mitigation? Understanding that do you think you could apply those rules fairly and impartially to the facts and make a decision on your recommendation?

THE VENIREMAN: I don't know -- it's just -- don't feel that I would have the right to say kill somebody. I mean that's what it would be if you put somebody in the electric chair. I don't know whether I could do it. I just really don't because could I really say something like a little -- like if the law says if you kill go to jail or to the electric chair then if you put them in the electric chair you still kill them. That's what you said not to do, so I just -- I just don't know what -- I just really don't know if I could do it or not.

I know I am supposed to. I am a citizen and I would abide by the rules and regulations, but I really want to be honest because a lot of times you don't agree with the people on the jury.

Then just for me to go right on and say, yes, you know, then they are looking at our part and I would be trying to look on the inward part and what -- so I couldn't really -- I don't feel that I really could because it's just something about killing that does to me.

MR. CHIPPERFIELD: Well, it's a situation you have never been put in before, and you don't know how you are going to react once you are in the jury room.

THE VENIREMAN: Right.

MR. CHIPPRFIELD: Till you --

THE VENIREMAN: But I would be fair. I know I would try to be fair to the best of my mind.

MR. CHIPPERMAN: That's really what this is all about. If you think you can be fair and if you would -- if you think you can follow the rules that Judge Wiggins gives you in solving this problem then you are qualified.

THE VENIREMAN: I could do that, but I -- I would have to be fair. I couldn't be no other way but fair.

MR. CHIPPERFIELD: Okay. And when you say you could be fair that means you will do your best to follow the rules that the Judge gives you?

THE VENIREMAN: Yes.

(T 278-280).

Although Mrs. Dorsey clearly indicated that her beliefs would interfere with or substantially impair her ability to vote to convict the appellant (T 208), that she did not feel she would have the right to kill somebody (T 279) and that "I don't

feel that I really could because its just something about killing that does to me" (T 279), appellant suggests that these statements were offset by her later assertion that she could follow the rules set out for her by the trial judge. However, it is quite clear that such a statement does not necessarily rehabilitate a prospective juror who has already demonstrated prejudice or bias. As the Eleventh Circuit noted in *Darden v. Wainwright,* 767 F.2d 752 (11th Cir.1985), *aff'd,* 477 U.S. 168, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986):

> Although the dissenting judges in this case properly point out that a juror with strong conscientious objections to the death penalty might well be able to lay aside those objections and follow the law, it is nevertheless true that the difficulties such a juror would experience in doing so might well rise to the level of a "substantial impairment" of his performance as a juror.

Id., at 753, 754. In *King v. State,* 436 So.2d 50 (Fla. 1983), this Court found proper the excusal for cause of jurors who stated they were opposed to the death penalty, but could sit impartially on the issue of guilt or, innocence. In *Reilly v. State,* 15 F.L.W. S135 (Fla. March 8, 1990), this Court recognized that even when a potential juror gives the "right" answers as to whether he can be impartial those answers may not be determinative of whether he should be excused for cause. In *Reilly,* the prospective juror stated he had read in the newspaper that a confession had been obtained from the defendant, but that unless one were produced in evidence, he would not consider it. The

Court said "it is unrealistic to believe that during the course of deliberations he could have entirely disregarded his knowledge of the confession no matter how hard he tried." **Id.**, at S136.

The record demonstrates that the judge did not reach his decision lightly. Another prospective juror, Mrs. Creighton, testified as follows on voir dire:

> MR. PHILLIPS: Okay. No problem. Well, let me ask you this: does it bother that you might be asked to make a decision in a case this important?
>
> THE VENIREMAN: In a way, yes, because I might be doubtful.
>
> * * *
>
> MR. PHILLIPS: Okay. Now I take it from that you think that it may be that you would have some difficulty in making a decision about a case like this?
>
> THE VENIREMAN: Yes, sir.
>
> MR. PHILLIPS: Okay. How do you feel about the capital punishment?
>
> THE VENIREMAN: I am not for it.
>
> * * *
>
> [MR. PHILLIPS]: Now do you think that your beliefs about capital punishment, ma'am, would interfere with or substantially impair your ability to vote to convict Mr. Durocher if you knew that it might result in him getting a death sentence?
>
> THE VENIREMAN: Yes, sir.
>
> MR. PHILLIPS: Okay.

THE COURT: I am sorry. No one --

THE VENIREMAN: Yes, sir.

MR. PHILLIPS: And presumably if you were picked and he was convicted anyway would it be fair to say that your beliefs would interfere with or substantially impair your ability to vote for a death sentence?

THE VENIREMAN: I don't really know.

MR. PHILLIPS: Okay. Thank you very much, ma'am.

(T 201-203).

However, when questioned by defense counsel, Mrs. Creighton indicated that she thought she could follow the rules given her by the trial judge and apply the rules to the facts of the case. (T 277). The judge refused to excuse Mrs. Creighton for cause. (T 302). The prosecutor exercised a peremptory challenge toward Mrs. Creighton. At the time Ms. Dorsey was excused, the prosecutor had four peremptory challenges remaining. (T 304-305). Although he did eventually use them all, the suggestion is inescapable that, had Ms. Dorsey not been excused for cause, a peremptory challenge would have been exercised toward her.

This Court has upheld challenges for cause where the jurors have stated that "they could not or possibly might not be able to impose the death penalty." *Masterson v. State,* 516 So.2d 256, 258 (Fla. 1987). (Emphasis supplied). In *Robinson v. State,*