IN THE SUPREME COURT OF FLORIDA

LARRY DEAN KRAMER,

Appellant,

v. CASE NO. 78,659

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE NINTH JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

Appellee accepts Kramer's statement of the case and facts with the exception of his final sentence, where he states that he suffers from pathological intaxication which means he need only drink a small amount to get intoxicated (IB 10-11). This is not a case of pathological intoxication (R 791).

Appellee adds the following facts:

The state presented the testimony of Donald Ostermeyer, who was accepted as an expert in blood stain pattern analysis and crime scene reconstruction (R 396). The crime scene photographs and blood spatter testimony demonstrate that the attack began at the upper portion of the embankment, proceeded down approximately fifteen feet to the culvert, and down the culvert to the victim's final resting place (R 428). The blood pattern, which was individual droplets as opposed to cast off blood, indicated there was not a struggle (R 414). The victim would have been in upright, seated, and lying down positions when blows were delivered, and was once in a face down position with his hand at his forehead, though when found he was on his back (R 408, 417-18, 426). At some point during forceful bloodshed his arm was elevated with his hand up, allowing the forearm to be exposed to bloodshed (R 423). There were two cast off stains in the culvert where the victim was found, which are created by an object wet with blood being moved and casting off blood (R 409). The fact that there are two stains of this type indicates there were two such actions (R 410). The victim had defensive wounds on his hand and other blunt force injuries which could have been caused

by falling (R 364-65, 379). Kramer had no visible injuries when he was arrested within 48 hours of the murder (R 457).

SUMMARY OF ARGUMENT

POINT 1: Counsel below never objected to the state's reasons or rating scale, so appellee submits the claim has been waived. In any event, the trial court did not abuse its discretion in determining that the state gave valid, nonracial reasons for backstriking the juror. The record demonstrates a valid basis for the prosecutor's rating scale, and also demonstrates that the challenged juror was sufficiently questioned on both issues and her answers differ from those of the seated jurors and the juror the state found preferable.

POINT 2: The issue is not cognizable since there was no proffer of the question or what the witness would have answered, nor was the alleged relevance of the evidence that is being argued on appeal argued to the trial court. Even if the claim is cognizable, the trial court's ruling is correct since the question exceeded the scope of direct examination and the evidence the defense was attempting to elicit was irrelevant.

POINT 3: The trial court properly denied Kramer's motion for judgment of acquittal, There was substantial competent evidence from which the jury could have concluded, to the exclusion of all other inferences, that the murder was premeditated.

POINT 4: The trial court did not abuse its discretion in admitting photographs of the victim and crime scene. The pictures were relevant and were used by the medical examiner during his testimony. Even if error occurred as to any of the

photographs, it was harmless at worst as the verdict could not have been affected.

POINT 5: The trial court correctly ruled on defense counsel's objections to the prosecutor's closing argument. The prosecutor's comments were not even erroneous, particularly when viewed in conjunction with defense counsel's closing argument. Even if error occurred it was harmless as the trial court gave a curative instruction and the remarks were not so prejudicial as ta warrant a new trial.

POINT 6: The trial court correctly denied Kramer's requested guilt phase jury instructions since the standard instructions adequately apprised the jury of the law. Error, if any, was harmless.

POINT 7: Kramer was not denied a fair trial due to prosecutorial comment during the penalty phase. There is nothing in the record to show that the prosecutor deliberately and intentionally misled the jury, and nothing to demonstrate that the jury was in fact misled or relied on improper factors in recommending the death sentence.

POINT 8: This court's construction of the heinous, atrocious or cruel aggravating factor comports with constitutional standards. The trial court expressly acknowledged this court's construction of this factor in its sentencing order and expressly set forth the factual basis to support its finding of this factor.

POINT 9: The trial court did not abuse its discretion in denying Kramer's requested jury instructions in the penalty phase. This court has consistently held that the standard

instructions are sufficient to apprise the jury of the applicable law and has consistently rejected claims that a trial court should have given additional instructions at the penalty phase.

POINT 10: The trial court correctly found that the murder of Walter Traskos was heinous, atrocious or cruel. Kramer savagely beat the victim as the victim attempted to flee and fend off the blows. The absence of any injuries to Kramer indicates it was a one-sided fight, with the victim's only actions being evasive and defensive. The victim would have known what was happening to him, would have felt the blows delivered by Kramer and the pain from the injuries they caused, and would have been contemplating his own demise as he lay helpless in the culvert while Kramer found a rock, then delivered the final, fatal blows.

POINT 11: The trial court acted well within its discretion in rejecting Dr. Lipman's opinion, which was at best equivocal and based on Kramer's unsubstantiated and suspect self report. There was no error in the trial court's consideration of mitigating evidence.

POINT 12: Compared with other cases where the jury has recommended death and the trial court has imposed the death penalty, Kramer's case warrants the death penalty. There are two aggravating factors to be weighed against minimal mitigation.

POINT 1

THE TRIAL, COURT DID NOT ERR IN PERMITTING THE STATE TO USE A PEREMPTORY CHALLENGE TO EXCUSE A BLACK JUROR.

Kramer contends that the trial court erred in overruling his objection to the state's use of a peremptory challenge to the

only black juror on the potential panel, claiming that the reason given by the prosecutor was insufficient and pretextual. Both the defendant and the victim are white. The original venire consisted of 42 prospective jurors; each was asked to fill out a questionnaire on the death penalty, and individual *voir* dire was conducted on this issue (R **14, 18-217**). Eight of those jurors were excused for cause (R **217**). The remaining jurors returned for general *voir* ***dire,*** and were first questioned as a group by the trial court (R 219-34). Next the prosecutor questioned the prospective jurors as a group (R **234-38**). The prosecutor then stated:

> Now, this last question is one that I want you to take some time on and discuss with each and every one of you. Let me preface it by saying this. There are two divergent schools of thought an an issue I will call the issue of personal responsibility. There is a school of thought that says that what a person does in his life or crimes that he commits are the products of genetics. That is, how he was born, and his upbringing, how he was brought **up.** And this school of thought says that since a person doesn't have any control over how they are born, and doesn't have any control over how they are raised, that they really shouldn't be held responsible for what they do. That they are the product of something beyond their control and that in criminal cases, in particular in death penalty cases, that they really aren't responsible for what they do. That they commit crimes not because they are bad people, but because they are sick people, or because of the way they were raised. That's one school of thought, On the other end, there is a spectrum of opinion, there are people everywhere in between, other end of the opinion is people commit crimes because they decide

> to. People don't commit crimes because they were depraved (sic) OK abused or poor or rich or mentally ill, they do it because they want to and they ought to be held responsible for whatever they do. Now, what I want to find out from each of you is where do you put yourself on that spectrum. What do you think about that. And that is a serious question, and please, give it some careful thought, because I want to know where you all stand on that spectrum of opinion. Again, as with the death penalty, there is no right answer, there is no wrong answer. There is simply a number of different opinions. I would like to talk to you about this, and what I am going to do in order to keep you awake a little bit more, I won't *go* row by row. I'm jumping around. So be alert.

(R 238-39). The prosecutor then sought each juror's individual position as to personal responsibility (R 240-51).

After general questioning was completed, further challenges and excusals for cause were made, and the parties began exercising peremptory challenges until there were twelve prospective jurors (R 289-93). The state then backstruck juror number twelve and accepted juror number 28, who the defense struck (R 294). Both parties accepted juror number 29, and the state backstruck juror number 27, who is the juror at issue (R 294).

Defense counsel noted that it was the second black juror the state had moved to strike, and asked that the state give a race neutral reason (R 294). Defense counsel stated that she understood why the state had moved to strike the first black juror, as that juror had expressed concerns about fairness (R 294). The prosecutor then explained that he keeps a chart, and

does not note the jurors' races on it, but rates the jurors on a numerical scale of one to five based on their opinions on the death penalty questions and personal responsibility questions (R **295).** The prosecutor stated that the next juror up had scored better on both the personal accountability question (five out of five as opposed to four out of five) and the death penalty question (3.5 out of five a3 opposed to three out of five) (R 295-96), and he preferred that juror because her responses on those two key issues were better (R **296).**

The trial court made a finding that the defense had made a *prima* ***facie*** showing, but expressed doubt as to whether in fact it really had (R **296).** The court went on to find that the state's reasons were race neutral and legitimate, and there was no indication that any juror had been singled out because of race (R **296-97).** The court determined this based upon the prosecutor's rating scale, and stated that the reasons were not pretextual as far as race was concerned (R 297).

The initial presumption is that peremptories will be exercised in a nondiscriminatory manner. ***State*** *v. Neil,* 457 So.2d 481, 486 (Fla. 1984). The procedure to be followed under these circumstances is:

> There must be an objection that the challenges **are** being exercised in a racially discriminatory manner. At this point, the judge should determine if there has been a prima facie showing that there is a strong likelihood that the jurors have been challenged because of their race, *Neil.* If legitimate reasons for the challenge are not apparent from the jurors' statements but these are other reasons why the

> challenges do not appear to be racially motivated, the judge should note these reasons on the record. If the judge rules that a prima facie showing has been made, the burden shifts to the challenging party to demonstrate valid, nonracial reasons why each minority juror has been stricken. *Thompson v. State*, 548 So.2d 198 (Fla. 1989). The judge must then evaluate the proffered reasons in deciding whether the objection is well taken.

Valle v. State, 581 So.2d 40, 44 (Fla. 1991). A trial court is vested with broad discretion in determining whether peremptory challenges are racially intended. *Reed v. State*, 560 So.2d 203 (Fla. 1990). The trial judge has the responsibility to evaluate both the credibility of the person giving the explanation and the credibility of the reasons asserted. *Green v. State*, 583 So.2d 647 (Fla. 1991).

Kramer alleges that two of the five factors listed in *State v. Slappy*, 522 So.2d 18 (Fla. 1988), are present here, specifically, 1) a perfunctory examination an the questioned issue; and, 2) reasons equally applicable to all jurors. Kramer further alleges that the state's reason had to do with a personal rating scale and that there is nothing in the record to indicate a basis upon which these ratings are applied. Counsel below never claimed that these factors were present, nor did counsel dispute the prosecutor's rating scale, so appellee submits that this argument has not been preserved for appellate review, *Bowden v. State*, 588 So.2d 225 (Fla. 1991).

In any event, the trial court did not abuse its discretion in determining that the state gave valid, nonracial reasons for

backstriking the juror. ***Reed, supra.*** Appellee wauld first point out that even if counsel's apparent acceptance of the prosecutor's reasons is not sufficient to waive the claim, it certainly should weigh heavily towards determining that the trial court did not abuse its discretion. ***See, Happ v. State,*** 17 F.L.W. 69 (Fla. January 23, 1991) (counsel did not contest the reasons and the trial court properly, within its discretion, accepted those reasons **as** race neutral). Further, the record demonstrates that the challenged juror was sufficiently questioned on both issues and that her answers to both questions differ from those of the seated jurors, specifically the juror that the prosecutor wanted seated over Ms. Davis, which demonstrates a race neutral basis for the prosecutor's rating scale.

Kramer states that the questioning of Ms. Davis about her feelings on the death penalty consisted of three questions, but he has apparently overlooked the juror questionnaire filled out by Ms. Davis. Significantly, in response to the question, "If the evidence and the law was such that the death penalty was appropriate in this case, could you vote to impase the death penalty?", Ms. Davis responded "No" (R **24**, 1027). While she stated during questioning that **she** should have said, "...due to the circumstances. It all depends" (R 24), her original response, along with her apparent nervousness (R 23), certainly would give the prosecutor cause for concern, and justify his numerical evaluation of these responses as a three out of five. In this respect, appellee would point out that all of the other

jurors who were eventually seated, except Bordner,[1] simply responded "Yes" (R 1000, 1010, **1015, 1039, 1041, 1061, 1069, 1071, 1079, 1081, 1085).**

The record **also** demonstrates that the prosecutor put a lot of weight on the jurors response to his "personal responsibility" question, It is apparent from the prosecutor's initial explanation to the jurors that he was attempting to determine where each one fell on his spectrum of "not responsible" at one end to "fully responsible" at the other end. It is just as apparent from comparing Ms. Davis' response to the preferred juror Ms. Christiansen's response that the prosecutor's ratings were not arbitrary. Ms. Davis believed that people should be held responsible, but noted that there are circumstances sometimes, which the prosecutor rated as a four. Ms. Christiansen stated that people are responsible, which rated as a five, at the extreme end of the spectrum (R **247, 249, 295-96).** These ratings are certainly consistent with the prosecutor's initial explanation.

Kramer also argues that the prosecutor's reason had to do with his own personal rating scale, and there is no basis in the record to indicate the basis for these ratings. Kramer contends that acceptance of this reason invites the most invidious form of discrimination. As was just demonstrated, the basis of the prosecutor's numerical evaluations of responses to the personal responsibility question is apparent from the record, Likewise,

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[1] Bordner's response was "As a member of society, I am compelled to uphold the "law" of the land; therefor, I could vote to impose the death penalty" (R 998).

as was demonstrated, it is apparent why Ms. Davis was rated lower than Ms. Christiansen on the death penalty question. In addition, the prosecutor stated that he does not note the race of the jurors, and the trial court was well within his discretion in finding this credible. ***Green,*** *supra.*

Further, it must be remembered that this challenge was made as a backstrike. At the time the prosecutor was assigning a numerical value to each juror's response, he would have had no way of knowing who would eventually be the next juror to be seated in the event of a challenge. Thus, the prosecutor would have to manipulate the numbers beforehand at the risk of seating an undesirable white juror simply to strike a black juror. Appellee submits this is far to speculative and unbelievable, and there was no abuse of discretion in finding adequate and credible the state's reasons for striking one juror in order to reach another. *Kibler v. State,* 546 So.2d 710 (Fla. 1989).

POINT 2

THE TRIAL COURT WAS CORRECT IN SUSTAINING THE STATE'S OBJECTION TO CROSS-EXAMINATION OF THE MEDICAL EXAMINER REGARDING NEEDLE MARKS ON THE VICTIM'S BODY.

Kramer contends that the defense should have been able to question the medical examiner about the presence of fresh needle marks on the victim's body. Kramer alleges that this could have shown that the victim was a drug addict, who in the latter stages of withdrawal became so crazed that he was prone to violence, which manifested itself in the form of pulling a knife on him. Appellee first contends that the issue is not cognizable for two

reasons. First, there was no proffer of the question or what the witness would have answered, so the claim is too speculative and thus not cognizable. *Lucas v.* ***State,*** 568 So.2d 1822 (Fla. 1990). Second, the alleged relevance of this evidence which has been offered on appeal was never argued to the trial court, and thus cannot be argued on appeal. ***Bertolotti v. Dugger,*** **514** So.2d **1095** (Fla. **1987).**

Even if the claim is somehow cognizable, the trial court's ruling is correct for several reasons. Appellee first contends that the question clearly exceeded the scope of cross examination, and contrary to defense assertions below, the state never opened the door to such line of questioning. A defendant may not use cross examination as a vehicle for presenting defensive evidence. *Steinhorst v.* ***State,*** 412 So.2d **332** (Fla. **1982).** **Cross** examination questions must either relate to credibility or be germane to the matters brought out on direct examination, **and** where the defendant seeks to elicit testimony from an adverse witness which goes beyond the scope encompassed by the witness on direct, other than matters going to credibility, he must take the witness as his own. ***Id.; see*** *also,* ***Penn v. State,*** **574** So.2d **1079** (Fla. **1991).** A criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross examination designed to show a prototypical form of **bias** on the part of the witness, and thereby expose to the jury facts from which the jury could draw inferences relating to the reliability of the witness. ***Delaware v. VanArsdale.*** **474** U.S. **673, 106** S.Ct. **1431, 89** L.Ed.2d **674 (1986).**

The fact that the victim may have had old or even a relatively fresh needle mark on his body was not relevant to his cause of death and did not relate to the medical examiner's credibility, and if Kramer wanted to elicit such testimony to bolster his defense he should have made the witness his own. The omission of such question left no incorrect inferences to be drawn, and left no incorrect or incomplete information in front of the jury, as was the case in the cases relied upon by Kramer. As such, it was not error to preclude defense counsel from cross examining the medical examiner about needle marks.

Similarly, on the basis of this record, the evidence is clearly irrelevant, so there was no abuse of discretion in denying Kramer the right to cross examine in this area. *Hayes v. State,* 581 So.2d 121 (Fla. 1991); *Gunsby v. State,* 574 So.2d 1085 (Fla. 1991); *Harris v. State,* 570 So.2d 397 (Fla. 3d DCA 1990). Appellee would first point out that nowhere in Kramer's statements was there any suggestion that he believed Mr. Traskos was going through withdrawal and thus behaving as he did. Further, and more significantly, the fact that Mr. Traskos may have had a relatively fresh needle mark on his body demonstrates nothing other than the fact that he had a needle mark on his body, and this fact was not relevant to any of the issues at trial. There is nothing to demonstrate that Mr. Traskos was a drug addict or injected illegal drugs; he may well have been a plasma or blood donor or may have received legal injections of some sort. More importantly, even if it were true that Mr. Traskos abused drugs, there was no foundation for the medical

examiner to testify to this "fact" solely on the basis of a needle mark, then make the quantum leap that Mr. Traskos was experiencing withdrawal, and go yet a step further and testify that he got violent as a result.

Even if for some reason the trial court should have permitted defense counsel to ask the question, any error is harmless at worst as the verdict could not have been affected, As stated, all the medical examiner would have been able to testify was that there was a relatively fresh needle mark on the victim's body. In the absence of any other facts, foundation, or special expertise on the part of the medical examiner on dating needle marks, determining their origin and the substance injected through them, and the effects of withdrawal, any argument such as that now presented on appeal would have been forbidden. Since the testimony would have been of no use, its omission, particularly during the state's case in chief, was harmless error. *See, Puce v. State,* 17 F.L.W. 205 (Pla. March 26, 1992).

POINT 3

THE TRIAL COURT CORRECTLY DENIED KRAMER'S MOTION FOR JUDGMENT OF ACQUITTAL.

Kramer claims that the trial court erred in denying his motion for judgment of acquittal as the evidence was woefully insufficient to prove premeditation. In moving for a judgment of acquittal, Kramer admitted the facts in evidence as well as every conclusion favorable to the state that the jury could fairly and reasonably infer from the evidence. *Taylor v. State,* 583 So.2d 323 (Fla. 1991). When the state seeks to establish premeditation by

circumstantial evidence, the evidence must be inconsistent with every other inference that could reasonably be drawn from the evidence. *Id.; Bedford v. State,* 589 So.2d 245 (Fla. 1991). The question of whether the evidence proves premeditation to the exclusion of all other inferences is a question of fact for the jury, whose verdict will not be reversed on appeal where there is competent, substantial evidence to support it. *Id.* The circumstantial evidence standard does not require the jury to believe the defendant's version of facts on which the state has presented conflicting evidence and the state is entitled to a view of any conflicting evidence in a light most favorable to the jury's verdict. *Id.; Cochran v. State,* 547 So.2d 930 (Fla. 1989). Premeditation may be inferred from the manner in which the homicide was committed and the nature and manner of the wounds inflicted. *Holton v. State, 573* So.2d 284 (Fla. 1990); *Heiney v. State,* 447 So.2d 210 (Fla. 1984).

Kramer states that the state's evidences consisted solely of medical testimony regarding the injuries suffered by the victim. However, there was also testimony from an expert in blood stain pattern analysis and crime scene reconstruction. The blood patterns indicated that the confrontation took place over a distance of ten to fifteen feet (R 428). The blood flow pattern indicated that the victim was in a seated position while blood flow was going on starting at the top of the hill (R 407, 412). There were individual droplets of blood flowing down the hill; with a struggle it would be expected that there would be more cast off blood than flowing blood (R 414). There were two cast

off stains in the culvert where Mr. Traskos was found, which are created by an object wet with blood being moved and casting off blood (R 409). The fact that there are two stains of this type indicates there were two such actions (R 410). At one point Mr. Traskos was face down, with his hand at his forehead (R 418). When Mr. Traskos was found he was on his back (R 419).

The medical examiner testified that Mr. Traskos was struck a minimum of nine to ten times (R 359). There was a blow to the left side of the head, which tore the cartilage of the ear and would have required surgical repair (R 360, 362). There were three lacerations to the chin, which were caused by a minimum of two blows (R 360). One of these blows also caused a full penetrating laceration of the lip (R 350). There was some contusion of the under lip and nose, which generally indicates a blow across the mouth (R 350). There were additional blows to the right side of the face which caused contusions around the eye, the right cheek, the right jaw, and the right ear (R 360-61). None of these injuries probably would have been fatal (R 364).

The major blow to the side of the face caused fractures to the skull, including the eye socket and nose, and hemorrhaging (R 355, 363). One fracture extended from one side of the head to the other, which would have come from a severe blow (R 359). The brain was swollen and contused (R 360, 363). A small piece of rock or concrete was found under the skin (R 351). Mr. Traskos' head was down on the concrete when this blow occurred (R 353-54). The cause of death was skull and facial fractures due to blunt

force injuries of the head, due to beating (R 363-64). Blood from the fractures in and around the face was aspirated, which meant it went down through the nasal passages into the lungs, which contributed to the death (R 363).

Mr. Traskos also had contusions and abrasions on his chest, elbows, and knees (R 364-65). The left biceps, left shoulder blade area, back of the right forearm, and inside of each knee had small bruises (R 365). On the left hand there were two bruises and a laceration, which were consistent with the hand striking an object, and could have been a defensive wound (R 364, 379). In the medical examiner's opinion, all of these injuries could not have come from only two blows (R 368). The officer who took Kramer's statement within 48 hours of the murder saw no injuries on Kramer (R 457).

Kramer gave two statements; in the first he denied any involvement, and in the second given several minutes later he stated that he threw a rock at Mr. Traskos which hit him in the head, and when he started to get up Kramer hit him again. Kramer disposed of the rock in a drainage ditch at the end of the culvert under a grate and threw his pants in the dumpster because they had blood on them. Kramer stated that he took the knife that Mr. Traskos had allegedly pulled on him and threw it in Lake Eola. Kramer also stated that Mr. Traskos never got completely up after the first blow, but was on his way back up in kind of a sitting or kneeling position because he had fallen on his back,

The state's evidence conflicts with Kramer's version of events in several important respects. Most significantly, the

medical examiner testified that Mr. Traskos' head was on the concrete when the fatal blow was struck, which is contrary to Kramer's story that Mr. Traskos was on his way back up. Further, the blood stain expert testified that at one point Mr. Traskos was on his stomach in the culvert, which conflicts with Kramer's version that Mr. Traskos fell on his back. Kramer stated that he only hit Mr. Traskos twice with the rock, but the medical examiner testified that there were a minimum of nine to ten blows, and the cast off blood stain pattern in the culvert indicates that the bloody weapon was swung at least twice after it had blood on it. While Kramer stated that the confrontation began as a mutual fight, the fact that there was dropped blood as opposed to cast off blood on the hill indicates that it was not mutual combat. Likewise, the fact that the victim had defensive wounds and no injuries were observed on Kramer indicates that the combat was far from mutual.

Given the state's evidence regarding Mr. Traskos' injuries that conflicted with Kramer's version of events, the jury could have reasonably rejected his statement as untruthful. *Taylor, supra* (defendant's statement that he had vaginal intercourse without full penetration conflicted with medical examiner's testimony regarding extensive injuries to victim's vagina caused by hand or object other than penis; victim sustained minimum of ten massive blows to head, neck, chest and abdomen); *Bedford, supra* (victim's injuries inconsistent with defendant's version of events); *Heiney, supra* (victim beaten until brain was pulped, ear lacerated and hanging by a fragment, skull fractured and eye exploded). Kramer

hid the murder weapon, disposed of his bloody pants, first gave an exculpatory statement, then said he did it but disposed the knife the victim allegedly pulled on him. *Holton v. State,* **573** So.2d **284** (Fla. **1990)** (defendant set house where murder occurred on fire to cover up the crime and **gave** an exculpatory statement); *Penn v. State,* **574** So.2d **1079** (Fla. **1991)** (defendant hid murder weapon and washed blood off self after murder). The victim suffered a minimum of nine to ten blows, with a rock that Kramer would had to have taken the initiative and time to find, the most vicious having been administered while the victim's head was on the concrete, which was sufficient for the jury to find that Kramer made a conscious decision to kill Mr. Traskos. *Taylor, supra; Heiney, supra; Asay v. State, 580* So.2d 610 (Fla. **1991)** (nature of wounds inflicted and circumstances surrounding the shooting sufficient to demonstrate premeditation); *Henry v. State,* **574 So.** 2d **73** (Fla. **1991)** (victim stabbed thirteen times); *Preston v. State,* **444** So.2d **939 (1984)** (victim stabbed and head virtually severed); *Sireci v. State,* **399** So.2d **964** (Fla. **1981)** (victim suffered numerous stab wounds). The blood spatter evidence, which indicated there was no mutual combat, was consistent with the state's theory and inconsistent with the theory of defense. *Reichmann v. State,* **581** So.2d **133** (Fla. **1991).** Since there was substantial competent evidence from which the jury could have concluded, to the exclusion of all other inferences, that the murder was premeditated, the trial court properly denied Kramer's motion for judgment of acquittal.

POINT 4

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING PHOTOGRAPHS OF THE VICTIM AND THE CRIME SCENE INTO EVIDENCE.

Kramer contends that the trial court committed reversible error in admitting into evidence photographs of the victim and the crime scene as they were irrelevant and unnecessarily gory, Kramer also contends that the trial court erred in admitting slides of his prior crime during the penalty phase, as they had nothing to do with the instant offense but showed the previous victim. Appellee contends that the trial court did not abuse its discretion in admitting the photographs.

Prior to the testimony of the medical examiner at the guilt phase, the state sought the admission of 28 slides, which would be used by the medical examiner during his testimony (R 326-37). The defense objected to thirteen of the slides (Numbers 1, 4, 5, 8, 9, 10, 11, 14, 16, 17, 18, 24, 25) (R 326, 327, 328, 330, 332, 333, 334, 336). The trial court sustained the objection to number 9, which was withdrawn (R 328-30). Of the remaining twelve, one (Number 10) depicted the blood spatter on the wall and the pool of blood in the culvert with the body removed, which the medical examiner said would assist his testimony (R 330-31). Three (Numbers 1, 4, and 5) depicted the scene with the body at it from different directions; the trial court found Number 1, which is like number 4 from the opposite direction, depicted a panorama and was not prejudicial (R 326, 327). Of the remaining eight, the medical examiner specifically stated that five would

assist in his testimony (R 327-28, 332, 334-35, 336).[2] The defense objected to number 14 as cumulative, but the prosecutor pointed out that it showed additional injuries to the inside of the lower lip and the objection was overruled (R 333). The defense objected to number 16 as cumulative, and while the medical examiner stated that he could do without it, the prosecutor noted it showed a different angle and he wanted the jury to be able to see it, so the objection was overruled (R 334). Likewise, the defense objected to number 17 as cumulative, but again it showed a different angle and the objection was overruled (R 334).

The test of admissibility of photographs is relevancy rather than necessity. *Nixon v. State*, 572 So.2d 1336 (Fla. 1991). The trial court has discretion, absent abuse, to admit photographic evidence so long as it is relevant, and the gruesome nature of the photographs does not render the decision to admit them into evidence an abuse of discretion. *Thompson v. State*, 565 So.2d 1311, 1314 (Fla. 1990). Kramer specifically takes issue with slides 11 and 16. As stated, the medical examiner acknowledged that slide 11 was important to his testimony, and appellee contends that based on this, the slide was clearly

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[2] Number 8 (showed the blood running off pattern, spatter on head and clothes, blood on face and in culvert)-"It will assist, your Honor"; Number 11 (injuries to front of face)-"This is an important picture to me. My testimony"; Number 18 (close up of ear showing severe blow)-"I would like this one to be used to assist my testimony"; Number 24 (close up of fracture line)-"This goes in combination with the pictures to follow to assist in telling the jury where this is. The blood spatter expert may be interested in this injury, also"; Number 25 (close up of fracture line with scalp removed)-shows the same fracture "with the scalp removed".

relevant. As to slide 16, even though the medical examiner stated he could do without it, as stated, the test is relevancy and not necessity. Appellee contends that all of the slides were relevant and there was no abuse of discretion.

The primary issue in this case was premeditation. AS demonstrated in the previous point, premeditation may be inferred from the manner in which the homicide was committed and the nature and manner of the wounds inflicted. ***Heiney, supra.*** Kramer's theory of defense was that although he killed Mr. Traskos, it was in response to Traskos pulling a knife on him, and he only hit Traskos twice. Thus, each wound inflicted, including the number and severity thereof, became relevant to a determination of premeditation. In addition, since Kramer admitted he killed Mr. Traskos, this is not a case where there was a chance of convicting an innocent person on the basis of photographs. Kramer should not be heard to complain that the injuries *he inflicted* were gruesome and therefore irrelevant. ***See, Henderson v. State,*** **463** So.2d 196, 200 (Fla. 1985) ("Those whose work products are murdered human beings should expect to be confronted by photographs of their accomplishments"). Given the nature of the subject, in conjunction with the state's burden of proof, the photographs were not unnecessarily "graphic and gruesome", and are not so shocking as to outweigh their probative value. *Nixon, **supra; Thompson, supra; Henry v. State, 586*** So.2d ***1033*** (Fla. 1991); ***Haliburton v. State, 561*** So.2d 248 (Fla. 1990), ***Wilson v. State,*** **436** So.2d 908 (Fla. 1983) (photographs properly admitted where relevant to identity, nature and extent of victims' injuries,

manner of death, nature and force of violence used, and premeditation).

Even if the admission of any of the photographs was erroneous, it was harmless at worst as the verdict could not have been affected. Defense counsel did not object to many of the slides that depicted the victim's injuries, and the basis of the objections to the slides at issue was that they were cumulative, and not that their contents should not be seen. The fact that the jury on occasion saw twice what the defense did not object to them seeing once could not have affected the verdict, particularly since the slides were in evidence and could have been viewed by the jurors numerous times during deliberations.

As to the slides that were admitted during the penalty phase, appellee would first point out that they were not, as Rramer states, pictures of the previous victim. One was of a bloodstain at the scene and the other was of the weapon used in the attempted murder (R 612, 854, Exhibit 11). The slides were used by the prosecutor in closing argument to compare the prior violent felony with the instant murder (R 854). The two incidents occurred within one city block of one another (R 602). Both victims were, to use Dr. Lipman's term, "bricked" with concrete blocks in concrete gullies in ditches off of Interstate 4 (R 35).

As stated, the test of admissibility of photographs is relevancy and not necessity. *Nixon, supra.* During the penalty phase, evidence may be presented as to any matter the court deems relevant to the nature of the crime and the character of the

accused, and shall include matters relating to any of the aggravating circumstances. §921.141(1), Fla. Stat. (1991). "If a defendant was previously convicted of any violent felony, *any evidence* showing the use or threat of violence to a person during the commission of such felony would be relevant in a sentence proceeding." *Delap v. State,* 440 So.2d **1242,** 1255 (Fla. **1983)** (emphasis supplied). This court has held that it is appropriate to introduce testimony concerning the details of a prior violent felony conviction, and it is legitimate for the prosecutor to compare the two crimes during closing argument. *Lucas v. State., 568* So.2d 18 (Fla. **1991); *Freeman v. State, 563* So.2d **73** (Fla. 1990).

Appellee contends that, since the circumstances of the two crimes were virtually identical, and the slides demonstrating this and nothing more were the best way for the state to prove this, the state should not be precluded from using them *so* there was no abuse of discretion in their admission into evidence. A jury cannot be expected to make a decision in a vacuum, and must be aware of the underlying facts. *Lucas, supra.* Propensity to commit violent crimes is a valid consideration for the jury and judge, *Elledge v. State,* 346 So.2d 998 (Fla. 1977), and the fact that a defendant has committed a virtually identical violent crime, knowing full and well the effects and consequences of such, is extremely relevant in determining the weight to be accorded to this aggravating factor.

Even if the trial court abused its discretion in admitting the two slides, any error was harmless at worst as neither the

jury recommendation nor sentence would have been affected. The facts depicted through the slides, that the victim bled a lot and was "bricked" with a piece of concrete, were admissible without the photographs. In actuality, it would seem that the two photographs, briefly flashed in front of the jury, would be much less prejudicial than testimony concerning the attack and injuries, where the jurors would have been left to create the pictures in their own minds. Finally, it is difficult to imagine that two slides could have affected the weight given to this aggravating factor, since it was already entitled to the greatest possible weight.

POINT 5

THE TRIAL COURT CORRECTLY RULED ON DEFENSE COUNSEL'S OBJECTIONS TO THE PROSECUTOR'S CLOSING ARGUMENT; EVEN IF ERROR OCCURRED THE INSTRUCTIONS CURED IT AND THE REMARKS WERE NOT SO PREJUDICIAL AS TO WARRANT A NEW TRIAL.

Kramer contends that prosecutorial comment in closing argument destroyed his right to a fair trial. Kramer further alleges that the effect of the remarks was to shift the burden of proof onto him and that the argument was an improper comment on his silence at trial. Wide latitude is permitted in arguing to a jury; logical inferences may be drawn and counsel is allowed to advance all legitimate arguments. *Breedlove v.* ***State,*** 413 So.2d 1 (Fla. 1982). The control of arguments is within the trial court's discretion, and an appellate court will not reverse unless an abuse of such discretion is shown. ***Id.*** Each case must be considered on its own merits and within the circumstances

surrounding the remarks. *Id.* Appellee contends that Kramer has failed to demonstrate that the trial court abused its discretion, as the prosecutor's comments were not even erroneous, particularly when viewed in conjunction with defense counsel's argument.

The first passage quoted by Kramer[3] is nothing more than a statement regarding the uncontradicted nature of the evidence, which is perfectly legitimate closing argument. ***White v. State,*** **377 So.2d 1149 (Fla. 1979);** ***State v. Sheperd,*** **479 So.2d 106 (Fla. 1985).** Following defense counsel's objection, the trial court specifically found:

> It was a challenge for you to explain, that is how I see it. The challenge for you to explain how the physical evidence would support the theory that you proposed in your opening statement and closing arguments. I suppose I can see your point of view. I don't think it reaches that. I really don't.

(R 507). Appellee would first point out that defense counsel specifically stated that she was not objecting on the ground of the right to remain silent (R 508), and to the extent such claim is presented in the instant brief it must be found waived. ***Clark v. State,*** **363 So.2d 331 (Fla. 1978).**

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> The testimony is absolutely uncontradicted that this man was lying right there when he was killed, on his back, on the cement. And I defy defense counsel to show any piece of evidence that refutes that.

(R **506).**

In any event, Appellee submits, as the trial court found, that the prosecutor was speaking in terms of the evidence presented, and that this was a permissible comment on all the inferences from that evidence rather than an argument requiring a negative inference from the defendant's failure to testify. *United States v. Norton,* 867 F.2d 1354 (11th Cir. 1989). A prosecutorial comment in reference to the defense as opposed to the defendant individually cannot be "fairly susceptible" of being interpreted by the jury as referring to the defendant's failure to testify. *Id.; Sheperd, supra* at 107. When the prosecutor's statement is viewed in conjunction with defense counsel's closing argument, it is apparent that the trial court's ruling was correct.

Early in her argument, while discussing the medical examiner's testimony, defense counsel asked, "Did we have any evidence that this man was down on the ground, and Larry was beating him over the back of the head?", then answered, "No." (R 489). Defense counsel then argued, in detail, that Kramer's statement was consistent with the blood spatter evidence and the photographs, and concluded "[t]hat shows that this is a second degree murder" (R 491-92). Appellee contends, as the trial court found, that the prosecutar was well within permissible bounds in challenging defense counsel to show any evidence to refute that the victim was on the ground when he was killed, particularly where defense counsel had argued that there was *no* evidence that showed he *was* on the ground.

A virtually identical situation was presented in *Norton, supra.* There, the prosecutor "invited" defense counsel to provide an explanation for the evidence, and on rebuttal repeated the lack of any reasonable explanation and his "exhortation" to the defense to provide one. *Id.* at 1364 n. 10. The court first noted that a defendant's fifth amendment privilege is not infringed by a comment on the failure of the defense, as opposed to the defendant, to counter or explain the testimony presented or evidence introduced, and found that the comment at issue was permissible. *Id.* at 1364. ***See** also, **United States** v. Wutson,* 866 F.2d 381 (11th Cir. 1989).

As to the next two quoted passages,[4] appellee would first point out that there was no objection to the second passage, so

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> Why wauld someone, having been through what Larry Kramer said he went through, first of all, why would he throw away the knife to begin with? The knife obviously is a part of any defense he might want to raise if he got caught. It is not his knife. He didn't use it. It was in Walter's hand, presumably.
>
> * * *
>
> Presumably in Walter's hand, at least from what Larry Kramer said. Getting up with the knife when the second blow was struck. Why would he get rid of it? Even if he decided to get rid of it, why wouldn't he get rid of it in the culvert where he dumped the rock, or in the dumpster where he dumped his pants? Two places which the police could search. But no. He says he took it all the way down to Lake Eola, the opposite side of the lake from where the swans are, and just threw it in the lake, I don't know why. A place where it could never be found.

(R 509).

any claim of error is waived. In any event, the prosecutor was simply drawing a logical inference from Kramer's statement, and this can in no way be construed as an implication that the defense had any duty to produce the knife. In other words, the prosecutor was commenting an the fact that Kramer said he threw the knife away, not on the fact that the defense did not present it. Immediately prior to the quoted remarks, the prosecutor stated "[y]ou can use common sense and logic to judge the truth of a statement'' (R 509). Immediately after the quoted remarks, the prosecutor stated:

> Does that make sense? I submit to you it does not, Doesn't because there was no knife, because there was no fight, because all there was **was** one man with a design to kill and a rock.

(R 510). This is not a case where the prosecutor knew there actually was **a** knife but kept that fact from the jury, or had somehow precluded the defense from presenting evidence of a knife and then attempted to draw a negative inference from it. Likewise, this is not a case where the prosecutor **asked** why the knife was not produced by the defense if there really was one. Rather, the prosecutor was simply drawing logical inferences from the evidence as presented to demonstrate the apparent **lack** of logic and thus credibility of Kramer's statement, which appellee submits is entirely proper. ***See,*** *Breedlove,* ***supra.*** The trial court properly instructed the jury on the burden of proof, and Kramer's claim is without merit. *Haliburton v.* ***State,*** 561 So.2d 248 (Fla. **1990).**

As to the final quoted remarks,' Kramer has omitted two significant facts. First, when defense counsel interposed an objection that she did not argue voluntary intoxication, the trial court sustained it, and limited any comments as follows:

> THE COURT: Okay. I think he can argue that and you can argue that the Court is going to give you no instruction on voluntary intoxication. But saying okay. Here's the defense. Here's what it says. And defense didn't raise it. Or that type of argument. Probably is marginal, but I think I'll sustain it. I think you can say and culminate that the Court is not going to give it. Not to be any defense at all. Any legal defense to alcohol.

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> In the second statement where he admits to the killing, there is not one single reference in that entire statement to him drinking. Nothing. Now there is a defense called voluntary intoxication--
>
> * * *
>
> As I said there is a defense called voluntary intoxication in the law. The judge is not going to instruct you that that has any application to this case. So Ms. Cashman's statement that--
>
> * * *
>
> That the defendant was drinking or may have been intoxicated, and imagine what his blood alcohol level was, should be disregarded by you because it is not relevant to any legal defense in this case. Because the fact--
>
> * * *
>
> Thank you. Ms. Cashman's argument of the defendant was or may have been intoxicated at the time of the crime are, one, not supported in any respect by any evidence in this case, and two, not relevant to any legal defense.

(R 500-02).

(R 501). Shortly after this exchange and after the prosecutor told the jury that the fact the defendant had been drinking was irrelevant, the trial court instructed the jury:

> THE COURT: Ladies and gentlemen, there is from time to time during closing arguments objections that are made dealing with the law. You will recall that I instructed you, and you all promised me that you will follow the law as I instruct, number one, and number two is what the attorneys say to you in closing arguments is not evidence. Based on your repsesentatians to me, I think all of you, when it comes to what the law is, and what law you must follow in order to reach a lawful verdict, that all of you are going to follow the instructions as I present them to you. Is that true and correct?
>
> JURORS: **Yes.**
>
> THE COURT: Okay. I'm satisfied with that, and any interpretation, and please understand that neither of these attorneys are in any way attempting to mislead you. I don't want you to get off on that path. There are reasonable interpretations of what the law is, and that's natural in the court system. Ultimately, I will instruct you on the law that is applicable. So I think if we bear it in mind, keep things in the proper perspective, then we're in good shape. Okay. Mr. Ashton, you may proceed,

(R 502-03). There was no further objection or motion for mistrial as to this line of argument. Appellee submits that on the basis of this record, the instant claim has been waived since there was no further objection or motion for mistrial after the trial court issued an instruction which would have cured any error that may have occurred. *Clark v.* ***State,*** 363 So.2d 331 (Fla. **1978).**

Even if the claim is cognizable, the record demonstrates that the prosecutor's remarks were clearly in response to defense counsel's closing argument. Defense counsel argued:

> The State has to prove beyond and to the exclusion of a reasonable doubt that it was premeditated, That there was this conscious decision to kill. Was that present here? No. No. Larry was there, Larry was drinking. There is a lot of empty beer cans there. Larry's statement says that him and Kyle had been out there, that they had been drinking, they were both under the influence of alcohol. You heard from the medical examiner that Walter Traskos' blood alcohol level was such that he was impaired. You can read in the statement of Larry, you can listen to the tape. How much beer did they buy? What did he drink? What was his blood alcohol level do you think? Was he impaired? What kind of decision did he make out there?

(R 493). Significantly, at this point the prosecutor interposed an objection, an the basis that defense counsel was improperly arguing that Kramer was too drunk to form an intent to premeditate, since there would be no instruction on that (R 494). The trial court stated that he did not believe defense counsel had reached that, but if the prosecutor believed she had he could answer, but there would be no instruction on voluntary intoxication (R 494).

Counsel is accorded wide latitude in making arguments to the jury, particularly in retaliation to prior improper comments made by opposing counsel, *Schwarck v. State, 568* So.2d 1326 (Fla. 3d DCA 1990). While the trail court may not have found it to be so at the time, a review of defense counsel's closing argument

clearly demonstrates that she was arguing that Kramer could not premeditate because he had been drinking, which is nothing short of arguing voluntary intoxication, which was improper in this case since there would be no instruction on it. The prosecutor cannot be faulted for attempting to set the record straight, as the trial court told him he could do in overruling the objection to defense counsel's argument. Further, the judge cautioned the jurors that the court would instruct them an the law and that they should follow those instructions, which would have remedied any alleged impropriety. *Craig v. State,* 510 So.2d 857 (Fla. 1987).

Even if this court determines that any of the prosecutor's statements were erroneous, the verdict could not have been affected so any error would be harmless at worst, *State v. Diguilio,* 491 So.2d 1129 (Fla. 1986). Kramer admitted he hit the victim with a rock, and the evidence was overwhelming that Kramer brutally beat the victim before he administered the final, fatal blows. *See,* Point 3, *supra.* None of the prosecutor's allegedly erroneous statements put anything new or improper before the jury, and no improper inferences were created or drawn. There was evidence that the victim's head was on the ground when the fatal blows were delivered, and it was unrefuted. The statement that the knife would obviously be part of any defense Kramer would want to raise was nothing more than a comment on the obvious; Kramer did indeed use the alleged knife as a component of his defense. Intoxication was irrelevant to any of the issues, since no instruction on it was given, so Kramer could not have been harmed by the fact that the prosecutor told the jurors not to cansider it as a defense.

POINT 6

THE TRIAL COURT CORRECTLY DENIED KRAMER'S REQUESTED GUILT PHASE JURY INSTRUCTIONS.

Kramer contends that the trial court erred in refusing to give two requested jury instructions.[6] As to the first requested instruction, appellee would first point out that Kramer was convicted of first degree murder, which is two steps removed from manslaughter, so even if the trial court should have given the requested instruction any error is harmless. *See, State v. Abreau,* 363 So.2d 1063 (Fla. 1978). Appellee also contends that the trial court was carrect in refusing to give this instruction. Kramer asserts that the theory of defense was that his actions were merely reactions to the fact that the victim had pulled a

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> The killing of a human being, by the act, or culpable negligence of another, in cases where such killing shall not be justifiable or excusable homicide, as herein defined, nos murder in any of its degrees is manslaughter. Thus killing done in sudden heat of passion, without any premeditated design to effect death, but not being done under such circumstances as would make it excusable homicide, as hereinafter defined, would be manslaughter. Febre v. State, 158 Fla. 853, 30 So.2d 367 (1947); Smith v. State, 344 So.2d 915, 921 (Fla. 1st DCA 1977).
>
> Photographs of the deceased have been admitted into evidence and will be received by you. These photographs are admitted to better help you understand the evidence in this case. They should not be allowed to influence your emotions. Neither sympathy nor prejudice should influence your decision.

knife on him. Kramer has set forth no authority for the proposition that this is a recognized legal defense, and appellee contends that in the absence of a claim of self defense, it is not. The cases cited by Kramer below in support of this instruction acknowledge that the act of the seducer or adulterer has been treated as provocation. They do not hold that the act of a man defending himself from a brutal beating should be treated as provocation. In the absence of any legal authority that the victim's pulling of a knife constituted "legal provocation", the trial court properly rejected Kramer's attempt to formulate an unrecognized hybrid self defense/heat of passion defense, whereby he could avoid the legal requirements of excusable or justifiable homicide. Defense counsel was not precluded from arguing that this was manslaughter, the trial court instructed the jury on manslaughter, and no abuse of discretion has been demonstrated.

Appellee would also point out that even if there was such a theory of defense, the evidence in the instant case would not support it. The only evidence presented which arguably goes to this theory is Kramer's statement, wherein he stated that he was wrestling with the victim, he hit the victim a couple of times with his fist, he may have grabbed the victim by the throat, and he thought he stuck his finger in the victim's eye. Appellee contends that just as a claim of duress does not excuse a defendant who places himself in a situation likely to cause duress, *United States v. Blanco*, 754 F.2d 940 (11th Cir. 1985), a defendant should not be permitted to mitigate his culpability by

claiming he was in a "heat of passion" over events he precipitated,

Likewise, the trial court correctly refused to give a special instruction regarding the photographs. This court has long held that a challenged instruction should be considered in connection with all other instructions bearing on the same subject and if, when thus considered, the law appears to have been fairly presented to the jury, alleged error predicated on the challenged instruction, standing alone, must fail. *Driver v. State*, **46 So.2d 718 (Fla. 1950).** The jurors were instructed that the case should not be decided for or against anyone because they felt sorry or angry at anyone (R 537), and were further instructed that feelings of bias, prejudice or sympathy were not legally reasonable daubts and should not be discussed (R 538). Since the instructions as given fairly presented the law to the jury, the trial court did not err in not giving the requested instruction. ***See also, Mendyk v. State,*** **545** So.2d **846** (Fla. **1989)** (standard jury instructions adequately covered the matters raised by appellant so trial court did not abuse its discretion in rejecting instructions beyond those contained in the standard jury instructions). Appellee also contends that it would have been erroneous to give the requested instruction, as the trial court should not comment on the weight, character or credibility of the evidence. *Whitfield v. State,* **452** So.2d **548** (Fla. **1984).** Such comments **on** the evidence are more properly reserved for closing arguments, ***see, Fenelon v. State,*** **17 F.L.W. 112 (Fla.** February **13,** 1992), and counsel was not precluded from so arguing in the instant case (R **495-96).**

POINT 7

KRAMER WAS NOT DENIED A FAIR TRIAL DUE TO PROSECUTORIAL COMMENT DURING THE PENALTY PHASE.

Kramer alleges that the prosecutor deliberately made highly prejudicial comments which served to completely taint the penalty proceedings and denied him his right to a fair trial. Appellee would first point out that the record does not support the allegation that these comments were deliberately made, and in fact it is apparent that the prosecutor accidentally misspoke. Further, the prosecutor did not *only* reply "I'm sorry" after the three comments, but in each instance explained to the jury how and why he had misspoken. Appellee will first set the record straight, and then demonstrate that reversal is not warranted based on this record.

During the testimony of John Chisari, the prosecutor asked:

> Q. Could you determine whether the last time you saw him, he had any permanent physical disabilities? There was some part of his body you could tell just wasn't working?

(R 595). Chisari replied:

> A. His eye wasn't working. He was blind. One of his eyes. His memory was completely shot from the trauma that he received.

(R 595-96). Chisari then gratuitously added:

> Other than that, I know he passed away later on down the line. That's all I can tell you.

(R 596). The trial court deferred ruling on the motion for mistrial, and after all testimony was completed, denied the motion during the following exchange:

> THE COURT: I'll deny the motion for mistrial. There is two components to this. One is that I did indicate I didn't want any mention whatsoever, and Mr. Ashton went ahead and mentioned it. One of the witnesses mentioned it for both the State **and** the defense. Your defense witness made a statement that, you know, the witness-the victim **was** not dead.
>
> MR. SIMS: Yes, sir. And he pointed that out during Mr. Ashton's questioning.
>
> THE COURT: Well, I understand that, but that was **a** gratuitous-that was not responsive to the question. So far, it looks like across the board here, everybody is just kind of going off on their own here. At any rate, I read the deposition of Dr. Ruiz. I don't see any prejudice here. I really don't. so I'll deny the motion.

(R 845-46). Kramer does not contend that this ruling was erroneous.

During closing argument, the prosecutor first discussed the aggravating factor prior violent felony, and stated four times that Kramer had been convicted of attempted first degree murder (R 850). In comparing the two crimes, which were virtually identical, the prosecutor stated "You heard how the victims were killed" (R 851). Defense counsel objected, and stated that the harm to Kramer would be the different weight given to this aggravatar, knowing that the victim from the first case was now deceased (R 852). The prosecutor stated that it was a misstatement on his part, and he would reapproach the jury and correct himself, and the trial court denied the motion for mistrial (R 852). The prosecutor reapproached the jury and stated:

> Let me correct a misstatement I made a moment ago. I referred to the defendant having killed both individuals. First case was an attempted murder, not a completed murder. 1 apologize for that. Please don't mistake what I said for facts that you heard. Both crimes occurred same manner, same general area.

(R 853). The prosecutor then stated that he was going to show some slides from the completed murder and the attempted murder (R 853). After asking that the lights be turned down, the prosecutor stated:

> This is May, 1987. The area you heard described is the place where Robert Milhausen was killed.

(R 853). Defense counsel objected again, and the prosecutor stated, "I'm sorry. Attempted to be killed" (R 853). The trial court stated he would reserve ruling, and the prosecutor stated he would try not to make that mistake again, and continued as follows:

> Ladies and gentlemen, I'm sorry. He was attempted to be murdered. This is the area where the victim Walter Traskos was killed in 1990. I think you can see the similarity in the areas. Here we have a photograph of the blood stains left by the attempted murder of the victim, Robert Milhauser. We see here a similar pattern, similar evidence in the murder of Walter Traskos. Here we have a photograph of the cement block that was used in the attempted murder of Robert Milhauser. Here we have the murder weapon that was used to kill Walter Traskos. To determine what weight to give, you can look at the similarity in these two crimes, in determining what weight to give the prior conviction for attempted first degree murder.

(R 854). Defense counsel objected on a different basis, and the trial court instructed the jury that what the attorneys said was not evidence nor was it the instruction on the law (R 854). The argument proceeded without objection, as the prosecutor described injuries suffered by the attempted murder victim, including the facts that he had a series of six operations between May and August of 1987, and after six months in the hospital was transferred to a nursing home (R 302-03).

Near the end of his thirty minute argument,[7] while discussing the testimony of the defense expert Dr. Lipman,[8] the prosecutor noted that the doctor had discussed the previous attempted murder, then stated, "...if the reason for the murder was something entirely different, which we do nat know--" (R 864). Defense counsel objected, and the prosecutor told the jury:

> Did I say murder? I'm sorry. I'm getting it mixed up. Let me make sure, so you are not deceived in any way. The Robert Milhauser case was an attempted murder. If I get mixed up and say murder, I apologize. Two cases are similar. I'm getting them mixed up. The attempted murder was entirely different.

(R 864). All in all, the prosecutor referred to the prior crime as a murder three times, and in addition to describing the injuries to Milhauser, correctly referred to it as an attempted murder at least nineteen times (R 850, 853, 854, 855, 859, 864,

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[7] Each side was given thirty minutes for closing, and the court told the prosecutor when he had two minutes left (R 845, 866).

[8] Dr. Lipman had testified that the previous victim did not die (R 814).

865). In addition, the jurors were instructed prior to argument that what the attorneys said was not evidence (R 846), the prosecutor told the jurors not to mistake what he said for evidence (R 853), and during the prosecutor's argument the trial court again told the jurors that the attorneys' statements were not evidence or instructions (R 854).

Prosecutorial error alone does not warrant automatic reversal, unless the errors involved are so basic to a fair trial that they can never be treated as harmless. *State v. Murray,* 443 So.2d 955 (Fla. 1984). In the penalty phase, which results in a recommendation which is advisory only, prosecutorial misconduct must be egregious indeed to warrant vacating the sentence and remanding for a new penalty phase trial. *Bertolotti v. State,* 476 So.2d 130 (Fla. 1985). Appellee contends that the prosecutor's statements in the instant case, when viewed in context of the record, do not warrant vacating Kramer's sentence and remanding for a new penalty proceeding.

Kramer has failed to demonstrate how he was prejudiced by any of the foregoing. While Chisari testified that Milhauser died, he did not testify that it was a result of the injuries caused by Kramer. As noted, Kramer does not contend that the trial court erred in denying his motion for mistrial as to this testimony. Likewise, it was made perfectly clear to the jury that Krarner had entered a plea to attempted first degree murder and not first degree murder on the previous offense. Viewed in the context of the evidence presented, the jury would not have associated Milhauser's eventual death with the murder attempt or

given any additional weight to the prior violent felony aggravator on this basis, so error, if any would be harmless. *See, e.g., Omelus v. State,* 584 So.2d 563 (Fla. 1992) (jury would not have known there was a second murder unless they had prior knowledge and could distinguish minor factual variations).

Further, even if it could be said that the jury would have been able to draw this inference from the evidence, reversal is not warranted, While Kramer refers to the prosecutor's argument as "deliberate", "highly prejudicial", highly inflammatory", and claims that it "thwarted the pursuit of justice", he has failed to provide any argument to support these serious, and appellee submits unwarranted and unfounded, allegations. This is not a case where the jury could have drawn an improper or incorrect inference even knowing that Milhauser had died. Kramer intended to kill Milhauser, which is evidenced by his plea to attempted first degree murder. *See, Fleming v. State,* 374 So.2d 954, 956 (Fla. 1979) (the offense of attempted first degree murder requires a premeditated design to effect death). The fact that Kramer was not immediately successful, as a result of another transient summoning help and modern medicine, including six operations[9] which permitted Milhauser to survive with a greatly reduced quality of life for a year or so, does nothing to change his conduct in committing the crime or culpability for it, and consequently the weight to be accorded this aggravating factor. This court has determined that it is permissible for victims of

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[9] Milhauser's medical records were admitted into evidence (R 859).

the prior violent felonies to testify at the penalty proceeding, and appellee contends that where the victim cannot testify because he has subsequently died as a result of the defendant's prior violent felony, such factor is a relevant consideration in determining the weight to be given that factor. The jury heard that Kramer was a good boy while he was in jail for this offense, and appellee submits that it was just as relevant for the jury to hear the Milhauser was dying while Kramer was working, going on retreats, and leading his bible group.

Appellee further contends that evidence that Robert Milhauser eventually died from the injuries he sustained as a result of Kramer's attack was relevant and would have been admissible in the penalty phase, so again, prejudice cannot be demonstrated. In the penalty proceeding, evidence may be admitted as to any matter relevant to the nature of the crime and the character of the defendant, and shall include matters relating to any of the aggravating circumstances. §921.141(1), Fla.Stat. (1989). This court has held that a propensity to commit violent crimes is a valid consideration for the jury and judge, noting that a jury cannot be expected to make a decision in a vacuum and must be made aware of the underlying facts. *Elledge v. State,* 346 So.2d 998 (Fla. 1977). *See also, Waterhouse v. State,* 17 F.L.W. *135* (Fla. February 20, 1992); *Lucas v. State, 568* So.2d 18 (Fla. 1991); *Rhodes v. State,* 547 So.2d 1201 (Fla. 1989); *Chandler v. State,* 534 So.2d 701 (Fla. 1988); *Stewart v. State, 558* So.2d 416 (Fla. 1990); *Stano v. State,* 473 So.2d 1282 (Fla. 1985); *Tompkins v. State,* 502 So.2d 415 (Fla. 1986); *Perri v. State,* 441 So.2d

606 (Fla. 1983). Likewise, it is legitimate for the prosecutor to compare the two crimes in closing argument. *Lucas, supra; Freeman v. State,* **563** So.2d 73 (Fla. 1990). "If a defendant was convicted of any violent felony, *any* ***evidence*** showing the use of threat or violence to a person during the commission of such felony would be relevant in such proceeding." *Delap v.* ***State,*** 440 So.2d 1242, 1255 (Fla. 1983)(emphasis supplied).

The deposition of Dr. Ruiz, which the trial court relied upon in denying the motion for mistrial as to the fact that Milhauser's death was mentioned, demonstrates that the only thing wrong with Milhauser which could have led to his death was the injuries inflicted by Kramer (R 566-67). Milhauser's cause of death was a cerebral infarction (R 565). Defense counsel stated that if after the state proffered the medical examiner's testimony, the doctor said that Milhauser died of injuries inflicted by Kramer, that would be an expert opinion (R 565-66). Thus, the fact that Kramer's efforts eventually proved to be successful certainly would not mislead the jury in any respect, and would be a relevant consideration in its sentencing recommendation.

Appellee would also point out that such evidence would have been admissible during the guilt phase had the state elected to present it at that time. The fact that the two crimes are virtually identical cannot be seriously disputed. Both victims were transients, who Kramer claimed he had been drinking with before he attacked them. Both crimes occurred within one city block of each other. Both crimes happened in the evening, and

both occurred when no witnesses were present. Both victims were attacked with a large rock, both sustained extensive head injuries, and both were left lying in a concrete culvert. In both instances Kramer initially denied committing the crime, but subsequently admitted he had done it but it was the result of mutual combat. Finally, both victims died as a result of Kramer's actions, and all of the above would have been relevant to show opportunity, intent, plan, knowledge, and absence of mistake or accident. §90.404(2), **Fla. Stat. (1989);** *Williams v. State,* 110 So.2d 654 (Fla. 1959).

The fact that the prosecutor mentioned that Kramer was on probation for the prior attempted murder at the time he committed this murder was also a relevant consideration in determining the weight to be accorded this aggravating factor. The prosecutor never argued that this should be considered as a separate aggravating factor, and the jury was instructed as to the matters it could appropriately find in aggravation. Further, since the judgment and sentence were entered into evidence, the jury would have been well aware of the fact that Kramer was on probation, since the sentence reflects he received fifteen years probation following his incarceration.

In sum, there is nothing in this record to show that the prosecutor attempted to deliberately and intentionally mislead the jury, and nothing to demonstrate that the jury was in fact mislead or relied on improper factors in recommending the death sentence. The trial court and the prosecutor stressed that the jury's decision was to be based on the evidence and law and not

on the basis of the attorney's arguments. *See, Harich v. Dugger*, 844 F.2d 1464 (11th Cir. 1988). In the three instances during closing, the prasecutor quickly corrected his misstatement, and never urged the jury to consider the fact that Milhauser eventually died as an aggravating factor. The prosecutor was never chastised by the trial court, who admittedly was starting to get mad (R 852), which indicates that he did not find these statements intentional. Appellee submits that under the circumstances, the prosecutor's misstatements were understandable, his explanations reasonable, and three mistakes over the course of a thirty minute argument that were quickly rectified do not render this proceeding unfair.

POINT 8

THE AGGRAVATING FACTOR HEINOUS, ATROCIOUS OR CRUEL IS NOT UNCONSTITUTIONALLY VAGUE.

Kramer contends that the aggravating factor heinous, atrocious or cruel is vague and that the limiting construction used by this court both facially and as applied is too vague and indefinite to comport with the Eighth and Fourteenth Amendments as set forth in *Maynard v. Cartwright*, 486 U.S. 356 (1988); *Godfrey v. Georgia*, 446 U.S. 420 (1980), and *Shell v.* Mississippi, 111 S.Ct. 313 (1990). Kramer's claim is without merit. *Smalley v. State*, 546 So.2d 720 (Fla. 1989). *See also, Robinson v. State*, 574 So.2d 108 (Fla. 1991); *Trotter v. State*, 576 So.2d 691 (Fla. 1990); *Occhicone v. State*, 570 So.2d 902 (Fla. 1990); *Freeman v. State*, 563 So.2d 73 (Fla. 1990); *Randolph v. State*, 562 So.2d 331 (Fla. 1990); *Brown v. State*, 565 So.2d 304 (Fla. 1990); *Smith v. Dugger*, 565 So.2d 1293

(Fla. 1990). In *Smalley,* this court found that its narrowing construction of this aggravating factor had been upheld in *Proffitt v. Florida,* **428 U.S.** 242 (1976), and the fact that ***Proffitt*** is still good law today is apparent from the ***Maynard*** decision, where the majority distinguished Florida's sentencing scheme from those of Georgia and Oklahoma. *Smalley* at 722. The ***Shell*** decision does not change this, as it was decided on the basis of ***Maynard.***

Further, the United States Supreme Court recently upheld the Arizona Supreme Court's construction of this aggravating factor, noting that it was similar to Florida's construction which was approved in ***Proffitt.*** *Walton v.* ***Arizona,*** 110 S.Ct. 3047, 3057-58 (1990). This clearly indicates that ***Proffitt*** continues to be good law today, and that this court's Construction of the heinous, atrocious or cruel aggravating factor comports with constitutional standards. The trial court expressly acknowledged this court's construction af this factor in its sentencing order and expressly set forth the factual basis to support its finding of this factor (R 1274-75), so it is clear he was aware of the construction given to it by this court. ***See, Sanchez-Velasco v. State,*** 570 So.2d 908 (Fla. 1990).

POINT 9

of the requested instructions, and simply alleges that the remaining ones "clarified vague and confusing standard jury instructions." Appellee contends that in the absence of any argument or authority to support this claim, it is not cognizable on appeal.

Even if the claim is cognizable, there was no abuse of discretion in refusing to give the instructions. This court has ruled adversely to Kramer's claims on the instructions specifically mentioned by him. *Mendyk v. State*, 545 So.2d 846, 849 n. 3 (Fla. 1989) (#4A-death penalty reserved for most aggravated and unmitigated crimes); *Stewart v. State*, 549 So.2d 171 (Fla. 1989) (#6-instruction an all aggravating factors); *Robinson v. State*, 574 So.2d 108, 113 (Fla. 1991) (#2-allocation of burden of proof; #9 and #9A-doubling of aggravating factors). Appellee would also point out that as to requested instructions 9 and 9A, the state only argued two aggravating factors, which could in no way result in impermissible doubling, so those instructions were inapplicable to this case.

This court has consistently held that the standard jury instructions are sufficient to apprise the jury of the applicable law and has consistently rejected claims that a trial court should have given additional instructions at the penalty phase. *Dougun v. State*, 17 F.L.W. 10 (Fla. January 2, 1992) (standard instruction on nonstatutory mitigating evidence allows jurors to consider and weigh relevant mitigating evidence); *Randolph v. State*, 562 So.2d 331 (Fla. 1990) (no error in refusing to instruct jury separately an specific nonstatutory circumstances); *Sochor v. State*,

580 So.2d 595 (Fla. **1991)** (rejecting claims that instructions as to statutory and nonstatutory mitigating evidence were improper, that jury was improperly instructed as to the burden and standard of proof with regard to mitigating circumstances); ***Robinson,*** *supra;* (burden shifting, doubling, consideration of listed aggravating factors, burden of proof on aggravating factars); ***Brown*** *v.* ***State,*** 565 So.2d **304** (Fla. **1990)** (standard instructions **do** not impermissibly put any particular burden of proof on capital defendants); *Mendyk, supra,* (instructions on doubling of aggravating circumstances, that the death sentence is only for most aggravated crimes, mercy-pardon power).

POINT 10

THE TRIAL COURT CORRECTLY FOUND THAT THE MURDER OF WALTER TRASKOS WAS HEINOUS, ATROCIOUS OR CRUEL.

The trial court found the following facts:

> Dr. Jesse Gilles, Assistant Orange County Medical Examiner, testified Walter Edward Traskos sustained a minimum of nine to ten blows to the head region. Only two of the blows were characterized as being fatal. There were blows to the chin, the eye region, and approximately two blows to the left side of the head, all of which were considered non-fatal or local type injuries. There was additional major trauma to the skull resulting in a compression fracture and the doctor opined Walter Edward Traskos died of severe skull and facial fractures due to blunt trauma. He testified the blows to the head and face were consistent with being struck by a large concrete block. Dr. Gilles also observed what he construed as "defensive wounds" to the back of the left hand and fingers and in the area of the right arm.

> Officer Donald C. Ostermeyer of the Orlando Police Department was qualified as a blood stain pattern analyst. The science of blood stain pattern analysis is commonly referred to as "blood splatter" analysis". Officer Ostermeyer testified that in his opinion and based upon an examination of photographs Walter Edward Traskos was initially attacked by Larry Dean Kramer at or near the upper portion of the embankment. The attack proceeded downward approximately 15 to 20 feet to the bottom of the embankment and into a semilunar concrete culvert. The attack then continued along the culvert to a position where the body was discovered. Based upon the blood patterns on the rocks, ground and clothing Officer Ostermeyer opined that there was forceful blood shed along this path to the final resting place of the body indicating the victim was alive during this period of time and was moving.

(R 1272-73). In finding that the murder of Walter Traskos was heinous, atrocious or cruel, the trial court stated:

> This Court has reviewed in detail the testimony of Jesse C. Gilles, M.D., the Assistant Orange County Medical Examiner, the testimony of Officer Ostermeyer of the Orlando Police Department, the photographs and slides taken of the decedent Walter Edward Traskos, and the scene of this offense. Based upon this examination the court is of the opinion the murder of Walter Edward Traskos was especially heinous, atrocious and cruel. The Court finds the State of Florida has proven this aggravating factor beyond and to the exclusion of every reasonable doubt. This Court is convinced Walter Edward Traskos was alive and conscious and experienced pain and anguish while being bludgeoned by Larry Dean Kramer. It is apparent from the scientific evidence that the fatal blows were struck to the head of Walter Edward Traskos as he lay in his final resting position.

> The testimony of Dr. Gilles also establishes "defensive wounds" on the arm and hand of Walter Edward Tsaskos leading the Court to conclude he was attempting to defend himself as he was being repeatedly struck by Larry Dean Kramer.

(R 1275-76).

When there is a legal basis to support an aggravating factor, a reviewing court will not substitute its judgment for that of the trial court. *Occhicone v. State,* 570 So.2d 902 (Fla. 1990). The resolution of factual conflicts is solely the responsibility and duty of the trial judge and an appellate court has no authority to reweigh that evidence. *Gunsby v. State,* 574 So.2d 1085 (Fla. 1991). In arriving at a determination of whether an aggravating circumstance has been proved the trial judge may apply a "common-sense inference from the circumstances". *Swafford v. State,* 533 So.2d 270, 277 (Fla. 1988); *Gilliam v. State,* 582 So.2d 610, 612 (Fla. 1991). When a trial judge, mindful of the applicable standard of proof, finds that an aggravating circumstance has been established, this finding should not be overturned unless there is a lack of competent substantial evidence to support it. The sentencing order demonstrates that the trial court was well aware of the applicable standard of proof. The facts of this murder and precedent demonstrate that there is a legal basis for the trial court's finding that this murder was heinous, atrocious and cruel, and this finding is supported by competent substantial evidence.

This was not, as Kramer characterizes it, a "frenzied attack which culminated in a major blow which caused death nearly immediately" (IB 58). Rather, the evidence demonstrates that Kramer systematically pulverized the victim as he tried to get away and fend off the blows, Kramer delivered a minimum of nine to ten blows; none but the final two would have been fatal (R 360, 364). Some of these injuries were consistent with having been caused by a fist (R 375). The crime scene photographs and blood spatter testimany demonstrate that the attack began at the upper portion of the embankment, proceeded down approximately fifteen feet to the culvert, then down the culvert to the final resting place of the victim (R 428). The blood pattern, which was individual droplets as opposed cast off blood, indicated there was not a struggle (R 414). The final blows, which were delivered with a concrete block, were inflicted at the victim's final resting place in the culvert while his head was lying against the cement (R 353-54). The victim would have been in upright, seated, and lying down positions when blows were delivered, and was once in a face down position with his hand at his forehead, though when found he was on his back (R 408, 417-18, 426). At same point during forceful bloodshed his arm was elevated with the hand up, allowing the forearm to be exposed to bloodshed (R 423). The victim had defensive wounds on his hand and other blunt force injuries which could have been caused from falling (R 364-65, 379). Kramer had no visible injuries when he was arrested within 48 hours of the murder (R 457).

foot area as the victim attempted to flee and fend off the blows. The absence of any injuries to Kramer indicates that it was a one-sided fight, with the victim's only actions being evasive and defensive, The victim certainly would have known what was happening to him, would have felt the blows being delivered by Kramer and pain from them and the injuries they caused, and would have been contemplating his own demise as he lay helpless in the culvert, with his hand at his head, before Kramer found a rock and delivered the final, fatal blows.

This court has upheld the finding of heinous, atrocious or cruel under very similar circumstances. *Lamb v.* ***State,*** 532 So.2d **1051** (Fla. 1988) (victim struck six times in head with claw hammer, had defensive wound, and moaned while defendant kicked him in the face); ***Roberts v. State,*** **510** So.2d ***885*** (Fla. **1987)** (victim killed **as** a result of numerous blows to back of head and evidence indicated that victim attempted to fend off further blows); *Wilson v.* ***State,*** **493** So.2d 1019 (Fla. 1986) (victim brutally beaten while attempting to fend off blows before being fatally

Similarly, this court has upheld the finding of this factor where a victim has been stabbed and has defensive wounds. *See, e.g., Campbell v. State,* 571 So.2d 415 (Fla. 1990); *Floyd v. State,* 569 So.2d 1225 (Fla. 1990).

The cases cited by Krames are distinguishable. In *Simmons v. State,* 419 So.2d 316 (Fla. 1982), and *Herzog v. State,* 439 So.2d 1372 (Fla. 1983), there was no evidence that the victims knew they were going to be attacked, and in *Herzog,* the evidence indicated the victim was semi or unconscious. As demonstrated, the evidence in the instant case demonstrates the victim was attempting to flee and fend off the blows. *Menendez v. State,* 368 So.2d 1278 (Fla. 1978), *Lewis v. State,* 377 So.2d 640 (Fla. 1979), and *Teffeteller v. State,* 439 So.2d 840 (Fla. 1983), all involved shooting deaths, which were not accompanied by additional acts which set the crimes apart or were accompanied by additional acts that were unnecessarily torturous to the victims. Significantly, the *Lewis* court distinguished that case from *Adams, supra,* where the victim had been savagely beaten. In *Rembert v. State,* 445 So.2d 337 (Fla. 1984), the victim was hit once or twice with a club, and the court specifically distinguished *Scott, supra,* where the victim had been beaten after a struggle. The trial court correctly found that the murder of Walter Traskos was heinous, atrocious and cruel.

Even if for some reason this aggravating factor was stricken, the death penalty is still appropriate in this case. While only one aggravating factor would remain, appellee contends that it is entitled to the greatest possible weight, and clearly

outweighs any of the proffered mitigation. Kramer previously committed a virtually identical crime, and but for the fact that one of that victim's buddies returned to the scene and reported it, it would have been identical in all respects. The mitigation in this case is minimal and far from compelling. Death is the appropriate penalty.

POINT 11

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REJECTING THE OPINION OF DR. LIPMAN THAT KRAMER SUFFERS FROM EPISODIC DYSCONTROL SYNDROME,

Kramer contends that the trial court erred in rejecting unrefuted mitigating circumstances, specifically the opinion of Dr. Lipman that Kramer suffers from episodic dyscontrol syndrome. Kramer alleges that this evidence is uncontroverted and unrefuted, and the trial court pointed to nothing in the record to refute Dr. Lipman's testimony, Appellee contends that the trial court acted well within its discretion in rejecting Dr. Lipman's opinion, which was based on Kramer's unsubstantiated self report and was at best equivocal.

Deciding whether a mitigating circumstance has been established is within the trial court's discretion, and reversal is not warranted simply because an appellant draws a different conclusion. *Sireci v. State*, 587 So.2d 450 (Fla. 1991); *Stano v. State*, 460 So.2d 890 (Fla. 1984). The resolution of factual conflicts is solely the responsibility and duty of the trial judge, and this court has no authority to reweigh that evidence. *Gunsby v. State*, 574 So.2d 1085 (Pla. 1991). The trial court may accept or

reject the testimony of an expert witness just as he may accept or reject the testimony of any witness. *Roberts v. State,* **510** So.2d 885 (Fla. 1987). The record supports the trial court's rejection of Dr. Lipman's opinion, and Kramer has failed to demonstrate an abuse of discretion.

As the trial court noted, the very predicate of Dr. Lipman's diagnosis rests upon the history presented to him by Kramer, and Kramer's family did not provide Dr. Lipman with any history of episodes of violence (R 1282). The record demonstrates that Kramer's self report is extremely suspect. Appellee would first point out that the test results had to be modified for Kramer's "talking bad'' (R **764).** Kramer had a high score for faking bad and had motivation to exaggerate mental or personality disorders (R **840).** Kramer's personality profile elicits antisocial traits (R 819-20). Kramer told Dr. Lipman he was drinking sixteen ounce beers but only twelve ounce cans were found at the scene (R 803). Significantly, approximately nine beer cans were found at the scene, which could not account for the victim's blood alcohol and a similar blood alcohal in Kramer, and if Kramer **was** not **drunk** the episodic dyscontrol diagnosis is not valid (R 832).

Kramer also told Dr. Lipman that he had a "distant mother", but all other testimony indicated that Kramer had a very loving mother and that he was in fact her favorite **(R 643, 693, 706, 719, 737,** 820). As to the two instances of Kramer harming himself, there was no basis to demonstrate that either was a suicide attempt. The first incident was just as consistent with

a drunk falling on his knife; Kramer did not remember shooting himself and the fact that he was shot in the shoulder was inconsistent with a suicide attempt and he could just as likely have been shot by someone else (R **823-25).** In fact, Kramer had apparently told family members that it was a drive-by shooting (R **799).**

According to Dr. Lipman, due to Kramer's episodic dyscontrol syndrome there is no way Kramer can know it is happening ok stop himself, then he does not have an explanation for it (R **808).** Interestingly, Kramer had an explanation for the entire incident, which **revolved** around the victim having pulled a knife. Kramer also hid the murder weapon and disposed of his bloody pants. It is also interesting that with this syndrome a person emits violence and rage completely out of proportion to the stimulus that triggers it (R 792), which would explain why Dr. Lipman did nat believe **that** the victim had pulled a knife (R 827). Dr. Lipman testified that he would expect to see somewhere in Kramer's life an outburst, and there were none (R **815-16).** Dr. Lipman agreed that even without alcohol, Kramer would be withdrawn, asocial, timid, threat sensitive, tense, undisciplined, uncontrolled, despondent, hypomanic, shaky, frightened, clumsy, gloomy and sad (R 838), which is in sharp contrast to the behavior exhibited by Kramer while he was at Lake Correctional, where he exhibited a leadership role, participated in all activities, and got along with everyone (R **661-66, 740-41, 742-44).** In fact, Kramer did so well in prison that he was released after serving less than **three** years of a fifteen year

sentence for attempted first degree murder. Kramer now states that his sister testified that he got violent when he drank, but his brother does not remember him being violent and testified that he was a happy-go-lucky drinker (R **722-23**).

The trial court considered that testimony, resolved the conflicts, and did not abuse his discretion in rejecting it. ***Gunsby, supra.*** ***See*** *also, Bruno v. State,* 574 So.2d *76* (Fla. **1991**); *Ponticelli v. State,* 17 F.L.W. 169 (Fla. March **9, 1992**). The testimony regarding Kramer's mental state was not without equivocation, and it was such that the trial judge was within his authority to deny application of the mitigating factors testified to by Dr. Lipman. ***See,*** *Sanchez-Velasco* ***v. State,*** *570* **So.2d 908** (Fla. 1991). Further, the trial court was of the opinion that sufficient evidence was presented to demonstrate the presence of impaired capacity **and** at least some mental and emotional stress, but that the aggravating factors outweighed the mitigating evidence. ***See,*** *Gunsby,* ***supra.*** There was no error in the trial court's consideration of mitigating evidence. *Gaskin v. State,* **591** So.2d 917 **(Fla. 1991).**

POINT 12

THE DEATH SENTENCE IS PROPORTIONATE.

In reviewing a death sentence, this court looks to circumstances revealed in the record in relation to those present in other death penalty cases to determine whether death is appropriate. Compared with other cases where the jury has recommended death and the trail court has imposed the death penalty, Kramer's case warrants the death penalty. *Livingston v.*

State, 565 So.2d 1288 (Fla. 1988). In the instant case, there are two aggravating factors (heinous atrocious or cruel and prior violent felony conviction for a very similar crime) to be weighed against minimal mitigation. The imposition of the death penalty in this case upon the jury's recommendation is consistent with this court's prior decisions. See, *Bowden v. State,* 588 So.2d 225 (Fla. 1991) (HAC and prior violent felony weighed against terrible childhood and adolescence); *Cook v. State,* 581 So.2d 141 (Fla. 1991) (two aggravating factors, including a prior capital felony, and one statutory mitigating factor); *Asay v. State, 580* So.2d 611 (Fla. 1991) (two aggravating factors weighed against age of 23); *Hayes v. State,* 581 So.2d 121 (Fla. 1991) (two aggravating factors weighed against minor mitigating factor of age, low intelligence, learning disabled, product of deprived environment); *Freeman v. State, 563* So.2d 73 (Fla. 1990) (death penalty not disproportionate where two aggravating factors weighed against mitigating evidence of low intelligence and abused childhood); *Kight v. State,* 512 So.2d 922 (Fla. 1987) (death penalty proportionally imposed with two aggravating factors despite evidence of mental retardation and deprived childhood). This court has also found that the death penalty is proportional in a line of cases where the murder was heinous atrocious or cruel and the defendant had previously been convicted of a very similar crime. *Lemon v. State, 456* So.2d *885* (Fla. 1984); *King v. State,* 436 So.2d *50* (Fla. 1983); *Harvard v. State,* 414 So.2d 1032 (Fla. 1982).

The cases cited by Kramer are distinguishable. *Blakely v. State,* 561 So.2d 560 (Fla. 1990), *Wilson v. State,* 493 So.2d 1019 (Fla. 1986), and *Farinas v. State,* 569 So.2d 425 (Fla. 1990), all involved heated domestic confrantations. *See, Asay, supra,* which distinguished *Wilson.* *Livingston v. State,* 565 So.2d 1288 (Fla. 1988) and *Fitzpatrick v. State,* 527 So.2d 809 (Fla. 1988), both had extensive mitigating factors not present in the instant case. *Rembert v. State,* 445 So.2d 337 (Fla. 1984) had only one aggravating factor, which was during the course of a felony. The death penalty is proportionally warranted in the instant case.

CONCLUSION

Based on the foregoing arguments and authorities, appellee requests this court affirm the judgment and sentence of the trial court in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Answer Brief has been furnished by hand delivery to Michael S. Becker, Assistant Public Defender, in the Public Defender's in-box at the Fifth District Court of Appeal, this 1st day of May, **1992.**

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