IN THE SUPREME COURT OF FLORIDA

CHARLES W. FINNEY,

Appellant,

v. Case No. 80,990

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE THIRTEENTH JUDICIAL CIRCUIT
IN AND FOR HILLSBOROUGH COUNTY

# BRIEF OF APPELLEE

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

CAROL M. DITTMAR
Assistant Attorney General
Florida Bar No. 0503843
2002 North Lois Avenue, Suite 700
Tampa, Florida 33607-2366
(813) 873-4739

COUNSEL FOR APPELLEE

/tms

TABLE OF CONTENTS

## TABLE OF CITATIONS

OTHER AUTHORITIES:

## STATEMENT OF THE CASE AND FACTS

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

Prior to trial, the appellant filed a motion seeking to have his public defender replaced, and the public defender filed a motion to withdraw (R. 21-28). Both motions cited an incident that occurred when the attorney and an investigator met with the appellant in jail (R. 21-22, 24). As documented in the Incident Report, the appellant had to be physically escorted from the room and continued to threaten the investigator as he was returned to his cell (R. 27; T. 1051-1052). The trial court ultimately appointed new counsel for the appellant (R. 37-38).

The victim in this case, Sandra Sutherland, was found on top of her bed in her apartment about 2:00 p.m. on January 16, 1991 (T. 278, 375). Sandra had been bound, gagged and stabbed to death (T. 280, 331, 375-376). She was lying crosswise, with her head near one side of the bed and her feet hanging over the other side (T. 473; Ex. 24, 25). On the bedside table near her feet there was an open jar of face cream. The top was unscrewed and laying next to the jar (T. 318, Ex. 20). The room had been ransacked, a jewelry box was missing, and the contents of her purse had been dumped and strewn over the floor (T. 274, 318-319, 406; Ex. 18, 19, 21, 22). The other rooms of the apartment appeared to be in order, although a shelf underneath the television in the living room had an outline of dust and loose

wires indicating that a VCR had recently been taken, and her cordless phone was inoperable (T. 280, 317-318, 407; Ex. 16, 17).

Sandra's VCR had been pawned at 1:42 that afternoon (T. 287; Ex. 4). Although Sandra lived in Temple Terrace, which is a mixed residential/commercial area, the pawn shop was located about nine miles away, almost to downtown Tampa (T. 425-426). The appellant had pawned the VCR and gotten thirty dollars for it (T. 288; Ex. 4). In addition, the appellant's fingerprints were discovered on the lid to the jar of face cream on the bedside table, and on the back of one of the pieces of paper scattered around the floor of Sandra's bedroom (T. 346, 349). A fingerprint expert testified that under normal circumstances a print will be destroyed either by being handled or by exposure to heat, humidity or rain (T. 342).

Dr. Charles Diggs was the associate medical examiner that observed Sandra at the scene and then later performed her autopsy (T. 374-375). Dr. Diggs testified that Sandra was found lying face down with her hands tied behind her back (T. 375). There were thirteen stab wounds on her back, but no evidence of any other trauma was observed (T. 376-377). Each wound was five inches deep, and had been inflicted by a knife-type weapon (T. 378). One wound was located on the back of Sandra's neck, and each of the remaining twelve had punctured her lungs (T. 379). Any one of these twelve would have been fatal in and of itself (T. 380). Diggs stated that Sandra would have remained conscious for thirty to sixty seconds, and would have died in four to five

minutes (T. 382-383). It was not an immediate death as it would have been had a stab directly wounded her heart (T. 383). She would have been conscious through at least the first several stabbings, and she was alive during all thirteen of the stabs (T. 386, 391). The nature of the wounds indicated that they had occurred in quick succession, as "in some type of frenzic passionate activity" (T. 397).

Tampa Police Department Detective Randy Bell testified that the appellant was identified as a suspect when a review of recent pawn slips revealed the ticket for Sandra's VCR (T. 407, 409). Bell interviewed the appellant at 4:28 p.m. on January 30, 1991 (T. 410). After the appellant waived his constitutional rights, Bell advised him that he was investigating a homicide, and asked him if he knew Sandra Sutherland (T. 413). The appellant indicated that he did, due to the fact that they had lived in the same apartment complex in the area next to each other for a while (T. 413). He stated that Sandra had moved into a different apartment about eight months earlier, and he had only seen her twice since then (T. 413). One time he had talked to her about putting a screened porch on the back of her apartment, and then about two months prior to the homicide he had seen her by the mail boxes and they had talked about her trip to Germany (T. 413).

Bell asked the appellant where he had been on January 16, and the appellant told him that he had called in sick that morning, and about 10:30 some maintenance people came to repair

some holes in the wall of his apartment (T. 414). After they left, according to the appellant, he stayed inside all day by himself watching television until his girlfriend returned with the car about 4:30 to 5:15 (T. 414). He stated that he never left the apartment (T. 415). When Bell confronted the appellant with the fact that Bell knew he had pawned Sandra's VCR that afternoon, the appellant was shocked and said that he had found the VCR in a green duffle bag when he took the garbage out, and that he took it to his house, then put it in his car and drove it to the pawn shop (T. 415).

The appellant presented several witnesses. Sydney Bayles testified that he had seen Sandra outside arguing with a big white male the day before she was killed (T. 446-447). Brad Ganka and his girlfriend Bernice Phipps testified that they saw a man named William Kunkle leaving Sandra's apartment about 9:50 on the morning of the murder, locking the front door on his way out (T. 501-503, 510-512). The defense also wanted to recall Dr. Diggs, but the state objected to the testimony sought as speculative (T. 456-457). The trial court entertained a proffer of Diggs' testimony (T. 462).

In the proffer, Diggs was asked his opinion as to Sandra's position at the time her wounds were inflicted (T. 464). He stated that she had probably been lying face down on her bed, just as she was found (T. 464). When asked about the significance of the fact that Sandra had been bound and gagged, Diggs stated that two possible scenarios came to mind -- that she

had been incapacitated so that she couldn't fight or yell, or that she had consented to a bondage type situation (T. 465). He stated that the two scenes would look identical, and that "as to what happened here, I have no idea" (T. 466). He noted that there were no defensive wounds or signs of a struggle (T. 466). Diggs stated that even in consensual sex cases he had seen, there are usually bruises and lacerations present (T. 470). Diggs also stated that he could not identify where the perpetrator would have been at the time of the stabbing, although the most "common theme" would place the perpetrator behind Sandra (T. 467). Finally, Diggs noted that the path of the stab wounds was basically left to right, which generally meant that the perpetrator would be left handed, *if* Sandra had been lying flat at the time, which could not be determined (T. 467-468). Diggs cautioned that there would be "large percentages of variations" on this conclusion (T. 468). While he believed Sandra was prone at the time of the offense, she was not necessarily lying flat in the position she was found (T. 470-471). He was not able to determine if the perpetrator had been closer to Sandra's head or her feet as she was stabbed (T. 473-474).

The trial court asked several questions in order to determine the admissibility of Diggs' testimony (T. 475). In response, Diggs stated that whether or not the bondage was consensual was not something that he, as medical examiner, would typically testify about or try to determine (T. 475). He suggested that this was not within his purview, and that a

psychiatrist would be more help in ascertaining what had happened beyond the physical positions (T. 475-476). The court ruled that she would allow testimony as to the positions of the body and the lack of defensive wounds, but not whether the bondage was consensual or forced (T. 479-480). Defense counsel asked if he could inquire whether the scene was "consistent with a bondage murder" and Diggs noted that there was not enough information, that the scene was consistent with both theories because it was not inconsistent with either one (T. 480, 483). In addition, Diggs stated that offering such a conclusion would be "total speculation" and misleading for the jury (T. 484-485).

Thereafter, Dr. Diggs testified before the jury that, based on his observations, Sandra had been lying down at the time her wounds were inflicted (T. 490-492). He stated that there were no signs of a struggle, and no evidence of defensive wounds or any beating prior to the stabbing (T. 492-493). Based on the blood spatters, he believed that the perpetrator was over Sandra at the time, but that he could have been in any position behind her (T. 493-494). Diggs also testified that the left-to-right direction of the wounds could mean that the perpetrator was left or right handed, depending on several unknown factors (T. 496). Diggs could not say if Sandra had been lying flat or face down, she may have been hunched over (T. 498).

The appellant also testified on his own behalf (T. 527). He stated that prior to January, 1991, he had lived in the same apartment complex for, at most, one and a half years (T. 529-

530). At one time, he lived in an apartment behind Sandra Sutherland (T. 530). Sandra had moved to a different apartment, and sometime after she moved and five or six months before she was killed, he had moved to a different apartment as well (T. 529, 532).

The appellant saw Sandra on the back porch of her new apartment before he had moved to his new apartment (T. 532). They had previously talked about his screening her patio in, and at that time she handed him a piece of paper to write measurements on, but then took it back saying he shouldn't write on it (T. 532-533). She handed him a notepad instead and he wrote down everything she would need for the screening job (T. 533). He returned a week or two later and she had decided not to have the patio screened (T 534). He actually went inside her apartment, and, according to his testimony, this was the only time he was ever inside her new apartment (T. 552). He helped her move boxes around and pulled "whatnots" and stuff out of the boxes (T. 536, 538). He did not specifically recall the jar of face cream on which his fingerprint was found (T. 537).

When asked the last time that he had seen Sandra alive, the appellant said they had once talked awhile out by the mailboxes (T. 539). He then said he once saw her coming out of her apartment early in the morning, about 6:30 or 7:00 (T. 539). She was getting ready to go somewhere, and she was calling someone on her portable phone and cranking up her car (T. 539). When she saw him, she came over to his car and he told her he was just

getting home from playing poker (T. 539). He stated that she laughed and threw her phone in his car, saying he should call home first (T. 539-540). He handed her phone back, saying "you know I don't have a phone" and they talked about the Gulf War (T. 540). He estimated that this was a day or two prior to her murder (T. 555-556). However, the time that he saw her and they talked outside by the mailboxes was much earlier, before she had moved to her new apartment prior to September, 1990 (T. 553-555).

The appellant claimed that he had told Detective Bell that he had seen Sandra within a few days of her murder, and stated that Bell was lying when he testified that the appellant had told him that the last time he had seen Sandra was a couple of months earlier at the mailboxes (T. 556). The appellant also testified that he had told Bell that he was home all day on the day of the murder because he "didn't associate anything that I did that day with a murder or anything" (T. 557). He said he was aware of the murder but didn't make any connection with the VCR so he didn't volunteer anything about the VCR to Bell (T. 558). The appellant also stated that he told Bell that he and his girlfriend had been planning to move to separate apartments, but that they had changed their minds and were going to move together to another complex (T. 559-560).

The appellant testified that on January 16, 1991, he did not work but called in sick because he had taken some cold medication and did not feel like getting up at 5:30 a.m. (T. 540). Two

maintenance men had come to do some repairs at his apartment, and they were going to be returning with their supervisor, so the appellant decided to take out the garbage (T. 541). He found the VCR and some orange pillows and newspapers in a green laundry type bag in the dumpster near his apartment (T. 542). He originally thought the VCR was a compact disc player (T. 542). He took it out, cleaned it up, dusted it off and pawned it because he already had a VCR and needed a few extra dollars (T. 544). In fact, he stated that he had had financial problems all his life (T. 559).

The appellant testified that he was surprised when he realized that Detective Bell was talking about his friend Sandy, since he never knew her as Sandra Sutherland (T. 546). He denied having been in her apartment on January 16, 1991, and stated that he had not stolen her VCR or killed her (T. 547).

In rebuttal, William Kunkle testified that on January 16, 1991, he worked in the building next door to the building where Sandra's apartment was located, but that he had not been in Sandra's apartment at all that day (T. 567-568). He stated that to his knowledge, he had never had any conversation or any interaction with Sandra at all (T. 569).

The state also recalled Detective Bell (T. 576). Bell reiterated that the appellant had told him that the last time the appellant saw Sandra alive was two months prior to the murder, outside at the mailboxes (T. 585). The appellant also told him that the appellant and his girlfriend were moving to separate

apartments, and did not tell him that they planned to move together to a different apartment complex (T. 586).

Fingerprint examiner David Farnell also testified in rebuttal that William Kunkle's fingerprints had been compared with all of the unknown prints recovered from Sandra's apartment, and that there were no matches based on these comparisons (T. 629).

The jury convicted the appellant as charged on all counts (T. 758). Prior to the beginning of the penalty phase, defense counsel requested that the appellant's shackles be removed (T. 815). The trial judge denied this request after insuring that the jury would not be able to see the shackles, and noted that she would have the jury taken out of the courtroom prior to the appellant's testifying so that the shackles could be removed at that time (T. 816).

The court took judicial notice of and instructed the jury regarding the appellant's prior violent felony convictions (T. 798, 818-819). Thereafter, Judy Baker testified to the facts underlying those convictions (T. 820). Baker stated that she was working at her gift shop in Temple Terrace on January 29, 1991, when the appellant came in about 3:45 p.m. (T. 820-821). After looking around and speaking with Baker about a possible gift, the appellant grabbed Baker, took the cordless telephone out of her hand, and pulled her head back (T. 822-824). Baker saw that the appellant had a knife with a four to five inch blade (T. 824). The appellant stated that he did not want to hurt her, he only

wanted her money, and he would not hurt her if she remained calm (T. 824). He asked her where her money was, and then led her into another room where he tore her blouse and stuffed it in her mouth to gag her (T. 824). He tied her hands behind her back and tied another cord around her mouth to hold the gag in (T. 825). He took thirty two dollars out of the cash register, then dumped the contents of her purse out and took twenty to thirty dollars from her wallet (T. 825).

The appellant took her into a storage room, put tape over the cord that tied her hands behind her back, and told her he had to cover her face (T. 826-827). He got angry when she looked at him, implying that he could not let her live if she saw and remembered him (T. 832). He raped her, and commented that he should "take care of this so I have nothing to worry about" (T. 832). Following Baker's testimony, the court instructed the jury that sympathy should not play any part in their decision (T. 839).

The defense called Tammy Gallimore, the appellant's girlfriend[1] (T. 839). Tammy and the appellant moved to Florida in March, 1988, and their daughter was born on April 21, 1988 (T. 843, 847). Tammy described the appellant's positive character traits and begged the jury to "spare his life" (T. 855). Following her testimony, the court noted that the witness had

---

[1] Although the PSI reflects that Tammy and the appellant were married in Georgia on June 15, 1988, the appellant testified at trial that he was not married and Tammy did not specifically address their relationship (T. 527-528, R. 964).

been crying, and repeated her instruction to the jury that sympathy should not play any part in their deliberations (T. 856, 858). Joe Williams also testified about the appellant's good character traits and the circumstances surrounding his being fired from the job at University Community Hospital (T. 860-869).

Dr. Michael Gamache is a clinical and forensic psychologist who had spent a total of five or five and a half hours with the appellant (T. 869-870). The appellant had told Gamache that he grew up in a family near poverty level, and that his father had been a very heavy drinker that left when the appellant was about three years old (T. 874). Gamache would characterize the appellant's childhood as deprived since the appellant's father had not been around, and the appellant grew up in a small southern town in the sixties (T. 888-889). Gamache described the appellant's education and military history (T. 875-876). His testing revealed that the appellant was normal, was not psychotic or a psychopath, and had no major psychological symptoms (T. 884, 886). He noted that the appellant was bonded to and loved his daughter (T. 890). He concluded that the appellant would adjust well to a prison setting and had an excellent potential for rehabilitation (T. 888).

The jury returned a recommendation of death by a nine to three vote (T. 921). After reviewing written memoranda and entertaining arguments of counsel, the trial judge followed this recommendation (T. 942, 950; R. 153, 157). She found three aggravating circumstances: prior violent felony convictions;

murder committed for pecuniary gain; and murder was especially heinous, atrocious and cruel (T. 942-948; R. 153-155). She also gave some weight to each of five nonstatutory mitigating circumstances: contributions to community as evidenced by work and military history; positive character traits; would adjust well to prison setting and his potential for rehabilitation; deprived childhood; bonding and love for his daughter (T. 948-950; R. 155-156). However, she determined that the aggravating circumstances outweighed the mitigating circumstances and imposed a sentence of death (T. 950; R. 156-157).

## SUMMARY OF THE ARGUMENT

Issue I: There was substantial, competent evidence presented to support the jury verdicts rendered in this case. The appellant's testimony in this case was inconsistent with the testimony of Detective Bell, and therefore the jury was entitled to reject the appellant's hypothesis of innocence. In addition, the appellant did not reasonably explain the presence of his fingerprints in Sandra's apartment. The evidence clearly established that the appellant committed the crimes, and was sufficient to support a first degree murder conviction under either a premeditated or felony murder theory.

Issue II: The trial court properly excluded the proffered testimony of the associate medical examiner as speculative. Dr. Diggs characterized the testimony sought as total speculation and misleading. As such, it could not possibly have aided the trier of fact and was correctly excluded by the court.

Issue III: The appellant's argument as to trial court's denial of his request to have his shackles removed has not been preserved for appellate review, since defense counsel acquiesced once the judge took measures to insure that the jury would not see the shackles. Even if the argument is considered, the appellant has failed to demonstrate that he is entitled to a new sentencing proceeding, since the jury was not aware of the shackles.

Issue IV: The trial court did not err in allowing Judy Baker, rather than the investigating detective, to testify to the facts underlying the appellant's prior violent felony convictions. The prejudicial nature of this evidence came from the substance of the testimony, not who was testifying. The state cannot be precluded from presenting the witness with the most knowledge simply to diminish the impact of the tragic prior convictions on the jury.

Issue V: The appellant's claim that the trial court improperly prohibited defense counsel from cross examining Mrs. Baker regarding the identity of her attacker has not been preserved for appellate review, since there was no proffer of the excluded testimony. The state did not open the door to this evidence by presenting Baker as a witness. Furthermore, such evidence would be irrelevant since lingering or residual doubt as to the validity of a prior violent felony conviction cannot be admitted or argued as mitigation in a penalty phase proceeding.

Issue VI: The appellant's argument that the trial court erred in denying the appellant's request for individual jury instructions on the specific nonstatutory mitigators is not adequately before this Court, since the proposed instructions do not appear in the record on appeal. In addition, this Court has previously recognized that the "catch-all" instruction relating to any other aspect of the defendant's character is sufficient even when multiple nonstatutory mitigators are argued.

Issue VII: The appellant has failed to demonstrate any error in the imposition of his sentence of death. There was substantial, competent evidence to support each of the aggravating circumstances found by the trial court, and the sentence is not disproportionate with other death penalty cases.

## ARGUMENT

### ISSUE I

WHETHER THERE WAS SUBSTANTIAL, COMPETENT EVIDENCE PRESENTED TO SUPPORT THE JURY VERDICTS RENDERED AGAINST THE APPELLANT.

The appellant initially attacks the sufficiency of the evidence to support his convictions, arguing that the evidence was not sufficient to rebut his reasonable hypotheses of innocence. Of course, the question of whether the evidence presented was inconsistent with his hypotheses of innocence was for the jury, and the verdicts cannot be disturbed if they are supported by substantial, competent evidence. Heiney v. State, 447 So. 2d 210 (Fla.), cert. denied, 469 U.S. 920 (1984). A motion for judgment of acquittal should not be granted unless there is no view of the evidence favorable to the state that can be sustained under the law. DeAngelo v. State, 616 So. 2d 440 (Fla. 1993). Furthermore, the state is not required to rebut every conceivable version of events, but only to introduce evidence which is inconsistent with the defendant's theory of events. State v. Law, 559 So. 2d 187, 189 (Fla. 1989).

Specifically, the appellant claims that there was insufficient evidence to establish his identity as the perpetrator; to prove that the murder was premeditated; to prove that the murder was committed during the course of a robbery; and to prove that the murder was motivated by a desire for pecuniary gain. With the above principles in mind, these claims will each be considered individually.

A. IDENTITY

The appellant claims that there was insufficient evidence to establish that he was the perpetrator of these offenses. The state clearly established a prima facie case of the appellant's identity, based on the facts that the appellant pawned the VCR taken from Sandra's apartment within hours of the killing; the appellant's fingerprints were located on two items within Sandra's bedroom; and the appellant initially told Detective Bell that he had not left his apartment at all on the day of the murder. Because the appellant believes that he explained all of this evidence at trial, he argues that his version of events must be accepted. He offers two hypotheses of innocence based on his version of events: that William Kunkle killed Sandra, and that Sandra was killed by an unknown person, possibly the man she was seen arguing with the day before her death.

The first hypothesis is easily refuted by the fact that William Kunkle testified at trial that he had not killed Sandra (T. 567-569). Although other circumstantial evidence also exonerated Kunkle, it is not necessary to weigh that evidence since the jury clearly could have rejected this hypothesis of innocence based on Kunkle's testimony. Certainly, a jury is not required to accept any theory on which the state has produced conflicting evidence. Cochran v. State, 547 So. 2d 928 (Fla. 1989).

The appellant's second hypothesis could also be rejected by the jury based on circumstances showing it to be false. Most notably, the appellant's testimony at trial could have been rejected entirely since it contradicted the appellant's initial statement to Detective Bell that the appellant had not left his apartment at all on January 16, 1991 (T. 415-416). When a defendant has made pretrial statements that contradict his story at trial, the evidence is sufficient to create a jury issue. Bedford v. State, 589 So. 2d 245, 250-251 (Fla. 1991), cert. denied, ___ U.S. ___, 118 L. Ed. 2d 432 (1992); Stone v. State, 564 So. 2d 225 (Fla. 4th DCA 1990), rev. denied, 576 So. 2d 292 (Fla. 1991); Fowler v. State, 492 So. 2d 1344 (Fla. 1st DCA 1986), rev. denied, 503 So. 2d 328 (Fla. 1987); Buenoano v. State, 478 So. 2d 387 (Fla. 1st DCA 1985), rev. dismissed, 504 So. 2d 762 (Fla. 1987).

The appellant also challenges the adequacy of this evidence by asserting that the state failed to prove that his fingerprints could only have been left during commission of the crime. However, the appellant's reliance on the general rule requiring the state to offer such proof is misplaced. A review of the relevant case law demonstrates that this general rule only applies when the fingerprints are the sole evidence linking a defendant to a crime, and when the fingerprints are discovered in a place or on a thing accessible to the general public. Miles v. State, 466 So. 2d 239 (Fla. 1st DCA 1984), rev. denied sub nom. State v. Hampton, 476 So. 2d 675 (Fla. 1985); Sorey v. State,

419 So. 2d 810 (Fla. 3d DCA 1982). Neither of these prerequisites are present in this case. The fingerprints were not the sole evidence of identity, since the appellant was shown to have pawned the VCR shortly after the murder. Sorey; Dixon v. State, 216 So. 2d 85 (Fla. 2d DCA 1968) (fingerprints at scene not sole evidence when defendant also found to be in possession of stolen property), cert. denied, 225 So. 2d 524 (Fla. 1969). Furthermore, the appellant's fingerprints were not found in an area accessible to the general public, since they were in Sandra's bedroom. Amell v. State, 438 So. 2d 42 (Fla. 2d DCA 1983), habeas corpus denied, 450 So. 2d 485 (Fla. 1984). Thus, the state was under no obligation to prove that the fingerprints could only have been left during commission of the crime.

The appellant attempted to explain the presence of his fingerprints in Sandra's apartment by testifying that he had been in Sandra's apartment just after she had moved, and before he had moved to his new apartment, at least four months prior to her murder (T. 257, 529, 532, 534, 552). He attempted to explain pawning the VCR by claiming that he found it in the garbage dumpster behind his apartment. These explanations could have been rejected by the jury as unreasonable even without contrary evidence by the state. See, Jaramillo v. State, 417 So. 2d 257 (Fla. 1982) (evidence insufficient because not inconsistent with defendant's *reasonable* explanation); Larry v. State, 104 So. 2d 352, 355 (Fla. 1958) (defendant's explanation was so incredible that a jury of reasonable men were warranted in refusing to

accept it). In addition, as noted above, the jury would have been entitled to reject the appellant's testimony entirely based on the appellant's pretrial statements to Detective Bell.

Furthermore, the state contradicted the appellant's explanation by the testimony of David Farnell, a fingerprint expert who testified that fingerprints will be destroyed by subsequent handling or exposure to the elements (T. 342). The lid to the jar of face cream on which one of the appellant's fingerprints had been found had obviously been handled since the lid was unscrewed from the jar when found on Sandra's night stand (T. 318, 346, Ex. 20). Similarly, it would be reasonable for the jury to infer that a piece of paper which Sandra had apparently carried in her purse for four or five months after being touched by the appellant would have been handled and exposed to heat and humidity, thereby negating the appellant's explanation as to how his fingerprint came to be found on the paper (T. 318-319, 349, 532-533, Ex. 18, 19, 21, 22).

In Peavy v. State, 442 So. 2d 200 (Fla. 1983), this Court found sufficient evidence to support convictions for first degree murder, burglary and robbery in a case similar to the one at bar. The elderly victim in Peavy was found lying dead on his bed with multiple stab wounds. His room had been ransacked and a television set and his watch were missing. Peavy's fingerprints were matched to prints found in the victim's apartment on the top of a can of shaving cream and on the victim's cashbox. Peavy testified at trial that on a date he could not remember, he had

helped the victim carry a bag of groceries home from a store ten to twelve blocks away. He had gone inside the apartment, ate some fruit and talked with the victim. A neighbor testified that he usually did the victim's shopping, and he had purchased groceries for the victim on the day he was killed. He had never known the victim to have walked as far as the store where Peavy had indicated meeting the victim, and the witness was not sure that the victim would have been able to walk that far. This Court held that the neighbor's testimony, coupled with Peavy's fingerprints inside the apartment, was sufficient to support the convictions and justified the jury's disbelief in Peavy's story. 442 So. 2d at 202.

Given the testimony rebutting the appellant's version of how his fingerprints could have been left in Sandra's bedroom, coupled with the circumstantial evidence that the appellant pawned the VCR in a very short time after the murder, coupled with the inconsistent statements which the appellant provided to Detective Bell as to his activities on the day of the murder, and the appellant's own testimony that Detective Bell was lying about the appellant's statements, the state clearly presented sufficient evidence to establish the appellant's identity as Sandra's murderer. Therefore, he is not entitled to be acquitted of these crimes.

B. PREMEDITATION

The appellant next challenges the sufficiency of the evidence to establish the premeditated nature of the murder, proposing that Sandra was killed in a blind rage. The appellant relies heavily on Dr. Diggs' conclusory testimony that the wounds in this case suggested that they occurred in quick succession, as in some type of "frenzic passionate activity," and argues that such activity is inconsistent with premeditation under Mitchell v. State, 527 So. 2d 179 (Fla.), cert. denied, 488 U.S. 960 (1988). Mitchell is not helpful to the appellant, however, since that case only found that the rage by Mitchell negated the finding of cold, calculated and premeditated as an aggravating circumstance.

As opposed to the heightened premeditation required to prove the aggravating factor, the premeditation required to support a first degree murder conviction can be formed in a moment and need only exist long enough for an accused to be aware of the nature and probable consequence of his acts. DeAngelo, 616 So. 2d at 441. The defendant in DeAngelo strangled the victim but confessed that he had done so in a blind rage during an argument. This Court held that there was substantial, competent evidence presented which defeated this theory, including the facts that it would have taken five to ten minutes to kill the victim, that the victim was strangled with a ligature as well as manually, and that DeAngelo had previously indicated an intention to kill the victim. In fact, these circumstances were sufficient to support

the aggravating factor of cold, calculated and premeditated as well.

Whether or not the evidence supports a finding of premeditation in the commission of a murder is a question of fact for the jury. Sochor v. State, 619 So. 2d 285 (Fla.), cert. denied, ___ U.S. ___, 126 L. Ed. 2d 596 (1993); Bedford, 589 So. 2d at 250; Preston v. State, 444 So. 2d 939 (Fla. 1984). This Court has consistently upheld a finding of premeditation in cases involving multiple stab wounds. In the instant case, as in Preston, the murder weapon was probably a knife of four to five inches in length (T. 378). This Court noted there that "[s]uch deliberate use of this type of weapon so as to nearly decapitate the victim clearly supports a finding of premeditation." 444 So. 2d at 944.

The traditional factors for consideration in determining the existence of premeditation all support a finding of premeditation in the instant case. Such factors include the nature of the weapon, the presence or absence of provocation, previous difficulties between the parties, the manner in which the homicide was committed, the nature and manner of the wounds, and the accused's actions before and after the homicide. Larry, 104 So. 2d at 354. The weapon in this case, as noted above, was a four to five inch knife (T. 378). There is absolutely no evidence of anything that would have provoked a rage or frenzy, and no evidence of prior difficulties between the parties. To the contrary, the appellant indicated that he and Sandra were

friends (T. 413, 530). The homicide was committed by stabbing a bound and gagged woman in the back thirteen times, with at least twelve of the stabs being of lethal force (T. 280, 331, 375-377, 380). In addition to killing Sandra, the appellant ransacked her bedroom, stole a jewelry box and VCR, and pawned the VCR within hours (T. 274, 287-288, 318-319, 406).

None of these factors lose significance due to the lack of evidence of a struggle or defensive wounds, or even in light of Dr. Diggs' proffered speculation that the scene may have started out as a consensual bondage situation. It is not surprising that Sandra could not fight or defend herself since she was bound and gagged. Even if she had agreed to the bondage initially, the appellant concedes that at some point the episode "escalated" into a homicide. That escalation provides the necessary premeditation to support this conviction since it required the appellant to reflect long enough to go get a knife or to take out a knife which he had brought to the bedroom with him in obvious anticipation of its use.

Other cases routinely acknowledge the existence of premeditation under similar circumstances, rejecting claims that the emotional nature of the crime precludes a finding of premeditation. See, Sochor, 619 So. 2d at 288-289 (fact that Sochor stopped assaulting victim long enough to look up and yell for his brother to get into the truck demonstrated a sufficient period of reflection to contemplate the nature of his acts); Kramer v. State, 619 So. 2d 274 (Fla. 1993) (evidence suggested

victim was killed during spontaneous fight, with no discernible reason, between a disturbed alcoholic and a legally drunk man, but blood spatter and victim injury provided substantial basis for finding of premeditation); Pellot v. State, 582 So. 2d 124 (Fla. 4th DCA) (although Pellot stabbed his wife thirty-two times during a domestic dispute, evidence that he had previously taken the knife into the bedroom and that he had obtained another knife from the kitchen during the attack was sufficient to support finding of premeditation), rev. denied, 591 So. 2d 183 (Fla. 1991); see also, Taylor v. State, 583 So. 2d 323 (Fla. 1991) (physical evidence permitted jury to reject Taylor's testimony that he beat victim in a rage).

In Bedford v. State, 589 So. 2d at 247-251, the victim was found, bound and gagged, in a garbage dumpster. The defense maintained that she had been killed accidently during erotic sexual asphyxia. Although a defense expert testified that the victim's injuries were consistent with erotic sexual asphyxia, this Court concluded that sufficient evidence existed from which the jury could have inferred premeditation to the exclusion of all other possible inferences. Such evidence included the facts that the victim had been bound, gagged, and had abrasions to her mouth indicating her attempts to scream; that she had sustained some injuries prior to her death; and that the defendant had provided inconsistent versions of events.

The appellant's reliance on Smith v. State, 568 So. 2d 965 (Fla. 1st DCA 1990) is misplaced. In Smith, the victim's body

was found floating in Tampa Bay, wrapped in a bedspread and chains. Due to the decomposition of the body, the state was unable to show the nature of the weapon or any wounds or the manner in which the homicide was committed. Therefore the state was unable to rebut Smith's hypothesis that he had killed the victim in the heat of passion, and the district court reduced his conviction to second degree murder. Accord, Hoefert v. State, 617 So. 2d 1046 (Fla. 1993). Since the evidence in the instant case clearly demonstrated the manner in which the homicide was committed, this case was properly submitted to the jury on the issue of premeditation.

There was clearly substantial, competent evidence presented to support a finding of premeditation on the facts of this case. In addition, even a lack of such evidence would not warrant relief since there was sufficient evidence to support a first degree murder conviction under a felony murder theory, as discussed in the subissue that follows. Therefore, the appellant is not entitled to have his conviction reduced to second degree murder.

C. FELONY MURDER/ARMED ROBBERY

The appellant also attacks the sufficiency of the evidence to support his armed robbery conviction, and consequently his first degree murder conviction under a felony murder theory. The appellant maintains that his intent to steal may not have arisen until after completion of the murder herein, and therefore the

taking of Sandra's jewelry box, VCR, and possibly any money that may have been in her wallet was merely incidental to her homicide and without the use of force. He has now fashioned a hypothesis of innocence that because the taking of Sandra's VCR was an afterthought by the killer it cannot be used to support convictions for robbery or felony murder. It must be noted initially that the defense never suggested this version of events to the jury or the judge below, and therefore the state is not required to rebut the argument. Law, 559 So. 2d at 189. In addition, the suggestion that a verdict based on felony murder cannot stand unless the state establishes that an intent to commit the underlying felony existed at the time of the murder is not properly before this Court since it was not directed to the court below for consideration. See, Bertolotti v. Dugger, 514 So. 2d 1095 (Fla. 1987) (argument that general verdict for first degree murder was void could not be considered on appeal where defendant failed to challenge sufficiency of evidence to support felony murder in trial court).

The appellant relies on cases from other jurisdictions to convince this Court that felony murder in Florida requires a preexisting or concurrent intent to commit the underlying felony to be proven. Furthermore, by challenging the sufficiency of the evidence of such intent in this case, the appellant apparently believes that the actual commission of the underlying felony cannot implicitly provide evidence of this intention, and the state must have offered independent proof of the intent to steal

in this case in order to support a felony murder verdict. The appellant is mistaken on both points.

Historically, the concept of felony murder never required a preexisting or independent intent to commit the underlying felony. Dislike for felony murder liability has led to legislative and judicial limitations on the applicability of the felony murder doctrine. At present, commentators recognize that there is a "split of authority" on this issue of whether felony murder requires a preexisting or concurrent intent to commit the underlying felony. See, LaFave and Scott, Substantive Criminal Law, §7.5(d)(4) (1986). In addition, commentators reject the notion that a perpetrator's intent to commit a felony will supply the intent to kill to sustain a first degree murder conviction, finding this theory to be "pure fiction" and the better practice to recognize felony murder as a category of murder separate from the intent to kill murder. Id., §7.5(a).

In Commonwealth v. Tomlinson, 284 A. 2d 687 (Pa. 1971), the Pennsylvania Supreme Court reiterated that felony murder can be committed even if the intent to commit the underlying felony does not arise until after the killing has taken place.

> Appellant next contends that the felony-murder rule should not apply if the intention to perpetrate the felony was not conceived until after the actual killing. There is no merit in this contention. This Court has several times decided that if a homicide occurs in the perpetration of or attempt to perpetrate a robbery or other statutorily-enumerated felonies, a conviction of murder in the first degree will be sustained regardless of when the design to commit the

> robbery or other felony was conceived or the felony committed.

284 A. 2d at 690.

The appellant's claim appears to be that Florida should specifically adopt a requirement of preexisting or concurrent intent to commit the felony simply because this is the prevailing view. However, this Court must examine Florida's statutory scheme for legislative intent, not just accept other judicial interpretations of different felony murder statutes. For example, it is generally accepted that felony murder will not apply in situations where one felon is shot and killed by a police officer, victim, or innocent bystander (see LaFave and Scott, supra, §7.5(d) at 217), but certainly one would not make this argument in Florida where the statute expressly provides for this situation. Section 782.04(3), Fla. Stat.

Florida law requires the application of felony murder anytime that a homicide is "committed by a person engaged in the perpetration of, or in the attempt to perpetrate," any of twelve enumerated felonies. Section 782.04(1)(a)2., Fla. Stat. Florida courts have consistently interpreted this language to mean that the statute applies as long as the murder and the felony were part of the same criminal episode. See, Young v. State, 579 So. 2d 721 (Fla. 1991), cert. denied, ___ U.S. ___, 117 L. Ed. 2d 438 (1992); Roberts v. State, 510 So. 2d 885, 888 (Fla. 1987), cert. denied, 485 U.S. 943 (1988). Since the purpose of the felony murder rule is to protect the public from inherently dangerous

situations created by the commission of the felony, the rule should apply whenever a death occurs during the same criminal episode of a related felony. Parker v. State, 19 Fla. L. Weekly S322 (Fla. June 16, 1994).

By so construing the statute, Florida has recognized the inherent difficulty in determining the relationship between two or more criminal acts committed at the same time. Specifically, the courts look for a definitive break in the chain of circumstances, either by time, place or causation, in determining the applicability of felony murder. Griffin v. State, 19 Fla. L. Weekly S365, S367 (Fla. July 7, 1994); Parker v. State, 570 So. 2d 1048 (Fla. 1st DCA 1990). In fact, cases have applied the same test involved in determining the propriety of stacking minimum mandatory sentences when crimes are committed during the same criminal episode in considering whether the felony was sufficiently connected with the murder to support a felony murder conviction. See, W.S.L. v. State, 470 So. 2d 828, 829 (Fla. 2d DCA 1985) (citing Palmer v. State, 438 So. 2d 1 (Fla. 1983)), rev'd. on other grounds, 485 So. 2d 421 (Fla. 1986).

Jackson v. State, 575 So. 2d 181 (Fla. 1991), is illustrative. Jackson was convicted of robbing a hardware store in January, 1984, when the theft statute did not recognize violence used during the course of an escape as force that would support a robbery conviction. See, Royal v. State, 490 So. 2d 44 (Fla. 1986). He was also convicted of first degree murder because the owner of the store was killed at the scene of the

robbery. This Court rejected Jackson's argument that there was no armed robbery since the state failed to prove that the owner was not shot as part of the perpetrator's escape from the scene, finding that Jackson did not present any reasonable hypothesis of innocence when viewed in light of the totality of the evidence against him.

The appellant similarly suggests that no robbery occurred in this case because no force was used to steal property from the dead victim, assuming the person was killed for some reason other than to perpetrate the theft. The crime of robbery is defined as the taking of money or property, "when in the course of the taking there is the use of force, violence, assault, or putting in fear." Section 812.13(1), Fla. Stat. The phrase "in the course of the taking" is further defined to mean any act that "occurs either prior to, contemporaneous with, or subsequent to the taking of the property and if it and the act of taking constitute a continuous series of acts or events." Section 812.13(3)(b), Fla. Stat. Thus, when a homicide and a related theft occur in an uninterrupted series of events, the force used to commit the homicide is sufficient to aggravate the theft into a robbery.

There is no evidence, or even the unsubstantiated suggestion, of any interruption between Sandra's murder and the taking of her property in the record before this Court. And the appellant does not, and cannot, suggest that the murder and robbery in this case are totally unrelated. Clearly, the murder

helped facilitate the robbery, even if the intent to steal did not develope until after Sandra was dead. But for the murder, the appellant would not have been sitting around in someone else's apartment, knowing his only witness was dead, when he was suddenly and spontaneously struck by the urge to ransack Sandra's bedroom and steal her VCR. Thus, the murder provided the impetus and the opportunity for the appellant to steal, and robbery was sufficiently established in this case.

In Randolph v. State, 463 So. 2d 186 (Fla. 1984), cert. denied, 473 U.S. 907 (1985), this Court noted that sufficient evidence had been presented to support Randolph's murder conviction on either a premeditated or felony murder theory. Randolph's girlfriend was a prostitute, and the victim was one of her regular customers. One night after the girlfriend and the victim had been together, Randolph showed up as the girlfriend was leaving, and pushed her away. The girlfriend ran away, but overheard Randolph tell the victim that he wouldn't shoot if the victim didn't try anything. The girlfriend then heard two gunshots. After the shooting, Randolph asked the girlfriend if the victim had any money. When she said he did, Randolph walked over to the truck, with the victim inside, looked inside the window, got in, and took something. There was testimony that the victim had been given $100 in cash from his father that evening, but the only money found at the scene was $20 that was hidden in the truck. Thus, under the facts as recited in this Court's opinion, the evidence that the victim was killed and at least

eighty dollars could not be accounted for was sufficient to support a verdict based on felony murder.

Of course, intent is usually established by circumstantial evidence, and our courts have consistently held that a motion for judgment of acquittal should rarely, if ever, be granted based on the state's failure to prove intent. King v. State, 545 So. 2d 375 (Fla. 4th DCA), rev. denied, 551 So. 2d 462 (Fla. 1989). The evidence in this case showed that the appellant admitted having financial problems all his life, that he had pawned a television set the day before the murder, and, most significantly, that he pawned Sandra's VCR at 1:42 on the day she was killed, before her body had even been discovered (T. 287). Sandra's bedroom had been ransacked, and the contents of her purse, including her open wallet, had been dumped all over the floor (T. 274, 318-319, 406, Ex. 18, 19, 21, 22).

On these facts, the appellant is not entitled to acquittal from his robbery conviction. However, even if successful, the appellant's attack on the validity of his robbery conviction could not possibly affect his first degree murder conviction, since there was ample evidence of premeditation to support the conviction for the reasons discussed in Issue I(B). In Griffin v. United States, 502 U.S. ___, 112 S. Ct. 466, 116 L. Ed. 2d 371 (1991), the United States Supreme Court rejected the argument that a general verdict should be set aside if there is not sufficient evidence to support one of the possible bases for the conviction, noting the prevailing rule that the verdict stands as

long as the evidence is sufficient with respect to any one of the acts charged. See also, Teffeteller v. State, 439 So. 2d 840 (Fla. 1983), cert. denied, 465 U.S. 1074 (1984). Therefore, no harmless error analysis is necessary in this case due to the validity of a first degree, premeditated murder conviction. However, even if a harmless error analysis was required, the overwhelming nature of the evidence of premeditation discussed in Issue I(B) and the lack of any evidence indicating that Sandra's murder was anything but intentional clearly demonstrates the harmlessness of any deficiency in the felony murder verdict.

D. PECUNIARY GAIN

The appellant also challenges the applicability of the pecuniary gain aggravating factor. Of course, the finding of this factor may be upheld based on the facts recited above to support the appellant's robbery conviction, since the same facts demonstrate the financial motivation behind this offense. The most compelling fact, of course, is the pawning of Sandra's VCR. It is not simply that the VCR was taken during the assault, it is the appellant's actions in driving a good distance immediately following the murder, coupled with having pawned a television the day before. In addition, the fact that Sandra's room was ransacked and the contents of her purse were dumped on the floor sets this case apart from those cited by the appellant. In the appellant's cases, this factor has been rejected when personal items such as a gun, boots, or money have been removed from the

body of the victim and the thefts are incidental to the murders, or property is taken to help facilitate an escape. See and compare, Clark v. State, 609 So. 2d 513 (Fla. 1992); Jones v. State, 580 So. 2d 143 (Fla.), cert. denied, ___ U.S. ___, 116 L. Ed. 2d 179 (1991); Scull v. State, 533 So. 2d 1137 (Fla. 1988), cert. denied, 490 U.S. 1037 (1989); Peek v. State, 395 So. 2d 492 (Fla. 1980), cert. denied, 451 U.S. 964 (1981).

The finding of this factor is also supported by the penalty phase testimony of Judy Baker, regarding the appellant's prior violent felony conviction. As noted by the trial court, Baker's offenses were clearly motivated by a desire for money, and the facts of Sandra's offenses are strikingly similar. Both women were attacked in the daytime in the same part of town, the appellant bound and gagged them both, and he used a similar type weapon during each offense.

The appellant's concern that the testimony about Baker's offense cannot be considered in determining the existence of this aggravating factor is not persuasive. He first claims that the incidents were not sufficiently similar, however the concern with points of similarity between collateral crimes is only relevant if the collateral crime is being offered to show the identity of the perpetrator in the primary crime being tried. These crimes were similar enough in the manner in which they were committed to support a finding that they were both motivated by pecuniary gain.

The appellant also argues that evidence of the subsequent rape should not be considered for this aggravator because aggravating circumstances cannot be established by evidence of unrelated incidents, citing Power v. State, 605 So. 2d 856 (Fla. 1992), cert. denied, ___ U.S. ___, 123 L. Ed. 2d 483 (1993), and Trawick v. State, 473 So. 2d 1235 (Fla. 1985), cert. denied, 476 U.S. 1143 (1986). In Trawick, the sentencer improperly relied on acts committed against a separate victim in establishing the heinous, atrocious or cruel factor for the victim for which Trawick was being sentenced; in Power the sentencer improperly relied on evidence of prior rapes in determining that the murder following the rape in that case was cold, calculated and premeditated, although none of the victims in the prior rapes had been killed. These cases are certainly distinguishable and should not be read as broadly as the appellant suggests to preclude any consideration of facts of an unrelated crime to support the finding of an aggravating circumstance. In fact, Power implies that, while evidence of another offense cannot be used as the only evidence to establish an aggravating offense, it can be considered and used to support the finding of an aggravator in conjunction with other evidence.

This Court has upheld the finding of the pecuniary gain/commission of a robbery aggravating factor on facts similar to those in this case. Atwater v. State, 626 So. 2d 1325 (Fla. 1993), cert. denied, ___ U.S. ___, 114 S. Ct. 1578 (1994); Bruno v. State, 574 So. 2d 76 (Fla.), cert. denied, ___ U.S. ___, 116

L. Ed. 2d 81 (1991); Floyd v. State, 569 So. 2d 1225 (Fla. 1990), cert. denied, ___ U.S. ___, 111 S. Ct. 2912 (1991). While the appellant would argue factual distinctions in those cases, obviously every case is different on its facts. The appellant's ransacking Sandra's bedroom, dumping out her purse, stealing and pawning her VCR immediately, having pawned a TV the day before, and committing another violent crime during the course of a robbery two weeks later all support the finding of this aggravating factor in this case.

Finally, it should be noted that any error in the finding of this aggravating circumstance would not affect the validity of the appellant's sentence. The court below refrained from considering the applicability of the aggravating circumstance that the murder in this case was committed during the course of a felony in order to avoid improperly doubling the pecuniary gain factor. However, even if there was no evidence of any intent to rob or steal from Sandra, the appellant clearly committed an armed burglary which could be weighed if the pecuniary gain factor was struck. Even if this factor was not considered below, this Court may take it into account in determining the validity of the sentence imposed in this case since it is clearly reflected in the record. See, Echols v. State, 484 So. 2d 568 (Fla. 1985), cert. denied, 479 U.S. 871 (1986). For all of the above reasons, the appellant's death sentence should not be disturbed on this issue.

## ISSUE II

WHETHER THE TRIAL COURT ERRED IN EXCLUDING THE PROFFERED TESTIMONY OF DR. DIGGS AS TO WHETHER THE VICTIM HAD CONSENTED TO BEING BOUND.

The appellant also challenges the trial court's refusal to allow Dr. Diggs to speculate about Sandra's state of mind prior to being bound, gagged and stabbed to death. Of course, a trial court has broad discretion in determining the range of subjects on which an expert witness may be allowed to testify, and this ruling cannot be disturbed on appeal absent a clear showing of abuse of that discretion. Burns v. State, 609 So. 2d 600 (Fla. 1992); Johnson v. State, 393 So. 2d 1069 (Fla. 1980), cert. denied, 454 U.S. 882 (1981). No such abuse has been demonstrated in this case.

During cross examination, Dr. Diggs testified that the nature of the wounds in this case suggested that they occurred in quick succession, as "in some type of frenzic passionate activity" (T. 397). Thereafter, the defense called Dr. Diggs' as a defense witness and sought to elicit his conclusion that the injuries were "consistent with" a consensual bondage situation that escalated into a murder. In the proffer, Dr. Diggs testified that his observations in this case led to two possible scenarios, one where the victim was incapacitated and could not fight or yell and one where the victim had engaged in a bondage situation, but noted that "as to what happened here, I have no idea" since both scenes would look just alike after the fact (T. 465-466).

The judge inquired of Dr. Diggs in an effort to ascertain the admissibility of the testimony sought. Dr. Diggs stated that determining whether a bondage situation was consensual or forced was not something he normally testified about or considered as a medical examiner (T. 475). When asked if this was within his purview, he stated it was not and that attempting to decide what happened beyond the physical positioning of the bodies was outside of his expertise (T. 476). Dr. Diggs clearly felt uncomfortable in offering an opinion that the scene was consistent with a consensual bondage:

> THE COURT: Well, there is not enough information. But isn't that, then, just total speculation?
> THE WITNESS: Exactly. That is the point I'm trying to bring out. That is the point that I was trying to bring out altogether. It's total speculation, because you just don't have enough information.

(T. 484). The judge then opined that it would be misleading to offer such speculation as an expert opinion, and Dr. Diggs stated "That is exactly right." (T. 485).

The appellant has failed to demonstrate any abuse of discretion in the trial court's ruling to exclude this testimony. In fact, the trial court's ruling to exclude this testimony was proper for several reasons. Clearly, an expert witness may not offer an opinion based on speculation or suppositions, as any opinion must have some basis in fact that is supported by the physical evidence available. Young-Chin v. City of Homestead, 597 So. 2d 879 (Fla. 3d DCA 1992). In addition, the testimony

would not have been probative of any fact in issue since Dr. Diggs could not conclude whether Sandra had or had not consented to being bound and gagged. Since, according to the proffer, the evidence was equally consistent with both theories, an opinion that she may have consented but may not have consented would not provide any assistance to the jury in resolving the factual issues before it.

The cases cited by the appellant do not demonstrate any error in the instant case, since those decisions only uphold the admissibility of an expert's opinion that the evidence was consistent with a particular set of facts. In fact, the cases relied on are all distinguishable because they involve situations where a witness had a factual basis for the opinion. The appellant herein did not lay a sufficient predicate for the admission of the challenged testimony, and it was properly excluded below.

In Fridovich v. State, 489 So. 2d 143 (Fla. 4th DCA), rev. denied, 496 So. 2d 142 (Fla. 1986), the defense sought to admit testimony by the county medical examiner that the circumstances of the shooting were consistent with an accident. The fourth district reversed the trial court's exclusion of this proffer, finding that the examiner should have been permitted to testify about his opinion on the manner of death, since his opinion was based on the autopsy he performed, his education and experience, and his familiarity with the circumstances of the shooting. The autopsy report itself, characterizing the shooting as accidental,

was admitted into evidence, as was other testimony from witnesses relating their opinions as to whether the shooting was accidental.

Central to the holding in Fridovich is the district court's recognition that the opinion as to the manner of death was clearly within the witness' area of expertise, as it was reflected in the autopsy report itself, and that the witness had sufficient knowledge about the circumstances surrounding the incident as well as the investigation to be able to draw the conclusion that the angle of the entry of the shot was consistent with an accidental shooting. It is this knowledge that distinguished Fridovich from the case of Spradley v. State, 442 So. 2d 1039 (Fla. 2d DCA 1983), where the second district reversed a conviction following testimony by a medical examiner that the death in that case was a homicide. In Spradley, the medical examiner had been told at some point that the shooting was not an accident, but he did not know that at the time of the autopsy and did not have sufficient knowledge of the shooting incident or the investigation to be able to offer this opinion.

In the instant case, the witness initially did not want to express any opinion as to the victim's state of mind, advising the court that it was beyond his expertise and that there was not enough information to be able to reach a founded conclusion on the issue (T. 475, 483-485). This was not something, as was the opinion in Fridovich, that was discernible based on a physical examination of the victim's body or the crime scene (T. 476).

Although Diggs agreed that his observations were "consistent with" a consensual bondage situation, he only did so because he had seen nothing affirmatively inconsistent with such a situation (T. 483). The lack of inconsistency does not establish a sufficient basis for a conclusion that something is "consistent with" a set of facts, and absent some evidentiary support for such a conclusion, it is properly excluded.

The state recognizes that expert testimony does not have to be stated in terms of reasonable medical certainty, see Delap v. State, 440 So. 2d 1242 (Fla. 1983), cert. denied, 467 U.S. 1264 (1984), and that was not the basis for exclusion of this testimony below. Rather, the trial court ruled, based on Diggs' responses about the information sought, that it was speculative and misleading (T. 484-485). Diggs' concurred in this ruling (T. 485).

An expert witness' opinion must be based on facts, or inferences supported by the evidence, and cannot be deduced or inferred from the conclusion itself. Arkin Construction Co. v. Simpkins, 99 So. 2d 557 (Fla. 1957); Ruth v. State, 610 So. 2d 9 (Fla. 2d DCA 1992). An opinion which is nothing more than speculation, offered by a witness that admits it is beyond his area of expertise, invades the province of the jury. Mills v. Redwing Carriers, 127 So. 2d 453 (Fla. 2d DCA 1961).

The proffered opinion in this case was not probative of any fact, since it did not tend to prove or disprove whether or not Sandra consented to being bound and gagged, it merely concluded

robbery in this case does not demonstrate the harmful or prejudicial nature of excluding the testimony, since there was a great deal of testimony admitted to show that Dr. Diggs believed this case went beyond a standard robbery (T. 397-398). Because this testimony did not challenge the state's evidence to convict the appellant or offer additional support for any defense theory, it could not possibly have affected the verdict and any potential error on these facts would clearly be harmless beyond any reasonable doubt.

## ISSUE III

WHETHER THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S REQUEST TO HAVE HIS SHACKLES REMOVED.

The appellant also challenges the denial of his request to have his shackles removed during the penalty phase of his trial. However, the appellant's argument as to this issue has not been preserved for appellate review. The record reflects that at the beginning of the penalty phase, defense counsel asked the trial judge to have the appellant's shackles removed (T. 815). The court denied the request, noting that the appellant was seated between his defense attorneys, and that the table where they were sitting did not have legs, but had a board which would obscure the jury's view of the appellant's legs (T. 816). The judge commented that, if the appellant wanted to testify, she would have the jury taken out so that the shackles could be removed at that time[2] (T. 816).

The appellant did not specifically object to proceeding with the shackles. Clearly, defense counsel acquiesced in the court's decision to defer to the sheriff's office on the matter. He did not request an inquiry as to the reason for the shackles, and certainly never suggested that the shackles in any way confused the appellant, interfered with his ability to confer with his

---

[2] Later in the proceedings, the jury did in fact leave the courtroom so that the shackles could be removed for the appellant's testimony, but the appellant decided at that time not to testify (T. 858-859).

client, or limited his trial strategy, as now suggested on appeal. Therefore, this argument is not properly before this Court. See, Steinhorst v. State, 412 So. 2d 332 (Fla. 1982); Lucas v. State, 376 So. 2d 1149 (Fla. 1979) (defense counsel acquiesced to judge's incorrect statement of law).

Even if this argument is considered, however, the appellant is not entitled to a new sentencing proceeding. The appellant relies on Bello v. State, 547 So. 2d 914 (Fla. 1989), where this Court held that a new sentencing proceeding was required, in part due to the fact that Bello's jury observed him wearing shackles during the penalty phase. The trial judge had denied a request to investigate the decision by the sheriff's office to shackle Mr. Bello, and this Court could find no basis in the record to justify the use of shackles. The most obvious distinction in the instant case is the fact that the appellant's jury was never aware of his shackles.[3]

This Court has recognized that the critical issue in any restraint case is the degree of prejudice which may arise by the use of a particular security measure. Elledge v. State, 408 So.

---

[3] The appellant argues in a footnote that the court below did not make a finding that the shackles could not be seen. This argument is unpersuasive in light of the trial judge's obvious efforts to insure that the jury would not be made aware of the shackles, and the lack of any suggestion to the court that these efforts were not successful. Certainly if there was any possibility that the jury could view the shackles, defense counsel had an obligation to bring this to the judge's attention. The comments by the court insuring that the jury would not be aware of the shackles amounts to an implicit finding that the jury could not see the shackles, and distinguishes this case from Bello.

2d 1021 (Fla. 1981), cert. denied, 459 U.S. 981 (1982). The appellant claims that, because shackling is a procedure which has been deemed "inherently" prejudicial, it is not necessary for him to establish that any actual prejudice occurred. Even if this is true, however, reversal cannot be required if the state can affirmatively show that no prejudice existed. Merely describing a procedure as "inherently" prejudicial does not create an absolutely irrebuttable presumption that prejudice exists. Since the appellant's jury did not see his shackles, and since there is no indication in the record that the appellant was confused, unable to confer with counsel, or otherwise detrimentally affected by the use of shackles, the circumstances establish that no prejudice occurred due to the use of shackles, and therefore no new sentencing proceeding is warranted.

Another aspect of this case distinguishes it from Bello. Prior to the appellant's trial, the judge entertained a pro se motion to discharge counsel, and the public defender's motion to withdraw, both of which were premised upon an incident occurring when the public defender and an investigator were meeting with the appellant in a conference room at the jail (R. 21-28). When the jail guard came in the room, the appellant had to be restrained and physically escorted from the room (R. 27, 1051-1052). He continued to threaten the investigator as he was led down the hall back to his cell (R. 27, 1052). Thus, although the appellant's subsequently appointed attorney indicated at trial that the appellant had stated that he would be well behaved, the

trial judge was aware of the appellant's history of being unpredictably violent.

On these facts, the appellant has failed to demonstrate that he is entitled to a new sentencing hearing based on the trial court's denial of his request to have his shackles removed.

## ISSUE IV

WHETHER THE TRIAL COURT ERRED IN ALLOWING TESTIMONY AND ARGUMENT AS TO THE FACTS UNDERLYING THE APPELLANT'S PRIOR VIOLENT FELONY CONVICTIONS.

The appellant next challenges the trial court's rulings allowing Judy Baker to testify about the facts underlying the appellant's prior violent felony convictions, and denying a subsequent motion for mistrial when the prosecutor referred to the facts of the prior convictions as "disgusting." It is important at the outset to understand the scope of this issue. The appellant does not, and cannot, challenge the admissibility of the testimony regarding the facts of the prior convictions. The only issue preserved for appeal is whether the state was precluded from eliciting these facts from the victim, Judy Baker, since the investigating detective was available to testify. To the extent that the appellant alleges that the admission of evidence and argument relating to Baker's rape and robbery was improper because the probative value was outweighed by unfair prejudice and because this testimony became a feature of the trial, these particular arguments were never presented to the court below, and therefore they are not cognizable in this appeal. Steinhorst, 412 So. 2d at 338.

Judy Baker's testimony about the appellant's prior violent convictions was highly relevant, given its similarity with the instant case. Both Sandra and Judy were attacked in the daytime in the same part of town. The appellant wielded a large knife

and bound and gagged both victims. The appellant robbed Judy before physically attacking her, and warned her that he could not let her remember his face (T. 825, 832). As noted by the trial court, these similarities supported the finding that Sandra's murder was also motivated by a desire for money (R. 154).

This Court has consistently upheld the state's right to admit and argue evidence relating to the facts of a capital defendant's prior violent felony convictions. Stewart v. State, 558 So. 2d 416 (Fla. 1990); Rhodes v. State, 547 So. 2d 1201 (Fla. 1989); Stano v. State, 473 So. 2d 1282 (Fla. 1985), cert. denied, 474 U.S. 1093 (1986); Elledge v. State, 346 So. 2d 998 (Fla. 1977). Such testimony assists the jury and judge in analyzing a defendant's character, including any propensity to commit violent crimes, in order to determine the propriety of imposing the death sentence. Id. at 1001.

In this case, Judy Baker's testimony was prejudicial, but the prejudice arose from the substance of her testimony, and not the fact that Baker was the one testifying. Although at one point Baker apparently became emotional on the stand, the court quickly recessed and reminded the jury following the testimony that they were not to allow sympathy to play any role in their deliberations (T. 827, 839). This was not the emotional highpoint of the proceedings, since Tammy Gallimore, a defense witness, broke down on the stand when she was begging the jury to spare the appellant's life (T. 856).

Judy Baker's testimony did not become a feature of this case, and, while obviously prejudicial, was not unfairly so. Her testimony was brief, with her direct examination taking up less than ten pages of transcript (T. 820-833). Although the prosecutor referred to her testimony, his description and argument focused on the facts of her crime, and did not reinforce the fact that Baker rather than the detective had testified.

In Stano, this Court held that evidence regarding each of Stano's eight prior first degree murder convictions was properly admitted and did not become a feature of his sentencing hearing. This Court has also approved the admission of such evidence through testimony by the victim, as was done in this case. Stewart, 558 So. 2d at 419. Certainly there should be no bar to having the state present such testimony through the person with first hand knowledge rather than rely on the hearsay testimony of an investigating detective. In fact, this Court has stated

> While it is true that the court must guard against the possibility that sympathy will be injected in the trial, and that is why, normally, a family member should not be called to identify the victim, such evidence is admissible if other witnesses could not perform that function as well. If the family member has relevant testimony which is peculiarly within his knowledge, such testimony is always admissible.

Randolph, 463 So. 2d at 189-190.

Freeman v. State, 563 So. 2d 73 (Fla. 1990), cert. denied, ___ U.S. ___, 111 S. Ct. 2910 (1991), was the primary case relied upon by defense counsel below. It is obviously distinguishable

from the instant case since the prior victim's spouse that testified therein had no personal knowledge of the prior crime. When there are two people with hearsay knowledge of a crime, one a police officer and the other a relative of a deceased victim, it is understandably preferable to have the officer rather than a family member testify. That was not the situation in the case at bar, and this Court has never even indirectly inferred that the state must choose a less knowledgeable witness in order to minimize the horrible nature and emotional impact of a prior conviction.

As to the prosecutor's closing argument, which was an entirely unrelated issue as presented to the court below, the appellant has failed to demonstrate that the trial judge abused her discretion in denying his mistrial requested when the prosecutor characterized the facts of the appellant's prior crime as disgusting. The prosecutor's comment was not improper since it was a conclusion to be drawn from the evidence. Mann v. State, 603 So. 2d 1141 (Fla. 1992), cert. denied, ___ U.S. ___, 122 L. Ed. 2d 368 (1993); Craig v. State, 510 So. 2d 857 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988). The prosecutor was not offering his opinion as to the credibility of a witness or the legitimacy of a particular defense. The egregious nature of a prior conviction is a proper consideration for a sentencing jury, and therefore was appropriately commented on by the prosecutor. In the context that this is argued in this issue, nothing about the prosecutor's reference to the appellant's prior

convictions in any way reinforced or drew attention to the fact that Baker, rather than the officer, had testified. It was the appellant's actions which the prosecutor characterized as disgusting, not the fact that the victim was forced to recant them for the jury.

Furthermore, any possible error in the rulings challenged herein would clearly be harmless beyond any reasonable doubt. As noted above, the prejudicial impact of this evidence was derived from the substance of the testimony, not from the identity of the witness. In Freeman, although this Court found that the spouse of a prior homicide victim should not have been allowed to testify about the prior conviction, the error was not so prejudicial as to warrant reversal of the sentencing proceeding. Similarly, in Duncan v. State, 619 So. 2d 279 (Fla.), cert. denied, ___ U.S. ___, 126 L. Ed. 2d (1993), this Court found harmless error in the admission of a gruesome photograph of a victim of Duncan's prior violent felony conviction, since a certified copy of the judgment and extensive, detailed testimony about the circumstances involved and injuries sustained in Duncan's previous murder had also been admitted. Both Freeman and Duncan demonstrate that any possible error in the admission of Baker's testimony and the prosecutor's argument thereon would clearly be harmless beyond any reasonable doubt.

On these facts, the appellant has failed to demonstrate any error in the trial court's rulings to allow Judy Baker to testify, or denying the motion for mistrial based on the

prosecutor's closing argument. Therefore, he is not entitled to a new sentencing hearing on this issue.

## ISSUE V

WHETHER THE TRIAL COURT ERRED IN PROHIBITING CROSS EXAMINATION OF JUDY BAKER REGARDING HER DESCRIPTION OF HER ATTACKER.

The appellant's next challenge concerns the trial court's refusal to allow defense counsel to cross examine Judy Baker about her initial description of her attacker. It must be noted that this issue is not properly before this Court, since defense counsel never proffered or attempted to proffer the testimony which the appellant now claims should have been admitted. Pursuant to Section 90.104(1)(b), Florida Statutes, a party may only challenge the exclusion of evidence when the substance of the evidence is made known through a proffer or is apparent from the context of the questioning. See, Ketrow v. State, 414 So. 2d 298 (Fla. 2d DCA 1982). In this case, although we know that defense counsel wanted to bring out a prior description that Baker had provided of her attacker, and we can probably assume that the description was arguably inconsistent with the appellant, we do not know the substance of the testimony and therefore cannot judge the propriety of this ruling or any possible effect that excluding this evidence may have had on the jury's verdict. Therefore, this Court should find this issue procedurally barred due to the lack of a proffer and decline to consider the merits.

Even if this Court assumes that Baker would have offered an arguably inconsistent description, the appellant has failed to

demonstrate any error in the trial court's ruling. On direct examination, Baker stated that a man that "later became known to her" as the appellant entered her gift shop one afternoon and robbed and raped her. The substance of her testimony described the appellant's actions and statements during these offenses. On cross examination, the appellant asked Baker to recount the description of her attacker that she provided to the police (T. 834). The state objected that the appellant was not permitted to go behind the jury's verdict, since lingering doubt was not a mitigating factor (T. 834). The court noted that if she allowed defense counsel to question Baker about the description, she would have to allow the state to bring in the DNA evidence admitted at Baker's trial, and it was not appropriate to be retrying the prior convictions at this time (T. 835).

The state did not "open the door" to this testimony by presenting Baker as witness and eliciting the facts of the prior convictions. Most decisions will recognize that a party may "open the door" by presenting a condensed or edited version of events that leaves an unfair impression or inference, and therefore is subject to being clarified by the other party through what would otherwise be inadmissible evidence. See, Tompkins v. State, 502 So. 2d 415 (Fla. 1986), cert. denied, 483 U.S. 1033 (1987). In this case, there is no unfair inference, only the proven fact that the appellant was Baker's attacker, and this fact carries the force of a jury verdict behind it. The defense did not earn an opportunity to test the validity of the

prior convictions by retrying them before a new jury simply because the state chose to give the jury a better understanding of the appellant's character by presenting the facts of his prior convictions.

In addition, the appellant's reliance on the district court's offhand comments about the potential admissibility of similar evidence in Tafero v. State, 406 So. 2d 89 (Fla. 3d DCA 1981), is misplaced. In Tafero, the district court was considering Tafero's application to petition his trial court for coram nobis relief, due to alleged new evidence implicating another person in crimes which Tafero had been convicted of committing. In noting the convictions at issue had been used as aggravating factors in a subsequent capital case, the court specifically recognized

> Whether this same evidence should be considered in mitigation of the aggravating factors used to justify the imposition of the death penalty is a question not before us and one which must be directed to the courts which imposed and affirmed that penalty.

406 So. 2d at 95. The court went on to speculate that the admission of such evidence at a death penalty hearing would be constitutionally required under Green v. Georgia, 442 U.S. 95, 99 S. Ct. 2150, 60 L. Ed. 2d 738 (1979), a case which held that evidence demonstrating a defendant's minimal involvement in a capital crime could not be excluded from a penalty phase proceeding on the basis of hearsay. Thus, the appellant has taken dicta from a noncapital case to create a constitutional

right to present evidence to attack the validity of a prior conviction, although this Court and the United States Supreme Court have both recognized that lingering or residual doubt as to a jury's verdict is not properly considered as mitigation in a death penalty case. See, Franklin v. Lynaugh, 487 U.S. 164, 108 S. Ct. 2320, 101 L. Ed. 2d 155 (1988); Hitchcock v. State, 578 So. 2d 685 (Fla. 1990), vacated on other grounds, ___ U.S. ___, 120 L. Ed. 2d 892 (1992).

Furthermore, the trial court's ruling did not violate the appellant's sixth amendment right to cross examine this witness. Judy Baker's testimony consisted of relating the actions and statements of the appellant when he came into her gift shop and robbed and raped her. This testimony was relevant to demonstrate the appellant's character so that his jury could make an individual analysis on the applicability of the death penalty in this case. The defense had the opportunity to bring out any facts from the situation that may have minimized his behavior or shown that he demonstrated concern for his victim. This is obviously distinguishable from the situations in Rhodes, 547 So. 2d at 1204-1205, where the victim of a prior crime testified via a tape recording which the defense could not explore or explain, or in Engle v. State, 438 So. 2d 803 (Fla. 1983), cert. denied, 465 U.S. 1074 (1984), where the jury was permitted to consider a codefendant's confession even though the defendant could not cross examine the codefendant.

The closest this Court has come to addressing this issue seems to be Francois v. State, 407 So. 2d 885 (Fla. 1981), cert. denied, 458 U.S. 1122 (1982). In that case, the state admitted copies of judgments of prior convictions of Marvin Francois, as well as the testimony of an assistant state attorney who had prosecuted one of the prior charges. On cross examination, defense counsel asked if the judgment for that charge had been based on a negotiated plea with a sentence of probation. The trial court sustained the state's objection to the question, finding that the judgment spoke for itself in establishing the aggravating factor, and this Court refused to disturb the ruling.

In rejecting Francois' challenge, this Court noted that a defendant must be allowed to present evidence relating to the degree of his involvement in the circumstances upon which the prior convictions are based. However, Francois' death sentence was not subject to being vacated since the defense had

> made no proffer of its own of matters relating to the gravity of appellant's previous criminal activity. ... It would be a different case if the court had excluded evidence proffered by the defendant rebutting the state's evidence of aggravation or relative to any matter in mitigation.

407 So. 2d at 890. The appellant in the instant case similarly failed to proffer any evidence rebutting his prior convictions or in mitigation. Even if he had, however, Francois counsels that such testimony would be relevant only to the extent that it could be used to argue the minimal nature of a defendant's involvement in prior violent felonies, and not as a way of attacking the fact

of the convictions themselves. The appellant, similar to Francois, never disputed the accuracy of his prior convictions at any time below. Since his identity as the person convicted of attacking Judy Baker has never been an issue, he was seeking to cross examine Baker on an immaterial fact. The trial court properly prohibited this cross examination.

Even if this issue were properly preserved with a proffer, the appellant has failed to establish any abuse of discretion in the trial court's ruling to exclude testimony about Judy Baker's description of her attacker. Furthermore, any possible error in this ruling would be harmless. since even if the testimony had been admitted, the state would have been allowed to offer other identification evidence, including DNA evidence,[4] from Finney's other trial. Whatever the substance of Baker's initial description, it obviously was not so lacking in credibility as to generate any reasonable doubt in the jury that heard the case. On these facts, a new sentencing hearing is not warranted on this issue.

---

[4] The trial judge below noted that she would allow the state to present DNA evidence in rebuttal if defense counsel were permitted to challenge Baker's identification of the appellant (T. 835). In addition, photopack identifications, in court identifications, and identifications from other witnesses were admitted at the prior trial.

## ISSUE VI

WHETHER THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S REQUEST FOR INDIVIDUAL JURY INSTRUCTIONS ON THE SPECIFIC NONSTATUTORY MITIGATING FACTORS ALLEGED.

The appellant also challenges the trial court's refusal to instruct the jury on the particular individual nonstatutory mitigating factors advanced by the defense. Once again, however, the appellant is attempting to bring before this Court an issue which has been waived. Although defense counsel below requested the trial judge to instruct the jury on the specific nonstatutory mitigating factors alleged, and apparently the prosecutor offered a set of jury instructions which included nonstatutory mitigators, the proposed, requested instructions do not appear anywhere in this record on appeal. Without the instructions, this Court cannot intelligently discern the substance of this argument, and therefore this Court need not consider this issue. See, Ray v. State, 403 So. 2d 956 (Fla. 1981) (where requested jury instructions are not in writing, counsel must ensure that the record clearly reflects the precise language of the proffered instruction; the specific grounds for the instruction; and the trial court's ruling).

In addition, as the appellant concedes, this Court has already rejected the merits of his argument in Robinson v. State, 574 So. 2d 108 (Fla.), cert. denied, ___ U.S. ___, 116 L. Ed. 2d 99 (1991):

> Robinson suggests that the 'catch-all' instruction, which explains to the jury that they may consider any aspect of the defendant's character or record and any other circumstances of the offense, denigrates the importance of the nonstatutory mitigating circumstances. We do not agree that the instruction requires or encourages the jurors to consider everything within these categories as a single factor, thereby distorting the weighing process. *Jackson v. State,* 530 So.2d 269, 273 (Fla. 1988), *cert. denied,* 488 U.S. 1050, 109 S.Ct. 882, 102 L.Ed.2d 1005 (1989). The instruction is not ambiguous, and we find no reasonable likelihood that the jurors understood the instruction to prevent them from considering and weighing any 'constitutionally relevant evidence.' *Boyde v. California,* ___ U.S. ___, 110 S.Ct. 1190, 1198, 108 L.Ed.2d 316 (1990).

574 So. 2d at 111. In Robinson, as in the instant case, there were no statutory mitigating factors argued by the defense, and Robinson complained that his different nonstatutory mitigators lost significance because they were lumped together in the catch-all jury instruction.

The appellant attempts to distinguish Robinson by claiming that the prosecutor's closing argument in this case further misled the jurors regarding the consideration of mitigating evidence. That argument, however, properly suggested to the jury that the mitigation evidence presented by the defense did not outweigh the aggravating factors established by the evidence. The prosecutor never claimed that this evidence could not be considered as mitigating, only that it did not mitigate the egregious nature of this murder. In fact, the prosecutor referred to this evidence as mitigating ("I anticipate one more

mitigator as well will be ... " see T. 899) but consistently commented that it did not mitigate "this murder" (T. 897-898). Defense counsel below, in objecting to the prosecutor's argument, specifically agreed that the prosecutor had not denied the existence of the mitigators (T. 903).

In Boyde v. California, 494 U.S. 370, 110 S. Ct. 1190, 108 L. Ed. 2d 316 (1990), the United States Supreme Court considered this same issue on a case out of California. The challenged jury instruction advised the jurors to consider eleven factors in determining whether to impose a sentence of life or death. The last of these factors was "Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." This was the only factor that even remotely suggested that the jury could consider evidence about the defendant's character or background in mitigation of the offense. Boyde claimed that the jury instructions interfered with the jury's obligation to consider all relevant mitigating evidence, since the factor could be interpreted as limiting the jury's consideration to evidence related to the crime rather than the perpetrator. The Supreme Court rejected Boyde's claim, holding that there was no reasonable likelihood that the jury applied the instruction in a way that prevented the consideration of constitutionally relevant evidence. 494 U.S. at 380.

The Boyde case is particularly interesting in this appeal because the defense also argued that the impermissible interpretation of the "catch-all" instruction was reinforced by

the prosecutor's closing argument, because the prosecutor had indicated that the evidence did not sufficiently mitigate Boyde's conduct. In rejecting this claim, the Court noted that arguments of counsel generally carry less weight than instructions from the court; that closing statements are billed in advance as argument and viewed as statements of advocates rather than binding definitions of the law; that the arguments, like court instructions, must be judged in the context in which they are made; and that defense counsel's argument had stressed a broader reading of the catchall factor. 494 U.S. at 384-385. There was no improper prosecutorial argument in Boyde, because even though the prosecutor argued that the evidence did not mitigate Boyde's conduct, he never suggested that Boyde's background and character evidence could not be considered. As in the instant case, the prosecutor's position was not to contend that background and character were irrelevant, but that despite his difficulties, Boyde must still take responsibility for his actions.

The court's instruction in this case is more explicit than the one at issue in Boyde, since it clearly directed the jury to consider the appellant's character in mitigation (T. 918). The appellant's jury was instructed to consider evidence presented during the guilt trial as well as the evidence presented during the penalty proceedings (T. 917). And, of course, defense counsel had emphatically argued that the prosecutor was trying to have the jury deviate from the law and ignore the mitigating evidence that had been presented (T. 909-910).

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

## ISSUE VII

WHETHER THE TRIAL COURT ERRED IN IMPOSING A SENTENCE OF DEATH.

The appellant's final issue challenges the propriety of his death sentence. Specifically, the appellant challenges the existence of all three aggravating factors, and alleges that the sentence is disproportional to other death penalty cases. These arguments will each be considered individually.

### A. PECUNIARY GAIN

The appellant's argument as to the sufficiency of the evidence to support the finding of this aggravating circumstance has been answered in Issue I (D) above. In addition, the appellant claims that, because it was used in conjunction with a felony murder conviction relying on robbery for the underlying felony, this aggravator cannot be constitutionally considered since it does not narrow the class of persons eligible for the death penalty. Of course, this argument can be rejected in this case since there was sufficient evidence presented below to support a finding of first degree murder based on premeditation, for the reasons discussed in Issue I (B) above.

However, assuming for the sake of argument that the appellant's murder conviction could only be premised on the finding that it occurred during the course of a robbery, this Court has consistently rejected the argument that the pecuniary gain aggravating circumstance cannot be considered on such facts.

See, Stewart v. State, 588 So. 2d 972 (Fla. 1991) (argument that using aggravator of commission during a course of a felony when the same felony is a predicate for felony murder conviction amounts to unconstitutional "double dipping" has been rejected many times), cert. denied, ___ U.S. ___, 118 L. Ed. 2d 313 (1992); Clark v. State, 443 So. 2d 973 (Fla. 1983) (death penalty statute not unconstitutional on basis that felony murder is automatically aggravated), cert. denied, 467 U.S. 1210 (1984). The appellant's reliance on cases from other jurisdictions is not persuasive in light of the prior decisions rejecting this argument from this Court.

B. PRIOR VIOLENT FELONY CONVICTIONS

The appellant speculates that his prior convictions may ultimately be reversed on appeal, and argues that if this occurs the trial court's reliance on this aggravating circumstance must be considered reversible error. However, this argument is not ripe for determination at this time since the appellant's appeal of those convictions remains pending. In addition, the brief which has been filed in that case on behalf of the appellant challenges only an evidentiary ruling by the trial court, and seeks the granting of a new trial (Finney v. State, 2d DCA Case No. 92-4580). Thus, even if the appeal is successful, the appellant may be reconvicted of the prior offense without any impact upon his sentence in this case. See, Blanco v. State, 452 So. 2d 520 (Fla. 1984), cert. denied, 469 U.S. 1181 (1985)

(pointless to remand after prior conviction that had been reversed on appeal was reinstated, since judge could once again consider the same factor). Should his prior convictions be set aside for some reason in the future, clearly the appellant may request post conviction relief from his sentencing court. Until such time as that occurs, however, it is premature to consider the appellant's argument.

C. HEINOUS, ATROCIOUS OR CRUEL

The appellant also challenges the trial court's finding that this murder was heinous, atrocious or cruel. Of course, this Court has consistently upheld findings of heinous, atrocious or cruel where the evidence shows the victim was repeatedly stabbed. See, Atwater, 626 So. 2d at 1329; Campbell v. State, 571 So. 2d 415 (Fla. 1990); Haliburton v. State, 561 So. 2d 248 (Fla. 1990); Nibert v. State, 508 So. 2d 1 (Fla. 1987); Johnston v. State, 497 So. 2d 863 (Fla. 1986); Wright v. State, 473 So. 2d 1277 (Fla. 1985), cert. denied, 474 U.S. 1094 (1986); Lusk v. State, 446 So. 2d 1038 (Fla.), cert. denied, 469 U.S. 873 (1984). The facts of this case are particularly close to those in Floyd, 569 So. 2d at 1232, where this Court upheld the heinous, atrocious or cruel aggravator based on a medical examiner's testimony describing twelve stab wounds the victim had received to her abdomen, chest and left wrist.

The trial court's sentencing order recites the facts supporting the application of the heinous, atrocious or cruel factor in this case (R. 154-155).

> The victim had thirteen stab wounds to the back area and the weapon appeared to be a knife. Although the doctor testified that all the wounds were lethal, he stated that the victim lived through the infliction of each of them. While he could not say exactly how long she lived, he made it clear that the victim felt many of the stab wounds. This testimony disputes the defense's assertion that testimony regarding the victim's state of consciousness was not elicited by the State. The testimony of Dr. Diggs showed that Sandra Sutherland was knowledgeable of her impending death. The actual cause of death was suffocation caused by blood filling her punctured lungs. Dr. Diggs said that she basically drowned in her own blood. The defendant killed Ms. Sutherland in the safety of her own home, in fact, in her bedroom. She was lying face down on the bed with her right leg tied to the end of the bed and her arms tied behind her back. In addition, there was a pantyhose gag around her mouth. The thirteen stab wounds were present all over her back with the depth of the deepest wound being five inches. ... Dr. Diggs made it clear that the victim probably felt many of these stab wounds and that she lived for a period of time, because it would have taken a period of time for the hemorrhaging to actually kill her. This murder was extremely wicked and violent and inflicted a high degree of pain and suffering on the victim. The murder was accompanied by such additional acts which sets this crime apart from the normal capital felonies.

(R. 154-155). Clearly, the trial court's finding that this aggravator was proven beyond any reasonable doubt is well supported by the evidence. The appellant claims that the factor cannot apply in this case since there were no defensive wounds or signs of a struggle, no evidence of an intent to torture, and a rapid period of death and unconsciousness. As noted in the order, Dr. Diggs testified that Sandra would have been conscious

for at least thirty to sixty seconds and would have taken four or five minutes to die (T. 382-383). He stated that she would have felt at least the first several stabs (T. 391). The fact that torture was inflicted is evidence of an intent to inflict torture. The lack of defensive wounds or a struggle is not surprising, nor does it negate the finding of this aggravator herein, since the victim was bound and gagged.

The appellant has clearly failed to demonstrate an abuse of discretion in the trial court's reliance upon the aggravating factor of heinous, atrocious or cruel on these facts.

D. PROPORTIONALITY

Finally, the appellant suggests that even if his prior felony convictions are upheld on appeal, his sentence is disproportionate since the other two aggravating circumstances are invalid and the trial court found five nonstatutory mitigating circumstances to exist. This argument need not be addressed unless this Court agrees with the claims the appellant has presented in Issues I (D), VII (A), and VII (C). However, assuming for the sake of argument that the only aggravating factor existing in this case was the prior violent felony conviction, the egregious facts of that conviction in the context of this case outweigh the nonstatutory mitigating evidence presented, and therefore this Court should affirm the death sentence.

The prior violent felony convictions found below demonstrated that the appellant has the propensity to commit serious, violent and inexcusable crimes. His casual use of a deadly weapon and the short time span between the prior offenses and the instant case justify the heavy reliance on this aggravating factor to support the appellant's sentence. On the other hand, the mitigating evidence to which the trial judge gave "some" weight is sparse and inconsequential. Although the sentencing order denotes five mitigating factors recognized from the evidence, these basically amount to the appellant's being a good father, worker, and community member who would do well in prison. His deprived childhood is based on the fact that he was raised in a single parent home (T. 888-889). Evidence of positive character traits is routinely accepted as having little mitigation value. See, Penry v. Lynaugh, 492 U.S. 302, 319, 109 S. Ct. 2934, 106 L. Ed. 2d 256 (1989) (evidence of defendant's background is relevant due to society's belief that defendants whose criminal acts are attributable to a disadvantaged background or mental problems "may be less culpable than defendants who have no such excuse"); Zeigler v. State, 580 So. 2d 127 (Fla.) (upholding sentence where trial court gave minimal weight to defendant's community and church activities, noting they were no more than society expected), cert. denied, ___ U.S. ___, 116 L. Ed. 2d 340 (1991). This was obviously not the most mitigated of crimes.

The appellant suggests that this sentence would be disproportionate if the pecuniary gain and heinous, atrocious or cruel factors are disapproved, noting that this Court rarely affirms a death sentence when only one aggravating factor has been upheld. Of course, a proportionality determination is not made by the existence and number of aggravating and mitigating factors, but this Court must weigh the nature and quality of the factors as compared with other death cases. Kramer, 619 So. 2d at 277.

When compared to similar cases where the death penalty has been ordered and upheld, this case clearly involves the necessary aggravation to set it apart from other capital murders, warranting the extreme sanction of death. In Duncan v. State, 619 So. 2d at 281, the defendant stabbed his fiancee six times with a kitchen knife. The only aggravating factor was Duncan's prior violent felony convictions, and the trial court found fifteen mitigating factors. This Court struck reliance on three of the mitigating factors, and otherwise upheld the sentence as proportional.

In Freeman, 563 So. 2d at 75, the defendant beat a man that came in as he was trying to burglarize the man's house. Freeman had prior violent felony convictions of a similar nature that had been committed three weeks prior to this murder, and the trial court also found as one aggravator that it was committed in the course of a burglary/pecuniary gain. In mitigation, the trial court found low intelligence, abuse as a child, artistic ability,

and enjoyed playing with children. This Court determined the sentence to be proportional, noting that the nonstatutory mitigating evidence was not compelling.

In Hudson v. State, 538 So. 2d 829 (Fla.), cert. denied, 493 U.S. 875 (1989), the defendant took a knife into his girlfriend's apartment and stabbed the girlfriend's roommate. The aggravators were Hudson's prior violent felony conviction and committed during the course of an armed burglary, which is what could be considered in this case if the pecuniary gain factor were found inapplicable. Although the trial court also found three statutory mitigating factors, little weight was given to the mitigation and this Court upheld the sentence. See also, Clark v. State, 613 So. 2d 412 (Fla. 1992) (aggravators of prior violent felony conviction and during course of robbery; mitigating evidence presented but not found), cert. denied, ___ U.S. ___, 126 L. Ed. 2d 79 (1993); Watts v. State, 593 So. 2d 198 (Fla.) (prior convictions, during course of sexual battery, and pecuniary gain outweighed mitigation of defendant's age and low IQ), cert. denied, ___ U.S. ___, 120 L. Ed. 2d 881 (1992).

A review of the aggravating and mitigating factors established in this case clearly demonstrates the proportionality of the death sentence imposed. Even if one or more of the aggravating factors is found to be inapplicable, the circumstances of this murder and the defendant's propensity for violence compel the imposition of the death penalty. The appellant's prior violent felony convictions, even standing alone

in aggravation, outweigh the weak mitigation evidence presented and found in this case. Therefore, this Court should not disturb the appellant's sentence in this appeal.

## CONCLUSION

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

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

CAROL M. DITTMAR
Assistant Attorney General
Florida Bar No. 0503843
2002 N. Lois Avenue, Suite 700
Tampa, Florida 33607-2366
(813) 873-4739

OF COUNSEL FOR APPELLEE

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to STEVEN L. BOLOTIN, Assistant Public Defender, Polk County Courthouse, P. O. Box 9000--Drawer PD, Bartow, Florida, 33830, this 12th day of August, 1994.

CAROL M. DITTMAR

OF COUNSEL FOR APPELLEE