IN THE SUPREME COURT OF FLORIDA

DAVID PANGBURN,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

Case No. 81,650

ON APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTEENTH JUDICIAL CIRCUIT,
IN AND FOR BROWARD COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant, David Pangburn, was the defendant in the trial court below and will be referred to herein as "Appellant." Appellee, the State of Florida, was the prosecution in the trial court below and will be referred to herein as "the State." Reference to the pleadings will be by the symbol "R," reference to the transcripts will be by the symbol "T" and reference to the supplemental record will be by the symbol "ST [vol.]" followed by the appropriate page number(s).

STATEMENT OF THE CASE AND FACTS

On July 19, 1990, Appellant was indicted along with his brother, Michael Pangburn, for the first-degree murder and robbery with a deadly weapon of Diane Matlawski, and for the first-degree murder of Nancy Cole Temple, allegedly committed on November 20, 1989. (R 1569-71). Appellant filed numerous pretrial motions, including a motion to suppress his statements to the police. (R 1805-07). In his motion to dismiss, Appellant alleged that his post-Miranda statements to the police were obtained "in violation of the Defendant's right to counsel, and the Defendant's privilege against self-incrimination," were not "freely and voluntarily given," were obtained "in violation of the defendant's right to be free from unreasonable searches and seizures," and were not "supported by an independent prima facie proof of the corpus delicti of the crime for which the Defendant is charged." (R 1805-07). At the hearing on Appellant's motion to dismiss, the State called Detective Dominick Gucciardo and Lieutenant John Auer as witnesses. Both officers testified that they went to the South Florida Reception Correctional Facility in Miami on July 11, 1990, to interview Appellant after his brother's confessions implicated him. (T 136, 153). Upon arriving at the facility, the supervisor, John Culligan, brought Appellant to the cafeteria and then opened an office for the interview. In the officers' presence, Mr. Culligan told Appellant that he did not have to speak to them and could leave at any time. (T 137, 153-54). Appellant indicated that he would speak to the officers, told Mr. Culligan that he could leave, and stated that he had "nothing to hide." (T 138). Both detectives then identified themselves, and Detective Gucciardo

read Appellant his rights from a card. After each question, Appellant responded that he understood his rights. Appellant indicated that he had not "previously requested any law enforcement officer to allow [him] to speak to an attorney," and agreed to speak to them. (T 138-40, 154).

At that point, Detective Gucciardo told Appellant that they were investigating these murders and that his brother had implicated him in the murders. (T 140-41, 155). Appellant sighed, stared at the officers, then lowered his head and said,

> [B]ecause of my brother, I really did it this time. I knew what we were doing was wrong but he's my brother. . . .
>
> [H]e could go anytime now because of AIDS. I moved in with him to take care of him, but it was his idea to kill the girls for the car. I left my wife and two kids for that. I have been trying to clear myself from the escape. I spent seven years in prison before I escaped and now this. My brother should have kept his mouth shut.
>
> If I tell you guys everything, I know I will be putting myself and my brother in the electric chair for sure. I have nothing else to say. I guess I will see guys you in court.

(T 141, 155-56). When Detective Gucciardo asked Appellant if he would give a taped statement, Appellant said Mr. Culligan told him that he could stop any time, and he left. (T 141-42, 157).

On his own behalf, Appellant testified that he was in the correctional facility pursuant to his escape charge, which was dropped, and for four burglaries for which he was sentenced to 43 years in prison. (T 169-70). Mr. Culligan told him the detectives were there to see him and that he did not have to speak with them. Appellant agreed to, and Mr. Culligan left. (T 170). Neither officer read him his Miranda rights before questioning him. (T

170). According to Appellant, Detective Gucciardo initially asked him if his brother was the father of Appellant's stepson, and then asked him about two women in a Trans Am. Appellant asked if he was a suspect in anything, and Detective Gucciardo told him that his name kept coming up in their investigation of these murders and that they thought he had information relating to them. One of the officers then said, "[W]e are going to nail your ass to the wall." (T 171). At that point, Appellant left. (T 171). He denied making any of the statements testified to by the officers and denied knowing anything about the murders. (T 172-76).

The State argued that Appellant was read his Miranda rights and voluntarily, knowingly, and intelligently waived them. A written waiver form was not executed because Appellant stopped the interview and left after making a brief statement. (T 177-78). Defense counsel agreed that it was "a matter of credibility," and argued that the officers' failure to obtain a written waiver or taped statement cast doubt on their version of events. (T 178-82). The trial court took the motion under advisement and issued a written order denying the motion twelve days later. (R 1831; T 182).

Jury selection began on November 30, 1992, and concluded the following day (ST 1-502), after which the attorneys gave opening statements (T 255-68). Thereafter, the attorneys stipulated that Diane Matlawski was the first victim, that Nancy Cole was the second victim, that the red Trans Am belonged to Diane Matlawski, and that November 19, 1989, was a Sunday. (T 269-70).

The State's first witness was Elizabeth Hollenbaugh, Nancy Cole's mother. Ms. Hollenbaugh testified that she last saw her

daughter on Sunday, November 19, 1989, around 5:00 p.m., when Nancy left with Diane Matlawski in Diane's car. (T 272). She also testified that her daughter's top teeth were dentures. (T 273).

The State's next witness was Helen Matlawski, Diane's mother. Ms. Matlawski testified that Diane called her on Sunday evening around 9:00 p.m. She also testified that Diane drove a red 1986 Trans Am, in which Diane kept the two green towels that were found with the bodies. According to Ms. Matlawski, Diane wore two thin bracelets, one with rubies in it and one with diamonds in it. (T 281-82).

Next, the State called Deputy Michael McGurgan, who responded to mile marker 63 on Alligator Alley at approximately 4:25 a.m. on November 20, 1989, and found the victims' bodies. (T 288-95). Detective Joseph Damiano then testified that he and Detective Gucciardo were the next officers on the scene. (T 296). They found a white female (later identified as Diane Matlawski) on the edge of the roadway wrapped in an unzipped brown sleeping bag with a white towel over her face and a blood-soaked nylon-type rope around her neck. The victim was wearing a pink shirt torn in the front, and had severe trauma to her head and face. (T 298-302). They found a second white female (later identified as Nancy Cole) twenty feet away on the other side of a guardrail that was two to three feet high. This victim was fully clothed and was wrapped in a pink blanket. Her bra was hanging on her right arm. She had severe trauma to her face, neck, and head, and a ligature mark around her neck. (T 298, 302-04). Also at the scene, the officers discovered, among other things, two green towels and two cardboard boxes with markings on them. (T 302-03).

Having matched the victims' fingerprints to previous arrest records, the officers determined the identities of the two victims and then contacted their family. (T 307-08). They learned that Diane Matlawski owned a red Trans Am and wore two tennis bracelets. (T 309). Eight days later, Diane's car was found backed into a parking space at Carriage Crossing Apartments in Pompano Beach. (T 309). Several people reported seeing someone around the car the preceding week. (T 311).

The State's next witness was Michael Crosse, who testified that he was at his cousin's house laying baseboards on November 19, 1989, when Diane Matlawski came over to visit his cousin, Paul Clark. The first time, she came to visit around noon and stayed around twenty minutes. The second time, she and a white male got out of a car and walked into the backyard of his cousin's neighbor, Jerry White, around 3:30 p.m. From a photo array, Mr. Crosse identified Appellant's brother, Michael, as the man with Diane. (T 333-39). On cross-examination, Mr. Crosse testified that he knew that Nancy Cole was dating Jerry White, but he did not know that Jerry White was a drug dealer. (T 340-41).

Following Mr. Crosse's testimony, defense counsel made a motion in limine seeking to redact from Appellant's statements to the police his references to his prior incarceration and his escape from jail. His motion was granted. Defense counsel also renewed his motion to suppress, which was denied. (T 362-70).

Thereafter, the State called as a witness Patricia Carter, the records custodian for BellSouth Mobility. Ms. Carter testified that Diane Matlawski's car phone was used on November 19, 1989, at 5:45 p.m. and 6:04 p.m. to call a number previously identified as

Nancy Cole's mother's number, and again at 8:45 p.m. to call a number previously identified as Diane Matlawski's mother's number. (T 273, 281, 372-77).

Next, the State called Detective Dominick Gucciardo of the Broward County Sheriff's Office, who was the lead detective in this case. Detective Gucciardo recounted the steps taken in his investigation of the case as previously recounted by his partner, Detective Damiano. (T 379-92). Detective Gucciardo further testified that the case had stalled out until an informant called CrimeStoppers on July 9, 1990, and implicated Appellant and his brother. (T 393). At that point, Detective Gucciardo put together two photo arrays, one containing a photo of Appellant and one containing a photo of his brother. He showed these arrays to several people at the apartment complex where Diane's car was found and people identified both Appellant and Michael as being around or driving Diane's car. (T 395-98). Detective Gucciardo also learned that Michael's fingerprint was found on a plastic newspaper bag that he found inside Diane's car. (T 397).

According to Detective Gucciardo, he interviewed Michael's lover, Scott Palmer, on July 11, 1990, and learned that Michael was staying at the Oasis Motel in Pompano Beach. (T 399-400). He went to the motel, but learned that Michael and a female companion had just left on a bus for Lauderhill Mall where Scott Palmer worked. He then went to the mall, but was told that Michael had just left on a bus, so Detective Gucciardo tried to find him. (T 400-01). Meanwhile, Michael was apprehended at the mall with Denise Norys and taken to the sheriff's department. Detective Gucciardo interviewed Denise and Scott, and two other officers interviewed

Michael. (T 402).

Detective Gucciardo then testified that, based on Michael's interview, he and Sergeant Scheff located Appellant. After waiving his Miranda rights, Appellant made a brief statement (as recounted at the motion to suppress hearing) and left. (T 403-07). Appellant was ultimately arrested for the murders, and they searched a residence at 812 Southwest 15th Avenue, wherein they believed the murders had occurred. Scott Palmer owned the residence, but Michael, Appellant, and a man named Alfred LeBlanc lived there until the bank foreclosed on it and evicted them. (T 408-09).

The State's next witness was Michael Blair, who lived at Carriage Crossing Apartments in November of 1989. Sometime around Thanksgiving, Mr. Blair noticed a red Camaro or Trans Am parked in the parking lot. He saw a white male, six feet tall, with blonde wavy hair and a mustache drive off in the car. When shown the two photo arrays put together by Detective Gucciardo, Mr. Blair identified Appellant as the man he had seen driving the car. (T 427-35).

Michael Blair's wife, Linda, then testified that she saw a red Firebird by the apartment carwash around Thanksgiving. She identified Diane Matlawski's car as the car she had seen. (T 439). She also saw a man with a medium build/height and two-toned hair washing the car. She later identified Appellant from the photo arrays as the man she saw. (T 440-42). On cross-examination, she admitted that she initially described the man as 5'5"-5'6" tall although he appeared to be 5'9" or 5'10" tall in court. She also testified that he did not look the same in court with short brown

hair, and she did not remember seeing the abdominal scar or tattoos that Appellant displayed in the courtroom and which defense counsel described as "pretty significant." (T 443-46).

Following Linda Blair's testimony, the parties discussed Appellant's intention of calling Michael as a witness. The trial court and defense counsel explained to Appellant that by doing so the State could then admit the substance of Michael's prior inconsistent statements. Appellant indicated that he understood and agreed with defense counsel's tactical decision to let the State elicit Michael's prior inconsistent statements during its case-in-chief rather than in rebuttal. (T 462-74, 618-21).

Next, Rita Flint, a former nurse at the North Broward Medical Center, testified that Appellant's brother, who identified himself as Michael Bates, was admitted into the hospital on November 20, 1989, at 12:33 p.m., for a laceration on his right hand. (T 477-78). His emergency room sheet indicated that he cut his hand on glass, but an addendum indicated that a dog bit him. (T 498-99). Ms. Flint noticed that Michael was wearing two tennis bracelets, one with rubies and one with diamonds. (T 477-80). When Ms. Flint came to his room to check on him, Michael had two visitors: a man whom she later identified as Appellant, and a woman. Appellant was wearing one of the tennis bracelets. (T 480-81).

The State's next witness was Detective Stephen Wiley of the Broward County Sheriff's Office. Detective Wiley testified that he received information about these murders through CrimeStoppers in July of 1990. He contacted Detective Gucciardo, and they both interviewed the informant. (T 503-05). From this interview, Detective Wiley contacted Scott Palmer's boss and obtained Scott's

telephone number. He then called Scott, looking for Appellant's brother, but Scott did not give him any information. Several minutes later, Michael Pangburn called. (T 507-08). Detective Wiley called Scott Palmer back, and Palmer denied telling Michael that the police were looking for him. Following that call, Michael Pangburn called again. (T 508-09). Detective Gucciardo then brought Scott Palmer to the station, and Scott told them where to find Michael. (T 511). After unsuccessfully trying to find Michael, Detective Wiley returned to the station and Michael was there. He interview Scott Palmer and Michael's companion, Denise Norys.(T 511-12). On cross-examination, Detective Wiley testified that Mr. and Mrs. Quilles identified Michael as a resident of Carriage Crossing Apartments. (T 518).

The State's next witness was Detective James Kammerer, the lead crime scene technician. Detective Kammerer recounted his efforts at collecting evidence where the bodies were found, finding fibers on the bodies and other evidence, fingerprinting the victims, processing Diane Matlawski's car, finding blood in her car, finding a fingerprint on a plastic newspaper bag in the car, processing the house where the murders occurred, finding bloodstains on the wall in the Southwest bedroom and on the wall in the livingroom, and obtaining a positive reaction for blood on the wall and floor of the Southeast bedroom.

Next, the State called Sergeant Richard Scheff, the homicide unit supervisor, as a witness. Sergeant Scheff testified that he answered the phone for Detective Wiley one day and it was Michael Pangburn. Following their conversation, during which Michael threatened to come to the sheriff's department and stick his foot

up Detective Wiley's behind, Sergeant Scheff then called Scott Palmer, who denied telling Michael that the police were looking for him. (T 623-24). He and Detective Gucciardo went to Palmer's job, and Palmer agreed to go with them to the sheriff's department. Sergeant Scheff admitted that he was very angry at Palmer. Palmer ultimately admitted telling Michael that the police were looking for him, and told them about bloody carpet being removed from the house. (T 628-30).

Based on Palmer's interview, Sergeant Scheff and others left to find Michael. He went to the Oasis Motel and learned that Michael had taken a bus to Lauderhill Mall where Palmer worked. At the mall, he learned that Michael had just left on another bus, so Sergeant Scheff tried to locate him. Meanwhile, Michael and Denise Norys were arrested at the mall and taken to the sheriff's department. (T 631-33).

After waiving his Miranda rights, Michael initially denied any knowledge of the murders. When Sergeant Scheff confronted him with the fact that his fingerprint was found on a plastic newspaper bag in Diane Matlawski's car, Michael admitted that he knew something about the murders, that he was involved in it, but that he did not do anything, and that it was all done by Appellant. After giving a brief account of what happened, Michael agreed to repeat it on tape. (T 640-46). His first sworn taped statement was then played for the jury. (T 648). On the tape, Michael explained that he came home from riding his bicycle, saw a red Trans Am in the driveway, and saw Diane Matlawski, whom he had never seen before, dead in the living room. Appellant walked out of Michael's bedroom, and Michael asked him what he was doing. Appellant told

him to sit down, shut up, and mind his own business. Appellant walked back into Michael's bedroom, and Michael heard "crying noises." Michael went in there and saw Appellant "choking this girl," so he jumped on Appellant, and Appellant hit him. Michael's dog then bit Appellant on the behind, and Appellant hit the dog with a baseball bat. Michael "just sat there and watched him choke this girl." (ST IV 506-13).

Michael then recounted how Appellant wrapped the girls in his dog's blanket, sought assistance from Michael, which he refused, and then put the girls in Diane's car. Appellant returned about an hour and a half later complaining about all the blood in his new car. Appellant had taken two tennis bracelets off of the victims, one of which he gave to his wife, and the other he sold for crack. Appellant removed blood-stained carpet from his (Appellant's) bedroom and threw it in a dumpster somewhere. Several days later, Appellant laughed at a newspaper article regarding the victims being found on Alligator Alley, and Michael threw Appellant out of the house. Michael did not know why Appellant parked Diane's car at the apartment complex. He speculated that it was because Appellant knew a man and woman there. Michael later learned that Appellant had met the girls in a bottle club and that they were all free-basing cocaine. He estimated that this occurred around 7:30 or 8:00 p.m. (ST IV 515-22).

Following this statement, Sergeant Scheff told Michael that he did not believe him and then left the room. About thirty minutes later, Michael called for him, told him to bring his tape recorder back in, and told him that he would tell Sergeant Scheff the truth. This second statement was then played for the jury. (T 648-51).

In this second sworn statement, Michael stated that he came home and found a girl dead in the living room. He tried to help the girl in the bedroom, and Appellant told him that if he loved him he would help him kill her. While the girl was tied up with pantyhose and begging Michael for help, he and Appellant got the dog's leash and wrapped it around her neck. He got one end and Appellant got the other and they both pulled until she died. They then put both girls into the Trans Am and drove them to a secluded spot where they dumped them. He did not know how the first girl was killed, and he did not know why this happened or why he agreed to help Appellant. Appellant told him that he had to help him because they were brothers. Michael stated that he agreed to tell Sergeant Scheff the truth so that he could "go back to feeling normal." (ST IV 528-33). Michael was then arrested for the murders. (T 652).

Following Sergeant Scheff's testimony, the State presented the videotaped testimony of Alfred LeBlanc, who had since died of cancer. Mr. LeBlanc testified that he had known Michael about a year, and Appellant about four months, prior to the murders. (T 539). He moved into the master bedroom of Scott Palmer's house where Michael and Appellant were living. (T 540-43). Sometime before the murders, he saw Diane Matlawski's car with Diane in it at the house. On another day, Appellant took him for a ride in Diane's car. (T 547-48).

On the day of the murders, Mr. LeBlanc came home from work and saw Diane sleeping on the couch. No one else was home. Shortly thereafter, Michael came home and borrowed his bicycle to go to the store for beer and cigarettes. (T 549-51). Later that night,

while he was in his room, Mr. LeBlanc heard a party going on. Sometime later, he heard a woman say, "You bastard. You bitch." He got scared and put a chair under his doorknob. (T 553-54). He woke up later, thought the party was over, and opened his door. He saw Appellant with a baseball bat "walking around like paranoia, so to speak, acting weird." Appellant told him to go in his room, that everything was okay, and that it was none of his business, so he did. (T 554). When Mr. LeBlanc got home from work the next day, he saw Appellant and Michael cutting up carpet in Appellant's bedroom. It had a dark stain on it, and there was a dark stain on the floor underneath it. Appellant threw the carpet in the dumpster. He also saw Michael wiping the floor in the living room. (T 556-61). On cross-examination, Mr. LeBlanc testified that Michael had called him several times regarding his testimony. He also admitted that he stated at a prior deposition that he was not sure if Appellant had a bat in his hand when he came out of his room. (T 600-01).

Thereafter, the parties stipulated that the blood found in Diane Matlawski's car was Diane's (T 684), and the State called Theresa Knowles as a witness. Ms. Knowles testified that she was a leasing consultant at Carriage Crossing Apartments and that she had known Appellant for a year and a half to two years. One day after Thanksgiving in 1989, Appellant and his brother came to the complex to do laundry, and Appellant bragged that he had a new red sports car. (T 686-94).

Thereafter, the State called Scott Palmer as a witness. Mr. Palmer testified that he owned a house at 812 Southwest 15th Avenue in Fort Lauderdale. He had known Michael Pangburn 14 or 15 years

and had been his lover since Michael was in his late teens. He had known Appellant four or five years. (T 695-97). Michael, Appellant, their mom, and Alfred LeBlanc lived in his house. (T 698-99). Sometime before Thanksgiving, he saw Diane Matlawski's car in the driveway. Michael, Appellant, and two women were there. (T 701-02). On November 20, he went to the house looking for Michael, and Appellant met him at the kitchen door. Appellant looked like he had been up all night partying and was still partying. Appellant told him that Michael was in the hospital because he had cut his hand. (T 703-05). Mr. Palmer noticed that the kitchen was in disarray, and Appellant remarked that they had had a party. When Mr. Palmer said that it looked like more than that, Appellant responded that they had had "a little bit of trouble" and that they had had to "get rid of some bodies," which he understood to mean that someone got out of hand and they had to throw them out. (T 705-06). Two or three days later, Mr. Palmer went back to the house and noticed that carpet had been removed from Appellant's bedroom and parts of the living room. Appellant's room had also been freshly painted blue. (T 707-08). Mr. Palmer stopped seeing Michael in March of 1990, and the bank evicted everyone in the house in March or April. (T 709).

On cross-examination, Mr. Palmer testified that Michael told him two or three weeks ago that he (Michael) was solely responsible for the murders and that he was going to tell the truth at Appellant's trial. (T 721). As a result of this testimony, the State argued and the trial court agreed that defense counsel had opened the door to redirect regarding Michael's previous inconsistent statements. (T 722-32). Thereafter, on redirect, Mr.

Palmer testified that Michael's statements to the police were different from what Michael told him two or three weeks ago. He also testified that prior to Michael's trial Michael told him what happened and he testified to such at Michael's trial; Michael's pretrial version was different than what he told him two or three weeks ago. Michael's version of events after his conviction was also significantly different than what he said two or three weeks ago. (T 735-36).

The State's next witness was Lieutenant John Auer. Lieutenant Auer testified that he and Detective Gucciardo met with Appellant on July 11, 1990, at approximately 7:30 p.m. Detective Gucciardo read Appellant his Miranda rights, and Appellant indicated that he understood them. When Detective Gucciardo indicated that he had information implicating Appellant in the murders, Appellant initially stared through them, then covered his face, lowered his head, and said,

> Because of my brother, I really did it this time. I knew what we were doing was wrong but he's my brother. He could go any time now because of AIDS. I moved in with him to take care of him but it was his idea to kill the girls for the car. I left my wife and two kids for that. My brother should have kept his mouth shut. If I tell you guys everything, I know I'll be putting myself and my brother in the electric chair for sure. I have nothing else to say. I guess I'll see you in court.

(T 745-46). Appellant was ultimately arrested for the murders. (T 746-47).

Next, the State called Bruce Ayala, a forensic chemist with the Broward County Sheriff's Office, as a witness. Mr. Ayala testified that fibers found on a floor mat and a rear seat in Diane

Matlawski's car were consistent with fibers from the pink nightgown that Diane was wearing when found. In addition, fibers found on the sleeping bag in which Diane was wrapped were consistent with carpet fibers from the Southwest bedroom in Scott Palmer's house. Fibers found on Nancy Cole's clothing were consistent with carpet fibers from the living room at Mr. Palmer's house. Fibers found on Nancy Cole's clothing also were consistent with fibers from the driver's side floor mat in Diane Matlawski's car. (T 752-64).

The State's final witness was Dr. Ronald Wright, the medical examiner. Dr. Wright estimated the time of death between 10:00 p.m. and 1:00 a.m. (T 775, 815). An external examination of Diane Matlawski, who was 5'5" tall and weighed 148 pounds, revealed a laceration over her right eyebrow with an abrasion downward, an abrasion on her left cheek extending under her chin, a ligature mark around her neck, a laceration behind her right ear, five fractures of the scull on the back of her head, one of which depressed the scull into the brain, and abrasions and bruising on her left shoulder caused by one to three blows with a blunt object. (T 780-83, 785-86). This blunt force trauma was consistent with a bat or club--something long, hard, smooth and round. (T 784). She did not have defensive wounds, which was "unusual." She had a small level of cocaine in her system and a blood alcohol level of .08 percent. (T 792-94).

According to Dr. Wright, Diane Matlawski's cause of death was asphyxiation, more likely caused by strangulation. A rope was found around her neck, and multiple indentations were found on her neck. (T 781, 785-87). Dr. Wright opined that Diane was alive when all of these injuries were inflicted as evidenced by the fact

that the victim swallowed some blood from her head injuries. Because she did not swallow a lot of blood, which would have caused her to asphyxiate as well, it is likely that she was also alive when she was strangled. (T 786-88).

When asked if the blows to the head would have caused unconsciousness, Dr. Wright testified that they "will eventually produce unconsciousness but not instantaneously. It will take a matter of some - ordinarily some minutes . . . ." (T 790). Similarly, when asked if the strangulation would have caused unconsciousness, Dr. Wright explained that it would depend on how deep a breath the person had taken, how much the victim struggled, and how effectively the airway was restricted. On the average, it would take "some seconds to [a] minute to produce unconsciousness." (T 791-92). However, "[t]o kill someone then requires a continued application of force" for another one to three minutes. (T 792).

Regarding Nancy Cole, who was 5'9" tall and weighed 113 pounds, Dr. Wright testified that his external examination revealed a laceration above the right eyebrow and a black eye, swelling of the right side of the face and jaw, abrasions and bruising on the left forearm, bruising on the palm of the right hand, and a ligature mark around her neck with a deep furrow caused by a large amount of pressure. Her voice box was crushed. (T 797-801). She was also missing her top teeth. (T 801). The injuries to her forearm were consistent with being defensive wounds. (T 805). The injuries to her face were consistent with being struck by a left hand. She was alive when struck and probably not rendered unconscious. (T 800-02). Her cause of death was asphyxiation. (T 804). The ligature mark was 1/8" wide and consistent with a dog

leash but not a rope. (T 802-03). He could not imagine how one person could have enough strength to pull the ligature as tightly as it was pulled. (T 811). She also had an average amount of cocaine in her system but no evidence of alcohol. (T 805).

Following Dr. Wright's testimony, the State rested is case. (T 820). The following day, defense counsel moved for a judgment of acquittal, which was denied. (T 824-28). Thereafter, on his own behalf, Appellant called John Bates as a witness. Mr. Bates testified that he had been a friend of Appellant for approximately four years, and that Appellant had lived with him and his wife for a short period of time around October or November of 1989. Mr. Bates further testified that he owned a red 1988 Camaro, which is the Chevrolet equivalent of the Pontiac Firebird, and that he let Appellant drive the car periodically. (T 829-38).

Appellant's next witness was David Carter. Mr. Carter, a nine-time convicted felon currently serving a jail sentence, testified that he met Michael Pangburn in February of 1990 at a crack house in Fort Lauderdale. (T 839). Michael introduced himself as David and was accompanied by his girlfriend, DeeDee, who was a prostitute. Mr. Carter estimated that he saw Michael at the crack house three times during February and March. (T 841-42). On one of those occasions, Mr. Carter was arrested for grand theft auto while driving around with Michael and DeeDee in a stolen car. Mr. Carter later saw Michael in jail when Michael was arrested for these murders, and Michael told him that he implicated Appellant in the murders because the police were harassing him and he wanted to get some rest. (T 843-46). About a year or so later, Mr. Carter met Appellant in jail and asked Appellant how his brother was

doing. Appellant responded that he did not have a brother. Sometime later, Appellant asked Mr. Carter how he knew his brother, and Mr. Carter related his prior conversation with Michael. (T 847-49). On cross-examination, Mr. Carter admitted that Michael initially told him that neither he nor Appellant committed the murders. (T 853-54).

As his final witness, Appellant called his brother, Michael. Michael testified that he was 31 years old, 15 months younger than Appellant. His family moved to New York City when he was two or three years old and lived in Yonkers for 14 or 15 years. His stepfather, who could not have children of his own and was apparently resentful of Michael and Appellant, was an alcoholic and was abusive to them. (T 857-59, 865, 903). His mother was a prostitute when they were little and was addicted to alcohol and drugs, as was he. He began using drugs when he was nine or ten years old, when his mother brought them home from the hospital where she worked. Since then he has tried numerous different drugs, but prefers cocaine, especially crack. (T 860, 865, 866, 868-69, 903). He is gay and had contracted AIDS from Scott Palmer, with whom he had been lovers since he (Michael) was 18 years old. (T 862-67). He had been convicted between ten and thirty times, once for threatening to kill then-President Ronald Reagan. He was also convicted of the first-degree murder of Nancy Cole. (T 860-63).

Michael then testified that he called Scott Palmer on July 11, 1990, and Scott told him that the police were looking for him, so he went to Lauderhill Mall where Scott worked to get money so that he could leave town. (T 873-74). While at the mall, Michael was

arrested and taken to the sheriff's office, where Detective Gucciardo and Sergeant Scheff threatened to "rough up" Scott Palmer if Michael did not talk to them, so he talked. (T 876). The officers left, then came back and told Michael that he did not tell them enough, and that they would charge his mother, Denise Norys, and Scott Palmer with being accessories if he did not tell the whole story. Michael then blamed the murders on Appellant, hoping that he could make a deal and leave, then straighten it out later. (T 877-79). Michael also admitted that he told several people in the jail that he was Appellant and that he committed the murders so that they would testify against Appellant and he would live. (T 882). He called Appellant's attorney six weeks ago and agreed to tell the truth at Appellant's trial because he could no longer lie against Appellant. (T 879-80).

Regarding the murders, Michael gave the following account: He picked up Diane Matlawski at a bottle club and took her in Scott Palmer's Mercedes to his house to smoke crack. (T 883, 924). Diane called Nancy Cole, then went over to get her in Scott's car, and they went by and picked Diane's car up at the bottle club. (T 924). He had never met either woman before. (T 926). Once back at Michael's house, they did more crack, then they all left to get some more. They returned to the house around 10:00 p.m. They smoked crack with Fred LeBlanc, then Fred went to his room. While Nancy was in the bathroom, Diane took her clothes off and wanted to have sex with Michael. He rebuffed her advances and she called him a "faggot," so he hit her in the face. (T 928). She jumped up and wanted to fight, so he picked up a baseball bat and swung it at her. She moved into it, and it hit her on the left side of the

head. (T 928). She was screaming during the encounter. (T 928). He was "enraged" at her because she "f___ed up [his] whole evening and on top of it, she had blood all over [his] house, so [he] . . . hit her with the bat three or four [more] times." (T 930). She was making noises, and he had already decided that he was going to kill her because he was "pissed off," so he took his dog's leash and wrapped it twice around her neck, then stood on her neck and pulled until she was dead. (T 883-87, 931). It took her three to four minutes to die. (T 931).

After he killed Diane, he took another hit of crack. He had made up his mind that Nancy "was nothing but a witness and she had to go too," so when she came out of the bathroom about five minutes later, he met her in the foyer and hit her twice. (T 931-32). When she saw Diane, she screamed, so he hit her several more times. Her dentures broke and cut his hand. He beat her down to the floor and then strangled her with the leash. He dragged them both to Appellant's room. Appellant was at work. (T 887-88, 934-35). Michael did some more crack and then decided that he had to get rid of the bodies before Scott Palmer saw them, so he picked up Nancy, threw a blanket on her, and put her in her car. He put Diane in a sleeping bag and dragged her to the car. (T 891-92). He drove out into the Everglades to a remote spot and threw Nancy over the guardrail. He hit his injured hand on the car, so he just left Diane on the side of the road. He then went home and got high and started to clean up. (T 893-94). Appellant came home around 6:30 or 7:00 a.m. He did not tell Appellant what happened, but asked Appellant to help him clean up. Michael fell asleep on the couch and Appellant later took him to his doctor and then to the

hospital. He left Diane's car in the driveway. He gave Diane's ruby bracelet to Appellant's wife and sold the other one for crack. (T 896-900, 956). He later painted Appellant's bedroom and the living room blue. (T 957).

On cross-examination, Michael admitted that he had been convicted in January and sentenced in February for Nancy Cole's murder. Because he had testified in another case for the State, that prosecutor testified on Michael's behalf at his penalty phase proceeding. He also admitted that he had reviewed all of the witnesses' statements, police reports, etc., prior to his trial, and was present for the witnesses' testimony. (T 911-15). When the State listed him as a witness in Appellant's trial and the defense sought to depose him, he refused. (T 917). He has used numerous aliases, including his brother's name, and tells lies when he wants to. (T 921-23). He will tell people what he wants to tell them, when he wants to tell them. (T 948). He would lie for Scott Palmer any day but the day of his testimony. (T 950).

Regarding the blood splatter on the wall in Appellant's bedroom, Michael explained that he was carrying Diane under her arms when he dropped her and she hit her head on a small table in the bedroom, causing her blood to splatter. (T 936). He then stated that he tried to carry Diane under her arms but he could not manage, so he dragged her by her feet into Appellant's bedroom. (T 937-38). He could not explain the blood found in his own room. (T 937). He also stated that the police should have found a pack of Marlboros in the newspaper bag found in Diane's car. (T 938).

Michael admitted that he told a man named Adam Angel while in jail that Appellant hit him with a bat, that Appellant handed the

leash to Michael to strangle Nancy Cole, and that Appellant forced him to help Appellant move the bodies. (T 939-40). Michael also admitted that he told Denise Norys, with whom he lived from March until July of 1990, that he killed two girls in the house, that the girls pulled a knife on him, and that he "bashed her head in." (T 943). At his motion to suppress hearing, he testified that his first taped statement was true, and that he would not be a witness at the hearing if he had not given the second statement implicating Appellant. (T 961-63). However, before he left for prison, he told Scott Palmer what had happened, which was the same story he had recounted for the police in his second taped statement. (T 953). Three or four weeks ago, Michael then called Scott and told him that he was going to tell the truth at Appellant's trial. (T 953).

Following Michael's testimony, Appellant rested his case, and defense counsel renewed his motion for judgement of acquittal, which was denied. (T 969, 971-72). Following the parties' closing arguments (T 1009-55, 1057-1115, 1115-19), and the jury instructions (T 1119-49), the jury returned verdicts of guilty on all counts as charged. (T 1175-77). Seven weeks later, the parties convened for a prehearing conference, wherein the trial court denied defense counsel's penalty-phase motions and his motion for new trial. (T 1199-1201, 1234-39).

On February 1, 1993, the penalty phase commenced. The State called Jeanine McKenzie, a latent print examiner, to testify that Appellant was the person named in a 1980 judgment and sentence for robbery which the State admitted into evidence. (T 1291-96). Next, the State called Sergeant Timothy Falk from the City of Fort

Lauderdale Police Department, who testified over Appellant's objection that, on May 25, 1980, Appellant came up behind an elderly lady on East Las Olas Boulevard in Fort Lauderdale and grabbed her purse, knocking her down. The strap on the purse broke, and Appellant ran off. The victim, Miss Stein, was taken to the hospital with a head injury. Bystanders chased Appellant and cornered him behind a house, at which point he brandished a knife and then jumped into a canal. The bystanders jumped in after him and held him until the police arrived. After waiving his Miranda rights, Appellant told the officer that he did it because he needed money since he had just gotten out of jail the day before. (T 1297-1302).

On his own behalf, Appellant called Sherry Downing as a witness. Mrs. Downing testified that she was married and had three children. She had known Appellant for approximately seven months prior to his arrest, and he was her best friend. In her opinion, Appellant was a "good husband" and a "caring and loving father." Appellant was not violent with his family. He had helped her with her self-esteem and had given her advice about raising her children. They continued to write letters to each other still. (T 1304-09).

Appellant's next witness was his fifteen-year-old stepson, Kevin Chermark. Kevin testified that his natural father abandoned him on his grandmother's doorstep, and Appellant and his wife took him in. Appellant is more of a father than his natural father has ever been. Appellant was "a great dad." He would take him and his stepsister, Amber, to the park and play with them. He never physically disciplined him. Appellant was also a "great husband"

and never hit his (Kevin's) mother. Appellant worked two jobs to support the family, and was kind and helpful to other people. (T 1309-13).

Next, Appellant called his father, Charles Pangburn, as a witness. Mr. Pangburn testified that he was a retired fireman and lived in Illinois. Appellant was born in 1959, he separated from Appellant's mother in 1961, and he divorced her in 1964. Appellant's mother was a prostitute and abused drugs and alcohol. Although the court granted custody of Appellant and his brother to Mr. Pangburn, Appellant's mother kidnapped the boys and took them to New York. He found them in 1966, and she indicated that she was going to get married, and that her new husband wanted to adopt the kids. He agreed to let the kids stay with her if her new husband would adopt them, but he never did. He later learned through telephone conversations with Appellant and Michael that their stepfather was mentally and physically abuse to them. Mr. Pangburn did not see Appellant again until Appellant was eight or nine years old. The only other time that he has seen him was two or three years ago when Appellant was arrested for these murders. (T 1313-21).

Appellant's next witness was Dr. Trudy Block-Garfield, a licensed psychologist. Dr. Garfield testified that she met with Appellant for one to one-and-one-half hours. She obtained a biographical history, screened for brain damage, and administered the Carlson Psychological Survey which is used to classify inmates. (T 1325-26). She also reviewed some school records from New York and spoke to Appellant's father. (T 1326). According to Dr. Garfield, the tests did not reveal much. Appellant "seems to be

functioning within a relatively reasonable range," although "there's certainly issues . . . with respect to impulse control." There were some indications of "some organic defect," but the tests were inconclusive. The Carlson Survey indicated hostility and resentment from his unsettled home life as a child.

Appellant was reluctant to discuss his parents and cried when doing so. (T 1326-28). Despite his stepfather's abusive behavior, Appellant still loved him. (T 1329). She opined that, although Appellant has a problem with authority figure, he would function well while institutionalized. (T 1327, 1334). Appellant recounted to her that he began smoking marijuana and drinking when he was about twelve years old. By eighteen, he was drinking heavily and using downers, Quaaludes, PCP, and crack. He preferred downers. He and Michael were supportive of each other, but fought. Appellant would run away from home in order to keep the family together but was placed in state custody when Appellant was thirteen or fourteen. Michael asked to go with him but they were separated because of their age difference. While serving time in prison, Appellant was attacked by an inmate so he escaped. Dr. Garfield diagnosed Appellant as an antisocial personality, which would become subdued during his late thirties or early forties. (T 1331-35, 1339). On cross-examination, Dr. Garfield testified that Appellant knew that she was there for mitigation purposes. She also opined that Appellant knew right from wrong, and she did not believe that Appellant had any brain damage. He was, however, "a very angry young man." (T 1336-41).

Appellant's next witness was Deputy Sheila Cutter, who worked in Appellant's cell block at the jail. Deputy Cutter testified

that Appellant volunteered to work within the unit as a trustee. (T 1345-46).

Appellant then testified on his own behalf: He was born on October 21, 1959, in Gary, Indiana, was 33 years old, was married, and had two children: Kevin, from his wife's previous marriage, and Amber, who was five years old. He was raised by two foster families until he was five years old when his mother took him. His childhood was not happy, he did not do well in school and dropped out in the eighth grade, and he ran away from home many times. He was ultimately sent to a juvenile detention center. His mother was a prostitute, a waitress, and then a nurse. She was addicted to drugs and alcohol. His stepfather beat him and Michael "real good." His mother and stepfather divorced in 1974, and she began living a gay lifestyle. His mother later married another man who was an alcoholic and drug abuser. He has only met his natural father three times. His brother is angry, antisocial, and violent. Appellant characterized his relationship with Michael as a love/hate one. Because they both spent time in prison, he did not see Michael for fifteen years. (T 1351-58, 1370-94).

Appellant met his wife before he was incarcerated on other charges. While in a work release center, he and a bunkmate got into a fight and the bunkmate threatened to kill him, so he packed his belongings and walked out. He obtained false identification and assumed the identity of Sonny Bates. He proposed to his wife two months after his escape, and they later married and had a child. One day his mother showed up at his doorstep, a crack addict and alcoholic. He took her in, and then she told Michael where Appellant lived, so he showed up too. His brother's and

mother's behavior caused difficulties between him and his wife, so he got a house down the street for his mother and brother to live in. (T 1360-65, 1403-12).

Regarding the murders, Appellant testified that he did not know the victims and did not know what happened to them, other than what Michael related. Appellant dropped by Michael's house on the way to work one day and the house was a mess. There was blood on the floor. Appellant took Michael to the hospital, and Michael told him that he had gotten into a fight with someone. That was not the first time he had seen blood in the house. One day he came over after his job was rained out and Alfred LeBlanc and his boyfriend had clubbed each other over the head with a baseball bat in a fight over the last beer in the refrigerator. (T 1365-67).

On cross-examination, Appellant testified over defense objection that he had been convicted nine times. When he escaped from the work release center, he had ten to twelve more years to serve. He assumed a false identity because he did not want to go back to prison. (T 1426-29).

After closing arguments (T 1436-48, 1448-53), and jury instructions (T 1454-60), the jury recommended death by a vote of seven to five. (T 1470-71). A month later, at the allocution hearing, the trial court noted the fact that there was only one recommendation and sought comments from the parties. The options posed by the trial court included (1) reconvening the jurors and individually questioning them regarding their intentions with the single recommendation, i.e., whether it intended the recommendation to apply to both or only one of the victims; (2) empaneling a new penalty phase jury; or (3) applying the single recommendation to

both victims. It was also open to other suggestions. (T 1479-82). The prosecutor indicated that she had recently run into one of the jurors who asked her whether the judge had followed the jury's recommendation. The prosecutor responded negatively and told the juror that she could call the judge's judicial assistant within the next six weeks to learn the final sentence. The juror complemented the prosecutor on her presentation of the case, asked if the defense attorneys were privately retained or appointed by the court, and indicated that she was not impressed with them. The prosecutor responded that Appellant would most likely appeal and that the court would consider the attorneys' representation. (T 1483-86).

After consulting privately with Appellant, the defense attorneys indicated that an ultimate life sentence by the court would render the problem moot. (T 1487). The trial court responded that it had not formed any opinion or made any decision regarding its ultimate sentence and could not do so until this issue was resolved. (T 1488-89). At that point, the defense attorneys indicated that they would leave the decision up to the court as to how to resolve this matter. Appellant agreed and indicated that his attorneys had fully discussed the options with him. For some reason, however, the attorneys wanted to consult privately with Appellant again. (T 1489-91).

During this recess, the State proposed to the defense that they apply the recommendation only to Diane Matlawski and that they assume a life recommendation as to Nancy Cole. Defense counsel indicated that they had discussed the option with Appellant and that everyone was in agreement. (T 1492-94). Thereafter, the

trial court explained the proposal to Appellant in detail, explained the other options in detail, and explained the ramifications of each. When Appellant indicated that he was trying to meet everyone half way so that they could conclude the proceedings, the trial court impressed upon him that expediency was not a consideration and that it would empanel a whole new jury and litigate the penalty all over again if that was what Appellant wanted. (T 1494-98). Appellant indicated that he understood, and declined the court's and defense counsels' invitations to consider the matter for a week or two. (T 1499). At that point, the trial court questioned Appellant extensively and agreed to accept his waiver. (T 1500-01).

At the next scheduled hearing, Appellant addressed the court and maintained that he was innocent of these crimes. (T 1510). At that point, the trial court reminded Appellant of the stipulation, and his agreement with it, but gave Appellant an opportunity to change his mind and empanel a new penalty phase jury. Both the trial court and defense counsel impressed upon Appellant that it was his decision to make. (T 1510-13).

Ten days later, Appellant sent a letter to the court clerk, seeking to withdraw his waiver and proceed with a new penalty phase jury. **Brief of Appellant** at app. A. At the final sentencing hearing, however, neither Appellant nor his attorneys reiterated his written request. Thereafter, the trial court read its written sentencing order into the record.

After relating the parties' discussions regarding the single recommendation and noting Appellant's letter to the clerk, the trial court determined that there was "no legal basis presented

that would warrant the right to withdraw and resend [sic] his prior stipulation." (R 2021-22). Thereafter, having independently evaluated the evidence regarding the murder of Diane Matlawski, the trial court found the existence of four aggravating factors: "under sentence of imprisonment," "prior violent felony," "felony murder," and HAC. In mitigation, the trial court found no statutory mitigating factors, but found the following nonstatutory factors: Appellant was a good parent, husband, and family man (some weight), Appellant had done good deeds for others (little weight), Appellant was mentally, physically, and emotionally abused by his stepfather (great weight), Appellant worked two jobs to provide for his family after he escaped from custody (little weight), Appellant had no suitable father figure or other male figure while growing up (some weight), Appellant had a poor home environment with his stepfather (some weight), Appellant exhibited good behavior during the trial (little weight), Appellant's mother was an alcoholic and drug abuser, was a prostitute, and was in trouble with the law (some weight), Appellant was amenable to rehabilitation (some weight), and Appellant had a five-year-old daughter that needed a father (some weight). Ultimately, the trial court determined that the mitigating factors did not outweigh the aggravating factors and sentenced Appellant to death for the murder of Diane Matlawski.

As for the murder of Nancy Cole, the trial court found that "the tenor of the agreement reached by the parties was a clear understanding that David Scott Pangburn be sentenced to life." (R 2033). As to the armed robbery count, the trial court sentenced Appellant as a habitual felony offender to a consecutive term of

life imprisonment with a mandatory minimum of fifteen years. (R 2033-34). This appeal follows.

SUMMARY OF ARGUMENT

Issue I - Appellant failed to preserve his arguments below. Regardless, the trial court properly denied Appellant's motion to suppress. Even if it did not, any error in the admission of Appellant's statements was harmless beyond a reasonable doubt.

Issue II - Appellant's conviction for the armed robbery of Diane Matlawski was supported by the evidence. Even though the taking was perpetrated after the murder, the murder and the taking constituted a continuous series of acts. Appellant should not have been sentenced consecutively as a habitual violent felony offender, however, since the robbery occurred in the same criminal episode.

Issue III - Appellant's convictions for the first-degree murder of Diane Matlawski and Nancy Cole are supported by the evidence under either a premeditated or felony murder theory.

Issue IV - Appellant failed to preserve for review any comments made by the prosecutor during her guilt phase closing argument. Regardless, her comments were proper, and even if improper were harmless beyond a reasonable doubt.

Issue V - The crime scene and autopsy photographs of the victims were properly admitted to help witnesses explain their testimony. Even if improper, however, they were harmless beyond a reasonable doubt.

Issue VI - Appellant freely, knowingly, and voluntarily waived any objection to the jury's single death recommendation for this double homicide when he stipulated that the single recommendation would relate to Diane Matlawski and that a life recommendation would be presumed for Nancy Cole. Since Appellant failed to allege good cause for withdrawing his waiver, and since Appellant failed

to pursue his withdrawal at the final sentencing hearing, the trial court properly refused to allow it.

Issue VII - Appellant failed to preserve this claim for review. Regardless, the trial court properly allowed the State to impeach Appellant during his cross-examination in the penalty phase regarding the existence of number of his prior convictions.

Issue VIII - The record supports the trial court's finding of the "felony murder" aggravating factor. Even if it does not, there is no reasonable possibility that the sentence would have been different given the three remaining aggravating factors and the unavailing nature of Appellant's mitigation.

Issue IX - The trial court properly rejected Appellant's proposed instruction relating to the "felony murder" aggravating factor. This Court has repeatedly held that this aggravating factor does not constitute an "automatic" aggravator.

Issue X - Appellant's proposed instruction, unaccompanied by any legal argument, did not adequately preserve his argument that the "felony murder" aggravating factor constitutes an "automatic" aggravator. Regardless, this Court has previously rejected this argument.

Issue XI - The record supports the trial court's finding of the HAC aggravating factor. Even if it does not, there is no reasonable possibility that the sentence would have been different given the three remaining aggravating factors and the unavailing nature of Appellant's mitigation.

Issue XII - Appellant withdrew his proposed HAC instruction. Thus, his argument that the trial court improperly rejected it is disingenuous. Regardless, the trial court was given the amended

HAC instruction previously upheld by this Court.

Issue XIII - Appellant has failed to preserve his argument for appeal. Regardless, this Court has previously upheld the amended HAC instruction that was given in this case.

Issue XIV - Appellant had a fair opportunity to rebut hearsay testimony presented in the penalty phase relating to Appellant's prior violent felony conviction. Moreover, this Court has previously held that the State can present testimony relating to the underlying facts of such an offense. Even were the testimony admitted in error, there is no reasonable possibility that the sentence would have been different.

Issue XV - Appellant did not preserve his argument for review. Regardless, the jury did not hear the victim impact evidence, yet returned a recommendation of death, and there is no indication that the trial court relied upon such evidence in imposing sentence.

Issue XVI - Appellant's sentence is not disproportionate.

Issue XVII - The trial court did not err in deciding that the mitigating factors outweighed the aggravating factors.

ISSUE I

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION TO SUPPRESS HIS STATEMENTS TO THE POLICE (Restated).

In his three-page motion to suppress, defense counsel alleges without any factual support or legal analysis that Appellant's post-Miranda statements to the police were obtained "in violation of the Defendant's right to counsel, and the Defendant's privilege against self-incrimination," "were not freely and voluntarily given," were obtained "in violation of the defendant's right to be free from unreasonable searches and seizures," and were "not supported by an independent prima facie proof of the corpus delicti of the crime for which the Defendant is charged." (R 1805-07). At the hearing on Appellant's motion to dismiss, Detective Gucciardo and Lieutenant John Auer testified that they went to the South Florida Reception Correctional Facility in Miami on July 11, 1990, to interview Appellant after his brother's confessions implicated Appellant. (T 136, 153). Upon arriving at the facility, the supervisor, John Culligan, brought Appellant to the cafeteria and then opened an office for the interview. In the officers' presence, Mr. Culligan told Appellant that he did not have to speak to them and could leave at any time. (T 137, 153-54). Appellant indicated that he would speak to the officers, told Mr. Culligan that he could leave, and stated that he had "nothing to hide." (T 138). Both detectives then identified themselves, and Detective Gucciardo read Appellant his rights from a card. After each question, Appellant responded that he understood his rights. Appellant indicated that he had not "previously requested any law

enforcement officer to allow [him] to speak to an attorney," and agreed to speak to them. (T 138-40, 154).

At that point, Detective Gucciardo told Appellant that they were investigating these murders and that his brother had implicated him. (T 140-41, 155). Appellant sighed, stared at the officers, then lowered his head and said,

> [B]ecause of my brother, I really did it this time. I knew what we were doing was wrong but he's my brother. . . .
>
> [H]e could go anytime now because of AIDS. I moved in with him to take care of him, but it was his idea to kill the girls for the car. I left my wife and two kids for that. I have been trying to clear myself from the escape. I spent seven years in prison before I escaped and now this. My brother should have kept his mouth shut.
>
> If I tell you guys everything, I know I will be putting myself and my brother in the electric chair for sure. I have nothing else to say. I guess I will see guys you in court.

(T 141, 155-56). When Detective Gucciardo asked Appellant if he would give a taped statement, Appellant said Mr. Culligan told him that he could stop any time, and he left. (T 141-42, 157).

On his own behalf, Appellant testified that he was in the correctional facility relating to his escape charge, which was dropped, and for four burglaries for which he was sentenced to 43 years in prison. (T 169-70). Mr. Culligan told him the detectives were there to see him and that he did not have to speak with them. Appellant agreed to, and Mr. Culligan left. (T 170). Neither officer read him his Miranda rights before questioning him. (T 170). Detective Gucciardo initially asked him if his brother was the father of Appellant's stepson, and then asked him about two women in a Trans Am. Appellant asked if he was a suspect in

anything, and Detective Gucciardo told him that his name kept coming up in their investigation of these murders and that they thought he had information relating to them. One of the officers then said, "[W]e are going to nail your ass to the wall." (T 171). At that point, Appellant left. (T 171). He denied making any of the statements testified to by the officers and denied knowing anything about the murders. (T 172-76).

Contrary to Appellant's testimony, the State argued that Appellant was read his Miranda rights and freely, voluntarily, and knowingly, waived them. A written waiver form was not executed because Appellant stopped the interview and left after making the brief statement. (T 177-78). Defense counsel agreed that it was "a matter of credibility," and argued that the officers' failure to obtain a written waiver or taped statement cast doubt on their version of events. (T 178-82). The trial court took the motion under advisement and issued a written order denying the motion twelve days later. (R 1831; T 182).

In this appeal, Appellant claims that the trial court abused its discretion in denying his motion to suppress and makes the following arguments in support thereof: (1) Appellant's Fifth Amendment rights were violated because "after Miranda, Appellant said nothing until Gucciardo informed him that he had been fingered as a participant in the murders by his brother[, and thus] Appellant clearly invoked his right to remain silent until that time prohibiting any further interrogation," **brief of appellant** at 25 (emphasis in original); (2) Appellant's Sixth Amendment rights were violated because "the police never checked to see or insure whether or not Appellant had been appointed counsel or was

represented by counsel on the escape charge as of July 11, 1990," and "did not interview Appellant that day at Appellant's invitation or request," id. at 27; and (3) Appellant's statements were not voluntarily made because (a) they were coerced by the information that Appellant's brother had implicated him, (b) Appellant's statements were not taped even though a tape recorder was available, and Appellant was never asked to sign a written waiver, and (c) no attempt was made to explain or clarify his rights when, "in response to alleged Miranda advisements, Appellant said 'no' to whether he understood he had the right to stop questioning 'at any time and speak to an attorney,'" id. at 27-29.

The record reveals, however, that Appellant did not make any of these arguments below. The only argument made below by defense counsel was that Appellant was not read his Miranda rights, and thus his statements were obtained in violation of his Fifth Amendment rights. In a footnote, Appellant claims that his Sixth Amendment argument "was adequately preserved by Appellant's suppression motion challenging the admission of the statement on Sixth Amendment grounds." **Brief of Appellant** at 27 n.1. Such is not the case. A conclusory motion which states no factual or legal basis for suppression, but merely claims a violation based on provisions of the state or federal constitution, does not preserve specific arguments made on appeal. See Forrester v. State, 565 So.2d 391, 393 (Fla. 1st DCA 1990) (privacy issue raised on appeal was not preserved by conclusory claim that rights guaranteed by Fourth, Fifth, and Fourteenth amendments to the U.S. Constitution, and parallel provision of the Florida Constitution were violated). Thus, merely citing to constitutional provisions and claiming a

violation of them does not satisfy the objective of the contemporaneous objection rule. Since defense counsel did not make any of the arguments at the motion hearing that Appellant makes on appeal, these arguments have not been preserved, and since Appellant does not argue on appeal the only argument made below, he has waived that argument as well. See Tillman v. State, 471 So.2d 32, 35 (Fla. 1985) ("In order to be preserved for further review by a higher court, an issue must be presented to the lower court and the specific legal argument or ground to be argued on appeal or review must be part of that presentation if it is to be considered preserved."); Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982) ("[I]n order for an argument to be cognizable on appeal, it must be the specific contention asserted as legal ground for the objection, exception, or motion below.").

Even if the argument made below could somehow be gleaned from Appellant's arguments on appeal, it is wholly without merit. Defense counsel conceded below that the issue was one of credibility. He argued that Appellant's version of events, i.e., that he was not read his Miranda rights and did not make any statements, was supported by the fact that there was no written waiver form and no tape recording of the alleged statement. It is well-established, however, that "in matters of suppression, the trial court sits as both trier of fact and of law, and that matters pertaining to the credibility of witnesses and the weight of the evidence are exclusively within its province." Davis v. State, 606 So.2d 460, 463 (Fla. 1st DCA 1992). Moreover, "the trial court's order comes to this court clothed with a presumption of correctness." Id. Assuming Appellant has renewed this argument,

he has failed to overcome the presumption.

The trial court's obvious determination that Appellant was read his rights and voluntarily waived them is supported by the record. Both Detective Gucciardo and Lieutenant Auer testified that Appellant was read his rights and affirmatively responded that he understood them and agreed to speak to them. After informing Appellant that they were there because his brother had implicated him in the murders, Appellant voluntarily made the statements recounted by the officers. That Appellant fully understood his rights is proven by the fact that Appellant terminated the interview and left the room, knowing that any further statements would put himself and his brother in the electric chair. Based on the totality of the testimony, the trial court properly exercised its discretion in denying Appellant's motion to suppress. Jones v. State, 569 So.2d 1234, 1237 (Fla. 1990) (evidence supported court's denial of motion to suppress where judge resolved question of credibility in favor of state); Henry v. State, 613 So.2d 429, 431 (Fla. 1992) (trial court properly concluded that defendant made statements knowingly and voluntarily); Brown v. State, 609 So.2d 60 (Fla. 4th DCA 1992) (evidence supported court's conclusion that there was valid waiver even though evidence was in conflict), rev. denied, 617 So.2d 318 (Fla. 1993).

Were this Court to determine that the arguments Appellant makes here were somehow meaningfully communicated to the trial court, and thus preserved, the State submits that they are equally without merit. Appellant's Fifth Amendment argument is patently absurd. Appellant's silence between the conclusion of his rights and the beginning of Detective Gucciardo's interview does not

constitute an invocation of his right to remain silent. Appellant had just indicated a willingness to speak to them. Obviously, he was waiting to hear what they had to say. Though creative, this argument has no merit. See Brown v. State, 592 So.2d 1243, 1244 (Fla. 3d DCA 1992) ("[A]ppellant's non-responsive behavior while being questioned does not constitute an invocation of his right to remain silent. In the absence of some affirmative manifestation of a desire to remain silent, it is presumed that the privilege has not been invoked."); Rodriguez v. State, 559 So.2d 392, 393 (Fla. 3d DCA 1990) (defendant's response after Miranda warnings that he would speak to police, but that he "really [didn't] have anything to say" did not constitute invocation of right to remain silent).

As for Appellant's Sixth Amendment argument, the record reveals that Detective Gucciardo asked Appellant if he had "previously requested any law enforcement officer to allow [him] to speak to an attorney," and Appellant responded negatively. (T 139-40). Besides, even if he had previously requested or been appointed an attorney on the escape charge, such request or appointment does not preclude questioning regarding the murders. McNeil v. Wisconsin, 501 U.S. ___, 111 S.Ct. 2204, 115 L.Ed.2d 158 (1991); Gore v. State, 599 So.2d 978, 982 (Fla. 1992). Thus, this argument is also without merit.

Finally, Appellant claims that his statements were involuntary because they were coerced by Detective Gucciardo's statement that Appellant's brother had implicated him in the murders. By that time, Appellant had been read his rights and had waived them. Detective Gucciardo did not ask a question; he merely made a statement of fact that Appellant's brother had confessed and

implicated Appellant. Knowing his rights, Appellant could have invoked them right then, but instead he spoke. There was nothing coercive about this encounter.

Contrary to Appellant's assertion, the lack of a written waiver or a tape recording of his statement does not support his argument that his statements were involuntary. The officers testified that they read Appellant his rights and he understood them and waived them. The trial court believed the officers instead of Appellant. The written waiver and a tape recording would have done nothing more than bolster their testimony. Jones, 569 So.2d at 1237; Henry, 586 So.2d at 1035; Brown, 609 So.2d at 60.

The record also disputes Appellant's assertion that he responded negatively when Detective Gucciardo asked if he understood that he could stop talking at any time and seek the advice of an attorney. Detective Gucciardo recounted at the suppression hearing the exact rights that he read to Appellant. The transcript reflects the following:

> Q [By the State] What else?
>
> A [By Detective Gucciardo] Anything you do say can and will be used against you in a court of law, do you understand. You have the right to speak to an attorney before speaking to the police and to have an attorney present during questioning now or in the future, do you understand. If you cannot afford an attorney, one will be appointed for you before asking you any questions if you wish, do you understand; and he responded, yeah, I do.
>
> If you decide to answer the questions now without an attorney present, you will still have the right to stop answering at any time and speak to an attorney, do you understand.
>
> To this particular question he advised

> no. Have you previously requested any law enforcement officer to allow you to speak to an attorney. Knowing and understanding your rights as I have explained them to you, are you willing to answer any questions without an attorney present; and he agreed to speak to us.

(T 139-40). The negative answer obviously related to the subsequent, not the preceding, question. Appellant's contention to the contrary is belied by a common sense reading of the record.

Assuming the foregoing arguments were preserved below, they are clearly without merit. Appellant's silence did not equate to an invocation of his Fifth Amendment right to remain silent, his representation on the escape charge did not equate to an invocation of his Sixth Amendment right to counsel as to the murder investigation, and the statement relating to his brother's confession and the lack of a written waiver or tape recording does not establish that Appellant's statements were made involuntarily.

Even were Appellant's statements admitted into evidence in error, however, they were harmless beyond a reasonable doubt. Diane Matlawski and Nancy Cole Temple were murdered in the house Appellant shared with his brother and Alfred LeBlanc. Alfred LeBlanc testified that he came home from work and saw Diane Matlawski asleep on the couch. Later that night, Mr. LeBlanc thought Appellant and his brother were having a party. Mr. LeBlanc heard a woman say, "You bitch. You bastard." Mr. LeBlanc came out of his bedroom during the night and saw Appellant walking around with a baseball bat "acting weird." Appellant told him to go back in his room, that everything was okay. The next day, Mr. LeBlanc saw Appellant and his brother cutting out pieces of carpet in Appellant's bedroom and the living room. The carpet had dark red

stains on it. Scott Palmer came over the morning of November 20 and met Appellant at the kitchen door. Appellant looked like he had been up all night. When Mr. Palmer asked Appellant why the kitchen was in such disarray, Appellant said that they had had a party, that they had had "a little bit of trouble," and that they "had to get rid of some bodies." Appellant told him that Michael was in the hospital because he cut his hand. A couple of days later, Mr. Palmer returned to the house and noticed that pieces of carpet were missing and that Appellant's bedroom had been painted. Blood stains were later found in Appellant's bedroom, his brother's bedroom, and the living room. Diane Matlawski's blood was found in her car. Carpet fibers from Appellant's bedroom and from the living room were found on the victims. Appellant was seen wearing one of Diane Matlawski's bracelets and driving her car after the murders. Based on all of this evidence, there is no reasonable possibility that the verdict would have been different had Appellant's statements to the police not been admitted into his trial. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). Therefore, this Court should affirm Appellant's convictions and sentence of death.

ISSUE II

WHETHER APPELLANT'S CONVICTION FOR ROBBERY WITH A DEADLY WEAPON IS SUPPORTED BY THE EVIDENCE (Restated).

In this appeal, Appellant claims, as he did in his motion for judgment of acquittal (T 824-27), that the State's evidence is not sufficient to support a conviction for armed robbery. Specifically, Appellant claims (1) that the jewelry and the car were taken after Diane Matlawski was unconscious or dead, and thus they were not taken with force, violence or fear; and (2) that there is no evidence that Appellant stole the jewelry and car, or helped someone else steal them while the victim was conscious or alive. Appellant also claims that his consecutive jail sentence was reversible error. **Brief of Appellant** at 30-36.

As to Appellant's first two arguments, this Court recently held that

> Robbery is "the taking of money or other property which may be the subject of larceny from the person or custody of another when in the course of the taking there is the use of *force, violence, assault, or putting in fear.*" § 812.13(1), Fla. Stat. (1989) (emphasis added). An act is considered "'in the course of the taking' if it 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." § 812.13(3)(b), Fla. Stat. (1989). Thus, a taking of property that otherwise would be considered a theft constitutes robbery when in the course of the taking *either* force, violence, assault, or putting in fear is used. We have long recognized that it is the element of threat or force that distinguishes the offense of robbery from the offense of theft. Under section 812.13, the violence or intimidation may occur prior to, contemporaneous with, or subsequent to the taking of the property so long as both the act of violence or

> intimidation and the taking constitute a continuous series of acts or events.
>
> A victim does not have to perceive the force or violence used in the course of a taking in order for the element of force or violence to be present. Under the plain language of the robbery statute, all that is required to support a conviction under the force of violence component of the statute is that the act of force or violence be a part of "a continuous series of acts or events" that include the taking. There is no requirement that the victim be aware that a robbery is being committed if force or violence was used to render the victim unaware of the taking. In other words, where the defendant employs force or violence that renders the victim unaware of the taking, the force or violence component of the robbery statute is satisfied.

Jones v. State, 20 Fla. L. Weekly S29, 30 (Fla. Jan. 12, 1995) (citations omitted).

Taking the evidence in a light most favorable to the State, the record in this case shows that Diane Matlawski and Nancy Cole were killed, and their bodies transported in Diane's car to a remote location where they were dumped. Within hours, Rita Flint saw Michael Pangburn wearing Diane's bracelets. Shortly thereafter, she saw Appellant wearing one of them. Contrary to Appellants assertion, both Michael Blair and Linda Blair testified that they saw Appellant driving and washing the car on separate days around the time of the murders. Appellant bragged to Theresa Knowles that he was driving a new red sports car. Finally, Appellant told the police that it was his brother's idea to kill the victims for the car, and that he knew what they were doing was wrong. Such evidence sufficiently supports Appellant's conviction for the armed robbery of Diane Matlawski. Jones; Marquard v. State, 641 So.2d 54, 57 (Fla. 1994) (robbery conviction affirmed where defendant killed victim then stole her money, purse, wallet,

car and other property); Fennie v. State, 19 Fla. L. Weekly S370 (Fla. July 7, 1994) (armed robbery conviction affirmed where defendant killed victim then stole her car and credit cards); Jones v. State, 19 Fla. L. Weekly S577 (Fla. Nov. 10, 1994) (robbery conviction affirmed where defendant killed victim then stole his money and car). Therefore, this Court should affirm Appellant's conviction for the robbery with a deadly weapon of Diane Matlawski.

Regarding Appellant's habitual violent felony offender sentence of life imprisonment which was imposed consecutively to counts I and II, the State acknowledges that this was error given that the offenses were committed in a single episode.

ISSUE III

WHETHER APPELLANT'S CONVICTIONS FOR THE MURDER OF DIANE MATLAWSKI AND NANCY COLE ARE SUPPORTED BY THE EVIDENCE (Restated).

In this appeal, Appellant claims that the evidence was insufficient to convict Appellant for the murder of Diane Matlawski under either a premeditation or felony murder theory. Specifically, as to premeditation, Appellant claims that the evidence was "just as consistent with an inference of an unlawful killing resulting from an angry, sudden, cocaine-induced, frenzied and brief encounter between Diane Matlawski and Michael Pangburn." As to felony murder, Appellant relies on his claim that the evidence was insufficient to support an armed robbery, thereby rendering his conviction under a felony murder theory unlawful. **Brief of Appellant** at 36-40. Regarding the murder of Nancy Cole, Appellant claims that, because the robbery count related only to Diane Matlawski, the felony murder theory did not apply to Nancy, and thus the jury was improperly instructed on felony murder as a basis for her murder. Id. at 40-41.

Taking the evidence in a light most favorable to the State, the facts adduced at trial were clearly sufficient to overcome Appellant's hypothesis of innocence. Appellant maintained at all times (exclusive of his statement to the police) that he had no involvement in the murders and was completely innocent. The evidence at trial, however, showed that Appellant; his brother, Michael; and Alfred LeBlanc lived in a house owned by Scott Palmer, who was Michael's lover. On November 19, 1989, Alfred LeBlanc came home from work and saw Diane Matlawski sleeping on the couch. (ST

IV 550-51). Michael came home later and borrowed his bicycle to go to the store. (ST IV 549). When Michael came home, Mr. LeBlanc went to his room. (ST IV 551). Later that night, Mr. LeBlanc thought they were having a party. Sometime during the night, he heard a woman say, "you bastard" and "you bitch." He thought they were "having an argument over something." He "got a little scared" and put a chair under his doorknob. (ST IV 553-54). He woke up later and "figured the party was over, opened up the door, and David was walking around like paranoia, so to speak, acting weird." (ST IV 554). Appellant told him to go back in his room, that everything was okay, and that it was none of his business, so he did. (ST IV 554).

The next morning, Scott Palmer came to the house to visit Michael, and Appellant met him at the kitchen door. Appellant looked like he had been up all night partying and was still partying. Appellant told him that Michael had cut his hand and was in the hospital. (T 703-05). The kitchen was a shambles. When Palmer asked Appellant what had happened, Appellant told him that they had had a party, that they had had "a little trouble," and that they "had to get rid of some bodies." (T 706). Later that day, Alfred LeBlanc came home from work and saw Appellant and Michael cutting out pieces of carpet in Appellant's room and the living room and throwing them in the dumpster. Mr. LeBlanc noticed a dark red stain on the carpet and on the floor underneath. (ST IV 556-59). Scott Palmer came by the house two or three days later and noticed that pieces of the carpet were missing and that Appellant's room had been recently painted blue. (T 707-08).

Months later, the crime scene technician found blood on the

wall in one bedroom and in the living room, and on the wall and floor in another bedroom. (T 600-01). The medical examiner testified that both victims had extensive injuries to the head, particularly Diane Matlawski, which were consistent with being struck by a baseball bat. (T 780-84).

Diane Matlawski's mother testified that Diane wore two tennis bracelets, a ruby one and a diamond one. (T 282). The nurse who treated Michael at the hospital testified that Michael was wearing the two bracelets. When she returned to his room later, a man whom she later identified as Appellant was wearing one of them. (T 480-83).

Contrary to Appellant's assertion, both Michael and Linda Blair identified Appellant from a photo lineup as the man they saw at separate times driving and washing Diane Matlawski's car at the Carriage Crossing Apartments.[1] (T 427-32, 439-42). Theresa Knowles, who was a leasing consultant at the same apartment complex and who knew Appellant personally, testified that Appellant and his brother came to the complex to do laundry one day around Thanksgiving, and Appellant boasted that he had a new red sports car. (T 686-89).

Finally, in his statement to the police, Appellant stated,

> Because of my brother, I really did it this time. I knew what we were doing was wrong but

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[1]Michael Blair testified that he picked photograph #2 from the array as the person he had seen driving Diane's car. (T 432). Linda Blair also testified that she picked photograph #2 from the array as the person she had seen washing Diane's car. (T 442). Detective Gucciardo had previously testified that he made two six-picture photo arrays, one containing Appellant, and one containing Michael Pangburn. Appellant was photograph #2 in one array, and Michael was photograph #5 in the other one. (T 395-97).

> he's my brother. . . . He could go any time now because of AIDS. I moved in with him to take care of him, but it was his idea to kill the girls for the car. I left my wife and two kids for that. My brother should have kept his mouth shut. If I tell you guys everything, I know I'll be putting myself and my brother in the electric chair for sure. I have nothing else to say. I guess I'll see guys you in court.

(T 745-46) (emphasis added). Although Appellant does not specifically state his involvement in either the murders or the robbery, it is clear from this evidence and his statement that he was involved in both of them.

To refute this evidence, Appellant presented the testimony of John Bates, David Carter, and Michael Pangburn. Mr. Bates testified that he often let Appellant drive his 1988 red Camaro around October or November of 1989. (T 829-32). Mr. Carter, a nine-time convicted felon and professed crack addict, testified that Michael Pangburn told him in jail that he (Michael) lied to the police and implicated Appellant in the murders because the police were badgering him and he wanted to get some rest. (T 839-46). Michael, a ten- to thirty-time convicted felon and professed drug addict with a preference for crack, testified in detail how he committed the murders by himself while Appellant was at work. (860, 868-69, 883-900).

On cross-examination, however, Mr. Carter also testified that Michael told him that neither he nor Appellant committed the murders. (T 853-54). Michael's' cross-examination was far more impeaching. Michael, who is dying of AIDS, admitted that he had already been convicted and sentenced for Nancy Cole's murder. During his trial, he had reviewed all of the witnesses' statements,

police reports, etc., and was present for the witnesses' testimony. (T 911-15). When the State listed him as a witness in Appellant's trial and the defense sought to depose him, he refused. (T 917). He has used numerous aliases, including his brother's name, and tells lies when he wants to. (T 921-23). He will tell people what he wants to tell them, when he wants to tell them. (T 948). He would lie for Scott Palmer any day but the day of his testimony. (T 950).

Regarding the blood splatter on the wall in Appellant's bedroom, Michael explained that he was carrying Diane under her arms when he dropped her and she hit her head on a small table in the bedroom, causing her blood to splatter. (T 936). He then stated that he tried to carry Diane under her arms but he could not manage, so he dragged her by her feet into Appellant's bedroom. (T 937-38). He could not explain the blood found in his own room. (T 937).

Michael admitted that he told a man named Adam Angel while in jail that Appellant hit him with a bat, that Appellant handed the leash to Michael to strangle Nancy Cole, and that Appellant forced him to help Appellant move the bodies. (T 939-40). Michael also admitted that he told Denise Norys, with whom he lived from March until July of 1990, that he killed two girls in the house, that the girls pulled a knife on him, and that he "bashed her head in." (T 943). At his motion to suppress hearing, he testified that his first taped statement was true, and that he would not be a witness at the hearing if he had not given the second statement implicating Appellant. (T 961-63). Before he left for prison, he told Scott Palmer what had happened, which was the same story he had recounted

for the police in his second taped statement, implicating Appellant. (T 953). Three or four weeks ago, Michael then called Scott and told him that he was going to tell the truth at Appellant's trial. (T 953).

By agreement of the defense, the State had already admitted in its case-in-chief the pretrial statements of Michael wherein he either disclaimed any knowledge of the murders or implicated Appellant in the murders.[2] In his first statement to the police, Michael denied any involvement in the murders. (T 642). When the police confronted Michael with his fingerprint found on the plastic newspaper bag in Diane Matlawski's car, Michael changed his story and gave a sworn taped statement claiming that he walked in the house and found Diane dead on the couch. Appellant told him to sit down, shut up, and mind his own business. Michael walked into his own bedroom and saw Appellant strangling Nancy Cole, so he jumped on Appellant, and Appellant hit him. Michael sat there and watched Appellant strangle Nancy and then put both of the victims in Diane's car. Appellant gave one of Diane's bracelets to his wife, and the other one he traded for crack. (T 644-48; ST IV 506-22).

After giving that taped statement, Sergeant Scheff told Michael that he did not believe him and then left the room. Shortly thereafter, Michael called him back in and gave a second taped statement. This time, Michael claimed that he walked in the

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[2]The defense made it known that it was going to present Michael's testimony, and that Michael would claim sole responsibility for the murders. Instead of presenting Michael's prior inconsistent statements on rebuttal, the State presented them in its case-in-chief after much discussion with the court and the defense. Appellant personally waived any objection to the State presenting the rebuttal out of turn. (T 462-74, 618-21).

house and found Diane dead on the couch. Appellant told him that if he loved him he would help him kill Nancy Cole. While Nancy was tied up with pantyhose, screaming for Michael to help her, they got a dog leash and put it around her neck. Appellant grabbed one end, Michael grabbed the other, and they pulled until she was dead. Both of them then loaded the girls into Diane's car and drove them out to a secluded spot and dumped their bodies. (T 648-51; ST IV 528-33).

During the testimony of Scott Palmer, the State had also elicited the fact that Michael had consistently implicated Appellant until two or three weeks before Appellant's trial when Michael claimed sole responsibility. Prior to Michael's trial, Michael told Palmer what had happened, and Palmer testified to Michael's statements at Michael's trial. They were substantially different than what Michael claimed to be the truth two or weeks before Appellant's trial. Michael's version of events after his conviction were also substantially different from what Michael told him two or three weeks before Appellant's trial. (T 721-36).

Based on all of this evidence, Appellant's hypothesis of innocence was sufficiently refuted, and Appellant was properly convicted of first-degree murder under a premeditation theory. In Melendez v. State, 498 So.2d 1258 (Fla. 1986), a case not unlike Appellant's, this Court concluded that the jury's verdict was supported by competent substantial evidence:

> That is, a rational trier of fact could have found proof of guilt beyond a reasonable doubt. It is not the province of this Court to reweigh conflicting testimony. Rather it is within the province of the jury to determine the credibility of witnesses and to resolve factual conflicts. Absent a clear

> showing of error, its finding will not be disturbed.

Id. at 1261 (citations omitted). No such error has been shown in this case. See also Carter v. State, 560 So.2d 1166, 1167-68 (Fla. 1990) (affirming conviction for first-degree murder and stating, "[T]he issue of [the co-defendant's] credibility was properly an issue for the jury. This Court thus may not disturb the verdict."); Geralds v. State, 601 So.2d 1157 (Fla. 1992); Gore v. State, 599 So.2d 978 (Fla. 1992); Holton v. State, 573 So.2d 284 (Fla. 1990); Roberts v. State, 510 So.2d 885 (Fla. 1987); Marek v. State, 492 So.2d 1055 (Fla. 1986); Bundy v. State, 471 So.2d 9 (Fla. 1985).

As for Appellant's claim that a verdict based on felony murder is unsupported by the evidence because there is insufficient evidence of armed robbery, the State submits that the murder was committed during the commission of the robbery, and thus this theory of guilt is equally applicable. See Issue II, supra. See also Gore; Roberts; Van Poyck v. State, 564 So.2d 1066 (Fla. 1990).

Appellant's final argument--that he should not have been convicted of felony murder for the death of Nancy Cole because the underlying felony was perpetrated on Diane Matlawski--is absurd. At the very least, Nancy Cole was killed in furtherance of the robbery of Diane Matlawski. See Roberts, 510 So.2d at 888 ("Roberts killed Napoles in furtherance of his intent to rape Rimondi."). Appellant's convictions for the murders of Diane Matlawski and Nancy Cole should be affirmed.

ISSUE IV

WHETHER THE STATE COMMITTED FUNDAMENTAL ERROR DURING ITS GUILT-PHASE CLOSING ARGUMENT (Restated).

In this appeal, Appellant claims that the prosecutor impermissibly vouched for the credibility of state witnesses, misrepresented evidence, and commented on Appellant's right to remain silent. **Brief of Appellant** at 41-46. At no time, however, did defense counsel object to the State's comments. Thus, his complaints have not been preserved for appeal. Wasko v. State, 505 So.2d 1314, 1317 (Fla. 1987) (failure to object to prosecutor vouching for witnesses precluded appellate review); Carter v. State, 560 So.2d 1166, 1168 (Fla. 1990) (failure to object to prosecutor impugning defense counsel and vouching for truthfulness of state's chief witness precluded appellate review); Marshall v. State, 604 So.2d 799, 805 (Fla. 1992) (same); Stewart v. State, 620 So.2d 177, 179 (Fla. 1993) (failure to object to comments regarding defendant's difficulty in testifying and reliance on mental health expert to relate defendant's self-serving statements precluded appellate review).

Regardless, Appellant's complaints are without merit. When the State's comments are taken in context, it is obvious that the State did not vouch for the credibility of its witnesses. In the first instance complained of by Appellant, the State was attempting to show an inconsistency in Michael Pangburn's testimony. Michael claimed that there was a pack of cigarettes in the plastic newspaper bag found in Diane Matlawski's car. (T 938). The State's obvious response was that no pack of cigarettes was found

by either the lead detective who initially found the plastic bag or the evidence technician. Had there been a pack of cigarettes in the bag, one of these officers would have discovered it and processed it as evidence. This was a fair comment on the testimony. See Mann v. State, 603 So.2d 1141, 1141 (Fla. 1992) ("Merely arguing a conclusion that can be drawn from the evidence is permissible fair comment."); Breedlove v. State, 413 So.2d 1, 18 (Fla. 1982).

In the second complained-of comment, the State was recounting the chronology of events and reviewing Sergeant Scheff's testimony. Sergeant Scheff had testified that he interviewed Scott Palmer and admitted that he was initially angry at him for telling Michael that they were looking for him. Once he learned that Michael and Palmer were lovers, he was no longer upset. (T 629-30). Defense counsel questioned Sergeant Scheff about any abusive or threatening behavior towards Palmer or Michael and alluded to Palmer's and Michael's different opinion on the issue. (T 669-70). Michael later testified during Appellant's case that Sergeant Scheff was abusive to Scott Palmer in order to get Michael to talk to them. (T 876-77). In its closing argument, the prosecutor noted Sergeant Scheff's admission that he was angry at Palmer, but that his anger subsided when he discovered the nature of their relationship. (T 1036-37). This too was a fair comment on the evidence. Mann; Breedlove.

In the third instance of alleged misconduct, Appellant claims that the State misrepresented evidence in an attempt to impeach Michael Pangburn's credibility. Michael had testified that he swung the bat at Diane Matlawski and Diane stepped into it and was

hit in the left side of the head. (T 928). From the medical examiner's testimony, the State argued that Diane was hit on the back of the head, not the side. (T 1047). Appellant claims, however, as he did in his motion for new trial (T 1235-37), that the medical examiner's testimony was consistent with Michael's testimony. However, in describing the injuries to Diane Matlawski, Dr. Wright testified that Diane had a laceration (or tearing of the skin) over the eyebrow ridge and an abrasion (or scraping of the skin) that extended downward across the eyelid on the right-hand side, an abrasion on her left cheek and under her chin on the left side, a laceration behind the right ear caused by a blunt object, several lacerations to the back of the head, and abrasions and bruising on the back of her left shoulder. (T 780-83). Thus, his testimony was not consistent with Michael's testimony, and the State's comments in closing reflected the testimony fairly. Mann; Breedlove.

Finally, Appellant complains that the State commented on his right to remain silent. In an attempt to refute defense counsel's claim that Appellant's statement to the police was involuntary and made without the benefit of Miranda warnings as evidenced by the lack of a written waiver, the prosecutor noted that Appellant knew he could leave at any time and chose to terminate the interview. Although she incorrectly stated that this fact came from defense counsel's own questioning, it was nevertheless a fair comment on the evidence. Mann; Breedlove. Appellant had moved to suppress his statement and moved in limine to redact a portion of it relating to his escape from prison. He did not, however, object to or move to redact that portion of it where Appellant said, "I have

nothing else to say. I guess I'll see you guys in court." Nor did he object when both Detective Gucciardo and Lieutenant Auer testified to this portion of the statement. See Lowe v. State, 19 Fla. L. Weekly S621, 622-23 (Fla. Nov. 23, 1994) (defense counsel had previously moved to redact portions of defendant's taped statement but not these objectionable comments; thus, objections not preserved for review). Under these circumstances, the State's attempt with his own statement to refute Appellant's claim that he was not read his rights and did not know them did not constitute an impermissible comment on Appellant's right to remain silent. Stewart.

Even were these comments individually or collectively made in error, they were harmless beyond a reasonable doubt. Based on the evidence of guilt as recounted in Issue III, supra, there is no reasonable possibility that the verdicts would have been different had the State not made these statements during its closing argument. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986); Wasko; Marshall. Therefore, this Court should affirm Appellant's convictions.

ISSUE V

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING AUTOPSY AND CRIME SCENE PHOTOGRAPHS (Restated).

Prior to the testimony of the crime scene technician during the State's case in chief, defense counsel objected to two crime-scene photographs that the State intended to introduce during the officer's testimony. Specifically, defense counsel claimed that the photographs were unduly prejudicial because they depicted the victims after they were uncovered by the police and not as they were originally found covered up. After viewing the pictures itself, the trial court overruled the objection. (T 537-42). Sergeant Kammerer then testified, over defense counsel's repeated objection, that he responded to the site where the bodies were found and documented the scene through photographs. He described the scene with the photographs. (T 545-50).

Prior to the testimony of the medical examiner, defense counsel also objected to several autopsy photographs that the State intended to introduce during the medical examiner's testimony.[3] Again, defense counsel claimed that the photographs were unduly prejudicial. The State responded that out of 70 or 80 photographs of the victims it was only using those that were necessary to assist the witness. Dr. Wright had previously testified in Michael Pangburn's case that the photographs aided his testimony. After

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[3]The prosecutor produced 14 photographs which related to both victims. During the discussion, defense counsel withdrew his objection to one depicting a shoulder and others depicting hands. They were not specifically described by exhibit number. (T 765-66).

viewing the photographs that the State intended to introduce, the trial court indicated that it would overrule the objection if Dr. Wright, in fact, testified that the photographs would aid him in testifying. (T 764-67). Thereafter, Dr. Wright testified that the photos would assist his testimony. (T 778). In fact, defense counsel asked Dr. Wright if he could not testify equally well from his standard medical chart, and the doctor responded:

> A. [By Dr. Wright] Well, I think that it would describe the injuries. I - I think the photographs show a lot more than I could draw, mostly because of inadequate ability to draw but --
>
> Q. [By defense counsel] Except for the specific -- You could testify as to the details of the injuries, correct?
>
> A. Probably. It helps with the photographs very much, though.
>
> Q. Are they necessary or are they just an - a tool that helps to aid you?
>
> A. I think they're very necessary.

(T 779). After the trial court overruled defense counsel's objection, the doctor described the injuries to Diane Matlawski using the photographs. (T 780-88).

In this appeal, Appellant renews his claim that the photographs were unduly prejudicial. **Brief of Appellant** at 46-49.[4]

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[4]Appellant only challenges in this appeal a total of eight photographs. **Brief of Appellant** at 46-49. Given his citations to the record, it appears that he is only challenging the admission of the two introduced through Sergeant Kammerer and the six introduced through Dr. Wright which related solely to Diane Matlawski. However, defense counsel objected again when the State sought to introduce eight photographs relating to Nancy Cole Temple, which the trial court again overruled. (T 996-97). Regardless, the State submits, as will be discussed, that all of the photos were properly admitted.

As the crime scene technician and the medical examiner testified, these photographs aided their testimony. The State limited the number of photographs it sought to admit, and the trial court cautiously reviewed them before determining that there probative value was not outweighed by their prejudicial nature. Given these facts and circumstances, the trial court did not abuse its discretion in admitting these photos. Jones v. State, 19 Fla. L. Weekly S577, 581 (Fla. Nov. 10, 1994) (no abuse of discretion in admitting photographs that "were relevant either to show the condition and location of the body when discovered, or to assist the medical examiner in explaining the condition of the victim's clothing or the nature of his injuries and the cause of death."); Burns v. State, 609 So.2d 600, 604 (Fla. 1992) (no abuse of discretion in showing jury color autopsy slides of victim which assisted medical examiner in testimony); Preston v. State, 607 So.2d 404, 410 (Fla. 1992) ("The fact that photographs are gruesome does not render their admission an abuse of discretion."). Even were they improperly admitted, however, they were harmless beyond a reasonable doubt given the quality and quantity of evidence upon which the jury could have relied to convict Appellant of murder. See Issue III, supra; State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). Therefore, this Court should affirm Appellant's conviction for the murder of Diane Matlawski.

ISSUE VI

WHETHER APPELLANT'S WAIVER OF SEPARATE JURY RECOMMENDATIONS WAS VOLUNTARILY, KNOWINGLY, AND INTELLIGENTLY GIVEN (Restated).

At the end of the penalty phase proceeding, the jury returned a single recommendation of death for this double murder. (R 1981; T 1470-71). At the next scheduled hearing, the trial court noted the fact that there was only one recommendation and sought comments from the parties. The options posed by the trial court included (1) reconvening the jurors and individually questioning them regarding their intentions with the single recommendation, i.e., whether it intended the recommendation to apply to both or only one of the victims; (2) empaneling a new penalty phase jury; or (3) applying the single recommendation to both victims. It was also open to other suggestions. (T 1479-82). The prosecutor indicated that she had recently run into one of the jurors who asked her whether the judge had followed the jury's recommendation. The prosecutor responded negatively and told the juror that she could call the judge's judicial assistant within the next six weeks to learn the final sentence. The juror complemented the prosecutor on her presentation of the case, asked if the defense attorneys were privately retained or appointed by the court, and indicated that she was not impressed with them. The prosecutor responded that Appellant would most likely appeal and that the court would consider the attorneys' representation. (T 1483-86).

After consulting privately with Appellant, the defense attorneys indicated that an ultimate life sentence by the court

would render the problem moot. (T 1487). The trial court responded that it had not formed any opinion or made any decision regarding its ultimate sentence and could not do so until this issue was resolved. (T 1488-89). At that point, the defense attorneys indicated that they would leave the decision up to the court as to how to resolve this matter. Appellant agreed and indicated that his attorneys had fully discussed the options with him. For some reason, however, the attorneys wanted to consult privately with Appellant again. (T 1489-91).

During this recess, the State proposed to the defense that they apply the recommendation only to Diane Matlawski and that they assume a life recommendation as to Nancy Temple Cole. Defense counsel indicated that they had discussed the option with Appellant and that everyone was in agreement. (T 1492-94). Thereafter, the trial court explained the proposal to Appellant in detail, explained the other options in detail, and explained the ramifications of each. When Appellant indicated that he was trying to meet everyone half way so that they could conclude the proceedings, the trial court impressed upon him that expediency was not a consideration and that it would empanel a whole new jury and litigate the penalty all over again if that was what Appellant wanted. (T 1494-98). Appellant indicated that he understood, and declined the court's and defense counsels' invitations to consider the matter for a week or two. (T 1499). At that point, the trial court engaged in the following colloquy:

> THE COURT: I have to ask you the following series of questions, Mr. Pangburn. Are you presently under the influence of alcohol?

DEFENDANT: No, sir.

THE COURT: Any drugs?

DEFENDANT: No, sir.

THE COURT: Is there anything about the discussions that have taken place with your attorneys, and I'm not asking you to discuss the contents of those conversations, with anything that I've said, anything that Ms. Solomon [the prosecutor] has said with respect to where we are that you don't understand?

DEFENDANT: No, sir.

THE COURT: This is what you believe to be in your best interest?

DEFENDANT: Yes, sir.

THE COURT: You understand, again, that by virtue of this stipulation, that you may very well be waiving your right to appellate review on this issue?

DEFENDANT: Yes, sir.

THE COURT: Is counsel for the defense comfortable and satisfied that Mr. Pangburn understands the full ramification of the decision that's presently being made?

MR. SOLOMON: Yes, sir.

MR. DALLAS: Yes, sir, and I'd like to also add that there was nothing different about his perception today or his ability to understand and relate to me today than from any other time that I've been with David as recent as yesterday when I spent some time with him. So I have no doubt about his ability to understand what his choices are and what the consequences of those choices are today.

THE COURT: Then at this juncture the Court is going to accept the jury's recommendation that was made by the penalty phase jury as applying to Count I of the indictment and as stipulated by the State, defense and the defendant, will consider the second count of the indictment as a life recommendation; and that's where we are, correct?

MS. SOLOMON: That's correct.

(T 1499-1501).

At the next scheduled hearing, Appellant addressed the court and maintained that he was innocent of these crimes. (T 1510). At that point, the trial court reminded Appellant of the stipulation, and his agreement with it, but gave Appellant an opportunity to change his mind and empanel a new penalty phase jury. Both the trial court and defense counsel impressed upon Appellant that it was his decision to make:

> THE COURT: I'm trying to tell you I'm going to be here no matter what the decision is.
>
> MR. SOLOMON: Whatever you want to do is fine with him and you got to do what you feel is in your best interests. It's your decision.
>
> Whatever you want to do, the judge is telling you it's okay. You're not being penalized, and myself and Ron are here for you.
>
> THE COURT: That's why I'm asking you eight days later. I have to be honest with you, this is the last time I'm going to ask you that question.
>
> DEFENDANT: I realize that, Your Honor. I'm fine with that decision, Your Honor.
>
> MR. SOLOMON: Whatever you want to do, David, is fine with us.
>
> DEFENDANT: Oh, I realize that.
>
> THE COURT: Okay.
>
> DEFENDANT: It's a lot more involved than you know.
>
> MR. SOLOMON: There's a lot involved in whatever you do or don't do, but it's your life. That's why it's your decision, and inconveniencing people is not an excuse for throwing away an opportunity to perhaps save

> your life or not save your life. That's why it's your decision and you need to be informed about it.

(T 1510-13).

Ten days later, Appellant sent the following letter to the court clerk:

> Clerk of Courts,
>
> After previous consideration I wish to withdraw my consent to accept a life sentence on count two of the indictment (case # 90-14442 CF 10 B).
> I also wish to select another panel of jurors to determine my fate until a Appeals Court can review the case.
> I accepted the plea as a convenience which I had thought included myself but I find I cannot live with this decision and pray it is not too late to correct this error.
> To concede at this point and time I would be compromising everything I believe and have taken a stand for.
>
> Respectfully,
>
> David S. Pangburn

Brief of Appellant at app. A.

At the final sentencing hearing, before the trial court read its sentencing order into the record, it discussed with the parties and the defendant matters relating to the robbery count and the State's request for habitualization. At no time did Appellant or his counsel renew Appellant's written request for a new penalty phase proceeding. In its written sentencing order, the trial court recited the facts and circumstances surrounding the single recommendation and stipulation, and Appellant's subsequent request to rescind the stipulation, and then stated: "The Court having reviewed the Defendant's request finds no legal basis presented that would warrant the right to withdraw and resend [sic] his prior

stipulation." (R 2021-22; T 1536-38).[5]

In this appeal, Appellant claims that his death sentence "was the result of a fundamentally flawed process, and must be reversed as a violation of his Federal and Florida Constitutional rights." **Brief of Appellant** at 50. In addition, he contends that "neither the parties or the Court could legally stipulate that the defective advisory consideration and verdict was a death recommendation for the Matlawski count and life for the Cole count." Id. at 56. Alternatively, he alleges that were this defect capable of waiver "the Record shows Appellant did not make an unequivocal knowing and voluntary waiver of his essential rights to a valid separate penalty proceeding before a new jury." Id. Finally, Appellant claims that "the Circuit Court erred in failing to honor Appellant's withdrawal request." Id. at 59.

Initially, the State submits that Appellant waived any objection to the single recommendation when he failed to raise the objections in the trial court. When the trial court discovered that the jury had not been provided with and had not rendered separate recommendations for each victim, it told Appellant that it would consider empaneling a new penalty phase jury and seek separate recommendations. Thus, Appellant had the option of correcting the arguably ambiguous recommendation. He repeatedly waived this option and chose instead to stipulate that the recommendation related only to the murder of Diane Matlawski.

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[5]The trial court also noted that it had sent copies of Appellant's letter to counsel. Thus, counsel was on notice at the time of the final sentencing hearing that Appellant had changed his mind and wanted a new penalty phase proceeding.

Although he later sought to withdraw the waiver, it was incumbent upon him or his counsel to press his request at the final sentencing hearing. Instead, he stood mute and allowed the trial court to sentence him according to the stipulation. By failing at the final sentencing hearing to renew his written request to withdraw from the stipulation, Appellant waived his objections to the single recommendation.

Even if his letter to the clerk was sufficient to preserve his arguments, they are wholly without merit. It is well-established that defendants can waive numerous fundamental rights. For example, they can plead to an offense and waive a trial. Canada v. State, 198 So. 220, 144 Fla. 633 (Fla. 1940). They can waive a jury and proceed to a bench trial. Tucker v. State, 559 So.2d 218 (Fla. 1990). They can waive representation by counsel. Faretta v. California, 422 U.S. 806 (1975). They can waive a twelve-person jury in a capital case. State v. Griffith, 561 So.2d 528 (Fla. 1990). They can waive a unanimous verdict. Flanning v. State, 597 So.2d 864 (Fla. 3d DCA 1992), rev. denied, 605 So.2d 1266 (Fla. 1993). Just recently, this Court held that a defendant can waive a penalty-phase jury even over the State's objection. State v. Hernandez, 19 Fla. L. Weekly S607 (Fla. Nov. 23, 1994). And they can waive the presentation of mitigating evidence. Henry v. State, 613 So.2d 429 (Fla. 1992). Appellant has presented no compelling reason why he could not waive empaneling a new jury to render separate recommendations on each of the two victims. When faced with the prospect that a new jury could render two death recommendations, Appellant knowingly and voluntarily chose to accept one death recommendation and one life recommendation. As in

cases where a defendant has the right to waive a penalty-phase recommendation and/or the presentation of mitigation, Appellant had a right to waive a new penalty-phase proceeding. After all, "in the final analysis, all competent defendants have a right to control their own destinies." Hamblen v. State, 527 So.2d 800, 804 (Fla. 1988).

As detailed above, the record unquestionably establishes that Appellant voluntarily, knowingly, and intelligently waived this right. During the first hearing in which the matter was discussed, several options were discussed openly among the parties in Appellant's presence. Appellant was even asked personally whether he had any alternative suggestions. (T 1490). The trial court also recessed twice for Appellant and his attorneys to discuss privately the options. (T 1487, 1491). It was during the second recess that the State proposed the solution ultimately adopted. Once it was proposed to the trial court, the trial court had extensive discussions with Appellant and his counsel regarding the State's proposal as well as the option of empaneling a new jury. Appellant consistently maintained that he understood his options and wished to proceed upon the State's proposal. At no time during this first hearing did Appellant waver about what he wanted to do. Even at the second hearing, despite the fact that he proclaimed his innocence, Appellant maintained that he knew what his options were and wanted to proceed with the State's proposal. The record fully supports the trial court's finding that Appellant's waiver was voluntarily, knowingly, and intelligently made. "The intense and exhaustive care with which the trial court advised defendant of his rights, and determined that defendant understood the effect of his

[waiver], was clearly established." Holmes v. State, 374 So.2d 944, 946 (Fla. 1979), cert. denied, 446 U.S. 913 (1980). See also Lopez v. State, 536 So.2d 226, 227-29 (Fla. 1988) (plea of guilty in capital case freely, voluntary, and intelligently made).

As for Appellant's argument that his letter to the clerk constituted a withdrawal of his waiver, the State submits that the trial court properly exercised its discretion in denying Appellant's request. As with a motion to withdraw a plea, the burden is on the defendant to establish good cause, and the decision to grant or deny the motion is within the trial court's discretion. Lopez, 536 So.2d at 229 ("Allowing the withdrawal of a guilty plea is within a trial court's discretion; it is not a matter of right."); Brown v. State, 428 So.2d 369, 371 (Fla. 5th DCA 1983). See also Baker v. State, 408 So.2d 686, 687 (Fla. 2d DCA 1982) ("A defendant who deliberately pleads guilty to a criminal charge should not be allowed to withdraw his pleas merely because he changes his mind."). For withdrawal to be granted, a defendant must show that his waiver "was entered under mental weakness, mistake, surprise, misapprehension, fear, promise, or other circumstances affecting his rights." Baker, 408 So.2d at 687. Here, Appellant merely alleged that he could not "live with [his] decision." **Brief of Appellant** at app. A. This does not constitute "good cause." See Elam v. State, 636 So.2d 1312, 1313 (Fla. 1994). Therefore, the trial court did not abuse its discretion in denying Appellant's request to withdraw his waiver. See Hernandez, 19 Fla. L. Weekly at 608 ("[A] trial judge may require a jury recommendation notwithstanding the defendant's waiver."); Sireci v. State, 587 So.2d 450 (Fla. 1991), cert.

denied, 112 S.Ct. 1500, 117 L.Ed.2d 639 (1992). Consequently, this Court should affirm Appellant's sentence of death for the murder of Diane Matlawski.

ISSUE VII

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN ALLOWING THE STATE TO CROSS-EXAMINE APPELLANT REGARDING HIS PRIOR CRIMINAL CONVICTIONS WHEN APPELLANT HAD WAIVED THE "NO SIGNIFICANT HISTORY" MITIGATING FACTOR (Restated).

At the beginning of the penalty phase proceeding, the State sought guidance from the trial court regarding its ability to impeach Appellant during his testimony with the existence and number of his prior convictions. Defense counsel objected because they had waived the "no significant history" mitigating factor and because Appellant's prior convictions were too remote in time. The trial court took the issue under advisement. (T 1259-65). Shortly thereafter, the trial court ruled that the State could impeach Appellant with his prior convictions just like any other witness. (T 1286).

The State's very first question to Appellant on cross-examination was, "Mr. Pangburn, how many times have you been convicted --" Defense counsel interrupted by saying, "Objection, Judge. Can we have a sidebar." The trial court responded, "If you insist." And defense counsel said, "Oh, withdraw the objection." (T 1426). At that point, the State repeated its question, and Appellant responded that he had been convicted nine times, "six the first time and three the second time." (T 1427). At no time did the State inquire into the offenses themselves.

Relying principally on Maggard v. State, 399 So.2d 973 (Fla. 1981), Appellant claims that the trial court erred in admitting this type of impeachment. **Brief of Appellant** at 59-63. The State submits, however, that Appellant waived this issue for appeal when

defense counsel withdrew his objection to the State's question. See Fotopoulos v. State, 608 So.2d 784, 791 (Fla. 1992) (defense counsel failed to renew objection after state sought to impeach defendant with prior hearing transcripts, counsel claimed he did not have a copy of them, and state provided him a copy).[6] Regardless, this Court has previously held that "a party may attack the credibility of any witness, including the accused, by evidence of a prior felony conviction." Id. (emphasis added). Although this Court has not addressed whether the State may impeach the defendant during the penalty phase of a capital trial when the defendant has waived the "no significant history" mitigating factor, this distinction is without importance.[7] Any witness who testifies necessarily puts his credibility in issue. To allow a defendant to escape cross-examination on this issue because he has waived this mitigating factor would, as the State and the trial court noted, perpetrate a fraud upon the jury regarding the defendant's credibility. (T 1287).[8]

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[6]Appellant seeks to overcome this waiver by claiming that his "previously stated objections and oral Motion in Limine preserved this claim." **Brief of Appellant** at 60 n.2. Appellant is mistaken. See Fotopoulos. In the alternative, Appellant claims that the State committed fundamental error in eliciting his prior convictions. As will be discussed, the State committed no error, much less fundamental error.

[7]But see Marquard v. State, 641 So.2d 54, 56 n.3 & 58 n.4 (Fla. 1994), wherein this Court rejected the defendant's claim that the trial court erred in "permitting cross-exam into Marquard's criminal history during the penalty phase."

[8]Appellant's cases to the contrary are factually distinguishable. In Maggard, the state impermissibly elicited testimony regarding the defendant's prior convictions in an attempt to rebut the "no significant history" mitigating factor even though the defendant had waived it. Similarly, in Geralds v. State, 601 So.2d 1161, 1162-63 (Fla. 1992), the state sought to impeach a

Even were the State's questions improper, such error was harmless beyond a reasonable doubt. Appellant testified on direct examination that he "got in all that trouble" and spent five years and nine months in prison before walking away from a work release center and creating a new identity for himself. (T 1411). He also testified that he had "committed some silly crimes." (T 1418). Following up on cross-examination, Appellant explained that he had ten or twelve more years to serve but had a parole date that was four years from the date of his escape. (T 1427). Based on this testimony, the jury knew that Appellant had been convicted of at least one serious offense and that Appellant was serving a sixteen- or seventeen-year prison sentence when he escaped. Given the four valid aggravating factors in this case and the unavailing nature of Appellant's mitigation, there is no reasonable possibility that the jury's recommendation or the trial court's sentence would have been different had Appellant's testimony regarding the number of prior convictions not been admitted. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). Therefore, this Court should affirm Appellant's sentence of death for the murder of Diane Matlawski.

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witness with evidence of the defendant's prior convictions after the witness testified that the defendant played with her children, and that she never had any problem with him. Finally, in Fitzpatrick v. Wainwright, 490 So.2d 938, 940 (Fla. 1986), this Court granted the defendant's habeas petition because appellate counsel mistakenly failed to appeal the same issue raised in Maggard.

ISSUE VIII

WHETHER THE RECORD SUPPORTS THE TRIAL COURT'S FINDING OF THE "FELONY MURDER" AGGRAVATING FACTOR (Restated).

In its written sentencing order, the trial court made the following findings regarding the "felony murder" aggravating factor:

> The Defendant was charged and convicted of Robbery with a Deadly Weapon from Diane Matlawski. The evidence at trial showed that Diane Matlawski was murdered for the purpose of stealing her car and jewelry. Witnesses testified seeing the Defendant David Scott Pangburn driving and cleaning her car. Witnesses further testified that Diane Matlawski always wore two (2) thin gold bracelets. One bracelet was described as a diamond tennis bracelet and the other had red stones. The bracelets ended up in the possession of the Co-Defendant, Michael Pangburn, the Defendant's brother. Based upon the evidence and verdicts returned by the Jury, the capital felony was committed while the Defendant was engaged in the commission of Robbery with a Deadly Weapon. This aggravating circumstance was proved beyond and [sic] reasonable doubt.

(R 2023-24; T 1540-41).

Appellant claims that the robbery was not the dominant motive for the murder, but was merely an afterthought, as evidence by the lack of any statements prior to the murder regarding the jewelry and car, the lack of any evidence that the jewelry and car were taken contemporaneously with the murder, and the lack of any credible evidence linking Appellant to the jewelry and car. **Brief of Appellant** at 63-67. As outlined in Issue II, supra, the State submits that there was sufficient evidence to support the conviction for robbery with a deadly weapon.

In the present case, Appellant's intent to rob Diane Matlawski

was formed prior to her murder as evidenced by Appellant's statement to the police that it was his brother's idea to kill the girls for the car. (T 745). Further proof is Appellant's statement, "[B]ecause of my brother, I really did it this time. I knew what we were doing was wrong but he's my brother." These statements constitute direct, conclusive evidence that the intent to steal her car was formed prior to her murder, and that Appellant was, at the very least, a principal in the murder/robbery. In addition, Michael Blair testified that he saw Appellant driving the car, Linda Blair testified that she saw Appellant washing the car, and Rita Flint testified that she saw Appellant wearing one of Diane Matlawski's bracelets which Michael Pangburn was previously wearing with the other one. (T 431-32, 439-42, 480-83). Such evidence, which is fully supported by the record, establishes this aggravating factor beyond a reasonable doubt. Wuornos v. State, 19 Fla. L. Weekly S455, 458 (Fla. Sept. 22, 1994) ("At the very least a jury question existed, in part because items once belonging to [the victim] were found in Wuornos' warehouse unit or had been pawned or given away by her."); Melendez v. State, 498 So.2d 1258, 1261 (Fla. 1986); Scott v. State, 411 So.2d 866, 869 (Fla. 1982); Perry v. State, 422 So.2d 817, 820 (Fla. 1988) (contemporaneous conviction for armed robbery "unquestionably warranted the finding in aggravation that the murder was committed during commision of a robbery"); Fotopoulos v. State, 608 So.2d 784, 793 (Fla. 1992) (contemporaneous conviction for burglary established the felony

murder aggravating factor).[9]

Were this evidence insufficient to establish this aggravating factor, however, there exist three other valid aggravating factors--"under sentence of imprisonment," "prior violent felony," and HAC. Given these aggravating factors and the unavailing nature of Appellant's mitigation, there is no reasonable possibility that the jury's recommendation or the trial court's sentence would have been different without this aggravating factor. Rogers v. State, 511 So.2d 526 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988); Capehart v. State, 583 So.2d 1009 (Fla. 1991), cert. denied, 112 S.Ct. 955 (1992). Therefore, this Court should affirm Appellant's sentence of death for the murder of Diane Matlawski.

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[9]Appellant's cases can be easily distinguished based on the fact that the robberies were all incidental to the murder, i.e., afterthoughts. Here, Appellant admitted they killed the victims for the car.

ISSUE IX

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN REJECTING APPELLANT'S SPECIAL REQUESTED INSTRUCTION RELATING TO THE "FELONY MURDER" AGGRAVATING FACTOR (Restated).

During the penalty-phase charge conference, defense counsel offered the following proposed instruction (#3):

> The fact that you have found the defendant guilty of first degree murder is not, of itself, reason to recommend the death penalty. Indeed, the death penalty is reserved for only the most aggravated of first degree murders.

(R 1956). The trial court denied the proposed instruction without comment from defense counsel. (T 1278). Appellant now claims that the trial court abused its discretion in rejecting this proposed instruction because the standard "felony murder" aggravating factor instruction "did not distinguish between the felony-murder aggravating circumstance and the fact of Appellant's conviction of both murder and robbery." **Brief of Appellant** at 67. In other words, Appellant claims that the standard instruction constitutes an "automatic" aggravating factor. This Court, however, has repeatedly rejected this argument. Thompson v. State, 19 Fla. L. Weekly S632, 633 (Fla. Nov. 23, 1994); Jones v. State, 19 Fla. L. Weekly S577, 581 (Fla. Nov. 10, 1994) (and cases cited therein). Thus, Appellant's instruction was unnecessary, and thus properly rejected. See Guzman v. State, 19 Fla. L. Weekly S442, 443 (Fla. Sept. 22, 1994). Moreover, as noted in Issue III, supra, the evidence was sufficient to support a conviction for premeditated murder. Consequently, this Court should affirm Appellant's sentence of death for the murder of Diane Matlawski.

ISSUE X

WHETHER THE "FELONY MURDER" AGGRAVATING FACTOR AND ITS ATTENDANT INSTRUCTION ARE UNCONSTITUTIONAL (Restated).

In this appeal, Appellant claims that the "felony murder" aggravating factor and its attendant jury instruction are unconstitutional because they constitute an "automatic" aggravating factor. **Brief of Appellant** at 69-71. Appellant did not make this argument in the trial court. Thus, he has failed to preserve it for appeal. Thompson v. State, 19 Fla. L. Weekly S632, 633 (Fla. Nov. 23, 1994); Jones v. State, 19 Fla. L. Weekly S577, 581 (Fla. Nov. 10, 1994).[10] Regardless, this Court has repeatedly rejected this argument. See, e.g., Thompson; Jones (and cases cited therein). Since Appellant has presented no compelling reason to reverse this line of precedent, this Court should affirm his sentence of death for the murder of Diane Matlawski.

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[10]Although Appellant submitted the proposed instruction discussed in Issue IX, supra, the State submits that this instruction does not adequately preserve this issue for review. Defense counsel did not make any argument at the charge conference regarding this issue. Thus, by itself, the proposed instruction does not preserve the argument made on appeal.

ISSUE XI

WHETHER THE RECORD SUPPORTS THE TRIAL COURT'S FINDING THAT THE MURDER WAS ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL (Restated).

In its written sentencing order, the trial court made the following finds of fact regarding the HAC aggravating factor:

> The testimony of Chief Medical Examiner Dr. Ronald Wright establishes that Diane Matlawski received multiple blows to her face, her left shoulder, and at least three (3) separate blows to the back of her head. Each of the blows to the back of her head caused her skull to fracture in separate places. There were five (5) separate fractures of the skull, including one which was depressed, which, Dr. Wright indicated means that the bones were actually driven into the brain. The object used to inflict the injuries was long, fairly hard, fairly smooth and round, consistent with a baseball bat. The injuries occurred prior to Diane being strangled as evidenced by her having swallowed some blood. Diane Matlawski was killed by asphyxiation. The Doctor's testimony indicated that the blows to the back of her head would not have produced immediate unconsciousness. She was conscious throughout and surely knew of her impending doom when the Defendant wrapped the rope around her throat and began to choke the life out of her. Diane was found with a piece of rope wrapped loosely around her neck. The rope around her neck was consistent with the ligature marks found around her neck. Dr. Wright's testimony with respect to the internal examination of her neck revealed significant compression to the tissues in her neck. This murder was extremely wicked and vile and inflicted a high degree of pain and suffering on the victim. The defendant acted with utter indifference to the suffering of this victim. This murder was accompanied by such additional acts which sets this crime apart from the normal capital felonies. It was indeed a conscienceless, pitiless crime which was unnecessarily tortuous [sic] to Diane Matlawski. Since these facts are fully supported by the evidence, the aggravating factor that the capital felony was especially heinous, atrocious, or cruel has been proved beyond a reasonable doubt.

(R 2024-25; T 1541-43).

Appellant claims that there was insufficient evidence to support the trial court's finding of the HAC aggravating factor. Specifically, Appellant points to the fact that there was no evidence of a struggle, no defensive wounds, no statements by the victim, blows to the back of the head, a "possibility" that the blows to the head rendered her unconscious or semi-conscious, and alcohol and cocaine in the victim's blood system. Appellant claims that such evidence, or lack of evidence, proves that the victim was not conscious throughout the attack, and thus did not have foreknowledge of her impending death. **Brief of Appellant** at 72-76.

As the trial court noted, the record fully supports this aggravating factor. Dr. Wright testified that he found a laceration behind Diane Matlawski's right ear and five fractures of the scull on the back of her head, one of which depressed the scull into the brain. (T 780-83, 785-86). This blunt force trauma was consistent with a bat or club--something long, hard, smooth and round. (T 784). Her cause of death, however, was asphyxiation, more likely caused by strangulation. A rope was found around her neck, and multiple indentations were found on her neck. (T 781, 785-87). Dr. Wright opined that Diane was alive when these injuries were inflicted as evidenced by the fact that the victim swallowed some blood from her head injuries. Because she did not swallow a lot of blood, which would have caused her to asphyxiate as well, it is likely that she was also alive when she was strangled. (T 786-88).

When asked if the blows to the head would have caused unconsciousness, Dr. Wright testified that they "will eventually

produce unconsciousness but not instantaneously. It will take a matter of some - ordinarily some minutes . . . ." (T 790). Similarly, when asked if the strangulation would have caused unconsciousness, Dr. Wright explained that it would depend on how deep a breath the person had taken, how much the victim struggled, and how effectively the airway was restricted. On the average, it would take "some seconds to [a] minute to produce unconsciousness." (T 791-92). However, "[t]o kill someone then requires a continued application of force" for another one to three minutes. (T 792).

This Court has previously held that "'strangulation, when perpetrated upon a conscious victim, involves foreknowledge of death, extreme anxiety and fear, and that this method of killing is one to which the factor of heinousness is applicable.'" Sochor v. State, 619 So.2d 285, 292 (Fla. 1993). See also Tompkins v. State, 502 So.2d 415, 421 (Fla. 1986), cert. denied, 483 U.S. 1033 (1987). The medical examiner's testimony sufficiently established that the victim was conscious when beaten and then strangled. Thus, this Court should affirm the trial court's finding of this aggravating factor. Taylor v. State, 630 So.2d 1038, 1042-43 (Fla. 1993) (medical examiner testified that victim was alive while she was being beaten, stabbed, and strangled); Marshall v. State, 604 So.2d 799, 805 (Fla. 1992) (HAC upheld where victim was attacked twice, was "at least partially conscious" during second attack, was struck six times on back of head, and pled for mercy); Owen v. State, 596 So.2d 985, 990 (Fla. 1992) (HAC upheld where sleeping victim was struck five times with hammer, awoke screaming, was sexually battered and strangled, and lived "for a period of from several

minutes to an hour").[11]

Were this aggravating factor somehow not supported by the record, Appellant's sentence of death should nevertheless be affirmed. Although Appellant only got a single death sentence, this was a brutal double murder. Appellant was under a sentence of imprisonment from which he had escaped, he had committed a prior violent felony (and a contemporaneous capital offense), and he committed the murder(s) during the course of a robbery. Diane Matlawski was beaten with a baseball bat and strangled with a rope for her 1988 Pontiac Trans Am. Given these aggravating factors, and the unavailing nature of Appellant's mitigation, there is no reasonable possibility that the jury's recommendation or the trial court's sentence would have been different. Rogers v. State, 511 So.2d 526 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988); Capehart v. State, 583 So.2d 1009 (Fla. 1991), cert. denied, 112 S.Ct. 955 (1992). Therefore, this Court should affirm Appellant's sentence of death for the murder of Diane Matlawski.

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[11]Appellant's cases can be easily distinguished. In DeAngelo v. State, 616 So.2d 440 (Fla. 1993), the trial court rejected the HAC factor because the evidence did not establish it--there was no evidence of a struggle, no defensive wounds, a substantial amount of marijuana in the victim's system, and testimony from the medical examiner that the victim was possibly rendered unconscious from the force of the strangulation or the blow to her head. In Rhodes v. State, 547 So.2d 1201, 1208 (Fla. 1989), the defendant repeatedly described the victim as "knocked out" or drunk when he strangled her, and other evidence supported his testimony. In Herzog v. State, 439 So.2d 1372, 1380 (Fla. 1983), the victim was under the heavy influence of Quaaludes, both eyewitnesses stated that the victim was unconscious, and other evidence established that the victim was only semi-conscious during the entire attack. Finally, in Cook v. State, 542 So.2d 964, 970 (Fla. 1989), the victim died from a single gunshot wound to the chest.

ISSUE XII

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN REJECTING APPELLANT'S SPECIAL REQUESTED INSTRUCTION ON THE HAC AGGRAVATING FACTOR (Restated).

During the penalty-phase charge conference, defense counsel submitted numerous proposed instructions, including one on the HAC aggravating factor (# 6A):

> In considering the aggravating factor of heinous, atrocious and cruel, the following definitions should be considered:
>
> **Heinous** means extremely wicked or shockingly evil; atrocious means outrageously wicked and vile; and cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of another. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies; the conscienceless or pitiless crime which is unnecessarily tortuous [sic] to the victim.
>
> In order to find that the aggravating factor of especially heinous, atrocious and cruel applies to these facts, the victims [sic] knowledge of his [sic] impending death should be considered.
>
> Acts committed after the death of the victim are not relevant in considering whether the homicide was "especially heinous, atrocious or cruel."

(R 1960). When the trial court got to this instruction in the packet, the following colloquy occurred:

> THE COURT: Penalty Instruction Number 6.
>
> MR. DALLAS: I withdraw that but I think it's covered by Mindy's request.
>
> THE COURT: I agree. Penalty Instruction Number 6. I think the case law sets forth the specific instruction and the definitions and,

accordingly, the Court's going to deny this requested instruction.

MR. DALLAS: 6 will be withdrawn by the defense.

(T 1279).[12]

Having withdrawn his proposed instruction, Appellant has effectively waived his claim that the trial court improperly rejected his proposed instruction. In fact, given his withdrawal of the proposed instruction, his argument is quite disingenuous. Regardless, the instruction given was the amended instruction which this Court has upheld. Hall v. State, 614 So.2d 473, 478 (Fla. 1993); Whitton v. State, 19 Fla. L. Weekly S639, 641 & n.9 (Fla. Dec. 1, 1994). As in Whitton, Appellant has provided no adequate reason for this Court to recede from its rulings. Thus, this Court should affirm Appellant's sentence of death for the murder of Diane Matlawski.

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[12]Although there is a proposed instruction 6, 6A, and 6B, it is obvious from the court's reference to "definitions" that it is referring to instruction 6A. Instruction 6B relates to the CCP instruction which was not sought by the State and not given to the jury, and instruction 6 states, "The aggravating circumstances that you may consider are limited to:" (R 1659, 1661).

ISSUE XIII

WHETHER THE AMENDED STANDARD INSTRUCTION ON THE HAC AGGRAVATING FACTOR IS UNCONSTITUTIONALLY VAGUE (Restated).

Appellant claims that the HAC instruction given in his case is unconstitutionally vague. **Brief of Appellant** at 78-81.[13] Specifically, he claims that the terms "conscienceless," "pitiless," and "unnecessary torturous" in the limiting instruction are not defined, and thus do not provide adequate guidance to the jury in determining the applicability of this aggravating factor. Id. at 80-81. In addition, he claims that the amended instruction does not instruct the jury that the victim must be conscious and aware of his or her impending death. Id. at 81. As noted previously in Issue XII, supra, Appellant withdrew his proposed HAC instruction, and he made no objection to the instruction as given. Thus, Appellant has failed to preserve this issue for appeal. Watson v. State, 19 Fla. L. Weekly S564, 566 (Fla. Nov. 3, 1994). Regardless, the proposed instruction did not define the terms Appellant claims are vague. Thus, even if it were not withdrawn, Appellant has failed to preserve that particular argument. Heath v. State, 19 Fla. L. Weekly S540, 542 (Fla. Oct. 20, 1994) ("Claims that the instruction on the HAC aggravator is unconstitutionally vague are procedurally barred unless a specific objection on that ground is made at trial and pursued on appeal."). As for his other argument, this Court has upheld the standard instruction. Hall v. State, 614 So.2d 473, 478 (Fla. 1993); Whitton v. State, 19 Fla.

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[13]The trial court gave the newly amended instruction. (R 1455-56).

L. Weekly S639, 641 & n.9 (Fla. Dec. 1, 1994). As in Whitton, Appellant has provided no adequate reason for this Court to recede from its rulings. Thus, this Court should affirm Appellant's sentence of death for the murder of Diane Matlawski.

ISSUE XIV

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING HEARSAY EVIDENCE IN THE PENALTY PHASE RELATING TO THE "PRIOR VIOLENT FELONY" AGGRAVATING FACTOR (Restated).

During the penalty phase proceeding, the State introduced a certified copy of conviction relating to Appellant for one count of robbery committed in 1980. (T 1296). The State then called as a witness Sergeant Timothy Falk from the City of Fort Lauderdale Police Department to testify concerning the 1980 robbery offense. As Sergeant Falk began to testify, defense counsel objected to his testimony based on hearsay and based on the fact that his testimony went beyond the mere fact of conviction. (T 1298, 1299-1301). Over defense counsel's objection, Sergeant Falk testified that, on May 25, 1980, Appellant came up behind an elderly lady on East Las Olas Boulevard in Fort Lauderdale and grabbed her purse, knocking her down. The strap on the purse broke, and Appellant ran off. The victim, Miss Stein, was taken to the hospital with a head injury. Bystanders chased Appellant and cornered him behind a house, at which point he brandished a knife and then jumped into a canal. The bystanders jumped in after him and held him until the police arrived. After waiving his Miranda rights, Appellant told the officer that he did it because he needed money since he had just gotten out of jail the day before. (T 1297-1302).

In this appeal, Appellant renews his objections to the testimony based on hearsay and prejudice. **Brief of Appellant** at 82-84. Regarding his hearsay argument, Appellant claims that he "had no 'fair opportunity' to confront or 'rebut' these statements, when those who made them were not present and testifying." Id. at

83. The record is clear, however, that the parties exchanged penalty-phase witness lists well in advance of the proceeding. Appellant had every opportunity to depose Sergeant Falk, determine the source(s) of the hearsay statements, and rebut them with other witnesses or evidence. Appellant obviously chose not to; thus, this argument is without merit. Clark v. State, 613 So.2d 412, 415 (Fla. 1992) (hearsay testimony from detective relating to prior conviction for first-degree murder was admissible in penalty-phase proceeding; that the defendant did not or could not rebut such evidence does not make it inadmissible); Long v. State, 610 So.2d 1268, 1274-75 (Fla. 1992) (same).

As for his other argument that Sergeant Falk's testimony went beyond the mere fact of conviction, this Court has consistently held that the underlying facts of a prior violent felony conviction can be elicited. Tompkins v. State, 502 So.2d 415, 419-20 (Fla. 1986); Waterhouse v. State, 596 So.2d 1008, 1016 (Fla. 1992); Duncan v. State, 619 So.2d 279, 281-82 (Fla. 1993). Contrary to Appellant's assertion, nothing elicited from Sergeant Falk was unduly prejudicial. Even were it so, there is no reasonable possibility that the absence of such testimony would have changed the jury's recommendation or the trial court's ultimate sentence. The aggravating factor to which this evidence pertained remains viable, as do the other three. Consequently, any error in admitting Sergeant Falk's testimony was harmless beyond a reasonable doubt. Tompkins; Duncan. Therefore, this Court should affirm Appellant's sentence of death for the murder of Diane Matlawski.

ISSUE XV

WHETHER THE TRIAL COURT IMPROPERLY CONSIDERED VICTIM IMPACT EVIDENCE (Restated).

In this appeal, Appellant claims that the trial court considered impermissible victim impact evidence when the victims' friends and family members gave statements to the court. **Brief of Appellant** at 85-87. The record reveals that, while the jury was deliberating its sentencing recommendation, Nancy Cole's brother and two of her daughters, as well as Diane Matlawski's live-in boyfriend, made statements to the court. (T 1461-69). Defense counsel made no objection either prior to or at any time subsequent to the statements. Thus, Appellant has failed to preserve this issue for review. Grossman v. State, 525 So.2d 833, 842 (Fla. 1988); Mendyk v. State, 592 So.2d 1076, 1082 (Fla.), receded from on other grounds Hoffman v. State, 613 So.2d 405 (Fla. 1992); Brown v. State, 596 So.2d 1026, 1028 (Fla. 1992).

Regardless, although the substance of their statements related to Appellant's potential sentence of death, there is no indication that the trial court considered any of their comments in determining Appellant's sentence for count I. Thus, any error in their admission was harmless beyond a reasonable doubt.

In Davis v. State, 586 So.2d 1038, 1040-41 (Fla. 1991), the victim's daughter read a statement to the trial court, asking that the defendant receive a death sentence. In finding such error harmless, this Court relied on the fact that the jury was not exposed to the statement, but nevertheless recommended a sentence of death, and that there was no evidence that the trial court relied on the daughter's statement in imposing a sentence of death.

As in Davis, the jury in Appellant's case was not exposed to the statements, but nevertheless recommended a sentence of death. In addition, the trial court specifically stated in its sentencing order that "[n]othing except as previously indicated in paragraphs 1 - 4 above was considered an aggravation." (R 2025, T 1543). Paragraphs one through four made no mention of the victim impact statements. Further evidence that the trial court did not consider such statements is the fact that the trial court specifically stated that "[a]ny other matters and recommendations contained within the P.S.I. were not relied upon in the sentencing process for Counts I and II by this Court." (R ; T 1558). If it ignored impermissible victim impact evidence in the PSI, then surely it ignored impermissible victim impact evidence presented in court. Such evidence clearly was harmless beyond a reasonable doubt. See also Mann v. State, 603 So.2d 1141, 1144 (Fla. 1992). Therefore, this Court should affirm Appellant's sentence of death for the murder of Diane Matlawski.

ISSUE XVI

WHETHER APPELLANT'S SENTENCE OF DEATH IS DISPROPORTIONATE (Restated).

Appellant claims that his death sentence is not proportionately warranted because "[t]he facts and circumstances at most suggest an unpremeditated, angry and 'frenzied' confrontation or argument amongst cocaine smokers including a victim who was drinking and smoking cocaine at a party in Michael Pangburn's home." **Brief of Appellant** at 95. To support his contention, Appellant relies principally on Livingston v. State, 565 So.2d 1288 (Fla. 1988); Kramer v. State, 619 So.2d 274 (Fla. 1993); Nibert v. State, 574 So.2d 1059 (Fla. 1990); Songer v. State, 544 So.2d 1010 (Fla. 1989); Ross v. State, 474 So.2d 1170 (Fla. 1985); and Penn v. State, 574 So.2d 1079 (Fla. 1991), all of which are easily distinguishable. In Nibert, Songer, Ross, and Penn, there was only one aggravating factor weighed against several mitigating factors. In Livingston and Kramer, there were only two aggravating factors weighed against numerous mitigating factors. In this case, the trial court found four aggravating factors--"under sentence of imprisonment," "prior violent felony," "felony murder," and HAC. Appellant has challenged only two of them--"felony murder" and HAC. As previously noted, these two factors are fully supported by the record.

To support its argument that Appellant's sentence is proportionately warranted, the State relies on Marquard v. State, 641 So.2d 54 (Fla. 1994) (death sentence proportionately warranted where four aggravating factors outweighed nonstatutory mitigating factors which included an unstable family life as a child, an

antisocial personality, difficult childhood, sexual abuse as child, use of drugs and alcohol); Marshall v. State, 604 So.2d 799 (Fla. 1992) (mitigating evidence that defendant entered prison at young age and was 22 at time of murder "pales in significance" to four aggravating factors; thus, override upheld and death sentence found proportionately warranted); Preston v. State, 607 So.2d 404 (Fla. 1992) (death sentence proportionately warranted where four aggravating factors outweighed statutory mitigator of age and five nonstatutory mitigators); and Happ v. State, 596 So.2d 991 (Fla. 1992) (death sentence proportionately warranted where three aggravating factors outweighed mitigating factors which included age, poor upbringing, drug and alcohol use, and educational aid to other inmates). "The trial judge carefully weighed the aggravating and mitigating circumstances and concluded that death was the appropriate penalty." Freeman v. State, 563 So.2d 73 (Fla. 1990). This Court should affirm the trial court's findings.

Appellant also claims that his sentence is disproportionate because "his brother, who was equally if not more culpable in the Matlawski killing, received a life sentence." **Brief of Appellant** at 93. In its written sentencing order, the trial court made the following findings regarding Appellant's proposed nonstatutory mitigating factor that Michael Pangburn received a life sentence:

> The jury was advised that Michael Pangburn was convicted of murdering Nancy Temple Cole and Grand Theft as a lesser included offense of robbery with a Deadly Weapon. Michael Pangburn was acquitted of Murdering [sic] Diane Matlawski. The jury after weighing and considering the aggravating and mitigating circumstances returned a recommendation of life with no eligibly [sic] of parole for twenty-five (25) years. Michael Pangburn testified at the Defendant's trial that he

> (Michael) was solely responsible for the two (2) murders and that David had no involvement. The Post Miranda statements of Michael indicated that the murders were his brother's (David's) idea. He initially stated that when he arrived home Diane was already dead and he only assisted in murdering Nancy Temple Cole. It was clear from Michael's statement that David was the dominant actor and force leading to the deaths of Diane Matlawski and Nancy Temple Cole. There were considerable mitigating factors which applied to Michael which do not apply to this Defendant. The Court has considered the relative mitigating circumstances for both Michael and David. After weighing the facts and circumstances of this case, it is clear that David Scott Pangburn may be punished more than Michael Pangburn. He was the driving force behind this entire criminal episode. Dissimilar facts or circumstances may result in unequal sentences. Accordingly, this non-statutory mitigating circumstance does not apply to the Defendant.

(R 2029-30).

This Court has previously held that "it is permissible to impose different sentences on capital codefendants whose various degrees of participation and culpability are different from one another." Hoffman v. State, 474 So.2d 1178, 1182 (Fla. 1985). Having presided over both Appellant's and Michael's trials, the trial judge obviously found parts of Michael's testimony credible, namely, his numerous statements detailing Appellant's involvement in the murders. Based on these statements, Michael's acquittal for the murder of Diane Matlawski, Appellant's admission of his involvement in the murders, Appellant's possession of one of Diane's bracelets and her car after the robbery/murder, and all of the other evidence supporting Appellant's involvement, the trial court properly determined that Appellant was more culpable than his brother. See Marek v. State, 492 So.2d 1055, 1058 (Fla. 1986);

Hayes v. State, 581 So.2d 121, 127 (Fla. 1991); Cook v. State, 581 So.2d 141, 143 (Fla. 1991); Coleman v. State, 610 So.2d 1283, 1287-88 (Fla. 1992); Colina v. State, 634 So.2d 1077, 1082 (Fla. 1994). Therefore, this Court should affirm Appellant's sentence of death for the murder of Diane Matlawski.

ISSUE XVII

WHETHER THE TRIAL COURT ERRED IN CONCLUDING THAT THE MITIGATING FACTORS OUTWEIGHED THE AGGRAVATING FACTORS (Restated).

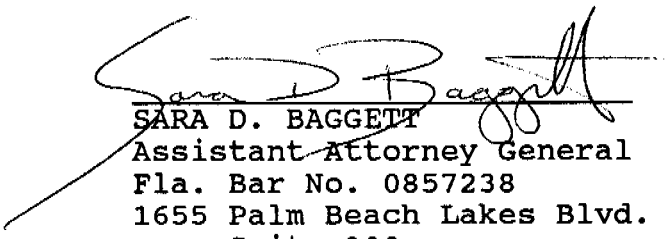
After detailing all of the mitigating evidence found by the trial court, Appellant claims that "[t]he trial court's weighing process in favor of death is simply not supported by sufficient competent evidence." **Brief of Appellant** at 97. This Court has previously held, however, that its function is not to reweigh the aggravating and mitigating circumstances. See, e.g., Freeman v. State, 563 So.2d 73, 77 (Fla. 1990); Lucus v. State, 568 So.2d 18, 23 (Fla. 1990); Hudson v. State, 538 So.2d 829 (Fla. 1989), sentence vacated on other grounds, 614 So.2d 482 (Fla. 1993). To the extent that Appellant is arguing that his sentence is not proportionately warranted, the State would rely on its arguments related in Issue XVI, supra, regarding proportionality.

CONCLUSION

Wherefore, based on the foregoing arguments and authorities, the State requests that this Honorable Court affirm Appellant's conviction and sentence of death.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General



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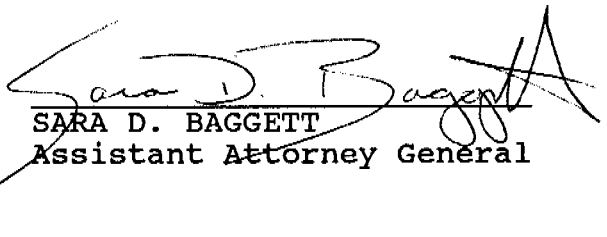
CERTIFICATE OF SERVICE

I hereby certify that the above document was sent by U.S. mail to Richard G. Bartmon, Esquire, Law Offices of Bartmon & Bartmon, 1515 N. Federal Highway, Suite 300, Boca Raton, Florida 33432, this 30th day of January, 1995.



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