IN THE SUPREME COURT OF FLORIDA

MICHAEL THOMAS COOLEN,

Appellant/Cross Appellee,

vs.

Case No.: 84,018

STATE OF FLORIDA,

Appellee/Cross Appellant.

ANSWER BRIEF OF THE APPELLEE
~~INITIAL BRIEF OF THE CROSS-APPELLANT~~

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STATEMENT OF THE CASE AND FACTS

The victim, John Michael Kellar, was stabbed to death by the defendant, Michael Coolen, on November 7, 1992 Coolen was arrested shortly after fleeing the scene. He was charged by indictment on November 10, 1992 with the first degree murder of John Kellar. (R 1-5) The case proceeded to trial on April 12, 1994. (R 225 -418)

At trial Barbara Caughman Keller testified that on the day of the murder, she and her husband John went to a pub at approximately 4:30 p.m. (T 321) While they were there, they met Michael Coolen and Debbie Morabito. They all went back to the Keller's home where they continued their partying in the Keller's back yard. After they got there, Michael Coolen showed Barbara's son, Jamie, the fireworks he had in the back of the van. Michael then took Jamie down to the end of the road to shoot off the fireworks, while Barbara, John and Debbie stood by Debbie Morabito's van talking. After Michael and Jamie returned from shooting fireworks they all stood by the van talking and having a good time. John took then Debbie into the house to show her where the bathroom was. Barbara Caughman Keller testified that while they were gone she was sitting in the side of the van with the door open and Michael Coolen put his hand down her shirt. When she pushed him off, he left and she did not know where he went. (T 329) When Debbie and John returned from the house, Debbie got into the driver's side of the van. John walked up to Barbara and put his hand on her leg. They were standing there talking when suddenly John was pulled away and was being backed up to the house by Michael Coolen. Barbara testified that she had heard John hollering and moaning and that she ran to assist him. (T 330) She testified that her husband never struck Michael Coolen, he never had a chance. When she threw her body over

John to protect him, Coolen struck her several times with the knife. When Debbie started screaming, Coolen ran, jumped in the van and they took off. (T 330)

Jamie Caughman testified that Coolen showed him the fireworks in the van and then he and the defendant played tag. Jamie claimed that when he went to step on the van door, Michael pulled him to the ground, took a knife out of his pocket and told him not to step on the door again. (T 373) His parents and Debbie Morabito were on the other side of the van. He didn't tell anyone; he just went into the house and played Nintendo. (T 375) Later he went out the front door and around the building. He saw his dad and Michael fighting. (T 376) Coolen was stabbing his father and his father was trying to push him away. (T 377) James Caughman testified that his dad did not have a gun that evening and that Michael was mad because John had picked up his beer right before the fight started (T 388).

Deputy Kenneth Wright testified that he was dispatched to the scene on 11/7/92 at approximately 10 p.m. (T 237) When he arrived, Jamie met him out front and pointed out the Morabito van which was driving away. (T 238) When Deputy Wright stopped the van, Coolen was not wearing a shirt. (T 245) The officer then transported Coolen back to the scene where he was identified by the victim's wife. (T 248) Deputy Wright testified that couldn't tell if Coolen was drinking but he was not under the impression that he was dealing with a drunk person. (T 251)

Deputy Mike Bailey testified that he read Coolen his rights and that Coolen admitted the knife Morabito found in her pocket was his and that he stabbed the victim. (T 252-258) Bailey testified that Coolen understood his rights and was able to respond, despite his claim that he'd been drinking all day. (T 261)

Deputy Peay testified that when he approached the scene that Barbara Caughman-Kellar came running out. He testified that she was covered with blood and that scene was very bloody. (T 263-5) John Kellar, the victim, was on kitchen floor covered in blood although the stabbing occurred in the back yard. (T 265) Kellar's wounds were so severe that he was breathing out of a puncture wound in his side. (T 266) The victim was in a fetal position trying to breath causing blood to foam on the wound. He was in no condition to interview. (T 267) The victim was taken by helicopter to Bayfront Medical Hospital. (T 270)

Deputy Peay also testified that Coolen gave him a false name the first time he interviewed him and that the false name came back as deceased. (T 270-273) Coolen told him they had been out drinking and the John Kellar came up to him with a piece of steel. Coolen said he'd been playing word games with John's wife and that he had a very bad temper because of the Irish in him. (T 274) Coolen appeared intoxicated; he said he'd been drinking but, didn't say how much or how long. (T 278) Although Coolen was intoxicated, he didn't have any trouble understanding the deputy Rather it, seemed he was trying to manipulate the deputy. (T 296)

The medical examiner, Dr. Marie Hansen, testified that the victim was 36 years old, 5'9" and 152 pounds and that he had six stab wounds (T 425 427). There were two defensive wounds, one to the forearm and to the hand (T 432-33). Additionally, there were four other stab wounds including a six-inch wound to the right chest (made with a knife blade of 3-7/8 inches) and a stab wound to the right back (T 430 - 36). These types of stab wounds, are not only inconsistent with Coolen's claim of self defense, but are evidence of the premeditated nature of the attack.

The state also presented Coolen's taped statement which Coolen gave to Deputy Michael Madden with the Pinellas County Sheriff's Office a few hours after the murder. (R 396-412) In this statement Coolen claimed:

> "MC: Ah, we were all sitting out in the van, ah, we got a TV and a VCR in the van, so we were all playing with the thing, and I bought some fireworks up in South Carolina on the way down here. And we were screwing around, just, you know, they got a kid or something, they got a couple of kids, so we were screwing around the kid, you know ah, we had the fireworks and this and that an the other thing and then then that was that. And we went back to the van. We were screwing around in our van, and we were gonna smoke a bong or two, you know, Fuck around a little and ah. I was fucking with his old lady. I was just joshing. All of a sudden, you know, he gets all fucking, cops a fucking attitude and everything. Started to come at me, and I just panicked. And I just pulled the knife out and stuck him and I got scared shitless and jumped in the van and fuck it, screw it I even crease the van trying to get out of there and ah I just ran. I don't know, I just panicked I guess. I just ran, which usually happens after I've been drinking because like ah, I don't take no shit from nobody. You're trying to hurt me, my wife, ah my wife, my girlfriend ah my property.
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> MM: Well, how would he of hurt you
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> MC: Oh he had some, I thought he, I saw something in his hand. He had left, he had gone in the house and come out and there was something in his hand and he had told me earlier that he had a twenty-two and a shotgun. He had a little bitty twenty-two and he told, told me about, you know, I don't know maybe five, six inches handgun. So I didn't know what it was. I thought it might have been the twenty-two.
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> MM: But you didn't see anything.
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> MC: I saw a flash. I saw a flash in his hand, I saw something silver in his hand, but I don't know whether he had that, a hunk of pipe, a piece of steel, I don't know what he had, but I've done eight years in the maximum prisons up in Massachusetts and I react very quickly. If you don't you get hurt

MM: Maybe you over react sometimes

MC: Ah, yeah, sometimes

MM: Nobody else out there saw him with anything

MC: Um, that's, that was me. Maybe I just, like you said, I over reacted, I don't know. I just, you know, he started getting a bad attitude and I just snapped, I guess but I

MM: So just cause

MC: (inaudible) somebody, I saw something in his hand. I saw something, whether it was a figment of my imagination or not, I saw something in his hand, whether I was wrong or not. I'd rather be safe than sorry, and it looks like I'm rather sorry than safe right now"

(T 716 - 717)

"MC: Could have been a beer can, could of been a beer bottle, could of been a flash off the light pole, or the light from the house or whatever, off a piece of silver in his hand or or whatever, but he got a bad attitude because I was playing, you know, I was playing word games with his old lady or whatever. You know, we're all just joking around and shit, and he, then he copped an attitude, and I don't know what to think. Because I'm from out of state, and I don't know anybody down here. And he already told me he owned two guns so, I'm not ready for anybody' I'm not (inaudible) ready to get shot" (R 718)

Coolen also admitted that although he said it could have been a gun that Kellar had not shown any weapons and that he had not had them with him that evening. (R 718) Subsequent to the claim that he saw the victim with something in his hand, Coolen said that he received the scratches on his hands probably from trying to stop Kellar from swinging at him because he had cocked his hands a couple of times getting ready to swing. Coolen then said that that's when he stabbed Kellar (T 724). And finally in Coolen's confession he said, "I don't give a shit if it's a

beer can, a, or whatever, or a bobby pin. To me its steel." (T 721)

After deliberating for two hours and ten minutes, the jury returned a verdict of guilty as charged. (T 543-44) The penalty phase was held on April 21, 1994. (R 1136-1318)

During the penalty phase in the instant case, the state presented evidence of the prior violent felony convictions including the testimony of one of Coolen's previous stabbing victim who testified about Coolen's multiple assaults on him. (R 1145-68) Coolen presented the testimony of his aunt, cousin and sister, as well as Debra Morabito, his girlfriend and a witness to the crime. (R 1184, 1197, 1226) He also presented the testimony of two friends with whom he had previously worked. (R 1202, 1206)

The jury returned a recommendation of death, by a vote of 8-4. (R 1312) On June 20, 1994, after hearing argument from counsel, the court sentenced Coolen to death. In his written order the court found one aggravating factor (prior violent felony) and three nonstatutory mitigating factors (employment, caring relative, participation in self-help groups) to which he gave little or no weight. (R 1087-1100)

The trial court refused to give the state's requested instruction on HAC.

SUMMARY OF THE ARGUMENT

Appellant's first claim is that the evidence was insufficient to prove a premeditated killing. He claims that although the jury could find that the defendant reacted unreasonably in self defense and, therefore the killing was not justifiable; they could have believed that because the defendant acted from an honest, albeit unreasonable belief that he was defending himself, the murder was not premeditated. It is the state's position that when the evidence is viewed in the light most favorable to the state, the trial court properly denied the motion for judgment of acquittal as the evidence clearly supports the jury's finding of premeditated first degree murder.

Appellant's next claim is that the trial court erred in denying a defense motion to redact statements Coolen made during his taped confession referring to the length of his criminal record and his time in prison. Although the trial court recognized that evidence of a prior record is generally inadmissible, the court agreed with the state that the statements were relevant to show Coolen's state of mind during the attack on John Kellar. This finding was within the trial court's discretion and Appellant has failed to show an abuse of that discretion.

Next appellant argues that the trial court erred in allowing the state to present evidence of that shortly before Coolen attacked and killed John Kellar, that he had thrown young Jamie Caughman, to the ground and threatened him with the knife. He contends that this testimony constituted evidence of "collateral crimes." He charges that the evidence was inadmissible and that he had not received the requisite notice of intent to use collateral crime evidence. It is the state's position that no Williams rule notice was necessary as this evidence was not Williams Rule evidence, but, rather, evidence that was "inextricably intertwined"with other evidence of the murder. Accordingly, the trial court properly admitted James Caughman and

Deputy Madden's testimony concerning Coolen's threat to the boy.

Coolen also contends that the trial court erred in limiting his cross-examination of the witness and that the restriction was a violation of his federal constitutional right as guaranteed by the confrontation clause of the Sixth Amendment. It is the State's position that the trial court properly limited the cross-examination as any probative value of Caughman-Kellar's subsequent sexual assault was outweighed by the potential for prejudice or confusion of issues.

Appellant urges that the trial court erred in sustaining a state objection to the admission of a double hearsay statement allegedly made by the appellant's mother. Appellant urges the proposition that while the state may be limited in its presentation of hearsay evidence in the penalty phase, the defendant should be not so hindered in his presentation of mitigating evidence. It is the state's position that a defendant's right to introduce hearsay testimony at the sentencing phase is not unlimited and that the admission or exclusion of evidence is a matter that lies within the trial court's discretion. Appellant has failed to show an abuse of that discretion.

As his sixth claim, Appellant asserts that the trial court erred in admitting the facts surrounding Coolen's prior violent felonies. It is the state's position that this claim is procedurally barred and without merit as the state properly presented the facts concerning the prior violent felonies.

As his seventh claim, appellant argues that the trial court erred in denying his request for an admittedly unclear penalty phase jury instruction to the effect that his lack of intent to kill the victim could be considered as mitigating. He contends that this was error because the sentencer cannot be precluded from considering this circumstance as mitigating. This Court has reviewed a similar claim in DeAngelo v. State, 616 So.2d. 440 (Fla. 1993) and found it to be

without merit. Moreover, the state maintains that this claim has not been adequately preserved for appellate review.

Appellant contends that the trial court erred in rejecting his claim of intoxication as either the statutory mitigating circumstance of substantially impaired or a nonstatutory mitigating circumstance. It is the trial court's duty to decide if a mitigating factor has been established and when there is substantial evidence to support a trial court's rejection of mitigators, as there is in the instant case, that rejection must be upheld.

Appellant also disagrees with the trial court's findings as to the other proposed mitigating circumstances. In general, this Court has held that a trial court must consider the proposed mitigators to decide if they have been established and if they are of a truly mitigating nature in each individual case. When there is competent, substantial evidence to support a trial court's rejection of mitigators, that rejection will be upheld. Ponticelli v. State, 593 So.2d. 483 (Fla.1991); Shere v. State, 579 So.2d. 86 (Fla.1991). Here, the trial court fully considered and discussed the mitigators that Coolen argued applied to his committing these murders. The Court considered each of these factors and found each to be refuted by the evidence. This was within the trial court's discretion and appellant has failed to show an abuse of that discretion. Furthermore, when this insignificant evidence is weighed against Coolen's prior violent history, as well as the brutal unprovoked attack committed against John Kellar, error, if any, was harmless beyond a reasonable doubt.

Appellant's final claim is that the death penalty is not proportional in the instant case because there is only one aggravating circumstance balanced against significant mitigating circumstances that were rejected by the trial court. Proportionality review is not a recounting of

aggravating versus mitigating but, rather, compares the case to similar defendants, facts and sentences. Under circumstances similar to the instant case, this Honorable Court has upheld the imposition of the death penalty. John Kellar's murder was the result a totally unprovoked attack by Michael Coolen, who has an extensive history of prior violent felonies, including multiple stabbings. Kellar was unarmed and in his own home. After inviting what he obviously thought were new friends into his home, he was stabbed multiple times in front of his wife and child for no better reason than Coolen did not like his attitude. Kellar was conscious throughout and, therefore, suffered the pain and apprehension of impending death. After being helped into his home by his wife, who had also been stabbed, and directing her to call 911, he collapsed to floor and ultimately bled to death. When compared to similar cases the sentence in this case should be affirmed as proportionate.

CROSS-APPEAL

First degree murders that are a result of multiple stab wounds on a conscious victim are consistently found to be heinous, atrocious, or cruel. Kellar was stabbed six times, including wounds in the chest, back and face, in an unprovoked attack. Kellar was conscious and aware of the extent of his injuries. Accordingly, the state maintains that the aggravating factor of heinous, atrocious, or cruel aggravating should have been found by the court below and should be considered by this Court in determining the appropriateness of the sentence in the instant case.

ARGUMENT

ISSUE I

WHETHER THE EVIDENCE WAS SUFFICIENT TO SUPPORT A CONVICTION FOR FIRST DEGREE PREMEDITATED MURDER.

Appellant's first claim is that the evidence was insufficient to prove a premeditated killing. He claims that although the jury could find that the defendant reacted unreasonably in self defense and, therefore the killing was not justifiable, they could have believed that the murder was because the defendant acted from an honest, albeit unreasonable, belief that he was defending himself. It is the state's position that when the evidence is viewed in the light most favorable to the state, the trial court properly denied the motion for judgment of acquittal as the evidence clearly supports the jury's finding of premeditated first degree murder.

In general, this Court has held that "a court should not grant a motion for judgment of acquittal unless there is no view of the evidence which the jury might take favorably to the opposite party that can be sustained under the law." Taylor v. State, 583 So.2d 323 (Fla. 1991), citing Lynch v. State, 293 So.2d 44, 45 (Fla. 1974). This Court further noted in Taylor that, "If there is room for a difference of opinion between reasonable people as to the proof or facts from which an ultimate fact is to be established, or where there is room for such differences on the inferences to be drawn from conceded facts, the court should submit the case to the jury." Id. at 328.

To prove a fact by circumstantial evidence, the evidence must be inconsistent with any reasonable hypothesis of innocence. The question of whether the evidence fails to exclude all

reasonable hypotheses of innocence is to be decided by the jury. Taylor v. State, citing Cochran v. State, 547 So.2d 928, 930 (Fla. 1989). The jury need not believe the defense's version of the facts for which the state has produced conflicting evidence.

Further, as intent is usually established by circumstantial evidence, our courts have consistently held that trial courts should rarely, if ever, grant a motion for judgment of acquittal based on the state's failure to prove intent. As the court noted in King v. State, 545 So.2d 375 (Fla. 4th DCA 1989):

> "A trial court should rarely, if ever, grant a judgment of acquittal based on the state's failure to prove mental intent. Brewer v. State, 43 So.2d 1217 (Fla. 5th DCA 1982). This is because the proof of intent usually consists of the surrounding circumstances of the case. Id. Where reasonable persons may differ as to the existence of facts tending to prove ultimate facts, or inferences to be drawn from the facts, the case should be submitted to the jury. Victor v. State, 141 Fla. 508, 193 So. 762 (1939). A directed verdict cannot be given if the testimony is conflicting, or lends to different reasonable inferences, tending to prove the issues. Snipes v. State, 154 Fla. 262, 17 So.2d 93 (1944)."
>
> (545 So.2d at 378)

In addition to the physical evidence in the instant case, the state presented two eyewitnesses to the murder as well as the confession of Michael Coolen. Barbara Caughman Keller testified that on the day of the murder, she and her husband John went to a pub at approximately 4:30 p.m. (T 321) While they were there, they met Michael Coolen and Debbie Morabito. They all went back to the Keller's home where they continued their partying in the Keller's back yard. After they got there, Michael Coolen showed Barbara's son, Jamie, the fireworks he had in the back of the van. Michael then took Jamie down to the end of the road to shoot off the fireworks, while Barbara, John and Debbie stood by Debbie Morabito's van. After Michael and Jamie returned

from shooting fireworks they all stood by the van talking and having a good time. John took then Debbie into the house to show her where the bathroom was. Barbara Caughman Keller testified that while they were gone she was sitting in the side of the van with the door open and Michael Coolen put his hand down her shirt. When she pushed him off, he left and she did not know where he went (T 329). When Debbie and John returned from the house, Debbie got into the driver's side of the van. John walked up to Barbara and put his hand on her leg. They were standing there talking when suddenly John was pulled away and was being backed up to the house by Michael Coolen. Barbara testified that she had heard John hollering and moaning and that she ran to assist him (T 330). She testified that her husband never struck Michael Coolen. He never had a chance. When she threw her body over John to protect him, Michael struck her several times with the knife. When Debbie started screaming Michael ran, jumped in the van and they took off (T 330).

James Caughman testified that Coolen showed him the fireworks in the van and then he and the defendant played tag. Jamie claimed that when he went to step on the van door, Michael pulled him to the ground, took a knife out of his pocket and told him not to step on the door again (T 373). His parents and Debbie Morabito were on the other side of the van. He didn't tell anyone; he just went into the house and played Nintendo (T 375). Later he went out the front door and around the building. He saw his dad and Michael fighting (T 376). Coolen was stabbing his father and his father was trying to push him away (T 377). James Caughman testified that his dad did not have a gun that evening and that Michael was mad because John had picked up his beer right before the fight started. (T 388). In addition to the eyewitnesses' testimony, the state also presented Coolen's taped statement which Coolen gave to Detective Madden with the

Pinellas County Sheriffs Office a few hours after the murder. In this statement Coolen claimed:

"MC: Ah, we were all sitting out in the van, ah, we got a TV and a VCR in the van, so we were all playing with the thing, and I bought some fireworks up in South Carolina on the way down here. And we were screwing around, just, you know, they got a kid or something, they got a couple of kids, so we were screwing around the kid, you know ah, we had the fireworks and this and that an the other thing and then then that was that. And we went back to the van. We were screwing around in our van, and we were gonna smoke a bong or two, you know, Fuck around a little and ah. I was fucking with his old lady. I was just joshing. All of a sudden, you know, he gets all fucking, cops a fucking attitude and everything. Started to come at me, and I just panicked. And I just pulled the knife out and stuck him and I got scared shitless and jumped in the van and fuck it, screw it I even crease the van trying to get out of there and ah I just ran. I don't know, I just panicked I guess. I just ran, which usually happens after I've been drinking because like ah, I don't take no shit from nobody. You're trying to hurt me, my wife, ah my wife, my girlfriend ah my property.

MM: Well, how would he of hurt you

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MM: Nobody else out there saw him with anything

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"MC: Could have been a beer can, could of been a beer bottle, could of been a flash off the light pole, or the light from the house or whatever, off a piece of silver in his hand or or whatever, but he got a bad attitude because I was playing, you know, I was playing word games with his old lady or whatever, You know, we're all just joking around and shit, and he, then he copped an attitude, and I don't know what to think. Because I'm from out of state, and I don't know anybody down here. And he already told me he owned two guns so, I'm not ready for anybody' I'm not (inaudible) ready to get shot"

(R 718)

Coolen also admitted that although he said it could have been a gun that Kellar had not shown any weapons and that he had not had them with him that evening (R 718). Subsequent to the claim that he saw the victim with something in his hand, Coolen said that he received the scratches on his hands probably from trying to stop Kellar from swinging at him because he had cocked his hands a couple of times getting ready to swing. Coolen then said that that's when he stabbed Kellar (R 724). And finally in Coolen's confession he said, "I don't give a shit if it's a

beer can, a, or whatever, or a bobby pin. To me its steel." (R 721).[1]

Furthermore, premeditation can be shown by circumstantial evidence. Penn v. State, 574 So.2d. 1079, 1081 (Fla. 1991). "Whether or not the evidence shows a premeditated design to commit a murder is a question of fact for the jury. Preston v. State, 444 So.2d. 939 (Fla.1984). This Court has previously stated: "Evidence from which premeditation may be inferred includes such matters as the nature of the weapon used, the presence or absence of adequate provocation, previous difficulties between the parties, the manner in which the homicide was committed and the nature and manner of the wounds inflicted. It must exist for such time before the homicide as will enable the accused to be conscious of the nature of the deed he is about to commit and the probable result to flow from it insofar as the life of his victim is concerned." Sireci v. State, 399 So.2d. 964,967 (Fla. 1981), cert. denied, 456 U.S. 984, 102 S.Ct. 2257, 72 L.Ed.d. 862 (1982). Accord Heiney v. State, 447 So.2d. 210 (Fla.), cert. denied, 469 U.S. 920, 105 S.Ct. 303, 83 L.Ed.d. 237 (1984)." Penn v. State, 574 So.2d. at 1081.

In addition to the eyewitnesses' testimony and Coolen's own confession, evidence of intent can be inferred from the weapon used and the nature of the injury done to the victim. The medical examiner testified that the victim was 36 years old, 5'9" and 152 pounds and that he had six stab wounds (R 427). There were two defensive wounds, one to the forearm and to the hand (R 432-33). Additionally, there were four other stab wounds including a six-inch wound to the right chest (made with a knife blade of 3-7/8 inches) and a stab wound to the right back (T 430 - 36). These type of stab wounds, are not only inconsistent with Coolen's claim of self defense,

[1] Coolen's own 'confession' was inconsistent as to whether he thought Kellar was attacking him with a knife a bobby pin or just his "cocked" hands.

but are evidence of the premeditated nature of the attack. Clearly the force and the nature of the wounds inflicted upon the victim are consistent with a premeditated intent to commit murder. Thus, when taken in the light most favorable to the state, it is clear that the trial court properly denied the judgment of acquittal.

Appellant also contends that other circumstances support a reasonable hypothesis that the evidence in the instant case fits what some courts and commentators call "imperfect self-defense." Appellant concedes that Florida law does not recognize imperfect self-defense as a defense, but contends, however, that there has been some recognition by this Court that there are circumstances where an intentional killing neither is justifiable nor premeditated murder. In support of this position, Coolen relies on this Court's decision in Banda v. State, 563 So. 2d 221 (Fla. 1988). In relevant portion, this Court in Banda stated:

> Florida law requires that, before a murder can be deemed cold, calculated, and premeditated, it must be committed "without any pretense of moral or legal justification." Sec. 921.141(5)(i), Fla.Stat. (1985).
>
> * * *
>
> Our decisions in the past have established general contours for the meaning of the word "pretense" as it applies to capital sentencings. For instance, we have held that a "pretense" of moral or legal justification existed where the defendant consistently had made statements that he had killed the victim only after the victim jumped at him and where no other evidence existed to disprove this claim. *Cannady v. State, 427* So.2d 723, 730-31 (Fla. 1983). We reached this conclusion even though the accused himself, an obviously interested party, was the only source of this testimony,
>
> On the other hand, we have upheld the trial court's finding that no pretense existed where the defendant's statements were wholly irreconcilable with the facts of the murder. Thus, we have upheld a finding that no pretense existed where the accused said the victim intended to kill him over a $15 .00 debt, but where

> the evidence showed that the victim had never been violent or threatening and had been attacked by surprise and stabbed repeatedly. (FN2) *Williamson v. State*, 5 11 So.2d 289, 293 (Fla.1987), cert. denied, --- U.S. -----, 108 S.Ct. 1098, 99 L.Ed.2d 261 (1988).
>
> We conclude that, under the capital sentencing law of Florida, a "pretense of justification" is any claim of justification or excuse that, though insufficient to reduce the degree of homicide, nevertheless rebuts the otherwise cold and calculating nature of the homicide.
>
> Applying these principles, we find *Williamson* clearly distinguishable from the present case. Substantial uncontroverted testimony of several witnesses exists on this record that the victim was a violent man and had made threats against appellant. Upon this record, we thus must hold that appellant established a reasonable doubt as to the "no pretense of justification" element. The state's own theory of prosecution--that appellant plotted to kill the victim to prevent the victim from killing him--underscores this conclusion. Together with the uncontroverted evidence establishing the victim's violent propensities, we find that appellant acted with at least a pretense of moral or legal justification. That is, a colorable claim exists that this murder was motivated out of self-defense, albeit in a form clearly insufficient to reduce the degree of the crime.
>
> Banda v. State, 536 So.2d 221, 225 (Fla. 1988) (emphasis added)

Coolen urges that although this Court's statement, that "a colorable claim exists that this murder was motivated out of self-defense, albeit in a form clearly insufficient to reduce the degree of the crime" is dicta insofar as establishing a doctrine of imperfect self-defense, it clearly contemplates the existence of a form of self-defense sufficient to reduce the degree of the crime without providing complete justification.

This argument completely misapprehends this Court's holding in Banda. This Court in

Banda was referring to a finding of cold, calculated and premeditated which by its nature requires that the state prove 'heightened premeditation.' Rogers v. State, 511 So.2d. 526, 533 (Fla. 1987), cert. demed, --- U.S. ----, 108 S.Ct. 733, 98 L.Ed.d. 681 (1988). In negating the finding of cold, calculated and premeditated, Banda provides that a judge or jury could consider the fact that a defendant had a reasonable belief that he was acting in self-defense. This Court has also allowed consideration of any number of other factors to negate a finding of cold, calculated and premeditated. See, e.g., Santos v. State, 591 So. 2d 160 (Fla. 1991), Opinion Justice Grimes dissenting. This reference in Banda in no way establishes a reduction of the conviction for first degree premeditated murder based upon the defendant's statement that he thought 'possibly' the victim 'maybe' could have had something in his hand, but, rather referred to the pretense of morale justification aspect of the cold, calculated and premeditated factor.

Based on the foregoing the state maintains that the trial court did not err in denying the motion for judgment of acquittal.

ISSUE II

WHETHER THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION TO EXCISE PORTIONS OF HIS TAPED STATEMENT TO THE POLICE WHICH REFERRED TO HIS PRIOR RECORD AND CRIMINAL SENTENCES IN MASSACHUSETTS.

Appellant's next claim is that the trial court erred in denying a defense motion to redact statements Coolen made during his taped confession referring to the length of his criminal record and his time in prison.[2] Although the trial court recognized that evidence of a prior record is generally inadmissible, the court agreed with the state that the statements were relevant to show Coolen's state of mind during the attack on John Kellar. This finding was within the trial court's discretion and Appellant has failed to show an abuse of that discretion.

Generally it is improper to admit evidence tending to show that the accused has committed crimes or bad acts other than those of which he stands accused. This rule is but a specific application of the more general principle that all evidence must be relevant to a material issue.

2

In footnote 3, Initial brief of Appellant, page 35, Coolen notes that defense counsel requested that two other statements in his confession be deleted. Appellant, however, is now declining to argue those points in the "interest of maintaining a coherent and concise argument" but, maintains that he is not waiving same. It is appellee's position that the failure to fully brief and argue these points constitutes a waiver of the claims. Duest v. State, 555 So. 2d 849, 852-53 (Fla. 1990) (rejecting attempt to raise claims by simply referring to arguments presented in motion for postconviction relief and noting that the purpose of an appellate brief is to present arguments in support of the points on appeal). "Merely making reference to arguments below without further elucidation does not suffice to preserve issues, and these claims are deemed to have been waived." Id. at 853. In the instant case, appellate counsel's has an additional seventeen pages in which to have presented any arguments he deemed appropriate as he has only used 83 pages of his 100 page limit. The failure to do so waives any such claim.

However, this type of evidence is given special treatment because of the danger of prejudicing the jury against the accused either by depicting him as a person of bad character or by influencing the jury to believe that because he committed the other bad acts or crimes, he probably committed the crime charged. See, e.g., Williams v. State, 110 So.2d 654 (Fla.), cert. denied, 361 U.S. 847, 80 S.Ct. 102, 4 L.Ed.2d 86 (1959); Winstead v. State, 91 So.2d 809 (Fla.1956); Nickels v. State, 90 Fla. 659, 106 So. 479 (1925). Nevertheless, the test for the admissibility of evidence is still relevance. Sec. 90.402, Fla. Stat. (1991). Relevant evidence is defined as "evidence tending to prove or disprove a material fact, " Sec. 90.401, Fla. Stat. (1991). "Relevant evidence is only inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence." Sec. 90.403, Fla.Stat. (1991). Griffin v. State, 639 So.2d 966, (Fla. 1994)

Relying on this Court's decision in Jackson v. St&, 498 So.2d 406 (Fla. 1986), (wherein this Honorable Court approved the admission of a defendant's statements concerning a prior stint in "jail" where the evidence was relevant to establish the defendant's motive or state of mind), the trial court, in the instant case, properly admitted Coolen's statements concerning his eight years in "the can" and his "six foot long" "shit bum" record. In Jackson, this Court held:

> Appellant also claims prejudicial error in allowing Ms. Freeman to testify concerning appellant's statement that "she wasn't going back to jail." Appellant cites Jackson v. State, 45 1 So.2d 458 (Fla.1984), to support her position that Ms. Freeman's testimony was inadmissible as a comment implying past criminal conduct. Reliance on Jackson is misplaced. In that case testimony was admitted that the defendant had boasted of being a "thoroughbred killer" from Detroit. The statement had no relevance. except as to the character and propensity of the defendant to commit the murder charged. In this case, Ms. Freeman's testimony was relevant to prove appellant's motive for killing Gary

Bevel and therefore its admission was proper.

Jackson v. State, 498 So.2d 406 (Fla. 1986) (Emphasis added)

Similarly, Coolen's statements to Deputy Madden helped the jury to understand why Coolen attacked Kellar, why he hid the incriminating evidence, and why he lied to the officer during the questioning. Thus, Coolen's statements established his state of mind at the time of the offense and were properly admitted.

Appellant's relies on several cases where similar evidence was found inadmissible. In each of these cases, however, the evidence went solely to establish the defendant's prior record and was not relevant to establish motive, intent, or state of mind. Where, as in the instant case, the evidence is relevant to establish a material fact, it is within the court's discretion to admit such evidence. While evidence of motive is not necessary to a conviction, when it is available and would help the jury to understand the other evidence presented, it should not be kept from them merely because it reveals the commission of other crimes or bad acts. The test for admissibility is not the necessity of evidence, but rather its relevancy. Craig v. State, 510 So.2d 857, 864 (Fla. 1987) (evidence of other thefts was relevant to show motive), *citing,* Hall *v.* State, 403 So.2d 1321 (Fla. 1981); Ruffin v. State, 397 So.2d 277 (Fla.), cert. denied, 454 U.S. 882, 102 S.Ct. 368, 70 L.Ed.2d 194 (1981).

Assuming, arguendo, that the evidence was improperly admitted, the admission of the statement was harmless. Castro v. State, 547 So.2d 111 (Fla. 1989) (In light of the totality of the evidence against Castro, including Castro's own confession, the erroneous admission of the testimony could not have affected the outcome of the guilt phase, as with or without the error, the

jury could have reached no conclusion other than that Castro was guilty); Craig v. State, 510 So.2d 857 (Fla. 1987) (Where evidence does not establish that the defendant committed a similar crime, or one equally heinous, there is no showing of prejudice and error is harmless). In light of the substantial evidence that established Coolen's guilt, it is beyond a reasonable doubt that the outcome of the proceeding was not affected by the admission of these statements.

Appellant also contends that he was prejudiced by the prosecutor's comments during closing argument regarding the defendant's statements. It is the state's position that this claim is procedurally barred, as it was not specifically argued to the trial court below. The only objection counsel made to the statement was a "Golden Rule " argument which was overruled by the court. (T 515-16) As the argument now being advanced was not presented to the Court below it is barred. Steinhorst v. State, 412 So. 2d 332 (Fla. 1982).

ISSUE III

WHETHER THE TRIAL COURT ERRED BY ADMITTING TESTIMONY FROM JAMES CAUGHMAN ABOUT A THREAT APPELLANT MADE TOWARD HIM ON THE NIGHT OF THE MURDER.

Next appellant argues that the trial court erred in allowing the state to present evidence of that shortly before Coolen attacked and killed John Kellar, that he had thrown young Jamie Caughman, to the ground and threatened him with the knife. He contends that this testimony constituted evidence of "collateral crimes. " He charges that the evidence was inadmissible and that he had not received the requisite notice of intent to use collateral crime evidence. It is the state's position that no Williams rule notice was necessary as this evidence was not Williams Rule evidence, but, rather, evidence that was "inextricably intertwined"with other evidence of the murder. Accordingly, the trial court properly admitted James Caughman and Deputy Madden's testimony concerning Coolen's threat to the boy,

In Griffin v. State, 639 So.2d 966 (Fla. 1994), this Court clarified the distinction between similar fact evidence and evidence of other crimes.

> Similar fact evidence of other crimes, wrongs, or acts is admissible when relevant to prove a material fact in issue, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, but it is inadmissible when the evidence is relevant solely to prove bad character or propensity.
>
> This rule of evidence is often called *the "Williams rule,* " because the statutory language tracks the language in *Williams v. State,* 110 So.2d. 654, 662 (Fla.), cert. denied, 361 U.S. 847, 80 S.Ct. 102, 4 L.Ed.d. 86 (1959). If the State wishes to introduce Williams rule evidence in a criminal action, it must provide the defendant notice, at least ten days before trial, of the acts or

offenses it intends to offer. Sec. 90.404(2)(b)1, Fla.Stat. (1991).

In the past, there has been some confusion over exactly what evidence falls within the Williams rule. The heading of section 90.404(2) is "OTHER CRIMES, WRONGS, OR ACTS." Thus, practitioners have attempted to characterize all prior crimes or bad acts of an accused as Williams rule evidence. This characterization is erroneous. The Williams rule, on its face, is limited to "[s]imilar fact" Sec. 90.404(2)(a), Fla.Stat. (1991) (emphasis added).

Thus, evidence of uncharged crimes which are inseparable from the crime charged, or evidence which is inextricably intertwined with the crime charged, is not Williams rule evidence. It is admissible under section 90.402 because "it is a relevant and inseparable part of the act which is in issue . . . [I]t is necessary to admit the evidence to adequately describe the deed." Charles W. Ehrhardt, Florida Evidence Sec. 404.17 (1993 ed.); see Gorham v. State, 454 So.2d 556,558 (Fla. 1984), cert. denied, 469 U.S. 1181, 105 S.Ct. 941, 83 L.Ed.2d 953 (1985); Erickson v. State, 565 So.2d 328, 332-33 (Fla. 4th DCA 1990), review denied. 576 So.2d 286 (Fla.1991); Tumulty v. State, 489 So.2d 150, 153 (Fla. 4th DCA), review denied, 496 So.2d 144 (Fla.1986) Griffin, 639 So.2d 966 (Fla. 1994)

* * *

We turn now to the facts of the instant case. Count IV of the indictment under which Griffin was tried charged him with the theft of the white Chrysler LeBaron which Griffin used during burglaries. The car was rented by Mr. Richard Marshall. During the trial, Mr. Marshall testified that on the evening of April 23, 1990, he returned to the Miami Beach hotel where he was staying, placed the car keys on the dresser, and retired for the evening. When he awoke the next morning, Mr. Marshall found that the car keys and the car were gone.

Griffin concedes that his possession of the automobile was admissible because grand theft was a charge the jury was considering. However, Griffm argues that the testimony relating to

the missing keys was inadmissible Williams rule evidence because it suggested that the hotel room had been burglarized, and was used by the State to show that Griffin had a propensity to burglarize motel rooms.

Mr. Marshall's testimony does not fall within the Williams rule. It was not introduced by the State as similar fact evidence. The manner in which the car keys were taken was inextricably intertwined with the theft of the automobile, one of the charges before the jury. The testimony was necessary to establish the entire context out of which the crime arose. Mr. Marshall's testimony was relevant and not unduly prejudicial. Therefore, there was no error in its admission.

Griffin v. State, 639 So.2d 966 (Fla. 1994)

Similarly, in Craig v. State, 510 So.2d 857(Fla.1987), this Court held that the evidence of Craig's thefts of cattle on several occasions was relevant to show his motive for killing Ebanks and Farmer:

The cattle thefts were not wholly independent of the murders but rather were an integral part of the entire factual context in which the charged crimes took place. *Smith v. State, 365* So.2d 704 (Fla. 1978), cert. denied, 444 U.S. 885, 100 S.Ct. 177, 62 L.Ed.2d 115 (1979). While evidence of motive is not necessary to a conviction, when it is available and would help the jury to understand the other evidence presented, it should not be kept from them merely because it reveals the commission of crimes not charged. The test for admissibility is not the necessity of evidence, but rather its relevancy. *Hall v. State,* 403 So.2d 1321 (Fla.1981); *Ruffin v. State,* 397 So.2d 277 (Fla.), cert. denied, 454 U.S. 882, 102 S.Ct. 368, 70 L.Ed.2d 194 (1981). We therefore hold that the evidence about the cattle thefts was relevant and was properly admitted.

Craig v. State, 510 So.2d 857, 864 (Fla. 1987)

More recently, in Henry v. State, 649 So.2d 1366, (Fla.

1994), this Court reviewed a similar claim and held:

> The facts in question relating to Eugene Christian's murder were inextricably intertwined with facts pertaining to Suzanne Henry's murder. To try to totally separate the facts of both murders would have been unwieldy and likely have led to confusion. See Henry, 574 So.2d at 70-71; Griffin v. State, 639 So.2d 966 (Fla.1994); Tumulty v. State, 489 So.2d 150 (Fla. 4th DCA), Aeviews denied, 496 So.2d 144 (Fla.1986). e d i n our opinion in Henry's first appeal, "[s]ome reference to the boy's killing may have been necessary to place the events in context, to describe adequately the investigation leading up to Henry's arrest and subsequent statements, and to account for the boy's absence as a witness." Henry, 574 So.2d at 75. We find that the evidence relating to Eugene Christian's whereabouts during and after his mother's murder, as well as the fact that Henry admitted killing Christian, was indeed necessary to establish the context of events and to describe the investigation leading up to Henry's arrest for Suzanne Henry's murder and the subsequent confession, The evidence was relevant to prove Henry's presence at the scene of the murder. The evidence concerning the briar bushes where Christian's body was found refuted Henry's claim that the cuts on his arms came from Suzanne Henry's attack with a knife. The act of removing the only person present in the house where Christian was killed also tended to prove guilty knowledge. Because the facts regarding Christian were inseparable crime evidence, we find that no error was made in their admission.
>
> Henry v. State, 649 So.2d 1366, (Fla. 1994) (emphasis added).

As this Court found in Henry, evidence of the attack on Jamie placed the events of the evening in context. Jamie's testimony related to his whereabouts during the murder as well as Coolen's state of mind at the time of the crime. Accordingly, this evidence was properly admitted.

Furthermore, in light of the evidence concerning Coolen's other questionable actions on the night of the crime, error if any, was harmless beyond a reasonable doubt.

ISSUE IV

WHETHER THE TRIAL COURT IMPROPERLY LIMITED APPELLANT'S CROSS-EXAMINATION OF BARBARA KELLER BY NOT ALLOWING QUESTIONING ABOUT THE NATURE OF UNRELATED CRIMINAL CHARGES.

Appellant's fourth claim is that he was impermissibly restricted in his cross-examination of state witness Barbara Caughman-Kellar by the court's ruling that he could not bring out the nature of the pending criminal charges against her. He contends that this error was prejudicial because the credibility of her testimony was essential to the state's case of premeditation. It is the state's position that the trial court properly limited the cross-examination.

The victim John Kellar was murdered by the defendant on November 7, 1993. In the ensuing days, his wife Barbara Caughman-Kellar gave several statements to the officers concerning the Kellar's murder on November 7, 1993. Several days later, after John Kellar's funeral, Barbara Caughman-Kellar had sexual contact with Kellar's fourteen year old son. She was subsequently charged with soliciting sexual activity, a third degree felony (T 6). At the time of the trial the case had been referred to the pretrial intervention program (T 5 - 7). The state represented to the court that Caughman-Kellar's statements to the police prior to the incident in question were consistent with the statements she gave during the deposition concerning the events surrounding the murder. Therefore, the state maintained that the evidence concerning the incident should be limited to the fact that there was a charge pending that had been referred to the pretrial intervention program and that the defense should not be allowed to inquire as to the facts

surrounding the incident. Defense counsel, on the other hand, maintained that the actual facts went to her credibility, her motive for testifying and as to the actual events that happened on the evening. Defense counsel maintained that Caughman-Kellar's sexual activities with her fourteen-year-old stepson (who was not present during the murder) reflects on the veracity of Coolen's statements that he and Barbara were playing word games prior to his attack on the victim. Counsel contended that Caughman-Kellar's sexual contact with Kellar's son gives credibility to the fact that she was fooling around on her husband and caused him to get mad at the defendant. (T 9) Counsel maintained that she since denied having any sexual contact with the defendant, the incident with the son would corroborate the fact that she does "this sort of thing." The court granted the motion in limine, noting that the contact with the fourteen-year-old was only being brought up to show that Caughman-Kellar had a propensity for promiscuity and that it was not relevant (T 10).

Subsequently, prior to cross-examination of Caughman-Kellar, the defense asked the court to revisit the issue as to whether they could cross-examine her regarding the incident on the night of the funeral (T 337). Relying on Patterson v. State, 501 So. 2d. 691 (Fla.1987), counsel claimed that the evidence of pending charges against a state witness in a criminal case is admissible for impeachment purposes even though they relate to a different offense. Additionally, he maintained that under the confrontation clause, he had the right to cross-examine her concerning those events. Counsel, nevertheless, conceded that Caughman-Kellar had already indicated that she would invoke the Fifth Amendment as to any of the details of the charge. (T 339) He claimed that if she invoked the Fifth Amendment that the defense should then be able to call witnesses as to the events that transpired. On rebuttal, the state distinguished Patterson,

noting that in Patterson the witness was the state's key witness in battery charges and that the conviction rested on her credibility. In the instant case, a conviction did not rest solely on Caughman-Kellar's testimony. Unlike Patterson, where the charges were actually still pending against the state's witness and, therefore, constituted evidence that he had a reason to testify for the state, Mrs. Kellar's charges had already been resolved by being referred to the pretrial-intervention program. Furthermore, her statements after the charges were filed were consistent with those made the evening of the incident. Therefore, she had no reason to testify falsely in favor of the state. Accordingly, the state maintained that the evidence was not relevant in that its probative value was substantially outweighed by the danger of undue prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence. The state further noted that Patterson does not state that all the facts in the underlying events are allowed to be brought out (T 343). The court responded:

> "I agree, but if it's consistent if her testimony is -- you can impeach her in any numbers of ways, but I don't believe that you can impeach a story that is consistent throughout. From the night that this happened to now by saying that now it can be impeached because she is under some pending criminal charge. That doesn't make sense to me. You know, to believe that, you would have to believe that she made the story up the night in question because she knew she was to involve herself in this five days later and the state would find out about it and file criminal charges. That just doesn't make sense. , . ,
>
> (T 345)

Having determined that the facts concerning the incident were inadmissible, the trial court then brought Caughman-Kellar into the courtroom and instructed her as follows:

> "Ma'am, we had a discussion with counsel, some legal argument regarding the incident and the effects of the incident after this particular incident with the fifteen-year-old stepchild.

> I have ruled that the defense attorney in his cross-Examination may bring out the fact that you were charged with a felony subsequent to this incident and that you are currently on PTI. He is not allowed to suggest what that felony is or is he allowed to get into the facts of those circumstances. Only the fact that at this present time you are on PTI. There are charges pending that will be dropped if you successfully complete it and that the charges that resulted in your PTI were after the events of this night in question. That they were not pending at that time. They did not occur before this incident. Do you understand that?"
>
> (T 348 - 49)

Mrs. Caughman-Kellar was then put on the witness stand and cross examined by defense counsel McDermott as follows:

> Q. Ms. Kellar, as I understand it, you have a current-subsequent to the incident with your husband you were charged with an incident. You are currently on a program called pre-trial intervention. You understand that if you complete that program the case against you would be dismissed.
>
> A. Yes.
>
> (T 350)

Now on appeal, Coolen contends that the trial court erred in limiting his cross-examination of the witness and that the restriction was a violation of his federal constitutional right as guaranteed by the confrontation clause of the Sixth Amendment. He maintains that in the instant case it cannot be doubted that the credibility of Barbara Caughman-Kellar was of "paramount importance" because she accused him of suddenly, attacking her husband for no reason whatsoever, which contradicted Coolen's claim that the word games between Caughman-Kellar and himself provoked John Kellar. Coolen argues that if the jury believed that Kellar was angry, they would be more inclined to accept that Coolen really thought Kellar had a weapon. Thus, he

maintains that the credibility of Barbara Caughman-Kellar's testimony as to whether she was flirting with Coolen was essential to establish premeditation.

It is the State's position that the trial court properly limited the cross-examination as any probative value of Caughman-Kellar's subsequent sexual assault was outweighed by the potential for prejudice or confusion of issues. Caughman-Kellar's sexual encounter with her stepson several days *after* Coolen stabbed her husband to death in no way reflects on her credibility. By the time she committed the offense everyone had already given their statements to the police and none of those statements were materially different from the testimony received at trial.

At trial, Barbara Caughman-Kellar testified (as she had previously stated) that after the fireworks all of them sat in the van and Coolen showed them the inside of the van. She testified that the van was very nice that it had a television and that Coolen wanted to show them movies, but they were all buzzed and didn't want to get into any movies. (T 328) She testified that while Debbie and John went into the house for Debbie to use the restroom and while they were in the apartment, Coolen put his hand down her shirt and she pushed him off. She claimed that after she shoved him off that he didn't say anything to her and that she did not see him again until the attack. (T 329). She stated that it was approximately five minutes after that when Debbie and John came back out to the van and that Coolen attacked John a couple of minutes later. (T 330)

Coolen did not testify at trial. The only evidence of Coolen's version of the events came through his confession to Deputy Mike Madden, the night of the murder (the same time Caughman-Kellar gave her statement). During this confession Coolen gave several conflicting versions of this event. In one of those versions he states; "We were screwing around our van, and we were going to smoke a bong or two, you know, fuck around a little. I was fucking around

with his old lady. I was just joshing. All of the sudden you know, he gets all fucking, cops a fucking attitude and everything, He started to come at me, and I just panicked. And I just pulled the knife out and stuck him and I got scared shitless and jumped in the van and fuck it, screw it, I even creased the van trying to get out of there and I just ran. " (R 716) Later in the interview with Deputy Madden, Coolen stated that when he and Debbie Morabito jumped in the van and took off that she was asking him what happened, Coolen stated that he told her; "That he come at me and I stabbed him, and we got to get the fuck out. Because I was playing fuck fuck with his old lady. Like she was playing fuck fuck with me earlier in the night. Okay. I mean, if you'll let me grab your tits if your an old, if you're a broad and if this that and the other thing, what would you think. So he got a little upset." (R 726) Coolen also stated that,"He [John] got a bad attitude because I was playing. You know I was playing word games with his old lady, whatever. You know, all just joking around and shit, and he, then he copped an attitude and I don't know what to think because I'm from out of state and I don't know anybody down here. And he already told me that he owned two guns, so, I'm not ready for anybody, I'm not (Inaudible) ready to get shot. " (R 718)

Therefore, even assuming Barbara was such a promiscuous person that she would have sex with her stepson and flirt with a stranger and even accepting Coolen's version of the events that John was angry because Coolen was playing "fuck fuck" with his [Kellar's] wife, it seems unlikely that John Kellar would have been less angry if Barbara Caughman-Kellar had participated in the flirtation or that Coolen wouldn't have perceived the threat to be as serious if Caughman-Kellar wasn't encouraging Coolen. The real issue is whether John was aware of what had transpired between the two and whether John's anger at finding out something that happened after he went

in the house would have allowed him the foresight to bring a gun out with him in case something had happened in his absence. Even Coolen admitted that he had not seen a gun all evening and that he did not see a gun in Kellar's hand. Coolen readily admitted that he only saw something silver and that Kellar had a silver beer can in his hand all evening. Coolen further admitted that he really didn't care if it was a gun or a bobby pin.

Further, if evidence of her part in the "flirtation" with Coolen was so critical to the defendant's case, it seems odd that defense counsel did not even attempt to ask Barbara Caughman-Kellar whether she had been flirting with Coolen. There was nothing in the Judge's ruling that kept counsel from asking these questions. Thus, if Coolen honestly believed that Caughman-Kellar's admission tbat she was flirting with Coolen was essential to rebut the inference of premeditation he could have simply ***asked*** her about it. It is inconceivable that he would believe this to be critical testimony and ***not*** even try to inquire on cross-examination about this issue of "paramount importance." (T 320-368)

Assuming, arguendo, that the trial court improperly limited the cross-examination, the limitation was harmless beyond a reasonable doubt. A review of the physical evidence as well as the testimony of Barbara and Jamie, clearly refutes Coolen's claim of self defense. No weapon was found at the scene of the crime and Coolen admitted that he never actually saw a weapon. Furthermore, there was no physical evidence that Kellar attacked Coolen; Coolen was not injured and *no one,* including Coolen, testified that Kellar attacked Coolen. Kellar had all of the injuries including a stab to the back, whereas Coolen came out of the attack essentially unharmed. Even in Coolen's statements to the police he never actually claimed that Kellar attacked him first. Rather, Coolen claimed that Kellar had "copped an attitude" and had something, Coolen didn't

care what, in his hand.[3] In light of the fact that Caughman Kellar's testimony was consistent with the statements that she gave immediately following the murder in question that she had already been sentenced to PTI and had nothing to gain by testifying in favor of the state, that her testimony was consistent with the other eyewitnesses' testimony as well as the physical evidence, and that counsel did not even attempt to inquire about her part in the "flirtation," clearly shows that the trial court's limitation of cross-examination was harmless beyond a reasonable doubt.

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[3] Coolen's statements on this point were also inconsistent. Coolen initially claimed that Kellar copped an attitude and started to come at him and then Coolen stabbed him. (R.716) Coolen then claimed he thought Kellar might have a gun because he had something silver in his hand. (R. 716) When confronted with the fact that no one else had seen anything in Kellar's hand, Coolen said that maybe he just overreacted because Kellar was getting an attitude. (R. 717) Later Coolen claimed he had some scratches on his hand from "trying to stop him from swinging at me because he cocked his hands a couple of times, getting ready to swing at me" and that's when he stabbed him. Coolen then went back to the "I saw a flash" story. (R. 720)

ISSUE V

WHETHER THE TRIAL COURT ERRED IN SUSTAINING THE STATE'S OBJECTION TO THE ADMISSION HEARSAY TESTIMONY REGARDING COOLEN'S MOTHER'S FAILURE TO GET HIM COUNSELING AS A CHILD.

Appellant contends that the trial court erred in sustaining a state objection to the admission of a double hearsay statement allegedly made by the appellant's mother. Appellant urges the proposition that while the state may be limited in its presentation of hearsay evidence in the penalty phase, the defendant should be not so hindered in his presentation of mitigating evidence. It is the state's position that admission or exclusion of evidence is a matter that lies within the trial court's discretion and appellant has failed to show an abuse of that discretion. Griffin v. State, 639 So.2d 966(Fla. 1994); Jent v.State, 408 So.2d 1024 (Fla.). cert. denied, 457 U.S. 1111 (1982).

In Griffin v. State, 639 So.2d 966(Fla.1994), this Honorable Court made it clear that a defendant's right to introduce hearsay testimony at the sentencing phase is not unlimited, stating:

> Griffin next argues that the trial court erred in restricting the introduction of nonstatutory mitigating evidence. During the penalty phase of the trial, Griffin sought to introduce statements made by him to several witnesses indicating his remorse. The State objected, arguing that the statements were self-serving hearsay, and the trial court sustained the objection. The trial court also prevented the defense from introducing a newspaper article written about Griffin which the defense argued was relevant to show Griffin' s character.
>
> We have held that the State may not bar relevant mitigating evidence from being presented and considered during the penalty phase of a capital trial. Hitchcock v. State, 578 So.2d 685, 689 (Fla.1990), vacated on other grounds, --- U.S. ----, 112 S.Ct. 3020, 120 L.Ed.2d 892 (1992). Further, a defendant in a capital

> case has an absolute right to introduce nonstatutory mitigating evidence at the penalty phase of his trial. Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). In Florida, remorse is a proper nonstatutory mitigating circumstance. Smalley v. State, 546 So.2d 720, 723 (Fla.1989). However, a defendant's right to introduce hearsay testimony at the sentencing phase is not unlimited. Hitchcock, 578 So.2d at 690. "While the rules of evidence have been relaxed somewhat for penalty proceedings they have not been rescinded . . . [There is no merit] to [the] claim that the state must abide by the rules but that defendants need not do so."
>
> In the instance case, Griffin was not precluded from presenting evidence of remorse. In fact, the judge expressly found remorse as a nonstatutory mitigating circumstance. The judge acted within his discretion to preclude Griffin from eliciting hearsay testimony from witnesses to the effect that Griffin had made self-serving statements that he was sorry for murdering Officer Martin.
>
> We find that the newspaper article was also properly excluded, At the time of trial, the individual who wrote the article, Mr. Randy Gage, was available and testified. At trial, Mr. Gage stated that he had written the article, and related his knowledge of Griffm's background, character, and culpability as contained in the article. Further, he was permitted to testify as to his opinion on alleged shortcomings in the "system," as reflected in the article. The trial judge did not err in precluding Griffin from reading the article to the jury.
>
> Id. at 97 1- 72. (Emphasis added)

The trial court, in the instant case, found this testimony to be not only hearsay but, double and triple hearsay and, therefore, inadmissible. (R. 1191) This holding was within the trial court's discretion and appellant has failed to show an abuse of that discretion.

Furthermore, as defense counsel had already questioned the aunt as to whether Coolen needed treatment and, if so, did he receive it, the only testimony excluded was Kathryn Coolen's multiple hearsay testimony that Coolen's mother declined counseling because the clinic wanted to include her in that counseling. (R. 1189) Accordingly, error, if any, was harmless beyond a

reasonable doubt.

ISSUE VI

WHETHER THE TRIAL COURT ERRED IN ALLOWING THE STATE TO PRESENT ALLEGEDLY IRRELEVANT EVIDENCE CONCERNING PRIOR VIOLENT FELONIES.

Appellant contends that the trial court erred in admitting the facts surrounding Coolen's prior violent felonies . It is the state's position that this claim is procedurally barred and without merit as the state properly presented the facts concerning the prior violent felonies.

First, as to the procedural bar, appellant concedes that evidence concerning the facts a prior violent felony is generally admissible, but contends that the prosecutor in the instant case went too far when he dwelt on Blysma's injuries by inquiring on redirect as to the extent of his injuries, his physical condition in 1987 and the level of improvement in 1994. (R 115 1-2) Although counsel had previously objected to the admission of what, he contended, 'appeared to be "victim impact" evidence,' no objection was raised to this line of questioning. Therefore, to the extent that Appellant is challenging the admission of this testimony the claim is procedurally barred as it was incumbent on counsel to renew any objection at the time the evidence was admitted. (R 1167). Accordingly, counsel's failure to renew an objection at the time of the admission of evidence waives this claim. Feller v. State, 637 So.2d 911 (Fla. 1994) (confrontation clause objection waived unless renewed at time evidence is admitted).

Even if this claim was properly preserved for appellate review, it is without merit. This Court has repeatedly held that "details of prior felony convictions involving the use or threat of violence to the victim are admissible in the penalty phase of a capital trial." Waterhouse v. State, 596 So.2d 1008 (Fla. 1992), citing, Rhodes v. State, 547 So.2d 1201, 1204 (Fla.1989);

Tompkins v. State, 502 So.2d 415,419 (Fla.1986), cert. denied, 483 U.S. 1033, 107 S.Ct. 3277, 97 L. Ed.2d 781 (1987). "Such testimony 'assists the jury in evaluating the character of the defendant and the circumstances of the crime so that the jury can make an informed recommendation as to the appropriate sentence.' Rhodes, 547 So.2d at 1204. hearsay testimony is admissible, provided that the defendant has a fair opportunity to rebut it. Sec. 921.141(1), Fla. Stat. (1989); *Tompkins, 502* So.2d at 419." Waterhouse v. State, 596 So.2d 1008 (Fla. 1992)

While appellant concedes that evidence of prior violent felonies is generally admissible, he contends, however, that in Rhodes v. State, 547 So. 2d 1201 at 1205, this Court drew a line excluding such evidence when it gives rise to a violation of defendant's confrontation rights or when the prejudicial value outweighs the probative value. He contends that this Court in Rhodes reversed in part because irrelevant evidence describing the "physical and emotional trauma and suffering" of the victim in the prior violent felony was submitted. Accordingly, he contends that the prosecutor's admission of evidence concerning the injury suffered by Michael Bylsma was improperly admitted.

Appellant's reliance on Rhodes is misplaced. The Rhodes Court in no way issued a blanket ruling that evidence of the physical or emotional trauma and suffering of the victim is always inadmissible. The concern in Rhodes was that a taped statement of the victim at the time of the crime that was emotionally charged and, essentially unrebuttable as the victim was not available to cross-examine, was a violation of a defendant's confrontation rights. This Court specifically held:

> While hearsay evidence may be admissible in penalty phase

proceedings, such evidence is admissible only if the defendant is accorded a fair opportunity to rebut any hearsay statements. Sec. *921.141(1), Fla. Stat.* (1985). The statements made by the Nevada victim came from a tape recording, not from a witness present in the courtroom. In *Engle* v. *State*, 438 So.2d 803, 814 (Fla. 1983), cert denied, 465 U.S. 1074, 104 S.Ct. 1430, 79 L.Ed.2d 753 (1984), we stated:

> The sixth amendment right of an accused to confront the witnesses against him is a fundamental right which is made obligatory on the states by the due process of law clause of the fourteenth amendment to the United States Constitution. *Pointer* v. *Texas, 380* U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965). The primary interest secured by, and the major reason underlying the confrontation clause, is the right of cross-examination. *Pointer* v. *Texas*. This right of confrontation protected by cross-examination is a right that has been applied to the sentencing process. *Specht v. Patterson,* [386 U.S. 605, *87* S.Ct. 1209, 18 L.Ed.2d 326 (1967)].

Obviously, Rhodes did not have the opportunity to confront and cross-examine this witness. By allowing the jury to hear the taped statement of the Nevada victim describing how the defendant tried to cut her throat with a knife and the emotional trauma suffered because of it, the trial court effectrvely demed Rhodes this fundamental right of confronting and cross-examining a witness against him. Under these circumstances if Rhodes wished to deny or explain this testimony, he was left with no choice but to take the witness stand himself. (FN5)

Although this Court has approved the introduction of testimony concerning the details of prior felony convictions involving violence during the penalty phase of a capital trial, *Tompkins; Stano,* the line must be drawn when that testimony is not relevant, gives rise to a violation of a defendant's confrontation rights, or the prejudicial value outweighs the probative value. Not only did the introduction of the tape recording deny Rhodes his right of cross-examination, but the testimony was irrelevant and highly prejudicial to Rhodes' case. The information presented to the jury did not directly relate to the crime for which Rhodes was on trial, but instead described the physical and emotional trauma and suffering of a victim of a totally collateral crime committed by

> the appellant. For these reasons, it was error for the trial court to allow the tape recording to be played before the jury.
>
> Rhodes v. State, 547 So.2d 1201, 1204 (Fla. 1989)

This Court in Rhodes did not state that a prior victim can *never* testify about the extent of his or her injuries resulting from a defendant's prior violence. To the contrary, this Court has consistently approved the admission of such evidence when the defendant is afforded the opportunity to rebut such evidence. Accord, Waterhouse v. State, 596 So.2d 1008 (Fla. 1992); Henry v. State, 649 So.2d 1366, 1369 (Fla. 1994). In Henry v. State, 649 So.2d 1366, 1369 (Fla. 1994); this Court considered the holding in Rhodes and approved the admission of evidence concerning a prior violent felony:

> [T]his Court has specifically held that details of prior felony convictions involving the use of violence to the victim are admissible in the penalty phase of the trial. *Waterhouse v. State*, 596 So.2d 1008 (Fla.), cert. denied --- U.S. ----, 113 S.Ct. 418, 121 L.Ed.2d 341 (1992). Fuller was an eyewitness to the altercation between Henry and Roddy which led up to Roddy's murder as well as to the murder itself. Such testimony is unlike the emotionally charged *hearsay* testimony made by a prior victim who was ***unavailable*** *for cross-examination* and found inadmissible in Rhodes. Therefore, we do not find that the trial court abused its discretion in admitting the transcript.
>
> Henry v. State, 649 So.2d 1366, 1369 (Fla. 1994).

This was not a case such as Rhodes, where the victim's trauma was presented to the jury by way of a taped statement, but, rather, Blysma personally testified and was subject to cross-examination by appellant, That appellant could not rebut Blysma's statement of injuries only reflect on the veracity of those statements and not on a denial of Coolen's confrontation rights.

Accordingly, as the defendant had the opportunity to confront the witness and rebut any erroneous evidence it was not error to admit such evidence.

Appellant also relies on this Court's decision in Trawick v. State, 473 So.2d 1235 (Fla. 1985) to support his claim that the admission of evidence concerning Blysma's injuries was error. Trawick is also readily distinguishable from the instant case. In that case, the state was allowed to present detailed testimony to the jury about the surviving victim's shooting, the injuries she received, and the pain she suffered in support of the heinous, atrocious, or cruel aggravating factor and *not* to establish the prior violent felony factor. This Court premised a finding of error on the fact that injuries suffered by the surviving victim were not relevant to question of whether the capital felony itself was especially heinous, atrocious, or cruel. Trawick v. State, 473 So.2d 1235 (Fla. 1985), citing, Halliwell v. State, 323 So.2d 557 (Fla.1975). The evidence in the instant case went exclusively to establish the prior violent felony aggravating factor and was properly admitted. Waterhouse v. State, 596 So.2d 1008 (Fla. 1992).

With regard to appellant's claim that certain evidence was impermissibly allowed to be presented to the jury by way of the certified copies of the Massachusetts judgment and sentence, the state also maintains the no error has been established. Coolen objected to the admission of these documents during the penalty phase. (R 1179 - 82). The state represented to the court that the Massachusetts judgment and sentence s include all information that relates to that charge. (R 1180). A review of the copies of the judgment and sentence from Massachusetts does not reveal any prejudicial evidence outside of the convictions for the prior violent felonies. While the documents clearly include extraneous information, such as continuances, none of this information was harmful to the defendant or constituted non-statutory aggravating circumstances.

Appellant also makes several reference to arguments by the prosecutor with regard to Michael Coolen's prior record. Although, he contends that Coolen was harmed by the prosecutor's misstatements, the record shows that in none of those cases did defense counsel find these statements to be so objectionable as to actually raise an objection. Accordingly, any claim based on these statements has been waived, Hitchcock v. State, 578 So.2d 685 (Fla. 1990); Berm -, 514 So. 2d 1095 (Fla. 1987).

The state maintains that the trial court properly admitted the challenged evidence. Assuming, *arguendo,* it was error to admit Blysma's testimony as to the extent of his injuries or the Massachusetts judgment and sentences in their entirety, the error was harmless beyond a reasonable doubt as the evidence was not so prejudicial as to effect the sentence imposed. The state clearly established the existence of numerous prior violent felonies and this aggravating factor was properly found,

ISSUE VII

WHETHER THE TRIAL COURT ERRED IN DENYING APPELLANT'S REQUEST FOR A PENALTY PHASE JURY INSTRUCTION ON LACK OF INTENT TO KILL THE VICTIM AS A MITIGATING INSTRUCTION.

As his seventh claim, appellant argues that the trial court erred in denying his request for an admittedly unclear penalty phase jury instruction to the effect that his lack of intent to kill the victim could be considered as mitigating. He contends that this was error because the sentencer cannot be precluded from considering this circumstance as mitigating. This Court has reviewed a similar claim in DeAngelo v. St&, 616 So.2d 440 (Fla. 1993) and found it to be without merit. Moreover, the state maintains that this claim has not been adequately preserved for appellate review.

In Street v. State, 636 So.2d 1297 (Fla. 1994), this Court found a challenge to the heinous, atrocious, or cruel instruction barred where the proposed instruction was also constitutionally insufficient.

> Street also claims that the jury received an erroneous instruction on the aggravating circumstance of heinous, atrocious, and cruel. The instruction given was the old standard jury instruction declared invalid in Espinosa v. Florida, --- U.S. ----, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992). Street only sought to have the definitions of heinous, atrocious, or cruel added to the instruction. Thus, the instruction as requested also would have been constitutionally deficient. Shell v. Mississippi, 498 U.S. 1, 111 S.Ct. 313, 112 L.Ed.2d 1 (1990). As a consequence, we find that Street did not preserve the issue for appeal. Roberts v. Singletary, 626 So.2d 168 (Fla.1993); Johnson v. Singletary, 612 So.2d 575, 577 (Fla.), cert. denied, --- U.S. ----, 113 S.Ct. 2049, 123 L.Ed.2d 667 (1993). In any event, even if the issue had been preserved, we conclude that

the error was harmless beyond a reasonable doubt.

Street v. State, 636 So.2d 1297 (Fla. 1994)

Apparently, the only instruction 'proposed' by counsel was during the charge conference, which is reflected in the record as follows:

> THE COURT: What about non-statutory?
>
> MR. ARMSTRONG: I've got family background, defendant's remorse, employment background, participation in self-help programs, alcoholism or drug use and dependency, the defendant's voluntary confession and/or cooperation with law enforcement authorities, the quality of being a caring relative, the defendant's lack of intent to kill the victim.
>
> MR. FREDERICO: I would start with the last one first. The defendant's lack of intent is an issue --
>
> THE COURT: That's been resolved by the jury,
>
> MR. FREDERICO: I was going to argue that's a linger [sic]- doubt type argument. He's trying to suggest that they didn't really meet their burden in the first part of the trial. I would ask that that be stricken.
>
> THE COURT: That one can't be given.
>
> (T 1258-59)

The record shows that counsel did not object to the court's ruling at that time nor did he object after the instructions were given to the jury. (T 1311) As counsel did not object to the court's failure to give the instruction nor suggest a proper instruction, this claim is waived.

Assuming, *arguendo*, that Appellant's claim was preserved it is without merit. In support of this claim Coolen relies on dicta in this Court's decision in Banda v. State, 536 So.2d 221 (Fla. 1988), where this Court noted that "a colorable claim exists that this murder was motivated out of self-defense, albeit in a form clearly insufficient to reduce the degree of the crime. " As noted

in Issue I, when this statement in Banda is read in context, it is apparent that this Court was reviewing a claim that evidence of self-defense was admissible to rebut a finding of cold, calculated, and premeditated and was not meant to create new degree of the crime itself or otherwise mitigate the crime when cold, calculated and premeditated has not been urged. Obviously, this Court in Banda did not provide that a denial of intent constitutes a mitigating factor or that it should be considered at all if the cold, calculated, and premeditated factor is not a consideration. As the aggravating factor of cold, calculated, and premeditated was not even urged by the state, evidence that would rebut it was not relevant and an instruction on lack of intent would merely confuse the jury.

It appears, however, that what appellant is ***really*** suggesting is that since the murder was ***not*** cold, calculated and premeditated, without a pretense of moral justification, that the jury could consider that as mitigating, As previously noted, a similar claim was considered and rejected by this Court in DeAngelo v. State, 616 So.2d 440 (Fla. 1993):

> Some of the evidence DeAngelo points to as mitigating was not mitigating at all. For example, he established, and the trial court found, that his victim was not a stranger or a child, that the killing was not for financial gain, that it did not create a great risk to many persons, and that it did not occur during the commission of another crime. Yet, neither evidence of who the victim "was not" nor the fact that the crime was not more aggravated reduces the moral culpability of the defendant or the seriousness of the crime which was committed. The same is true of the finding that DeAngelo was "not a drifter. " While this fact was established, we do not believe that it was mitigating in any meaningful sense. We reject DeAngelo's claim that the trial court failed to give these mitigators adequate weight.
>
> DeAngelo v. State, 616 So.2d 440 (Fla. 1993)

Additionally, even if this evidence was potentially mitigating, the failure to read the instruction was harmless. The jury heard argument that Coolen did not intend to kill John Kellar during both phases and obviously rejected the claim in the guilt phase. Even if the jury had believed that the killing was motivated by an "honest but unreasonable belief that he was acting in self-defense, a claim completely unsupported by the evidence, the jury was given the catchall instruction that they could consider any other aspect of the defendant's character. Accordingly, there was nothing that would preclude the jury from making this finding if they found it to be mitigating.

ISSUE VIII

WHETHER THE SENTENCING JUDGE ERRED IN REJECTING THE STATUTORY MITIGATING CIRCUMSTANCE SUBSTANTIALLY IMPAIRED CAPACITY OR, IN THE ALTERNATIVE, REJECTING INTOXICATION AS A NONSTATUTORY MITIGATING FACTOR.

Appellant contends that the trial court erred in rejecting his claim of intoxication as either the statutory mitigating circumstance of substantially impaired or a nonstatutory mitigating circumstance. It is the trial court's duty to decide if a mitigating factor has been established and when there is substantial evidence to support a trial court's rejection of mitigators, as there is in the instant case, that rejection must be upheld. Johnson v. State, 608 So. 2d 4, 12 (Fla. 1992), cert. denied, ___ U. S. ___, 124 L. Ed. 2d 273 (1993).

During the penalty phase in the instant case, the state presented evidence of the prior violent felony convictions. Coolen presented the testimony of his aunt, cousin and sister, as well as Debra Morabito, his girlfriend and a witness to the crime. He also presented the testimony of two friends with whom he had previously worked, Based on this testimony, coupled with the evidence presented during the guilt phase, Coolen claims the trial court should have found intoxication as either a statutory and nonstatutory mitigating circumstance.

The trial court's written order reflects that the court specifically considered Coolen's intoxication at the time of the murder and his history of substance abuse and rejected same, stating:

> Statutory Mitigating Circumstance 2. **The capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was**

substantially impaired. During the penalty phase of the trial there was testimony presented by several witnesses that the Defendant had a strict mother who would chain or tether him in the back yard when he was young. She would apparently show him very little affection and had a domineering personality. The Defendant's aunt, Kathleen Coolen, who testified to these acts, moved to Florida when the Defendant was about sixteen and only saw him occasionally after that. Her daughter, Judy O'Connor, is six years younger than the Defendant. She confirmed the relationship between the Defendant and his mother. The other witness who testified regarding this issue was the Defendant's girlfriend, Deborah Morabito. She suggested that the Defendant was an alcoholic and that he underwent a personality change when he had been drinking. There was no doubt that the Defendant had been drinking on the evening of the stabbing. This Court recognizes that a mental or emotional condition that does not rise to the level of insanity may be a mitigating circumstance in a death penalty proceeding.

In analyzing the evidence there appears to be a substantial conflict regarding the Defendants ability to appreciate the criminality of his conduct and to conform his conduct to the requirements of law. Although the Defendant's aunt testified to abusive treatment of the Defendant by his mother, there was also evidence from other relatives and even the same relatives regarding his close and loving family relationships as an adult. For instance the Defendant's sister, Michelle Garrity, who is ten years younger, described him as a "typical' brother. She said that he was good to her, used to babysit for her, bought her things and showed kindness toward her. In his adult relationship with her he continued to be kind, generous and considerate toward her children. He lived in her home for a short period and he was described as helpful, kind and very affectionate toward his nieces and nephews. This does not describe a person seriously affected by childhood experiences to the extent that he is unable to conform his conduct to the requirements of the law. It is worthy to note that subsequent to the trial Michelle Garrity was interviewed by Debra Tarbert, an investigator for the Department of Corrections regarding the preparation of a presentence investigation. In that interview she, like Debra Morabito at trial, offered the opinion that the Defendant's actions may have been prompted by alcohol or drug abuse. She also

suggested that the Defendant undergoes a personality change when he has been drinking. Those matters were not mentioned during her testimony, which was given through a videotaped deposition taken prior to trial. Other acquaintances who testified likewise failed to describe the Defendant as alcoholic or someone with a serious personality disorder. Bill Najjar, a childhood friend, characterized the Defendant as a "good kid." When the Defendant worked for him he was reliable and exhibited no violence. It seems unlikely that under the circumstances the witness would not have noticed any suggestion of alcoholism. Another friend, Matthew D'Ambrosio, worked with the Defendant for some time at the Department of Public Works. They became good friends and socialized together away form work also. Mr. D'Ambrosio describes the Defendant as ambitious. He never saw him argue with anyone or exhibit any violence. No signs of social maladjustment were observed at all by this witness, and he did not suggest that the Defendant was alcoholic. No expert testimony was produced at trial to suggest that the Defendant's substance abuse or family background had affected in some way his actions on the night of the murder. The Court will not engage in speculation regarding the existence of such a circumstance, absent consistent and credible evidence. In summary, no pattern of proof emerged from the testimony during the penalty phase to support this statutory mitigating circumstance.

The totality of the evidence and testimony at trial does not reasonably establish the existence of this circumstance by the greater weight of the evidence. The Court finds that this statutory mitigating circumstance does not exist.

Non-Statutory Mitigating Circumstance 5. **The Defendant's alcoholism or drug use and dependency.**

As previously stated herein, there is no doubt that on the night Michael Kellar was murdered, the Defendant had been drinking. This was testified to by his girlfriend Mrs. Morabito and the victim's wife. The question of whether the Defendant was intoxicated or even under the influence to the extent his judgement was substantially impaired is less certain. The evidence does not suggest that the Defendant was so intoxicated that he was incapable of rational thought and action. The jury, who was given the voluntary intoxication instruction, agreed and found that the Defendant's actions constituted premeditated murder. Immediately following the stabbing, the Defendant had the presence of mind to drive off with his girlfriend in her van. While attempting to escape

> from the area, he had the forethought to place the knife in his girlfriend's jacket and to remove his bloody shirt. When stopped by a deputy, he gave a false name. Although the deputy felt that the Defendant was impaired to the extent necessary to qualify for a driving under the influence charge, there was no testimony that the Defendant was drunk, or even highly intoxicated. As to the Defendant being an alcoholic, the only proof of that assertion is from his own self-serving statements and those of his girlfriend. No other family members, friends or acquaintances testified to this fact. Likewise, there was no testimony that the Defendant's prior violent acts were in any way connected to alcohol consumption, refuting the assertion of Mrs. Morabito that the Defendant only got violent when he was intoxicated. Finally, there was no expert opinion offered as to the Defendant's alcoholism or drug dependency or the effect of alcohol on his actions on the night of the murder. Although the Florida Supreme Court in ***Johnson v. State,*** 608 So.2d 4 (Fla. 1992), cert. denied 124 L. Ed.2d 273 (1994), has recognized that voluntary intoxication may be found to be a mitigator, such a finding is dependent on the facts of the particular case. It is apparent, from the facts recited in the discussion of this circumstance as well as others, that the Defendant engaged in a substantial amount of purposeful conduct on the night of the murder. He knew what he was doing, and he knew it was wrong.
>
> In summary, the testimony failed to reasonably establish by the greater weight of the evidence that the Defendant is an alcoholic or drug addict. Further, the testimony revealed that the Defendant was fully aware of the criminality of his conduct and was not so impaired by alcohol that he was significantly inhibited from conforming his conduct to the requirements of the law. The totality of the evidence fails to reasonably establish this non-statutory mitigating circumstance by the greater weight of the evidence. The Court finds that this mitigator does not exist.
>
> (R 1097)

Thus, it is clear from the sentencing order that the trial court considered Coolen's intoxication and, based on the facts of this case, found that it was refuted by the evidence. This finding was within the court's discretion.

Coolen's claims that the court's rejection of intoxication or substance abuse as a mitigating circumstance in the instant case was error. To support this claim, Coolen relies on this Court's decision in Nibert v. State, 574 So.2d 1059 (Fla.1990). In Nibert this Court found error when the trial judge rejected this mitigating factor. However, the evidence presented by Nibert, was substantially more than the insignificant evidence presented herein and, apparently, was not, as the evidence in the instant case was, refuted by the evidence. Nibert's evidence of intoxication was set forth by this Court as follows:

> Finally, Dr. Merin, an expert in the field of brain dysfunction, testified without equivocation that in his opinion, Nibert committed the murder under the influence of extreme mental or emotional disturbance, and that his capacity to control his behavior was substantially impaired. Dr. Merin supported those conclusions with a battery of psychological examinations conducted over a two-and-one-half-year period; with interviews of Nibert and his family; and with Dr. Merin' s examination of the record evidence in this case. Moreover, there was proof that Nibert has suffered from chronic and extreme alcohol abuse since his preteen years; that he was a nice person when sober but a completely different person when drunk; that he had been drinking heavily on the day of the murder; and that, consistent with the physical evidence at the scene, he was drinking when he attacked the victim. We have held that such evidence is relevant and supportive of the mitigating circumstances of extreme mental or emotional disturbance and substantial impairment of a defendant's capacity to control his behavior. See Ross v. State, 474 So.2d 1170, 1174 (Fla. 1985) (trial court erred in not considering in mitigation, among other things, that defendant had drinking problems and had been drinking when he attacked the victim), cf. Carter, 560 So.2d at 1168-69 (jury override vacated upon considering evidence of defendant's extreme emotional disturbance, impaired ability to appreciate criminality of his conduct, amenability to rehabilitation, and defendant "suffered the ill effects of chronic alcohol and drug abuse at the time of his offense"),
>
> In this instance, there was no competent, substantial evidence in the record to refute the mitigating evidence. Rather,

> the record shows that Nibert was a child-abused, chronic alcoholic who lacked substantial control over his behavior when he drank, and that he had been drinking heavily on the day of Snavely 's murder.
>
> Nibert v. State, 574 So.2d 1059 1063 (Fla. 1990)

(emphasis added).

In the instant case, there was competent, substantial evidence in the record to refute the mitigating evidence. Relying on this Court's decision in Johnson v. State, 608 So. 2d 4 (Fla. 1992), cert. denied, U. S. ___, 124 L. Ed. 2d 273 (1993), the trial court properly rejected this proposed mitigating circumstance. In Johnson v. State, 608 So. 2d 4 (Fla. 1992), cert. denied, ___ U. S. ___, 124 L. Ed. 2d 273 (1993), this Court reviewed a similar case and approved the court's rejection of the proposed evidence in mitigation, stating:

> There is evidence tending to show that the defendant was under the influence of drugs at the time of the alleged offenses. There is also evidence to show that the defendant had been a regular drug user. However, the evidence also shows that he clearly was not under extreme mental or emotional disturbance because of the use of these drugs based on observations of him after and before the murders. Based on his actions and physical events that took place during the course of the commission of these crimes, it is clear that the defendant knew and understood his actions and that his actions although they may have been enhanced by the use of drugs, were not such as to place him under the influence to the extent of causing any extreme mental or emotional disturbance. The Court specifically notes that while the doctors' testimony in this regard is to the contrary, the doctor's testimony was based primarily on his conversation with the defendant some nine months after the event took place.
>
> * * * * * *
>
> The defendant in this capital felony was able to appreciate the criminality of his conduct by his actions and by his burning or committing arson of the taxi cab after the murder of the taxi cab driver. Although the doctors have presented argument as to the defendant's use of drugs, it is this Court's finding that based on the

evidence the defendant had the capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law and they were not substantially impaired by the use of drugs.

The defendant's action in marching the victim, Darrell Beasley , to a field, taking his wallet and sifting out any incriminating evidence that might be found such as I.D. and photographs show the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law were not substantially impaired by the use of drugs.

Immediately after the capital felony was committed on Deputy Burnham, the defendant was alert enough to jump out of a ditch, distract the officers while attempting first degree murder on them. He was able to return fire and dodge their bullets escaping from their attempts to subdue him. This, together with the testimony and evidence that was presented as to the events leading to Deputy Burnham's death, shows that the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was not substantially impaired.

* * * * * *

The defendant is this case used drugs on a large scale whether he needed to or not. He apparently depended on drugs to attain a state of euphoria. However, this desire to feel good perhaps even reached a point where his inhibitions were or may have been lowered cannot be said to be a contributing factor in committing the crimes in this case, Euphoria notwithstanding, the defendant knew what he was doing and was able to distinguish right from wrong as well as the criminality of his conduct. It is the Court's opinion that there is no mitigating circumstances under this condition,

* * * * * *

While his childhood may not have been a happy one such does nothing in mitigation of his conduct in this case.

While voluntary intoxication or drug use might be a mitigator, whether it actually is depends upon the particular facts of a case. Here, the evidence showed less and less drug influence on

> Johnson's actions as the night's events progressed and support the trial court's findings. There was too much purposeful conduct for the court to have given any significant weight to Johnson's alleged drug intoxication, a self-imposed disability that the facts show not to have been a mitigator in this case.& Bruno v. State, 574 So.2d 76 (Fla.), cert. denied, --- U.S. ----, 112 S.Ct. 112, 116 L.Ed.2d 81 (1991). Therefore, we find no error in the trial court's consideration and treatment of Johnson's proposed mitigating evidence.
>
> Johnson v. State, 608 So. 2d 4, 12 (Fla. 1992), cert. denied, ___ u. s. ___, 124 L. Ed. 2d 273 (1993).

Coolen attempts to distinguish Johnson, claiming that Johnson's intoxication was deliberate in order to give him 'chemical courage' and that it subsided over a period of time. As the court below noted, the evidence in the instant case established that although Coolen had been drinking he was not so intoxicated that he was incapable of rationale thought and action, The court also noted that Coolen had the presence of mind to attempt an escape, hide incriminating evidence, and give a false name. This obviously is the same type of evidence the trial court in Johnson relied on to reject this mitigating factor. As there was competent, substantial evidence in the record to refute the mitigating evidence and this evidence was considered by the court and set forth in his order, no error has been shown.

Furthermore, even if the court should have found this evidence as mitigating, the failure to do so was harmless in the instant case. Cook v. State, 581 So. 2d 141 (Fla. 1991).

ISSUE IX

WHETHER THE SENTENCING JUDGE ERRED IN FAILING TO FIND THAT APPELLANT HAD PROVED A NONSTATUTORY MITIGATING CIRCUMSTANCE WITH EVIDENCE OF HIS FAMILY BACKGROUND AND BY FAILING TO GIVE WEIGHT TO TWO NONSTATUTORY MITIGATING FACTORS HE DID FIND.

Appellant also disagrees with the trial court's findings as to the other proposed mitigating circumstances. In general, this Court has held that a trial court must consider the proposed mitigators to decide if they have been established and if they are of a truly mitigating nature in each individual case. Campbell v. State, 571 So.2d 415 (Fla.1990). The court's duty to decide if mitigators have been established by competent, substantial evidence and to resolve conflicts in the evidence. Sireci v. State, 587 So.2d 450 (Fla.1991), cert. denied, --- U.S. ----, 112 S.Ct. 1500, 117 L.Ed.2d 639 (1992). When there is competent, substantial evidence to support a trial court's rejection of mitigators, that rejection will be upheld. Ponticelli v. State, 593 So.2d 483 (Fla. 1991); Shere v. State, 579 So.2d 86 (Fla.1991).

Here, the trial court fully considered and discussed the mitigators that Coolen argued applied to his committing these murders, As stated by the trial court:

> Non-Statutory Mitigating Circumstance 1. **The Defendant's family background.**
>
> Most of the facts concerning this circumstance have already been recited in the above section. As previously stated, this Court has considered the evidence produced at trial and through the presentence investigation regarding the Defendant's family background. Although there was some testimony as to matters in the Defendant's childhood that were characterized as abuse, it did not reasonably establish that his upbringing created a personality disorder that would explain or mitigate the conduct for which he was convicted in this case. Indeed, the testimony of family

members characterized the Defendant as a kind and considerate person. The Defendant was brought up in a large family with two brothers and three sisters. While not wealthy, they apparently were not particularly impoverished, and **his** other **siblings** seem to have developed **into** perfectly well adjusted, law-abiding citizens. There simply was no competent evidence to reasonably establish by the greater weight of the evidence that the Defendant's family history should be considered as a non-statutory mitigating circumstance in this case. The Court finds that this circumstance does not exist.

Non-Statutory Mitigating Circumstance **2. The Defendant's remorse.**

The Defendant has asked that the Court consider his remorse as a mitigating circumstance. The only evidence of remorse by the Defendant produced at trial was inferred from the fact that after his arrest the Defendant sobbed or cried briefly during his interview with Detective Madden when he was told that John Kellar had died. It is impossible to determine whether his emotion was prompted by concern for the victim or for himself. Certainly he showed no remorse at the time of the offense. Once Michael Kellar was down and dying, the Defendant fled the scene with Ms. Morabito and showed absolutely no concern for the welfare of the victim or his family. Although the Defendant had engaged in a completely unprovoked attack on Mr. Kellar, he did not give the first thought to helping him obtain aid in his defenseless and helpless condition, After the Defendant was arrested and transported back to the scene of the incident to be identified, he expressed no apparent concern about the act he had committed or the condition of the victim. During the interview with Detective Madden, the Defendant never inquired as to the condition of his victim and his display of emotion upon learning of Keller's death does not establish the existence of sincere remorse, This non-statutory mitigating circumstance was not reasonably established by the greater weight of the evidence. This Court finds that this circumstance does not exist.

Non-Statutory -Mitigating Circumstance **3. The Defendant's employment background.**

The Defendant was unemployed at the time of the offense, However, there was some testimony produced at trial to the effect that the Defendant, when employed, was a reliable and ambitious worker. As previously noted, both Bill Najjar and Matthew D' Ambrosio testified regarding work related experiences with the Defendant that were positive. According to

the presentence investigation, the Defendant completed high school but has no special skills or training. He reported his occupation as a truck driver, but was unable to provide the Department of Corrections investigator with the name of his last employer. His employment history has been affected by the fact that, according to his sister's statement in the presentence investigation, over the last twenty years he has been in prison more than he has been out. That would certainly have a detrimental effect on achieving any substantial career goals. It does not appear from the evidence and testimony that the Defendant's employment history was stable, nor does it reveal any notable accomplishments that could be considered as significant. This court finds that although the Defendant was at various times employed, this fact, and his performance on the job do not constitute mitigation in this case and the Court does not attribute any weight to this factor.

Non-statutory mitigating Circumstance **4. The Defendant's participation in self-help programs.**

Evidence was introduced during the penalty phase that the Defendant had participated in a narcotics anonymous program while incarcerated in the Pinellas County Jail, awaiting trial. He apparently also completed a self-esteem and reliance course offered in the jail, The fact of participation in these programs was offered as a potential non-statutory mitigating circumstance. It was specifically agreed that this circumstance would not be used to suggest that the Defendant would adjust well to life in prison. The presentence investigation report reflects that the Defendant reported that he was in a rehabilitation center in 1978, but walked out because the "rules were too strict."This casts some doubt on whether the Defendant's participation in counseling would have occurred at all if the Defendant had been free to walk away, as he did in 1978. Although the fact of his participation was reasonably established, this Court finds that it should be given no weight, considering the fact that the Defendant did not want to suggest that his participation reflected an ability to adjust to prison life.

Non-Statutory Mitigating Circumstance **5. The Defendant's alcoholism or drug use and dependency.**

As previously stated herein, there is no doubt that on the night Michael Kellar was murdered, the Defendant had been

drinking. This was testified to by his girlfriend Mrs. Morabito and the victim's wife. The question of whether the Defendant was intoxicated or even under the influence to the extent his judgement was substantially impaired is less certain. The evidence does not suggest that the Defendant was so intoxicated that he was incapable of rational thought and action. The jury, who was given the voluntary intoxication instruction, agreed and found that the Defendant's actions constituted premeditated murder. Immediately following the stabbing, the Defendant had the presence of mind to drive off with his girlfriend in her van. While attempting to escape from the area, he had the forethought to place the knife in his girlfriend jacket and to remove his bloody shirt. When stopped by a deputy, he gave a false name. Although the deputy felt that the Defendant was impaired to the extent necessary to qualify for a driving under the influence charge, there was no testimony that the Defendant was drunk, or even highly intoxicated. As to the Defendant being an alcoholic, the only proof of that assertion is from his own self-serving statements and those of his girlfriend. No other family members, friends or acquaintances testified to this fact. Likewise, there was no testimony that the Defendant's prior violent acts were in any way connected to alcohol consumption, refuting the assertion of Mrs. Morabito that the Defendant only got violent when he was intoxicated. Finally, there was no expert opinion offered as to the Defendant's alcoholism or drug dependency or the effect of alcohol on his actions on the night of the murder. Although the Florida Supreme *Court* in *Johnson v. State,* 608 So.2d 4 (Fla. 1992), cert. denied 124 L. Ed.2d 273 (1994), has recognized that voluntary intoxication may be found to be a mitigator, such a finding is dependent on the facts of the particular case . It is apparent, from the facts recited in the discussion of this circumstance as well as others, that the Defendant engaged in a substantial amount of purposeful conduct on the night of the murder. He knew what he was doing, and he knew it was wrong.

In summary, the testimony failed to reasonably establish by the greater weight of the evidence that the Defendant is an alcoholic or drug addict. Further, the testimony revealed that the Defendant was fully aware of the criminality of his conduct and was not so impaired by alcohol that he was significantly inhibited from conforming his conduct to the requirements of the law, The totality of the evidence fails to reasonably establish this non-statutory mitigating circumstance by the greater weight of the evidence. The Court finds that this mitigator does not exist.

Non-statutory Mitigating Circumstan e 6. **Defendant3 voluntary confession and/or cooperation with law enforcement authorities.**

The Defendant suggests that his interview with Detective Madden constituted cooperation with law enforcement and that his admission that he did in fact stab the victim represents a confession This Court disagrees. There was most certainly not any cooperation with law enforcement. In fact, the Defendant fled the scene after the crime. He hid the murder weapon in his girlfriend's jacket and removed the shirt he was wearing to hide the bloody evidence of his involvement. When stopped by a deputy, he gave a false name. Although he later claimed that this was done because he thought there were "traffic" warrants out for him from Massachusetts, it is more likely he was avoiding arrest for the stabbing or for other violent felony charges that he apparently still has pending in that state.

It is true that the Defendant did voluntary participate in an interview with Detective Madden after he was arrested. This so called confession was nothing more than a lame effort to avoid responsibility for his actions. The Defendant knew that there were witnesses to the attack, so he couldn't deny his involvement. He knew the victim was not armed, and he couldn't claim he was defending himself. His only refuge was to claim he didn't know what he was doing, i.e., he was intoxicated, or devise a scenario that would allow him to claim that he thought he was being attacked or threatened with attack. It is a testament to the Defendant's presence of mind that he was able to analyze his predicament and devise a position that would incorporate his only two possible defenses. The jury rejected both of them of course, but that does not diminish the fact that they still were the only conceivable defenses to a senseless and inexcusable act. The Defendant did not confess to Detective Madden, he tried to con him, He did not cooperate with law enforcement officers, he attempted to avoid and deceive them. This nonstatutory mitigating circumstance was not reasonably established by the greater weight of the evidence. This Court finds that this circumstance does not exist.

Non-Statutory Mitigating Circumstance 7. **caring relative. The (Defendant's) quality, of being a caring relative.**

The testimony supporting this circumstance came from the Defendant's sister, his aunt, and a cousin. All said that the

Defendant was a caring, considerate relative who loved children. Although there is no reason to believe that their testimony was not sincere, there does not appear to be any aspect of the Defendant's relationship with these family members that is significantly different than that which any person would normally expect to have. Although this circumstance was reasonably established, this Court accords it only slight or marginal weight.

Non-Statutory Mitigating Circumstance **8. Any other aspect of the Defendant's character or record, and any other circumstances of the offense.**

As is previously recited in this order, the Court has requested that the Defendant clarify or articulate any additional specific evidence or testimony that the Court should consider which is claimed to be mitigating in nature for the purposes of this requested circumstance, No other facts or arguments have been suggested by the Defendant, and the Court can find none. The Court finds that there is no other aspect of the Defendant's character or record, or any other circumstance of the offense that has been reasonably established by the greater weight of the evidence that should be considered as mitigating in this case. This non-statutory mitigating circumstance does not exist.

This Court has now considered and evaluated each statutory and non-statutory mitigating circumstance which the Defendant has requested. The Court has identified each such mitigating factor that has been reasonably established by the greater weight of the evidence The Court must now weigh the aggravating circumstance against those that are mitigating. The Court found one aggravating circumstance to exist beyond a reasonable doubt. The Court found that no statutory mitigating circumstances exist in this case. Three non-statutory mitigating circumstances were reasonably established: The Defendant's employment background, the Defendant's participation in self-help programs, and the (Defendant's) quality of being a caring relative, Of these three circumstances, the Court was unable to attribute any weight whatsoever to the first two, and only slight weight to the third. The Court finds that the aggravating circumstance outweighs the mitigating circumstances and that it. does so beyond a reasonable doubt. The jury likewise found this to be the case and recommended the imposition of the death penalty by a vote of eight to four. Ibis Court is required to give the jury recommendation great weight in determining the proper penalty to be imposed. In reaching its decision, the Court has considered the

> reasoning contained in such cases as *Songer v. State, 544* So.2d 1010 (Fla. 1989) and *Nibert v. State,* 574 So.2d 1059 (Fla. 1990), wherein the Florida Supreme Court addressed the proportionality of the death penalty where only one aggravating circumstance was found to exist. In such cases the Court recognizes that any significant substantial mitigation would require that the jury's recommendation be overridden. In this case however, the amount of mitigation is so slight that it is practically nonexistent. It is therefore ORDERED AND ADJUDGED THAT THE DEFENDANT, MICHAEL COOLEN BE AND HE IS HEREBY sentenced to death in the electric chair for the murder of MICHAEL KELLER.
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> (R1097-1099)

In Henry v. State, 649 So.2d 1366 (Fla. 1994) this Court rejected a similar argument that the trial judge failed to properly consider all the mitigating evidence presented by the defense, This Court noted that there was no indication that the judge failed to consider any nonstatutory mitigation brought to his attention by the defense. Furthermore, this Court affirmed the sentence stating that the minimal evidence Henry claimed as mitigating could hardly ameliorate the enormity of his guilt. Henry v. State, 649 So.2d 1366, (Fla. 1994), citing, Lucas v. State, 568 So.2d 18 (Fla.1990).

The mitigating factors Coolen urges that the court failed to properly consider are his family background, employment background, and participation in self-help programs. Such positive character traits are routinely accepted as having little mitigation value. See, Penry v. Lynaugh, 492 U.S. 302, 319, 109 S. Ct. 2934, 106 L. Ed. 2d 256 (1989) (evidence of defendant's background is relevant due to society's belief that defendants whose criminal acts are attributable to a disadvantaged background or mental problems "may be less culpable than defendants who have no such excuse"); Zeigler v. State, 580 So. 2d 127 (Fla.), cert. denied, ___ U.S. ___, 116 L. Ed 2d 340 (1991) (upholding sentence where trial court gave minimal weight

to defendant's community and church activities, noting they were no more than society expected).

The Court considered each of these factors and found each to be refuted by the evidence. This was within the trial court's discretion and appellant has failed to show an abuse of that discretion.

Furthermore, when these insignificant mitigating factors are considered in light of Coolen's prior violent history and in light of the brutal unprovoked attack committed against John Kellar, error, if any, was harmless beyond a reasonable doubt.

ISSUE x

WHETHER THE SENTENCE OF DEATH IS DISPROPORTIONATE.

Appellant's final claim is that the death penalty is not warranted in the instant case because there is only one aggravating circumstance balanced against significant mitigating circumstances that were rejected by the trial court, It is the state's contention that the sentence was properly imposed and should be affirmed by this Court.

First, proportionality review is not a recounting of aggravating versus mitigating but, rather, compares the case to similar defendants, facts and sentences. Tillman v. State, 591 So. 2d 167 (Fla. 1991). This Court must weigh the nature and quality of the factors as compared with other death cases. Kramer v. State, 619 So. 2d 274, 277 (Fla. 1993). Under circumstances similar to the instant case, this Honorable Court has upheld the imposition of the death penalty. Hannon v. State, 638 So.2d 39, 43 (Fla.1994) (victim at home when stabbed); Bowden v. State, 588 So. 2d 225 (Fla. 1991) (sentence affirmed where the evidence shows that the victim was brutally beaten to death with a rebar and the trial court imposed death after finding HAC and prior violent felony balanced against Bowden's abused childhood).

Although the court, in the instant case, refused to instruct the jury on the aggravating factor of heinous, atrocious, or cruel or consider it in the imposition of Coolen's sentence the state's position that the trial court erred in refusing to find this aggravating factor as the evidence in the instant case clearly supports a finding that this murder was especially heinous, atrocious or cruel

in that the victim was repeatedly and brutally stabbed by Coolen.[4] Pittman v. State, 646 So.2d 167, 173 (Fla.1994) (finding HAC where victims stabbed and bled to death), cert. denied. --- U.S. ----, 115 S.Ct. 1982, 131 L.Ed.2d 870 (1995). See, also, Haliburton v. State, 561 So.2d 248 (Fla. 1990); Nibert v. State, 508 So.2d 1 (Fla. 1987); Johnson v. State, 497 So.2d 863 (Fla. 1986); Wright v. State, 473 So.2d 1277 (Fla. 1985); Lusk v. State, 446 So.2d 1038 (Fla. 1984).

In any event the heinousness of this brutal stabbing should be considered as part of a proportionality review since such a review is not concerned with the number of aggravating and mitigating factors, but with comparing factually similar cases in order to insure that the death penalty is applied in a consistent manner throughout the state. Kramer, 619 So. 2d at 277; Tillman v. State, 591 So. 2d 167, 169 (Fla. 1991).

John Kellar's murder was the result a totally unprovoked attack by Michael Coolen, who has an extensive history of prior violent felonies, including multiple Stabs. Kellar was unarmed and in his own home. After inviting what he obviously thought were new friends into his home, he was stabbed multiple times in front of his wife and child for no better reason than Coolen did not like his attitude. Kellar was conscious throughout and, therefore, suffered the pain and apprehension of impending death. After being helped into his home by his wife, who had also been stabbed, and directing her to call 911, he collapsed to floor and ultimately bled to death. When compared to similar cases the sentence in this case should be affirmed.

Since this case factually involves more aggravation than the one factor found below, the appellant's reliance on "single aggravator" cases is not persuasive. However, even a comparison

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[4]In accordance with this Court's decision in Cannady v. State supra., the state is presenting this claim on cross-appeal in the instant case.

with those cases demonstrates the propriety of the sentence herein. In Duncan v. State, 619 So. 2d 279 (Fla.), cert. denied, ___ U.S. ___, 126 L. Ed. 2d 385 (1993), this Court rejected a proportionality claim where the trial court found one aggravating factor, and fifteen mitigating factors. Other death sentences have been affirmed, even when supported by only one aggravating factor. See, Windom v. State, 656 So. 2d 432 (Fla. 1995) (as to murders of two of the victims, the only aggravating factor was prior violent felony conviction, based on contemporaneous crimes; in mitigation, trial court found no significant criminal history, extreme mental disturbance, substantial domination of another person, helped in community, was good father, saved sister from drowning, saved another person from being shot over $20); Cardona v. State, 641 So. 2d 361 (Fla. 1994) (mitigation included extreme emotional disturbance, daily use of cocaine and substantial impairment therefrom, raped as a child, did not meet father until she was 12); Arango v. State, 411 So. 2d 172 (Fla. 1982) (defendant had no prior criminal history); Armstrong v. State, 399 So. 2d 953 (Fla. 1981) (defendant was 23 years old); LeDuc v. State, 365 So. 2d 149 (Fla. 1978), cert. denied, 444 U.S. 885 (1979); Douglas v. State, 328 So. 2d 18 (Fla. 1976); Gardner v. State, 313 So. 2d 675 (Fla. 1975).

It is true, as appellant notes, that there have been a number of cases in which the death penalty has been deemed disproportionate but in those cases there has usually been uncontroverted and substantial evidence of mental or emotional trauma that is not present in the instant case. Songer v. State, 544 So. 2d 1010 (Fla. 1989) (one weak aggravator and ten mitigating factors); DeAngelo v. State, 616 So. 2d 440 (Fla. 1993) (bilateral brain damage, hallucinations, psychotic disorders and mental illness); Klokoc v. State, 589 So. 2d 219 (Fla. 1919) (bipolar affective disorder, manic type with paranoid features and family history of suicide and alcoholism); White

v. State, 616 So. 2d 21 (Fla. 1993) (trial judge erred in finding CCP, crime committed while high on cocaine, extensive mental mitigation supported by expert testimony and found by the sentencing judge); Irizarry v. State, 496 So. 2d 822 (Fla. 1986) (override of jury life recommendation supported by testimony of psychologist of extreme emotional disturbance and impairment of capacity to appreciate the criminality of his conduct); Santos v. State, 591 So. 2d 160 (Fla. 1991) (proportionality not reached, trial court erred in rejecting without explanation unrebutted testimony of defense psychological experts). These cases cannot be equated with the instant case where there is no testimony by a mental health expert describing the existence of substantial mental health statutory and nonstatutory mitigation.

Appellant relies on Nibert v. State 574 So. 2d 1059 (Fla. 1990) to demonstrate that the death penalty is disproportionate. In Nibert there was undisputed testimony from a mental health expert (Dr. Merin) that Nibert committed the murder under the influence of extreme mental or emotional disturbance and that his capacity to control his behavior was substantially impaired. In that case there was no evidence that Nibert had a prior record of violent criminal behavior.

In the instant case, as the trial court found, Coolen has seven prior felony convictions involving the use or threat of violence. In two incidents involving the same victim Michael Bylsma, separated by seven years, the victim was first stabbed seven times in 1980 resulting in a three-month coma and permanent brain damage and in 1987 Coolen staked the victim for "unfinished business to settle" and tried to run him down with a car (R 1088). Coolen is far more dangerous to society than was Nibert. And unlike Nibert, Coolen did not offer the testimony of mental health experts to support his proffered mental health mitigator. Accordingly, even assuming that there was only one valid aggravating factor, this sentence is still proportionate as

there was no mitigating evidence of any substance.

Based on the foregoing the state urges this Honorable Court to find that the sentence imposed in the instant was properly imposed.

CONCJUSION

Based on the foregoing facts, arguments and citations of authority the decision of the lower court should be affirmed as to the judgment and sentence. The state also urges this Court to reverse the lower court's decision as to the heinous, atrocious, or cruel aggravating factor.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to: the Office of the Public Defender, Polk County Courthouse, P. 0. Box 9000, Drawer, P.D., Bar-tow, Florida 33830, this 23 day of February, 1996.

COUNSEL FOR APPELLEE/CROSS APPELLANT