IN THE SUPREME COURT OF FLORIDA

DWANE KIRKLAND,

Appellant,

v. CASE NO. 84,353

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTEENTH JUDICIAL CIRCUIT,
IN AND FOR CALHOUN COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

BARBARA J. YATES
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 293237

OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(904) 488-0600

COUNSEL FOR APPELLEE

TABLE OF CONTENTS

PAGE(S)

TABLE OF CITATIONS

FLORIDA STATUTES

STATEMENT OF THE CASE AND FACTS

This summary of the facts is offered to supplement and/or clarify Kirkland's factual statement.

On May 17, 1993 a grand jury indicted Kirkland for the first-degree murder of Coretta Martin, the sixteen-year-old daughter of the woman Kirkland lived with. (R 5).[1] In late June defense counsel moved for the appointment of experts to determine Kirkland's competency. (R 18). The trial court appointed a psychiatrist and a psychologist to examine Kirkland (R 21), and, after considering the matter, ordered Kirkland committed to a Department of Health and Rehabilitative Services (HRS) treatment facility on July 21, 1993. (R 24). On September 20, 1993 an HRS forensic administrator filed a competency evaluation with the trial court (R 30) that stated that Kirkland was competent to proceed. (R 35). On October 27, 1993 the trial court entered an order declaring Kirkland competent to stand trial. (R 40).

Early in March 1994 Kirkland filed notice of his intent to rely on insanity as a defense. (R 58). He also filed motions to terminate the administration of antipsychotic or psychotropic medications. (R 59, 62). On April 29, 1994 the trial court

---

1. "R" refers to the record in this case (one volume, 160 pages); "T" refers to the transcript (13 volumes, 1037 pages).

ordered that mellaril or prozac would be administered only on Kirkland's request. (R 71). At the state's request the court ordered that Kirkland submit to an examination by Dr. Lawrence Annis so that Annis could "render an opinion as to his sanity or insanity at the time of the alleged offense." (R 70).

After the jury was selected on June 28, 1994, Kirkland's trial began on June 29. (T 241). Among the state's witnesses was Thomas Wood, the medical examiner. Dr. Wood described the victim's injuries as follows: a large stellate laceration on the forehead with skull bone exposed, probably caused by blunt trauma (T 530), with bruises and abrasions under it (T 531); "a very deep, complex, irregular wound of the neck" that cut blood vessels, the voice box, windpipe, swallowing tube, and even the spine, composed of at least seven slashes (T 532); an irregular wound to the top of the head, probably caused by blunt trauma (T 533); four cuts on the back of the neck, the longest of which connected with the major slash wound at the front and sides of the neck (T 533-34); bruises on the foot and ankle (T 534); an abrasion-contusion on a forearm (T 534); lacerations on and above the left knee (T 534); an abrasion-contusion of the right thigh (T 534-35); and cuts on the inside and outside of the hands (T 528). He thought the wounds on the hands and forearm, and possibly the knee, were defensive wounds. (T 528-

29). Ward Schoob, a technician with the Florida Department of Law Enforcement (FDLE), testified that he retrieved State's Exhibit 1 from the bed, next to the victim's body. (T 400). The victim's mother identified that exhibit as a "cool stick" that the victim and her brother had found. (T 304, 298-99). Josephine Roman, an FDLE serologist, testified that she found blood consistent with the blood type of the victim on exhibit 1, a pipe walking cane wrapped with black electrical tape. (T 448).

After the state rested, Kirkland presented several witnesses in his attempt to establish the defense of insanity. Dr. Robert Head, chief psychiatrist for the Apalachee Community Mental Health Unit in 1985 (T 701), did not remember Kirkland (T 702, 712), but testified from Kirkland's records that Kirkland was diagnosed as suffering an acute psychosis when admitted to the unit on July 1, 1985 (T 716), but that he was much improved when released the following day. (T 718). Dr. Harry McClaren, a psychologist, interviewed Kirkland and several of his relatives and studied Kirkland's records and concluded that Kirkland "would probably meet the criteria for sanity despite his mental illness." (R 745). On the other hand, Dr. Ralph Walker, a psychiatrist, thought that Kirkland was insane at the time of the murder, April 13-14, 1993. (T 766). Dr. Walker stated that people with Kirkland's problems

could still know right from wrong (T 776), but that he thought Kirkland's ability in that regard was "seriously impaired at all times." (T 788). He then agreed that this assessment was not the legal definition of insanity. (T 788).

In rebuttal the victim's mother, with whom Kirkland had lived, testified that Kirkland took no medication while they lived together (T 805) and that he exhibited no bizarre or unusual behavior. (T 806). He also never did or said anything that indicated he did not know right from wrong. (T 807). Glen Kimbrell of the Blountstown Police Department transported Kirkland from Ft. Myers to Gadsden County on April 21, 1993. (T 817). In an untaped statement on May 13, 1993 Kirkland told Kimbrell, "You know that I'm guilty" (T 822) and "I knew that you knew I was guilty the first time you talked to me." (T 823). Larry Annis, a psychologist, testified that he found Kirkland mildly retarded (T 837), that Kirkland was sane when this offense was committed (T 841), and that he knew right from wrong. (T 843).

The jury convicted Kirkland of first-degree murder as charged on July 1, 1994. (T 963). At the penalty proceeding on July 5, 1994 the state presented certified copies of Kirkland's previous

convictions[2] and then rested on the evidence presented at the guilt phase. (T 974). Kirkland presented Dr. Angel Rivera, an osteopathic physician, who testified that Kirkland was HIV positive (T 979) after which Kirkland also rested on the evidence presented during the guilt phase. (T 982). After deliberating on the matter, the jury unanimously recommended that Kirkland be sentenced to death. (T 1014).

At sentencing on August 29, 1994 defense counsel questioned Kirkland's competency to proceed because Kirkland recently had been prescribed several medications that counsel had not been consulted about. (T 1021). After testimony from the prescribing doctor that he prescribed the medications because Kirkland "knew what was going on and he was able to tell me his complaints and understand that medications would help" (T 1031), the defense made no further mention of Kirkland's competency to proceed. The trial court then sentenced Kirkland to death. (T 1035).

In his findings of fact the judge stated that three aggravators had been established, i.e., prior conviction of violent felonies, committed during the attempt to commit a sexual battery, and heinous, atrocious, or cruel (HAC). (R 123). The court found that

---

2. The prior convictions were for aggravated assault and aggravated battery with a deadly weapon. (R 125).

two proposed statutory mitigators did not exist, but considered the evidence presented as nonstatutory mitigators. (R 126). The court also considered Kirkland's mild retardation, HIV positive status, childhood spinal meningitis, and automobile accidents as nonstatutory mitigators. (R 126-27). The court then held, however, that the aggravators outweighed the mitigators and that death was the appropriate sentence. (R 127).

SUMMARY OF ARGUMENT

Issue I: The state presented sufficient evidence of premeditation to survive Kirkland's motion for judgment of acquittal, and the trial court did not err in denying that motion.

Issue II: The state proved beyond a reasonable doubt that Kirkland committed this murder while attempting to commit sexual battery on the victim. The trial court properly found the felony-murder aggravator.

Issue III: The facts support the trial court's finding the murder was heinous, atrocious, or cruel.

Issue IV: The instruction on the heinous, atrocious, or cruel aggravator was constitutionally adequate.

Issue V: The trial court correctly instructed the jury on the weighing of aggravators and mitigators.

Issue VI: The record clearly demonstrates that Kirkland was competent to be sentenced.

Issue VII: When set beside truly comparable cases, it is obvious that Kirkland's death sentence is proportionate.

Issue VIII: The trial court weighed and analyzed all of the purported mitigating evidence and correctly followed the dictates of this Court's caselaw.

Issue IX: The prosecutor's comments on the complained-about evidence was invited by the defense. If any error occurred, it was harmless.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED IN DENYING KIRKLAND'S MOTION FOR A JUDGMENT OF ACQUITTAL.

Kirkland argues that the trial court should have granted his motion for a judgment of acquittal because the state did not prove the premeditation needed to support a charge of first-degree murder. There is no merit to this claim.

The indictment charged Kirkland with one count of first-degree murder pursuant to subsection 782.04(1)(a)(1), Florida Statutes. (R 5). After the state rested its case, Kirkland moved "for a judgment of acquittal and the main ground, the only ground, is sufficiency of the evidence to show premeditated murder." (T 688). Kirkland argued that the state's circumstantial evidence did not show the intent required for first-degree murder, even assuming that it proved that he committed the murder. (T 689). The prosecutor responded that Kirkland admitted being with the victim and that his version of the facts was contradicted by the medical examiner's testimony. (T 689). The prosecutor concluded that "the circumstances show enough for the jury if that evidence is believed to conclude, and he fled by the way, to conclude that he is the

killer." (T 690). The court then read the standard jury instruction on premeditation:

> "Killing with premeditation is killing after consciously deciding to do so. Decision must be present in the mind at the time of the killing. The law does not fix the exact period of time that must pass between the formation of the premeditated intent to kill and the killing. The period of time must be long enough to allow reflection by the Defendant. The premeditated intent to kill must be formed before the killing. The question of premeditation is a question of fact to be determined by you from the evidence. It will be sufficient proof of premeditation if the circumstances of the killing and the conduct of the accused convince you beyond a reasonable doubt of the existence of premeditation at the time of the killing."

(T 690-91). Based on his understanding of the instruction, the judge denied Kirkland's motion. (T 691).

When a defendant moves for a judgment of acquittal, he or she "admits not only the facts stated in the evidence adduced, but also admits every conclusion favorable to the adverse party that a jury might fairly and reasonably infer from the evidence." Lynch v. State, 293 So.2d 44, 45 (Fla. 1974). The court should "review the evidence to determine the presence or absence of competent evidence from which the jury could infer guilt to the exclusion of all other inferences." State v. Law, 559 So.2d 187, 189 (Fla. 1989)

(emphasis in original); Barwick v. State, 660 So.2d 685 (Fla. 1995); Atwater v. State, 626 So.2d 1325 (Fla. 1993), cert. denied, 114 S.Ct. 1578, 128 L.Ed.2d 1038 (1994). The trial court's review of the evidence must be "in the light most favorable to the state," Law, 559 So.2d at 189, and the state does not have to rebut every possible sequence of events - it only has to introduce evidence that is inconsistent with a defendant's version of what happened. Barwick; Atwater; Law. If the state does this, the case should be presented to the jury: "Where there is room for a difference of opinion between reasonable men as to the proof or facts from which an ultimate fact is sought to be established, or where there is room for such differences as to the inference which might be drawn from concealed facts, the Court should submit the case to the jury." Lynch, 293 So.2d at 45; Barwick.

The standard instruction embodies the case law as developed by this Court. As this Court has stated: "Premeditation is a fully formed conscious purpose to kill that may be formed in a moment and need only exist for such time as will allow the accused to be conscious of the nature of the act about to be committed and the probable result of that act." Spencer v. State, 645 So.2d 377, 381 (Fla. 1994). Kirkland's acts meet the test for premeditation. The medical examiner testified that the victim suffered blunt trauma

injuries to the back of her head, the top of her head, and her forehead. (T 527-28, 530-31). She died, however, from having her throat cut. (T 523-24). A metal walking cane was found next to the victim (T 418-19), and the blood on that cane was consistent with the victim's. (T 448). Kirkland told a police officer that he threw the knife away. (T 823). Thus, it is obvious that Kirkland used two weapons against the victim. The record does not show how long it took for Kirkland to beat and stab the victim to death. Premeditation, however, can be formed in only moments. Spencer; McCutchen v. State, 96 So.2d 152 (Fla. 1957). Kirkland had more than sufficient time to form the requisite premeditated intent, and the use of multiple weapons shows that he intended to kill the victim. The nature and extent of the victim's wounds also support the conclusion that Kirkland formed a premeditated decision to kill her. Spencer.

Kirkland's defense was insanity, and he now argues that his mental illness prevented him from forming the premeditated intent to kill the victim. Numerous mental health experts testified and, as Kirkland acknowledges, "the debate revolved around whether Kirkland knew right from wrong." (Initial brief at 33). Harry McClaren, a defense psychologist, testified that on the date of the crime Kirkland "probably met the criteria for sanity despite his

mental illness" (T 745) and, on cross-examination, stated that people with Kirkland's symptoms do not automatically not know the difference between right and wrong. (T 754). Ralph Walker, a defense psychiatrist, thought that Kirkland was insane at the time of the offense. (T 766). On cross-examination he stated that he thought Kirkland was anti-social (T 774) and that he had a defective conscience (T 795), but that such people can still know right from wrong. (T 796). Larry Annis, a prosecution psychologist, testified that Kirkland was sane at the time of the offense (T 841) and that he knew right from wrong. (T 843). On recross-examination Annis stated that Kirkland "does not suffer and has not suffered at least for a very, very long time conditions in which his mental impairment is such that he has not known what is right and what is wrong." (T 860). The victim's mother testified that she had never known Kirkland to do or say anything that indicated he did not know right from wrong. (T 807). Thus, it is apparent that the testimony was not all favorable to Kirkland or as favorable as he now contends.

Whether premeditation exists is a question of fact for the jury and can be established by circumstantial evidence, and "the circumstantial evidence rule does not require the jury to believe the defendant's version of the facts when the State has produced

conflicting evidence." Spencer, 645 So.2d at 381; Cochran v. State, 547 So.2d 928 (Fla. 1989). Moreover, as the appellee, the state "is entitled to a view of any conflicting evidence in the light most favorable to the jury's verdict." Cochran, 547 So.2d at 930.

The jury obviously did not believe, nor was it required to believe, Kirkland's insanity defense because it convicted him as charged. There was also sufficient evidence from which the jury could conclude that this murder was premeditated, i.e., the kind of weapons Kirkland used on the victim, the fact that Kirkland beat and then stabbed her, the number and location of the victim's wounds, and the testimony of several witnesses that Kirkland knew right from wrong. The state produced sufficient evidence to withstand the motion for judgment of acquittal and to support Kirkland's conviction of first-degree murder. Kirkland has failed to show that the court erred in denying his motion, and that denial, as well as the conviction, should be affirmed.

ISSUE II

WHETHER THE COURT ERRED IN FINDING THE MURDER WAS COMMITTED DURING AN ATTEMPTED SEXUAL BATTERY.

Kirkland argues that the facts do not support the trial court's finding in aggravation that the murder was committed during an attempted sexual battery. There is no merit to this claim.

The trial court instructed the jury on only two aggravators, prior conviction of a violent felony and HAC. (T 1008-09). In its proposed order, however, the state included committed during an attempted sexual battery as a third aggravator. (R 118-19). Kirkland did not object to the state's proposing that a third aggravator be found, and in its sentencing order the court found that the now-complained-about aggravator had been established:

> The murder was committed while the defendant was attempting to commit sexual battery upon Coretta Martin. Dwane Kirkland was not charged with sexual battery and was not tried and convicted of that crime. Regardless, the motive, purpose, and reason for the eventual death resulted or was associated with an attempt to [commit] sexual assault on Coretta. The evidence proves this beyond a reasonable doubt. Coretta was home alone (her mother and other family members were away for at least the evening until the next day); the defendant had discussed his sexual preoccupation over Coretta with friends on the same day of the murder; the murder was committed on the double bed in the bedroom; Coretta was dressed in bed clothes; her bra

> and night shirt was up around her neck and her bra was disconnected and also up around her neck; and she was naked from the neck down. The only link missing in this conclusive chain of circumstantial evidence is the defendant's matching sperm. The only reason for this missing link is his attempt failed.

(R 124-25).

These findings are supported by the record. Teresa Martin testified that the victim went back to Blountstown on Monday after spending the day at the hospital. (T 282). Cuyler Engram testified that, on the day of the murder, Kirkland told him he could have the victim sexually and seemed preoccupied with such thoughts about the victim. (T 373-74). The transcript of the videotape of the crime scene, a blood-spattered and smeared bedroom (T 548-49), describes the victim as "partially clothed" and "wearing a bra." (T 549). After the victim was uncovered, the narration describes her as "unclothed from the waist down." (T 551). Teresa Martin also testified that she had surgery after the birth of her daughter some five weeks before this killing and that, as a result, she could not engage in sexual intercourse. (T 305). Based on this evidence, finding that Kirkland attempted to rape the victim is a reasonable conclusion. Furthermore, the defense admitted that the killing "occurred as a consequence of and while engaged in the sexual battery." (T 867).

As this Court has previously held, where "'there is a legal basis to support finding an aggravating factor, we will not substitute our judgment for that of the trial court.'" Johnson v. State, 608 So.2d 4, 11 (Fla. 1992) (quoting Occhicone v. State, 570 So.2d 902, 905 (Fla. 1990), cert. denied, 111 S.Ct. 2067, 14 L.Ed.2d 471 (1991)), cert. denied, 113 S.Ct. 2366, 124 L.Ed.2d 273 (1993). The record supports finding this aggravator, and the trial court drew logical, permissible conclusions from the evidence. See Barwick v. State, 660 So.2d 685 (Fla. 1995); Sochor v. State, 619 So.2d 285 (Fla.), cert. denied, 114 S.Ct. 638, 126 L.Ed.2d 596 (1993). Kirkland has demonstrated no error, and this Court should affirm the trial court's finding that the murder was committed during an attempted sexual battery in aggravation. Even if this Court decides that this aggravator should be struck, however, no relief is warranted. Striking this aggravator would leave two others, and any error would be harmless. E.g., Barwick.

ISSUE III

WHETHER THE EVIDENCE SUPPORTS FINDING THE MURDER WAS HEINOUS, ATROCIOUS, OR CRUEL.

Kirkland argues that the evidence does not support finding HAC in aggravation. There is no merit to this issue.

The trial court made the following findings regarding this aggravator:

> The murder was [especially] atrocious, heinous or cruel. Heinous in that the murder was extremely wicked or shockingly evil; atrocious in that the murder was outrageously wicked and vile; or cruel in that the manner of the killing was designed to inflict a high degree of pain with utter indifference to the suffering of Coretta Martin.
>
> The crime scene, the small bedroom, reveals a violent struggle for life by Coretta Martin. Blood spatters abound on the walls and ceiling in the room, all the result of violent blows to the back and front of the head -- blows from a metal walking stick covered with tape. Dents appear on the bedroom walls and ceiling from the same metal object. The body also reveals the same struggle for life. The incise wound to the palms of the hand and the back of the hands of Coretta Martin are classified by the medical examiner as "defensive wounds", meaning Coretta Martin was attempting to ward off the attack, an attack by club and eventually by knife.
>
> The dead body of Coretta Martin further reveals the suffering and torture she experienced before the death. There were four incise wounds (caused by a cutting instrument) to the upper back of the head along with a large irregular contused laceration (made by a blunt object). On her forehead was a massive stellate (starlike) contused laceration caused by considerable force along with lesser contusions above the eyes. Finally the fatal wounds: seven to ten forceful slash wounds, seven to ten slash wounds from a sharp knife which was eventually dulled by the continued cutting, seven to ten slash wounds which began

> from the back of each side of the neck, seven to ten slashes that went all the way to the spinal column severing the windpipe, voice box and large neck veins. Coretta then bled to death.

(R 123-24). The record supports these findings.

The medical examiner described the injuries that the victim suffered, including a large stellate wound on the forehead with abrasions and contusions beneath it (T 527-28) that was likely caused by "blunt trauma with some very hard object striking the skin" (T 530-31); a "deep, complex, irregular wound of the neck" that cut blood vessels and through the victim's windpipe, voice box, swallowing tube, and into her cervical vertebra and was caused by at least seven separate slashes (T 532); and cuts, abrasions, and bruises on the victim's right thigh, left knee, left arm, both hands, and the back of her head and neck. (T 528). The medical examiner thought that the wounds on the hands and forearm, and possibly on the knee, were defensive wounds. (T 528-29). In his opinion the victim died from having her throat cut and either bled to death, drowned in her own blood, or suffocated from having her windpipe cut. (T 523-24). When asked his opinion of the weapon with which the victim's neck was slashed, the doctor described it as "probably a fairly large knife" with a cutting edge, "but it probably was not really sharp but it had a cutting blade and it

wasn't real sharp." (T 535). In closing argument defense counsel recounted Dr. Wood's testimony as "it was either a dull knife or it got dull." (T 914). There was no testimony as to how long the victim remained conscious or how long it took for her to die. There was also no evidence that the victim was involved with drugs or alcohol. (T 543).

In cross-examination Kirkland asked the victim's mother about a "cool stick," a metal walking cane that the victim and her brother found. (T 298-99). She identified the cane on redirect examination. (T 300). Ward Schoob, a technician with the Florida Department of Law Enforcement (FDLE), described finding the cane on the bed beside the victim. (T 400, 418-19). The transcript of the videotape of the crime scene notes the cane being on the bed. (T 616). Josephine Roman, an FDLE serologist, testified that blood on the cane was consistent with the victim's. (T 448). The videotape transcript describes blood and blood smears on the east and north walls of the bedroom and on the carpet (T 616), on the ceiling (T 617), and on the bed. (T 618). Schoob stated that "[t]here was blood over a good portion of the room." (T 424). The trial court's findings are somewhat melodramatic, but they are supported by the record.

Kirkland ignores the fact that HAC applies to almost all homicides where the victim was stabbed. E.g., State v. Breedlove, 655 So.2d 74 (Fla. 1995) (victim was stabbed to death in his home); Henry v. State, 649 So.2d 1366 (Fla. 1994) (Henry beat and stabbed his wife to death), cert. denied, 132 L.Ed.2d 839 (1995), and cases cited therein; Davis v. State, 648 So.2d 107 (Fla. 1994) (Davis stabbed to death an elderly woman during a residential burglary); Taylor v. State, 630 So.2d 1038 (Fla. 1993) (victim beaten about the head and face, then stabbed and strangled), cert. denied, 115 S.Ct. 107, 130 L.Ed.2d 54 (1994). Kirkland argues that he did not have the requisite intent to make this murder HAC. This argument, however, ignores the fact that the HAC aggravator applies to the nature of the killing and the surrounding circumstances. Gorby v. State, 630 So.2d 544 (Fla. 1993), cert. denied, 115 S.Ct. 99 (1994); Stano v. State, 460 So.2d 890 (Fla. 1984), cert. denied, 471 U.S. 1111, 105 S.Ct. 2347, 85 L.Ed.2d 863 (1985); Mason v. State, 438 So.2d 374 (Fla. 1983), cert. denied, 465 U.S. 1051, 104 S.Ct. 1330, 79 L.Ed.2d 725 (1984). "In determining whether the circumstance of heinous, atrocious or cruel applies, the mind set or mental anguish of the victim is an important factor." Harvey v. State, 529 So.2d 1083, 1087 (Fla. 1988), cert. denied, 489 U.S. 1040, 109 S.Ct. 1175, 103 L.Ed.2d 237 (1989); Phillips v. State,

476 So.2d 194 (Fla. 1985). As this Court has held many times, fear and emotional strain preceding a victim's death contribute to the heinous nature of that death. Sochor v. State, 619 So.2d 285 (Fla.), cert. denied, 114 S.Ct. 538, 126 L.Ed.2d 596 (1993); Preston v. State, 607 So.2d 404 (Fla. 1992), cert. denied, 113 S.Ct. 1619, 123 L.Ed.2d 178 (1993); Adams v. State, 412 So.2d 850 (Fla.), cert. denied, 459 U.S. 882, 103 S.Ct. 182, 74 L.Ed.2d 148 (1982).

The cases that Kirkland relies on are factually distinguishable. In both Rhodes v. State, 547 So.2d 1201 (Fla. 1989), and Herzog v. State, 439 So.2d 1372 (Fla. 1983), this Court held the HAC aggravator inapplicable due to the victims' semi-consciousness caused by alcohol or drug use. Jackson v. State, 451 So.2d 458 (Fla. 1984), is also distinguishable because the victim lost consciousness moments after being shot the first time. The other shooting cases are likewise distinguishable. In Robinson v. State, 574 So.2d 108 (Fla. 1991), the victim was told that she would not be killed and then died almost instantaneously from a single gunshot to the head. The victim in Lewis v. State, 377 So.2d 640 (Fla. 1979), died from several quick gunshots accompanied by no additional acts that set the killing apart from the norm of most murders. Similarly, in Amoros v. State, 531 So.2d 1256 (Fla.

1988), the victim and his killer were strangers and there were no additional acts beyond three quick gunshots. This Court found the murder in Porter v. State, 564 So.2d 1060 (Fla. 1990), cert. denied, 498 U.S. 1110, 111 S.Ct. 1024, 112 L.Ed.2d 1106 (1991), not to be HAC because it considered Porter's shooting his lover several times to be a crime of passion. In Shere v. State, 579 So.2d 86 (Fla. 1991), the victim had no defensive wounds, died from rapid, close-range gunshots, any one of four of the five shots was fatal, and there was no evidence that Shere meant to torture his victim.

The facts in the instant case, however, are vastly different from those in the cases Kirkland cites and fully support finding HAC in aggravation. Here, a sixteen-year-old young woman was viciously beaten and stabbed to death in her home by a thirty-year-old man who was, in essence, a member of her family. Kirkland argues that there was no evidence that the victim was conscious during the attack, but ignores her defensive wounds and the lack of significant alcohol or drug use. Moreover, the medical examiner did not testify that any of the victim's injuries were postmortem, so they must have been inflicted prior to death.

Any minor inaccuracies in the trial court's findings are inconsequential and harmless beyond a reasonable doubt. Therefore,

the finding that the HAC aggravator applies to this murder should be affirmed.

ISSUE IV

WHETHER THE HAC INSTRUCTION WAS ADEQUATE.

Kirkland acknowledges that the HAC instruction given to his jury was identical to that approved in Hall v. State, 614 So.2d 473 (Fla.), cert. denied, 114 S.Ct. 109, 126 L.Ed.2d 74 (1993). He argues, however, that the instruction is still constitutionally deficient. There is no merit to this issue.

At the penalty-phase charge conference defense counsel objected "to the definition of heinous and atrocious and cruel" in the standard HAC instruction, but did not propose alternative wording. (T 989). After discussion of the matter, the court stated: "Your objection for the record, as it relates to heinous, atrocious and cruel, is noted but since I don't have any other thing to replace or give, I will give the standard." (T 991-92). Thereafter, and without further objection, the court gave the jury the following instruction:

> The crime for which the Defendant is to be sentenced was especially heinous, atrocious or cruel. "Heinous" means extremely wicked or shockingly evil. "Atrocious" means outrageously wicked and vile. "Cruel" means designed to inflict a high degree of pain with

> utter indifference to, or even enjoyment of, the suffering of others.
>
> The kind of crime intended to be included as heinous, atrocious, or cruel is one accompanied by additional acts that show that the crime was conscienceless or pitiless and was unnecessarily torturous to the victim.

(T 1009).

As Kirkland admits, this Court found this instruction adequate in Hall. This Court has been consistent in following Hall. E.g., Finney v. State, 660 So.2d 674 (Fla. 1995); Johnson v. State, 660 So.2d 637 (Fla. 1995); Fennie v. State, 648 So.2d 95 (Fla. 1994), cert. denied, 115 S.Ct. 1120, 130 L.Ed.2d 1083 (1995); Walls v. State, 641 So.2d 381 (Fla. 1994), cert. denied, 115 S.Ct. 943, 130 L.Ed.2d 887 (1995); Taylor v. State, 630 So.2d 1038 (Fla. 1993), cert. denied, 115 S.Ct. 518, 130 L.Ed.2d 424 (1994). Kirkland has shown no reason that this Court should reconsider this issue, and the current claim should be denied as being without merit.

Even if this Court were to find error in the HAC instruction, it would be harmless because, as shown in issue III, supra, this murder was heinous, atrocious, or cruel under any definition of those terms.

ISSUE V

WHETHER THE PENALTY INSTRUCTIONS CREATED AN IMPROPER PRESUMPTION THAT A DEATH SENTENCE WAS MANDATORY.

Kirkland argues that the instructions on weighing aggravators and mitigators "created a reasonable likelihood that the jury would have believed that a death sentence was mandatory if mitigating factors did not outweigh aggravating factors." (Initial brief at 49). This issue has not been preserved for appeal and, even if cognizable, has no merit.

The court gave the jury the following standard instructions:

> If one or more aggravating circumstances are established, you should consider all the evidence tending to establish one or more mitigating circumstances and give that evidence such weight as you feel it should receive in reaching your conclusion as to the sentence that should be imposed.
>
> * * *
>
> The sentence that you recommend to the court must be based upon the facts as you find them from the evidence and the law. You should weigh the aggravating circumstances against the mitigating circumstances, and your advisory sentence must be based on these considerations.

(T 1010-11). Kirkland acknowledges that with these instructions "a jury could appropriately determine that even though aggravating circumstances outweigh mitigating circumstances, the mitigating

circumstances are still weighty enough to recommend a life sentence." (Initial brief at 50). The court also gave the jury the following standard instruction: "Should you find sufficient aggravating circumstances do exist, it will then be your duty to determine whether mitigating circumstances exist that outweigh the aggravating circumstances." (T 1009-10). Kirkland argues that this burden-shifting instruction could create a death-prone jury that thought it had to recommend the death penalty.

This burden-shift, presumption-of-death argument is procedurally barred, however, because Kirkland did not object to these instructions at trial. E.g., Hunter v. State, 660 So.2d 244 (Fla. 1995); Wournos v. State, 644 So.2d 1012 (Fla. 1994), cert. denied, 115 S.Ct. 1708, 131 L.Ed.2d 568 (1995); Fotopoulos v. State, 608 So.2d 784 (Fla. 1992), cert. denied, 113 S.Ct. 2377, 124 L.Ed.2d 282 (1993). Moreover, there is no merit to the argument. E.g., Johnson v. State, 660 So.2d 637 (Fla. 1995); Robinson v. State, 574 So.2d 108 (Fla.), cert. denied, 502 U.S. 841, 112 S.Ct. 131, 116 L.Ed.2d 99 (1991). Therefore, this claim should be denied.

ISSUE VI

WHETHER KIRKLAND WAS COMPETENT TO BE SENTENCED.

Kirkland argues that he was not competent to be sentenced when the trial court imposed the death sentence on August 29, 1994. There is no merit to this claim.

After receiving reports from two mental health professionals, the trial court entered an order committing Kirkland to the Florida State Hospital on July 21, 1993. (R 24). On September 13, 1993, the hospital reported to the court that Kirkland was competent to stand trial. (R 29). Thereafter, the court declared Kirkland competent to stand trial on October 27, 1993. (R 40).

Kirkland filed notice that he would rely on an insanity defense in March 1994. (R 58). At the end of April the court granted the defense request that Kirkland be administered mellaril and prozac only on his request. (R 71). No further question of Kirkland's competency was raised at his trial which began on June 28, 1994 and extended through July 5, when the jury recommended that he be sentenced to death. At trial, Dr. Larry Annis, a psychologist, testified that he examined Kirkland in late May or early June 1993 and found him competent to proceed. (R 833).

At sentencing on August 29, 1994 the court asked if there were any legal cause why sentencing should not proceed. (T 1020-21). Counsel responded that "it is our position by a written plea of insanity that this man is still incompetent to proceed and particularly incompetent to proceed to sentencing." (T 1021). Counsel further stated:

> I was told Friday, just last Friday, about the Defendant having been taken by a Jo Hilton from the Sheriff's Department and new medications prescribed for him, up to five medications I believe, through a Dr. Darmarajah. This was all without my knowledge. I knew nothing about it. I don't know who they are. I never hired them. I called that lady as a witness in the trial of the case but I don't know by what authority they were doing this. It is our position he is still incompetent to proceed for sentencing.

(T 1021). The prosecutor responded that Hilton and the doctor were employed by the state to oversee the mental health of prisoners. (T 1021-22). Counsel then stated: "It is just that I don't know where these people came from and just because they work for the State of Florida doesn't mean I submit to their getting ahold of my client and taking him in effect surreptitiously without knowledge to the lawyer and prescribing medication. I have nothing further, Judge." (T 1023).

The following exchange then occurred:

THE COURT: I'm concerned that maybe out of an abundance of precaution, this is a sentencing on a first degree murder case, and with this in the record and you know it is going up on appeal, just concerned about what the appellate court is going to do. I look at Mr. Kirkland and he appears to be about the same that he was when we spent the week down here trying him but I don't know if we might ought to just take a break and allow -- I think this is the first time you have learned of this.

MR. PAULK [prosecutor]: Yes, sir.

THE COURT: Take a break and to allow you to talk to these people and maybe take a little testimony as to exactly what happened where there will be something that the appellate court can look at since this issue has been raised.

MR. ADAMS [defense counsel]: Judge, I would appreciate that too and I advise the court as an officer of the court that I knew nothing about it until Friday when I checked.

MR. PAULK: Okay, I will check and see if I can locate Miss Hilton and that particular doctor.

THE COURT: Let me do this. What we'll do, we'll recess this sentencing hearing at this time and give you an opportunity [to] talk with the Sheriff and find out exactly what you have determined actually went on, then I will be here all day if it is necessary. Then y'all come back when you think you are ready and we might need to take some testimony just for the record to make sure exactly what happened. I don't want it to just be on the record with nothing else in there.

> MR. PAULK: I understand. What I will do is I will see if we can get ahold of the people. If I can get ahold of the people I will get them here to testify and we'll get back with the court.

(T 1024-25). After the recess, Dr. Darmarajah, a psychiatrist with Alternative Counseling Services in Panama City, testified telephonically that he saw Kirkland at Jo Hilton's request on August 4, 1994 and prescribed five medications[3] for him (T 1027-28) because Kirkland had been complaining of insomnia, auditory hallucinations, and depression. (T 1029). The doctor prescribed the medications to help with the anxiety, hallucinations, and depression (T 1030) so that Kirkland would be more mentally stable. (T 1031). The doctor stated that Kirkland "knew what was going on and he was able to tell me his complaints and understand that medications would help." (T 1031). On cross-examination the doctor stated that he did not know that Kirkland had an attorney and that he conferred with no other doctors in regard to Kirkland. (T 1031). When he examined him, Kirkland exhibited signs of mild to moderate psychosis (T 1032), and the doctor had no opinion as to

---

3. The doctor prescribed: Trazadone, an anti-depressant; alprazolam (xanax) for anxiety; thorazine, an anti-psychotic; prozac for depression; and trihexyphenidyl to counteract side effects of thorazine. (T 1029-30).

Kirkland's competency on August 29. (T 1033). After the doctor testified, the sentencing continued.

To be competent to stand trial, it must be shown that a defendant "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding - and whether he has a rational as well as factual understanding of the proceedings against him." Dusky v. United States, 362 U.S. 402, 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960); Hunter v. State, 660 So.2d 244 (Fla. 1995); Scott v. State, 420 So.2d 595 (Fla. 1982); Lane v. State, 388 So.2d 1022 (Fla. 1980). Even though a defendant has been determined to be competent, the defendant's condition must be monitored during trial to ensure that he or she does not become incompetent during the proceedings. Nowitzke v. State, 572 So.2d 1346 (Fla. 1990); Pridgen v. State, 531 So.2d 951 (Fla. 1988). However, "one need not be mentally healthy to be competent to stand trial." Muhammed v. State, 494 So.2d 969, 973 (Fla. 1986), cert. denied, 479 U.S. 1101, 107 S.Ct. 1332, 94 L.Ed.2d 183 (1987). It is the trial court's function to resolve factual disputes, and the court's decision will be upheld unless an abuse of discretion is demonstrated. Hunter; Ponticelli v. State, 593 So.2d 483 (Fla. 1991), vacated on other grounds, 113 S.Ct. 32, 121 L.Ed.2d 5 (1992); Carter v. State, 576 So.2d 1291 (Fla. 1989).

Kirkland argues that the court erred by not making a specific finding of competency to proceed. The testimony showed that the medications were prescribed at Kirkland's request several weeks before sentencing. After the doctor's testimony, it was obvious that there was no basis for anyone to believe that Kirkland was presently incompetent. Defense counsel made no further complaint and did not seek to halt the proceedings. Thus, there was a tacit agreement among all concerned that Kirkland was as competent to proceed on August 29 as he was during the trial.[4]

The trial court resolved counsel's question of why and by whom Kirkland was being medicated and counsel had no further complaints. Kirkland has demonstrated no abuse of discretion. This issue has no merit and should be denied.

---

4. No question of Kirkland's competency to proceed was raised at trial even though several experts commented on Kirkland's behavior while testifying. E.g., Robert Head stated that Kirkland "had his hands over his head and he's rocking" and that Kirkland might by psychotic then (T 705-06); Harry McClaren observed that Kirkland was covering his eyes and rocking (T 750); and Ralph Walker described Kirkland as not looking at people, withdrawn, covering his face, and rocking and opined that such behavior was consistent with psychotic withdrawal. (T 768).

ISSUE VII

WHETHER KIRKLAND'S DEATH SENTENCE IS PROPORTIONATE.

Kirkland argues that the state established only one aggravator while he established numerous mitigators and that, therefore, death is a disproportionate sentence. There is no merit to this argument.

Contrary to Kirkland's assumption, three, not one, aggravators exist: previous convictions of violent felonies, felony murder (attempted sexual battery), and HAC. His reliance on single-aggravator cases, therefore, is misplaced. E.g., Thompson v. State, 647 So.2d 824 (Fla. 1994); Sinclair v. State, 657 So.2d 1138 (Fla. 1995); Penn v. State, 574 So.2d 1079 (Fla. 1991); Nibert v. State, 574 So.2d 1059 (Fla. 1990); Smalley v. State, 546 So.2d 720 (Fla. 1989); DeAngelo v. State, 616 So.2d 440 (Fla. 1993). All of these cases had mitigators comparable to or greater than those established by Kirkland and fewer aggravators.

Kirkland cites only one multiple-aggravator case. Fitzpatrick v. State, 527 So.2d 809 (Fla. 1988), but Fitzpatrick is factually distinguishable. The state established five aggravators in Fitzpatrick which were to be balanced against three statutory mitigators, i.e., both mental mitigators and Fitzpatrick's age. In

its proportionality review this Court described Fitzpatrick as a "seriously emotionally disturbed manchild," 527 So.2d at 872, and noted that two strong aggravators, HAC and cold, calculated, and premeditated (CCP), were "conspicuously absent." Id. Here, on the other hand, HAC is conspicuously present, and Kirkland demonstrated the applicability of no statutory mitigators. As explained in issue VIII, infra, the trial court did not err in not considering the nonstatutory mitigators now advanced because Kirkland did not identify those items for the court. Moreover, the court found several nonstatutory mitigators and correctly concluded that they did not outweigh the three strong aggravators established in this case.

Cases other than those cited by Kirkland are more comparable to the instant case and show that Kirkland's death sentence is proportionate. For example, in Johnson v. State, 660 So.2d 637 (Fla. 1995), the defendant stabbed an elderly woman to death in her home. The trial court found three aggravators that are very similar to those in this case, i.e., prior violent felony, pecuniary gain, and HAC. The court also found fifteen nonstatutory mitigators but held that they did not outweigh the aggravators. This Court found Johnson's death sentence proportionate. In his second case Johnson stabbed a woman to death in front of her

residence. The trial court found the same three aggravators overwhelmed the same fifteen mitigators, and this Court again found the death sentence to be proportionate. Johnson v. State, 660 So.2d 648 (Fla. 1995).

Similarly, in Finney v. State, 660 So.2d 674 (Fla. 1995), the trial court found three aggravators (prior violent felony, pecuniary gain, and HAC) and five nonstatutory mitigators, and this Court found the death sentence proportionate. This Court also found the death sentence proportionate in Dailey v. State, 659 So.2d 246 (Fla. 1995), where Dailey stabbed, strangled, and drowned a fourteen-year-old girl where there were three aggravators - prior violent felony, felony murder (sexual battery), and HAC - and numerous nonstatutory mitigators. In Watson v. State, 651 So.2d 1159 (Fla. 1994), this Court upheld the death sentence where Watson stabbed a woman in her home, the state established three aggravators - prior violent felony, felony murder (robbery), and HAC - and the trial court properly evaluated the mitigating evidence. Castro v. State, 644 So.2d 987 (Fla. 1994), is another triple-aggravator case (prior violent felony, felony murder (robbery), HAC) where the victim was stabbed, and this Court found the death sentence warranted. In Taylor v. State, 630 So.2d 1038 (Fla. 1993), cert. denied, 115 S.Ct. 107, 130 L.Ed.2d 54 (1994),

the death penalty was affirmed where a woman was stabbed, beaten, and strangled where there were three aggravators, felony murder (burglary/sexual battery), pecuniary gain, HAC, and numerous nonstatutory mitigators. Tompkins v. State, 502 So.2d 415 (Fla. 1986), cert. denied, 483 U.S. 1033, 107 S.Ct. 3277, 97 L.Ed.2d 781 (1987), has the same three aggravators as the instant case, and the death penalty was held to be proportionate for the strangulation of Tompkins' girlfriend's fifteen-year-old daughter. Death has also been found to be proportionate in cases with only two aggravators where the victim was stabbed. E.g., Davis v. State, 648 So.2d 107 (Fla. 1994) (six nonstatutory mitigators did not outweigh the aggravators of felony murder (burglary) and HAC); Lemon v. State, 456 So.2d 885 (Fla. 1984) (mitigator of extreme disturbance was outweighed by HAC and prior violent felony aggravators), cert. denied, 469 U.S. 1230, 105 S.Ct. 1233, 84 L.Ed.2d 370 (1985).

This case has three strong aggravators and, as found by the trial court, mitigators worth little weight. When placed beside comparable cases, it is obvious that Kirkland's death penalty is proportionate. Kirkland has shown no impropriety in his death sentence and that sentence should be affirmed.

ISSUE VIII

WHETHER THE TRIAL COURT'S ORDER COMPLIES WITH CAMPBELL.

Kirkland argues that the trial court's sentencing order does not comply with Campbell v. State, 571 So.2d 415 (Fla. 1990), because it does not discuss all the possible items of nonstatutory mitigation. There is no merit to this claim.

In Campbell this Court stated that, in its sentencing order, a trial court "must expressly evaluate" each proposed mitigator and "must find as a mitigating circumstance each proposed factor that is mitigating in nature and has reasonably been established by the greater weight of the evidence." Id. at 419 (footnote omitted). The trial judge made the following findings in his sentencing order:

> The statutory mitigating circumstances at trial were:
>
> 1. The murder was committed while under the influence of extreme mental or emotional disturbance;
>
> 2. The defendant's capacity to appreciate the criminality of his act or to conform his conduct to the requirements of law was substantially impaired at the time of the murder.

Although argued by defendant, the evidence was clearly conflicting as to whether the defendant suffered from extreme mental or emotional disturbance or whether he was substantially incapable at the time of the crime, to conform his conduct to the law or to appreciate the criminality of his actions. In fact the evidence was insufficient to establish either.

It was, however, clear that the defendant suffered or suffers from a mental disturbance, either active or in remission; either a typical psychosis with prominent anti-social, paranoid personality traits or chronic undifferentiated schizophrenia with adjustment disorder and mixed emotional features. But the evidence is clear, before and after the murder, the defendant's actions were not unusual or bizarre. In fact his actions after the murder were goal-oriented (escape), logical (a plan to leave town) and intentionally devious (he made up a clever lie to get his employer to take him to Quincy). The evidence was equally clear from the mother of Coretta, the woman who lived with and slept with the defendant several years immediately before the killing, there was no evidence of a substantial or extreme mental disturbance. These two statutory mitigating circumstances do not exist. They should be considered as, and they are, non-statutory mitigating factors only and to that extent should be weighed against the aggravating factors.

Other Non-Statutory Mitigating Factors

There are four other aspects of the defendant's character or record which were presented as non-statutory mitigators:

1. The defendant is mildly retarded[.]

2. The defendant is positive for HIV.

3. The defendant had spinal meningitis when he was an infant.

4. The defendant was involved in several serious automobile accidents.

The evidence is unrebutted that these are true. Regardless, to what extent did the four categories above impact or influence the murder. To what extent does the fact that he has tested positive for HIV mitigate the heartless killing? None. To what extent does the fact that the defendant had meningitis mitigate the heartless killing? Only to the extent that this may account for the defendant's mild mental retardation should this be considered, and then only considered with mild retardation as a single mitigating factor. To what extent does mild retardation mitigate this heartless murder? Little. The defendant knew right from wrong. He admitted that to Captain Kimbrell. Additionally, the pre-sentence investigation reflects he has his GED. His life experiences are better than his IQ level reveals. The low level IQ cannot be discounted completely but when compared to his life skills this fact is not overwhelming. Lastly, to what extent does the automobile accidents impact on the heartless murder? Again, none. This may account or explain some of his mental abilities but should not be weighed singly and not in addition to his mental infirmities.

(R 125-27) (emphasis in original). Now, however, Kirkland complains that the trial court did not address "each of the items in his proportionality argument." (Initial brief at 62). Those items included in issue VII are: 1) mental retardation; 2) HIV

positive; 3) spinal meningitis; 4) car accidents; 5) mental illness; and 6) Kirkland's "foothold in humanity" (initial brief at 60), i.e., kindness toward and nurturing of children, charitable spirit, generosity, church attendance, bible study, being a father to Martin's son, and working to support Martin's family. As is readily apparent, the trial court expressly considered the first five items listed above.

This argument ignores this Court's admonition that, "[b]ecause nonstatutory mitigating evidence is so individualized, the defense must share the burden and identify for the court the specific nonstatutory mitigating circumstances it is attempting to establish." Lucas v. State, 568 So.2d 18, 24 (Fla. 1992). At the penalty phase the defense argued to the jury that Kirkland's concern for his sick baby (T 1004), his low IQ and retardation (T 1004-05), his mental illness (T 1005-07), and his HIV positive status should be considered in mitigation. (T 1007). The defense's sentencing memorandum urged the court to consider Kirkland's prior incompetence to stand trial (R 129-30), his mental illness, childhood meningitis, low IQ, and stress caused by the baby's illness in mitigation. (R 130). Just prior to imposing sentence the court asked defense counsel if there were "any other matters that you wish to present in mitigation on behalf of your

client?" (T 1033). Counsel responded: "Nothing, Your Honor." (T 1034).

Thus, except for Kirkland's concern for his infant daughter, which might fit within the alleged kindness toward and nurturing of children, it is obvious that the defense did not identify for the court any of the possible nonstatutory mitigators Kirkland now complains that the court did not consider. Because Kirkland did not ask the court to address these alleged mitigators, the court cannot be faulted for not doing so. Hodges v. State, 595 So.2d 929 (Fla.), vacated on other grounds, 113 S.Ct. 33, 121 L.Ed.2d 6 (1992), aff'd on remand, 619 So.2d 272 (Fla. 1993). As with the nonstatutory mitigators that the court considered, Kirkland's concern for the infant would merit little weight in light of Kirkland's brutal killing of that child's half-sister, who was still a child herself.

Even if the court should have considered the now-advanced additional nonstatutory mitigators of Kirkland's care for, nurturing, and support of Martin and her children, such mitigators would be worth little if any weight. The damage Kirkland did to that family by attempting to rape and then killing one of Martin's children cannot be considered nurturing conduct. Moreover, his actions show that his church attendance and bible study had no

positive effect on him. Any error in the court's not considering such things is harmless. Wuornos v. State, 644 So.2d 1000 (Fla. 1994), cert. denied, 115 S.Ct. 1705, 131 L.Ed.2d 566 (1995); Pietri v. State, 644 So.2d 1347 (Fla. 1994), cert. denied, 132 L.Ed.2d 836 (1995); Wickham v. State, 593 So.2d 191 (Fla. 1991), cert. denied, 112 S.Ct. 3003, 120 L.Ed.2d 878 (1992).

The decision on whether the facts establish a particular mitigator lies with the trial court and will not be reversed because an appellant or this Court reaches a different conclusion. Wyatt v. State, 641 So.2d 355 (Fla. 1994), cert. denied, 115 S.Ct. 1372, 131 L.Ed.2d 227 (1995); Preston v. State, 607 So.2d 404 (Fla. 1992), cert. denied, 113 S.Ct. 1619, 123 L.Ed.2d 178 (1993); Sireci v. State, 587 So.2d 450 (Fla. 1991), cert. denied, 112 S.Ct. 1500, 117 L.Ed.2d 639 (1992). Resolving conflicts in the evidence is the trial court's duty, and its resolution is final if supported by competent substantial evidence. Parker v. State, 641 So.2d 369 (Fla. 1994), cert. denied, 115 S.Ct. 944, 130 L.Ed.2d 888 (1995); Lucas v. State, 613 So.2d 408 (Fla. 1992), cert. denied, 114 S.Ct. 136, 126 L.Ed.2d 99 (1993); Johnson v. State, 608 So.2d 4 (Fla. 1992), cert. denied, 113 S.Ct. 2366, 124 L.Ed.2d 273 (1993); Sireci; Gunsby v. State, 574 So.2d 1085 (Fla.), cert. denied, 112 S.Ct. 136, 116 L.Ed.2d 103 (1991). As this Court has held

repeatedly, "the weight to be given a mitigator is left to the trial judge's discretion." Mann v. State, 603 So.2d 1141, 1144 (Fla. 1992); Jones v. State, 648 So.2d 669 (Fla. 1994), cert. denied, 132 L.Ed.2d 836 (1995); Ellis v. State, 622 So.2d 991 (Fla. 1993); Campbell; Swafford v. State, 533 So.2d 270 (Fla. 1988), cert. denied, 489 U.S. 1100, 109 S.Ct. 1578, 103 L.Ed.2d 944 (1989). Kirkland has shown no error in the trial court's consideration of the mitigating evidence, and that court's findings should be affirmed.

ISSUE IX

WHETHER THE COURT PROPERLY REFUSED TO GRANT A MISTRIAL BASED ON THE PROSECUTOR'S CLOSING ARGUMENT.

Kirkland argues that the prosecutor, in rebuttal closing argument, improperly commented on two taped statements that were not introduced into evidence and that the court erred by not granting a mistrial because of that comment. There is no merit to this argument.

The state introduced Kirkland's statement that was recorded on April 22, 1993 through Glen Kimbrell, an investigator with the Blountstown Police Department, who played the taped statement for the jury. (T 625 et seq.). On cross-examination Kirkland brought

out that Kimbrell had talked with Kirkland on April 21 and May 13, 1993, as well as on April 22. Defense counsel stated the following in closing argument:

> Mr. Kimbrell was brought back after Tom Wood and we saw the video and we heard the tape, one of the three tapes that he took. Now, I ask you all about, "Well, if I get after the cops, you are not going to get angry with me?" Glen Kimbrell has known me for years and we have our moments, we haven't had in this trial. The only thing I can say is you learned that there were three taped statements, one on the 21st of April, one on the 22nd, and one on the 13th of May, and you heard one of them. Just one on the 22nd. Now, in listening even to this tape you probably would conclude that well, Dwane Kirkland didn't sound crazy. He was able to talk to Mr. Kimbrell. And he didn't sound like some raving lunatic. And I want you to remember what he sounded like. I'm going to get to that when I talk about these nut doctors, all [in deference] to Dr. McLaren who is still sitting here, mental health experts, I think is a better phrase. So, we learned from Mr. Kimbrell about the tape of the 22nd. We also learned one interesting thing when he was re-called later on as a rebuttal witness, and this is the only bone I have to pick with him, couldn't let the whole trial go without picking on him in some other way or he would think I was slipping, he told you some things he related to Dwane Kirkland after he had turned the tape off on May 13th. So, the question was is there any way we can verify this and the answer obviously is, no. They didn't have a tape and Glen to the question when I looked at the report, you probably remember, I wanted to look at it to see what it said, and he was using it to refresh his

> recollection in the trial, and it was dated May 5, and yet he was relating what Dwane was supposed to have said on May 13th. And I think Glen may be telling you, "Well, it is a typographical or some kind of mistake" and that's all I tell you. Mistakes happen. Without being able to verify it with the tape like we heard, we have to consider the weight to be given that testimony. Just one other thing to consider in assessing what you think that testimony is worth.
>
> Now, I get to tell you that with that in mind at any time did you learn that, witnesses were asked, did Dwane Kirkland at any time admit that he killed that girl? And the answer was, no. You never heard of any admission he killed her to any of the mental health experts either. With that in mind, I'm telling you what I started out with, that did they prove this case beyond that reasonable doubt, to an abiding conviction, based on this evidence, the little bit of conflict or the lack of evidence.

(T 921-22). In rebuttal argument the prosecutor stated:

> Another thing I need to point out, Mr. Adams makes an issue out of, "Okay, there were three taped statements, one on the 21st, one on the 22nd, and one on the 13th." Yes, there were, we didn't try to hide that. And Mr. Adams tries to make an issue out of, "You didn't hear the other two tapes, that's a lack of evidence." Yeah, you didn't hear the other two tapes but what Mr. Adams didn't tell you is those tapes are equally accessible to him and could be played. Why is it. . .

(T 940). Kirkland objected to this as "a comment on the Defendant not testifying." (T 940). The court sustained the objection (T

940, 941), denied Kirkland's motion for a mistrial (T 941), and instructed the jury to "disregard Mr. Paulk's statement as to the tapes having been equally accessible." (T 942). Now, Kirkland claims that the prosecutor missed the point in rebuttal and should not have made any reference to the tapes not introduced into evidence.

This argument ignores the fact that, but for Kirkland's questioning and argument, the jury would never have known that any statements other than the April 22 one had been recorded. Moreover, the closing argument was an invitation to the jury to speculate about what was in those recorded statements that it did not hear. As such, the state correctly argued that Kirkland could have introduced the other statements. The rebuttal argument, therefore, was not error. Cf. Barwick v. State, 660 So.2d 685 (Fla. 1995) (prosecutor's comment was invited by the defense's attempt to create reasonable doubt in the jury).

Even if the prosecutor's statement is determined to be error, however, no relief is warranted. The complained-about comment comprises less than ten lines in more than fifty pages of argument. Kirkland has failed to show how this comment compromised his defense or contributed to his conviction. Any error, therefore, was harmless. E.g., Whitton v. State, 649 So.2d 861 (Fla. 1994);

Heath v. State, 648 So.2d 660 (Fla. 1994), cert. denied, 132 L.Ed.2d 860 (1995); Dailey v. State, 594 So.2d 254 (Fla. 1991).

CONCLUSION

Therfore, the state requests that this Court affirm Kirkland's conviction of first-degree murder and his sentence of death.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

Barbara J. Yates

BARBARA J. YATES
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 293237

OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(904) 488-0600

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing answer brief has been furnished by U.S. Mail to Mr. Steven L. Seliger, Esq., 16 North Adams Street, Quincy, Florida 32351, this 20th day of December, 1995.

Barbara J. Yates
Assistant Attorney General