IN THE SUPREME COURT OF FLORIDA

ROBERT T. HAWK,

Appellant,

vs. **CASE NO. 88,179**

STATE OF FLORIDA,

Appellee.

_____/

AMENDED ANSWER BRIEF OF THE APPELLEE

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

CANDANCE M SABELLA
Assistant Attorney General
Florida Bar No. 0445071
Westwood Center
2002 North Lois Avenue, Suite 700
Tampa, Florida 33607-2366
(813) 873-4739

COUNSEL FOR APPELLEE

TABLE OF CONTENTS

PAGE NO.:

TABLE OF CITATIONS

OTHER AUTHORITIES CITED

STATEMENT OF THE CASE AND FACTS

On February 19, 1993, appellant, Robert Hawk, was observed at approximately 11:15 a.m. by neighbor, Elizabeth Teas, to enter the residence of Matthew and Betty Gray, located on Dunbeath Street in Pinellas County, Florida. (T 532-35) Hawk remained in the residence for a short period of time. When he left he was carrying an unknown rigid object in his hand concealed by a towel. Ms. Teas testified that appellant then drove away in the Grays' car. (T 536) She thereafter alerted the Pinellas County Sheriff's Office and gave them a composite drawing of the intruder. Ms. Teas also testified that she had seen Hawk walking past the Grays' residence on Thursday, February 18, 1997 at approximately 2:00 or 3:00 p.m. (T 540)

Responding to Teas' call, Deputy John Jewett of the Pinellas County Sheriff's Office immediately noticed that the back door had pry marks, that a jalousie and window screen had been removed. Upon entering the Grays' home, Deputy Jewett discovered the body of Betty Gray lying on the floor of her bedroom. She had massive trauma to her head. There was dried blood on her face, her nightgown was pulled over her pubic area and her panties were at her feet, along with a Depends pad. (T 571) Deputy Jewett heard labored breathing. Upon further investigation Matthew Gray was located inside an adjacent bedroom. Though he was still alive, Mr. Gray had sustained massive trauma to the left side of his head. (T 571-72) Deputy Jewett testified that there was blood everywhere.

(T 572-73)

The medical examiner, Dr. Robert Davis, testified that Mrs. Gray was 60 years old, 5'5", 198 lbs. (T 811) The cause of death was massive skull fractures on the left side of her head and at the base of her skull. (T 823) Dr. Davis described the wounds as both crescent-shaped and similar in size and shape to those suffered by Matthew Gray. (T 814-19, 825) Dr. Davis opined that the murder weapon may have been a hammer. (T 819) The time of death would have been between 9:00 p.m. on Thursday, February 18 through 9:00 a.m. Friday, February 19. (T 810) Mrs. Gray had a bruise on her wrist which may have been a defensive wound. (T 815, 819-21) Dr. Davis testified that he did not know the sequence in which Mrs. Gray received the wounds, but that once she received the major wounds on the left side of her head, death would have been within seconds. (T 827) Nevertheless, Mrs. Gray had blood in her lungs which indicates she took a *minimum* of three to four breaths after being struck on the head; beyond that he could not say how many breaths she was able to take. (T 824)

Deputy Kenneth Kanoski testified that Mr. Gray was Bayflited to the Bayfront Medical Center. Mr. Gray's birth date was June 12, 1929. Mr. Gray was not able to communicate, all he could do was groan. (T 657) He was wearing a white T-shirt, a pair of white underwear and a pair of socks. (T 658) Mr. Gray survived his injuries. As a result of this attack, however, he sustained permanent paralysis to the right side of his body.

Blood spatter expert, Charles Edel, testified that because there was extensive blood spatter evidence on the walls and ceiling over the bed, that this evidence indicated different angles of attacks during the beating. Mr. Edel also testified that blood found on the floor suggests Mrs. Gray may have been beaten after she was dragged onto the floor, but that the primary attack took place as she lay on her bed. (T 987) There was a bloody left palm print on the floor, six to eight inches from Mrs. Gray's head. (T 984) There was also a bloody left shoe print on the bed sheet, which was preserved by technicians with the Pinellas County Sheriff's Office. (T 889)

Mr. Edel also testified the blood shedding on the wall established that Mr. Gray received two separate beatings because the blood had time to clot from the first beating to the second. (T 996, 999) Mr. Gray was also lying on the bed when he was attacked. (T 997) The blood on the walls also showed the swinging of the murder weapon by an assailant standing beside the victim. (T 998) In his opinion there was no question that the weapon used on both victims was a claw hammer. (T 1006)

The murder scene was processed by technicians with the Pinellas County Sheriff's Department who determined that the point of entry was through the kitchen window at the rear of the residence. (T 568-70) Latent fingerprints were also obtained from this forced point of entry to the Gray residence. (T 847, 857, 859-61) An extensive search of the interior of the dwelling

revealed pry marks to a desk located in the bedroom in which Matthew Gray was found. Of further significance was the fact that no U.S. currency, whatsoever, was found within the Gray residence. (T 602-03)

Within hours, the sheriff's department had developed Robert Hawk as a suspect, and subsequently received an anonymous tip that he had been seen during the early morning hours of February 19, 1993, with blood on his clothing while driving a new automobile. (T 731) Numerous friends of Hawk testified at trial that the appellant bragged to them about his new car and flashed a wad of money to them during the evening of February 18, 1993, and the early morning hours of February 19, 1993, saying that he got the money from shooting someone. (T 438-39, 452, 495) Hawk told Luis Valle that he had killed two people and had "blown them away." (T 425) Prior to the murder Hawk had told Christopher Clements and Deborah Thomas that he could "fuck up old people," that "old people are nothing." (T 394, 411)

Hawk was questioned by detectives with the sheriff's department during the early morning hours of February 20, 1993, and gave a taped statement to officers. (T 907) (Attached as Exhibit A.) Hawk first denied any knowledge of the killings and denied ever going into the victims' residence. After repeated questioning, however, Hawk later admitted that he went into the hallway area of the Gray residence where he observed Mrs. Gray's lifeless and bloodied body, then quickly panicked and drove off in

the victim's vehicle. He denied ever going into the bedroom or standing on the bed where Betty Gray's body was located at the time of the attack.

Hawk's fingerprints were found inside the victims' car, which had been located within blocks of both the Hawk and Gray residences. Sneakers taken from appellant's bedroom after his arrest were thereafter positively compared with the bloody shoe print found on the sheet covering the bed in Betty Gray's residence. A body hair recovered from Betty Gray's left eyelid was found to be microscopically indistinguishable from body hairs later taken from Robert Hawk at the Pinellas County Jail. (T 1047-49)

Appellant testified in his own behalf at trial and stated that while denying that he had any memory of the attack on either Mr. or Mrs. Gray, he remembered ingesting alcohol, marijuana and LSD in various amounts throughout the day preceding the attack. (T 1104-06) Hawk additionally accused both victims of sexually molesting him at their residence approximately seven years earlier yet never complained of such abuse to either his family or the police. (T 1100-1103)

On rebuttal the state produced Mr. Gray for the limited purpose of denying the alleged sexual abuse. (T 1138, 1161-62) Detective Madden and Nancy Freeland also testified that Hawk was not high on drugs at the time of his statement. (T 1156-57) Madden also testified that Hawk had never mentioned his claim of sexual abuse. (T 1140-41, 1144-46) Following argument of counsel,

the jury found appellant guilty of the First Degree Murder of Betty Gray and the Attempted First Degree Murder of Matthew Gray. (T 1266)

In the penalty phase the court heard from two defense witnesses. Appellant's mother described in great detail the nomadic lifestyle she had led while trying to raise her son, appellant, Robert Hawk. (T 1345-47) She indicated that the family often lived with relatives across the country and on numerous occasions sustained themselves only through support received from Public Assistance programs. (T 1347) The court learned that appellant contracted spinal meningitis at 3 years of age, and as a result lost approximately 95% of his hearing. (T 1353) Appellant's mother detailed Hawk's problems adjusting to his handicap and outlined a troubled youth plagued by poor scholastic performances and substance abuse problems. (T 1355, 1358-59) She also indicated that because appellant's natural father could not cope with Hawk's deafness, he abandoned the family while appellant was very young. This witness testified that she has since remarried and attempted to provide a more normal family setting together with appellant's stepfather. (T 1356-58)

The trial jury recommended that the trial court impose a sentence of death by a vote of 8-4.

SUMMARY OF THE ARGUMENT

Appellant contends that the trial court should have suppressed his statements to law enforcement. He maintains that since he is deaf, it is unclear whether he understood his rights and made a knowing and intelligent waiver of his right to remain silent and his right to counsel. It is the state's position that Hawk's constitutional rights were not violated and that the motion to suppress was properly denied.

Appellant contends that the state failed to present sufficient evidence to establish either first degree premeditated murder or the theft necessary to establish felony murder. The motion for judgment of acquittal was properly denied, as the evidence when taken in the light most favorable to the state, is sufficient to support either felony murder or first degree premeditated murder.

Appellant complains that the prosecutor made improper arguments and comments to the jury in voir dire, opening statements, witness examination, and in closing arguments in the penalty and guilt phases. He also contends that even if no single comment was reversible, the cumulative effect of all comments and arguments denied him a fair trial. It is the state's position that no prosecutorial misconduct constituting reversible or harmful error has been demonstrated and, therefore, relief should be denied. Esty v. State, 642 So.2d 1074 (Fla.), cert. denied, 514 U.S. 1027 (1995).

After appellant surprised the state by claiming for the first time that the Grays had sexually molested him as a child, the state on rebuttal called Matthew Gray to testify concerning the new allegations of sexual abuse. Appellant maintains on appeal that it was error to allow Matthew Gray to testify without conducting a competency hearing or questioning Gray to determine whether he knew the truth from a lie. This claim is barred and meritless.

Appellant's challenge to the heinous, atrocious or cruel jury instruction is procedurally barred. This Court has repeatedly stated that to preserve this claim for review, there must be an objection to the instruction and a proposed alternate instruction. While counsel objected to the instruction, he refused to give a proposed instruction stating that he was unable to fashion an instruction that would cure vagueness. Accordingly, he is not entitled to relief on this claim.

Appellant asserts that it was error for the court to instruct the jury on the aggravating factor of heinous, atrocious or cruel since the trial judge did not find this factor to exist. This claim was rejected by this Court in Bowden v. State, 588 So.2d 225 (Fla.), cert. denied, 503 U.S. 975 (1992).

Appellant also urges error based on the court's instruction to the jury that if by six or more votes the jury determined that Hawk should not be sentenced to death, their advisory recommendation should be "a sentence of life imprisonment upon Robert T. Hawk without possibility of parole for twenty-five years". (T 1402) He

contends that though his crime occurred before effective date of the newly enacted § 775.082 (1), Fla. Stat. (1995), that the trial court should have instructed the jury in accordance with the new law which eliminates the possibility of parole. This position is procedurally barred and an incorrect statement of the law.

The appellant next contends that the trial court erred in finding in aggravation that this crime was committed for pecuniary gain. According to the appellant, any financial gain that he obtained by taking the victims' car and money was incidental to the murder, and not the primary motive for it. Thus, he asserts, under Scull v. State, 533 So.2d 1137 (Fla.), cert. denied, 490 U.S. 1037 (1989), and Hill v. State, 549 So.2d 179 (Fla. 1989), the pecuniary gain factor was not applicable. It is the state's position that the trial court properly found the aggravating factor of pecuniary gain.

Appellant contends that death is a disproportionate punishment in this case. He contends that the pecuniary gain aggravating circumstance was improperly found, so only one valid aggravating factor remains. He also contends that even if both of the aggravators were properly found, the mitigating evidence is so compelling that a sentence of life should have been entered. It is the state's position that the sentence in the instant case is proportionate to similar cases and that the sentence was properly imposed based on the facts of this case.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION TO SUPPRESS STATEMENTS TO LAW ENFORCEMENT AS UNKNOWING AND INVOLUNTARY.

Appellant contends that his statements to law enforcement should have been suppressed. He maintains that since he is deaf, it is unclear whether he understood his rights and made a knowing and intelligent waiver of his right to remain silent and his right to counsel. It is the state's position that Hawk's constitutional rights were not violated and that the motion to suppress was properly denied.

Appellant's motion to suppress statements was the subject of an evidentiary hearing held on August 18, 1995, before the Honorable Charles Cope, Circuit Judge in and for the Sixth Judicial Circuit. (SR 3) The state presented the testimony of Detective Michael Madden and interpreter Nancy Freeland concerning the confession of Hawk. Hawk did not testify at the hearing and the defense did not present any other evidence in support of the motion. (SR 122)

Detective Madden testified that he and Nancy Freeland went to Hawk's residence and asked Hawk to come to the station voluntarily for questioning. Hawk agreed and was not placed under arrest at that time. Once they reached the station, Detective Madden gave Hawk Miranda warnings and he agreed to answer questions. The entire interview, which lasted 45 minutes, was audio taped and

transcribed. (Attached as Appendix A) Both Detective Madden and Nancy Freeland testified that Hawk understood his rights and that he did not have any problems understanding or answering questions. (SR 10,13-15, 46, 56) After hearing argument from counsel the trial court denied the motion finding that under the totality of evidence Hawk freely, intelligently and voluntarily waived his rights with a full knowledge of his constitutional rights. (SR 85)

The principle is well settled that a trial court's order denying a defendant's motion to suppress comes to the appellate court clothed with a presumption of correctness. Henry v. State, 586 So.2d 1033 (Fla. 1991); DeConingh v. State, 433 So.2d 501, 504 (Fla.), cert. denied, 465 U.S. 1005 (1984); Stone v. State, 378 So.2d 765, 769 (Fla.), cert. denied, 449 U.S. 986 (1980); McNamara v. State, 357 So.2d 410 (Fla. 1978). While the burden is upon the state to prove by a preponderance of evidence that the confession was freely and voluntarily given, a reviewing court must interpret the evidence in the light most favorable to sustaining the trial court's ruling. Johnson v. State, 22 Fla. L. Weekly S253 (Fla. May 8, 1997); Johnson v. State, 660 So.2d 637, 642 (Fla.), cert. denied, 116 S.Ct. 1550 (1996); Wuornos v. State, 644 So.2d 1012, 1019 (Fla.), cert. denied, 514 U.S. 1070 (1995); Balthazar v. State, 549 So.2d 661, 662 (Fla. 1989); DeConingh v. State, 433 So.2d 501, 503 (Fla.), cert. denied, 465 U.S. 1005 (1984). The trial court's ruling on this issue cannot be reversed unless it is clearly erroneous. The clearly erroneous standard applies with

"full force" where the trial court's determination turns upon live testimony as opposed to transcripts, depositions or other documents. Thompson v. State, 548 So.2d 198, 204, n. 5 (Fla.), cert. denied, 515 U.S. 1125 (1995). A review of Hawk's specific claims and the court's findings in denial of those claims reveals that Hawk has failed to show reversible error as the trial court's ruling is well supported by the record and the law.

Initially, appellant contends that his statement should have been suppressed because of his deafness and inherent language difficulties. In Balthazar v. State, 549 So.2d 661 (Fla. 1989), this Court made it clear that although the state's burden of proving voluntariness may be heavier when the defendant claims language difficulties, the standard of proof remains the same. This Court in Balthazar found no difference between a language factor and other factors which might impinge upon a knowledgeable and voluntary waiver, such as limited intelligence or education, mental retardation, or other emotional stress. Accordingly, this Court found no reason why a language barrier, more than any other, should trigger a different standard of proof. Id. at 662. See, also, Jesus v. State, 565 So.2d 1361, 1363 (Fla. 4DCA 1990)(Waiver was valid where Spanish-speaking translator communicated with the Spanish-speaking defendant, even if different dialects were involved).

In Rawls v. State, 596 So.2d 1255, 1257 (Fla. 2DCA), rev. denied, 602 So.2d 942 (Fla. 1992), the court upheld the admission

of a deaf defendant's confession. The court noted that Rawls' confession was freely, intelligently and voluntarily given, in light his ability to read lips well and carry on an intelligent conversation wherein he provided details of the crime that were not public knowledge. The court further noted that the officers read the Miranda warnings to him and he indicated that he understood them and was willing to talk to the officers. Further, after the interview, Rawls was arrested and subsequently signed a statement acknowledging that he had previously waived his Miranda rights.

Appellant suggests that Detective Madden's failure to videotape the interrogation or provide Hawk with a written Miranda waiver undermines the validity of the waiver. Hawk also takes several questions and answers from the taped statement out of context to support his argument that he did not understand or comprehend his Miranda rights. In order to find that a confession is involuntary within the means of the Fourteenth Amendment, there must first be a finding that there was coercive police action. Colorado v. Connelly, 479 U.S. 157 (1986). The test of determining whether there was police coercion is determined by reviewing the totality of the circumstances under which the confession was obtained. In the instant case, the trial court found under the totality of circumstances the state established by a preponderance of the evidence that the waiver was valid. A review of the entire taped statement, and not merely selected portions, clearly establishes by substantial competent evidence that the waiver was

valid.

Certainly, there is no requirement that interviews with deaf suspects must be videotaped as suggested by appellant. In fact, the only requirement imposed on law enforcement for interviewing deaf persons is set forth in § 901.245, Fla. Stat. (1995) which requires law enforcement to secure the services of a qualified interpreter in the event that a person who is deaf is arrested and taken into custody. The statute further provides that if the services of a qualified interpreter cannot be obtained, the arresting officer may interrogate or take a statement from such person provided such interrogation and the answers thereto are in writing.[1]

Detective Madden secured the assistance Nancy Freeland, an interpreter who had interpreted for Hawk on at least four prior occasions, for both the initial confrontation and the subsequent interview. (T 1155) Furthermore, Madden taped the entire interview, including the initial reading of rights, Madden's questions and Hawk's responses.

Appellant also urges that his inappropriate responses to Madden as he [Madden] was reading the Miranda card shows "that he

[1] Further, as the court held in Rawls even the failure to comply with § 901.245 is not per se reversible error. The Rawls court concluded, "We hold simply that when statements or admissions of a defendant are shown to be freely, intelligently and voluntarily given, with full knowledge of one's applicable constitutional rights, a failure to comply with the terms of § 901.245 will not of itself render such statements or admissions inadmissible." Rawls v. State, 596 So.2d at 1257.

had no idea what was going on in the interview." (Brief of Appellant, pg. 31)[2] Both Madden and Freeland testified that Hawk was not intoxicated and that he had no problems communicating. (T 1146, 1156-57) Madden also testified that suspects frequently ask questions prior to the completion of Miranda as to why they are being questioned and what the incident is about, but that he goes ahead and gets through with the Miranda prior to responding, so he doesn't forget to finish Miranda and get involved in the interview. (SR 13-14) A review of the tape/transcript supports Detective Madden's explanation. That appellant can now put a different spin on his responses in no way undermines the trial court's findings. This Court has repeatedly stated that the record should be reviewed in the light most favorable to the prevailing party. Johnson v. State, 22 Fla. L. Weekly S253 (Fla. May 8, 1997); Johnson v. State, 660 So.2d 637, 642 (Fla.), cert. denied, 116 S.Ct. 1550 (1996); Wuornos v. State, 644 So.2d 1012, 1019 (Fla.), cert. denied, 514 U.S. 1070 (1995); Balthazar v. State, 549 So.2d 661, 662 (Fla. 1989); DeConingh v. State, 433 So.2d 501, 503 (Fla.), cert. denied, 465 U.S. 1005 (1984).

Finally, appellant suggests that his responses were at least an equivocal request for counsel which required Madden to clarify Hawk's responses. First, this claim is procedurally barred as it

[2] Hawk's responses during cross examination at his trial were similarly unresponsive when the questions suggested his guilt. (T 1114-1117) Logically, he was not intoxicated or otherwise incompetent at trial.

was not presented to the court below. Furthermore, it is factually and legally without merit. On May 8, 1997, this Court issued it's opinion in State v. Owen, 22 Fla. L. Weekly S246a (Fla. May 8, 1997) adopting the holding of the United States Supreme Court in Davis v. United States, 512 U.S. 452 (1994), that neither Miranda nor its progeny require police officers to stop interrogation when a suspect in custody, who has made a knowing and voluntary waiver of his or her Miranda rights, thereafter makes an equivocal or ambiguous request for counsel. Thus, under Davis and Owen police are under no obligation to clarify any equivocal or ambiguous request and may continue the interrogation until the suspect makes a clear assertion of the right to counsel. Accordingly, even if Hawk's statements constituted an equivocal request for counsel, a proposition with which the state does not agree, Madden was under no obligation to discontinue the interrogation.

In the instant case, the state produced substantial evidence that the defendant did indeed understand his constitutional rights and that his decision to give a statement was knowing, voluntary and intelligent. A review of the transcript shows that Hawk understood his rights and that he agreed to answer Madden's questions.[3] Hawk appropriately responded to the questions and had

[3] At the hearing on the motion to suppress, the state also introduced evidence that a month prior to his arrest for the instant murder, that Hawk had previously entered a plea agreement and acknowledgment of rights for another charge. Accordingly, Miranda warnings were nothing new or baffling to Hawk when Madden read them to him.

the wherewithal to avoid placing himself near the scene of the crime and to adapt his story to the facts as presented by Madden. As both Madden and Freeland testified that Hawk understood his rights and no contrary evidence was presented by Hawk, the trial court properly denied the motion.

Based on the foregoing the state urges this Court to uphold the findings of the lower court.

ISSUE II

WHETHER THE TRIAL COURT ERRED IN DENYING THE DEFENSE MOTION FOR JUDGMENT OF ACQUITTAL OF FIRST DEGREE MURDER CLAIMING THAT THE STATE FAILED TO (1) PRESENT SUFFICIENT EVIDENCE OF PREMEDITATION, OR TO (2) PROVE HAWK KILLED MRS. GRAY DURING THE COMMISSION OF A THEFT, AS CHARGED IN THE INDICTMENT, TO PROVE FELONY MURDER.

Appellant contends that the state failed to present sufficient evidence to establish either first degree premeditated murder or felony murder. It is the state's position that the motion for judgment of acquittal was properly denied, as the evidence taken in the light most favorable to the state is sufficient to support either felony murder or first degree premeditated murder.

A. PREMEDITATION

Appellant initially attacks the sufficiency of the evidence to support premeditated murder. Although, appellant concedes that the state presented direct evidence that Hawk killed Betty Gray, he contends that the evidence was not sufficient to rebut his reasonable hypotheses of innocence as to premeditation. Meyers v. State, 22 Fla. L. Weekly S129 (Fla. 1997) (Because confessions are direct evidence, the circumstantial evidence standard does not apply where defendant confesses). The state does not agree that no direct evidence was presented on the question of premeditation. Nevertheless, this Court in Barwick v. State, 660 So.2d 685, 694-695 (Fla.), cert. denied, 116 S.Ct. 823 (1996), and in Orme v. State, 677 So.2d 258 (Fla.), cert. denied, 117 S.Ct. 742 (1997),

has made it clear that the question of whether the evidence fails to exclude all reasonable hypotheses of innocence is to be decided by the jury. On appeal, the only question to be resolved is whether, *taken in the light most favorable to the state,* there is competent substantial evidence to support the verdict. See, also, Crump v. State, 622 So.2d 963, 971 (Fla. 1993) (The question of whether evidence fails to exclude any reasonable hypothesis of innocence is for jury to determine, and if there is substantial, competent evidence to support jury verdict, verdict will not be reversed on appeal); Tibbs v. State, 397 So.2d 1120 (Fla.), aff'd, 457 U.S. 31, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982) (concern on appeal must be whether, after all conflicts in the evidence and all reasonable inferences therefrom have been resolved in favor of the verdict on appeal, there is substantial, competent evidence to support the verdict and judgment).

A motion for judgment of acquittal should not be granted unless there is no view of the evidence favorable to the state that can be sustained under the law. DeAngelo v. State, 616 So.2d 440 (Fla. 1993). The state is not required to rebut every conceivable version of events, but only to introduce evidence which is inconsistent with the defendant's theory of events. State v. Law, 559 So.2d 187, 189 (Fla. 1989).

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.), cert. denied, 456 U.S. 984, 102 S.Ct. 2257, 72 L.Ed.2d 862 (1982). Accord, Heiney v. State, 447 So.2d 210 (Fla.), cert. denied, 469 U.S. 920, 105 S.Ct. 303, 83 L.Ed.2d 237 (1984)." Penn v. State, 574 So.2d at 1081.

Even though intent is usually established by circumstantial evidence, our courts have consistently held that a motion for judgment of acquittal should rarely, if ever, be granted based on the state's failure to prove intent. King v. State, 545 So.2d 375 (Fla. 4DCA), rev. denied, 551 So.2d 462 (Fla. 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, 17 So.2d 93 (1944)."

Id. at 545 So.2d at 378.

Taken in the light most favorable to the state, the evidence in the instant case establishes that Hawk had the requisite intent to commit the first degree premeditated the murder of Betty Gray.

The evidence shows that three days before the murder Hawk bragged to his friends, Deborah Thomas and Christopher Clements, that he could "fuck up old people."[4] (T 394, 411) The medical examiner testified that Betty Gray sustained massive and numerous wounds to the left side of her head and to the base of her skull. He described the wounds as crescent-shaped, similar in size and shape to those suffered by her husband Matthew Gray and consistent with having been made by a hammer. Mrs. Gray's body was found lying on the floor next to her bed. Her underwear had been torn off and discarded on the floor between her legs. She was still clad in a nightgown which had been pulled up above her waist.

Blood spatter expert, Charles Edel, testified that because there was an extensive amount of blood on the walls and ceiling above the bed, he believed that a majority of the attack occurred

---

[4] Appellant quotes the threat he made three days prior to the murder as "beat up old people." (brief of appellant pg. 43) Deborah Thomas and Christopher Clements both testified that Hawk used his speech as well as finger-spelled the word fuck when stating he could "fuck up old people." He also said he could hit and beat them. (T 394, 401-02, 411)

while Mrs. Gray was lying in her bed. (T 987) Mr. Edel opined that the attack occurred from different angles during the beating and that Mrs. Gray was drug off the bed and onto the floor. There was further evidence that once she was on the floor that the attack continued. (T 987) Mrs. Gray suffered lethal and nonlethal wounds to her head and face, as well as a possible "defensive" wound to her arm.[5] Due to the massive nature of the wounds, the exact number of wounds could not be established. Finally, the evidence also shows that after having repeatedly bludgeoned the helpless victims, Hawk stole the Grays' car and went in search of friends so he could brag about his new car and the killing(s). Statements made to these friends in no way indicates that Hawk did not intend to murder Mrs. Gray or that he was too intoxicated or drugged to form the requisite intent.

Despite this overwhelming evidence of homicidal intent, Hawk contends that he may have only meant to knock Mrs. Gray out. Appellant also contends that Mr. Gray's failure to die after having received an identical attack, shows that he didn't intend for the attack on Mrs. Gray to be fatal. This argument suffers from several flaws. First, Hawk was convicted of the attempted murder of Mr. Gray, thus, the jury found that he intended to kill Mr. Gray also. (R 1635) Hawk's own confession shows that when he returned

[5] Because it is difficult to "age" a wound, he could not within a reasonable degree of medical certainty characterize this injury as a defensive wound.

the next day he was shocked when he saw the wounded Mr. Gray alive. (T 924-931) Apparently, he overcame his expressed fear of touching Mr. Gray upon finding him still alive, because the evidence shows that Mr. Gray was beaten with the hammer in two separate attacks. (T 996, 999)

Further, the repeated and brutal bludgeoning of the defenseless Mrs. Gray clearly rebuts any contention that the blows to the head were only intended to knock her out. Given the fact that Mrs. Gray was deaf and lying in bed when the unprovoked attack occurred, it is unreasonable to hypothesize that there was any reason to knock her out. She obviously was not interfering with the burglary at that point. Furthermore, a simple desire to render her unconscious would not result in the number and type of wounds she received, would not require her assailant to stand on her bed or to drag her body off the bed.

The jury, in the instant case, heard the testimony, could assess the witnesses' credibility and demeanor and found appellant guilty as charged. This Court should not "substitute its judgment for that of the trial court on questions of fact, likewise of the credibility of the witnesses, as well as the weight to be given to the evidence by the trial court." Goldfarb v. Robertson, 82 So.2d 504, 506 (Fla. 1955); Demps v. State, 462 So.2d 1074 (Fla. 1984).

There was clearly substantial, competent evidence presented to support a finding of premeditation on the facts of this case. In addition, even a lack of such evidence would not warrant relief

since there was sufficient evidence to support a first degree murder conviction under a felony murder theory, as discussed in the subissue that follows. Therefore, the appellant is not entitled to have his conviction reduced to second degree murder.

B. FELONY MURDER/THEFT

Appellant also attacks the sufficiency of the evidence to support a felony murder theory. The appellant maintains that there was no evidence that he intended to commit a theft when he entered the home and killed Mrs. Gray. He contends that he may have entered the house only for the stated purpose of "fucking up old people" and that he did not commit a theft. Further, although he concedes that he stole the Grays' car, he contends that it may have been an afterthought and that there is no evidence that the keys were inside the house.

This argument is erroneous in fact and law. Cf. Fowler v. State, 492 So.2d 1344 (Fla. 1DCA), rev. denied, 503 So.2d 328 (Fla. 1987); Parker v. State, 458 So.2d 750 (Fla.), cert. denied, 470 U.S. 1088 (1985). The evidence, in the instant case, shows that Hawk was seen walking by the victim's home on the afternoon before the break-in and murder and that he broke into the home while the deaf victims were in bed. (T 534) The evidence also shows that the desk was broken into, that there was no money in Mrs. Gray's purse or anywhere else in the house, that the formerly destitute Mr. Hawk suddenly had a "wad" of cash that he claimed to get from shooting some people and that he was driving the Grays' stolen vehicle. (T

452, 540, 603)

Appellant's contention that although he had in his possession a single key to the vehicle, there he is no evidence that the key was taken from the house, is simply wrong. (Brief of Appellant, pg. 45) In Hawk's initial confession he admitted that he got the key to the car from the Grays' key ring which was in the deadbolt to the front door. (T 927) Thus, even absent evidence that the formerly destitute Hawk suddenly had cash, the theft of the vehicle is sufficient to support the felony murder conviction.

More importantly, felony murder can be committed even if the intent to commit the underlying felony does not arise until after the killing has taken place. The suggestion that the theft of the vehicle was a mere afterthought and, therefore, cannot support felony murder relies on language from cases where the underlying felony is robbery and the concern is for the element of taking with force, violence, assault, or putting in fear. § 812.13, Fla. Stat. (1995). The state did not argue that a robbery occurred in the instant case. Thus, the only relevant question is whether he formed the intent to commit the theft during the same criminal episode. The evidence clearly establishes the existence of that intent.

Florida law requires the application of felony murder anytime that a homicide is "committed by a person engaged in the perpetration of, or in the attempt to perpetrate," any of twelve enumerated felonies. § 782.04(1)(a)2, Fla. Stat. (1995). Florida

courts have consistently interpreted this language to mean that the statute applies as long as the murder and the felony were part of the same criminal episode. See, Young v. State, 579 So.2d 721 (Fla.), cert. denied, ___ U.S. ___, 117 L.Ed.2d 438 (1992); Roberts v. State, 510 So.2d 885, 888 (Fla.), cert. denied, 485 U.S. 943 (1988). Since the purpose of the felony murder rule is to protect the public from inherently dangerous situations created by the commission of the felony, the rule should apply whenever a death occurs during the same criminal episode of a related felony. Parker v. State, 19 Fla. L. Weekly S322 (Fla. June 16, 1994).

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

Jackson v. State, 575 So.2d 181 (Fla. 1991), is illustrative. Jackson was convicted of robbing a hardware store in January, 1984, when the theft statute did not recognize violence used during the course of an escape as force that would support a robbery conviction. See, Royal v. State, 490 So.2d 44 (Fla. 1986). He was also convicted of first degree murder because the owner of the store was killed at the scene of the robbery. This Court rejected Jackson's argument that there was no armed robbery since the state failed to prove that the owner was not shot as part of the perpetrator's escape from the scene, finding that Jackson did not present any reasonable hypothesis of innocence when viewed in light of the totality of the evidence against him.

Even in those cases where the state urges that a robbery occurred, this Court has upheld felony murder convictions on similar facts. Recently, in Finney v. State, 660 So.2d 674, 680 (Fla.), cert. denied, 116 S.Ct. 823 (1996), this Court rejected Finney’s claim that there was insufficient evidence to support a conviction of first-degree felony murder with robbery as the underlying felony. Finney contended that the State failed to prove that a robbery occurred because it failed to show that the taking of the murder victim's VCR was anything but an afterthought. This Court held that there was no reasonable hypothesis other than that Finney killed Ms. Sutherland in order to take her property. “Ms. Sutherland's VCR was pawned by Finney within hours of the murder; her mother testified that her jewelry box was missing; and there

also was testimony that Ms. Sutherland's bedroom was ransacked and the contents of her purse was dumped on the floor." Finney at 680. Holding that the State is not required to rebut every possible hypothesis that can be inferred from the evidence; it need only present evidence that is inconsistent with the defendant's version of events, this Court found that there was sufficient evidence to support the convictions. Cf. Jones v. State, 652 So.2d 346 (Fla.), cert. denied, 116 S.Ct. 202 (1995); Finney at 680.

Nevertheless, even where there are conflicts in testimony or the theories of the case, the jury has the prerogative to resolve those conflicts in favor of the state, as it apparently did. Riechmann v. State, 581 So.2d 133 (Fla.), cert. denied, 506 U.S. 952 (1992). Bedford v. State, 589 So.2d 245 (Fla.) (the circumstantial evidence rule does not require that jury to believe the defense's version of the facts when the state has produced conflicting evidence), cert. denied, 503 U.S. 1009 (1992). Accordingly, as there was substantial, competent evidence to support the jury's verdict, the trial court correctly denied the motion for judgment of acquittal. Holton v. State, 573 So.2d 284 (Fla.), cert. denied, 500 U.S. 960 (1992).

On these facts, the appellant is not entitled to acquittal from his murder conviction. However, even if successful, the appellant's attack on the validity of the theft charge could not possibly affect his first degree murder conviction, since there was ample evidence of premeditation to support the conviction for the

reasons discussed in Issue II(B). In Griffin v. United States, 502 U.S. 46, 112 S.Ct. 466, 116 L.Ed.2d 371 (1991), reh. denied, 502 U.S. 1125, 112 S.Ct. 1253, 117 L.Ed.2d 484 (1992), the United States Supreme Court rejected the argument that a general verdict should be set aside if there is not sufficient evidence to support one of the possible bases for the conviction, noting the prevailing rule that the verdict stands as long as the evidence is sufficient with respect to any one of the acts charged. See also, Teffeteller v. State, 439 So.2d 840 (Fla.), cert. denied, 465 U.S. 1074 (1984). Therefore, no harmless error analysis is necessary in this case due to the validity of a first degree, premeditated murder conviction. Further, even if a harmless error analysis was required, the overwhelming nature of the evidence of premeditation discussed in Issue II(A) and the lack of any evidence indicating that Mrs. Gray's murder was anything but intentional clearly demonstrates the harmlessness of any deficiency in the felony murder verdict.

ISSUE III

WHETHER A NEW TRIAL IS REQUIRED BASED ON APPELLANT'S ALLEGATION THAT THE PROSECUTOR MADE IMPROPER COMMENTS AND ARGUMENTS THAT WERE NOT BASED ON THE EVIDENCE, WERE OUTRAGEOUS AND INFLAMMATORY, AND WERE UNFAIRLY PREJUDICIAL TO THE APPELLANT.

Appellant complains that the prosecutor made improper arguments and comments to the jury in voir dire, opening statements, witness examination, and in closing arguments in both penalty and guilt phase. He also contends that even if no single comment was reversible, the cumulative effect of all comments and arguments denied him a fair trial. It is the state's position that no prosecutorial misconduct constituting reversible or harmful error has been demonstrated and, therefore, relief should be denied. Esty v. State, 642 So.2d 1074 (Fla.), cert. denied, 514 U.S. 1027 (1995).

This Court has repeatedly recognized that "wide latitude is permitted in arguing to a jury." Thomas v. State, 326 So.2d 413 (Fla. 1975); Spencer v. State, 133 So.2d 729 (Fla.), cert. denied, 369 U.S. 880, 82 S.Ct. 1155, 8 L.Ed.2d 283 (1962), cert. denied, 372 U.S. 904, 83 S.Ct. 742, 9 L.Ed.2d 730 (1963). Logical inferences may be drawn, and counsel is allowed to advance all legitimate arguments. Spencer. The control of comments is within the trial court's discretion, and an appellate court will not interfere unless an abuse of such discretion is shown. Thomas; Paramore v. State, 229 So.2d 855 (Fla.), modified, 408 U.S. 935, 92

S.Ct. 2857, 33 L.Ed.2d 751 (1972). "A new trial should be granted only when it is 'reasonably evident that the remarks might have influenced the jury to reach a more severe verdict of guilt than it would have otherwise done.' Darden v. State, 329 So.2d 287, 289 (Fla.), cert. denied, 430 U.S. 704, 97 S.Ct. 308, 50 L.Ed.2d 282 (1977). Each case must be considered on its own merits, however, and within the circumstances surrounding the complained of remarks. Id. Compare, Paramore with Wilson v. State, 294 So.2d 327 (Fla. 1974). Breedlove v. State, 413 So.2d 1, 8 (Fla.), cert. denied, 459 U.S. 882, 103 S.Ct. 184, 74 L.Ed.2d 149 (1982)." Bonifay v. State, 680 So.2d 413 (Fla. 1996). A determination as to whether substantial justice warrants the granting of a mistrial is within the sound discretion of the trial court. Sireci v. State, 587 So.2d 450 (Fla.), cert. denied, 503 U.S. 946 (1992). A mistrial is appropriate only when the error committed is so prejudicial as to vitiate the entire trial. King v. State, 623 So.2d 486 (Fla. 1993).

In the instant case, Hawk challenges the following statements, arguments, or examination of witnesses as improper:

1) Prosecutor Heyman's comment to the jury during voir dire that at the close of the state's case with the evidence put on that they would be convinced beyond a reasonable doubt that Mr. Hawk was guilty. (T 247-48) Defense counsel objected that the state was getting into closing arguments. The trial sustained the objection, denied the motion for mistrial and instructed the jury to disregard

the comment. (T 249-51) Short of granting the mistrial, Hawk got the relief requested. As previously noted a mistrial is appropriate only when the error committed is so prejudicial as to vitiate the entire trial. King v. State, 623 So.2d 486 (Fla. 1993). The suggestion during voir dire that the evidence would establish Hawk's guilt is not so prejudicial as to vitiate the entire trial. See, Henyard v. State, 689 So.2d 239, 250 (Fla. 1996) (prosecutor's isolated misstatements during jury selection harmless error).

2) Heyman's comment to the jury during opening statement that the evidence would show that Hawk was an amoral, vicious, cold-blooded killer. (T 357) Although the court overruled defense counsel's objection, the ruling was without prejudice in case Heyman's characterization was not borne out by the evidence. Further, the court cautioned the jury that arguments were not evidence and to disregard the comment. (T 377-79) In Esty v. State, 642 So.2d 1074 (Fla.), cert. denied, 514 U.S. 1027 (1995), this Court found no merit to Esty's claim that he was entitled to a new trial because the trial court failed to grant a mistrial after the prosecutor made improper comments during closing argument describing Esty as a "dangerous, vicious, cold-blooded murderer" and warning the jury that neither the police nor the judicial system can "protect us from people like that" as the challenged comments were not so prejudicial as to vitiate the entire trial. Esty v. State, citing, Duest v. State, 462 So.2d 446, 448 (Fla.

1985). This Court further noted that the control of the prosecutor's comments is within a trial court's discretion, and a court's ruling will not be overturned unless an abuse of discretion is shown. Esty v. State, citing, Durocher v. State, 596 So.2d 997, 1000 (Fla. 1992). Appellant has failed to show an abuse of that discretion.

3) Heyman's objection to Hawk's testimony that the victims sexually abused him and stating that "It's just outrageous" as grounds for the objection. (T 1098-99) Appellate counsel misrepresents the record concerning the objection and argument that followed. For example, the record does not say that Heyman "exclaimed" his grounds for objection, defense counsel did not refer to the objection as an "outburst" as stated by appellate counsel, and the basis of the state's objection was lack of notice and relevance. (T 1101-02) Specifically, the record shows the following:

> "Q Did you ever have any problems with Mr. and Mrs. Gray?
> A Yes.
> Q What?
> A Because he sexually abused me.
> Q Who did?
> A Matthew and Betty.
> MR. HEYMAN: Judge, I'm going to object.
> THE COURT: Grounds?
> MR. HEYMAN: It's just outrageous.
> THE COURT: Overruled.
> MR. MARTIN: May I have a moment with Counsel?
> MR. McDERMOTT: Judge, I would request that the Court instruct the jury to disregard Mr. Heyman's comment.

MR. HEYMAN: May we approach the bench?

THE COURT: No, Sir. It's not necessary. You may continue, Counsel.

MR. McDERMOTT: Judge, I'd ask the Court to instruct Counsel to stop the sarcastic glances as well.

THE COURT: Counsel, if you have comments to make you approach the bench. I'm not going to have any dissertations from Counsel from their respective podiums in front of the jury and both of you are so instructed.

You will disregard the comments of Counsel as just presented. Thank you.

Q (By Mr. McDermott) Robert, you need to tell us what happened and when it happened and how it happened.

A Please repeat that. I didn't understand.

Q You need to tell us what Mr. or Mrs. Gray did.

MR. HEYMAN: Judge, I'm also going to object to the relevance of this.

THE COURT: Approach the bench.

(BENCH CONFERENCE)

THE COURT: Let me hear your argument.

MR. HEYMAN: Well, now I know why the Public Defender got off the case. What relevance is it that they sexual abused this Defendant and now claiming some type of mental defect or sanitary [sic] defense which I have never been even put on notice of. I don't understand anything behind this line of questioning besides dirtying up the victims in this case.

I think I should bring in Matthew Gray now to rebut these outrageous allegations. I see no relevance to the -- any of the allegations of first degree murder or attempted first degree murder. Did he do this in retribution against these people and I would object to any further --

THE COURT: Response.

MR. McDERMOTT: It's definitely relevant. It fits into the definition of second degree murder in that it goes to the issue of second degree murder. In fact, which evinces a depraved mind and shows his

relationship with these people and Mr. Heyman will have an opportunity to cross-examine him as to that. But I think I can explore how he got along with these people and what they did to him and that would go to the issue of his intent if they're claiming a premeditated design to effect their death and I think this evidence will show he did not.

THE COURT: Do you have any authority that would show that something that happened -- did we establish when this allegedly happened?

MR. McDERMOTT: Between the ages of nine and 13.

THE COURT: Okay. Something that happened six years prior to the homicide?

MR. McDERMOTT: That's right.

THE COURT: Would be evidence of depraved mind.

MR. McDERMOTT: At the time this happened the evidence will also establish that he was under the influence of drugs and alcohol.

MR. HEYMAN: I have no problem with that but the evidence of second degree murder talks about the nature of actions, not the actions within the mind; an action evinces a depraved mind because it's so flagrant, not the fact that the person may have some mental defect. That is insanity defect or some kind of diminished capacity which is not present in a first degree murder case to begin with and, once again, I object to any further -- strongly object to any further questions on this issue.

THE COURT: An act imminently dangerous to another and evincing a depraved mind. We're talking about his mind. A depraved mind regardless of human life. And dangerous to another. Is done from ill will, hatred and spite. Any further argument.

MR. HEYMAN: I just don't see how he's going to tie-in. First of all I think he's already tying in -- something that's going to happen between a nine and 13 year old to something that happened in 1993 when he crawls in the kitchen window and in the nighttime and repeatedly beats these people with a hammer, I don't see the relevance at

all.

THE COURT: Okay. Objection overruled."

(T 1098-1102)

None of the foregoing represents misconduct or any other reversible error.

Again, the control of the prosecutor's comments is within a trial court's discretion, and appellant has failed to show an abuse of that discretion. Esty.

4) Heyman's examination of Hawk and Madden concerning whether Hawk had ever reported to anyone his allegation of sexual abuse. Counsel objected to this line of questioning claiming that it was a comment on failure to "testify" at the time of his arrest and that it violated his right to remain silent. (T 1118-20, 1121, 1125-27, 1142, 1148) The court overruled the objection, denied a request for a curative instruction and the motion for mistrial.

Hawk waived his right to remain silent and gave a statement to law enforcement. He also testified in his own defense. Thus, Hawk neither invoked his right to remain silent nor failed to testify. As this argument was a proper response to the defense argument, Street v. State, 636 So.2d 1297 (Fla.), cert. denied, 513 U.S. 1086 (1995), and as a prosecutor may properly comment upon the defendant's failure to deny or explain incriminating facts when the defendant testifies or confesses, the trial court properly denied the objection. Caminetti v. United States, 242 U.S. 470, 492-95, 37 S.Ct. 192, 61 L.Ed. 442 (1917); Tucker v. Francis, 723 F.2d 1504

(11th Cir. 1987).

5) Prosecutor Daniel's guilt phase closing argument that Hawk's statement to Madden that he didn't know anything about the crime was a lie. This Court in Craig v. State, 510 So.2d 857, 865 (Fla.), cert. denied, 484 U.S. 1020 (1988), rejected a similar claim, stating:

> "Appellant argues that the prosecutor improperly made repeated references to defendant's testimony as being untruthful and to the defendant himself as a "liar." It may be true that the prosecutor used language that was somewhat intemperate but we do not believe he exceeded the bounds of proper argument in view of the evidence. When counsel refers to a witness or a defendant as being a "liar," and it is understood from the context that the charge is made with reference to testimony given by the person thus characterized, the prosecutor is merely submitting to the jury a conclusion that he is arguing can be drawn from the evidence. It was for the jury to decide what evidence and testimony was worthy of belief and the prosecutor was merely submitting his view of the evidence to them for consideration. There was no impropriety."
>
> Craig v. State, 510 So.2d 857, 865 (Fla. 1987).

As Daniel's statement was a proper comment on the evidence, Hawk's objection was properly overruled.

6) Heyman's penalty phase closing argument regarding the weight to be given Hawk's deafness. Defense counsel did not raise an objection until after the state's closing argument. Counsel then asked to approach the bench and moved for mistrial based on the state's argument that Mrs. Gray struggled with her attacker and the

state's argument concerning Hawk's deafness. He contended that the statement was inflammatory and that it constituted an improper "message to the community argument." The objection was overruled. (T 1391)

The failure to make a contemporaneous objection waives the claim for review. Ferguson v. State, 417 So.2d 639, 641 (Fla. 1982). Furthermore, the prosecutor's argument was a proper comment on the evidence. Since Campbell v. State, 571 So.2d 415 (Fla. 1991), this Court has made it clear that the state is to be afforded the opportunity to rebut the existence of mitigating factors and to introduce evidence tending to diminish their weight if they cannot be rebutted. Ellis v. State, 622 So.2d 991 (Fla. 1993). As Hawk's deafness was argued as a mitigating factor, the prosecutor properly presented argument as to the weight that it should be afforded in the context of this case.

This Court in Jones v. State, 652 So.2d 346, 352 (Fla.), cert. denied, 116 S.Ct. 202 (1995), rejected Jones' argument that a comment about former President Gerald Ford and Justice Clarence Thomas so inflamed the jury as to entitle him to a new sentencing proceeding. The State urged the Jones' jury to use its common sense to reject the defense expert's testimony that because Jones had been abandoned by his mother and raised by his aunt he suffered from extreme mental or emotional distress throughout his life. The prosecutor pointed out that although Thomas had been raised in a foster home and Ford had been adopted, they had been able make

positive choices in their lives. In rejecting Jones' argument this Court noted:

> "Later in the argument, the prosecutor continued:
>
> Dr. Toomer has testified that [Jones] was under extreme mental disturbance. Is everyone raised in a foster home destined to be a killer? That is ridiculous.
>
> Use your common sense. We have talked about people, this just doesn't make any, Gerald Ford, Clarence Thomas. It is an insult to those kinds of people to--
>
> Although Jones' objection to the "insult" comment was sustained, his motion for mistrial was denied.
>
> It is clear from the record that the State made the Ford/Thomas comparison as part of its argument that Dr. Toomer's testimony that Jones was suffering from extreme mental or emotional disturbance because he had been raised in a foster family was "ridiculous." Considered in context, we agree with the trial court that although the "insult" comment was "unfortunate" it was not so inflammatory or prejudicial as to warrant a mistrial."
>
> Jones v. State, 652 So.2d 346, 352 (Fla. 1995).

7) Heyman's argument concerning the young taking life for granted. At trial Hawk only challenged one of the statements now being asserted as error and only on the basis that it was inflammatory. (T 1367) He did not, as he does on appeal, contend that the arguments were not based on the evidence and that it was improper name calling. The failure to raise a specific and contemporaneous objection bars review. Jones v. State, 652 So.2d 346 (Fla.), cert.

denied, 116 S.Ct. 202 (1995). Furthermore, the argument was a proper comment on the evidence.

8) Heyman's argument that Mrs. Gray had struggled with Hawk during the murder. This argument by the prosecutor was not objected to until after counsel had finished his closing statement. The failure to make a contemporaneous objection bars review. Furthermore, Heyman's argument was a logical inference that was supported by the evidence and, therefore, was proper argument.

9) Cumulative error. Finally, Hawk argues that even if no single comment was reversible, the cumulative effect of all comments and arguments denied him a fair trial. A similar argument was also rejected by this Court in Jones:

> "The remainder of the challenged comments likewise either have been mischaracterized or were proper comments on the evidence. Moreover, our review of the record reveals that even if the challenged comments could be considered improper, none of them, either individually or collectively, so undermined the jury's recommendation as to warrant a new sentencing proceeding. Davis v. State, 604 So.2d 794, 797 (Fla.1992)."
>
> Jones v. State, 652 So.2d 346, 352-53 (Fla.), cert. denied, 116 S.Ct. 202 (1995).

Based on the foregoing, it is the state's position that the prosecutors' arguments did not "either deprive the defendant of a fair and impartial trial, materially contribute to the conviction, be so harmful or fundamentally tainted as to require a new trial, or be so inflammatory that they might have influenced the jury to

reach a more severe verdict than that it would have otherwise". Spencer v. State, 645 So.2d 377, 383 (Fla. 1994). As no reversible or harmful error has been demonstrated, relief should be denied. Esty v. State, 642 So.2d 1074 (Fla.), cert. denied, 514 U.S. 1027 (1995).

ISSUE IV

WHETHER THE TRIAL COURT ERRED BY ALLOWING VICTIM MATTHEW GRAY TO TESTIFY IN REBUTTAL OVER DEFENSE OBJECTION AS TO COMPETENCY.

After appellant surprised the state by claiming for the first time that the Grays had sexually molested him as a child, the state on rebuttal called Matthew Gray to testify concerning the new allegations of sexual abuse. Appellant maintains on appeal that it was error to allow Matthew Gray to testify without conducting a competency hearing or questioning Gray to determine whether he knew the truth from a lie. It is the state's position that this claim is barred and meritless.

Although appellant now maintains that it was error to allow Matthew Gray to testify without conducting a competency hearing or questioning Gray, Hawk did not ask for a competency hearing prior to Mr. Gray taking the stand. Rather, the record shows that defense counsel asserted that while Mr. Gray might be a relevant rebuttal witness, to parade him before the court for a sympathy factor would be inappropriate. (T 1135) The state responded that he had not called Gray as a witness earlier for that very reason, but that Hawk brought him into it. Heyman informed the court that he only intended to ask about the sexual abuse claim. (T 1136) He also represented that the interpreters could testify that they just had a conversation with Mr. Gray and he was able to communicate. In response to defense counsel's argument that it was his understanding based on what was related to him before trial that

Mr. Gray was not able to testify because his condition was so bad, Heyman clarified that he was not able to testify about what had happened when he got his head bashed in, but that he could testify as to whether he had ever sexually molested Hawk. Defense counsel then requested a proffer of Gray's testimony. Heyman objected stating that he had just proffered the testimony. (T 1136) The issue of competency was then raised for the first time by the court. In response to the court's inquiry, Heyman represented as an officer of the court that Gray understood what it means to take an oath, to tell a lie and to tell the truth. This was confirmed by co-counsel Brian Daniels. (T 1137)[6] Based on those representations, the court allowed Gray to testify that he had not molested Robert Hawk. (T 1138, 1161, 1163)

Hawk did not ask for a competency determination until after Gray had begun to testify. (T 1162) The failure to specifically request the evaluation prior to the testimony waives the claim for review. Steinhorst v. State, 412 So.2d 332 (Fla. 1982).

Even if this claim was properly presented to the court below, Hawk is not entitled to relief. Competency to testify is presumed until the contrary is established. See § 90.601, Fla. Stat. (1995); Hackmann v. Hyland, 445 So.2d 1079, 1080 (Fla. 3DCA 1984); Williams v. McGehee, 2 Fla. 58 (1848). The burden of proving a

[6] After Gray testified the interpreter confirmed that he understood the questions and that she had no problem communicating with him. (T 1163)

witness' disqualification to testify is upon the objecting party. Hackmann; Lynagh v. Marine Bank & Trust Co., 177 So.2d 256 (Fla. 2DCA 1965). When Hawk finally argued to the court below that a competency determination should have been made, he did not present any evidence in support of his claim other than the appearance of the witness. Obviously, Mr. Gray appeared competent because after seeing and hearing the witness and inquiring of the interpreters, the court did not find Mr. Gray incompetent to testify. Accordingly, since Hawk did not meet his burden to establish the witness' disqualification to testify, he is not entitled to relief. Furthermore, the competency of a witness to testify is a determination left to the sound discretion of the trial court, and absent an abuse of discretion, the trial court's decision will not be disturbed. Baker v. State, 674 So.2d 199, 200 (Fla. 4DCA 1996), citing, Lloyd v. State, 524 So.2d 396 (Fla. 1988); Rutledge v. State, 374 So.2d 975, 979 (Fla.), cert. denied, 446 U.S. 913, 100 S.Ct. 1844, 64 L.Ed.2d 267 (1980); Begley v. State, 483 So.2d 70, 72 (Fla. 4DCA 1986); In the Interest of M.A., 477 So.2d 47, 48 (Fla. 4DCA 1985); Davis v. State, 348 So.2d 1228, 1229-1230 (Fla. 3DCA), cert. denied, 358 So.2d 134 (Fla. 1978). See, also, Thomas v. State, 74 So. 1, 4 (Fla. 1917).

In Kaelin v. State, 410 So.2d 1355 (Fla. 4DCA 1982), the District Court found no abuse of discretion where the trial court allowed the testimony of a mentally retarded deaf girl. The court stated:

> "We now turn to the issue of Claire's competency to testify. This question is by no means clear. Undeniably, Claire has a very low intelligence quotient, and intelligence is a primary component of witness competency. Bell v. State, 93 So.2d 575 (Fla.1957). Additionally, we recognize that Claire's other handicaps severely strain opportunity for effective cross-examination. However, we cannot conclude, on the record before us, that allowing Claire to testify was an abuse of discretion. As limited as she was, Claire was nevertheless able to relate the circumstances of the assaults upon her with sufficient clarity and decisiveness so that her testimony was properly submitted to the jury. Claire was firm in her identification of appellant as her assailant. She was likewise consistent in her description of the assaults. We have no doubt that the defense of appellant was made more difficult by the limitations of Claire's communicative ability. Yet the record is clear that "a comprehensible narrative does emerge from the sum of her testimony." United States v. Benn, 476 F.2d 1127 (D.C.Cir.1973)."
>
> Kaelin v. State, 410 So.2d 1355 (Fla. 4DCA 1982).

The Kaelin court further noted that the resolution of the issue of witness competency is exclusively the responsibility of the trial court, subject to limited appellate review. "It is the trial judge who has the opportunity to view the witness, to observe manner, demeanor and presence of mind, and to undertake such inquiries as are effective to disclose the witness's capacity and intelligence. Impressions that may be validly drawn only from close hand personal observation cannot be 'photographed into the record' for later study by appellate courts." Kaelin at 1357-1358.

The trial judge, in the instant case, who had "the opportunity

to view the witness, to observe manner, demeanor and presence of mind, and to undertake such inquiries as are effective to disclose the witness's capacity and intelligence" found the witness competent to testify. That finding is within the court's discretion and appellant has failed to show an abuse of that discretion.

Moreover, Hawk's reliance on cases concerning children's competency to testify is misplaced. The question of child's competency to testify is clearly distinguishable from the presumption of competency that applies to adult witnesses. Under common law, no child under the age of fourteen was considered competent to testify in any controverted matter. Griffin v. State, 526 So.2d 752, 753 (Fla. 1DCA 1988); Lloyd v. State, 524 So.2d 396 (Fla. 1988); Radiant Oil Co. v. Herring, 200 So. 376 (Fla. 1941). Under current Florida law, the primary test "of testimonial competence of an infant witness is his or her intelligence, rather than his or her age, and, in addition, whether the child possesses a sense of obligation to tell the truth. Griffin at 753; §§ 90.603 and 90.605(2), Fla. Stat. (1995).

Matthew Gray is a deaf adult who prior to becoming the victim of horrendous attack by Hawk lived in his own home with his wife. As a result of the near fatal beating he received from Hawk, he became partially paralyzed, suffered a loss of eyesight and had to move to a nursing home. (R 1727, 1892) No evidence was presented

to the trial court which would in anyway suggest that Mr. Gray was reduced to the same status as an infant witness.

In his motion for new trial and now on appeal, Hawk contends that there was evidence that Mr. Gray was not competent to testify that was not presented at trial. At the motion for new trial defense counsel argued to the court that they had discovered that Mr. Gray was actually under an Order of Mental Incompetency. (T 1893) The record shows, however, that it was not an Order of Mental Incompetency, but, rather, was an Order Determining Total Incapacity and Appointing a Plenary Guardian. (R 1687-1694) The Order states that he was found to be incapacitated and provides for the appointment of a guardian to handle his affairs. Nothing in this Order suggests any *mental* infirmity on the part of Mr. Gray.

"Incapacitated person" is defined by Florida law as a person who has been judicially determined to lack the capacity to manage at least some of the property or to meet at least some of the essential health and safety requirements of such person. § 744.102(10), Fla. Stat. (1995). See also, § 744.3201, Fla. Stat. (1995). Under the circumstances, it should come as a surprise to no one that the severely injured Mr. Gray would be incapacitated to the point that he could not handle his own affairs during the pendency of his recovery. This determination does not mean that he was incompetent to testify.

More importantly, the state presented undisputed evidence that eight months prior to the trial in the instant case, Mr. Gray's

rights were partially restored by an Order of Partial Restoration. (R 1961) Therefore, at the time of the trial the incapacities that hindered Mr. Gray's ability to handle his own affairs were largely a nonissue.

In light of Hawk's failure to request a competency hearing, to present competent evidence that Mr. Gray was incompetent to testify and to show that the trial court abused its discretion in allowing the witness to testify as to the alleged sexual abuse, he is not entitled to relief on appeal.

Finally, it is the state's position that even if it was error to allow Mr. Gray to testify, it was harmless beyond a reasonable doubt.

Mr. Gray's complete testimony was as follows:

> "BY MR. HEYMAN:
> Q Could you state your name?
> THE INTERPRETER: He's spelling it, Matthew Gray.
> Q (by Mr. Heyman) Mr. Gray, do you know Robert Hawk? Yes or no?
> A Yes. Yes. Yes. He stole --
> THE INTERPRETER: Stop.
> MR. HEYMAN: Stop. Stop. Stop. The --"
>
> (T 1161)

> "Q (By Mr. Heyman) Mr. Gray, I need a yes or a no answer to this question. Understand?
> A The question.
> Q He has a question? He can't ask me.
> A Yes or no.
> Q Why don't you ask him this, did you ever sexually molest Robert Hawk?
> A No, no, no.
> Q No further questions.

A No. Never.
MR. HEYMAN: No further questions.
MR. MCDERMOTT: No questions, Judge."

(T 1163)

Mr. Gray's testimony was limited to the question of Hawk's claim of abuse. Although Appellant claims prejudice from Mr. Gray's statement that "he stole," the court found that his statement was not clear and that he didn't think the jury heard it. (T 1164) Additionally, since the evidence showed that Hawk had stolen the victims' car and money, the only inference the jury could make is that Gray was referring to the instant theft. Based on the foregoing and in light of the overwhelming nature of the evidence in the instant case, error, if any, was harmless beyond a reasonable doubt. Burns v. State, 22 Fla. L. Weekly S419 (Fla. 1997).

ISSUE V

WHETHER THE TRIAL COURT ERRED IN DENYING THE DEFENSE MOTION TO DECLARE THE HEINOUS, ATROCIOUS OR CRUEL JURY INSTRUCTION UNCONSTITUTIONAL AND DECLINING TO INSTRUCT THE JURY ON THE FACTOR.

Appellant's challenge to the heinous, atrocious or cruel jury instruction is procedurally barred. This Court has repeatedly stated that to preserve this claim for review, there must be an objection to the instruction and a proposed alternate instruction. Hall v. State, 614 So.2d 473 (Fla.), cert. denied, ___ U.S. ___, 114 S.Ct. 109, 126 L.Ed.2d 74 (1993). While counsel objected to the instruction, he refused to give a proposed instruction stating that he was unable to fashion an instruction which would cure vagueness. Accordingly, he is not entitled to relief on this claim. (R 1588, T 1319-20, 1333)

Even if this claim was not barred, it is without merit. The jury was given the full instruction on heinous, atrocious, or cruel now contained in Florida Standard Jury Instructions in criminal cases. This Court has consistently rejected claims that the statute or the new jury instructions are unconstitutionally vague.

> ". . . Because of this court's narrowing construction, the United States Supreme Court upheld the aggravating circumstance of heinous, atrocious, or cruel against the vagueness challenge in Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (Fla. 1976). Unlike the jury instruction found wanting in Espinosa v. Florida, ___ U.S. ___, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992), the full instruction on heinous, atrocious and cruel now contained in the Florida Standard

> Jury Instruction in Criminal Cases, which is consistent with Proffitt was given in Preston's case."
>
> Preston v. State, 607 So.2d 404, 411 (Fla. 1992). Accord, Stein v. State, 632 So.2d 1361 (Fla. 1994); Hall v. State, 614 So.2d 473 (Fla. 1993).

To paraphrase this Court's holding in Whitton v. State, 649 So.2d 861, 867 (Fla. 1994) this instruction was approved in Hall v. State, 614 So.2d 473 (Fla.), cert. denied, ___ U.S. ___, 114 S.Ct. 109, 126 L.Ed.2d 74 (1993), and [Hawk] has not presented an adequate reason to recede from that decision.

The instruction given in the instant case and the statute are constitutional and, therefore, even absent the procedural bar, Hawk would not be entitled to relief on this claim. Further, in light of the particular facts of this case, error, if any, is harmless beyond a reasonable doubt.

ISSUE VI

WHETHER THE TRIAL COURT ERRED BY INSTRUCTING THE JURY ON HEINOUS, ATROCIOUS OR CRUEL AGGRAVATOR WHICH HE LATER DECLINED TO FIND ESTABLISHED.

Appellant asserts that it was error for the court to instruct the jury on the aggravating factor of heinous, atrocious or cruel since the trial judge did not find this factor to exist.

This claim was rejected by this Court in Bowden v. State, 588 So.2d 225 (Fla.), cert. denied, 503 U.S. 975 (1992), wherein this Court stated:

> "In connection with the penalty phase of the trial, Bowden maintains that it was error to instruct the jury it could consider the aggravating circumstance that the homicide was committed during a robbery because the evidence did not support such a finding, as evidenced by the trial court's rejection of the circumstance. The fact that the state did not prove this aggravating factor to the trial court's satisfaction does not require a conclusion that there was insufficient evidence of a robbery to allow the jury to consider the factor. Where, as here, evidence of a mitigating or aggravating factor has been presented to the jury, an instruction on the factor is required. Stewart v. State, 558 So.2d 416, 420 (Fla.1990). As we have previously noted,
>
> [i]f the advisory function [of the jury] were to be limited initially because the jury could only consider those mitigating and aggravating circumstances which the trial judge decided to be appropriate in a particular case, the statutory scheme would be distorted. The jury's advice would be preconditioned by the judge's view of what they were allowed to know.
>
> 558 So.2d at 421 (emphasis deleted)

(quoting Floyd v. State, 497 So.2d 1211, 1215 (Fla.1986)).”

Bowden at 231.

Appellant argues that the Court’s decision in Griffin v. United States, 502 U.S. 46 (1991), mandates reversal because the jury could have erroneously relied on the instruction. Both the Griffin Court and this Court have recognized that a jury is not going to be misled about a factual finding which lacks the necessary factual support. Foster v. State, 679 So.2d 747, 753 (Fla.), cert. denied, ___ U.S. ___, 117 S.Ct. 1259 (1997); Johnson v. Singletary, 612 So.2d 575, 577 (Fla.), cert. denied, 508 U.S. 901 (1993).

In the instant case, there was evidence of a brutal beating, massive and multiple blunt trauma to the head, a sexual assault, movement of the body either during or after the attack, blood in the lungs which indicated that the victim was still alive during the continuance of the attack and a defensive wound indicating a struggle.[7] Although the age of the defensive wound was in question, it was still a fact which the jury could consider. Based

[7] Although the state argued to the court that the position of Betty Gray’s body indicated a sexual assault, the court did not allow the state to argue it to the jury. It is the state’s position that this evidence should have been considered. Although the medical examiner could not state with a reasonable degree of medical certainty that a sexual assault had occurred, he said the evidence was consistent with such an assault. Betty Gray’s body was found sprawled on the floor, her panties were removed and at her feet and her nightgown was pushed up over her hips, as well as being torn so as to expose her breast.

on these facts, the trial court properly gave the requested instruction. Bowden.

Furthermore, it is the state's position that the trial court erred in failing to find the heinous, atrocious or cruel aggravating factor.

Assuming, arguendo, that it was error to so instruct the jury, in light of the facts of this case, it was harmless.

ISSUE VII

WHETHER THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON THE SENTENCING OPTION OF LIFE WITHOUT PAROLE WHERE THAT PENALTY BECAME THE LAW AFTER THE CRIME BUT BEFORE TRIAL.

Appellant also urges error based on the court's instruction to the jury that if by six or more votes the jury determined that Hawk should not be sentenced to death, their advisory recommendation should be "a sentence of life imprisonment upon Robert T. Hawk without possibility of parole for twenty-five years". (T 1402) He contends that even though his crime occurred prior to effective date of the newly enacted § 775.082(1), Fla. Stat. (1995), that his jury should have been instructed in accordance with the new law which eliminates the possibility of parole. This position is procedurally barred and an incorrect statement of the law.

Initially, appellant may not prevail because this claim was not argued to the court below. (T 1285-92) In Lucas v. State, 376 So.2d 1149 (Fla. 1979), this Court ruled:

> "This Court will not indulge in the presumption that the trial judge would have made an erroneous ruling had an objection been made and authorities cited contrary to his understanding of the law."
>
> (text at 1152).

Having failed to present this argument to the trial court, his argument must fail here as unpreserved.

Secondly, appellant's claim must fail because this Court has determined that the 1994 amendment to F.S. 775.082(1) became

effective on May 25, 1994, and therefore, "it applies to offenses committed on or after that date". In Re Standard Jury Instructions in Criminal Cases, 678 So.2d 1224, fn. 1 (Fla. 1996). Since Hawk committed his offense in February of 1993, the amendment is not applicable.[8] To have instructed the jury otherwise would have been an incorrect statement of the law.

Accordingly, the state urges this court to find that this claim is barred and meritless.

[8] While appellant relies on a number of Oklahoma decisions supporting a contrary view, they are not binding on this Court's interpretation of a Florida statute. Appellee agrees with the dissenting view of Judge Lumpkin that the appropriate criminal penalty is the penalty in effect at the time the defendant committed the crime. Salazar v. State, 852 P.2d 729, at 740-742 (Okla. Cr. 1993); Hain v. State, 852 P.2d 744, at 754-755 (Okla. Cr. 1993); Humphrey v. State, 864 P.2d 343, 344 (Okla. Cr. 1993); Fontenot v. State, 881 P.2d 69, at 86 (Okla. Cr. 1994); Parker v. State, 887 P.2d 290, at 299 (Okla. Cr. 1994); Cheatham v. State, 900 P.2d 414, 429-430 (Okla. Cr. 1995); McCarty v. State, 904 P.2d 110, 129 (Okla. Cr. 1995); Bowie v. State, 906 P.2d 759, 765 (Okla. Cr. 1995).

ISSUE VIII

WHETHER THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON AND FINDING THAT THE CRIME WAS COMMITTED FOR PECUNIARY GAIN.

Appellant next contends that the trial court erred in finding in aggravation that this crime was committed for pecuniary gain. According to appellant, any financial gain that he obtained by taking the victims' car and money was incidental to the murder, and not the primary motive for it. Thus, he asserts, under Scull v. State, 533 So.2d 1137 (Fla.), cert. denied, 490 U.S. 1037 (1989) and Hill v. State, 549 So.2d 179 (Fla. 1989), the pecuniary gain factor was not applicable. It is the state's position that the trial court properly found the aggravating factor of pecuniary gain.

In the sentencing order on this matter, the trial judge noted that, from the totality of the evidence, Betty Gray was murdered to facilitate the theft of money from the house and the grand theft of the car, and that the defendant's actions and motives distinguished this case from Hill and Scull. Appellant disputes this conclusion, speculating that he may have been motivated to kill in order to impress his friends or because he was angry with the Grays. Based on the evidence presented below, appellant's argument is without merit.

At trial, the state established that after killing Mrs. Gray and nearly killing her husband, appellant had the Grays' car keys from the house and left in their car. (T 927) He later bragged

about the crime to his friends, showing them the car and a "wad" of money. (T 439, 452) Significantly, no money was found in Mrs. Gray's purse or anywhere in the Grays' home. State witness Palmer indicated that usually, Hawk kept his money organized on a money clip; that night, it was just in wads, and Hawk claimed to have gotten it from shooting someone. (T 452) Appellant concedes that he did not take the car to facilitate his escape (Appellant's Initial Brief, p. 84); since he lived in the same neighborhood as the victims, he had no need of stealing a car in order to facilitate his escape. This Court has repeatedly upheld the finding of this aggravating factor where, as here, other felonies such as robbery were committed at the time of the murder. Melton v. State, 638 So.2d 927 (Fla. 1994); Bates v. State, 465 So.2d 490, 492 (Fla. 1985).

The circumstances of appellant's possession of the money support a reasonable inference that the money was stolen from the Grays. Appellant's ability to speculate that the money may have come from another source is not material, since this Court will view the record in the light most favorable to the prevailing theory as to the existence of an aggravating circumstance. Wuornos v. State, 644 So.2d 1012, 1019 (Fla.), cert. denied, 514 U.S. 1070 (1995). In addition, even if there were no evidence that the appellant possessed money after the murder, the pecuniary gain factor is clearly applicable where the murder is committed in order to obtain the victims' car. Jones v. State, 690 So.2d 568, 570

(Fla. 1996); Jones v. State, 612 So.2d 1370, 1375 (Fla.), cert. denied, 510 U.S. 836 (1993); Medina v. State, 466 So.2d 1046, 1050 (Fla. 1985). The fact that the appellant abandoned the car the following day does not preclude a finding that the murder was committed to facilitate the taking of the car. Porter v. State, 429 So.2d 293, 296 (Fla. 1983).

The trial court is not required to reject this aggravator based on a suggestion that another motivation for the murder existed. Lawrence v. State, 22 Fla. L. Weekly S125 (Fla. March 13, 1997); Thompson v. State, 553 So.2d 153, 156 (Fla. 1989). As long as the murder was motivated, at least in part, by a desire for pecuniary gain, the aggravating factor applies. Finney v. State, 660 So.2d 674, 680 (Fla.), cert. denied, 116 S.Ct. 823 (1996).

This case is not governed by Scull, since appellant did not take the victims' car in order to facilitate his escape; he used the car, returned it to the Grays' driveway, then returned later and used the car again. Similarly, Hill is not analogous factually since the defendant in that case had previously stated his intent to rape and beat the victim, suggesting that taking her billfold was an afterthought. In this case, no other possible motive for the burglary is suggested by the evidence, only by appellant's unsupported speculation. Thus, the court below correctly distinguished these cases.

On these facts, no error has been shown by the trial court's reliance on the aggravating factor that the murder was committed

for pecuniary gain. In addition, even if evidence of a theft was lacking, the murder was clearly committed during the course of a burglary, and there would be no bar to consideration of this factor if appellant's sentence were reconsidered. Thus, any impropriety in the consideration of the pecuniary gain factor would not affect the appellant's sentence, and must be deemed harmless beyond any doubt.[9] Therefore, appellant is not entitled to any relief on this issue.

[9] If this Court should deem it necessary to remand for a resentencing, the additional aggravating factors set forth in §921.141(5)(a), Fla. Stat. (1996) (committed by a person on felony probation) and §921.141(5)(m), Fla. Stat. (1996) (victim vulnerable due to advanced age or disability) would be applicable as Hawk was on felony probation at the time he murdered the elderly and disabled Mrs. Gray. (T 1722-1732) Cf. Trotter v. State, 690 So.2d 1234 (Fla. 1996)

ISSUE IX

WHETHER THE DEATH SENTENCE WAS PROPORTIONATE WHEN COMPARED TO SIMILAR CASES.

Appellant contends that death is a disproportionate punishment in this case. He contends that the pecuniary gain aggravating circumstances was improperly found, so only one valid aggravating factor remains. Noting that this Court rarely affirms a death sentence when only one aggravating factor has been upheld, appellant suggests that this sentence would be disproportionate if the pecuniary gain factor was disapproved. He also contends that even if both of the aggravators were properly found, the mitigating evidence is so compelling that a sentence of life should have been entered. It is the state's position that the sentence in the instant case is proportionate to similar cases and that the sentence was properly imposed.

As this Court has repeatedly stated, a proportionality determination is not made by the existence and number of aggravating and mitigating factors, but, rather, is a comparison of the facts in this case with other death cases. Sliney v. State, 22 Fla. L. Weekly S419 (Fla. 1997); Tillman v. State, 591 So.2d 167 (Fla. 1991). The facts in the instant case show that Hawk burglarized the elderly couple's home in the middle of the night after they were in bed. Both victims were brutally and repeatedly bludgeoned with a blunt instrument, probably a hammer, as they lay in their own beds. (T 572, 814) Mrs. Gray was beaten so severely

and repeatedly to the same spot on her head that the medical examiner could not tell exactly how many blows she received. (T 811, 814-20) Mr. and Mrs. Gray were both deaf and offered little or no resistance to the burglary or the resulting attack. Hawk then ransacked the Grays' desk in search of cash. Hawk also admitted that he took the key to the Grays' automobile from the key ring in the deadbolt and stole the Grays' car. (T 927) Hawk then left the dead and/or dying victims to find his friends, brag about the murders and show off his "new" car and the wad of cash.

When compared to similar cases where the death penalty has been ordered and upheld, this case clearly involves the necessary aggravation to set it apart from other capital murders, warranting the extreme sanction of death. In Duncan v. State, 619 So.2d 279, at 281 (Fla. 1993), the defendant stabbed his fiancee six times with a kitchen knife. The only aggravating factor was Duncan's prior violent felony convictions, and the trial court found fifteen mitigating factors. This Court struck reliance on three of the mitigating factors, and otherwise upheld the sentence as proportional.

In Freeman v. State, 563 So.2d 73, at 75 (Fla. 1990), the defendant beat a man that came in as he was trying to burglarize the man's house. Freeman had prior violent felony convictions of a similar nature that had been committed three weeks prior to this murder, and the trial court also found as one aggravator that it was committed in the course of a burglary/pecuniary gain. In

mitigation, the trial court found low intelligence, abuse as a child, artistic ability, and enjoyed playing with children. This Court determined the sentence to be proportional, noting that the nonstatutory mitigating evidence was not compelling.

In Hudson v. State, 538 So.2d 829 (Fla.), cert. denied, 493 U.S. 875 (1989), the defendant took a knife into his girlfriend's apartment and stabbed the girlfriend's roommate. The aggravators were Hudson's prior violent felony conviction and committed during the course of an armed burglary, which is what could be considered in this case if the pecuniary gain factor were found inapplicable. Although the trial court also found three statutory mitigating factors, including the mental mitigators, this Court upheld the sentence.

Similarly, in Watts v. State, 593 So.2d 198, 204-5 (Fla.), cert. denied, ___ U.S. ___, 120 L.Ed.2d 881 (1992), this Court found the twenty-two year old Watts' sentence proportionate despite substantial mitigating evidence where Watts also committed a burglary and sexual battery of the victim's wife.

> "Finally, Watts argues that his sentence of death is disproportional. In reviewing a death sentence, this Court looks to the circumstances revealed in the record in relation to those present in other death penalty cases to determine whether death is appropriate. Livingston v. State, 565 So.2d 1288 (Fla.1988). Here, even after the elimination of the finding that the murder was especially heinous, atrocious, or cruel, three aggravating factors remain to be weighed against the fact that Watts was twenty-two years old when the crime was committed and the

> nonstatutory finding of low I.Q. We conclude that the imposition of the death penalty upon the jury's recommendation was clearly consistent with this Court's prior decisions. E.g., Freeman v. State, 563 So.2d 73 (Fla.1990) (death penalty not disproportional when two aggravating circumstances were weighed against mitigating evidence of low intelligence and abused childhood), cert. denied, --- U.S. ----, 111 S.Ct. 2910, 115 L.Ed.2d 1073 (1991); Kight v. State, 512 So.2d 922 (Fla.1987) (death penalty proportionally imposed with two aggravating circumstances despite evidence of mental retardation and a deprived childhood), cert. denied, 485 U.S. 929, 108 S.Ct. 1100, 99 L.Ed.2d 262 (1988). The suggestion that these cases might be distinguished because Watts shot the victim in response to the victim's unexpected advances must fail because these advances were precipitated by the fact that Watts was sexually battering the victim's wife."
>
> Watts v. State, 593 So.2d 198, 204-5 (Fla.), cert. denied, ___ U.S. ___, 120 L.Ed.2d 881 (1992).

See also, Sliney v. State, 22 Fla. L. Weekly S419 (Fla. 1997)(death sentence for young defendant with two aggravators proportionate where crime was particularly brutal); Clark v. State, 613 So.2d 412 (Fla.) (aggravators of prior violent felony conviction and during course of robbery; mitigating evidence presented but not found), cert. denied, ___ U.S. ___, 126 L.Ed.2d 79 (1993); Owen v. State, 596 So.2d 985, 990 (Fla.), cert. denied, 506 U.S. 921 (1992) (sentence upheld where sleeping victim was bludgeoned); Brown v. State, 565 So.2d 304 (Fla. 1990) (death sentence for murder committed during the course of burglary was proportionate where there were two aggravating factors balanced

against the mental mitigators); Melton v. State, 638 So.2d 927 (Fla. 1994) (a sentence found proportionate where defendant convicted of a fatal shooting during a robbery where there were two aggravating factors and little mitigation); Jones v. State, 652 So.2d 346 (Fla.)(murder and robbery of husband and wife balanced against evidence of abused childhood and mental illness), cert. denied, 116 S.Ct. 202 (1995).

A review of the aggravating and mitigating factors established in this case clearly demonstrates the proportionality of the death sentence imposed. Even if the pecuniary gain aggravating factor is found to be inapplicable, the circumstances of this murder and the defendant's propensity for violence compel the imposition of the death penalty. This Court has made it clear that a proportionality analysis is based on the facts of the case and not on the number of aggravating and mitigating factors found by the trial court. Thus, the absence of a finding with regard to a factor should not be fatal to a proportionality analysis. See, Sliney v. State, supra.

In the instant case, the trial court refused to allow the state to argue during the course of a sexual battery to the jury. Nevertheless, the evidence supports a finding of both during the course of a sexual battery and during the course of a burglary. Hawk’s contention that there was no evidence of a burglary because there is no evidence that he had the intent to commit a theft in the dwelling is simply wrong. (See Issue I) First, the evidence shows that Hawk not only walked away from the Gray home with a

“wad” of cash, but, also, that he took the car key off the key ring in the deadbolt prior to leaving the house. Clearly, the removal of the key was for the sole purpose of taking the Grays’ car. Further, the commission of the murder and the attempted murder after entering the home satisfies the finding of during the course of a burglary for § 921.141, Fla. Stat. (1995). Fotopoulos v. State, 608 So.2d 784 (Fla. 1992).

Similarly, the evidence also supports a finding that this murder was committed during the course of a sexual battery. Mrs. Gray was drug off the bed onto the floor, her underwear ripped off and her nightgown pushed up and ripped to expose her breast and her genitalia.

These facts are sufficient for a jury to conclude that a burglary and a sexual battery occurred, as well as the murder, attempted murder and theft. Davis v. State, 604 So.2d 794 (Fla. 1992). As such the facts in aggravation are significant. These facts outweigh the mitigation evidence presented and found in this case. Therefore, this Court should not disturb the appellant's sentence in this appeal.

CONCLUSION

Based on the foregoing facts, arguments and citations of authority the decision of the lower court should be affirmed as to the judgment and sentence.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

CANDANCE M. SABELLA
Assistant Attorney General
Florida Bar ID#: 0445071
2002 N. Lois Avenue, Suite 700
Westwood Center
Tampa, Florida 33607
(813) 873-4739

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to A. Anne Owens, Assistant Public Defender, Post Office Box 9000, Drawer PD, Bartow, Florida 33831, this _____ day of November, 1997.

COUNSEL FOR APPELLEE

IN THE SUPREME COURT OF FLORIDA

ROBERT T. HAWK,

Appellant,

vs. **CASE NO. 88,179**

STATE OF FLORIDA,

Appellee.

_____/

INDEX TO APPENDIX