IN THE SUPREME COURT OF FLORIDA

CHARLES D. DONALDSON,

Appellant,

v. CASE NO. 88,205

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT
IN AND FOR OKALOOSA COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

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

OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(850) 488-0600

COUNSEL FOR APPELLEE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

FEDERAL STATUTES

STATE STATUTES

STATEMENT OF THE CASE AND FACTS

About 8:00 a.m. on July 10, 1994, a man taking his morning walk on the county line road between Okaloosa and Santa Rosa counties spotted two bodies lying near the road. (XXIII 357).[1] The victims were thirteen-year-old Lawanda Campbell and fifteen-year-old Donnta Head. (XXV 712-13, 719). Both died from gunshot wounds. (XXV 718, 726). Suspicion quickly centered on Charles Donaldson. (XXIII 380).

Donaldson was a drug dealer in Fort Walton Beach (XXIV 433); his regular job was the "crack cocaine business." (XXIV 437). George Joseph Wengert was a longtime friend of Donaldson's and, during the summer of 1994, was Donaldson's driver and bodyguard. (XXIV 432). Ruben Cisneros, Jr., was a fifteen-year-old runaway who was Donaldson's partner in "the crack cocaine business." (XXIV 433). Joseph Sykosky was one of Donaldson's customers. (XXIV 466, 558-59). William Percell Straham was a longtime friend of Wengert's. (XXVI 846).

On the evening of July 9, 1994 Donaldson, Cisneros, Wengert, and Straham were at Donaldson's house. (XXVI 852). Donaldson received a phone call from Campbell, with whom he had been sleeping (XXIV 443), during which he told her to stand outside her house so that he could shoot her. (XXIV 444). He also spoke with

---

[1] The record on appeal consists of thirty volumes numbered I through XXX. "XXIII 357" refers to page 357 of volume XXIII.

Campbell's father. (XXIV 446). When the doorbell rang later, "everybody grabbed for the guns and ran outside." (XXIV 448). They found Head at the front door, and Cisneros brought Head into the house at gunpoint. (XXIV 449). Donaldson told Cisneros and Wengert to get Campbell, and Cisneros brought her into the house at gunpoint, too. (XXIV 449). Donaldson, Cisneros, and Wengert questioned Head and Campbell for hours about their trying to set Donaldson up and rob him. (XXIV 452-53). When Donaldson said that he did not care about Campbell, Cisneros beat and kicked her. (XXIV 458).

During the interrogation of Head and Campbell, Donaldson returned a telephone call and told the party called that he "might need him to do a favor for him." (XXIV 463). Donaldson told Cisneros and Straham to pick up Sykosky. (XXIV 464). When he arrived, Sykosky asked Donaldson if "these are the ones that you want me to take care of?" (XXIV 467). Donaldson responded affirmatively and told Wengert to turn up the stereo and then to turn it louder. (XXIV 467, 469). When Wengert looked back, he saw that Sykosky had shot the victims with Donaldson's pistol. (XXIV 469).

Donaldson directed removal of the bodies to his car, and he, Cisneros, and Wengert drove off to dispose of them. (XXIV 472). They dumped the bodies, and Donaldson and Cisneros removed the clothes from the bodies. (XXIV 473-74). The victims' clothes and

the trunk lining were left in one dumpster, and Cisneros, Wengert, and Donaldson's clothes were dumped in another. (XXIV 474-75). When the trio returned to Donaldson's, they helped Sykosky clean the house. (XXIV 475-76). The shell casings were picked up and given to Donaldson, who told Sykosky to get rid of the gun. (XXIV 477-78).

The state charged Donaldson with two counts of first-degree murder, two counts of armed kidnapping, and two counts of aggravated child abuse while armed.[2] (I 14-16). The jury convicted Donaldson on all six counts as charged. (XIII 2528-33; XXVII 1194-95). After hearing testimony on April 25 and 26, 1996, the jury recommended that Donaldson be sentenced to death on both counts of first-degree murder. (XIV 2679; XXX 1724). On May 22, 1996 the court reconvened the sentencing proceeding (XV 2949), received more testimony and evidence (XV 2952-92), and set final sentencing for May 28, 1996. (XVI 3001). On that date the trial court sentenced Donaldson to death, finding that the aggravators of

---

[2] Sykosky stood trial from May 6-10, 1996 on two counts of first-degree murder and two counts of aggravated child abuse and was convicted as charged. (XXI 4016). His jury recommended that he be sentenced to life imprisonment on the first-degree murder convictions, and the trial court followed that recommendation. (XXI 4175). Wengert was allowed to plead guilty to accessory after the fact to each murder and was to receive probation in exchange for his truthful testimony against Donaldson and Sykosky. (XXIV 430). Straham was not charged in connection with these crimes. (XXVII 1004). Donaldson claims that Cisneros was sentenced to twelve years' imprisonment (initial brief at 96), but there appears to be no record support for that statement.

prior violent felony, felony murder/kidnapping, heinous, atrocious, or cruel (HAC), and cold, calculated, and premeditated (CCP) had been established and that they outweighed the nonstatutory mitigators that Donaldson established. (XIV 2750-58; XVI 3004-18).

SUMMARY OF ARGUMENT

Issue I: Donaldson freely and voluntarily waived his right to testify at the guilt phase, and the trial court did not err in refusing to reopen the defense's case.

Issue II: The convictions are supported by competent substantial evidence.

Issue III: The trial court properly allowed the state to present evidence showing that Donaldson's accessory after the fact conviction was for a crime of violence. The record supports finding the prior violent felony aggravator.

Issue IV: The court did not err in allowing the state to introduce hearsay evidence during the penalty phase.

Issue V: The evidence supports finding the HAC aggravator. Both the aggravator and the instruction on it are constitutional.

Issue VI: The evidence supports finding the CCP aggravator. Both the aggravator and the instruction on it are constitutional.

Issue VII: The evidence supports finding the felony murder aggravator.

Issue VIII: The trial court properly considered the mitigating evidence.

Issue IX: Donaldson's death sentence is proportionate.

Issue X: Donaldson should be resentenced on the noncapital convictions.

ARGUMENT

Issue I

WHETHER THE TRIAL COURT ERRED IN REFUSING TO REOPEN THE CASE SO THAT DONALDSON COULD TESTIFY.

Donaldson argues that the trial court committed reversible error when it refused to reopen the case and allow him to testify on his own behalf. There is no merit to this claim.

After four days of testimony, the state rested its case on April 12, 1996. (XXVII 1038). The defense immediately rested as well. (XXVII 1038). Following the charge conference, the prosecutor asked the court to determine on the record that Donaldson personally waived his right to testify. (XXVII 1069). Defense counsel stated that the matter had been thoroughly discussed with Donaldson. (XXVII 1069). The court questioned Donaldson and established that he had made a free and voluntary waiver of his right to testify and that he agreed with the decision not to present any evidence in the guilt phase. (XXVII 1070-71). Thereafter, the parties gave their closing arguments, and the court dismissed the jury for the evening. (XXVII 1076 et seq.).

Before the jury was brought to the courtroom the following morning, however, defense counsel announced that Donaldson had decided that he wanted to testify. (XXVII 1169). The state objected because Donaldson waived his right to testify on the preceding day. (XXVII 1169). The judge denied the request,

stating that the subject had been fully explored and that he knew of no procedure that would allow Donaldson's testimony at that point in the proceedings. (XXVII 1170). Donaldson presented no procedure or precedent that would require the case to be reopened nor did he object to the court's ruling. The court then instructed the jury (XXVII 1171), and the jury retired to deliberate.

Now, Donaldson claims that the judge committed reversible error by refusing to let him testify. Because Donaldson did not object to the court's ruling, the state does not concede that this issue has been preserved for appeal. Stewart v. State, 420 So.2d 862 (Fla. 1982), cert. denied, 460 U.S. 1103 (1983). Even if preserved, however, this issue has no merit.

Donaldson is correct in stating "that a defendant in a criminal case has the right to take the witness stand and to testify in his or her own defense." Rock v. Arkansas, 483 U.S. 44, 49 (1987). This right is not without limits, however, and "'may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process.'" Id. at 55 (quoting Chambers v. Mississippi, 410 U.S. 284, 295 (1973)). Moreover, reopening a case for the presentation of additional testimony rests within the trial court's discretion. Stewart; Pitts v. State, 185 So.2d 164 (Fla. 1966); Hughes v. State, 61 Fla. 32, 55 So. 463 (1911). An appellate court will rarely interfere with an exercise of that discretion. Pitts; Hughes.

The burden is on a defendant "to provide the trial court with sufficient specific reasons as to why he should" be allowed to reopen his case. Rose v. State, 472 So.2d 1155, 1158 (Fla. 1985). Donaldson, however, failed to do this. He merely asked to testify and provided the trial court with no reasons why reopening his case should be allowed. Appellate counsel states that the court should have reopened the case because Donaldson's testimony in the penalty phase "presented a compelling depiction of the events that night, materially refuting the State's self-contradictory evidence." (Initial brief at 53-54). The inaccuracy of this reason for reopening the case is illustrated by the jury's recommending death for each count of first-degree murder. The jury obviously did not find Donaldson's penalty-phase testimony to be "compelling."

The cases cited by Donaldson to support this claim are distinguishable. In United States v. Walker, 772 F.2d 1172 (5th Cir. 1985), Walker stated in open court, prior to resting, that he wanted to testify, but needed to discuss the matter further with his counsel. The Fifth Circuit held that the trial court should have allowed the defense to reopen its case where the parties had not made their closing arguments and the jury had not been given its instruction. Similarly, in Steffanos v. State, 80 Fla. 309, 86 So. 204 (1920), Delgado v. State, 573 So.2d 83 (Fla. 2d DCA 1990), and State v. Ellis, 491 So.2d 1296 (Fla. 3d DCA 1986), closing

arguments had not been made and jury instructions had not been given.

Donaldson made a free and voluntary waiver of his right to testify.[3] The following day, after closing arguments had been made and immediately prior to when the jury was to be given its instructions, he asked to be allowed to testify. He presented no reasons for being allowed to do so, however, and did not object to the denial of his request. Donaldson has not demonstrated an abuse of the trial court's discretion, and this claim should be denied.

Issue II

WHETHER DONALDSON'S CONVICTIONS ARE SUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE.

The jury convicted Donaldson of two counts each of first-degree murder, armed kidnapping, and aggravated child abuse while armed. Now, Donaldson argues that the evidence was insufficient to support these convictions because the state's "contradictory evidence" was "predicated on testimony of admitted liars." (Initial brief at 54). There is no merit to this claim.

Much of the evidence to support Donaldson's convictions came from Wengert and Straham. Wengert testified that the victims were brought into the house at gunpoint (XXIV 449), that they were frightened and concerned about being killed (XXIV 449, 453; XV

---

[3] The trial court gave the standard jury instruction on a defendant's not testifying. (XXVII 1183-84).

2953), that Donaldson directed Straham and Cisneros to pick up Sykosky (XXIV 464), that Donaldson told Sykosky to kill the victims and handed him a gun (XXIV 467, 513; XV 2958), and that Donaldson directed the removal and disposal of the bodies (XXIV 470-78), among other things. Straham, unlike Wengert who was in the living room during this episode, spent most of the time in the dining room watching television and drinking. (XXVI 850). Straham did not see any guns (XXVI 862) and did not hear any shots. (XXVI 881). He did, however, witness Cisneros' beating and kicking Campbell (XXVI 872) and said that Donaldson was in charge. (XXVII 1016).

Wengert and Straham each made numerous statements. At trial both the prosecutor and the defense went through their statements one by one and established that their stories had changed over time. (E.g., XXIV 430-31, 498-513, 516-612; XXVI 895-1023). After the state rested, Donaldson moved for judgment of acquittal based on the contrary statements made by Wengert and Straham. (XXVII 1071-72). The trial court denied the motion. (XXVII 1072). During closing argument, defense counsel went through the instructions on deciding a witness' credibility (XXVII 1080-1082) and through the inconsistencies in the state witnesses' testimony. (XXVII 1082-1111).

Moving for a judgment of acquittal "admits not only the facts stated in the evidence adduced, but also admits every conclusion favorable to the adverse party that a jury might fairly and

reasonably infer from the evidence." Lynch v. State, 293 So.2d 44, 45 (Fla. 1974); Taylor v. State, 583 So.2d 323 (Fla. 1991); Spinkellink v. State, 313 So.2d 666 (Fla. 1975), cert. denied, 428 U.S. 911 (1976); Holland v. State, 129 Fla. 363, 176 So. 169 (1937). Judgments of conviction come to reviewing courts with a presumption of correctness, Terry v. State, 668 So.2d 954 (Fla. 1996); Spinkellink, and any conflicts in the evidence must be resolved in the state's favor. Holton v. State, 573 So.2d 283 (Fla. 1990), cert. denied, 500 U.S. 960 (1991); Williams v. State, 437 So.2d 133 (Fla. 1983), cert. denied, 466 U.S. 909 (1984). This Court has long recognized that "an appellate court should not retry or reweigh conflicting evidence submitted to a jury or other trier of fact." Tibbs v. State, 397 So.2d 1120, 1123 (Fla. 1981), aff'd, 457 U.S. 31 (1982); Smith v. State, 515 So.2d 182 (Fla. 1987), cert. denied, 485 U.S. 971 (1988); Melendez v. State, 498 So.2d 1258 (Fla. 1986); Burr v. State, 466 So.2d 1051 (Fla.), cert. denied, 474 U.S. 879 (1985); Williams; Alvord v. State, 322 So.2d 533 (Fla. 1975), cert. denied, 428 U.S. 923 (1976). Reweighing the evidence, however, is precisely what Donaldson asks this Court to do.

Instead of an appellate court doing so, it is the jury's duty to make factual determinations. As this Court has stated:

> If there is room for a difference of opinion between reasonable people as to the proof or facts from which an ultimate fact is to be established, or where there is room for such

> differences on the inferences to be drawn from conceded facts, the court should submit the case to the jury.

Taylor, 583 So.2d at 328; Jent v. State, 408 So.2d 1024 (Fla. 1981), cert. denied, 457 U.S. 1111 (1982); Holland.

Donaldson's main complaint is about the credibility of the state's witnesses. Conflicts in the evidence do not render evidence inadmissible. Smith v. State, no. 83,485 (Fla. July 3, 1997). Impeaching a witness' testimony goes only to the credibility of that testimony. Porter v. State, 429 So.2d 293 (Fla.), cert. denied, 464 U.S. 865 (1983). It is the jury's duty to determine the credibility of the witnesses. Melendez; Jent; Silvestri v. State, 332 So.2d 351 (Fla. 4th DCA 1976); see also Lott v. State, 22 Fla.L.Weekly S289 (Fla. May 22, 1997); Burr.

Donaldson brought the witnesses' credibility to the jury's attention, and the jury performed its duty. The evidence supports Donaldson's first-degree murder convictions and those convictions should be affirmed.

Besides being sufficient to support first-degree murder, the evidence also showed that armed kidnapping and aggravated child abuse had been committed. The state charged aggravated child abuse under subsection 827.03(1)(a) and (b), Florida Statutes. (I 16). This statute requires "[i]ntentional infliction of physical or mental injury upon a child" or "[a]n intentional act that could reasonably be expected to result in physical or mental injury to a

child." Both victims were under the age or legal majority and, therefore, children. Forcing them into the house at gunpoint, interrogating and threatening them for hours, beating Campbell, and then shooting them to death is competent substantial evidence to support the conviction of aggravated child abuse.

The state charged Donaldson with kidnapping pursuant to subsection 787.01(1)(a)(3), Florida Statutes. That statute defines kidnapping as "forcibly, secretly, or by threat confining, abducting, or imprisoning another person against his will and without lawful authority, with intent to: . . . [i]nflict bodily harm upon or to terrorize the victim or another person." Again, the victims were brought into the house at gunpoint, were not allowed to leave, and then were shot to death. This evidence is sufficient to support the kidnapping convictions. See Sochor v. State, 619 So.2d 285 (Fla.), cert. denied, 510 U.S. 1025 (1993); Bedford v. State, 589 So.2d 245 (Fla. 1991), cert. denied, 503 U.S. 1009 (1992).

The dual-conviction cases that Donaldson relies on are factually distinguishable and do not control this case. The jury, as was its duty, resolved the conflicts in the evidence and found the evidence sufficient to support the state's charges. This Court, rather than substituting its judgment for that of the jury, should affirm Donaldson's convictions.

Issue III

WHETHER THE TRIAL COURT PROPERLY ADMITTED EVIDENCE OF AND FOUND THE PRIOR VIOLENT FELONY AGGRAVATOR.

Donaldson argues that the court erred by allowing the state to introduce evidence of his prior conviction of accessory after the fact to murder to prove the prior violent felony aggravator and that the court erred in its consideration of that aggravator. Most of the claims presented in this issue have no merit. Even if error occurred as to some of Donaldson's claims, however, it was harmless.

A. The Accessory After The Fact Conviction

1. Evidence of an accessory after the fact to murder conviction is admissible.

In 1991 the state charged Donaldson with being a principal to a second-degree murder. (XVIII 1370). The state allowed him to plead guilty to accessory after the fact. (XVIII 1370). Donaldson argues that a conviction of accessory after the fact is not a crime of violence and, therefore, cannot be used to support finding the prior violent felony aggravator. This argument and the accessory cases that Donaldson relies on, however, miss the point of the state's having to prove aggravators.[4]

---

[4] Donaldson's analogy to the habitual offender statute is not well taken. This Court has routinely rejected the attempt to analogize the habitual offender statute's provisions on prior convictions to capital cases. Preston v. State, 444 So.2d 939 (Fla. 1984); Ruffin v. State, 397 So.2d 277 (Fla.), cert. denied, 454 U.S. 882 (1981); McCrae v. State, 395 So.2d 1145 (Fla. 1980),

This Court has stated that "the purpose for considering aggravating and mitigating circumstances is to engage in a chracter analysis of the defendant to ascertain whether the ultimate penalty is called for in his or her particular case." Stewart v. State, 558 So.2d 416, 419 (Fla. 1990); Finney v. State, 660 So.2d 674 (Fla.), cert. denied, 116 S.Ct. 823 (1996); Lockhart v. State, 655 So.2d 69 (Fla. 1995); Waterhouse v. State, 596 So.2d 1008 (Fla.), cert. denied, 506 U.S. 957 (1992); Rhodes v. State, 547 So.2d 1201 (Fla. 1989); Buenoano v. State, 527 So.2d 194 (Fla. 1988); McCrae v. State, 395 So.2d 1145 (Fla. 1980), cert. denied, 454 U.S. 1041 (1981); Elledge v. State, 346 So.2d 998 (Fla. 1977). Prior convictions of violent felonies are important in conducting the requisite character analysis because "[p]ropensity to commit violent crimes surely must be a valid consideration for the jury and the judge." Stewart, 558 So.2d at 419; Sireci v. State, 399 So.2d 964 (Fla. 1981), cert. denied, 456 U.S. 984 (1982); McCrae. To this end, therefore, the state may present evidence to show that a prior conviction was for a crime of violence. Finney; Lockhart; Sweet v. State, 624 So.2d 1138 (Fla. 1993), cert. denied, 510 U.S. 1170 (1994); Padilla v. State, 618 So.2d 165 (Fla. 1993); Waterhouse; Stewart; Brown v. State, 473 So.2d 1260 (Fla.), cert. denied, 474 U.S. 1038 (1985); Johnson v. State, 465 So.2d 499 (Fla.), cert. denied, 474 U.S. 865 (1985); Mann v. State, 453 So.2d

---

cert. denied, 454 U.S. 1041 (1981).

784 (Fla. 1984), cert. denied, 469 U.S. 943 (1985). Therefore, evidence of the murder which produced Donaldson's accessory after the fact conviction was admissible during the penalty phase.

2. The evidence of Donaldson's prior conviction was properly admitted.

Donaldson argues that, even if generally admissible, the evidence of his prior conviction should have been prohibited because most of it was hearsay that he had no opportunity to rebut. There is no merit to this claim.

In 1991 Donaldson, his brother Mario, Schrolf Barnes, and Christie Smith were involved in an incident where either Donaldson or Barnes hit the victim, who died two days later, in the head with a baseball bat. (XXVIII 1234, 1245, 1257). Barnes was convicted of second-degree murder (XXVIII 1256), and Donaldson pled guilty to accessory after the fact and received a thirty-month sentence of imprisonment. (XXVIII 1370-71). The state presented most of this evidence through the testimony of Don Vinson, an Okaloosa County deputy who investigated the 1991 murder; Herman Hicks, Jr., a companion of the victim; Steve Ashmore, another deputy who worked on the case; and David Fleet, the assistant state attorney who prosecuted Barnes and Donaldson. James Kasten, another of the victim's companions, was out of the country and, thus, unavailable to testify at trial. The state published his interview taken by Vinson and his deposition taken by Barnes' attorney. The state

also introduced Donaldson's taped interview in which he admitted being involved in the events that caused the victim's death.

Donaldson objected to the introduction of Kasten's interview and deposition because he could not cross-examine him. (XXVIII 1242). The prosecutor responded that the defense had heard the interview and read the deposition and that one of Donaldson's current attorneys had questioned Kasten at length in the deposition. (XXVIII 1242-43). After further argument, the trial court denied the objection. (XXVIII 1246). The defense cross-examined Vinson, Ashmore, and Fleet, but had no questions to ask Hicks.

Hearsay testimony is admissible in a penalty proceeding so long as the defendant has a fair opportunity to rebut it. §921.141(1), Fla.Stat. (1995); Lockhart; Henry v. State, 649 So.2d 1366 (Fla. 1994), cert. denied, 115 S.Ct. 2591 (1995); Spencer v. State, 645 So.2d 377 (Fla. 1994); Chandler v. State, 634 So.2d 701 (Fla. 1988), cert. denied, 490 U.S. 1075 (1989); Clark v. State, 613 So.2d 412 (Fla. 1992), cert. denied, 114 S.Ct. 114 (1993); Waterhouse. Vinson related all the information he gained from all of the witnesses during his testimony. Although Kasten was not available for cross-examination, Vinson was, and counsel cross-examined him. See Waterhouse, 596 So.2d at 1016. Furthermore, Kasten was an eyewitness to the 1991 attack and, as such, his

deposition[5] and interview were unlike the emotionally charged testimony of the victim, who was not available for cross-examination, in Rhodes v. State, 547 So.2d 1201 (Fla. 1989); see Henry, 649 So.2d at 1368.

Donaldson also claims that he had no opportunity to rebut the hearsay statements attributed to Smith and Robinson[6] (initial brief at 68), but made no effort to have them testify to rebut those statements.[7] The court limited introduction of the autopsy report to the portion showing the victim died from a blow to the head. (XXVIII 1230-31). The blow to the head was the cause of death, a fact that Donaldson could not rebut. The court properly overruled the objection to Fleet's testifying to the facts of the disposition of the charges against Barnes and Donaldson.

Donaldson had the opportunity to rebut the hearsay testimony about the 1991 murder. That he did not or could not rebut that hearsay did not make it inadmissible. Clark. Donaldson has shown

---

[5] Donaldson's reliance on State v. Green, 667 So.2d 756 (Fla. 1995), is misplaced. In Green this Court held that a discovery deposition cannot be introduced as substantive evidence of a defendant's guilt. The concerns in Green are not present in a penalty phase, §921.141(1), Fla.Stat. (1995), and Green should not be extended to such proceedings.

[6] Robinson was another witness to the 1991 incident. (XXVIII 1239).

[7] Robinson and Smith both told Vinson that Donaldson hit the victim (XXVIII 1257), but Vinson did not think Robinson was a trustworthy witness and said that Smith also told him she did not see who used the baseball bat. (XXVIII 1254). Thus, their statements were not unduly prejudicial.

no abuse of discretion in the trial court's admitting this testimony, and this claim should be denied.

3. Evidence of the 1991 murder did not improperly become a feature of the penalty phase.

Donaldson complains that because the state produced only one witness at the penalty phase that did not testify about the 1991 murder, the 1991 incident improperly became a feature of the proceedings.[8] This claim has no merit.

Testimony about the details of a defendant's prior violent felony convictions is relevant in penalty proceedings. Such evidence should be omitted, however, when its prejudicial effect outweighs its probative value. Duncan v. State, 619 So.2d 279 (Fla.), cert. denied, 510 U.S. 969 (1993); Rhodes. The cases cited by Donaldson to support this claim are factually distinguishable. Unlike in Finney and Rhodes the victim of the 1991 murder did not testify; nor did the victim's survivor testify as happened in Freeman v. State, 563 So.2d 73 (Fla. 1990), cert. denied, 501 U.S. 1259 (1991). No photograph, such as that condemned in Duncan, was introduced. Unlike Hitchcock v. State, 673 So.2d 859 (Fla. 1996), no evidence of uncharged crimes was introduced. The fact that evidence of the 1991 incident was prejudicial did not make it

---

[8] Contrary to Donaldson's claim, this witness' testimony about Campbell's state of mind was relevant to the aggravators. Moreover, Donaldson cross-examined the witness about the circumstances surrounding Campbell's statement. (XXVIII 1397 et seq.).

inadmissible. This evidence was not overly prejudicial and did not become a "feature" of the proceedings.

Even if the court erred in admitting some of this evidence, in the context of the entire penalty phase any error was harmless. See Buenoano.

B. The Prior Violent Felony Aggravator Was Properly Weighed.

Donaldson argues that this aggravator was improperly given double consideration in the weighing process. The state does not concede that any error occurred regarding this aggravator. If it did, however, any error was harmless.

In closing argument the prosecutor urged the jury to find that this aggravator "applies two-fold to this case" (XXX 1669), based on the contemporaneous murders and the 1991 murder. The trial court made the following findings of fact:

> 1. The Defendant was previously convicted of another capital offense. Since this case involves the simultaneous murder of two teen-age children, the Defendant having been found guilty of first degree murder in both Counts I and II, this aggravating factor is uncontroverted as it applies to each count individually. This aggravating factor has been proved beyond a reasonable doubt as to each count.
>
> 2. The Defendant was previously convicted of a felony involving the use or threat of violence to some person, to-wit: the Defendant's January 8, 1992, conviction of Accessory after the Fact to Second Degree Murder. While a conviction of Accessory After the Fact to Second Degree Murder is not, standing alone, sufficient to satisfy the

> requirements of this aggravating factor, the evidence introduced by the State during the penalty phase proceeding proved beyond a reasonable doubt that the Defendant's conviction for this offense most certainly did involve the use or threat of violence to the person of Paul Mahugh. The evidence presented indicated that the Defendant, while riding his bicycle, apparently heard what he thought to be a racial slur from a group of white males standing in the parking lot of a bowling alley. The Defendant went home, recruited several of his friends, collected his bat which he referred to as "bam-bam", and returned with his friends and the baseball bat to the parking lot. The Defendant's own testimony indicates that his intention in taking the baseball bat to the parking lot was to threaten the group of young white males for making what he perceived to be a racial slur. Upon arriving at the parking lot, the Defendant and his friends approached the group of white males and the Defendant participated in the fatal attack on Paul Mahugh by striking the victim with his fists and holding him while another co-defendant struck the victim with the baseball bat, resulting in the death of the victim. Thereafter, testimony was uncontroverted that the Defendant bragged to his friends back at his residence about "smashing that cracker." While the Defendant was allowed to negotiate a plea for a lesser offense, it has been proven beyond a reasonable doubt that the Defendant has been previously convicted of a felony involving the use or threat of violence to some person.

(XIV 2751). The record supports these findings. The contemporaneous convictions and the 1992 conviction qualify as prior violent felony convictions and establish the prior violent felony aggravator.

The double mention, both by the prosecutor and the trial court, is not fatal to Donaldson's sentencing. This Court has stated that

> the propriety of a sentence of death is not a function of merely tabulating aggravating versus mitigating factors. Rather, the sentencing determination is the result of a weighing process during which each factor must be assigned a qualitative weight. Accordingly, it is only logical that record evidence of the circumstances underlying the aggravating and mitigating factors may be considered in assigning a relative weight to each factor.

Slawson v. State, 619 So.2d 255, 259-60 (Fla. 1993) (citations and footnote omitted); see also Windom v. State, 656 So.2d 432 (Fla.), cert. denied, 116 S.Ct. 571 (1995); Floyd v. State, 569 So.2d 1225 (Fla. 1990), cert. denied, 501 U.S. 1259 (1991); Herring v. State, 446 So.2d 1049 (Fla.), cert. denied, 409 U.S. 989 (1984). Moreover, even "[t]he double recitation of proven factors does not call the propriety of the sentence into question unless it interferes with the mandated process of weighing the circumstances." Sims v. State, 444 So.2d 922, 926 (Fla. 1983), cert. denied, 467 U.S. 1246 (1984).

The jury received the standard instruction that the aggravators should be weighed against the mitigators. (XXX 1719). There is no indication that the jury did not follow this instruction or that the jury counted the aggravators and mitigators rather than weighing them.

There is also no evidence that the trial court did anything other than weigh rather than count the aggravators and mitigators. There is no indication that the double recitation of this aggravator interfered with the weighing process. As noted earlier, prior violent convictions are important in analyzing a defendant's character because the propensity to commit violent crimes is a valid consideration. The weight to be given an aggravator is within the trial court's discretion, Slawson, and Donaldson has demonstrated no abuse of discretion.

Even if some error occurred, there is no possibility that it contributed to Donaldson's being sentenced to death. The state established the prior violent felony aggravator, as well as three others, beyond a reasonable doubt. Therefore, this Court should affirm the trial court's findings. Wuornos v. State, 676 So.2d 966 (Fla. 1995).[9]

Issue IV

WHETHER THE TRIAL COURT ERRED BY ADMITTING CISNEROS' DEPOSITION INTO EVIDENCE.

Donaldson argues that the trial court erred by admitting into evidence the discovery deposition of Ruben Cisneros, Jr.[10] There

---

[9] Contrary to Donaldson's contention (initial brief at 75-76), giving the requested doubling instruction on aggravated child abuse and armed kidnapping would not have cured any problem regarding this aggravator.

[10] Cisneros' deposition is included in the record at XII 2254-2340.

is no merit to this claim. Even if error occurred, however, it was harmless.

Prior to the defense resting in the penalty phase on April 26, 1996, the trial court excused the jury so that Donaldson could return to the defense table. (XXX 1634). While the jury was still out of the courtroom, the defense introduced several exhibits, including a copy of Cisneros' written plea agreement, and the court admitted those exhibits into evidence. (XXX 1634-35). The state then sought to introduce its motion asking the court to withdraw Cisneros' plea agreement. (XXX 1635). When the court inquired as to the relevance of that document, the prosecutor responded that, after entering the plea, Cisneros lied in his deposition taken by defense counsel. (XXX 1635-36). The prosecutor stated that he wanted the jury to know that Cisneros had violated the plea agreement and that the state wanted to withdraw it. (XXX 1636). Donaldson had no objection to the state's exhibit, and the court admitted it into evidence. (XXX 1637). After the jury returned to the courtroom the defense rested. (XXX 1662).

The parties reconvened the sentencing hearing on May 22, 1996. (XV 2949). The prosecutor sought to introduce all of Cisneros' statements including one taken by the prosecutor on January 17, 1996 (XV 2984) and the deposition taken by the defense the following month. Donaldson objected, and, when the judge established that defense counsel had not been present for the

statement taken by the state attorney, he refused to admit the January statement. (XV 2988).

The prosecutor then stated that he wanted to present Cisneros' statements to rebut the mitigating argument that who did what during the murder was unclear because Cisneros' statement was consistent with all the other witnesses' testimony. (XV 2988). The prosecutor withdrew the January statement, and the court admitted the deposition because "both [defense] counsel were present, in fact, not only these counsel but Mr. Cisneros' counsel also. That evidence is clear upon reading the deposition, and in that counsel had an opportunity at that time to examine and cross-examine Mr. Cisneros, the court will overrule the objection, and I will admit the deposition." (XV 2990).

As stated in subsection 921.141(1), Florida Statutes (1995): "Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements." As Donaldson acknowledges, the rules of evidence thus are relaxed in the penalty phase of a capital case, and evidence that might not be admissible during the guilt phase may be admissible during the penalty phase if the defendant has an opportunity to rebut that evidence. Lawrence v. State, 691 So.2d 1086 (Fla. 1997); Spencer v. State, 645 So.2d 377 (Fla. 1994); Wuornos v. State, 644 So.2d 1012 (Fla.

1994), cert. denied, 115 S.Ct. 1708 (1995); Clark v. State, 613 So.2d 412 (Fla. 1992), cert. denied, 114 S.Ct. 114 (1993). As the trial court correctly held, Donaldson's counsel had the opportunity to rebut Cisneros' deposition testimony at the deposition.

Thus, it is apparent that the trial court did not err in admitting the deposition into evidence. Donaldson's reliance on State v. Green, 667 So.2d 756 (Fla. 1995), is misplaced because that case is factually distinguishable. In Green this Court held that discovery depositions cannot be used as substantive evidence of a defendant's guilt. In this case, however, Donaldson's guilt had already been established. The deposition was used only to rebut Donaldson's arguments as to penalty. Green should not be extended to preclude the introduction of relevant evidence, provided for in subsection 921.141(1), at the penalty phase of a capital proceeding. Donaldson's characterization of Old Chief v. United States, 117 S.Ct. 644 (1997), stretches that case far beyond its holding construing 18 U.S.C. §922(g)(1). It also ignores Old Chief's recognition that the state need not accept a stipulation in most cases because

> the prosecution may fairly seek to place its evidence before the jurors, as much to tell a story of guiltiness as to support an inference of guilt, to convince the jurors that a guilty verdict would be morally reasonable as much to as to point to the discrete elements of a defendant's legal fault.

Id. at 654. Therefore, this claim should be denied.

If this Court decides that the deposition should not have been admitted, however, it should find any error harmless. The jury never knew that the deposition existed, and there is no indication that the trial court relied on the deposition in sentencing Donaldson to death. If admitting the deposition constituted error, it was harmless beyond any reasonable doubt.

Issue V

WHETHER THE TRIAL COURT CORRECTLY FOUND THESE MURDERS TO HAVE BEEN COMMITTED IN A HEINOUS, ATROCIOUS, OR CRUEL MANNER.

Donaldson argues that both the HAC aggravator and the instruction given to his jury are unconstitutionally vague and overbroad and that the facts do not support finding this aggravator. There is no merit to these arguments.

This Court has repeatedly upheld the constitutionality of the HAC aggravator. Lott v. State, 22 Fla.L.Weekly S289 (Fla. May 22, 1997); Washington v. State, 653 So.2d 362 (Fla. 1995); Lucas v. State, 613 So.2d 408 (Fla. 1992), cert. denied, 114 S.Ct. 136 (1993). The trial court gave the HAC instruction approved in Hall v. State, 614 So.2d 473 (Fla.), cert. denied, 510 U.S. 834 (1993). (XXX 1716). This Court has consistently held that instruction to be proper. Geralds v. State, 674 So.2d 96 (Fla. 1996), cert. denied, 117 S.Ct. 230 (1997); Finney v. State, 660 So.2d 674 (Fla.), cert. denied, 116 S.Ct. 823 (1995); Johnson v. State, 660 So.2d 637 (Fla. 1995), cert. denied, 116 S.Ct. 1550 (1996); Fennie

v. State, 648 So.2d 95 (Fla. 1994), cert. denied, 115 S.Ct. 1120 (1995); Walls v. State, 641 So.2d 381 (Fla. 1994), cert. denied, 115 S.Ct. 943 (1995). Donaldson has shown no good reason why this Court should overturn the holdings of these cases.

The trial court made the following findings as to the HAC aggravator:

> 5. The murders were committed in an especially heinous, atrocious, or cruel manner. These two teen-agers were kidnapped at gunpoint and held for several hours and interrogated extensively by the Defendant and his cohorts as both Lawanda Latisha Campbell and Donnta Lamar Head asked on more than one occasion if they were "going to die." The testimony indicates without question that both victims were obviously in fear of dying at the hands of the Defendant for several hours before the arrival of the triggerman, Joseph Sykosky. We will never know the amount of fear and anxiety suffered by these two children when they witnessed the arrival of Joseph Sykosky, the Defendant handing him the gun, and the Defendant directing George Wengert to go turn on the stereo and then to turn it up louder. If the victims had suspicions earlier that they might die, as evidenced by this question, "Are we going to die", certainly they knew from the time of Mr. Sykosky's arrival that he was there for the purpose of murdering them. While the evidence is not clear which child watched as their friend was executed with full knowledge and understanding that they would be next. Even though the deaths of these victims may have been quick rather than lingering, they were subjected to hours of terror and at least minutes of excruciating and heightened anguish and fear before their death. This aggravating circumstance has been proved beyond a reasonable doubt as to each count.

(XIV 2753). Donaldson argues that the trial court erred in finding this aggravator applicable to both murders because he did not intend "to inflict extraordinary pain, torture or severe mental anguish" (initial brief at 86), and because the court focused on the victims' being children. (Initial brief at 87-88). The facts of this case, however, support the trial court's findings.

The victims were brought into the house forcibly and at gunpoint. (XXIV 449). Once inside they were interrogated for hours. (XXIV 452). Although they were told they would not be killed (XXIV 456-57), the victims looked scared. (XXIV 453). They were being kept against their will and could not have left the house. (XXIV 514). Donaldson had previously had a relationship with Campbell (XXIV 443), but said he did not care what happened to her. (XXIV 458). On hearing that Cisneros beat and kicked Campbell. (XXIV 458; XXVI 872). In front of the victims Donaldson told Sykosky to kill them (XXIV 513), which Sykosky did with Donaldson's pistol. (XXIV 469).

The HAC aggravator applies to the nature of the killing and the surrounding circumstance. Gorby v. State, 630 So.2d 544 (Fla. 1993), cert. denied, 115 S.Ct. 99 (1994); Stano v. State, 460 So.2d 890 (Fla. 1984), cert. denied, 472 U.S. 1111 (1985); Mason v. State, 438 So.2d 374 (Fla. 1983), cert. denied, 465 U.S. 1051 (1984). Even that Donaldson "might not have meant the killing[s] to be unnecessarily torturous does not mean that [they were] not

unnecessarily torturous and, therefore, not heinous, atrocious, or cruel." Hitchcock v. State, 578 So.2d 685, 692 (Fla. 1990), cert. denied, 502 U.S. 912 (1991). This is so because "[i]n determining whether the circumstance of heinous, atrocious or cruel applies, the mind set or mental anguish of the victim is an important factor." Harvey v. State, 529 So.2d 1083, 1087 (Fla. 1988), cert. denied, 489 U.S. 1040 (1989); Wyatt v. State, 641 So.2d 1336 (Fla. 1994), cert. denied, 115 S.Ct. 1983 (1995); Phillips v. State, 476 So.2d 194 (Fla. 1985). As this Court has held many times, fear and emotional strain preceding a victim's death contribute to the heinous nature of that death. Lott; Henyard v. State, 22 Fla.L.Weekly S14 (Fla. December 19, 1996); Thompson v. State, 648 So.2d 692 (Fla. 1994), cert. denied, 115 S.Ct. 2283 (1995); Sochor v. State, 619 So.2d 285 (Fla.), cert. denied, 510 U.S. 1025 (1993); Preston v. State, 607 So.2d 404 (Fla. 1992), cert. denied, 113 S.Ct. 1619 (1993); Adams v. State, 412 So.2d 850 (Fla.), cert. denied, 459 U.S. 882 (1982). Furthermore, as this Court has recognized, the HAC aggravator can "be supported by evidence of actions of the offender preceding the actual killing." Swafford v. State, 533 So.2d 270, 277 (Fla. 1988); Lott; Henyard; Thompson.

The cases that Donaldson relies on are distinguishable and do not control the instant case. In those cases, listed in pages 83 through 86 of the initial brief, this Court decided that HAC was not supported by the facts of those cases. Each case is different,

however, and the facts of this case support the trial court's finding the HAC aggravator.

Even though these victims died quickly from the gunshot wounds, their being shot was only the culmination of the night's events. Hours before their deaths they were kidnapped at gunpoint, interrogated, and threatened. Campbell was beaten and kicked; Head knew this had been done to her. In front of the victims Donaldson gave Sykosky the gun and told him to kill them. The facts and circumstances surrounding these murders set them apart from the norm of capital felonies and show them to have been heinous, atrocious, or cruel.

Even if this Court decides that the trial court erred in finding this aggravator applicable to either or both, no relief is warranted. As stated by this Court previously: "If there is no likelihood of a different sentence, the trial court's reliance on an invalid aggravator must be deemed harmless." Rogers v. State, 511 So.2d 526, 535 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988). Striking HAC would leave three aggravators (felony murder, prior conviction, and CCP) to be weighed against inconsequential nonstatutory mitigation. Given the presence of three strong aggravators and the lack of significant mitigators, there is no reasonable likelihood that Donaldson would have received a sentence of life imprisonment if the HAC aggravator had not been considered. Cf. Ferrell v. State, 686 So.2d 1324 (Fla. 1996) (striking HAC was

harmless); Hartley v. State, 686 So.2d 1316 (Fla. 1996) (same); Geralds v. State, 674 So.2d 96 (Fla.) (no reasonable likelihood of different sentence where striking an aggravator left two aggravators to be weighed against a statutory mitigator and three nonstatutory mitigators), cert. denied, 117 S.Ct. 230 (1996); Barwick v. State, 660 So.2d 685 (Fla. 1995) (no likelihood of different sentence when eliminating CCP left five aggravators to be weighed against minimal mitigating evidence"), cert. denied, 116 S.Ct. 823 (1996); Fennie, 648 So.2d at 99 (eliminating CCP would be harmless because "[t]he totality of the aggravating factors and the lack of significant mitigating circumstances conclusively demonstrate that death is the appropriate penalty in this case"); Pietri v. State, 644 So.2d 1347 (Fla. 1994) (striking CCP left three aggravators and, even if the trial court had found mitigators, there was no reasonable likelihood of a different sentence), cert. denied, 115 S.Ct. 2588 (1995); Wyatt v. State, 641 So.2d 355, 360 (Fla. 1994) (striking two aggravators was harmless where the three remaining aggravators "far outweigh the minimal mitigating evidence"), cert. denied, 115 S.Ct. 1372 (1995); Peterka v. State, 640 So.2d 59 (Fla. 1994) (striking two aggravators was harmless where three aggravators remained to be weighed against lack of a significant criminal history), cert. denied, 115 S.Ct. 940 (1995); Stein v. State, 632 So.2d 1361 (Fla.) (harmless error where four aggravators remained to be weighed against statutory

mitigator), cert. denied, 115 S.Ct. 111 (1994); Watts v. State, 593 So.2d 198 (Fla.) (eliminating HAC was harmless where three aggravators remained to be weighed against one statutory mitigator and one nonstatutory mitigator), cert. denied, 505 U.S. 1210 (1992).

Because no reversible error has been demonstrate, Donaldson's death sentence should be affirmed.

Issue VI

WHETHER THE TRIAL COURT PROPERLY FOUND THESE MURDERS TO HAVE BEEN COMMITTED IN A COLD, CALCULATED, AND PREMEDITATED MANNER.

Donaldson claims that the CCP aggravator and the instruction on it given to his jury are unconstitutionally vague and overbroad and that the CCP aggravator should not have been found because he had a pretense of moral or legal justification for killing the victims. There is no merit to these claims.

This Court has upheld the constitutionality of the CCP aggravator numerous times. Larzelere v. State, 676 So.2d 394 (Fla. 1996); Hunter v. State, 660 So.2d 244 (Fla. 1995), cert. denied, 116 S.Ct. 946 (1996); Fotopoulous v. State, 608 So.2d 784 (Fla. 1992), cert. denied, 508 U.S. 924 (1993). Donaldson presents nothing to warrant overturning these decisions.

At the penalty-phase charge conference the judge denied the defense requested CCP instruction because it "contain[s] some language that is not at this time recommended by the Florida

Supreme Court in the standard instruction" and announced his intention to give the CCP instruction adopted by this Court in Standard Jury Instructions in Criminal Cases, 665 So.2d 212, 213-214 (Fla. 1995). (XXX 1644). The prosecutor then asked if the defense conceded that the state's requested instruction was the CCP instruction approved by the Florida Supreme Court in 1995. (XXX 1644). The court, however, moved on to other instructions, but Donaldson did not object after the court stated that the 1995 instruction would be given.

As Donaldson points out, there is a minor difference between the instruction given and the standard. The last line of the given instruction reads "rebuts the otherwise cold and calculated nature of the murder" (XXX 1717), rather than "rebuts the otherwise cold, calculated or premeditated nature of the murder." Id. at 214. Because Donaldson did not object to the instruction as given by the trial court, the state does not concede that the complaint about the validity of the instruction has been preserved for appeal. If this Court decides otherwise, however, and also decides that the given instruction was error, any such error would be harmless because these murders were CCP under any instruction on that aggravator. Cf. Larzelere (giving improper CCP instruction was harmless error where facts established CCP); Foster v. State, 654 So.2d 112 (Fla.) (same), cert. denied, 116 S.Ct. 314 (1995); Walls

v. State, 641 So.2d 381 (Fla. 1994) (same), cert. denied, 115 S.Ct. 943 (1995).

Four elements must be proved to establish the CCP aggravator: The murder must be "cold," it must be the product of a careful or prearranged design, there must be heightened premeditation, and there must be no pretense of moral or legal justification. Fennie v. State, 648 So.2d 95 (Fla. 1994), cert. denied, 115 S.Ct. 1120 (1995); Jackson v. State, 648 So.2d 85 (Fla. 1994); Walls. This aggravator "focuses on the manner in which the crime was executed, i.e., the advance procurement of the murder weapon, the lack of resistance or provocation, the appearance of a killing carried out as a matter of course." Stein v. State, 632 So.2d 1361, 1366 (Fla.), cert. denied, 115 S.Ct. 111 (1994). Execution-style killings are often CCP. E.g., Jones v. State, 690 So.2d 568 (Fla. 1996). This is especially true when the victim is kidnapped and then executed. Hartley v. State, 686 So.2d 1316 (1996); Ferrell v. State, 686 So.2d 1324 (Fla. 1996); Foster v. State, 679 So.2d 747 (Fla. 1996); Fennie.

The trial court made the following findings regarding the CCP aggravator:

> 4. The murders of Donnta Lamar Head and Lawanda Latisha Campbell were committed in a cold and calculated and premeditated manner, and without any pretense of moral or legal justification.
>
> The facts of this case indicate strongly that these murders were committed for the purpose

of revenge against the victims for their part in a failed attempted robbery of the Defendant several days prior to the murder. On the night of the murders, the Defendant had talked to one of the victims, Lawanda Latisha Campbell, on the telephone and had threatened to kill her at that time. Thereafter, the victims arrived at the Defendant's residence for some unknown reason, knocked at the Defendant's door, and thereafter the sequence of events culminated in the "execution-style" murders of the victims. Upon knocking at the Defendant's door, the victims were kidnapped at gunpoint, forced into the Defendant's home, and thereafter terrorized and interrogated at gunpoint for several hours. Upon admitting their involvement in the attempted robbery of the Defendant several days earlier, the Defendant asked George Wengert if he would kill the victims. Mr. Wengert refused and, thereafter, the Defendant called the triggerman, Joseph Sykosky, to the Defendant's residence. Upon Mr. Sykosky's arrival, Mr. Sykosky, while looking at Donnta Head and Lawanda Campbell, asked the Defendant "Are these the ones you went me to do?". The Defendant answered, "Yes", handed Mr. Sykosky the murder weapon, and directed Sykosky to execute the two children. After handing Sykosky the murder weapon, the Defendant told Sykosky to wait and instructed George Wengert to go turn on the stereo, and thereafter instructed Mr. Wengert to go back to the stereo and to turn up the volume for the obvious purpose of drowning out the noise of the impending shots. Mr. Sykosky thereupon shot each of the two victims as they sat in the chair and then shot them again after they fell to the floor. Thereafter, the Defendant personally directed the cleanup and disposal of the bodies. Following the murder of the two victims, the Defendant told Sykosky that Sykosky's drug debt to the Defendant was now cleared. These murders were obviously committed for the purpose of the Defendant's revenge against the victims and were carried out in a classic "contract execution-style murder" and cannot under any stretch of the

> imagination be said to have been committed under any pretense of legal or moral justification. This aggravating factor has been proved beyond any reasonable doubt as to each count.

(XIV 2752-53). The record supports these findings.

Each victim was brought into Donaldson's house at gunpoint. (XXIV 449). Donaldson, Cisneros, and Wengert interrogated them for hours. (XXIV 451-62). Donaldson called someone and told that person that he might need a favor done and then sent Cisneros and Straham to pick up Sykosky. (XXIV 463-64). Sykosky asked Donaldson if Head and Campbell were the ones that Donaldson wanted him to take care of. (XXIV 467). Donaldson said yes, told Wengert to turn up the stereo, and then told him to turn it louder. (XXIV 467, 469). Sykosky owed Donaldson money for drugs, and Donaldson said that, if Sykosky did the job, his debt would be paid. (XXIV 496). After the victims were dead, Donaldson directed that their bodies be taken to his car. (XXIV 470-71). Donaldson, Cisneros, and Wengert then drove off to dump the bodies. (XXIV 472-73). Donaldson and Cisneros undressed the victims. (XXIV 474). Donaldson and Cisneros put the victims' clothes and the lining of the trunk into one garbage dumpster, and their own clothes into another. (XXIV 474-75). After returning to Donaldson's, they cleaned the house and gave the shell casings to Donaldson who told Sykosky to get rid of the gun. (XXIV 476-78).

There is no merit to Donaldson's claim that he had a pretense of moral or legal justification in committing these murders because he "was living in a constant state of siege." (Initial brief at 92). There was no evidence that, when the telephone went dead earlier in the evening, the line had been cut. Rather, it appears that the other party merely hung up. The victims, unarmed and only thirteen and fifteen years of age, posed no threat to Donaldson and the other occupants of his house, all of whom were older and larger than the victims and heavily armed. Banda v. State, 536 So.2d 221 (Fla. 1988), cert. denied, 489 U.S. 1087 (1989), Christian v. State, 550 So.2d 450 (Fla. 1989), cert. denied, 494 U.S. 1028 (1990), and Cannady v. State, 427 So.2d 723 (Fla. 1983), are factually distinguishable from this case and do not support the instant claim. The trial court correctly found that Donaldson had no pretense of moral or legal justification for committing these cold-blooded murders.

The deliberate nature of Donaldson's actions demonstrate the requisite level of coldness, planning, and calculation. The length of time these events took demonstrate the requisite premeditation. The facts of this case support the trial court's findings and demonstrate that these murders were truly cold, calculated, and premeditated. The trial court's finding the CCP aggravator applicable to both murders should be affirmed.

Issue VII

WHETHER THE FELONY MURDER AGGRAVATOR WAS PROPERLY FOUND.

The trial court made the following findings as to the felony murder aggravator:

> 3. The murders of Donnta Lamar Head and Lawanda Latisha Campbell were committed while the Defendant was engaged in the commission of a kidnapping. The Defendant was convicted of the kidnapping of both Donnta Lamar Head and Lawanda Latisha Campbell, and the evidence proves beyond a reasonable doubt that both of these murders were committed while the Defendant was engaged in the crime of kidnapping. Both of these victims were kidnapped from outside the Defendant's home at gunpoint upon orders, and/or instructions, of the Defendant. The victims were taken into the Defendant's residence and confined there against their will for several hours prior to their murder. The victims were under the Defendant's control at all times following their kidnapping and were interrogated and terrorized upon orders of the Defendant. This aggravating circumstance has been proved beyond a reasonable doubt as to each count.

(XIV 2751-52). Donaldson argues that the trial court improperly relied on this aggravator because the evidence did not support his convictions of armed kidnapping. There is no merit to this claim.

As demonstrated in issue II, supra, the armed kidnapping convictions were supported by competent substantial evidence. When the state produces sufficient evidence to support conviction of a felony, that evidence also supports the felony murder aggravator. Jones v. State, 652 So.2d 346 (Fla.), cert. denied, 116 S.Ct. 202 (1995); Sochor v. State, 619 So.2d 285 (Fla.), cert. denied, 510

U.S. 1025 (1993); Fotopoulous v. State, 608 So.2d 784 (Fla. 1992), cert. denied, 508 U.S. 924 (1993); Perry v. State, 522 So.2d 817 (Fla. 1988); Melendez v. State, 498 So.2d 1258 (Fla. 1986).

The trial court correctly found that the felony murder aggravator applied to these murders, and this claim should be denied.

Issue VIII

WHETHER THE TRIAL COURT ERRED REGARDING MITIGATING EVIDENCE.

In this issue Donaldson makes numerous claims of error regarding mitigating evidence. He has shown no reversible error, however, and these claims should be denied.

Donaldson first argues that the trial court should have allowed him to present evidence that he turned down the state's offer of a plea agreement. During Donaldson's penalty-phase testimony, defense counsel asked if he had been offered a plea agreement, and Donaldson responded affirmatively. (XXIX 1575). The state objected, and, after having the jury removed, the court sustained the objection. (XXIX 1576).

Donaldson did not object to the court's ruling so this issue has not been preserved for appeal. Even if preserved, however, it has no merit. Section 90.410, Florida Statutes (1995), provides in pertinent part as follows: "Evidence of a plea of guilty later withdrawn; a plea of nolo contendere; or an offer to plead guilty or nolo contendere to the crime charged or any other crime is

inadmissible in any civil or criminal proceeding." See Reese v. State, 22 Fla.L.Weekly S150 (Fla. March 20, 1997); Groover v. State, 458 So.2d 226 (Fla. 1984). Pursuant to section 90.410, therefore, the trial court properly sustained the state's objection to Donaldson's testimony.

Next, Donaldson argues that the court erred by refusing to give his specially requested instructions on nonstatutory mitigators. There is no merit to this claim because, as this Court has held many times, the "catch-all" instruction on nonstatutory mitigation is sufficient. Burns v. State, no. 84,299 (Fla. July 10, 1997); James v. State, 22 Fla.L.Weekly S223 (Fla. April 24, 1997); Kilgore v. State, 688 So.2d 895 (Fla. 1996); Finney v. State, 660 So.2d 674 (Fla. 1995); Ferrell v. State, 653 So.2d 367 (Fla. 1995); Robinson v. State, 574 So.2d 108 (Fla.), cert. denied, 502 U.S. 841 (1991).

Donaldson also claims that the court erred by not giving more weight to the lesser punishment given to Sykosky, Wengert, and Cisneros and to Straham's lack of punishment. The trial court made the following findings on the proposed nonstatutory mitigation of disparate treatment:

> 1. The triggerman, Joseph Sykosky, has been sentenced to life by this Court for the exact same offenses. It is acknowledged that this Court followed the jury recommendation in the case of Joseph Sykosky and imposed a life sentence on each count for the murders of Donnta Head and Lawanda Campbell. However, the evidence is overwhelming in this case, as

it was in the trial of Joseph Sykosky, that the murders of Donnta Head and Lawanda Campbell were planned, orchestrated, and ordered by the Defendant, Charles Donaldson. If it were not for the Defendant's participation in these murders, the evidence leaves no doubt that these two victims would still be alive. The evidence indicates strongly that the triggerman, Joseph Sykosky, was little more than a "puppet" whose strings were pulled and manipulated by the Defendant. Joseph Sykosky was not involved in the kidnapping or abuse of these children prior to his arrival at the residence. In fact, the evidence is uncontroverted that Joseph Sykosky had no knowledge of the kidnapping or abuse of the children. He was present in the residence only a few minutes before the murders occurred. Furthermore, the aggravating circumstances of "cold, calculated, and premeditated" and "conviction of a prior violent felony" did not apply to Joseph Sykosky. The aggravating factors applicable to Charles Donaldson simply do not apply to Joseph Sykosky. As to the Co-Defendants, George Wengert and Ruben Cisneros, the evidence tends to establish that they were relatively "minor players", and while they were involved in the kidnapping and abuse of the children, and the disposal of the bodies at the direction of the Defendant, Charles Donaldson, they were basically "yes-men" of the Defendant and certainly did not plan or orchestrate the murders. While the Court has given due consideration to the sentences imposed upon the Co-Defendants, particularly the consecutive life sentences imposed upon Joseph Sykosky, the Court finds this nonstatutory mitigator is entitled to little, if any, weight in consideration of the sentence to be imposed upon the Defendant.

2. Disparate treatment of Co-Defendants and other participants. This factor has already been addressed in the preceding paragraph by this Court. However, Defendant argues in his memorandum that the other "participant" in this event, William Straham, was a "solid gold

> liar." While it is acknowledged that Mr. Straham has in the past made statements inconsistent with his testimony in Court, the jury apparently did not agree with defense counsel's assessment of Mr. Straham's trustworthiness. There was no evidence tending to indicate Mr. Straham was involved in these murders and he was never charged by the State. Any treatment of Mr. Straham is not relevant to the sentence to be imposed upon the Defendant. The Court finds that this is not a mitigating factor.

(XIV 2755-56). The record supports these findings. The culpability of Wengert, Straham, and Cisneros in these murders was less than that of Donaldson and warrants their lesser punishment. Sykosky actually shot the victims, but his jury recommended sentences of life imprisonment, which the trial court imposed, rather than death as recommended by Donaldson's jury. As this Court has recognized, a life recommendation "entails a wholly different legal principle and analysis." Franqui v. State, no. 83,116, slip op. at 16 (Fla. June 26, 1997); Burns. This Court has long held that "the weight to be given a mitigator is left to the trial judge's discretion." Mann v. State, 603 So.2d 1141, 1144 (Fla. 1992), cert. denied, 506 U.S. 1085 (1993); Gudinas v. State, 22 Fla.L.Weekly S181 (Fla. April 10, 1997); Spencer v. State, 691 So.2d 1062 (Fla. 1996); Kilgore v. State, 688 So.2d 895 (Fla. 1996); Bonifay v. State, 680 So.2d 413 (Fla. 1996); Jones v. State, 648 So.2d 669 (Fla. 1994), cert. denied, 115 S.Ct. 2588 (1995); Swafford v. State, 533 So.2d 270 (Fla. 1988), cert. denied, 489 U.S. 1100 (1989). Donaldson has demonstrated no abuse of

discretion regarding the trial court's handling of the disparate treatment, and the court's findings should be affirmed.

Donaldson next complains that the court failed to find in mitigation and weigh his "good qualities." One of the nonstatutory mitigators proposed in Donaldson's sentencing memorandum reads as follows:

> 8. The defendant has other good qualities shown in his life. All of these factors should be mitigating circumstances in this case.
>
> a) The defendant has a capacity for hard work and has worked well when employed Medina v. State, 466 So.2d 1046.
>
> b) The defendant attended church regularly with his family while growing up. He was very talented and played the organ and would sing in church. Gore v. State, 475 So.2d 1205.
>
> c) The defendant's good qualities might best be exemplified by his moving to Georgia to take care of his invalid grandparents.

(XIV 2721). The trial court made the following findings as to Donaldson's "good qualities":

> 8. The Defendant has a capacity for hard work and has worked well when employed. This mitigating factor was established by the evidence and again given slight weight by the Court.
>
> 9. The Defendant attended church regularly with his family while growing up, was very talented, and played the organ and would sing in church. The Court finds that these facts

> were established by the evidence but entitled to no weight as a mitigating factor.
>
> 10. The Defendant's good qualities might best be exemplified by his moving to Georgia to take care of his invalid grandparents. This factor was established by the evidence. However, while commendable, this fact does not rise to the level of a mitigating factor.

(XIV 2757).

Mitigators "extenuat[e] or reduc[e] the degree of moral culpability for the crime." Rogers v. State, 511 So.2d 526, 534 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988); Consalvo v. State, 21 Fla.L.Weekly S423 (Fla. October 3, 1996); Spencer. The decision as to whether a mitigator has been established is within the trial court's discretion and will not be reversed if that decision is supported by the record. James v. State, 22 Fla.L.Weekly S223 (Fla. April 24, 1997); Consalvo; Bonifay; Foster v. State, 679 So.2d 747 (Fla. 1996). Donaldson has shown no abuse of discretion in not finding in mitigation that he helped his grandparents and in giving no weight to his musical talent and church attendance. While supposedly taking care of his grandparents, he ran away, became involved in criminal activity, and was placed in detention. (XXIX 1463-64). His church attendance and musical efforts apparently occurred before he went to Georgia at age fourteen. (XXIX 1470). These purported "good qualities" did not last because by age twenty-one Donaldson was a confessed drug dealer. These "good qualities" do not reduce Donaldson's culpability or extenuate

the circumstances of this cold-blooded murder of two children. The same is true as to the court's refusal to find Donaldson's life sentence in federal prison as a mitigator. (XIV 2756). The trial court's findings as to these nonstatutory mitigators should be affirmed.

Finally, Donaldson argues that the court erred in not considering in mitigation his history of drug abuse, his attempted suicide, and his consumption of drugs and alcohol on the day of the murders. In Lucas v. State, 568 So.2d 18, 24 (Fla. 1990), this Court stated that "the defense must share the burden and identify for the court specific nonstatutory mitigating circumstances it is attempting to establish." A document titled "Defendant's Non-Statutory Mitigating Circumstances" and dated May 2, 1996, mentioned Donaldson's "drinking and smoking marijuana on the night of the homicide."[11] (XIV 2680). Donaldson did not mention the currently complained-about items in his sentencing memorandum of May 21, 1996, however, and did not argue them to the trial court. The trial court, therefore, did not err in not considering them. Consalvo; Thompson v. State, 648 So.2d 692 (Fla. 1994). Even if this Court were to find that the trial court should have expressly considered these items of nonstatutory mitigation, any error would be harmless. Given the four strong aggravators in this case, the

---

[11] Donaldson did not list the history of drug abuse and attempted suicide in his May 2 document.

trial judge would have imposed the two death sentences on Donaldson regardless of whether he considered this nonstatutory mitigation. Thomas v. State, 22 Fla.L.Weekly S223 (Fla. March 20, 1997); Lawrence v. State, 691 So.2d 1086 (Fla. 1997); Armstrong v. State, 642 So.2d 730 (Fla. 1994), cert. denied, 115 S.Ct. 1799 (1995).

The trial court's findings as to mitigation should be affirmed, and this issue should be denied.

Issue IX

WHETHER DONALDSON'S DEATH SENTENCES ARE PROPORTIONATE.

Donaldson argues that his death sentences are disproportionate. There is no merit to this claim.

The cases that he relies on are factually distinguishable by their lack of aggravation and the presence of mitigation.[12] In the instant case, however, there are four strong aggravators and only nonstatutory mitigators that the trial court found to be worth little weight.

---

[12] Thompson v. State, 647 So.2d 824 (Fla. 1994) (death disproportionate where, after three aggravators were struck, the remaining aggravator was outweighed by "significant" mitigation); Besaraba v. State, 656 So.2d 441 (Fla. 1995) (same where one of two aggravators was struck and there were both statutory and nonstatutory mitigators); Knowles v. State, 632 So.2d 62 (Fla. 1993) (same where two aggravators struck and trial court should have found both mental mitigators, intoxication, and brain damage); Songer v. State, 544 So.2d 1010 (Fla. 1989) (same where there was only a single aggravator to be weighed against both mental mitigators, age, and numerous nonstatutory mitigators).

In Slater v. State, 316 So.2d 539 (Fla. 1975), and Curtis v. State, 685 So.2d 1234 (Fla. 1996), this Court reduced death sentences to life imprisonment for nontriggermen when the triggermen were not sentenced to death. Both Slater and Curtis are factually distinguishable from Donaldson's case. Slater's coperpetrator, Ware, was allowed to plead nolo contendere and received a sentence of life imprisonment. Moreover, Slater's jury recommended life imprisonment by a vote of eleven to one. On these facts this Court found Slater's death sentence disproportionate. Although Curtis' jury recommended death, this Court found that sentence disproportionate in view of the fact that the codefendant shot both victims, pled guilty, and received a sentence of life imprisonment; that only two aggravators (felony murder and prior conviction) had been established; and that one statutory (Curtis' age of seventeen years) and numerous nonstatutory mitigators existed.

Here, on the other hand, Donaldson's jury recommended death on both convictions of first-degree murder. Moreover, there are four strong aggravators - prior convictions of violent felonies, felony murder, CCP, and HAC - and nonstatutory mitigation that is insufficient to overcome those aggravators. Donaldson was the instigator of these murders and played the major role, except only for the actual shooting, in their commission. Sykosky, in contrast to Donaldson, received recommendations of life imprisonment from

his jury. Although ignored by Donaldson, there are cases with facts similar to those in the instant case where this Court has affirmed death sentences for nontriggermen in spite of the triggermen receiving lesser punishments. Larzelere v. State, 676 So.2d 394 (Fla.), cert. denied, 117 S.Ct. 615 (1996); Van Poyck v. State, 564 So.2d 1066 (Fla. 1990), cert. denied, 499 U.S. 932 (1991); White v. State, 403 So.2d 331 (Fla. 1981), cert. denied, 463 U.S. 1229 (1983); see also Ferrell v. State, 686 So.2d 1324 (Fla. 1996); Jackson v. State, 502 So.2d 409 (Fla. 1986).

When placed beside truly comparable cases it is obvious that Donaldson's death sentences are both proportionate and appropriate and that they should be affirmed.

Issue X

WHETHER DONALDSON SHOULD BE RESENTENCED WITHIN THE GUIDELINES FOR HIS NONCAPITAL CONVICTIONS.

Besides the two counts of first-degree murder, the jury convicted Donaldson of two counts of armed kidnapping and two counts of aggravated child abuse while armed. (XIII 2528-33). The court imposed a sentence of life imprisonment for each kidnapping conviction and of thirty years' imprisonment for each child abuse conviction at sentencing on May 28, 1996. (XIV 2735-47; XV 2757-58). Thereafter, on June 26, 1996, the court entered an amended judgment, nunc pro tunc May 28, 1996. (XV 2815-36). On July 16, 1996, the court entered a second amended judgment nunc pro tunc May

28, 1996. (XV 2837-61). The second amended judgment contains a guidelines scoresheet showing the maximum prison sentence to be 325.1 months.[13] (XV 2859-61).

The court did not enter the guidelines scoresheet into the record contemporaneously with sentencing on May 28, 1996 and did not include any written reasons for departure on the scoresheet. This Court's case law supports Donaldson's argument that he should be resentenced within the guidelines for his noncapital convictions. Gibson v. State, 661 So.2d 288 (Fla. 1995); King v. State, 623 So.2d 486 (Fla. 1993); Padilla v. State, 618 So.2d 165 (Fla. 1993); Robertson v. State, 611 So.2d 1228 (Fla. 1993); Owens v. State, 598 So.2d 64 (Fla. 1992); Wright v. State, 586 So.2d 1024 (Fla. 1991).

[13] This is the equivalent of 27.09 years.

Conclusion

Therefore, for the foregoing reasons, the State of Florida asks this Court to affirm Donaldson's convictions and sentences of death.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

Barbara J. Yates

BARBARA J. YATES
Assistant Attorney General
Florida Bar No. 293237

OFFICE OF THE ATTORNEY GENERAL
The Capitol
Tallahassee, FL 32399-1050
(850) 488-0600

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Chet Kaufman, Assistant Public Defender, Leon County Courthouse, Fourth Floor North, 301 South Monroe Street, Tallahassee, Florida 32301, this 14th day of July, 1997.

Barbara J. Yates

BARBARA J. YATES
Assistant Attorney General