IN THE SUPREME COURT OF FLORIDA

OSVALDO ALMEIDA,

Appellant/Cross-appellee,

vs. Case No. 89,432

STATE OF FLORIDA,

Appellee/Cross-appellant.
_____/

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

ANSWER BRIEF OF APPELLEE/INITIAL BRIEF OF CROSS-APPELLANT

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PRELIMINARY STATEMENT

Appellant, OSVALDO ALMEIDA, was the defendant in the trial court below and will be referred to as such herein or as "Appellant." Appellee, the State of Florida, was the prosecution in the trial court below and will be referred to herein as "the State." Reference to the record will be by the symbol "R", with the exception that reference to the transcripts will be by the symbol "T", followed by the appropriate page number(s). Occasionally references are made to the page and line of transcript by use of a slash, for example page 10, line 21 would be cited as 10/21. Reference to appellant's initial brief will be by the symbol "IB."

STATEMENT OF THE CASE AND FACTS

(In re Issue #1) Prior to closing argument, the trial court informed the jury that he would instruct them on the law, and that counsel's closing statements were not evidence (T 1221, 1230, 2027-28). During closing argument, the prosecutor first stated, "All persons are presumed to be sane. However, if the evidence causes you to have a reasonable doubt concerning the defendant's sanity, then the presumption of sanity vanishes and the State, I must prove beyond a reasonable doubt that the defendant was sane" (T 2041/15-20). Subsequently, defense counsel objected when the prosecutor mistakenly stated that the presumption vanishes when the jury is convinced beyond a reasonable doubt that the defendant was not sane (T 2041/24, 2042/13). The trial court overruled this objection (T 2042/1). Very shortly thereafter, the prosecutor stated, "If evidence is presented beyond a reasonable doubt that leads you to believe that he is not sane, then that presumption vanishes" (2042/9-12). Defense counsel then openly stated, "That's the wrong standard" and requested a side-bar conference (2042/13). Just prior to this conference, in open court, the trial court advised the jury that he would instruct them as to the applicable and appropriate standard, when he instructed them on the law, and that it was the court's instructions, not what the lawyers say, that the jury was bound to follow (T 2042/15-22). Then during the side-bar discussion, the trial court asked the prosecutor to modify the language of his statement; defense counsel suggested that the

prosecutor just read the jury instruction; and the prosecutor indicated that he thought that he had but that he would read it again (T 2044/6-8). The prosecutor then told the jury that the judge would instruct them on the law regarding insanity; and he read to the jury that portion of the insanity instruction, verbatim, that he indicated the judge would read later (T 2042/12-21). Subsequently, the trial court did read the Florida standard jury instruction on insanity to the jury (T 2164/23 - 2166/10), and the jury took this instruction along with the others into the jury room during deliberation (T 2177/14-16, 2183/11-12).

(Issue #2) (A) On cross-examination, Louis Salmon testified that as soon as he and appellant got outside Higgy's he knew from previous experience that there was going to be a problem (T 1409). He explained that from previous experience he knew that appellant was very sensitive to people doing what he considered normally offensive conduct (T 1410); when appellant would get into everyday conflicts with people, he was not capable of "letting it go" (T 1411). Mr. Salmon gave examples of certain experiences that led him to make these conclusions, including a time when he bumped into appellant (T 1410-11), and a time when Mr. Salmon did not wait for appellant's arrival before starting a party for his daughter (T 1416). Mr. Salmon concluded that appellant was becoming paranoid (T 1417).

On redirect, the prosecutor immediately began questioning Mr. Salmon about these previous experiences with appellant that led him to conclude that appellant was sensitive (T 1419). Mr. Salmon

repeated the time when he bumped into appellant (T 1419). He also related an experience, where appellant got into an argument with a manager at the job (T 1420). No objection was made to this testimony, other than a hearsay objection, when Mr. Salmon started to say what the manager had told appellant to do (T 1420). On further recross-examination, Mr. Salmon indicated that the incident with the manager on the job was another situation where appellant was too sensitive (T 1435). He also again testified that it was his impression that appellant had become paranoid, and that the killing was an irrational and crazy act (T 1436).

Then on further redirect, the prosecutor inquired whether Mr. Salmon's opinion concerning paranoia was based on observations after the killing, and Mr. Salmon indicated that it was (T 1437). The prosecutor then asked if that was when he was threatened (meaning after this killing), and Mr. Salmon indicated that it was (T 1437). Finally, the prosecutor asked whether the incident, when Mr. Salmon was threatened, was the same incident involving the knife, and Mr. Salmon indicated that it was not and that the knife incident came before (T 1437). The prosecutor then asked a confirming question that the knife incident was before, and Mr. Salmon again indicated that it was (T 1437). Only after Mr. Salmon had twice responded to questions about the knife incident, did defense counsel interpose a general objection and indicate that he had a motion to make in regard to this objection (T 1437/20). Defense counsel never asked for a ruling, and the prosecutor continued to ask Mr. Salmon several questions (T 1437-38). Not

until Mr. Salmon was excused and left the witness stand did defense counsel ask for a side-bar conference and move for a mistrial, on the bases that the knife incident was not the subject of his recross examination, that the knife incident had nothing to do with appellant's sensitivity, that it was not relevant and that it was a violation of the William's Rule (T 1438-39). The trial court denied the motion for mistrial (T 1439).

(B) During the direct examination of Mike Turner, defense counsel made no objection when the prosecutor asked if he had ever had a conversation with appellant regarding killing someone (T 1490/5). Defense counsel also made no objection when the prosecutor asked Mr. Turner what appellant had told him with respect to killing someone (T 1490/8). On cross-examination, defense counsel asked the witness about the conversation he had with appellant, where appellant indicated he had visions of killing, and attempted to elicit from the witness whether he thought such a statement was a sane statement, made by someone mentally stable (T 1490-2). Mr. Turner testified that he thought it was a statement made by someone who was angry with the manager at the restaurant, with whom he had a conflict (T 1491-92). Only after Mr. Turner was excused (T 1492/4) did defense counsel move for a mistrial on the bases that Mr. Turner's testimony regarding appellant's vision was not relevant and nonresponsive (T 1492/17).

(D) On direct examination, Dr. Ross Seligson (T 1730) testified that, in reviewing Dr. Bukstel's data regarding appellant, he found many items indicative of someone who is

experiencing paranoid thinking (T 1746-7). He diagnosed appellant as having two mental illnesses, residual schizophrenia and alcohol abuse (T 1788-89). On cross-examination, Dr. Seligson testified that he did no formal psychological, testing but worked off of Dr. Bukstel's raw data (T 1811/19). He also testified that delusions were included in the characteristic symptoms of his diagnosis (T 1818-19). He further testified that in his opinion before appellant was incarcerated he was suffering from paranoid delusions (T 1823), that people were out to get him and harm him (T 1828). Subsequently, the prosecutor asked the witness, "What information do you possess in the documents that you reviewed that people were out to get him that led you to think that he was suffering delusions?" (T 1828/21-24). Among other things, Dr. Seligson responded that appellant's concerns about being beaten as a child contributed to this condition, resulting in his always being on guard and not trusting people (T 1829/5-8). Immediately thereafter, Dr. Seligson testified that he thought one of appellant's family members had told him that appellant had been beaten by a gang when he was an adolescent (T 1829/8-11). The prosecutor then retorted, "He was in a gang though?" (T 1829/12). Dr. Seligson responded that he did not know (T 1829/13). After Dr. Seligson gave this answer, defense counsel interposed an objection on the basis that whether appellant was in a gang was not relevant to delusional thinking (T 1829/14 - 1930/16). At side bar, the trial court commented that the fact that appellant had been beaten by a gang would leave an impression of his having been the victim

of random violence, but that the jury could reach a different conclusion if appellant were a member of a gang (T 1830/19 - 1831/6). Defense counsel admitted that if the prosecutor had evidence of this, it might "change the equation slightly" (T 1831/7). The prosecutor responded that the evidence of this was in Dr. Trudy-Block Garfield's report (T 1832/21).

(Issue #3) Louis Salmon testified on cross-examination that he treated appellant like a kid and looked out for him, because he acted like a kid (T 1411-13). In response to defense counsel's question, "And you thought that was a pretty crazy thing to do, didn't you" (referring to the killing), Mr. Salmon said, "Anybody would, you know" (T 1415). Then in response to defense counsel's suggestion that he thought appellant was acting crazy on the night of the killing, Mr. Salmon testified that he thought that appellant had acted very irrationally (T 1415). Again, Mr. Salmon also testified on cross-examination that it was his impression that appellant was becoming paranoid (T 1417). Subsequently on redirect (not direct as appellant indicated [IB 37]), Mr. Salmon testified that it was his impression that appellant knew what he had done was wrong and that he was prepared to face the consequences (T 1434-35). Subsequently on recross-examination, Mr. Salmon testified that it was his impression that appellant had become paranoid (T 1436).

(Issue #4) The prosecutor started questioning Dr. Selove regarding Exhibit No. 10 (the photograph at issue) at line 22, page 1284 of the transcript. The prosecutor stopped questioning Dr.

Selove regarding Exhibit No. 10 and started questioning him about Exhibit No. 9 at line 3, page 1286 of the transcript. Shortly thereafter, Dr. Selove returned to the stand (T 1286/20), and the prosecutor began a series of questions about the physiological effects of the wound, without the aid of any exhibit (T 1286/21 - 1288/13). This testimony of the physiological effects included gradual blood loss, which alone would cause death, and also deflated lungs, which resulted in the victim's not being able to get his breath. Dr. Selove testified that the instant that the bullet hit the backbone, the victim was paralyzed and fell to the ground immediately, where he would have lost consciousness in approximately five minutes, due to his running out of blood and air. After this testimony, as the prosecutor started to ask Dr. Selove about Exhibits 11 and 12, defense counsel asked for a side-bar conference to inform the trial court that the victim's mother "was <u>just</u> sobbing" (emphasis supplied)(T 1288). When the trial court denied defense counsel's motion for mistrial, he offered to give any type of instruction to the jury, but defense counsel only indicated that he wanted them out of the courtroom, which was already the case (T 1289/22 - 1290/4).

(Issue #6) The pre-trial hearing, where a lady commented that appellant should fry (T 323) took place on September 1, 1995 (T 209). Voir dire did not commence until February 5, 1996 (T 451-52). When, at trial, defense counsel informed the trial court of the mother's sobbing during the testimony of Dr. Selove (T 1288), neither the trial court nor the prosecutor saw or heard anything (T

1290-91). Again, although the trial court denied appellant's motion for mistrial, he offered to give a curative instruction, which appellant declined, other than stating that he wanted "them" out of the courtroom and did not want it to happen again (T 1289-90).

While Dr. Macaluso was being cross-examined by defense counsel, defense counsel asked for a side-bar conference and notified the trial court that he had heard someone repeat twice, "who cares" (T 1985). Defense counsel told the court, "I know you didn't hear it and Mr. Donnelly (the prosecutor) never hears it...We can ask them if they said it" (T 1985/22 - 1986/1). Defense counsel never asked the trial court to inquire of what was said as indicated by appellant (IB 54). Defense counsel then suggested that the trial court ask the bailiff whether she heard anything, since the bailiff "was sitting right there" (T 1986). However, when asked, the bailiff indicated that she was listening and heard a sound, but not the comment suggested by defense counsel (T 1986-87). The trial court subsequently sent the bailiff to tell all persons to refrain from making any comments at all, and that even if they had to cough they should leave the courtroom (T 1987).

(Issues #7 & #8) Louis (Dave) Salmon testified that approximately two weeks prior to the killing, he witnessed a confrontation between appellant and the victim, where the victim would not let appellant and Sergio (Hoggro) drink beer (T 1359-60). Nonetheless, on November 14, 1993, he and appellant went to Higgy's, where a co-worker named Rich bought them some beer (T

1362-63). They arrived at about 12:15 a.m. (T 1362), but they did not stay long (T 1363). The victim came over and slapped the beer out of appellant's hand and asked for identification (T 1363-64). Appellant told the victim that his identification was in the car and invited the victim outside to check; however, the victim declined to do so (T 1365). He testified that appellant wanted to kick the victim's ass; he saw that a problem was about to develop, so he asked appellant to leave (T 1365). After about five to ten minutes outside, telling appellant to "let it go," he and appellant drove back to the Regas Grill (T 1371), where they picked up Eddie (Cooper) and Sergio to take them home (T 1371). Mr. Salmon testified that on the way he tried to calm appellant down, but appellant indicated that he would not be talked out of doing something to the victim (T 1373-75). When they arrived at Mr. Salmon's house, Mr. Salmon spoke with appellant for about one and one-half hours, during which they were not consuming alcoholic beverages (T 1373, 1399). Mr. Salmon testified that by the end of their conversation appellant had calmed down (T 1375-76). However, the next day appellant called him (T 1376) and told him that he went back and waited for the victim to come out of Higgy's, asked the victim if he knew where 42nd Street was, and then shot him (T 1377). Appellant told him that he had remained in his car, and as he drove off he heard the victim screaming (T 1378).

Eddie Cooper testified that it took about twenty minutes to drive to Dave's (Louis Salmon) house (T1445). They left Dave's house between 2 and 2:30 a.m. (T 1447), and appellant drove him

home, which took less than twenty minutes (T 1446-47). When they arrived at his home, he asked appellant if he was all right, and appellant responded that he was (T 1447). Later that evening, appellant admitted that he had killed the manager at Higgy's (T 1448-49) and asked him and Sergio not to tell on him (T 1461). Two days later, he saw appellant read a news article and remark that he was happy that it indicated there were no witnesses to the killing (T 1449).

Sergio Hoggro testified that earlier in November 1993, he and appellant had gone to Higgy's, but were asked to leave because they were underage (T 1465). He also testified that on the ride home on November 14, 1993 (T 1466), appellant indicated that he was going back to Higgy's to shoot the guy (T 1469). He was the last to be dropped off between 2:30 and 3:00 a.m.(T 1470). The next day, appellant admitted in a laughing manner that he had shot the manager in the parking lot and killed him (1472-73), and that he could now go to Higgy's and drink beer any time he wanted (T 1486).

Appellant himself gave a sworn statement during which he admitted going back to Higgy's and shooting the manager (T 1530). He stated that he waited for about half an hour for the manager to come out (T 1538). A couple of minutes before the manager came out, he saw two other people leave (T 1538-39). When he saw the manager come out, he drove by to get a closer look, and when he saw that it was the manager he shot him (T 1531). As he was driving off, he heard the victim screaming in pain (T 1538). He admitted having told Dave, Sergio and Eddie that he killed the manager (T

1540-42). When asked if he took the victim's life for no reason (T 1544), appellant responded, "Yeah, put it that way cause --", and then explained that he killed him because he was "pissed off," which he indicated is not a reason to kill someone (T 1545). Shortly thereafter, when again asked why he killed the victim, appellant stated that the victim did make him look bad and did "piss him off," but that was no reason for him to kill the victim (T 1537).

Dr. Thomas Macaluso testified that appellant told him that had the victim gone outside to check his identification, his plan was to physically attack him, and that had the victim gone outside they would have fought but that would have saved the victim's life (T 1999). Dr. Macaluso also testified that appellant told him that he thought the victim deserved to be shot for having thrown him out of the bar (T 1999).

Jamie Fine testified that he worked at Higgy's on November 14, 1993, and that he and Barry (Hilton) left together at about 4:30 a.m., leaving the victim still inside (T 1301-05).

(Issue #8) Appellant was convicted on November 16, 1995, of Murder in the First Degree in case number 93-22047 CF 10A involving the death of Marilyn Leath (R 342-43). Ms. Leath was killed by a single gunshot on October 7, 1993 (T 2217). Appellant was also convicted on December 12, 1995, of Murder in the First Degree in case number 93-21249 CF 10A involving the death of Chiquita Counts (R 343). Ms. Counts was killed by a single gunshot on October 13, 1993 (T 2217-18). The State introduced into evidence certified

copies of these judgments (T 2215). Detective John Abrams of the Fort Lauderdale Police Department (T 2216) testified that appellant gave him sworn statements in regard to these homicides (T2219).

In regard to the Marilyn Leath homicide, appellant stated Ms. Leath was a prostitute he had picked up, but changed his mind because she had a dirty appearance and "stink breath" (T 2226). When he asked her to leave his car, she took his keys (T 2226) and demanded his wallet for their return (T 2227). She took twenty dollars and threw his wallet back at him (T 2227). As Ms. Leath and her sister were walking away, appellant was very upset so he turned the car around, drove by her (T 2237) (she was now on the driver's side [T 2237-38])and shot her (T 2227) with his Smith & Wesson, Model 29, .44 Magnum and Black Talon ammunition (T 2234-35). He only fired once, and she collapsed (T 2238).

In regard to the Chiquita Counts homicide, appellant stated that she also was a prostitute, who he had paid for sex (T 2253), but who was asking for more money (2254). When he indicated he had no more money, she started arguing and insulting him[1] and got out of the car. He turned the car around for a quick escape (T 2263). She was about to go inside a hotel, but he called to her and she came back (T 2263, 2265). When she came up to within two feet (T 2264) of the driver's side window, he shot her (T 2263). He only fired once with the same .44 Magnum but with Hydro Shocks

[1] She called him a cracker and a bastard (T 2261).

ammunition (T 2265, 2268). He shot her because she insulted him (T 2266).

SUMMARY OF ARGUMENT

Issue 1 - Although not preserved, the prosecutor's misstatement of the law was not so prejudicial that it vitiated the entire trial, so a retrial is not warranted. Further, any error was cured and rendered harmless, in that both the prosecutor and the trial judge corrected the misstatement.

Issue 2 - The first two sub-issues were not preserved, and all, if error, were harmless because they were minor points of the trial and due to the confessions given by appellant to five different individuals. Appellant opened the door to Mr. Salmon's testimony about the knife incident, in that he elicited testimony that based on certain experiences Mr. Salmon believed that appellant was paranoid. The prosecutor properly inquired whether the knife incident was one of these experiences. Mr. Turner's testimony, regarding appellant's admitted vision of killing, was relevant to show appellant's state of mind and to explain his subsequent behavior. Mr. Salmon's testimony, about appellant telling him the type of wound inflicted by Black Talon bullets, was relevant to show premeditation. Whether appellant was a gang member was a proper subject of Dr. Seligson's cross-examination, since appellant had brought out that appellant had been beaten by a gang.

Issue 3 - The issue also was not preserved and, if error, is harmless, because Drs. Strauss, Block-Garfield and Macaluso also testified that in their opinions appellant knew the difference from right and wrong at the time of the offense. Further, it was a proper line of inquiry on redirect, because it could qualify or limit Mr. Salmon's testimony on cross, that he thought that appellant was becoming paranoid and that what appellant did was crazy.

Issue 4 - The autopsy photograph was properly admitted, because it was relevant to help the medical examiner explain the nature of the wound inflicted and its effect.

Issue 5 - Appellant's motion to suppress was properly denied, because the law now only requires that law enforcement stop questioning an accused, once he or she had made an unequivocal request for counsel. Furthermore, the facts clearly show that the equivocal request for counsel was made after appellant was Mirandized and substantive questioning had begun.

Issue 6 - A mistrial was not warranted since the alleged outbursts were minor incidents which likely caused no antagonism toward appellant. However, it is impossible, from a review of the record, to determine what, if any, impact these incidents had on the jury, so this Court should defer to the trial court's ruling.

Issue 7 - The trial court correctly found the existence of the CCP aggravator. The homicide was "cold," because after the incident, which allegedly "pissed off" appellant, approximately four hours elapsed during which appellant's friends indicate

appellant calmed down. Also, if appellant had been in a fit of rage, he would not have left Higgy's at the mere suggestion of his friend, Dave Salmon. Nonetheless, during a four-hour period, appellant reflected about killing Frank Ingargiola, returned to Higgy's and waited in the parking lot for thirty minutes before shooting him dead. The fact that the victim "pissed off" appellant making appellant believe that the victim should die does not provide a colorable claim for a pretense of moral or legal justification. The court was also correct to instruct the jury on both the prior violent felony and CCP aggravators, since the prior felonies are a characteristic of appellant, while the CCP aggravator focuses on appellant's state of mind at the time of the killing. In other words, they refer to different aspects of the crime or characteristics of appellant.

Issue 8 - Appellant's sentence is proportionate, because there were two weighty aggravators, and the mitigation was properly given little weight. The mitigation was based, in large part, on appellant's childhood abuse, but evidence of this abuse came either from appellant's self-serving statements or from family members, who were biased and had no first-hand knowledge. Mitigation was also based on use of alcohol, but again only appellant indicated that he consumed alcohol before the murder, and even his statements are vague and contradictory.

Issue 9 - It is clear from the sentencing order that the trial court exercised discretion in evaluating the mitigating circumstances. Just because the trial court did not elaborate each

fact that were the bases of his determination of weight does not demonstrate that such evidence was not considered.

Issue 10 - The pertinent part of the instructions given the jury, in regard to mitigation, tracks the language of Florida's standard jury instruction. This language has been previously subject to litigation and been upheld.

Issue 11 - Whether appellant knew what he was doing at the time of the offense is relevant in determining the applicability of the two mental mitigators. Therefore, the trial court did not abuse his discretion in allowing the State to cross-examine the mental health experts in this regard.

Issue 12 - Although it cannot be determined with accuracy from this record, it appears that the reason appellant did not make a statement was because he acquiesced to his counsel's repeated advise not to do so. Certainly, the trial court did not threaten appellant in any regard but was merely trying to determine whether appellant appreciated his counsel's advice. Further, the advice given by the trial court was either correct or was corrected.

Issue 13 - Based on the sentencing order, the trial court obviously knew that he was not bound by the jury's advisory sentence and did not give it undue weight, but instead sentenced appellant after independently evaluating all of the evidence.

Issue 14 - Again, based on the sentencing order in its entirety, it is obvious that the trial court properly performed his function of independently weighing the aggravating and mitigating

factors, regardless of his cite to *White v. State*, 403 So. 2d 331 (Fla. 1981).

Issue 15 - This issue was not preserved for appellate review. Further, appellant made no valid waiver of his constitutional right to protection from *ex post facto* legislation. Also, defense counsel never indicated that appellant was prepared to do so, nor did counsel attempt to put such a waiver on the record. Therefore, the trial court properly instructed the jury.

Cross-Appeal - The trial court abused his discretion by not allowing the State to present evidence of the prior homicides during the guilt phase. Such evidence was relevant to prove premeditation and to negate appellant's insanity defense.

ARGUMENT

ISSUE 1

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION BY OVERRULING APPELLANT'S OBJECTION TO ARGUMENT BY THE STATE (RESTATED).

Appellant has failed to preserve this issue for appellate review. In order to preserve an objection to improper comment during closing argument, the defendant generally must make a timely specific objection and move for a mistrial. *James v. State*, 695 So. 2d 1229 (Fla. 1997). However, the defendant need not seek a mistrial if the trial court overrules the contemporaneous objection. *Simpson v. State*, 418 So.2d 984 (Fla.1982), *cert. denied*, 459 U.S. 1156 (1983).

In this case, the trial court clearly overruled defense counsel's first objection; however, after defense counsel's second objection for the same conduct, the trial court told the prosecutor, during a side-bar conference, to change the language of his statement. Such admonition essentially sustained defense counsel's objection. As a result, appellant was required to move for a mistrial to preserve this issue for appellate review. Having failed to do so, he has failed to preserve this issue for review. *See Riechmann v. State*, 581 So. 2d 133, 138-39 (Fla. 1991).

Moreover, during the side-bar conference, defense counsel interrupted the prosecutor's response and suggested that he read the standard instruction on the sanity defense to the jury, which the prosecutor promptly did upon returning to his argument. By doing so, the prosecutor cured any error from his previous comments. Further, defense counsel then had an opportunity to dispel any misunderstanding during his argument. Finally, the trial court further cured any error when he gave the standard instruction following counsels' arguments.

Furthermore, a conviction should not be overturned, unless a prosecutor's comment is so prejudicial that it vitiates the entire trial. *King v. State*, 623 So. 2d 486 (Fla. 1993). The prosecutor's comments in this case were not so prejudicial. The prosecutor initially correctly recited the pertinent portion of the insanity instruction to the jury. The prosecutor also ended this portion of his argument by reading the pertinent portion of the standard jury instruction on insanity verbatim. Certainly, his

correct statement and his subsequent correction rendered his intervening misstatements harmless. *Cf. Burns v. State*, 609 So. 2d 600 (Fla. 1992); *Wuornos v. State*, 644 So. 2d 1000, 1010 (Fla. 1994).

Also intervening between the first and last comments by the prosecutor were the speaking objections interposed by defense counsel, where he indicated, "Objection, that's not the standard" (T 2041/24), and "That's the wrong standard" (T 2042/13). Additionally, the trial court's comment that what the lawyers say is not the law and that he would instruct the jury on the appropriate standard, was also made between these two comments. Further, prior to closing arguments, the trial court told the jury that he would be instructing them on the law, and that what the lawyers said was not evidence but argument. After making the misstatement, the prosecutor read the instruction verbatim and told the jury that the judge would be instructing them on the law. Finally, the trial court did subsequently instruct the jury properly on the standards concerning the insanity defense, and the jury took these instructions into deliberations. Based on these events, any error was not sufficiently prejudicial to warrant a reversal. *Cabrera v. State*, 490 So. 2d 200 (Fla. 3d DCA 1986).

Finally, to the extent that the prosecutor misstated the law, since the trial court immediately cautioned the jury that he would instruct them on the applicable law and that they should follow the instructions of the court, this also would remedy any impropriety.

Craig v. State, 510 So. 2d 857 (Fla. 1987), *cert. denied*, 484 U.S. 1020 (1988). Again, the trial court did eventually instruct the jury properly in regard to the insanity defense, and the jury took the correct instruction with them into deliberations.

The trial court, in the exercise of its discretion, controls comments made in closing arguments, and the trial court's ruling on such matters shall not be overturned absent a showing of a clear abuse of discretion. *Hooper v. State*, 476 So. 2d 1253 (Fla. 1985), *cert. denied*, 475 U.S. 1098 (1985). If reasonable men could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion. *Booker v. State*, 514 So. 2d 1079, 1085 (Fla. 1985). Considering the above circumstances, the trial court did not abuse his discretion, but if this court does not agree the State contends any error was harmless pursuant to Fla. Stat. §59.041, Fla. Stat. § 924.33 and the holding of *State v. Diguilio*, 491 So. 2d 1129 (Fla. 1986).

ISSUE 2

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING CERTAIN TESTIMONY (RESTATED).

A. Appellant now argues that Louis Salmon's testimony regarding a knife incident (1) was not relevant, (2) if relevant, was prejudicial or confusing, and (3) was relevant to prove only criminal propensity (IB 34-5). However, these issues were not preserved for appellate review in several ways. First, defense counsel did not object until after Mr. Salmon had responded two times to questions regarding the knife incident. Absent

fundamental error, a contemporaneous objection is required to preserve error for appellate review. *Castor v. State*, 365 So. 2d 701 (Fla. 1978). Generally, objections to the admissibility of evidence must be made when it is offered, and an objection to a question after it is answered comes to late. *Schley v. State*, 48 Fla. 53, 37 So. 518 (1904); *Rowe v. State*, 163 So. 22 (Fla. 1935).

Second, the objection was a general objection. In order to preserve an issue for appellate review, a specific legal argument or ground upon which it is based must be presented to the trial court. *Rodriguez v. State*, 609 So. 2d 493 (Fla. 1992). When objections are not made with sufficient specificity to apprise the trial court of the alleged error, they do not preserve the objection for appellate review. *Johnston v. State*, 497 So. 2d 863 (Fla. 1986). Here, counsel said after the second reference to the knife incident only, "Objection, a motion to make with regard to that as well" (T 1437). A general objection like the one made by defense counsel does not sufficiently apprise the trial court of the alleged error, and therefore does not preserve the issue for appeal. *Tolbert v. State*, 679 So. 2d 816 (Fla. 4th DCA 1996).

Third, after defense counsel interposed his objection he had the burden to secure a ruling on it, and his failure to do so waived it for appellate review. *Leretilley v. Harris*, 354 So. 2d 1213 (Fla. 4th DCA), *cert. denied*, 359 So. 2d 1216 (Fla. 1978).

Fourth, it was not until after Mr. Salmon had been excused and left the stand that defense counsel requested a sidebar conference

and moved the court for a mistrial, based on his objection to this testimony. Normally, if at the time the improper comment is made a defendant fails to object or if, after having objected, does not ask for a mistrial, he has failed to preserve the issue for appellant review. *Clark v. State*, 363 So. 2d 331 (Fla. 1978). Granted, in *Jackson v. State*, 451 So. 2d 458, 461 (Fla. 1984), this Court acknowledged that an objection need not always be made at the moment an examination enters impermissible areas of inquiry and that an objection to an impermissible gratuitous comment made several questions after the objectionable testimony was contemporaneous, but the trial court had sufficient time to instruct the jury to disregard the testimony or to consider a motion for mistrial. *See also Johnston v. State*, 497 So. 2d 863 (Fla. 1986). However, this case is different, in that appellant failed to move for a mistrial until after the witness had left the stand. This seriously impacted the options available to the trial court to effectively remedy any alleged impropriety.

Finally, appellant also implies that the statement was inadmissible, because the State failed to give 10 days notice of its intent to use such evidence. However, section 90.404(2)(b)1, Florida Statutes (1995), does not require notice when the evidence is used for impeachment or rebuttal, as it was in this case. Furthermore, appellant never raised this issue at trial.

Notwithstanding the above, appellant opened the door to such testimony. Appellant's theory of defense was insanity (R 169, T

1248-49). In support of this theory, defense counsel elicited testimony on cross-examination of Louis Salmon that from previous experiences his opinion was that appellant was overly sensitive, paranoid and acting crazy. Defense counsel also elicited facts relating to several of these experiences, which caused Mr. Salmon to reach his opinion. On redirect, the prosecutor elicited testimony, without objection, that certain of these experiences took place after the killing, including an incident where appellant threatened Mr. Salmon. Finally, the prosecutor asked if the threat incident was the same incident as the knife incident. Certainly, appellant "opened the door" to the relevancy of such testimony about these experiences. Testimony is admissible on redirect which tends to qualify, explain or rebut cross-examination testimony. *Johnson v. State*, 608 So. 2d 4 (Fla. 1992). Once a defendant introduces evidence which ordinarily may have been inadmissible against him, the State then is entitled to either clarify the evidence adduced, or rebut an improper inference that the introduction of that evidence has created, because "opening the door" to such evidence, by the defense, has waived the applicable evidentiary rule which would have excluded it. Such a rule is mandated by fair play and common sense: "[W]hat is sauce for the goose is sauce for the gander." *Bogren v. State*, 611 So. 2d 547, 551 n.1 (Fla. 5th DCA 1992) (citation omitted).

Be that as it may, a ruling on a motion for mistrial is within the sound discretion of the trial court, and such motions should be granted only when it is necessary to insure that the defendant

receives a fair trial. *Gorby v. State*, 630 So. 2d 544 (Fla. 1993), *cert. den.*, 513 U.S. __ (1994). This testimony not only did not invalidate or vitiate the trial, it was harmless. It was an innocuous statement made relatively early on in the trial. Mr. Salmon merely indicated that the knife incident was not the same incident where he was threatened but was a prior incident. No details of this incident were brought out. If anything, this testimony may have helped appellant with the theory of his defense. The prosecutor was trying to establish that the experiences, which were the bases of Mr. Salmon's lay opinion, took place after the killing and were therefore no basis for an opinion regarding appellant's sanity at the time of the offense. However, Mr. Salmon testified that the knife incident took place before, which could support the defense theory that appellant was insane at the time of the offense. Nonetheless, reasonable persons could differ as to the propriety of the trial court's ruling, so there was no abuse of discretion. *Booker v. State*, 514 So. 2d 1079, 1085 (Fla. 1985).

B. Appellant also argues that Mike Turner's testimony about his conversation with appellant, regarding a vision he had about killing, is not relevant and only serves to establish criminal propensity. Based on the above case law, the issue regarding criminal propensity is not preserved, because appellant never raised that issue below. Also, defense counsel made no contemporaneous relevancy objection to the testimony, but again moved for a mistrial only after cross-examining the witness in

regard to this testimony, and after the witness had been excused and left the stand. In addition to the State's position that the motion for mistrial was untimely and therefore waived, even if the motion were considered timely, a contemporaneous objection was still necessary to preserve this issue for appeal. *Nixon v. State*, 572 So. 2d 1336 (Fla. 1990). Nonetheless, this testimony was relevant to show appellant's state of mind to prove or explain his subsequent behavior. *Armstrong v. State*, 642 So. 2d 730 (Fla. 1994).

C. In regard to the testimony of Louis Dave Salmon, that appellant discussed with him the effect of Black Talon ammunition, appellant now argues that this testimony had no bearing on appellant's state of mind at the time of the shooting (IB 35). However, premeditation may be established by circumstantial evidence, including 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. *Kearse v. State*, 662 So. 2d 677 (Fla. 1995); *Spencer v. State*, 645 So. 2d 377 (Fla. 1994). In *Kearse*, defense counsel objected when the State asked a police officer why the defendant switched from a one-handed to a two-handed gun grip, in response to which the witness indicated, "Better control, better accuracy." The basis of that objection was the same as the instant objection, that the testimony was not probative of defendant's mind set at the time of the shooting.

However, this court found that the testimony was relevant to the issue of premeditation. 662 So. 2d at 683-84. Mr. Salmon's testimony, that appellant told him that Black Talon bullets make a small hole going in and a big hole coming out, was relevant to show premeditation, in that it shows both the nature of the weapon used and the manner of the wounds inflicted. The fact that this testimony did not establish that Black Talon bullets were in fact used by appellant to kill Frank Ingargiola does not make the testimony less relevant. Appellant himself admitted that he used 250 grain Black Talon bullets when he shot this victim (T 1532/11). Also, Dennis Grey, a firearms expert with the Broward Sheriff's Office (T 1571), testified that the projectile removed from the victim's body was a Black Talon hollow point bullet (T 1572-3), which was fired from appellant's gun (T 1580). He also testified that this type of bullet expands when it strikes a target, causing more damage to the target, which happened in this case (T 1574).

D. Appellant argues that it was error to put before the jury that appellant was a gang member, in that it was not relevant to the State's case or the defense of insanity (IB 35). However, this line of questioning was made in response to Dr. Seligson's direct testimony that in his examination of appellant he found many indications of paranoid thinking and diagnosed appellant as schizophrenic. First, Dr. Seligson testified that one of the symptoms that led to his diagnosis was paranoid delusions that people were out to get him. Following this line of questioning, the prosecutor asked for the detailed information that led Dr.

Seligson to conclude that appellant thought people were out to get him. In response, Dr. Seligson mentioned that appellant had been beaten as a child, which included an instance when he was beaten by a gang. Only after Dr. Seligson mentioned the gang beating did the prosecutor ask, "He was in a gang though," and Dr. Seligson responded that he did not know.

Wide latitude is permitted on cross-examination in criminal trials, where the scope and limitation of cross-examination lies within the sound discretion of the trial court, and a trial court's ruling should not be overturned on appeal absent a clear abuse of that discretion. *Thompkins v. State*, 502 So. 2d 415 (Fla. 1986). Generally, the function of cross-examination is to elicit testimony favorable to the cross-examining party, to challenge evidence adduced from the witness by the other party and to challenge the witness's credibility. *Shere v. State*, 579 So. 2d 86, 90 (Fla. 1991). Cross-examination of a witness is usually limited to relevant matters within the scope of the subject matter of the direct examination and matters affecting the credibility of the witness; however, the trial court has the discretion to permit inquiry into additional areas. *Steinhorst v. Wainwright*, 477 So. 2d 537 (Fla. 1985); Fla. Stat. § 90.612(2). Nonetheless, when the direct examination opens a general subject, the cross-examination may go into any phase, and may not be restricted to mere parts or specific facts developed on direct examination. Cross-examination should always be allowed to bring out the details of an event or

transaction, a portion only of which has been testified to on direct examination. Cross-examination extends to the entire subject matter of direct examination, and to all matters that may modify, supplement, contradict, rebut, or make clearer the facts testified to on direct. *Geralds v. State*, 674 So. 2d 96 (Fla. 1996); *Coco v. State*, 62 So. 2d 892 (Fla. 1953). To put it another way, a defendant's witness can be cross-examined on matters which illuminate the quality of his or her testimony. *Randolph v. State*, 463 So. 2d 186 (Fla. 1984). This also applies to the cross-examination of mental health experts, when it is proper to fully inquire into the basis of the expert's opinion. *See Jones v. State*, 289 So. 2d 725 (Fla.1974); *Holland v. State*, 636 So. 2d 1289 (Fla. 1994), *cert. denied*, 115 S. Ct. 351 (1994).

Be that as it may, this question and answer were harmless, in that Dr. Seligson neither confirmed nor denied that appellant was a gang member, and this testimony was not a feature of the trial. It was only a moment in an otherwise long trial and about a fact that was never confirmed and was never re-visited by the prosecutor.

In regard to each of these sub-issues, even if this court finds error, such error would be harmless pursuant to sections 59.041 and 924.33, Florida Statutes (1995) and the holding of *State v. Diguilio*, 491 So. 2d 1129 (Fla. 1986). In addition to what has already been argued, there is no reasonable possibility that they would have contributed to the verdict, because they were only minor

points, briefly raised at trial, and were not a focal point of the trial. Further, appellant confessed that he murdered the victim to Louis (Dave) Salmon (T 1377-78), to Eddie Cooper (T 1448-49), to Sergio Hoggro (T 1472-73) and to Detective Randy Mink (T 1521 - 1545). Also, appellant told Dr. Thomas Macaluso that he shot the victim, and that had the victim previously gone outside and fought it would have saved his life (T 1999 - 2000). Clearly, the first three sub-issues above relate to the elements of the crime and not to the defense of insanity. Also as clearly, appellant murdered Frank Ingargiola. Where evidence of guilt is overwhelming, as it is in this case, any error may be harmless. *Jones v. State*, 332 So. 2d 615 (Fla. 1976).

ISSUE 3

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING OPINION TESTIMONY (RESTATED).

A trial court has wide discretion concerning the admissibility of evidence, and a reviewing court should not disturb a trial court's evidentiary ruling unless an abuse of that discretion has been demonstrated. *Jent v. State*, 408 So. 2d 1024 (Fla. 1981), *cert. denied*, 457 U.S. 1111 (1982). Appellant has not established any such abuse of discretion.

First, appellant argues that the State went beyond proper bounds in eliciting Louis Salmon's opinion testimony that he believed that appellant knew what he had done was wrong and that appellant was prepared to face the consequences (IB 37). He claims that the state made no predicate showing that the witness could not

"readily, and with equal accuracy and adequacy communicate what he ... perceived to the trier of fact without testifying in terms of inferences or opinions" as required by section 90.701, Florida Statutes (1991) (IB 39-40). However, this issue has not been preserved for appellate review. For an argument to be cognizable on appeal, it must be the specific contention asserted as the legal ground for objection, exception, or motion below. *Rodriguez v. State*, 609 So. 2d 493 (Fla. 1992). At trial, defense counsel only interposed an objection on the basis that Mr. Salmon was giving opinion testimony (T 1434/11, 18; 1435/3). No objection was ever made that the necessary predicate was not laid before Mr. Salmon was allowed to offer his opinion. Thus, appellant may not make this argument for the first time on appeal.

Further, testimony is admissible on redirect which tends to qualify, explain or limit cross-examination testimony. *Tompkins v. State*, 502 So. 2d 415, 419 (Fla. 1986). In this matter, Mr. Salmon testified on cross that appellant acted like a kid, was becoming paranoid, was acting very irrationally just prior to the killing and that what appellant did was a crazy thing to do. Certainly, in light of this testimony, which was opinion testimony probative of appellant's sanity at the time of the offense, the State was justified in qualifying or limiting this testimony by further opinion testimony probative of the same issue.

Appellant also argues that it was improper to allow Mr. Salmon to give opinion testimony about whether appellant knew what he had

done was wrong. However, lay opinion testimony as to a defendant's mental condition is not improper where it is based, as it was in this matter, on personal observations in the time period reasonably proximate to the alleged offense. *Garron v. State*, 528 So. 2d 353 (Fla. 1988); *Rivers v. State*, 458 So. 2d 762 (Fla. 1984). Further, contrary to appellant's assertion and *Hansen v. State*, 585 So. 2d 1056, 1058 (Fla. 1st DCA 1991), a witness can testify about his or her opinion whether a defendant knew what he did was wrong. *Strausser v. State*, 682 So. 2d 539, 541 (Fla. 1996).

Based on these circumstances, the trial court did not abuse his discretion by allowing Mr. Salmon's testimony, but even if determined to be error by this Court it would be harmless. Defense witness, Dr. Abbey Strauss, testified on direct that at the time of the offense appellant knew the difference between right and wrong (T 1659). Also, state rebuttal witness, Dr. Trudy Block-Garfield, testified on direct without objection that at the time of the offense appellant knew that what he was doing was wrong (T 1884; 1889-90). State rebuttal witness, Dr. Thomas Macaluso, also testified on direct without objection that at the time of the offense appellant knew that what he was doing was wrong (T 1966-67). Even incorrectly admitted evidence is deemed harmless and may not be grounds for reversal when it is essentially the same as or merely corroborative of other properly considered testimony at trial. *Erickson v. State*, 565 So. 2d 328, 335 (Fla. 4th DCA 1990).

ISSUE 4

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING A PHOTOGRAPH OF THE VICTIM (RESTATED).

Appellant argues that it was error to admit State's Exhibit 10, an autopsy photograph of the victim, because it was not essential to the State's case, and because the danger of unfair prejudice far outweighed its probative value. However, being essential is not the test of admissibility. The test of admissibility of photographs is relevance, and they are admissible where they assist the medical examiner in explaining to the jury the nature and manner in which the wounds were inflicted and the cause of death. *King v. State*, 623 So. 2d 486 (Fla. 1993); *Burns v. State*, 609 So. 2d 600 (Fla. 1992); *see also Jones v. State*, 648 So. 2d 669 (Fla. 1994)(finding no abuse of discretion in admitting photographs that were relevant either to show the condition and location of the body when discovered, or to assist the medical examiner in explaining the condition of the victim's clothing or the nature of his injuries and the cause of death).

In this matter, Dr. Daniel Selove, who was the medical examiner (T 1271), testified that Exhibit 10 would assist him in describing the victim's injuries (T 1277). He also testified that it would be helpful in assisting his description of the trajectory of the bullet and the effect of this trajectory, which caused instant paralysis (T 1214). He testified that this exhibit would allow the jury to better understand what he would be explaining to

them (T 1216).[2] Furthermore, contrary to appellant's assertion, Dr. Selove did in fact use this exhibit to explain the trajectory of the bullet and how it struck the vertebrae without hitting either the heart or the aorta (T 1284 - 1286). He later went on to testify that this wound caused a gradual loss of blood pressure and an inability of the lungs to expand sufficiently (T 1287).

The fact that a photograph is gruesome does not bar its admissibility, if it is relevant to any fact at issue. *Preston v. State*, 607 So. 2d 404, 410 (Fla. 1992). It is relevant if it illustrates the testimony of a witness or assists the jury in understanding the testimony or if it bears on issues of the nature and extent of the injuries, nature and force of the violence used, premeditation or intent. *Id; Henderson v. State*, 463 So. 2d 196, 200 (Fla.), *cert. denied*, 473 U.S. 916 (1985).

Appellant argues that the prejudice of this exhibit is apparent due to the mother's reaction; however, the record does not indicate that her reaction was to this exhibit. After the prosecutor had finished discussing this exhibit and had gone on to, and finished discussing, Exhibit 9, he elicited testimony from Dr. Selove about the physiological impact of the victim's wound. Dr. Selove gave an extremely graphic visualization of the victim becoming instantly paralyzed, immediately falling in place, and

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[2] At note #19, on page 41 of appellant's initial brief, appellant mentions that the trial court did exclude Exhibit K, which is a similar photograph; however, Dr. Selove had testified that the jury might not understand what it portrayed, even with an explanation, and therefore would not be helpful (T 1218/16).

then gradually losing consciousness over a five-minute period, during which he could not breath and was bleeding to death. After this graphic testimony, as the prosecutor was inquiring about Exhibits 11 and 12, defense counsel pointed out to the trial court that the victim's mother was just sobbing (T 1288). Considering the amount of time between the last testimony regarding Exhibit 10 and the ten to thirty seconds after the reaction, it is far more likely that her reaction was to Dr. Selove's graphic testimony of her son's last moments of life, and not to Exhibit 10.

Admission of photographs is within a trial court's discretion and will not be disturbed on appeal, unless there is a showing of clear abuse. *Wilson v. State*, 436 So. 2d 908 (Fla. 1983). Based on the above, the trial court did not abuse his discretion in admitting this exhibit. Neither he nor the prosecutor saw or heard anything, and the prosecutor was standing only five feet from the mother (T 1290-91). Furthermore, even if error, it would be harmless in light of Dr. Selove's subsequent testimony regarding the effect of the wound, independent of the photograph. *See Thompson v. State*, 619 So. 2d 261 (Fla. 1993). It would also be harmless, because once admitted there was very little reference to the photograph (T 1284/22 - 1286/2); it was not urged as a basis for a death recommendation; and it was not made a focal point of the proceedings. *See Duncan v. State*, 619 So. 2d 279, 282 (Fla. 1993).

ISSUE 5

WHETHER APPELLANT MADE AN EQUIVOCAL REQUEST FOR COUNSEL DURING POLICE QUESTIONING; WHETHER APPELLANT MADE THE ALLEGED REQUEST DURING THE GIVING OF MIRANDA WARNINGS OR DURING SUBSTANTIVE QUESTIONING; AND WHETHER *DAVIS* AND *OWEN* SHOULD APPLY RETROACTIVELY TO APPELLANT'S CASE (RESTATED).

The identical issues raised by appellant in this case were raised by him before this Court in his appeal from his conviction for the murder of Marilyn Leath. *State v. Almeida*, 22 Fla. L. Weekly S521 (Fla. Aug. 28, 1997). Although the opinion itself does not detail the precise arguments that Almeida made, this Court should take judicial notice of the briefs in that case, as the arguments are identical. *See* § 90.202(6), Fla. Stat. (1995).

In an abundance of caution, however, the State responds to appellant's arguments in this case as follows: Detective Mink of the Sunrise Police Department testified at the suppression hearing that he and Detective Allard began interviewing appellant at the police station at 5:16 p.m. (T 127). After providing appellant a copy of a waiver-of-rights form, Detective Mink read each individual right to appellant and asked him if he understood them. Appellant responded that he did and initialed beside each right as it was read. After the detective read the entire form, appellant agreed to speak to them without an attorney and signed the waiver section of the form (T 128-36). At that point, the *Miranda* warnings were complete, and the waiver was in effect.

Thereafter, Detective Mink questioned appellant about the murder of Frank Ingargiola at Higgy's Restaurant. After initially denying any involvement, appellant confessed that he killed Mr. Ingargiola (T 136-37). At 5:30 p.m., they turned on a tape recorder to memorialize appellant's confession (T 137). After Detective Mink placed appellant under oath and asked him some preliminary questions (T 1524-1526), the following colloquy occurred:

> Q [By Detective Mink] All right. Prior to us going on this tape here, I read your Miranda rights to you, that is the form that I have here in front of you, is that correct? Did you understand all of these rights that I read to you?
>
> A [By appellant] Yes.
>
> Q Do you wish to speak to me now without an attorney present?
>
> A Well, what good is an attorney going to do?
>
> Q Okay, well you already spoke o me and you want to speak to me again on tape?
>
> Q (By Detective Allard) We are, we are just going to talk to you as we talked to you before, that is all.
>
> A Oh, sure.

(T 1526-27) (emphasis supplied). Detective Mink testified that he interpreted appellant's remark as "[a] comment, not a question. Just a comment," which he did not believe he needed to clarify. (T 143). Detective Allard testified that he also interpreted appellant's remark similarly: "I basically took it as like he was

commenting on the fact, not as much as - I trying to - just like a negative comment towards having an attorney or something like that. I took that as a negative comment." (T 177). He did not interpret it as a request for an attorney (T 177).

Appellant alleged in his motion to suppress, and renews his allegation now, that he made an equivocal request for counsel, which Detectives Mink and Allard should have clarified more thoroughly prior to continued questioning (R 165-68; T 324-32; IB at 45-53). The trial court found that appellant's comment was "no more than a rhetorical question at best. As such, it did not require a response from law enforcement." (R 193-94). The State maintains, as it did below, that appellant's comment was more of a statement than a question and was not intended by appellant to invoke, even equivocally, his right to counsel.[3] Even were it an equivocal request, it was not an unequivocal request, which the law requires before the police must clarify with questions and/or cease the interview. *See State v. Owen*, 696 So. 2d 715 (Fla. 1997); *Davis v. United States*, 512 U.S. 452 (1994).

Appellant alleges, however, that *Owen* and *Davis* do not apply to his case, because those defendants made equivocal or ambiguous requests for counsel "during substantive questioning," whereas appellant made his equivocal request "during the process of giving

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[3] The Fourth District Court of Appeal, however, found that the comment was an equivocal request for counsel "under the relevant case law." *Almeida v. State*, 687 So. 2d 37, 38-39 (Fla. 4th DCA 1997), *quashed*, 22 Fla. L. Weekly S521 (Fla. Aug. 28, 1997).

or waiving *Miranda* rights" (IB 45-50 [emphasis omitted]). He believes the timing of the defendants' responses in *Owen* and *Davis* was crucial to the Courts' analyses and that the same analyses would not, and should not, apply to his case *(Id.* at 47-50).

This Court need not reach this issue, however, because the record does not support appellant's characterization that he made an equivocal request "during the process of giving or waiving Miranda rights." Detective Mink's uncontroverted testimony was that he read appellant his rights; appellant acknowledged his understanding of each as they were read; and appellant waived his rights in writing before the detective began any questioning (T 128-36). Once the reading and waiver were complete, Detective Mink began substantive questioning. Shortly thereafter, appellant confessed to the murder of Frank Ingargiola, and Detective Mink obtained appellant's consent to tape-record the confession. It was during the subsequent tape-recording that appellant made the allegedly equivocal request for counsel. However, given appellant's previous waiver of his rights, and the intermediate substantive questioning, appellant's characterization that he made an equivocal request for counsel "during the giving or waiving of *Miranda* rights" is belied by the record.

Alternatively, appellant claims that, were there no factual distinction between his case and *Owen* or *Davis*, this Court should not apply *Owen* and *Davis* retroactively to him (IB at 50-51). This Court obviously rejected this argument in the Leath appeal. *State*

v. Almeida, 22 Fla. L. Weekly S521 (Fla. Aug. 28, 1997). *See also Owen*, 696 So. 2d at 719 (applying *Davis* retroactively to a 1986 confession). As in *Owen*, reliance on the original *Owen* opinion and its progeny would result in manifest injustice to the people of this state. Since appellant has established no legitimate reason why this Court should not apply *Davis* (through *Owen*) retroactively to him, this Court should affirm the trial court's denial of his motion to suppress and his conviction for the first-degree murder of Frank Ingargiola.

Furthermore, any decision of the Florida Supreme Court announcing a new rule of law, or merely applying an established rule of law to a new or different factual situation, must be given retrospective application by the courts of this state in every case pending on direct review or not yet final. *Smith v. State*, 598 So. 2d 1063 (Fla. 1992). This court should apply to this pending matter the new rule of law espoused by this Court in both *State v. Owen*, 696 So. 2d 715 (Fla. 1997) and *State v. Almeida*, 22 Fla. L. Weekly S521 (Fla. Aug. 28, 1997), where it answered affirmatively the certified question, "Do the principles announced by the United States Supreme Court in *Davis v. United States*, 512 U.S. 452 (1994), apply to the admissibility of confessions in Florida, in light of *Traylor v. State*, 596 So. 2d 957 (Fla. 1992)?"

Finally, an error on a ruling on a motion to suppress is not per se reversible, but can be found to be harmless. *Owen v. State*, 560 So. 2d 207 (Fla. 1990). Certainly, even if it had been error

for the trial court to deny appellant's motion to suppress, it would be harmless, since appellant confessed to Louis (Dave) Salmon (T 1377-78), Eddie Cooper (T 1448-49), and to Sergio Hoggro (T 1472-73), who all testified accordingly. *See State v. Diguilio*, 491 So. 2d 1129 (Fla. 1986).

ISSUE 6

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION FOR MISTRIAL (RESTATED).

Appellant waived any objection to the sobbing incident, because the trial court offered to give a curative instruction, and defense counsel declined the offer. *Marshall v. State*, 604 So. 2d 799, 802 (Fla. 1992)

Appellant argues that the court erred in denying his motion for mistrial, without fully informing himself as to the effect of several outbursts made by bystanders. In support of his position, appellant cites to *Rodriguez v. State*, 433 So. 2d 1273 (Fla. 3d DCA 1983); however, in *Robriguez*, the outburst was by a testifying witness, who shouted epithets and interspersed her testimony with impassioned statements evidencing her hostility toward the defendant. The appellate court found that the witness's conduct necessarily engendered sympathy for her plight and antagonism toward the defendant, which deprived the defendant of a fair trial. In this matter, the alleged conduct was not nearly as egregious as in *Rodriguez*, did not necessarily engender antagonism for appellant, and therefore did not deprive appellant of a fair trial.

Obviously, the incident at the pre-trial hearing was too far removed from the trial to justify any action and certainly could not have prejudiced the verdict.[4] Further, even if the victim's mother began sobbing, and a man held her arms for ten to thirty seconds (T 1288-89), such an incident does not vitiate the entire trial. Here, there is nothing in the record to indicate that the jury even knew who the sobbing lady was. Further, her sobbing did not necessarily engender antagonism for appellant. Again, if reasonable men could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion. *Booker v. State*, 514 So. 2d 1079, 1085 (Fla. 1985). Certainly, at the very least persons, could differ as to the propriety of the trial court's ruling; therefore, there was no abuse of discretion.

The same is true for the incident when defense counsel indicated that he heard an unidentifiable spectator say "who cares" during Dr. Macaluso's cross-examination. This also did not deprive appellant of a fair trial. Again, it is not like *Rodriguez*, where the alleged conduct necessarily engendered antagonism for the defendant.

Appellant argues that the trial court had a duty to inquire about any effect these comments may have had on the jury. However,

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[4] Appellant incorrectly indicates that the trial court did nothing to ensure that such an incident would not arise at trial (IB 54). At the beginning of this trial, the trial court instructed the families not to talk with the jurors and to quietly leave the courtroom, should they become emotional (T 1207-09).

appellant's authority for this proposition is unavailing. Appellant cites to *Bauta v. State*, 22 Fla. L. Weekly D1020 (Fla. 3d DCA April 23, 1997); however, in *Bauta* the appellate court held that the trial court did not abuse his discretion by deciding to conduct voir dire of the jury panel to evaluate possible taint. This opinion certainly does not hold that such an inquiry is required. Appellant also cites to *Bertone v. State*, 224 So. 2d 400 in support of this position. However, in *Bertone* the trial court made no inquiry of the jury; the trial court did, however, admonish the testifying witness and instruct the jury to disregard the statements. As previously stated, in this case the trial court offered to give any instruction the appellant requested; however, defense counsel refused this offer.

Appellant also states that, "This case is a far cry from *Torres-Arboledo v. State*, 524 So. 2d 403, 409 (Fla. 1988)." However, *Torres-Arboledo* is right on point, in that this Court noted that in a case where it cannot be gleaned from the record how intense an outburst was nor the degree to which it may have affected the jury, the Court must defer to the trial court's ruling. *See also Arbelaez v. State*, 626 So. 2d 169 (Fla. 1993). The record in this matter certainly does not reflect the intensity of the two outbursts or the degree to which they may have affected the jury. In fact, if the record reflects anything, it reflects that the alleged outbursts lacked intensity. The mother's sobbing only lasted ten to thirty seconds, before she left the courtroom.

Neither the judge nor the prosecutor heard or saw anything. Further, when someone allegedly said, "who cares," the bailiff never heard this comment, although she was "sitting right there." Based on such a record, this Court should defer to the trial court's ruling. Be that as it may, the alleged comments were not sufficient to vitiate the entire trial, and based on the aforementioned case law mistrial was not appropriate.

Issue 7

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN FINDING THE EXISTENCE OF THE COLD, CALCULATED AND PREMEDITATED CIRCUMSTANCE (RESTATED).

Appellant argues that the trial court erred by applying the cold, calculated, and premeditated circumstance, because the evidence did not support it. Appellant's position is that because the trial court found the existence of the two mental mitigators, this is "contrary to a finding that he acted in a calm, reflective manner" (IB 58). More specifically, appellant argues that it was error to find the CCP circumstance, because the existence of the two mental mitigators "refuted the 'cold' element of the circumstance" (IB 60). However, the existence of mental mitigating circumstances do not preclude the finding of this aggravating circumstance, they merely affect the weight given the mitigating factors. *See Card v. State*, 453 So. 2d 17 (Fla. 1984); *Michael v. State*, 437 So. 2d 138 (Fla. 1983).

Appellant relies on several cases to support his position. In *Besaraba v. State*, 656 So. 2d 441, 445 (Fla. 1995), this Court

determined that the "calculated" element of the CCP circumstance had not been sufficiently proven, thus *Besaraba* is inapplicable to this case, where appellant is challenging the "cold" element. However, in *Besaraba* the trial court found the presence of a strong mental mitigator, whereas in this case the trial court gave the two mental mitigators little weight. Also, whereas in *Besaraba*, where there were significant facts that belied a careful plan, there are no record facts in this case which suggest that this homicide was anything but cold. "Cold" means "calm, cool reflection, and not an act prompted by emotional frenzy, panic, or a fit or rage." *Jackson v. State*, 648 So. 2d 85 (Fla. 1994); *Richardson v. State*, 604 So. 2d 1107 (Fla. 1992). Appellant left Higgy's at about 12:30 a.m. Over the next two hour period,[5] Dave Salmon tried to calm appellant down. Although appellant initially indicated that he was going back to shoot the victim and that he could not be talked out of it, appellant did in fact calm down, according to Mr. Salmon. Twenty minutes later, appellant also indicated to Eddie Cooper that he was all right, as he dropped Eddie off at home. Sergio was the last to be dropped off between 2:30 and 3:00 (it would appear from the record that he was not dropped off before 3:00). After appellant dropped off Sergio, he indicated that he consumed some beer and then returned to Higgy's, where he laid in wait for thirty

[5] Five or ten minutes outside Higgy's plus twenty minutes to Dave Salmon's home plus one and one-half hours at Dave's home.

minutes,[6] until the victim left around 4:30 a.m., at which time he shot the victim to death. Clearly, this homicide was cold. Here, appellant reflected for approximately four hours, before shooting Frank Ingargiola to death. The facts show that when Mr. Ingargiola confronted appellant, Dave Salmon could tell there was going to be a problem, so he asked appellant to leave. Nothing in the facts indicate that appellant put up any resistance to Mr. Salmon's request. If appellant had been in an emotional frenzy, in a panic, or in a fit of rage, certainly he would have done more than invite the victim to go outside and then succumb without incident to Mr. Salmon's suggestion to leave. Appellant indicated that he was "pissed off," but this is not tantamount to a fit of rage. Also, the facts show that although appellant was initially upset, he had calmed down two hours later. Therefore, this homicide was the result of a calm, cool reflection.

Appellant also cites to *Spencer v. State*, 645 So. 2d 377, 384 (Fla. 1994), where this Court found that the cold component of the circumstance had not been proven, and that the evidence of its existence was negated by evidence of mental mitigating circumstances. However, *Spencer* involved a domestic killing, where the defendant killed his wife during a heated domestic dispute. Although mental mitigators might have weighed on the existence of

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[6] Based on this testimony, appellant would have only had approximately one hour to go to the liquor store and consume beer. Appellant told Dr. Macaluso that he consumed several beers at the liquor store, and then returned to Higgy's (T 1999).

an aggravator, the CCP circumstance does not normally apply to a domestic killing, because these types of cases do not normally involve calm, cool reflection, but rather mad acts prompted by wild emotion. *Douglas v. State*, 575 So. 2d 165 (Fla. 1991); *Richardson v. State*, 604 So. 2d 1107 (Fla. 1992); *Maulden v. State*, 617 So. 2d 298 (Fla. 1993). Appellant also cites to *Hamilton v. State*, 678 So. 2d 1228, 1231 (Fla. 1993), and *Cannady v. State*, 620 So. 2d 165, 170 (Fla. 1993), which in turn cites to *Santos v. State*, 591 So. 2d 160 (Fla. 1991), all of which involved domestic heat-of-passion killings, where this court determined that the "cold" component had not been proven. This case, on the other hand, does not involve a domestic killing; therefore, these cases are not applicable.

Appellant also argues that the "pretense of moral or legal justification" element was not proven beyond a reasonable doubt (IB 60). Referencing the sentencing order, he claims that the trial court found this element proven without giving it any consideration. The sentencing order reflects, however, that appellant told authorities that he had no reason for killing Frank Ingargiola. Appellant now suggests that, although he said that he had no reason, his statement to police indicated that he did have a pretense -- that Mr. Ingargiola made him look bad, which "pissed" him off. However, appellant provides no legal authority which holds that such a subjective feeling amounts to a pretense of moral or legal justification. Rather, appellant merely concludes that it

is and cites to *Banda v. State*, 536 So. 2d 221, 224 (Fla. 1988) (defining "pretense" as "any claim of justification or excuse"). However, in *Walls v. State*, 641 So. 2d 381 (Fla. 1994), this Court elaborated that a pretense of moral or legal justification is any colorable claim based at least partly on uncontroverted and believable factual evidence or testimony that, but for its incompleteness, would constitute an excuse, justification, or defense to the homicide. This Court further stated that "colorable" means that which is in appearance only, or having the appearance of truth; while "appearance" means that there must be at least some basis in fact to support the defendant's belief that the killing would be excusable, justifiable or subject to a legal defense. *Walls v. State*, 641 So. 2d 381 (Fla. 1994). In other words, appellant's purely subjective beliefs, without more, do not establish a pretense of moral or legal justification. *Jackson v. State*, 22 Fla. L. Weekly S690, 692 (Fla. Nov. 11, 1997)("We have repeatedly rejected claims that the purely subjective beliefs of the defendant, without more, could establish a pretense of moral or legal justification).

In *Williamson v. State*, 511 So. 2d 289 (Fla. 1987), this Court also noted that where the "pretense" is self-defense and there is no evidence that prior to the murder there were threatening acts by the victim against the defendant, or evidence that the victim planned to attack the defendant, no pretense of moral or legal justification will be found. Also, as noted by this Court in

Jackson v. State, 22 Fla. L. Weekly S690, 691-92 (Fla. Nov. 6, 1997), *Banda* involved a situation where the victim had threatened violence to the defendant and caused the defendant to fear for his life. Like *Jackson* and unlike *Banda* and *Williamson*, the victim in this case made no threat of violence, which would have caused appellant to fear for his life.[7] There is no law in existence which makes a killing excusable, justifiable or subject to a legal defense just because the victim made the perpetrator look bad and "pissed him off." Therefore, appellant's statement in no way provides a valid basis for concluding that a pretense of moral or legal justification existed.

Appellant also contends that the trial court was wrong to rely on the other murders to establish this aggravating factor. However, it is clear in his sentencing order that the trial court primarily based his finding on appellant's own statements. The court secondarily noted the other murders as additional justification. Be that as it may, *Wuornos v. State*, 676 So. 2d 966 (Fla. 1995), does not hold, as appellant suggests, that the trial court cannot rely on collateral crimes at all to justify finding a particular circumstance. *Wuornos* holds that when nothing in the record supports statements in the sentencing order, other than

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[7] Appellant did state that the victim threatened to kick his ass the next time he came in Higgy's (T 1530), but appellant never indicated that this put him in any life-threatening fear. Even if appellant would have made this representation, without more, such a subjective claim should be rejected to establish a moral or legal justification. *Walls* and *Jackson*, 641 So. 2d 381 (Fla. 1994)

collateral crimes evidence, the sole relevance of which was to establish bad character or propensity, then the collateral crimes evidence alone cannot be used to establish the aggravating factor. In *Wuornos*, there were no witnesses and the defendant's confessions did not support the existence of this aggravator. In this matter, the trial court clearly based his finding on record evidence of appellant's own statements, and whether or not his finding was based in part on collateral crimes evidence is inconsequential.

Appellant also argues that it was error for the trial court to overrule his objection and instruct the jury on this circumstance. Appellant suggests that the only bases argued by the State in support of this circumstance were the two prior homicides. However, the prosecutor clearly indicated that the homicides were just another basis for this aggravator (T 220/17). However, litigants are entitled to have the jury instructed on the law applicable to the issues presented, so long as there is evidence presented at trial which legitimately raises these issues. *Bryant v. State*, 412 So. 2d 347 (Fla. 1982).

Appellant's next position is that instructing the jury on both the "prior violent felony" and CCP aggravators resulted in the improper doubling of aggravating circumstances. However, doubling of aggravating circumstances is improper only when they refer to the same aspect or feature of the crime or of the same characteristics of the defendant. *Cherry v. State*, 544 So. 2d 184 (Fla. 1989). Further, so long as each aggravator is supported by

distinct facts, there is no impermissible doubling. *Stein v. State*, 632 So. 2d 1361, 1366 (Fla. 1994). For example, since a defendant's previous felony convictions and his status as being under a sentence of imprisonment are two distinct characteristics of the defendant and not based on the same evidence and the same essential facts, these aggravators may be considered separately. *Squires v. State*, 450 So. 2d 208 (Fla. 1984); *Muhammad v. State*, 494 So. 2d 969 (Fla. 1986). Also, since HAC pertains to the nature of the killing and CCP pertains more to the killer's state of mind or intent, these aggravators may both be applied without improper doubling. *Johnson v. State*, 465 So. 2d 499 (Fla. 1985). Clearly, in this case appellant's prior capital convictions is a characteristic of appellant, while CCP is an aspect of the crime which focuses on appellant's state of mind at the time of the killing. Both are supported by facts separate and distinct from the other. Therefore, although it could be argued that the two prior homicides show appellant had no pretense of a moral or legal justification, there is no improper doubling of circumstances.

Finally, appellant argues that the evidence does not support the finding of this circumstance. However, when a trial judge, mindful of the applicable standard of proof, finds that an aggravating circumstance has been established, the finding should not be overturned unless there is a lack of competent, substantial evidence to support it. *Swafford v. State*, 533 So. 2d 270, 277 (Fla. 1988). Certainly, based on the above, reasonable minds would

agree that there was sufficient evidence to support the conclusion that this circumstance existed.

Nonetheless, even if this Court were to strike this aggravator, it would be harmless. In light of appellant's prior homicide convictions and the little weight given the mitigating circumstances by the trial court, there is no reasonable likelihood that the trial court would sentence differently, even without this circumstance. *See Rogers v. State*, 511 So. 2d 526, 535 (Fla. 1987).

ISSUE 8

WHETHER APPELLANT'S SENTENCE IS PROPORTIONATELY WARRANTED UNDER THE FACTS OF THIS CASE.

Appellant argues that his death sentence is disproportionate, because there were two aggravating circumstances but substantial mitigation. However, this Court has repeatedly held that this process is more than a numbers game and requires a careful consideration of the totality of the circumstances and the weight of the aggravating and mitigating circumstances. *Floyd v. State*, 569 So. 2d 1225, 1233 (Fla. 1990), *cert. denied*, 501 U.S. 1259 (1991). So long as the sentencing court recognizes and considers a mitigating factor, the weight which it is given will generally not be disturbed. *Quince v. State*, 414 So. 2d 185 (Fla. 1982). The weight assigned to a mitigating circumstance is within the trial court's discretion and subject to an abuse of discretion

standard. *Blanco v. State*, 22 Fla. L. Weekly S575 (Fla. Sep. 18, 1997).

In this matter, the trial court found the existence of two very strong aggravating factors: CCP and that appellant was previously convicted of murdering both Marilyn Leath and Chiquita Counts (R 342-346). The court found the existence of three statutory mitigators, but gave them little weight (R 346-48), and eight non-statutory mitigating circumstances, which he also gave little weight, except for appellant's difficult and abusive childhood, which the court gave some weight (T 348-351). Based on a careful evaluation, the trial court concluded that the mitigating circumstances did not outweigh the aggravating circumstances (R 352-53).

Proportionality review compares the sentence of death with other similar cases in which a sentence of death has been approved or disapproved. *Songer v. State*, 544 So. 2d 1010 (Fla. 1989). Death is presumed to be the proper penalty when one or more aggravating circumstances are found, unless they are outweighed by one or more mitigating circumstances. *White v. State*, 403 So. 2d 331 (Fla. 1981). The death penalty is appropriate if, as here, the jury has recommended and the judge imposes the death sentence, finding that the mitigating evidence did not outweigh the aggravating factors. *Brown v. State*, 565 So. 2d 304 (Fla. 1990); *Freeman v. State*, 563 So. 2d 73 (Fla. 1990).

In regard to assigning a relative weight to the mitigating circumstances, the trial court can consider the circumstances underlying each factor. *Slawson v. State*, 619 So. 2d 255 (Fla. 1993).

Age

The trial court gave little weight to appellant's age because appellant was twenty when the murder occurred, was married and a father when the murder occurred, had been living on his own as a self-supporting individual and because there was no evidence suggesting that appellant's emotional age did not match his chronological age (R 346). Chronological age alone is of little import. *Campbell v. State*, 679 So. 2d 720 (Fla. 1996). Also, mitigating circumstances must, in some way, ameliorate the enormity of a defendant's guilt;[8] therefore, age is a mitigating circumstance when it is relevant to mental and emotional maturity and defendant's ability to take responsibility for his own acts and to appreciate the consequences flowing from them.[9] *Eutzy v. State*, 458 So. 2d 755 (Fla. 1984); *cert. denied*, 471 U.S. 1045, (1985).

Nothing in the record suggests that appellant's age played a role in the murder of Frank Ingargiola, or that appellant was so

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[8] In other words, the court must determine whether the facts extenuate or reduce the degree of moral culpability for the crime committed. *Rogers v. State* 511 So. 2d 526 (Fla. 1987).

[9] Both Dr. Trudy Block-Garfield and Dr. Thomas Macaluso testified that appellant appreciated the consequences of his conduct (T 1889-90, 1966-67).

immature that he was less able to take responsibility for his actions or less able to appreciate the consequences of them. Quite to the contrary, when his wife met him, he was working and going to school (T 1619). His mother testified that he was always a hard worker (T 1609). Also, when appellant got Francis Almeida pregnant, he accepted this responsibility and married her.[10] A less mature person would have gone to extreme measures to avoid this responsibility. After he was married, he continued to work and go to school (T 1621). This evidence shows unusual maturity and should diminish the weight of this circumstance. *Ellis v. State*, 622 So. 2d 991 (Fla. 1993). Further, appellant's own expert, Dr. Lee Bukstel, testified that he tested appellant and determined that appellant's intelligence is in the low average to average range (T 2291-92); and that his best abilities include mental control and memory functions (T 2292).

This Court has found that a court did not abuse its discretion by giving little weight to a defendant's age of twenty, when the only other relevant evidence was that he was immature. *Kokal v. State*, 492 So. 2d 1317 (Fla. 1986). Again, if reasonable men could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion. *Booker v. State*, 514 So. 2d 1079, 1085 (Fla. 1985). Certainly, to

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[10] Francis testified that their son turned four in March of 1996 (T 1618), which means that he was born in March of 1992. Francis and appellant were married on September 14, 1991 (T 1624-25), which means that unless the child was a minimum of 74 days premature Francis was pregnant when they were married.

say the least, reasonable persons could differ regarding the weight to be given this mitigating circumstance; therefore, there can be no abuse of discretion.

Extreme mental or emotional disturbance

The trial court also gave little weight to the mitigator that appellant was under the influence of an extreme mental or emotional disturbance (R 347). The trial court pointed out that most of the mental health experts agreed that appellant was under the influence of such a disturbance; however, a trial court is free to reject even allegedly uncontroverted expert psychiatric testimony in determining the applicability of a mental health mitigating circumstance. *Roberts v. State*, 510 So. 2d 885 (Fla. 1987).

Appellant relies in part on the testimony of Dr. Abbey Strauss to establish both mental mitigators. Dr. Strauss based the existence of this mitigator on appellant's depression and alcohol related problems, brought on by childhood abuse (T 2447-49). However, Dr. Strauss indicated that the sources of his information, upon which he based his opinion, were eight or nine hours with appellant (T 1655);[11] appellant's own statement admitting guilt (T 1658); a couple of depositions from family members and friends; Dr. Bukstel's report; police reports; and a narrative from the police department (T 1658).[12] Dr. Strauss testified that his source of

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[11] The first time he met appellant was August 30, 1995 (T 1655), almost two years after the murder.

[12] Dr. Strauss did not review the depositions of Louis Salmon, Sergio Hoggro or Eddie Cooper, who were the co-workers with

information regarding the abuse appellant encountered as a child came from appellant himself and the family member's depositions (T 1661). However, Dr. Strauss admitted that none of the family members were in Brazil when appellant was allegedly abused by his father and stepmother (T 1661). Although appellant's brother, Tony Almeida, testified that he spent 2½ months in Brazil in 1983 and saw the stepmother hit appellant once in the back with a broomstick because appellant refused to go into punishment, he indicated that after he told his father about the incident, he never saw his stepmother ever lift another hand to appellant again (T 2374-76). Not only was there no direct evidence, other than appellant's self-serving hearsay, that appellant was abused by his stepmother and father, this testimony suggests that the father took measures to stop corporal punishment by his stepmother.

Dr. Strauss also indicated that the abuse caused by appellant's mother was more in terms of exposing appellant to inappropriate sexual conduct, like getting him a prostitute when he was twelve, because she believed that he should be introduced to sex (T 1662). However, when the mother testified, she indicated that this was untrue and what happened was that while they were still in Brazil appellant asked for a prostitute as a Christmas present, and her husband (the step-father) arranged for it (T 2408-09). Again, it appears that appellant's self-serving statements to medical professionals were not truthful.

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appellant shortly before the murder, to whom appellant confessed to the murder (T 1708).

As for Dr. Strauss' reliance on alcohol consumption to support this mitigator, Dr. Strauss admitted that the only evidence of appellant's use of alcohol the evening of the murder was appellant's own statement (T 1707). Dr. Strauss thought that appellant's statement to the police indicated that he had consumed six beers, but he was mistaken.[13] He later admitted on cross-examination that appellant could not recall how much alcohol he had consumed (T 1707). Thus, not only was there no corroboration of appellant's self report, he could not quantify the amount of alcohol consumed. As a result, Dr. Strauss' opinion is unreliable. Furthermore, Dr. Strauss also testified that, although the confrontation with the manager started the process, if appellant had not had alcohol that night perhaps the shooting would never have occurred; it was the combination of the confrontation and the alcohol consumption that resulted in the shooting (T 1706). Without the alcohol, appellant would probably have just walked away (T 1709).[14] Since Dr. Strauss's opinion was based on the testimony of persons, who had no personal knowledge, and on the use of

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[13] It was appellant's statement regarding the Chiquita Counts homicide where he indicated that he had consumed a six pack of beer (T 2274). In the statement he gave concerning this homicide, appellant only stated that he got "kind of drunk" and came back and shot the manager (T 1530).

[14] Dr. Trudy Block-Garfield testified that appellant told her that he had consumed some beer before the homicide, but that he did not remember how much (1890). She also testified that appellant was a daily beer drinker, and people who drink regularly adapt and can drink a lot more than those who drink now and then (1890).

alcohol, when there was no legitimate evidence of alcohol use, Dr. Strauss's finding of this mitigating circumstance must fall.

Finally, it should be noted that Dr. Strauss also testified that in his opinion on the night of the murder appellant knew what he was doing and knew the difference between right and wrong (T 1659).

Appellant also relies on the testimony of Dr. Thomas Macaluso. Dr. Macaluso testified that he interviewed appellant on January 26, 1995, and again on January 2, 1996 (T 1954), and that it was during the second interview that he looked for the presence of possible mitigators (T 2426). He admitted, however, that the longer period of time between the event and the evaluation made the evaluation more difficult (T 1975). Thus, by the doctor's own admission, his ultimate conclusions were weakened by the time period between the crime and the evaluation.

Based on his first interview, Dr. Macaluso became suspicious that appellant suffered from a dysthymic disorder (T 1968). He testified that a person suffering from a dysthymic disorder is depressed nearly everyday for a period of more than a year and will have other symptoms such as those suffered by appellant, insomnia, low self esteem and suicidal thinking (T 1958-59). He also testified, however, that usually persons with dysthymic disorders are able to function day to day and can hold highly technical jobs (T 1969). He pointed out that a person suffering from a dysthymic disorder does not have enough symptoms to qualify as suffering from

a more acute type of depression called major depressive illness (T 1959).[15]

Between the first and second interview, he reviewed depositions of family members and friends of the family to get background information on appellant (T 1957). However, the doctor did not speak with or review the depositions of Eddie Cooper, Sergio Hoggro or Louis Salmon, who were with appellant hours before the murder (T 1995-96).

Dr. Macaluso testified that during the first interview, appellant told him that he went to the bar, where the manager asked him for I.D. and took a beer out of his hand (T 1998). He told the doctor that he did not drink any beer at the bar, because he had not had the chance to do so (T 2003). He also said that when he invited the manager to go outside, because he had his I.D. in the car, all along he was planning to physically attack the manager (T 1999). He told the doctor that after he left the bar he went to a liquor store and drank several beers and then went back to the bar and waited in the parking lot for the manager. During the second interview, however, Dr. Macaluso asked appellant about going to the liquor store after the homicide, and appellant said that he may have gone to a liquor store, but that he did not have a good recollection of doing so (T 2002).

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[15] Dr. Trudy Block-Garfield, who the trial court mentioned in his sentencing order, testified that she did not know whether appellant suffers from dysthymia and explained that dysthymia involves slight mood fluctuations, where a person one day feels somewhat depressed and another day feels up (T 1932).

Dr. Macaluso also testified that appellant specifically described how, as the manager came out, he drove by and when he was at a good shooting distance he straightened out his arm and pulled the trigger (T 2000). Dr. Macaluso testified that those statements by appellant were significant, because they show a rational thought-out plan.

Dr. Macaluso testified that at the time of the incident appellant knew what he was doing and the consequences (T 2000). He testified that appellant told him that he knew that what he had done was against the law, and that he was scared of getting caught by the police, so he immediately drove home (T 2000).

Finally, Dr. Bukstel testified for appellant in the penalty phase. Again, like Dr. Macaluso, Dr. Bukstel felt that the extreme mental or emotional disturbance mitigator applied, but that the capacity to appreciate mitigator did not (T 2306). Dr. Bukstel testified that he found this mental mitigator existed, because appellant had been recently separated from his wife, and this sent him back to his family, which Dr. Bukstel postulated had been the source of appellant's problems (T 2307).

Unlike Dr. Strauss or Dr. Macaluso, Dr. Bukstel diagnosed appellant as having a mixed personality disorder with paranoid features (T 2295). He also testified that at the time he saw appellant there was a suggestion of some current mild underlying depression (T 2295-96, 2320). Dr. Bukstel, like the others, indicated that his findings were based on interviews with appellant, some medical records, police records and depositions of

family members and a friend of the family (T 2289-90). However, Dr. Bukstel admitted that the only deposition he reviewed of a person who was in Brazil during the time appellant lived there and could have had personal first-hand knowledge about the facts relating to appellant's abuse was the deposition of appellant's stepmother (T 2334). While reviewing this deposition during his testimony, Dr. Bukstel testified that appellant's stepmother, Maria Almeida, had testified that appellant never went without food while in Brazil, that she did not acknowledge the conduct she was accused of, and that, although there may have been charges brought against her and appellant's father, nothing came of them (T 2328-30).

Dr. Bukstel also testified that in his opinion at the time of the homicide, appellant was not psychotic or suffering from schizophrenia (T 1983), that he knew what he was doing, knew that it was wrong and understood the consequences of his actions (T 1967-68, 2345).

The testimony of each of these mental health experts was based on self-serving comments from appellant[16] and from statements of family members who did not have personal knowledge of the circumstances and who, being biased, testified in an effort to save appellant from a death sentence. The experts concluded that Appellant's alleged abuse as a child contributed to his severe

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[16] A trial court is not required to accept a defendant's self-serving statements when evaluating the existence or weight of mitigating factors. *Pardo v. State*, 563 So. 2d 77 (Fla. 1990).

depression. But, again, the depression was never corroborated. Nor were the claims of abuse. In fact, some of the allegations were refuted. Others, such as the allegations of abuse in Brazil, were dubious given that the family members resided in the United States at the time. Other than appellant's self-report, no one with direct knowledge testified to appellant's alleged abuse.

Also, to the extent that these experts found severe depression to be the underlying cause of appellant's extreme mental or emotional disturbance, none had any evidence that appellant was depressed at the time of the murder. In fact, none of these experts read the depositions of Dave Salmon, Eddie Cooper or Sergio Hoggro, who were with appellant just prior to the homicide.

Similarly, there was no evidence, other than appellant's self-report, that he had been abusing alcohol in the past or using it at the time of the murder. Appellant's statements were also contradictory and vague regarding alcohol consumption before the murder. The facts show that he would have only had about one hour to consume the several beers, that he first indicated that he had consumed, but since he drank beer daily, this, according to Dr. Block-Garfield likely would have had little impact on appellant. It should also be noted that Dr. Strauss testified that absent the consumption and effect of alcohol, appellant's depression alone would not have contributed to this homicide. Together, these circumstances lessened the weight of this mitigating factor.

In light of the above and of the contradictory evidence, the court did not abuse its discretion by giving little weight to this mitigating factor. *Quince v. State*, 414 So. 2d 185 (Fla. 1982).

Further, whether appellant had the ability to differentiate between right and wrong and to understand the consequences of his actions is relevant to this and the impaired capacity mitigating circumstances. *Ponticelli v. State*, 593 So. 2d 483 (Fla. 1991). As is more fully discussed below, each of the mental health experts agreed that at the time of the offense appellant could differentiate between right and wrong, and all but Dr. Strauss was convinced that appellant understood the consequences of his conduct.

Based on the above, the trial court did not abuse his discretion by giving this circumstance little weight.

Impaired capacity

The trial court gave this mitigating circumstance little weight, due in part to Drs. Strauss, Macaluso and Bukstel all testifying that in their opinion at the time of the offense appellant knew what he was doing (R 348). In fact, each of these medical experts also testified that appellant knew the difference between right and wrong. Also, Drs. Macaluso and Bukstel testified that appellant understood the consequences of his conduct. Dr. Strauss testified that he did not think that appellant could really understand the consequence of his conduct (T 1659). Further, State witness, Dr. Trudy Block-Garfield, testified that in her opinion at

the time of the incident appellant could distinguish right from wrong (1884), knew what he was doing and the consequences of same (T 1889-90). Not a single mental health expert testified that appellant's mental condition had any effect on appellant's ability to distinguish right from wrong, and only Dr. Strauss testified that it had any effect on his ability to understand the consequences of his actions, but even Dr. Strauss's testimony in this regard was equivocal. It is very difficult to believe that appellant did not completely understand that his conduct was wrong and the consequences of it, in that he told Dr. Macaluso that he knew that what he had done was against the law, and that he was afraid of getting caught by the police. Corroborative of this fact is the statement that he gave Detective Mink that he took off in a hurry with tires squealing (T 1536). Again, it should be noted that only Dr. Strauss testified that he found this circumstance applicable. Neither Dr. Macaluso nor Dr. Bukstel, both of whom testified for appellant during the penalty phase, testified in regard to this circumstance.

This mental mitigator is defined as a disturbance less than insanity but more than the emotions of an average person, however inflamed, which means that there exists a mental disturbance which interferes with, but does not obviate appellant's knowledge of right and wrong. *State v. Dixon*, 283 So. 2d 1 (Fla. 1973). Further, as stated above, whether appellant had the ability to differentiate between right and wrong and to understand the consequences of his actions is relevant to the existence of this

mitigating circumstance. *Ponticelli v. State*, 593 So 2d 483 (Fla. 1991). Obviously, this is also relevant to the weight to be given the circumstance. In light of the mental health experts' testimony, the trial court did not abuse its discretion by giving this mitigator little weight.

Additionally, the specificity with which a defendant can recount the details of a homicide contradicts any notion that he did not know what he was doing and supports a trial court's decision to give this mitigating circumstance little weight. *Kokal v. State*, 492 So. 2d 1317 (Fla. 1986). In the statement that appellant gave Detective Mink, he recalled: (1) that he, Dave and Sergio had gone to Higgy's after work (1527-28); (2) that the manager was white with dark hair and a slim build (T 1528-29); (3) that the manager was wearing a white shirt and black (not blue) pants; (4) that he shot the manager in the parking lot (T 1531); (5) that a couple of minutes before the manager came out, two people left before him (T 1538-9); (6) that after he shot the victim he drove to University Drive past the dark building onto Broward Boulevard (T 1535-36); (7) that he took off in a hurry with tires squealing (T 1536); and (8) that as he drove off he heard the victim screaming in pain (T 1538). Appellant also gave Dr. Macaluso a detailed explanation of the events and how as the manager came out he drove by him to a good shooting distance; how he straightened his arm out; and how he pulled the trigger (T

2000). Certainly, based on the above, the trial court did not abuse his discretion in giving his circumstance little weight.

Capacity for rehabilitation

Regarding this nonstatutory mitigator, the trial court gave it little weight, because Dr. Bukstel was the only witness who testified directly on this subject and indicated that appellant's depression would be difficult but not impossible to treat (R 348)(T 2308-9). Appellant's only argument is that the testimony from jailers about his good behavior indicates a substantial ability to live well in prison (IB 68). However, it should be noted that each of these jailers testified that appellant usually keeps to himself in his cell reading (T 2355-56, 2388-89, 2392, 2403). Fine and well, but the real issue is what will appellant do the next time he is around others and someone "pisses him off." Be that as it may, in light of this contradictory evidence, the court did not abuse its discretion by giving little weight to this mitigating factor. *Quince v. State*, 414 So. 2d 185 (Fla. 1982).

Good behavior while incarcerated

As the trial court noted, appellant presented several jail guards to testify that appellant had not caused any problems while in custody (R 349). Again, each of these jailers testified that appellant usually kept to himself, in his cell reading. Such evidence, although mitigating in nature, requires one to make a leap of faith and infer that appellant will maintain his good behavior while in general population at a maximum security state

penitentiary for the rest of his life. Such a conclusion is difficult at best, especially given Dr. Bukstel's testimony that appellant has certain personality traits, which are enduring in nature, those being: (1) deviant perceptions of people; (2) having difficulty dealing with authority; (3) being overly suspicious and sensitive; (4) being argumentative and prone to violent temper outbursts (T 2297). Nothing supports giving this factor any more than little weight.

Cooperation with police and confession

The trial court gave this mitigator little weight, in that Detective Abrams testified that when he initially asked appellant about the Chiquita Counts homicide, appellant denied any knowledge of it (R 349)(T 2244-45). Furthermore, shortly thereafter, while giving his taped statement, appellant stated, "Well, first of all, I want to apologize for giving you guys a hard time, you know" (R 349)(T 2272). The trial court reasoned from this evidence that appellant's cooperation with police was at best inconsistent.

While a defendant's cooperation with the police may be mitigating in nature, based on appellant's initial evasion the confession does not merit more than little weight. *See Blanco v. State*, 22 Fla. L. Weekly S575 (Fla. Sep. 18, 1997).

Additionally, Detective Mink of the Sunrise Police Department testified that when he told appellant that he wanted to question him about the homicide at Higgy's, appellant said that he had heard about it from his friends (T 1520). It was only after Detectives

Mink and Allard told appellant that they had taken statements concerning this homicide and were getting a search warrant for his car that appellant confessed and cooperated with police (1521). Considering that appellant's cooperation did not begin until after he was told that his friends had given sworn statements, the trial court could have ignored this as mitigation and certainly did not abuse its discretion by giving it little weight. *See Washington v. State*, 362 So. 2d 658 (Fla. 1978).

Right to remain silent

The trial court also gave little weight to this mitigator based on the reasons above (R 349); which was not an abuse of discretion.

Use and abuse of alcohol

The trial court generously found that appellant had a history of alcohol abuse, and that he had used alcohol on the night of the murder. Other than appellant's self-report of same, there was no evidence to support such a finding. Absent such corroborating evidence, the trial court could have rejected this mitigating factor, *see Robinson v. State*, 574 So. 2d 108, 111 (Fla. 1991), but nevertheless found it to exist and gave it some--though little--weight. It should be noted that appellant's statement to Detective Mink indicated that he was "kind of drunk" (T 1530). The trial court also explained that Dr. Block-Garfield testified that the alcohol appellant says he consumed would not have affected his judgment. Further, Dr. Block-Garfield testified that appellant

told her that he consumed some beer, but that he could not recall how many (T 1890). Dr. Macaluso testified that appellant told him that he had no beer at Higgy's (2003). During the first interview, appellant told Dr. Macaluso that he went to a liquor store and drank several beers (1999); however, during the second interview appellant told Dr. Macaluso that he may have gone to a liquor store, but that he did not have a good recollection of doing so (2002). As a matter of fact, Louis Salmon testified that the night of the murder, when he and appellant were at Higgy's, appellant told him that he had quit drinking two days earlier (T 1433). Based on this testimony, the trial court did not abuse its discretion by giving this circumstance little weight.

Abusive childhood

The trial court found this mitigator to exist and gave it "some" weight (R 351). As has already been pointed out, virtually all the evidence of abuse came from appellant's statements and the depositions of family members and friends, who had no personal knowledge of such matters. Furthermore, some of the evidence was refuted. For example, appellant's brother testified that when he spent one summer in Brazil, he only saw the stepmother hit appellant once in the back with a broomstick, for refusing his punishment. After he brought it to his father's attention, he never saw anyone again lift a finger against appellant. Also, appellant's mother did not procure a prostitute for appellant because she thought he needed the experience, his stepfather had

done so, after appellant indicated that was what he wanted for Christmas. Appellant's mother testified that she never saw anyone strike appellant (T 1407), and appellant's stepfather denied that he ever beat or even touched appellant (T 2557). Finally, while reviewing her deposition during his testimony, Dr. Bukstel testified that appellant's stepmother, Maria Almeida, had testified that appellant never went without food while in Brazil, that she did not acknowledge the conduct she was accused of, and that although there may have been charges brought against she and appellant's father nothing came of them (T 2328-30).

Despite the lack of corroboration, the refutation of some of the allegations, and the dubious nature of other allegations, the trial court nevertheless gave such evidence some weight, and under the circumstances, it was not entitled to more weight.

Remorse

The trial court found this circumstance to exist, in that each of the mental health experts testified that he appeared to be genuinely remorseful; however, he gave this mitigator little weight (R 351). The court was undoubtedly mindful that in slightly more than a month and a half, appellant brutally murdered three people, for no other reason than they "pissed him off." And he did so with extreme efficiency, execution style, always turning the car around for a quick getaway; using special bullets to cause extreme damage; never using more than a single shot; and shooting into the spine to immediately bring the victim down. Given appellant's repeated

violent acts, it cannot be said that the trial court abused its discretion in giving this factor little weight. *See Blanco v. State*, 22 Fla. L. Weekly S575 (Fla. Sep. 18, 1997)

Religious beliefs

Appellant's experts testified to his religious conversion while in jail awaiting trial. However, Dr. Bukstel speculated that appellant's preoccupation with religion was a way to keep him whole and together emotionally (T 2309-10). He noted that when a person is desperate, they typically will try to hold onto something (like religion)(T 2310-11). As with evidence of his good behavior in jail while awaiting trial, one must make a leap of faith that appellant will sustain his religious devotion and remain a peaceful follower throughout the remainder of his life. Such is a fairly large leap given Dr. Bukstel's opinion that appellant may have difficulty dealing with authority, may be suspicious, overly sensitive and argumentative, may have trouble conducting himself in a responsible, dependable way, and may be prone to violent outbursts. (T 2297). This factor, too, was deserving of no more than little weight.

Other mitigation

Appellant claims that there were "a number of other unrebutted mitigating circumstances present in this case," namely, that "appellant was passed back and forth between families and never had the opportunity to be raised by a positive role model," and that "appellant's death would be traumatic for his son" (IB 70-1).

However, appellant never requested that the jury be instructed on these mitigating circumstances, nor did he articulate these mitigating circumstances to the jury. At the end of the *Spencer* hearing, the trial court requested sentencing memoranda from both parties and specifically requested that defense counsel enumerate each nonstatutory mitigator, which he believed was applicable (T 2569-70). Appellant's sentencing memorandum does not enumerate these particular circumstances. (R 325-40). As this Court held in *Lucas v. State*, 568 So. 2d 18, 23-24 (Fla. 1990), "the defense must share the burden and identify for the court the specific nonstatutory mitigating circumstances it is attempting to establish." Having failed to do so, appellant cannot now claim on appeal that additional mitigation existed and should be factored into the proportionality equation.

Proportionality

Appellant cites to several cases to support his position that death is disproportionate. He cites to *Robertson v. State*, 22 Fla. L. Weekly S404 (Fla. July 3, 1997), where the two aggravators were HAC and that the capital felony was committed during the course of a burglary. This case is significantly different, in that appellant was previously convicted of the cold-blooded murders of Marilyn Leath and Chiquita Counts. In *Robertson*, this Court also noted that the defendant, for no apparent reason, strangled a woman, and that it was an unplanned, senseless murder. In this

case, the murder was planned carefully and executed with great precision, merely because appellant was "pissed off."

Appellant also cites to *Fitzpatrick v. State*, 527 So. 2d 809 (Fla. 1988), where there were five aggravators, including a prior capital or violent felony; however, this Court noted that HAC and CCP were conspicuously absent. Further, this Court noted that the homicide resulted from the actions of a seriously emotionally disturbed man-child, not a cold-blooded heartless killer. Again, this case is different. Not only did appellant commit this homicide in a cold, calculated and premeditated manner, he is very much a cold-blooded heartless killer, who uses a high caliber weapon with special ammunition to heartlessly kill anyone who annoys him.

Appellant also cites to *Chaky v. State*, 651 So. 2d 1169 (Fla. 1995), indicating that it involved two aggravators (IB 72); however, this Court found that one was not supported by the evidence and that the remaining aggravator (prior conviction for attempted murder) was mitigated in weight due to the circumstances surrounding the conviction. Therefore, this case is clearly not applicable to this matter for proportionality review.

Appellant also cites to *Livingston v. State*, 565 So. 2d 1288 (Fla. 1988), where the two aggravators were a previous conviction of a violent felony and that the capital felony was committed during an armed robbery. Certainly the two aggravators in this case should be given considerably greater weight, in that here the

prior convictions were for murder, not just a violent felony, and in that this murder was committed in a cold, calculated and premeditated manner. Further, Livingston was severely beaten and neglected as a child and was only seventeen at the time of the offense. The mitigation in *Livingston* was far weightier than in this case.

Finally, appellant cites to several cases to support his contention that death is not automatic, where the prior violent felony is murder (IB 72). Of course, nothing is automatic under proportionality review. Be that as it may, appellant cites to *Besaraba v. State*, 656 So. 2d 441 (Fla. 1995), where this Court found death to be disproportionate. *Besaraba* involved but a single aggravator, that being contemporaneous murder and attempted murder convictions, which is distinguishable from this case, where the court found two aggravating circumstances. Further, in *Besaraba*, like *Livingston*, had vast mitigation, unlike this case. Also, since the two contemporaneous homicides were the extent of the Besaraba's criminal history, the court found that the mitigator of no significant history of prior criminal activity existed. This case is entirely different, in that prior homicides were totally unrelated to this homicide and to themselves; therefore, appellant was not entitled to this mitigator.

Appellant also cites to *Santos v. State*, 629 So. 2d 838 (Fla. 1994), where this Court found death to be disproportionate, but *Santos* is like *Besaraba*, in that after this Court struck the CCP

aggravator, the only remaining aggravator was for other felonies committed contemporaneously with the murder, which again were the only crimes on defendant's record.

Appellant tries to distinguish *Ferrell v. State*, 680 So. 2d 390 (Fla. 1996) and *Duncan v. State*, 619 So. 2d 279 (Fla. 1993), where this Court found death to be proportional. Appellant argues that neither of these cases involved a homicide that was temporally proximate to the prior homicide. Appellant argues that this case is more like *Besaraba* and *Santos*, where the instant homicide was temporally proximate to the prior homicide. But that is not the rationale behind *Besaraba* and *Santos*, where the prior homicides were contemporaneous with and part of the same criminal episode. A case which drives this point home is *Asay v. State*, 580 So. 2d 610 (Fla. 1991), where this Court found death to be proportionate, and where the prior homicide occurred twenty minutes after the instant homicide, but was totally unrelated to the instant homicide.

Conclusion

The death penalty is appropriate if the jury, as here, has recommended and the judge imposed the death sentence, finding that more than one aggravating circumstance outweighed the mitigating evidence. *Freeman v. State*, 563 So. 2d 73 (Fla. 1990). When deciding whether appellant's sentence is proportionate to those of other defendants under similar circumstances, this Court should compare appellant's case to those where the defendant committed a

prior murder and had equally minimal mitigation. Two similar cases are, in fact, *Ferrell v. State*, 680 So. 2d 390 (Fla. 1996), and *Duncan v. State*, 619 So. 2d 279 (Fla. 1993). Ferrell killed his live-in girlfriend and had been convicted previously of "a second-degree murder bearing many of the earmarks of the present case." 680 So. 2d at 391. Although *Ferrell* involved only a single aggravator, where this case involves two, this Court found Ferrell's lone aggravator especially weighty, because the prior felony was a murder, and because both homicides had many of the same earmarks. The prior homicides in this matter also have many of the same earmarks as the instant homicide. Appellant always shot from his car, which he had positioned for a quick getaway and for a shot out the driver's side; and each time appellant only fired once, making the victim fall in place, due to the type of weapon, ammunition and the spinal shot. In mitigation, the trial court found that Ferrell "was impaired, was disturbed, was under the influence of alcohol, was a good worker, was a good prisoner, and was remorseful." *Id.* at 392 n.2. In considering this mitigation, this Court noted that the trial court, as in this case, assigned little weight to each of the mitigating factors. *Id.* at 391.

In *Duncan*, the defendant murdered his fiancee and had been convicted previously of the second-degree murder of an inmate in 1969, which again was the sole aggravator. In mitigation, the trial court found that Duncan's "childhood and upbringing saddled

him with an emotional handicap," the killing was not for financial gain, Duncan did not create a great risk of death to others, the killing was not committed during the course of another crime, the victim was not a stranger or a child, Duncan was a good worker and friend, he had satisfactorily completed parole, he had confessed to the crime, the murder resulted from a domestic dispute, and the victim had chosen him as her husband. 619 So. 2d at 281.[17] In performing its proportionality analysis, this Court distinguished those cases cited to by Duncan which involved mental mitigation and drug or alcohol abuse, and those that did not involve a prior conviction for murder or similar prior violent offense. 619 So. 2d at 284.

Two other cases, which are very similar to the instant case are *Henry v. State*, 649 So. 2d 1361 (Fla. 1994) and *Hudson v. State*, 538 So. 2d 829 (Fla. 1989). In *Henry*, this Court found death proportionate, where there were two aggravators and eight mitigators. The aggravators were for two prior murders and because the instant homicide was committed during a kidnaping. In this case, aggravation is greater due to the additional weighty aggravator that this homicide was committed in a cold, calculated and premeditated manner. Furthermore, in *Henry*, as in this case, the trial court found the existence of both statutory mental

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[17] The trial court also found two mental mitigators and that Duncan was under the influence of alcohol at the time of the murder, which this Court struck pursuant to the State's cross-appeal. *Id.* at 282-84.

mitigators, but this Court nonetheless found death to be proportional. In *Henry*, the trial court gave these mitigators some weight, whereas in this matter the trial court only gave these mitigators little weight. In *Hudson*, there were also two aggravators, a prior sexual battery and because the homicide was committed during an armed burglary. Again, in this case we are dealing with two prior murders and CCP. In *Hudson*, the trial court also found the existence of both mental mitigators, but like here gave them little weight.

Based on the above, this Court should find that death is proportionate.

ISSUE 9

WHETHER THE TRIAL COURT GAVE APPROPRIATE WEIGHT TO APPELLANT'S MITIGATING CIRCUMSTANCES (RESTATED).

In its written sentencing order, the trial court discussed each of the three statutory and eight nonstatutory mitigating circumstances that appellant presented (R 346-52). After analyzing whether appellant had established each circumstance, the court indicated how much weight it accorded each circumstance that it found to exist. This fulfilled the requirements of *Ferrell v. State*, 653 So. 2d 367 (Fla. 1995).

In this appeal, appellant challenges the weight the trial court accorded each mitigating circumstance. While he acknowledges that the weight to be accorded a mitigating circumstance is within the trial court's discretion, he claims that the trial court failed

to exercise any discretion in weighing the mitigating circumstances, but instead merely designated the mitigating circumstances to have little weight without giving a reason.

However, it is presumed that the trial court followed his own instructions and considered all mitigating evidence when there is nothing in the record to indicate that he did not. *Johnson v. Dugger*, 520 So. 2d 565, 566 (Fla. 1988). So also, it should be presumed that the trial court followed his own instructions to give mitigating evidence such weight it deserves after careful consideration of the evidence (T 2518-18). Further, the failure of the trial court to specifically address every conceivable mitigating circumstance or to specifically address appellant's evidence and arguments in his findings of fact in his sentencing order does not demonstrate that such evidence was not considered. *Brown v. State*, 473 So. 2d 1260, 1268 (Fla. 1985); *Mason v. State*, 438 So. 2d 374, 379-80 (Fla. 1983). Appellant suggests that *Van Royal v. State*, 497 So. 2d 625 (Fla. 1986), holds that a judge is duty bound to do more than make a finding of whether a mitigating circumstance exists and determine its relative weight; however, this is not so. Nowhere in any of the cases cited by appellant is there a holding that the trial court must put in his sentencing order his reasons for determining the relative weight of a mitigating circumstance. How a court must address mitigating circumstances in its sentencing order is laid out in *Campbell v. State*, 571 So. 2d 415 (Fla. 1990), *rev'd on other grounds*, 679 So.

2d 720 (Fla. 1996). The court must determine if the circumstance is supported by the evidence. Additionally, the court must consider the weight of each mitigating circumstance against the weight of the aggravating circumstances. To be sustained, the trial court's decision in the weighing process must be supported by sufficient competent record evidence. *Id.* Nowhere in this opinion is a trial court required to put in his sentencing order his reasons for determining the relative weight of a mitigating circumstance.

Based on the above, and the argument in the preceding issue, there is sufficient competent evidence in the record to support the trial court's findings. Therefore, there is no error and no abuse of discretion. As in *Blanco v. State*, 22 Fla. L. weekly S575 (Fla. Sept. 18, 1997), this Court cannot say that no reasonable person would give appellant's mitigating circumstances little (or some) weight in the calculus of this crime. 22 Fla. L. Weekly at 576 (affirming "little weight" given to defendant's impoverished background); *see also Elledge v. State*, 22 Fla. L. Weekly S597, 599-600 (Fla. Sept. 18, 1997) (affirming "little weight" given to defendant's child abuse).

Issue 10

WHETHER PENALTY PHASE ARGUMENT AND JURY INSTRUCTIONS AMOUNTED TO FUNDAMENTAL ERROR (RESTATED).

Appellant argues that the trial court committed fundamental error by instructing the jury that they "may" consider mitigating

circumstances, instead of instructing them that they "had a duty" to consider all mitigating evidence (IB 85). The reason appellant argues fundamental error is because no contemporaneous objection was made concerning this issue, so it has not been preserved for appellate review. *James v. State*, 615 So. 2d 668 (Fla. 1993).

However, appellant is incorrect when he indicates that the trial court did not instruct the jury that they had a duty to consider all mitigating evidence. The judge instructed that, "it will then be your duty to determine whether mitigating circumstances exist that outweigh the aggravating circumstances (T 2515-16, R 243). The trial court also instructed the jury that "[i]f one or more aggravating circumstances are established, you should consider all the evidence tending to establish one or more mitigating circumstances, and give that evidence such weight as you feel it should receive in reaching your conclusion as to the sentence that should be imposed" (T 2518, R 244).

The language used by the trial court tracks the same language used in Florida's standard jury instructions for penalty proceedings in capital cases, which has already been the subject of review by this Court and approved. *Elledge v. State*, 408 So. 2d 1021 (Fla. 1981). The instruction given by the trial court was not error, let alone fundamental error; therefore, the issue has not been preserved for review by this Court.

Appellant also argues that fundamental error occurred when the prosecutor argued about the weight the jury should give to

appellant's abusive childhood (IB 84) and about the weight that should be given the capacity for rehabilitation (IB 85). Again, these issues were not preserved for appellate review, so appellant had to argue fundamental error. A contemporaneous objection must be made in order to preserve for appellate review a comment made by the prosecutor during argument in either the guilt or penalty phases. *Crump v. State*, 622 So. 2d 963 (Fla. 1993).

Nonetheless, argument made to negate the weight that certain mitigators should be given is appropriate. *James v. State*, 695 So. 2d 1229 (Fla. 1997); *Mann v. State*, 603 So. 2d 1141 (Fla. 1992). Further, a prosecutor is allowed a considerable degree of latitude in arguing to a jury during closing argument. *Crump v. State*, 622 So. 2d 963, 972 (Fla. 1993); *Breedlove v. State*, 413 So. 2d 1, 8 (Fla. 1982). Fundamental error exists, as a result of improper argument during the penalty phase, when the remarks are so prejudicial as to taint a jury's recommendation of the death sentence. *Wyatt v. State*, 641 So. 2d 355 (Fla. 1994). Certainly, neither of the two alleged errors was so prejudicial as to taint the jury's recommendation of death; therefore, even if this court found the comments improper they would not amount to fundamental error; therefore, appellant also failed to preserve these issues for review.

ISSUE 11

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN ALLOWING THE STATE TO CROSS-EXAMINE APPELLANT'S MENTAL HEALTH EXPERT ABOUT WHETHER APPELLANT KNEW WHAT HE WAS DOING AT THE TIME OF THE OFFENSE (RESTATED).

Appellant argues that the State improperly cross-examined Dr. Bukstel about the insanity defense. However, this is not entirely correct. After the prosecutor initially asked Dr. Bukstel whether he was asked to render an opinion regarding sanity (T 2339), the prosecutor made it perfectly clear, repeatedly, that what he wanted to elicit from Dr. Bukstel, in order to negate the mental mitigators, was whether appellant knew what he was doing at the time of the offense (T 2340-44). The trial court even stated, "Why didn't you ask the doctor whether the defendant knew what he was doing whether the mental infirmity that he is referring to rose to that level" (T 2343). Finally, that is exactly what the prosecutor did ask Dr. Bukstel (T 2345).

As previously stated, a medical expert's opinion that a defendant had the ability to differentiate between right and wrong and to understand the consequences of his actions is relevant in determining the applicability of the two mental mitigators. *Ponticelli v. State*, 593 So. 2d 483 (Fla. 1991). During the penalty phase in this matter, Dr. Bukstel testified on direct that in his opinion when appellant committed this homicide, he was under the influence of an extreme mental or emotional disturbance (T 2307). Therefore, whether appellant knew what he was doing at the

time of the offense was relevant and within the scope of direct. Consequently, the court did not abuse its discretion in overruling appellant's objection to this question.

Issue 12

WHETHER THE TRIAL COURT IMPROPERLY PRECLUDED APPELLANT FROM TESTIFYING DURING PENALTY PHASE BY GIVING APPELLANT MISADVICE (RESTATED).

Appellant argues that the trial court's misadvice tainted his waiver of his right to testify, but on this record appellant has not shown this prejudice. The record clearly shows that appellant conferred with counsel both before and after the trial court interjected his comments. Initially, appellant's counsel informed the trial court that appellant's desire to testify was against his advice. Because of this, the trial court addressed appellant to ensure that he understood that his proposed actions were against the advice of counsel. Appellant changed his mind in regard to testifying, but only after he again conferred with counsel. This record does not reflect what his counsel advised during this recess, but based on the totality of the circumstances one can conclude that his counsel again recommended against taking the stand.

This case is similar to *Bailey v. State*, 559 So. 2d 604 (Fla. 3d DCA 1990), where the defendant wanted to testify against advice of counsel, and the trial court, mindful of the *Torres-Arboledo*

opinion,[18] questioned the defendant to ensure that he considered his attorney's advice to the contrary and understood the possible consequences. Although the trial court made an improvident statement that the defendant claimed coerced him into foregoing his right to testify, this Court found that the defendant was not precluded from testifying by the trial court, because the comments by the trial court were not threatening, and that the defendant instead had acquiesced in his attorney's advice not to testify.

In this case, the trial court also interceded to insure on the record that appellant had discussed this matter with counsel, and contrary to his advice wanted to testify. Further, the comments made by the trial court were not threatening. They were not nearly as provocative as in *Bailey*, where the trial court accused the defendant of being a kamikaze by testifying. The only difference between this case and *Bailey* is that in *Bailey* when the defendant changed his mind and decided not to testify, he stated that he had changed his mind as a result of counsel's advice. Although appellant made no such statement in this case, immediately after a recess during which he and counsel again discussed his taking the

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[18] This Court indicated that although a trial court does not have an affirmative duty to make a record inquiry concerning a defendant's waiver of the right to testify, it would be advisable for the court to make a record inquiry as to whether the defendant understands he has a right to testify, what his personal decision is and whether that decision was made after consultation with counsel. *Torres-Arboledo v. State*, 524 So. 2d 403, 411 n. 2 (Fla. 1988).

stand, his counsel indicated that appellant decided not to testify. Based on the record, as it is, it appears as though appellant acquiesced in his attorney's continuing advice not to testify. Therefore, any error was of his own making.

Further, the trial court did not misadvise appellant. Appellant argues that the trial court misadvised him by stating that if he took the stand his testimony "could" be used against him, if one of his homicide convictions was reversed and remanded for another trial. In concluding that the trial court's advice was incorrect, appellant analogizes this situation to a hearing on a motion to suppress, where a defendant's testimony at the hearing cannot be used at trial against him. Appellant cites to *Simmons v. United States*, 390 U.S. 377 (1968), which announced this holding; however, appellant has not shown where the *Simmons* holding has ever been applied in situations such as this. In fact, it would appear far more likely that if appellant were retried and took the stand, he could be impeached with inconsistent statements made under oath during the penalty phase of this trial. Fla. Stat. § 90.608, Fla. Stat. § 90.801. Furthermore, once a criminal defendant decides to testify, he may be cross-examined the same as any other witness on matters which illuminate the quality of his testimony. *Randolph v. State*, 463 So. 2d 186 (Fla. 1985). Based on the above, the trial court was correct to advise appellant that his testimony "could" be used against him in a retrial.

Appellant also argues that the trial court misadvised him in regard to the allowable extent of cross-examination. After being informed that, against the wishes of his attorney, appellant desired to make a statement during the penalty phase, the trial court first advised appellant that by taking the stand he was subjecting himself to cross-examination relating to any matter (T 2452). After defense counsel stated his belief that if appellant took the stand it would not subject him to cross-examination on every matter (T 2454), the trial court stated that the defense had put appellant's mental and emotional state into issue, and that the State could cross-examine appellant on those issues going toward mitigation (T 2455/2-9). Defense counsel agreed with the court (T 2455/10) but added that such cross-examination should be limited to this homicide, not the prior homicides (T 2455/17-22). When the court responded that it would be difficult for the prosecutor to determine what areas he would want to inquire about, without first hearing the testimony (T 2455/24), defense counsel indicated that he realized that they could take up such matters, question by question (T 2456/2). After a short discussion between the parties, defense counsel asked for a recess (T 2457/4). After this recess, defense counsel told the trial court that he had further discussion with appellant, who had decided not to testify, and that appellant's motivation was perhaps to make an apology (T 2457/11). The trial court then advised appellant that he could make an

apology at the *Spencer* hearing, or he could take the stand and be subject to cross-examination on issues raised in mitigation that deal with this homicide (T 2457/18 - 2458/12). After making this statement, the court indicated that he could not make a further determination, about whether the prior homicides could be brought up on cross, until he saw what was brought out on direct (T 2458/12-21). The trial court then directly addressed appellant to ascertain that he had consulted with is attorney, and that his decision was not to take the stand (T 2459-60).

If there was misadvice, it was the court's first statement that appellant could be cross-examined "as it relates to any matter." However, the trial court quickly corrected himself and indicated that appellant could be cross-examined on those issues that he put in issue regarding mitigation (T 2455, 2458). Further, although the court indicated that he would want to make a ruling at the time testimony was elicited about the other homicides, he did indicate that his instincts were that it would be limited to the question of whether appellant had ever been convicted of a felony or a crime involving dishonesty or moral turpitude (T 2456/20, 2458/8). Certainly, if the trial court's initial statement was error, that error was remedied and rendered harmless by the trial court's subsequent advice, which was within the constraints cited by appellant in *State v. Dixon*, 283 So. 2d 1, 7 (Fla. 1973).

Correct advice cures misadvice. *Bermudez v. State*, 603 So. 2d 657 (Fla. 3d DCA 1992).

Finally, although the State argues that nothing in this record shows that the trial court precluded appellant from "address(ing) the jury" (T 2451/19) to "make some apology" (T 2457/15), it should be noted that notwithstanding appellant has a constitutional right to testify, that right may bow to accommodate other legitimate interests. *Bowden v. State*, 588 So. 2d 225 (Fla. 1991). In *Bowden*, like here, what the defendant wanted to do was to make a statement, as distinguished from testifying. In this case, it is apparent that appellant wanted to make a statement of apology, and when he was informed by the trial court and counsel that his statement would be construed as testimony subject to cross-examination, he decided against making that statement. Therefore, if the trial court precluded anything, it was not testimony but merely a statement.

ISSUE 13

WHETHER THE TRIAL COURT GAVE UNDUE WEIGHT TO THE JURY'S DEATH RECOMMENDATION (RESTATED).

Appellant argues that this record shows that the trial court gave undue weight to the jury's advisory opinion, citing to *Ross v. State*, 386 So. 2d 1191 (Fla. 1980). *Ross* holds that when a trial court believes that he or she is bound by a jury's recommendation of death, then the matter should be reversed for resentencing. In

Ross, this Court concluded that the trial court felt compelled or bound to impose the death penalty, because in its sentencing order stated, "[T]his court finds no compelling reason to override the recommendation of the jury. Therefore, the advisory sentence of the jury should be followed."

Quite to the contrary in this matter, in his sentencing order the trial court stated that "[T]he ultimate decision as to whether the death penalty should be imposed, however, rests with the trial judge," (R 352) citing to *Hoy v. State*, 353 So. 3d 826 (Fla. 1977), which holds that although the advisory recommendation of a jury is to be accorded great weight, the ultimate decision as to whether the death penalty should be imposed rests with the trial judge. *Id.* at 832. Also in his sentencing order, the trial court stated, "[A]fter independently evaluating all of the evidence presented, the Court must make a reasoned judgment as to what factual situation requires the imposition of the death penalty, and which can be satisfied by life imprisonment, in light of the totality of the circumstances," and "[U]pon carefully evaluating all of the evidence presented, it is this Court's reasoned judgment that the mitigating circumstances do not outweigh the aggravating circumstances (R 352-53). It is abundantly clear from this sentencing order that this sentencing judge not only knew that he was not bound by the recommendation of the jury, but also performed an independent weighing of the circumstances. Therefore, the trial

court did not give undue weight to the advisory sentence. *See Ellidge v. State*, 22 Fla. L. Weekly S597, 599 (Fla. Sept. 18, 1997)(finding no error where trial court made comments identical to present case).

ISSUE 14

WHETHER THE TRIAL COURT APPLIED AN IMPROPER PRESUMPTION IN FAVOR OF THE DEATH PENALTY IN ITS SENTENCING ORDER (RESTATED).

In the concluding paragraphs of its written sentencing order, the trial court made the following comments:

> In summary, the Court finds that two aggravating circumstances were presented and are applicable. As to the mitigating circumstances, the Court finds three statutory and eight nonstatutory mitigating circumstances have been established, considered, and weighed. In evaluating aggravating and mitigating circumstances, this Court does not engage in a mere counting procedure of so many aggravating and so many mitigating circumstances. After independently evaluating all of the evidence presented, the Court must make a reasoned judgment as to what factual situation requires the imposition of the death penalty, and which can be satisfied by life imprisonment, in light of the totality of the circumstances.
>
> The jury recommended that this Court impose the death penalty by a majority of seven (7) to five (5). A jury recommendation must be given great weight by the sentencing judge and should not be overruled unless no reasonable basis exists for the recommendation. The ultimate decision as to whether the death penalty should be imposed, however, rests with the trial judge. Death is presumed to be the proper penalty when one or more aggravating circumstances are found, unless they are outweighed by one or more

> mitigating circumstances. Upon carefully evaluating all of the evidence presented, it is this Court's reasoned judgment that the mitigating circumstances do not outweigh the aggravating circumstances.

(R 352-53) (emphasis added; citations omitted).

Appellant seizes on the underscored sentence to claim that the trial court improperly presumed that death was the appropriate sentence, but it is clear from the order in its entirety that the trial court properly performed its function of independently weighing the aggravating and mitigating factors. Given the depth of its analysis, it cannot be said that the trial court failed to perform its duty under the statute. *See Elledge v. State*, 22 Fla. L. Weekly S597, 599 (Fla. Sept. 18, 1997) (finding no error where trial judge allegedly applied presumption of death by citing to *White v. State*, 403 So. 2d 331 (Fla. 1981), because the record showed that the trial court properly weighed the aggravating and mitigating circumstances). This case is identical to *Elledge*.

ISSUE 15

WHETHER THE TRIAL COURT ERRED IN REFUSING TO ALLOW LIFE WITHOUT PAROLE AS A SENTENCING OPTION, WHERE APPELLANT COMMITTED THE MURDER BEFORE AMENDMENT OF THE DEATH PENALTY STATUTE (RESTATED).

In this appeal, Appellant claims that the trial court committed fundamental error by failing to instruct the jury on the sentencing option of life without parole, and by failing to consider this sentencing option in determining the proper sentence.

(IB 97). However, appellant made no valid waiver of his constitutional right to protection from ex post facto legislation. Had the trial court instructed the jury on this option or considered this option in its independent analysis without appellant's knowing, voluntary and intelligent waiver it would have committed an *ex post facto* violation.

Appellant could have waived any *ex post facto* challenge and requested instruction and consideration under the amended statute, but he did not do so. *Cf., e.g., Larzelere v. State*, 676 So. 2d 394,403 (Fla. 1996) (holding that defendant can waive fundamental right to conflict-free counsel); *State v. Upton*, 658 So. 2d 86,87 (Fla. 1995) (holding that defendant can waive constitutional right to trial by jury); *Armstrong v. State*, 579 So. 2d 734, 735 (Fla. 1991) (holding that defendant can waive challenge to fundamentally erroneous jury instruction by requesting instruction). However, an effective waiver of a constitutional right must be knowing, voluntary and intelligent. *State v. Upton*, 658 So. 2d 86, 87 (Fla. 1995). Also, a waiver of a fundamental right must be on the record made by the defendant himself. *Torres-Arboledo v. State*, 524 So. 2d 403 (Fla. 1988).

In this case, defense counsel initially stated, "I was thinking, Judge, I wonder whether the Court can fashion an instruction that advised the jury again, with a waiver from the defense, that it would be a life sentence without the language of

the possibility of parole for 25 years" (T 2440/17). Subsequently, defense counsel stated, "I think we can put a waiver on the record about the possibility of parole" (T 2440/25). The trial court responded that he had not seen any case that allowed a defendant to waive the 25-year minimum mandatory and accept a sentence of life without parole, and invited defense counsel to find such a case (T 2441/7). Defense counsel made no further comment on this issue and failed to present the court with the authority that he had requested. More importantly, appellant made no attempt to put a valid waiver into the record, either personally or through counsel. All the record shows is that defense counsel believed that a defendant can waive the protection of *ex post facto* legislation. The record does not show that defense counsel even stated that this defendant was prepared to make a knowing, voluntary and intelligent waiver. Therefore, there was no error, and he cannot now complain that the trial court did not apply the amendment to his case.

Further, although there was some discussion during the charge conference in regard to this issue, appellant never clearly objected to this instruction and never provided or submitted a written alternative instruction to the court; therefore, appellant failed to preserve this issue for review. *Lacy v. State*, 387 So. 2d 561 (Fla. 4th DCA 1980); *Hicks v. State*, 622 So. 2d 14 (Fla. 5th DCA 1993); *Foreman v. State*, 47 So. 2d 308 (Fla. 1950).

In support of his argument that the alleged error is reversible error, appellant cites to numerous cases from Oklahoma, the principal case being *Allen v. State*, 821 P.2d 371 (Okla. Crim. App. 1991). Critical to the Oklahoma court's analysis was the fact that the amendment did not affect the minimum and maximum penalties to which a defendant would be subjected. In Florida, on the other hand, the legislature replaced the minimum penalty (life with the possibility of parole after 25 years) with one more harsh (life without parole). This amendment, if applied retroactively to appellant without his consent, would have resulted in an *ex post facto* violation. Given that appellant did not waive any *ex post facto* challenge, the trial court cannot be said to have fundamentally erred in failing to instruct on and consider the amended sentencing option. Therefore, this claim must fail.

ISSUE ON CROSS-APPEAL

WHETHER THE TRIAL COURT ABUSED HIS DISCRETION BY NOT ALLOWING THE STATE TO INTRODUCE EVIDENCE OF TWO PRIOR MURDER CONVICTIONS TO PROVE PREMEDITATION AND IN REBUTTAL TO APPELLANT'S INSANITY DEFENSE.

The State filed its notice of intent to use *Williams* rule evidence on January 14, 1994 (R 11). Appellant filed his notice of intent to rely on the insanity defense on April 27, 1995 (R 169). The issue was argued on September 22, 1995 (T 397-436). During trial, after appellant had put on his experts in support of his

insanity defense, the State renewed its motion to allow admission of evidence of these prior homicides (T 2009).

The *Williams*[19] Rule, codified in Florida Statutes section 90.404(2)(a), governs the admissibility of most evidence of collateral crimes, and states that evidence of other crimes is admissible when relevant to prove a material fact in issue, such as identity, motive, intent, plan or absence of mistake. Evidence of a similar criminal act is admissible to prove the requisite level of intent, i.e., premeditation, and to negate an insanity defense. *Wuornos v. State*, 644 So. 2d 1000 (Fla. 1994); *Rossi v. State*, 416 So. 2d 1166 (Fla. 4th DCA 1982). While there must be more than a general likeness between the similar act and the crime charged, absolute factual identity is not required. *Traylor v. State*, 498 So. 2d 1297 (Fla. 1st DCA 1986). In *Traylor* as in this case, the State used evidence of a prior homicide to prove premeditation. Also, since the evidence of the prior homicides in this case was not offered to prove identity, the prior homicides need not entail any factual similarities with the instant offense. *See Mitchell v. State*, 491 So. 2d 596, 598 (Fla. 1st DCA 1986). As pointed out by this Court, the admissibility of *Williams* Rule evidence turns on its relevance and is not limited to other crimes with similar facts. *Bryan v. State*, 533 So. 2d 744, 746 (Fla. 1988).

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[19] *Williams v. State*, 110 So. 2d 654 (Fla.), *cert. denied*, 361 U.S. 847 (1959).

Nonetheless, the prior homicides in this case were sufficiently similar. In regard to the Marilyn Leath homicide, appellant shot her, because he was upset with her for taking his money and ridiculing him (T 2227/20). He had turned the car around and was driving by her when he shot her one time with his .44 Magnum Smith & Wesson loaded with Black Talon bullets (T 2234-35, 2237-38). Appellant stated, "When I fired, well, she collapsed" (T 2238/22). Afterward, appellant immediately drove away (T 2238). In regard to the Chiquita Counts homicide, appellant stated that he shot her because she insulted him by calling him a cracker and a bastard (T 2254, 2261, 2266). Before shooting her, appellant turned the car around for a quick getaway, drove forward calling her over to the car and shot her once with his .44 Magnum Smith & Wesson with Hydro-Shock ammunition (T 2263, 2265, 2268). Appellant indicated that that was not the ammunition he normally used, which was Black Talon (2269). After appellant shot her, he "just drove right back out" (T 2266/1). In regard to this homicide, appellant stated that he shot Frank Ingargiola, because he "pissed him off" (T 1537). Appellant indicated that when the victim came out of Higgy's, he drove up to him (T 1531/6) and shot him once with his .44 Magnum Smith & Wesson with Black Talon ammunition (T 1531-32). Appellant stated that after he shot him he drove off in a hurry with tires squealing (T 1536).

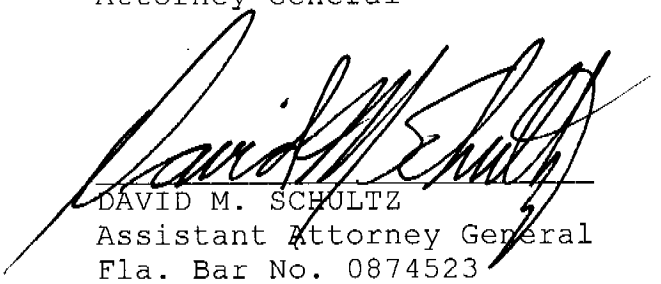
Besides his signature of using a .44 Magnum with exceptionally lethal ammunition, normally Black Talon hollow point bullets, appellant's homicides all have many similarities. In each case, appellant fired from his vehicle. In each case, appellant either turned his vehicle around or already had it in position, so he could fire from the driver's side and make a quick getaway. Each time, appellant drove toward his victim to get the best shooting distance, fired once and immediately sped off. Although not explicitly spelled out in the record, it can be fairly inferred that appellant knew that his shot was designed to sever his victims' spinal cords, known as a spinal shot, and that it would fall his victims in place. These crimes were relevant to prove premeditation and to rebut the insanity defense. The trial court abused his discretion by disallowing their admission.

CONCLUSION

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

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General



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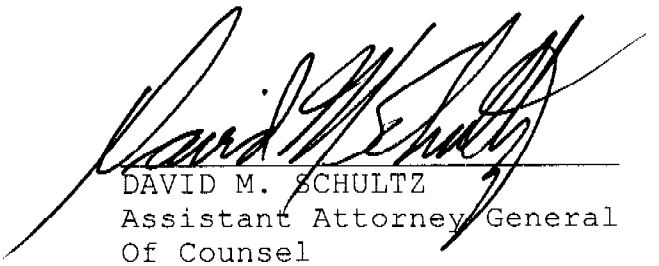
CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was furnished by U.S. mail to Gary Caldwell, Esq., Assistant Public Defender, Criminal Justice Building, 421 Third Street, Sixth Floor, West Palm Beach, Florida 33401, this 9th day of December, 1997.



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