IN THE SUPREME COURT OF FLORIDA

ANDREW RICHARD LUKEHART,

Appellant,

v. CASE NO. 90,507

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

Misty Rhue lived at 10502 Epson Lane, Jacksonville, Florida, with her two small daughters, her father, David Hanshaw, and her uncle, James Butler. (XV 721).[1] Misty met Andrew Lukehart in 1994, and he moved in with her and her family in January 1996. (XV 725). On Sunday, February 25, 1996, Hanshaw left the house about 4:45 p.m. to play golf. (XV 728-29). Misty took her two-year-old daughter Ashley, who had been ill that day, to their bedroom while Lukehart took care of five-month-old Gabrielle. (XV 731). About fifteen minutes later Lukehart brought the baby into the bedroom and asked where the baby wipes were so that he could change her diaper. (XV 732-33). When Misty told him they were in the den, Lukehart took the baby and a clean diaper and left the room. (XV 733). Approximately fifteen minutes later, Misty heard the door of her 1981 white Oldsmobile slam and the car being started. (XV 735). When she went to a window, Misty saw Lukehart "in the car fixing to leave." (XV 735). Misty ran to the garage, but Lukehart was gone, and, when she checked the house, Misty could not find the baby. (XV 737). She noticed that her and Lukehart's cigarettes

[1] "XV 721" refers to page 721 of volume XV of the record filed with this Court. The record consists of 19 volumes, numbered I through XIX. The pages of volumes I through XII are numbered consecutively from 1 through 1945. The pages of volumes XIII through XIX are numbered 309 through 1644.

were gone from the table in the garage where they kept them. (XV 738).

Thirty minutes later, Lukehart called from a convenience store on Normandy Boulevard. (XV 740). Lukehart told her to call 911 because someone in a blue Blazer had kidnapped the baby from the living room of their house. (XV 741-42). He also told her that he would kill himself if he could not get the baby back or if anything happened to her. (XV 744). Misty called 911 ten to fifteen minutes later (XV 747), and, at 6:23 p.m., Deputy David Sweat was told to go to the house on Epson Lane; he arrived there eight minutes later. (XIV 693).

At approximately the same time, Trooper Richard Davis, of the Florida Highway Patrol, heard a helicopter over his home in rural Clay County. (XV 815). Trooper Davis called 911 to find out why a Jacksonville Sheriff's Office (JSO) helicopter was in the area and was told that a white male had possibly abducted a baby. (XV 815). When he went back outside, a white male walked from the street, through a ditch, and through the yard toward the Davis house. (XV 817-18). The man, who was Andrew Lukehart, raised his hands in the air and said: "I'm the one they're looking for." (XV 818). Trooper Davis handcuffed Lukehart "basically for officer safety and [to] detain him because he had made that statement."

(XV 819). When he asked where the baby was, Lukehart responded: "I don't know what the hell you['re] talking about, read me my rights." (XV 819). Trooper Davis did not read Lukehart his Miranda[2] rights and did not question him. (XV 820). He had no further contact with Lukehart after putting him in a Clay County Sheriff's Office (CCSO) car. (XV 820).

CCSO Deputy Jeff Gardner was on patrol in the area and found Misty's car abandoned about fifty feet off the road around 6:00 p.m. on February 25. (XV 827-28). When he called his dispatcher, Gardner was told that the JSO wanted to talk to him. (XV 834). The JSO officer that he talked with said that the car Gardner found had apparently been chasing a car involved in an abduction. (XV 834). Because he was unsure what he had, Gardner secured the scene around the car, and, when JSO Deputy Richard Davis arrived, they looked around the general area. (XV 835-36). Shortly thereafter, the dispatcher told Gardner that the car's driver was approximately one block away at Trooper Davis' home. (XV 836).

Gardner went to pick up Lukehart, and Lukehart said that he wanted to die and that he had tried to kill himself. (XV 838). Gardner kept Lukehart handcuffed because he said he wanted to kill himself. (XV 838). Gardner saw some red marks on Lukehart's neck

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[2] Miranda v. Arizona, 384 U.S. 436 (1966).

but Lukehart refused medical attention and agreed to go back to Misty's car with Gardner. (XV 839). The only reason Gardner kept Lukehart handcuffed was because Lukehart said he tried to kill himself. (XV 839-40). Back at the car, Gardner allowed Lukehart to stand outside the squad car and smoke. (XV 840). Gardner did not try to question Lukehart who volunteered the statement: "I wish she hadn't shit in her diaper." (XV 841). Later, Lukehart said something about being in trouble and that things would not look good for him. (XV 842).

On cross-examination Gardner stated that Lukehart said he wanted a lawyer. (XV 843). Gardner reiterated that he kept Lukehart handcuffed because there were red marks on his neck and Lukehart said he tried to hang himself. (XV 844). Gardner firmly believed that Lukehart might try to harm himself. (XV 844-45).

Deputy Richard Davis of the JSO responded to a call about an abducted baby and began looking for a blue Blazer on Normandy Boulevard near Cecil Field. (XV 846). When he heard that Misty's car had been located in Clay County, he went to that site and looked around the area. (XV 848-49). A Clay County sergeant arrived, and, at his request, Davis called in a JSO helicopter that arrived just after dark. (XV 849). Shortly after 7:00 p.m. other Clay County officers arrived and began searching the area. (XV

850-51). Deputy Gardner left to pick up Lukehart at Trooper Davis' house. (XV 851).

When Gardner brought Lukehart to that site, they kept him handcuffed because he had tried to commit suicide. (XV 852). He was allowed to stand outside of the car and smoke, however, and they asked Lukehart what the baby was wearing, for a description of the abductor's vehicle, and where he lost that vehicle. (XV 852). Lukehart stated that his girlfriend probably would be upset with him and would not let him live at her house anymore. (XV 854). When Lukehart asked why he was handcuffed, Davis told him it was because he tried to commit suicide. (XV 854). Lukehart stated that he tried to kill himself after he lost the Blazer and asked several times when he would be allowed to tell his side of the story. (XV 854). Davis told him that JSO people were on the way, and, when Detective Lavelle Goff arrived, Davis told him that Lukehart wanted to talk. (XV 855). After Lukehart spoke with Goff, Davis transported Lukehart back to Epson Lane. (XV 856). Davis did not question Lukehart during the ride (XV 856-57), but Lukehart asked if he could remain in the car when they got to the house. (XV 857).

Lavelle Goff, a JSO detective, arrived at the Clay County site around 8:00 p.m. (XV 863). Before Goff spoke with Lukehart, he

was told that Lukehart asked for a lawyer, but then asked to speak with a detective. (XV 864). Goff advised Lukehart of his Miranda rights, and Lukehart interrupted him several times to say that he understood those rights. (XV 865-66). Lukehart told him that he put the baby in the car and went back in the house for a drink and that, when he returned, someone was taking the baby and getting into a blue Blazer. (XV 869). Lukehart chased the Blazer on Normandy and stopped at a convenience store to call Misty. (XV 869). Goff stopped talking to Lukehart and did not see him again until at the Police Memorial Building (PMB) in Jacksonville around 5:30 a.m. the next morning. (XV 870-71). At that time Lukehart was not handcuffed and still denied taking the baby or being involved with her abduction. (XV 872). Lukehart said he lied initially because he did not want people to think him stupid for leaving the baby alone. (XV 873).

Lieutenant Tom Waugh of the JSO arrived at the scene in Clay County around 8:30 p.m. on February 25 and was present when Goff read Lukehart his rights. (XV 875-77). Waugh confirmed that Lukehart interrupted and said he understood his rights. (XV 877). He heard Lukehart tell Goff that someone in a Blazer took the baby from Misty's car, that he called Misty, and that he tried to kill himself. (XV 879-81). After Goff left, Lukehart continued to talk

with Waugh and said that the baby was not at that location. (XV 881-82). When asked about that, Lukehart went back to the Blazer story. (XV 882).

JSO Deputy Mike Raffaely was called to the Epson Lane house at 11:27 p.m. on February 25. (XV 884-85). Lukehart was already there when Raffaely arrived, and he and Misty were put in Raffaely's squad car which had a tape recorder in it. (XV 885-86). Raffaely recorded the conversation between Lukehart and Misty during the forty minutes they were in the car. (XV 887-88).

During the taped conversation, Lukehart told Misty that the baby had been taken from the car at a convenience store, not from the living room. (XV 904, XVI 918). Lukehart also told her that he might go to jail for fifteen years, and Misty responded that, when she asked if Lukehart was being arrested, she was told no. (XV 908). He also told Misty that he would be taken "to the nut house tonight" and mentioned the Baker Act. (XVI 919). Misty told Lukehart that the police had a picture of the baby. (XVI 922). Lukehart described his arrival at Trooper Davis' house and that he told Davis that he was the person the helicopter was looking for and that Davis should handcuff him. (XVI 926). He told Misty that her "car almost got totaled" (XVI 926), even though Deputy Gardner testified that the car was not severely damaged. (XV 836-37).

When Lukehart complained about the handcuffs, Raffaely said they would be removed at the PMB (XVI 928) and asked Lukehart if he could put up with the cuffs for another ten to fifteen minutes. (XVI 930). Lukehart responded: "Yeah, I ain't worried about the handcuffs." (XVI 931). Near the end of the taped conversation Lukehart stated that he would be in the "looney bin and they're probably going [to] hold me in jail although I have not been arrested yet." (XVI 932). Misty again stated that she was told that Lukehart had not been arrested, and Lukehart said: "Yeah, well, if I was arrested, if I was arrested she wouldn't be able to ride with me, right?" (XVI 932). Raffaely responded: "No, sir, you wouldn't." (XVI 932). Lukehart then repeated that he was "going to the looney bin" because he "tried to commit suicide." (XVI 932). When Misty said she was wondering about the handcuffs, the following exchange occurred:

> [Lukehart] Yeah, I, I, suicide attempt. Did you tell them something about me doing bodily harm to myself?
>
> [Misty] No, I told them that you said if anything happened to her or if you can't catch the people that you said you was going to kill yourself.
>
> [Lukehart] See, that's why they handcuffed me real fast.

(XVI 933).

Tim Reddish, a JSO detective, heard about the abduction around 7:00 p.m. on February 25 and went to Epson Lane. (XVI 962-63). He went to Clay County when he learned that "the last person to have seen the victim of this particular abduction had been located." (XVI 964). When Reddish arrived, Lukehart was in the rear seat of a JSO patrol car. (XVI 965). Reddish was told that Lukehart was handcuffed because he said he tried to commit suicide. (XVI 965).

Reddish knew that Goff had advised Lukehart of his rights and had talked with him. (XVI 966). Based on all the information he had, Reddish had no reason to arrest Lukehart at that time, but kept him handcuffed for Lukehart's safety. (XVI 967). Lukehart told Reddish that he was "glad they handcuffed me or I might have hurt myself further." (XVI 967). Reddish began talking to Lukehart around 9:40 p.m. and readvised him of his rights. (XVI 971-72). Lukehart told Reddish that he ran off the road in an attempt to kill himself (XVI 974) and that he also tried to hang himself. (XVI 976). When asked why he wanted to kill himself, Lukehart responded that he didn't want to live because he could not catch his daughter's abductor. (XVI 977). Reddish told Lukehart he had been handcuffed for his own safety, and Lukehart responded "Yes, that's correct, and I'm glad they handcuffed me or I might have hurt myself further." (XVI 978).

Reddish knew that Lukehart had changed his story, i.e., that he told Misty the baby was taken from inside the house and told Goff that she was taken from the car. (XVI 978-79). When questioned about the difference, Lukehart told Reddish that the baby had been taken while outside a convenience store. (XVI 980). Lukehart said he parked on the east side of the store, heard a cry from the baby as he reached the entrance, and went back to the car where he saw someone taking the baby. (XVI 981-82). Lukehart could not describe that person (XVI 982-83), even though he gave Misty a description later. (XV 906, XVI 914). Lukehart agreed to go to the PMB for a further interview and was kept cuffed for his own safety. (XVI 986).

When he listened to the tape of Lukehart's conversation with Misty, Reddish discovered that Lukehart made some different statements on the tape. (XVI 987). Reddish talked with Misty, her father, and her uncle and interviewed Lukehart again at 3:00 a.m., February 26. (XVI 987-88). Detective Kearney was with Reddish and Lukehart, who was not handcuffed because, on arrival at the PMB, Lukehart said he would not try to hurt himself if the handcuffs were removed. (XVI 989-90). The interview concluded at 5:00 a.m., and Lukehart agreed to retrace the route he traveled. (XVI 1000-01).

They left the PMB at 6:45 a.m. and went to Epson Lane, then to have breakfast and to a store where Reddish bought Lukehart some clothes. (XVI 1001-03). Lukehart rode in the passenger seat of the car next to Reddish and was not handcuffed, with Detective Kearney in the back seat. (XVI 1003-04). While still at the PMB, Lukehart gave Reddish more details about the abduction from the convenience store parking lot (XVI 1004-05) and his chase of the Blazer. (XVI 1006). When they arrived at the convenience store, Reddish immediately realized that what Lukehart had told him did not correspond to the store's parking area. (XVI 1008). Lukehart changed his story yet again when he realized that he could not have parked where he said he had. (XVI 1010). After leaving the convenience store, they traveled on Normandy Boulevard to the store where Lukehart said he called Misty. (XVI 1011-12). After that, Reddish followed Lukehart's directions to where Misty's car was found. (XVI 1013-16).

Reddish asked Lukehart why he picked a certain telephone pole to run into, and Lukehart told him that he really had not tried to kill himself. (XVI 1016-17). When they arrived at the Clay County site, the area was being searched by the Florida Department of Law Enforcement and the Clay County Sheriff's Office, including the use of dogs, all-terrain vehicles, and divers. (XVI 1017-19). After

arriving at that site at 9:30 a.m., Reddish left at 9:45 in the JSO helicopter to get an overview of the area. (XVI 1018-20). Lukehart was left with Detective Kearney, and, when he returned about 10:15 a.m., Reddish heard that Detective Jimm Redmond of the CCSO wanted to talk to Lukehart. (XVI 1020-21).

Redmond talked with Lukehart and then returned to Reddish and told him that Lukehart had confessed and would take them to the baby's body. (XVI 1021-22). Thereafter, Redmond, Reddish, Kearney, and Lukehart left in Redmond's car. (XVI 1022). Lukehart was not handcuffed and gave Redmond directions. (XVI 1022-23). While traveling, Lukehart said he wanted to retrieve the baby's body, and both Reddish and Redmond told him that would not be allowed. (XVI 1026). They found the baby's body in a pond, and evidence technicians later examined the area. (XVI 1027-28). Reddish described the site and identified photographs taken of the area and the position of the victim. (XVI 1036-41). After the victim's body was recovered, Lukehart was readvised of his rights (XVI 1044-45) and later arrested at the county jail. (XVI 1049). Lukehart previously said that he walked the victim into the pond and laid her on her back, but at the jail admitted that he threw her body into the pond. (XVI 1049-50).

About 5:45 a.m. on February 26, 1996, Detective Jimm Redmond of the Clay County Sheriff's Office learned that a command post had been established where Misty's car had been found; he arrived at that site at 6:35 a.m. (XVI 1087-88). Redmond first saw Lukehart around 10:30 a.m. (XVI 1089). He interviewed Lukehart, who was not handcuffed, while both were seated in the front seat of a car. (XVI 1090-91). From what he had learned about the case, he considered Lukehart a suspect. (XVI 1091-92). During the interview, Lukehart said he lied about the location of the abduction. (XVI 1094). Redmond later asked if Lukehart was making up the story because he killed the baby. (XVI 1096-97). Someone had given Redmond the baby's picture, and, when he looked over and saw it, Lukehart looked away. (XVI 1097). Lukehart said the baby was in Duval County and that, if Redmond took him away from the immediate area, he would tell him what had happened. (XVI 1098).

After consulting with the other officers, Redmond moved Lukehart to his car and drove to a nearby cul-de-sac. (XVI 1098-1101). Lukehart told Redmond that he dropped the baby and "that he snatched the baby up and he knew it was hurt, that he tried to revive the baby by shaking the baby hard, said he realized that he had killed the baby." (XVI 1102). Later, Lukehart directed them to the victim's location (XVI 1103-06), after which he was

readvised of his rights (XVI 1107), and Lukehart wrote out a confession. (XVI 1107-08, XVII 1116-19).

On March 7, 1996 the state indicted Lukehart for one count of first-degree murder and one count of aggravated child abuse. (I 13). Lukehart's trial ran from February 24 through 27, 1997. Lukehart testified at the trial and changed his story yet again. In the trial version Lukehart said that, while he was changing her diaper, the baby kept pushing herself up and that he kept pushing her down until "[t]he last time I did it she just stopped moving, she was just completely still." (XVII 1177-78). He claimed that he panicked, grabbed the baby, and drove away and that she died in the car. (XVII 1179-82). Lukehart admitted that he lied in his earlier stories (XVII 1190-95) and, on cross-examination, admitted that he was not in such a panic that he forgot to stop in the garage and pick up the cigarettes (XVII 1200), and stated that the baby's injuries were caused from less than four feet off the ground and that he changed her diaper. (XVII 1207).

In contrast to Lukehart's testimony, however, Dr. Bonifacio Floro, the medical examiner, testified that the baby was wearing a dirty diaper when found (XVII 1140), and Steven Foster, a JSO technician testified that he found a clean, opened diaper in the play pen. (XV 807). Dr. Floro also testified that the victim's

injuries could not have occurred as Lukehart described. (XVII 1152, 1160-61). She had bruises on her hand and arm that occurred "very close to the time of death," but prior to her death (XVII 1144, 1148), two skull fractures from two separate blows (XVII 1144, 1151-55), and five separate bruises on her skull. (XVII 1156). The victim was alive when hit and suffered "five individual blows, two of which created fracture." (XVII 1158). Dr. Floro stated: "If you use your fist it will be that force that you need to fracture the skull." (XVII 1152). The injuries were caused by blunt trauma (XVII 1159), and the cause of death was "multiple blunt trauma to the head with cerebral swelling and subdural hemorrhaging." (XVII 1160). The manner of death was homicidal, not accidental. (XVII 1160).

The jury convicted Lukehart of first-degree murder and aggravated child abuse as charged. (II 379, 380; XVIII 1323). The trial court scheduled the penalty phase to begin on March 13, 1997. (XVIII 1326). On that date the state presented witnesses who established that Lukehart pled guilty to felony child abuse (XVIII 1362) for shaking his former girlfriend's eight-month-old daughter so hard that she had a closed head injury resulting in seizures and visual deficits. (XVIII 1353, 1355). The state also established that Lukehart was still on probation for that prior felony

conviction in February 1996. (XVIII 1381). Lukehart presented numerous witnesses in his attempt to demonstrate mitigation. (XVIII 1401-1508; XIX 1518-57).

The jury recommended that Lukehart be sentenced to death with a vote of nine to three. (III 400; XIX 1639). The trial court set the sentencing hearing for later in the month and told the parties to file sentencing memoranda. (XIX 1642). On March 26, 1997 the trial judge denied Lukehart's motion for a new trial (XII 1921) and acknowledged receiving the sentencing memoranda and Lukehart's PSI. (XII 1921). After listening to the parties' arguments, the judge set sentencing for April 4, 1997. (XII 1933).

On April 4, 1997 Judge Wilkes read his sentencing order into the record (XII 1936 et seq.) and filed it. (III 417 et seq.). The judge found that four aggravators had been established, i.e., committed during a felony (aggravated child abuse), victim under 12 years of age, under sentence of imprisonment, and prior violent felony conviction. (III 417-19). The court merged the third and fourth aggravators into one. (III 419). In considering the proposed mitigators the court found and gave some weight to the following statutory and nonstatutory mitigators: Lukehart's age; substantially impaired capacity; alcoholic father; Lukehart's drug and alcohol abuse; Lukehart's being sexually abused; and Lukehart's

being employed. (III 419-21). Finding that the aggravators outweighed the mitigators, the court sentenced Lukehart to death for the first-degree murder conviction (III 414, 422) and to fifteen years' imprisonment for the aggravated child abuse conviction. (III 415).

SUMMARY OF ARGUMENT

Issue I: The trial court correctly denied Lukehart's motion to suppress his statements and did not err in allowing the state to present those statements to the jury.

Issue II: The trial court did not err in refusing to allow the defense to cross-examine a state witness about whether the witness found a lawyer for Lukehart.

Issue III: Lukehart's convictions of first-degree murder and aggravated child abuse are supported by competent substantial evidence, do not violate double jeopardy, and should be affirmed.

Issue IV: The trial court did not err by instructing the jury on justifiable and excusable homicide.

Issue V: Lukehart's death sentence is both proportionate and appropriate where the trial court properly found and weighed the aggravators and mitigators and decided that the three aggravators outweighed the mitigators.

Issue VI: The trial court correctly found that the felony murder aggravator had been established based on Lukehart's conviction of aggravated child abuse.

Issue VII: The trial court correctly found the under sentence of imprisonment aggravator based on Lukehart's being on felony

probation for a previous child abuse conviction. If error occurred, however, it was harmless.

Issue VIII: The trial court did not improperly double the felony murder/aggravated child abuse and victim under 12 years of age aggravator because those aggravators are based on different aspects of this crime.

Issue IX: Both the under 12 years of age aggravator and the instruction on that aggravator are constitutional.

Issue X: The state did not make Lukehart's prior conviction of felony child abuse an impermissible feature of the penalty proceedings.

Issue XI: No prosecutorial misconduct occurred during the penalty-phase closing argument.

Issue XII: The trial court properly sentenced Lukehart to fifteen years' imprisonment for the aggravated child abuse conviction and did not err by entering the restitution orders.

ARGUMENT

Issue I

WHETHER THE TRIAL COURT PROPERLY REFUSED TO SUPPRESS LUKEHART'S STATEMENTS.

In his first issue Lukehart argues that the trial court erred in denying his motion to suppress numerous statements he made to law enforcement officers. There is no merit to this claim.

Prior to trial Lukehart filed a motion to suppress all of his statements, claiming that they had been coerced. (I 89-91). The trial court held a hearing on this motion on February 21, 1997, at which the following testimony was presented.

Deputy Richard Davis of the JSO testified that he was on patrol, looking for the blue Blazer, when he was notified that Misty's car had been found in Clay County. (XI 1732-33). He joined Deputy Gardner of the CCSO at the site of that car, and both looked for the baby and her father. (XI 1733-34). Gardner left to pick up Lukehart from Trooper Davis' house and returned ten to fifteen minutes later. (XI 1735).

Lukehart was wearing handcuffs because he said he tried to commit suicide, and Davis stated that "they placed him in handcuffs to protect him." (XI 1735). They kept Lukehart handcuffed for the same reason. (XI 1736). Lukehart asked for a lawyer one time. (XI 1736). Davis and Gardner did not try to question Lukehart

after he made that request except “we were trying to ask him what happened to the Blazer, what was the situation,” so that they could continue searching for the baby. (XI 1736). No one questioned Lukehart, and Gardner allowed him to stand outside the patrol car and smoke. (XI 1737-38). This would not have been allowed if Lukehart had been under arrest. (XI 1739). Davis was still under the impression that Lukehart was a danger to himself and kept him handcuffed for that reason. (XI 1739). When Lukehart asked why he had to be handcuffed, Davis told him it was because of the suicide attempt. (XI 1740). Lukehart then told Davis that he wanted to run off the road into a telephone pole after he lost the Blazer, but missed. (XI 1740).

Lukehart never mentioned a lawyer again, but “asked several times if he could tell his side of the story, when was I going to get a chance to tell my side of the story.” (XI 1740-41). Davis told Lukehart that detectives were coming from Jacksonville and that he could talk with them. (XI 1741). When Detective Goff arrived, Davis told him that Lukehart asked for an attorney. (XI 1741).

On cross-examination Davis stated that he never mentioned the Baker Act in Lukehart’s presence and that he did not question Lukehart after he mentioned an attorney. (XI 1742-43). On

redirect examination Davis stated that, as far as he knew, Lukehart was the only witness to the baby's abduction and that the investigation into the abduction was nowhere near over when he returned Lukehart to Epson Lane. (XI 1745).

Trooper Davis testified that, after hearing a helicopter over his house, he called 911 to find out what was happening and learned that a baby had been abducted. (XI 1748). While he was on hold with 911, he checked outside between 7:00 and 7:20 p.m., and saw Lukehart walking toward his house. (XI 1749-50). Lukehart put his hands in the air and said "I'm the one they're looking for." (XI 1750). Davis retrieved his gunbelt from the house and handcuffed Lukehart. (XI 1750-52). When he asked Lukehart where the baby was, Lukehart responded that he did not know what Davis was talking about and to read him his rights. (XI 1752). Deputy Gardner arrived within a minute and put Lukehart into a CCSO car. (XI 1752-53). Lukehart, however, was not under arrest. (XI 1754). Davis said that he would not have handcuffed Lukehart if he had not put his hands in the air and said he was the one being looked for. (XI 1758).

Deputy Gardner of the CCSO found Misty's car about fifty feet off the road. (XI 1760). He spoke with a JSO deputy at the abducted baby's home and heard that the car belonged to Lukehart

and that the baby had been abducted by someone in a blue Blazer. (XI 1763-64). JSO Deputy Davis arrived at the site, and, about five minutes later, the dispatcher told Gardner that Lukehart was about a block away at Trooper Davis' house. (XI 1764-65).

Gardner arrived at Davis' about a minute later; Lukehart was handcuffed, and Gardner had no idea what was going on. (XI 1767). Lukehart said "I don't want to speak to anybody until I see a lawyer." (XI 1767). When Gardner asked Lukehart what was going on, Lukehart looked toward some trees and said that he had just tried to hang himself. (XI 1769). Lukehart's neck was slightly red. (XI 1769). Lukehart agreed to go back to Misty's car with Gardner. (XI 1769). Lukehart was not under arrest, and Gardner could not have arrested him for running the car off the road. (XI 1769-70).

Gardner did not question Lukehart on the way back to Misty's car, but Lukehart pointed to a tree and said that was where he tried to hang himself. (XI 1771). When they reached Misty's car, Lukehart asked if he could smoke. (XI 1771). Gardner let Lukehart leave the car and found a cigarette for him. (XI 1771). If Lukehart had been under arrest, Gardner would not have let him out of the car. (XI 1772). He stayed with Lukehart at the back of the car and kept the handcuffs on him for Lukehart's protection because

he did not know what Lukehart would do. (XI 1772). Gardner did not question Lukehart, but Lukehart said that he wished the baby had not messed in her diaper; Gardner had no idea what Lukehart was talking about. (XI 1773-74). Lukehart also said that he had been arrested before for child abuse, but that he had not done it. (XI 1775). Lukehart also told Gardner that he wanted to talk to the detectives. (XI 1776).

On cross-examination Gardner stated that he thought Lukehart was upset enough that he might try to harm himself and that he told several detectives that Lukehart said he wanted to talk with a lawyer. (XI 1777-78). On redirect examination Gardner repeated that he had no idea what was going on with Lukehart and that he kept Lukehart handcuffed because Lukehart said he wanted to kill himself and had tried to do so. (XI 1779). He made no promises or threats to Lukehart and only gave him cigarettes because Lukehart asked for them. (XI 1779-80).

Detective Goff of the JSO testified that he arrived at the Clay County site around 8:00 p.m. (XI 1782-83). At that time Lukehart was not a suspect, and Goff had no probable cause to arrest him. (XI 1785). After arriving, Goff had been told that Lukehart wanted to talk with a lawyer, that he had tried to kill himself, and that he had said he wanted to talk with the

detectives. (XI 1785-87). Goff told Lukehart he had heard that Lukehart asked both for a lawyer and to talk with detectives. (XI 1787). He asked Lukehart if he wanted to speak to him and, when Lukehart responded affirmatively, read the Miranda rights to him. (XI 1787). Lukehart maintained that he wanted to talk to Goff and interrupted, stating he understood them, while Goff read the rights card. (XI 1789-90). Goff said that he made no promises to Lukehart and did not threaten him. (XI 1792). Goff reiterated that Lukehart said he wanted to talk to him and stated that Lukehart did not appear to be under the influence of drugs or alcohol, did not appear to be injured, and was not upset. (XI 1793-94). Goff talked with Lukehart again at the PMB between 5:30 and 6:00 a.m. on February 26. (XI 1796). During the two times that Goff talked with him, Lukehart said that he had nothing to do with the baby's abduction, never said that he did not want to talk with Goff, and never asked for a lawyer. (XI 1797).

On cross-examination Goff stated that the Clay County conversation lasted about thirty minutes. (XI 1797). Goff said that Lukehart was not handcuffed at the PMB and never asked to leave that facility. (XI 1799). On redirect examination Goff repeated that Lukehart was not under arrest when Goff spoke with

him (either time) and, on recross examination, that Lukehart was not a suspect when Goff advised him of his rights. (XI 1800).

Detective Waugh of the JSO reached the Clay County site around 8:30 p.m. (XI 1801). Goff told him that Lukehart wanted to talk with the detectives and asked Waugh to accompany him. (XI 1804). While Goff was reading the Miranda rights, Lukehart interrupted and said that he understood his rights. (XI 1806). Waugh had been told that Lukehart tried to kill himself, but Waugh saw no visible injuries. (XI 1807). Lukehart did not appear to be upset, did not ask for a lawyer, did not stop speaking to Goff, and did not break down. (XI 1807). No promises or threats were made to Lukehart, and he never asked that the questioning stop. (XI 1808). Lukehart was not under arrest and was kept handcuffed for his own safety. (XI 1809).

Tim Reddish of the JSO arrived in Clay County around 9:00 p.m. (XI 1821). Lukehart was in the back seat of a JSO car, and Reddish was told he was there because of a suicide attempt and that he had been advised of his rights. (XI 1822). Reddish did not arrest Lukehart and was told that Lukehart was a witness to the baby's abduction and that he had tried to apprehend the kidnapper. (XI 1823-24). Lukehart was in handcuffs because of a suicide attempt. (XI 1824). Reddish readvised Lukehart of his rights. (XI 1824).

Lukehart did not ask for a lawyer and never said that he did not want to talk to Reddish, and Reddish did not threaten him or make him any promises. (XI 1827).

Reddish recovered the tape recorder from Raffaely's squad car and stated that Lukehart was not under arrest when he was in the car with Misty. (XI 1829-30). Lukehart arrived at the PMB around midnight and was put into an interview room. (XI 1831). Lukehart was readvised of his rights at the PMB, was not handcuffed while in the interview room, was allowed to go to the restroom, and was offered refreshments. (XI 1832-34). Lukehart did not ask for a lawyer and said that he mentioned a lawyer in Clay County because of a prior conviction. (XI 1834-35). Reddish still considered Lukehart to be a primary witness, not a suspect, and had no probable cause to arrest him. (XI 1837).

Around 6:45 a.m. Reddish took Lukehart to retrace his route of the previous day, but first bought him breakfast and some clothes. (XI 1837-38). Lukehart was not handcuffed, never mentioned a lawyer, was cooperative and talked freely, and kept talking even though Reddish challenged him about some parts of his story. (XI 1838-39). When they reached Clay County, Jimm Redmond of the CCSO asked if he could speak with Lukehart, and, when Reddish returned from his helicopter survey, Redmond told him that Lukehart had

confessed. (XI 1843, 1846). After they found the victim, Lukehart was read his rights again. (XI 1846). Lukehart did not ask for a lawyer and took between forty-five minutes and one hour to write his statement. (XI 1847-49). Lukehart was arrested when they returned to the PMB. (XI 1850).

On cross-examination Reddish stated that after arriving at the PMB around midnight Lukehart did not ask if he were under arrest and did not ask to leave. (XI 1853-54). Reddish testified that he never told Lukehart he would be arrested if he stuck to the Blazer story. (XI 1856). Reddish also said that he removed the handcuffs before Lukehart went into the interview room because, when Reddish asked if he would hurt himself if he did so, Lukehart said no. (XI 1857).

Detective Redmond of the CCSO first came into contact with Lukehart around 10:30 a.m. on February 26. (XI 1861). He asked Reddish if he could speak with Lukehart and joined Lukehart in the front seat of Reddish's car. (XI 1862-63). Lukehart was not handcuffed and did not ask for a lawyer, and Redmond did not threaten Lukehart or make any promises to him. (XI 1862-63).

After repeating the Blazer story, Lukehart told him that it was not true. (XI 1865-66). Lukehart did not ask for a lawyer and told Redmond that, if they could leave the immediate area, he would

tell Redmond the whole story. (XI 1866). Redmond drove to a nearby cul-de-sac where Lukehart told him that he dropped the baby while changing her diaper, that he snatched her back up and knew that he had hurt her, and that he shook the baby. (XI 1868).

On cross-examination Redmond said that he readvised Lukehart of his Miranda rights around 1:15 to 1:30 p.m., after they found the victim's body. (XI 1873). Redmond also said that, while they were in Reddish's car at the Clay County site, someone handed him a picture of the baby. (XI 1874). Redmond did not show Lukehart the picture, but, when Lukehart looked over and saw it, he said that he did not want to see the picture and looked away. (XI 1874). Redmond said that he told Lukehart that it was important to find the baby and that she needed a "decent burial" and denied saying that she needed a "Christian burial." (XI 1875). Reddish did not know who gave him the baby's picture (XI 1880) and said that it was given to him ten to fifteen minutes (XI 1881) before their thirty to forty minute conversation ended. (XI 1876).

On redirect examination Redmond said that the baby's picture did not cause Lukehart to break down and that Lukehart's saying he could not tell Redmond anymore was about details of the crime did not mean that Lukehart did not want to talk anymore. (XI 1881-82).

Lukehart never indicated to Redmond that he did not want to talk to him. (XI 1882).

Lukehart was the last witness to testify at the suppression hearing. He said that, when taken to where Misty's car was, he told the officers that he wanted a lawyer (XI 1884) and that he was kept handcuffed the entire time he was at the PMB. (XI 1886). When Goff interviewed him at the PMB, he asked if he were under arrest and was told no. (XI 1886). Lukehart stated that he put his hands out so that the handcuffs could be removed, but no one did so, and he did not think he was free to leave. (XI 1887). He admitted that he could have slept, but that he did not. (XI 1888). Lukehart claimed that Redmond told him they needed to find the baby so that she could have a Christian burial and that he waved the picture in Lukehart's face. (XI 1892). He said that he asked for a lawyer several times. (XI 1892). He also stated that he tried to hang himself with his tee shirt and ran Misty's car off the road because he was "upset." (XI 1893).

On cross-examination Lukehart said that he surrendered to Trooper Davis because he "just guessed" that "they were looking for" him. (XI 1893). He admitted that no one told him he was under arrest and that he did not really know why he surrendered to Davis. (XI 1894). Lukehart also admitted that he told the trooper

several times that he tried to kill himself (XI 1894-95) and that, after telling Deputy Davis that he wanted a lawyer, he also asked to be able to tell his side of the story and that he was allowed to speak to the detectives at his request. (XI 1896-97). Lukehart stated that he "asked them" for an attorney "[w]hen they had me in the back of the car" and that he asked Goff for an attorney before Goff read him the Miranda rights. (XI 1898). He also admitted, however, that he interrupted Goff and told him that he knew his rights and Goff did not need to read them. (XI 1898). He verified his signature on the rights form and stated that no one forced him to make any statements, threatened him, or made him any promises. (XI 1899). Lukehart denied that the handcuffs were removed when he got to the PMB the first time and stated that he was handcuffed while Reddish interviewed him at the PMB. (XI 1901). Lukehart admitted that he was not cuffed at breakfast and the store (XI 1900) or at any time he was in Reddish's car. (XI 1902).

After the testimony was presented, Lukehart argued that Redmond improperly used the Christian burial technique to coerce him into confessing and that Redmond did not read him his rights until after he confessed. (XI 1907-08). He also argued that he was read his rights so often that it became coercion. (XI 1910). The state responded that Lukehart "was not in custody for anything

other than that he turned himself in for some unknown charge[,] that he was not under arrest and nobody else knew what was going on at the time." (XI 1911). The state relied on Lukehart's saying numerous times that he tried to kill himself and his several requests to be able to tell his side of the story. (XI 1911). Redmond's lack of knowledge of any susceptibility on Lukehart's part distinguished the Christian burial cases. (XI 1911-12). Finally, the state argued that Lukehart was not in custody when he asked for a lawyer, that there was nothing inherently coercive about the situation, that Lukehart was not questioned until he asked to speak to a detective, and that he waived his rights when read to him at that point. (XI 1910). The trial judge denied the motion to suppress based on the testimony of the witnesses and mentioned that Lukehart was given his rights in a timely manner. (XI 1913-14).

Now, Lukehart argues that his statements were not voluntary because he was in custody (initial brief at 54-56) and because his statements were the product of officer-initiated interrogation. (Initial brief at 56-59). Lukehart has, however, failed to demonstrate that the trial court erred in denying his motion to suppress.

Miranda held that a person questioned by law enforcement personnel after being "taken into custody or otherwise deprived of his freedom of action in any significant way" must be told "that he has the right to remain silent, that any statement he does make may be used as evidence against him, and that he has the right to the presence of an attorney." Miranda v. Arizona, 384 U.S. 436, 444 (1966). When a person in custody requests counsel, interrogation cannot begin or, if already begun, cannot be continued unless that person initiates further communication with the authorities. Edwards v. Arizona, 451 U.S. 477 (1981); Minnick v. Mississippi, 498 U.S. 146 (1990); Traylor v. State, 596 So.2d 957 (Fla. 1992). Miranda's procedural safeguards are not required, however, unless a person is both in custody and being interrogated. Rhode Island v. Innis, 446 U.S. 291 (1980); Davis v. State, 698 So.2d 1182 (Fla. 1997), cert. denied, 118 S.Ct. 1076 (1998); Sapp v. State, 690 So.2d 581 (Fla.), cert. denied, 118 S.Ct. 116 (1997). Furthermore, the police have no obligation to clarify an ambiguous or equivocal request for counsel. Davis v. United States, 512 U.S. 452 (1994); Walker v. State, 707 So.2d 300 (Fla. 1997); State v. Owen, 696 So.2d 715 (Fla.), cert. denied, 118 S.Ct. 574 (1997).

As this Court has noted, "the reason for informing individuals of their rights before questioning is to insure that statements

made during custodial interrogation are given voluntarily, not to prevent individuals from ever making these statements without first consulting counsel." Sapp, 690 So.2d at 586. To determine if a person "was in custody, a court must examine all of the circumstances surrounding the interrogation." Stansbury v. California, 511 U.S. 318, 322 (1994). This Court has recognized that "[a]ny interview of one suspected of a crime by a police officer will have coercive aspects to it, simply by virtue of the fact that the police officer is part of a law enforcement system which may ultimately cause the suspect to be charged with a crime." Roman v. State, 475 So.2d 1228, 1232 (Fla. 1985), cert. denied, 475 U.S. 1090 (1986). Interrogation for Miranda purposes, therefore, "must reflect a measure of compulsion beyond that inherent in the custody itself." Innis, 446 U.S. at 299. Moreover, "the ultimate inquiry" as to whether a person was in custody "is simply whether there [was] a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." Stansbury, 511 U.S. at 322 (citations omitted). Finally, as stated by this Court, "requiring the invocation [of the right to counsel] to occur either during custodial interrogation or when it is imminent strikes a healthier balance between the protection of the individual from

police coercion on the one hand and the State's need to conduct criminal investigations on the other." Sapp, 690 So.2d at 586.

Applying the above-stated principles to this case, it is obvious that no Miranda violation occurred because Lukehart was neither in custody nor was he being interrogated when he ostensibly invoked his right to counsel.

Lukehart was handcuffed (around 7:00 p.m. by Trooper Davis) when he told Deputy Gardner that he wanted to speak with a lawyer. He remained handcuffed until he reached the PMB around midnight. In Stansbury the United States Supreme Court held that a police officer's undisclosed subjective view "does not bear upon the question of whether the individual is in custody for purposes of Miranda." 511 U.S. at 524. Therefore, "an officer's evolving but unarticulated suspicions . . . cannot affect the Miranda custody inquiry." Id. In the instant case, however, the fact that Lukehart was kept in handcuffs for his own protection because he said he tried to kill himself was communicated to Lukehart rather than being undisclosed. (E.g., XI 1740; XV 845; XVI 978). During his conversation with Misty, Lukehart acknowledged that he was kept in handcuffs because he said he tried to commit suicide (XVI 926, 933) and also stated that he was not concerned about being handcuffed. (XVI 930). In fact, Lukehart told Reddish that he was

"glad they handcuffed me or I might have hurt myself further." (XVI 967). Thus, in spite of being handcuffed, Lukehart knew that he was not in custody.

Lukehart claimed that he did not feel free to leave. However, Deputy Gardner testified that Lukehart was free to stay at Trooper Davis' house (XI 1777), but agreed to accompany Gardner. (XI 1769). Both Goff and Reddish testified that Lukehart never asked if he could leave after he arrived at the PMB. (XI 1799, 1854). Lukehart also knew that he was not under arrest. When he asked if he were, Goff told him "no" (XI 1886), he told Misty that he had not been arrested, which she confirmed, and Lukehart also told her that she would not have been allowed to ride with him if he were under arrest. (XVI 932).

Lukehart claimed at the suppression hearing that he asked for counsel several times, but deputies Gardner and Davis testified that he mentioned a lawyer only once. Both Gardner and Davis denied interrogating Lukehart about his part in the baby's abduction after he asked for a lawyer. (XI 1736-37, 1771). Any questions they asked were innocuous and not designed to elicit an incriminating response. Innis; Johnson v. State, 660 So.2d 648 (Fla. 1995), cert. denied, 517 U.S. 1159 (1996). In fact, Lukehart talked freely to both deputies, i.e., immediately after saying he

would not speak until he saw a lawyer, Lukehart pointed to a tree and said he tried to hang himself from it. (XI 1769). Lukehart initiated further conversation with the deputies (XI 1739-40, 1774-75), and asked several times when he would be able to tell his side of the story. (XI 1740, 1776). When Detective Goff interviewed Lukehart around 8:30 p.m., he told Lukehart that he had heard that Lukehart asked for an attorney, but also that Lukehart said he wanted to talk to a detective. (XI 1787). Lukehart confirmed that he wanted to talk and never asked for an attorney. (XI 1797). See Slawson v. State, 619 So.2d 255, 258 (Fla. 1993) (Slawson never indicated to the detectives that he did not want to talk to them or that he wanted an attorney), cert. denied, 512 U.S. 1246 (1994).

There is also no merit to Lukehart's claim that Detective Redmond coerced him into confessing by using the "Christian burial technique." Although Lukehart claimed that Redmond waved the baby's picture in his face and said that she needed a "Christian" burial, Redmond testified that he used the word "decent" burial and that he did not show Lukehart the photograph, but that Lukehart simply looked over toward Redmond and saw it.

Even though coercion can be psychological, the psychological impact of voluntary disclosure of a guilty secret does not qualify as state compulsion. Oregon v. Elstad, 470 U.S. 298 (1985). Thus,

the "[p]olice are not required to protect people from their own unwarranted assumptions," nor is it "forbidden to appeal to the consciences of individuals." Johnson v. State, 660 So.2d 637, 643 (Fla. 1995) (noncoercive plea to be candid), cert. denied, 517 U.S. 1159 (1996); Walker v. State, 707 So.2d 300, 311 (Fla. 1997) (not improper to show suspect photograph of infant's decomposing body while telling him whoever killed child did a terrible thing); Hudson v. State, 538 So.2d 829, 830 (Fla.) ("reference to finding the body so that it could be buried insufficient to make an otherwise voluntary statement inadmissible"), cert. denied, 493 U.S. 875 (1989); Roman v. State, 475 So.2d 1228, 1232-33 (Fla. 1985) (deception not sufficient to make voluntary statement inadmissible), cert. denied, 475 U.S. 1090 (1986). Redmond did not use any sincerely held religious beliefs to convince Lukehart to confess, and Lukehart's comparison of Redmond's statement to the Christian burial technique is not valid.

The cases that Lukehart relies on do not support his claim. Unlike in Haliburton v. State, 514 So.2d 1088 (Fla. 1987), no lawyer had been retained for Lukehart. Also, unlike in Smith v. State, 492 So.2d 1063 (Fla. 1986), Lukehart never said he would not talk and, in fact, kept making unprompted and unprovoked statements. At most Lukehart made an ambiguous or equivocal

request for counsel that he, himself, then ignored. This distinguishes his case from State v. Brown, 592 So.2d 308 (Fla. 3d DCA 1991), where Brown unequivocally asserted his right to counsel. Kyser v. State, 533 So.2d 285 (Fla. 1988), and Sawyer v. State, 561 So.2d 278 (Fla. 2d DCA 1990), rely on cases receded from in State v. Owen, 696 So.2d at 720.[3] Sawyer is also distinguished by Lukehart's being given breaks and left alone during which times he admitted he could have slept if he had chosen to do so; the honoring of his Miranda rights; and the lack of misleading questions, among other things. Finally, Snipes v. State, 651 So.2d 108 (Fla. 2d DCA 1995), where an emotionally impaired juvenile was interrogated and kept isolated form his mother for ten hours, is factually distinguishable. Lukehart was an adult and no stranger to the criminal justice system, having been convicted of felony child abuse less than two years before.

A trial court's denial of a motion to suppress is presumed correct. San Martin v. State, 705 So.2d 1337 (Fla. 1997); Terry v. State, 668 So.2d 954 (Fla. 1996); Trepal v. State, 621 So.2d 1361

[3] Owen v. State, 560 So.2d 207 (Fla. 1990); Long v. State, 517 So.2d 664 (Fla. 1987); Valle v. State, 474 So.2d 796 (Fla. 1985); Waterhouse v. State, 429 So.2d 301 (Fla. 1983); Cannady v. State, 427 So.2d 723 (Fla. 1983).

(Fla. 1993), cert. denied, 510 U.S. 1077 (1994).[4] An appellate court must interpret the evidence, reasonable inferences, and deductions in a manner most favorable to sustaining the trial court's ruling. San Martin, Terry, Orme v. State, 677 So.2d 258 (Fla. 1996), cert. denied, 117 S.Ct. 742 (1997). An appellate court, therefore, should defer to and follow the fact-finding authority of the trial court. Walker v. State, 707 So.2d 300 (Fla. 1997); Hamilton v. State, 703 So.2d 1038 (Fla. 1997); Johnson v. State, 660 So.2d 637 (Fla. 1995), cert. denied, 517 U.S. 1159 (1996); Gilbert v. State, 629 So.2d 957 (Fla. 3d DCA 1993). Finally, appellate review is limited to determining if the trial court's ruling is supported by competent substantial evidence. San Martin; Rhodes v. State, 638 So.2d 920 (Fla.), cert. denied, 513 U.S. 1046 (1994); Tibbs v. State, 397 So.2d 1120 (Fla. 1982), aff'd, 457 U.S. 31 (1982).

The evidence supports the trial court's denial of the motion to suppress. Lukehart was not under arrest or even a suspect when he mentioned a lawyer. Because he was not under interrogation while in custody, mentioning a lawyer was an anticipatory

[4] On page 53 of his initial brief Lukehart states: "The trial court's legal determination is not entitled to a presumption of correctness, for the appellate court must independently review the legal issue de novo." He relies on two federal cases for this proposition. While it might be the standard in the federal courts, it is not the standard of review in this state.

invocation of his Miranda rights and, thus, ineffective. Sapp. At the very earliest Lukehart was interrogated while in custody only after Goff advised him of his rights. Lukehart fully understood those rights and knowingly, intelligently, and voluntarily waived them. The trial court properly denied the motion to suppress, and that ruling should be affirmed.[5]

Issue II

WHETHER THE COURT PROPERLY LIMITED LUKEHART'S CROSS-EXAMINATION OF A WITNESS.

In this issue Lukehart claims that the trial court erred in restricting his cross-examination of a state witness. There is no merit to this claim.

During his direct testimony, Clay County Deputy Jeff Gardner testified that Lukehart told him that he wanted to speak to a detective. (XV 843). On cross-examination the following exchange occurred:

> Q He also told you he wanted a lawyer, didn't he?
>
> A Yes, he did.
>
> Q Was one provided him by you?

[5] Lukehart's claim that he would not have testified if his statements had been suppressed (initial brief at 66) is sheer speculation and ignores the court's colloquy with Lukehart about testifying and Lukehart's averring that it was his well-counseled decision to testify. (XVII 1167-70).

> Ms. Corey: Objection, that's not relevant to the trial. That's already been determined by this Court.
>
> The Court: Sustained.

(XV 843). Now, Lukehart claims that he "was attempting to cast into doubt the voluntariness of" his statements. (Initial brief at 66). Defense counsel made no such argument at trial, however, and did not challenge the court's sustaining the state's objection.

The subjects of inquiry on and the extent of cross-examination are within the trial court's discretion. Monlyn v. State, 705 So.2d 1 (Fla. 1997), cert. denied, ___ S.Ct. ___ (1998); Moore v. State, 701 So.2d 545 (Fla. 1997), cert. denied, ___ S.Ct. ___ (1998); Tompkins v. State, 502 So.2d 415 (Fla. 1986); Rose v. State, 472 So.2d 1155 (Fla. 1985). A claim of improper restriction of cross-examination is not subject to review unless a clear abuse of discretion is demonstrated. Tompkins; Rose. Lukehart has failed to show a clear abuse of discretion. The area Lukehart attempted to explore was beyond the scope of cross-examination. See Jimenez v. State, 703 So.2d 437 (Fla. 1997); Penn v. State, 574 So.2d 1079 (Fla. 1991); Jones v. State, 440 So.2d 570 (Fla. 1983). Lukehart was not prevented from presenting a defense, Jimenez; Tompkins, and was not denied his right of confrontation. Rose; see State v. Ford, 626 So.2d 1338, 1346 (Fla. 1993) ("The record does

not support the district court's conclusion that the trial court severely limited cross-examination to the point that it resulted in 'no cross-examination at all'").

There is no merit to this claim, and it should be denied.

Issue III

WHETHER LUKEHART'S CONVICTIONS SHOULD BE AFFIRMED.

Lukehart argues that the trial court erred in denying his motions for judgment of acquittal and that his convictions should not be affirmed. There is no merit to this claim.

The state filed a two-count indictment against Lukehart. The first count charged first-degree murder, either premeditated or, pursuant to subsection 782.04(1)(a), Florida Statutes (1995), during the commission of an aggravated child abuse. (I 13). The second count charged that Lukehart committed aggravated child abuse in violation of section 827.03, Florida Statutes (1995). (I 13). The trial court denied Lukehart's motions for judgment of acquittal. (XVII 1167, 1221). The jury convicted Lukehart of both counts as charged. (II 379-80; XVIII 1324).

When a defendant moves for a judgment of acquittal, he or she "admits not only the facts stated in the evidence adduced, but also admits every conclusion favorable to the adverse party that a jury

might fairly and reasonably infer from the evidence." Lynch v. State, 293 So.2d 44, 45 (Fla. 1974). This Court has repeatedly affirmed the rule that "courts should not grant a motion for judgment of acquittal unless the evidence is such that no view which the jury may lawfully take of it favorable to the opposite party can be sustained under the law." Id.; Gordon v. State, 704 So.2d 107 (Fla. 1997); Gudinas v. State, 693 So.2d 953 (Fla. 1997), cert. denied, 118 S.Ct. 345 (1997); Barwick v. State, 660 So.2d 685 (Fla. 1995), cert. denied, 516 U.S. 1097 (1996); DeAngelo v. State, 616 So.2d 440 (Fla. 1993); Taylor v. State, 583 So.2d 323 (Fla. 1991). A trial court should "review the evidence to determine the presence or absence of competent evidence from which the jury could infer guilt to the exclusion of all other inferences." State v. Law, 559 So.2d 187, 189 (Fla. 1989) (emphasis in original); Orme v. State, 677 So.2d 258 (Fla. 1996), cert. denied, 117 S.Ct. 742 (1997); Barwick; Atwater v. State, 626 So.2d 1325 (Fla. 1993), cert. denied, 511 U.S. 1046 (1994). The trial court's review of the evidence must be "in the light most favorable to the state," Law, 559 So.2d at 189, and the state need not "conclusively rebut every possible variation of events which can be inferred from the evidence but [needs] only to introduce competent evidence which is inconsistent with the defendant's theory of events." Atwater, 626

So.2d at 1328; Barwick; Law. If the state does this, the case should be presented to the jury: "Where there is room for a difference of opinion between reasonable men as to the proof or facts from which an ultimate fact is sought to be established, or where there is room for such differences as to the inference which might be drawn from concealed facts, the Court should submit the case to the jury." Lynch, 293 So.2d at 45; Orme; Barwick.

A longstanding rule of appellate review is that judgments of conviction come to reviewing courts with a presumption of correctness and that any conflicts in the evidence must be resolved in favor of the judgment or verdict. Terry; Holton v. State, 573 So.2d 283 (Fla. 1990), cert. denied, 500 U.S. 960 (1991); Williams v. State, 437 So.2d 133 (Fla. 1983), cert. denied, 466 U.S. 909 (1984); Tibbs v. State, 397 So.2d 1120 (Fla. 1981), aff'd, 457 U.S. 31 (1982); Spinkellink v. State, 313 So.2d 666 (Fla. 1975), cert. denied, 428 U.S. 911 (1976); Taylor v. State, 139 Fla. 542, 190 So. 691 (1939). In other words, an appellate court "has no authority at law to substitute its conclusions for that of a jury in passing upon conflicts or disputes in the evidence." Taylor, 139 Fla. at 547, 190 So. at 693. A district court of appeal, in applying this rule, commented that "it is axiomatic that appellate judges, who review only the cold record, are not in a position to fully

determine the credibility of witnesses and are not at liberty to simply reweigh the evidence that was presented to the" factfinder. State v. Reutter, 644 So.2d 564, 565 (Fla. 2d DCA 1994); Tibbs. Therefore, because the state prevailed in the trial court, factual conflicts in this case should be resolved in the state's favor, i.e., in the light most favorable to supporting the judgment and sentence. Orme.

Applying the rules set out above, it is obvious that the trial court did not err in denying Lukehart's motions for judgment of acquittal, that the evidence supports Lukehart's convictions, and that this Court should affirm those convictions.

Contrary to Lukehart's contention, the evidence is sufficient to support his first-degree murder conviction on the basis of premeditation. Lukehart claims "that this was a killing caused by an accidentally extreme use of force, rage, or a sudden, impulsive, and complete loss of control" (initial brief at 69) and, therefore, could not have been premeditated. Premeditation, however, "does not have to be contemplated for any particular period of time before the act, and may occur a moment before the act. . . . It must exist for such time before the homicide as will enable the accused to be conscious of the nature of the deed he is about to commit and the probable result to flow from it." Sireci v. State,

399 So.2d 964, 967 (Fla. 1981), cert. denied, 456 U.S. 984 (1982); Spencer v. State, 645 So.2d 377 (Fla. 1994); McCutchen v. State, 96 So.2d 152 (Fla. 1957).

In his various statements and testimony Lukehart claimed that he either dropped the baby or pushed her down too hard while he was changing her diaper and that, although he killed her, he did not mean to do so.[6] The medical examiner, however, testified that the blunt trauma to the baby's head could not have been caused by dropping her from the height Lukehart meant and that it would have taken "hard blows" that were "very severe," as from a fist, to have fractured the victim's head. (XVII 1152, 1157). The state also produced testimony that, when found, the baby was wearing a dirty diaper and that a clean diaper was found in her playpen. In some of his statements Lukehart admitted that he knew he had hurt the victim because she cried. The fact that the baby was not rendered unconscious by the first blow, which Lukehart knew, and the fact that he hit her four more times is sufficient so that the jury could find this first-degree murder premeditated. See San Martin v. State, 705 So.2d 1337, 1345 (Fla. 1997) (four shots sufficient to find premeditation).

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[6] A confession is direct evidence. Meyers v. State, 704 So.2d 1368 (Fla. 1997); Walls v. State, 641 So.2d 381 (Fla. 1994), cert. denied, 513 U.S. 1130 (1995). Thus, contrary to Lukehart's claim, this is not entirely a circumstantial evidence case.

The state argued that this murder was premeditated (XVII 1257-60) and produced evidence that conflicted with Lukehart's accounts. It is the jury's duty to determine the credibility of the witnesses and evidence. Melendez v. State, 498 So.2d 1258 (Fla. 1986); see also Lott v. State, 695 So.2d 1239 (Fla.), cert. denied, 118 S.Ct. 452 (1997); Burr v. State, 466 So.2d 1051 (Fla.), cert. denied, 474 U.S. 879 (1985). The state presented sufficient evidence of premeditation, and Lukehart's conviction of first-degree murder should be affirmed on that basis.[7] His claim that he should have been convicted of no more than second-degree murder, or even manslaughter, has no merit.

Lukehart also argues that, based on Mills v. State, 476 So.2d 172 (Fla. 1985), cert. denied, 475 U.S. 1031 (1986), his

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[7] The cases that Lukehart relies on should not be followed in this case. In all of them - Norton v. State, 709 So.2d 87 (Fla. 1997); Coolen v. State, 696 So.2d 738 (Fla. 1997); Kirkland v. State, 684 So.2d 732 (Fla. 1996); Knowles v. State, 632 So.2d 62 (Fla. 1993); Hoefert v. State, 617 So.2d 1046 (Fla. 1993); Van Poyck v. State, 564 So.2d 1066 (Fla. 1990); Smith v. State, 568 So.2d 965 (Fla. 1st DCA 1990); Tien Wang v. State, 426 So.2d 1004 (Fla. 3d DCA 1983) - the appellate courts ignored the general rule that they "should not retry or reweigh conflicting evidence submitted to a jury or other trier of fact" and substituted their judgment for that of the factfinders. Tibbs v. State, 397 So.2d 1120, 1123 (Fla. 1981), aff'd, 457 U.S. 31 (1982). They are also factually distinguishable. E.g., Norton (total lack of evidence of the circumstances of the killing); Coolen escalating fight between two drunks over a can of beer); Knowles (child victim shot for unknown reason by drunk defendant); Hoefert (cause and manner of death could not be established); Smith (same).

convictions of first-degree murder, based on a felony murder theory, and the underlying felony of aggravated child abuse violate double-jeopardy. Rather than controlling this case, however, Mills supports Lukehart's multiple convictions.

The state charged Mills with one count of first-degree murder, one count of burglary with a firearm, and one count of aggravated battery with a firearm, and the jury convicted him as charged. Id. at 177. This Court, recognizing that Mills' underlying felony of burglary was not a necessarily lesser included offense of felony murder, affirmed both Mills' convictions of first-degree murder and burglary. Id. at 175, 177. Regarding the aggravated battery conviction - which was not the underlying felony - this Court held that aggravated battery was not a lesser included offense of felony murder, but stated:

> Even so, we do not believe it proper to convict a person for aggravated battery and simultaneously for homicide as a result of one shot gun blast. In this limited context the felonious conduct merged into one criminal act. We do not believe that the legislature intended dual convictions for both homicide and the lethal act that caused the homicide without causing additional injury to another person or property.

Id. at 197.

Seizing on the above-quoted statement, Lukehart argues that under subsection 775.021(4)(b)(2), Florida Statutes (1995), both

his aggravated child abuse and first-degree murder convictions are degree variants of the same core act of aggravated battery. (Initial brief at 74-75). In the alternative he argues that his convictions violate double jeopardy because every element of aggravated child abuse by aggravated battery is included in his felony murder indictment. (Initial brief at 75-76). There is no merit to either of these claims.

This Court relied on State v. Enmund, 476 So.2d 165 (Fla. 1985), in holding in Mills that the underlying felony is not a lesser included offense of felony murder. In Enmund this Court recognized that the legislature adopted the rule of statutory construction set out in Blockberger v. United States, 284 U.S. 299 (1932), in subsection 775.021(4), Florida Statutes (1983). After considering Hunter v. Missouri, 459 U.S. 359 (1983),[8] however, the Court concluded that the federal supreme court "has now made it clear that the Blockberger rule of statutory construction will not prevail over legislative intent." Enmund, 476 So.2d at 167. This Court then found "sufficient intent that the legislature intended

[8] In Hunter the United States Supreme Court stated: "With respect to cumulative sentences in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended." 459 U.S. at 366.

multiple punishments when both a murder and a felony occur during a single criminal episode." Id.

Two years after Enmund, this Court decided Carawan v. State, 515 So.2d 161 (Fla. 1987), setting forth rules of construction to be used in deciding whether multiple offenses could be "predicated on a single underlying act." Id. at 170. Carawan also added judicial gloss by assuming that the legislature "does not intend to punish the same offense under two different statutes" and that courts should not apply subsection 775.021(4) to produce "unreasonable results." Id. at 167. Instead, that statute was to be used as an "aid" to determine legislative intent, not treated as a statement of such intent. Id. at 168.

The following year, however, the legislature made its intent clear by overruling Carawan and amending subsection 775.021(4) to read as follows:

> (4)(a) Whoever, in the course of one criminal transaction or episode, commits an act or acts which constitute one or more separate criminal offenses, upon conviction and adjudication of guilt, shall be sentenced separately for each criminal offense; and the sentencing judge may order the sentences to be served concurrently or consecutively. For the purposes of this subsection, offenses are separate if each offense requires proof of an element that the other does not, without regard to the accusatory pleading or the proof adduced at trial.

> (b) The intent of the Legislature is to convict and sentence for each criminal offense committed in the course of one criminal episode or transaction and not to allow the principle of lenity as set forth in subsection (1) to determine legislative intent. Exceptions to this rule of construction are:
>
> 1. Offenses which require identical elements of proof.
>
> 2. Offenses which are degrees of the same offense as provided by statute.
>
> 3. Offenses which are lesser offenses the statutory elements of which are subsumed by the greater offense.

Ch. 88-131, §7, Laws of Fla. In Smith v. State, 547 So.2d 613, 616 (Fla. 1989), this Court recognized the effect of the amendment, i.e., "[m]ultiple punishment shall be imposed for separate offenses, even if only one act is involved," and stated: "Absent a statutory degree crime or a contrary clear and specific statement of legislative intent in the particular criminal offense statutes, all criminal offenses containing unique statutory elements shall be separately punished." (Emphasis in original, footnote omitted).

Since Smith, this Court has acknowledged that "[l]egislative intent is the polestar that guides [its] analysis in double jeopardy issues." Donaldson v. State, 23 Fla.L.Weekly S245, S247 (Fla. April 30, 1998); State v. Anderson, 695 So.2d 309 (Fla. 1997). Using that guide, the Court has reversed multiple

convictions for a single act only when those convictions were for degree variants of a single crime. E.g., Gibbs v. State, 698 So.2d 1206 (Fla. 1997); Anderson; Thompson v. State, 650 So.2d 969 (Fla. 1994); Goodwin v. State, 634 So.2d 157 (Fla. 1994); Sirmons v. State, 634 So.2d 153 (Fla. 1994).

This Court recently reaffirmed both Enmund and Smith in Boler v. State, 678 So.2d 319 (Fla. 1996). The Court approved Boler's convictions of first-degree felony murder and robbery, concluding that neither United States v. Dixon, 509 U.S. 688 (1993), nor the 1988 amendments to subsection 775.021(4) prohibit convictions and sentences for both felony murder and the underlying felony. See Jordan v. State, 694 So.2d 708 (Fla. 1997) (same). Boler stated that "Dixon leaves intact only one analysis for determining whether a successive prosecution or a successive punishment is prohibited by the Double Jeopardy Clause: the Blockberger 'same elements' test." 678 So.2d at 321.

The core offense of murder is murder, while the core offense of aggravated child abuse is harm to a child. When murder, section 782.04, Florida Statutes (1995), is compared with aggravated child abuse, section 827.03, Florida Statutes (1995), it is obvious that each contains elements the other does not. Murder is an unlawful killing, while aggravated child abuse does not necessarily entail

a killing. Aggravated child abuse requires a child victim, while murder does not.[9] Beltran v. State, 700 So.2d 132, 134 (Fla. 4th DCA 1997) (district court affirmed Beltran's convictions of aggravated child abuse and attempted second-degree murder because "it is fairly obvious from the statutes that each of the offenses . . . contains an element that the others do not").

The third district court of appeal followed Boler in Green v. State, 680 So.2d 1067 (Fla. 3d DCA 1996), and Dingle v. State, 699 So.2d 834 (Fla. 3d DCA 1997), and affirmed the appellants' convictions of both felony murder and aggravated child abuse. See also Mackey v. State, 703 So.2d 1183 (Fla. 3d DCA 1997) (affirming Mackey's convictions of both first-degree murder and aggravated child abuse). Contrary to Lukehart's contention, this Court should not overrule Boler (initial brief at 76-77), and Green and Dingle have not "erroneously stretched the general rule discussed in Boler." (Initial brief at 76 n.15). Instead, this Court should

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[9] This conclusion is reinforced by the list of category 1 lesser included offenses appended to Standard Jury Instructions in Criminal Cases (97-2), No. 91,815 (Fla. July 16, 1998). The only necessarily included offenses for first-degree felony murder are second-degree murder and manslaughter. Id. at 6. Aggravated child abuse, on the other hand, has no necessarily lesser included offenses. Id. at 17. Cf. Kama v. State, 507 So.2d 154, 159 (Fla. 1st DCA 1987) ("Aggravated child abuse is a unique statutory creature which does not appear to have a lesser included offense when the offender is a person entrusted with the care and discipline of the child victim").

reaffirm Boler and approve Green and Dingle, as well as affirming Lukehart's convictions of both first-degree murder and aggravated child abuse.[10]

Finally, there is no merit to Lukehart's argument that "[t]here is no crime of aggravated battery alleged or committed separate and independent of the homicide" and that, therefore, the convictions should be merged as was done in Mills. (Initial brief at 74). First, the state does not concede that Lukehart's conviction of aggravated child abuse was based solely on the aggravated battery proscribed by subsection 827.03(1)(a). Instead, the state produced evidence from which the jury could have decided that Lukehart willfully tortured the victim under subsection 827.03(1)(b), i.e., even though the baby cried and Lukehart knew he had hurt her after the first blow, he hit her four more times. Cf. §827.01(3), Fla.Stat. (1995) (defining "torture" as "every act,

[10] Lukehart's reliance on Laines v. State, 662 So.2d 1248 (Fla. 3d DCA 1995), is misplaced. Laines held that a defendant cannot be convicted of both second-degree murder and aggravated battery arising from a homicidal attack on a single victim. Green distinguished Laines, however: "The point of Laines is very clear. The decision rests solely on the panel's perception of what the legislature intended. . . . [but] it is clear why Laines has no application to the case now before us. In the present case, unlike Laines, we deal with the felony murder statute. The felony murder statute authorizes a defendant to be prosecuted for both felony murder and the qualifying felony of aggravated child abuse." 680 So.2d at 1070.

omission, or neglect whereby unnecessary or unjustifiable pain or suffering is caused").

More importantly, however, the merger in Mills that Lukehart relies on does not apply in the instant case and does not prevent Lukehart's dual convictions. Some states retain the old common law definition of felony murder and allow any felony to serve as the underlying felony for felony murder. E.g., Richardson v. State, 823 S.W.2d 710, 714 (Tex. App. 1992) (noting that Texas authorizes any felony, except the designated manslaughters, to be the underlying felony in applying the felony murder rule). In states where any felony can serve as the basis for felony murder, allowing a felony that is an integral part of the homicide to activate the felony murder rule permits the jury to ignore the issue of malice. Any murder where there is a felonious assault or battery upon the victim - a majority of homicides - automatically becomes felony murder. This Court acknowledged the existence of the merger doctrine in Robles v. State, 188 So.2d 789 (Fla. 1966), and discussed New York cases,[11] but held: "It is obvious that the

[11] People v. Moran, 158 N.E. 35 (N.Y. 1927), is one of the cases cited in Robles. Moran held that the felonious assault on a police officer was not independent of the homicide but was the homicide itself. However, after New York's felony murder statute was limited to certain enumerated felonies, the New York courts have refused to extend the merger doctrine because it was developed to remedy a fundamental defect in the former felony murder statute. People v. Miller, 297 N.E.2d 85 (N.Y. 1973).

problem that motivated the New York court to adopt the [merger] rule cannot exist under a statute like Florida's, which limits the felony-murder rule to homicides committed in the perpetuation of specified felonies, not including assault in any of its forms." Id. at 792. Because "the logic of the New York cited cases does not apply in Florida," id., the court disagreed with Robles' claim that the felony murder rule does not apply unless the underlying felony is separate and independent of the murder.

In Mapps v. State, 520 So.2d 92 (Fla. 4th DCA 1988), the court held that felony murder does not merge with the underlying felony of aggravated child abuse, relying on Robles:

> In Robles, the Florida Supreme Court rejected the argument that an underlying felony must always be independent of the killing as a prerequisite to conviction under the felony murder statute. In People v. Moran, 246 N.Y 100, 158 N.E. 35 (1927), the New York court had held that a merger occurs, precluding a felony murder conviction, when a killing results from a felonious assault. The Robles court recognized that the New York statute, in Moran, was worded so broadly that all assaults resulting in death could serve as the underlying basis for felony murder. Thus, New York adopted a merger doctrine which precluded conviction for felony murder unless the underlying felony was distinct from the act of killing. The Florida court recognized that, unlike New York, the Florida felony murder statute was limited to certain specific felonies. Therefore, the problem motivating the New York court to adopt the merger doctrine did not exist in Florida.

Mapps, 520 So.2d at 93; cf. Taylor v. State, 640 So.2d 1127 (Fla. 1st DCA 1994) (same).

The legislature added aggravated child abuse to the list of qualifying felonies in the felony murder statute in 1984.[12] Ch. 84-16, §1, Laws of Fla. Aggravated battery, one method of committing aggravated child abuse and the third of Mills' convictions, is not now and never has been one of the felonies enumerated in subsection 775.04(1)(a). Thus, this Court's merging Mills' aggravated battery into his felony murder conviction, while affirming both that murder conviction and Mills' conviction of the underlying felony of burglary, has no effect on this case. Instead, as the Mapps court held in affirming Mapps' convictions of both first-degree murder and aggravated child abuse: "It is obvious that our legislature did not intend that the felonies specified in the felony-murder statute merge with the homicide to prevent conviction of the more serious charge of first-degree murder." 520 So.2d at 93.

By severely punishing people who kill children through some form of child abuse the legislature has recognized society's outrage over the killing of children. The legislative intent is clear - felony murder and aggravated child abuse are separate crimes that carry separate punishments. Thus, there is no merit to

[12] §775.04(1)(a)(2)(h), Fla. Stat. (1995).

Lukehart's claims. His convictions of first-degree murder and aggravated child abuse are supported by competent substantial evidence, and both convictions should be affirmed.

Issue IV

WHETHER THE COURT CORRECTLY DECIDED TO INSTRUCT THE JURY ON JUSTIFIABLE OR EXCUSABLE HOMICIDE.

Lukehart argues that the trial court committed reversible error by instructing the jury on justifiable or excusable homicide when he wanted to waive those defenses. There is no merit to this claim.

At the guilt-phase charge conference the prosecutor announced that she had been told that the defense did not want the jury instructed on justifiable homicide. (XVII 1222). She remarked that this was a standard jury instruction, but stated that she would not quibble about it if the defense did not want the instruction. (XVII 1222). The trial judge, however, asked if he did not have to instruct on both justifiable and excusable homicide "any time there is a charge of homicide?" (XVII 1222). The prosecutor agreed, while the defense did not. (XVII 1222). The judge them stated that "in order to be abundantly cautious, I'm going to give them anyway. Supreme Court has said justifiable homicide and excusable homicide are to be given." (XVII 1223).

Thereafter, the court instructed the jury on both justifiable and excusable homicide. (XVII 1296-97).

Now, Lukehart argues that the trial court "had no authority to refuse his right to waive [an] inapplicable defense instruction." (Initial brief at 78). This argument ignores the fact that in his initial brief Lukehart claims no fewer than three times that he should have been convicted of no more than manslaughter. (Initial brief at 72, 77, 80). As this Court has held, however, it has "repeatedly recognized that because manslaughter is a 'residual offense, defined by reference to what it is not,' a complete instruction on manslaughter requires an explanation that justifiable and excusable homicide are excluded from the crime." State v. Lucas, 645 So.2d 425, 427 (Fla. 1994) (citations omitted); Hill v. State, 688 So.2d 901 (Fla. 1996), cert. denied, 118 S.Ct. 265 (1997); State v. Smith, 573 So.2d 306 (Fla. 1990). As the trial court stated, this Court has directed that these instructions must be given: "Further, we have consistently adhered to the rule that in a homicide prosecution the failure to instruct on justifiable and excusable homicide as part of the definition of manslaughter is fundamental error regardless of the lack of objection and not subject to a harmless error analysis." Wike v. State, 648 So.2d 683, 689 (Fla. 1994).

The trial court did not err in instructing Lukehart's jury on justifiable and excusable homicide, and this claim should be denied.

Issue V

WHETHER LUKEHART'S DEATH SENTENCE IS PROPORTIONATE.

Lukehart argues that his death sentence is disproportionate. There is no merit to this claim.

Lukehart's speculation that he felt "great affection" for the victim and had no ill will toward her (initial brief at 79) ignores his prior history of child abuse and the fact that he actively sought out and put himself into a situation similar to the previous one where he caused grave physical injuries to another infant for, apparently, no reason. His claims that the victim could have been rendered unconscious by the first of the five blows that killed her and that he did not intend to cause her any pain or suffering (initial brief at 79) ignores his written confession where he stated that, after dropping the baby, he could tell he had hurt her because she cried (II 346) and that he told Detective Redmond that, when he snatched up the victim, he knew he had hurt her and then he shook her hard. (XI 1868). Lukehart's allegation that it is "unrebutted" that he "immediately" tried to resuscitate the victim

(initial brief at 80) is based only on his testimony and ignores the fact that he is an admitted liar. (XVII 1183, 1190-95).

Contrary to Lukehart's claim that this "is a classic manslaughter case" (initial brief at 80), the evidence supports his conviction of first-degree murder. See issue III, supra. His claim that there is only one aggravator in this case (initial brief at 80) is simply incorrect. See issues VI, VII, VIII, and IX, infra. Moreover, although Lukehart spends a paragraph listing "a mountain of" mitigation (initial brief at 80), he never challenges the trial court's findings regarding that mitigation.

In fact, the trial court did not err in its consideration of the mitigating evidence presented by Lukehart. The court found and gave some weight to the following statutory and nonstatutory mitigators: Lukehart's age; his substantially impaired capacity to appreciate the criminality of his conduct; his father's being an alcoholic; his own alcohol and drug abuse; his being sexually abused; and his being employed. (III 419-21). Trial courts have broad discretion in determining whether mitigators apply, and their decisions regarding mitigators will not be reversed absent a palpable abuse of discretion. E.g., Banks v. State, 700 So.2d 363 (Fla. 1997), cert. denied, 118 S.Ct. 1314 (1998). Moreover, "the weight to be given a mitigator is left to the trial judge's

discretion." Mann v. State, 603 So.2d 1141, 1144 (Fla. 1992). Lukehart's trial judge did not abuse his discretion regarding the mitigators, and his findings should be affirmed. Cf. Elledge v. State, 706 So.2d 1340, 1347 (Fla. 1997) (trial court did not abuse discretion in assigning mitigation "little weight"); Consalvo v. State, 697 So.2d 805, 819 (Fla. 1996) (within trial court's discretion to give mitigation "very little weight"); see also Henyard v. State, 689 So.2d 239, 244 (Fla. 1996) (death sentence affirmed where trial court gave mitigators "some weight," "little weight," and "very little weight"), cert. denied, 118 S.Ct. 130 (1997).

The cases that Lukehart relies on are factually distinguishable from the instant case. In Smalley v. State, 546 So.2d 720 (Fla. 1989), the trial court found that only one aggravator - heinous, atrocious, or cruel - had been established. This Court found the death sentence disproportionate in light of the "seven statutory and nonstatutory mitigating factors found by the trial court," including no prior significant criminal activity, Smalley's mental state due to disputes with his girlfriend, money troubles, etc., that caused him to be "severely depressed," and that Smalley was not normally abusive to children. Id. at 723. In this case, on the other hand, Lukehart had a significant criminal

history, i.e., a prior conviction of felony child abuse, and there was no evidence of problems at home and depression comparable in quantity or quality to that produced by Smalley. Lukehart's case, therefore, is not "markedly similar" (initial brief at 82) to Smalley. Comparing the jury override cases listed on page 83 of Lukehart's brief[13] to this case is inappropriate because, as recognized by this Court, "override cases involve a wholly different legal principle and are thus distinguishable from" cases where, as here, the jury recommended the death penalty. Burns v. State, 699 So.2d 646, 649 n.5 (Fla. 1997), cert. denied, 118 S.Ct. 1063 (1998).

The reference to Knowles v. State, 632 So.2d 62 (Fla. 1993), is not well taken because this Court held that Knowles had no intent to shoot his child victim who, unfortunately, was simply in the wrong place at the wrong time. Lukehart's claim that "scores of decisions have approved trial court decisions to impose lesser sentences for far more horrible child murders than the one now under review" (initial brief at 84) is not supported by the cases he cites. Nicholson v. State, 600 So.2d 1101 (Fla. 1992), involved a plea bargain, and it appears that the state did not seek the

[13] Reilly v. State, 601 So.2d 222 (Fla. 1992); Jackson v. State, 599 So.2d 103 (Fla. 1992); Buford v. State, 570 So.2d 923 (Fla. 1990); Morris v. State, 557 So.2d 27 (Fla. 1990); Wasko v. State, 505 So.2d 1314 (Fla. 1987).

death penalty in Freeze v. State, 553 So.2d 750 (Fla. 2d DCA 1989). Both Nicholson and Freeze are examples of prosecutorial discretion that is not at issue in this case. In State v. Law, 559 So.2d 187 (Fla. 1989), the jury convicted Law only of second-degree murder. These three cases are further distinguished by the facts that they predate the victim under 12 years of age aggravator and that none of the defendants appear to have had a prior child-abuse conviction as Lukehart does.

Lukehart's main argument appears to be that this Court upholds death sentences for killing children only when the HAC aggravator is present and that such cases usually involve a kidnapping and/or sexual battery, crimes that did not occur in this case. (Initial brief at 81-82). The presence or absence of HAC, however, is not a valid way to distinguish cases affirming a death sentence from the instant case.

As this Court has held, the HAC aggravator focuses on the impact on the victim. Banks, 700 So.2d at 367. The mindset or mental anguish of the victim is important in determining the existence of HAC, Henyard, because fear and emotional strain preceding a victim's death contribute to the heinous nature of that death. Sochor v. State, 619 So.2d 285 (Fla.), cert. denied, 510 U.S. 1025 (1993). Here, Lukehart admitted that the baby cried and

that he knew he had hurt her. Other than crying, there is little that this five-month-old infant could have done to express the pain and fear she must have felt. The victim, however, had no defensive wounds, and there were no outside witnesses to her murder. Given that lack and the fact that most people would consider the murder of an infant to be a despicable act and, therefore, heinous, atrocious or cruel, the state did not pursue the HAC aggravator.

As the trial court properly found, the state established three aggravators - felony murder/child abuse, victim under 12 years of age, and prior violent felony conviction/felony probation - while Lukehart established mitigation that was outweighed by those aggravators. This Court has affirmed death sentences in other child abuse cases, including cases with fewer aggravators and more mitigators than this case. E.g., Davis v. State, 703 So.2d 1055 (Fla. 1997) (two aggravators - felony murder/sexual battery and HAC - outweighed numerous nonstatutory mitigators); James v. State, 695 So.2d 1229 (Fla.) (three aggravators - HAC, prior violent felony conviction, felony murder/kidnapping, aggravated child abuse, attempted sexual battery - outweighed both mental mitigators (given substantial weight) and numerous nonstatutory mitigators (given from some to substantial weight)), cert. denied, 118 S.Ct. 569 (1997); Cardona v. State, 641 So.2d 361 (Fla. 1994) (one aggravator

(HAC) outweighed both mental mitigators and nonstatutory mitigation), cert. denied, 513 U.S. 1160 (1995); Dobbert v. State, 375 So.2d 1069 (Fla. 1979) (death penalty appropriate in jury override case where state established two aggravators (avoid arrest and HAC)), cert. denied, 447 U.S. 912 (1980). Other child murder cases that did not include convictions of child abuse are also appropriate comparisons. E.g., Meyers v. State, 704 So.2d 1368 (Fla. 1997) (two aggravators - prior violent felony conviction and felony murder - outweighed several nonstatutory mitigators); Henry v. State, 649 So.2d 1361 (Fla. 1994) (two aggravators - prior violent felony conviction and felony murder - outweighed two statutory and six nonstatutory mitigators), cert. denied, 516 U.S. 830 (1995); Durocher v. State, 604 So.2d 810 (Fla. 1992) (two aggravators - prior violent felony conviction and cold, calculated, and premeditated); Duckett v. State, 568 So.2d 891 (Fla. 1990) (two aggravators - felony murder and HAC - outweighed statutory and nonstatutory mitigators); Atkins v. State, 497 So.2d 1200 (Fla. 1986) (three aggravators - felony murder, avoid arrest, HAC - outweighed two statutory mitigators); Adams v. State, 412 So.2d 850 (Fla.) (three aggravators - felony murder, avoid arrest, HAC -

outweighed three statutory mitigators), cert. denied, 459 U.S. 882 (1982).[14]

When set beside truly comparable cases, it is obvious that Lukehart's death sentence is both proportionate and appropriate. Therefore, Lukehart's death sentence should be affirmed.

Issue VI

WHETHER THE TRIAL COURT ERRED IN FINDING THAT THE FELONY MURDER AGGRAVATOR HAD BEEN ESTABLISHED.

Lukehart claims that finding the felony murder aggravator based on the aggravated child abuse that resulted in the victim's murder constituted an improper automatic aggravator. There is no merit to this claim.

The trial court made the following findings regarding the felony murder aggravator:

> 1. The Defendant, in committing the crime for which he is to be sentenced, was engaged in the commission of or an attempt to commit the crime of Aggravated Child Abuse.
>
> The Defendant was convicted of Aggravated Child Abuse in addition to 1st Degree Murder. The evidence clearly shows that the five month old victim, Gabrielle Hanshaw, died as a result of numerous blows to her head. The medical examiner testified that the child suffered at least five separate blows to her head, which were the cause of her death. This

[14] HAC was not found in Meyers, Henry, or Durocher.

> conviction was proven beyond a reasonable doubt.

(III 417-18). The second count of Lukehart's indictment charged him with aggravated child abuse (I 13), and the jury convicted him of that crime as charged. (II 380; XVIII 1323). When the state produces sufficient evidence to support conviction of a felony, that evidence also supports the felony murder aggravator. Sliney v. State, 699 So.2d 662 (Fla. 1997), cert. denied, 118 S.Ct. 1314 (1998); Jones v. State, 652 So.2d 346 (Fla. 1995), cert. denied, 516 U.S. 875 (1996); Perry v. State, 522 So.2d 817 (Fla. 1988). The trial court, therefore, properly found that the felony murder aggravator had been established.

In State v. Enmund, 476 So.2d 165, 167 (Fla. 1985), this Court found "sufficient intent that the legislature intended multiple punishments when both a murder and a felony occur during a single criminal episode." The court held both "that an underlying felony is not a necessarily included offense of felony murder," id., and "that a defendant can be convicted of and sentenced for both felony murder and the underlying felony." Id. at 168; see Bertolotti v. Dugger, 883 F.2d 1503 (11th Cir. 1989), cert. denied, 497 U.S. 1032 (1990). In spite of Enmund, however, appellants uniformly complain that finding the felony murder aggravator in felony murders is

improper. This Court has uniformly and consistently rejected these automatic aggravator claims because, as recently explained:

> Eligibility for this aggravating circumstance is not automatic: The list of enumerated felonies in the provision defining felony murder is larger that the list of enumerated felonies in the provision defining the aggravating circumstance of commission during the course of an enumerated felony. A person can commit felony murder via trafficking, carjacking, aggravated stalking, or unlawful distribution, and yet be ineligible for this particular aggravating circumstance. This scheme thus narrows the class of death-eligible defendants. See Zant v. Stephens, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983). See generally White v. State, 403 So.2d 331 (Fla. 1981).

Blanco v. State, 706 So.2d 7, 11 (Fla. 1997).

Lukehart claims that this Court should overrule Blanco, but has presented no good reason for doing so. The trial court properly applied the felony murder aggravator, and this issue should be denied.

Issue VII

> WHETHER AN EX POST FACTO APPLICATION OF AN AGGRAVATOR OCCURRED.

Lukehart argues that he should be resentenced because the felony probation aggravator was applied in an ex post facto manner. There is no merit to this claim. If any error occurred, however, it was harmless, and no relief is warranted.

Lukehart murdered this victim on February 25, 1996, and his sentencing proceeding began on March 13, 1997. At the time of the murder the first aggravator listed in the statute read as follows: "(a) The capital felony was committed by a person under sentence of imprisonment or placed on community control." §921.141(5)(a), Fla. Stat. (1995). In 1996, however, the legislature amended subsection (5)(a). "(a) The capital felony was committed by a person previously convicted of a felony and under sentence of imprisonment or placed on community control or on felony probation." Ch. 96-301, § 1, Laws of Fla. This amendment became effective on October 1, 1996.

At the beginning of the penalty phase a discussion concerning aggravators occurred. Lukehart objected to the felony probation aggravator because it became effective after this murder. (XVIII 1329-1330). After discussing Trotter v. State, 690 So.2d 1234 (Fla. 1996), cert. denied, 118 S.Ct. 197 (1997), and Jackson v. State, 648 So.2d 85 (Fla. 1994) (XVIII 1331), the court allowed the state to present a witness who testified that Lukehart was on probation for a felony child abuse conviction when he committed this murder. (XVIII 1381).

At the penalty-phase charge conference the court asked if the felony probation and prior violent felony conviction aggravators

should be merged. (XIX 1559). After discussing the applicability of the four aggravators sought by the state in this case,[15] the court directed the state to include the merger instruction set out in Standard Jury Instructions in Criminal Cases - No. 96-1, 690 So.2d 1263 (Fla. 1997). (XVIII 1559-68). Thereafter, the court gave the jury the following instructions, among others:

> The aggravating circumstances that you may consider are limited to the following that are established by the evidence, one, the crime for which Andrew Richard Lukehart is to be sentenced was committed while he had been previously convicted of a felony and was on felony probation, two, the defendant has previously been convicted of a felony involving the use [or] threat of violence to some person, the crime of child abuse is a felony involving the use [or] threat of violence to another person, three, the crime for which the defendant is to be sentenced was committed while he was engaged in the commission of or an attempt to commit or flight after committing or attempting to commit the crime of aggravated child abuse, and four, the victim of the capital felony was a person less than 12 years of age.
>
> The State may not rely upon a single aspect of the offense to establish more than one aggravating circumstance.
>
> Therefore, if you find that two or more of the aggravating circumstances are proven beyond a reasonable doubt by a single aspect of the offense you are to consider that as supporting only one aggravating circumstance.

[15] Felony probation, prior violent felony conviction, felony murder/aggravated child abuse, and victim under 12 years of age.

(XIX 1634-35).

The trial court made the following findings of fact as to the prior violent felony conviction and felony probation aggravators:

> 3. The Capital Felony was committed by a person previously convicted of a felony and on probation at the time this crime was committed.
>
> The Defendant had previously been convicted of Child Abuse on September 2, 1994, in Duval County, Florida, Case No. 94-4293CF. The Defendant pled guilty to Child Abuse and was adjudicated guilty and was subsequently sentenced to four years probation, and was on probation at the time of the commission of the crime for which he is currently being sentenced. This aggravator was proven beyond a reasonable doubt.
>
> 4. The Defendant was previously convicted of another felony involving the use or threat of violence to another person.
>
> The Defendant was previously convicted of Child Abuse of an eight month old child named Jillian French, the daughter of a woman whom the Defendant was living with in 1994. The (French) child suffered numerous injuries, including broken ribs, retinal hemorrhages, and trauma to the head. However, it is clear to the court that aggravator three and four merge, and is treated by this court as one aggravator.

(III 418-19).

In Peek v. State, 395 So.2d 492, 499 (Fla. 1980), cert. denied, 451 U.S. 964 (1981), this Court stated: “Persons who are under an order of probation and are not at the time of the

commission of the capital offense incarcerated or escapees from incarceration do not fall within the phrase 'person under sentence of imprisonment' as set forth in section 921.141(5)(a)." Later, however, another appellant challenged the legislature's adding community control to the (5)(a) aggravator. Trotter v. State, 690 So.2d 1234 (Fla. 1996), cert. denied, 118 S.Ct. 197 (1997). This Court found no ex post facto violation and stated:

> Custodial restraint has served in aggravation in Florida since the "sentence of imprisonment" circumstance was created, and enactment of community control simply extended traditional custody to include "custody in the community." See §948.001, Fla. Stat. (1985). Use of community control as an aggravating circumstance thus constitutes a refinement in the "sentence of imprisonment" factor, not a substantive change in Florida's death penalty law.

Id. at 1237. Thus, this Court disagreed with Trotter's claim, "just as [it has] found no violation in every other case where an aggravating circumstance was applied retroactively - even on resentencing." Id.; e.g., Jackson, 648 So.2d 85 (Fla. 1994) (victim was law enforcement officer aggravator); Valle v. State, 581 So.2d 40 (Fla. 1991) (same); Zeigler v. State, 580 So.2d 127 (Fla.) (cold, calculated, and premeditated (CCP) aggravator), cert. denied, 502 U.S. 946 (1991); Hitchcock v. State, 578 So.2d 685 (Fla. 1990) (under sentence of imprisonment aggravator), vacated on

other grounds, 505 U.S. 1215 (1992); Justus v. State, 438 So.2d 358 (Fla. 1983) (CCP aggravator), cert. denied, 465 U.S. 1052 (1984); Combs v. State, 403 So.2d 418 (Fla. 1981) (same), cert. denied, 456 U.S. 984 (1982).

Recently, and for the first time ever, this Court found that the proposed application of a new aggravator would be an ex post facto violation. In Hootman v. State, 709 So.2d 1357 (Fla. 1998), this Court held that subsection 921.141(5)(m), Florida Statutes (Supp. 1996), could not be applied to a murder committed prior to the new aggravator's effective date of October 1, 1996. The (5)(m) aggravator applies when "[t]he victim of the capital felony was particularly vulnerable due to advanced age or disability, or because the defendant stood in a position of familial or custodial authority over the victim." §921.141(5)(m). Because "advanced age of the victim had not been part of any of the previously enumerated factors," this Court held that "the legislature altered the substantive law by adding an entirely new aggravator to be considered in determining whether to impose the death penalty." Hootman, 709 So.2d at 1360.

This case is more like Trotter than Hootman. As far as the under sentence of imprisonment aggravator is concerned, felony probation is the functional equivalent of community control. See

ch. 948, Fla. Stat., entitled “Probation and Community Control.” Felony probation, just like community control, is a type of custody in the community. §948.001, Fla. Stat. (1997). Therefore, felony probation is also an extension of custodial restraint and merely a refinement of the (5)(a) aggravator, rather than a substantive change like the (5)(m) advanced age aggravator. Thus, no error occurred when the trial court allowed the state to introduce evidence that Lukehart was on felony probation or when the trial court instructed the jury on and then found that the felony probation aggravator had been established. See Waterhouse v. State, 429 So.2d 301, 307 (Fla. 1982) (“previous conviction and the parole status were two separate and distinct characteristics of the defendant not based on the same evidence and the same essential facts”), cert. denied, 464 U.S. 977 (1983).

Even if this Court were to disagree with the above analysis and decide that the felony probation aggravator is a substantive change, any error would be harmless. The trial court gave the jury a merger instruction and then found that the felony probation aggravator merged with the prior violent felony conviction aggravator. No double consideration occurred, and Lukehart was not disadvantaged. Valle, 581 So.2d at 47; see also id. at n.9 (“The

trial judge did not err by not instructing the jury to merge the three factors when making their sentencing recommendation").

Lukehart has failed to demonstrate reversible error, and this claim should be denied.

Issue VIII

WHETHER BOTH THE FELONY MURDER AND VICTIM UNDER 12 YEARS OLD AGGRAVATORS WERE PROPERLY FOUND.

In this issue Lukehart argues that the trial court erred both in not instructing the jury to merge the felony murder and victim under 12 years of age aggravators and in finding that both aggravators had been established. There is no merit to this claim.

As explained in issue VI, supra, the jury convicted Lukehart of aggravated child abuse, and the trial court properly found felony murder/aggravated child abuse in aggravation. The trial court made the following findings as to the victim under 12 aggravator:

> 2. The victim of the Capital Felony was a person less than twelve years of age.
>
> The legislature in enacting this aggravator clearly felt that if the victim was under the age of twelve, the death of the child would indicate a separate aggravator. Florida Statute 827.03 defines a child as any person under the age of eighteen. The Defendant was charged with Aggravated Child Abuse under Florida Statute 827.01 [sic], and

> it was specifically alleged in the Indictment that the Defendant committed an Aggravated Battery on a child inflicting blunt trauma to the head of Gabrielle Hanshaw. It is obvious that Aggravated Child Abuse includes any person under the age of eighteen. It is very obvious that this aggravating factor applies to this case in that the age of the victim was five months, and had no ability to resist the abuse that she received at the hands of the Defendant. This aggravator was proven beyond a reasonable doubt.

(III 418). The record supports the trial court's conclusions.

Lukehart claims that the "only reason either of these circumstances applied was the victim's age" and that they "were unlawfully doubled." (Initial brief at 92). As Lukehart acknowledges (initial brief at 92), his jury was instructed that a single aspect of the crime could support only a single aggravator. (XIX 1634-35). That merger instruction does not apply to the aggravators challenged in this issue, however, because the elements of those aggravators are not the same in this case. As this Court stated in Banks v. State, 700 So.2d 363, 367 (Fla. 1997), cert. denied, 118 S.Ct. 1314 (1998), "there is no reason why the facts in a given case may not support multiple aggravating factors so long as they are separate and distinct aggravators and not merely restatements of each other."

As the trial court recognized, these two aggravators are not mere restatements of one another. Section 827.03, Florida Statutes

(1995), defines and prohibits aggravated child abuse, while a "child" is defined as any person under the age of 18 years. §827.01(1), Fla. Stat. (1995). On the other hand, the aggravator at issue here reads: "The victim of the capital felony was a person less than 12 years of age." §921.141(5)(l), Fla. Stat. (1995). Although age is central to both aggravated child abuse and the (5)(l) aggravator, each requires proof of a different age. Because they contain different elements, there is no merit to Lukehart's claim that the felony murder/aggravated child abuse and victim under 12 years of age aggravators were improperly given double consideration. This issue should be denied.

Issue IX

WHETHER THE VICTIM UNDER 12 YEARS OF AGE AGGRAVATOR AND THE STANDARD INSTRUCTION ON IT ARE CONSTITUTIONAL.

In this issue Lukehart claims that the aggravator for killing a child under 12 years of age is "an automatic aggravating circumstance, is vast, undiscriminating, and overinclusive" (initial brief at 93) and that, therefore, the aggravator and the instruction on it are unconstitutional. This issue is procedurally barred because Lukehart did not challenge the constitutionality of

the aggravator at trial. Larzelere v. State, 676 So.2d 394 (Fla.), cert. denied, 117 S.Ct. 615 (1996); Jackson v. State, 648 So.2d 85 (Fla. 1996). Any complaint about the instruction is also procedurally barred because Lukehart did not raise it at trial. Pope v. State, 702 So.2d 221 (Fla. 1997); Wike v. State, 698 So.2d 817 (Fla. 1997), cert. denied, 118 S.Ct. 714 (1998). Even if it were not procedurally barred, however, it should be denied because it has no merit.

The legislature added this aggravator to subsection 921.141(5), Florida Statutes, to read as follows: "(l) the victim of the capital felony was a person less than 12 years of age." Ch. 95-159, § 1, Laws of Fla., effective October 1, 1995.[16] Lukehart recognizes the propriety of the (5)(j), law enforcement officers, and (5)(k), public officials, aggravators. (Initial brief at 92-93). See Pietri v. State, 644 So.2d 1347 (Fla. 1994), cert. denied, 515 U.S. 1147 (1995). He argues that the under 12 aggravator is not narrow enough, however, because "every person who has ever lived fit within the statute at some point, and about a fifth of the population [currently] are juveniles under the age of 12." (Initial brief at 93).

[16] As set out in issue VIII, supra, the trial court properly found that the state established this aggravator.

Lukehart's statement of his claim reveals its flaw. The fact that everyone was less than 12 years old at some time is of no moment because less than twenty percent of the population is currently less than 12. This classification of being less than 12 years old "genuinely narrow[s] the class of persons eligible for the death penalty," Zant v. Stephens, 462 U.S. 862, 877 (1983), because not all homicide victims are less than 12 years old. Thus, this aggravator will apply only to those people who murder children that are less than 12, a narrow subset of all homicides. Moreover, this aggravator "reasonably justif[ies] the imposition of a more severe sentence compared to others found guilty of murder." Id. The statutory class, persons under 12 years of age, bears a reasonable relationship to a legitimate state interest, i.e., the protection of people who are less able to protect themselves than are the general population. This aggravator is no broader or more inclusive than the other groups of people that the legislature, in its discretion, has decided need or deserve special protection. E.g., §921.141(5)(j), (k), (m).

There is also no merit to Lukehart's complaint about the instruction on this aggravator. The standard instruction, Standard Jury Instructions in Criminal Cases - No. 96-1, 690 So.2d 1263, 1263 (Fla. 1997), as given by the trial court (XIX 1634), repeats

the language of the statute. Unlike the cold, calculated, and premeditated and the heinous, atrocious, or cruel aggravators, the victim under 12 aggravator contains no terms "so vague as to leave the jury without sufficient guidance for determining the absence or presence of the factor." Whitton v. State, 649 So.2d 861, 867 n.10 (Fla. 1994), cert. denied, 516 U.S. 832 (1995); Davis v. State, 698 So.2d 1182 (Fla. 1997), cert. denied, 118 S.Ct. 130 (1998); Wike v. State, 698 So.2d 817 (Fla. 1997), cert. denied, 118 S.Ct. 714 (1998). Because the terms of the aggravator are easily understood, they do not need to be defined in the instruction. Whitton; Davis; Wike.

This issue is procedurally barred and should be summarily denied. Relief should also be denied if this Court decides to discuss the merits of this claim.

Issue X

WHETHER LUKEHART'S PRIOR FELONY CHILD ABUSE CONVICTION BECAME A "FEATURE" OF THE PENALTY PHASE.

Lukehart claims that the state's presentation of evidence to support two aggravators improperly became a feature of his penalty phase. There is no merit to this claim.

At the beginning of the penalty phase the state relied on the evidence and testimony presented during the guilt phase, and the prosecutor read a three-sentence stipulated-to victim impact statement. (XVIII 1341). Thereafter, the state presented three witnesses to establish the prior violent felony conviction aggravator and one to establish the under sentence of imprisonment/felony probation aggravator.

Donald Tuten of the Jacksonville Sheriff's Office testified that he responded to a hospital on April 14, 1994 regarding Jillian French. (XVIII 1343). Lukehart claimed to be the child's father. (XVIII 1344). Although Lukehart said the child had almost drowned, the treating doctor said there was no evidence of drowning and that all the injuries appeared to be the result of child abuse. (XVIII 1345). Lukehart kept changing his story (XVIII 1345, 1348), and Tuten arrested him at the hospital for child abuse. (XVIII 1349).

Dr. Janette Capella treated the French baby at the University Medical Center. (XVIII 1350-52). She found the major injuries to be a closed head injury and retinal hemorrhages that indicated the baby had been shaken “a lot” and “very recently.” (XVIII 1353). The subdural hematoma indicated that the baby had been struck on the head with a fair amount of force. (XVIII 1354). The baby later suffered seizures and was left with visual deficits. (XVIII 1355).

Holly Dunlap, a former assistant state attorney, testified that she filed charges against both Lukehart and the baby’s mother. (XVIII 1360-61). In September 1994 Lukehart pled guilty to felony child abuse in exchange for ten months in jail and four years’ probation, conditioned on his completing a parenting skills course and an anger control course, and requiring that he have no contact with the victim or with other children until he completed the courses. (XVIII 1363). On cross-examination Lukehart established that he was allowed a plea despite a recommended sentence of more than three years to almost seven years. (XVIII 1366).

Robin Solomon, a probation specialist, testified that Lukehart completed both of the required courses and that he was on probation in February 1996. (XVIII 1379-81).

As this Court has stated, "relevant evidence concerning the circumstances of a prior violent felony conviction is admissible in a capital sentencing proceeding, unless admission of the evidence would violate the defendant's confrontation rights, or the prejudicial effect of the evidence clearly outweighs its probative value." Finney v. State, 660 So.2d 674, 683 (Fla. 1995), cert. denied, 516 U.S. 1096 (1996). The victims of such prior felonies should not be used to prove them, however, and admissible evidence may be unduly prejudicial "where highly prejudicial evidence is unnecessary, or where the evidence is likely to cause the jury to feel overly sympathetic towards the prior victim." Id. at 684. In spite of this dicta in Finney, however, this Court has held that "[t]estimony by the victims, or others, about prior crimes is admissible if the defendant is given the opportunity to confront the witness." Lucas v. State, 568 So.2d 18, 21 (Fla. 1990). Moreover, prior convictions of violent felonies are important tools for conducting the character analysis required in capital sentencing because "propensity to commit violent crimes surely must be a valid consideration for the jury and the judge." Stewart v. State, 558 So.2d 416, 419 (Fla. 1990); Sireci v. State, 399 So.2d 964 (Fla. 1981), cert. denied, 456 U.S. 984 (1982); McCrae v.

State, 395 So.2d 1145 (Fla. 1980), cert. denied, 454 U.S. 1041 (1981).

Lukehart has not demonstrated reversible error, or indeed any error, regarding the state's presentation of evidence establishing several aggravators. As Lukehart admits, he did not object that the state's evidence became a feature of the penalty phase. (Initial brief at 96). Additionally, the cases cited by Lukehart do not support this claim. In Hitchcock v. State, 673 So.2d 859 (Fla. 1996), this Court reversed because the state introduced evidence that Hitchcock was a pedophile and committed sex crimes on someone other than the homicide victim when he had never been charged with or convicted of such crimes. Proving the cold, calculated aggravator solely by collateral crime evidence was disallowed in Wuornos v. State, 676 So.2d 966 (Fla. 1995), cert. denied, 117 S.Ct. 395 (1996). No photographs of the prior victim were introduced, as was done in Duncan v. State, 619 So.2d 279 (Fla.), cert. denied, 510 U.S. 969 (1993). Unlike in Rhodes v. State, 547 So.2d 1201 (Fla. 1989), and Freeman v. State, 563 So.2d 73 (Fla. 1990), cert. denied, 501 U.S. 1259 (1991), neither the victim of the prior violent felony nor any of her family testified.

Instead, the testimony from the state's witnesses was straightforward and unemotional. Lukehart cross-examined those

witnesses and was not denied the right to confront them. This testimony helped show the similarity between the 1994 and 1996 crimes and established the prior violent felony aggravator. See Lockhart v. State, 655 So.2d 69 (Fla.), cert. denied, 516 U.S. 896 (1995).

There is no merit to this claim, and it should be denied.

Issue XI

WHETHER PROSECUTORIAL COMMENTS CONSTITUTED REVERSIBLE ERROR.

As his eleventh claim, Lukehart argues that several of the prosecutor's comments during penalty-phase closing argument constituted fundamental error necessitating resentencing. There is no merit to this claim.

Lukehart complains that several of the prosecutor's comments were improper (initial brief at 96-97), but fails to tell this Court that he objected to none of those comments. This issue is, therefore, procedurally barred. Gudinas v. State, 693 So.2d 953, 959 (Fla.), cert. denied, 118 S.Ct. 345 (1997); Kilgore v. State, 688 So.2d 895, 898 (Fla. 1996); Allen v. State, 662 So.2d 323, 331 (Fla. 1995), cert. denied, 517 U.S. 1107 (1996); Rose v. State, 461 So.2d 84, 86 (Fla. 1984), cert. denied, 471 U.S. 1143 (1985).

To overcome this procedural bar, Lukehart argues that the complained-about comments constituted fundamental error. As this Court stated in Crump v. State, 622 So.2d 963, 972 (Fla. 1993): "Fundamental error goes to the foundation of the case or the merits of the cause of action and can be considered on appeal without objection." Lukehart ignores, however, other pronouncements of this Court on how prosecutorial comments are to be considered:

> Wide latitude is permitted in arguing to a jury. Logical inferences may be drawn, and counsel is allowed to advance all legitimate arguments. The control of comments is within the trial court's discretion, and an appellate court will not interfere unless an abuse of such discretion is shown. A new trial should be granted when it is "reasonably evident that the remarks might have influenced the jury to reach a more severe verdict of guilt than it would have otherwise done." Each case must be considered on its own merits, however, and within the circumstances surrounding the complained of remarks.

Breedlove v. State, 413 So.2d 1, 8 (Fla.), cert. denied, 459 U.S. 882 (1982) (quoting Darden v. State, 329 So.2d 287, 289 (Fla. 1976), cert. denied, 430 U.S. 704 (1977)) (citations omitted). Moreover, reversal is inappropriate if any error that occurred was harmless. State v. Murray, 443 So.2d 955 (Fla. 1984). Instead, "it is the duty of appellate courts to consider the record as a whole and to ignore harmless error, including most constitutional violations." Id. at 956. This is so because fundamental error

occurs only if the "error committed was so prejudicial as to vitiate the entire trial." Id. Applying those principles to this case, it is obvious that no reversible error occurred.

First, Lukehart rearranges and takes out of context part of the end of the prosecutor's argument and argues that "the prosecutor here minimized and denigrated the significance of [the] victimization as mitigation evidence." (Initial brief at 98). The complained-about comments occurred during the following portion of the argument, during which the prosecutor explained her view of the proposed mitigating evidence:

> What is there about Andrew Lukehart and what he did that should mitigate this crime and not have him receive the death penalty? Nothing. Because in the final analysis, ladies and gentlemen, if you give him significant weight as far as mitigation because of what Luke Scram did to him; and if you give him weight for the fact he sometimes was a decent human being, either way you look at it he was a victim himself or he was good sometimes to these babies or that he was only 22 years old at the time of the offense, however, you look at any of it, none of it outweighs the fact that he hurt Jillian French so severely and that he killed Gabrielle Hanshaw.
>
> Where are we going to start [to] stop that cycle of violence that started in his family? If Mr. Edwards gets up here and says he never would have hurt Jillian and never would have killed Gabrielle if he hadn't been hurt by Luke Scram, then are you going to go to Luke Scram and say, "You're responsible for them." When Luke Scram tells us he never

would have hurt Missy and Andy and all these other children, seems he got hurt by somebody, are we going to go back to that person and say, you hurt Luke, he hurt Missy and Andy, then Andy hurt Gabrielle and Andy hurt Jillian so therefore you are responsible? How many generations are we going to go back? Where is the cycle of violence going to stop? It stops here and it stops now because there are no more excuses.

When is this man going to take responsibility for what he did? Doctor Krop sat on the stand yesterday and told you, well, you know from the very beginning he took responsibility. He did? You didn't hear that in this courtroom. He never admitted what he did to this baby because he couldn't have just kept pushing her head down from four inches.

How do we know that? Because the medical examiner, the expert told you there's no way that baby could have sustained five fractures to her head in the manner this man suggested. So where is his acceptance of responsibility? He was still denying it even when he got in front of you. He denied it to Doctor Krop, and Doctor Krop had no idea what the medical examiner's testimony was. He also had no idea what this defendant had said on the stand.

So this man has not accepted responsibility for what he's done. You had to make him accept responsibility by finding him guilty of first degree murder. And you have to make him suffer the consequences by recommending death.

It's not an easy thing for you to do, you probably will be very depressed when you leave here, nobody said it was going to be easy, we told you it was going to be tough. It wasn't easy for me to sit and watch Missy Smith on the stand yesterday, it was difficult to get

up and question somebody that's usually a State witness because she's been victimized. But where do you take that victimization? How do you fit it into what's going on here? Is every single person that's been victimized in this country going to be excused from a crime that they've committed? We can't do that, ladies and gentlemen. We will have absolute chaos and lawlessness if we allow every person who feels they've been victimized to go out and rectify that by committing other crimes. We simply cannot tolerate that.

So here's what you have to do: You have to say to Andrew Lukehart by your recommendation, you have to say by your weighing process we're sorry Luke Scram raped you and we're sorry your father was an alcoholic but you must take responsibility for what you did, you must be held accountable because the bottom line is he knew better. Before he was raped by Luke Scram and before he ever was victimized he knew that it was wrong to hurt somebody. His parents told you they loved him, they hugged him, they held him. They had a good household except for his father's alcoholism and what household doesn't have its problems?

But what tells you the most about his background? Is that his father sought help for his alcoholism and they all went through it together. And that after he went through alcoholics Anonymous that family knew that if there was a problem it got worked out together. So you can't hold Randy Lukehart accountable for the injuries to Jillian French and the injuries and the death of Gabrielle Hanshaw because this defendant knew that if you have a problem you seek a solution and you work it out. He knew about counseling from an earlier age than most kids because of what his father went through.

And he still had his mother and father to rely on, to support him and to go to if he ever felt that one of these stressers was coming on and he was going to have one of those incidents of whatever Doctor Krop called it.

Ladies and gentlemen, you can't excuse this man because he was raped or because his father was an alcoholic because it doesn't take much common sense to know that a baby is helpless and that you're not suppose[d] to hurt a baby. He didn't kill a man capable of fighting back, he didn't kill a woman capable of fighting back. He killed a baby.

And there's nothing about his background that should have made him think that that was okay. And there's nothing about his background that should make you think it's okay to recommend life. Because the aggravators in this case wholly or singularly outweigh all of the mitigation together. Put it all together, the extremely emotional disturbance, his age and everything else about Andrew Lukehart, take into consideration the fact that he is fairly [clever] and fairly intelligent. When you look at his poems you will think this man has some redeeming social quality, some of his poetry is not bad, one of them is actually very good and for that you should give him credit. You should give him mitigation, you should say that a shame, this man had such good talent but you can't excuse him because he can draw cartoons, and you can't excuse him because he's [clever]; you must hold him accountable.

And ladies and gentlemen, I implore you to carefully weigh the mitigation and you will see that the aggravating factors, the fact that he hurt Jillian French and killed Gabrielle Hanshaw clearly and completely outweighs anything else about this man and

> therefore you should recommend death. Thank you.

(XIX 1602-07).

Second, Lukehart complains that the prosecutor stated that he preyed upon his victims and that she said over and over he should die. (Initial brief at 97). When put into context, however, these comments were not nearly so egregious as Lukehart claims.

> And what I'm asking you to do at this time is to follow the law and engage in the weighing process that the Judge is going to explain to you. And the State submits once you engage in this weighing process you will not have any qualms about saying death.
>
> Andrew Lukehart deserves to die because he chose to live outside the law. He chose to come down to the state of Florida to begin with, and when he did he had no obligations, all he had to do was get a job and live right, he was an adult, but he chose to live with a woman Jillian French's mother or in that household where there was a tiny baby. He had no obligation to assume responsibility for Jillian French nor did he for Gabrielle Hanshaw but he chose to do that. Nobody made him be around babies knowing that he had problems.
>
> And when you hear Mr. Edwards come after me and talk to you about poor Andrew Lukehart, remember this: He knew two years before he bashed Jillian French's head and caused her that emergency trip to the hospital that he had problems, he knew his cousin was undergoing counseling for the problems that had occurred as a result of their sexual abuse, he was an adult by then. He knew that he could go to someone and get the help that

he needed, his cousin did it, she went to the authorities and prosecuted and she went and got counseling. Why didn't he? He chose not to and he lived with whatever demons he thought he had. But the point is he did all of this of his own free will. He never had to be in a stressful situation at all but he chose to place himself there.

And then what's so bad about it is once he got caught up, he won't look at it from this perspective and say, well, you know that intermittent explosive disorder that Doctor Krop talked about yesterday, the thing that causes him to lose his temper, the thing we all go through in any given day in our lives.

You want to say, well, you know, he didn't really realize how bad the effect of being raped was on him, well, he knew it after he hurt Jillian French, and he got put on probation for it and he got counseling for it and he got help for it. He went to two separate classes parenting skills and anger control. So once he was given that chance there was no excuse for him to even be in a situation that would cause him the kind of stress that made him do what he did to Jillian French but he did. Put himself right back into it.

And for that, ladies and gentlemen, he cannot be forgiven. What are the aggravators that should convince you that this man deserves the electric chair? Judge Wilkes is going to instruct you on four separating aggravators and let me tell you right now this is not a quantity process, it's not that the State has four aggravators, Mr. Edwards is going to get up here and tell you he has three mitigators, you'll see numbered paragraphs but ignore numbers, this is a quality process, it's a weighing process. Even if the State only had one aggravator, there would be a way

> to come up here and tell you he deserves to die. So it is not sheer numbers, it is the quality of the evidence that attaches to each aggravating circumstance that should convince you that this man deserves to die.

(XIX 1579-82). The prosecutor then went on to give her view of the aggravators established by the state.

This Court has consistently recognized that "[t]he purpose of closing argument is to help the jury understand the issues by applying the evidence to the law applicable to the case." Hill v. State, 515 So.2d 176, 178 (Fla. 1987), cert. denied, 485 U.S. 993 (1988). The prosecutor "is the advocate for the State and has the duty, not only to present evidence in support of the charge, but likewise the duty to advocate with all his talent, vigor and persuasion the acceptance by the jury of such evidence." Robles v. State, 210 So.2d 441, 442 (Fla. 1968); Bonifay, 680 So.2d 413, 418 (Fla. 1996) (counsel may advance all legitimate arguments and draw logical inferences from the evidence). As this Court stated recently:

> When it is understood from the context of the argument that the charge is made with reference to the evidence, the prosecutor is merely submitting to the jury a conclusion that he or she is arguing can be drawn from the evidence. Craig v. State, 510 So.2d 857, 865 (Fla. 1987). It was for the jury to decide what conclusion to draw from the evidence and the prosecutor was merely

> submitting his view of the evidence to them for consideration.

Davis v. State, 698 So.2d 1182, 1191 (Fla. 1997), cert. denied, 118 S.Ct. 1076 (1998). Moreover, "each case must be considered upon its own merits and within the circumstances pertaining when the questionable statements are made." Darden v. State, 329 So.2d 287, 291 (Fla. 1976), cert. denied, 430 U.S. 704 (1977).

As stated by the United States Supreme Court, "capital punishment is an expression of society's moral outrage at particularly offensive conduct." Gregg v. Georgia, 428 U.S. 153, 183 (1976). The Gregg Court went on to state that "the decision that capital punishment may be the appropriate sanction in extreme cases is an expression of the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death." Id. at 184 (footnote omitted). To that end, this Court stated: "It is certainly appropriate for the prosecuting attorney to urge the jury to prescribe the supreme penalty on the basis of the evidence which the jury hears." Pait v. State, 112 So.2d 380, 384 (Fla. 1959). Moreover, this Court has held that the prosecution "may properly argue that the defense has failed to establish a mitigating factor and may also argue that the jury should not be swayed by sympathy." Valle v. State, 581 So.2d 40, 47 (Fla. 1991).

The cases that Lukehart relies on are factually distinguishable from this case and do not support his claim. In Wilson v. State, 294 So.2d 327 (Fla. 1974), this Court reversed Wilson's conviction of perjury because the prosecutor accused her three times of a crime for which she had been acquitted and twice of crimes with which she had not been charged. This Court reversed in Grant v. State, 194 So.2d 612, 613 (Fla. 1967), because the prosecutor asked the jury: "Do you want to give this man less than first degree murder and the electric chair and have him get out and come back and kill somebody else, maybe you?" (Footnote omitted). In Pait this Court reversed because the prosecutor incorrectly stated the law and also stated that he and his staff had decided that death was the proper penalty. In Nowitzke v. State, 574 So.2d 1346 (Fla. 1990), Garron v. State, 528 So.2d 353 (Fla. 1988), Riley v. State, 560 So.2d 279 (Fla. 3d DCA 1990), and Russo v. State, 505 So.2d 611 (Fla. 3d DCA 1987), the appellate courts reversed because the state ridiculed or questioned the validity of the appellants' defense of insanity and self-defense.

Here, on the other hand, the prosecutor did not attack or ridicule the principles of mitigation. She merely argued that Lukehart's evidence did not ameliorate the enormity of his guilt. She also did nothing more than what this Court said she should do

in Robles, Davis, Bonifay, Hill, and Pait. Rather than being fundamental error, the complained-about parts of the prosecutor's argument were fair comment on the evidence. Even if this Court were to consider some comments unwarranted, Lukehart has failed to show that they were other than harmless. Therefore, this claim should be denied, and Lukehart's death sentence should be affirmed.

Issue XII

WHETHER THE COURT ERRED REGARDING THE SENTENCE FOR THE NONCAPITAL CONVICTION AND THE RESTITUTION ORDERS.

Lukehart argues that he should be sentenced within the guidelines for his aggravated child abuse conviction and that the court should not have entered restitution orders against him. He has not, however, demonstrated reversible error.

The trial court sentenced Lukehart to fifteen years' imprisonment for the aggravated child abuse conviction. (III 415). A guidelines scoresheet is included in the record at III 423-24, the first page of which carries the handwritten notation: "Capital Murder - Guidelines do not apply." (III 423). The form was not filled out.[17]

A first-degree murder conviction cannot be scored under the guidelines and is a valid reason for imposing a departure sentence. Bedford v. State, 589 So.2d 245 (Fla. 1991), cert. denied, 503 U.S. 1009 (1992). Thus, it is apparent that the trial court gave a valid reason for departing from whatever sentence the guidelines may have recommended. If the noncapital sentence is remanded, it

[17] Although Lukehart argues that he should be resentenced within the guidelines, he has not shown that the 15-year sentence is a departure sentence.

should be for the trial court to fill out the rest of the guidelines scoresheet, not to reduce that sentence.

The trial court imposed sentence on Lukehart on April 4, 1997. (III 411; XII 1936). The court also entered two restitution orders on that date. (III 425-28). Lukehart now claims that the trial court erred by not determining his ability to pay before entering the restitution orders. There is no merit to this claim.

The 1995 Florida Legislature amended paragraph (6) of section 775.089, Florida Statutes, to read as follows:

> (6)(a) The court, in determining whether to order restitution and the amount of such restitution, shall consider the amount of the loss sustained by any victim as a result of the offense.
>
> (b) The criminal court, at the time of enforcement of the restitution order, shall consider the financial resources of the defendant, the present and potential future financial needs and earning ability of the defendant and his dependents, and such other factors which it deems appropriate.

Ch. 95-160, §1, Laws of Fla. (effective May 8, 1995). Thus, Lukehart's trial court was not required to consider his ability to pay when it entered the restitution orders and will not need to do so until an attempt is made to enforce those orders. Owens v. State, 679 So.2d 44 (Fla. 1st DCA 1996). Additionally, the failure to object to restitution in the trial court bars raising the issue

on appeal. Cole v. State, 701 So.2d 845 (Fla. 1997), cert. denied, ___ S.Ct. ___ (March 20, 1998); Spivey v. State, 531 So.2d 965 (Fla. 1988); Loring v. State, 674 So.2d 165 (Fla. 4th DCA 1996); Blair v. State, 667 So.2d 834 (Fla. 4th DCA 1996); Brooks v. State, 605 So.2d 522 (Fla. 4th DCA 1992); Butts v. State, 575 So.2d 1379 (Fla. 5th DCA 1991).[18] The reference to the "Victim Compensation Trust Fund" on the restitution orders is obviously to the Crimes Compensation Trust Fund. §§ 775.0835, 960.01-.03, 960.17, 960.20, 960.21, Fla. Stats. (1995).

CONCLUSION

For the foregoing reasons the State of Florida asks this Court to affirm Lukehart's convictions of first-degree murder and aggravated child abuse and his death sentence.

Respectfully submitted,

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BARBARA J. YATES

[18] The cases Lukehart relies on predate the 1995 amendment to subsection 775.089(b) and also are factually distinguishable. In Shipley v. State, 528 So.2d 902 (Fla. 1998), the issue was community service, not restitution. In Sumter v. State, 570 So.2d 1039 (Fla. 1st DCA 1990), the issue was postconviction costs, not restitution. In Gilmore v. State, 668 So.2d 1092 (Fla. 1st DCA 1996), the state conceded error; it does not do likewise here.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Chet Kaufman, Office of the Public Defender, Leon County Courthouse, Fourth Floor North, 301 South Monroe Street, Tallahassee, FL 32301, this 22nd day of July, 1998.

_____
BARBARA J. YATES
Assistant Attorney General