IN THE SUPREME COURT OF FLORIDA

MICHAEL DUANE ZACK,

Appellant,

vs. Case No. 92,089

STATE OF FLORIDA,

Appellee.
_____/

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

ANSWER BRIEF OF APPELLEE

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

SARA D. BAGGETT
ASSISTANT ATTORNEY GENERAL
FLA. BAR NO. 0857238
1655 PALM BEACH LAKES BLVD.
SUITE 300
WEST PALM BEACH, FL. 33409
(561) 688-7759

ATTORNEY FOR APPELLEE

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PRELIMINARY STATEMENT

Appellant, MICHAEL DUANE ZACK, was the defendant in the trial court below and will be referred to herein as "Appellant." Appellee, the State of Florida, was the petitioner in the trial court below and will be referred to herein as "the State." Reference to the pleadings will be by the symbol "R," reference to the transcripts will be by the symbol "T," and reference to the supplemental pleadings and transcripts will be by the symbols "SR[vol.]" or “ST[vol.]” followed by the appropriate page number(s).

STATEMENT OF THE CASE AND FACTS

Given Zack's outrageously slanted and incomplete statement of the facts, the State will make the following additions and/or clarifications:

1. Edith Pope testified that Zack came to the bar in Tallahassee where she worked every day or every other day over a two month period. Zack would "nurse" his beer and do odd jobs for free beer because he did not have money to buy any. She never saw him intoxicated. Zack told her that his sister murdered his mother in his presence, and she felt sorry for him. When Zack's girlfriend called the bar and told Zack to come get his belongings out of her house, she loaned him her car, which he never returned. (T III 553-64).

2. From Tallahassee, Zack drove to Youngstown, Florida, just north of Panama City. Bobby Chandler testified that he met Zack at a bar in town and saw him there every day for about three weeks. Zack did not drink much, and Chandler never saw him intoxicated. (T III 575-77, 579-579). Zack ingratiated himself to Chandler and around June 8th or 9th Chandler invited Zack to work with him doing carpentry work. When Chandler learned that Zack was living out of his car (a red Honda with a Leon County plate), he offered to let Zack stay at his home. Zack stayed with Chandler Saturday, Sunday, and Monday night. When Chandler awoke Tuesday morning, Zack was gone, as were Chandler's .44 Magnum handgun, 306 rifle, and $42 in cash. Chandler never saw Zack again. (T III 579-82, 593). Later

that same morning, Zack drove Pope's stolen car to Niceville where he pawned Chandler's guns for $225. (T IV 605-09).

3. Later that same evening, Zack was at a bar on Okaloosa Island when Laurie Russillo approached him and started talking to him. (T III 491; V 825). Russillo left with Zack in Pope's stolen Honda ostensibly to do cocaine. While they were driving, Russillo became upset with Zack and demanded that he stop the car. When she opened the door to jump out, he turned off onto a side road and slammed on the brakes. She started to struggle, so he hit her and slammed her head into the passenger door, then he got out of the car and went around to her side. He pulled her out of the car and slammed her head into the side of the car. He also kicked her several times. He eventually strangled her to death, then dragged her body off the side road and tried to cover her with sand. Zack claimed she tore her own clothes off before she lost consciousness. (T V 825-26, 865-881, 899). One of the crime scene technicians testified that Russillo's tube top was torn and hanging off her hip. Her spandex pants were pulled down around her right ankle. Her socks and shoes were still on. (T II 392-93). The serologist found sperm on a swab from Russillo's vagina, but he did not have enough to perform DNA testing. (T IV 687).

4. From there, Zack drove Pope's stolen Honda to Pensacola Beach, where the following day he met Ravonne Smith at Dirty Joe's Bar. Debra Forsyth saw Zack at Dirty Joe's between 2:00 and 3:00 p.m. (T I 203-05). Other patrons noticed Zack talking to Smith throughout the afternoon and into the evening. None of them

thought Zack was intoxicated. (T II 212-18, 225-28, 235-39). Once again, Zack told Smith that he witnessed his sister ax-murder his mother. (T VI 1088). Smith apparently liked Zack and left with him and Russ Williams to smoke marijuana around 7:30 p.m. The bartender who relieved Smith at 7:00 p.m. testified that she served Zack two beers before he left and that he did not appear intoxicated. (T I 216-17). Russ Williams testified that Zack had two or three beers between 5:30 and 7:30 p.m., when they left, and that Zack did not appear intoxicated. (T I 246-49). The three of them drove around the beach in Williams' car and smoked a marijuana cigarette that Zack supplied.

5. Although Zack told the police that Smith gave him half a hit of LSD that he though she got from Williams (T V 932), Williams testified that Zack had asked Williams about LSD in the bar, but Williams did not have any and did not get any for Zack. (T I 250-52). Smith's toxicology report indicated that there was no evidence of LSD in her blood. (T III 520-21).

6. Williams dropped Smith and Zack off at Dirty Joe's around 7:30 p.m. (T II 253). Patrons in Dirty Joe's saw Smith and Zack leave the bar for the last time around 8:00 or 8:15 p.m. (T II 225). Zack testified that he drove Pope's Honda down the street and abandoned it. He did not remember taking the license plate off of it. (T VI 1092). He also did not intend to return to it because Pope had reported it stolen. (T VI 1124, 1141). It was found several blocks from Dirty Joe's with its license plate missing. (T III 566-67, 570-73). The police found Russillo's

blood between the seats, on the passenger doorjam, and the passenger floorboard, and on the rear passenger wheel rim and tire. (T III 410-19; IV 675-76).

7. After abandoning the Honda, Smith and Zack drove around in Smith's car, smoking marijuana and engaging in "sexual conduct." After an hour to an hour and a half, they went to Smith's house. (T V 921; VI 1094-95).

8. Danny Schaffer testified that he was Smith's live-in boyfriend and that he returned home from a pool tournament around 10:45 that evening to find Smith dead in an unused second bedroom. He found the living room a "wreck." (T II 269-76).

9. According to Zack, when he and Smith arrived at her house, they immediately engaged in consensual sex. They were both nude, but he did not notice if she had her shoes on. Her bra may have been torn during their rough foreplay. After sex, while he was walking to the bathroom, Smith followed him into the hallway, putting on her shirt, and made a disparaging comment about his mother. It made him angry, so he hit her, and she fought back. According to Zack, their struggle progressed into the living room, then into the master bedroom, where she must have bled on the bed, and then into the second bedroom. Thinking that she was going to retrieve a weapon from this room, Zack obtained a knife from the kitchen. Smith fell on the knife twice as she charged him. He did not remember beating her head on the floor, nor did he remember how many times he stabbed her. He then washed his hands. He stole her

car, TV and VCR in order to get back to Kentucky, but he did not know why he went back to Panama City. (T V 929-66).

10. The State's blood spatter expert testified that she found bloodstains on the front door, spattered and dropped blood on the living room floor, castoff spatter on the wall above the loveseat, and dropped blood on the loveseat itself. (T II 362). From the living room, a trail of blood then led down the hall to the master bedroom, where the police found blood on the bedroom floor, on the comforter near the pillow, on the bed rail, and on the dresser. (T II 363; VII 1249-50). The police also found the victim's panties and bra on the floor near the bed. Both of the bra's straps had been broken, while the bra was still hooked in the back. The victim's shirt and shorts were found in a drawer of the dresser. The shirt had blood near the collar and a button missing. The missing button was found on the bedroom floor. (T II 317-22, 329, 363). Ravonne Smith was found in a vacant second bedroom, lying on the floor with only socks and tennis shoes on. (T II 317). Blood was found on the floor and walls of this room. (T II 363-64). The victim was lying in a pool of blood that came from massive injuries to her head and face. (T II 371-73). Based on her analysis and interpretation of the blood spatter evidence, Ms. Johnson opined that "the bloodshed began in the living room area. The injured person traveled down the hallway, was into -- traveled into the east bedroom and then into the north bedroom. . . . After traveling into the north bedroom, that's when the extreme forceful injuries occurred while the victim was on the floor." (T II 373).

11. The police found an oyster knife, believed to have been the murder weapon, in a kitchen drawer. (T II 323).

12. With Michael Willett's TV and VCR, Zack drove Smith's black Plymouth Conquest back to Panama City and tried to pawn the TV and VCR, but fled when the owner indicated he needed to call the police to check on something. (T IV 617-20, 628-41, 644-48).

13. Zack abandoned Smith's black Conquest behind a restaurant a mile from the pawn shop. (T IV 649-52, 653-54). In the Conquest, the police found Smith's purse, the license plate to Pope's Honda, a black T-shirt and some shorts with Russillo's blood on them, a white T-shirt with Smith's blood on it, and two socks with Zack's blood on them. (T III 431-37; IV 682-83, 697-98). Zack's fingerprints were also found on various items in the car. (T IV 709-14).

14. After abandoning Smith's car, Zack walked to George Freund's home, where he surveilled the home from a storage building on the property. When he was assured that no one was home or coming home, he broke into the main house, ate the owner's food, changed into the owner's clothes, and stashed his bloody clothes in a bag behind the couch. (T IV 740-43, 765-67, 796-97; V 804-09, 956). The clothes contained the blood of both Laurie Russillo and Ravonne Smith. (T IV 677-79).

15. Zack was apprehended walking down the road near Freund's home on the morning of June 16, 1996. (T IV 747-50). On the shoes he was wearing, the police found the blood of both Russillo and Smith. (T IV 676-77).

16. In Zack's defense, his maternal grandmother testified that Zack's mother married at 17, then divorced and married Zack's father. They divorced when Zack was about one year old. Zack's mother then married Anthony Midkiff when Zack was about two years old. His mother died in March 1981. After her death, Zack spent the night with her, and she awoke to Zack screaming in the night. In the first dream, Zack screamed, "[D]on't do it, don't do it." In the second dream, Zack was straddling the bed, holding his penis, and screaming, "Tony, please don't do that to me. What in the hell have I done? Goddamn it, it hurts. Don't do it no more." He was sweating profusely and looked like "a mad dog." Zack never would say what his dream was about. She also never saw or heard that Midkiff was abusing Zack. (T VI 1006-13).

17. Michael Zeck, after whom Zack was named, testified that he met Zack's mother in a bar in Kentucky. She was pregnant with Zack and also had a daughter. He felt sorry for her, so he married her. During her pregnancy, they went out on the weekends, and she would drink six to ten beers. She also went out with friends during the week and drink. When he asked her to stop going out and drinking, she refused, so he divorced her. (T VI 1029-41).

18. Theresa McEwing, Zack's step-sister, testified that Tony Midkiff got mad at Zack when Zack wet the bed. Midkiff punished Zack by burning Zack's "privates" with a spoon that Midkiff heated on the stove, by fashioning an electric blanket so that it would electrocute Zack if Zack wet the bed, and by pulling hard on Zack's penis. Midkiff also threw Zack against the wall and once tried to

drown Zack in the pool. She slept with Zack to keep Midkiff from abusing Zack. During those nights, Zack had nightmares and yelled, "Tony, please stop." At some point, McEwing started "seeing" a man in a black cape and killed her mother. She was declared insane and spent three or four years in a mental hospital. Midkiff had raped her and told her not to tell or he would kill the family. (T VI 1055-69).

19. Zack testified on his own behalf and related the same basic story that he had related to the police regarding Smith's murder. (T VI 1086-95). He also detailed his social history and abuse by his stepfather. (T VI 1097-1118).

20. Zack also presented the testimony of Dr. Michael Maher, a psychiatrist, who detailed the four levels of alcohol intoxication, the effects of marijuana and LSD, peoples' ability to suppress the effects of alcohol, the effects of alcohol on a fetus, the symptoms of Fetal Alcohol Syndrome, and the potential causes of Posttraumatic Stress Disorder. He then opined based on hypothetical information that a person's ability to plan the death of another would be impaired if that person had Fetal Alcohol Syndrome and PTSD and consumed alcohol and drugs. Under those circumstances, that person would not have a normal ability to control impulses. (T VI 1173-1206). Because he had not evaluated Zack personally, he could not opine that Zack suffered from either FAS or PTSD. (T VI 1220, 1234).

21. In rebuttal, the State presented the testimony of Dr. Harry McClaren, a forensic psychologist, who testified that he

could not diagnose Zack with FAS solely from reviewing records. He also testified that diagnosing FAS is very inexact at present, especially with an adult of average intelligence, who has no gross physical abnormalities. Dr. McClaren was also not able to diagnose Zack with PTSD solely from the records. While his mother's death might have caused PTSD, McClaren would need to evaluate Zack, get an accurate history, interview other historians of Zack's life, and administer psychometric testing. (T VII 1251-1308).

22. Following the jury's verdicts of guilty on September 15, 1997, to all counts as charged (T VIII 1521-27), the penalty phase began on October 14, 1996. The State presented the testimony of Donald Steeley, a senior probation officer from Oklahoma, who testified that Zack was an absconder from probation with an active warrant for his arrest. (T IX 1619-23). The State also presented the testimony of Ravonne Smith's mother and two brothers as victim impact witnesses. (T IX 1623-29, 1629-32, 1632-35).

23. On his own behalf, Zack presented the testimony of his maternal grandmother again, who identified multiple photographs of Zack's family through the years. (T IX 1650-95).

24. Michael Zeck also testified again as to his marriage to and divorce from Zack's mother, and the mother's ingestion of alcohol during her pregnancy with Zack. (T IX 1695-1717).

25. Richard Enfield, a correctional officer, testified that Zack volunteered while in jail awaiting trial to speak with juvenile delinquents about life in jail. He stopped using Zack in

this program, however, after Zack attacked a jail guard. (T IX 1719-23).

26. Zack's maternal aunt, Ione Tanner, related alleged instances of abuse against Zack by Anthony Midkiff, but admitted that she did not get medical attention for Zack or report Midkiff's abuse. She also admitted that defense counsel told her that the experts would rely on allegations of child abuse in formulating their opinions. (T IX 1724-53).

27. Phyllis Anglemyer testified that she and her husband were best friends with Zack's mother while her husband and Anthony Midkiff were in the military together. Phyllis also related instances of abuse committed in her presence by Midkiff, but Phyllis' husband, who saw Midkiff interact with Zack on a daily basis for five years, reported seeing only one instance of abuse. (T IX 1753-63, 1763-68).

28. Ziva Knight, Midkiff's daughter and Zack's half-sister, also related extensive abuse by Midkiff, then related for the first time in her life, after hypnosis, that she was hiding under the bed when Midkiff, not Theresa, killed her mom, despite the fact that Theresa was convicted and sent to a mental hospital for committing the murder. (T IX 1768-95).

29. Next Theresa McEwing, Zack's other half-sister, whom everyone had previously believed killed Zack's mother, but who could not remember anything about it, related specific instances of abuse by Midkiff, but admitted that she had spent an unknown number of years in a mental institution. (T X 1797-1803).

30. Thereafter, Zack presented the testimony of Dr. William Spence, a forensic psychologist, who evaluated Zack in Tallahassee after Zack had been arrested for grand theft auto. Dr. Spence indicated that he had diagnosed Zack with PTSD. However, he admitted that Zack's social history was related solely by Zack, and that Zack originally told him that he witnessed his sister ax murder his mother. (T X 1822-41).

31. Dr. James Larson, Dr. Barry Crown, and Dr. Michael Maher, after evaluating Zack and investigating his social history, all diagnosed Zack with PTSD and FAS. They also opined that Zack committed the murder under an extreme mental or emotional disturbance and that Zack's ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. They all admitted, however, that they did not speak to anyone who had contact with Zack around the time of the murder. They did not believe that such investigation was necessary. (T X 1847-84, 1884-1926, 1927-67).

32. In rebuttal, the State presented the testimony of Dr. Eric Mings, a neuropsychologist, who testified that Zack had a full scale I.Q. of 86, which is in the "low average" range. Zack is stronger in nonverbal problem solving and intellectual abilities than verbal abilities. Zack's frontal lobe abstract reasoning was normal. Dr. Mings believed that there were too many variable to diagnose Zack with FAS and that neuropsychological testing cannot be used by itself to diagnose PTSD. He did not see any evidence of impulsivity. (T XI 1972-2014).

33. Dr. McClaren testified that he administered the MMPI, but the malingering scale was outside the normal limits, so the test was not very useful. He believed that Zack was dependent on alcohol and marijuana, and could possibly be diagnosed with PTSD. In his opinion, Zack has a personality disorder with prominent antisocial features. He too believed that it was difficult to diagnose Zack with FAS, because Zack's unstable home environment could have caused cognitive deficits. He found no deficits in Zack's impulse control. After interviewing numerous lay witnesses and police officers who had contact with Zack around the time of the murder, Dr. McClaren opined that neither of the statutory mental mitigators applied, because they described Zack as nonviolent, friendly, joking, and sociable. He also believed that Zack's actions around the time of the murder were more planned than spontaneous and showed purposeful behavior. (T XI 2015-47).

34. Finally, Candice Fletcher testified that she and Zack had a three-year, live-in relationship between 1988 and 1991, during which they had a child together. Ms. Fletcher testified that Zack was living with Tony Midkiff in Oklahoma when she met him. After Zack moved in with her, Zack would visit Midkiff and socialize with him. She described Zack's relationship with Midkiff as "nothing out of the ordinary." It was one she would expect between a stepfather and his son. However, Midkiff cut off their relationship because Zack stole from him. Thereafter, Fletcher testified that Zack had periodic contact with the mental health center in Oklahoma when he was about to go to jail. There came a

point in time, however, when the mental health center refused to treat Zack because Zack would not conform to any treatment program. Zack did not seek mental health treatment unless he was facing jail time because "he never wanted help." (T XI 2048-54).

35. The jury recommended death by a vote of 11 to 1.

36. In sentencing Zack to death, the trial court gave "great weight" to the following aggravating factors: "under sentence of imprisonment," "felony murder," "avoid arrest," "pecuniary gain," HAC, and CCP. It gave "very little weight" to the following mitigation: "extreme mental or emotional disturbance," "extreme duress or substantial domination," "substantial impairment," remorse, cooperation with the police, good conduct while in jail, and abusive childhood.

SUMMARY OF ARGUMENT

Issue I - The trial court properly admitted the collateral crime evidence of the Chandler theft and Russillo murder as inextricably intertwined evidence or under the Williams rule to prove motive, intent, plan, or absence of mistake. Even were it introduced in error, it was harmless beyond a reasonable doubt, given the quantity and quality of evidence upon which the jury could have relied to find Zack guilty of first-degree murder under either a premeditation or felony murder theory.

Issue II - When taken in a light most favorable to the State, the evidence and reasonable inferences therefrom provided competent, substantial evidence upon which the jury could find Zack guilty of sexual battery to the exclusion of every reasonably hypothesis of innocence. Thus, the trial court properly denied Zack's motion for judgment of acquittal on this count.

Issue III - When taken in a light most favorable to the State, the evidence and reasonable inferences therefrom provided competent, substantial evidence upon which the jury could find Zack guilty of robbery to the exclusion of every reasonably hypothesis of innocence. Thus, the trial court properly denied Zack's motion for judgment of acquittal on this count.

Issue IV - The trial court properly instructed the jury on the offense of burglary as an underlying offense to felony murder, where the evidence showed that Ravonne Smith withdrew her consent for Zack to remain in her home when he began beating, raping, and stabbing her. Even if it were error to give the burglary

instruction, such error was harmless beyond a reasonable doubt, given that the jury could have found Zack guilty of premeditated murder or felony murder based on the underlying offenses of sexual battery or robbery.

Issue V - While framed as an attack on the quality of the trial court's written order, Zack's argument actually challenges the weight given to Zack's mitigation, almost all of which the trial court found to exist, but gave "very little weight." Since it cannot be said that no reasonable person would give Zack's evidence "very little weight" in the context of all of the evidence, his sentence of death should be affirmed.

Issue VI - The record in this case supports the trial court's finding of the "avoid arrest" aggravating factor. Ravonne Smith knew that Zack had stolen and abandoned a car. Moreover, Zack knew that he had just raped and killed Laurie Russillo, and that the stolen car could link him to those crimes. Finally, Zack killed Smith to eliminate her as a witness to his sexual battery and robbery of her. Even were this aggravator found in error, however, Zack's sentence should nevertheless be affirmed, since there remain five other weighty, valid aggravators and unavailing mitigation.

Issue VII - The record in this case supports the trial court's finding of the "cold, calculated, and premeditated" aggravating factor. Zack had a general plan to ingratiate himself to others by telling them sad stories of his childhood, then robbing, raping, and/or killing them. In the seven hours preceding Smith's murder, Zack calmly and coolly reflected on his plan to rape, rob, and kill

Smith, knowing that he had just raped and killed Laurie Russillo less than 24 hours earlier. Not only did he premeditate Smith's murder, he contemplated her death to a heightened level and executed his plan as soon as they walked in the door to her home. Given his actions and demeanor preceding and following the murder, the trial court was justified in finding that Zack's allegations of mental illness did nothing to impair his ability to commit this murder in a cold, calculated, and premeditated manner. Even were this aggravator found in error, however, Zack's sentence should nevertheless be affirmed, since there remain five other weighty, valid aggravators and unavailing mitigation.

Issue VIII - The State's comments regarding the victim impact evidence were not improper. Nor did the trial court improperly use the victim impact testimony as nonstatutory aggravation. Rather, it used the mother's testimony to explain the degree of pain and suffering Zack inflicted on the victim. To the extent the State's comments were improper or the trial court's use of such evidence was improper, any error was harmless beyond a reasonable doubt.

Issue IX - Candice Fletcher's testimony was properly admitted to rebut Zack's allegations that his stepfather tortured him throughout his childhood and that Zack consistently sought psychological help, but was prevented from doing so.

Issue X - The trial court properly rejected Zack's special requested instruction on sympathy in the penalty phase.

Issue XI - Zack failed to preserve his argument that the recent amendment to the "under sentence of imprisonment" aggravator

was applied retroactively to him in violation of the ex post facto clause. Regardless, this amendment, which added probation as a qualifying form of imprisonment, was merely a judicial refinement and not a substantive change in the law. Even were it error, however, to apply this aggravating factor to Zack, his sentence must nevertheless be affirmed, since there remain five other weighty, valid aggravators and unavailing mitigation.

Issue XII - The trial court properly exercised its discretion in excluding a photograph offered by Zack during the penalty phase, where the witness was going to testify to the subject of the photograph. Even were it error to preclude this evidence, however, such error was harmless beyond a reasonable doubt.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING EVIDENCE OF OTHER CRIMES THAT WERE INEXTRICABLY INTERTWINED WITH THE CHARGED OFFENSES AND THAT WERE RELEVANT TO PROVE MOTIVE, INTENT, PLAN, OR ABSENCE OF MISTAKE OR WERE RELEVANT TO DISPROVE ZACK'S DEFENSE OF INTOXICATION (Restated).

The State charged Zack in this case with the first-degree murder, sexual battery, and robbery of Ravonne Smith. (R I 1-3). In his defense, Zack claimed that his level of intoxication at the time, coupled with the symptoms of his post traumatic stress disorder and his fetal alcohol syndrome, negated the intent elements of the murder and robbery charges. Thus, at most, he was guilty of second-degree murder or manslaughter. He altogether denied committing a sexual battery on the victim, claiming that they engaged in consensual intercourse prior to the argument that resulted in her death. Thus, Zack claimed that he was not guilty of first-degree felony murder. (T I 181-97; VIII 1418-44).

Knowing pretrial the general theory of Zack's defense, the State filed nine separate notices of its intent to rely on other crimes, wrongs, or acts to prove the intent/premeditation elements and to disprove Zack's voluntary intoxication/fit-of-rage defense. (R II 230-47, 271-72). Specifically, it sought to introduce evidence that Zack ingratiated himself to Edith Pope, a bartender in Tallahassee, and then stole her Honda automobile on June 5, 1996; that he drove the stolen Honda to Panama City, ingratiated himself to Bobby Chandler, then stole two firearms and money from

Chandler on June 12, 1996; that he pawned Chandler's guns at a pawn shop in Niceville that morning; that he ingratiated himself to Laurie Russillo at a local bar, then murdered her in or near Pope's Honda in Okaloosa County the evening of June 12, 1996; that he stole a TV, VCR and automobile from the victim in this case, Ravonne Smith, on June 13, 1996; that he drove Smith's car to Panama City and attempted to pawn the TV and VCR on June 15, 1996; and that he burglarized the home of George Freund in Panama City on June 16, 1996, where he secreted his clothes that contained the blood of both murdered women. (R II 276-302; III 357-58). Zack objected to such evidence and filed a motion in limine, claiming that it was inherently prejudicial and far more prejudicial than probative. (R II 273-75). The State responded to Zack's motion with a memorandum of law. (R II 276-302). After a hearing on Zack's motion in limine (R III 330-39, 345-47), the trial court issued a five-page order denying the motion and allowing the evidence. (R III 357-61). In pertinent part, the trial court made the following findings:

> The basic facts are not in dispute with the exception that Defendant contends that there is a difference between the two homicide victims warranting exclusion regarding evidence of the Okaloosa County homicide. This Court is of the opinion that while some distinction between the two victims has been proffered in the Defendant's memorandum, such distinctions are not material. The crimes and acts enumerated above all occurred between June 5, 1996, and June 13, 1996. All of the crimes and acts of the Defendant constitute relevant evidence because the same are inextricably intertwined in the case at hand and are material to proving matters in

controversy. All of the above enumerated crimes and acts of the Defendant constitute relevant evidence which has a probative value in establishing material issues in this cause. Williams v. State, 110 So. 2d 654 (Fla. Sup. Ct. 1959). The said crimes and acts of the Defendant are relevant in this cause because the same casts light on the character of the crime for which the accused is being prosecuted. Ruffin v. State, 397 So. 2d 277 (Fla. Sup. Ct. 1981). Also, the aforesaid crimes and acts are relevant to establish a pattern of conduct by the Defendant in establishing a motive by the Defendant, to-wit: to obtain funds to continue his lifestyle. Wilson v. State, 330 So. 2d 457 (Fla. Sup. Ct. 1976); Smith v. State, 641 So. 2d 1319 (Fla. Sup. Ct. 1994).

As alluded to above, the similarities in the two homicides are pervasive and the dissimilarities attempted to be established by the Defendant in his brief are insubstantial. The Florida Supreme Court has never required the collateral crimes or acts to be absolutely identical to the crime charged in this case. Gore v. State, 599 So. 2d 978 (Fla. Sup. Ct. 1992).

As pointed out in the authorities submitted by the State, all evidence of crimes, including the homicide in Okaloosa County, prejudices the Defendant's case and the real question is whether that prejudice is so unfair that it should be deemed unlawful. This Court cannot so conclude insomuch as relevance clearly outweighs prejudice and there is no doubt in this Court's mind that the crimes and acts are relevant in the prosecution of this cause. The similarity in the two homicides goes to the issue of establishing premeditation and motive - robbery and forcible rape. Evidence of the two homicides is relevant, not for the showing of bad character or propensity, but, also for refuting the Defendant's defense in that in both homicides the Defendant has admitted to the same and is making the defense of intoxication and the existence of a mental condition referred to as post-traumatic syndrome disorder.

In substance, all of the enumerated crimes and acts of the Defendant are clearly an inseparable part of the context surrounding the crimes and the instant homicide before this Court and the State should be allowed to present to the jury the complete picture of the criminal episode that lasted about one week that includes evidence of other crimes and acts of the Defendant. Foster v. State, 679 So. 2d 747 (Fla. Sup. Ct. 1996).

On June 5, 1996, the Defendant stole a red 1996 Honda vehicle in Tallahassee. This vehicle was used to transport the Defendant to Panama City, Florida, and then to Fort Walton Beach, Florida, and to Pensacola, Florida. Ultimately the vehicle was found and it had blood, hair, and personal property identified as having come from the Okaloosa County victim. Less than twenty-four (24) hours after the Okaloosa County homicide, the Defendant goes to a bar on Pensacola Beach in the red Honda and in that bar he encounters the second victim. Also, the red Honda is recovered a short distance away from the bar during the course of the Escambia County homicide investigation. Prior to leaving the Escambia County victim's residence, the victim took property which he ultimately tried to pawn in Panama City. Following the Escambia County homicide the Defendant took the vehicle of the victim and that vehicle was recovered in Panama City when the Defendant was arrested after having attempted to pawn the Escambia County victim's television and VCR. The Panama City burglary was being investigated by authorities in Panama City and this investigation resulted in the apprehension of the Defendant.

Evidence of the burglaries, attempted pawning and pawning the burglarized property appears to support the State's theory that these crimes were committed for the purpose of obtaining goods or funds for the Defendant to utilize to continue his lifestyle. The theft of the Tallahassee vehicle is relevant to establish a context out of which the Defendant's conduct arose and ultimately culminated in the two murders. All of the said crimes and acts should be admitted just

> as other evidence which is part of the so-called res gestae and it appears necessary to admit the said evidence to adequately understand the reason for the homicide in question. Florida Evidence, Earhardt (2d Ed. 1984).

(R III 358-60).

In this appeal, Zack concedes the relevancy and admissibility of his theft of Pope's red Honda, his attempt to pawn Smith's TV and VCR in Panama City, and his burglary of Fruend's home in Panama City. He argues only that the stealing and pawning of Chandler's guns and money, and the rape/murder of Laurie Russillo were inadmissible. Specifically, he claims that the Chandler theft and Russillo rape/murder were not sufficiently similar to qualify as Williams rule evidence, that they did not prove intent or disprove voluntary intoxication, that they were not so inextricably intertwined that they could not have been separated out without confusion, that they were more prejudicial than probative, and that they became a feature of the trial. **Brief of Appellant** at 13-32.

The State maintains, as it argued below and as the trial court found, that the Chandler theft and Russillo rape/murder were properly admitted to put the charged offenses in context, to prove material issues in fact, and to disprove Zack's defense of voluntary intoxication. It also maintains that the evidence of the Chandler theft and Russillo rape/murder was not more prejudicial than probative, and that it did not become a feature of the trial.

A. Sections 90.402 and 90.403

Under sections 90.402 and 90.403, all relevant evidence is admissible unless its relevance is outweighed by its prejudicial effect. Here, Appellant engaged in a crime spree that culminated in the death of Ravonne Smith. His defense to this murder, sexual battery, and robbery, however, was one of voluntary intoxication. He argued that he suffered from post traumatic stress disorder and fetal alcohol syndrome, and that his ingestion of drugs and alcohol exacerbated these conditions so much so that he could not form the requisite intent for first-degree murder or robbery. Rather, he claimed that he had consensual sex with the victim, but when she made a disparaging remark about the death of his mother, he flew into a fit of rage and killed her.

By presenting evidence of his actions and demeanor over a nine-day period, the State sought to show that Ravonne Smith's murder was not a one-time, aberrational act of rage, but rather the culmination of deliberate, calculated, purposeful conduct. For example, Edith Pope testified that she was a bartender at Chad's Bar in Tallahassee in June 1996 when she met Zack through her daughter. She stated that Zack came into the bar every day or every other day, but would drink very little, "nursing" his beer over time. Zack ingratiated himself by telling Pope that his sister killed his mother with an ax in his presence. Pope felt sorry for him, so when Zack offered to do chores around the bar, she would give him free beer. She did not think he had very much money. (T III 555-58, 560-61). Then, on June 4, 1996, Zack's

girlfriend called the bar and told Zack that he had to move out of their place and that he should come get his belongings. Pope decided to loan Zack her red Honda Civic, so that he could move his things, but she never saw the car, or Zack, again. (T III 558-59).

From Tallahassee, Zack drove to Youngstown, Florida, just north of Panama City. Bobby Chandler testified that he met Zack at a bar in town and saw him there every day for about three weeks. Zack did not drink much, and Chandler never saw him intoxicated. (T III 575-77, 579-579). Zack ingratiated himself to Chandler and around June 8th or 9th Chandler invited Zack to work with him doing carpentry work. When Chandler learned that Zack was living out of his car (a red Honda with a Leon County plate), he offered to let Zack stay at his home. Zack stayed with Chandler Saturday, Sunday, and Monday night. When Chandler awoke Tuesday morning, Zack was gone, as were Chandler's .44 Magnum handgun, 306 rifle, and $42 in cash. Chandler never saw Zack again. (T III 579-82, 593). Later that same morning, Zack drove Pope's stolen car to Niceville where he pawned Chandler's guns for $225. (T IV 605-09).

Later that evening, Zack was at a bar on Okaloosa Island when Laurie Russillo approached him and started talking to him. (T III 491; V 825). Once again, Zack ingratiated himself to Russillo, who ended up leaving with Zack in Pope's stolen Honda ostensibly to do cocaine. While they were driving, Russillo became upset with Zack and demanded that he stop the car. When she opened the door to jump out, he turned off onto a side road and slammed on the brakes. She started to struggle, so he hit her and slammed her head into

the passenger door, then he got out of the car and went around to her side. He pulled her out of the car and slammed her head into the side of the car. He also kicked her several times. He eventually strangled her to death, then dragged her body off the side road and tried to cover her with sand. Zack claimed she tore her own clothes off before she lost consciousness.[1] (T V 825-26, 865-881, 899). The serologist found sperm on a swab from Russillo's vagina, but he did not have enough to perform DNA testing. (T IV 687).

From there, Zack drove Pope's stolen Honda to Pensacola Beach, where the following day he met Ravonne Smith at Dirty Joe's Bar. Debra Forsyth saw Zack at Dirty Joe's between 2:00 and 3:00 p.m. (T I 203-05). Other patrons noticed Zack talking to Smith throughout the afternoon and into the evening. (T II 212-18, 225-28, 235-39). Once again, Zack ingratiated himself to Smith, telling her that he witnessed his sister ax-murder his mother. Smith apparently liked Zack and left with him and Russ Williams to smoke marijuana around 7:30 p.m. The bartender who relieved Smith at 7:00 p.m. testified that she served Zack two beers before he left and that he did not appear intoxicated. (T I 216-17). Russ Williams testified that Zack had two or three beers between 5:30 and 7:30 p.m., when they left, and that Zack did not appear intoxicated. (T I 246-49). The three of them drove around the

[1] One of the crime scene technicians testified that Russillo's tube top was torn and hanging off her hip. Her spandex pants were pulled down around her right ankle. Her socks and shoes were still on. (T II 392-93).

beach in Williams' car and smoked a marijuana cigarette that Zack supplied. Zack had asked Williams about LSD in the bar, but Williams did not have any and did not get any for Zack. (T I 250-52).

Williams dropped Smith and Zack off at Dirty Joe's around 8:00 or 8:15 p.m., then Smith drove Zack to her house, where he savagely beat her, raped her, smashed her scull on the floor and stabbed her with an oyster knife he found in the kitchen. Thereafter, he washed his hands in the kitchen sink, along with the oyster knife, and put the knife back in the drawer where he found it. (T V 931-42). He then stole Michael Willett's TV and VCR, which Smith had been keeping for him, and drove off in Smith's car, a black Plymouth Conquest.[2] (T IV 617-20). Zack drove back to Panama City and tried to pawn the TV and VCR, but fled when the owner indicated he needed to call the police to check on something. (T IV 628-41, 644-48). Shortly thereafter, Zack abandoned Smith's black Conquest behind a restaurant a mile from the pawn shop. (T IV 649-52, 653-54). He then walked to George Freund's home, where he surveilled the home from a storage building on the property. When he was assured that no one was home or coming home, he broke into the main house, ate the owner's food, changed into the owner's clothes, and

[2] Pope's stolen red Honda was found the next morning abandoned two blocks from Dirty Joe's. Its license plate was later found in Smith's black Conquest in Panama City. (T III 435-37, 564-69, 569-73).

stashed his bloody clothes in a bag behind the couch.[3] Zack was apprehended walking down the road near Freund's home on the morning of June 16, 1996. (T IV 740-43, 747-50, 765-67; V 804-09).

In Griffin v. State, 639 So. 2d 966, 968 (Fla. 1994) (citations omitted), this Court distinguished between evidence admitted under section 90.404(2)(a) of the Florida Evidence Code--so-called Williams rule evidence--and evidence admitted to establish the entire context of the charged crime:

> "The Williams rule, on its face, is limited to "*[s]imilar fact evidence*." § 90.404(2)(a), Fla.Stat. (1991) (emphasis added). . . . [E]vidence of uncharged crimes which are inseparable from the crime charged, or evidence which is inextricably intertwined with the crime charged, is not Williams rule evidence. It is admissible under section 90.402 because "it is a relevant and inseparable part of the act which is in issue. . . . [I]t is necessary to admit the evidence to adequately describe the deed."

See also Pittman v. State, 646 So. 2d 167, 170 (Fla. 1994) ("[E]vidence of bad acts or crimes is admissible without regard to whether it is similar fact evidence if it is relevant to establish a material issue.").

As the State argued, and the trial court ruled, the circumstances surrounding Zack's nine-day crime spree, which included the Chandler theft and Russillo murder, were relevant and necessary to describe adequately the events surrounding the murder of Ravonne Smith. To admit only the facts that Zack stole Pope's

[3] The clothes contained the blood of both Laurie Russillo and Ravonne Smith. (T IV 677-79).

Honda Civic, that he stole Willett's TV and VCR, that he attempted to pawn the TV and VCR, and that he burglarized Freund's home would have painted an inaccurate and incomplete picture of the events surrounding her death. Zack's apprehension in Panama City resulted from a chain of events that were so interwoven that extraction of whole blocks of time and conduct would have distorted the events surrounding Smith's murder, rape, and robbery.

Zack was supporting his transient lifestyle by ingratiating himself to others and then stealing from them. The $225 he obtained from pawning Chandler's guns were his financial means to meet other people in other bars, so that he could either steal from them or rape them. While he stole nothing from Russillo, the evidence strongly suggested that he raped her.[4] After raping and murdering Russillo, Zack immediately sought his next victim, Ravonne Smith, in a bar on Pensacola Beach. Less than 24 hours after raping and killing Russillo, he raped and killed Smith. And to perpetuate his transient lifestyle, he stole a TV and VCR that

[4] Zack confessed that when he left the bar with Russillo she became very upset and demanded that he let her out of the car. She even tried to jump out while the car was moving. (T V 866). It is unlikely, however, as Zack contended, that she did so because she was angry that he had an insufficient quantity of cocaine to suit her. It is more likely that he began to assault her, given the amount and location of her blood in the car. Moreover, when she was found, Russillo's tube top was ripped and hanging off her hip, and her spandex pants were down around only her right ankle. (T II 392-93). It is equally unlikely, as Zack contended, that Russillo undressed herself prior to losing consciousness from Zack's savage beating. Finally, fresh sperm was found in Russillo's vagina. Although the police collected an insufficient quantity to run DNA testing, such a fact, combined with all of the other facts and circumstances, strongly suggests that Zack raped her, then killed her.

Smith was keeping for a friend. As a means of transportation, he also stole Smith's car. When apprehended in Panama City, the police found the blood of both victims on the clothes Zack hid behind Freund's couch and on a tennis shoe Zack was wearing. (T III 450-60; IV 676-81). The police also found Russillo's blood on items of clothing found in Smith's Conquest. (T IV 682-83). "[T]o try to totally separate the facts . . . would have been unwieldy and likely have led to confusion." Henry v. State, 649 So. 2d 1366, 1368 (Fla. 1994). Given the fact that the Chandler theft and Russillo rape/murder were inseparable from the Smith murder/rape/robbery and that their probative value was not outweighed by undue prejudice, the trial court did not abuse its discretion in admitting such evidence. Henry, 649 So. 2d at 1368; Griffin, 639 So. 2d at 969; Foster v. State, 679 So. 2d 747, 753 (Fla. 1996); Bryan v. State, 533 So. 2d 744, 747 (Fla. 1988).

B. Section 90.404(2)(a)

Alternatively, the trial court properly admitted evidence of the Chandler theft and Russillo rape/murder as traditional Williams rule evidence. "Similar fact evidence that reveals other crimes is relevant and 'admissible if it casts light upon the character of the act under investigation by showing motive, intent, absence of mistake, common scheme, identity or a system or general pattern of criminality' and should be admitted if 'relevant for any purpose save that of showing bad character or propensity.'" Schwab v. State, 636 So. 2d 3, 7 (Fla. 1994) (quoting Williams v. State, 110 So. 2d 654, 662 (Fla.), cert. denied, 361 U.S. 847 (1959)). Here,

the evidence was relevant to prove motive, intent, absence of mistake, and a common scheme. It was also relevant to rebut Zack's defense of voluntary intoxication and consent to the sexual battery. See Williams v. State, 621 So. 2d 413 (Fla. 1993) (holding that "similar fact evidence is admissible to rebut a defense of consent in a sexual battery case").

Zack took great pains to convince the trial court that the collateral crimes were too factually different from the charged crimes to be admissible as Williams rule evidence. (R II 273-75; T III 330-39). However, "[t]his Court has never required the collateral crime to be absolutely identical to the crime charged." Gore v. State, 599 So. 2d 978, 984 (Fla. 1992). As in Gore, "[t]he few dissimilarities here seem to be a result of differences in the opportunities with which [Zack] was presented, rather than differences in modus operandi." Id.

The Chandler theft and Russillo rape/murder, in combination with the Pope theft, the pawning of Smith's belongings, and the burglary of Freund's home, show a pattern of conduct. They show purposeful behavior. All of the people with whom Zack came into contact described him as a calm and sociable person, as opposed to a brain-damaged, hyper-alert, impulsive man-child that would explode when someone made a disparaging remark to him. Zack's actions preceding and following the rape/murder/robbery of Ravonne Smith not only proved that Zack premeditated the murder, but they also showed that he had the intent to commit a robbery and that he had sexual intercourse with Smith without her consent. In light of

Zack's defenses of intoxication and consent, the collateral crime evidence was properly admitted to rebut these defenses and to prove material elements of the charged crimes.

In Wuornos v. State, 644 So. 2d 1000, 1006-07 (Fla. 1994), the State introduced evidence of not one, but six prior murders, committed over a six-month period, "to rebut Wuornos' claims regarding her level of intent and whether she had acted in self-defense." In rejecting Wuornos' claim that the evidence was improperly admitted, this Court stated that "Wuornos' own testimony at trial portrayed her as the actual victim here. She claimed [the victim] viciously abused her and then engaged in actions suggesting he intended to kill her. This was the only eye-witness testimony of the actual murder and, within itself at least, was consistent. Had the jury believed this testimony, it might have concluded that Wuornos lacked premeditated intent and thus should be convicted of some lesser degree of homicide or acquitted." Id. at 1006.

As in Wuornos, Zack portrayed the victim as an antagonizer. When she disparaged his mother, he flew into a fit of rage. His hyper-sensitivity, of course, was caused by his voluntary intoxication, which in turn was exacerbated by his Fetal Alcohol Syndrome and his Posttraumatic Stress Disorder. Since he was the only living eye-witness to the murder, had the murder been presented in a vacuum, i.e., without the events of the preceding eight days, the jury could have believed his version of events and found him guilty of a lesser-included offense or acquitted him. The Chandler theft and Russillo murder, in combination with Zack's

other activities preceding and following the murder were properly admitted to rebut his version of events.

As for Zack's claim that the collateral evidence was unduly prejudicial and became a feature of the case, this Court made the following applicable comments in Wuornos:

> We also do not agree with Wuornos' contention that the nature of the similar crimes evidence was so disturbing that its relevance was outweighed by the potential for prejudice. All evidence of a crime, including that regarding the murder in question, "prejudices" the defense case. The real question is whether that prejudice is so unfair that it should be deemed unlawful. We cannot say that this was the case here. The nature of the various crimes was relevant in establishing a pattern of similarities among the homicides. This, in turn, was relevant to the State's theory of premeditation and to rebut Wuornos' claim that she was the one attacked first. Relevance clearly outweighs prejudice here; and the similar crimes evidence was fair within the requirements of the law.

Id. at 1007 (citation omitted).

In Zack's case, the State presented 30 witnesses in its case-in-chief, covering 773 pages of the transcript. Of those 30 witnesses, only six related exclusively to the Chandler theft or Russillo rape/murder, and their testimony covered only 150 or so pages. Five other witnesses testified in part to the Chandler theft or Russillo rape/murder, but such testimony covered only an additional 100-110 pages. Given the relevance of this evidence, and the proportionately little testimony that was presented, it cannot be said that it was unduly prejudicial or became a feature

of the case, such that Zack's right to a fair trial was violated. Cf. Wuornos; Foster, 679 So. 2d at 753; Schwab, 636 So. 2d at 7.

Were this Court to find, however, that the trial court abused its discretion in admitting evidence of the Chandler theft and Russillo rape/murder, such error was harmless beyond a reasonable doubt. The evidence upon which the jury could have relied to find Zack guilty includes the following: Zack frequented a bar in Tallahassee where he drank very little while ingratiating himself to the bartender with stories of his mother's death and his terrible life; Zack became such good friends with the bartender that she loaned him her car, which he never returned; several days later, Zack showed up at Dirty Joe's driving the stolen car, which he knew had been reported stolen; Zack struck up a conversation with Ravonne Smith at least as early as 2:00 p.m. on the day of the murder; several people noticed Zack talking to her and noticed that Zack did not seem intoxicated; during the rest of the afternoon, Zack conversed with Smith, and they played pinball and pool; Zack told her stories about his sister murdering his mother in his presence, about his terrible childhood, and about his recent theft of Pope's car; around 7:30 p.m., Zack left with Smith and Russ Williams in Williams' car to smoke a marijuana cigarette; around 8:00 p.m., Williams dropped Zack and Smith off at Dirty Joe's; shortly thereafter, Zack left with Smith, cleaned out the stolen Honda, and drove around with Smith for an hour to an hour and a half; they ended up at Smith's house, despite the fact that Smith's live-in boyfriend could come home at any time; from the blood

spatter evidence, Zack began assaulting Smith as soon as they walked in the door, breaking a beer bottle over her head; Zack then dragged, forced, or chased Smith into the master bedroom where he ripped her clothing off and sexually battered her while she bled on the bed; at some point, Smith escaped from or was taken from the master bedroom into a second bedroom where Zack pounded her head into the wood floor until her scull cracked; then, instead of leaving her there and taking her car and belongings, Zack went to the kitchen, retrieved an oyster knife, stabbed her four times in the heart, then went back into the kitchen to wash has hands and the knife, which he put back in the drawer; Zack stole her television, VCR, purse, and car and drove to Panama City where he attempted to pawn the TV and VCR in a very calm and cool manner before abandoning Smith's car; Zack then walked to Freund's home where he broke in, stole some food and clothing, and left his bloody clothes behind the couch before being apprehended in the neighborhood.

Even with Zack's evidence of voluntary intoxication, Fetal Alcohol Syndrome, and Posttraumatic Disorder, the above facts constitute substantial, competent evidence from which the jury could have inferred guilt of premeditated or felony murder beyond a reasonable doubt, absent the Chandler theft and Russillo rape/murder. Premeditation can be inferred from "the nature of the weapon used, the presence or absence of adequate provocation, previous difficulties between the parties, the manner in which the homicide was committed and the nature and manner of the wounds

inflicted." Sireci v. State, 399 So. 2d 964, 967 (Fla. 1981). Here, Zack conducted himself in a calm and sociable manner in Tallahassee and during the entire afternoon at Dirty Joe's bar. Running from the law and in need of another car and some money, Zack lured Smith to her home where he immediately attacked her. Evidence that Zack chased her from room to room, by itself, evidences sufficient premeditation. Beyond that, however, Zack incapacitated her in the second bedroom and, instead of leaving her there, he consciously retrieved a knife and finished her off.

As for his claim of voluntary intoxication, none of the witnesses at the bar, including the bartender and Russ Williams, described Zack as intoxicated. So beyond the few beers he had at Dirty Joe's during the six or more hours he was there, he shared a marijuana cigarette with Smith and Williams. All other claims Zack made that he was drunk and "tripping" from LSD were merely self-serving statements that the jury did not have to believe. Moreover, Zack's sole mental health expert did not diagnose Zack with Fetal Alcohol Syndrome or Posttraumatic Stress Disorder, because he had not evaluated Zack personally. Rather, based on hypothetical information, he opined that Zack probably fit the criteria for those disorders. Given the nature of this testimony and the lack of evidence of intoxication at the time of the crime, there is no reasonable possibility that the verdicts would have been different had the Chandler theft and Russillo rape/murder not been admitted. See State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986).

Therefore, this Court should affirm Zack's convictions for first-degree murder, sexual battery, and robbery.

ISSUE II

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL ON THE SEXUAL BATTERY CHARGE (Restated).

At the end of the State's case-in-chief, defense counsel made a motion for judgment of acquittal as to all of the charges against him, including the charge of sexual battery with a deadly weapon or physical force. (T V 976-77). Although the trial court was somewhat receptive to defense counsel's argument regarding the felony murder theory of prosecution based on the underlying charges of robbery, sexual battery, and burglary, it took the motion under advisement. (T V 977-79). It also took the motion under advisement when defense counsel renewed it without argument at the end of the defense case. (T VII 1247-48).

Following verdicts of guilty as charged on all counts, including the sexual battery count, defense counsel reminded the court of his pending motions for judgment of acquittal on this count. (R III 428). The trial court denied the motions without further discussion or explanation. (R III 428). In this appeal, Zack claims that the trial court abused its discretion in denying his motions for judgment of acquittal. **Initial brief** at 32-37. For the following reasons, the State disagrees.

According to this Court, "a motion for judgment of acquittal should not be granted unless there is no view of the evidence which the jury might take favorable to the opposite party that can be sustained under the law." Davis v. State, 703 So. 2d 1055, 1059 (Fla. 1997). Here, the only issue in dispute was whether Ravonne Smith consented to sexual intercourse with Zack. Where the State relied on circumstantial evidence to support its argument that the sexual contact was nonconsensual, it was required to present evidence consistent with Zack's guilt and inconsistent with any reasonable hypothesis of innocence. Id. "If a case is to proceed to trial where the jury can determine whether the evidence presented is sufficient to exclude every reasonable hypothesis of innocence beyond a reasonable doubt, the trial judge must first determine there is competent evidence from which the jury could infer guilt to the exclusion of all other inferences. . . . To meet its threshold burden, the State must introduce competent evidence which is inconsistent with the defendant's theory of events." Barwick v. State, 660 So. 2d 685, 694-95 (Fla. 1995). However, in moving for judgment of acquittal, Zack "admitted the facts in evidence as well as every conclusion favorable to the state that the jury might fairly and reasonably infer from the evidence. If there is room for a difference of opinion between reasonable people as to the proof or facts from which an ultimate fact is to be established, or where there is room for such differences on the inferences to be drawn from conceded facts, the

court should submit the case to the jury." Taylor v. State, 583 So. 2d 323, 328 (Fla. 1991).

Taken in the light most favorable to the State, the evidence and reasonable inferences therefrom showed that the violent altercation began in the living room and progressed to the two bedrooms, contrary to Zack's version of events. Danny Schaffer, the victim's live-in boyfriend, described the living room as "a wreck": the couches were pushed over and there was broken glass on the floor. (T II 275). Sergeant Suarez, who processed the scene, also described the living room as the scene of a struggle. He too noted a broken beer bottle on the couch and on part of the loveseat. (T II 317). More importantly, Janice Johnson, the State's blood spatter expert, found bloodstains on the front door, spattered and dropped blood on the living room floor, castoff spatter on the wall above the loveseat, and dropped blood on the loveseat itself. (T II 362).

From the living room, a trail of blood then led down the hall to the master bedroom, where the police found blood on the bedroom floor, on the comforter near the pillow, on the bed rail, and on the dresser. (T II 363; VII 1249-50). The police also found the victim's panties and bra on the floor near the bed. Both of the bra's straps had been broken, while the bra was still hooked in the back. The victim's shirt and shorts were found in a drawer of the dresser. The shirt had blood near the collar and a button missing. The missing button was found on the bedroom floor. (T II 317-22, 329, 363).

Ravonne Smith was found in a vacant second bedroom, lying on the floor with only socks and tennis shoes on. (T II 317). Blood was found on the floor and walls of this room. (T II 363-64). The victim was lying in a pool of blood that came from massive injuries to her head and face. (T II 371-73). Based on her analysis and interpretation of the blood spatter evidence, Ms. Johnson opined that "the bloodshed began in the living room area. The injured person traveled down the hallway, was into -- traveled into the east bedroom and then into the north bedroom. . . . After traveling into the north bedroom, that's when the extreme forceful injuries occurred while the victim was on the floor."[5] (T II 373).

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[5] This is the version of events the trial court ultimately adopted. In its written sentencing order, it made the following findings in relation to the "felony murder" aggravating factor:

> [I]t appears that immediately upon entry into the victim's home, the victim was struck about the head with a beer bottle causing the victim's blood to be dispersed in the living room area of the home, inside the front door, and a loveseat was slammed into the wall and this trail of blood continued down the hall and into the victim's bedroom where a large amount of blood was found on the bed and on the floor. The trail of blood continued into the vacant bedroom floor and wall where the victim was ultimately killed. Therefore, although entry into the home was consensual, it appears the victim was immediately assaulted and battered and, accordingly, this Court is of the view that the consensual entry by the Defendant was revoked. The evidence substantiates beyond a reasonable doubt that the Defendant committed a sexual battery upon the victim and the Court rejects the Defendant's contention that such sexual intercourse was consensual. Had the same been consensual, there would have been no need to inflict the gruesome injuries to the victim.

In addition to the above evidence, the State presented evidence of Zack's sexual battery and murder of Laurie Russillo less than 24 hours before Smith's murder to establish lack of consent.[6] See Williams v. State, 621 So. 2d 413 (Fla. 1993) (holding that "similar fact evidence is admissible to rebut a defense of consent in a sexual battery case"). In that instance, Zack left a bar with Russillo and was driving her around when, by Zack's own account, she became upset and demanded that he stop the car. When he did not do so, she tried to open the door and jump out.[7] In response, Zack pulled down a side road and slammed on the brakes. A violent struggle ensued in the car, as evidenced by Russillo's blood in between the seats and on the passenger door. Again, by Zack's own account, he dragged her out of the car, smashed her head up against the car's wheel and tire, kicked her

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> Clothing was torn from the victim's body. It is most logical to conclude that after the attack upon the victim in the living room, the victim either ran or was dragged down the hall into her bedroom and onto her bed where the sexual battery took place and on the bed a large pool of blood was found which logically came from the wounds to the victim's head.

(R VI 860-61).

[6] To the extent this Court finds that such evidence was inadmissible, the State submits that the physical evidence was sufficient by itself to support the trial court's denial of Zack's motion for judgment of acquittal.

[7] Zack's contention that she became irate because he did not have enough cocaine to satisfy her was not a reasonable explanation for her attempt to jump out of a moving car. It was far more reasonable for the judge and jury to conclude that Zack had begun his attack and/or had made unwanted sexual advances, causing her to attempt a dangerous escape.

several times, then strangled her to death, before dragging her body over a sand dune and trying to cover her with sand. (T II 412-19; V 825-28). She too was found with her top ripped and hanging off her hip, with her pants pulled down around one ankle, with her socks and shoes on, and with sperm in her vagina.[8] (T II 392-93).

The physical evidence surrounding Ravonne Smith's murder, singularly or in combination with the collateral crime evidence, provided competent, substantial evidence upon which the jury could infer guilt to the exclusion of all other inferences. Zack's version of events was simply unreasonable under the circumstances. He claimed that he and Smith left Dirty Joe's around 8:00 p.m., cleaned out the stolen Honda, drove around for an hour to an hour and a half, then went to Smith's house and immediately engaged in consensual sex in the master bedroom. (T V 934-35; VI 1091-95). Yet, Smith lived with someone, who could have arrived home at any time. In fact, Danny Schaffer arrived home at around 10:45 p.m. from his pool tournament. (T II 271-74). It was not reasonable for the judge or jury to believe that Ravonne Smith would spend an hour or more driving around and then take Zack to her home to have sex when her boyfriend could arrive home at any minute.

Zack also claimed that, during their consensual sex, her bra may have been ripped off during rough foreplay. (T V 937). After

[8] Zack's story that she ripped her own clothes off during their violent struggle, and his theory that the sperm in her vagina preexisted their encounter were completely unreasonable.

their sexual encounter, he was walking to the bathroom when Smith followed him into the hallway while she was putting on her shirt, and she made a disparaging remark about his mother. He became enraged and hit her, and she fought back. Their fight moved into the living room, then into the master bedroom, and finally into the second bedroom, where he killed her. He suggested that her shirt may have been removed during this struggle. (T V 935-38; VI 1144-53).

It was not reasonable, however, for the judge or jury to believe that, prior to having sex, Smith ripped her own bra off, or that Zack ripped it off during foreplay, and that she was in too much of a hurry to have sex to take off her socks and shoes. Equally unreasonable was that Smith followed him into the hallway while dressing and then made a comment about his mother that sent him into a rage, during which her shirt is ripped off, since Smith's shorts and bloody shirt were found in the dresser in the master bedroom. Finally, Zack's story that the fight began in the hallway, moved to the living room, then moved to the master bedroom, and finally ended in the second bedroom is inconsistent with the physical evidence. It was not reasonable to believe that a battered and bloodied Smith would escape her enraged lover, run from the living room into the master bedroom, and simply lie on the bed, where she would deposit enough blood to soak through the comforter onto the sheets, before escaping again to the vacant bedroom. These theories that he presented were unreasonable and

inconsistent with the evidence in this case.[9] Therefore, the trial court properly denied Zack's motions for judgment of acquittal. Cf. Davis, 703 So. 2d at 1059 (finding circumstantial evidence of sexual battery sufficient to overcome motion for judgment of acquittal); Taylor, 583 So. 2d at 329 (affirming denial of motion for judgment of acquittal as to sexual battery where issue was consent, given evidence conflicting with Taylor's version of events).

ISSUE III

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL ON THE ROBBERY CHARGE (Restated).

At the close of the State's case-in-chief, defense counsel made a motion for judgment of acquittal as to all of the charges against him, including the charge of armed robbery. (T V 976-77). Although the trial court was somewhat receptive to defense counsel's argument regarding the felony murder theory of

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[9] As further evidence to support his theory of consensual sex, Zack alleges in his brief that Smith "invited Zack to her house." **Initial brief** at 36. Except, perhaps, for Zack's own self-serving statement, the record does not support this statement. In fact, given that Smith's boyfriend could arrive home at any time, the more reasonable inference from the evidence is that Zack forced her to drive to her home so that he could rape, rob, and kill her.

Zack also alleges in his brief that "Smith was interested in [him], and that "[o]ne witness said Smith was 'all over' Zack. (11 R 900)." **Initial brief** at 36 & n.21. The "one witness," however, was Zack. The record reference is to Zack's taped confession to Investigator Griggs. But even if Smith were initially attracted to Zack and left voluntarily with him, the evidence and all reasonable inferences therefrom support the conclusion that Smith changed her mind and that Zack raped her.

prosecution based on the underlying charges of robbery, sexual battery, and burglary, it took the motion under advisement. (T V 977-79). It also took the motion under advisement when defense counsel renewed it without argument at the end of the defense case. (T VII 1247-48).

Following verdicts of guilty as charged on all counts, including the armed robbery count, defense counsel reminded the court of his pending motions for judgment of acquittal on this count. (R III 428). The trial court denied the motions without further discussion or explanation. (R III 428). In this appeal, Zack claims that the trial court abused its discretion in denying his motions for judgment of acquittal because Zack's theft of Smith's television, video cassette recorder, and automobile were mere afterthoughts and not part of the acts surrounding the murder. Alternatively, he claims that Zack could not form the requisite intent to commit a robbery because of his involuntary intoxication, which was exacerbated by his posttraumatic stress disorder and fetal alcohol syndrome. **Brief of Appellant** at 38-42. For the following reasons, the State disagrees.

As to Appellant's first argument, this Court has held that

> [r]obbery is "the taking of money or other property which may be the subject of larceny from the person or custody of another when in the course of the taking there is the use of *force, violence, assault, or putting in fear*." § 812.13(1), Fla. Stat. (1989) (emphasis added). An act is considered "'in the course of the taking' if it occurs either prior to, contemporaneous with, or subsequent to the taking of the property and if it and the act of taking constitute a continuous series of

> acts or events." § 812.13(3)(b), Fla. Stat. (1989). Thus, a taking of property that otherwise would be considered a theft constitutes robbery when in the course of the taking *either* force, violence, assault, or putting in fear is used. We have long recognized that it is the element of threat or force that distinguishes the offense of robbery from the offense of theft. Under section 812.13, the violence or intimidation may occur prior to, contemporaneous with, or subsequent to the taking of the property so long as both the act of violence or intimidation and the taking constitute a continuous series of acts or events.
>
> A victim does not have to perceive the force or violence used in the course of a taking in order for the element of force or violence to be present. Under the plain language of the robbery statute, all that is required to support a conviction under the force of violence component of the statute is that the act of force or violence be a part of "a continuous series of acts or events" that include the taking. There is no requirement that the victim be aware that a robbery is being committed if force or violence was used to render the victim unaware of the taking. In other words, where the defendant employs force or violence that renders the victim unaware of the taking, the force or violence component of the robbery statute is satisfied.

Jones v. State, 652 So. 2d 346, 349 (Fla. 1995) (citations omitted).

When taken in the light most favorable to the State, the evidence in this case shows that Zack left Pope's stolen Honda on Pensacola Beach when he left with Ravonne Smith; thus, he was dependent on Smith for transportation. By his own testimony, he had no intention of returning to the car and knew that Pope had filed a police report regarding his theft of the car. (T VI 1124, 1141). He went to her house, beat her, raped her, killed her, then

stole a TV and VCR she was keeping for a friend, loaded them into her car, and drove them to Panama City to pawn them. Under these circumstances, his taking of the TV, VCR, and automobile were not mere afterthoughts. They were taken to effect his escape and to support his life on the run. After all, he had been financing his lifestyle previously by ingratiating himself to people like Pope and Chandler, earning their trust, and then stealing from them, just as he had done with Ravonne Smith. Such evidence sufficiently supported the trial court's denial of Zack's motion for judgment of acquittal as to the robbery count. Jones, 652 So. 2d at 349; Finney v. State, 660 So. 2d 674, 680 (Fla. 1995) (rejecting defendant's claim that theft and pawning of victim's VCR was merely afterthought); Atwater v. State, 626 So. 2d 1325, 1328 (Fla. 1993) (rejecting claim that theft of money from victim's pocket was afterthought); Bruno v. State, 574 So. 2d 76, 80 (Fla. 1991) (rejecting claim that robbery of stereo equipment was afterthought); Marquard v. State, 641 So. 2d 54, 57 (Fla. 1994) (affirming robbery conviction where defendant killed victim then stole her money, purse, wallet, car and other property); Fennie v. State, 648 So. 2d 94 (Fla. 1994) (affirming armed robbery conviction where defendant killed victim then stole her car and credit cards); Jones v. State, 648 So. 2d 669 (Fla. 1994) (affirming robbery conviction where defendant killed victim then stole his money and car).[10]

[10] Unlike in Mahn v. State, 714 So. 2d 391 (Fla. 1998), upon which Zack relies, there was evidence in this case that the crimes

As for Zack's contention that he could not form the requisite intent to commit the robbery, he presented no evidence, expert or otherwise, that he was intoxicated to the point of being incapable of forming intent, or that he suffered from posttraumatic stress disorder or fetal alcohol syndrome. Other than his self-serving statements that he was under the influence of alcohol, marijuana, cocaine, and LSD, he presented no evidence to support that contention. Cf. Bertolotti v. State, 534 So. 2d 386, 387 (Fla. 1988) (affirming trial court's denial of intoxication instruction where defendant's self-serving declaration that he had ingested Quaaludes made during a confession was unsupported by independent testimony or evidence and was specifically contradicted at trial). Mary Bedard testified that she served Zack two beers at Dirty Joe's between 7:00 and 8:00 p.m., and that Zack did not appear intoxicated. (T II 212-17). Russell Williams testified that he talked to Ravonne Smith and Zack between 5:30 and 7:30 p.m. Zack had two or three beers during that time, but did not appear intoxicated. At around 7:30 p.m., Williams, Smith, and Zack left to smoke a marijuana cigarette, after which he dropped Smith and Zack off at Dirty Joe's. Although Zack had asked him about LSD, he did not have any, did not provide any, and did not see Smith with any. (T II 246-53). Thus, evidence independent of Zack's self-serving statements established that Zack had had, at most, six or

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were motivated by a desire to take property. Zack did not, as in Mahn, merely come across the TV and VCR while looking for something else. He needed a new car because he had had Pope's too long, and he needed money to live.

seven beers between 2:00 and 8:00 p.m., and one marijuana cigarette shared three ways. No one who had contact with him that afternoon and evening described him as intoxicated.

As for the effects of such alcohol/drug use, Dr. Maher, Zack's only expert witness, had never evaluated Zack personally and could not testify to the effects of same on Zack. He could only testify to the general effects of alcohol and drugs on an average person. (T VI 1172-84). Similarly, he could only testify to the criteria for Fetal Alcohol Syndrome (FAS) and Posttraumatic Stress Disorder (PTSD). When given hypothetical information about Zack's childhood, Dr. Maher speculated that Zack might fit the criteria for those disorders, but he could not diagnose Zack as having them without evaluating Zack personally. (T VI 1184-1205). More importantly, he could only conclude that someone under the influence of alcohol, marijuana, and LSD, who suffered from FAS and PTSD, would have an <u>impaired ability</u> to plan the death of another. (T VI 1205-06). He did <u>not</u> opine that someone under those circumstances was <u>incapable of forming the mental state</u> necessary to commit a specific intent crime, such as premeditated murder, robbery, or burglary, which is the standard for a voluntary intoxication defense. (T VIII 1472-73). Thus, while he could hypothesize that Zack fit the criteria for alcohol and/or drug intoxication, and FAS, and PTSD, he could not <u>diagnose</u> Zack with those conditions, nor could he opine that such diagnoses, if accurate, would satisfy the standard for voluntary intoxication as a defense to the specific intent crimes Zack was charged with.

Under these circumstances, the trial court properly denied Zack's motions for judgment of acquittal as to the robbery count, and this Court should affirm his conviction for that offense.

ISSUE IV

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN INSTRUCTING THE JURY THAT IT COULD CONVICT APPELLANT OF FELONY MURDER BASED ON AN UNDERLYING OFFENSE OF BURGLARY (Restated).

At the end of the State's case-in-chief, defense counsel made a motion for judgment of acquittal as to all counts. During the discussion about the felony murder theory, the State indicated that it was proceeding under three underlying felonies: robbery and sexual battery that had been charged in the indictment, and burglary that had not been charged but that could be used to support felony murder. (T V 974-79). At no time did defense counsel object to the State's argument regarding the uncharged burglary as an underlying felony for felony murder. At the later charge conference, however, defense counsel objected to giving an instruction on burglary as an underlying felony of felony murder. Ultimately, the trial court overruled the objection, agreeing with the State that the underlying felony did not have to be charged in the indictment. (T VII 1312, 1344-52). Thereafter, the jury was charged that burglary could be an underlying felony to support a conviction for felony murder. (T VIII 1457-66).

In this appeal, Zack claims that the trial court abused its discretion in instructing the jury on burglary as an underlying offense for felony murder. **Initial brief** at 42-44. Section 810.02(1), Florida Statutes (1993), defines burglary as "entering or remaining in a structure or a conveyance with the intent to commit an offense therein, unless the premises are at the time open

to the public or the defendant is licensed or invited to enter or remain." Thus, under this statute, one can commit burglary by "entering" or "remaining in" a structure with the intent to commit an offense therein. Consent to enter or remain becomes an affirmative defense that, once presented by the defendant, the State must overcome beyond a reasonable doubt. Robertson v. State, 699 So. 2d 1343, 1346 (Fla. 1997). The State, of course, can prove withdrawal of consent with circumstantial evidence. Id.

Here, Zack told the police during questioning, and the jury during trial, that Smith took him to her home. (T V 921; VI 1094-95). Thus, he met his threshold burden. As in Robertson, however, "there was ample circumstantial evidence from which the jury could conclude that the victim of this brutal [beating/bludgeoning/ stabbing] murder withdrew whatever consent she may have given [Zack] to be in her [home]." It reasonably could have concluded that Smith withdrew consent for Zack to remain when he began beating her, smashing a beer bottle into her head or face, chasing her from room to room, ripping her clothes off, raping her, smashing her head into the wooden floor until her scull cracked, and stabbing her four times in the heart with an oyster knife. See also Raleigh v. State, 705 So. 2d 1324, 1329 (Fla. 1997) (affirming finding of commission of a murder during a burglary where there was "ample circumstantial evidence from which the jury could conclude that Eberlin withdrew whatever consent he may have given for Raleigh to remain when Raleigh shot him several times and beat him so viciously that his gun was left bent, broken, and bloody");

Jimenez v. State, 703 So. 2d 437, 441 (Fla. 1997) (finding evidence sufficient to support burglary conviction where there was "ample circumstantial evidence from which the jury could conclude that Minas withdrew whatever consent she may have given for him to remain when he brutally beat her and stabbed her multiple times in her neck, abdomen, side, and through her heart").

To support his contention to the contrary, Zack cites to Miller v. State, 713 So. 2d 1080 (Fla. 1998), wherein the defendant and his cousin entered a grocery store that was open for business and, during the commission of a robbery, shot the security guard. In reversing Miller's burglary conviction, this Court reasoned that, "[t]o allow a conviction of burglary based on the facts in this case would erode the consent section of the statute to a point where it was surplusage: every time there was a crime in a structure open to the public committed with the requisite intent upon an aware victim, the perpetrator would automatically be guilty of burglary. This is not an appropriate construction of the statute." Id. at 1010.

The distinction between Miller and Robertson/Raleigh/Jimenez/Zack is that "[t]here was no attempt to show--even through circumstantial evidence--that although Miller entered the store legally, consent was withdrawn. There must be some evidence the jury can rationally rely on to infer that consent was withdrawn besides the fact that a crime occurred." Miller, 713 So. 2d at 1010-11. Not only did this Court not find any such evidence, the State argued none. Here, on the other hand, the State presented

sufficient circumstantial evidence to prove beyond a reasonable doubt that, if Zack had Smith's consent to enter her home, Smith withdrew her consent when he began his vicious attack and she attempted to escape by running into the second bedroom. Therefore, the trial court properly instructed the jury on burglary as an underlying offense, and the evidence supports Zack's conviction for first-degree felony murder based on burglary as an underlying offense. Likewise, the record supports the trial court's finding in aggravation that Zack committed the murder during the course of a burglary.

To the extent the trial court should not have instructed the jury on burglary as an underlying offense for felony murder, either in the guilt or penalty phases of the trial, such error was harmless beyond a reasonable doubt. The evidence in this case equally supported a conviction for premeditated murder or felony murder based on robbery and/or sexual battery as underlying offenses. Similarly, the felony murder aggravator was equally applicable based on robbery and/or sexual battery as the underlying offenses. As a result, there is no reasonable possibility that Zack's conviction or sentence would have been different had burglary not been argued or instructed on as a basis for a first-degree felony murder conviction or the "felony murder" aggravator. Consequently, this Court should affirm both Zack's conviction for first-degree murder and the trial court's finding of the "felony murder" aggravator.

ISSUE V

WHETHER THE TRIAL COURT SUFFICIENTLY ARTICULATED AND ANALYZED APPELLANT'S MITIGATION IN ITS WRITTEN SENTENCING ORDER (Restated).

In its 17-page sentencing order, the trial court spent eight pages articulating and discussing the following mitigation: (1) Zack committed the murder while under the influence of an extreme mental or emotional disturbance, (2) Zack committed the murder while under extreme duress or the substantial domination of another, (3) Zack's ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired, (4) Zack's age of 27 at the time of the murder, (5) remorse, (6) Zack's voluntary confession upon arrest, (7) Zack's good conduct in jail awaiting trial, and (8) Zack's childhood and family background. (R VI 866-73). Except for the age mitigator, the trial court found every mitigator to exist, but gave them "very little weight." (R VI 873).

Although Zack phrases this issue as a Campbell violation, the pith of his challenge is to the weight given to, not the consideration or articulation of, his mitigation. Zack spends page after page disputing practically every sentence of the order, but the bottom line is that Zack is unhappy with the weight given to his mitigating evidence. This Court recently reaffirmed, however, that "the weight assigned to a mitigating circumstance is within the trial court's discretion and subject to the abuse of discretion standard." Blanco v. State, 706 So. 2d 7, 10-11 (Fla. 1997).

"[D]iscretion is abused only where no reasonable [person] would take the view adopted by the trial court." Huff v. State, 569 So. 2d 1247, 1249 (Fla. 1990) (cited in Blanco). Moreover, "[r]eversal is not warranted simply because an appellant draws a different conclusion." Sireci v. State, 587 So. 2d 450, 453 (Fla. 1991). Thus, Appellant's disagreement with the weight accorded to his mitigating circumstances does not authorize this Court to go behind the trial court's judgment and reweigh the circumstances.

In any event, the record supports the little weight given to Zack's mitigation. Based on the following, this Court cannot say that no reasonable person would give Appellant's mitigating circumstances very little weight in the calculus of this crime:

A. Extreme mental or emotional disturbance

In giving this circumstance "very little weight," the trial court considered the witnesses' testimony, made credibility determinations, and drew reasonable inferences therefrom:

> The Court has considered testimony of the various mental health experts as well as the lay witnesses insofar as the same touches upon the Defendant's mental state prior to and during the commission of the crimes in question. A great deal of testimony was received concerning fetal alcohol syndrome and post-traumatic stress disorder. Expert testimony suggests that four to eighteen percent of the population of this country suffer[s] from post-traumatic stress disorder. This equated to somewhere between ten million and forty million people that have this condition in the United States. Without exception, every expert testified that the vast majority of these people that have fetal alcohol syndrome and post-traumatic stress disorder do not commit criminal acts.

Recalling the testimony elicited during the guilt-innocence phase of the trial, there was no evidence of heavy consumption of alcohol by the Defendant. Edith Pope, from whom the Defendant stole a car in Tallahassee, testified that the Defendant would consume much time in drinking a beer until the same became warm. Bobby Chandler, from whom the Defendant stole some weapons, testified that the Defendant drank three or four beers during the course of an evening after work and never saw the Defendant intoxicated. The witnesses that encountered the Defendant in the Pensacola Beach bar prior to the Defendant leaving with the victim did not describe the Defendant as intoxicated. The bartender at the bar, Mary Bedard, with ten years experience as a bartender, did not describe the Defendant as being intoxicated on the day that he met the victim. None of the witnesses who had contact with the Defendant for several weeks prior to the commission of this murder noted anything unusual about the Defendant's behavior which would reflect that he was under the influence of extreme or emotional disturbance. The testimony which the jury heard relative to the Defendant's conduct on the day of the murder was that the Defendant was relaxed and sociable. This Court recalls evidence to the effect that the Defendant would take or attempt to take refuge in a mental health center whenever incarceration was imminent. The evidence was susceptible to interpretation that the Defendant does not have emotional problems but rather was using his childhood treatment or mistreatment and the death of his mother as a manipulative tool to victimize people. When the Defendant was released from jail in Tallahassee, he had the benefit of free mental health assistance but, instead, he stole a car from a person whom he had befriended and embarked upon a crime spree.

It appears that the Defendant made his life an open book to those he met and readily discussed the circumstances surrounding his mother's murder. One could readily conclude that the revelation of the circumstances surrounding his mother's demise was solely for the purpose of gaining sympathy and trust and

that having accomplished this purpose, used the same to commit crimes against those persons. Therefore, the Court rejects the theory that the Defendant had a “hot button”, that is, a mention of his mother’s death, that if accidentally touched, the Defendant turns into a murderous human being. Further, the Defendant distorted the truth concerning his mother’s death by reciting that he was present in the room when his mother was killed.

It is unreasonable to this Court for any expert to testify that such expert does not need to look at the behavior of the Defendant from 1988, when his mother was murdered, until mid-1996 when the Defendant committed his first murder, to ascertain whether or not he was under extreme mental duress at the time of the crime. One can only believe that since the time of his mother’s murder no such “hot button” had existed and he was using the episode of his mother’s murder to invoke sympathy. However, this Court does consider the testimony of family members concerning the Defendant’s youth and his mistreatment by his stepfather but such does not establish that the Defendant was under the influence of extreme mental or emotional disturbance at the time he committed this murder.

Several people testified in behalf of the Defendant as to childhood abuse of the Defendant by his stepfather, Anthony Midkiff. However, although these witnesses allegedly saw the abuse, they never did anything about it - never reported it to appropriate authorities. The Defendant was living with his stepfather in 1988 as an adult and shortly thereafter he established a relationship with one Candice Fletcher and she bore a child by the Defendant and while this relationship existed, the Defendant continued to interact and socialize with his stepfather, Anthony Midkiff. Candice Fletcher testified that the reason the relationship between the Defendant and his stepfather terminated was because the Defendant had taken something from the stepfather.

As to the Post Traumatic Stress Disorder and the Fetal Alcohol Syndrome, the Defendant

claims that he sought help therefor but never could obtain the same. This is rebutted by the testimony of Candice Fletcher that in 1990 a mental health center in Lawton, Oklahoma, refused to have anything more to do with the Defendant because the only time he showed up for counseling was when he thought he was going to jail. When the Defendant got in trouble in Tallahassee, he told Dr. Spence that he wanted help. However, when released from jail, he did not follow up and obtain the mental health treatment available to him in Tallahassee.

The people that the Defendant encountered during the few days prior to this murder all testified that they did not observe anything wrong or abnormal with the Defendant's conduct. There is absolutely no evidence that the Defendant exhibited any stress or duress prior to the homicide in question. In fact, in arriving at the conclusion that the Defendant was not under the influence of extreme mental or emotional disturbance at the time of this murder, this Court considered the Defendant's conduct for the week prior to the murder. On June 5, 1996, the Defendant stole a red 1996 Honda vehicle in Tallahassee from Edith Pope after befriending her and securing her trust and confidence. He borrowed the car to move his personal property from one abode to another. The Defendant used this vehicle to transport himself to Panama City and then to Fort Walton Beach and ultimately to Pensacola Beach. While in Panama City he befriended Bobby Chandler who invited the Defendant to reside in his home and was going to put the Defendant to work. After spending about two nights there, the Defendant got up during the night and stole several weapons which he pawned in Niceville, Florida, the same day or the next day. In the same manner the Defendant befriended the barmaid in Fort Walton Beach and the victim on Pensacola Beach whom he killed and thereafter took her property. The Court permitted the introduction of this Williams Rule evidence since all of the conduct was so closely related and it appeared necessary to admit the same to adequately understand the reason for the homicide in question. Arguendo, even if

> Defendant had the Fetal Alcohol Syndrome and Post-Traumatic Stress Disorder, there is no evidence considering his course of conduct that he was under any extreme mental disturbance or extreme duress at the time of the murder in question. The jury heard the evidence concerning this mitigating factor and obviously gave little or no weight to the same. There is no reason why this Court should do otherwise.

(R VI 867-70). Such conclusions are supported by the record, and it cannot be said that no reasonable person would not afford this mitigator "very little weight" in the context of this entire case. Cf. Kilgore v. State, 688 So. 2d 895, 900 (Fla. 1996) (affirming little weight given to "extreme mental or emotional disturbance" mitigator); Shellito v. State, 701 So. 2d 837 (Fla. 1997) (affirming slight weight given to defendant's mental and emotional health where evidence conflicting).

B. Extreme duress[11]

In assessing this mitigator, which was based on the same evidence as the "extreme mental or emotional disturbance" mitigator, the trial court relied extensively on its findings relating to the prior mitigator. However, in giving this mitigator "very little weight," the trial court did make the following additional findings:

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[11] Normally, this mitigating factor is reserved for those crimes where a third person exerts external provocations such as imprisonment or the use of force or threats to cause the defendant to commit a murder. See Toole v. State, 479 So. 2d 731, 734 (Fla. 1985). However, neither of the parties nor the court understood this distinction and applied the "extreme duress" portion of the mitigator as a separate mental mitigator.

> The reasoning set forth above concerning the first mitigator, extreme mental or emotional disturbance, applies to this statutory mitigator. There is absolutely no evidence that the Defendant was acting under extreme duress at the time he murdered the victim and every witness who had contact with the Defendant prior to the murder testified to the contrary. Further, the defense experts did not interview any of the witnesses who had contact with the Defendant in the days preceding this murder so that they could formulate a valid opinion that at the time of the murder the Defendant was acting while under extreme duress. This Court gives very little or no weight to this mitigating factor.

(R VI 871). As with the prior mitigator, the record supports these conclusions. Thus, since it cannot be said that no reasonable person would give this mitigator "very little weight," this Court should affirm this finding. Cf. Shellito v. State, 701 So. 2d 837 (Fla. 1997) (affirming slight weight given to defendant's mental and emotional health where evidence conflicting).

C. Substantial impairment

Relying on substantially the same evidence as that for the "extreme mental or emotional disturbance" mitigator, the trial court found this mitigator to be of equally little weight, based on the following findings:

> The other mitigator proffered by the defense is whether the Defendant had the capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law and whether the same was substantially impaired. Much of the conduct considered with regard to the first mitigator must also be considered in determining whether or not this mitigator exists and, if so, how much weight it should be given. Again, without exception, the experts agree that people with the conditions claimed to have

> existed in the Defendant at the time of the commission of this murder do not commit criminal acts because of those conditions. However, there is no evidence that the Defendant's conduct was in any way unusual during the week prior to the commission of this murder. He did not excessively imbibe in alcohol and did not display any sign of mental or emotional disturbance or duress. Rather, he appeared to be a happy-go-lucky wanderer throughout northwest Florida seeking means to satisfy his sexual and financial needs.
>
> The witnesses described the Defendant as an individual who nursed a beer and was not a heavy drinker. The Defendant was sober enough to gain the trust of the victim and rape, murder and rob her and then drive from Pensacola to Panama City, Florida, to pawn the victim's property on the following morning. The video tape which documented the pawn transaction in Panama City reflects that the Defendant had all of his faculties about him and was not impaired or uncoordinated in any way. This video was made within hours of the time the victim was murdered by the Defendant. To this mitigating factor the Court gives very little weight.

(R VI 871-72). As with the two prior mitigators, the record supports the weight given to this one as well. And, again, where it cannot be said that no reasonable person would give very little weight to this mitigator in the context of this entire case, this Court should affirm the trial court's finding. Cf. Jimenez v. State, 703 So. 2d 437, 442 (Fla. 1997) (affirming minimal weight given to "substantial impairment" circumstance); Kilgore v. State, 688 So. 2d 895, 900 (Fla. 1996) (same).

D. Nonstatutory mitigation

In giving "very little weight" to Zack's remorse, his cooperation with the police, his good conduct in jail while

awaiting trial, and his abusive childhood, the trial court made the following findings:

> The Defendant has asked the Court to consider the following non-statutory mitigating factors. The Defendant's remorse, voluntary confession, and good conduct while in jail in Okaloosa County. The only evidence of remorse was that displayed briefly by the Defendant when he testified. The voluntary confession in Panama City was made after he was apprehended by the police and was in custody but, even then, the confession omitted substantial crimes which were brought to the Defendant's attention and to which he ultimately confessed. A Deputy Sheriff from Okaloosa County testified that the Defendant was participating in helping to educate inmates against leading lives of crime.
>
> The Defendant's childhood and family background information presented as evidence which would fall into this category pales in comparison to the aggravating circumstances which have been established beyond a reasonable doubt. The Court feels that very little weight should be given to the above because frequently defendants facing punishment will do anything to mitigate their sentence.

(R VI 872).

Once again, the record supports the trial court's findings. Zack did not express remorse during his confessions to the police, and made only minimal effort while testifying at trial. More importantly, Zack significantly qualified his apology to Ravonne Smith's family at the Spencer hearing by persistently excusing and/or minimizing his behavior because of his trauma as a child. (R VI 839-47). Cf. Raleigh v. State, 705 So. 2d 1324, 1330 (Fla. 1997) (affirming little weight given to defendant's remorse as nonstatutory mitigator); Mann v. State, 603 So. 2d 1141, 1144 (Fla.

1992) (same); Burns v. State, 699 So. 2d 646, 650 (Fla. 1997) (same).

As for his cooperation with the police, Zack consistently feigned ignorance of the Russillo murder and consistently feigned memory loss regarding the Smith murder. Moreover, the details of the events between June 5 and June 13 differed with each version of the story he told. (T IV 782-811, 814; V 832-901, 928-66). Cf. Raleigh, 705 So. 2d at 1330 (affirming little weight given to defendant's cooperation with police as nonstatutory mitigator).

Regarding Zack's good behavior while in jail, such evidence was limited to Zack's participation in a program to steer juvenile delinquents away from crime. Significantly, however, Officer Enfield stopped seeking Zack's assistance after Zack attacked a jail guard. (T IX 1720-23). Thus, his behavior in jail while awaiting trial was not exactly exemplary. Under these circumstances, it cannot be said that no reasonable person would afford this mitigator very little weight.

Finally, as for Zack's evidence of a dysfunctional family and an abusive childhood, the trial court minimized the weight of such evidence because of the motivation the family and friends had to embellish allegations of child abuse. Since Zack's mother was dead, his father was unknown, and his allegedly abusive stepfather lost custody of Zack when Zack's mother died, the family could relate virtually anything it wanted to. Moreover, Ione Tanner, Zack's maternal aunt, admitted that defense counsel told her that Zack's expert witnesses would rely on allegations of child abuse.

(T IX 1749). Although Phyllis Anglemyer told of extensive abuse committed in her presence by Zack's stepfather, Tony Midkiff, Phyllis' husband, who saw Midkiff interact with Zack on a daily basis for five years, reported seeing only one instance of abuse. (T IX 1753-63, 1763-68). Ziva Knight, Midkiff's daughter and Zack's half-sister, also related extensive abuse by Midkiff, then related for the first time in her life, after hypnosis, that she was hiding under the bed when Midkiff, not Theresa, killed her mom, despite the fact that Theresa was convicted and sent to a mental hospital for committing the murder. (T IX 1768-95). Finally, Theresa McEwing, Zack's other half-sister, whom everyone had previously believed killed Zack's mother, but who could not remember anything about it, related specific instances of abuse by Midkiff, but admitted that she had spent an unknown number of years in a mental institution. (T X 1797-1803).

To rebut the family's tales of terror committed by Tony Midkiff, the State presented the testimony of Zack's former girlfriend, with whom he lived for two years from December 1988 to November 1991 and with whom he fathered a child. Candice Fletcher testified that Zack was living with his childhood abuser, Tony Midkiff, when she met Zack. According to her, Zack's relationship with Midkiff was "nothing out of the ordinary." It was a relationship she would expect between a stepfather and son. Zack would go over to Midkiff's house and socialize with him on occasion. Zack's relationship with Midkiff ended, however, when Zack stole from Midkiff. (T XI 2048-52).

Of all the witnesses, Ms. Fletcher was arguably the least interested in the outcome of Zack's penalty phase. A fair inference from her testimony is that Zack's family and friends, because of their interest, at least embellished the extent of the physical, emotional, and sexual abuse that Midkiff allegedly inflicted on Zack as a child. Given the relative motivation of the witnesses, their credibility, or lack thereof, and the inherent logical inconsistency between Midkiff abusing Zack mercilessly as a child and Zack living with Midkiff as a young adult, it cannot be said that no reasonable person would give very little weight to Zack's evidence of child abuse. Cf. Wuornos v. State, 644 So. 2d 1012, 1020 (Fla. 1994) ("The vast bulk of the case for mitigation was hearsay. While hearsay can be admissible in the penalty phase, we cannot conceive that there is any absolute duty for the trial court to accept it in mitigation where, as here, the State's rebuttal established strong indicia of unreliability."); Blanco, 706 So. 2d at 10-11 (affirming "little weight" given to defendant's impoverished background); Elledge v. State, 706 So. 2d 1340, 1347 (Fla. 1997) (affirming "little weight" given to defendant's child abuse); Jones v. State, 648 So. 2d 669, 680 (Fla. 1994) (same).

E. Other mitigating evidence

Zack claims that the trial court failed to identify and discuss in its written sentencing order the following nonstatutory mitigation: (1) Zack has suffered brain damage, (2) Zack has a skewed perception of reality, (3) Zack "was in a mental hospital for a year when he was 11 year old, and since then has had no home,

but was bounced among foster homes and physically and sexually abused," (4) Zack "came from a dysfunctional home with very dysfunctional parents, (5) Zack "has a mental age of 15 and the emotional maturity of a 10 year old," (6) Zack "is an alcoholic and a marijuana addict," and (7) Zack "suffered a tragic, horrible childhood." **Initial brief** at 61-62. When read in its entirety, however, the court's sentencing order reveals that all of this information was considered and analyzed in relation to other mitigation. For example, defense counsel and the expert witnesses used any mental infirmities, emotional disturbances, child abuse, and alcohol/drug abuse to support their arguments and opinions that Zack met the criteria for the statutory mental mitigators. In turn, the trial court analyzed such evidence in terms of the existence, and weight deserving, of such mitigation. In addition, it used evidence of Zack's dysfunctional home and tragic, horrible childhood to support a nonstatutory mitigator. As the State is not allowed to use the same evidence to support more than one aggravator, the defendant should not be allowed to use the same evidence to support multiple mitigators. Since the trial court used all of the mitigation listed above to support the statutory mental mitigators, its written sentencing order met the requirements of Campbell. Therefore, this Court should affirm Appellant's sentence of death for the first-degree murder of Ravonne Smith.

ISSUE VI

WHETHER THE RECORD SUPPORTS THE TRIAL COURT'S FINDING OF THE "AVOID ARREST" AGGRAVATING FACTOR (Restated).

In its written sentencing order, the trial court made the following findings of fact regarding the "avoid arrest" aggravating factor:

> It appears that there was only one reason to kill the victim and that was to avoid detection by the police authorities. After the sexual battery in the victim's bedroom, the victim somehow managed to escape therefrom and entered the vacant bedroom where she was again attacked and her head was pounded on the floor until she was incapacitated. Notwithstanding such incapacity, the Defendant returned to the kitchen and secured an oyster knife which he used to stab the victim four times in the left chest immediately over the heart. The Defendant then returned to the kitchen and washed the oyster knife and put it back in the drawer. Having been incapacitated, there was no need to kill the victim and the evidence is clear and convincing that the victim was killed so that she could not identify her attacker.
>
> Less than twenty-four (24) hours before the murder in question, the Defendant murdered another woman on the beach in Okaloosa County. At the time he was still using the red Honda that he stole from one Edith Pope in Tallahassee several days prior. The Defendant was aware of the prior murder in Okaloosa County and knew that he could be linked to that murder because of the red Honda he operated at the time and through witnesses who could identify him as having been with the murder victim in Okaloosa County prior to her death.
>
> Less than forty-eight (48) hours before he murdered this victim, the Defendant robbed the property of Bobby Chandler in Bay County at which time he was also operating the red Honda. Therefore, when the Defendant departed

> Pensacola Beach with the victim he took the license plate from the red Honda, which license plate was ultimately found in the victim's vehicle which the Defendant stole subsequent to the murder.
>
> Following the murder of the victim, he took personal property from the residence and the victim's car. All of the above facts establish beyond a reasonable doubt that the sole purpose for the murder of the victim was to eliminate her as a witness who could identify the Defendant as having committed the crimes for which he was ultimately convicted by the jury. Clearly, this aggravating factor has been proven beyond a reasonable doubt and will be given great weight by the Court.

(R VI 861-62).

In this appeal, Zack contends that the evidence did not support the trial court's findings, because there was insufficient evidence that Zack's dominant motive for killing Smith was to eliminate her as a witness and to avoid arrest. **Initial brief** at 64-70. The record reveals, however, that Zack was on felony probation from Oklahoma when he met Ravonne Smith at Dirty Joe's bar. (T IX 1619-22). Zack also testified that he told Ravonne Smith that he had stolen Pope's red Honda. And before leaving the beach with Smith he removed his belongings from the Honda in Smith's presence. (T VI 1088, 1092-93). He further testified that he knew Pope had filed a police report regarding the stolen Honda. (T VI 1124). Thus, Zack was running from the law, and Smith knew it.

Dependent on Smith for transportation, and in need of his own transportation, Zack then went to Smith's home and continued his pattern of victimizing those who befriended him. After raping

Smith, he brutally beat her and incapacitated her by pounding her head into the floor. But instead of leaving her there alive, he went into the kitchen, retrieved a knife, stabbed her four times in the heart, washed his hands and the knife, and returned the knife to its drawer, before leaving with her car, TV, and VCR.

As this Court has recently reaffirmed, "[a] motive to eliminate a potential witness to an antecedent crime . . . can provide the basis for this aggravating factor. An arrest need not be eminent at the time of the murder. Such a motive can be inferred from the evidence presented in th[e] case." Fotopoulos v. State, 608 So. 2d 784, 792 (Fla. 1992) (citations omitted). Based on the fact that Ravonne Smith knew Appellant and knew that he had stolen a car, that Appellant knew the car had been reported stolen and could tie him to the Russillo rape/murder, and that Zack could have raped Smith and stolen her car, TV, and VCR without killing her, this aggravating factor is supported by the evidence. Cf. Henry v. State, 613 So. 2d 429, 433 (Fla. 1992) (finding factor supported by evidence that defendant "could have effected the robbery without killing [female victims]"); Lightbourne v. State, 438 So. 2d 380, 391 (Fla. 1983) (finding strong evidence to support factor where defendant surprised victim, whom he admitted knowing, after breaking into her home, sexually assaulting her, robbing her of money and jewelry, and shooting her in the head despite her pleas for mercy); Sweet v. State, 624 So. 2d 1138, 1142 (Fla. 1993) (finding that defendant's motive was to eliminate victim as a witness to defendant's prior robbery of her); Hodges v. State, 595

So. 2d 929, 934 (Fla. 1992) (finding that defendant's motive was to eliminate victim as a witness to defendant's prior indecent exposure to her).[12]

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[12] Zack's reliance on cases to the contrary is misplaced. In Garron v. State, 528 So. 2d 353 (Fla. 1988), the defendant was at home drinking and in "a foul mood." He made an obscene remark to one of his step-daughters just as his wife came home. The stepdaughter told her mother, and her mother argued with the defendant. The defendant got a gun and shot his wife in the chest. The stepdaughter ran to the phone, and the defendant followed her and shot her. A second step-daughter ran from the house, and the defendant shot at her but missed. When the police arrived, the defendant had shot himself. The dominant motive for killing his step-daughter on the phone was not to eliminate her as a witness; rather, it was to eliminate her as a member of his family.

In Livingston v. State, 565 So. 2d 1288 (Fla. 1990), the defendant shot a convenience store clerk immediately upon entering the store. The clerk neither knew the defendant, nor had witnessed an antecedent crime. Thus, there was no evidence upon which to conclude that his dominant motive was to kill the clerk, as opposed to stealing the cash register without resistance.

Similarly, in Menendez v. State, 368 So. 2d 1278 (Fla. 1979), the defendant shot a jewelry store owner and stole merchandise from the store. Although the defendant's gun was fitted with a silencer, this fact, by itself, was not sufficient to prove the defendant's motivation: "[W]e do not know what events preceded the actual killing; we only know that a weapon was brought to the scene which, if used, would minimize detection. We cannot assume Menendez's motive; the burden was on the state to prove it."

Finally, in Doyle v. State, 460 So. 2d 353 (Fla. 1984), the defendant raped and strangled a neighbor in the woods near his home. This Court struck the "avoid arrest" aggravator, even though Doyle was subject to jail time under a prior suspended sentence if reported for the rape, because it believed that the murder was merely the culmination of aggressive impulses rather than "a reasoned act motivated primarily by the desire to avoid detection." In the present case, however, besides knowing the defendant from their conversation in the bar, the victim knew that Zack had stolen Pope's Honda, and Zack knew that Pope had reported it stolen. Moreover, Zack knew that the Honda could tie him to the Chandler thefts and, more importantly, the Russillo rape/murder. Thus, the threat of arrest and incarceration was far more real and likely to Zack than to Doyle were he to leave Smith alive after raping and beating her.

Were this Court to find, however, that the evidence was insufficient to support this factor, Zack's sentence should nevertheless be affirmed. The trial court found five other aggravating factors, two of which Zack does not challenge in the least: HAC and "pecuniary gain." It gave each of the five aggravators "great weight." Moreover, in its final analysis, it concluded that "the aggravating circumstances present in this case far, far outweigh the mitigating circumstances." (R VI 859-73) (emphasis added). Thus, there is no reasonable possibility that the jury's recommendation or the trial court's sentence would have been different had the "avoid arrest" aggravator not been found. See Rogers v. State, 511 So. 2d 526, 535 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988); Capehart v. State, 583 so.2d 1009, 1015 (Fla. 1991), cert. denied, 112 S.Ct. 955 (1992). Consequently, this Court should affirm Zack's sentence of death for the first-degree murder of Ravonne Smith.

ISSUE VII

WHETHER THE RECORD SUPPORTS THE TRIAL COURT'S FINDING OF THE CCP AGGRAVATING FACTOR (Restated).

In its written sentencing order, the trial court made the following findings of fact regarding the "cold, calculated, and premeditated" aggravating factor:

> The evidence leads one to logically conclude that when the Defendant went into the bar on Pensacola Beach he knew exactly what his goal was. The Defendant needed money and he looked for a victim which he found in the

bar and there he spun his wed for a number of hours gaining the victim's trust and confidence. Less than twenty-four (24) hours prior he had killed a woman in Okaloosa County and the Defendant knew at the time that he left the Pensacola Beach bar with the victim that he was going to kill her.

The Defendant contends that the crimes he committed in the victim's home were during a frenzy or a panic or during a fit of rage. The Defendant testified that he thought perhaps the victim was going to get a weapon and that is why he had to kill her. The Defendant testified that the victim said something about his mother which triggered the Defendant to commit the crimes upon the victim. The evidence belies all of these contentions and to establish this contention one need only to go back and recall the evidence and having done so this Court can only conclude beyond a reasonable doubt that the assertions of the Defendant are mere efforts to manipulate the minds of the jurors and secure from them a recommendation of life imprisonment. There is no evidence from the testimony of the Defendant that the victim did anything during the course of the attack upon her that could lead the Defendant to think that she was attempting to obtain a weapon.

The evidence clearly establishes that the Defendant pursued a course of conduct in a smooth manner by stalking and hunting his prey and trapping the prey and then committing the crimes for his own personal sexual gratification and financial needs. The crimes directed to the victim were done with a viciousness that is not duplicated very often in life. After beating the victim into unconsciousness, the Defendant then went to the kitchen and obtained the oyster knife and returned to the vacant bedroom where he methodically stabbed the victim four times in the heart, each stab wound in close proximity to the other. The Defendant then returned to the kitchen where he washed the murder weapon and his hands and returned the murder weapon to a kitchen drawer and gathered up the victim's personal property and loaded it in the victim's car and left in the victim's car.

> At some time the Defendant took some of the clothing the victim had been wearing and put them in a drawer of a dresser in the victim's bedroom. This aggravator has been proven beyond a reasonable doubt and to it the Court will give great weight.

(R VI 865-66).

In this appeal, Zack claims that the record does not support the finding of this aggravating factor, and that the trial court relied on irrelevant evidence and speculation in ruling otherwise. In fact, Zack believes not only that the evidence to prove the elements of this aggravator are woefully lacking, but also that he was too mentally impaired to form the heightened premeditation required. **Initial brief** at 70-78.

Conspicuously, Zack does not challenge in this appeal, his first-degree murder conviction based on premeditation, even though he maintained at trial that he was incapable of forming the requisite intent because of his alcohol/drug use, Posttraumatic Stress Disorder, and Fetal Alcohol Syndrome. Yet he challenges his ability to form heightened premeditation for application of this factor based on the same alleged afflictions. Not only did the jury and the trial court reject Zack's voluntary intoxication defense in the guilt phase, they rejected his mental mitigation in the penalty phase. They did so because Zack's actions immediately preceding and following this murder proved beyond a reasonable doubt that Zack not only premeditated the murder of Ravonne Smith, but he also committed her murder in a cold, calculated, and (heightened) premeditated manner.

Zack preyed on people, mostly women, who were sympathetic to the embellished stories about his shocking life history. Edith Pope fell victim to Zack's sad stories and lost her car. Bobby Chandler fell victim to Zack's sad stories and homeless state and lost two guns and $42. Laurie Russillo fell victim to Zack's promise of cocaine, and lost her dignity and her life. Finally, Ravonne Smith fell victim to Zack's sad stories and lost not only her dignity and her life, but her car, television, and VCR.

Obviously finding Candice Fletcher a credible witness, the trial court (and presumedly the jury) noticed the pattern in Zack's life: he would embellish and use his mother's death to ingratiate himself with people, then he would steal from them, rob them, rape them, and/or kill them. When he got caught, he would cry mental illness and feign interest in treatment until his threat of conviction and jail were past. Then he would return to his well-worn ways. He sought help in Oklahoma only when he was facing jail and was finally refused treatment when he failed to conform to their treatment plan. He sought help in Tallahassee when facing jail for an auto theft, but never followed up on treatment upon his release from jail. Rather, he began stalking his next set of victims.

While admittedly Zack's plan had some spontaneous aspects to it, Zack nevertheless had a prearranged design to ingratiate himself to others, lull them into a false sense of security, and then victimize them in whatever opportunistic way he could. After

all, it was not always about money, as evidenced by his failure to rob Russillo. Rape was obviously a goal as well.

As for the element of calm and cool reflection, Zack knew that he had just raped and murdered Russillo without detection not 24 hours earlier. In those 24 hours, Zack had located his next victim and had at least seven hours to plan his attack on Smith. The first sighting of Zack in Dirty Joe's was between 2:00 and 3:00 p.m. (T II 203-05). He left the bar with Smith around 8:00 p.m., then drove around with her for an hour to an hour and a half. (T V 921; VI 1091-94, 1142). During those seven or so hours he charmed Smith into leaving with him, and either charmed or forced her to take him to her house. While he alleged that the murder was "prompted by emotional frenzy, panic or a fit of rage," the blood spatter and other inconsistent physical evidence, as detailed in Issue II, supra, show that Zack's murderous attack on Smith began as soon as they walked in the door. At the very least, he calmly and coolly reflected her fate during the hour to an hour and a half that they drove around, smoking marijuana and engaging in sexual conduct.

During this period, if not throughout the day, he contemplated and premeditated his plan to rape, kill, and rob her. Though of dubious credibility, Zack's statement that he abandoned Pope's car upon leaving Dirty Joe's with Ravonne Smith further supports this argument. He knew he was going to rape, kill, and rob Smith when he abandoned the Honda. He needed Smith's car and anything else of value that he could convert into money. He knew he was running

from the law for at least the car theft, and likely for the theft of Chandler's guns and money. He also knew that the Honda could link him to the Russillo murder, so he had to obtain another car and traveling money. Even if he did not abandon Pope's car prior to leaving the beach, he knew he had to find a replacement. To Zack, Smith had that replacement, and more.

Zack's purposeful behavior preceding and following the murder defy his experts' opinions that he committed the murder under an extreme mental or emotional disturbance and that his ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. Both of these mitigators require the assessment of Zack's mental state at the time of the crime. Yet, none of Zack's experts believed that it was important to know how Zack behaved and functioned preceding and following the murder. All of the people, however, who came in contact with Zack preceding and following the murder, and who lived to tell about it, described him as relaxed and sociable. If anything, he was charming and affable. After all, he managed to get Pope to loan him her car, he managed to get Chandler to take him into his home and give him a job, he managed to get Russillo to ride in his car to do cocaine, and he managed to get Smith to leave Dirty Joe's with him after knowing him only seven or so hours. It was simply not credible, as the trial court found, that such conduct was not important to Zack's mental health experts. In light of this flaw in the formulation of their respective opinions, the trial court (and jury) acted well within its discretion in

rejecting Zack's mental health testimony to the extent it attempted to undermine his ability to formulate a plan to, calmly and coolly reflect on a plan to, and premeditate Smith's murder to a heightened degree.

In Wuornos v. State, 644 So. 2d 1000 (Fla. 1994), this Court found the giving of an unconstitutional CCP instruction harmless error where the evidence established that the murder was committed in a cold, calculated, and premeditated manner under any definition of those terms. In performing this analysis, this Court made the following findings:

> The first element is that the murder was "cold." The State's theory of the case here, which was supported by the similar crimes evidence, was that Wuornos coldly and calmly planned this killing and did not act out of emotional frenzy, panic, or a fit of rage. We recognize that Wuornos' own testimony was to the contrary. However, judge and jury were entitled to reject that testimony as self-serving, unbelievable in light of Wuornos' constantly changing confessions, contrary to the facts that could be inferred from the similar crimes evidence, or contrary to other facts adduced at trial. Thus, the record establishes coldness to the requisite degree.
>
> The second element is that the murder was the product of a careful plan or prearranged design to commit murder before the fatal incident. On this question, the State's theory of the case was that Wuornos had armed herself in advance, lured her victim to an isolated location, and proceeded to kill him so she could steal his belongings. By definition, this sequence only could be the product of a careful plan or prearranged design. Judge and jury would be within their discretion in rejecting Wuornos' testimony to the contrary, so this element also exists and is sufficiently supported by the record.

> The third element is that there must be "heightened premeditation" over and above what is required for unaggravated first-degree murder. We have found this factor present when the prevailing theory of the case established "deliberate ruthlessness" in committing the murder. The State's theory of the case, especially that relying on the similar crimes evidence and Wuornos' initial confession, established this type of heightened premeditation to the degree required by law. Accordingly, the third element exists here.
>
> The fourth and final element is that the murder must have no pretense of moral or legal justification. . . . An incomplete claim of self-defense would fall within this definition provided it is uncontroverted and believable. While Wuornos' factual testimony advanced an incomplete self-defense claim, we believe that claim was largely controverted by the facts of the murder and the similar crimes evidence together with the items of property Wuornos had taken from her various victims, including Mallory.
>
> Moreover, that testimony also could be rejected as self-serving, untrustworthy in light of Wuornos' inconsistent statements, or inconsistent with the facts--questions that go to the believability of the testimony. Accordingly, the finders of fact would have been entitled to reject the claim and conclude that there was no pretense of moral or legal justification here, which is sufficiently supported by the record.

Id. at 1008-09 (citations omitted).

As in Wuornos, the judge and jury acted within their discretion in rejecting not only Zack's version of events, but also Zack's mitigation to the extent he claimed that he could not have planned the murder, calmly and coolly reflected on it, and then premeditated it. The testimony of the witnesses who observed Zack preceding and following the murder, the testimony of the State's

experts, the physical evidence, the collateral crime evidence, and all of the reasonable inferences from such testimony and evidence combined to prove beyond a reasonable doubt that Zack committed this murder in a cold, calculated, and premeditated manner. Therefore, the trial court properly found this aggravator to exist. Cf. Arbelaez v. State, 626 So. 2d 169, 177 (Fla. 1993) (affirming CCP factor where defendant's actions preceding and following murder rebutted claim that defendant acted from rage); Atwater v. State, 626 So. 2d 1325, 1329 (Fla. 1993) (affirming CCP factor where defendant planned to kill victim, used ruse to obtain access to victim's home, then robbed and murdered victim before calmly leaving apartment).[13]

Even were this Court to find, however, that the record does not support the CCP factor, it should nevertheless affirm Zack's sentence. There remain five other weighty, valid aggravating factors--two of which Zack does not challenge (HAC and "pecuniary gain"). It gave each of the five aggravators "great weight." Moreover, in its final analysis, it concluded that "the aggravating circumstances present in this case far, far outweigh the mitigating circumstances." (R VI 859-73) (emphasis added). Thus, there is no reasonable possibility that the jury's recommendation or the trial

[13] Zack relies principally on Wuornos v. State, 676 So. 2d 966, 971 (Fla. 1995), to support his position to the contrary. However, in this Wuornos case, "the trial court relied entirely upon collateral crimes evidence to prove the existence of this factor when the sole relevance of this evidence was to establish bad character or propensity." Such was not the case here, as the trial court's order, and the foregoing argument, shows.

court's sentence would have been different had the CCP aggravator not been found. See Rogers v. State, 511 So. 2d 526, 535 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988); Capehart v. State, 583 so.2d 1009, 1015 (Fla. 1991), cert. denied, 112 S.Ct. 955 (1992). Consequently, this Court should affirm Zack's sentence of death for the first-degree murder of Ravonne Smith.

ISSUE VIII

WHETHER THE TRIAL COURT IMPROPERLY USED VICTIM IMPACT EVIDENCE TO SUPPORT THE HAC AGGRAVATING FACTOR AND WHETHER THE STATE COMMITTED FUNDAMENTAL ERROR IN CLOSING ARGUMENT REGARDING THE JURY'S CONSIDERATION OF VICTIM IMPACT EVIDENCE (Restated).

During the State's penalty phase case, it presented the testimony of the victim's mother and two of the victim's brothers, who testified without objection to the victim's uniqueness as an individual and to their loss from her death. (T IX 1623-29, 1629-32, 1632-35). Specifically, the mother testified, among other things, that she was not able to say goodbye to her daughter because "[w]hen we had Vonnie's viewing and I looked at her at the funeral home, I said I can't say goodbye, this does not look like my daughter. And I held that thought because every time the phone rang for at least six or eight weeks after that, it was Vonnie calling me. Because that was not her." (T IX 1625) (emphasis added).

Thereafter, in its penalty phase closing argument, the State made the following comments without objection regarding the victim impact testimony:

> What that evidence was designed to show you and demonstrate to you, [was] that this woman was unique, that she was loved, and that her loss is a loss to this community. That's what that evidence is. That this is just not some unnamed face. That there were people who loved and cared about her. And that the community is less now that we don't have her. You'll give that weight whatever you feel is appropriate, but you are entitled to hear that.

(T XI 2077). Finally, when discussing the applicability of the HAC aggravating factor, the trial court made the following comments in its written sentencing order:

> The Defendant's actions leading up to the crimes were undisputedly wicked inasmuch as the evidence is clear that the Defendant gained the confidence and trust of the victim thereby securing an invitation into the victim's home and once inside the home the attack on the victim began. She was beaten about the head with a beer bottle shortly after entering the home. She either ran or crawled or was dragged down the hallway while bleeding. Her clothes and underwear were ripped from her and she was forced onto her own bed where she was raped and where she left a large amount of blood, and then either escaped or was dragged into the vacant bedroom where she was beaten into unconsciousness following the rape in her bedroom. Her head was slammed against the floor a number of times and, probably, her face was either slammed into the floor or beaten with the Defendant's fists. Then, the victim was killed for the reasons aforesaid.
>
> The mother of the victim testified that for a long time after her daughter's death she did not believe her daughter was dead and when a knock came upon her door she rushed to the

> door thinking that it might be her daughter returning home. The reason for this disbelief was when she was taken to identify her daughter she was unable to do so by looking at her daughter's face. The victim was brutally beaten about her face and there were a number of stab or cuts about her neck. . . .

(R VI 863-64).

In this appeal, Zack complains that the State informed the jury during excerpted closing argument that it could consider the victim impact evidence as aggravation and give it whatever weight it deserved. He also complains that the trial court misinterpreted the mother's testimony and then used it improperly to support the HAC aggravating factor. **Initial brief** at 79-82.

Initially, the State submits that Zack failed to object to the State's comments during closing argument. Therefore, he failed to preserve for review this part of his contention. See Tillman v. State, 471 So. 2d 32 (Fla. 1985); Steinhorst v. State, 412 So. 2d 332 (Fla. 1982).

Regardless, neither of his contentions has merit. As noted by Zack, this Court stated in Windom v. State, 656 So. 2d 432, 438-39 (Fla. 1995) (emphasis added), that victim impact evidence "is not admitted as an aggravator, but, instead, . . . allows the jury to consider 'the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death.'" By its comments, the State was merely informing the jury that it could consider such evidence. Its weight or effect was up to them. In light of Windom, this was proper argument.

As for the trial court's use of the mother's testimony in its written order, it did not use her testimony as a nonstatutory aggravating factor, which is condemned by Windom and its precursors. Rather, it referenced her testimony to characterize the extent of the injuries to the victim: Ravonne Smith's face was so badly beaten that her own mother refused to believe that it was her daughter. When trying to justify the existence of the HAC factor, it was not improper for the trial court to use the mother's testimony to relate the extent of Zack's infliction of pain and suffering on the victim. That she was beaten to the point where her own mother hardly recognized her was a fact that the trial court could properly use to justify his findings. Cf. Parker v. State, 641 So. 2d 369, 377 (Fla. 1994) ("During its narrative of the facts [in its written sentencing order], the court mentioned that Parker left Nicholson to bleed to death in the street and that there were three children in the Mallow car. Rather than being nonstatutory aggravators, these items are simply facts. Additionally, the facts support all of the aggravators found by the court beyond a reasonable doubt.").

Were this Court to find, however, that the State's comments and/or the trial court's use of the mother's testimony were improper, such error was harmless beyond a reasonable doubt. See State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). The facts more than amply supported the finding of the HAC aggravating factor without reference to the mother's testimony. Moreover, there is no reasonable possibility that the State's comment regarding the

victim impact evidence affected the jury's recommendation, given the existence and weight of the six aggravating factors and the unavailing mitigation. Therefore, this Court should affirm Zack's sentence of death for the first-degree murder of Ravonne Smith.

ISSUE IX

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING SEVERAL COMMENTS BY CANDICE FLETCHER OVER APPELLANT'S OBJECTION (Restated).

During his penalty phase case, Zack presented numerous witnesses and doctors who related allegations of physical, emotional, and sexual abuse on Zack by Zack's stepfather, Anthony Midkiff. (T IX 1678-81, 1727-38, 1754-60, 1764-65, 1770-83; X 1800-02, 1856-62, 1932). Zack had also contended in the guilt phase that he had tried to get psychological help throughout his life, but was unsuccessful because no one would help him. (T V 849, 884-85; VI 1106, 1108, 1134-35). In rebuttal, the State sought to introduce the testimony of Candice Fletcher, with whom Zack had a three-year, live-in relationship between 1988 and 1991, and with whom Zack fathered a child. Ms. Fletcher testified that Zack was living with Tony Midkiff in Oklahoma when she met him. After Zack moved in with her, Zack would visit Midkiff and socialize with him. She described Zack's relationship with Midkiff as "nothing out of the ordinary." (T XI 2048-51). When asked if Zack's relationship with Midkiff was one that she would expect between a stepfather and his son, defense counsel objected that

Fletcher was not qualified to answer that question because she was not a psychologist. That objection was overruled. (T XI 2051-52). The State then asked Fletcher if Midkiff cut off his relationship with Zack, and why. She responded that he did because Zack stole from him. Defense counsel then objected and moved for a mistrial because of the introduction of a collateral crime. The trial court overruled the objection. (T XI 2052-53). Thereafter, Fletcher testified that Zack had periodic contact with the mental health center in Oklahoma. When asked when he had contact, Fletcher responded, "When he was -- would be fixing to go to jail." Defense counsel renewed his motion for mistrial, which was denied. (T XI 2053-54). Immediately thereafter, the State asked Fletcher if there came a point in time when the mental health center refused to treat Zack because Zack would not conform to any treatment program, and Fletcher responded affirmatively. Defense counsel objected on the basis of hearsay, which the trial court overruled. (T XI 2054). Fletcher then concluded her testimony without objection by stating that Zack did not seek mental health treatment unless he was facing jail time because "he never wanted help." (T XI 2054).

In this appeal, Zack claims that the trial court abused its discretion in overruling his objections to Fletcher's testimony that Zack had stolen from his stepfather, that Zack's relationship with Midkiff was what Fletcher expected from a stepfather/son relationship, and that the mental health center refused to treat Zack because he would not conform to any treatment program. **Initial brief** at 83-91. This Court has previously held, however,

that "[o]nce the defense advances a theory of mitigation, the State has a right to rebut through any means permitted by the rules of evidence." Wuornos v. State, 644 So. 2d 1012, 1017-18 (Fla. 1994) (affirming admission of evidence that defendant had threatened police during incarceration; that, without provocation, she had used her gun to threaten man who attempted to give her ride; and that she previously had claimed a religious conversion during her incarceration on other charges in the early 1980s to rebut defense theory that defendant had never attacked without provocation and had undergone a recent religious conversion). Moreover, "[w]hen the defense puts the defendant's character in issue in the penalty phase, the State is entitled to rebut with other character evidence, including collateral crimes tending to undermine the defense's theory." Johnson v. State, 660 So. 2d 637 (Fla. 1995) (affirming admission of testimony by defendant's companion that she and defendant had violent arguments to rebut companion's testimony that defendant was loving and a good father figure to his son and her daughter). Thus, Fletcher's testimony was proper to rebut Zack's testimony that his stepfather severely abused him throughout his life and that Zack had repeatedly sought psychological help, but was consistently put off.

As for Fletcher's qualification to opine about the relationship between Zack and Midkiff, the question Zack objected to had twice previously been asked and answered without objection. The State had already asked Fletcher the nature of Zack's contact with Midkiff. Without objection, Fletcher stated that Zack lived

with Midkiff when she first met Zack, and "it was nothing out of the ordinary really." (T XI 2051). The State then asked the witness whether Zack had contact with Midkiff after Zack moved in with her, and she responded affirmatively. Again without objection, Fletcher testified that she observed Zack and Midkiff interact and that there did not "appear to be anything strange or unusual about that relationship." (T XI 2051). Thus, when the State immediately thereafter asked if the relationship was one that she would expect between a stepfather and his son, the pith of the question had already been asked and answered twice without objection.

Moreover, the State was not asking her an opinion that called for a psychological conclusion. It was merely asking her to relate her impression of how Zack and his stepfather interacted when they were together. This was not an improper question. Cf. Strausser v. State, 682 So. 2d 539, 541 (Fla. 1996) (affirming admission of lay witness' opinion relating to defendant's mental state); Occhicone v. State, 570 So. 2d 902, 906 (Fla. 1990) (affirming admission of lay witnesses' opinions relating to defendant's state of intoxication or lack thereof).

To the extent Zack complains that her testimony regarding the mental health center was based on hearsay, such testimony is admissible as long as the opponent has an opportunity to rebut it. See § 921.141(1), Fla. Stat. (1995). Zack had the opportunity to cross-examine Fletcher regarding the circumstances under which the mental health center refused treatment. Additionally, he had the

opportunity to rebut her testimony with other evidence, even though it was a collateral matter. "That he did not or could not rebut this testimony does not make it inadmissible." Clark v. State, 613 So. 2d 412, 415 (Fla. 1992). Cf. Damren v. State, 696 So. 2d 709, 713 (Fla. 1997) (affirming admission of deceased declarant's statement through police officer where defendant had opportunity to rebut evidence through cross-examination of police officer).

To the extent this Court finds any or all of these statements improperly admitted, such error was harmless beyond a reasonable doubt. When weighed against the six aggravating factors, Zack's mitigation, even if unrebutted by these statements of Fletcher, pales in comparison. Thus, even without Fletcher's objected-to testimony, there is no reasonable possibility that the jury's recommendation or the trial court's ultimate sentence would have been different. See State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). As a result, this Court should affirm Zack's sentence of death for the first-degree murder of Ravonne Smith.

ISSUE X

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN REFUSING TO INSTRUCT THE JURY THAT MERCY AND SYMPATHY WERE PROPER CONSIDERATIONS IN SENTENCING (Restated).

During jury selection, the State objected when defense counsel attempted to explain that the jury could consider sympathy or mercy during the penalty phase if it was caused by their emotional reaction to the mitigating evidence. The trial court sustained the

objection and instructed the jury as follows: "Feelings of prejudice, bias or sympathy are not legally reasonable doubts and they should not be discussed by any of you in any way in reaching your verdict." (T I 128-31).

Later, during the hearing on Zack's motion for new trial, defense counsel objected to the trial court's anti-sympathy instruction during jury selection and requested that it give the following special instruction during the penalty phase:

> During the guilt/innocence phase of this trial you were instructed that sympathy for one side or the other should not be considered. The mitigation evidence inevitably involves sympathy which should not cause you to disregard mitigation evidence that is reasonably established.
>
> Mere sympathy which is purely an emotional response to what you have heard should not influence your decision in any way. However, if sympathy arises as part of a reasoned moral response to mitigation placed before you, you may consider that in your decision about the appropriate penalty.

(R III 425). The trial court overruled the objection to the anti-sympathy instruction during jury selection and denied defense counsel's special requested instruction. (R III 429-32). Defense counsel raised the issue again during the penalty phase charge conference, and his proposed instruction was again denied. (T VIII 1572-80).

In this appeal, Zack claims that the trial court abused its discretion in denying his proposed instruction on sympathy in the penalty phase. Appropriately, he acknowledges that this Court has

rejected similar arguments regarding sympathy,[14] but invites this Court to reconsider its previous rulings under the specific facts of this case. As a basis for this special consideration, Zack alleges that the State improperly told the jury that it could not consider any mitigation that evoked sympathy, and thus his instruction was necessary to correct the improper argument. **Initial brief** at 91-93.

However, Zack did not object to the State's comment in closing argument and did not subsequently renew his request for the proposed instruction in light of the State's comment. Thus, he cannot now challenge the trial court's denial of his instruction when the court's ruling predated the allegedly improper comment that required an exception to this Court's precedent. In other words, Zack proposed an instruction that was contrary to the law, and the trial court denied the requested instruction. Subsequently, the State allegedly made a comment that violated Zack's rights to a fair sentencing proceeding and created the need to give the requested instruction. Yet, defense counsel neither objected to the State's comment, nor renewed his requested instruction because of the State's argument. Thus, he failed to preserve this argument for review and has provided this Court with no legitimate reason to create an exception to its previous rulings, much less to recede from them entirely. See Tillman v.

[14] Hunter v. State, 660 So. 2d 244, 253 (Fla. 1995); Hitchcock v. State, 578 So. 2d 685, 694 (Fla. 1990); accord Saffle v. Parks, 494 U.S. 108 (1990).

State, 471 So. 2d 32 (Fla. 1985); Steinhorst v. State, 412 So. 2d 332 (Fla. 1982).

More importantly, the State does not agree that the prosecutor's comment was a misstatement of the law or misled the jury to believe that it could not consider any mitigating evidence that evoked sympathy towards the defendant. Rather, the State argued that sympathy, by itself, was not a legitimate basis upon which to recommend a life sentence. This was proper argument. See Hunter v. State, 660 So. 2d 244, 253 (Fla. 1995); Hitchcock v. State, 578 So. 2d 685, 694 (Fla. 1990).

To the extent this Court agrees that the State's comments presented a compelling reason for the trial court to give Zack's proposed instruction sua sponte, the trial court's failure to do so was harmless beyond a reasonable doubt. The trial court ultimately instructed the jury that it could consider as mitigating evidence "any other aspect of the defendant's character, record or background; and . . . any other circumstance of the offense." (T XI 2111). Thus, the jury was well aware that it could consider any evidence in mitigation, even if it caused them to feel sympathy for Zack. After all, mitigation by its nature ameliorates the enormity of the crime by evoking feelings that lessen the weight of aggravation. Since no error occurred, or any error was harmless, this Court should affirm Zack's sentence of death for the murder of Ravonne Smith.

ISSUE XI

WHETHER THE TRIAL COURT COMMITTED AN EX POST FACTO VIOLATION WHEN IT FOUND THAT APPELLANT'S PROBATIONARY STATUS SATISFIED THE "UNDER SENTENCE OF IMPRISONMENT" AGGRAVATING FACTOR (Restated).

Prior to trial, Zack made numerous constitutional challenges to the death penalty statute as a whole and to individual aggravating factors and instructions. (R I 12-86). He did not challenge facially or as applied section 921.141(5)(a), Florida Statutes (Supp. 1996), which makes applicable as an aggravating factor a capital felony "committed by a person previously convicted of a felony and under sentence of imprisonment or placed on community control or on felony probation." At the penalty phase charge conference, the State indicated that it would be seeking an instruction on the "under sentence of imprisonment" aggravator, based on Zack's status on probation at the time of the commission of the murder. Again, Zack made no objection to the facial constitutionality of this aggravator, nor did he object to the application of it to him. (T VIII 1533-34). In fact, at no time did Zack challenge the application of this aggravator, up to an including his sentencing memorandum to the court, wherein he "concede[d] that the State ha[d] proved this aggravating circumstance beyond a reasonable doubt." (R VI 818). Thus, Zack failed to preserve this issue for appeal. Cf. Parker v. Dugger, 537 So. 2d 969 (Fla. 1988) (finding claim procedurally barred on habeas review that application of CCP aggravator constituted ex post facto violation where defendant failed to object to

application of factor); State v. Johnson, 616 So. 2d 1, 3 (Fla. 1993) (holding that facial challenge to statute's constitutional validity may be raised for first time on appeal only if error fundamental, i.e., basic to judicial decision under review and equivalent to denial of due process); Isaac v. State, 626 So. 2d 1082, 1083 (Fla. 1st DCA 1993) ("[B]ecause appellant's argument attacks the statute on the ground that it is unconstitutional as applied, rather than on its face, that argument may not be made for the first time on appeal.").

Even were his challenge subject to review on appeal, it is wholly without merit. 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 defendant challenged the legislature's addition of community control to this 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.; see e.g., Jackson v. State, 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.) (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 Zack was on felony probation or when the trial court instructed the jury on, and then found, that the felony probation aggravator had been established.

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 found five other aggravating factors in this case: "felony murder," "avoid arrest," "pecuniary gain," CCP, and HAC. Zack makes no challenge to two of them: HAC and "pecuniary gain." Although the trial court gave the "under sentence of imprisonment" aggravator "great weight," it also gave each of the other five aggravators "great weight" and ultimately found that "the aggravating circumstances

present in this case far, far outweigh the mitigating circumstances." (R VI 859-73) (emphasis added). Thus, there is no reasonable possibility that the jury's recommendation or the trial court's sentence would have been different if the "under sentence of imprisonment" aggravator had not been applied. See Rogers v. State, 511 So. 2d 526, 535 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988); Capehart v. State, 583 so.2d 1009, 1015 (Fla. 1991), cert. denied, 112 S.Ct. 955 (1992). Consequently, this Court should affirm Zack's sentence of death for the first-degree murder of Ravonne Smith.

ISSUE XII

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN REFUSING TO ADMIT A PHOTOGRAPH OF APPELLANT'S FAMILY DURING THE PENALTY PHASE (Restated).

During the penalty phase, Zack presented numerous photographs that depicted a chronology of his life. Some of the photographs were of himself alone, some were of members of his family by themselves or in groups, and some were of him with various members of his family. The State objected to relevancy and/or the cumulative nature of many of these photographs, but the trial court allowed their admission. (T IX 1637-48, 1651-78, 1739-41). Prior to the testimony of Zack's half-sister, Theresa McEwing, defense counsel sought to introduce a picture of Theresa's child, who was of mixed race, ostensibly to show that Zack would have a niece with whom he could develop a relationship if he were sentenced to life

in prison. (T X 1795-97). After confirming that defense counsel intended to elicit from the witness that she has a daughter with whom Zack could communicate while in prison, the trial court excluded the photograph. When pressed as to its reason, the trial court indicated its belief that counsel's purpose in admitting the photograph was, "perhaps[,] to seek the sympathy of the black jurors from the panel." (T X 1796). Thereafter, Theresa McEwing testified that she has a child whose father is black. (T X 1798).

In this appeal, Zack claims that the trial court abused its discretion in excluding the photograph of his niece as relevant evidence in mitigation. **Initial brief** at 98-100. This Court has previously held, however, that the admission of evidence is within the trial court's discretion and that this Court will not overturn such a decision absent a palpable abuse of that discretion. Hodges v. State, 595 So. 2d 929, 933 (Fla. 1992). Zack has failed to meet his burden. McEwing was going to testify that she had a child and ultimately testified that that child had a Black father. Thus, a photograph depicting that child was not relevant, and thus properly excluded. Cf. Johnson v. State, 660 So. 2d 637, 645 (Fla. 1995) (affirming preclusion of photograph of defendant's daughter who died by miscarriage where jury told of photograph's existence, its importance to defendant, and impact miscarriage had on defendant); Griffin v. State, 639 So. 2d 966, 970 (Fla. 1994) (affirming preclusion of newspaper article as evidence of remorse where writer of article was available to, and did, testify to contents); Jackson v. State, 648 So. 2d 85, 90 (Fla. 1994) (affirming preclusion of

videotape of defendant's hypnotic regression session where doctor was available to testify to procedure of session and to read from transcript of session).

In the event this Court finds that the photograph of Zack's niece should have been admitted, any error was harmless beyond a reasonable doubt. See State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). As noted, the jury knew that McEwing had a daughter, and defense counsel was free to argue that Zack had family with whom to communicate if given a life sentence. There is no reasonable possibility that the admission of that photograph would have affected the jury's recommendation or the trial court's ultimate sentence. Therefore, this Court should affirm Zack's sentence of death for the first-degree murder of Ravonne Smith.

CONCLUSION

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

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General

_____
SARA D. BAGGETT
Assistant Attorney General
Fla. Bar No. 0857238
1655 Palm Beach Lakes Blvd.
Suite 300
West Palm Beach, FL 33401-2299
(561) 688-7759

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was sent by United States mail, postage prepaid, to David A. Davis, Assistant Public Defender, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, Florida 32301, this ____ day of October, 1998.

_____
SARA D. BAGGETT
Assistant Attorney General