IN THE SUPREME COURT OF FLORIDA

ALEX PAGAN

Appellant,

vs. **CASE NO. SC94365**

STATE OF FLORIDA,

Appellee.

_____/

ANSWER BRIEF OF THE APPELLEE

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

SCOTT A. BROWNE
Assistant Attorney General
Florida Bar No. 0802743
Westwood center
2002 North Lois Avenue, Suite 700
Tampa, Florida 33607-2366
(813) 873-4739
(813) 326-1292 (Fax)

COUNSEL FOR STATE OF FLORIDA

TABLE OF CONTENTS

PAGE NO.:

TABLE OF CITATIONS

PAGE NO.:

OTHER AUTHORITIES CITED

CERTIFICATE OF TYPE SIZE AND STYLE

This brief is presented in 14 point Times New Roman, a proportionately spaced font.

PRELIMINARY STATEMENT

The record on appeal will be cited as "R" followed by the appropriate volume number and page number. The transcript will be cited as "TR" followed by the appropriate volume and page number.

STATEMENT OF THE CASE AND FACTS

The State generally accepts appellant's statement of the case and facts as accurate, but adds the following.

Guilt Phase

Latasha Jones testified that on Monday, February 22, 1993 she lived in a two bedroom pool home with her husband Freddy and her two children, Laffiette Jones and Michael Len. (V-18, 2139). She and her husband were operating a restaurant called "Lil Laff's Sole Food and Seafood Restaurant" at that time. The restaurant was named for her baby, Laffiette. (V-18, 2141).

On late Monday evening or early Tuesday morning, Latasha was in bed with her husband and youngest child, little "Laff." (V-18, 2144). She had just drifted off to sleep when she heard a crash, the sound of glass breaking. (V-18, 2144). They both sat up in bed and noticed one side of the sliding glass door had been broken out. (V-18, 2144-2145). It was very dark in the bedroom, only a light above the stove was on in the house. (V-18, 2145). However, she observed two men standing on each side of the bed. Latasha testified to their appearance: "That they were, they were armed with guns and they were heavy equipped with a whole bunch of clothes and stuff and had a mask on their face." (V-18, 2145-46). She testified the mask looked like a ski mask that covered pretty much the entire face. (V-18, 2146). Latasha heard a conversation develop between the men and her husband. (V-18, 2146). Latasha testified: "Well, the one that was on my husband's side, he said, Mr. Laff, we heard you had, I'm not sure it was twelve or thirteen thousand dollars in the house and we want it. So he was like, man, I don't know where you get your information from."

Id. They were told to turn over and lay face down on the bed. (V-18, 2147).

One of the men appeared to be getting angry and was waving the gun around. (V-18, 2149). Freddy asked the man to stop waving the gun around, Latasha testified: "He was like, don't worry about this, I got this. He was like, then the other guy on the other side, he was like, we want that money. And then the one on my husband's side said, you need to stop telling your business, he told somebody in Carver's Ranches that he had the money in the house." (V-18, 2149). Her husband said that was a lie and one of the men continued to say we want the money while the other one, the "hyper one," went looking for money in the house. (V-18, 2150). The hyper one was not gone long, maybe five minutes before returning to the bedroom. (V-18, 2151). The gunman who remained was again stating that he wanted the money and something about he had "messed up the first time." (V-18, 2151). He did not elaborate on the messed up the first time comment. Id. Latasha believed it was the quiet one who said it. (V-19, 2235). However, Latasha did testify that she had a burglary at her house approximately a month before this home invasion. (V-18, 2151). When the other gunman returned, Latasha testified that he had her son Michael with him. He threw Micahel down at the end of the bed and told him to lay down. (V-18, 2152). "Mike was sitting up, saying mom what's going on, what's going on. I was just like, Michael, lay down." (V-18, 2152). The hyper gunman was getting frustrated: "So the guy went there fussing and shit saying so, the hyper one, he went fussing, saying, I'm getting tired of this, I'm getting fed up, I want that money, I want that money." (V-18, 2154).

At that point, one gunman told Latasha to get up and took her out through the house looking for the money. (V-18, 2154). The gun was pressed against her head,

but she could also feel like a cushion instead of naked skin on his hand. (V-18, 2155). Latasha concluded that he had a glove on. (V-14, 2155). She had seen a bag with money in it earlier in the guest bedroom or living room but could not find it now.[1] (V-18, 2154, 2157). Latasha hoped to find the money and stated that if she did, "maybe we had a chance." (V-18, 2156). She was taken back into the bedroom after stopping in the kitchen where the gunman rifled through her purse. (V-18, 2157). Once back inside the bedroom, the gunman hit her on the side of the face with his gun. (V-14, 2158). He also said "bitch, you know where the money at. He was like, stop playing with me." (V-18, 2159). When he hit her, Latasha testified that [b]lood went shooting everywhere." (V-18, 2159). She claimed that the blow fractured her nose. Id. At that point, Latasha was crying and asking Freddy to turn over the money. Freddy told the men: "...don't do them like that, let them go, stuff like that." (V18, 2159). One gunman said "I'm tired of playing with ya'all. As (sic) I want the money. I want it now or somebody's going to get hurt." (V-18, 2160). After being struck, Latasha was laid back on her stomach on the bed. (V-18, 2160). Her face was turned toward the closet door and the quiet one must have had his mask partially off because she could see "he was very bright skinned, looked like he was white."[2] (V-18, 2161). He said, "man, close the door, that bitch can see me." (V-18, 2161). She also heard a

[1]The bag was later found by the police, Latasha had no idea that the suitcase contained over one hundred thousand dollars. (V-18, 2191). The police turned over approximately "90 thousand dollars back, the lawyer got most of it, half of it." (V-18, 2191). Evidently, Latasha found receipts, gambling tickets from the dog track that showed "winnings." Id.

[2]The closet had a light that goes on automatically when the door is opened. (V-18, 2161).

name called out, it sounded like "Zack" or "Sack."[3] (V-18, 2161). The door was only open for approximately seven or eight seconds. (V-18, 2162).

Next, one gunman asked for the keys to the truck. (V-18, 2163). Freddy told them they were in his pants pocket at the foot of the bed. Id. The quiet one then told the hyper gunman to get the rope. (V-18, 2163). Latasha saw the quiet one tie up Freddy, his hands were behind his back, his feet were tied together. (V-18, 2164). One of them left and Latasha heard the truck start, after it was cranked up the hyper one came back and said he needed more rope. (V-18, 2165). Evidently, they found some rope, and Latasha testified that she was tied up the same as Freddy. (V-18, 2166). After she was tied up, Latasha testified that she observed the quiet one shoot her husband. "I seen him shoot him about twice and I turned my head." (V-18, 2167). Latasha continued: "And then I seen him, I heard him say to my baby, he said, shorty, if you live through this. Make sure you go to school everyday." (pause). "You son, you don't have to grow up to like me. Then I heard more shots. I didn't know if he had shot Mike or not and then I seen shots coming up there towards me. So I saw one shot being hit and I just turned my head and laid there and played dead." (V-18, 2167-68).

Latasha recalled hearing her baby screaming: "The baby went to screaming after he woke up, like they was leaving, he like, I guess they fired out two or three more shots inside the room and I think one of them hit him then and he started screaming." (V-18, 2168). Altogether, Latasha estimated that she heard "seven or eight" shots. (V-18, 2172). She never saw the hyper one fire any shots. (V-18, 2168). The hyper one was standing in the doorway when the quiet one shot her

[3]Graham's nickname was "Shaikwan." (V-21, 2412, V-25, 3011).

husband. (V-18, 2168).

Latasha heard the car door to the Honda and then another door, this one from the truck close. She heard the truck "going down the street." (V-18, 2169). At that point she began kicking out with her feet and managed to free one of her legs. (V-18, 2169). She rolled out of bed to the doorway and grabbed her baby Lafiette. Her baby was screaming and hollering. (V-18, 2170-2171). Latasha tried to go out through the master bedroom, through the broken window, as she did she attempted to communicate with her husband and Mike: "When I know, first said, Mike, Mike, then I said, Laff, and they ain't said nothing. I was like, oh shit, Mike, Laff, they didn't say nothing." (V-18, 2120-2171). Latasha testified: "I was panicked, blood was all over my face. I couldn't see because he already had hit me in the face with the gun and I was bleeding out of my nose. It was gushing everywhere when he shot me in the head, I was bleeding from there. So I really couldn't see too much, you know, because the blood was everywhere." (V-18, 2172).

Latasha attempted to get help from her neighbors, knocking on two front doors. Latasha thought the neighbors were frightened because no one let her in. (V-18, 2173). As she moved down the street she ran into a man who was a paramedic. He got her to sit down, took her baby, and then ambulances arrived shortly thereafter. (V-18, 2173-74). She did not remember talking to a police officer at the scene or riding in a helicopter to the hospital. (V-18, 2174).

Latasha also testified about a burglary that occurred approximately one month before the home invasion. Latasha testified that on the evening of January 23, 1993, she and her children were at her mother's house. When she returned to her house, she observed the screen door was bent over backwards. Inside the master bedroom in the

house, Latasha observed: "All the drawers were opened, clothes were all over the bed, stuff was everywhere." (V-19, 2205). She was frightened and ran out of the house to her friend's house. (V-19, 2205). Latasha returned to her mother's house and when her husband showed up, she believed he called the police.[4] (V-19, 2207). Latasha filled out an inventory of lost or stolen items for the police. (V-19, 2208). The total value of the missing property was listed as "twenty-six thousand dollars." (V-19, 2210). Six thousand dollars was cash, the remainder was clothes and jewelry. (V-19, 2210-2211).

Latasha identified a photograph of her wearing jewelry, an anchor with a crucifix. (V-19, 2213). She identified another photograph, this one depicting a Honda ring, which was also taken during January 23rd burglary. (V-19, 2215-2216). She also identified a photograph depicting a Cadillac ring. (V-19, 2216). She identified in court the Honda ring and her crucifix, as well as other items taken during the January burglary. (V-19, 2217-2229). Those items recovered by the police included a chain with a large anchor, her husband's ring [three men's diamond ring, gold, Cadillac] and a man's "two way" layered bracelet. (V-19, 2225-2229).

Latasha attempted to give a good description to the police of the gunmen, but testified it was dark and she is not good at estimating height and weight. (V-18, 2181). The only time she got a decent look was when the closet light came on and she

---

[4]January 23, 1993, Sergeant Lind of the Miramar Police Department, responded to a burglary call at the victims' residence. (V-14, 1553-1555). The point of entry was through a jalousie door where the window had been apparently pried loose. (V-14, 1555). Lind observed that the rear flood lights had been unscrewed. Consequently, Lind dusted the bulbs for prints. (V-14, 1556). Lind also dusted two jalousie panes and the door knobs for prints. (V-14, 1556). The lack of ridged detail on the processed items suggested to Lind that the perpetrators had worn some type of gloves or socks on their hands. (V-14, 1562).

could see part of one gunman's face. (V-18, 2182). However, this only allowed her to see that "he was very bright, that's all." (V-18, 2182). She also recognized the speaking voice had a New York accent. (V-19, 2235). On a voice lineup, Latasha testified that of the six voices on the lineup, she thought she recognized voice number two. (V-19, 2272). However, Latasha testified that she was not sure of the identification. (V-19, 2272). She did not want to make a mistake. The voice depicted in number two, was the defendant, Alex Pagan. (V-19, 2274). However, the police never told her that voice number two of the lineup was Pagan's.[5] (V-19, 2276).

After hearing shots on the morning of February 23, 1993, off-duty paramedic Edan Jacobs left his home which was near the Miramar residence of the Jones family. He walked out to his front porch and observed a screaming, hysterical female, she was bleeding and holding a baby in her arms. (V-14, 1493-1495). She told Jacobs that "they shot us, they shot us." (V-14, 1494). The woman, later identified as Latasha Jones, had a gunshot wound to her head and a large amount of blood on her clothes. (V-14, 1494). She had a gunshot wound to the right side of her head near the temple. (V-14, 1520). Jacobs took the baby from her arms and began treating him; the baby had a gunshot wound to his left arm "and it was pretty well mangled up, you know, there was a lot of blood on the baby and on her." (V-14, 1495). He applied a splint to the baby's arm "because the wound was [a] pretty nasty wound. The arm was

[5]The video depicting the voice line up was played for the jury without objection from the defense. (V-20, 2317-2325). Detective Manzella testified that although Latasha did not write down the number provided on a form, she "mentioned the fact that she had heard the voice but was afraid to say so at the time." (V-20, 2327). Manzella testified that she was talking about voice number two. Id. Deputy Irene McPhaul testified that she always approached the witnesses in the same manner to keep the names of the lineup participants hidden from the witness or victim. (V-24, 2836).

pretty well fragmented and so you need to support it." (V-14, 1500). One of the first responding officers of the Miramar Police Department, Craig Bonczek, testified that he entered the victims' home with Officer Morton and looked inside of the master bedroom. On the bed were two males, one was in his twenties or thirties, along with a younger male. Both individuals were hogtied, with hands tied behind the back and tied to his legs. (V-14, 1510). After clearing the house, Bonczek testified that he went back to the bedroom to check on the two individuals in the bedroom. (V-14, 1511). The older male appeared to be breathing. "He was gasping for air." (V-14, 1511). The child, however, did not appear to be breathing. (V-14. 1511). The paramedics arrived at the residence within five minutes and pronounced both victim's dead at the scene. (V-14, 1512).

Dr. Ronald Wright, District Medical Examiner for Broward County, testified that he arrived at the crime scene and found two bodies, both appeared to be shot and were "hog tied" on the bed. (V-15, 1729). Dr. Wright performed the autopsy and noted that the adult male victim died from multiple gunshot wounds to his head. (V-15, 1740-45). The child, Michael, had four gunshot wounds, "1 to his buttock and 3 to his head." (V-15, 1747). Any one of the three gunshot wounds to Michael's head would have been fatal.[6] Id.

Dr. Wright testified that based upon his medical training and many years of experience in the field, he was familiar with injuries produced by human bodies coming into contact with glass. (V-15, 1718-20). Dr. Wright testified:

Well, I was regional medical examiner, Department Chief Medical

[6]A ballistics expert, Patrick Garland, testified that the 9 millimeter shells recovered from the scene were fired from a semi-automatic. The eight cartridges were fired from the same weapon. (V-25, 3013).

> Examiner of Dade County as well as District Medical Examiner of Broward. Some of, I suppose, 26 years in all. Yes, I have a lot of experience with glass injuring people. I've autopsied a reasonable, not a large number of people, but probably a couple dozen individuals who have been killed by encounters with glass and then probably some hundreds or maybe thousands who have had injuries associated with or caused by glass, maybe not killed them, but they've died and had glass cut injuries as well.

(V-15, 1720). Dr. Wright was familiar with glass used in South Florida, called safety glass. Such glass will break into small pieces rather than large pieces and therefore "don't generally cause serious injury to people." (V-15, 1722). Contact with this kind of glass does not generally produce injuries when a person is wearing clothing: "If there's any clothing or anything protecting it, it won't. It's not capable of getting through even a T-shirt." (V-15, 1724). Dr. Wright testified over defense objection that it would be "highly unlikely" that a person using his shoulder or foot to kick in the sliding glass door would be "cut, bleeding [or] injured." (V-15, 1724).

Antonio Quezada testified that on February 23, 1993, he was nineteen years old. (V-21, 2454). Quezada was a student at Miami Dade Community College in February 1993. (V-21, 2458). In February of 1993, Quezada had known Pagan over a year and testified: "We were good friends." (V-21, 2456). Quezada frequently stayed over at Pagan's house. Quezada testified that he "would go to his house probably everyday or five or six times a week." (V-21, 2456). They were very close friends for about six or seven months prior to February of 1993. (V-21, 2457). Quezada met Willie Graham and Keith Jackson in the course of his relationship with Pagan. (V-21, 2460).

Two or three days prior to January 23, 1993, Quezada recalled a conversation about robbing a house. (V-21, 2503). Quezada recalled being paged by Pagan who asked to be picked up at Graham's house. (V-21, 2501). At Graham's house he got

in Quezada's car and then said let's go pick up "Keith" [Jackson]. (V-21, 2502). In the car, Graham and Pagan discussed robbing a house: "They said they were going to rob the guy." (V-21, 2502). As for identifying the victim, Quezada testified: "It was, just as far as I heard, it was a drug dealer who owned a restaurant. He had a lot of money in his house." (V-21, 2503).

On the evening of January 23rd, Quezada recalled dropping Pagan off at Graham's house. He was beeped an hour or so later to pick them up. (V-21, 2503). When he picked them up from Graham's they had items that they did not have in their possession before: "Clothes, jewelry, money." (V-21, 2503). Pagan and Graham told Quezada they got jewelry from the house. (V-21, 2505). Pagan had a Honda ring, a Rolex ring, a Herringbone necklace and "a rope chain with a cross on it." (V-21, 2505). Quezada described the clothes they picked up: "Willie had a warm-up suit and Alex had a black suede jacket." (V-21, 2504). Pagan was wearing this suede jacket when he was driven to the victims' residence on February 23rd. (V-21, 2507).

After picking up Pagan and Graham, Quezada went to pick up Jackson. (V-21, 2504). Once Jackson was in his car, they drove past the victims' house because Jackson "wanted to check it out." (V-21, 2504). When they drove past the house they could see a jeep in the driveway, but no police cars. (V-21, 2505). As they drove by, Pagan said "that's the house." (V-21, 2505). Quezada testified that the night and morning after the burglary they went out to night clubs with "Alphie" and Jackson.

During the period from January 23, 1993 to the homicide of February 23, 1993, Quezada testified he was with Pagan "[m]ost of the time." (V-21, 2506). During that period, Quezada testified that he frequently observed the jewelry taken by Pagan and even had the opportunity to wear it. (V-21, 2506). In court, Quezada identified the

rope chain and Honda ring taken from the January 23rd burglary as items he observed Pagan with and had worn. (V-21, 2507). Quezada also identified the suede jacket, exhibit 155 as the jacket Pagan had on after the January 23rd burglary and the jacket he wore on February 23rd. (V-21, 2508-10).

Quezada also described jewelry Graham was wearing after the burglary: "It was a big gold watch, like the band was about, I would say, an inch or two and he had a long rope chain with a cross on it and he had a bracelet with the name Latasha written in cursive." (V-21, 2512-13). He identified in court a wide band gold watch he observed Graham with after the burglary. (V-22, 2519). Quezada also described the necklace as a "cross" with an "anker" [sic] on it. (V-21, 2512-13). He identified the exhibit (137) introduced at trial as the one he observed Graham with after the victims' house was burglarized. (V-22, 2520). Quezada testified that the last time he observed Pagan with a herringbone chain was in his car the day Pagan was arrested. (V-22, 2519). Quezada had no idea what happened to a "Rolex" ring (sic) that he saw Pagan with after the burglary on January 23rd. (V-22, 2519).

After the January 23rd burglary, Graham and Pagan expressed dissatisfaction with the results. Quezada testified that Pagan told him: "Next time we're going to do it right." (V-22, 2521). Quezada explained: "They said they were looking for a hundred thousand dollars in cash and some cocaine." (V-22, 2521). Quezada believed that this conversation occurred on the way to some night clubs. (V-22, 2521). "They were talking about going back, getting what they didn't get the first time." (V-22, 2522).

On Monday, February 22, 1993, Quezada recalled he spent much of the day with Pagan. (V-21, 2461). In fact, Quezada believed that he spent the night of

February 22nd with Pagan, in his apartment. Id. They woke up in the afternoon and later went to the house of Pagan's girlfriend, who lived near Ft. Lauderdale. (V-21, 2462-63). Quezada drove his mother's car. The visit was cut short after Pagan was paged on his beeper. (V-21, 2464). After receiving the page, Pagan told Quezada "let's go pick up Shaikwam. (Willie Graham)" Id. Graham lived in Pembroke near Pagan's residence, near the airport. (V-21, 2465). They arrived at Graham's house at approximately 9:00. (V-21, 2466). From Graham's residence, they went to another friend's house to see about a job. (V-21, 2466).

On the way back to Pagan's residence he heard Pagan or Graham say "[t]his would be a good night to go back and or, excuse me, to go back into the house." (V-21, 2471). Quezada understood this to mean they would return to the house they had burglarized on January 23, 1993. (V-21, 2471). Once back inside Pagan's apartment, Pagan said that "'[w]e're going to kill everybody.'" (V-21, 2475). Graham appeared to be in agreement with that statement, however, Quezada testified: "I didn't take it too seriously at the time." (V-21, 2475). They were only at Pagan's for about five minutes, Pagan changed and then they proceeded to Graham's house. (V-21, 2475). Pagan changed into "a black suede jacket, silk shorts, a black polo shirt and some black dress shoes." (V-21, 2476).

They drove from Pagan's to Graham's and on the way, Keith Jackson was mentioned. (V-21, 2476). At some point, Pagan said "Fuck, Red Man, he's taking too long." (V-21, 2477). He did not see Jackson that evening. Id. At Graham's house, Quezada remained in the car. When Graham emerged, he had changed into "sweat pants, boots, black boots and a field jacket." (V-21, 2477). The boots looked like military style "combat boots." (V-21, 2477). When he got to the car, Quezada

asked him "if he was going to war." (V-21, 2478). In a jovial manner, Graham "said, yeah." (V-21, 2478). From Graham's they drove to the street where the victims lived.[7] (V-21, 2478). As they drove to the residence "it was discussed that they were going to go in and rob the guy, Freddy, I believe his name was." (V-21, 2479). Pagan said "I'm going to kill everybody." (V-21, 2479). In response, Quezada said "[d]on't kill the kids." (V-21, 2479). Quezada had learned there were kids in the house after the burglary in January. (V-21, 2479). In response, Graham said "[w]e can't leave any witnesses." (V-21, 2480). The drive to the victims' home only took about two minutes from Graham's house. (V-21, 2480). Quezada testified: "I drove about half a block and then I dropped them off around the corner." (V-21, 2480).

Quezada did not see any guns or ski masks, but he did see gloves in the car. (V-21, 2480). The surgical gloves were passed over his shoulder from Graham to Pagan. (V-21, 2480). He noticed that both Pagan and Graham had gloves on when they got out of the car. (V-21, 2481). When they left the car, Quezada said "see you tomorrow." (V-21, 2482). Quezada then went home to study for a test he had on Tuesday morning. (V-21, 2482). He did not expect to see Pagan or Graham again that night.

As he was at home studying later that evening or early morning, Quezada testified that he heard a knock on his door and was surprised to see Pagan when he opened the door. (V-21, 2482-2483). Quezada testified that he noticed a "gunpowder" smell when he first opened the door for Pagan. (V-21, 2484). Quezada was in the military and was familiar with the smell of gunpowder. (V-21, 2484).

---

[7]At the time, Quezada did not know the victims' names and only learned the names of the victims after the offenses had been committed. (V-21, 2479).

Pagan came inside his apartment and told Quezada "I killed everybody." (V-21, 2483). Quezada asked Pagan if he even killed the kids, Pagan admitted that he killed the kids too, stating "he couldn't leave any witnesses." (V-21, 2483). Graham did not come inside the apartment. Pagan only stayed long enough according to Quezada to ask him to take Graham to the bus station. Quezada recalled: "He stayed there long enough to conduct the conversation I just said, asked me to take him to take Shaikwam [Graham] to the bus station and say hi to my grandfather, that's about all the time that the was there." (V-21, 2483). Quezada agreed to take him to the bus station. (V-21, 2483). When Quezada asked how they got to his apartment, Pagan replied: "[T]hey stole the victim's car, they left it at a supermarket, walked down to a gas station where they found a guy who needed some money for gas. They offered him money for gas in exchange for a ride to my house." (V-21, 2484-85).

Graham appeared "very upset," Quezada testified: "He told me he was mad because they didn't get anything." (V-21, 2485). Graham or Pagan told Quezada that Graham intended to leave for Geogia. (V-21, 2485). Before going to the bus station, the three of them drove to South Beach, the downtown area. (V-21, 2486). Pagan was in the passenger seat and Graham was in the rear passenger seat. (V-21, 2486). When they were driving they talked about the home invasion. They admitted entering through a sliding glass door and they threatened to kill the victims' if "they didn't give them the money." (V-21, 2487). Pagan said he broke through the window with his body. (V-21, 2487). Pagan told Quezada, "the lady was pleading with the man to give him what they wanted, but the man denied that he had anything." (V-22, 2522). Again, Pagan said "he shot everybody" before leaving in the victims' jeep. (V-21, 2488). Quezada asked him why he killed the kids, the baby in particular, Pagan did

not respond to that question in the car. (V-21, 2489). They were driving for about an hour-and-a-half to two hours. (V-21, 2489).

During that drive, Quezada testified he did not see either Graham or Pagan with a weapon. (V-21, 2492). Some time in the car, however, Pagan told Quezada that the gun he used had been "broken up and scattered in various places." (V-21, 2492). The gun Pagan referred to was a "[n]ine millimeter pistol." (V-21, 2492). Quezada testified he had previously seen Pagan in possession of a black nine millimeter. (V-21, 2493-94). Quezada previously observed Pagan carrying that weapon in a shoulder holster. Id. Quezada believed that Pagan had bought the gun from Graham sometime around the date of the first burglary of the victims' residence. (V-21, 2495).

Quezada testified that neither Graham nor Pagan complained of cuts after the home invasion. (V-22, 2522). Nor did Quezada observe any blood on them. (V-22, 2523).

After driving around Miami, Quezada testified that he finally went to the bus station. He estimated that they arrived at the station at approximately 4:00 a.m. (V-21, 2490). After getting out of the car, Graham stated that he wanted to switch jackets. He was wearing a camouflage field jacket. (V-21, 2491-92). He switched jackets with Quezada who was wearing a black Reebock jacket. (V-21, 2491). Quezada never saw his jacket again. He later threw out the camouflage jacket Graham had given him on the way home from the bus station. (V-21, 2491).

Later that morning, Quezada drove Pagan to his mother's apartment so that he could get a change of clothes and his toothbrush. (V-21, 2496). They went back to Quezada's where he studied for his exam and then went to sleep. Id. After only two hours or so of sleep, the alarm went off and Quezada went to school to take his exam.

(V-21, 2496). Pagan went with him to the junior college and waited for him. (V-21, 2496-97). After the exam, he met up with Pagan and while still on the campus, Quezada received a page. (V-21, 2497). He was paged by Keith Jackson who evidently wanted to speak with Pagan. (V-21, 2498). In response to the page they drove to Keith Jackson's mother's house who lived in Carver Ranches. (V-21, 2498). Once inside the house, Pagan went inside a room with Jackson while Quezada stayed outside with Anthony Graham. (V-21, 2498).

When Pagan emerged from the room they all discussed what happened the night before. Pagan explained to Jackson "everything that went down." (V-21, 2499). Quezada recalled:

> Said they tied up the victims and Willie hit the lady in the head with the gun. Again, that he was calm and Willie was real hyper and he said Willie, he sent Willie to start up the truck and he pointed the gun to the seven year old boy and he told him that if he lived through it not to choose that path, to get an education, be somebody, something along those lines. Then, he said, he killed everybody, and they left.

(V-21, 2499-2500).

Quezada was present when Pagan was arrested and told the police that Pagan was with him all night on February 23rd. (V-22, 2524). Quezada admitted that this was a lie. (V-22, 2527). Quezada also testified that he lied in court in April of 1993, falsely testifying as to Pagan's "whereabouts during the time of the homicide."[8] (V-22, 2528). He attempted to provide an alibi for Pagan, testifying: "I was afraid of Mr. Pagan and I felt if I remained loyal to him nothing could happen to me." (V-22, 2528).

On cross-examination, Quezada testified that when first questioned by the

[8]Evidently, Quezada testified on Pagan's behalf at a pretrial bond reduction hearing.

police he was threatened with prosecution, physically intimidated, and even battered. (V-22, 2536-37). Under defense attorney Colleran's advice, Quezada went to the hospital to have his bruises documented, but he did not need treatment. (V-22, 2540). Even though he was intimidated, Quezada initially maintained his false alibi for Pagan. (V-22, 2541-42).

Quezada was later charged with being an accessory after the fact for murder. (V-22, 2542). Quezada retained an attorney who thought Quezada could get a deal: "They said that they could probably get the state attorney to go easy on us if I confessed." (V-22, 2542). Quezada later did cut a deal so that he would not be charged with any offense. Specifically, no perjury charges would be brought against him for his prior false testimony on Pagan's behalf. (V-22, 22, 2547). Quezada's attorney told him there was a "remote" chance he could be charged with murder if he did not take the deal. (V-22, 2550).

While Pagan claims that Quezada admitted that he learned "many of the details" that he knew about the offense from law enforcement (Appellant's Brief at 24), the record does not support this contention. The most that can be said is that Quezada learned some or a few details from the police, such as the name of the family and details about the fatal shooting of the child. (V-22, 2544). And, when asked about changing his story after maintaining an alibi for Pagan, Quezada admitted his version changed: "Then I told the truth." (V-22, 2545).

Quezada's prior consistent statement was then introduced in the form of a tape recording made by then confidential informant Keith Jackson. Quezada had no idea he was being taped in the car with Mr. Jackson and another individual, "Alphie." On the tape, Quezada confirmed that he drove Pagan and Graham to the house on the

night of the home invasion double murders. (V-22, 2655). Quezada also stated that Pagan and Graham got a ride from the supermarket after the offense from someone who needed gas money. (V-22, 2655). On questioning from Jackson, Quezada confirmed that they did not get anything from the home invasion: "Nothing."[9] (V-22, 2656). This taped statement was made after his initial questioning from the police wherein he maintained the false alibi, but well before any agreement had been made with the State.

After Pagan was arrested, Quezada received a call from Graham to pick him up from the Greyhound station. (V-22, 2523). Graham was wearing the same combat boots he wore the night of the home invasion when he was picked up at the station. (V-22, 2523).

Keith Jackson also heard Pagan confess to committing the home invasion murders. In February of 1993, Jackson had known Pagan "about eight years." (V-25, 3047). However, there was a period of time, about "four or five years" that he did not have any contact with Pagan. (V-25, 3048). Jackson was also acquainted with Willie Graham and in February of 1993 had known him for about "a year or so." (V-25, 3048). In November or December of 1992, he began to socialize with Pagan and Graham, and, in fact, testified that he introduced Graham to Pagan. (V-25, 3049). Jackson also knew Quezada, but he was more of a friend to Pagan and he had little or no relationship with him. (V-25, 3050). Jackson testified that he only knew Pagan

---

[9]Although not admitted for the jury, the full version of the tape appears to reflect that Quezada was going to provide a false alibi:

> They're gonna fuck with your head, their head, that's what I'm thinking. Best thing is to get it over with. But Sha (Graham) say he was in Georgia. Alex was with me. I'll say he was with me. (V-22, 2607).

as Alex and associated his last name with his mother's, Ramirez, or Rivera. (V-25, 3050-51).

Jackson explained why the victims' house was targeted by Pagan and Graham. Jackson testified that he learned about the victims and that the father was called "Laff" from his cousin Eric Miller. (V-25, 3064). Three or four weeks prior to the January 23rd burglary of the victims' house, Jackson met with Miller and Pagan. Miller took them to the victims' house. Miller said that "he knows, he knows a big dope dealer that we can rob his house and get some money out of the house." (V-25, 3065). Miller was not interested in burglarizing the house, neither was Jackson: "Not really, no." (V-25, 3065). This conversation occurred in late December or early January. (V-25, 3065). Later, on a few occasions it was discussed between Pagan, Graham, and Jackson about robbing the house: "Doing a home invasion." (V-25, 3065). Jackson testified that Quezada was a party to probably one of these conversations. (V-25, 3067). Quezada "didn't participate, but he heard." Id. Jackson also testified that from October of 1992 to February 1993, he frequently observed Pagan and Quezada together. When he saw Pagan, Quezada "Papito" was always there. (V-25, 3110). Jackson testified that sometimes Graham's nickname, "Shaikwan" was abbreviated to "Sha." (V-25, 3111).

On Saturday, January 23rd, he received a call from Graham and Pagan at about 9:30 or 10:00 p.m. (V-25, 3068). Graham told Jackson that they had "just hit the house." (V-25, 3068). They came over to Jackson's house after that conversation. Quezada was with them. Jackson observed Pagan and Graham with a lot of gold jewelry on. Jackson described some of the jewelry: "A rope chain with a cross on it, he had a ring with diamonds in it, he had another little chain hooked to the rope with

Latasha's name on it." (V-25, 3075). In court, Jackson was able to identify the rope chain with anchor and watch that he observed Graham with after the burglary. (V-25, 3076-3077). He identified the rope chain and watch that Graham Jackson testified: "Alex told me that they went in the house, he was telling me about how Willie broke into the house and they went in, they ransacked the house. They took jewelry, they took a jacket, took some other things and they sat down and ate then they left." (V-25, 3069).

From Jackson's house, they all drove back to the victims' house in Miramar. (V-25, 3070). Quezada drove them all in his car. They showed Jackson the victims' house and Pagan said "he was pist (sic) because they didn't get all the money that was supposedly in the house." (V-25, 3070). Graham told Jackson that they were going to go back to the house and do it again. (V-25, 3070).

Between January 23rd and February 23rd Jackson observed Pagan with a firearm "[s]everal times." (V-25, 3077). Specifically, Jackson observed a handgun carried in a shoulder holster which he believed was a nine millimeter "Biretta" (sic). (V-25, 3078). Pagan had this handgun when Pagan came to his house after the burglary and carried it when they went to nightclubs in Miami. (V-25, 3078). Previously, he had seen this handgun in the possession of Willie Graham and thought it was Graham's gun. (V-25, 3078).

They drove to another friend's house, "Alphie," and from there went to a club in Miami. (V-25, 3071). They actually went to three different night clubs, adult dancing establishments. (V-25, 3072). While at the nightclubs, Pagan and Graham paid for Jackson's drinks. They also paid for dancing girls and private dances. (V-25, 3074). He had no idea how much money was taken in the burglary, but Jackson

testified that he thought Graham gave him two hundred dollars and Pagan gave him "three or two, I don't know." (V-25, 3074). He also observed Pagan with another handgun during January or February, this one was a .38. He also observed Graham with a handgun during that period, "the nine millimeter" and the ".38." (V-25, 3079). Jackson explained that "they switched guns." (V-25, 3079).

When Jackson got off from work on February 23rd at between 9:00 and 10:00 in the morning, he received a call from his cousin, Anthony. (V-25, 3052-53). Based upon that call, Jackson called Graham a number of times, paging him and leaving his number. (V-25, 3053). When Graham did not call him back, Jackson paged Pagan. Pagan responded to the page and Jackson asked him if he had seen Graham. (V-25, 3054). When Jackson asked Pagan what was going on, Pagan said: "Well, I don't know what happened but I will talk to you later. I will be at your house later." (V-25, 3055). Pagan said that he was "at the school" when he talked with Jackson over the phone. (V-25, 3055).

Later that morning, Pagan arrived at Jackson's house with Quezada. (V-25, 3055). Jackson met Pagan outside and said that they needed to talk. "So, him and I excused ourselves, went into my bedroom in the house and I asked Alex, I said, 'Alex what the fuck is going on. The house got robbed, that's the house Willie was telling me about.' He goes, 'I don't know what the fuck you're talking about.' I said, 'Alex, don't fuck with me, tell me what's going on.' He said, 'We broke into the house and we did in the house' and I said, 'Alex, you guys killed the kid.'..." (V-25, 3056). Jackson said he learned a child had been killed "from the news." (V-25, 3056). Jackson had turned the news on after talking with Anthony, Graham's cousin. Id. Jackson asked Pagan why he killed a kid, Pagan responded: "He had to do it." (V-25,

3056). Pagan also said that "he shot everybody in the house." (V-25, 3057). Pagan told Jackson that everyone was "dead." (V-25, 3057). Jackson, however, told Pagan that "everybody wasn't dead, he left two witnesses." (V-25, 3057). In response, Pagan told Jackson: "[N]o, he didn't. He said everybody was dead." (V-25, 3058). Jackson responded: "You left a baby alive and a fucking bitch alive." (V-25, 3058).

Later they went outside to talk and Quezada was present. He did not remember additional conversation regarding the murders except that Jackson asked Pagan where the guns were. Pagan responded: "don't worry about it, they'll never find the guns." (V-25, 3059). Pagan said "that they dismantled the guns, they're all over Miami." (V-25, 3059). Pagan also told Jackson that they stole the victims' truck and drove it to the "Xtra." (V-25, 3059). Before Pagan left "he made a remark by saying, well, they should be finding the truck right about now. It was about 12 noon when he was getting ready to leave." (V-25, 3060). Pagan also told Jackson that Graham was in Georgia and that they had "dropped him off at the bus station." (V-25, 3059).

A later conversation occurred between Jackson and Pagan after the victims' truck was found by the police. Jackson asked Pagan about fingerprints he may have left at the scene:

> I asked him did he leave any fingerprints, he said, no, he had some latex gloves. They got out of the truck, went to the front of Xtra, they met this Jamaican guy that was on the telephone, the guy needed money, they needed a ride, they gave the guy some cash to take them to Miami to Papito's house.

(V-25, 3061). Jackson also asked Pagan why he killed them. Pagan said that "a light came on in the house, splattered on him and he said he thought they saw his face. I said, Alex, did you have on a mask, he said, yes, but I thought they saw my face." (V-

25, 3061). He also gave Jackson a description of what occurred inside of the house:

> He said that after him and Willie went in through the sliding glass door that he made everybody get down, was looking for the money, the guy wouldn't give up the money, the guy was laying down and he told the little kid, he said, 'If you make it through the night don't grow up to be like your father.'

(V-25, 3062). Pagan said he sent Graham out to start the truck and then he just opened fire as he was heading toward the door. (V-25, 3062).

Jackson testified that he had previously been arrested with Graham in Dade County and that charges were filed against him for attempted first degree murder and armed robbery. (V-25, 3080). The charges were dropped but then reinstated in 1996, "this year." (V-25, 3081). As a result, Jackson testified that he obtained a lawyer and entered a "guilty plea" to those charges and was presently awaiting sentencing. (V-25, 3081). His lawyer and the State Attorney's Office arranged for Jackson to become a witness in the attempted murder case. (V-25, 3081). When he entered a plea in that case they told him his potential sentence ranged from "[f]ive years probation to ten years imprisonment." (V-25, 3082). In January and February of 1993, Jackson was under the impression that those charges had been dropped; he was surprised that they were reinstated in 1996. (V-25, 3082).

The police first contacted Graham about two days after the home invasion double murder. (V-25, 3085). At that time he provided them a statement, but did not disclose all of his knowledge about the case, stating: "I really didn't want any part of it." (V-25, 3086). His attitude changed shortly after that first meeting and he claimed he wanted to cooperate with them.[10] (V-25, 3086-87). His cooperation had nothing

[10]Defense counsel impeached Jackson with a statement he made after his first contact with the police. As Jackson explained: "I was not fully cooperative with that statement on the 26th, that was three days after it happened and he came, got me. I

to do with the previous charges which had already been dropped at the time. (V-25, 3086-87).

Detective Manzella testified that he learned where Alex Pagan lived from Keith Jackson. (V-20, 2291). The distance between the Graham residence and the victims' house was only "6/10's of one mile." (V-20, 2297). The distance from the Graham residence to the Xtra where the victim's Jeep was found was "about four miles." (V-20, 2298). Manzella identified an exhibit which was a yellow colored ring with white stones which belonged to Freddy Jones and was recovered from Advantage Pawn. (V-20, 2312). A watch face was recovered from another pawn shop: "This particular watch face belonged to Freddy Jones and then I had received a call from a William Valentine, I believe, from A and B Pawn stating that this particular watch was at it's [sic] location." (V-20, 2314).

George Fundora, owner of Advantage Pawn and Loan Company, testified that on February 13, 1993 a standard police form transferring title of property was used in connection with property received from Willie Graham. (V-24, 2845-47). This particular item was a "fourteen carot [sic] ring with diamonds." (V-24, 2849). Graham's identification from his driver's license matched the information on the pawn

---

was not fully cooperative with those people at all." (V-26, 3146). Graham testified that he still considered Graham and Pagan friends and still had some feelings of loyalty toward them. (V-26, 3151). However, since his statement on February 26th and March 4th, Jackson had given these matters some thought. He has resolved his difficulties caused by his loyalty to his friends, Jackson testified: "Well, after I gave the first testimony and the police came and talked to me, again, I had several people that knew me very well, told me to go ahead and tell the truth and just be honest about it and once I saw the kid, that kind of hurt me." (V-26, 3159). He felt obligated as he had a little girl and "felt what they did was wrong to the kid and that everything that I knew about the situation, that I should come tell the police." (V-26, 3160).

form.[11] (V-24, 2849).

Robert Valentine, owner of A&B pawn, testified that a man with Graham's identification, i.e., Willie Graham, pawned a "man's Seiko watch on a nugget (gold) band." (V-23, 2719). The ring had eight diamonds and was pawned by Mr. Graham on February 14, 1993. (V-23, 2719, 21, 29). The fingerprint on the pawn form was positively identified as Willie Graham's. (V-24, 2822-23). Prior to being contacted by the police, Valentine testified that the watch was separated from the gold and diamonds for disposal. He identified the watch movement in court and testified he previously had turned it over to the police. (V-23, 2722).

Detective Daniel Learned of the Miramar Police Department participated in the search of Pagan's residence. (V-21, 2398). A cooperating witness, Keith Jackson, had shown Learned Pagan's apartment earlier that morning.[12] (V-21, 2400-01). The Officers entered the apartment and woke Pagan up.[13] Pagan was advised of his rights and signed a rights waiver form. (V-21, 2405). Pagan said he was with a girlfriend in South Beach on the night and early morning of the murders. (V-21, 2410-11). When asked to identify his girlfriend, Pagan refused to do so. (V-21, 2411). About five or ten minutes later, while still in the apartment, Officer Learned overheard Pagan state: "[H]e said that he had been out with a friend looking for work had been to see

---

[11]Howard Seiden, a specialist in questioned documents with the Broward Sheriff's Department, examined a pawn receipt in the name of Willie Graham. He concluded that it was "very probable" the two signatures on the form belonged to Willie Graham. (V-24, 2880).

[12]The warrant mistakenly identified Pagan as Alehandro Ramirez. (V-20, 2328). Keith Jackson only knew Alex Pagan as "Alex" but believed his last name was Ramirez. (V-20, 2333).

[13]When the warrant was read, it was in the name of Alex Ramirez. Pagan initially told them they had the wrong guy. (V-21, 2402-2403).

about a job up near 595." (V-21, 2417).

Learned then asked Pagan about a specific item of jewelry found in his bedroom drawer (E-7). (V-21, 2411). Pagan claimed he "bought it from some guy." Pagan used a racial term in lieu of the word "guy." (V-21, 2412). Officer Gil Bueno identified the seized items (E-7) as a Honda ring, an anchor with a crucifix on it, and a medallion with a crucifix.[14] (V-21, 2429-30). The Honda ring was located with other pieces of jewelry on a table. (V-21, 2433). As for the Honda Ring, Pagan said that he got it from "Willie Graham, referred to him as Shaikwam." (V-21, 2434). A jacket was also recovered from the living room area of Pagan's apartment. (V-21, 2437). When asked about this particular jacket; "[h]e said that this particular jacket belonged to Willie Graham, Shaikwam. He had one just like it, but his girlfriend had it." (V-21, 2437).

When asked about the home invasion double homicide, Pagan stated: "Man, I don't know nothing." (V-21, 2412). When asked if Willie Graham did it, Pagan replied: "[H]e could have, he's crazy enough." (V-21, 2412). When asked if he killed the kid, Pagan replied: "[I]f I killed the kid, do you think I would tell you." (V-21, 2413). When he questioned Pagan, Antonio Quezada, a friend of his, was present in the apartment. (V-21, 2414-15).

Bruce Ayala a forensic chemist, testified that he conducted an analysis of the boots seized from Mr. Graham. While he did not analyze the glass found in the sole of the boots, he collected it and packaged it for later analysis. He testified that it was

---

[14]Officer Bueno took the medallion and Honda ring to Latasha Jones. She identified the anchor medallion and Honda ring as hers. (V-21, 2435, 2449). Latasha recalled getting the anchor and crucifix, that she received it "for a holiday or her birthday from Mr. Freddy Jones. (V-21, 2449). It was Officer Bueno's belief that this jewelry was taken in the January 23rd burglary of the victims' home. (V-21, 2450-51).

clear at least two types of glass were present in the soles, clear glass and green tinted. (V-22, 2686-2689). Based upon his observations, Ayala advised Detective Foley to gather glass samples from the murder scene.[15] (V-22, 2690).

Supervisor Special Agent Bruce Hall testified that he is responsible for examination of soil, glass, and building materials. (V-24, 2963). Agent Hall was accepted as an expert in "the field of glass comparison analysis" without objection from the defense. (V-24, 2975-2976). Hall has worked on more than a thousand cases involving glass comparisons. (V-24, 2976). Hall explained that a refractive index measures the behavior of light passing through an object. "The behavior is controlled by the glass composition as well as thermal history differences in compensation and thermal history manifest themselves in that difference in that optical property, which then you can compare but the two things have different optical properties, different refractive index, they didn't come from the same particle." (V-24, 2971-2972).

Hall testified that the refractive index from the glass recovered from Graham's boots was the same as glass recovered from the victims' house.[16] "Those two particles of glass recovered from the boots in question was the same. Those two particles of glass that is the glass from the known particles submitted and the known glass particles were indistinguishable. They both have the same refractive index." (V-24, 2982). Consequently, the glass particles recovered from Graham's boots "represents

---

[15]Ayala did not find any carpet fibers on Graham's boots. This, however, is not at all unusual; Ayala testified that the average shoe will not retain carpet fibers without an adhesive such as gum or velcro. (V-22, 2705).

[16]Willie Graham's boots were recovered when he was first questioned by the police. He was wearing the boots at the time he was contacted by law enforcement. (V-21, 2426). The boots had rubber soles. (V-21, 2452).

a likely source for that glass present on the boots." (V-24, 2982). "That they're optically indistinguishable. They both secure the same refractive index. The glass recovered from shoes with respect to the crime scene, the crime scene is a likely source of that glass." (V-24, 2986). Hall testified that only less than three percent of the glass tested by the FBI carried that particular refractive index. (V-24, 2988). This data base has been maintained since the "mid 60's" and contains "21 to 23 hundred perhaps of known glass." (V-24, 2990). It was of course possible that the subject glass did not come from the crime scene, however, it depended upon a significant coincidence: "In other words, another glass with that same refractive index would have to be broken somewhere and the individual wearing those shoes would have to step in it, fin[d] its way to my lab, then I would say that." (V-24, 2994).

Gerald Roelling, a terminal manager for Transus Motor Freight authenticated copies of Keith Jackson's timecard reflecting that he worked from February 22nd at shortly before 12:00 am to the morning of February 23rd, at approximately 9:39 am. (V-23, 2775). Roelling then went through a number of freight bills which appeared to confirm that Jackson was present and working the hours reflected on his timecard.[17] (V-23, 2779-2787).

Penalty Phase

Pagan mistakenly asserts that the trial court found in aggravation that the murders were committed for the purpose of avoiding or preventing a lawful arrest. (Appellant's Brief at 45). While the trial court did discuss this aggravator in its order,

[17]Kenneth Dacks was working for Transus in February 1993 as an inbound supervisor of the loading dock. (V-24, 2910-11). Keith Jackson was a member of his crew. Dacks testified that if someone did not show up for work he made notations on the employees timecard. (V-24, 2917). Dacks testified that he believed he would notice someone punching in and then leaving for "lunch" and not returning. (V-24, 2922).

it did not find the State proved its existence beyond a reasonable doubt. (R-6, 1117).

As Pagan notes in his brief, Dr. Jacobson testified on his behalf at the Spencer hearing and found that Pagan has a Borderline Personality Disorder and suffered from attention deficit disorder as a child. (Appellant's Brief at 40-41). However, Dr. Jacobson was forced to admit that Pagan may have exhibited a reckless disregard for others that may be consistent with an "Antisocial Personality Disorder." Dr. Jacobson also stated that such an attitude may also fit "other disorders." (V-32, 3744-45).

In response to Dr. Jacobson's testimony, the State presented Dr. Harley Stock, a forensic psychologist. Based upon his review of the offenses, records relating to Pagan, and a personal interview, Dr. Stock disputed Dr. Jacob's finding of Borderline Personality Disorder. (App. I at 4-30). Instead, Dr. Stock concluded that Pagan suffered from Antisocial Personality Disorder.[18]

Dr. Stock also took issue with Dr. Jacobson's conclusion that Pagan suffered from Attention Deficit Disorder. In fact, Dr. Stock testified that although Pagan's school records reflect he had some problems paying attention in school, the tests administered by Dr. Jacobs suggested just the opposite. (App. I at 36). Pagan scored high on tests requiring attention to detail and environment. Moreover, Pagan had no problem paying attention during his rather lengthy jail interview. (App. I at 37).

---

[18]Dr. Stock noted that Pagan belonged to a gang and was frequently involved in aggressive behavior. (App. I at 32). He also had a reckless disregard for the safety of others: "he told me he would carry guns in public. He pulled a gun on people. He carried I believe, two guns at a time. The prior sexual assault and certainly the prior other assault behavior, Mr. Pagan knew the difference between right and wrong. It was clear to me he knew the difference between right and wrong. He would just choose to disregard normal societal values, rules." (App. I at 33). Pagan also displayed consistent irresponsibility, as indicated by his failure to sustain consistent work or to honor financial obligations. Pagan also exhibited signs of lacking any remorse which indicated a "callous indifference." (App. I at 33-34). Pagan's criminal history showed a "continuing disregard for hurting others." (App. I at 34).

SUMMARY OF THE ARGUMENT

ISSUE I – The trial court properly denied Pagan's motion for a judgment of acquittal. Pagan's argument to the contrary, the evidence against Pagan was not entirely circumstantial. Pagan confessed to committing the home invasion double murders to Jackson and Quezada.

ISSUE II – The lower court properly allowed the State to introduce evidence that Pagan and Graham burglarized the victims' home one month prior to the home invasion murders. Such evidence was relevant to motive and intent. This evidence also helped place the charged offenses in context as well as explaining a comment made by one of the perpetrators during the home invasion.

ISSUE III – The police had probable cause to believe that contraband would be found during a search of Pagan's residence. Pagan confessed to a named witness that he committed the home invasion double murders. Further, two confidential informants also implicated Pagan ("Alex") and Graham in the murders. Once inside the apartment pursuant to a valid warrant, the police could seize items in plain view that they reasonably believed were evidence of a crime.

ISSUE IV – The trial court did not abuse its discretion in denying Pagan's motions for mistrial based upon the prosecutor's closing argument.

ISSUE V – Pagan contended that either the police threats or a later favorable agreement with the State persuaded Quezada to testify against Pagan. Therefore, Quezada's statement implicating Pagan and Graham which was made before any deal was reached with the State was properly admitted as a prior consistent statement.

ISSUE VI – Pagan never sought to exercise a peremptory challenge against prospective juror Laster. Since this argument was never made below, it cannot form

the basis for reversal on appeal.

ISSUE VII – Pagan's general claim that the lower court erred in denying his motion for new trial is insufficient to raise an allegation of error before this Court. Pagan's complete failure to provide argument in support of his claim serves to waive this issue on appeal.

ISSUE VIII – Pagan's failure to provide supporting argument in support of his claim that the trial court erred in failing to grant one or more of his motions for mistrial operates to waive this issue on appeal. The closest Pagan comes to making an argument is on the issue of leading questions. Pagan has shown no abuse of discretion in the trial court's handling of his objection to leading questions below. **ISSUE IX –** Pagan had no right to preclude the jury from observing the result of his homicidal violence. While the photographs of the murdered child were no doubt unpleasant, they were relevant and not unduly gory or shocking.

ISSUE X – Pagan did not establish a discovery violation below. Defense counsel was present during the voice lineup and possessed the report listing the police officer witness.

ISSUES XI, XII – Pagan has not established a single impropriety in the prosecutor's closing argument; much less identified a comment that would warrant the drastic remedy of a mistrial.

ISSUE XIII – Pagan was charged with the murder of a six-year-old child. The State properly asked Jackson his motive for testifying against his former friends.

ISSUE XIV – The medical examiner had the requisite education, training, and years of practical experience to render an opinion on whether someone would be injured breaking through the glass door found at the victims' residence.

ISSUE XV – It was the defense, not the State that brought out the fact that Latasha Jones tentatively identified Pagan as the voice of one of her attackers. Having invited the claimed error, Pagan cannot now take advantage of that error on appeal.

ISSUE XVI – Pagan has not established that any allegations of error, either alone or in combination, denied him of a fair trial.

ISSUE XVII – Pagan's sentence is supported by two particularly weighty and uncontested aggravators: Cold, calculated, and premeditated, and prior violent felony convictions. A review of factually similar cases supports the propriety of the imposition of the death penalty on the facts of this case.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED IN FAILING TO GRANT A MOTION FOR A JUDGMENT OF ACQUITTAL AT THE CLOSE OF THE STATE'S CASE? (STATED BY APPELLEE)

Pagan claims the trial court erred in failing to grant his motion for a judgment of acquittal. Specifically, Pagan claims that the State's circumstantial evidence was insufficient to overcome his reasonable hypothesis of innocence. The State disagrees.

A. The Standard of Review

As this Court recognized in Orme v. State, 677 So.2d 258, 261 (Fla. 1996), the first question in a sufficiency case such as this is to determine whether or not the evidence was "wholly circumstantial." Here, in addition to circumstantial evidence, Pagan confessed to two different individuals that he broke into the victims' home with Graham, searched for cash and drugs, then shot everyone in the house.

Pagan's claim that the special standard of review for circumstantial evidence cases is applicable in this case is without merit. (Appellant's Brief at 56). Indeed, even trial counsel below did not make this argument to the trial court in his motion for a judgment of acquittal. (V-26, 3169). Since the State's evidence included confessions to committing the murders to two different individuals, this case was not entirely circumstantial.

In Hardwick v. State, 521 So.2d 1071, 1075 (Fla. 1988), this Court rejected the defendant's contention that the State's evidence against him was purely circumstantial:

> We disagree that the case was circumstantial, since Hyzer and others testified that Hardwick had confessed to the murder or told others of his plans in advance of the killing. A confession of committing a crime is

> direct, not circumstantial, evidence of that crime. *Dunn v. State*, 454 So.2d 641 (Fla. 5th DCA 1984). *See* McCormick, *Handbook of the Law of Evidence* § 185 (2d ed. 1972).

See also Meyers v. State, 704 So.2d 1368, 1370 (Fla. 1997)(rejecting a contention that the State's case was entirely circumstantial where the state's evidence included the defendant's confessions to his former cellmates); Orme, 677 So.2d at 261 (evidence not wholly circumstantial where direct testimonial evidence placed defendant at the scene of the crime along with defendant's statement to the police establishing both presence and an altercation of some type with the victim).

Since the State's evidence in this case included both direct and circumstantial evidence, the State is entitled to an extremely favorable standard of review. "'A court should not grant a motion for a judgement of acquittal unless there is no view of the evidence which the jury might take favorable to the opposite party.'" Deangelo v. State, 616 So.2d. 440, 442 (Fla. 1993)(quoting Taylor v. State, 583 So. 2d. 323, 328 (Fla. 1991)). In moving for a judgement of acquittal, appellant admits "the facts in evidence as well as every conclusion favorable to the state that the jury might fairly and reasonably infer from the evidence." Taylor v. State, 583 So. 2d. 323, 328 (Fla. 1991). "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." Id. Finally, the State is entitled to "a view of any conflicting evidence in the light most favorable to the jury's verdict." Cochran v. State, 547 So.2d. 928, 930 (Fla. 1989).

B. The Evidence Linking Pagan To The Home Invasion Murders Was More Than Sufficient To Submit The Issue To The Jury For Resolution

Appellate counsel's claim that "[n]o physical or direct evidence whatsoever

linked Alex Pagan to the home invasion murders or the January burglary" (Appellant's Brief at 53) cannot survive even a cursory review of the record in this case.[19] As noted above, the State's evidence in this case includes confessions to committing both the January burglary and February double murders to two different individuals.

Jackson and Quezada testified that Pagan and Graham burglarized the victims' house on January 23, 1993, and received jewelry and cash as a result. Both Graham and Pagan, however, expressed dissatisfaction with the results of the burglary; they had been seeking a large amount of cash. They returned on February 23rd, and Pagan's close fried, Quezada, testified that he drove them to the victims' house. Prior to entering the house, Quezada observed both Graham and Pagan with gloves on. Pagan had earlier told Quezada that he was going to shoot everyone in the house. (V-21, 2479). Both Quezada and Jackson testified that Pagan admitted killing the victims. In fact, Pagan was surprised to learn that two people in the house survived his attempt to kill them. (V-25, 3057-3058).

As for the claimed lack of physical evidence, the fact that no fingerprints were found is not surprising, Quezada testified that both Pagan and Graham had gloves on when they left to commit the February home invasion. (V-21, 2480-2481). Pagan also admitted to Jackson that he wore latex gloves during the home invasion. (V-25, 3090-3091). Moreover, the lack of DNA evidence is not remarkable, the perpetrators

---

[19]An argument can be made that Pagan's bare bone's motion for a judgment of acquittal below does not preserve this issue for review. See Archer v. State, 613 So.2d 446 (Fla. 1993). While defense counsel did mention briefly mention identity in association with his motion, he appeared to condition that aspect of his motion on the exclusion of evidence due to his renewed motion to suppress evidence found in Pagan's residence. (V-26, 3168-3169).

did not leave any DNA evidence at the scene. Pagan and Graham did not commit a sexual assault, nor were either of them cut by broken glass at the murder scene.[20] (V-22, 2522-2523). However, glass found in Graham's boots was microscopically indistinguishable from the glass found at the murder scene. (V-24, 2982).

While Pagan complains that no physical evidence was found to link him to the January burglary, items seized from his residence when he was arrested included jewelry taken from the victims' house during the January burglary. (V-21, 2429-33). The perpetrators of the January burglary were linked to the February home invasion not only by their confessions to Quezada and Jackson, but also by Latasha, who testified that during the home invasion one of the gunmen said he had "messed up the first time." (V-18, 2149). This clearly suggested that the perpetrators had been at the house previously, but were unhappy with their criminal gains, i.e, Pagan and Graham. Both Quezada and Jackson testified that Pagan and Graham were dissatisfied with the loot they seized in the January 23rd burglary and claimed that they would return to do it right. (V-21, 2475; V-22, 2521-2522; V-25, 3070). They returned one month later, focusing their efforts on finding a large amount of cash.

While Pagan complains the State never showed what happened to the weapons used in the murders, Quezada and Jackson testified that the guns were broken up and scattered around Miami. (V-21, 2492). In fact, when asked about the weapons used in the home invasion, Pagan told Jackson, "don't worry about it, they'll never find the

[20]The only blood found at the scene which was capable of DNA analysis was identified as belonging to Latasha Jones. (V-23, 2757-2760). Thus, it is quite clear that the perpetrators of the home invasion were not cut by broken glass. This corroborates the testimony of Quezada who testified that after the home invasion neither Graham nor Pagan complained of cuts. Further, Quezada did not observe any blood on them after the murders. (V-22, 2522-23).

guns" ... "they're all over Miami." (V-25, 3059). Thus, the failure to find the weapons is not surprising, Graham and Pagan were smart enough to discard them in pieces in different locations.

Pagan's cryptic attempt to discredit the testimony of Quezada and Jackson does not lend any support to his contention that the trial court erred in failing to grant his motion for a judgment of acquittal. See Tibbs v. State, 397 So.2d 1120, 1123 (Fla. 1981), affirmed, 457 U.S. 31, 72 L.Ed.2d 652, 102 S.Ct. 2211 (1982)("[a]n appellate court should not retry a case or reweigh conflicting evidence submitted to a jury or other trier of fact."). However, even if a *de novo* review of credibility was even appropriate at this level, the State submits that ample evidence supports the jury's verdict in this case. Significant consistencies between the confessions Pagan made to Jackson and Quezada and the testimony from Latasha about what actually occurred inside the victims' house indicates the jury made the proper credibility determination. The common threads of consistency, between Quezada's, Jackson's, and Latasha's testimony, created a powerful case for Pagan's guilt.

Terranova v. State, 24 Fla.L.Weekly D2476 (Fla. 2d DCA 1999), provides no support for Pagan's argument on appeal. In Terranova, the State's evidence was in fact entirely circumstantial. Here, the evidence included Pagan's confession to committing the murders to two individuals, i.e, direct evidence. Moreover, in Terranova, the defendant had an alibi defense that the Second District noted was largely unimpeached: "In this case, not only is Terranova's alibi testimony concerning his whereabouts at 10:00 p.m. unimpeached, [] but the physical evidence contradicts the State's case." slip op at 3. In this case, Pagan did not have an alibi defense. In fact, Quezada, the individual Pagan initially relied upon for a false alibi,

placed Pagan at the scene of the murders and testified that Pagan admitted he killed the victims.

Pagan's mention of other individuals he suggests might have been involved in the home invasion, is not accompanied by any reference to the record in this case. (Appellant's Brief at 55). In fact, there was no **evidence** to suggest that any of these individuals were involved in the charged offenses. Thus, this unsupported contention that other individuals may have committed the home invasion murders need not long detain this Court.

In conclusion, the trial court heard all of the testimony and considered the arguments of counsel before determining that sufficient evidence was presented to the jury. The jury was able to weigh the evidence, observe the witnesses and evaluate their credibility. The jury found the evidence sufficient to establish Pagan's guilt beyond a reasonable doubt. Pagan has offered this Court nothing on appeal which compels a different conclusion than that reached by the trial court and jury below.

II.

WHETHER THE TRIAL COURT ERRED IN ALLOWING EVIDENCE THAT PAGAN AND GRAHAM COMMITTED A BURGLARY OF THE VICTIMS' HOME APPROXIMATELY ONE MONTH PRIOR TO THE HOME INVASION DOUBLE MURDERS? [Sub-Issue B] (STATED BY APPELLEE).

Pagan argues that the trial court erred in allowing the State to introduce evidence showing that he and Graham burglarized the victims' home on January 23, 1993. As far as the State can surmise, Pagan maintains that such evidence was either dissimilar and irrelevant or that there was insufficient evidence to link him to the January 23rd burglary. Pagan's argument to the contrary, the prior burglary of the

victims' home was clearly relevant and therefore admissible.

A. Preservation

While the admissibility of this evidence was raised and ruled on prior to trial, the lower court declined to give the appellant a continuing objection to testimony surrounding the January 23rd burglary of the victims' home, advising counsel that he should also object when the evidence is introduced. (V-14, 1488). And, the State notes, that the vast majority of testimony surrounding the prior burglary was admitted without a contemporaneous objection from the appellant.[21] (V-21, 2503-2506; V-25, 3067-72). Thus, it can be argued that this issue is not preserved for review by this Court.[22] See Pomeranz v. State, 703 So.2d 465, 470 (Fla. 1997)("Failure to object to collateral crime evidence at the time it is introduced violates the contemporaneous objection rule and waives the issue for appellate review."); Correll v. State, 523 So.2d 562, 566 (Fla. 1988)("Even when a prior motion in limine has been denied, the failure to object at the time collateral crime evidence is introduced waives the issue for appellate review."). Nonetheless, even if this issue is preserved for appeal, it is clear that the January burglary of the victims' home by Pagan and Graham was relevant and admissible.

B. Standard of Review

A trial court has broad discretion in determining the relevance of evidence and such a determination will not be disturbed absent an abuse of discretion. Jorgenson v. State, 714 So.2d 423 (Fla. 1998), (citing Heath v. State, 648 So.2d 660, 664 (Fla.

---

[21]For example, no contemporaneous objection was lodged to Graham's testimony regarding the prior burglary of the victims' residence. (V-25, 3067-72).

[22]When January 23rd was raised during Sergeant James Lind's testimony, Pagan objected, asserting the grounds previously argued. (V-14, 1554)

1994)).

C. The Prior Burglary Was Inextricably Intertwined With The Home Invasion Murders

Pagan's burglary of the victim's home with Graham on January 23, 1993, was admitted as "inextricably intertwined" evidence. Evidence of uncharged crimes which are inseparable from crime charged, or evidence which is inextricably intertwined with crime charged, is not Williams rule evidence; rather, it is admissible under the other crimes provision because it is relevant and inseparable part of act which is in issue. Griffin v. State, 639 So.2d 966 (Fla. 1994).

Generally, evidence of other crimes or acts may be admissible if it is relevant to prove a material fact in issue. Bryan v. State, 533 So.2d 744, 746 (Fla. 1988), cert. denied, 490 U.S. 1028, 109 S.Ct. 1765, 104 L.Ed.2d 200 (1989); Williams v. State, 110 So.2d 654 (Fla.), cert. denied, 361 U.S. 847, 80 S.Ct. 102, 4 L.Ed.2d 86 (1959); Pittman v. State, 646 So.2d 167, 170-171 (Fla. 1994). *Relevance*, not necessity, is the standard for admissibility. The evidence need not prove the defendant's guilt of the charged offense if "it is in the nature of circumstantial evidence forming part of the web of truth" proving the defendant to be the perpetrator, Bryant v. State, 235 So.2d 721 (Fla. 1970) or would "cast light" upon the character of the act under investigation.

In proving its case, the State is entitled to paint an accurate picture of events surrounding crimes charged. Smith v. State, 699 So.2d 629 (Fla. 1997). Inextricably intertwined evidence or inseparable crime evidence may be admitted at trial to establish the entire context out of which a criminal act arose. State v. Cohens, 701 So.2d 362, 364 (Fla. 2d DCA 1997); Hunter v. State, 660 So.2d 244, 251 (Fla. 1995), cert. denied, 116 S.Ct. 946, 133 L.Ed.2d 871 (1996). See also, Remeta v. State, 522

So.2d 825, 827 (Fla. 1988) (Collateral murder admissible because the same gun was used in both crimes and the evidence established defendant's possession of the murder weapon and counteracted defendant's statements blaming the crimes on a companion.)

In this case, Pagan's burglary of the victims' house on January 23rd explained what was meant when he said they had "messed up the first time." (V-18, 2149). Latasha overheard one of the gunmen make this statement during the home invasion. Without reference to the prior burglary, this statement made no sense and could not be placed in context. After the burglary, Pagan admitted that he and Graham were disappointed that they did not find the large amount of cash allegedly kept in the victims' home. (V-22, 2521). They talked about returning to the house to do it right. (V-22, 2521-2522). These statements formed the basis for their motive to return to the victims' home in February. And, the statement tended to establish that the persons who burglarized the home in January committed the February home invasion murders.

In Price v. State, 538 So.2d 486, 489 (Fla. 3d DCA 1989), the Third District stated that evidence of two previous robberies was relevant and admissible under similar circumstances, stating:

> Before the perpetrator left the Dadeland store, he boasted to the bound employees that he had twice before robbed the County Seat Store in the Cutler Ridge Mall. Therefore, if the state could prove that it was the *defendant* who committed the Cutler Ridge robberies, then that proof would be relevant to identify the defendant as the perpetrator of the Dadeland robbery and the subsequent murder. Because evidence of the defendant's braggadocio, if believed, was sufficient to show that the Dadeland and Cutler Ridge robbers were the same person, the identity of the Dadeland robber could be shown merely by proving the identity of the Cutler Ridge robbers and evidence to that end was relevant and admissible. (footnote and citations omitted).

The prior burglary was also important to explain the "set up" for the later home

invasion. See U.S. v. Canelliere, 69 F.3d 1116, 1124 (11th Cir. 1995)("Furthermore, Rule 404(b)[23] does not apply where the evidence concerns the 'context, motive, and set-up of the crime' and is 'linked in time and circumstances with the charged crime, or forms an integral and natural part of an account of the crime, or is necessary to complete the story of the crime for the jury.'")(quoting United States v. Williford, 764 F.2d 1493, 1499 (11th Cir. 1985)). Further, the January burglary also helped explain Pagan's comment on February 23rd to Quezada that tonight was a good night to go back to the house. (V-21, 2471). Quezada understood this statement to mean the house that Pagan and Graham had burglarized in January. Without reference to the previous burglary, that statement could not be placed in proper context. (V-21, 2471).

Finally, the January burglary also helps explain why the perpetrators either ignored or seemed disinterested in jewelry and other items of value during the February home invasion. Pagan and Graham were only interested in the large sum of money that they did not get in the January burglary of the victims' house. See Caruso v. State, 645 So.2d 389 (Fla. 1994)(Evidence regarding Caruso's drug-related activities established relevant context in which the crimes occurred, the defendant's state of mind at the time of the murders, and his motive to commit a burglary, which was relevant to the State's theory of felony-murder); U.S. v. McLean, 138 F.3d 1398, 1404 (11th Cir. 1998), cert. denied, 525 U.S. 896, 142 L.Ed.2d 182 (1998)("What the record makes clear is that the Gucci Hole evidence was vital to an understanding of the context of the government's case against McLean and, therefore, can be said to be 'inextricably intertwined' with the government's proof of the charged offenses.").

In Ferrell v. State, 686 So.2d 1324, 1329 (Fla. 1996), this Court held that the

[23]The Federal equivalent to Section 90.404 of the Florida Statutes.

defendant's robbery of the victim by the defendant, two days prior to the charged murder, was admissible even though it was not similar to the charged murder. This Court stated:

> 'Under [section 90.404(2)(a), Florida Statutes (1995)], evidence of other crimes is admissible only if it is 'similar fact evidence.' *Griffin v. State*, 639 So.2d 966 (Fla. 1994), *cert. denied*, _ U.S. _, 115 S.Ct. 1317, 131 L.Ed.2d 198 (1995); *Drake v. State*, 400 So.2d 1217 (Fla. 1981). Clearly, under the circumstances set forth in this record, evidence that Hartley had robbed the victim in this case two days before the murder was not similar fact evidence, and, thus, was inadmissible under section 90.404(2)(a). This does not mean, however, that evidence of other crimes is never admissible unless it is similar. Rather, evidence of other crimes that are 'inseparable from the crime charged or evidence which is inextricably intertwined with the crime charged,' is admissible under section 90.402 (admissibility of relevant evidence) because it is relevant and necessary to adequately describe the crime at issue. *Griffin,* 639 So.2d at 968; *Bryan v. State*, 533 So.2d 744 (Fla. 1988), *cert. denied*, 490 U.S. 1028, 109 S.Ct. 1765, 104 L.Ed.2d 200 (1989).' Op. at 1320.
>
> Here we find that evidence of the robbery was properly admitted to complete the story of the crime on trial and to explain Ferrell's motivation in seeking to prevent retaliation by the victim.

(quoting Hartley v. State, 686 So.2dc 1316 (Fla. 1996)).

In Finney v. State, 660 So. 2d 674, 682 (Fla. 1995), the Court reasoned that overall similarity is important when dealing with an issue of identity..."[H]owever such is not the case when dealing with motive." Thus, evidence of a collateral crime need not be factually similar to the charged offense when such evidence is relevant to prove the defendant's motive to commit the charged offense." State v. Richardson, 621 So. 2d 752 at 757, (Fla. 5th DCA 1993).

The State correctly maintained below that the prior burglary need not be similar to the home invasion as it was relevant and inextricably intertwined with the later offense. Nonetheless, the prior burglary and home invasion do share significant points of similarity. The largest and perhaps most obvious similarity is that each offense

involved the same house. In each case the perpetrators were the same and in each case Pagan and Graham were hoping to obtain a large amount of cash. Significantly, in each case the perpetrators left behind no physical evidence such as fingerprints. Admittedly, there were also differences , the most obvious of which is that the victims were home during the February home invasion. And, the method of entry in the house was different. C.f. Wright v. State, 473 So.2d 1277, 1281 (Fla. 1985)("We find the evidence that appellant had previously burglarized the victim's house and, in so doing, had utilized the identical point of entry used on the date of the victim's murder, is, under the *Williams* rule, legally relevant to show identity and to show that Wright knew that point of entry was available."). However, these differences probably stem from the fact that Pagan and Graham were disappointed in not being able to find the money the first time and wanted to ensure the victims were home in order to find the large amount of cash allegedly kept in the house. Thus, these differences are not, in the Appellee's view, significant. See Jensen v. State, 555 So.2d 414, 415 (Fla. 1st DCA 1989)(Finding evidence of eight prior burglaries against the same victim admissible, stating: "Jensen's acts are unique in that he committed the previous acts on eight previous occasions all against the same victim and the acts have a distinct point of similarity in that all were burglaries of a single dwelling committed in a similar fashion.").

The record does not support Pagan's assertion that evidence of the prior burglary became a feature of the trial. The trial court's conclusion that the probative value of this testimony was not substantially outweighed by the danger of unfair prejudice was correct. The evidence was clearly relevant, highly probative and limited in scope. This Court has repeatedly approved the admission of highly

prejudicial evidence, including evidence of the defendant's commission of other murders, when sufficient probative value has been shown. See Fotopoulos v. State, 608 So.2d 784 (Fla. 1992); Henry v. State, 649 So.2d 1361, 1365 (Fla. 1994), cert. denied, 116 S.Ct. 101, 133 L.Ed.2d 55 (1995); Wuornos v. State, 644 So.2d 1000, 1007 (Fla. 1994) (finding relevance of six similar murders committed by Wuornos "clearly outweighs prejudice" of their admission), cert. denied, 115 S.Ct. 1705, 131 L.Ed.2d 566 (1995).

III.

WHETHER THE TRIAL COURT ERRED IN DENYING PAGAN'S MOTION TO SUPPRESS EVIDENCE SEIZED PURSUANT TO A SEARCH WARRANT? (STATED BY APPELLEE).

Pagan contends that the search warrant was invalid for three reasons: 1) lack of probable cause; 2) false statements in the affidavit indicate a reckless disregard for the truth; and, 3) in executing the warrant, officers exceeded the scope of the search warrant. (Appellant's Brief at 70). The record, however, clearly supports the trial court's decision to deny the motion to suppress physical evidence.

A. Relevant Facts

Detective Manzella testified that he was involved in gathering information used to obtain a search warrant. (V-5, 488). Manzella obtained information from Sharon Foster initially and was present when Detective Peluso had contact with Mrs. Jackson, the two confidential sources named in the probable cause affidavit. (V-5, 489). On February 24th, Sharon Foster called the Miramar Police Department anonymously and spoke to Officer Gallagher. (V-5, 489). Ms. Foster claimed to have information about a homicide. (V-5, 490).

Manzella first met with Ms. Foster on February 25th. (V-5, 490, 514). Ms. Foster told Manzella that she heard from her daughter Tameka Roberts who was dating Anthony Graham and "on the street" that Anthony Graham's cousin who went by "some type of Moslem name" was "the one who committed the homicide." (V-5, 490). Ms. Foster told Manzella she was reluctant to come forward: "She indicated to me she did not wish to give me a taped statement, that she felt that she had come forward because of the fact that children were killed, or a child was killed in this incident and she felt she needed to tell someone." (V-5, 491). While Ms. Foster did state that her daughter was dating Anthony Graham, Manzella understood her information was gleaned from two different sources: "She had obtained two confidants (sic), one was initially she heard it on the street and then she heard it from Tameka as well." (V-5, 491-492). Ms. Foster also told Manzella that a person by the name of Eric Miller had "orchestrated" the homicide and "a prior burglary that Willie Graham committed at the same residence about a month prior." (V-5, 492). As Manzella understood it, Eric Miller may have orchestrated either the burglary or homicide. (V-5, 492). She also made reference to a boy named "Alex" but did not provide or did not know his last name. (V-5, 492-493). Ms. Foster indicated, referring to the previous burglary, that Eric Miller had given her nephew, Darrel Featherstone, about $10,000 to hold. (V-5, 493). When asked why Eric Miller was not named as a possible perpetrator, Manzella explained: "She stated to me Eric Miller may have orchestrated or conspired this particular homicide, but he specifically did not do the homicide." (V-5, 494). Ms. Foster indicated that Willie Graham and a person by the name of Alex had committed the homicides and that Willie Graham was involved in a prior burglary of the victim's house. (V-5, 527).

Manzella had one contact with Ms. Jackson, who he met at a public restaurant parking lot on February 26, 1993. (V-5, 514). Manzella explained that she was the one who contacted the police and volunteered information about the homicide. (V-5, 498). Ms. Jackson told Manzella and Peluso that the people who did the shooting were a black male with the name Alex and a black male known as "Shaykwan." (V-5, 528, 530). When shown various photographs, Manzella explained that Ms. Jackson at first denied recognizing the photograph of her husband Keith. However, she then admitted one photograph depicted her husband, "[p]ractically in the same breath." (V-5, 499). And, Ms. Jackson stated that the source of her information about the homicide was her husband, Keith. (V-5, 499-500). Manzella explained that when the affidavit stated two independent sources, it was meant to convey that Ms. Jackson and Ms. Foster did not know each other. (V-5, 500).

Manzella testified that Sharon Foster and Wanda Jackson provided information that the homicides were committed by two people, one Willie Graham and a white Latin male known as "Alex." (V-5, 513). Neither one of them would give a sworn statement in this case, Manzella testified: "They were afraid that they too, themselves would become victims." (V-5, 513-14). Those two people asserted that both Willie Graham and "Alex" lived in the city of Miramar. (V-5, 514). Manzella verified this information by contacting residents on Pembroke Road where Willie Graham lived and by having Keith Jackson show the officers where Alex lived. (V-5, 514-516). Prior to drafting the affidavit, Manzella testified that Willie Graham's prior arrest for attempted murder was verified by Detective Peluso. (V-5, 519).

Detective Peluso testified that he met Ms. Jackson who had earlier called over the phone anonymously and claimed to have information regarding the home invasion

murders. (V-6, 575). She claimed to have received information from a friend regarding the offenses. She gave a description of the two people involved: "She described one of the individuals as a Latin male by the name of Alex, 5'10, dark hair, usually wears nice clothes, twenty-one to twenty-three years of age. And she explained to us there was a second subject by the name of Willie Graham, who was a black male, wore baggy clothes, gave us a physical description and his approximate age." (V-6, 575). She did not know Alex's last name. (V-6, 576). As a result of an earlier investigation, Peluso had obtained a photograph of Willie Graham and Keith Jackson, he also possibly had a photograph of Anthony Graham. (V-6, 577). He showed these photographs to Ms. Jackson, known only as Mary at that time, and she identified Willie Graham. (V-6, 578). At first, she denied recognizing Keith Jackson's photo, paused, then admitted that it was her husband. (V-6, 578). In Peluso's view, the fact that Keith Jackson was her husband, who was a known friend of Graham's, enhanced Ms. Jackson's credibility. (V-6, 578). Peluso admitted they did not advise Judge Schapiro that Ms. Jackson's information about the case came from her husband, Keith. (V-6, 635). However, Peluso testified that what Ms. Jackson told her was consistent with his knowledge of the case and "had no reason to think she was lying to me." (V-6, 637).

After talking to Ms. Jackson, Peluso made contact with her husband, Keith. (V-6, 581). They undertook surveillance of Jackson's grandmother's house and waited for Keith Jackson to arrive. (V-6, 581). When they made contact, they told Jackson they were investigating a homicide and asked him to come down to the station. (V-6, 583). He agreed and was questioned as a suspect initially. (V-6, 583). The only reason Jackson was considered a suspect initially was that he had been arrested

approximately a year earlier with Willie Graham for attempted murder. (V-6, 626). And, Peluso stated that he had no information from any source linking Jackson to the home invasion murders in this case. (V-6, 626).

At first, Jackson denied knowing anything about the home invasion murders. (V-6, 585). The Detective told Jackson that he had information to the contrary, that "we knew he had information." (V-6, 590). During the course of the same interview, Jackson admitted he had knowledge of what "transpired." (V-6, 586). And, Jackson stated the reason he admitted knowledge of what transpired was, as follows: "The hideous crime that took place, he said it just bothered him. He couldn't sleep at night. He has children of his own. Because he knew, he wanted to tell us. He was concerned with what transpired." (V-6, 591). The interval between Jackson denying he possessed any information to admitting knowledge was not long, "[m]aybe a minute." (V-6, 591).

Jackson told him about the home invasion, including a claim that a door opened and that a light came on and Latasha was able to see their faces. (V-6, 594-595). There was some question over whether or not Jackson recalled it being a garage door. (V-6, 595). Jackson told Peluso that he learned about the murders after coming home from work on the morning of February 23rd and was contacted by Anthony Graham, Willie Graham's cousin. (V-6, 627). Latasha Jones had told the detectives that one gunman was quiet and the other was hyper. (V-6, 627). Jackson described Graham as hyper and Pagan as being quiet. (V-6, 627). Jackson also stated that Graham and Pagan had previously burglarized the victims' house and had stolen various items of jewelry from the victims. (V-6, 628).

After hearing from Keith Jackson, Sharon Foster and Wanda Jackson, Peluso

testified that he felt they had enough information to apply for an arrest warrant. (V-6, 596). He was given information from Jackson about where Alex lived and a description. (V-6, 596). In fact, Jackson gave the officers directions to a particular apartment building and an apartment on the fifth floor. (V-6, 597, 599). At that point, surveillance of the apartment was initiated. The detectives also established contact with the state attorney's office and were instructed to apply for search and arrest warrants for Alex Pagan. (V-6, 597).

It was late in the evening when he applied for a warrant, the officers checked the apartment's mailbox but found no name on it. (V-6, 597-598). Peluso testified that he was definitely looking for Alex Pagan, but mistakenly thought his last name was Ramirez. (V-6, 599). He got the name Alejandro Ramirez from a pay stub where Graham worked. (V-6, 599). Peluso admitted that this was a mistake. However, Peluso asserted that in attempting to obtain Pagan's last name, he questioned Jackson who told him that Ramirez "could be" Alex's last name. (V-6, 623). Peluso explained: "Mr. Jackson wasn't sure of his last name. Everything else was consistent with what we gave him. He wasn't sure of the last name." (V-6, 600).

The warrant was signed and Peluso was one of the Officers who executed the warrant. Peluso knocked and announced "police, search warrant" before entering through the unlocked door. (V-6, 604). He read the warrant to Ms. Ramirez in the living room and explained that they were there to arrest her son. (V-6, 605). Pagan maintained that they had the wrong name Alejandro Ramirez as opposed to Pagan. (V-6, 606). While Jackson did not know Pagan's last name, Peluso did not find this unusual, testifying: "Several people that mentioned Alex's name to me did not mention Alex's last name. A lot of people I talk to, a lot of people that knew Alex

said they didn't know his last name." (V-6, 607). Peluso noted that Pagan fit the description of "Alex", also consistent was the fact that he had recently been incarcerated, and was associated with or knew Willie Graham. (V-6, 608). Also significant was the "fact that Keith Jackson took us directly to that apartment and he said this individual Alex lived in that location and he had been to that location on several occasions." (V-6, 608-609).

Although Peluso did not personally seize any jewelry, he was present when certain items of jewelry were discussed. Peluso testified:

> There was [sic] several pieces of jewelry. I believe there was a watch and rings. And Mr. Pagan's mother, Ms. Ramirez stated that she purchased one ring and a watch for her son. And the other piece of jewelry she had no idea where it came from.
>
> And that was - then it was my understanding that Mr. Pagan stated to one of the detectives that he had gotten a piece of jewelry from Willie Graham.
>
> So based on the fact we knew there was a prior break in of the victim's house that Mr. Graham and Mr. Pagan were in fact suspects in the case and numerous jewelry was taken from the house, we felt it was possibly connected to the first break in, so we decided to take it into evidence.

(V-6, 610-11).

Peluso wanted to stress that several pieces of jewelry were not taken because Pagan's mother indicated she had purchased it. (V-6, 611). She did not know where a certain ring came from. (V-6, 630). Peluso testified that some of the seized jewelry was located on the dining room table and observed it while talking to Mrs. Ramirez. (V-6, 629). Peluso testified that everything that was seized was identified in the warrant except the jewelry. (V-6, 612). A dark, medium length jacket was seized. (V-6, 612). The warrant described the jacket as a trench coat. Id. When asked about the coat, Pagan claimed it belonged to Willie Graham and that he had one just like it, but his girlfriend currently had possession of it. (V-6, 615).

Detective Dan Learned participated in Pagan's arrest and the search of his apartment. (V-5, 651). Learned testified that he thought they had the right apartment and suspect. Learned testified:

> The information that we had was that Mr. Pagan was a white male, latin, originally from New York.
> He was approximately five foot ten.
> His hair color was black.
> He spoke with a slight New York accent. He had previously been released from prison.
> That he lived in the apartment with his mother.
> The apartment had been pointed out to us previously.
> That he would stay out most nights very very late at night with –

(V-6, 651-652). Learned testified that a crucifix of gold was found in a dresser drawer next to where Pagan was standing in the bedroom. (V-6, 653-654). Learned decided to gather the cross as he thought it was important for the investigation, even though jewelry was not specifically named in the warrant. (V-6, 654). He asked Pagan about the gold crucifix found in the drawer and where it came from. (V-6, 655). Pagan claimed that he got it from some man, using a derogatory racial term, in the Ranches. (V-6, 657). Learned testified that it was unusual for an unemployed man living with his mother to have such expensive jewelry. (V-7, 707). Learned also testified:

> There was also some discussion that there has been expensive jewelry taken in previous burglary at the victims' home. There was also some discussion that one of the rings had the letter H on it. It was a distinctive H that also resembles the Honda emblem that you use on Honda cars. This made sense. In fact, that search warrant was executed at the victims' residence after the crime there had been a Honda car parked in the garage.
>
> The totality of those circumstances, the jewelry was pocketed, possibly collected, and it was taken in the first burglary and still possessed by the defendant.

(V-7, 708).

B. Standards Of Review

A trial court's ruling on a motion to suppress comes to the appellate court

clothed with a presumption of correctness. Henry v. State, 613 So.2d 429 (Fla. 1993). The role of an appellate court in reviewing a motion to suppress is to interpret the evidence, and reasonable inferences therefrom, in a light most favorable to sustaining the trial court's ruling. San Martin v. State, 717 So.2d 462, 469 (Fla. 1998). "A reviewing court is bound by the trial court's findings of fact--even if only implicit--made after a suppression hearing, unless they are clearly erroneous." State v. Setzler, 667 So.2d 343, 346 (Fla. 1st DCA 1995).

The trial court's duty upon reviewing a magistrate's decision to issue a search warrant was not to conduct a de novo determination of probable cause, but to determine whether substantial evidence supported the magistrate's finding that, based on the totality of circumstances, probable cause existed to issue the warrant. Massachusetts v. Upton, 466 U.S. 727, 104 S. Ct. 2085, 80 L. Ed. 2d 721 (1984). The task of the issuing magistrate is to make a "practical, common sense decision whether, given all the circumstances set forth in the affidavit there is a fair probability that the contraband or the evidence of a crime will be found." Illinois v. Gates, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527, 548 (1983). In Gates, the Court observed:

> ...[A]fter the fact scrutiny by court of the sufficiency of the affidavit should not take the form of *de novo* review. A magistrate's 'determination of probable cause should be paid great deference by reviewing courts.' Spinelli, supra, at 419, 21 L.Ed.2d 637, 89 S.Ct. 584, 'A grudging or negative attitude by reviewing courts toward warrants,' Ventresca, 380 U.S. at 108, 13 L.Ed.2d 684, 85 S.Ct. 741, is inconsistent with the Fourth Amendment's strong preference for searches conducted pursuant to a warrant; 'courts should not invalidate warrant[s] by interpreting affidavit[s] in a hypertechnical, rather than a commonsense manner.' Id., at 109, 13 L.Ed.2d 684, 85 S.Ct. 741.

Gates, 462 U.S. at 236, 76 L.Ed.2d at 547.

C. The Affidavit In Support Of The Warrant Established Probable Cause And The Warrant Was Properly Executed

(i) Probable Cause

Pagan's first two arguments challenge the probable cause affidavit used by the officers seeking the search warrant. He summarily claims that the officers either lacked probable cause or that they intentionally falsified information in the affidavit to secure the warrant. Specifically, he alleges that the officers failed to establish the credibility of Keith Jackson. (Appellant's Brief at 71). However, the affidavit itself establishes that the confession from Pagan as reported by Jackson as well as other information was consistent with what was told to the detectives by the only adult surviving victim, Latasha Jones.

For example, Jackson told the officers that Pagan is quiet and reserved. (PCA at 4 [Probable Cause Affidavit, Attached Appendix II]). Latasha Jones described one gunman as quiet or reserved and the other as hyper. (PCA at 2). Further, Jackson stated that he had observed Graham previously with a nine millimeter handgun and dark clothes of the type used by the perpetrators in this case. (PCA at 4).

It must be remembered that Jackson is not a confidential source, he was named in the affidavit. Moreover, the officers did not hide anything significant regarding Jackson's credibility from the reviewing magistrate. The detectives included the fact that Jackson initially denied possessing any knowledge of the offense, and the fact that he was "a co-defendant along with Graham in the Dade County homicide in 1992." (PCA at 3). The only omission cited by Pagan regarding Jackson's credibility was that the Detectives failed to inform the reviewing magistrate that Jackson was initially considered a suspect in this case. (Appellant's Brief at 71). However, an affidavit seeking a search warrant is not a complete legal document, the omission if, any of this information, was not material and would have absolutely no impact upon whether or

not probable cause existed to search Pagan's residence. See e.g. Power v. State, 605 So.2d 856, 862 (Fla. 1992)("We agree with the State, however, that even if the omitted information had been included, the affidavit would still have contained sufficient information to constitute probable cause."); State v. Schulze, 581 So.2d 610, 611 (Fla. 2d DCA 1991)("When there is a question concerning material omissions from a search warrant, a reviewing court should consider the affidavit as though the omitted facts were included in the affidavit and then determine whether the affidavit still provides probable cause.").

At the suppression hearing, Detective Peluso testified that the only reason Keith Jackson was initially considered a suspect was that he had previously been arrested with Willie Graham on a separate offense; information disclosed in the probable cause affidavit. (V-6, 626). Peluso also testified that he had no information from any source linking Jackson to the home invasion murders in this case. Id. Thus, even without the omission of the assertion that Jackson was initially considered a suspect, inclusion of such information would not have any impact upon the existence of probable cause in this case.

As for Pagan's claim the officers failed to establish the reliability of the two confidential sources (Appellant's Brief at 71), the State notes that the two sources were not anonymous. While at first they made anonymous calls to the police, they agreed to meet with the officers personally and discuss whatever information they possessed about the home invasion double murders. They did not want their identity generally revealed because of the perceived danger their cooperation might engender. Although each of their statements were independent of each other, the statements were generally consistent, thereby enhancing the credibility of each confidential

source.

The first independent source was not, contrary to Pagan's argument, Tameka Roberts, but Sharon Foster. Sharon Foster was a concerned citizen who had heard from her daughter and on the "streets" that Willie Graham and another man had committed the home invasion murders. That Tameka Roberts, who was dating Anthony Graham, Willie's cousin, now states that she did not tell her mother any information about the homicides that was not generally available to the public, is not significant. The police did not know this at the time they sought the affidavit, and, it is not surprising that later she would seek to disavow any claim that she was a snitch given her close association with a relative of one of the defendants. Consequently, Pagan's attack upon Tameka, who was not even relied upon as a confidential informant in the probable cause affidavit, does not provide any basis to overturn the magistrate's probable cause decision. See Schmitt v. State, 590 So.2d 404, 409 (Fla. 1991), cert. denied, 118 L.Ed.2d 216 (1992)(probable cause is determined by looking at the "four corners of the affidavit" and the question to be answered is whether "the factual allegations created a substantial basis for concluding that probable cause existed.").

In any case, Jackson's account of the defendant's confession was largely consistent with the account given by the victim, Latasha Jones. And, the affidavit was buttressed by two other sources, one of whom, Sharon Foster, can only be described as a concerned citizen. Under the totality of the circumstances in this case, the magistrate clearly had probable cause within the four corners of the affidavit to issue the warrant.

(ii) Seizure Of Jewelry

Pagan next contends that the officers exceeded the scope of the search and therefore conducted an illegal general search in violation of the particularity requirement. (Appellant's Brief at 70). Pagan, however, fails to offer specific supporting argument to sustain this rather sweeping contention. Presumably, Pagan takes issue with seizure of the gold honda ring and gold necklace, items which were not specifically named in the warrant. While not named in the warrant, these items were properly seized under the "plain view" doctrine.

This Court stated in Jones v. State, 648 So.2d 669, 677 (Fla. 1994), "[u]nder the plain view doctrine, 'if police are lawfully in a position from which they view an object, if its incriminating character is immediately apparent, and if the officers have a lawful right of access to the object [itself], they may seize it, without a warrant.'" (citing Minnesota v. Dickerson, __ U.S. __, 113 S.Ct.2130, 2136-37, 124 L.Ed.2d 334 (1993) and Horton v. California, 496 U.S. 128, 136-37, 110 S.Ct. 2301, 2307-08, 110 L.Ed.2d 112 (1990)). In Black v. State, 630 So.2d 609, 613 (Fla. 1st DCA 1993), the First District summarized the requirements for the plain view seizure as follows:

> Items in plain view may be seized when 1) the seizing officer is in a position where he has a legitimate right to be, 2) the incriminating character of the evidence is immediately apparent, and 3) the seizing officer has a lawful right of access to the object. *Horton v. California*, 496 U.S. 128, 136, 110 S.Ct. 2301, 2308, 110 L.Ed.2d 112, 123 (1990). Under the third requirement, police must have probable cause prior to seizure. *Id. Arizona v. Hicks*, 480 U.S. 321, 326-27, 107 S.Ct. 1149, 1153-54, 94 L.Ed.2d 347 (1987).

Pagan does not argue that the officers were unlawfully in position when the jewelry was discovered. Indeed, the officers were lawfully searching the residence pursuant to a valid search warrant. Since the officers were lawfully searching pursuant to a valid search warrant when they observed the jewelry in plain view, "neither its observation nor its seizure would involve any invasion of privacy."

Horton v. California, 496 U.S. 128, 132, 110 S.Ct. 2301, 110 L.Ed.2d 112 (1990). "A seizure of the article, however, would obviously invade the owner's possesory interest." Horton, 496 U.S at 133.

Pagan's assertion that seizure of the jewelry establishes that the officers simply conducted a general search is without merit. It is apparent that only few items of jewelry were seized. While not fully articulated in Pagan's brief, it appears that the only argument against application of the plain view doctrine in this case is that the items were not immediately identifiable as contraband and therefore should not have been seized. However, the Supreme Court has observed that probable cause in this context "merely requires that the facts available to the officer would 'warrant a man of reasonable caution in the belief,' *Carroll v. United States*, 267 U.S. 132, 162, 45 S.Ct. 280, 69 L.Ed. 543.(1925), that certain items may be contraband or stolen property or useful as evidence of a crime; **it does not demand any showing that such a belief be correct or more likely true than false.**" Texas v. Brown, 460 U.S. 730, 742, 103 S.Ct. 1535, 75 L.Ed.2d 502 (1983)(emphasis added).

Testimony from the officers below established that they recognized the items of jewelry as the likely fruit of the previous burglary of the victim's residence. (V-6, 610-611). In particular, the connection was made between the ring with the "H" on it and the Honda vehicle found at the victim's residence. (V-7, 708). Consequently, the officers had a reasonable belief or probable cause that the seized jewelry was useful and important evidence of a criminal offense. See generally Antone v. State, 382 So.2d 1205, 1212 (Fla. 1980)(seizure of fiber was proper and reasonable even though warrant authorized search for weapon, spent cartridges and counterfeit money); Black v. State, 630 So.2d 609, 613 (Fla. 1st DCA 1993)("It is clear, however,

from the totality of the circumstances, that the officers had probable cause to believe that the items plainly visible in the house were the fruits of the several robberies appellant was suspected of having committed, and that their seizure of these items was not unreasonable.").

In Alford v. State, 307 So.2d 433 (Fla. 1975), cert. denied, 428 U.S. 912, 96 S.Ct. 3227, 49 L.Ed.2d 1221 (1976), the defendant complained that the State improperly seized clothing that was not described in the warrant. The warrant described items such as a weapon and spent shell casings to be seized during the search. This Court disagreed with the defendant's contention that the items were seized during a general search, stating:

> Having authority and justification for being where they were, the officers were clearly warranted in seizing items in plain view or discovered inadvertently during the course of a reasonable search of defendant's premises. There is nothing to indicate that the officers were conducting a general exploratory search or that the search for spent cartridges was a subterfuge or an excuse to conduct a general exploratory search.
>
> . . .
>
> The State, in this case, should not be held to the strict requirement that only those things particularly described in the warrant may be seized. This would fly in the face of the universally accepted "plain view" exception to the warrant requirement. The police are not required to close their eyes and turn their heads away from evidence inadvertently discovered during the course of a lawful search, the presence of which they had no prior knowledge. (cites omitted).

Alford, 307 So.2d at 439.

Sub judice, the officers, having observed the two items of jewelry in "plain view"[24] while validly executing the warrant, were not required to simply ignore valuable evidence simply because it was not specifically listed in the warrant. See

[24]Although one item was located in a dresser drawer, the jewelry was in "plain view" in the sense that the officer was legitimately searching the drawer pursuant to a warrant when the item was observed.

generally United States v. Jenkins, 901 F.2d 1075 (11th Cir. 1990)(although letters were not described in warrant the officers had reason to examine bag where letters were found in seeking items listed in warrant and upon examination it became apparent that letters "were evidence of motive" and seizure was therefore appropriate); United States v. Davis, 589 F.2d 904, 905 (5th Cir. 1979)(pieces of newspaper found in suspect's home had sufficient nexus to crime under investigation to warrant seizure although the newspaper was not described in the warrant).

The officers had a lawful right of access to the jewelry and recognized these items as possible evidence of a crime or relevant evidence. Based upon this record, there was no legitimate basis for suppression of the jewelry seized from Pagan's residence. The lower court's ruling must be affirmed on appeal.

(iii) Knock And Announce

Pagan finally claims that the officers failed to properly knock and announce before entering Pagan's mother's residence. Pagan waived this argument by failing to raise it before the trial court below. (R-3, 401-406) See Section 924.051 (1)(b), Fla. Stat. (1996)("'Preserved' means that an issue, legal argument, or objection to evidence was timely raised before, and ruled on by, the trial court, and that the issue, legal argument, or objection to evidence was sufficiently precise that it fairly apprised the trial court of the relief sought and the grounds therefor."); Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982) post conviction relief denied, 574 So.2d 1075 (Fla. 1991)("except in cases of fundamental error, an appellate court will not consider an issue unless it was presented to the lower court."); Archer v. State, 613 So.2d 446, 448 (Fla. 1993)(For an issue "to be preserved for appeal . . . it 'must be presented to the lower court and the specific legal argument or ground to be argued on appeal must be

part of that presentation if it is to be considered preserved for appellate review.'")(quoting Tillman v. State, 471 So.2d 32, 35 (Fla. 1985)). And, had this argument been made below, the detectives could certainly have established reasonable grounds to believe that entering Pagan's residence without prior warning was reasonable. There was a strong possibility Pagan was armed and the officers had good reason to believe Pagan recently murdered two people and shot two others during a home invasion.[25]

D. Good Faith Exception

Assuming, *arguendo*, any defect in the search warrant or the scope of the search, the State maintains that the purposes of the exclusionary rule would not be served by excluding the evidence seized from Pagan's residence. If this Court finds that the information provided did not establish a probable cause finding, thus invalidating the entire search warrant, the actions of the officers in executing the search of Pagan's home would nevertheless qualify for the "good faith" exception to the warrant requirement. The Supreme Court in United States v. Leon, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984), held that the exclusionary rule should not be applied to evidence obtained as a result of an illegal search when the officer conducting the search acts in an objectively reasonable reliance on a warrant issued by a detached and neutral magistrate that is subsequently determined to be defective or invalid.

The Court reached this conclusion by utilizing a balancing approach in which the court must determine whether the purposes of the exclusionary rule will be furthered. Where the evidence sought to be suppressed was obtained as a result of a

[25]The Officers did in fact knock before entering through the unlocked front door.

search warrant issued by a neutral magistrate who had determined that probable cause existed, the benefits produced by suppressing evidence obtained on a subsequently invalidated search warrant does not outweigh the societal cost of excluding the evidence. State v. Bernie, 472 So. 2d 1243 (Fla. 2d DCA 1985), approved Bernie v. State, 524 So. 2d 988 (Fla. 1988). This exception; however, is applicable only when the officer's conduct is objectively reasonable. United States v. Leon, supra; State v. Diamond, 598 So. 2d 175, 178 (Fla. 1st DCA 1992)("An objective analysis indicates that a reasonably trained police officer would be justified in relying on the judicial determination of probable cause in the instant case").

There is nothing contained in the record before this Court indicating that the affidavit contains any material false information or that the magistrate was misled by information contained in the affidavit. Therefore, the detectives' reliance on the probable cause determination and sufficiency of the warrant was objectively reasonable, and the trial court properly denied Pagan's motion to suppress the evidence subsequently obtained. Therefore based upon the rationale of United States v. Leon, supra, and State v. Bernie, supra, there was no police illegality and, therefore, nothing to deter.

The same good faith exception should apply to any defect in the seizure of jewelry if this Court were to conclude that such seizure impermissibly exceeded the scope of the search warrant. The Officers did not exhibit bad faith in seizing the jewelry. Indeed, much of the jewelry observed during the search was not seized. Pagan's mother indicated that she bought items of jewelry for Pagan and those items were not seized by the arresting officers. There was no police misconduct in this case, and, again, nothing to deter.

E. Harmless Error

Once again, assuming *arguendo*, some defect in seizure of the jewelry, this error does not require reversal of Pagan's convictions. The seized jewelry was not a centerpiece of the State's case; any error in admitting the jewelry was harmless beyond a reasonable doubt. Both Quezada and Jackson testified that they observed Pagan with items of jewelry taken in the January 23rd burglary.[26] (V-21, 2505-2506; V-25, 3075). Thus, the actual items seized from Pagan's residence were cumulative to testimony from Quezada and Jackson. Moreover, the State connected items of jewelry taken from the victim's house to Pagan's co-conspirator, Willie Graham. (V-20, 2312, V-24, 2845-47, 2849). The State had ample evidence linking Pagan and Graham to the January 23rd burglary of the victim's home without presenting the items seized from Pagan's home. The error, if any, in admission of these items at trial, was harmless.

[26]Quezada in particular, specifically recalled jewelry taken by Pagan, including a Honda ring, and a "rope chain with a cross on it." (V-21, 2505).

IV.

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN FAILING TO GRANT A MISTRIAL BASED UPON DEFENSE COUNSEL'S ALLEGATION THAT THE PROSECUTOR IMPROPERLY BOLSTERED THE CREDIBILITY OF A STATE WITNESS? (STATED BY APPELLEE).

Pagan argues that the prosecutor impermissibly bolstered the credibility of Latasha Jones in closing argument. The State, maintains, however, that the prosecutor's argument was entirely appropriate and certainly did not require the trial court to declare a mistrial.

The law is well established that a motion for mistrial is addressed to the sound discretion of the trial court and "the power to declare a mistrial and discharge the jury should be exercised with great care and should be done only in cases of absolute necessity." Ferguson v. State, 417 So.2d 639, 641 (Fla. 1982)(quoting Salvatore v. State, 366 So.2d 745, 750 (Fla. 1978), cert. denied, 444 U.S. 885, 100 S.Ct. 177, 62 L.Ed.2d 115 (1979)). Furthermore, "[i]n order for the prosecutor's comments to merit a new trial, the comment must either deprive the defendant of a fair and impartial trial, materially contribute to the conviction, be so harmful or fundamentally tainted as to require a new trial, or be so inflammatory that they might have influenced the jury to reach a more severe verdict than that it would have otherwise." Spencer v. State, 645 So.2d 377, 393 (Fla. 1994) (citations omitted).

The prosecutor in this case was not impermissibly enhancing Latasha's testimony, he was primarily repeating her testimony at trial that she was not good at estimating height or weight. (V-18, 2181). And, in his own closing, defense counsel argued that Latasha's initial description of the suspect's height was inconsistent with Pagan's. (V-27, 3221). Finally, the prosecutor was only stating the obvious, that

Latasha was severely traumatized by the offense and therefore her recollection may have suffered as a result. The prosecutor's comments, in context, were not at all improper.

Pagan next quotes a portion of the prosecutor's argument, but does not argue why this comment was at all improper. (Appellant's Brief at 74). The objection made below was to the prosecutor's comment about the relative worth of the two watches that were not taken during the home invasion. The objection was immediately sustained and no basis for the objection and no motion for mistrial appear in the record. In any case, the objection prevented the prosecutor from estimating the relative worth of the watch, consequently, there was no error. Moreover, any statement regarding the watches left behind was invited by defense counsel's comment in closing: "Their eyewitness gives contradictory testimony and their motive, which is robbery, does not appeal because nothing is taken. **Two watches**, twelve credit cards..." (V-27, 3223-3224). Obviously, counsel was using the fact the watches and other items were not taken to contradict the State's evidence that this was an attempted robbery: "The watch that was in the Cherokee, and also here's a picture of all the other furnishings and things in this house." (V-27, 3223). The prosecutor's comment was not improper and was invited by defense counsel's comments. See Ricks v. State, 242 So.2d 763 (Fla. 3d DCA 1971)("Certain of the remarks made by the prosecutor were in reply to an argument made by defense counsel and, even if they were objectionable [which we do not so find], they were fair comment and reply to the defense's argument.").

The next comment Pagan objects to was the prosecutor's comment about a camouflage jacket. (Appellant's Brief at 75). The objection was based upon lack of

evidence to support the prosecutor's statement regarding a camouflage jacket. The trial court sustained the objection, but denied Pagan's motion for mistrial. With due respect to the lower court, reference to a camouflage or field jacket was made in testimony introduced during trial. (V-21, 2477, 2491-2492). The Appellee recognizes that the nature of the jacket as a desert storm camouflage jacket may not have been introduced at trial. Nonetheless, even if improper, this isolated comment about a jacket is hardly the type of prejudicial comment that can serve to vitiate the entire trial. The jury was earlier instructed to rely upon their own recollection of the testimony introduced at trial rather than the comments of counsel. (V-27, 3217). Pagan has failed to show the trial court abused its broad discretion in handling his objections to the prosecutor's argument below.

V.

WHETHER THE TRIAL COURT ERRED IN ADMITTING QUEZADA'S TAPED CONVERSATION WITH JACKSON AS A PRIOR CONSISTENT STATEMENT? (STATED BY APPELLEE).

Pagan next challenges the admission of prior consistent statements made by Antonio Quezada. The statements were admitted to rebut a charge of recent fabrication. He contends, however, that the challenged statements were inadmissible hearsay and that the admission of same constitutes reversible error. The State disagrees.

"It is well settled that a witness's prior consistent statements are generally inadmissible to corroborate that witness's testimony." Jackson v. State, 498 So. 2d 906, 909 (Fla. 1986); accord Dawson v. State, 585 So. 2d 443, 444-45 (Fla. 4th DCA

1991). Section 90.801(2)(b), Florida Statutes (1999), sets forth an exception to the general rule when the prior consistent statement is offered to rebut an express or implied charge of improper influence, motive, or recent fabrication. Rodriguez v. State, 609 So.2d 493, 500 (Fla. 1992).

In this case, the primary thrust of counsel's cross-examination of Quezada was that he was potentially facing a murder charge and, as, a result of his cooperation, was not charged. (V-22, 2542). In fact, defense counsel made a point of showing that as a result of his 'deal' he was not to be charged with any offense and, specifically, his accessory after the fact charge would be dropped. (V-22, 2546-2547). The agreement with the State in exchange for his cooperation was clearly reached after the recorded statement with Jackson.[27] The consistent statement implicating Graham and Pagan was therefore properly admitted to rebut a charge of recent fabrication. Rodriguez v. State, 609 So. 2d 493 (Fla. 1992) (defense counsel's reference to a plea agreement with the state during cross-examination was sufficient to create an inference of improper motive to fabricate); Jackson v. State, 599 So.2d 103, 107 (Fla. 1992) (taped statement admissible to rebut the inference codefendant had a motive to fabricate in light of agreement to testify against Jackson); Alvin v. State, 548 So. 2d 1112, 1114 (Fla. 1989) (tape recording of statement made by witness to police shortly after he was stopped by police was admissible in murder prosecution to rebut inference that witness had fabricated story implicating defendant because State granted him immunity in exchange for his testimony); Dufour v. State, 495 So. 2d 154, 160 (Fla.

[27]On March 5, 1993, Jackson met with Quezada at a flea market. Prior to meeting Quezada, Jackson was in contact with the Miramar Police Department and agreed to be wired with a microphone and tape recorder. (V-25, 3082-83). He gave the police permission to record his conversation with Quezada on that date. (V-25, 3083).

1986), cert. denied, 479 U.S. 1101 (1987) (trial court could allow introduction of State witness' former statement as prior consistent testimony tending to rebut implications of improper motive or recent fabrication, where defense had raised those implications through impeachment during cross-examination); Shellito v. State, 701 So.2d 837, 841 (Fla. 1997) (Statement made by trial witness to police officer incriminating defendant was admissible as prior consistent statement of witness, to counter inference raised during cross-examination of witness of recent fabrication based on information obtained from newspaper reports).

Curiously, while conceding that Quezada initially gave a sworn statement that he was with Pagan all evening until "he changed his version of the events after being threatened by the police," appellant argues that the statements were inadmissible because there "was no express or implied charge of improper influence, motive or recent fabrication" or that the "fabrication was old." (Appellant's Brief at 76-77). He maintains that because three years had elapsed since Quezada's statement had changed, the statements were rendered inadmissible.

The import of Pagan's cross-examination of Quezada, as well as the assertion contained in his brief on appeal, was that either the threats he received from the police "improperly influenced" him into changing his testimony or that a favorable agreement reached with the State motivated his change in testimony. Thus, whether they were recent or not, the statements were properly admitted to rebut the charge that Quezada had changed his testimony.[28]

---

[28]The prosecutor noted the following chronology for the trial court below:

> Yes, ma'am, the prior consistent statement was made on March 5th, 1993. Counsel cross examined the witness regarding the statement that he gave on November 17th, 1993, about which is certainly six or seven months afterwards and the inference and implication is that his testimony in

Further, even if the admission of prior consistent statements was limited to *recent* fabrications, which it clearly is not, the term "recent" is used in reference to the sequence of the statements and is not a statute of limitations on the admissibility of such statements. In Chandler v. State, 702 So.2d 186 (Fla. 1997) this Court affirmed the admission of evidence to rebut a charge of recent fabrication where the prior consistent statement was made years before the trial. The record showed that Chandler's daughter Kristal Mays testified during the State's case-in-chief that Chandler admitted that he committed the murders when he visited her in November 1989. However, on cross-examination, defense counsel elicited alternative purported motives for Mays to testify falsely: an October 1990 drug money theft where her husband was severely beaten after Chandler fled, and her receipt of money for appearing on Hard Copy in 1994. On redirect, the State attempted to rehabilitate Mays by introducing her sworn statement made to the state attorney's office on October 6, 1992, before the Hard Copy appearance was negotiated. Under these circumstances, this Court agreed that the statements had been properly admitted to rebut the charge of "implied influence, motive or recent fabrication," without consideration of the timeliness of the statements to the date of trial. Chandler, 702 So.2d at 197-199.

Assuming, *arguendo,* error in admission of the taped statement, the error is harmless beyond a reasonable doubt. Chandler, 702 So.2d at 199. In Chandler, this Court found the admission of Kristal Mays' prior statement harmless where the record

---

> Court here is untrue as a result of his coming into contact with me in November and the promises that were made to him at that point and the statement which I seek to offer is one in which he admits to Keith Jackson that he drove Mr. Graham and Mr. Pagan to the scene. (V-22, 2566).

showed that the jury was made aware early on that Mays had cooperated with the police. While recognizing that the statement may have bolstered Mays' credibility, this Court concluded that the jury had ample information from which to assess Mays' credibility and weigh her testimony accordingly. Chandler, 702 So.2d at 197-199. Similarly, in the instant case, the jury had ample information, outside of the prior consistent statements, upon which to assess Quezada's credibility. No relief is warranted.

VI.

WHETHER THE TRIAL COURT ERRED REVERSIBLY IN DENYING PAGAN'S MOTION FOR NEW TRIAL IN UPHOLDING THE STATE'S CHALLENGE TO JUROR LASTER.

Pagan argues that the defense had challenged and attempted to strike juror Laster because the defense believed he gave undesired conservative views and that the State challenged this motion on the basis of State v. Neil, 457 So.2d 481 (Fla. 1984). Citing Pagan's motion for new trial, he claims that the trial court erred in upholding the state's challenge to juror Laster and that he improperly sat on his panel. (Appellant's Brief at 80; V-32, 3811). The State disagrees.

The instant claim is both procedurally barred and meritless. The claim is barred because the record reflects during voir dire selection that the defense did not seek to exercise a peremptory challenge on Laster.[29] The failure to preserve the point below

[29]While at the new trial motion hearing the defense asserted that Laster was left on after a successful Neil objection by the prosecutor (V-32, 3811), the prosecutor there responded that the Court made the appropriate ruling when called upon to do so, that the defense was given an extra peremptory challenge, and the prosecutor could not recall if the defense expressed anything on Laster (V-32, 3825).

precludes review now. See Rhodes v. State, 638 So.2d 920 (Fla. 1994); Archer v. State, 673 So.2d at 21; Peterka v. State, 640 So.2d 59, 65 (Fla. 1994). Moreover, appellant personally approved the jurors selected except for the Neil inquiry. (V-12, 1376). The record reflects that Mr. Laster was one of the jurors selected to sit and apart from the Neil inquiry, Pagan himself asserted he had no objection to the jurors selected. (V-12, 376-1377).

While appellant does not grace us with record cites, it appears that the record reflects the following. The prosecutor elicited from juror Laster that he watched such television shows as Law and Order about police and lawyers. (V-11, 1243). Laster agreed with defense counsel that police officers are human beings and subject to such things as job pressure or loyalty to other police officers. (V-12, 1339). The juror agreed it was good to have a system to check the police. (V-12, 1340). Laster informed defense counsel that he could take mercy into consideration (V-11, 1291).

The defense peremptorily excused jurors Borocz, Romero, Bango, Christenson, Dixon, Neumann, Grissett, Esposito, Nelson and Reeves (V-12, 1363-1369). The defense sought to strike jurors Dixon and Spencer, the prosecutor asserted a Neil challenge requesting race-neutral reasons, noting the defense had already struck several black jurors. (V-12, 1365). The Court accepted that there was a race-neutral reason on Dixon (he was the victim of an armed robbery) and allowed the strike. (V-12, 1365-1366). As to Spencer, the defense urged he had a strong belief in the death penalty, stating: "He has a strong belief in the death penalty. I think his exact words, automatic death in certain circumstances because this is a capital case..." (V-12, 1367). The Court responded that the record did not accurately reflect defense counsel's notes and denied the challenge (V-12, 1367-1368).

Assuming, for a moment, Pagan meant to challenge the denial of his strike on juror Spencer rather than Laster, the trial court did not err in denying the strike. As noted by this Court in Reed v. State, 560 So.2d 203, 206 (Fla), cert. denied, 498 U.S. 882, 111 S.Ct. 230, 112 L.Ed.2d 184 (1990):

> Within the limitations imposed by *State v. Neil*, the trial judge necessarily is vested with broad discretion in determining whether peremptory challenges are racially intended. Only one who is present at trial can discern the nuances of the spoken word and the demeanor of those involved . . .
> . . . In trying to achieve the delicate balance between eliminating racial prejudice and the right to exercise peremptory challenges, we must necessarily rely on the inherent fairness and color blindness of our trial judges who are on the scene and who themselves get a 'feel' for what is going on in the selection process.

Thus, a trial judge "is vested with broad discretion in determining whether peremptory challenges are racially motivated." Fotopoulos v. State, 608 So.2d 784, 788 (Fla. 1992), cert. denied, 113 S.Ct. 2377, 124 L.Ed.2d 282 (1993). Pagan has not established the trial court abused its discretion in finding the reason for the strike inadequate.

While juror Spencer did say in general he favored the death penalty for cold blooded killers who showed no remorse, his statement did not reveal an inflexible attitude. (V-11, 1281). Spencer had earlier agreed that a defendant's life experiences should be taken into account in determining the appropriate penalty: "I feel it should, the upbringing of that child, if he was abused and things like that, you should hear about that." (V-11, 1260).

VII.

THE LOWER COURT DID NOT ERR IN DENYING PAGAN'S MOTION FOR NEW TRIAL.

Pagan filed a motion for new trial asserting sixteen grounds. (R-5, 950-953). Appellant argued the motion to the Court (V-32, 3807-3820) and following the State's response thereto (V-32 3821-3827), the trial court considered and denied the motion (V-32, 3827).

Appellee would respectfully submit that Pagan's failure to specify and provide argument as to the alleged error and ruling precludes review and reversal here. See Duest v. Dugger, 555 So.2d 849, 851-852 (Fla. 1990)("The purpose of an appellate brief is to present arguments in support of the points on appeal. Merely making reference to arguments below without further elucidation does not suffice to preserve issues, and these claims are deemed to have been waived."); Polyglycoat Corp. v. Hirsch Distributors, Inc., 442 So.2d 958, 960 (Fla. 4th DCA 1983)("It is the duty of counsel to prepare appellate briefs so as to acquaint the Court with the material facts, the points of law involved, and the legal arguments supporting the position of the respective parties.") Appellee will rely on the prosecutor's response below and in the interest of brevity will not repeat it here (especially since appellant's challenge is so cursory). Pagan has failed in his burden to demonstrate reversible error.

VIII.

WHETHER THE TRIAL COURT ERRED IN FAILING TO GRANT ONE OR MORE OF PAGAN'S MOTIONS FOR MISTRIAL? (STATED BY APPELLEE).

Pagan asserts or reasserts several claims of error, concluding that the trial court erred in failing to grant one or more of his motions for mistrial. Aside from a general lack of argument to support his claims, this allegation of error lacks merit.

As for the allegedly improper Williams rule evidence, this issue was briefed under issue two, *infra.* The same is true for his assertion that a prior consistent statement was improperly admitted over Pagan's hearsay objection which was briefed under issue five. And, as Pagan has failed to supply additional argument under these claims to support his position, the State will rely upon the argument in response to those claims, *supra*.

Of the remaining new claims, Pagan asserts without supporting argument that the trial court denied his various requests for a mistrial. Pagan's generally one sentence assertions that a mistrial was improperly denied, leaves little for the State to rebut in the way of argument. Indeed, such cursory claims should not even be considered preserved for appeal. See Duest, 555 So.2d at 851-852.

The closest Pagan comes to actually raising a new issue or offering supporting argument under this claim is his allegation that the prosecutor was impermissibly allowed to lead witnesses in this case. (Appellant's Brief at 82). However, the State points out that the prosecutor was not allowed to ask leading questions over defense counsel's objections. Immediately prior to asking for a mistrial, defense counsel lodged objections on the basis of leading questions. These objections were generally sustained by the trial court. (V-21, 2508). The trial court obviously did not agree that

a mistrial was necessary based upon a few leading questions.

In Murrell v. Edwards, 504 So.2d 35, 36-37 (Fla. 5th DCA 1987), the Fifth District made the following observations about leading questions:

> We suspect that what constitutes a leading question causes lawyers (new and old) and judges much consternation and confusion. **Leading questions are not often analyzed in appellate opinions because they seldom, if ever, are the basis for error on appeal.** An objection may be made to a question as leading because it is, in fact, leading or because objecting counsel is attempting to disrupt the smooth flow of testimony. Interrogating counsel usually rephrases his question, doesn't belabor the point and proceeds. Whether the judge ruled correctly is usually left in the dust and no one has learned much of anything. (emphasis added)

In an attempt to bolster his argument on appeal, Pagan contends that the State's evidence was weak and circumstantial. However, as noted above under issue one, the State's evidence in this case was not circumstantial. Nor was the State's case 'weak'. The State's evidence included confessions Pagan made to two friends, the details of these confessions were consistent with the evidence found at the crime scene and the testimony of the lone surviving adult victim.

In this case, that a few leading questions were asked was an inconsequential fact of this trial. The trial court was under no obligation to declare a mistrial. See generally Puza v. Winn-Dixie Supermarkets, 526 So.2d 696 (Fla. 4th DCA 1988)("Although plaintiff's attorney did ask fifteen leading questions that were objected to, the questions and conduct were not so prejudicial as to improperly influence the jury to the extent of denying Winn-Dixie a fair trial.").

IX.

WHETHER THE TRIAL COURT ERRED IN ADMITTING PHOTOGRAPHS OF THE MURDERED CHILD? (STATED BY APPELLEE).

Pagan asserts that the trial court erred in allowing the State to introduce photographs of the child murder victim. However, Pagan does not assert which photographs were admitted over his objection, nor does he provide any record cites.

The State questions whether or not this issue is preserved for review. It appears that photographs of the child victim were admitted through the medical examiner without a contemporaneous objection from the defense. Without a contemporaneous objection, this issue is not preserved for appeal. Steinhorst, 412 So.2d at 338. ("except in cases of fundamental error, an appellate court will not consider an issue unless it was presented to the lower court.").

Although Pagan does not provide record cites, the State notes that photographs of the child victim, Michael, were admitted to show the nature of his wounds and extent of his injuries during the medical examiner's testimony. In fact, a photograph of Michael, depicting the three gunshot wounds to the head and one to the buttock were admitted without objection from the defense. (V-15, 1748, 1749, 1755). During the medical examiner's testimony one photograph was objected to as cumulative and the prosecutor then withdrew that photograph. The remaining photographs were introduced without objection. (V-15, 1753-1754). However, even assuming, this issue is preserved for appeal, Pagan's cryptic argument lacks any merit.

The admission of photographic evidence is within the trial court's broad discretion and should not be disturbed on appeal unless there is a showing of clear abuse. Wilson v. State, 436 So.2d 908 (Fla. 1983). The photographs admitted in this

case were relevant to several issues. They depicted the nature and extent of the victim's injuries. The photographs also shed light on the nature of the force and violence used by the appellant. Although the photographs admitted in this case depicted the dead body of a child, the photographs were not unduly gruesome, gory, or shocking. See Alford v. State, 307 So.2d 433, 441 (Fla. 1975), cert. denied, 428 U.S. 912, 96 S.Ct. 3227, 49 L.Ed.2d 1221 (1976)(ruling that photograph was admissible because the view depicted was neither gory nor inflammatory beyond the simple fact that no photograph of a dead body is pleasant.).

The appellant essentially seeks to exclude the evidence of his homicidal violence. While the photographs are no doubt unpleasant; this is because appellant chose to murder a six-year-old child. See Henderson v. State, 463 So.2d 196, 200 (Fla. 1985)("Those whose work products are murdered human beings should expect to be confronted by photographs of their accomplishments."). Based upon this record, appellant has not established the trial court abused its broad discretion in admitting the photographs.[30] See Ford Motor Company v. Kikis, 401 So.2d 1341, 1342 (Fla. 1981)(abuse of discretion review requires affirmance of the trial judge's ruling "[i]f reasonable men could differ as to the propriety of the action taken by the trial court.")(citations omitted).

[30]Even assuming error in admission of some or all of the photographs, the error was harmless given minimally prejudicial nature of the photographs and the strong evidence of Pagan's guilt. See Peterka v. State, 640 So.2d 59, 69-70 (Fla. 1994), cert. denied, 115 S.Ct. 940, 130 L.Ed.2d 884 (1995).

X.

WHETHER THE TRIAL COURT ERRED IN FAILING TO CONDUCT A FULL INQUIRY UPON AN ALLEGED DISCOVERY VIOLATION? (STATED BY APPELLEE).

Pagan next claims that the trial court reversibly erred in failing to conduct a Richardson inquiry. Pagan's argument to the contrary, the record reflects that a sufficient inquiry was made and the trial court determined that no discovery violation occurred.

The following discussion occurred when the State first mentioned it was going to call Deputy McPhaul. The prosecutor stated:

> I just mentioned to Mr. Colleran that I may, I am going to give him the name of the deputy who witnessed the live line-up. He has the report and Mr. Colleran indicated to me that he was present there at the line-up. I spoke to the lady regarding te procedure in which they did the line-up to determine whether or not the form was filled out before it was handed to Ms. Jones because his question on cross-examination related to the fact that the name was, you know, well known to her, you know, was a good question. The lady, Deputy Irene McFallen (sic) indicated to me the procedure is to have the form filled out but to cover up the names. I just spoke to her briefly and I indicated that I would talk to her again if I intended to call her and that's why I told Mr. Colleran I just spoke to her, as a matter of fact, over lunch recess and that's essentially what we're dealing with.

(V-21, 2141-2142). Defense counsel did not dispute the fact that he was present during the voice lineup or that he was given a report listing the people present. (V-21, 2442). The trial court stated that defense counsel knew of McPhaul's existence and that therefore the defense suffered no prejudice from the failure to list her as a witness. (V-21, 2442). And, the specific prejudice mentioned by defense counsel was the inability to take her deposition prior to trial. (V-21, 2442). The prosecutor then referred to a report provided to the defense, listing among others, the witness in question. (V-21, 2442-2443). See Craig v. State, 585 So.2d 278, 281 (Fla.

1991)(although state had not listed officer as a potential witness the trial court did not err in allowing testimony regarding officer's recovery of spent shell casings where the defense was provided with this officer's report prior to trial).

The prosecutor also asserted that he had not planned to call Deputy McPhaul regarding the line-up, noting that "the comments Latasha made regarding the live line-up didn't come out until cross-examination, so it was not something that I had anticipated." (V-21, 2443). The prosecutor agreed to make McPhaul available for deposition prior to calling her to testify. (V-21, 2443). The trial court ruled: "There's been no Richardson violation that I can see. If defense says this person exited [sic], has some issue regarding to the case, give her a chance to depose her before she takes the stand, but there's no Richardson violation." (V-21, 2443).

Deputy McPhaul later testified about the voice line-up procedures in this case without objection from the defense. (V-24, 2825). Consequently, there is no reason to believe that defense counsel was inadequately prepared to examine this witness because of the alleged discovery violation. Assuming, *arguendo*, a discovery violation even occurred in this case, the error was not preserved by an objection to the witness' testimony and/or was harmless. For example, in Smith v. State, 515 So.2d 182, 183 (Fla. 1987), cert. denied, 485 U.S. 971, 108 S.Ct. 1249, 99 L.Ed.2d 447 (1988), this Court held that the State did not commit a discovery violation by submitting an additional witness list on the day of trial. In refusing to find a Richardson violation, this Court stated: "The submission of an additional witness list is not a discovery violation. The trial judge followed *Richardson* by inquiring into the matter and granting appellant the right to depose the additional witnesses. This was apparently done and no further objections were heard." See also State v. Schopp, 653

So.2d 1016 (Fla. 1995)("[W]e now recognize that there are cases, such as this, where a reviewing court can say beyond a reasonable doubt that the defense was not prejudiced by the underlying violation and thus the failure to make adequate inquiry was harmless error.").

Sub judice, the trial court offered to allow defense counsel time to depose this witness prior to testifying. There is no reason to believe that this step was inadequate to address defense counsel's concerns.[31] Accordingly, Pagan's claim of error does not entitle him to relief on appeal.

XI.

WHETHER THE TRIAL COURT ERRED IN DENYING A MOTION FOR MISTRIAL BASED UPON THE PROSECUTOR'S COMMENTS IN CLOSING ARGUMENT? (STATED BY APPELLEE).

Pagan's sub-issues K and L allege that the trial court erred in failing to grant his motions for mistrial based upon the prosecutor's closing argument. The State asserts that the trial court did not abuse its discretion in refusing to grant a mistrial. See Ferguson v. State, 417 So.2d 639, 641 (Fla. 1982)(The law is well established that a motion for mistrial is addressed to the sound discretion of the trial court and "the power to declare a mistrial and discharge the jury should be exercised with great care and should be done only in cases of absolute necessity.") (quoting Salvatore v. State, 366 So.2d 745, 750 (Fla. 1978), cert. denied, 444 U.S. 885, 100 S.Ct. 177, 62 L.Ed.2d 115 (1979)).

[31]The prosecutor later noted that defense counsel did indeed depose McPhaul prior to her testifying for the State. (V-32, 3824).

First, Pagan asserts that the prosecutor made a comment suggesting that Pagan would go out and commit additional crimes if he was not convicted. (Appellant's Brief at 85). The State reads the comment in a different manner. The prosecutor was primarily addressing counsel's argument on the lack of physical evidence found at the scene of the home invasion murders. (V-27, 3218). The prosecutor was certainly entitled to point out that the crime was planned so that they would leave no trace, so that Graham and Pagan would not be caught. The prosecutor correctly pointed out that they wore masks, gloves, and generally tailored their actions to get away with these murders. (V-27, 3308). The prosecutor did not argue as defense counsel contends that the jury's job was to convict Pagan so he could not commit other crimes. As the prosecutor stated below in response to the objection: "I didn't say anything about him doing it again." (V-27, 3309). Consequently, defense counsel's objection was not in line with what the prosecutor had stated. While the trial court advised the prosecutor to watch his phraseology, she did not "hear what Mr. Colleran seemed to hear." (V-27, 3309).

Pagan also asserts that the prosecutor's comments violated the "Golden Rule." However, Pagan does not provide a page cite nor a quote wherein the prosecutor asked the jurors to place themselves in the victims' shoes. See Shaara v. State, 581 So.2d 1339, 1341 (Fla. 1st DCA 1991)(A Golden rule argument is made when a prosecutor asks "the jurors to place themselves in the victim's position, [or] to think how they would feel if the crime happened to them.")(string citations omitted). And, the State cannot find an objection made to the argument below which made this specific allegation. Consequently, this aspect of Pagan's argument is not preserved for review.

Pagan next asserts that the prosecutor erred in commenting upon a camouflage

jacket and the fact that camouflage at that time was different based upon Desert Storm. This argument mirrors a claim made under issue f of Pagan's brief, which was responded to by the State under issue four. Rather than brief the same issue twice, the State will rely upon its earlier argument. Pagan has not established prosecutorial misconduct, much less shown that the alleged misconduct served to vitiate the entire trial.

XII.

WHETHER THE TRIAL COURT ERRED IN ALLOWING WITNESS KEITH JACKSON TO TESTIFY ABOUT HIS MOTIVATION FOR COOPERATING WITH THE POLICE? (STATED BY APPELLEE).

It must be remembered that Pagan was standing trial pursuant to an indictment charging him, and a co-defendant Willie Graham, with the premeditated murder of Michael Lynn and Freddie Lafayette Jones (R-1, 5). Testimony introduced at trial established that Michael was six-years-old. (V-17, 2040).

Keith Jackson testified for the State in which he noted that appellant acknowledged to the inquiry "did you kill a kid?" that "[h]e had to do it." (V-25, 3056). Pagan said he shot everybody in the house (V-25, 3057). Jackson entered a plea of guilty to attempted first degree murder on an unrelated case and armed robbery and is now awaiting sentence. (V-25, 3080-3081). His potential sentence is five years probation to ten years imprisonment. (V-25, 3082). The witness admitted that he was not completely forthright when he talked to police in February of 1993. (V-25, 3085-3086). At first, Jackson did not want to become involved, but his attitude changed. (V-25, 3086). When he went to the police he wanted to cooperate with them. (V-25,

3086-3087). Three years later, the charges against him were reinstated (V-25, 3087).

On cross-examination, the defense sought to impeach Jackson by inconsistent statements. (V-26, 3112-3147). The witness was asked whether in his dealings with the police they scared him and threatened to beat him. (V-26, 3137). On redirect, the prosecutor pursued defense counsel's inquiry about particular statements the witness had given to police in February of 1993. Jackson explained that he had not been expecting to encounter the detectives that night. (V-26, 3149-3150). The witness added that he did not want to become a witness against Willie Graham or Pagan, based on some feelings of loyalty towards them. (V-26, 3151). He was told from the start by detectives that he was not a suspect in this homicide case. (V-26, 3152-3153). Since giving his two statements on February 26 and March 4 of 1993 he had a lot of time to give those matters some thought. (V-25, 3154). When asked "[h]ave you given the death of that six year old and his father a lot of thought?", the defense objected on relevance grounds. The Court sustained the objection. The defense moved for a mistrial. (V-26, 3154). The Court stated it had sustained objection because the questions were leading and denied the mistrial request. (V-26, 3154-3155). The witness testified that he had a change in attitude when he saw a picture of the little boy that got shot. Jackson felt they did wrong and he should tell the police. (V-26, 3159-3160).

This Court has repeatedly stated that a ruling on a motion for mistrial is within the trial court's discretion and that a mistrial is appropriate only where the error is so prejudicial as to vitiate the entire trial. See generally Thomas v. State, 748 So.2d 970 (Fla. 1999); Snipes v. State, 733 So.2d 1000 (Fla. 1999); Hamilton v. State, 703 So.2d 1038 (Fla. 1997).

In the instant case, the trial court properly sustained a defense objection based on the leading nature of the prosecutor's inquiry; obviously, it was not a manifest legal necessity to stop the proceeding with the drastic action of a mistrial. Any contention the defense might make that the testimony was not relevant is meritless. Pagan was standing trial for the murder of a six year old child, the witness had been examined and cross-examined as to any motive he might have in testifying and in making his various prior statements. Jackson could permissibly state the reasons for any change in his prior statements. See Chandler v. State, 702 So.2d 186 (Fla. 1997).

XIII.

WHETHER THE TRIAL COURT ERRED IN ALLOWING THE MEDICAL EXAMINER TO TESTIFY CONCERNING THE LIKELIHOOD OF INJURY AS A RESULT OF BREAKING THROUGH A SLIDING GLASS DOOR? (STATED BY APPELLEE).

Pagan argues that the trial court improperly allowed the medical examiner to testify regarding his opinion on the injuries likely received as a result of breaking through glass at the victims' home. (Appellant's Brief at 88). The State disagrees.

Dr. Wright testified that he worked at the Department of Pathology, University of Miami, and the University of Miami Jackson Memorial Hospital in the Veteran's Administration. (V-15, 1714). Previously, Dr. Wright had been a chief medical examiner in the State of Vermont, giving him a total of twenty six years experience in forensic medicine. (V-15, 1720). From 1980 to 1994 Dr. Wright was under contract as the district medical examiner of Broward County. (V-15, 1714). Over the past fifteen or twenty years he was called to testify more than one thousand times in court as an expert in the filed of forensic pathology. (V-15, 1716).

Dr. Wright testified that his education included studying the kinds of injuries that human contact with glass might produce. (V-15, 1718). Standard study in the field of pathology included comparisons of injuries a person might receive when coming into contact with glass. (V-15, 1718). Dr. Wright testified that in addition to his education concerning human contact with glass, he has practical experience that spans thirteen years as a result of his experience at the district medical examiner's office. (V-15, 1719-1720).

Section 90.702, Florida Statutes (1999), provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion; however, the opinion is admissible only if it can be applied to evidence at trial.

"A trial court has broad discretion in determining the range of subjects on which an expert witness can testify, and, absent a clear showing of error, the court's ruling on such matters will be upheld." Finney v. State, 660 So.2d 674, 682 (Fla. 1995), cert.denied, 116 S.Ct. 823, 133 L.Ed.2d 766 (1996). See also., Geralds v. State, 674 So.2d 96, 100 (Fla. 1996); Ramirez v. State, 542 So.2d 352, 355 (Fla. 1989). The State properly developed Dr. Wright's qualifications to render an opinion on whether someone would be injured as a result of breaking through a sliding glass door. Consequently, the trial court did not abuse its discretion in allowing Dr. Wright to render an opinion in this case.

Pagan asserts that Dr. Wright's opinion evidence cannot withstand the Frye analysis. However, Pagan did not raise this argument below when he objected to this testimony. (V-22, 1724). Consequently, this argument has been waived on appeal. Steinhorst 412 So.2d at 338. In any case, the Frye analysis does not apply in this

case.

In Ramirez v. State, 651 So.2d 1164 (Fla. 1995), this Court explained that the principal inquiry under the Frye test is whether the scientific theory or discovery from which an expert derives an opinion is reliable. The Frye analysis should only be used when it concerns a new or novel scientific principal. Pagan has offered no evidence to suggest that Dr. Wright employed a novel scientific principal in testifying that it was unlikely a person would be injured breaking through the glass found at the victims' residence. Dr. Wright properly gave his expert opinion on whether someone could be injured while breaking through a sliding glass door because as a medical examiner, he has encountered injuries sustained from various types of glass. (V-15, 1724). The Frye analysis is inapplicable.

Assuming, *arguendo*, any error in admission of Dr. Wright's testimony, the error is harmless in this case. There was no physical evidence left at the scene to suggest the perpetrator was injured by breaking through the sliding glass door. Quezada testified that he did not observe Graham or Pagan with any injuries after the home invasion. Nor did they complain of any injuries. (V-22, 2522-23). The medical examiner's testimony merely confirmed that breaking the type of glass found in the victims' house would not likely cause any significant injury. The error, if any, is harmless beyond a reasonable doubt. DiGuilio, 491 So.2d at 1135.

XIV.

WHETHER THE TRIAL COURT ERRED IN ALLOWING TESTIMONY RELATING TO A VOICE LINEUP? (STATED BY APPELLEE).

Pagan did not make a contemporaneous objection to the testimony regarding the voice line-up. In fact, it was defense counsel on cross-examination of Latasha who brought up the voice line up and her failure to positively identify the voice of Mr. Pagan. Since Pagan did not object to this testimony below, and, in fact, brought it out before the jury, he cannot raise the issue now on appeal. More than mere waiver, this issue is subject to the invited error doctrine. This Court observed in Goodwin v. State, 751 So.2d 537, 544 (Fla. 1999), that when an "error is 'invited' of the defendant 'opens the door' to the error, the appellate court will not consider the error a basis for reversal."

Pagan erroneously states in his brief that "Latoshia Jones was permitted to testify on redirect examination that although she [was] unable to identify anyone from the voice line-up, she thought it was individual number 2 (T 2272)." (Appellant's Brief at 93). The testimony to which Pagan refers was elicited by the appellant on recross examination, not by the State on redirect examination . As Pagan cites, the testimony in question is on page 2272 of the transcript. However, redirect examination ended on page 2268 of the transcript.

The trial court warned defense counsel that he was exceeding the scope of redirect examination in asking Latasha about the voice line-up. (V-19, 2267-2269). Nonetheless, immediately following this warning, defense counsel proceeded to initiate his line of questioning regarding Latasha Jones' participation in the voice line-up. (V-19, 2269). The following is the testimony of Latasha Jones which defense

counsel elicited and now seeks reversal on:

> Q. Okay. But after the test was finished you didn't feel like you could recognize any of the six voices, correct?
>
> A. No, I told the policeman that I wasn't sure. I thought it was number 2. (V-19, 2271-2).

Thus, the record clearly shows that Latasha Jones' testimony regarding the voice line-up was elicited by defense counsel during recross examination. (V-19, 2269-76). Further, it is clear from the record that the trial court warned defense counsel that he was exceeding the scope of the State's redirect and opening the door to the testimony regarding the voice line-up. (V-19, 2268-9). Defense counsel disregarded the Court's admonition and proceeded to introduce the testimony anyway. (V-19, 2269-76). Appellant now argues that the trial court erred by allowing the testimony, and erroneously asserts that the State was responsible for introducing the testimony. This argument is patently without merit.[32]

XV.

WHETHER PAGAN HAS DEMONSTRATED CUMULATIVE ERROR REQUIRING REVERSAL OF HIS CONVICTIONS? (STATED BY APPELLEE).

Pagan's next claim [sub-issue P] asserts that the combined effect of all alleged errors in this case warrants a reversal of his convictions. Although this may be a legitimate claim on the facts of a particular case, such facts are not present herein, as it is contingent upon Pagan's demonstrating error in at least two of the other claims

[32]In any case, Pagan has not identified any significant defect in the lineup which resulted in a substantial likelihood of misidentification. Moreover, any error in the admission of such testimony would clearly be harmless in this case. Latasha'a tentative identification of Pagan by voice was not a substantial factor in his conviction.

presented on appeal. For the reasons previously discussed, he has not done so. Melendez v. State, 718 So.2d 746, 749 (Fla. 1998)(where claims were either meritless or procedurally barred, there was no cumulative effect to consider) and Johnson v. Singletary, 695 So.2d 263, 267 (Fla. 1996)(no cumulative error where all issues which were not barred were meritless.) Thus, the claim must be rejected because none of the allegations demonstrate any error, individually or collectively

Even if Pagan were able to establish multiple errors sufficient to warrant a cumulative error analysis, reversal is not mandated where there is no reasonable possibility that the alleged errors contributed to the conviction. In Delgado v. State, 25 Fla.L.Weekly S79 (Feb. 3, 2000), this Court explained:

> Because we find multiple errors, we must consider whether even though there was competent substantial evidence to support a verdict ... and even though each of the alleged errors, standing alone, could be considered harmless, the cumulative effect of such errors was such as to deny to defendant the fair and impartial trial that is the inalienable right of all litigants in this state and this nation.
>
> Seaboard Air Line R.R. Co. v. Ford, 92 So.2d 160, 165 (Fla.1956) (on rehearing). In making this determination, we follow the analysis utilized by the Court in Jackson. First, we conclude that none of the errors in this case were fundamental. Second, had these errors not been committed, the jury still would have heard evidence of the two brutal murders in this case. Therefore, considering the weight of the errors and the magnitude of the totality of the evidence against appellant, we find that there is no reasonable possibility that the errors in this case contributed to the conviction. See id. Delgado v. State, 2000 WL 124382 (Fla. 2000)(citing Jackson v. State, 575 So.2d 181, 189 (Fla.1991)).

As Pagan has not demonstrated fundamental error and there is no reasonable possibility that the alleged errors in this case contributed to the conviction, no relief is warranted.

XVI.

WHETHER THE DEATH SENTENCE RECOMMENDED BY THE JURY AND IMPOSED BY THE TRIAL COURT IS DISPROPORTIONATE TO OTHER DEATH CASES IN THIS STATE?

Pagan's final claim disputes the proportionality of his death sentence. The State disagrees. When factually similar cases are compared to the instant case, the proportionality of appellant's sentence is evident.

A. Standard of Review

This Court has described the "proportionality review" conducted by this Court in every death case as follows:

> Because death is a unique punishment, it is necessary in each case to engage in a thoughtful, deliberate proportionality review to consider the totality of circumstances in a case, and to compare it with other capital cases. It is not a comparison between the number of aggravating and mitigating circumstances.

Porter v. State, 564 So.2d 1060, 1064 (Fla. 1990), cert. denied, 498 U.S. 1110 (1991) (citation omitted) (emphasis added); see also Terry v. State, 668 So.2d 954, 965 (Fla. 1996); Tillman v. State, 591 So.2d 167, 169 (Fla. 1991). While the existence and number of aggravating or mitigating factors do not prohibit or require a finding that death is nonproportional, this Court nevertheless is "required to weigh the nature and quality of those factors as compared with other similar reported death appeals." Kramer v. State, 619 So.2d 274, 277 (Fla. 1993). The purpose of the proportionality review is to compare the case to similar defendants, facts and sentences. Tillman, 591 So. 2d at 169.

B. Appellant's Death Sentence For Committing This Home Invasion Double Homicide Is Proportionate

The trial court found the following aggravating circumstances to exist in this

case: 1) Previous conviction of another capital felony or a felony involving the use and/or threat of violence; 2) the capital felonies were committed while the defendant was engaged in the commission of, or attempting to commit, the crimes of Armed Burglary and Armed Robbery; 3) the capital felony was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. In mitigation, the trial court found that Pagan had some childhood deprivation and afforded this factor some weight. Although conflicting testimony was presented, the trial court found that Pagan suffered from attention deficit disorder, but gave this factor little weight. And, despite conflicting testimony, the trial court found and gave some weight to the fact that Pagan possesses a borderline personality disorder.[33] Pagan was found to have a loving relationship with certain family members (sister, mother, grandparents) but the trial court gave this factor little weight. (R-6, 1124). Pagan was also found to have formed close friendships, but this factor was also given little weight. (R-6, 1125). Finally, the lower court found that Pagan had demonstrated good behavior while incarcerated. After weighing the various aggravating and mitigating circumstances, the trial court found that "[t]he aggravating circumstances in this case far outweigh the mitigating circumstances" and sentenced Pagan to death. (R-6, 1125).

This Court has upheld as "especially weighty" the aggravating factor of prior violent felony convictions such as presented in the instant case. See Ferrell v. State, 680 So.2d 390 (Fla. 1996), cert. denied, 137 L.Ed.2d 341 (1997) (prior second degree murder); Lindsey v. State, 636 So.2d 1327 (Fla.), cert. denied, 513 U.S. 972, 115 S.Ct. 444, 130 L.Ed.2d 354 (1994)(contemporaneous first degree murder and prior second

[33]Dr. Stock testified that Pagan had an antisocial personality disorder.

degree murder); Duncan v. State, 619 So.2d 279 (Fla.), cert. denied, 510 U.S. 969 (1993)(death sentence affirmed where single aggravating factor of prior second-degree murder of fellow inmate was weighed against numerous mitigators); Lemon v. State, 456 So.2d 885 (Fla. 1984), cert. denied, 469 U.S. 1230 (1985) (prior conviction for assault with intent to commit first degree murder); Harvard v. State, 414 So.2d 1032 (Fla. 1982), cert. denied, 459 U.S. 1128 (1983)(prior conviction for aggravated assault from shooting attack).

Aside from the horrendous facts of this case, the first aggravator, prior capital conviction or a felony involving the use and/or threat of violence to another person, is particularly strong in this case. In support, the trial court noted Pagan's September 1988 convictions for "two (2) counts of Aggravated Battery, both crimes involving the use of violence against persons using a deadly weapon." (R-6, 1115). Further, while Pagan was on probation for the aggravated battery charges, Pagan was charged and convicted of the crime of Indecent Assault. "The state produced evidence, including statements of the then thirteen year old victim of the assault, to establish that this crime involved the use and/or threat of violence to the victim. On September 26, 1988, the Defendant was sentenced to seven and one half (71/2) years in the Florida State prison on February 28, 1992." (R-6, 1115).

The State introduced evidence to establish that the thirteen year old victim complained of a sexual battery and had not been sexually active prior to Pagan's assault. (V-30, 3446). A rape examination revealed a slight tear and bleeding between the vagina and anus. (V-30, 3446-3447). During the examination, the victim was "visibly upset, occasionally she would break out and start to cry and she was very shaken by the whole chain of events." (V-30, 3447). Details of Pagan's sexual attack

upon the minor victim were admitted through the victim's prior sworn statement. (V-30, 3454-3465).

The trial court also found that Pagan had been convicted of attempting to murder "eighteen (18) month old toddler, Lafayette Jones and his mother, Latoshia Jones." The "evidence reflected that these two crimes were committed immediately after Freddie Jones was murdered, and virtually contemporaneously with the murder of Michael Lynn." (R-6, 1115). Pagan was also convicted for the First Degree Murder of Freddie Jones, which the trial court noted was properly considered on Pagan's sentence for the murder of Michael Lynn. Id.

This Court has also recognized that cold, calculated and premeditated is one of the strongest aggravating factors in Florida's sentencing scheme. See e.g. Larkins v. State, 739 So.2d 90 (Fla. 1999)(noting that "heinous, atrocious, or cruel" and cold, calculated and premeditated aggravators are "two of the most serious aggravators set out in the statutory sentencing scheme..."). The facts of this case detail a planned attempt to "massacre the entire family." The trial court noted that Pagan had told Quezada before leaving the car to commit the home invasion, "I'm going to kill everybody." (V-30, 1118). When Quezada said don't kill the kids, Graham stated: "We can't leave any witnesses." (V-30, 1118). The trial court observed that the victims "were all hog-tied and physically helpless to offer any resistence or pose any threat of danger to the Defendant." (V-30, 1119). "Once the 'get away' vehicle was running, the Defendant, who remained standing by Mr. Jones' side of the bed throughout the incident, shot directly [in]to Mr. Jones' head at a distance of less than two (2 feet). The defendant "shot Michael Lynn four (4) times. One bullet entered Michael's head just above the right ear; another entered the top part of his head toward

the back, a third bullet entered the back of his head where it met his neck somewhat to the right of center, and a fourth bullet entered his buttock." (V-30, 1120). (R-6, 1120). Pagan murdered one man, a six year old child, and shot and left for dead an eighteen month old baby, and the baby's mother.

In contrast with the horrendous nature of the instant crimes and Pagan's significant history of violent conduct, the mitigation in this case was rather weak. None of the statutory mental mitigators applied in this case. The most a defense expert could say is that Pagan suffered from a borderline personality and that he suffered from attention deficit disorder. Although these factors were found to exist despite the contrary testimony of a state expert, such mental mitigation is hardly compelling. Nor was there any evidence of significant childhood abuse. Although Pagan had little contact with his biological father, he had close relationships with male relatives. Given the powerful case in aggravation and weak case in mitigation, Pagan's death sentence is clearly proportional.

Pagan has cited no factually analogous case which suggests that his death sentence is disproportionate. Nibert v. State, 574 So.2d 1059 (Fla. 1990), was a single aggravator case (heinous, atrocious, or cruel) with much more compelling mitigation. This Court noted that the state presented "no evidence that Nibert had a prior record of violent criminal conduct." 574 So.2d at 1061. Balanced against the heinous, atrocious, or cruel aggravator this Court found substantial mitigation, including the statutory mitigators of extreme mental or emotional disturbance and impaired ability to appreciate the criminality of his conduct. Moreover, the defense established the non-statutory mitigators of child hood abuse, long term alcoholism, and potential for rehabilitation. Nibert, 574 So.2d 1062-1063. This Court concluded that "Nibert was

a child-abused chronic alcoholic who lacked substantial control over his behavior when he drank, and that he had been drinking heavily on the day of Snavely's murder." 574 So.2d at 1063.

While Pagan appears to argue that evidence of some type of alcohol problem as in Nibert minimizes his culpability in this case, there was no evidence to suggest he consumed alcohol on the night of these murders. And, in fact, the home invasion murder was carefully planned and executed to leave no physical evidence. C.f. Brown v. State, 721 So.2d 274, 281 (Fla. 1998)(upholding denial of statutory mental mitigator although defendant presented evidence of drug consumption of the might of the murder where there was "no evidence that Brown was actually intoxicated at the time of the murder or that his capacity to conform his conduct to the requirements of the law was substantially impaired."). See also White v. Singletary, 972 F.2d 1218, 1221 (11th Cir. 1992); White v. State, 559 So.2d 1097, 1099 (Fla. 1990), cert. dismissed, 115 S.Ct. 2008, 131 L.Ed.2d 1008 (1991)(Trial counsel is not ineffective in rejecting an intoxication defense when it is inconsistent with the deliberateness of the defendant's actions). And, unlike Nibert there was no evidence to establish the mental mitigators in this case. Pagan did not have a good prior record, Pagan committed prior violent felonies in addition to a prior murder (Freddie Jones) and attempted murder (Latasha Jones).

In Shellito v. State, 701 So.2d 837 (Fla. 1997), cert. denied, 523 U.S. 1084, 140 L.Ed.2d 686 (1998), this Court affirmed the death sentence for a twenty year old defendant with a prior violent felony conviction and pecuniary gain/committed during a robbery (merged) aggravators. The defendant's criminal convictions included eight

felonies as an adult and four felony convictions as a juvenile.[34] 701 So.2d at 843. This Court found the sentence proportionate despite non-statutory mitigation of alcohol abuse, mildly abusive childhood, and evidence that he had difficulty reading and had a learning disability. See Melton v. State, 638 So.2d 927 (Fla. 1994)(death sentence affirmed based upon prior violent felony conviction (first degree murder and robbery) and murder committed for financial gain where defense presented two non-statutory mitigators of good conduct while awaiting trial and difficult family background); Hudson v. State, 538 So.2d 829, 831 n.5 (Fla. 1989)(finding death sentence proportionate with aggravating factors of prior conviction of a violent felony (sexual battery) and committed during an armed burglary aggravators while mitigation included statutory mitigators of being under extreme mental or emotional disturbance, impaired capacity to conform conduct to requirements of law and age (22)).

In Finney v. State, 660 So.2d 674, 679 (Fla.), cert. denied, 516 U.S. 1096 (1995) this Court upheld the sentence imposed for the stabbing death of a young woman where the court found three aggravating factors: 1) prior violent felony; 2) pecuniary gain; and 3) the murder was especially heinous, atrocious or cruel balanced against five nonstatutory mitigating factors: 1) Finney's contributions to the community as evidenced by his work and military history; 2) Finney's positive character traits; 3) Finney would adjust well to a prison setting and had potential for rehabilitation; 4) Finney had a deprived childhood; and 5) Finney's bonding with and

---

[34]Pagan's reliance upon Scott v. Dugger, 604 So.2d 465 (Fla. 1992) is also misplaced. Scott was a case involving the robbery and murder of one victim which was affirmed on direct appeal. However, on post-conviction appeal this Court revisited the proportionality review based upon the life sentence received by a codefendant whom the majority of this Court believed was equally culpable for the victims' murder. *Sub judice*, it cannot be said that Graham was an equally culpable defendant, Pagan carried out the execution style murders.

love for his daughter. This Court held that after comparing the case to other death penalty cases, e.g., Hudson v. State, 538 So.2d 829 (Fla.), cert. denied, 493 U.S. 875 (1989) that death was proportionately warranted. Finney, 660 So.2d at 685.

These cases establish that this Court has affirmed death sentences in the past with less aggravation and/or more compelling mitigation.[35] The death sentence in this case is appropriate, proportionate, and must be affirmed on appeal.

[35]This Court has even affirmed the death penalty in single aggravator cases, despite the presence of mitigation. Ferrell v. State, 680 So.2d 390 (Fla. 1996), cert. denied, 117 S.Ct. 1262, 137 L.Ed.2d 341 (1997). *See also*, Windom v. State, 656 So. 2d 432 (Fla. 1995) (as to murders of two of the victims, the only aggravating factor was prior violent felony conviction, based on contemporaneous crimes; in mitigation, trial court found no significant criminal history, extreme mental disturbance, substantial domination of another person, helped in community, was good father, saved sister from drowning, saved another person from being shot over $20); Cardona v. State, 641 So. 2d 361 (Fla. 1994) (single aggravating factor of HAC; mitigation included extreme emotional disturbance, daily use of cocaine and substantial impairment therefrom, defendant raped as a child); Arango v. State, 411 So. 2d 172 (Fla. 1982) (single aggravator of HAC; defendant had no prior criminal history); Duncan v. State, 619 So. 2d at 284 (single factor of prior violent felony convictions supported death sentence, despite existence of numerous nonstatutory mitigating factors).

CONCLUSION

WHEREFORE, based on the foregoing arguments and authorities, the State respectfully asks this Honorable Court to affirm the judgment and sentence.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

SCOTT A. BROWNE
Assistant Attorney General
Florida Bar No. 0802743
Westwood Center, Suite 700
2002 North Lois Avenue
Tampa, Florida 33607-2366
(813) 873-4739
(813) 356-1292 (Fax)

COUNSEL FOR STATE OF FLORIDA

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Richard L. Rosenbaum, Esquire, One East Broward Boulevard, Suite 1500, Fort Lauderdale, Florida 33301, this _____ day of September, 2000.

COUNSEL FOR STATE OF FLORIDA

IN THE SUPREME COURT OF FLORIDA

ALEX PAGAN

Appellant,

vs. **CASE NO. SC94365**

STATE OF FLORIDA,

Appellee.

_____/

INDEX TO APPENDIX