IN THE SUPREME COURT OF FLORIDA

THOMAS DAVIS WOODEL,

Appellant,

vs. **CASE NO.SC95110**

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT, IN AND FOR POLK COUNTY, FLORIDA

ANSWER BRIEF OF THE APPELLEE

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

CAROL M. DITTMAR
Assistant Attorney General
Florida Bar No. 0503843
2002 North Lois Avenue, Suite 700
Tampa, Florida 33607-2366
(813) 873-4739

COUNSEL FOR APPELLEE

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SUMMARY OF THE ARGUMENT

I. Woodel's claim that the trial court erred in requiring the penalty phase to be completed in one day has not been preserved for appellate review. Defense counsel did not ask for a continuance and none of the claims asserted on appeal with regard to this issue were presented to the court below. Furthermore, there is no authority for Woodel's suggestion that requiring jurors to work a thirteen hour day in order to complete deliberations, where the jurors have expressed no hesitation about their ability to fulfill their responsibilities, interferes with the constitutional right to a fair trial.

II. The State presented competent, substantial evidence to support the jury verdicts finding Woodel guilty of murder, robbery and burglary. On the facts of this case, the murder conviction is easily sustainable on both premeditation and felony murder theories. Woodel's own statement, admitting that he was in the victims' trailer without consent and that he struck Mrs. Moody over the head with a toilet tank lid in order to knock her unconscious, is sufficient to establish that he was committing a burglary with the intent to commit an assault. Premeditation is also demonstrated by the prolonged nature of the attack, the repeated deliberate use of a deadly weapon, and the totality of the circumstances presented.

III. This Court has consistently rejected Woodel's claim that

the State may not rely on a felony murder theory when the Indictment only alleges premeditated murder. No satisfactory basis for revisiting this well established law has been offered.

IV. The trial court did not err in denying Woodel's motion for mistrial based on comments in the prosecutor's opening statements about evidence which was later excluded from trial. The trial court properly concluded that the lack of prejudice mandated the denial of the motion for mistrial.

V. The trial court properly applied the aggravating factors of during the course of a burglary and advanced age of the victims. The facts recited in the application of these factors are supported by the record, and the trial judge applied the correct rule of law.

VI. No error has been demonstrated with regard to the trial court's treatment of the mitigating evidence presented. The sentencing order reflects the mitigation found below and is sufficient to permit meaningful appellate review of Woodel's sentence. In addition, on the facts of this case, any possible deficiency in the trial court's written order would not compel relief as the record clearly establishes that, even if a more thorough discussion of the mitigation was provided, the trial court would have still imposed the death sentences.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED IN CONCLUDING THE PENALTY PHASE PROCEEDINGS IN ONE DAY.

Appellant Woodel initially alleges that the trial court denied him due process and effective assistance of counsel by insisting that the penalty phase proceedings be conducted in one day. A review of the record clearly demonstrates that no error occurred with regard to this issue. In fact, defense counsel below never even requested that the penalty phase hearing be continued. On the facts outlined below, no relief is warranted.

Jury selection for Woodel's trial began on November 9, 1998 (V2/T3). Due to known scheduling conflicts, the jury venire was advised that the trial may last as long as four weeks; that they would not be working on Veteran's Day or the Thanksgiving weekend; and that the trial would be concluded by December 5, 1998 (V2/T6). Jury selection took five days, and the jury was sworn on November 16, with opening statements given November 17 (V9/T1252, 1255). During the course of the trial, both routine and unexpected delays pushed the trial later. When court convened on Friday, November 20, a juror notified the judge of a family emergency, and since the judge was not going to be available on Monday, November 23, the trial was continued at that time until Tuesday, November 24 (V12/T1761-1766). However, jurors were assured at that time that

the trial should still be concluded by December 5 (V12/T1172).

Following closing arguments on December 2, there was an extensive discussion about scheduling (V17/2663-2672). The judge noted that charging the jury would take until about 5:00, and the question was whether to instruct the jury and then sequester them or to have everyone return early the next day (V17/2663-64). The judge expressed concern over being "rushed to the point to committing reversable [sic] error" and advised that, should a second phase be necessary, they could work late Thursday night and Friday night, and that the judge was available on Monday, but had a judicial conference on Tuesday which he was required to attend (V17/2664-65). Defense counsel recommended that the jurors be sent home for the day; although the prosecutor had reservations that it might mean the trial would go longer than the jury had been told all along, ultimately everyone agreed that the jurors should be released (V17/2665-2671). Although the attorneys had represented that they were ready to go forward with the penalty phase should it be necessary, the judge asked them to give the matter further consideration, as he did not want to start and possibly have to sequester the jury over the weekend if they did not get finished Friday night (V17/2677-78).

The jury was instructed the next morning, Thursday, December 3, and retired to deliberate at 9:45 a.m. (V17/2720). As the judge

released the alternate juror, the judge indicated that in the event of a penalty phase, the juror would need to continue to serve; it was anticipated at that time that any penalty phase would begin on Monday, December 7 (V17/2713-15). Approximately 4:30 that afternoon, the judge called the jury in and inquired as to whether they wanted to continue deliberations or break for the evening; the jurors elected to adjourn and start again in the morning (V17/2720-2725). The next day, the jury began deliberating at 9:45 a.m. and reached a verdict at 10:20, which was announced nearly an hour later (V17/2727-28). The court scheduled the penalty phase for Monday, December 7, and asked the jurors if any of them would not be able to make it at that time, since they had been previously advised that the trial would be concluded before then (V17/2732-33). The jury was then released for the weekend.

On Monday, the State recalled the medical examiner and then presented eight brief victim impact witnesses, resting just before 11:00 a.m. (V17/T2750; V18/T2813). The defense presented eight witnesses, concluding with Dr. Henry Dee, a clinical neuropsychologist (V18, V19). Dr. Dee's testimony began about 4:45 p.m. (V19/T2958). Following the penalty phase charge conference, the judge suggested they "move as fast as we can without jeopardizing either side" (V19/T3048). When the judge asked if everyone was ready to give their closing arguments, defense counsel

noted they were "[a]s ready as we're going to be in this late of the day" and stated "I think it's kind of dangerous to do these kind of closings this late in the day, but I understand the logistical problems" (V19/T3049-50). The prosecutor suggested that they inquire about the jurors needing to eat, and a discussion as to when to offer dinner ensued (V19/T3050-54). In addressing the issue of whether to provide dinner before or after the closing arguments, the defense attorney noted that he was exhausted, that he could "look at them and tell" the jury was exhausted, and that he did not want them to not listen to closing arguments because they're either exhausted, hungry, "or whatnot" (V19/T3052). The judge advised that he would go ahead and take dinner orders, so that the food would be ready at the time the jurors were sent for deliberations (V19/T3053). He asked if there was any objection to that procedure, and defense counsel responded, "No sir, there's no objection to that at all. Objection is to the lateness in the day" (V19/T3053).

Despite the current complaint that counsel was "forced" to conduct the penalty phase in one day, the defense trial attorneys never seriously took issue with the timing of the proceedings below. There was no motion to continue, no assertion that counsel could not effectively conclude his case, no request for any particular relief at any time. Certainly the cursory, lateness-in-

the-day objection was not sufficient to preserve the argument now offered on appeal. There was never any claim presented below that Woodel's due process rights or his right to counsel were being compromised. Thus, the lack of any contemporaneous objection precludes review of this issue. Castor v. State, 365 So. 2d 701 (Fla. 1978).

Furthermore, the record reflects that the jury retired to deliberate at 8:50 p.m. and returned with their recommendations at 10:00 p.m. (V19/T3146). Although the day of the penalty phase was long, the jury had been in recess for two and a half days prior to the start of the penalty phase. Prior to the calling of the last defense witness, jurors were given the opportunity to make phone calls for any personal arrangements that needed to be made (V19/2954-55). The jury recommended death by a vote of nine to three as to Mr. Moody, and death by a vote of twelve to zero as to Mrs. Moody (V19/T3147-3150). Woodel's current characterization of the jury as weary and fatigued is not supported by the record; in fact, the jury having deliberated for over an hour and making two different, independent recommendations demonstrates that the jury applied reasoned consideration and was not "rushed to judgment" as Woodel suggests. In light of these facts, the jury's inadvertent recording mistake on the initial recommendation for Mrs. Moody does not support counsel's speculation that the jurors were not paying

close attention to the proceedings.

The cases cited by Woodel do not require a new trial in this case. In Scull v. State, 569 So. 2d 1251 (Fla. 1990), this Court remanded for a new resentencing after the trial court abused its discretion in denying a motion to continue. The trial court in that case conducted a resentencing proceeding on December 28, but the mandate directing the resentencing was not received in the lower court until December 29. The resentencing proceeding was repeated on December 30 since the court had not had jurisdiction on the 28th. Among the egregious facts involved in Scull, the defense attorney did not even know of the hearing until returning from Christmas vacation on December 27. Noting that due process encompassed both fair notice and a reasonable opportunity to be heard, this Court found that neither had been afforded in the haste of the resentencing proceedings and remanded for another resentencing.

Woodel has not alleged that he was not provided with reasonable notice or any opportunity to be heard with regard to his penalty phase proceeding. Any such allegation would clearly be refuted by the facts as set forth above. Therefore, Scull offers no basis for relief in the instant case, and in fact contradicts Woodel's claim since the record affirmatively demonstrates both fair notice and an opportunity to be heard.

Similarly, Thomas v. State, 24 Fla. L. Weekly S461 (Fla. Sept. 30, 1999), presents a case involving extreme facts plainly distinguishable from the situation below. In Thomas, jurors were required to deliberate from 7:00 p.m. until 4:30 a.m. before being permitted to recess for the night. During that time, they advised the judge repeatedly that they were deadlocked; the court gave a coercive, erroneous charge for them to continue deliberations; they were threatened with sequestration; and the record reflected open hostility and crying among the jurors. No similar facts occurred at Woodel's trial. See also, Ferrer v. State, 718 So. 2d 822 (Fla. 4th DCA), rev. denied, 728 So. 2d 204 (Fla. 1998) (trial judge unreasonably inhibited counsel's ability to conduct meaningful voir dire by denying motion to continue, where process was only beginning at 7:30 p.m. after counsel had already worked a full day in court).

The granting or denial of a motion to continue is vested in the wide discretion of the trial judge. Fennie v. State, 648 So. 2d 95, 97 (Fla. 1994); Gorby v. State, 630 So. 2d 544, 546 (Fla. 1993). Even if a motion to continue had been presented below for the reasons now offered by Woodel, no abuse of discretion would be evident from the denial of the motion. Woodel is not entitled to any relief in this issue.

ISSUE II

WHETHER WOODEL'S CONVICTIONS ARE SUPPORTED BY COMPETENT, SUBSTANTIAL EVIDENCE.

Woodel next challenges the denial of his motions for judgment of acquittal. Specifically, Woodel claims that the evidence did not establish any premeditation to kill the victims; that there was no robbery because the taking of the victim's property was an afterthought; and that no burglary was proven because there was no intent to commit a crime when he entered the victim's dwelling. Each of these claims will be addressed in turn, and, as will be seen, there was substantial, competent evidence admitted to support the jury's verdicts of guilt against the appellant. Therefore, he is not entitled to relief on this issue.

A court should not grant a motion for judgment of acquittal unless there is no view of the evidence which the jury might take favorable to the opposite party that can be sustained under the law. Woods v. State, 733 So. 2d 980 (Fla. 1999); Gordon v. State, 704 So. 2d 107 (Fla. 1997); DeAngelo v. State, 616 So. 2d 440, 441-442 (Fla. 1993); Taylor v. State, 583 So. 2d 323, 328 (Fla. 1991), cert. denied, 115 S. Ct. 518 (1994); Lynch v. State, 293 So. 2d 44, 45 (Fla. 1974). In moving for judgment of acquittal, a defendant 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. 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. Lynch, Taylor.

Furthermore, although Woodel relies on the circumstantial evidence rule, the evidence in this case included direct evidence of unlawful killings. Woods, 733 So. 2d at 986. In addition, while this Court has recognized that circumstantial evidence may be deemed insufficient where it is not inconsistent with a reasonable theory of defense, this Court has also recognized repeatedly that the question of whether any such inconsistency exists is for the jury, and this Court will not disturb a verdict which is supported by substantial, competent evidence. Orme v. State, 677 So. 2d 258 (Fla. 1996), cert. denied, 117 S.Ct. 742 (1997); Barwick v. State, 660 So. 2d 685, 694-695 (Fla. 1995), cert. denied, 516 U.S. 1097 (1996); Spencer v. State, 645 So. 2d 377, 380-381 (Fla. 1994), cert. denied, 118 S. Ct. 213 (1997); Cochran v. State, 547 So. 2d 928, 930 (Fla. 1989); Heiney v. State, 447 So. 2d 210, 212 (Fla.), cert. denied, 469 U.S. 920 (1984); Williams v. State, 437 So. 2d 133, 134 (Fla. 1983), cert. denied, 466 U.S. 909 (1984); Rose v. State, 425 So. 2d 521 (Fla. 1982), cert. denied, 461 U.S. 909 (1983). It is not this Court's function to retry a case or reweigh conflicting evidence; the concern on appeal is limited to whether the jury verdict is supported by substantial, competent evidence. Crump v. State, 622 So. 2d 963, 971 (Fla. 1993) (question of

whether evidence fails to exclude any reasonable hypothesis of innocence is for jury to determine, and if there is substantial, competent evidence to support jury verdict, verdict will not be reversed on appeal); Tibbs v. State, 397 So. 2d 1120 (Fla. 1981), aff'd., 457 U.S. 31 (1982) (concern on appeal must be whether, after all conflicts in the evidence and all reasonable inferences therefrom have been resolved in favor of the verdict on appeal, there is substantial, competent evidence to support the verdict and judgment). As will be seen, the State clearly presented substantial, competent evidence that Woodel killed Cliff and Bernice Moody, and therefore he is not entitled to any relief on this issue.

Premeditation

Premeditation may be formed in a moment and need only exist for such time as will allow the accused to be conscious of the nature of the act he is about to commit and the probable result of that act. Spencer, 645 So. 2d at 380-381; Asay v. State, 580 So. 2d 610, 612 (Fla.), cert. denied, 502 U.S. 895 (1991); Wilson v. State, 493 So. 2d 1019, 1021 (Fla. 1986); Preston v. State, 444 So. 2d 939, 944 (Fla. 1984), cert. denied, 507 U.S. 999 (1993). There is no prescribed length of time which must elapse between the formation of the purpose to kill and the execution of the intent; it may occur a moment before the act. Provenzano v. State, 497 So. 2d 1177, 1181 (Fla. 1986), cert. denied, 481 U.S. 1024 (1987);

Sireci v. State, 399 So. 2d 964, 967 (Fla. 1981), cert. denied, 456 U.S. 984 (1982); McCutchen v. State, 96 So. 2d 152 (Fla. 1957). This Court has characterized the duration of the premeditation as "immaterial so long as the murder results from a premeditated design existing at a definite time to murder a human being." Songer v. State, 322 So. 2d 481, 483 (Fla. 1975), vacated on other grounds, 430 U.S. 952 (1977).

Whether or not the evidence shows a premeditated design to commit a murder is a question of fact for the jury which may be established by circumstantial evidence. Spencer, 545 So. 2d at 381; Sochor v. State, 619 So. 2d 285 (Fla.), cert. denied, 510 U.S. 1025 (1993); Bedford v. State, 589 So. 2d 245, 250 (Fla. 1991); Penn v. State, 574 So. 2d 1079, 1081-1082 (Fla. 1991); Asay, 580 So. 2d at 612; Cochran v. State, 547 So. 2d 928, 930 (Fla. 1989); Wilson, 493 So. 2d at 1021; Preston, 444 So. 2d at 944; Spinkellink v. State, 313 So. 2d 666 (Fla. 1975), cert. denied, 428 U.S. 911 (1976). Weighing the evidence in light of these standards it is clear that premeditation was proven beyond a reasonable doubt.

The traditional factors for consideration in determining the existence of premeditation support a finding of premeditation in the instant case. Such factors include the nature of the weapon, the presence or absence of provocation, previous difficulties between the parties, the manner in which the homicide was committed, the nature and manner of the wounds, and the accused's

actions before and after the homicide. Holton v. State, 573 So. 2d 284, 289 (Fla. 1990); Larry v. State, 104 So. 2d 352, 354 (Fla. 1958). The nature of the injuries to the Moodys, including being repeatedly stabbed and, as to Mrs. Moody, hit over the head with a porcelain toilet tank lid with sufficient force to break the lid into many pieces, provides a substantial basis for the finding of premeditation. There is absolutely no evidence of anything that would have provoked a rage or frenzy, and no evidence of prior difficulties between the parties. To the contrary, the evidence suggests that the Moodys had never met Woodel prior to these murders.

In Jimenez v. State, 703 So. 2d 437 (Fla. 1997), this Court found premeditation on strikingly similar facts. Jimenez beat and stabbed a woman in her home; when her neighbors came after hearing her screams, Jimenez locked the door and fled from a balcony. In rejecting the claim that no premeditation was established, this Court noted only that the victim had been beaten and stabbed eight times, suffering three deep stab wounds to her chest. This Court stated, "[t]he deliberate use of a knife to stab a victim multiple times in vital organs is evidence that can support a finding of premeditation." 703 So. 2d at 440.

Similarly, in Zack v. State, 25 Fla. L. Weekly S19 (Fla. Jan. 6, 2000), this Court found the evidence sufficient to support premeditation. Zack and the victim met at a bar, and left

together, eventually arriving at the victim's house. The evidence demonstrated that immediately upon entering the house, Zack hit the victim with a beer bottle and pursued her to a bedroom, where he sexually assaulted her. When she tried to escape he caught her and beat her head against the wooden floor. He then got a knife and stabbed her in the chest four times. Since the attack in the instant case was similar, Woodel's claim of lack of premeditation must be rejected.

This Court has consistently upheld a finding of premeditation in cases involving vicious, prolonged attacks with a deadly weapon. In Preston, this Court noted that "[s]uch deliberate use of this type of weapon so as to nearly decapitate the victim clearly supports a finding of premeditation." 444 So. 2d at 944. See also, Kramer v. State, 619 So. 2d 274 (Fla. 1993) (evidence suggested victim was killed during spontaneous fight, with no discernible reason, between a disturbed alcoholic and a legally drunk man, but blood spatter and victim injury provided substantial basis for finding of premeditation).

The cases cited by the appellant do not compel a contrary result. In Kirkland v. State, 684 So. 2d 732 (Fla. 1996), prior friction between the defendant (who had an IQ in the sixties) and the victim apparently led to the attack, where the victim suffered blunt trauma and a severe neck wound. Since there was no evidence of a robbery, there was nothing to explain why the victim was

killed. Although Kirkland involved a prolonged attack with a deadly weapon, there were significant distinguishing facts. The fact that the defendant and the victim knew each other and the prior friction between the parties are significant, since they suggest an emotional motive for the murder which does not exist in this case. Also, Kirkland was not burglarizing the victim's home at the time of the murder. Finally, Kirkland's low intelligence, while not controlling, was cited by this Court as militating against premeditation.

Similarly, in Coolen v. State, 696 So. 2d 738 (Fla. 1997), this Court rejected a finding of premeditation based on conflicting eyewitness testimony that suggested Coolen and the victim may have been fighting over a beer, or that Coolen may have acted in self-defense. Once again the victim and defendant knew each other, were drinking together at the time of the murders, and this Court noted evidence showing an ongoing pattern of hostility between the two men. The instant case is again distinguishable as involving a prolonged attack during a burglary, with absolutely no facts to support a heat of passion claim. Compare also, Tien Wang v. State, 426 So. 2d 1004 (Fla. 3d DCA 1983) (murder was culmination of violent quarrel between defendant and his estranged wife's stepfather).

Woodel's reliance on cases from other jurisdictions interpreting different statutes is not persuasive. In People v.

Hoffmeister, 394 Mich. 155, 229 N.W.2d 305 (Mich. 1975), the court noted that Michigan's first degree murder statute demanded a showing of premeditation and deliberation, which the court noted required more than the reflection "involved in the mere formation of a specific intent to kill." 229 N.W.2d at 307. And in Austin v. United States, 382 F. 2d 129 (D.C. Cir. 1967), overruled in part on other sub nom., United States v. Foster, 785 F. 2d 1082 (D.C. Cir. 1986) (en banc), the court cited the lack of evidence "of a calmly calculated plan to kill" in rejecting the premeditation and deliberation required under the applicable homicide statute. These elements are not encompassed in Florida's definition of premeditation.

Woodel suggests that the brutality of these murders supports the theory that no extensive planning was involved but that the murders were simply the result of panic, rage, or a depraved or intoxicated mind. However, there was no evidence in the instant case to support any speculation of provocation, depravity or intoxication at the time of the murders. Even Woodel's statements propose that he merely stood there calmly while the victims threw themselves at the knife in his hand. And while "extensive" planning may be necessary for the aggravating factor of cold, calculated, and premeditated, it is not necessary for simple premeditation. As opposed to the heightened premeditation required to prove the aggravating factor, the premeditation required to

support a first degree murder conviction can be formed in a moment and need only exist long enough for an accused to be aware of the nature and probable consequence of his acts. DeAngelo, 616 So. 2d at 441.

The fact that Woodel killed two victims in the trailer is also relevant to the existence of premeditation, and sets this case apart from those cited by Woodel. There was clearly substantial, competent evidence presented to support a finding of premeditation on the facts of this case, and there is no evidence other than Woodel's self-serving statements that these murders were not planned to support a suggestion that they were anything other than premeditated. Furthermore, any deficiency in the evidence of premeditation would be inconsequential, due to the clear proof of a robbery and burglary to support the convictions for first degree felony murder. The jury convicted Woodel of robbery and burglary, and testimony established that Woodel entered the victim's trailer, remained in the trailer against the victims' will, brutally assaulted the victims, and took the victim's property from the scene.

Robbery

Woodel maintains that his intent to steal may not have arisen until after completion of the murder herein, and therefore the taking of Mr. Moody's wallet and keys were merely incidental to his homicide and presumably without the use of force. See, Mahn v.

State, 714 So. 2d 391 (Fla. 1998). He alleges that since the property was taken as an afterthought, it cannot be used to support convictions for robbery or felony murder. It should be noted that the jury was given a special instruction, proposed by the defense and tailored after Mahn, that an "afterthought" taking could not be used to support a conviction of robbery (V17/2503, 2513-14, 2693-94). The jury's verdict clearly rejected this defense.

Moreover, Woodel confuses the evidence required to support the pecuniary gain aggravating factor with that necessary to support a robbery, and consequently felony murder, conviction. Compare, Scull v. State, 533 So. 2d 1137 (Fla. 1988) (although property could have been taken as afterthought, thus precluding application of pecuniary gain factor, Scull's robbery conviction was left intact); Randolph v. State, 463 So. 2d 186 (Fla. 1984), cert. denied, 473 U.S. 907 (1985) (robbery conviction upheld where defendant, after shooting victim, asked witness if victim had any money, then returned to victim's truck to take money). Florida law requires the application of felony murder anytime that a homicide is "committed by a person engaged in the perpetration of, or in the attempt to perpetrate," any of twelve enumerated felonies, and Florida courts have consistently interpreted this language to mean that the statute applies as long as the murder and the felony were part of the same criminal episode. Section 782.04(1)(a)2, Fla. Stat. See, Young v. State, 579 So. 2d 721 (Fla. 1991), cert.

denied, 117 L. Ed. 2d 438 (1992); Roberts v. State, 510 So. 2d 885, 888 (Fla. 1987), cert. denied, 485 U.S. 943 (1988). There is no requirement that the robbery itself be the motive for the murder, as with the pecuniary gain factor. Since the purpose of the felony murder rule is to protect the public from inherently dangerous situations created by the commission of the felony, the rule should apply whenever a death occurs during the same criminal episode of a related felony. Parker v. State, 641 So. 2d 369 (Fla. 1994), cert. denied, 513 U.S. 1131 (1995).

By so construing the statute, Florida has recognized the inherent difficulty in determining the relationship between two or more criminal acts committed at the same time. Specifically, the courts look for a definitive break in the chain of circumstances, either by time, place or causation, in determining the applicability of felony murder. Griffin v. State, 639 So. 2d 966 (Fla. 1994), cert. denied, 514 U.S. 1005 (1995); Parker v. State, 570 So. 2d 1048 (Fla. 1st DCA 1990).

The crime of robbery is defined as the taking of money or property, "when in the course of the taking there is the use of force, violence, assault, or putting in fear." Section 812.13(1), Fla. Stat. The phrase "in the course of the taking" is further defined to mean any act that "occurs either prior to, contemporaneous with, or subsequent to the taking of the property and if it and the act of taking constitute a continuous series of

acts or events." Section 812.13(3)(b), Fla. Stat. Thus, when a homicide and a related theft occur in an uninterrupted series of events, the force used to commit the homicide is sufficient to aggravate the theft into a robbery.

There is no evidence, or even unsubstantiated suggestion, in the record before this Court, of any interruption between Mr. Moody's murder and the taking of his property. And Woodel does not, and cannot, suggest that the murder and robbery in this case are totally unrelated. Clearly, the murder helped facilitate the robbery, even if the intent to steal did not develop until after Mr. Moody was dead. The murder provided the impetus and the opportunity for the appellant to steal, and robbery was sufficiently established in this case.

To the extent that the above authorities may be questioned under the reasoning of Mahn and Knowles v. State, 632 So. 2d 62, 66 (Fla. 1993), it must be noted that those decisions are factually distinguishable. In both Mahn and Knowles, the relationships between the defendants and victims clearly suggested motives for the murders other than theft or robbery. An independent motive may provide a sufficient break between the murder and the taking of property to support a conclusion that the crimes were unrelated. However, where no other clear motive for a murder has established, this Court has repeatedly upheld robbery convictions where property was taken from a murder victim during the same criminal episode, as

in the instant case. Scull; Randolph; Jones v. State, 652 So. 2d 346 (Fla. 1995).

Burglary

Finally, Woodel claims that his burglary conviction cannot stand because the State failed to prove that he intended to commit an assault or theft when he entered the Moodys' trailer. Rather, Woodel asserts that the explanation which he provided to law enforcement – that he was intoxicated and only wanted to know what time it was – was consistent with the evidence and therefore defeats his burglary conviction. His argument is unavailing for several reasons.

It must be noted initially that Woodel's own explanation of his reason for entering the trailer is highly unreasonable. The idea that he would have walked over a mile to his mobile home park, and come within a block or so of his own, unoccupied trailer,[1] only to walk into the home of a total stranger in order to ascertain the time makes no sense. And the further idea that, once inside, when a screaming old lady came at him with a knife demanding that he leave, he instead remained, took the knife away, and stabbed the lady 56 times with no intent to assault her clearly defies logic. Even less reasonable is his assertion that he didn't really stab Mrs. Moody, he merely held the knife while she repeatedly flailed herself at his deadly weapon. In fact, Woodel's own brief

[1]Both his sister and his girlfriend were out of town at the time (V14/2091; V15/2226-27).

acknowledges that he admitted that "he took the ceramic toilet tank lid and hit her in the head with it, *intending to make her pass out*" (Appellant's Initial Brief, p. 17) (emphasis added).

Of course, intent is usually established by circumstantial evidence, and our courts have consistently held that a motion for judgment of acquittal should rarely, if ever, be granted based on the State's failure to prove intent. King v. State, 545 So. 2d 375 (Fla. 4th DCA), rev. denied, 551 So. 2d 462 (Fla. 1989). The direct evidence of Woodel's intent to assault Mrs. Moody noted above is sufficient in itself to defeat his claim on this issue. This Court has upheld consistently burglary convictions on similar facts. See, Raleigh v. State, 705 So. 2d 1324 (Fla. 1997); Jimenez, 703 So. 2d at 440-441; Robertson v. State, 699 So. 2d 1343 (Fla. 1997).[2]

On these facts, the appellant is not entitled to acquittal from his robbery or burglary convictions. However, even if successful, Woodel's attack on the validity of his other felony convictions could not possibly affect his first degree murder convictions, since there was ample evidence of premeditation as previously discussed. Thus, Woodel has failed to demonstrate any

[2]The State acknowledges that Delgado v. State, 25 Fla. L. Weekly S79 (Fla. Feb. 3, 2000) specifically receded from these authorities to the extent that they relied on a withdrawal of consent to enter to support the burglary conviction. Since Woodel has never suggested that he entered the Moodys' trailer with their consent, and since this is an affirmative defense to the charge of burglary which is the defendant's burden to establish, Delgado does not preclude the burglary conviction herein.

error in the jury verdicts rendered against him. He is not entitled to have his conviction reduced to second degree murder or any lesser offense.

In conclusion, there was competent, substantial evidence presented below to support the first degree murder convictions, as well as the robbery and burglary verdicts, in this case. Thus, Woodel is not entitled to have his convictions reduced.

ISSUE III

WHETHER THE STATE IMPROPERLY AMENDED THE INDICTMENT.

Woodel's next claim has been rejected by this Court many times. In this issue, Woodel argues that the court should not have permitted the State to proceed under felony murder as an alternative theory when the Indictment only alleged premeditated murder. As Woodel candidly concedes, this Court has repeatedly upheld the State's right to pursue felony murder even when the Indictment gave no notice of that theory. Valdes v. State, 728 So. 2d 736 (Fla. 1999); Gudinas v. State, 693 So. 2d 953, 964 (Fla. 1997); Armstrong v. State, 642 So. 2d 730, 737 (Fla. 1994), cert. denied, 514 U.S. 1085 (1995); Young v. State, 579 So. 2d 721, 724 (Fla. 1991). Woodel's arguments to the contrary provide no basis to overturn these decisions. Even if his arguments compelled reconsideration, it would not be reasonable to require a new trial in this case, when the court below was following clearly established case law permitting the felony murder theory. Thus, Woodel is entitled to no relief in this issue.

ISSUE IV

WHETHER THE TRIAL COURT ERRED IN DENYING WOODEL'S MOTION FOR MISTRIAL BASED ON THE PROSECUTOR'S OPENING ARGUMENT.

Woodel's next issue contests the trial court's ruling to deny a motion for mistrial based on the prosecutor's opening statement. The particular comment at issue is the prosecutor's representation that Gayle Woodel, the appellant's "ex-wife," would testify that as Woodel was being taken from his trailer for questioning, he whispered to Gayle that she should get rid of the knife that he had hidden behind his dresser (V10/T1296-98). Unfortunately, the prosecutor did not learn until the morning Gayle Woodel was to be called as a witness that she was, in fact, still married to the appellant (V12/1632-33). Prior to this time, the prosecutor reasonably believed that Gayle and Woodel had been divorced; they had been separated since 1992, and Woodel had been living with another woman, his girlfriend, for a number of months prior to the murders (V12/1632-33, 1648, 1667). There is no question that the prosecutor had a good faith intention of presenting Woodel's statement to Gayle up until the time he learned that they were still married, and upon learning of their relationship, the prosecutor immediately brought the matter to the court's attention and proffered testimony from Gayle (V12/1632-34).

Although the prosecutor's statement about Woodel telling Gayle to get rid of the knife was not ultimately proven at trial, the

court below correctly denied Woodel's motion for mistrial. A motion for mistrial should only be granted when an error has occurred which is so prejudicial as to vitiate the fundamental fairness of the entire trial. Duest v. State, 462 So. 2d 446 (Fla. 1985). Where, as here, counsel's opening statement properly outlined the case as counsel anticipated it would unfold, no error has occurred. Occhicone v. State, 570 So. 2d 902, 904 (Fla. 1990); Travieso v. State, 480 So. 2d 100, 103 (Fla. 4th DCA 1985); Haws v. State, 590 So. 2d 1125, 1127 (Fla. 5th DCA 1992) (J. Sharp, concurring).

In Rutledge v. State, 374 So. 2d 975 (Fla. 1979), this Court rejected a claim on similar facts. Rutledge argued that he was prejudiced because a tape recording of the murder, subsequently ruled to be inadmissible, had been briefly mentioned by the prosecutor in his opening statement. The prosecutor had actually mentioned that the jurors would hear, on the tape, one of the children identifying the person attacking them as "Ray." However, this Court concluded from a review of the entire record and the totality of the circumstances that no reversible error had occurred.

A comparable situation was also presented in Randolph v. State, 556 So. 2d 808, 809-10 (Fla. 5th DCA 1990). In that case, a prosecutor's comment about the location of the victim's purse was not proven by the evidence. In approving the denial of the motion

for mistrial in Randolph, the Fifth District noted:

> Since there seems to be agreement that the location of the recovery of the purse was not proven after the prosecutor indicated the location in his opening statement, is this omission or perhaps misstatement enough to cause a mistrial? A broader way of stating the issue is whether the State must prove every assertion in an opening statement or face a mistrial if the prosecutor overlooks proving the assertion through the introduction of evidence during the State's case. A review of the record in this case requires a negative answer.

556 So. 2d at 809.

Woodel argues that he was prejudiced by the prosecutor's statement because his case involves a "prosecutor's rather extended discussion of damaging evidence which was later ruled inadmissible" (Appellant's Initial Brief, p. 64). Apparently, Woodel characterizes the discussion as extensive because his brief quotes nine paragraphs from the prosecutor's opening remarks about the knife that was seized from Woodel's bedroom. However, only the first couple of paragraphs actually discussed Woodel's statements to Gayle, and the admissibility of the knife and the incriminating nature of its discovery have never been disputed. In fact, the record reflects that Woodel himself told the police that he had hidden the knife behind the dresser in his bedroom (V15/2354-55). Thus, the same evidence that was excluded by application of the marital privilege was in fact admitted through Woodel's statements to law enforcement.

The trial court found that a mistrial was not warranted because the defense had conceded that Woodel was the perpetrator of this offense, and therefore disclosure of Woodel attempting to get rid of evidence of his crime was not unfairly prejudicial (V12/1639). In addition, there was a wealth of other evidence about Woodel's attempts to destroy other evidence, including his hiding fruits of the crime in his garbage and dumping pieces of the toilet tank lid and eyeglasses into a canal at the mobile home park. Furthermore, it is significant that the jury was repeatedly reminded that what the attorneys stated in their remarks was not to be considered evidence (V9/1255; V16/2517, 2518, 2537; see also, V17/2698, jury instructed to rely only on evidence, and proper evidence defined). See, Randolph, 556 So. 2d at 809-810; Rutledge, 374 So. 2d at 979. Since there was no prejudice to Woodel, the trial judge was obligated to deny the motion for mistrial. See, Spaziano v. State, 429 So. 2d 1344 (Fla. 2d DCA 1983) (defendant was improperly subjected to double jeopardy after court granted State's motion for mistrial due to defense counsel's failure to offer evidence discussed in opening remarks).

The appellant's reliance on Commonwealth v. Wilson, 402 A. 2d 1027 (Pa. 1979), is misplaced. In that case, prosecutorial comment as to direct evidence – Wilson's confession to the crime – which was not admitted into evidence required a new trial. In the instant case, the evidence at issue was not as prejudicial, but

more importantly, as noted above, the same evidence as to Woodel's hiding the knife was admitted from another source.

The trial court's finding that no mistrial was warranted after ruling to exclude Gayle Woodel's testimony about the appellant telling her to get rid of the knife is well supported by the record. No new trial is required on the facts of this case.

ISSUE V

WHETHER THE TRIAL COURT ERRED IN FINDING IN AGGRAVATION THAT THESE MURDERS WERE COMMITTED DURING A BURGLARY AND THAT THE VICTIMS WERE PARTICULARLY VULNERABLE DUE TO ADVANCED AGE.

Woodel next challenges the application of two of the aggravating factors. The jury was instructed on, and the trial court found as statutory aggravating circumstances, that the "the crime for which the defendant is to be sentenced was committed while he was engaged in the commission of or flight after committing the crime of burglary" and "the victim[s] of a capital felony [were] particularly vulnerable due to advanced age or disability" (V19/T3141-42). See, § 921.141 (5) (d) & (m), Fla. Stat. (1999). Woodel alleges that the evidence was inadequate to support either factor and, therefore, the trial court erred in giving the instructions and finding the factors.

This Court has made it clear that it will not reweigh the evidence to determine whether the State proved each aggravating circumstance beyond a reasonable doubt, that the task on appeal is to review the record to determine whether the trial court applied the right rule of law for each aggravating circumstance and, if so, whether competent substantial evidence supports its finding. Willacy v. State, 696 So. 2d 693, 695-96 (Fla. 1997). In the instant case, the trial court's findings are supported by competent substantial evidence and the right rule of law was applied. Accordingly, this Court must decline Woodel's invitation to usurp

the trial court's role, and affirm the lower court's findings. Willacy, 696 So. 2d at 695-96 (division of labor between trial and appellate courts is essential to "promote the uniform application of aggravating circumstances in reaching the individualized decision required by law"). See also, Lawrence v. State, 691 So. 2d 1068, 1075 (Fla. 1997) (even if some evidence existed supporting defendant's theory that he shot the store clerk because she angered him, the trial judge was not required to reject aggravator where there was competent, substantial evidence to support it); Orme v. State, 677 So. 2d 258, 262 (Fla. 1996) (duty on appeal is to review the record in the light most favorable to the prevailing theory and to sustain that theory if it is supported by competent, substantial evidence); Occhicone, 570 So. 2d at 905 (court will not substitute its judgment for that of the trial court when there is a legal basis to support finding an aggravating factor).

Burglary

Relying on his argument as presented in Issue II.C. (Appellant's Initial Brief, p. 54), Woodel asserts that the evidence was insufficient to support the during the course of a burglary aggravating factor. The State maintains that since the evidence was sufficient to support Woodel's conviction for the burglary of the Moody property (see Issue II), the trial court did not err in finding this aggravating factor.

Advanced Age

Next appellant challenges the advanced age aggravating factor. He asserts that there was no evidence to establish that the Moodys were particularly vulnerable due to their advanced age. He contends that the Moodys were very active for their age; that Bernice Moody was in good health and Clifford Moody was leading a normal life. He also contends there was no evidence to show they were singled out for killing due to their age or any infirmities they suffered and, therefore, the requisite nexus between the victims' ages and the crime was not established. These contentions are erroneous in fact and law.

In its written order, the trial court found:

> 4) **The victims of the killings were particularly vulnerable due to advanced age or disability.**
>
> Mrs. Moody was a 74-year old lady who, though in overall good health for a lady her age, had a prior injury to her shoulder that had diminished her use of one arm. Mr. Moody, however, was a 79-year old man who had in the recent past undergone heart by-pass surgery and suffered the residual problems and effects therefrom. Indeed, while Mrs. Moody fought valiantly, her age and disability without a doubt contributed to her defeat and death at the hands of a healthy man approximately one third her age. Mr. Moody's age and physical condition forced him to yield to the overpowering youth and strength of the defendant. The Court finds this aggravating circumstance has been proven beyond a reasonable doubt.
>
> (V2/R272-73)

As Woodel notes, the advanced age aggravating factor is relatively new and, as of this writing, its application to a particular set of facts has not yet been considered by this Court. Compare, Vulnerability of Victim as Aggravating Factor under State Sentencing Guidelines, 73 A.L.R.5th 383, §3a (1999). Regardless of any incremental nuance of decisional authority which may develop as cases involving this aggravator are presented to this Court in upcoming years, the aggravator clearly applies in this case. As the trial court found, Mr. Moody was 79 years old and Mrs. Moody was 74 years old. Although they may have been "active for their age," they were both, nevertheless, due to their age and the circumstances consequent to that age, "particularly vulnerable" to attack by this defendant. Indeed, it is hard to imagine coming to any other conclusion.

Moreover, nothing in §921.141(5)(m) requires the court to find that the victim was targeted because of their age or that some nexus exists between the victim's age and the crime. Appellant's reliance on this Court's jurisprudence concerning the consideration of youthful age as a mitigating factor is misplaced. While this Court has recognized that "age is simply a fact, every murderer has one," Echols v. State, 484 So. 2d 568, 575 (Fla. 1985), this Court has held that when the murder is committed by a minor, the mitigating factor of age must be found and given "full weight." Ellis v. State, 622 So. 2d 991, 1001 n. 7 (Fla. 1993). Where, as

here, the victims by virtue of their advanced age alone become particularly vulnerable, no other showing need be made. Cf. State v. Sims, 67 Wash. App. 50, 834 P.2d 78 (Div. 1 1992) (holding that particular vulnerability due to advanced age alone is, as a matter of law, sufficient to justify the imposition of an exceptional sentence); State v. Goodwin, 93 Wash.App. 1031 (Div. 2 1998), rev. denied, 137 Wash. 2d 1033, 980 P.2d 1281 (1999) (unpublished opinion)(law supported the imposition of the exceptional sentence based on the 74-year-old victim's vulnerability due to advanced age; court also held that the State was not required to prove some further vulnerability or disability beyond the victim's advanced age). Notably, even Woodel concedes that the evidence showed the victims "were very active *for their age*" (Appellant's Initial Brief, p. 43) (emphasis added); "for their age" being the operative words.

Furthermore, although the State established and the court found that both Moodys suffered from some form of disability, the statute is written in the alternative and does not require a showing that the victim was both of advanced age and disabled. Thus, once the State established that Mr. Moody was 79 years old and Mrs. Moody was 74 years old, the requirements of the statute have been met and the aggravator has been proven beyond a reasonable doubt.[3] See, State v. Hootman, 709 So. 2d 1357, 1360

[3] While §921.141 (5) (m), Fla. Stat., does not specify an exact age as advanced, pursuant to §775.085 (2) Fla. Stat., "advanced

(Fla. 1998) (holding that once it has been established that the victim was of advanced years in age, the aggravator is conclusively shown).

Finally, while the State maintains that the trial court properly found both aggravators in this case, error, if any, is harmless beyond a reasonable doubt. The trial court found four aggravating factors: 1) prior violent felony; 2) during the course of a burglary; 3) heinous, atrocious, or cruel; and 4) advanced age of the victims. These factors are balanced against the mitigating circumstance of no significant criminal history and seven background factors to which the court assigned minimal weight. Zakrzewski v. State, 717 So. 2d 488 (Fla. 1998) (erroneous finding of aggravating factor that murder was committed in especially heinous, atrocious, or cruel manner with regard to capital defendant's wife was harmless beyond a reasonable doubt, given existence of cold, calculated, and premeditated aggravator and contemporaneous murders aggravator). Accordingly, no reversible error has been shown.

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age" means that the victim is older than 65 years of age.

ISSUE VI

WHETHER THE TRIAL COURT ERRED IN ITS CONSIDERATION OF WOODEL'S MITIGATING EVIDENCE.

Woodel's final issue concerns the trial court's findings with regard to the proposed mitigation. Specifically, he claims that the trial court failed to delineate particular weight to each individual factor, and failed to properly assess his alleged intoxication at the time of the murders. A review of the evidence presented and the sentencing order establishes that this claim is without merit.

In sentencing Woodel to die for the murders of Cliff and Bernice Moody, the trial judge complied with all applicable law, including the dictates of this Court's decision in Campbell v. State, 571 So. 2d 415 (Fla. 1990). He expressly evaluated the aggravating factors and mitigating circumstances, and insured adequate appellate review of his findings by reciting the factual bases for the aggravating and mitigating factors. Campbell clearly recognizes that the factual question as to whether a mitigating factor was reasonably established by the evidence is a question for the trial judge. No abuse of discretion has been demonstrated with regard to the trial judge's factual or legal conclusions with regard to the sentencing factors.

This case does not present a situation where a court rejected a mitigating factor which had been reasonably established by the evidence, or where a particular factor was found but dismissed as

having no weight. To the contrary, the court found that the proposed mitigation had been proven, and afforded minimal weight to the specified circumstances. The proposed mitigation was expressly evaluated, with the trial court concluding that Woodel had no significant criminal history and noting the seven background factors suggested by the defense for the catch-all mitigator: physical abuse as a child, neglect as a child, instability of residences as a child, being a child of deaf-mute parents, use of alcohol and drugs, willingness to meet with the daughter of the victims, and willingness to be tested as a potential bone marrow donor for his daughter (V2/273-74). The judge characterized all of the mitigation as insignificant and afforded minimal weight to the factors (V2/273-74). Although Woodel appears to take issue with the judge's failure to assign a specific weight level within the particular discussion of each individual factor, this Court has approved a court's consolidation of mitigating factors for consideration. See, Campbell, 571 So. 2d at 419, n. 3.

As to the trial court's rejection of Woodel's intoxication at the time of the murders, the record supports the conclusion that this factor was not reasonably established by the evidence. Curiously, Woodel's brief does not identify any evidence presented below which casts doubt on the trial court's rejection of this claim. Instead, Woodel focuses on the trial judge's gratuitous comment about the jury having rejected an intoxication defense by

virtue of Woodel's convictions as allegedly demonstrating that the trial court applied an incorrect standard.

The only testimony of Woodel's possible intoxication at the time of the crime other than Woodel's self-serving statements to law enforcement was presented through Jessica Wallace. Ms. Wallace had spent time with Woodel on the evening of December 30, after Woodel had gotten off work at Pizza Hut, around 11:00 or 11:30 p.m. (V18/2819). Wallace stated that she and Woodel had walked to a convenience store to get beer, and met up with three other men at a campground (V18/2820). They all sat and drank beer and the men and Woodel were still drinking when Wallace left them, sometime between 1:00 and 2:00 a.m. (V18/2820-21). In her presence, Woodel drank "one full quart and probably around four, three or four while I was there" (V18/2820-21).[4] Wallace noted that Woodel was acting happy and singing "Green Acres" right before she left.

The victims, however, were not killed until several hours after this. Mr. Moody was seen at the laundromat around 5:00 a.m., and was still there at 5:30 or 5:40 a.m., when Elmer Schultz was relieved from his guard house duties (V12/1739, 1745). Sometime after Wallace left, Woodel apparently walked the mile or so from Pizza Hut back to the trailer park (V14/2183). No further accounting of Woodel's activities prior to the murders has ever

[4]Presumably, Wallace's reference to "three or four" would be bottles of beer from the case of Budweiser Woodel described to law enforcement (V15/2317-18).

been offered.

Since evidence of intoxication at the time of the murders is clearly lacking, Woodel suggests that the court below should have found and weighed this mitigator because intoxication was "the only plausible explanation for why these homicides occurred" (Appellant's Initial Brief, p. 75). However, desperation to explain an unexplainable murder does not reasonably establish that the explanation exists. Unfortunately, experience has shown that some murders simply have no plausible explanation.

Notably, the trial judge weighed in mitigation Woodel's history of drug and alcohol use *other than* the proposal that his drinking on the night of the murders clouded his mental state. (See, Sentencing Order, V2/274; after rejecting overindulgence in alcohol on the night in question, court notes "The remaining considerations under the 'catch-all' mitigating circumstances" had been proven, and were entitled to minimal weight.) On these facts, the trial court's rejection of Woodel's intoxication at the time of the offense does not compel relief.

Finally, even if this Court reaches a different conclusion with regard to the trial court's rejection of this proposed mitigation, there is no reason to remand this cause for resentencing since it is clear that any further consideration would not result in the imposition of life sentences. Despite rejecting extreme intoxication as proposed by Woodel, the trial court did

weigh the following factors in mitigation: no substantial criminal history, abuse and neglect as a child, instability of residences as a child and being a child of deaf-mute parents, alcohol and drug use, willingness to meet with the victim's daughter and willingness to be tested as a potential bone marrow donor for his daughter (V2/273-274). Any error relating to the sentencing court's failure to articulate additional details about the insignificant mitigation offered is clearly harmless since the mitigation cannot offset the strong aggravating factors found. Therefore, this Court should affirm the sentence as imposed. Thomas v. State, 693 So. 2d 951, 953 (Fla. 1997); Lawrence v. State, 691 So. 2d 1068, 1076 (Fla.), cert. denied, 118 S.Ct. 205 (1997); Barwick, 660 So. 2d at 696; Armstrong v. State, 642 So. 2d 730 (Fla. 1994), cert. denied, 115 S.Ct. 1799 (1995); Wickham v. State, 593 So. 2d 191, 194 (Fla. 1991), cert. denied, 505 U.S. 1209 (1992); Cook v. State, 581 So. 2d 141, 144 (Fla.) ("we are convinced beyond a reasonable doubt that the judge still would have imposed the sentence of death even if the sentencing order had contained findings that each of these nonstatutory mitigating circumstances had been proven"), cert. denied, 502 U.S. 890 (1991).

Although Woodel does not dispute the proportionality of his death sentences, this Court must still conduct a proportionality review. Of course, a proportionality determination does not turn on the existence and number of aggravating and mitigating factors,

but this Court must weigh the nature and quality of the factors as compared with other death cases. Kramer v. State, 619 So. 2d 274, 277 (Fla. 1993). The purpose of a proportionality review is to compare the case to similar defendants, facts and sentences. Tillman v. State, 591 So. 2d 167, 169 (Fla. 1991). When factually similar cases are compared to the instant case, the proportionality of Woodel's sentence is evident.

The court below found four aggravating circumstances: (1) during the course of a burglary, (2) prior violent felony conviction, (3) heinous, atrocious or cruel, and (4) advanced age of the victims. The only mitigating circumstances were no significant criminal history and the "catch-all" background factors. The jury recommended death by votes of 9 to 3 and 12 to 0 (V2/213-214).

A review of factually similar cases supports the imposition of the death sentences herein. See, Delgado, 25 Fla. L. Weekly at S79 (victim repeatedly stabbed in her home); Gordon, 704 So. 2d 107 (defendants beat and drowned victim in his apartment); Jimenez, 703 So. 2d 437 (elderly woman beaten and stabbed during burglary, statutory mitigator of substantial impairment applied); Johnson v. State, 660 So. 2d 637 (Fla. 1995) (stabbing death of elderly woman during burglary); Jones, 652 So. 2d 346 (couple stabbed during robbery at their business); Freeman v. State, 563 So. 2d 73, at 75 (Fla. 1990), cert. denied, 501 U.S. 1259 (1991) (defendant beat a

man that came in as he was trying to burglarize the man's house; Freeman had prior violent felony convictions of a similar nature, and the trial court also found the murder was committed in the course of a burglary/pecuniary gain. In mitigation, the trial court found low intelligence, abuse as a child, artistic ability, and enjoyed playing with children -- mitigation which this Court characterized as not compelling); Brown v. State, 565 So. 2d 304 (Fla.) (death sentence for murder committed during the course of burglary was proportionate where there were two aggravating factors balanced against the mental mitigators), cert. denied, 498 U.S. 992 (1990); Cherry v. State, 544 So. 2d 184, 187-88 (Fla. 1989) (sentence proportionate where victim was heinously beaten to death during the course of a burglary for pecuniary gain), cert. denied, 494 U.S. 1090 (1990).

The evidence presented in the instant case established that Woodel repeatedly stabbed the Moodys during the course of a burglary. Balanced against this heinous crime was a laundry list of character traits and aspects of the crime which Woodel urged as mitigating evidence. This evidence was completely unremarkable and afforded minimal weight. Based on the foregoing, this Court must find that Woodel's sentence is proportionate, and reject Woodel's plea for resentencing in this issue.

CONCLUSION

Based on the foregoing arguments and authorities, the judgment and sentences should be affirmed.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

CAROL M. DITTMAR
Assistant Attorney General
Florida Bar No. 0503843
2002 N. Lois Avenue, Suite 700
Tampa, Florida 33607-2366
(813) 873-4739
COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to ROBERT MOELLER, Assistant Public Defender, Polk County Courthouse, P. O. Box 9000 -- Drawer PD, Bartow, Florida, 33831, this _____ day of May, 2000.

COUNSEL FOR APPELLEE