

IN THE SUPREME COURT OF FLORIDA

ROBERT RIMMER,
Appellant,

CASE NO. 95,318

vs.

L.T. 98-12089CF-10B

STATE OF FLORIDA,
Appellee.

_____ /

APPELLEE'S ANSWER BRIEF

ON DIRECT APPEAL FROM THE CIRCUIT COURT
BROWARD COUNTY, FLORIDA
JAMES I. COHN, CIRCUIT COURT JUDGE

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CERTIFICATE OF TYPE SIZE AND STYLE

In accordance with the Florida Supreme Court Administrative

Order, issued on July 13, 1998, and modeled after Rule 28-2(d), Rules of the United States Court of Appeals for the Eleventh Circuit, counsel for the State of Florida, Appellee herein, hereby certifies that the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately.

PRELIMINARY STATEMENT

Appellant was the defendant in the trial court and will be referred to herein as "Appellant" or "Defendant." Appellee, the State of Florida, was the prosecution below and will be referred to herein as "Appellee" or the "State." Reference to the record on appeal will be by the symbol "R," to the transcripts will be by the symbol "T," reference to any supplemental record or transcripts will be by the symbols "SR[vol.]" or "ST[vol.]," and reference to Appellant's brief will be by the symbol "IB," followed by the appropriate page numbers.

STATEMENT OF THE CASE AND FACTS

Appellee accepts Appellant's statements of the case and facts for purposes of this appeal, subject to the additions, corrections, and/or clarifications below and in the Argument section.

On May 2, 1998, survivor/eyewitness, Joseph Louis Moore, took his girlfriend's car, a white 1991 Dodge Dynasty, to the Audio Logic store on Oakland Park Blvd., in Wilton Manors, to have a car stereo installed (T 871-73). His girlfriend, Kimberly Davis Burke, waited in the store lobby with her 2 year-old child while the work was being done (T 871, 874-75, 785, 786-88). As Mr. Moore was leaving the store, through the garage/service bay, he encountered a man who displayed a gun in his waistband, and pulled the gun out, telling Moore to go back inside (T 878-80).¹ He described the man

¹ The store's co-owner, Mike Dixon, described the store's layout as follows. Entering the front door of the store, you find a lobby or waiting area for the customers (T 621). There is a

as a black male, 5'7-5'10", 160-170 pounds, wearing baggy jeans, a t-shirt and a baseball cap (T 878-79). The gunman was not wearing eyeglasses (T 902). He was initially 6 feet away from Moore but was closer when he told Moore to go back inside (T 880). Moore identified Appellant as the gunman (T 881-82).

Once inside, Appellant told Moore to lay on the floor, which he did because he was afraid (T 881). Moore saw victim Aaron Knight lying face down on the floor (T 882-83). Aaron was co-owner of the Audio Logic store with Mike Dixon (T 616). The second victim, store employee, Bradley Krause, was also lying face down on the floor, behind Aaron (T 883, 614). Moore saw a third man, eyewitness, Louis Rosario, also lying face down in the bay (T 884). Finally, he saw a heavy-set, black male in the bay area but didn't really pay attention to him (T 884).

Appellant told everyone lying on the floor to put their hands behind their back and they were duct-taped (T 885). Moore was able to see that Aaron, Brad and Louis' hands were also duct-taped (T 885). He heard Appellant asking about the store's stereo equipment and how much it was worth (T 885). Moore's wallet (containing his

counter stretched across the wall opposite the front door, and the cash register was behind that counter (T 617). There is also a display case behind the counter (T 621). There is a door behind the counter leading back to the installation or service bay (T 622-23). There is also a door leading to the inventory room, which also functioned as a mini office (T 622). It is not accessible to customers (T 622). From the inventory room, there is a door leading to the installation bay (T 624).

driver's license, credit cards and other papers) and cell phone were taken from him (T 886). Appellant drove a blue-ish/purple Ford Probe into the service bay, it had the driver's side headlight stuck in the upright position (T 888-90). He opened the hatchback and along with another person, started loading the store's electronics equipment into the car (T 890).

While this was going on, Moore's girlfriend, Ms. Davis, was sitting in the lobby area of the store. Earlier, she had seen two (2) cars pull up-- a Kia Sephia and an older model, blue-ish Ford Probe, with one of its headlights stuck in the upright position (T 790-91). A few minutes later, she saw a black male in the inventory room, where she had earlier seen the two (2) white employees (T 796-97). When she made eye contact with him, he asked if that was her white car in the service bay and told her that her boyfriend was looking for her (T 797). She described him as 5'9", about 175 lbs., wearing a white t-shirt, khaki pants and a baseball cap (T 797-98). He was not wearing eyeglasses (T 833). She got as close as 3 feet away from him as she walked to the door connecting the lobby area with the service bay (T 798). Ms. Davis identified Appellant as the man she saw (T 799).

Upon entering the service bay, Ms. Davis saw several people lying face down on the ground with their hands duct-taped behind their backs, including her boyfriend Joe and the store employees (T 800-02). She knew what was going on and sat down with her baby on

her lap (T 803). She watched three people load boxes into the Ford Probe (T 803-05). They made about 25-30 trips in about 10-15 minutes, passing right in front of her and Davis was watching them most of the time (T 806, 803, 840). Ms. Davis was afraid, she saw that Appellant had a gun (T 806-07). She and Moore heard Appellant ask Aaron for the keys to the cash register, which Aaron replied were in his front pocket and Appellant took them (T 891-92, 807-08). They also heard Appellant ask Aaron where the store's video camera was located and Aaron told him that there wasn't one (T 892-93, 807). Moore heard Appellant ask Aaron about any guns in the store and wasn't sure what the response was, but later saw Appellant with a black gun and heard him ask Aaron what kind of gun it was (T 892-94). Aaron owned a Walther PPK .380, which he kept in his desk drawer (T 625).

After the boxes were loaded into the Ford Probe, Appellant told Ms. Davis, who had been sitting up near the front of a burgundy Acura, to move away and lay down on the ground because **he didn't "want this to get on [her]."** (T 809, 896-97). Ms. Davis had been sitting only 3 feet away from Aaron, in front of the burgundy Acura (T 808, 897). She moved down a few feet, towards the middle of the car, and laid down but was still able to see what was going on by looking underneath the car (T 809). Both Moore and Davis then saw Appellant get into the Ford Probe, and saw the car start to pull away but then stop (T 894-95, 810). Appellant came back

and said to Aaron "you know me." (T 810). Aaron replied that he didn't know him and appellant said "man, you do remember me." (T 895). Aaron again said that he didn't know him but Appellant put the gun to the back of Aaron's head and pulled the trigger (T 896, 810). Davis saw Appellant shoot Aaron in the head (T 811).

Moore jumped up when Aaron got shot but Appellant pointed the gun at him and said "get back on the floor." (T 897, 811-12). Appellant walked over to Brad and shot him in the back of the head (T 897, 812). **Appellant then thanked them all for their cooperation and left saying "have a nice day."** (T 898, 812).

The third survivor/eyewitness, Louis Rosario, was standing outside the service bay area, in front of his Jeep, smoking a cigarette when someone approached him from behind with a gun and told him to go inside and lie down (T 767). Rosario saw the gun but not the person (T 767). He described it as an automatic handgun (T 768). Rosario described the gunman as "about his height, probably," (6'2") or an inch or two shorter (T 768). The gunman was a black male, wearing jeans, a shirt and a baseball cap (T 769). Rosario was scared so he complied, lying down on the service bay floor, face down (T 769-71). He heard Joe Moore and the others also getting down on the floor (T 771). Rosario thinks that he was closest to Brad, he had one person by his feet and another one by his head (T 772). Rosario's hands were tied behind his back with duct-tape and he was asked for any money or valuables

that he had, but didn't have any (T 772).

Rosario kept praying because he thought that he was going to get killed (T 773). He corroborated Moore and Davis' testimony on what happened thereafter. He heard cars being moved in the bay area but didn't look around at all because he was scared (T 773). He also heard somebody loading stuff into a car and heard someone asking how much the items cost, how much they could get for it (T 774). The store employees were also asked for the keys to the cash register, whether they had any surveillance cameras in the place and if they had a gun (T 775). They responded that there was no surveillance camera and told where the gun was located (T 775).

Rosario heard a car start and begin to leave but then stop (T 777). One of the assailants came back and asked one of the store employees whether he knew him (T 777). The employee answered "no" and the gunman asked a few times more. The employee kept saying no but the gunman cocked the gun back and shot the employee (T 777). He then heard the gunman tell Joe Moore to stop moving around or he would be shot (T 778). The gunman then walked up to the second employee and shot him, he didn't say anything (T 778-79). The gunman then told them to "have a nice day," thanked them for their cooperation and left (T 779).

Officer David Akers, City of Wilton Manors Police Department, responded, at 12:35 p.m., to a 911 call about a possible shooting at the Audio Logic store (T 588-89). He found Brad lying on the

floor with his hands duct-taped behind his back, he was still breathing slightly (T 593).² There was a large pool of blood around his head (T 593). Aaron, tied in the same manner, was deceased (T 594, 1162). Officer Akers secured the scene and waited for the paramedics (T 596). He put out a BOLO for a dark-colored Ford Probe, possibly occupied by 3 black males, with one of its headlights stuck in the upright position (T 597-98).

The gunshot to Aaron's head fractured the skull in many places, lacerated his brain stem, caused excessive amounts of bleeding and exited through the left side of his nose (T 1101). The bullet to Brad's head entered the posterior area, left side of the head, fractured the skull, lacerated the brain, and exited the right eyebrow (T 1109).

Detective John Nelson Howard, a crime scene detective with the Broward County Sheriff's Office, responded to the murder scene that day (T 685-87).³ He took pictures and collected a spent projectile fragment, two spent shell casings and a baseball cap from the service bay area (T 687-692). There was a projectile impact hole in the baseball cap (T 693). One shell casing was next to the head of the victim (T 695). He sent the spent projectile

² Victim Brad Krause was transported to the hospital where he was pronounced dead.

³ The Broward County Sheriff's Office handles crime scene investigation for the City of Wilton Manors, wherein this Audio Logic store is located (T 687, 600).

and 2 spent shell casings to the sheriff's crime lab, firearms division (T 697).

Detective Howard processed the duct-tape from Aaron for fingerprints (T 700-01). He also processed the showroom, showroom counter, glass shelving within the counter, the store room, shelving in the store room, a few boxes of stereo equipment on the floor in the store room, the front doorway area, and plate glass windows on the side for latent fingerprints (T 702-03). Finally, survivor/eyewitness Davis' Dodge Dynasty was towed to the crime lab for further processing (T 703). Aaron's partner, Mike Dixon, confirmed that \$12,000 (wholesale, \$18,000 retail) worth of electronics equipment had been stolen, as well as Aaron's gun (T 627-28).

On May 4, 1998, two days after the double-murder, eyewitnesses Moore and Davis met with Deputy John McMahon, a forensic artist with the Broward County Sheriff's Office, to prepare a sketch of the gunman (T 900, 904, 814, 913). Davis went first, meeting with Deputy McMahon for 2 hours, to compile the sketch (T 915). Moore was shown the composite and concurred with it (T 900, 916). Lead Detective Anthony Lewis, City of Wilton Manors Police Department, disseminated the police sketch to different police agencies and the press (T 1160, 1163-64). In addition, a copy of the sketch was also faxed to Audio Logic's friendly competitors, including Mr. John Ercolano (T 628-29, 1068-

71).

Ercolano recognized the person in the sketch as someone who had been in his store about one month before the shooting (T 1071-73). He identified Appellant as that man (T 1074-75). The first time Appellant came in, on February 28, 1998, he complained about a car stereo that Audio Logic had installed (T 1074, 1076, 1080). That meeting lasted about 15 minutes (T 1074). The second time Appellant came in, on March 2, 1998, was to make an appointment to have the work re-done (T 1073-74, 1080). Appellant never had the work done (T 1078). Ercolano identified Appellant's 1978 Oldsmobile (T 1075).

Ercolano called Aaron's partner, Mike Dixon, which prompted Dixon to do a records search of the Oakland Park store (T 628-29). Dixon found an invoice from a job done on December 12, 1997 (T 632). The invoice shows that three amps and six speakers were installed on a 1978 Oldsmobile (T 633). The appointment book shows that "Robert" dropped a GM (General Motors) automobile off on December 12, 1997, for installation of an amp (T 636). Another notation in the book says "Robert, Oldsmobile" and has a telephone number "763-3984" (T 636).

Dixon remembered meeting the person in the police sketch, a man named "Robert", at the Davie store (T 628, 637, 639). He met Robert on three (3) occasions-- for 20-25 minutes the first time, 10 minutes the second time, and more than 30 minutes the last time

(T 637-38). During those meetings, Dixon was about 3 feet away from Robert (T 638). He identified Appellant as Robert (T 638-39). He had a complete system, including speakers and wanted it installed in his car, a late '70's, light blue Oldsmobile (T 639-41). Dixon quoted him a price for the labor and installation and told him to make an appointment (T 641-42). At the second meeting, Dixon referred Robert to the Oakland Park store, thinking it would have more time to do the installation (T 642).

The third contact that he had with Robert was also at the Davie store, after the installation was completed (T 643). Robert complained that his amp was shutting down after playing 20 minutes (T 643). Dixon tested it, letting the system play for a long time but it did not shut down (T 646).

Detective Lewis checked the telephone number in a cross reference directory for a name and address (T 1166). It showed a Robert Rimmed living at 736 Northwest 14th Terrace (T 1166). He also did a computer search of the Florida license plate and vehicle registration database and found that two vehicles were registered to Robert Rimmed (T 1167). A Ford Probe and a 1978 Oldsmobile (T 1168). The address provided matched the one from the cross reference book (T 1168).

Detective Lewis compiled a photo line-up and showed it, on May 8, 1999, to eyewitnesses Moore and Davis (T 1170, 900, 904, 814). Moore looked at the photo line-up first and identified Appellant (T

901, 1171). Ms. Davis picked 2 pictures that resembled her assailant, explaining that both pictures looked the same to her and that she selected the first photo (which wasn't the Appellant) because it was a close-up, providing a better view of the person (T 814, 845, 859, 1172-74). Detective Lewis did not tell her who to pick out (T 815, 1175). After Ms. Davis marked her 2 selections, Detective Lewis told her that Moore had picked her second choice (T 845, 1174). Detective Lewis took a taped statement from Moore and Davis after the photo line-up (T 1175).

Mike Dixon was also shown the photo line-up and picked Appellant (T 1175-77). The third eyewitness, Louis Rosario, was not able to identify anyone from the photo line-up (T 780-81). Thereafter, Detective Lewis obtained an arrest warrant for Appellant (T 1178). He requested help from the Ft. Lauderdale Police Department to pick up Appellant (T 1179). On May 10, 1998, Officer Kenneth Kelley, a K-9 officer with the City of Ft. Lauderdale Police Department, observed a 1978 blue Oldsmobile and attempted to stop it, but the car fled (T 978, 984-86). A 12 minute chase ensued, with the Oldsmobile traveling at speeds of 80-85 mph (in a 35 mph zone) (T 984, 986-87, 991). The car also went through red lights and almost struck other vehicles (SR 71).

Officer Kelley saw only one occupant (the driver) in the vehicle and saw him throw things out of the car during the chase (T 991-93, 995-96). The driver fled when he finally stopped and was

apprehended by the K-9 dog (T 992). Officer Kelley identified Appellant as the driver (T 993). The items that were thrown out of the car were later recovered-- a burgundy wallet, with Joe Moore's driver's license (T 1008-09), Aaron's Walther PPK firearm (T 1018) and a second firearm (T 1013-14). The spent projectile (bullet) and the two spent shell casings that were found at the murder scene were identified as being fired from that second firearm (T 1036, 1045, 1047, 1050).

Detective Lewis ordered that the 1978 Oldsmobile and bluish/purplish Ford Probe be impounded (T 1179-80). Pursuant to search warrants Appellant's home and the Ford Probe were searched but nothing of value was recovered (T 1182, 1184). A warrant was next obtained to search the Oldsmobile and Detective Howard assisted in the search (T 715). They found a live round of .380 ammunition inside a shoe (T 717-20). It was later determined to have come from Aaron's Walther PPK (T 1056-57). They also found an organizer inside the glove compartment, containing the vehicle registration (T 722, 1197) and a lease to a storage space (T 1197). The date of the lease was May 7, 1998, for a storage unit at Extra Space in Lauderhill (T 1198).

Finding no electronics equipment in the Oldsmobile, Detective Lewis obtained a search warrant to for the storage facility and executed it on May 14, 1998 with Detective Howard (T 1198-1200, 722). They found electronics equipment in the storage unit (T 724,

1200). The equipment was taken to the crime lab and processed for latent fingerprints (T 725, 1200). Twenty-four of Appellant's fingerprints were found on the items (T 1129). Pictures of the items seized were admitted into evidence and identified by Mike Dixon (T 649-661, 1154-1156, 1197-1201). A videotape showing Appellant renting the storage unit on May 7, 1998, was played for the jury (T 1205-06).

On July 13, 1998, Dixon, Moore and Davis viewed a live line-up and identified Appellant (T 1207-08, 1210, 647-48, 902, 816-17). The third eyewitness, Rosario, was not able to identify anyone in the photographic or live line-up (T 780-81).

In imposing a sentence of death, the trial court found a total of six (6) aggravating factors in this case and applied great weight to four (4) of them: (1) that Appellant was previously convicted of a felony and committed the double murders while under sentence of imprisonment (Conditional Release Program); (2) that Appellant has three prior convictions for felonies involving the use or threat of violence to individuals; (3) that the double murders were committed for the purpose of eliminating witnesses; and (4) that the double murders were committed in a cold, calculated and premeditated manner (R 2383-2399).

The trial court gave moderate weight to the HAC factor and to the double murders being committed during armed robberies/kidnappings. No statutory mitigators were found. The

trial court gave some or minimal weight to the non-statutory mitigators that Appellant was an excellent employee and had helped or ministered to others in the past, but gave very little weight to the other non-statutory mitigators--Appellant's family background, that Appellant was a good father, and Appellant's mental illness.

SUMMARY OF THE ARGUMENT

POINT I- The trial court properly denied Appellant's motion to suppress the organizer and its contents because it was discovered in plain view and fell within the ambit of the search warrant. The police were executing a lawfully issued search warrant at the time they discovered the organizer. The incriminating nature of the organizer and the officer's right of access were also apparent because the organizer could have contained any of the "smaller" items listed in the search warrant. Finally, even if error, denial of the motion was harmless.

POINT II- The trial court properly denied Appellant's motions to suppress the out-of-court and in-court identifications of survivors/eyewitnesses Joseph Louis Moore and Kimberly Davis Burke. The totality of the circumstances demonstrates that there was not a substantial likelihood of misidentification. Further, even if error, it was harmless.

POINT III- The trial court properly granted the State's cause

challenge to prospective juror David Vandeventer because he could not impose the death penalty under any circumstances and properly granted the State's peremptory to prospective juror Gwendolyn Sthilaire because she had previously served on a hung jury and that is a race-neutral, non-pretextual reason.

POINT IV- The trial court correctly admitted rebuttal testimony from Officer Kenneth Kelley regarding his ability to see without his eyeglasses. One of Appellant's theories of defense was that he could not be the shooter because the shooter wasn't wearing eyeglasses and he must wear his all the time to see. Officer Kelley's testimony was offered to rebut that defense and to show what a person with similar vision was able to see without his eyeglasses. Further, even if error, it was harmless beyond a reasonable doubt.

POINT V-The trial court properly denied Appellant's motion for mistrial based on the cross-examination of Appellant's wife, Joanne Rimmer. The prosecutor's question was not "fairly susceptible" of being a comment upon Appellant's right to remain silent. Further, even if error, it was harmless beyond a reasonable doubt.

POINT VI & VIII- Only one of the alleged improper prosecutorial comments was preserved for appellate review. Those that were not preserved are procedurally barred because they do not constitute fundamental error. The one preserved comment was not improper and does not constitute reversible error.

POINT VII-The trial court properly allowed the State to cross-examine Appellant's mental health expert, Dr. Martha Jacobson, on Appellant's prior criminal history because she relied upon it in forming her opinions. Further, even if error, it was harmless.

POINT IX- The HAC aggravator is supported by the evidence which shows that Aaron and Brad suffered fear, emotional strain and terror prior to their murders.

POINT X- Appellant failed to preserve this argument for appellate review. Further, the victim-impact jury instruction given by the trial court was proper as it tracked the language of the statute and Windhom case.

POINT XI- The death penalty is proportional in this case.

ARGUMENT

POINT I

THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION TO SUPPRESS THE ORGANIZER AND ITS CONTENTS (Restated).

The trial court properly denied Appellant's motion to suppress the organizer and its contents, which were seized during a search of Appellant's 1978 Oldsmobile, because although the organizer was not listed in the search warrant, it was discovered in plain view and fell within the ambit of the lawfully issued search warrant.

It is well-settled that a trial court's ruling on a motion to suppress comes to the appellate court clothed with a presumption of correctness, and the reviewing court must interpret the evidence and reasonable inferences and deductions derived therefrom, in a manner most favorable to sustaining the trial court's ruling. Medina v. State, 466 So. 2d 1046, 1049-1050 (Fla. 1985); Velez v. State, 554 So. 2d 545, 547 (Fla. 5th DCA 1989). An appellate court will give great deference to a trial court's ruling and findings of fact on a motion to suppress and should not substitute its judgment for that of the trial court. Johnson v. State, 438 So. 2d 774 (Fla. 1983), cert denied, 465 U.S. 1051 (1984); Wasko v. State, 505 So. 2d 1314, 1316 (Fla. 1987); DeConingh v. State, 433 So. 2d 501, 504 (Fla. 1983), cert. denied, 465 U.S. 1005, 104 S. Ct. 995, 79 L. Ed. 2d 228 (1984); Sommer v. State, 465 So. 2d 1339 (Fla. 5th DCA 1985).

Further, the totality of the circumstances considered by the

lower tribunal in making its evidentiary ruling cannot be reweighed on appeal. State v. Franko, 681 So. 2d 834 (Fla. 1st DCA 1996). The trial court's finding in this case, that the organizer and its contents, which were found in plain view, fell within the ambit of the lawfully issued search warrant (ST 12/18/98, 244-45), is supported by the record and therefore, the denial of the motion to suppress must be affirmed.

The law governing the seizure of evidence that is not listed in a search warrant but that is discovered in plain view by police while lawfully executing a search warrant is clear. In order to sustain such a seizure, the State must prove three things: (1) that the seizing officer was in a position where he had a legitimate right to be; (2) that the incriminating character of the evidence is immediately apparent; and (3) that the seizing officer has a lawful right of access to the object. Black v. State, 630 So.2d 609, 613 (Fla. 1st DCA 1993), citing Horton v. California, 496 U.S. 128, 136-7, 110 S.Ct. 2301, 2307-8, 110 L.Ed.2d 112 (1990).

The first element is met here because the police were executing a lawfully issued search warrant at the time they discovered the organizer. At the hearing on Appellant's motion to suppress, Detective Anthony Lewis, Wilton Manors Police Department, testified that on May 9, 1998, he obtained a search warrant to arrest Appellant for two counts of murder (ST 12/8/98, 87). The next day, Officer Kenneth Kelly, Broward County Sheriff's Office,

tried to pull Appellant over while he was driving his 1978 Oldsmobile but Appellant fled, taking the police on a chase throughout Ft. Lauderdale (ST 12/8/98, 68, 71-72). During the chase, Officer Kelly observed Appellant throwing items out of the car (ST 12/8/98, 71). Appellant was ultimately taken into custody and the car impounded by the Wilton Manors Police Department (ST 12/8/98, 72-73).

After Appellant was arrested, Detective Lewis obtained a search warrant for the 1978 Oldsmobile (ST 12/8/98, 90).⁴ The stolen electronics equipment, worth an estimated \$14,000-\$20,000, had not yet been recovered at the time the Oldsmobile was searched (ST 12/8/98, 89-91). Further, although victim Joe Louis Moore's wallet and driver's license had been recovered, as well as the firearm stolen from victim Aaron Knight and the firearm used in the double murder (IB 46), the remaining victims' wallets and other personal property had not been found (ST 12/8/98, 91, 109). Defense counsel **conceded** at the continued suppression hearing that the police had the right to search the glove compartment pursuant to that search warrant (ST 12/18/98, 237). Thus, the police were in the process of executing a lawful search warrant when they discovered the organizer.

⁴ Contrary to Appellant's assertion, the Oldsmobile was not searched at the time of its impoundment (IB 46). Instead, Detective Lewis testified that he conducted a cursory search of the Oldsmobile at the time of Appellant's arrest, which did not reveal anything of evidentiary value (SR 100-101).

Regarding the second element, that the incriminating character of the evidence be immediately apparent, Chief Justice Rehnquist, in a plurality opinion in Texas v. Brown, 460 U.S. 730, 103 S.Ct. 1535 (1983),⁵ explained that the "immediately apparent" prong does not require that the police officer "know" that certain items are contraband or evidence of a crime:

It merely requires that the facts available to the officer would 'warrant a man of reasonable caution in the belief'...that certain items may be contraband...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. A 'practical, nontechnical' probability that incriminating evidence is involved is all that is required.

Id. at 742, 103 S.Ct. at 1543 (citations omitted).

Here, the "incriminating nature" of the organizer was "immediately apparent" because it could have contained any of the "smaller" items listed in the search warrant--such as, fingerprints, shell casings, projectiles, ammunition, trace/microscopic evidence and/or duct tape (SR "C"). See State v. Weber, 548 So.2d 846, 847 (Fla. 3d DCA 1989) (police officers are authorized to search throughout the specified premises for the items described in the warrant, so long as the areas and containers

⁵ Although Brown is a plurality opinion, the remaining members of Court concurred with this and found that the police officer had probable cause to seize the contraband in that case. Id. at 744, 103 S.Ct. at 1544 (White, J. concurring); Id. at 746, 103 S.Ct. at 1545 (Powell, Blackmun, JJ, concurring); Id. at 750, 103 S.Ct. at 1547-8 (Stevens, Brennan, Marshall, JJ, concurring).

searched are ones in which the described items might reasonably be found); Alford v. State, 307 So.2d 433, 439 (Fla. 1975) (“[a]reasonable search for small items such as .38 caliber cartridges logically would lead to closets, drawers, clothes piles, and any other conceivable nook and cranny in which they could be found.”).

Indeed, Detective Lewis testified at the suppression hearing that the organizer was large enough to contain personal property, live rounds of ammunition, or a firearm (ST 12/8/98, 91). He believed that there was trace evidence inside the organizer (ST 12/8/98, 102). He also believed that the organizer could have contained credit cards and driver’s licenses belonging to the other victims (ST 12/8/98, 109). Detective Lewis further stated that he didn’t know whether a third firearm had been used during commission of the crime (ST 12/8/98, 104). Because the organizer could have contained items listed in the search warrant, the third element, requiring the seizing officer to have probable cause before legally seizing evidence discovered in plain view, was also met in this case. See Arizona v. Hicks, 480 U.S. 321, 326, 107 S.Ct. 1149, 1153, 94 L.Ed.2d 347 (1987).⁶

⁶ Appellant argues that because there was disagreement between Detectives Lewis and Howard as to which one of them found the organizer (IB 45, f.n.1). It is important to note, however, that based on the disagreement between Detectives Lewis and Howard over who discovered the organizer, Appellant renewed his motion to suppress the organizer and its contents **pre-trial** (T 8-11). It was denied by the trial court. It is not important to

Detectives Lewis and Howard were justified in searching the organizer and its contents, even though not listed on the search warrant, because it was large enough to contain some of the smaller items listed on the search warrant and Detective Lewis testified that he thought it might contain some of those smaller items. See U.S. v. Scott, 83 F.Supp.2d 187 (D.Mass. 2000) (items seized pursuant to the plain view exception do not have to be contraband or actual evidence of criminal activity; rather, there needs only to be enough facts for the reasonable person to believe that the items may be contraband or evidence of criminal activity); State v. Ridgeway, 718 So.2d 318 (Fla. 2d DCA 1998) (permissible to search cooler in defendant's bedroom closet because the search warrant listed drugs and paraphernalia, which could be stored in cooler; also permissible to search photo albums found inside cooler because they could have contained drugs or paraphernalia); Black v. State, 630 So.2d 609 (Fla. 1st DCA 1993) (police officers who were searching the defendant's girlfriend's residence were allowed to seize jewelry, electronic equipment, ammunition, sports equipment, and other merchandise found in plain view, but not listed in the search warrant, because they believed that the items were stolen

the "plain view" analysis whether it was Detective Howard or Detective Lewis that discovered the organizer, whether it was found in the glove compartment or interior portion of the car or whether detective Lewis' description of it was accurate; those are all issues going to the weight of the evidence, not its admissibility.

merchandise from robberies that the defendant was suspected of having committed).

The cases relied upon by Appellant are inapplicable to the facts at hand. In Perez v. State, 521 So.2d 262 (Fla. 2d DCA 1988), the Second District found that the second element, the "incriminating nature" of the item, was not met because there was absolutely no indication that the seized item, a VCR, possibly contained any of the items actually listed in the search warrant--- i.e., cocaine and guns. Further, the police did not think that the VCR was stolen or linked to any crime. Instead, it was seized for "further identification." Here, in contrast, the police believed that the organizer contained some of the smaller items listed in the search warrant and/or some personal property of the victims.

Likewise, the other cases relied upon by Appellant are inapposite. The "plain view" exception was not relied upon or even mentioned in Sims v. State, 438 So.2d 81 (Fla. 1st DCA 1986). All that case stands for is the general rule that a search warrant must set forth with particularity the items to be seized. Further, the issue in Purcell v. State, 325 So.2d 83 (Fla. 1st DCA 1976), was whether the officers were correct in continuing to search **after** finding all of the items listed in the search warrant. The warrant in that case specifically described photographic equipment. After it was discovered in the attic, the police continued to search, turning up additional contraband that was not in plain view. The

First District concluded that the officers had acted illegally by continuing the search. Purcell is inapplicable here because the officers in this case were still looking for all of the items listed in the search warrant at the time they discovered the organizer in "plain view.

Assuming arguendo that this Court finds the admission of the organizer and its contents erroneous, any error was harmless. See State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). There were three survivors/eyewitnesses in this case who saw and/or heard Appellant murder Aaron and Brad and testified regarding the robbery. It was the police sketch prepared by two of those eyewitnesses that led to Appellant's apprehension. The car they described, a Ford Probe with one of its lights stuck in the upright position, matched the one owned by Appellant. Further, while fleeing police, Appellant threw from his car the murder weapon, Aaron's gun and Mr. Moore's wallet, all of which tied him to the murders/robberies. Two of the eyewitnesses identified Appellant as the murderer in a photo line-up and live line-up. Aaron's partner, Mike Dixon, also identified Appellant as a former customer, which explained why Appellant thought that Aaron and Brad knew him. Considering that evidence, it cannot be said that the electronics equipment and Appellant's fingerprints on it contributed to the verdict.

POINT II

**THE TRIAL COURT PROPERLY DENIED APPELLANT'S PRE-TRIAL
MOTION TO SUPPRESS JOSEPH LOUIS MOORE AND KIMBERLEY DAVIS**

BURKE'S PRE-TRIAL AND IN-COURT IDENTIFICATIONS OF APPELLANT. (Restated).

The trial court properly denied appellant's pre-trial motion to suppress the out-of-court and in-court identifications of appellant by victims Joe Louis Moore and Kimberly Davis Burke. Based on the totality of the circumstances, there was **not** a substantial likelihood of misidentification.

As noted under Point I, it is well-settled that a trial court's ruling on a motion to suppress comes to the appellate court clothed with a presumption of correctness, and the reviewing court must interpret the evidence and reasonable inferences and deductions derived therefrom, in a manner most favorable to sustaining the trial court's ruling. Medina v. State, 466 So. 2d 1046, 1049-1050 (Fla. 1985); Velez v. State, 554 So. 2d 545, 547 (Fla. 5th DCA 1989). An appellate court will give great deference to a trial court's ruling and findings of fact on a motion to suppress and should not substitute its judgment for that of the trial court. Johnson v. State, 438 So. 2d 774 (Fla. 1983), cert denied, 465 U.S. 1051 (1984); Wasko v. State, 505 So. 2d 1314, 1316 (Fla. 1987); DeConingh v. State, 433 So. 2d 501, 504 (Fla. 1983), cert. denied, 465 U.S. 1005, 104 S. Ct. 995, 79 L. Ed. 2d 228 (1984); Sommer v. State, 465 So. 2d 1339 (Fla. 5th DCA 1985).

Further, the totality of the circumstances considered by the lower tribunal in making its evidentiary ruling cannot be reweighed on appeal. State v. Franko, 681 So. 2d 834 (Fla. 1st DCA 1996).

Given that standard of review, this Court must **affirm** the trial court's ruling.

The test for determining the legality of an out-of-court identification is: (1) did the police use any unnecessarily suggestive procedures and (2) if so, whether, considering all the circumstances, the suggestive procedures gave rise to a substantial likelihood of irreparable misidentification. Thomas v. State, 748 So.2d 970, 981 (Fla. 1999). Identifications obtained through the use of unnecessarily suggestive procedures are not per se inadmissible. Macias v. State, 673 So.2d 176, 181 (Fla. 4th DCA 1996). "Instead the inquiry is whether under the totality of the circumstances there has been a substantial likelihood of irreparable misidentification." Id. Stated another way:

An identification obtained from a suggestive procedure may be introduced if found to be reliable apart from the tainted procedures. "Reliability is the linchpin in determining the admissibility of identification testimony" As our supreme court has held, an identification resulting from a suggestive procedure is reliable where it is found to be based solely upon the witness's independent recollection of the offender at the time of the crime, uninfluenced by the suggestiveness of the procedure. The burden is on the State to establish reliability by clear and convincing evidence.

Macias at 181 (citations omitted).

Here, Appellant argues that it was unnecessarily suggestive for Detective Lewis: (1) to tell Mr. Moore, before he viewed the live line-up, that Appellant had been arrested and possessed Mr.

Moore's wallet at the time of his arrest; (2) to tell Mr. Moore, after the photo identification, that he and his girlfriend had picked the same photo; (3) to tell Mr. Moore's girlfriend, Kimberly Davis Burke, after she selected two photos that Mr. Moore had picked Appellant's photo.

The trial court agreed that the comment to Ms. Davis was improper, but found that none of the comments were so impermissibly suggestive as to give rise to a substantial likelihood of irreparable misidentification:

In ruling on the defendant's motion to suppress identification, the ultimate issue for the Court's determination is whether under the totality of the circumstances there has been a substantial likelihood of irreparable misidentification.

In making this determination, the Court has considered those factors outlined in Neal v. Biggers (sic). As to the photographic, live line-up and in-court identification made by witness Joe Moore, the Court finds, by clear and convincing evidence, that the procedures employed by Detective Lewis and Deputy McMann were not so impermissibly suggestive as to give rise to a substantial likelihood of irreparable misidentification

[T]his Court is convinced that Mr. Moore's identifications were based solely on his independent recollection of the perpetrator at the time of the offense and uninfluenced by the sketch.

As to the photographic line-up, live line-up and in-court identifications made by Kimberly Davis, the Court finds, number one, on May 2, 1998, Kimberly Davis witnessed the crime. Number two, on May 4, 1998, a composite sketch of the perpetrator of the crime was prepared at Ms. Davis' direction. Number 3, on May 8, 1998, Detective Lewis showed Ms. Davis a series of six photographs. Number 4, Ms. Davis selected two photographs she thought looked like the same person. Number 5, after selecting the two

photographs, Detective Lewis told Ms. Davis, quote, this is the one Joe picked, end of quote, referring to a photograph of the defendant. Number 6, Ms. Davis testified that Detective Lewis had not influenced her decision.

Although Detective Lewis' comment was improper, in the Court's opinion, this does not render Ms. Davis' identification per se inadmissible. The fact remains Ms. Davis did select the defendant's photograph, along with another photograph; and in doing so, she stated in her testimony, in open court, that the two photographs looked like the same person.

Accordingly, the Court finds, by clear and convincing evidence, that under the totality of the circumstances, there is not a substantial likelihood of irreparable misidentification. Ms. Davis, having confronted the defendant on two separate occasions, had a greater opportunity to view the defendant than any other eye witness. This is not a case of a witness losing or abandoning a mental image of the offender and adopting the identity suggested. The witness did, in fact, select the defendant's photograph as one of two selected. The jury is entitled to receive and weigh this evidence.

(ST 12/18/98, 233-235).

Factors which a trial court should use in assessing whether an identification is reliable are set out in Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375, 382, 34 L.Ed.2d 401 (1972), as follows:

[t]he opportunity of the witness to view the criminal at the time of the crime, the witness's degree of attention, the accuracy of the witness's prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.

Biggers, 409 U.S. at 198, 93 S.Ct. at 382. The list is not "all inclusive" and merely serves as a guideline. Macias at 181. The trial court considered the Biggers factors here and correctly

concluded that they showed the reliability of the identifications (ST 12/18/98, 232-35).

The first Biggers factor was satisfied here because the victims had ample opportunity to view Appellant during the robbery and murders. Joe Louis Moore testified at the suppression hearing that on his way out of the Audio Logic store that morning, he encountered a man who picked up his shirt, showed Mr. Moore a gun and told him to get back in the place (ST 12/8/98, 20-21). Mr. Moore was standing about 6-8 feet away from the man at the time and looked the man directly in the face (ST 12/8/98, 22-23, 28). He identified Appellant as the man (ST 12/8/98, 23). Appellant told Moore to lay on the floor and told another guy to duct tape him (ST 12/8/98, 23). Moore was lying face down with his hands tied behind his back for 20-30 minutes (ST 12/8/98, 23-24). During that time, he continued to sneak glances at Appellant when he would walk by him (ST 12/8/98, 28).

The other victim, Joe Moore's girlfriend, Kimberly Davis Burke, was waiting in the lobby of the Audio Logic store with her 2 year-old daughter (ST 12/8/98, 37, 41). She observed Appellant drive up in a blue-ish Ford Probe that had one of its headlights stuck in the upright position (ST 12/8/98, 38, 40). She then saw him in the storage area, where the speakers and other items were stored (ST 12/8/98, 37). Appellant told her that her boyfriend was looking for her (ST 12/8/98, 39). She got up and stood as close as

2 feet from him as she walked into the service bay area with her daughter (ST 12/8/98, 39). Once there, she found everyone on the ground (ST 12/8/98, 40). Appellant didn't tell Ms. Davis to get on the ground, but she saw what was going on and sat down with her daughter in her lap (ST 12/8/98, 40-41). Ms. Davis was able to watch Appellant for 10 minutes until he left (ST 12/8/98, 41).

It is clear that both victims had ample opportunity to view Appellant because both were able to give the police detailed descriptions of Appellant and Ms. Davis assisted in preparing a police sketch of Appellant which led to him being apprehended (ST 12/8/98, 25, 42). Mr. Moore described the man as a black male, 5'10", 150-160 pounds, with a goatee, wearing baggy clothes and a baseball cap (ST 12/8/98, 21-22). Ms. Davis described the man as 5'8"-5'9", wearing a baseball cap and a white t-shirt (ST 12/8/98, 38). Those descriptions and the accuracy of the police sketch show that, contrary to Appellant's assertions, the fact that Appellant's baseball cap was pulled down over his eyes did not prevent the victims from seeing his face.

Regarding the second Biggers factor, the witnesses' degree of attention, Mr. Moore stated that he was standing only 6-8 feet away from Appellant and was looking directly at his face when he told Mr. Moore to go back into the Audio Logic store (ST 12/8/98, 22-23). Further, he had 20-30 minutes, while he was lying down on the floor, to sneak glances at Appellant. Knowing that Appellant was

taking merchandise out of the store during this time, shows that Moore was able to see what was going on and was paying attention (ST 12/8/98, 24).

Ms. Davis was also in close proximity to Appellant, about 2 feet away, as she walked into the service bay (ST 12/8/98, 39). She was not lying face down but was sitting up and got to look at Appellant for 10 minutes as he cleared the merchandise out of the store. The degree of attention by Ms. Davis is evidenced by her ability to help the police prepare a sketch which led to Appellant's capture.

The third Biggers factor is the accuracy of the witnesses' prior description of Appellant. As already noted, the victims gave detailed descriptions of Appellant, providing his race, height, weight, and what he was wearing. Appellant argues that the descriptions are inaccurate because they vary greatly from Appellant's physical characteristics. There was dispute over Appellant's physical characteristics. Appellant claims that he is 6'2" and weighs almost 200 lbs (IB 57). However, the booking information for Appellant's arrest about one week after the double murders, on May 10, 1998, shows that he was 6'2", 160 lbs. Thus, Mr. Moore's weight description of 150-160 lbs. was accurate, but both he and Ms. Davis' height descriptions were wrong. Nonetheless, the best evidence of the accuracy with which the victims viewed Appellant is shown by the police sketch which they

helped prepare that led directly to Appellant being apprehended. The sketch was sent to Audio Logic's friendly competitors where Mr. Ercolano recognized the man and called Mike Dixon, co-owner of Audio Logic. Mr. Dixon then took a second look at the sketch and recognized Appellant as a former customer (ST 12/8/98, 6-7).

The fourth Biggers factor is the level of certainty demonstrated by the witnesses at the confrontation. On May 8, 1998, Moore was shown a photo line-up by Detective Lewis (ST 12/8/98, 25, 31-32). He viewed the photo line up before and separately from his girlfriend, Kimberly Davis Burke, and identified Appellant (ST 12/8/98, 26, 42, 80). Moore did not speak with his girlfriend after viewing the photo line-up (ST 12/8/98, 80-81). She picked out two photographs because the men looked so similar to one another (ST 12/8/98, 43, 46). Detective Lewis did not tell her who to pick or suggest to her who to pick (ST 12/8/98, 43). She picked the person that she saw at the store (ST 12/8/98, 45).

After she picked out her two choices, Detective Lewis told her that her boyfriend had picked photo #3 (ST 12/8/98, 44, 50, 54). Despite her statement to Detective Lewis, with which she was confronted, Ms. Davis made it clear that Detective Lewis did not tell her who her boyfriend had picked until **after** she had made her two selections and marked the form (ST 12/8/98, 54). Detective Lewis agreed that he did not tell her who Moore had picked until

after she made her selections (ST 12/8/98, 110). Both Moore and Davis went to a live line-up on July 13, 1998 (ST 12/8/98, 44). Each viewed the live line-up separately and each picked Appellant (ST 12/8/98, 85-86). Again, no one told Davis or suggested to her who to pick and Moore picked someone based on the robbery/murder incident, not the photo identification (ST 12/8/98, 44, 35).

The last Biggers factor is the length of time between the crime and the confrontation. Here, there was about 6 days between the murders and the photo identification and about 14 days between the murders and the live line-up. In Macias, the Fourth District found that a span of 32 days between the crime and confrontation was okay. Macias at 181.

The trial court recognized that the Biggers factors were satisfied here, finding the identifications reliable. The victims' identifications of Appellant were based upon their independent recollection of him and were not influenced by any suggestiveness of the procedure. To begin with, before any suggestive comments were made, both victims had already given detailed descriptions of Appellant, helped to prepare a police sketch which led to Appellant's capture and picked Appellant out of a photo line-up. It was not until after Ms. Davis picked her two photos that Detective Lewis told her that Mr. Moore had picked photo #3. Further, Mr. Moore was not told that both he and Ms. Davis had picked photo #3 until after Ms. Davis' selection. Similarly, it

was a few days later when Mr. Moore was told that Appellant had been arrested and Mr. Moore's wallet found.

Appellant's suggestion that Mr. Moore could not have picked him out of a photo line-up because he had told the police that his assailant had a baseball cap pulled down over his eyes, is without merit. Mr. Moore had 20-30 minutes to sneak glances at Appellant while he was robbing the Audio Logic store and most certainly got a good look at him. Further, there is no indication that the baseball cap stayed that way during the entire 20-30 minutes. Additionally, Ms. Davis saw Appellant when he pulled up, saw him in the storage room, and saw him when he came to tell her to go into the service bay. At one point, she was as close as 2 feet away from him. She then had the opportunity to look at Appellant for the last 10 minutes of the robbery. She was not face down, and although told not to look, she was able to see everything that happened.

Ms. Davis helped prepare the police sketch that led to Appellant being apprehended. She explained that she selected two photographs because the people in them looked so similar. She was adamant that Detective Lewis did not tell her who to pick and made clear that he did not tell her who her boyfriend had picked until **after** she made her selections.

This Court has held that a photo lineup was not unnecessarily suggestive, even though the police officer told the witness that

the suspect was within the six pictures that he was going to show her. See Green v. State, 641 So.2d 391, 394 (Fla.1994); Thomas v. State, 748 So.2d 970 (Fla. 1999) (photo identification not unnecessarily suggestive where police told witness that he had two suspects that he wanted her to look at but did not tell her that she had to pick a photo or suggest to her who to pick). The photo line-up here, where nothing was said until after the witnesses made their selections, cannot be unnecessarily suggestive. The trial court correctly found, based on the totality of the circumstances, that there was not a substantial likelihood of misidentification.

Assuming arguendo that this Court finds the admission of the identifications erroneous, any error was harmless. See State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). Joe Moore's photo identification was not at issue here (IB 62). There was also a photo identification and live line-up identification from Aaron's partner, Mike Dixon. Based on the police sketch, Dixon remembered that Appellant was a former customer. Further, the facts and circumstances surrounding Aaron and Brad's murders would still be admissible through Moore and Davis. Appellant's Ford Probe still matched the description of the car used and tying Appellant to the crime were the murder weapon, Aaron's gun and Mr. Moore's wallet, which he threw out of his car while fleeing the police.

POINT III

THE TRIAL COURT DID NOT ERR BY GRANTING THE STATE'S CAUSE CHALLENGE TO PROSPECTIVE JUROR DAVID VANDERVENTER AND THE

**STATE'S PEREMPTORY CHALLENGE TO PROSPECTIVE JUROR
GWENDOLYN STHILAIRE (Restated).**

The trial court did not commit manifest error by granting the State's cause challenge to prospective juror David Vandeventer because his religious beliefs prevented him from being able to recommend the death penalty under any circumstances. See Foster v. State, 679 So.2d 747, 752 (Fla. 1996) (a trial court's determination regarding a challenge for cause will not be disturbed on appeal absent a showing of **manifest error**); Delgado v. State, 25 Fla. L. Weekly S79 (Fla. Feb. 3, 2000) (it is within the trial court's province to determine if a challenge for cause is proper, and the trial court's determination of juror competency will not be overturned absent manifest error); Fernandez v. State, 730 So. 2d 277 (Fla. 1999); Smith v. State, 699 So.2d 629 (Fla. 1997).

On the first day of questioning, the court asked the venire for a show of hands regarding who felt "that under no circumstances could [they] recommend the death penalty." (T 64). Prospective juror David Vandeventer raised his hand (T 64). Later, during individual inquiry on the matter, Mr. Vandeventer confirmed that he could not recommend the death penalty under any circumstances and explained that his view was based on his **religious beliefs**:

THE COURT: Mr. Vandeventer, you said, felt under no circumstances could you recommend the death penalty?

MR. VANDEVENTER: That's correct.

THE COURT: How long have you held that view?

MR. VANDEVENTER: Pretty recently. Change of heart.

THE COURT: **What precipitated this change of heart?**

MR. VANDEVENTER: **Jesus Christ, teachings of Buddhist type teachings, all life is precious.**

THE COURT: **Your view is based on a religious belief?**

MR. VANDEVENTER: I would say so.

(T 107, emphasis added). Defense counsel was then given the opportunity to rehabilitate Mr. Vandeventer, asking whether he had recently become more spiritual, more religious (T II 107). Mr. Vandeventer explained that before he had health problems in 1996, he wouldn't have thought twice about condemning someone to death, but now that he had gone through a lot of stuff he couldn't do it (T II 107). When asked by defense counsel what type of stuff he had gone through, Mr. Vandeventer responded "[a] lot of emotional, got real sick in a lot of different ways. Not suicidal. Dark time." (T II 107-108).

Regarding Mr. Vandeventer's ability to follow the law despite his feelings, defense counsel asked only:

DEFENSE COUNSEL: You understand the import, as his Honor, Judge Cohn, told you about following instructions on the law at some particular point if you're chosen as a juror in this case?

MR. VANDEVENTER: Yes.

DEFENSE COUNSEL: Do you think following Judge Cohn's instructions on the law in the penalty phase of this trial, if it involved you perhaps, at some particular point, considering making a recommendation, a

recommendation of death, although giving great weight by His Honor, Judge Cohn?

MR. VANDEVENTER: To approve it?

DEFENSE COUNSEL: To make a recommendation?

MR. VANDEVENTER: **I guess so. I'm kind of unclear about that.**

DEFENSE COUNSEL: **No further questions.**

(T 108, emphasis added). Thus, contrary to appellant's representations (IB 63), Mr. Vandeventer did not state simply that he "guessed" that he could make a recommendation of death (IB 63). Rather, he immediately followed that up with a statement that he was "kind of unclear about that." Exactly what Mr. Vandeventer was unclear about-- his ability to make a recommendation of death or his lack of knowledge about how the process worked-- is unknown because **defense counsel failed to ask any follow-up questions, instead stating that he had "no further questions."**

To ascertain whether Mr. Vandeventer would be able to perform his duties as a juror, the prosecutor asked:

THE PROSECUTOR: Given this change that you went through in '96, correct me if I'm wrong, because of your religious beliefs, you feel that you could not make a death recommendation in any case under any circumstances?

MR. VANDEVENTER: I think so.

(T 108-09). When the State moved to strike Mr. Vandeventer for cause, based on his religious views and on his position with regards to the death penalty, defense counsel argued that an unsure

juror is not a sufficient cause challenge in death penalty cases and that in previous responses, the "I-don't-think-so" or the "I'm-not-sure" answers were not sufficient to strike for cause (T II 109). Defense counsel argued that Mr. Vandeventer's responses didn't indicate whether he definitely meant that he couldn't recommend the death penalty under any circumstances or whether he wasn't sure whether he could (T II 109). He described Mr. Vandeventer as a juror who "could follow the law but was unsure about whether or not he could recommend death and wavered back and forth on that." (T II 109-110).

The State explained that this involved a religious view or opinion which was different from a personal viewpoint or opinion (T II 110). Agreeing with the State, the court granted the cause challenge on Mr. Vandeventer, noting that it had "a reasonable doubt as to whether or not Mr. Vandeventure (sic) [could] follow the law in the penalty phase." (T II 110). Distinguishing juror Goldstein, the court explained that it did not have a reasonable doubt, based on Mr. Goldstein's verbal responses and demeanor, that he could follow the law, although it differed from his personal feelings (T II 110). The court found that Mr. Goldstein was clear and convincing in his assertion that he could follow the law (T II 110).

The standard for determining when a prospective juror may be excluded for cause because of his or her views on capital

punishment is "whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" Wainwright v. Witt, 469 U.S. 412, 424-26 (1985) (quoting Adams v. Texas, 448 U.S. 38 (1980)). It does not require that a juror's bias be proved with "unmistakable clarity." Id. Whether or not a juror should be stricken for cause is a question of fact for the trial court. See Patton v. Yount, 467 U.S. 1025, 1036, 104 S.Ct. 2885, 2891, 81 L.Ed.2d 847 (1984) (rejecting the circuit court's determination that it is a mixed question of law and fact). The decision is "based upon determinations of demeanor and credibility that are peculiarly within a trial judge's province." Wainwright, 469 U.S. at 428, 105 S.Ct. at 854.

Thus, "[d]espite [a] lack of clarity in the printed record, [], there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law . . . this is why deference must be paid to the trial judge who sees and hears the juror." Id. at 425-26. See also Gore v. State, 706 So.2d 1328, 1332 (Fla. 1997) ("a trial court has great discretion when deciding whether to grant or deny a challenge for cause based on juror incompetency"); Wainwright, at 424-26 ("because determinations of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism . . . deference must be

paid to the trial judge who sees and hears the juror").

In this case, Mr. Vandeventer agreed at the beginning of his individual questioning that he could not impose the death penalty under any circumstances. He also agreed that his opinion was based on his religious beliefs. While Mr. Vandeventer understood the importance of following the law if he was chosen as a juror, he could not say that he could follow the law to make a recommendation of death if selected as a juror. Mr. Vandeventer initially responded that he "guessed" he could make such a recommendation but then immediately stated that he was "kind of unclear about that." (T II 108). Instead of clarifying Mr. Vandeventer's position and clearing up any misunderstanding that he had, defense counsel chose to ask "no further questions." (T II 108).

The clearest assertion from Mr. Vandeventer on this point came in response to an explicit question from the State--whether Mr. Vandeventer could not make a recommendation of death under any circumstances because of his religious beliefs--to which he responded "I think so." (T II 109). Thus, based on his religious beliefs Mr. Vandeventer felt that he could not make a recommendation of death under any circumstances. The trial judge, who was able to assess Mr. Vandeventer's demeanor, ultimately determined that he met the Witt standard. This Court must give tremendous deference to that determination, which is supported by the record and find that no manifest error occurred here.

Castro v. State, 644 So.2d 987 (Fla. 1994), involved a similar situation. In Castro, the prospective juror also said that his religious beliefs would prevent him from imposing the death penalty. While he stated, in response to a defense question, that he could set aside those beliefs and follow the law as given by the trial court, he also said that he felt bound to follow a "higher law." The juror ultimately said that he was not sure he could follow the trial court's instructions on the matter. Applying Witt, this Court held that the trial court had not abused its discretion in granting the cause challenge because the record was not clear that the prospective juror was willing to consider all of the penalties provided by state law and in fact, indicated that the prospective juror could not set aside his beliefs.

Similarly, here, the record indicates that Mr. Vandeventer could not set aside his religious beliefs and therefore, he was properly excused for cause. See also Fernandez v. State, 730 So.2d 277 (Fla. 1999) (no manifest error in excusing for cause jurors who gave equivocal responses as to whether they could follow the law and set aside their personal beliefs concerning the death penalty); San Martin v. State, 705 So.2d 1337, 1343 (Fla. 1997) ("the jurors who were excused for cause had expressed their personal opposition to the death penalty and had, at best, responded equivocally when asked whether they could put aside their personal feelings and follow the law."); Kimbrough v. State, 700

So.2d 634, 639 (Fla. 1997) (“although the prospective juror did respond in the affirmative to a question by the defense attorney asking if she could follow the oath she would be administered and apply the law as instructed by the judge, she had clearly expressed uncertainty several times during the interview.”); Smith v. State, 699 So.2d 629, 636 (Fla. 1997) (finding no abuse of discretion in excusing juror for cause where juror equivocally expressed impaired ability to follow the law.”).

The cases relied upon by appellant are inapplicable. In Farina v. State, 680 So.2d 392 (Fla. 1996), the prospective juror stated only that she had “mixed feelings about the death penalty.” Id. at 398. Importantly, though, she also stated that she could recommend the death penalty depending upon the circumstances, and that she would fairly consider imposing the death penalty depending upon the evidence presented in that case. Id. There were no such representations made in this case. Further, the reversal in Farina was not just based upon the fact that the prospective juror’s views did not prevent or substantially impair her from performing her duties as a juror, but also upon two additional reasons: (1) that the State gave no reason for seeking the cause challenge; and (2) the trial court, in granting the State’s challenge, indicated that it was doing so because it had just granted a defense challenge.

Chandler v. State, 442 So.2d 171 (Fla. 1983), is likewise inapplicable because the prospective jurors in that case

unequivocally stated that their feelings toward capital punishment would not affect their ability to return a verdict of guilty, if it was warranted by the evidence. Regarding the penalty phase, the jurors' statement that they "probably would lean towards" or "might go towards" life rather than the death penalty was not sufficient for recusal.

PEREMPTORY CHALLENGE

Appellant failed to preserve his argument that the trial court erred by granting the State's peremptory challenge to prospective juror Gwendolyn Sthilaire because defense counsel failed to renew his objections before accepting the jury and allowing it to be sworn. See Joiner v. State, 618 So.2d 174, 176 (Fla.1993) (defendant waives any objection to a peremptory strike by affirmatively accepting the jury immediately prior to its being sworn without reserving an earlier-made objection; the acceptance of the jury raises the reasonable assumption that counsel has abandoned any earlier objection and is now satisfied with the jury); Franqui v. State, 699 So.2d 1332, 1334 (Fla.1997), cert. denied, Florida v. Franqui, 523 U.S. 1040, 118 S.Ct. 1337, 140 L.Ed.2d 499, Franqui v. Florida, 523 U.S. 1097, 118 S.Ct. 1582, 140 L.Ed.2d 797 (1998); Barwick v. State, 660 So.2d 685 (Fla. 1995).

Here, both defense counsel and Appellant affirmatively accepted the jury without renewing the earlier objection to the granting of a peremptory challenge to juror Sthilaire (T V 491-93).

A new venire panel was questioned between the granting of the State's peremptory challenge of Ms. Sthilaire (T 380), and the swearing of the jury (T 499). The questioning of the new panel spans approximately 120 pages of transcript. Without some indication by Appellant that he renewed his earlier objection or that he accepted the jury subject to the earlier challenge, "[i]t is reasonable to conclude that events occurring subsequent to his [challenge] caused him to be satisfied with the jury about to be sworn." Joiner, at 176.

A strict construction of the rules of preservation is required because otherwise, the defense "could proceed to trial before a jury he unqualifiedly accepted, knowing that in the event of an unfavorable verdict, he would hold a trump card entitling him to a new trial." Joiner 618 So.2d at 176 n. 2.

Even if this Court finds the issue preserved for appellate review, the trial court properly allowed the state to use a peremptory challenge to strike minority prospective juror Gwendolyn Sthilaire because the state's "race-neutral" reasons **were not** pretextual. Under Florida law, a party objecting to the other side's use of a peremptory challenge on racial grounds must a) make a timely objection; b) show that the venireperson is a member of a distinct racial group; and c) request that the court ask the striking party for its reason for the strike. The burden then shifts to the party exercising the strike to provide a race-neutral

explanation for the strike. If the explanation is facially race-neutral, the trial court must then decide whether the explanation, given all the circumstances surrounding the strike, is a pretext. If not, the objection must be overruled. Melbourne v. State, 679 So. 2d 759 (Fla. 1996); State v. Slappy, 522 So. 2d 18 (Fla. 1988), cert. denied, 487 U.S. 1219 (1988); State v. Neil, 457 So. 2d 481 (Fla. 1984).

The initial presumption is that the peremptory challenge is being exercised in a nondiscriminatory manner, thus, throughout the determination, the burden of persuasion remains with the party who opposed the strike. Melbourne at 764; Neil at 486. In determining whether the reasons for the strike are race-neutral, the trial court shall focus on the genuineness of the explanation, not the reasonableness. Melbourne at 764.

The trial court's role is to evaluate the credibility of the person offering the explanation, as well as the explanation itself. Slappy at 22. "Only one who is present at trial can discern the nuances of the spoken word and the demeanor of those involved." Miller v. State, 605 So. 2d 492 (Fla. 3d DCA 1992); Reed v. State, 560 So. 2d 203 (Fla.), cert. denied, 498 U.S. 881, 111 S. Ct. 230, 112 L. Ed. 2d 184 (1990). The credibility must be weighed in light of the totality of the circumstances and the total course of the voir dire in question, as reflected in the record. Slappy at 22; Knight v. State, 559 So. 2d 327 (Fla. 1st DCA 1990). A trial

court's ruling on the "genuineness" of a peremptory challenge will be affirmed on appeal unless clearly erroneous.

Based on the aforementioned, the State submits that the trial court's findings of "genuineness" and its decision to allow the State's peremptory strike of prospective juror Gwendolyn Sthilaire in the case at bar are not clearly erroneous, and affirmance is required.

Here, the State exercised its first peremptory against Ms. Sthilaire (T IV 380). The sum total of defense counsel's objection was-- "[h]old on a second. We ask for a race-neutral reason, pursuant to Melbourne versus State." (T IV 380). In response, the State offered **2 race-neutral reasons**: (1) that Ms. Sthilaire, when asked about the death penalty, said "that's the mystery question," didn't have an answer; and more importantly (2) that she sat on a case before that was a hung jury (T IV 380). **Defense counsel did not challenge or object to those reasons.** The trial court agreed that those were race-neutral reasons, made in good faith, that were not a pretext and allowed the strike (T IV 380).

Appellant is procedurally barred from arguing for the first time on appeal that the State's first reason is factually inaccurate and not supported by the record. A defendant is required to place the court on notice that he/she is contesting the factual existence of the State's proffered race-neutral reason. See State v. Fox, 587 So.2d 464 (Fla. 1991) (trial court cannot be

faulted for assuming that a race-neutral reason asserted by the State is accurate where defendant fails to challenge or object to it); Carter v. State, 762 So.2d 1024 (Fla. 3d DCA 2000). Because Appellant failed to object to the State's race-neutral reason here, it cannot challenge the reason given now.

Even if this Court decides to address the claim, it lacks merit. While it is true that Ms. Sthilaire response "that's the mystery question" was in response to the State's request for 2 or 3 causes of crime, the State's second reason is factually accurate and supported by the record. Ms. Sthilaire served on a jury, in a criminal case, approximately three years prior (T 275). It was a drug case, which took three days to try and the jury deliberated but could not arrive at a verdict (T 275-76). The State's second reason is factually accurate, race-neutral, genuine and not a pretext.

POINT IV

THE TRIAL COURT CORRECTLY ADMITTED REBUTTAL TESTIMONY FROM OFFICER KENNETH KELLY REGARDING HIS ABILITY TO SEE WITHOUT PRESCRIPTION EYEGLASSES. (Restated).

The trial court did not abuse its discretion by admitting rebuttal testimony from Officer Kelley regarding his eyesight and his ability to see without his eyeglasses. See Thomas v. State, 748 So.2d 970, 982 (Fla. 1999) (holding that "the admission of evidence is within the trial court's discretion and will not be reversed unless defendant demonstrates an abuse of discretion.").

One of Appellant's theories of defense was that he could not be the shooter because he wears eyeglasses "all the time" and cannot see without them, but the shooter wasn't wearing eyeglasses.

In support of this theory, during the state's case-in-chief, defense counsel tried to elicit testimony that Appellant was wearing eyeglasses when arrested. On cross-examination of Officer Kenneth Kelley, one of the K-9 officers who apprehended Appellant after the car chase, defense counsel asked:

DEFENSE COUNSEL: You're not sure if he [Appellant] was wearing glasses [when apprehended]?

OFFICER KELLEY: I don't know. I don't think he was.

DEFENSE COUNSEL: You're not sure about that?

OFFICER KELLEY: I don't know.

(T 997). On re-direct examination, the prosecutor asked Officer Kelley:

PROSECUTOR: Officer Kelley, I notice you're wearing glasses?

OFFICER KELLEY: Yes.

PROSECUTOR: Do you know what your vision is without your glasses being on?

(T 998). Defense counsel objected, arguing that Officer Kelley's vision was irrelevant (T 998). At a sidebar, the prosecutor explained that he anticipated Officer Kelley to answer that his eyesight is 2200 or 2300 (T 998). The prosecutor wanted to ask Officer Kelley whether he has ever driven an automobile without

wearing his eyeglasses and whether he could see sufficiently to do that (T 998). Arguing that what Officer Kelley could see without his eyeglasses was not relevant or probative, defense counsel again objected (T 999). Defense counsel acknowledged that he was going to put on evidence, during his case, as to what Appellant could see and was going to present expert testimony as to Appellant's eyesight (T 999). The trial court agreed that the testimony was irrelevant **at that point but noted that it may be relevant in rebuttal** (T 999).

Appellant then presented evidence, during his case, to support his theory that he could not be the shooter because he always wore his eyeglasses and couldn't see without them. Dr. Ralph Brucejolly, Appellant's optometrist, testified that Appellant is near-sighted and has 20/400 vision without his eyeglasses (T 1322, 1325). Dr. Brucejolly admitted, on cross-examination, that Appellant would be able to see State's Exhibit 26 without his eyeglasses (4 boxes containing 12-inch Fogate speakers, T 727-29, R 2271), from a distance of 13 feet away, but that he would not be able to see them clearly (T 1326). Appellant would also be able to see State's Exhibit 31 (1 box of speakers and 1 bag) from 13 feet away but it also would not be clear and he wouldn't be able to see the wording on the box clearly (T 1327, R 2272).

Similarly, appellant would be able to see a person standing 13 feet away from him without his eyeglasses but the person would be

fuzzy (T 1327-28). He would also be able to see a person lying on the floor 5 feet away from him and would be able to distinguish the person's head from his/her feet (T 1328-29). While Dr. Brucejolly opined that appellant would have an accident if he drove without his eyeglasses, he also admitted that he was not aware of any studies showing that people with appellant's vision get into accidents if they drive without their eyeglasses (T 1329, 1331).

To rebut Appellant's theory, the State sought to re-call Officer Kenneth Kelley during its rebuttal case to elicit testimony as to what Officer Kelley, who has 2300 vision, can see without his eyeglasses (T 1388). Defense counsel again objected, arguing that it was irrelevant (T 1389). The trial court found that the testimony was relevant and probative, showing what someone with an acuity of 2300 could see (T 1389-90). The state then elicited the following rebuttal testimony from Officer Kelley:

PROSECUTOR: Officer Kelley, you're wearing eyeglasses?

OFFICER KELLEY: That's correct.

PROSECUTOR: How long have you worn glasses for?

OFFICER KELLEY: Probably the past ten-and-a-half years.

PROSECUTOR: And do you know what your vision is uncorrected?

OFFICER KELLEY: 2300 for each eye.

PROSECUTOR: Officer Kelley, have, not being on

duty, okay, have you ever driven your automobile without your eyeglasses on?

OFFICER KELLEY: Yes.

PROSECUTOR: Get in a car wreck?

OFFICER KELLEY: No.

(T 1404-05). Officer Kelley was then instructed to take his eyeglasses off and was asked the same series of question that the state posed to Dr. Brucejolly about what someone with appellant's vision could see. Officer Kelley testified that, without his eyeglasses on, he could see State's Exhibit 26 from where he was sitting, but could not read the tiny printing on the boxes (T 1405). He also could see State's 31, but could not read the printing on the box (T 1405). Officer Kelley agreed that he could see the prosecutor but he was blurry (T 1405). Finally, he could see the prosecutor lying on the floor, about 5-6 feet away and could distinguish between his head and his feet (T 1406-07).

The trial court did not abuse its discretion by admitting the foregoing testimony from Officer Kelley. The admission of evidence is within the discretion of the trial court and will not be disturbed absent a clear abuse of discretion. See Alston v. State, 723 So.2d 148 (Fla.1998); Medina v. State, 466 So.2d 1046 (Fla.1985); Jent v. State, 408 So.2d 1024 (Fla.1981). Evidence is admissible to disprove a defendant's theory of defense. Wuornos v. State, 644 So.2d 1000, 1006-07 (Fla. 1994); Jackson v. State, 530 So.2d 269, 272 (Fla. 1988); Miller v. State, 667 So.2d 325 (Fla.

1st DCA 1995). **Officer Kelley's testimony was relevant and probative to rebut appellant's defense that he could not be the shooter because he wears eyeglasses all the time.** Appellant's optometrist, Dr. Brucejolly, had testified that appellant would have an accident if he drove without his eyeglasses. Officer Kelley's testimony was offered to contradict that, showing that **a person with 2300 vision (slightly better than appellant's) had driven without his eyeglasses and had not had a car accident.**

Dr. Brucejolly had also explained what appellant could see, without his eyeglasses, from varying distances. According to Dr. Brucejolly, appellant would be able to see a person lying on the floor from 5 feet away and would be able to distinguish his head from his feet. Officer Kelley's testimony showed that a person with similar vision (2300) could also see, without his eyeglasses, a person lying on the floor, 5 feet away, and could distinguish between the person's feet and head. It is important to remember that Officer Kelley's testimony was not offered, as appellant suggests, to prove what appellant could or could not see, but instead, only to prove what a person with similar vision could see without eyeglasses.

None of the cases cited by Appellant require reversal. In fact, the only case cited by appellant, State v. Taylor, 648 So.2d 701 (Fla. 1995), actually supports the trial court's decision in this case. In Taylor, the defendant, who was charged with driving

under the influence, argued that his refusal to take field sobriety tests was not relevant evidence because it could have been motivated by a factor other than guilt-- for example, a desire to end the encounter with the officer. The Supreme Court rejected that argument, finding that defendant's claim was not plausible given the strong incentives to take the test. Appellant's irrelevancy objection here is likewise without merit. Officer Kelley's testimony was relevant and probative to rebut appellant's defense that he could not be the shooter because he wears eyeglasses. Additionally, there is no doubt that appellant "opened the door" to this testimony and cannot now be heard to complain.

Finally, even if the trial court erred by admitting the testimony, it was harmless. See State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). There were three survivors/eyewitnesses in this case who saw and/or heard Appellant murder Aaron and Brad. It was the police sketch prepared by two of those eyewitnesses that led to Appellant's apprehension. Further, while fleeing police, Appellant threw out of his car the murder weapon, Aaron's gun and Mr. Moore's wallet, all of which tied him to the murders. Two of the eyewitnesses identified Appellant as the murderer in a photo line-up and live line-up. Aaron's partner, Mike Dixon, also identified Appellant as a former customer, which explained why Appellant thought that Aaron and Brad knew him. Finally, there was a videotape showing Appellant renting the storage space where the

stolen electronics equipment was found, which had Appellant's fingerprints on them. Considering that evidence, it cannot be said that this testimony contributed to the verdict.

POINT V

**THE TRIAL COURT PROPERLY DENIED APPELLANT'S
MOTION FOR A MISTRIAL. (Restated).**

The trial court also did not abuse its discretion by denying appellant's motion for a mistrial after the prosecutor asked Appellant's wife, Joanne Rimmer, on cross-examination, whether she had ever asked appellant about the double murder (T 1379-80). See Buenoano v. State, 527 So.2d 194 (Fla. 1986) (motion for mistrial is directed to the sound discretion of the trial court). The question and one word answer--no, are not "fairly susceptible" of being comments on appellant's right to remain silent.

Joanne Rimmer was appellant's alibi witness, testifying that appellant went fishing with their son at 8:00-9:00 a.m. on the day of the double murder and did not return until 3:30 p.m. (several hours after the murders) (T 1354-55). Additionally, she testified that she drove the Ford Probe that whole day and that appellant was driving his Oldsmobile. On cross-examination, the prosecutor attacked Mrs. Rimmer's credibility by showing her bias and that she was unaware of her husband's activities outside of her presence. Specifically, he elicited testimony that:

1) when Mrs. Rimmer first saw the police sketch of the suspect she thought that it looked like appellant and joked with him about

that (T 1357-58);

2) she did not cooperate in the prosecution of a domestic violence action against appellant in 1998 (T 1366);

3) she thought that appellant's take home pay was approximately \$300 every two weeks when it was really between \$113-158 (T 1368);

4) appellant did not tell her that he bought \$12,000-18,000 worth of stereo equipment (T 1372);

5) she wouldn't know whether appellant had \$5,000 to spend on electronics equipment in May, 1998 (T 1372-73);

6) she didn't tell the police or the State Attorney's Office that appellant couldn't have committed the double murder because she was driving the Ford Probe that day (T 1376-78).

Finally, the prosecutor elicited the objected-to testimony, that Mrs. Rimmer **never asked appellant about the case, even though she spoke to him about 60 times after his arrest and supposedly knew that he had an alibi** (T 1378-79):

PROSECUTOR: In say those numerous times you have spoken with the defendant, **you never asked him about this particular case, did you?**

(T 1379). Defense counsel objected to the question and moved for a mistrial, arguing that the question was an impermissible comment upon appellant's right to remain silent (T 1379). The prosecutor explained that he was inquiring about her relationship with the appellant, not in any way making a comment on appellant's right to

remain silent (T 1379). The trial court agreed, overruling the objection and the questioning resumed:

PROSECUTOR: In all those conversations, you never asked [appellant] about the double murder?

MRS. RIMMER: **No.**

PROSECUTOR: You don't want to see the [appellant] go to prison, do you?

MRS. RIMMER: No, I don't.

(T 1380).

Appellant has failed to preserve his argument that the question and one word answer violate the "husband-wife privilege" (IB 75), for appellate review. Defense counsel's only objection below was that the testimony constituted a comment on appellant's right to remain silent, he never argued that the question violated the "husband-wife privilege." Consequently, that argument may not be raised for the first time on appeal, absent fundamental error. See Tillman v. State, 471 So. 2d 32,35 (Fla. 1985) ("In order to be preserved for further review by a higher court, an issue must be presented to the lower court and the specific legal argument or ground to be argued on appeal or review must be part of the presentation if it is to be considered preserved."); Steinhorst v. State, 412 So. 2d 332, 338 (Fla. 1982) (same).

Fundamental error is not present here because the "husband-wife" privilege is inapplicable under the facts of this case. The State asked Mrs. Rimmer if she had ever asked her husband about the

double murder, it did not ask her to disclose the substance of any conversation. As such, the "husband-wife" privilege was not implicated. Further, a violation of the "husband-wife" privilege cannot be fundamental error because it is subject to the harmless error rule. See Koon v. State, 463 So.2d 201, 204 (Fla. 1985) (applying the harmless error rule to violation of the "husband-wife" privilege); Donaldson v. State, 369 So.2d 691, 694 (Fla. 1st DCA 1979) (applying harmless error rule).

Appellant's second argument, that the question was an impermissible comment upon his right to remain silent, is equally without merit. In Jackson v. State, 522 So.2d 802 (Fla.), cert. denied, 488 U.S. 871 (1988), our supreme court adopted a rule for determining whether a comment constitutes a comment on silence. The court said that if the comment is "fairly susceptible" of being interpreted by the jury as a comment on the defendant's exercise of his right to remain silent it will be treated as such. See also State v. Kinchen, 490 So.2d 21 (Fla.1985). A prosecution witness in Jackson, questioned about Jackson's demeanor during the time of his arrest and booking, replied: "His demeanor was he appeared very calm." Id. at The court held that the statement could not be construed as a comment on Jackson's right to remain silent.

Likewise here, the question asking Mrs. Rimmer whether she had ever asked her husband about the double murder and her one word answer-- "no"-- cannot be construed as a comment upon appellant's

right to remain silent. The focus of the question was on Mrs. Rimmer's actions, not appellant's. Mrs. Rimmer was not asked to disclose anything appellant may have said or not said about the double murder. Rather, she was asked only whether she had ever asked appellant about the double murder. As the prosecutor explained, he was trying to show the jury the type of relationship that Mrs. Rimmer, appellant's alibi witness, had with her husband (T 1379). The prosecutor had already established that Mrs. Rimmer either did not know or did not care to know about her husband's activities outside of her presence and this question further proved that.

Further, the question was proper as impeachment of Mrs. Rimmer's credibility. Every witness that takes the stand places his or her credibility at issue and is subject to being discredited by having bias, an interest in the outcome or an ulterior motive shown. See Section 90.608(1)(b), Florida Statutes (2000). Mrs. Rimmer provided her husband with an airtight alibi-- that he was fishing with their son that day and that she was driving the Ford Probe-- yet she never told the police or the State Attorney about those facts. Moreover, although she had joked with her husband about the police sketch resembling him, she never asked him once about the double murder. The jury was entitled to know this in evaluating Mrs. Rimmer's credibility.

The cases relied upon by appellant (IB 76-77) are inapposite

because they involve defendants who took the stand to testify and were then asked why they hadn't come forward earlier with their exculpatory version of events. In Torrence, the defendant took the stand and testified that he got the stolen property from Hershel Jones. On cross-examination, the prosecutor asked him, "all of these statements, all of your story about Hershel, did you ever tell anybody else your story about where Hershel got the jewelry and gave them to you?" Id. at 490. The defendant answered "no" and defense counsel immediately moved for a mistrial.

Similarly, in King, the defendant took the stand and explained that his fingerprints were found at the scene of the burglary because he had earlier delivered landfill to the house. On cross-examination, he was asked "who did you tell that story to knowing that it could possible absolve you from criminal charges?" Id. at 251-52. Finally, in Weiss the defendant/police officer was asked on cross-examination why he hadn't told his exculpatory version of events to the Internal Affairs Division during its investigation of his aggravated battery charge.

Conversely, here, it was not Appellant who was being asked the question but his wife. Finally, even if error, it was harmless beyond a reasonable doubt for the reasons asserted under Point IV. See DiGuilio 491 So. 2d at 1135 (comments on defendant's silence are subject to the harmless analysis).

POINTS VI & VIII

THE PROSECUTOR'S VARIOUS COMMENTS DID NOT DEPRIVE APPELLANT OF A FAIR TRIAL AND FAIR SENTENCING HEARING. (Restated).

Appellant complains that the prosecutor made several improper comments throughout the trial and penalty phase, the cumulative effect of which deprived him of a fair trial and fair sentencing hearing. The State submits that the comments in question are procedurally barred because they were not preserved for appellate review, are not improper, or if improper, do not constitute fundamental error.

Appellant failed to preserve all but one of the allegedly improper comments for appellate review. The proper procedure to preserve review of an allegedly improper comment is to object, request a curative instruction, and/or move for a mistrial. Kearse v. State, 25 Fla. L. Weekly S507, --- So.2d ----, 2000 WL 854156 (Fla. June 29, 2000); Spencer v. State, 645 So. 2d 377, 383 (Fla. 1994); cert. denied, -- U.S. --, 118 S. Ct. 213 (1997); Duest v. State, 462 So. 2d 446 (Fla. 1985), cert. denied, -- U.S. --, 113 S. Ct. 1857 (1993).

Here, Appellant failed to object to the allegedly improper comments made during opening statements (in both the guilt and penalty phase) and did not move for a mistrial (T 520, 544, IB 79, T 1842, 1845, IB 87-88). As such, he failed to preserve those alleged errors for appellate review. Further, of the twelve (12) improper comments appellant claims were made during closing

argument in the guilt phase, he objected to only one; however, he did not move for a mistrial on that claim either (T 1495). Appellant did not object to any of the eight (8) comments he alleges were improper during closing argument in the penalty phase (IB 87-88). Having failed to object and move for a mistrial, appellant likewise failed to preserve these alleged errors for appellate review.

This Court has long held that absent a showing of fundamental error, the failure to object to an alleged improper comment bars review. See Brooks v. State, 25 Fla.L.Weekly S417 (May 25, 2000); McDonald v. State, 743 So.2d 501, 505 (Fla. 1999); Wyatt v. State, 641 So.2d 355 (Fla. 1994); Street v. State, 636 So.2d 1297 (Fla. 1994); Waterhouse v. State, 596 So.2d 1008 (Fla. 1992). "Fundamental error has been defined as the type of error which 'reaches down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error.'" Delgado v. State, 25 Fla. L. Weekly S79 (Fla. 2000) (quoting Urbin v. State, 714 So.2d 411, 418 n. 8 (Fla.1998)). See also Crump v. State, 622 So.2d 963, 972 (Fla.1993) (holding that since prosecutorial comments did not constitute fundamental error, absence of preservation of issue by defense counsel precluded appellate review); Pacifico v. State, 642 So.2d 1178, 1182 (Fla. 1st DCA 1994).

Even where a challenged comment is the subject of a

contemporaneous objection, this Court has repeatedly recognized that wide latitude is permitted in arguing to a jury. Breedlove v. State, 413 So.2d 1, 8 (Fla. 1982); Thomas v. State, 326 So.2d 413 (Fla. 1975). Logical inferences may be drawn, and prosecutors are allowed to advance all legitimate arguments within the limits of their forensic talents in order to effectuate their enforcement of the criminal laws. Spencer v. State, 133 So.2d 729 (Fla. 1961), cert. denied, 369 U.S. 880, 82 S.Ct. 1155, 8 L.Ed.2d 283 (1962). The control of comments is within the trial court's discretion, and an appellate court will not interfere unless an abuse of such discretion is shown. Thomas; Paramore v. State, 229 So.2d 855 (Fla. 1969), modified, 408 U.S. 935, 92 S.Ct. 2857, 33 L.Ed.2d 751 (1972). Each case must be considered on its own merits, however, and within the circumstances surrounding the complained of remarks. Id.

THE UNPRESERVED "DO THE RIGHT THING" COMMENTS

These unpreserved comments do not constitute fundamental error. The first such comment was made during the prosecutor's opening statement (guilt phase). After giving the jury a brief overview of the facts of the case, the prosecutor told them:

I want you now to sit back and make yourselves comfortable because I'm going to take you through all of the evidence, the testimony that you will hear so that at the end of the case, when I come back before you, I will ask you to do the right thing, based upon the testimony and the evidence you have heard, and return a verdict of guilty on all counts of

the indictment.

(T 520). The comment was not improper and cannot constitute fundamental error. Read in context, the prosecutor did not actually ask the jury to "do the right thing" but rather, explained that after it had heard the testimony he would come back before the jury and ask it to do the right thing **based upon the testimony and evidence it had heard**. That is what happened during closing argument (guilt phase), the prosecutor stating at the end:

I have been talking for a while now. I have been discussing the evidence and the testimony and the exhibits with you. I anticipate I will get a chance to speak to you again.

But if I don't, I'll ask you now to do the right thing, **based upon the testimony and the evidence that you have before you**. Now that the State has proven the truth of the charges, I ask you to return a verdict that speaks the truth and find both defendants, Defendant Rimmed and Defendant parker, guilty as charged on all counts of the indictment.

(T 1501). This comment also was not improper because the prosecutor was simply asking the jury "to do the right thing, **based upon the testimony and the evidence that you have before you**." (T 1501). The prosecutor had explained to the jury that its recollection of the evidence governed, so he was asking the jury to "do the right thing" based on its recollection of the evidence.

Appealing to the jury to "do the right thing" is not clearly erroneous when it is coupled with reference to the record. See U.S. v. Barnett, 159 F.3d 637 (C.A.D.C. 1998); Adams v. U.S., 222

F.2d 45, 46 n. 1 (D.C.Cir.1955). Here, all the statements asked the jury to "do the right thing" based upon the evidence and testimony before it. As such, they were not improper appeals and cannot constitute fundamental error.

The same is true for the remainder of these comments. During the rebuttal portion of his closing argument, the prosecutor told the jury, in response to defense counsel's assertion that Appellant was not the shooter and that there was reasonable doubt based upon discrepancies in the witnesses' testimony, that he was "confident that [they would] follow [their] oath and [] do the right thing in this case, **based upon the testimony and the exhibits that are in evidence.** (T 1532). Again, this was merely an assertion that the jury would do the right thing based upon the evidence in this case. This was also "fair reply" to defense counsel's contention that there was plenty of reasonable doubt as to whether appellant was the shooter. See Hazelwood v. State, 658 So.2d 1241, 1243 (Fla. 4th DCA 1995) (it is "universal that counsel is accorded a wide latitude in making arguments to the jury particularly in retaliation to prior comments made by opposing counsel.").

At the end of rebuttal, the prosecutor asked the jurors to keep the entire case in context and used baseball as an analogy:

[A]fter [Hank Aaron] broke [the home run record], he was interviewed by a reporter and asked how he was able to hit all those home runs. And Hank Aaron said he was able to do that by keeping his eye on the ball. What I would ask you to do is to keep this entire

case in context. With all of the testimony that you have heard and all of the exhibits that are in evidence and all of the physical evidence that is available to you, and don't be swayed or go after a slider. Don't go after an outside fast ball. Don't go after an inside knuckle ball. Stay focused to do your duty, to do the right thing in this case.

(T 1545). It is proper for the prosecutor to ask the jury to stay focused on the facts and not be swayed by sympathy. See Lukehart v. State, 25 Fla.L.Weekly S489 (Fla. June 22, 2000) (prosecutor may argue that jury not be swayed by sympathy). Further, this comment was also "fair reply" to defense counsel's assertion that there was reasonable doubt in this case.

The unpreserved comments made during the penalty phase were also not improper and cannot constitute fundamental error. The first unpreserved comment was made at the conclusion of the prosecutor's opening argument (penalty phase) where, after explaining to the jury that it was there to determine Appellant's punishment and what aggravators and mitigators would be shown, the prosecutor stated that "the proper, moral recommendation and legal recommendation for defendant Rimmed is death." (T 1845). Appellant mischaracterizes this statement as one telling the jury to "do its job" and return the "morally" correct death sentence (IB 88). Read in context, the statement was not improper.

Similarly, at the end of the prosecutor's closing argument (penalty phase), the prosecutor, after talking about all of the aggravators that were proved and the mitigators that were not,

asked it "to do [its] job, based upon the oath that [it] took, based upon the law the Judge Cohn is going to give you." (T 1961). Exactly like the comments discussed above, the request to "do its job" was premised upon the law that the judge would give to the jury.

U.S. v. Young, 105 S.Ct. 1038 (1985), relied upon by Appellant, supports the State's position that no fundamental error occurred here. In that case, defense counsel impugned the prosecutor's integrity and charged that the prosecutor did not believe in the Government's case during his closing argument. On rebuttal, the prosecutor stated his opinion that the defendant was guilty and urged the jury to "do its job"; defense counsel made no objection. The Court held that the prosecutor's remarks, although error, did not constitute "plain error" under Federal Rule of Criminal Procedure 52(b), because it did not undermine the fundamental fairness of the trial or amount to a miscarriage of justice. The Court noted that, when addressing plain error, the claimed error must be viewed against the entire record.

U.S. v. Johnson, 968 F.2d 768 (8th Cir. 1992), the other case relied upon by appellant, is distinguishable for several reasons. First, it did not involve a "do the right thing" comment. Instead, the prosecutor in Johnson told the jurors that they were "the people that stand as a bulwark against the continuation of what [the defendant] is doing on the street, putting this poison on the

street." Id. at 769. Second, unlike this case, defense counsel in Johnson objected to the comment and moved for a mistrial. The Eighth Circuit held that the comment was reversible because it was an inflammatory appeal to the jurors to be the conscience of the community and there was only marginal evidence of guilt.

THE "EXECUTION" OR "EXECUTED" COMMENTS

The alleged improper use of the word "executed" was also unreserved. The prosecutor began his closing argument (guilt phase) by showing the jury pictures of victims while they were alive and pictures of them dead:

State's 8 in evidence is a photograph of Aaron Knight as he was in life, doing his profession, working at his business. State's 62 in evidence is a photograph of Aaron Knight at death, a death that occurred very violently, with an execution shot to the head on May the 2nd of 1998.

State's 9 in evidence is a photograph of 19-year-old Bradley Krause, Jr. in life, at his profession, at business, doing what he enjoyed. And State's 63 in evidence is a photograph of Bradley Krause, Jr., at death, a death that occurred on May the 2nd of 1998, when he was executed with a shot to the head.

Aaron Knight and Bradley Krause, Jr., as you have heard the evidence, as you have reviewed the exhibits in evidence, were executed, were murdered on May the 2nd of 1998 by that defendant, Defendant Rimmed.

(T 1478).

Contrary to appellant's assertions, there were not "repeated" references to the word "execution" in the closing argument (guilt

phase) (IB 81); only the three references above and one additional (T 1490) and they do not constitute fundamental error. The State acknowledges that in Brooks v. State, 25 Fla. L. Weekly S417 (Fla. May 25, 2000), this Court recently held it was improper for the prosecutor to use the word "executed" or "executing" **at least 6 times** during closing argument. Similarly, in Urbin v. State, 714 So.2d 411, 420 f.n. 9 (Fla. 1998), relied upon by appellant, this Court held that it was error for a prosecutor to use the word "executed" or "executing" **at least 9 times** during closing argument.⁷

There are important distinctions, however, between those cases and this one which make them inapplicable here. First, objections were lodged in both Brooks and Urbin; a curative instruction was also given in Urbin. Thus, those case did not analyze the use of the word under a fundamental error standard. Second, both of those cases involved the prosecutor's use of the word during the penalty phase of the trial, not the guilt phase as here. Finally, reversal in both those cases was premised upon the cumulative effect of several errors, neither case was reversed simply because the prosecutor used the word "executed" or "executing" six or nine times. In Brooks, for example, the prosecutor also characterized

⁷The other two cases relied upon by appellant, Campbell v. State, 679 So.2d 720 (Fla. 1996), and King v. State, 623 So.2d 486 (Fla. 1993), (IB 81) are inapplicable as they do not contain references to any form of the word "execution."

the defendants as persons of "true deep-seated, violent character"; "people of longstanding violence"; "they commit violent, brutal crimes of violence"; "it's a character of violence"; "both of these defendants are men of longstanding violence, deep-seated violence, vicious violence, brutal violence, hard violence ... those defendants are violent to the core, violent in every atom of their body." Id. at 900. Additionally, the prosecutor impermissibly used a "mercy" argument, impermissibly argued "prosecutorial expertise" to the jury, misstated the law regarding the jury's recommendation of a death sentence, misstated the law regarding the merged robbery and pecuniary gain aggravating circumstances, personally attacked defense counsel and asked the jury to not take the easy way out and recommend life.

Similarly, in Urbain, the prosecutor invited the jury to disregard the law, asserted that a vote for life would be irresponsible and a violation of the juror's lawful duty, emotionally created an imaginary script demonstrating that the victim was shot while pleading for his life, attacked the character of the defendant's mother and made an impermissible mercy argument, among other things. This Court found that the prosecutor's argument was full of "emotional fear" and efforts to dehumanize and demonize the defendant. The prosecutor cast the defendant as showing his "true, violent, and brutal and vicious character", as a "cold-blooded killer, a ruthless killer": exhibiting "deep seeded

[sic] violence. It's vicious violence. It's brutal violence"; and that Urbin was "violent to the core, violent in every atom of his body." Id. at 420, f.n. 9.

The four references to the word "execution" or "executed" were isolated here, made at the beginning of the prosecutor's closing argument (guilt phase) when he was explaining Aaron and Brad's murders. The prosecutor's closing argument (guilt phase) was not injected with emotion or pleas; rather, it was a dispassionate summation of what the evidence had shown.

Similarly, the one (1) isolated, unpreserved, reference to the word executed during opening argument (penalty phase) and one (1) isolated, unpreserved, comment during closing argument (penalty phase), cannot be fundamental error. The prosecutor's closing argument (penalty phase) was not emotional and did not try to instill fear in the jury or arouse their passions. These few isolated references to the word "executed" do not constitute fundamental error.

REMAINING UNPRESERVED COMMENTS (GUILT PHASE)

The other unpreserved comments made during closing argument (guilt phase) likewise do not constitute fundamental error. While discussing the testimony of the three eyewitnesses, telling the jury that he was not going to regurgitate all of their testimony because the jury was paying attention:

And I'm not going to stand here in front of
you all and regurgitate all of [the

eyewitnesses] testimony. You all were paying attention during the course of the entire trial. I'm not going to regurgitate back to you all of the testimony of all of the witnesses in this case. I'm not going to insult your all's intelligence. I will touch on some of the things.

(T 1482-83). A plain reading of the statement above shows that it was not, as Appellant alleges, an insinuation that defense counsel would be insulting the jury's intelligence if they reiterated the eyewitnesses' testimony. The comment makes no reference, explicit or implicit, to defense counsel and cannot logically be read as Appellant asserts. Defense counsel was not disparaged by the statement and no fundamental error occurred.

Appellant next objects to the prosecutor, while discussing why both premeditated and felony-murder apply to this case, stating:

We know that from the testimony and the evidence in this case that [appellant] walked over to Aaron Knight. He cycled the weapon. And you heard the ;metallic sounds it made when Mr. Haemmerle did that for you all and you heard the testimony from the surviving victims that they heard a metallic sound, and then they heard the shooter, I submit to you the evidence supports is defendant Rimmed, say to Aaron Knight, "You know me don't you?" And Aaron Knight said "No." Said, "You know me, don't you?" Then he blew his brains out by shooting him in the back of the head. That's after consciously deciding to do so.

(T 1491). Appellant does not explain how the prosecutor's reference to the fact that Appellant "blew [the victim's] brains out by shooting him in the back of the head," constitutes fundamental error. Presumably, appellant is arguing that this was

an emotional appeal to the jury. Again, this isolated reference to what in fact happened in this case does not constitute fundamental error.

In discussing the testimony of the co-defendant's girlfriend, a hostile witness, the prosecutor noted that "she didn't want to be here. She didn't want to testify. I felt, when I was questioning her, I felt kind of like I guess a dentist feels; but that's for your consideration and determination as to evaluating her testimony." (T 1493). This was not an improper comment. The prosecutor is allowed to comment upon the credibility of the witness. Defense counsel even agreed with the prosecutor, stating, "[y]ou know, I agree with [the prosecutor] about [the co-defendant's girlfriend]. She sat there with her head on the table, you know. Needed her Xanax." (T 1515).

The prosecutor went on to explain that he believed the co-defendant's role was that of a "look-out" that's why he parked his Kia Sephia in front of the store and initially came in through the front door. He then compared it to the military: "[y]ou know, we have some folks that were in the military and I'm sure you can, you can recall during tactical exercises around ---." (T 1495). Appellant raised a "golden rule" objection which was overruled, the trial court noting that the prosecutor was not asking the jury to place itself in the shoes of one of the parties (T 1495). The prosecutor continued explaining that in the military they have "a

tactical movement for ground troops called a Pincer (sic) movement," where one side clears out an entrance way for the other and they close in.

For the first time on appeal, Appellant argues that the comment was a "blatant appeal to the jurors' emotions," and an attempt by the prosecutor to personalize himself in their eyes (IB 82). It was not. The prosecutor was only trying to convey information to the jury and explain why the co-defendant parked his car out front, where it was visible and entered through the front door. The co-defendant was scoping out the front to make sure the robbery would be successful. The prosecutor did not talk about his own military service, all he did was compare the co-defendant's action to a military tactic. Ruiz v. State, 743 So.2d 1 (Fla. 1999), relied upon by appellant, is completely inapplicable because the prosecutor in that case directly referred to her father's military service and "urged the jurors to do their duty as citizens just as her own father had done his duty for his country in Operation Desert Storm." Id. at 6. See also Landry v. State, 620 So.2d 1099 (Fla. 4th DCA 1993) (prosecutor's reference to his own service in the Persian Gulf was improper).

Appellant also objects to comments that were made in rebuttal closing argument (guilt phase). To place those in proper context, it is necessary to review defense counsel's closing argument (T 1503-1530). Defense counsel argued that there was reasonable doubt

in this case that Appellant did not commit the murders (T 1505). He claimed that the state's theory was that Appellant's motive was revenge because he was not satisfied with speaker installation job that the victims had done and claimed that motive made no sense (T 1507-1509). He pointed out that the surveillance tape of the storage unit shows that Appellant was driving his Oldsmobile, stating that this equipment would not fit into the Probe and relied upon the wife's alibi testimony (T 1511-1512, 1527-28).

Also, defense counsel pointed out that Appellant wears eyeglasses and needs them to see but the shooter wasn't wearing eyeglasses (T 1514). Defense counsel claimed that the only crime Appellant committed was being in possession of stolen property, that he was being set up for the double murder (T 1515-16). Defense counsel tried to point out inconsistencies in the eyewitnesses' testimony and the lack of physical evidence (T 1518-1525).

In rebuttal, the prosecutor stated:

Years ago, years ago, when I first started law school, very first day, very first class, first class I attended, law professor said that if the facts are with you and the law is against you, you argue the facts. If the facts are against you and the law is with you, you argue the law. If the facts are against you and if the law is against you, you just argue. And folks, that's what you have heard from defense counsel-- a whole lot of argument.

(T 1531).

The prosecutor aptly described what defense counsel's statements to the jury are-- "argument"-- and therefore, there was no error in the prosecutor referring to it that way. Similarly, the prosecutor is allowed to rebut defense counsel's inference that there is reasonable doubt, stating:

Counsel argues to you there is a whole list of reasonable doubt. Could go through or list things that are reasonable doubt in this case. Folks, frankly, from my perspective, sitting over there, still have yet to hear it.

(T 1533).

Finally, contrary to Appellant's assertions, the prosecutor did not ask the jurors to think of themselves as baseball players, but simply asked them to stay focused on the facts and keep the entire case in context and used baseball as an analogy:

Before last baseball season, with Mark McGuire and Sammy Sosa, breaking the single season home run record, before that season, the last season, Hank Aaron broke Babe Ruth's all time home run record back in the early '70s. I think it was in 1972. But after Hank Aaron, . . . after he broke that record, he was interviewed by a reporter and asked how he was able to hit all those home runs. And Hank Aaron said he was able to do that by keeping his eye on the ball. What I would ask you to do is to keep this entire case in context. With all of the testimony that you have heard and all of the exhibits that are in evidence and all of the physical evidence that is available to you, and don't be swayed or go after a slider. Don't go after an outside fast ball. Don't go after an inside knuckle ball. Stay focused to do your duty, to do the right thing in this case.

(T 1544-45). As already noted, the prosecutor is allowed to ask the jury to stay focused on the facts and to not be swayed by emotion.

UNPRESERVED COMMENTS PENALTY PHASE

Appellant's challenge to the unpreserved comments made during closing argument (penalty phase) is also without merit (IB 87-88). The prosecutor argued that the statutory mitigator upon which Appellant was relying, that the capital felony was committed while Appellant was under the influence of extreme mental or emotional disturbance, had not been shown (T 1950). He noted that defense would try to argue that its mental health expert did establish the statutory mitigator and told the jury it was free to believe that, but argued that based on that expert's answers on cross-examination, the statutory mitigator had not been met (T 1950-51). "I submit to you, based upon the answers that she gave during cross-examination, she did what she was paid to do. Shy (sic) gave you a non-opinion on some mental mumbo-jumbo, with no factual basis to support it." (T 1951).

This comment was not improper. "A lawyer may discuss an expert witness' pecuniary interest in the outcome of the case." Rutherford v. Lyzak, 698 So.2d 1305, 1306 (Fla. 4th DCA 1997). Further, the prosecutor is allowed to make fair comment upon the evidence. "It is proper for a prosecutor in closing argument to refer to the evidence as it exists before the jury and to point out

that there is an absence of evidence on a certain issue." White v. State, 377 So. 2d 1149, 1150 (Fla. 1979), cert. denied, 449 U.S. 845 (1980). The prosecution is even permitted to comment upon the essential unbelievability of testimony. Reaves v. State, 324 So. 2d 687, 688 (Fla. 3d DCA 1976). Thus, although the prosecutor's choice of words could have been better, there is nothing improper about him commenting on the expert witness' failure to establish the statutory mitigator.

Appellant does not explain how the prosecutor's statement that the Appellant suffers from an anti-personality disorder and that "the prisons are filled with those types of individuals," constitutes fundamental error (T 1958-59). Appellant relied upon his mental condition as a defense and it was proper comment for the prosecutor. Similarly, it was not improper for the prosecutor to recognize the gravity of the situation, stating that it is never a good day when the government has to ask 12 citizens to return death recommendation and then saying that there were no winners, and that he felt sorry for all the families involved, including Appellant's (T 1949-50). The prosecutor was also required to state that Appellant was on conditional release in order to meet the first aggravator (T 1951-52, 1959-60). The last comment that Appellant objects to, made at the *Spencer* hearing, was not made in front of the jury (IB 88).

In sum, all of these unpreserved comments are procedurally

barred because Appellant failed to object and has failed to demonstrate that any of them constitute fundamental error. The prosecutor's arguments in both the guilt and penalty phase were, taken as a whole, not emotional or intended to arouse the jury's passions. Rather, they were dispassionate accounts of what the evidence would show and did show. Any isolated comments that may be improper do not constitute fundamental error given the overwhelming evidence from three survivors/eyewitnesses, the fact that Appellant's Ford Probe matched the one described by the survivors/eyewitnesses, the fact that Appellant threw the murder weapon, Aarons gun and Joe Moore's wallet out of his car during a chase and the fact that Appellant's fingerprints were found on the electronic equipment in his storage space.

Finally, the one comment that Appellant objected to does not constitute reversible error. The jury was told to disregard the prosecutor's comment that "[g]iven the Court's ruling, I have no further questions of Detective Lewis at this time," (T 1251). The curative instruction cured any error. Moreover, given the evidence in this case, as outlined above and in previous points, even if there was error, it was harmless.

POINT VII

THE TRIAL COURT DID NOT ERR BY ALLOWING THE PROSECUTOR TO CROSS-EXAMINE DR. JACOBSON REGARDING APPELLANT'S EXTENSIVE CRIMINAL HISTORY. (Restated).

Defense counsel filed a Motion in Limine to prevent the State from asking defense mental health expert, Dr. Martha Jacobson, about appellant's prior arrests or convictions, arguing that it would be improper to allow the State to inquire about prior arrests and/or convictions that do not qualify as statutory aggravators (T 1822-1828). Relying upon Davis v. State, 698 So.2d 1182 (Fla. 1997), Parker v. State, 476 So.2d 134 (Fla. 1985), and Jones v. State, 612 So.2d 1370 (Fla. 1992), the prosecutor explained that he was allowed to ask about prior arrests and/or convictions if the expert witness reviewed or relied upon the defendant's criminal history in formulating his/her opinion (T 1823).

Quoting from Dr. Jacobson's pre-trial deposition, the prosecutor noted that he asked Dr. Jacobson whether she had asked appellant about his criminal history when she spoke with him (T 1825). Dr. Jacobson agreed that she had asked appellant about his criminal history and he told her that:

he had some problems in the adolescent, juvenile justice system in terms of skipping school, petit theft and burglary. He was first tried as an adult at 16. Two armed robberies and possibly a possession of firearms. He wasn't quite sure if that was there. He also had eight cases for which he was sentenced to the Appalachian Correctional Institution for a period of four years. He was not specific as to what those charges were.

(T 1825-26). Dr. Jacobson was then asked whether she knew how many felony convictions appellant had, to which she responded "based on

what he told me, there would be at least ten if each of those cases was considered a separate conviction." (T 1826). She was also asked whether appellant told her how many times he was in prison and she answered "twice." (T 1826). The question then became whether Dr. Jacobson relied upon that information in formulating her opinion.

In a proffer, outside the presence of the jury, Dr. Jacobson testified that she evaluated appellant and that as part of that evaluation she administered some tests to him and conducted a clinical interview (T 1887). Dr. Jacobson agreed that she received information from appellant during the interview process and that she utilized that information in formulating her opinions about appellant (T 1887). On cross-examination by defense counsel, Dr. Jacobson stated that the criminal history appellant told her about did not play a "significant or relevant part of her evaluation of" his current mental condition or his mental condition at the time of the offense (T 1888). On re-direct examination, the prosecutor asked:

So that information that the defendant told you about, his prior prison sentences and prior criminal history was not utilized by you in any way, shape or form in formulating your opinions in this case?

(T 1888). Dr. Jacobson would not answer the question, telling the prosecutor that he needed "to be more specific as to what opinion. It did not affect my opinion as to the presence of mental illness."

(T 1888). Noting that the witness does not get to dictate the question asked, the prosecutor stood on the question he asked (T 1888). Based on Jones, the trial court denied the motion in limine finding that Dr. Jacobson relied upon the information that she received from appellant in formulating her opinions (T 1889).

The trial court did not abuse its discretion in allowing the State to inquire about appellant's prior criminal history on cross-examination of Dr. Jacobson. See Monlyn v. State, 705 So.2d 1, 4 (Fla. 1997), quoting Cruse v. State, 588 So.2d 983, 988 (Fla.1991) ("[w]e have said numerous times that the 'appropriate subjects of inquiry and the extent of cross-examination are within the sound discretion of the trial court.'"). "[I]t is proper for a party to fully inquire into the history utilized by the expert to determine whether the expert's opinion has a proper basis." Jones v. State, 612 So.2d 1370, 1374 (Fla. 1992), quoting Parker v. State, 476 So.2d 134, 139 (Fla. 1985). Further, under section 90.705, Florida Statutes (2000), a party may conduct a voir dire examination, prior to an expert giving an opinion, to determine the underlying facts and data supporting the expert's opinion.

In this case, in response to defense counsel's motion in limine to prevent the state from cross-examining appellant's mental health expert about appellant's criminal history, the trial court conducted a proffer to determine whether the expert relied upon appellant's criminal history in formulating her opinions. After

testifying on direct examination, during that proffer, that she had utilized the information appellant gave her during his clinical interview in formulating her opinions, Dr. Jacobson refused to answer on re-direct whether she utilized the information about appellant's prior criminal history in any way, shape or form in formulating her opinions in this case (T 1888). Thus, the trial court correctly found that Dr. Jacobson had relied upon appellant's prior criminal history in forming her opinions in this case.

Appellant's argument that the trial court's reliance upon Jones v. State, 612 So.2d 1370, 1374 (Fla. 1992), is misplaced lacks merit. The procedural posture of how this issue arose was different in Jones but the principle of law is equally applicable. In Jones, there was no proffer of the expert's testimony before defense counsel's direct examination. Thus, when the expert in Jones testified on direct examination, by defense counsel, that he had considered the defendant's juvenile, psychiatric, and psychological history in diagnosing him as having a borderline personality disorder, this Court held that he had "opened the door" to cross-examination by the state on the defendant's criminal background.

Here, the matter was considered before the expert testified, during a proffer, wherein Dr. Jacobson admitted on direct examination by the state that she relied upon the information appellant gave her during his clinical interview in formulating her

opinions (T 1887). On cross-examination by defense counsel, Dr. Jacobson agreed that appellant's prior criminal history did not play a significant or relevant part of her evaluation of his present mental condition or that at the time of the alleged offense (T 1888). Importantly, however, Dr. Jacobson refused to answer on re-direct whether she utilized the information about appellant's prior criminal history in any way, shape or form in formulating her opinions in this case (T 1888). Based upon that testimony, it was proper for the state to "fully inquire" into appellant's criminal history on cross-examination.

Furthermore, even if it was error, it was harmless. The jury's recommendation of death was not based upon the fact that it heard about Appellant's prior criminal history. The State presented evidence on six (6) aggravating factors here, which the trial court found. Appellant was unable to establish even one (1) statutory mitigator and the trial court gave little weight to his non-statutory mitigators.

POINT IX

THE TRIAL COURT CORRECTLY FOUND THAT THE TWO MURDERS WERE ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL. (Restated).

The trial court properly relied upon the heinous, atrocious and cruel (HAC) aggravating factor in this case. In support of this aggravator, to which it accorded moderate weight, the trial court found:

In this case, it is the fear, emotional strain, and terror of Aaron Knight and Bradley Krause, Jr. during the events leading up to their murders that allow these otherwise quick deaths to be considered heinous, atrocious or cruel.

Aaron Knight and Bradley Krause, Jr. were laying face down on the floor of the bay area with their hands tied with duct tape behind their backs for as long as 20 minutes. The defendant wielded a semiautomatic handgun in their presence while Audio Logic was being stripped of its inventory. At one point during this ordeal, the Defendant asked Aaron Knight if there were surveillance cameras. He also asked for the keys to the register. Mr. Knight gave his keys to the Defendant advising him that the "Chicago key" was the one that fit the register.

It was the testimony of the survivors, Kimberly Davis, Joe Louis Moore and Louis Rosario, that provided the best evidence of the fear, emotional strain, and terror that was experienced by Aaron Knight and Bradley Krause, Jr. prior to their deaths.

Louis Rosario testified that during the 15 to 20 minutes he laid duct-taped with his face to the floor, he was scared. He thought he was going to die.

Joe Louis Moore testified that during the 15 to 20 minutes he laid duct-taped with his face to the floor, he was afraid. He saw the Defendant take the gun and stick it to the back of Aaron Knight's head and pull the trigger. Moore jumped up at which time the Defendant pointed the gun at him and told him to get back down on the floor.

Kimberly Davis testified that while she huddled with her baby on the floor, she started praying. She was afraid. She was scared.

The evidence presented together with the

logical inferences drawn from the evidence established beyond a reasonable doubt that the capital felonies were especially heinous, atrocious and cruel.

(R 2390-91).

This Court has repeatedly stated that fear, emotional strain, mental anguish or terror suffered by a victim before death is an important factor in determining whether HAC applies. See Pooler v. State, 704 So.2d 1375, 1378 (Fla. 1997) (holding that fear, emotional strain, and terror of the victim "during the events leading up to the murder may be considered in determining whether this aggravator is satisfied, even where the victim's death was almost instantaneous"); James v. State, 695 So.2d 1229, 1235 (Fla. 1997) (fear, emotional strain, and terror of the victim during the events leading up to the murder may make an otherwise quick death especially heinous, atrocious, or cruel"); Preston v. State, 607 So.2d 404, 410 (Fla. 1992) ((holding that "fear and emotional strain may be considered as contributing to the heinous nature of the murder, even where the victim's death was almost instantaneous.").

Further, the victim's knowledge of his/her impending death supports a finding of HAC, even if the death itself was quick or instantaneous. See Douglas v. State, 575 So.2d 165 (Fla. 1991); Rivera v. State, 561 So.2d 536, 540 (Fla. 1990); Parker v. State, 476 So.2d 134 (Fla. 1985). In evaluating the victim's mental state, common-sense inferences from the circumstances are allowed to be drawn. Pooler, 704 So.2d at 1378 (citing Swafford v. State,

533 So.2d 270, 277 (Fla.1988)).

Here, as the trial court found, Aaron and Brad suffered tremendous fear, mental anguish and terror before their murders. They were forced to lie face down on the floor, with their hands duct-taped behind their backs for 20-30 minutes while Appellant, weilding a semi-automatic handgun, robbed their store. During that time, Aaron was asked for the keys to the cash register and for the location of any surveillance cameras and guns. Appellant came out with Aaron's gun, asking what kind it was. Aaron and Brad's terror had to increase when they heard Appellant tell survivor/Ms. Davis, who was sitting near Aaron, to move away because "he didn't want to get anything on her."

Their terror further escalated when Appellant started to leave but then came back and said to Aaron "you know me." (T 810). Aaron replied that he didn't know him but Appellant said "man, you do remember me." (T 895). Aaron again said that he didn't know him but Appellant put the gun to the back of Aaron's head and shot him (T 896, 810). Appellant then walked over to Brad and shot him in the back of the head (T 897, 812).

Henderson v. State, 463 So.2d 196 (Fl. 1985), is factually analogous to this case. In Henderson, the defendant argued, as Appellant has here, that the murders were not HAC because the victims died instantaneously from single gunshots to their heads. This Court rejected that argument, finding that the victims

experienced extreme fear and panic before their deaths because they were bound and gagged before they were shot and could see what was happening, i.e., anticipated their fate. Similarly, here, Aaron and Brad had their hands duct-taped behind their backs and were forced to lie face down on the floor, for 20-30 minutes anticipating their fate.

Another factually analogous case is Heynard v. State, 689 So.2d 239 (Fla. 1996). In that case, the defendant and an accomplice abducted a woman, Ms. Lewis, and her two young daughters, ages 3 and 7, from a Winn Dixie parking lot. As the defendant drove them out of town, the young girls were crying and upset and their mother "beseeched Jesus for help, to which defendant replied, 'this ain't Jesus, this is Satan.'" Id. at 242.

Later, defendant stopped the car at a deserted location and both he and his accomplice raped Ms. Lewis on the trunk while her daughters remained in the back seat. When Ms. Lewis tried to grab for the gun, the defendant shouted "you're not going to get the gun, bitch." Id. at 243. Defendant then shot her in the leg and shot her three more times at close range, wounding her in the neck, mouth, and the middle of the forehead between the eyes. Her unconscious body was then pushed off to the side of the road. The assailants got back in the car and drove the girls away as they continued to plead for their mother. The girls were taken to a secluded area and each killed by a single bullet to the head.

Defendant tried to argue that HAC did not apply because each child was killed by a single gunshot and if they were adults, HAC would not be found to apply. This Court rejected that argument finding that the aggravator was present because of the fear and emotional trauma the children suffered during the entire episode which culminated in their deaths. Id. at 254. This Court also rejected defendant's argument that HAC would not be present if the victims were adults, noting that its finding was not based on the fact that the victims were young children. See also Gore v. State, 706 So.2d 1328, 1335 (Fla. 1997) (upheld HAC factor even though victim's "death by gunshot was most likely instantaneous," because the victim experienced terror before her death. She had been abducted, handcuffed, transported to a remote place, tightly bound, and sexually battered, all under threat of death).

Routly v. State, 440 So.2d 1257 (Fla. 1983), is also applicable to this case. In Routly, the victim was bound and gagged while the defendant robbed his home. The defendant then loaded the victim into the trunk his (victim's) car, took him to an isolated place and shot three times. This Court upheld application of the HAC factor on the ground that the victim was subjected to agony and terror knowing that he was going to die.

Finally, even if this Court finds that it was error to apply the HAC factor, it is clear that any error was harmless. The trial court found a total of six (6) aggravating factors in this case and

applied great weight to four (4) of them: (1) that Appellant was previously convicted of a felony and committed the double murders while under sentence of imprisonment (Conditional Release Program); (2) that Appellant has three prior convictions for felonies involving the use or threat of violence to individuals; (3) that the double murders were committed for the purpose of eliminating witnesses; and (4) that the double murders were committed in a cold, calculated and premeditated manner (R 2383-2399).

The trial court gave only moderate weight to the HAC factor and to the fact that the double murders were committed while Appellant was engaged in the commission of armed robberies and armed kidnappings. The trial court found no statutory mitigating factors. Appellant asked for only one--that the double murders were committed while he was under the influence of extreme mental or emotional disturbance-- but that was not established by the evidence. The trial court gave some or minimal weight to the non-statutory mitigators that Appellant was an excellent employee and had helped or ministered to others in the past, but gave very little weight to the other non-statutory mitigators--Appellant's family background, that Appellant was a good father, and Appellant's mental illness. As such, it is clear that the trial court's weighing process would not be different if the HAC factor was eliminated.

POINT X

THE TRIAL COURT'S JURY INSTRUCTION ON VICTIM-IMPACT EVIDENCE WAS CORRECT (Restated).

Appellant failed to preserve his argument, that the trial court's jury instruction on victim-impact evidence was erroneous, for appellate review.⁸ The trial court gave the State's proposed jury instruction, which was taken from the statute and the Windhom and Maxwell cases, reasoning that it accurately recited Florida law (T 1764, 1767). The court instructed the jury as follows:

Now, you have heard the evidence relating to the impact of the victim's death in this case. This evidence should not be considered by you as evidence of an aggravating circumstance or rebuttal of a mitigating circumstance. This evidence may be considered to demonstrate the victim's uniqueness as an individual human being and the resultant loss to the community members by the victim's death. The sentence that you recommend to the Court must be based upon the facts as you find them from the evidence and the law. You should weigh the aggravating circumstances against the mitigating circumstances and your advisory sentence must be based upon these considerations.

(T 1985-86).

Appellant argues that the instruction was erroneous because the "jurors were not told how to factor the victim-impact evidence that they had heard into their sentencing decision" (IB 97). Defense counsel failed to make this objection to the trial court,

⁸ The State notes that the trial judge properly admitted the victim-impact statements, acknowledging that he was obliged to follow Damren v. State, 696 So.2d 709 (Fla. 1997), no matter what his personal feelings about victim impact statements (T 1766).

however, and therefore, appellant cannot make it for the first time on appeal. See Tillman v. State, 471 So.2d 32 (Fla. 1985) (specific legal argument presented on appeal must have been presented to the trial court below); Steinhorst v. State, 412 So.2d 332 (Fla. 1982).

Even if this Court decides to address the merits of Appellant's argument, it lacks merit. This Court rejected a similar argument to essentially the same jury instruction in Kearse v. State, 25 Fla.L.Weekly S507 (Fla. June 29, 2000). In Kearse, the jury was instructed as follows:

Now you have heard evidence that concerns the uniqueness of Danny Parrish as an individual human being and the resultant loss to the community's members by the victim's death. Family members are unique to each other by reason of the relationship and role each has in the family. A loss to the family is a loss to both the community of the family and to the larger community outside the family. While such evidence is not to be considered as establishing either an aggravating or mitigating circumstance, you may still consider it as evidence in the case.

Id. at S511.

Kearse argued, as Appellant has here, that the instruction was vague and did not give the jury adequate guidance in how to consider the victim impact evidence. This Court disagreed, holding that the instruction was proper because it mirrored this Court's explanation of the boundaries of victim impact evidence, set out in Bonifay v. State, 680 So.2d 413 (Fla. 1996), and the language in

the victim impact statute, section 921.141(7), Florida Statute (2000).

The instruction challenged here is essentially the same as the one approved by this Court in Kearse. It tracks the language of Bonifay, Windhom and section 921.141(7), stating that the jury should not consider the victim impact evidence as evidence of an aggravating factor but may consider it as evidence of the victim's uniqueness as an individual human being and the resultant loss to the community members by the victim's death.⁹ Similarly, in Alston v. State, 723 So.2d 148, 160 (Fla. 1998), this Court held that a victim impact jury instruction which stated "[y]ou shall not consider the victim impact evidence as an aggravating circumstance, but the victim impact evidence may be considered by you in making your decision in this matter, to comport with Windhom and Bonifay."

Both Windhom and Bonifay note that must be admitted, not as an aggravator, but to allow the jury to consider "the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death." That is precisely what the jury instruction in this case said.

POINT XI

PROPORTIONALITY

⁹ The State notes that in this case defense counsel apparently offered an alternative victim impact statement but we do not know what it said. It was never read into the record nor were Appellant proposed jury instructions made a part of the record.

The State submits that Appellant's sentence of death is proportional. The trial court found the existence of six (6) aggravating factors in this case and applied great weight to four (4) of them: (1) that Appellant was previously convicted of a felony and committed the double murders while under sentence of imprisonment (Conditional Release Program); (2) that Appellant has three prior convictions for felonies involving the use or threat of violence to individuals; (3) that the double murders were committed for the purpose of eliminating witnesses; and (4) that the double murders were committed in a cold, calculated and premeditated manner (R 2383-2399).

The trial court gave moderate weight to the other two (2) aggravating factors: HAC and that the double murders were committed while Appellant was engaged in the commission of armed robberies and armed kidnappings. The trial court found no statutory mitigating factors and give minimal or little weight to several non-statutory mitigators.

As this Court has repeatedly held, the weighing process is not a numbers game. Rather, when determining whether a death sentence is appropriate, careful consideration should be given to the totality of the circumstances and the weight of the aggravating and mitigating circumstances. Floyd v. State, 569 So.2d 1225, 1233 (Fla. 1990). Here, the evidence established that Appellant and two accomplices robbed the Audio Logic store at gunpoint. The victims,

Aaron and Brad, along with two of the three (3) survivors/eyewitnesses, were made to lie face down on the floor, with their hands duct-taped behind their backs, for 20-30 minutes, while Appellant and his accomplices loaded the store's stereo and electronics equipment into their car.

After loading the merchandise into his car, Appellant told survivor/eyewitness, Ms. Davis, who had been sitting up with her two year-old child on her lap near victim/Aaron, to move out of the way because he didn't want to get anything on her (T 809, 896-97). Appellant then began to leave, but stopped, came back and demanded to know whether Aaron knew him (T 810). Although Aaron replied that he did not, Appellant stated, "man, you do remember me." (T 895). Aaron again stated that he didn't know the Appellant, but the Appellant put the gun to the back of Aaron's head and shot him (T 811). He then walked over to victim/Brad, put the gun to his head and shot him (T 897, 812). Appellant then thanked them all for their cooperation and left saying "have a nice day." (T 898, 812).

To mitigate these senseless murders, Appellant tried to claim that he met the statutory mitigator of committing the crimes while under extreme mental or emotional disturbance. Appellant presented the testimony a mental health expert, Dr. Martha Jacobson, who opined that Appellant had a chronic mental condition characterized by deviate and bizarre thinking. When asked the ultimate question

regarding the statutory mitigating factorotr, however, Dr. Jacobson could not say that Appellant was under the influence of extreme mental or emotional disturbance at the time the capital felony was committed. The mental helath expert called during the *Spencer* hearing, Dr. Michael Walczak, also could not offer an opinion whether Appellant was under the influence of extreme or emotional disturbance at the time of the murders. Consequently, although the trial court allowed the jury to consider evidence of this statutory mitigator, it found it was not established by the evidence (R 2393-94).

Appellant also relied upon five (5) non-statutory mitigators, to which the trial court accorded little or minimal weight: (1) Appellant's family background; (2) Appellant's status as an excellent employee; (3) Appellant's helping and ministering to others; (4) Appellant being a good father; (5) Appellant's mental illness (R 2383-2399).

It is well-established that this Court's function is not to reweigh the facts or the aggravating and mitigating circumstances. Gunsby v. State, 574 So.2d 1085, 1090 (Fla. 1991); cert. denied, 116 L.Ed.2d 102 (1992); Hudson v. State, 538 So.2d 829, 831 (Fla. 1989), cert. denied, 493 U.S. 875 (1990). Rather, as the basis for proportionality review, this Court must accpet, absent demonstrable legal error, the aggravating and mitigating facotrs found by the trial court, and the relative weight accorded them. See State v.

Hnery, 456 So.2d 466 (Fla. 1984). It is upon that basis that this Court determines whether Appellant's sentence is too harsh in light of other decisions based on similar circumstances. Alvord v. State, 322 So.2d 533 (Fla. 1975), cert. denied, 428 U.S. 923 (1976).

The State relies upon Bush v. State, 682 So.2d 85 (Fla. 1996), Alston v. State, 723 So.2d 148, 153 (Fla. 1998), and Knight v. State, 746 So.2d 423 (Fla. 1998), in support of its argument that Rimmer's death sentence is proportionate. Bush involved the robbery of a convenience store and the abduction of the store clerk, who was driven 13 miles away, stabbed and then shot once in the head, execution style. The trial court found only three (3) aggravators--"prior violent felony," "felony-murder," and CCP-- and no mitigators. See also Cave v. State, 727 So.2d 227 (Fla. 1998) (affirming death sentence for Bush's co-defendant in the robbery and murder); Parker v. State, 476 So.2d 134 (Fla. 1985) (same).

In Alston, the victim's car and money were robbed and he was shot twice in the head, execution-style. All of the aggravators in this case, with the exception of committing the murders while under sentence of imprisonment, were present in Alston. Like here, the trial court found no statutory mitigators and gave little or no weight to three (3) of the five (5) non-statutory mitigators. Finally, in Knight, the victims were robbed of \$50,000 and then

shot to death. This Court found Knight's death sentence proportional, relying upon Rolling v. State, 695 So.2d 278 (Fla.) (affirming death sentences for multiple murders despite defendant's significant statutory and nonstatutory mental mitigation, including family's history of mental illness and defendant's physically and mentally abusive childhood), cert. denied, 522 U.S. 984, 118 S.Ct. 448, 139 L.Ed.2d 383 (1997), and Heynard v. State, 689 So.2d 239 (Fla. 1996) (affirming two death sentences despite trial court's finding of both statutory mental mitigators and nonstatutory mitigation involving defendant's stunted emotional level, low intelligence, impoverished upbringing, and dysfunctional family), cert. denied, 522 U.S. 846, 118 S.Ct. 130, 139 L.Ed.2d 80 (1997). See also Jennings v. State, 718 So.2d 144 (Fla. 1998) (affirming death sentence for murders of three (3) employees of Cracker Barrel Restaurant, who were robbed and then had their throats slit; with "felony murder," "avoid arrest/hinder law enforcement," and CCP aggravators, one statutory mitigator-- that Jennings had no significant history of prior criminal behavior and eight (8) nonstatutory mitigators, most of which were given little weight); Hartley v. State, 686 So.2d 1316 (Fla. 1996) (affirming death sentence where drug dealer was robbed and shot four (4) times in the head and where the trial court found "prior violent felony," "felony murder," "avoid arrest," "pecuniary gain," "HAC" and "CCP" aggravators and minimal mitigation); Fennie v. State, 648 So.2d 95

(Fla. 1994) (affirming death sentence where victim was robbed for her car and ATM cards and where the trial judge found "felony murder," "avoid arrest," "pecuniary gain," "HAC," and "CCP" and found a number of nonstatutory mitigating factors but determined that they were not of sufficient weight to preclude the death penalty); Troedel v. State, 462 So.2d 392 (Fla. 1984) (affirming death sentences where the victims were robbed and shot to death in their home and where the trial court found the "felony murder," "avoiding arrest," "pecuniary gain," "HAC," and "CCP" aggravators, no statutory mitigators and give little weight to the nonstatutory mitigators).

CONCLUSION

WHEREFORE based on the foregoing arguments and authorities cited herein, the State respectfully requests this honorable Court to **AFFIRM** Appellant's convictions and sentences.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Answer Brief" has been furnished by U.S. mail, postage prepaid, to: PATRICK C. RASTATTER, Esq., GLASS & RASTATTER, P.A., 524 S. Andrews Ave., Suite 301N, Ft. Lauderdale, Fl. 33301 on December 18, 2000.

