IN THE SUPREME COURT OF FLORIDA

JAMES D. FORD,

Appellant,

vs. **CASE NO. SC95972**

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE TWENTIETH JUDICIAL CIRCUIT,
IN AND FOR CHARLOTTE COUNTY, FLORIDA

ANSWER BRIEF OF THE APPELLEE

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SUMMARY OF THE ARGUMENT

I. The trial court did not err in denying a motion for mistrial during the State's closing guilt phase argument. The prosecutors' remarks were proper comments on the evidence and the weaknesses in the theory of defense. The prosecutors did not use offensive or derogatory terms for defense counsel and did not engage in personal attacks on counsel or the defendant. Any isolated impropriety would clearly be harmless beyond a reasonable doubt.

II. The trial court did not err in denying a motion for mistrial during the testimony of State expert witness Dr. Martin Tracy. The prosecutor's brief, isolated reference to the debris found in Ford's pocketknife as "flesh," was a fair inference from the testimony, which was immediately corrected for the jury, and could not possibly have rendered Ford's trial fundamentally unfair so as to warrant a mistrial.

III. Ford's conviction for child abuse was proper. The omission of the element that Ford was a caregiver for purposes of the neglect charge did not require the court below to grant a post-trial motion to dismiss, since the allegation taken as a whole was sufficient to charge a crime. Furthermore, there was sufficient evidence presented by the State to support this element, since the testimony established that Ford assumed responsibility for baby Maranda by killing her parents in a remote area.

IV. The trial court did not err in denying a motion for mistrial during the State's penalty phase closing argument. No improper comments from the argument have been identified. To the extent that any isolated impropriety may be discerned by taking the remarks out of context, any possible error must be found harmless beyond any reasonable doubt.

V. The trial court did not err in finding and weighing the aggravating circumstance of cold, calculated and premeditated. The trial court's order establishes that the correct rule of law was applied, and the court's findings are supported by substantial, competent evidence. In addition, the existence of three other strong aggravating factors and the limited mitigation offered would render any possible error in the application of this factor to be harmless.

VI. The trial court properly considered the mitigating evidence presented by the defense, and the court's order sufficiently addresses each of the mitigating factors offered. No error with regard to the trial court's treatment of the mitigation in this case has been demonstrated. Furthermore, the death sentences imposed in this case are proportionate to other similar cases where this Court has sustained the death penalty.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED IN DENYING FORD'S MOTIONS FOR MISTRIAL DURING THE STATE'S GUILT PHASE CLOSING ARGUMENT.

Ford's first claim asserts that he is entitled to a new trial due to comments made during the prosecutors' closing arguments. Specifically, Ford has identified three comments which were challenged by defense counsel during the State's initial closing argument, and another comment which was challenged during the State's rebuttal closing argument. The comments are all characterized as improper attacks on Ford's defense attorneys. However, a review of the particular comments in the context of the arguments made and in light of the evidence presented below clearly demonstrates that no new trial is warranted in this case.

The prosecutor's initial closing argument begins on page 3564 of volume 43 of the record on appeal, and comprises forty-eight pages of transcript. The first three disputed comments were all made during the last fifteen pages of the State's initial argument. There is no complaint with regard to the prosecutor's discussions on the elements of the offenses charged, the evidence admitted which incriminated Ford, and the evidence refuting Ford's voluntary intoxication defense. Beginning on page 3595, the prosecutor turned his focus to the defense theory that the police

investigation in this case was flawed. From the very start of the trial, the primary theory of the defense was that the State would not be able to establish guilt because the investigation into these murders was hopelessly inept and therefore no reliable evidence could be presented against Ford. See, V33/2077-2111 (defense opening statement); V33/2124-2132, 2162, 2164, 2236-2242, V34/2298-2302, 2307-2308, V35/2394-2400, 2451, 2460, 2473 (extensive cross examination of state witnesses on integrity of crime scene, accuracy of contamination logs and property receipts, inconsistent testimony about crime scene, etc.).

The prosecutor's comments were directed at keeping the jury focused on the evidence itself, and not getting sidetracked on details of the investigation which did not affect the value of the evidence that had been presented. He admitted that no investigation was ever perfect, but he encouraged jurors

> to assess the evidence as you saw it come in and not second guess whether something might have been done differently or better to accumulate more evidence against the Defendant. The issue is: What evidence do we have against the defendant?

(V43/3595-96). In that vein, he noted the phrase "the best defense is a good offense" and stated

> in this case, a lot of the questions that relate to numbers and evidence logs and that sort of thing, the defense has very aggressively mounted an offense to show that in some way this investigation wasn't a perfect investigation. I'm telling you it

> wasn't perfect. That's quite true.
>
> But the issue is: Does the evidence that you have convince you beyond a reasonable doubt that the Defendant committed these crimes, not whether more could have been done or done differently. And in court a good offense does not cancel the truth.

(V43/3596). Defense counsel objected and the trial court cautioned the prosecutor "to make sure that the burden remain with the State and that the argument is consistent with the burden" (V43/3597).

No error has been presented in this ruling. As this Court has repeatedly recognized, attorneys are permitted wide latitude in their closing arguments. See, Thomas v. State, 748 So. 2d 970, 984 (Fla. 1999); Breedlove v. State, 413 So. 2d 1, 8 (Fla.), cert. denied, 459 U.S. 882 (1982). Counsel may advance any legitimate argument. The prosecutor's explaining why the jury should reject the theory of defense in this case was not presented in a derogatory manner or with inflammatory labels; it was a proper argument as to why jury should not be swayed by the defense that the investigation was flawed. A prosecutor is clearly entitled to offer the jury his view of the evidence presented. Shellito v. State, 701 So. 2d 837, 841 (Fla. 1997) (no error where prosecutor referred to defendant's mother as "either an extremely distraught concerned mother or ... a blatant liar" since statement was fair comment on testimony and permissible as to prosecutor's view of the evidence), cert. denied, 523 U.S. 1084 (1998).

Shortly after the first incident, the prosecutor was still discussing the evidence of clerical errors on the property receipts, and noted that the evidence logs had not been "filled out as meticulously as they could have" (V43/3598). He went on to note that, over the course of the trial, "There were a number of individuals, number of attorneys, myself, Mr. Deifik [another prosecutor], Mr. Sullivan [defense counsel], for example, that got the numbers confused" (V43/3598). The prosecutor was interrupted with an objection when he then started to point out that Mr. Sullivan had mistakenly referred to the Fort Myers FDLE crime lab when it was actually the Tampa crime lab that received some evidence.[1] Defense counsel contended that this was a highly improper personal attack and moved for a mistrial, which the trial court denied, noting that the argument was being made to illustrate a point. Still, the judge advised the prosecutor that it was not appropriate to use defense counsel as an example and sustained the objection (V43/3600).

Once again, no error has been demonstrated with regard to the trial court's ruling. The prosecutor was merely remarking on how easily anyone could get confused over the number and types of exhibits involved in a trial of this nature. He included himself

[1]During the trial, the prosecutor had corrected defense counsel's misstatement as to location of the crime lab (V33/2246-49, 2252).

and another prosecutor in noting the commonality of this problem. And in defense counsel's closing argument, as he repeatedly identified mistakes that had been made by the state witnesses, he acknowledged over and over that he himself made similar mistakes; that such errors were to be expected from anyone (V43/3616, 3620, 3621, 3623, 3624). Since, as the trial judge found, the prosecutor only noted defense counsel's misstatement for illustrative purposes and not to be critical or demeaning of counsel's performance, no improper argument has been identified.

The final concern with the State's initial argument involves the prosecutor's discussion of the probative value of the DNA evidence. The DNA evidence in this case was extensive, and the State's DNA experts were aggressively cross examined by the defense (V39/3033 - V40/3127; V40/3181-3197; V40/3267-3289; V41/3366-3396). The prosecutor was suggesting to the jury that they should not discount all of the DNA evidence simply because they may not understand the intricacies of the technical, scientific details involved. He noted that we all rely on scientific devices every day although we may not fully comprehend the particular technology employed (V43/3609). He offered the comparisons of driving a car or using a telephone, and stated, "Can't you just hear a defense attorney questioning Alexander Graham Bell," to which defense counsel objected as another personal attack and moved for a

mistrial (V43/3610). The court sustained the objection, but when defense counsel asked for a curative instruction, the judge noted that there had only been three references to counsel in over an hour of argument, and denied the mistrial and instruction (V43/3610). When the prosecutor thereafter rephrased his comment to imagining "someone" questioning Alexander Graham Bell, no further objection was offered (V43/3611).

Once again, no improper argument has been presented. None of the comments in the prosecutor's initial argument were critical or derogatory to defense counsel. Although the prosecutor commented on defense counsel's tactics, he did so in a way that did not "attack" counsel but merely showed why the jury should not be persuaded by the defense's position. There is clearly a difference between talking about the actions that defense counsel has employed in order to convince the jury that the issues raised by those actions do not affect the strength of the State's case, and talking about defense actions in a manner which is demeaning or critical of the particular defense or defense attorney. Since the comments in this case involved the former rather than the latter, the prosecutor's comments were not improper.

Ford's attack on the State's rebuttal argument, presented by a different prosecutor, is similarly unpersuasive. During defense counsel's closing argument, he shrewdly discussed the evidence in

a manner which arguably misconstrued the testimony that had actually been presented. For example, he noted that Jerry Tolini's testimony that Kim Malnory had been face-up on the ground meant that someone had turned the body over, since everyone else testified that Kim was face-down, but in fact Tolini testified that, although his notes indicated he thought Kim was face-up, he was not in a good position to see her since he was looking through the truck and she was positioned out the other side (V33/2165; V43/3649). Similarly, counsel stated that Ford's pocketknife could not have been used to cut Greg Malnory's throat because the medical examiner had testified that Greg's neck wound was a chopping force wound (V43/3661). In fact, Dr. Borges had stated that, while many of the injuries to Kim and Greg were sharp force, chopping wounds, and while Greg's neck wound was a sharp force wound, that it was not necessarily a chopping wound; he expressly acknowledged that Greg's neck injury could have been made with a knife (V35/2420, 2443-44, 2471).

In the same manner, defense counsel had discussed the DNA evidence taken from Ford's knife, and suggested that Greg's DNA could have gotten on the knife because the farm employees ate lunch together, may have passed the knife around, and since DNA can be transferred by such things as shaking hands, Greg's DNA could have been placed on the knife that way (V43/3635-36). The problem with

this argument is that it ignores the testimony that Greg's DNA was found in debris deep inside the knife, where the blade folds inside (V39/3000-02). It was this particular argument that the prosecutor was addressing in his rebuttal comments when he remarked that defense counsel sometimes started out talking about one thing, but cleverly shifted to something else, "sort of a bait and switch legal argument" (V43/3674-75). Defense counsel's objection of prosecutorial misconduct and an improper personal attack were sustained, and although the trial judge denied the motion for mistrial, she thereafter instructed the jury "to disregard the argument of the State in reference to conduct or actions of defense counsel" and instead "focus on the evidence in this case" (V43/3677).

No reversible error has been demonstrated with regard to this remark because any possible impropriety was clearly cured by the court's instruction to disregard the prosecutor's comments. Thomas, 748 So. 2d at 984 (possible prejudice minimized by court's admonishing prosecutor to avoid personalizing the closing argument and instructing jury to disregard prosecutor's statement). Thus, any possible error must be deemed harmless. A new trial is only required in those cases where "it is reasonably evident that the remarks may have influenced the jury to reach a more severe verdict of guilt than it would have otherwise done." 748 So. 2d at 984.

That standard has not been met on the facts of this case, where eyewitnesses placed Ford at the scene around the time of the crimes and strong scientific evidence clearly established Ford's guilt.

Ford's brief on this issue cites only three cases, none of which can reasonably be considered as factually comparable. He has not cited any case in which this Court reversed a conviction due to an improper guilt phase argument by the prosecutor. In Brooks v. State, 25 Fla. L. Weekly S417 (Fla. May 25, 2000), this Court reversed for a new penalty phase proceeding due to repeated, egregious comments during the prosecutor's closing argument which were highly inflammatory, repeatedly noting the defendants' longstanding, deep-seated, vicious, brutal violence; telling the jury to show the defendants the same mercy that the defendants had shown the victim; telling the jury that the State only sought the death penalty in cases where the appropriate weighing test had been made; and misstating the law regarding the jury recommendation and aggravating circumstances. Obviously none of these improprieties have been presented in this issue. As to the prosecutor's personal attack on defense counsel, which is the claim made by Ford, this Court found that the trial court abused its discretion in overruling defense objections to the prosecutor's comments suggesting that "these two criminal defense lawyers" were unworthy of belief, as demonstrated by the fact that they had stood up at

the beginning and end of the guilt phase trial, “looked you straight in the eye” and said that the defendants were not guilty. While this Court found that this personal attack on counsel was not as egregious as many noted in other cases, it could not be considered harmless in light of the other numerous, overlapping improprieties and the jury’s recommendation by the slimmest of margins, seven to five.

Similarly, in Gore v. State, 719 So. 2d 1197 (Fla. 1998), the State not only made repeated improper comments but had presented inadmissible, highly inflammatory evidence about Gore’s having had sex with a young child and suggesting that Gore had murdered three women. Gore is an extreme example of egregious misconduct which permeated the prosecutor’s cross examination of Gore and culminated in the prosecutor telling the jury they must convict Gore if they did not believe his testimony. The prosecutor also engaged in vituperative characterizations of Gore. Once again, the challenged comments in the instant case are not even arguably close to the conduct described by this Court in Gore.

In Garron v. State, 528 So. 2d 353 (Fla. 1988), this Court reversed convictions after the prosecutor elicited testimony about Garron’s post-arrest invocation of rights; improper testimony from a State rebuttal witness on Garron’s sanity was admitted; the cross examination of defense expert testimony impermissibly discredited

insanity as a legal defense; and improper collateral crime evidence that Garron had engaged in sexual misconduct with his stepdaughters had been admitted. This Court also condemned several aspects of the prosecutor's penalty phase closing argument, including several Golden Rule violations, comments suggesting that the State has already determined the appropriate sentence and that jurors had a sworn duty to return a death recommendation, and misstatements of law. The particular claim in Ford's case that the prosecutor's comments impugned the integrity of defense counsel was not present in Garron.

Other recent cases demonstrate that this Court has routinely denied relief on comments more egregious than those challenged in this case. Compare, Knight v. State, 746 So. 2d 423, 433 (Fla. 1998) (improper comments about the value of defendant's and victims' lives not egregious enough to warrant voiding the entire proceeding); Chandler v. State, 702 So. 2d 186, 201 (Fla. 1997) (prosecutor's comments that Chandler and his counsel were thoughtless and petty, that counsel engaged in "cowardly" and "despicable" conduct and Chandler was "malevolent" were not so prejudicial as to vitiate the entire trial), cert. denied, 523 U.S. 1083 (1998); Crump v. State, 622 So. 2d 963, 971 (Fla. 1993) (prosecutor's characterization of defense as "'octopus' clouding the water in order to 'slither away,'" even if preserved for

review, not so outrageous as to taint jury's finding of guilt or recommendation of death).

The record presented herein does not support any claim that the prosecutors engaged in improper personal attacks on the integrity of the defense attorneys, the defendant, or the theory of defense in this case. Ford's position appears to be that any time a prosecutor discusses the weaknesses in a defense case, he is unfairly criticizing defense counsel. To the extent that any isolated, inappropriate comment could be identified in the prosecutors' statements, it could not possibly rise to the level of affecting the verdict given the overwhelming evidence of Ford's guilt. Clearly, on the facts of this case, no reversible error has been demonstrated with regard to the State's closing guilt phase arguments. No relief is warranted on this issue.

ISSUE II

WHETHER THE TRIAL COURT ERRED IN DENYING FORD'S MOTION FOR MISTRIAL DURING THE STATE'S QUESTIONING OF DNA EXPERT WITNESS.

Ford next contends that a prosecutor's question during the direct examination of Dr. Martin Tracy required the court below to grant a mistrial. Dr. Tracy was one of five experts on DNA presented by the State to provide the bases and implications of the scientific evidence presented against Ford. Dr. Tracy is an expert in population genetics and molecular genetics and, upon reviewing the genetic profiles, determined that the probabilities of finding another individual with the same six test profiles would be one in 94,000 on Ford's profile, one in 17,000 on Greg Malnory's profile, and one in 797 on Kim Malnory's profile (V41/3326-27).

Toward the end of Dr. Tracy's direct examination, the prosecutor asked him about DNA results on the knife found in Ford's residence. Dr. Robyn Ragsdale had previously testified that she had examined the knife and obtained DNA results from two areas, finding blood which matched Ford's DNA on the blade of the knife, and finding "a piece of debris" down inside the knife, where the blade would fold in, which matched Greg's DNA (V39/3000-02). The prosecutor was referring back to this testimony in questioning Dr. Tracy: "Sir, drawing your attention to the item that is referred to as State's Exhibit 93-4 identified as extracted DNA from the flesh taken from the pocket knife seized from the –-," when defense

counsel objected, noting that the debris had not been identified as flesh (V41/3352). The trial court sustained the objection, but denied the motion for mistrial, and thereafter agreed to a curative instruction as requested by the defense, telling the jury:

> All right. At this time the Court will direct the jury to disregard any reference to the word flesh that was used in the question that was just posed. The Court will now direct counsel to direct the witness' attention to the results of the analysis from the debris that had been located on the knife.

(V41/3353-54). Dr. Tracy then testified that he had reviewed Michael DeGuglielmo's analysis of the debris from the pocket knife and compared it with the results from Greg's dried bloodstain card, concluding that the chance of randomly locating another person in the population with the same genetic profile at the 12 markers noted would be, conservatively, one in 1.3 trillion (V41/3354).

Ford's contention that a new trial is warranted due to the prosecutor's use of the word "flesh" is without merit. A motion for mistrial should only be granted when an error has occurred which is so prejudicial as to vitiate the fundamental fairness of the entire trial. Duest v. State, 462 So. 2d 446 (Fla. 1985). Although Ford suggests that the prosecutor was improperly commenting on matters outside of the evidence, it is not an unreasonable inference from the testimony that the debris containing DNA was some type of bodily material. Particularly when coupled with the trial court's instruction to disregard the word

"flesh," this isolated comment by the prosecutor could not possibly have required a mistrial.

Ford's reliance on Pope v. Wainwright, 496 So. 2d 798, 803 (Fla. 1986), cert. denied, 480 U.S. 951 (1987), and Huff v. State, 437 So. 2d 1087 (Fla. 1983), does not compel a new trial. In Pope, the Court rejected a plea for relief based on a prosecutor's improper comments about the defendant's demeanor off the witness stand. In Huff, this Court reversed based on a prosecutor's implication, in closing argument, that the defendant had forged his deceased father's name to a guarantee agreement, where there had been no evidence of any forgery. Neither of these cases is comparable to the issue presented herein, where one word by the prosecutor is alleged to have precluded the fundamental fairness of Ford's trial.

On these facts, any error in the asking of this question must be deemed harmless beyond any reasonable doubt. See, Jackson v. State, 522 So. 2d 802 (Fla.) (any impropriety in state questioning defense witness about having been arrested and charged with homicide did not warrant mistrial), cert. denied, 488 U.S. 871 (1988). There was substantial evidence presented below that Ford savagely raped Kim Malnory, and brutally murdered Kim and Greg, before leaving baby Maranda stranded in her car seat for an extended period of time. Neither the sufficiency of the evidence to support the murder convictions nor the finding of heinousness

have been challenged in this appeal. Clearly, the prosecutor's isolated reference to Greg's "flesh" having been found deep within Ford's pocket knife did not contribute to the jury verdicts in this case. No relief is warranted on this issue.

ISSUE III

WHETHER FORD'S CONVICTION FOR CHILD ABUSE MUST BE VACATED.

Ford's next issue challenges the validity of his conviction for child abuse. Ford contends that the indictment against him failed to allege the crime of child abuse or neglect because it did not include the essential element that Ford was a caregiver or owed a duty of care to Maranda Malnory; he also claims that the evidence below was insufficient to establish this element. Once again, a review of the record on appeal refutes Ford's argument on this issue.

Count IX of the indictment returned against Ford specifically cited to Section 827.03, Florida Statutes, and alleged that on or about April 6, 1997, James Dennis Ford "did unlawfully and willingly deprive a child, to wit: MARANDA MALNORY, or did allow said child to be deprived of, necessary food, clothing, shelter, or medical treatment, or did knowingly inflict or permit the infliction of physical or mental injury to said child" (V1/13-15). No pretrial motion to dismiss was filed; however, Ford filed a motion to dismiss this charge in open court *after* the State rested its case in chief against him (V11/2013-18; V42/3433-58).

Because Ford did not challenge the sufficiency of the indictment prior to trial, the question now presented is whether or not the allegations completely failed to charge a crime. DuBoise v. State, 520 So. 2d 260 (Fla. 1988). In DuBoise, this Court

rejected a claim similar to the one presented in the instant case. The trial court in DuBoise had granted a post-trial motion for arrest of judgment upon finding that DuBoise's conviction for sexual battery had not been properly charged in the indictment. Although this Court agreed that the element of using actual physical force had not been alleged, such deficiency did not render the indictment fundamentally flawed since the particular statutory section was cited. This Court noted that a charging document which may be subject to dismissal prior to trial can withstand a post-trial attack:

> For example, the failure to include an essential element of a crime does not necessarily render an indictment so defective that it will not support a judgment of conviction when the indictment references a specific section of the criminal code which sufficiently details all the elements of the offense.

520 So. 2d at 265. Thus, even if a particular statutory element is not expressly stated in the indictment, the charge will be sufficient as long as the correct statute, wherein the element may be found, is cited. See also, Garcia v. State, 492 So. 2d 360 (Fla.) (defendant's pretrial motion to dismiss improperly granted where, although the element of premeditation was not specifically alleged, the indictment alleged attempted first-degree murder in violation of Section 782.04, Florida Statutes), cert. denied, 479 U.S. 1022 (1986); State v. Wimberly, 459 So. 2d 456 (Fla. 5th DCA 1984) (reversing relief that had been granted by the circuit court,

sitting in its appellate capacity, which had found that information referring to "notice against trespass," and citing to Section 810.09 was fundamentally defective).

Ford's reliance on State v. Gray, 435 So. 2d 816, 818 (Fla. 1983), is misplaced because Gray is distinguishable on this point. In Gray, the district court had ruled that the statute was only constitutional if a judicially created element of scienter was imposed; since this element was not charged in the indictment or detailed in the particular statute cited, the district court found the indictment to be fundamentally defective. This Court reversed, holding that scienter was not required to uphold the statute, but agreed with the general proposition that an information which completely fails to charge a crime may be challenged at any time.

Ford also complains that his indictment heading cited the crime as "child abuse" rather than the "child neglect" which was thereafter charged and proven. While such a defect may have been found if Ford had moved to dismiss the indictment prior to trial, any defect in this regard was waived by the lack of a pretrial objection. Williams v. State, 547 So. 2d 710, 711 (Fla. 2d DCA 1989) (defect in information charging sale of cocaine as third degree felony when defendant was convicted of second degree felony was waived since the body of the information sufficiently advised the defendant that he was charged with a second degree felony).

Thus, although the language of the child abuse charge in this

case did not specifically include an allegation that Ford was a caregiver or had assumed a duty of care toward Maranda, such omission was not fatal to the indictment since the particular statute involved was provided. Therefore, the trial court did not err in permitting the child abuse charge to be submitted to the jury.

Ford also argues that his conviction for child abuse must be vacated because the evidence below was insufficient to establish that he was a caregiver or owed any duty of care to Maranda. This issue presents a factual question which was resolved by the jury against Ford, and the jury's verdict is supported by competent, substantial evidence. There is no dispute that Ford, having killed both of Maranda's parents, left her strapped in her car seat in an open pickup truck in a remote wooded area, where she was not discovered for nearly twenty-four hours. Maranda was dehydrated, flushed from the heat, and had numerous insect bites as a result of having been left at the scene.

A "caregiver" is defined by statute to include anyone "responsible for the child's welfare." § 827.01(1), Fla. Stat. Clearly, by killing the parents of an eighteen-month-old baby in an isolated location, Ford assumed responsibility for the child's welfare.

The jury in this case was instructed:

> Before you can find the Defendant guilty of child abuse, the State must prove the

> following elements beyond a reasonable doubt: A –- number one, James Dennis Ford knowingly and willfully inflicted physical or mental injury upon Maranda Malnory; and, two, James Dennis Ford had assumed responsibility fo rthe temporary or permanent care and maintenance of Maranda Malnory. Three, Maranda Malnory was under the age of 18 years or B, number one, James Dennis Ford knowingly and willfully failed to provide Maranda Malnory with food, clothing, shelter, or medical treatment; and, two, the food, clothing, shelter, or medical treatment were necessary to maintain the physical and mental health of Maranda Malnory; and, three, a prudent person would consider the food, clothing, shelter or medical treatment were essential for the well-being of Maranda Malnory; and, four, James Dennis Ford had assumed responsibility for the temporary or permanent care and maintenance of Maranda Malnory; and, five, Maranda Malnory was under the age of 18 years.

(V43/3699-3700).[2]

The evidence presented below supports the jury's verdict of guilty on this charge. Ford admits that leaving Maranda unattended "was a by-product of what happened at the sod farm," (Appellant's Initial Brief, p. 41-42), but claims he could not be convicted because there was no proof of deliberate harm. However, no such proof is necessary to sustain a conviction for child neglect. On these facts, Ford's conviction for child [abuse] must be affirmed.

[2]This instruction, crafted by defense counsel and accepted by the State and the trial judge (V43/3543-45), added an element that Ford was a caregiver to the first alternative of child abuse, although the statute does not impose this element.

ISSUE IV

WHETHER FORD IS ENTITLED TO A NEW SENTENCING PROCEEDING DUE TO THE STATE'S PENALTY PHASE CLOSING ARGUMENT.

The remainder of Ford's claims dispute the imposition of his death sentence. His initial penalty phase claim asserts that statements by the prosecutor during the State's closing argument require that a new sentencing proceeding be conducted. Ford specifically challenges four areas addressed by the prosecutor: the remark that justice requires the punishment to "fit the crime;" the comments that Ford had "no excuse" for his actions and that the support he had from family and friends made the crime worse; the reference to sympathy; and the suggestion that Ford was not remorseful. As will be seen, however, Ford has again failed to demonstrate that he is entitled to any relief in this issue.

The prosecutor opened his remarks to the jury by stating:

> Ladies and gentlemen, there is one common thread that runs throughout our criminal law that is absolutely essential for those laws to truly produce justice. And that is that people must be held accountable for their actions; that is, punishment must fit the crime.

(V50/4579). The trial court's overruling of the defense objection to this statement was correct. Although Ford claims that this statement told jurors to limit their consideration of mitigating evidence, that claim is not supported when the prosecutor's closing argument is considered in its totality. Clearly, the State never

suggested that the jurors should not consider the extensive evidence about Ford's background and character in determining the appropriate sentence to recommend. In fact, the prosecutor followed his opening comment with the statement that "This penalty phase of the trial is intended to examine the nature of the crime and any mitigating circumstances to determine what penalty will justly hold the defendant accountable for his actions; that is, what punishment truly fits the crime when compared to the mitigation that you have heard" (V50/3581).

The prosecutor specifically addressed the mitigating evidence which had been presented, including testimony from family and friends about Ford's good deeds, his alcohol use, his low intelligence, his medical problems, his childhood -- and discussed why they did not outweigh the aggravating factors in this case (V50/4587-89, 4592, 4599, 4604-05). Hitchcock v. State, 25 Fla. L. Weekly S239 (Fla. March 23, 2000), cited by Ford, is easily distinguishable. In that case, the prosecutor told the jury that the defendant's poverty and living circumstances were "not mitigating in this case, at all, because they don't give us any understanding of why he did what he did." The comment in this case that the punishment should fit the crime did not encourage the jury to ignore any particular mitigating evidence, and therefore the reliance on Hitchcock is misplaced.

Furthermore, even if any similarity with Hitchcock is

discerned, the comments herein would be harmless just as they were in that case. In finding the remarks to be harmless in Hitchcock, this Court noted that the prosecutor also discussed the proper role of mitigation, that thirteen witnesses had discussed Hitchcock's deprivation and background, and that the trial judge had found and weighed this mitigation. These factors are all present in this case as well.

Additionally, in the instant case, the judge did not simply instruct the jury to consider the statutory mitigator of any aspect of Ford's character, record, or background; rather, she specifically advised them that relevant mitigation could include "devoted son, loyal friend, learning disabled, mild organic brain impairment, developmental age of defendant, family alcoholism, chronic alcoholism, diabetic, excellent jail record and conduct, self-improvement, lack of intervention as a child, emotionally impaired at the time of the crime, mentally impaired at the time of the crime, ability to conform conduct impaired at the time of the crime, not a sociopath, psychopath, not antisocial, and life sentences without release" (V50/4683). Thus, there is no reasonable possibility that the prosecutor's comments could have tainted the strong jury recommendations of eleven to one or the sentences of death imposed in this case.

As to the prosecutor's comment that Ford had "no excuse" for his actions, and that having the support of his family and friends

"In a lot of ways makes the crime itself that he committed worse," no reversible error has been shown. Similar comments were rejected as a basis for relief in Moore v. State, 701 So. 2d 545, 551 (Fla. 1997), cert. denied, 523 U.S. 1083 (1998). In Moore, the prosecutor acknowledged the mitigation that had been presented by family and friends that had loved Moore, had nurtured him, had watched him doing well in school, and playing football; and then stated "it may sound like mitigation, but to me it's the most –- well, I would submit to you that it's the most aggravating factor of all." The defense attorney had objected in Moore and made the same argument presented herein, that the prosecutor had tried to turn mitigation into aggravating factors, but this Court rejected the claim, holding that the trial court did not abuse its discretion in overruling the objection, and noting that the comments were not "of such a nature as to taint the jury's recommendation of death." Of course, as in Moore, the trial judge in this case instructed the jury repeatedly that closing arguments were not to be considered as evidence or as instructions on the law (V50/4579, 4608-09, 4620).

Ford's complaint regarding the prosecutor's remarks about sympathy is also without merit. In Davis v. State, 698 So. 2d 1182, 1192 (Fla. 1997), cert. denied, 522 U.S. 1127 (1998), this Court rejected the claim "that the prosecutor improperly misled the jurors into believing that they should not be swayed by any

sympathy." Although Ford also relies on Hitchcock for his claim of error with regard to the prosecutor telling the jury not to be swayed by sympathy, this Court's opinion in Hitchcock did not specifically address the comments in that case on sympathy. When the prosecutor below advised the jury not to consider sympathy, the defense objection that the comments were "integrating our mitigation evidence" and not proper was overruled (V50/4590-91). Curiously, although the defense now complains about the prosecutor's comments on sympathy, defense counsel below also advised the jury that they were not asking for sympathy, and that "Sympathy doesn't play a role in this" (V50/4647).

Finally, Ford's concern with the prosecutor's comments about Ford's lack of remorse is without merit. Ford's brief asserts that he did not present remorse as a mitigator, and did not adduce testimony that Ford was remorseful (Appellant's Initial Brief, p. 47). These assertions are serious misstatements of the record. In questioning defense witness Dr. William Mosman, defense counsel asked him to summarize his clinical opinions about Ford (V48/4285). Dr. Mosman went on to identify a number of mitigating factors, including that "There is, from a clinical point of view, remorse" (V48/4292). Mosman went on to testify that Ford was deeply saddened and hurt by the murders, and had feelings about them; he also noted, in explaining why Ford should not be diagnosed as antisocial, that an antisocial person has a lack of remorse, and in

this case “We find the exact opposite” (V48/4296).

The prosecutor discussed testimony about remorse for about a page in the transcript before defense counsel asked to approach the bench. The judge indicated that she thought the prosecutor was commenting on the weight of the expert’s testimony, and was supported by the evidence (V50/4607-08). Defense counsel agreed, “And I have no problem with that,” but stated he did not want the prosecutor characterizing remorse as a mitigator that had not been proven (V50/4608). The judge granted the defense request to instruct the jury to disregard the prosecutor’s comment and also reminded the jurors that attorney arguments “are not to be considered by you during your deliberations” (V50/4609).

Clearly the State cannot argue lack of remorse as an aggravating factor, but where, as here, the defense presents testimony that the defendant had remorse, such testimony is properly subject to prosecutorial comment. In addition, any possible impropriety in these comments was cured by the trial court’s immediate remarks to the jury. Thomas, 748 So. 2d at 984. Once again, no error has been demonstrated.

When the prosecutor’s argument in this case is compared with those discussed in recent decisions from this Court on the bounds of proper prosecutorial argument, the lack of merit to the instant claim is evident. Compare, Ruiz v. State, 743 So. 2d 1, 8-9 (Fla. 1999) (prosecutors obtained conviction and sentence in number of

improper ways, including invoking power and resources of the State; demeaning and ridiculing the defendant; characterizing the defendant as archetypical liar and then equating truth with justice and justice with a conviction; and by appealing to jurors' raw emotions); Urbin v. State, 714 So. 2d 411, 419 (Fla. 1998) (noting number of improper penalty phase arguments, including injecting elements of fear and emotion into deliberations; inviting jurors to disregard the law; suggesting that a vote for life would be irresponsible and a violation of jurors' sworn duty; violating the Golden Rule and offering speculative interpretation of the facts; making personal attacks on mother of defendant; telling the jury to show the defendant the same mercy that he showed the victim; and urging the jury to send a message to the community). The comments challenged by Ford in this case stand in stark contrast to those repeatedly condemned by this Court in other cases.

Thus, when each of the allegations of prosecutorial misconduct from the State's penalty phase argument are considered, no error has been demonstrated. Any impropriety in any of the challenged remarks discussed in this issue could not have affected the ultimate result. This Court has denied relief in a number of cases with comments more questionable that those presented herein, with death sentences imposed on less aggravating and involving more mitigation, and a closer jury recommendation for death. See, Reese v. State, 694 So. 2d 678, 685 (Fla. 1997) (no error in prosecutor's

use of story about a “cute little puppy” that “grew into a vicious dog”); Jackson v. State, 704 So. 2d 500, 507 (Fla. 1997) (no error in claim that prosecutor encouraged juror to send law and order message to the community); Walker v. State, 707 So. 2d 300, 316 (Fla. 1997) (prosecutor’s comments impugning defense counsel, referring to expert witnesses as hired guns, and violating Golden Rule were harmless); Bertolotti v. State, 476 So. 2d 130, 133 (Fla. 1985) (prosecutor’s impermissible comments on right to silence, Golden Rule violation, and appeal to emotions and fears of jury were harmless). Relief must be denied in this case as well.

ISSUE V

WHETHER THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON THE COLD, CALCULATED AND PREMEDITATED AGGRAVATING FACTOR AND APPLYING THIS FACTOR TO FORD.

Ford next challenges the applicability of the cold, calculated and premeditated factor found below. In considering such a claim, this Court's function is to review the record to determine whether the trial court applied the right rule of law in finding an aggravating circumstance and, if so, whether competent substantial evidence supports its finding. Willacy v. State, 696 So. 2d 693, 695-96 (Fla.), cert. denied, 522 U.S. 970 (1997). In the instant case, the trial court's findings are supported by competent substantial evidence and the right rule of law was applied. Accordingly, this Court must affirm the lower court's application of the CCP aggravating factor. Willacy, 696 So. 2d at 695-96 (division of labor between trial and appellate courts is essential to "promote the uniform application of aggravating circumstances in reaching the individualized decision required by law"); see also, Lawrence v. State, 691 So. 2d 1068, 1075 (Fla.)(even if some evidence existed supporting defendant's theory that he shot the store clerk because she angered him, the trial judge was not required to reject aggravator where there was competent, substantial evidence to support it), cert. denied, 522 U.S. 880 (1997); Orme v. State, 677 So. 2d 258, 262 (Fla. 1996) (duty on appeal is to review the record in the light most favorable to the

prevailing theory and to sustain that theory if it is supported by competent, substantial evidence), cert. denied, 519 U.S. 1079 (1997); Occhicone v. State, 570 So. 2d 902, 905 (Fla. 1990)(court will not substitute its judgment for that of the trial court when there is a legal basis to support finding an aggravating factor), cert. denied, 500 U.S. 938 (1991).

In finding CCP, the court below noted that Ford had learned that the Malnory's had planned a family outing and insinuated himself into the situation by inviting himself along (V15/2719). This is a reasonable inference from the testimony that Greg Malnory had asked for and received permission to be on the farm with his wife and child that Sunday; that Ford had not been mentioned by Greg and had not himself received permission as farm policy required; and that Ford appeared with Greg when they arrived at Mr. Griffin's home that morning (V36/2566-67, V42/3459-60). The court also noted that Ford had asked Griffin if Griffin had any bullets for a .22 caliber rifle, and when Griffin responded that he did not, Ford stated that he had four, and that would be enough (V15/2719). This is consistent with the testimony Griffin provided (V42/3467-68). Simply because Ford can now identify, through counsel, another possible innocent explanation for his comments does not mean that the court below was required to interpret the evidence in the manner he suggests. The court's finding that Ford chose the location and lured the victims to a remote site is

supported by the testimony that Ford had arranged to meet the Malnorys at the farm and thereafter led them, driving his truck ahead of theirs, to the crime scene (V36/2482-85; V42/3465-66).

The court also noted that Ford had consumed alcohol (contrary to Ford's suggestion that the court did not consider this fact in finding this factor), but that Greg and Kim had not consumed alcohol or drugs, which is both supported by the record (V35/2470), and reasonable to consider in determining whether the victims' behavior may have contributed to Ford committing these crimes reactively or impulsively. The court below also noted that there was no evidence to support the defense argument against this factor that the crime scene suggested a frenzied killing (V15/2719). In fact, the only thing Ford really offers to negate this factor is his use of alcohol at the time, but the testimony of witnesses that actually observed Ford consume alcohol was very limited and the evidence as to any signs of impairment was conflicting, even on the expert testimony (V36/2509-10, 2577, 2614, 2624; V42/3461-65, 3473-75; V48/4346-49; V49/4414, 4424).

Additionally, the court's finding that Ford was required to take the time to reload the single-shot, bolt-action .22 rifle is established by the trial testimony (V15/2719; V37/2650-53). Ford's concern with the trial court's reliance on the reloading of the weapon to support this factor is unwarranted. As Ford notes, this clearly applies to the second victim, but it is also significant

that Ford not only reloaded the rifle, but with each victim used another separate lethal weapon in addition to the rifle. Although this Court has held that the time for reflection involved in reloading a weapon is insufficient, in and of itself, to establish this factor, it is certainly an aspect of the crime which demonstrates reflection and should be considered in determining whether the totality of the circumstances establish the factor.

Based on all of these facts, the court below concluded that Ford "formed the intent to commit these crimes many hours before the afternoon of April 6, 1997," and held that the deliberateness with which the crimes were carried out, Ford's actions before the crimes and the coolness with which he conducted himself prior to the offenses "plainly indicate to the Court that the cold, calculated and premeditated aggravating circumstance was proven beyond a reasonable doubt" (V15/2720). This conclusion must be affirmed on appeal.

In accordance with case law, the State must establish four elements to prove the CCP factor: the murder was the product of cool, calm reflection rather than prompted by frenzy or a fit of rage; the murder must be the product of a careful plan or prearranged design; there must be "heightened" premeditation; and there must be no pretense of moral or legal justification. Lott v. State, 695 So.2d 1239, 1245 (Fla.), cert. denied, 522 U.S. 986 (1997); Jackson v. State, 648 So.2d 85, 89 (Fla. 1994). All of

these factors are reflected in the court's findings outlined above, and therefore the correct law was applied below. In this case, the evidence demonstrated that Greg was shot in the back of the head as he took a picture of his family, since Greg's blood was found on the camera in the Malnory's truck (V39/2961-62). There is a notable absence of any indication of resistance, provocation, or mental disturbance that might trigger an emotional frenzy. The ruthlessness of the attacks on both victims illustrates that Ford was cool and calm, and that the killings were carried out as a matter of course. The evidence that Greg Malnory had plans for a family picnic which did not include Ford when he obtained permission to come to the farm and fish, and then Ford appearing with the Malnorys that Sunday morning, indicate actions pursuant to a plan. Bringing the rifle, knife, and another murder weapon to the scene, and using at least two weapons separately on each victim, also support the heightened premeditation found below. No pretense of justification has been asserted, and there is absolutely no evidence of any possible justification in this record.

Thus, the judge's findings are supported by the evidence, and the correct standard of law was applied, compelling affirmance of the use of this aggravator. Willacy, 696 So. 2d at 695; Walls v. State, 641 So. 2d 381 (Fla. 1994) (outlining four elements which must be proven to establish this factor), cert. denied, 513 U.S.

1130 (1995). In Bell v. State, 699 So. 2d 674, 677 (Fla. 1997), cert. denied, 522 U.S. 1123 (1998), this Court noted that CCP may be proven by facts such as the advance procurement of the murder weapon, the lack of resistance or provocation, and the appearance of a killing carried out as a matter of course. See also, Stein v. State, 632 So. 2d 1361, 1366 (Fla. 1994); Thompson v. State, 648 So. 2d 692, 696 (Fla. 1994); Swafford v. State, 533 So.2d 270, 277 (Fla. 1988).

The finding of CCP in this case is consistent with decisions from this Court on the applicability of that factor, even if Ford's plan to kill Greg and Kim was not formed until after they arrived at the farm, since the facts outlined above demonstrate sufficient reflection at the scene to support this factor. Compare, Knight v. State, 746 So. 2d 423, 436 (Fla. 1998) ("Even if Knight did not make the final decision to execute the two victims until sometime during his lengthy journey to his final destination, that journey provided an abundance of time for Knight to coldly and calmly decide to kill"); Walls, 641 So. 2d at 388 (CCP established by nature of the murder, where victim was killed in mobile home after hearing defendant kill her boyfriend and being terrorized by defendant); Lockhart v. State, 655 So. 2d 69, 73 (Fla. 1995) (prolonged nature of torture murder demonstrated that killing did not occur on the spur of the moment, supporting CCP); Jones v. State, 690 So. 2d 568, 571-72 (Fla. 1996) (execution-style killing

of daughter to eliminate witness to subsequent robbery was CCP).

The cases cited by Ford where this Court has reversed a finding of CCP are all clearly distinguishable. In Hamilton v. State, 678 So. 2d 1228 (Fla. 1996), the defendant shot his wife and stepson during a domestic quarrel. Although Ford claims that Hamilton requires the State to prove motive in order for this factor to apply, this is not correct as a blanket statement of law -- but even if it were, the motive in this case is evident from Kim's rape. Almeida v. State, 748 So. 2d 922 (Fla. 1999), involved an unquestionably drunk, severely mentally disturbed defendant that made a statement indicating that he had killed the victim impulsively. Although Ford also claims to have been drunk and mentally deficient, the trial court properly rejected these claims factually, at least to the extent that they were found to exist in Almeida. Geralds v. State, 601 So. 2d 1157, 1163 (Fla. 1992), presented the case of an unplanned killing in the course of a planned murder. The instant case is not one where the State or the trial court relied on plans to commit a felony as the sole basis to establish a plan to kill the Malnorys.

Finally, it must be noted that any error in the finding of this aggravating factor must be deemed harmless. Given the three other strong aggravators of heinous, atrocious and cruel (the validity of which is not even challenged in this appeal), committed during the course of a sexual battery, and prior violent felony

conviction, and the lack of significant mitigation, there is no reasonable possibility that Ford's sentences would have been any different had this factor been rejected below. Compare, Geralds v. State, 674 So. 2d 96 (Fla.) (this Court struck CCP, leaving aggravating factors of heinous, atrocious and cruel and committed during course of burglary; mitigation of 22 years old; love of family; bipolar manic personality), cert. denied, 519 U.S. 891 (1996); Barwick v. State, 660 So. 2d 685 (Fla. 1995) (improper finding of CCP harmless where five aggravating factors remained), cert. denied, 516 U.S. 1097 (1996). In Rogers v. State, 511 So. 2d 526, 535 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988), this Court affirmed the death sentence after striking three of the five aggravating factors found by the trial court, including cold, calculated and premeditated. In doing so, this Court noted that the reversal of a sentence is only warranted when the correction of errors could reasonably result in a different sentence. There is no reasonable likelihood of a different sentence in this case, even without consideration of the cold, calculated and premeditated factor.

Ford's suggestion that a new sentencing proceeding is mandated by Bonifay v. State, 626 So. 2d 1310 (Fla. 1993), and Omelus v. State, 584 So. 2d 563, 566 (Fla. 1991), if this Court rejects this factor, is unavailing. Bonifay and Omelus simply concluded that harmless error could not be found on the facts of those cases, as

this Court could not determine what affect the improper instructions on heinous, atrocious or cruel may have had on the sentencing process. Since there is no possibility that permitting the jury below to consider CCP could have improperly tainted the strong eleven to one recommendations returned below, for the reasons outlined above demonstrating the harmlessness of any possible error even if this Court reverses the trial court's application of this factor, no new sentencing proceeding is required.

For all of these reasons, Ford is not entitled to any relief on this issue.

ISSUE VI

WHETHER THE TRIAL COURT ERRED IN FAILING TO PROPERLY CONSIDER AND WEIGH MITIGATION.

Ford's last issue challenges the trial judge's findings with regard to the proposed mitigation. Specifically, he claims that the trial court improperly rejected the statutory mental mitigators, his learning disability and developmental age, his diabetes, his organic brain damage, and the alternative life sentences as mitigating circumstances. A review of all of the evidence presented below and the sentencing order establishes that this claim is without merit.

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

Ford primarily takes issue with the trial court's rejection of the statutory mental mitigating factors. Ford claims that, because

Dr. Mosman testified expressly that Ford was under the influence of an extreme disturbance, the court was required to find and weigh this factor. To the contrary, this Court has repeatedly recognized that a trial judge may reject expert testimony, particularly when it is refuted by other evidence presented. Knight, 746 So. 2d at 436 (noting even uncontroverted expert testimony can be rejected, especially when it is difficult to reconcile with other evidence); Walls, 641 So. 2d at 388; Foster v. State, 679 So. 2d 747, 755 (Fla. 1996), cert. denied, 520 U.S. 1122 (1997).

Ford's argument on the rejection of this factor offers particular complaints about the trial court's written findings without actually discussing the testimony of an extreme disturbance presented below. The sum total of the testimony addressing the presence of this particular factor was offered by Dr. Mosman:

> There is very strong evidence to the extent that I'm going to indicate to you that it is well within a reasonable doubt of clinical certainty that at the time the crime happened Mr. Ford was under the influence of extreme mental and also extreme emotional disturbance.
>
> I didn't tell you he was crazy or insane. I said extreme mental and emotional disturbance, very far out of the ordinary, very alien and different from the normal way of functioning.

(V48/4286-87). The actual "disturbance" is never particularly identified, but is apparently to be presumed from Ford's chronic alcoholism and mental shortcomings. To this end, it is significant that the court below weighed both the alcoholism and Ford's

"mental" age in mitigation (V15/2727-28).

In addition, as the court below noted, Dr. Mosman's conclusions were premised on facts which were contradicted by other testimony, including testimony from other defense witnesses. For example, although Dr. Mosman testified that he had "no clinical doubt" that Ford had been abused and neglected as a child, many witnesses universally rejected such a childhood (V48/4288). Similarly, Mosman opined that Ford's actions in this case were heavily influenced by his alcohol consumption and assumed that Ford had two drinks of whiskey and 12 to 20 beers; yet the only direct evidence of consumption on the day of the murders was Griffin's testimony that Ford arrived at his house with a beer and then had two mixed drinks, and Zuniga's testimony that Ford had a beer, both prior to the murders. In addition, witnesses that observed Ford at the farm prior to the murders testified that Ford was able to walk and talk clearly and showed no signs of intoxication (V36/2509-10, 2577). Furthermore, there was substantial evidence that, although Ford had a problem with alcohol for many years, it never caused him to be violent.

Where, as here, opinion testimony relies on facts which are not supported by the evidence, its weight is properly diminished. Walls, 641 So. 2d at 388; Gudinas v. State, 693 So. 2d 953, 967 (Fla.) (affirming rejection of expert testimony on statutory mental mitigators where expert's opinion was heavily based on unsupported

facts), cert. denied, 522 U.S. 936 (1997). And although Ford also claims that the trial judge failed to consider Dr. Greer's testimony in her rejection of the extreme disturbance factor, Dr. Greer never testified that the factor was present, so this claim is without merit.

The rejection of the second statutory mental mitigator of substantial impairment was also well within the trial court's discretion. The evidence to support this factor comes from the testimony of Dr. Greer. Dr. Greer testified that, although he could not say that Ford committed these crimes during an alcoholic blackout, this was a likely possibility because the medical factors which could result in a blackout were present, and there was no other explanation for why these murders occurred (V49/4404, 4408, 4424). The trial court primarily rejected the suggestion of a blackout based on the testimony that, the following day, Ford spontaneously explained that he had left his rifle with the Malnorys, and if he did not recall the murder and throwing the rifle in the creek, he would have no reason to volunteer this false explanation (V15/2726). Dr. Greer had expressly testified that if Ford had spontaneously volunteered the information about the gun in order to cover his tracks, this "would be counter-indicative of a blackout" (V49/4464). Thus, Keith Worley's testimony about Ford's statement on the rifle is sufficient to support the trial court's rejection of this factor (V36/2517).

In addition, as previously noted, the trial court did specifically find that there was evidence to support Ford's claim of drinking on the day of the murders, and did weigh his chronic alcoholism in mitigation (V15/2727-28). Dr. Greer accepted, as had Dr. Mosman, that Ford had whiskey and 18 to 24 beers that day, despite the evidence outlined previously to rebut his claim of impairment, and despite the fact that Ford himself had told Greer that he had consumed 12 to 18 beers (V49/4420, 4424).

Ford's challenge to the trial court's rejection of some of the nonstatutory mitigation is similarly without merit. As to the rejection of Ford's learning disability and developmental age of 14, he disputes the court's ability to find these mitigating circumstances to exist, but afford them no weight. In Trease v. State, 25 Fla. L. Weekly S622, S623 (Fla. August 17, 2000), this Court receded from Campbell "to the extent that it disallows trial courts from according no weight to a mitigating factor." Thus, the trial judge was free to determine that these factors, which do not in any way appear to have been responsible for the commission of these crimes, were not mitigating in this case. Furthermore, again, as previously noted, the court weighed Ford's mental age under the statutory factor of age (V15/2727).

The court's determinations that Ford's diabetes was not mitigating in this case and that his alcoholism was only entitled to very little weight must also be sustained. This Court has

repeatedly recognized, the relative weight to be assigned any aggravating or mitigating circumstance is within the broad discretion of the trial judge. Blanco v. State, 706 So. 2d 7, 10 (Fla. 1997), cert. denied, 525 U.S. 837 (1998); Cole v. State, 701 So. 2d 845, 852 (Fla. 1997), cert. denied, 523 U.S. 1051 (1998); Bell v. State, 699 So. 2d 674, 678 (Fla. 1997), cert. denied, 522 U.S. 1123 (1998); Campbell, 571 So. 2d at 420. Although Dr. Greer testified that Ford's diabetes may have played a role in the apparent alcoholic blackout, the court's rejection of a blackout itself was within its discretion, as previously explained.

As to the mitigator of organic brain damage, the court was again not bound to accept Dr. Mosman's suggestion that some possible brain damage was present. Dr. Mosman testified that some of his psychological testing provided indications of possible brain damage, which could present mental processing difficulties and explain Ford's learning disability (V48/4304-05). Mosman was not aware of any medical tests, such as PET or CAT scans, to verify the existence of any possible damage (V48/4323). Given the speculative nature of Mosman's testimony about any damage, and the lack of any nexus between possible damage and the commission of these crimes, the court's rejection of this factor must be upheld.

Finally, Ford contests the trial court's rejection of the alternative sentences of life for these murders as mitigating. Although clearly a defense attorney must be permitted to argue such

a factor, and the jury cannot be precluded from considering it, there is no basis in law to support this claim that an alternative life sentence is a valid mitigating circumstance. Certainly the fact that the legislature has determined other harsh consequences for first degree murder when a death sentence is not imposed in no way ameliorates the defendant's guilt, or reduces his moral culpability for his crimes. As this Court noted in Walker v. State, 707 So. 2d 300, 315 (Fla. 1997), all that state and federal caselaw requires on this factor is the opportunity to argue potential parole ineligibility to the jury as a mitigating factor. Since Ford was provided that opportunity, no error has been demonstrated in the rejection of this factor.

As a general rule, a trial court's rejection of mitigation after a proper inquiry and comprehensive analysis of the evidence will not be disturbed on appeal. Knight, 746 So. 2d at 436. The trial court's single-spaced, eighteen page order in this case extensively discusses all of the judge's findings with regard to each mitigating factor proposed by the defense (V15/2715-32). A fair review of that order clearly refutes Ford's claim that the court below did not properly consider the mitigating evidence he presented.

Finally, even if this Court reaches a different conclusion with regard to the trial court's rejection of any of this mitigation, there is no reason to remand this cause for

resentencing since it is clear that any further consideration would not result in the imposition of life sentences. Despite rejecting some of the mitigation proposed by Ford, the trial court did weigh the following factors in mitigation: Ford had no substantial criminal history; Ford's *mental* age at the time of the crimes; Ford was a devoted son and a loyal friend; Ford's chronic alcoholism; Ford's excellent jail record and jail conduct; Ford's self-improvement while in jail; and the lack of intervention by the school system when Ford was a child (V15/2722-2729). Any error relating to the sentencing court's failure to articulate additional details about the further mitigation offered is clearly harmless since the mitigation cannot offset the strong aggravating factors found. Therefore, this Court should affirm the sentence as imposed. Thomas v. State, 693 So. 2d 951, 953 (Fla. 1997); Lawrence v. State, 691 So. 2d 1068, 1076 (Fla.), cert. denied, 522 U.S. 880 (1997); Barwick, 660 So. 2d at 696; Armstrong v. State, 642 So. 2d 730 (Fla. 1994), cert. denied, 514 U.S. 1085 (1995); Wickham v. State, 593 So. 2d 191, 194 (Fla. 1991), cert. denied, 505 U.S. 1209 (1992); Cook v. State, 581 So. 2d 141, 144 (Fla.) ("we are convinced beyond a reasonable doubt that the judge still would have imposed the sentence of death even if the sentencing order had contained findings that each of these nonstatutory mitigating circumstances had been proven"), cert. denied, 502 U.S. 890 (1991).

Although Ford does not dispute the proportionality of his death sentences, this Court must still conduct a proportionality review. Trease, 25 Fla. L. Weekly at S623; Jennings v. State, 718 So. 2d 144, 154 (Fla. 1997). Of course, a proportionality determination does not turn on the existence and number of aggravating and mitigating factors, but this Court must weigh the nature and quality of the factors as compared with other death cases. Kramer v. State, 619 So. 2d 274, 277 (Fla. 1993). The purpose of a proportionality review is to compare the case to similar defendants, facts and sentences. Tillman v. State, 591 So. 2d 167, 169 (Fla. 1991). When factually similar cases are compared to the instant case, the proportionality of Ford's sentence is evident.

The court below found four aggravating circumstances: (1) during the course of a sexual battery, (2) prior violent felony conviction, (3) heinous, atrocious or cruel, and (4) cold, calculated, and premeditated. The only mitigating circumstances were no significant criminal history, the defendant's mental age, and the "catch-all" background factors. The jury recommended death for both murders by votes of 11 to 1 (V13/357-58, V50/4691-92).

A review of factually similar cases supports the imposition of the death sentences herein. See, Knight, 746 So. 2d at 437 (double murder during robbery, despite extensive but rejected mental health evidence); Rolling v. State, 695 So. 2d 278 (Fla.) (affirming

multiple murders despite significant statutory and nonstatutory mental mitigation and abusive childhood), cert. denied, 522 U.S. 984 (1997); Jimenez v. State, 703 So. 2d 437 (Fla. 1997)(elderly woman beaten and stabbed during burglary, statutory mitigator of substantial impairment applied); Lawrence v. State, 698 So. 2d 1219 (Fla. 1997) (affirming sentence despite learning disability, low IQ, influence of alcohol, and lack of violent history); Henyard v. State, 689 So. 2d 239 (Fla. 1996) (affirming two death sentences despite both statutory mental mitigators, low intelligence, impoverished upbringing, and dysfunctional family), cert. denied, 522 U.S. 846 (1997); Foster, 679 So. 2d at 756; Walls, 641 So. 2d at 392; Brown v. State, 565 So. 2d 304 (Fla.) (death sentence for murder committed during the course of burglary was proportionate where there were two aggravating factors balanced against the mental mitigators), cert. denied, 498 U.S. 992 (1990).

The evidence presented in the instant case established that Ford shot, stabbed and cut the Malnorys during the course of a sexual battery on Kim. Balanced against this heinous crime was a laundry list of character traits and aspects of the crime which Ford urged as mitigating evidence. This evidence was completely unremarkable and properly afforded minimal weight. Based on the foregoing, this Court must find that Ford's sentences are proportionate, and reject Ford's plea for resentencing in this issue.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

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