IN THE SUPREME COURT OF FLORIDA

ORIGINAL

ANTHONY BANKS,

Petitioner,

vs.

CASE NO. SC00-1161
(L. T. #4D98-4175)

STATE OF FLORIDA,

Respondent.
_____/

PETITIONER'S BRIEF ON JURISDICTION

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit

MARCY K. ALLEN
Assistant Public Defender
Criminal Justice Building
421 Third Street, 6th Floor
West Palm Beach, Florida 33401
(561) 355-7600
Florida Bar No. 332161

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PRELIMINARY STATEMENT

Petitioner was the defendant and Respondent was the prosecution in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit In and For Broward County. The following symbol will be used:

A = Appendix

CERTIFICATE OF FONT

Counsel for Petitioner hereby certifies that the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately.

STATEMENT OF THE CASE AND FACTS

Petitioner was charged with delivery of cocaine. The facts were set forth in the opinion of the District Court as follows:

> Detective Roaden testified that she was working undercover and standing at a pay phone at a gas station when a car approached. Banks was the driver and Jeffrey Goodman was the passenger. Roaden was under surveillance by two other detectives located in a parked car. Goodman shouted for Roaden to come over to the car; Roaden complied and stood at the passenger window.
>
> Goodman asked Roaden why she was waiting, and Roaden replied that she was waiting for a friend with some money. Goodman asked her what she needed. Before answering, Roaden asked Goodman if Banks "was straight up." Roaden explained to the jury that this is street parlance for someone who is "with the game plan or part of the business, or not the cops,

wouldn't be susceptible to snitch out on you...." Goodman replied that Banks "was cool, he was okay, that he was with him." Shortly thereafter, Roaden stated that she was looking to purchase a fifty-cent piece, street parlance for fifty dollars worth of crack cocaine. Roaden stated that at that time, she was leaning into the car through the front passenger window, and Banks was looking at her. Goodman told Roaden there was no problem and asked when her friend would arrive with the money.

Roaden went to make a telephone call. When she returned to the car, Goodman pointed out a police surveillance vehicle. Roaden told them that if they were uncomfortable, they could go somewhere else to do the deal. Roaden said that her friend would bring the money and that if it was okay with them (Banks and Goodman), she would meet them in an alleyway. Goodman said, "Okay, no problem, and that he would be back and meet me there." Banks then drove the car away.

Roaden went to the alleyway, and Banks drove up ten or fifteen minutes later with Goodman, again, in the passenger seat. They pulled up to Roaden, who stood at the passenger side of the car. Roaden testified that

> Mr. Goodman said that he knew that I was straight up, that I was okay, **and that him and Mr. Banks had had a discussion while they were gone about the undercover vehicle being across the street at the Amoco and that if they saw that vehicle again, then they would know that I was either the cops or a snitch or trying to set them up... [emphasis in original]**

Goodman asked Roaden if she had the money; she answered yes and asked him if he had obtained

> the cocaine. Goodman replied affirmatively, then showed her the cocaine rock. Roaden handed Goodman fifty dollars. Roaden also asked the two men if she could get another piece the same size in about an hour, and Goodman replied "no problem." The conversation and transaction occurred while Banks silently listened and observed. Goodman did not testify.
>
> During closing, the state argued:
>
> > A car drives up to her driven by Mr. Banks. He's present when...Mr. Goodman...starts talking about what is Roaden there for, and **Roaden says to Goodman is he okay. Goodman says, yeah, he's cool, he's straight up.**
> >
> > **Do you know what that means?** [emphasis in original].

Banks v. State, 25 Fla. L. Weekly D417 (Fla. 4th DCA Feb. 16, 2000). Petitioner was found guilty, convicted and sentenced.

On direct appeal to the Fourth District Court of Appeal, Petitioner argued, as he did below, that it was error to permit the officer to testify to statements made to her by Goodman because these statements were inadmissible hearsay. The District Court of Appeal determined that the statements were verbal acts despite the state's use of the statements to prove the truth of the matter asserted therein and affirmed the conviction.

Petitioner's motion for rehearing or rehearing *en banc* was denied on April 26, 2000. Notice of invocation of discretionary

review was filed on May 24, 2000.

SUMMARY OF ARGUMENT

The decision of the Fourth District Court of Appeal Banks v. State, 25 Fla. L. Weekly D 417 (Fla. 4th DCA Feb. 16, 2000) directly and expressly conflicts with the decisions of this Court of two related fronts. First, contrary to this court's holding in Breedlove v. State, 413 So. 2d 1 (Fla. 1982), the Fourth District held that despite the prosecution's reliance upon an out of court statement made by a non-testifying declarant to prove the truth of the matter asserted therein, the statement was admissible as a verbal act. Second, contrary to this Court's holding in Consalvo v. State, 697 So. 2d 805, 813 (Fla. 1996), the Fourth District held that a statement which is admitted for a limited purpose may be relied upon by the prosecution as substantive evidence of guilt. This Court should thus, exercise its discretion to review the Banks decision.

ARGUMENT

THIS COURT HAS JURISDICTION OVER THE INSTANT DECISION OF THE FOURTH DISTRICT ON THE BASIS OF DIRECT AND EXPRESS CONFLICT WITH DECISIONS OF THIS COURT.

Article V, Section 3(b)(3) of the Constitution of Florida empowers this Court to review a decision of a district court of appeal which expressly and directly conflicts with a decision of this Court. The Florida Star v. B.J.F., 530 So. 2d 286, 288 (Fla. 1988). Here, the decision of the Fourth District Court of Appeal directly and expressly conflicts with the decisions of this Court of two related fronts. First, contrary to this Court's holding in Breedlove v. State, 413 So. 2d 1 (Fla. 1982) (A-3-12), the Fourth District held that despite the prosecution's reliance upon an out of court statement made by a non-testifying declarant to prove the truth of the matter asserted therein, the statement is admissible as a verbal act. Banks v. State, 25 Fla. L. Weekly D 417 (Fla. 4th DCA Feb. 16, 2000) (A-1-2). Second, contrary to this Court's holding in Consalvo v. State, 697 So. 2d 805, 813 (Fla. 1996)(A-13-28), the Fourth District held that a statement which is admitted for a limited purpose may be relied upon by the prosecution as substantive evidence of guilt. Banks v. State, 25 Fla. L. Weekly at D418.

At bar, Petitioner was charged as an aider and abettor with

delivery of cocaine. The Fourth District Court of Appeal determined that the undercover police officer's account of a conversation that she had with Jeffrey Goodman, the actual seller and a passenger in a vehicle driven by Petitioner, was admissible as a "verbal act." The District Court rejected Petitioner's contention that where the testimony was offered to prove the truth of the matter asserted as evidenced by the prosecutor's use of the evidence in closing argument, it was inadmissible hearsay. The appellate court held:

> We recognize that Goodman's statement to the effect that Banks was part of the deal may be viewed as offered for the truth of the matter asserted, particularly in view of the state's closing argument. However, a statement's inadmissibility for one purpose does not preclude its admissibility for another. See Breedlove v. State, 413 So. 2d 1 (Fla. 1982).
>
> To prove its case against Banks as a principal, the state was required to show that Banks did some act to assist Goodman in the commission of the crime; mere knowledge or presence at the scene are insufficient to establish participation. See Staten v. State, 519 So. 2d 622 (Fla. 1988). Assistance consists of engaging in some act that assists the co-perpetrator in committing the crime. See T.B. v. State, 732 So. 2d 1163 (Fla. 1st DCA 1999). The act of control of the vehicle in driving to and from the scene of the buy with knowledge of what was occurring is proof of Banks' assistance in the drug deal.
>
> Banks' intent and active assistance is evidenced by Goodman's statements, with Banks looking on, which set up the deal and Banks' response by driving them to the location

> indicated for the transaction to take place. As the statement was properly admitted as a verbal act, the state's creative use of the admissible testimony in its argument does not impact upon the issue of admissibility.

25 Fla. L. Weekly at D418.

The Fourth District's citation to Breedlove v. State, 413 So. 2d 1 (Fla. 1982) in the first paragraph quoted above, for the proposition that "a statement's inadmissibility for one purpose does not preclude its admissibility for another." is an incomplete statement of the Breedlove holding. The Breedlove decision actually reads:

> Merely because a statement is not admissible for one purpose does not mean it is inadmissible for another purpose. Hunt v. Seaboard Coast Line Railroad Co., 327 So.2d 193 (Fla. 1976); Williams v. State, 338 So.2d 251 (Fla. 3d DCA 1976). The hearsay objection is unavailing when the inquiry is **not** directed to the truth of the words spoken, but, rather, to whether they were in fact spoken. Id. (Emphasis added.)

413 So. 2d at 6. It therefore follows that where, as in the instant case, the inquiry is directed to the truth of the words spoken and **not** whether the words were in fact spoken, the hearsay objection **is** availing.

In Breedlove, certain statements were admissible to show their effect on the defendant rather than to prove the truth of the matter asserted. At the time the statement was admitted, the trial

court gave a proper limiting instruction. However, the prosecutor's reliance upon the out-of-court statements to prove the truth of the matter asserted therein constituted improper closing argument.

Here, even if that part of the officer's conversation with Goodman which set up the transaction was admissible as a verbal act under Decile v. State, 516 So. 2d 1139 (Fla. 4th DCA 1987), Goodman's statements to the officer which established Petitioner's participation and which were emphasized in the appellate court's decision were unrelated to the terms of the transaction. They were not introduced to prove the nature of the transaction and were not admissible as a verbal act. Rather, they were introduced solely to establish the truth of the matter asserted: Petitioner's participation in the crime. Therefore, based on Breedlove and contrary to the decision of the District Court, where the words are introduced to prove their truth, i.e., Petitioner's participation in the crime, rather than as a verbal act i.e. to establish the transaction, the hearsay objection is availing.

This conclusion comports with the policy underlying the hearsay rule. Goodman, the individual who linked Petitioner to the crime, was not a witness. He was not subject to the jury's scrutiny nor was he subject to cross-examination. Instead, the

jury was permitted to rely upon his out-of-court statement to prove Petitioner's guilt. The hearsay rule was designed to prevent this very situation. Breedlove v. State, 413 So. 2d at 6.

Assuming arguendo, the entire out-of-court conversation with a non-testifying witness was admissible as a verbal act, contrary to Banks opinion, it was error to allow the state to rely upon the testimony as evidence of appellant's participation in the crime during closing argument. This Court has held that where evidence is admitted for one purpose, it may not be used for other purposes. Consalvo v. State, 697 So. 2d 805, 813 (Fla. 1996) states:

> Appellant also claims that the State improperly argued the collateral burglary as similar fact evidence in closing argument to the jury. Under section 90.107, Florida Statutes (1995), evidence that is admissible for one purpose may be inadmissible for another purpose. See Parsons v. Motor Homes of America, Inc., 465 So.2d 1285, 1290 (Fla. 1st DCA 1985). Consequently, **it is error to take the position that once material "is received in evidence, it will be received for any probative value it may have on any issues before the court." Id.**
>
> .... . **The State's claim that it was simply arguing facts elicited during the trial and drawing legitimate inferences from them is not availing. The State's use of the facts from the Walker burglary exceeded the scope for which they were admitted**--i.e., to establish the entire context out of which the criminal action occurred. (Emphasis added.)

Accord, Bolin v. State, 736 So. 2d 1160, 1166 (Fla. 1999)(A

prosecutor cannot use as substantive evidence statements admitted under the guise of impeachment evidence.)

The decision of the Fourth District which approves using out-of-court statements of a non-testifying witness to prove the truth of the matter asserted therein as well as evidence of limited admissibility for any purpose is thus, in direct and express conflict with principles of law stated in Consalvo and Breedlove. Based upon this direct and express conflict on a matter of law, this Court should exercise its discretion to review the decision of the Fourth District Court of Appeal in Banks v. State, 25 Fla. L. Weekly at D417.

CONCLUSION

Because there is express and direct conflict, this Court should exercise its discretion to review the instant case.

Respectfully Submitted,

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit

MARCY K. ALLEN
Assistant Public Defender
421 Third Street, 6th Floor
West Palm Beach, Florida 33401
(561) 355-7600
Florida Bar No. 332161

IN THE SUPREME COURT OF FLORIDA

ANTHONY BANKS,

Petitioner,

vs.

CASE NO.
(L. T. #4D98-4175)

STATE OF FLORIDA,

Respondent.
_____/

APPENDIX TO

PETITIONER'S BRIEF ON JURISDICTION

INDEX

Appellant committed the crimes in this case on December 13, 1996. Thus, these charges fell outside the *Salters* window period and appellant does not have standing to raise the single subject rule challenge. On this issue we certify conflict with the second district in *Thompson*.

AFFIRMED. (STONE and POLEN, JJ., concur.)

[1]Section 810.02(1), Florida Statutes (1999), contains identical language to section 810.02, Florida Statutes (Supp. 1996).

[2]On the dealing in stolen property and grand theft counts, appellant was sentenced as an habitual violent offender.

* * *

Criminal law—Delivery of cocaine—Evidence—Statements made to undercover officer by co-perpetrator during transaction to the effect that defendant was "cool" and that he and defendant were concerned about whether undercover officer was a snitch were "verbal acts" not offered to prove the truth of the matter asserted and, accordingly, were not hearsay—No error in permitting undercover officer to testify concerning co-perpetrator's statements—Prosecutor's reference to statements in closing argument had no impact on issue of admissibility—In order to convict defendant as principal, state was required to show that defendant did some act to assist co-perpetrator in commission of crime—Intent and active assistance were evidenced by co-perpetrator's statements, with defendant looking on, which set up drug deal with undercover officer, and defendant's response by driving co-perpetrator to the location indicated for the transaction to take place

ANTHONY BANKS, Appellant, v. STATE OF FLORIDA, Appellee. 4th District. Case No. 4D98-4175. Opinion filed February 16, 2000. Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Sheldon Schapiro, Judge; L.T. Case No. 98-10238 CF. Counsel: Richard L. Jorandby, Public Defender, and Marcy K. Allen, Assistant Public Defender, West Palm Beach, for appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Ettie Feistmann, Assistant Attorney General, West Palm Beach, for appellee.

(STONE, J.) We affirm Banks' conviction for delivery of cocaine. It was not error to allow a police officer to testify to certain out-of-court statements of a co-perpetrator made in the course of the offense.

Detective Roaden testified that she was working undercover and standing at a pay phone at a gas station when a car approached. Banks was the driver and Jeffrey Goodman was the passenger. Roaden was under surveillance by two other detectives located in a parked car. Goodman shouted for Roaden to come over to the car; Roaden complied and stood at the passenger window.

Goodman asked Roaden why she was waiting, and Roaden replied that she was waiting for a friend with some money. Goodman asked her what she needed. Before answering, Roaden asked Goodman if Banks "was straight up." Roaden explained to the jury that this is street parlance for someone who is "with the game plan or part of the business, or not the cops, wouldn't be susceptible to snitch out on you...." Goodman replied that Banks "was cool, he was okay, that he was with him." Shortly thereafter, Roaden stated that she was looking to purchase a fifty-cent piece, street parlance for fifty dollars worth of crack cocaine. Roaden stated that at that time, she was leaning into the car through the front passenger window, and Banks was looking at her. Goodman told Roaden there was no problem and asked when her friend would arrive with the money.

Roaden went to make a telephone call. When she returned to the car, Goodman pointed out a police surveillance vehicle. Roaden told them that if they were uncomfortable, they could go somewhere else to do the deal. Roaden said that her friend would bring the money and that if it was okay with them (Banks and Goodman), she would meet them in an alleyway. Goodman said, "Okay, no problem, and that he would be back and meet me there." Banks then drove the car away.

Roaden went to the alleyway, and Banks drove up ten or fifteen minutes later with Goodman, again, in the passenger seat. They pulled up to Roaden, who stood at the passenger side of the car. Roaden testified that

> Mr. Goodman said that he knew that I was straight up, that I was okay, *and that him and Mr. Banks had had a discussion while they were gone about the undercover vehicle being across the street at the Amoco and that if they saw that vehicle again, then they would know that I was either the cops or a snitch or trying to set them up...* (emphasis added)

Goodman asked Roaden if she had the money; she answered yes and asked him if he had obtained the cocaine. Goodman replied affirmatively, then showed her the cocaine rock. Roaden handed Goodman fifty dollars. Roaden also asked the two men if she could get another piece the same size in about an hour, and Goodman replied "no problem." The conversation and transaction occurred while Banks silently listened and observed. Goodman did not testify.

During closing, the state argued:

> A car drives up to her driven by Mr. Banks. He's present when...Mr. Goodman...starts talking about what is Roaden there for, and *Roaden says to Goodman is he okay. Goodman says, yeah, he's cool, he's straight up.*
>
> *Do you know what that means?* (emphasis added).

Banks contends on appeal that the statements made by Goodman were inadmissible hearsay. We conclude, however, that Goodman's statements during the transaction, including his comments to the effect that Banks was "cool" and that he and Banks were concerned about whether Roaden was a snitch, were "verbal acts" not offered to prove the truth of the matter asserted and, therefore, not hearsay.

In *Chacon v. State*, 102 So. 2d 578 (Fla. 1957), our supreme court held that a police officer who had conducted a raid on a gambling establishment was permitted to testify as to the statements made by individuals who phoned in during the raid to place bets. The court explained that the callers' statements were simply not hearsay as they were not offered for the truth of "any particular fact that may have been stated," but rather were evidence of a " 'verbal fact' going to prove the nature of the illegal business being conducted in the establishment." *Id.* at 591.

In *Decile v. State*, 516 So. 2d 1139 (Fla. 4th DCA 1987), a police officer electronically monitored a conversation between a confidential informant and the defendant wherein the informant told the defendant, "I am here, I need eight," and the defendant replied, "no problem, come inside, I get you rocks." At trial, the informant did not testify, but the police officer did. On appeal we held, following *Chacon*, that the police officer's testimony as to statements he heard the confidential informant make to the defendant were admissible as "verbal acts," which "served to prove the nature of the act as opposed to proving the truth of the alleged statements." *Id.* at 1140. In simpler terms, it was not important whether the informant actually "needed eight," what was significant was Decile's verbal and non-verbal response and conduct after hearing that statement.

In *Stevens v. State*, 642 So. 2d 828 (Fla. 2d DCA 1994), which is materially indistinguishable from the case at hand, an undercover police officer had a conversation with a man named Hill who asked him what he was looking for. The police officer responded that he was looking for a dime ($10 worth of cocaine). After some discussion regarding the type and price, Hill stated that there was no problem. The police officer then testified that Hill walked away and met up with Stevens; at that point the police officer heard Hill yell out to Stevens, "I need a dime." The police officer then stated he saw Stevens reach in his pocket, grab several baggies, give one to Hill, and put the rest back in his pocket. The court, citing *Decile*, held that Hill's statements to both the police officer and to Stevens were admissible as proof of the crime and Stevens' response thereto, not for the truth of any matter asserted. Similarly, in this case, Goodman's statements made in Banks presence, which Banks clearly heard and acted upon by driving to and from the scene of the buy, were verbal acts offered to prove the fact of the crime and Banks' participation therein. *See also State v. McPhadder*, 452 So. 2d 1017 (Fla. 1st DCA 1984).

We recognize that Goodman's statement to the effect that Banks was part of the deal may be viewed as offered for the truth of the matter asserted, particularly in view of the state's closing argument. However, a statement's inadmissibility for one purpose does not preclude its admissibility for another. *See Breedlove v. State,* 413 So. 2d 1 (Fla. 1982).

To prove its case against Banks as a principal, the state was required to show that Banks did some act to assist Goodman in the commission of the crime; mere knowledge or presence at the scene are insufficient to establish participation. See *Staten v. State,* 519 So. 2d 622 (Fla. 1988). Assistance consists of engaging in some act that assists the co-perpetrator in committing the crime. See *T.B. v. State,* 732 So. 2d 1163 (Fla. 1st DCA 1999). The act of control of the vehicle in driving to and from the scene of the buy with knowledge of what was occurring is proof of Banks' assistance in the drug deal.

Banks' intent and active assistance is evidenced by Goodman's statements, with Banks looking on, which set up the deal and Banks' response by driving themtothe location indicated for the transaction to take place. As the statement was properly admitted as a verbal act, the state's creative use of the admissible testimony in its argument does not impact upon the issue of admissibility.

We further deem *Aneiro v. State,* 674 So. 2d 913 (Fla. 4th DCA 1996), where the out of court statement of confidential informant was offered for the truth of the matter asserted, inapposite.

We, thenfore, affirm Banks' conviction for delivery of cocaine and sentence entered thereon. (DELL and TAYLOR, JJ., concur.)

* * *

Criminal law-Sentencing-Prison **Releasee Reoffender** Act does **not apply to burglary of unoccupied structure or dwelling—Resentencing required where defendant was sentenced as both** prison **releasee reoffender and habitual offender and, although fifteen-year sentence imposed is permissible habitual offender sentence, appellate court cannot tell whether trial court imposed that sentence solely because it was the mandatory minimum under PRR**

MICHAEL ROBINSON, Appellant, v. STATE OF FLORIDA. Appellee. 4th Dii Cast No. 4D99-2151. Opinion filed February 16, 2000. Appeal from tht Cii Court for the Seventeenth Judicial Circuit, Broward County; Susan Ltbow. Judge: L.T. Case No. 98-26031 CFIOA. Counsel: Richard L. Jorandby, Public Dtftndtr, and Alltn J. DeWeese, Assistant Public Defender, West Palm Beach, for appellant. Robert A. Butterworth. Attorney General. Tallahassee, and Barbara A. Zappi, Assistant Attorney General, Fort Lauderdale, for appellee.

(FARMER, J.) Defendant was convicted of burglary of a dwelling in violation of section 810.02(1)(3)(b). § 810.02(1)(3)(b), Fla. Stat. (1997). We affirm the conviction. The trial court sentenced defendant to 15 years as both a Prison Releasee Reoffender (PRR) and as a Habitual Felony Offender (HFO). We reverse the PRR sentence.

Section 775.082(8) defines a "Prison releasee reoffender" as anyone who commits or attempts to commit, among other enumerated&roes, "burglary of an *occupied* [e.s.] structure or dwelling" within three years of being released from a state correctional facility. § 775.082(8)(a)1.q. (1997) ("Burglary of au occupied structure or dwelling"). The precise charge against defendant was under section 810.02(3)(b), which specifies that "there is not another person in the dwelling at the time the offender enters or remains...." Burglary under section 810.02(3)(b) is not one of the specified predicate crimes for sentencing as a PRR under section 775.082(8)(a)1 .q., which specifies that the dwelling or structure be occupied. In other words, it is apparent to us that the PRR statute as then drafted limits the enhanced sentencing as a PRR to those burglaries that involve a structure occupied by people.

In this case the minimum mandatory sentence under HFO applicable to defendant was 10 years, while the minimum mandatory sentence under PRR that the trial court thought applicable to defendant was 15 years. Even though a sentence of 15 years under HFO was legally possible, we have no way of knowing whether the trial court imposed the 15 year sentence because it was the mandated minimum sentence under PRR. We therefore remand for 'resentencing as a habitual felony offender. (STEVENSON and HAZOURI, JJ., concur.)

* * *

Criminal law-Community control-Error to modify sentence to allow defendant to reside with his mother in foreign state under Florida imposed community control where order did **not state that relocation of defendant's residence was contingent on approval of proper authorities of foreign state-Change significantly affects ability of Department of Corrections to supervise defendant in a way for which agency would have no remedy except by certiorari**

STATE OF FLORIDA, DEPARTMENT OF CORRECTIONS. Petitioner. v. SHANNON COLEMAN, Respondent. 4th District. Cast No. 4D00-1 18. Opiion filed February 16, 2000. Petition for writ of prohibition to the Circuit Court of tht Fifteenth Judicial Circuit. Palm Beach Countv: Harold J. Cohtn. Judat: L.T. Cast No. 99-1881 CFA02. Counsel: Roger Pickles, Assistant General Counsel, Department of Corrections, Tallahassee, for pttitiontr. Jack Edward Orsley of Law Offices of Orsley & Cripps, P.A., West Palm Beach, for respondent.

(FARMER, J .) Respondent was convicted of several violations of section 800.04 and sentenced to community control and subsequent probation. Four days after the sentence was imposed, the trial court granted his motion to correct sentence to allow him to serve the community control in Virginia, there to reside with his mother. The trial court specified that petitioner (DOC) was to continue to supervise respondent's community control from the state of Florida, simply notifying Virginia authorities of his new residence there. From that order, DOC has filed the present petition for a writ of prohibition, which we treat as alternatively seeking relief by writ of certiorari.

We grant certiorari' and quash the order modifying the sentence to allow respondent to take up residence with his mother in Virginia under Florida imposed community control. Section 948.03(6) unambiguously provides:

> "The enumeration of specific kinds of terms and conditions shall notprevent the court from adding thereto such other or others as it considersproper. However, ***thesentencing court may only impose a condition of supervision allowing an offender convicted of*** s. 794.011, *s. 800.04,* s. 827.071, or s. 847.0145, ***to reside in another state, if the order stipulates that it*** is ***contingent upon the approval of the receiving state interstate compact authority.***"

See § 948.03(6), Fla. Stat. (1999)[e.s.].

Because the order does not state that relocation of respondent's residence is contingent on the approval of the proper Virginia authorities, the change in the conditions of community control to allow the relocation was error. Moreover the change significantly affects the ability of DOC to perform ifs statutory duty to supervise this community controllee in a way for which the agency would have no remedy except by certiorari. On return of this case, the trial court shall be free to permit a relocation of residency to Virginia upon compliance with section 948.03(6). Because we have expedited this case, any motion for rehearing shall be filed within 7 days of the release of this opinion. (WARNER, C.J., and TAYLOR, J., concur.)

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[1]Prohibition is not a proper remedy because it is prospective only and may nor bt used as a mode of rtvicw of judicial action already undertaken. *Lorenzo* v. *Murphy,* 159 Fla. 639, 32 So. 2d 421 (Fla. 1947) (purpose of prohibition is to prevent tribunal from acting in txctss of its power. while certiorari is to remedy consequences of such action).

* * *

Criminal law-Juveniles-Felony battery charge arising out of incident in which **juvenile attempted to strike fellow student with whom he was fighting and instead struck teacher who tried to intercede-Where self-defense is viable defense to charge of battery on an intended victim, defense also operates to excuse battery on the unintended victim-Because state failed to rebut juvenile's claim of self-defense, trial court erred in denying motion for judgment of acquittal**

VM., a child. Appellant, v. STATE OF FLORIDA. Apptllct. 4th District. Cast No. 4D99-2311. Opiin filed February 16, 2000. Appeal from tht Circuit Court

COFFMAN REALTY, INC., a Florida corporation, et al., Petitioners,

v.

TOSOHATCHEE GAME PRESERVE, INC, Respondent.

No. 59273.

Supreme Court of Florida.

Feb. 25, 1982.

Rehearing Denied April 27, 1982.

Application for Review of the Decision of the District Court of Appeal-Direct Conflict of Decisions, Fifth District—Case No. 78–238.

Michael D. Jones of Jones, Morrison & Stalnaker, Altamonte Springs, for petitioners.

Geo. A. Speer, Jr., of Speer & Speer, Sandord, for respondent.

ADKINS, Justice.

We have for review a decision of the District Court of Appeal, Fifth District, *Coffman Realty, Inc. v. Tosohatchee Game* Preserve, Inc., 381 So.2d 1164 (Fla. 5th DCA 1980), wherein the court disagreed with *Hatmaker v. Advance Mortgage Corp.*, 351 So.2d 728 (Fla. 4th DCA 1977), *cert. denied*, *362* So.2d 1950 (Fla.1978), insofar as the latter case held it an abuse of discretion for a trial judge to refuse to admit affidavits filed with a motion to rehear the granting of a summary judgment.

We approve the opinion of the district *court* of appeal in the *case pub judice* and adopt it as our own.

It is so ordered.

SUNDBERG, C. J., and BOYD, OVER TON, ALDERMAN and McDONALD, JJ., concur.

McArthur BREEDLOVE, a/k/a McArthur Jenkins, Appellant,

v.

STATE of Florida, Appellee.

No. 56811.

Supreme Court of Florida.

March 4, 1982.

Rehearing Denied May 19, 1982.

Defendant was convicted in the Circuit Court, Dade County, Richard S. Fuller, J., of fir&degree murder, burglary, grand theft and petit theft. Defendant was sentenced to death and he appealed. The Supreme Court held that: (1) defendant was not improperly denied exculpatory material; (2) a statement given by defendant to police was voluntary; (3) there was no improper admission of hearsay; (4) any improper remarks by the prosecutor during closing argument did not prejudice defendant; (5) defendant could be convicted of both burglary and murder committed in the course of that burglary; and (6) the death sentence was properly imposed.

Affirmed.

Sundberg, C. J., filed a dissenting statement,

1. Constitutional Law ⇐268(5)

In murder prosecution, failure to turn over police report to defense did not deny defendant due process where material contained in report could have been found by reasonably diligent preparation and there was no indication that nonproduction of report prejudiced defendant.

2. Criminal Law ⇐627.6(5)

Police report concerning interview with mother and brother of defendant charged with murder was not "statement" subject to discovery where report was not signed, adopted, or approved by defendant's mother or brother, report did not quote interview verbatim, and report was not made contem-

3

poraneously with interview. West's F.S.A. Rules Crim.Proc., Rule 3.220.

3. Criminal Law ⇐414

In prosecution for murder, trial court's finding that defendant's statements to police were voluntarily made was not erroneous.

4. Criminal Law ⇐419(1)

Hearsay is out-of-court statement, other than one made by declarant who testifies at trial or hearing, offered in court to prove truth of matter contained in statement and it is inadmissible because declarant does not testify under oath, trier of fact cannot observe declarant's demeanor, and declarant is not subject to cross-examination.

5. Criminal Law ⇐419(1)

Out-of-court statements constitute hearsay only when offered in evidence to prove truth of matter asserted and merely because statement is not admissible for one purpose does not mean it is inadmissible for another.

6. **Criminal Law ⇐419(2)**

Hearsay objection is unavailing when inquiry is not directed to truth of words spoken, but rather, to whether they were in fact spoken.

7. Criminal Law ⇐419(1)

In murder prosecution, testimony of police officer concerning what mother and brother of defendant said to him was admissible because it came in to show effect of those statements on defendant, rather than for truth of those statements.

8. Criminal Law ⇐867

Mistrial should be declared for prejudicial error which will vitiate trial's result, but if alleged error does no substantial harm and causes no material prejudice, mistrial should not be declared.

9. Criminal Law ⇐730(1)

Improper remarks by counsel can be cured by ordering jury to ignore them unless they are so objectionable that such instructions would be unavailing.

10. Criminal Law ⇐1171.3

In prosecution for murder, prosecutor's closing remarks to jury, which transformed nonhearsay material into hearsay, were not prejudicially erroneous despite trial judge's refusal to renew earlier cautionary instruction, since defense counsel's remarks concerning that same testimony appeared to admit that those hearsay statements were true.

11. Criminal Law ⇐720(6)

Wide latitude is permitted in arguing to jury; logical inferences may be drawn and counsel is allowed to advance all legitimate arguments.

12. Criminal Law ⇐699, 1154

Control of counsel's comments to jury is within trial court's discretion and appellate court will not interfere unless abuse of discretion is shown.

13. **Criminal Law ⇐919(3)**

New trial should be granted when it is reasonably evident that prosecutor's remarks to jury might have influenced jury to reach more severe verdict of guilt than it would otherwise have done and each case must be considered on its own merits and within circumstances surrounding the complained-of remarks.

14. Criminal Law ⇐1171.6

In murder prosecution, prosecutor's closing argument containing allegations of rape, referring to defendant as "animal", and noting prevalence of violence in area were not prejudicial, in light of context in which remarks were made.

15. **Criminal Law ⇐29**

Where first-degree murder conviction was based on premeditation, not felony-murder, defendant could be convicted of both burglary and murder committed in course of that burglary.

16. Homicide ⇐354

Death sentence may be imposed for felony-murder.

17. Homicide ⇐354

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stance warranting imposition of death penalty was not unconstitutional.

18. Homicide ⇐354

Aggravating circumstance of "heinous, atrocious, and cruel,,, so as to warrant imposition of death penalty could be found where attack occurred while victim lay asleep in his bed, and, though death resulted from single stab wound, victim suffered considerable pain and did not die immediately+

19. Criminal Law ⇐1171.1(6)

Prosecutor's alleged use of three nonstatutory aggravating factors in arguing that death penalty should be imposed, i.e., that jury would make recommendation only, that defendant would be eligible for parole if not executed, and that defendant showed no remorse, were not prejudicial to defendant where court did not find them in aggravation.

20. Homicide ⇐354

Imposition of death penalty for first-degree murder was proper where no mitigating circumstances were found, but court did find three aggravating circumstances, previous conviction of violent felony, homicide committed during burglary, and heinous, atrocious, and cruel.

Jim Smith, Atty. Gen. and Alan T. Lipson, Asst. Atty. Gen., Miami, for appellee.

Bennett H. Brummer, Public Defender, and Elliot H. Scherker and Karen M. Gottlieb, Asst. Public Defenders, Eleventh Judicial Circuit, Miami, for appellant.

PER CURIAM.

McArthur Breedlove appeals his conviction of first-degree murder and sentence of death. We have jurisdiction [1] and affirm the results of his trial.

A five-count indictment charged Breedlove with first-degree murder, attempted fir&degree murder, burglary, grand theft, and petit theft. The charges stemmed from the stabbing death of one victim and the wounding of another which occurred during the burglary of their dwelling. The jury acquitted Breedlove of attempted murder, but convicted him of the other charges. Concurring in the jury's recommendation, the trial court imposed the death sentence for the murder conviction. The court also imposed consecutive sentences of life imprisonment for burglary, five years for grand theft, and sixty days for petit theft.

Breedlove presents six points on appeal: 1) *Brady* [2] violation; 2) denial of motion to suppress; 3) improper admission of hearsay; 4) improper remarks by prosecutor during closing argument; 5) conviction and sentence for burglary violate double jeopardy clause; and 6) impropriety of death sentence.

In four motions defense counsel requested the production of police reports made by six police officers and detectives and of field investigation cards filed on "suspicious" persons. The trial court denied all four motions without recorded comment. The requested material, along with other unrequested reports, was deposited with the judge who examined it in camera and ordered portions of the material released to defense counsel. All formal statements of persons connected with the case were also furnished to the defense.

On appeal Breedlove claims that the state violated the admonition of *Brady v. Maryland, 373* U.S. 83, 87, 83 S.Ct. 1194, 1196, 10 L.Ed.2d 215 (1963), that

> suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment irrespective of the good faith or bad faith of the prosecution.

In making this claim, Breedlove relies on unfurnished portions of a Detective McElveen's report? This report reflects the sub-

1. Art. V, § 3(b)(1), Fla.Const.

2. Brady *v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

8. After his in camera inspection, the trial judge waled the police reports. Breedlove's appellate counsel had access to the sealed reports after trial to assist in prepadng this appeal.

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stance of a conversation that McElveen had with Breedlove's mother, Mary Gibson, and his brother, Elisha Gibson, to the effect that the motber had not seen several items stolen from the victims' residence in Breedlove's possession and that Breedlove had returned home around 2:30 am. (the approximate time of the murder) and had left again between 4:00 and 4:30 am. This report also states that both the mother and brother referred to blood on Breedlove's clothes and that the brother described items, later established to have been taken from the victims' residence, which he saw in Breedlove's possession on hi8 return home at approximately 2:30 a.m.

[1] Breedlove's argument on this point, however, ignores, except for one *accord* reference, *United States v. Agurs*, *427* U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976). In *Agurs*, the Supreme Court identified three discovery situations: 1) undisclosed evidence demonstrate8 the prosecution'8 use of perjured testimony; 2) a pretrial request for specific evidence (Brady); and 3) a general request for "Brady material" (*Agurs*). McElveen's report falls within the third category, and *Agurs* is controlling on this point.

The state provided two lists of witnesses in which the name8 of sixteen law enforcement persons appear, These include officers, detectives, technicians, and a stenographer.) Although McElveen's name is on the first list, he was not included in the motion8 for production which specified the reports of six officers and detectives by name. The record reflects no formal request for all "*Brady* material," but we believe that McElveen's report, as well a8 those of the other unspecified law enforcement personnel, is within *Agurs'* third situation.

Brady's broad holding has been limited somewhat by *Agurs :*

> [T]o reiterate a critical point, the prosecutor will not have violated his constitutional duty of disclosure unless hi8 omission is of sufficient significance to result in the denial of the defendant'8 right to a fair trial.

427 U.S. at 108, 96 S.Ct. at 2399, 49 L.Ed.2d 342. Furthermore, "[t]he mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." *Id.* at 109--10, 96 S.Ct. at 2400. In response to claim8 very similar to Breedlove's, this Court recently stated that "[d]isclosure requirements for the prosecution principally concern those matters not accessible to the defense in the course of reasonably diligent preparation." *Perry v.* State, 395 So.2d 170, 174 (Fla.1980). The record shows that the trial court carefully observed Breedlove's discovery rights. Breedlove ha8 failed to demonstrate that the material contained in McElveen's report could not have been found through reasonably diligent preparation or that nonproduction of this report prejudiced him.

[2] Breedlove also claims that the police reports are discoverable per se as "statements." Florida Rule of Criminal Procedure 3.220 covers statements which are discoverable and define8 a "statement" a8

> a written statement made by said person and signed or otherwise adopted or approved by him, or a stenographic, mechanical, electrical, or other recording, or a transcript thereof, or which is a substantially verbatim recital of an oral statement made by said person to an officer or agent of the State and recorded contemporaneously with the making of such oral statement. . . .

Fla.R.Crim.P. 3.220(a)(1)(ii). The courts of this state have generally held that police reports are not "statements," except of the officers making them, and that generally they are not discoverable per se as statements of those officers. *See State v. Johnson*, 284 So.2d 198 (Fla.1973); *Lockhart v. State*, 384 So.2d 289 (Fla. 4th DCA 1980); *Black v.* State, 333 So.2d 295 (Fla. 1st DCA 1980); *Dumas v.* State, 363 So.2d 568 (Fla.

Only McElveen's report is specifically referred to on appeal. and inspection of the reports reveals McElveen's report to be the only one containing possibly favorable information which the defense might not have received in some fashion.

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3d DCA 1978), cert. *denied, 372* So.2d 471 (Fla.1979); *Pitts* v. state, 362 So.2d 147 (Fla. 3d DCA 1978), cert. denied, 363 So.2d 1372 (Fla.1979); *Miller* v. State, 360 So.2d 46 (Fla. 2d DCA 1978); State *v. Latimore,* 284 So.2d 423 (Fla 3d DCA 1973), *cert. denied,* 291 So.2d 7 (Fla.1974); *State* v. *Gillespie,*[4] 227 So.2d 550 (Fla. 2d DCA 1969). The material in the instant reports does not comprise "statements" because the reports have not been signed, adopted, or approved by the persons (other than the officers) to whom they have *been* attributed, they do not appear to be substantially verbatim, and they were not recorded contemporaneously with their making. We do not find that these reports are discoverable as "statements" as set out in rule 3.220.

The motions to suppress filed by Breedlove's attorneys sought exclusion of any statements by Breedlove, of evidence found at his mother's home, and of evidence found on his person. On appeal Breedlove only alleges error regarding admission of his statement of November 21, 1978. In that statement Breedlove admitted breaking into a dwelling, taking numerous items, stabbing a man, who had been asleep in a bedroom, with a butcher knife that Breedlove had taken off a table in the living room, and stealing a bicycle to make his getaway. Breedlove alleges that the police violated his fifth amendment rights in obtaining that statement.

Upon learning that Breedlove was in custody, a Detective Nagle of the Hallandale Police Department requested permission to interview him concerning a murder that had occurred in Hallandale several years earlier. Detective Zatrapalek of the North Miami Beach Police Department, lead officer on Breedlove's case, had Breedlove brought over from the county jail. Robert Shultz, a counselor at the jail, escorted Breedlove downstairs and turned him over to two officers.

4. *Gillespie* contains an analysis of what is and is not Brady material.

At the suppression hearing, Shultz testified that Breedlove had said something like "They had better be the people I want to talk to" or "I don't want to talk to certain detectives." He also stated that, on seeing the officers, Breedlove said, "I am not talking to them," and the officers "said something to the effect that 'Eventually you will talk to us.' " On appeal Breedlove claims that these statements show that he tried to exercise his right to remain silent and that his subsequent statement is invalid because the police did not "scrupulously honor" *(Michigan v. Mosley,* 423 US. 96, 164, 96 S.Ct. 321, 326, 46 L.Ed.2d 313 (1975)) his refusal to talk to them.[5]

Shultz also testified that it was his duty to report any improper police behavior but that he had not observed any improper behavior regarding Breedlove. Shultz had known Breedlove since his incarceration and testified that he had never noticed signs of Breedlove's being physically abused and that Breedlove had never complained to him about being abused. Shultz also said that prisoners could refuse to leave their cells in order to avoid being interrogated, but that Breedlove had *never* done so.

After arriving at the station, Detective Zatrepalek read Breedlove his *Miranda* rights and Breedlove signed the rights form. Breedlove then asked to speak with his mother and was not questioned during the hour or so before she arrived. He spoke with her in private and then asked her to tell Zatrepalek that he would make a statement. After speaking with the detectives, Breedlove was again read his rights, signed another card, and made a formal statement, Zatrepalek testified that he had never beat: en Breedlove and that, when interviewed by Detective Nagle on the following day, Breedlove asked Zatrapalek to stay with him.

Breedlove, on the other hand, testified that Detectives Zatrepalek and Ojeda had beaten him on November 9, that he refused

5. Appellant's brief states that Breedlove's public defenders had visited him in jail prior to the 21st and that he had agreed not to speak to police without counsel present.

to go with the officers on the 21st, and after being threatened on the 21st he confessed in order to avoid another beating.' The judge found that Breedlove understood his rights on both the 9th and 21st of November and that he freely and voluntarily waived those rights.

[3] Breedlove now claims that the statement, "eventually you will talk to us," was an implied threat constituting coercion and tainting the ensuing statement so that no proper waiver occurred. From the totality of the circumstances, it does not appear that the statement was coerced. Rather, Breedlove chose not to exercise his right to remain silent or to have counsel present, making the damaging statement after talking with his mother. The judge properly concluded that he freely and voluntarily made the statement.

At trial Detectives Ojeda and Zatrepalek testified regarding Breedlove's statement of the 21st. In relating what he said to them, both recited or alluded to the substance of a conversation they had with Breedlove's mother and brother. Neither the mother nor the brother testified at trial, and Breedlove now claims improper introduction of hearsay and violation of the confrontation clause,

[4–6] Hearsay is an out-of-court statement, other than one made by a declarant who testifies at the trial or hearing, offered in court to prove the truth of the matter contained in the statement. *Lombardi v. Flaming Fountain, Inc.*, 327 So.2d 39 (Fla. 2d DCA 1976).[7] Hearsay is inadmissible for three reasons: 1) the declarant does not testify under oath; 2) the trier of fact cannot observe the declarant's demeanor; and 3) the declarant is not subject to cross-examination. State *v. Freber*, 366 So.2d 426 (Fla.1978). "The hearsay rule does not prevent a witness from testifying as to what he has heard; it is rather a restriction on the proof of fact through extrajudicial statements." *Dutton* v. *Evans*, 400 U.S. 74, 88, 91 S.Ct. 210, 219, 27 L.Ed.2d 213 (1970). In *Dutton the Court* went on to say that "the mission of the Confrontation Clause is to advance a practical concern for the accuracy of the truthdetermining process in criminal trials by assuring that 'the trier of fact [has] a satisfactory basis for evaluating the truth of the prior statement.' *California v. Green*, 399 U.S. at 161, 90 S.Ct. at 1936." 400 U.S. at 89, 91 S.Ct. at 219. On the other hand, "[o]ut-of-court statements constitute hearsay only when offered in evidence to prove the truth of the matter asserted." *Anderson v. United States*, 417 U.S. 211, 219, 94 S.Ct. 2253, 2260, 41 L.Ed.2d 20 (1974). Merely because a statement is not admissible for one purpose does not mean it is inadmissible for another purpose, *Hunt v. Seaboard Coast Line Railroad Co.*, 327 So.2d 1% (Fla.1976); *Williams v. State*, 338 So.2d 251 (Fla. 3d DCA 1976). The hearsay objection is unavailing when the inquiry is not directed to the truth of the words spoken, but, rather, to whether they were in fact spoken. *Id.*

In the examination of Detective Ojeda the court sustained defense counsel's objection to his relating what Breedlove's mother said at her residence. Ojeda went on to testify that in talking with Breedlove on the 21st he told Breedlove what his brother had said about the bicycle. The court overruled the defense objection to this, stating that "it is not being offered for the truth of what waa said." Other comments made by the mother and brother came in the same way; objections were overruled or sustained as needed. A side bar conference on hearsay was held, following which the judge gave the jury a cautionary instruction on Ojeda's testimony. Prior to cross-examination another side bar conference

6. Breedlove's original public defender, David Finger, testified that, although Breedlove told him prior to the 21st that he had been beaten, Finger saw no evidence of physical abuse, never reported Breedlove's statements regarding the beating and later coercion on the 21st, and never investigated Breedlove's claims.

7. We note that ch. 81-93. Laws of Fla., slightly modified the deflnition of hearsay as set out in § 90.801(1)(c), Fla.Stat. (1981).

was held, wherein the defense said it would go" into the Gibsons' statements because they had been received for an impermissible purpose. The court cautioned that defense would have to live with what this approach elicited. A similar course of events occurred during Detective Zatrepalek's testimony.

In closing argument, defense counsel brought up the Gibsons' comments and wondered why they had not been called to testify. The state also brought up these comments, referred to their sworn statements *(not* introduced at trial), said that they told the truth in those statements, and then tied their formal statements to the detectives' testimony.

Defense counsel used these statements by the prosecutor to move for a mistrial because of "putting the truth of Elijah and Mary Gibson's statements in issue," and also asked that the jury be told to disregard the detectives' testimony regarding what the Gibsons had said or else be given another cautionary instruction. Defense counsel also asked that the jury be told to disregard the state's closing argument. The court found the state's argument proper and refused to reinstruct, referring to hi earlier cautionary instruction. Defense again referred to the mother and brother in its final argument.

[7] The court properly admitted the detectives' *testimony* about what the Gibsons said because it came in to show the effect on Breedlove rather than for the truth of those *comments.* The informal *statements,* therefore, were not hearsay and could be admitted into evidence. The judge cautioned the jury *on* how to use this testimony.

[8, 9] In their last motion for a new trial defense counsel cited the prosecutor's argument, alleging prejudicial error. The court denied the motion. A mistrial should be declared for prejudicial error which will vitiate the trial's result. *Perry v. State,* 146 Fla. 187, 200 So. 525 (1941). If the alleged error does no substantial harm and causes no material prejudice, a mistrial should not be declared. Id. Improper remarks can be cured by ordering the jury to ignore them unless they are so objectionable that such instruction would be unavailing.

[10] The judge refused to renew his cautionary instruction regarding the use of testimony referring to the Gibsons' statements and included no such instruction in those given before the jury retired to deliberate. The questions, therefore, are whether the prosecutor's comments transformed the nonhearsay material into hearsay and whether those comments were so prejudicial that this Court cannot say beyond a reasonable doubt that they had no effect on the verdict. *Chapman v. California, 386* U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 706 (1967).

It appears that the prosecutor's remarks were improper. These remarks, however, were no worse than, and possibly not as harmful as, defense counsel's remarks concerning the Gibsons' statements. On rebuttal defense counsel mentioned the stolen bicycle being found at the Gibson home. He went on to say that the bicycle

> could have been ridden by the other four adults in that house, and what, about those people? What did they do? ***They pointed the finger at my*** client.
>
> Sure it is his mother and brother. I do not, like mothers and brothers testifying like that against my client. ***They said, "He did it. He*** is ***the one."***
>
> Mr. Godwin would have you believe we can call people like that.

(Emphasis added.) It appears that defense counsel admitted that those statements were true. Considering the totality of the circumstances, we find the prosecutor's statements not so prejudicial as to require a new trial.[8]

On appeal Breedlove alleges that the prosecutor made improper arguments to the jury, thereby violating Breedlove's right to

8. In denying the motion for new trial the judge responded to defense's objection to the state's entire argument by saying: "I think the context in which the argument was made was not prejudicial in nature."

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a fair trial. Besides use of the Gibsons' statements, he points to three other prejudicial or inflammatory remarks: 1) allegations of other criminal acts (rape); [9] 2) "vituperative" characterization (referring to Breedlove as an animal); [10] 3) appeal to community prejudice (violence in Dade County)."

[11–13] Wide latitude is permitted in arguing to a jury. Thomas v. *State*, 326 So.2d 413 (Fla.1975); 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), cert. denied, 372 U.S. 904, 83 S.Ct. 742, 9 L.Ed.2d 730 (1963). Logical inferences may be drawn, and counsel is allowed to advance all legitimate arguments. Spencer. 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). A new trial should be granted when it is "reasonably evident that the remarks might have influenced the jury to reach a more severe verdict of guilt than it would have otherwise done." *Darden v. State*, 329 So.2d 287, 289 (Fla.1976), *cert. denied*, 430 U.S. 704, 97 S.Ct. 308, 50 L.Ed.2d 282 (1977). Each case must be considered on its own merits, however, and, within the circumstances surrounding the complained-of remarks. Id. *Compare Paramore with Wilson v. State*, 294 So.2d 327 (Fla.1974).

[14] The judge refused to grant a mistrial, finding the state's argument not prejudicial due to the context in which the objected-to remarks were made. Some of the remarks may have been improper, but we do not find them so prejudicial that a new trial is required.

[15] Breedlove was convicted of both first-degree murder, and burglary and received the death penalty for the former and a consecutive life sentence for the latter. On appeal he claims that *finder v. State*, 375 So.2d 836 (Fla.1979), mandates that the burglary conviction and sentence be vacated because the state proved only felony murder, not premeditated murder. The state, on the other hand, claims that it presented sufficient evidence of premeditation to warrant both convictions and sentences and also that *Pinder* should be rejected because of *Whalen v. United States*, 445 U.S. 684, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980). Breedlove's *Pinder* claim and the *state's Whalen* argument have been disposed of in *State v. Hegstrom*, 401 So.2d 1343 (Fla.1981). We find, however, that Breedlove's contention is not really an issue in this case because the state introduced sufficient evidence of premeditation.[12] See *Hegstrom*. Because we find that the jury need not have convicted Breedlove of burglary in order to support the murder conviction, we affirm the convictions and sentences for both first-degree murder and burglary.

9. Breedlove charges that the state implied that Breadlove wanted to rape the woman in the houaa he was burglarizing. In going through what had happened, the prosecutor said that because of the purse Breedlove knew that a woman lived there. This is a permissible inferonce. His next comment, however, is not supported by the evidence: "He went prowling through the house to find that woman." Although Breedlove was a convicted mentally disordered sex offender (California), evidence concerning his past record and tendencies was not presented to the jury until the sentencing phase.

10. The prosecutor characterized the killing as a "savage and brutal and vicious and animalistic attack;" he did not refer to Breedlove as an "animal."

11. The prosecutor said: "When we walk the streets we take our chances." In response to an objection the court said: "Stay on the evidence in this case." The prosecutor then said: "One place in the world where we ought to be free from this kind of violence, this kind of crime, is in our own home." The court overruled an objection to this remark. These comments appear to reflect common knowledge and are probably the sentiments of a large number of people. They do not appear to be out of place.

12. This evidence includes. among other things, Breedlove's arming himself with a butcher knife before entering the bedrooms and the defensive wounds suffered by both victims.

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As his final point, Breedlove makes several attacks on the death sentence: simple felony murder as a basis for the death penalty violates the eighth and fourteenth amendments; improper aggravating circumstances; limited consideration of mitigating circumstances; and death penalty disproportionate in this case.

[16] Breedlove claims that death is an excessive punishment for a simple felony murder, based on Justice White's concurring opinion in *Lockett v. Ohio, 438* U.S. *586, 98* S.Ct. 2954, 57 L.Ed.2d 973 (1978). Both the United States Supreme Court [13] and this Court [14] have found that the death penalty is not per se violative of either the federal or state constitution. Breedlove has presented nothing which would compel a different conclusion.

Breedlove states that "this Court has uniformly reversed death sentences in pure felony-murder cases, absent such a finding of an intent to kill" and cites numerous cases in support of this contention, While most of these cases deal with felony murder, all but one [15] concern jury overrides. They are not applicable to the instant case and do not support the point that Breedlove tries to make.

[17, 18] The court found three circumstances in aggravation: [16] previous conviction of violent felony; homicide committed during a burglary; and heinous, atrocious, and cruel. Breedlove argues that an underlying felony cannot be used in aggravation, but presents nothing which compels declaring the felony-murder aggravating circumstance unconstitutional. The trial court properly found the murder to be heinous, atrocious, and cruel. Although death resulted from a single stab wound, there was testimony that the victim suffered considerable pain and did not die immediately. While pain and suffering alone might not make this murder heinous, atrocious, and cruel, the attack occurred while the victim lay asleep in his bed. This is fat different from the norm of capital felonies and sets this crime apart from murder committed in, for example, a street, a store, or other public place.

[19] Breedlove also claims that the prosecutor improperly argued three nonstatutory aggravating factors to the jury: that the jury would make a recommendation only ("passing the buck"); that Breedlove would be eligible for parole; and that Breedlove showed no remorse. While these remarks may have stretched the bounds of proper argument, Breedlove does not appear to have been prejudiced because the court did not find them in aggravation. *Cf. Menendez* v. State, 368 So.2d 1281 (Fla.1979) (improper aggravating circumstances found); *Riley v. State*, 366 So.2d 19 (Fla.1978) (same).

[20] Breedlove also complains that the court limited the range of mitigating circumstances allowed to be considered and that the instructions gave inadequate guidance for consideration and weighing of these circumstances. The instructions, however, were proper and adequate, and the court did not limit presentation of mitigating evidence. [17] Breedlove now claims that the court erred in failing to find the lack of intent to cause death and impaired mental capacity. Finding felony murder in aggravation was proper, and, after acknowledging the conflicting testimony regarding Breedlove's mental capacity, the court chose to find his capacity not impaired or diminished. In the sentencing order the court stated:

> [T]his Court, after weighing and considering the aggravating and mitigating

of improper consideration of aggravating circumstances.

13. Gregg *v. Georgia, 428* U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976).

14. *State v.* Dixon, 263 So.2d 1 (Fla.1973), *cert. denied,* 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974).

15. *Menendez v. State, 368* So.2d 1278 (Fla. 1979). was remanded for resentencing because

16. No mitigating circumstances found.

17. Defense's presentation consisted of witnesses who testified about Breedlove's mental and emotional problems.

circumstances, is of the opinion that no mitigating circumstances, either statutory, or by any testimony, facts or circumstances presented at the advisory proceeding, exist which outweigh the aggravating circumstances.

In the light of properly found aggravating circumstances, with nothing found in mitigation, imposition of the death penalty was proper.

We therefore affirm Breedlove's convictions and sentences.

It is so ordered.

ADKINS, BOYD, OVERTON, ALDERMAN and McDONALD, JJ., concur.

SUNDBERG, Chief Justice, dissents:

"Because I believe that the truth of the statements attributed to Elijah and Mary Gibson were put in issue by the prosecution such testimony by the state's witnesses constituted prejudicial hearsay. Hence, I am compelled to reverse the conviction and remand for a new trial."

James A. GARDNER, Appellant,

v.

The BRADRNTON HERALD, INC., Appellee.

John DOE, Appellant,

v.

The BRADENTON HERALD, INC., Appellee.

Nos. 58761, 58735.

Supreme Court of Florida.

March 4, 1982.

Rehearing Denied April 28, 1982.

Appeals 'were taken from judgments of the Circuit Court, Manatee County, Robert E. Hensley, J., holding unconstitutional a statute making it a third-degree felony for any person to publish or broadcast in a newspaper, publication, or electronic media the name of the person who is a party to an interception of wire or oral communications until that person has been indicted or informed against. The Supreme Court, Overton, J., held that the statute violated the freedom of the press provisions of the First Amendment.

Affirmed.

Adkins, J., filed a dissenting opinion.

1. Constitutional Law ⇐90.1(1)

Statute making it thirddegree felony for any person to publish or broadcast in newspaper, publication, or electronic media the name of any person who is party to interception of wire or oral communications until that person has been indicted or informed against violated freedom of press provision of First Amendment. West's F.S.A. § 934.091; U.S.C.A.Const.Amend. 1.

2. Telecommunications ⇐493

State in person of state attorney had no standing to assert privacy rights of persons it had wiretapped.

Jim Smith, Atty. Gen. and James A. Purdy, Asst. Atty. Gen., Tampa, for James A. Gardner.

Edwin T. Mulock and Robert A. Farrance of Mulock & Farrance, Bradenton, for John Doe, Appellants.

Larry K. Coleman of Knowles, Blalock, Coleman & Landers, Bradenton, for appellee.

OVERTON, Justice.

This is an appeal from a trial court judgment holding section 934.091, Florida Statutes (1977), unconstitutional because it violates the freedom of the press provisions of the United States Constitution. The subject statutory section makes it a third-degree felony for any person to publish or broadcast in a newspaper, publication, or

Robert A. CONSALVO, Appellant,

v.

STATE of Florida, Appellee.

No. 82780.

Supreme Court of Florida.

Oct. 3, 1996.

Rehearing Denied July 17, 1997.

As Revised on Denial of Rehearing Oct. 16, 1997.

Defendant was convicted in the Circuit Court, Broward County, Howard M. Zeidwig, J., of armed burglary and first-degree murder and was sentenced to death. Defendant appealed. The Supreme Court held that: (1) state did not commit discovery violations alleged by defendant; (2) evidence of subsequent burglary involving different victim was admissible because it was inextricably intertwined with matter involving charged offenses; (3) during closing argument in guilt phase, state could permissibly be allowed to rebut suicide defense which state believed was raised by defense's case; (4) sufficient evidence existed that items of victim's personal property were recently stolen to justify instruction that proof of unexplained possession of recently stolen property by means of burglary may justify burglary conviction; (5) trial court's improper quotation in sentencing order of two statements from depositions which were never presented in open court was harmless error; (6) trial court permissibly rejected defendant's asserted nonstatutory mitigating circumstances; (7) trial court's decision to find mitigating circumstance of defendant's turbulent family history but accord it very little weight was within its discretion; (8) evidence supported finding of "avoid arrest" aggravating factor; and (9) death sentence was not disproportionate to other cases.

Affirmed.

1. Criminal Law ⇐1134(3)

First-degree murder defendant's ineffective assistance of counsel claim was not reviewable on direct appeal and was more properly raised in motion for postconviction relief. U.S.C.A. Con&Amend. 6.

2. Criminal Law ⇐627.5(5), 627.8(6)

State did not commit discovery *violation* in first-degree murder prosecution by failing to disclose that laboratory tried to test cigarette butts found in victim's toilet but was unable to test them, and *Richardson* hearing as to prejudice from discovery violation was not required, where cigarette butts were sent to crime laboratory, laboratory could not *perform* any tests on them, and no reports or statements were generated as a result. West's F.S.A. RCrP Rule 3.220(b)(1)(J).

3. Criminal Law ⇐627.6(3)

State did not commit discovery violation in first-degree murder prosecution by failing to disclose letter requesting laboratory analysis of cigarette butts found in victim's toilet, under rule requiring disclosure of tangible papers or objects that prosecutor intends to use in hearing or trial and that were not obtained from or did not belong to accused, where laboratory could not perform any tests on cigarette butts, and no reports or statements were generated as a result. West's F.SA RCrP Rule 3.220(b)(1)(K).

4. Criminal Law ⇐627.6(2)

Documents simply used to procure or elicit evidence are not subject to disclosure under discovery rule requiring prosecutor to disclose to defense counsel tangible papers or objects that prosecutor intends to use in hearing or trial and that were not obtained from or did not belong to accused. West's F.S.A. RCrP Rule 3.220(b)(1)(K).

5. Criminal Law ⇐627.6(5)

Trial court did not abuse its discretion in first-degree murder prosecution in finding that state did not violate its continuing duty of disclosure when, after defense's opening statement which asserted possible third-party killer theory, state informed defense that fingerprint expert had identified several previously unidentified prints as belonging to victim's deceased boyfriend, where expert was not acting on state's request or at its direction when he independently tied to match the unidentified fingerprints to someone other than victim, and state immediately

13

disclosed its results to defense counsel once state was informed of expert's analysis. West's F.S.A. RCrP Rule 3.220(j).

6. Criminal Law ⇐1166(10.10)

Defense in first-degree murder prosecution was not prejudiced and discovery violation, if any, was not willful when, after defense's opening statement which asserted possible third-party killer theory, state informed defense that fingerprint expert had identified several previously unidentified prints as belonging to victim's deceased boyfriend, where the third-party killer theory could still be asserted because there remained substantial number of unidentified prints, and expert's ultimate conclusion that none of latent fingerprints matched defendant's fingerprints was in fact helpful to the defense. West's F.S.A. RCrP Rule 3.220(j).

7. Criminal Law ⇐369.2(8)

Evidence of subsequent burglary involving different victim was admissible in prosecution for armed burglary and first-degree murder because it was inextricably intertwined with matters involving charged offenses, where police found murder victim's checkbook on defendant's person when they caught defendant during subsequent burglary, police placed defendant in custody as result of subsequent burglary, and defendant was in jail for subsequent burglary when he placed incriminating call to his mother as to murder. West's F.S.A. § 90.402.

8. Criminal Law ⇐369.2(1)

Evidence of other crimes, wrongs, and acts is admissible if it is relevant, i.e., it is probative of material issue other than bad character -or propensity of individual. West's F.S.A. § 90.402.

9. Criminal Law ⇐722.5

Prosecutor's closing argument was improper in pointing out similarities between subsequent burglary allegedly committed by defendant and subject burglary/murder in prosecution for armed burglary and first-degree murder, as state's use of facts from subsequent burglary exceeded scope for which they were admitted, where details of subsequent burglary were admitted because that burglary was inextricably intertwined with instant matter. West's F.S.A. § 90.402.

10. Criminal Law ⇐1171.1(3)

Prosecutor's improper closing argument as to similarities between subsequent burglary allegedly committed by defendant and subject burglary/murder, exceeding scope for which details of subsequent burglary were admitted, was harmless error in prosecution for armed burglary and first-degree murder, where jury was presented with evidence of both burglaries throughout trial, mostly without objection, and similarities between mimes were not made feature of trial. West's F.S.A. § 30.402.

11. Criminal Law ⇐726

During closing argument in guilt phase of first-degree 'murder prosecution, state could rebut suicide defense which state believed was raised by defense's case, despite contention that prosecutor improperly set up "strawman" defense to knock it down; defendant opened door to prosecutorial comment on suicide by eliciting testimony suggesting a potential suicide defense, and jury could have reasonably believed that issue of suicide was raised by defense.

12. Burglary ⇐46(7)

Sufficient evidence existed that victim's checkbook, canvas bag, automatic teller machine (ATM) card; and automobile were recently stolen to justify instruction that proof of unexplained possession of property recently stolen by means of burglary may justify burglary conviction, despite contention that instruction could lead jury to conclude defendant was guilty of burglary by his innocent possession of canvas bag and checkbook that were not shown to have been stolen from victim's residence; defendant was videotaped using card and was seen driving automobile several days before victim's body was found, and defendant failed to explain his possession of victim's items at trial or upon arrest.

13. Burglary ⇐46(7)

There must be appropriate factual basis in record to give instruction that proof of unexplained possession of property recently stolen by means of burglary may justify burglary conviction; this means, first, that it

14

must be shown that defendant, when arrested, either failed to explain or gave incredible or unbelievable explanation for his possession of property and, second, that instruction applies only where property is undisputedly stolen and question is who stole it.

14. Burglary ⇐46(7)

For purposes of determining propriety of giving instruction, that proof of unexplained possession of property recently stolen by means of burglary may justify burglary conviction, where there is conflict in evidence as to intent with which property alleged to have been stolen was taken, question should be submitted to jury without any intimation from trial court as to force of presumptions of fact arising from testimony.

15. Burglary ⇐46(7)

It is improper to give instruction, that proof of unexplained possession of property recently stolen by means of burglary may justify burglary conviction, when its only possible effect is to allow jury to presume that defendant is guilty because he was in possession of property; this goes against presumption of innocence inherent in criminal justice system.

16. Criminal Law ⇐1172.2

Even assuming it was error to give instruction that proof of unexplained possession of property recently stolen by means of burglary may justify burglary conviction, such error was harmless in prosecution for armed burglary and first-degree murder, as evidence against defendant was overwhelming, and there was no reasonable possibility that giving of instruction affected outcome; defendant knew victim and that she was living alone in her apartment, defendant was observed with various items of victim's personal property prior to victim's body being found, defendant made numerous incriminating statements, and towel in defendant's dresser contained blood matching victim's deoxyribonucleic acid (DNA) pattern.

17. Burglary ⇐42(3)
Homicide ⇐253(2)

Evidence supported convictions for first-degree murder and armed burglary; defendant knew victim and that she was living alone in her apartment, defendant was observed with various items of victim's personal property prior to victim's body being found, defendant made numerous incriminating statements, and towel in defendant's dresser contained blood matching victim's deoxyribonucleic acid (DNA) pattern.

18. Criminal Law ⇐1037.1(2)

By failing to object at trial, defendant failed to preserve for appeal claim that prosecutor improperly used victim-impact evidence in his opening and closing penalty-phase argument in first-degree murder prosecution. West's F.S.A. § 921.141(7).

19. Criminal Law ⇐986(3)
Homicide ⇐358(3)

Trial court erred in quoting two statements from depositions which were never presented in open court, in sentencing order in prosecution for armed burglary and first-degree murder. U.S.C.A. Const.Amend. 14.

20. Criminal Law ⇐1177
Homicide ⇐343

Trial court's improper quotation in sentencing order of two statements from depositions which were never presented in open court was harmless error in prosecution for armed burglary. and first-degree murder, where trial court did not actually rely on any information that was not otherwise proven during trial. U.S.C.A. Con&Amend. 14.

21. Homicide ⇐354(1)

Trial court was not required to expressly consider or find, as nonstatutory mitigating circumstances, that defendant had potential for rehabilitation and that, if defendant had been raised in different environment, his behavior might have been different, in penalty phase of first-degree murder prosecution, where defendant presented these circumstances neither to jury nor to trial court.

22. Homicide ⇐358(1)

Defense in first-degree murder prosecution must share burden and identify for court specific nonstatutory mitigating circumstances it is attempting to establish for penalty purposes.

15

23. Homicide ⇐354(1)

For Penalty purposes in first-degree murder prosecution, nonstatutory mitigation may consist of any factor that could reasonably bear on sentence.

24. Homicide ⇐354(1)

In ii&-degree murder prosecution, controverting evidence supported sentencing court's rejection of defendant's asserted nonstatutory mitigating circumstances that defendant was amenable to learning and had ability to learn and that defendant had some positive personality traits.

25. Homicide ⇐354(1)

For Penalty purposes in first-degree murder prosecution, trial court may reject defendant's claim that mitigating circumstance has been proven, provided that record contains competent, substantial evidence to support court's rejection of the mitigating circumstances.

26. Homicide ⇐354(1)

Trial court's decision in penalty phase of first-degree murder prosecution to find nonstatutory mitigating circumstance of defendant's turbulent family history but accord it very little weight was within its discretion, despite contention that court used wrong standard in assessing mitigating circumstance; it was mere speculation whether court would have accorded circumstance more weight had it used different standard.

27. Homicide ⇐354(1)

For Penalty purposes in first-degree murder prosecution, "mitigating circumstances" are defined as factors that, in fairness or in totality of defendant's life or character, may be considered as extenuating or reducing degree of moral culpability for crimes committed.

See publication Words and Phrases for other judicial constructions and definitions.

28. Homicide ⇐358(1)

Evidence supported finding of "avoid arrest" aggravating factor in prosecution for armed robbery and first-degree murder; witness testified that defendant told him tbat defendant struck victim to stop her from calling police and after she started screaming, defendant and victim knew each other, and defendant was aware that victim was pressing charges against him for bis prior theft. West's F.S.A. § 921.141(5)(e).

29. Homicide ⇐357(8)

In case of murder of witness to crime, mere fact of death is not enough to invoke "avoid arrest" aggravating factor in capital case, but rather, proof of requisite intent to avoid arrest and detection must be very strong; in other words, evidence must prove that sole or dominant motive for killing was to eliminate a witness. West's F.S.A. § 921.141(5)(e).

30. Homicide ⇐357(8)

Mere speculation on part of state that witness elimination was dominant motive behind murder cannot support "avoid arrest" aggravating factor in capital case. West's F.S.A. § 921.141(5)(e).

31. Homicide ⇐357(8)

In case of murder of witness to crime, mere fact that victim knew and could identify defendant, without more, is insufficient to prove "avoid arrest" aggravating factor in capital case. West's F.S.A. § 921.141(5)(e).

32. Homicide ⇐357(8)

In case of murder of witness, motive to eliminate potential witness to antecedent crime can provide basis for "avoid arrest" aggravating circumstance in capital case. West's F.S.A. § 921.141(5)(e).

33. Homicide ⇐357(8)

No arrest need be imminent at time of murder of witness to crime for "avoid arrest" aggravating factor to be applicable in capital case. West's F.S.A. § 921.141(5)(e).

34. Homicide ⇐358(1)

"Avoid arrest" aggravating factor in capital case can be supported by circumstantial evidence through inference from facts shown. West's F.S.A. § 921.141(5)(e).

35. Homicide ⇐354(1)

For penalty purposes, "avoid arrest" and felony-murder aggravating factors did not have to be merged in prosecution for armed burglary and first-degree murder, where

16

"avoid arrest" and felony-murder aggravators did not refer to same aspect of defendant's crime. West's F.S.A § 921.141(5)(d, e).

36. Criminal Law ⇐1208.1(5)

One who commits capital crime in course of burglary will not automatically begin with two aggravating circumstances for penalty purposes. West's F.S.A. § 921.141(5)(d, e).

37. Homicide ⇐357(7, 8)

Death sentence was not disproportionate to other cases, in prosecution for armed burglary and first-degree murder, where there were two aggravating factors, i.e., that murder was committed in order to avoid arrest and that murder was committed during course of burglary, there were no statutory mitigating circumstances, and trial court gave nonstatutory mitigating circumstances of defendant's employment history and defendant's abusive childhood very little weight. West's F.S.A. § 921.141(5)(d, e).

Richard L. Jorandby, Public Defender and Jeffrey L. Anderson, Assistant Public Defender, Fifteenth Judicial Circuit, West Pahu Beach, Florida, for Appellant.

Robert A Butterworth, Attorney General and Sara D. Baggett, Assistant Attorney General, West Palm Beach, Florida, for Appellee.

PER CURIAM.

Robert Consalvo appeals his convictions for armed burglary and first-degree murder and sentence of death. We have jurisdiction under article V, section 3(b)(1), Florida Constitution, and we affirm the convictions and sentence.

F A C T S

On September 21, 1991, at 8 p.m. the victim, Ma Lorraine Pezza, who was accompanied by her neighbor Robert Consalvo, drove to an automatic teller machine and withdrew $200 from her bank account. She placed $140 of that money in the glove compartment of her vehicle and placed the remaining $60 in her purse. At approximately 1:30 a.m. Pezza and Consalvo returned to the former's apartment and, at around 2:30 am, Pezza realized that she had left the money in her car and looked for her car keys which she never found. She used a spare key to unlock her car and discovered the $140 missing from the glove box At this point she called the police.

'At around 3 am Officer William Hopper was dispatched to Pezza's apartment. Pezza, with Consalvo present, reported to Hopper that she had lost or somebody had stolen $140 and a set of keys. Hopper asked Consalvo about the missing money and keys and he denied any wrongdoing* As Hopper was writing his report in his patrol car, he was again dispatched to Pezza's apartment. With Consalvo no longer present, Pezza told the officer that she suspected Consalvo of taking her keys and money.

Two days later, on September 24, 1991, Detective Douglas Doethlaff received a phone call from Pezza inquiring how to file charges against Consalvo. Doethlaff advised Pezza that more identifying data was needed on Consalvo and indicated he would contact Consalvo. Doethlaff then contacted Consalvo and told him that Pezza wished to proceed with the case and that it was his word against hers. Consalvo continued to deny any wrongdoing.

On September 27, 1991, from 10 am. to 11 am., Pezza employed a locksmith to change the locks on her apartment door and her mailbox The locksmith subsequently stated that he was also asked to change the locks on the victim's car, but was unable to do so. Tlie locksmith was the last witness to see Pezza alive. At 4:08 p.m. on the same day, Consalvo was documented on videotape using Pezza's ATM card. Consalvo also used Pezza's ATM card on September 29 and 30, 1991. The manager of a motel testified that on September 30, 1991, he saw appellant driving a car "similar" to Pezza's.

On October 3, 1991, at approximately 12:40 am., Nancy Murray observed a man wearing a brown towel over his head cut a screen door and enter the residence of Myrna Walker, who lived downstairs from the victim. Murray called the police and Consalvo was apprehended while burglarizing the apart-

1.7

ment. Fresh pry marks were found on a sliding glass door along with a cut porch screen. Assorted jewelry was found lying on the bedroom floor with a screwdriver and towel. When police searched Consalvo, they found checkbooks belonging to Pezza, as well as to Walker, and a small pocketknife. Consalvo was arrested and subsequent to his arrest, Consalvo repeatedly asked the police what his bond would be for this burglary offense and how quickly he could be released.

That same day, Detective Doethlaff went to Pezza's apartment to investigate why Consalvo was in possession of her checkbook. Doethlaff observed fresh pry marks on Pezza's front door between the deadbolt and the doorknob, When no one answered the door, which was locked, Doethlaff left a business card at the door requesting Pezza to contact the police. That evening, after Pezza's family had tried unsuccessfully for several days to reach her, Eva Bell, a social worker for the Broward Mental Health Division, went to the victim's apartment to check on her.[1] While at the apartment, Bell encountered Pezza's next-door neighbor, Consalvo's mother, Jeanne Corropolli. Corropolli, who lived with Consalvo, related to Ms. Bell that her son had been arrested earlier that day (for the burglary of Mrs. Walker's apartment). After receiving no response at Pezza's apartment, Bell contacted the police. At 7:16 p.m. Officer Westberry responded to Bell's request to check on Pezza. He knocked on Pezza's apartment door without getting a response and noticed Doethlaff's business card was still in the door jamb. The officer went back to bis patrol car to complete his report. Bell, who was still in Corropolli's apartment, testified that shortly after the officer left the apartment, Corropolli was on the phone. Corropolli hung up the phone and became hysterical. Corropolli told Bell that her son, Robert Consalvo, said that he was "involved in a murder," [2] Corropolli testified that when she told her son the police were next door, he replied, "Oh, shit" Bell immediately related this information to Officer Westberry, who then forced open Pezza's apartment door and discovered her decomposing body in the apartment. The porch screens of Pezza's apartment were cut

At 10:10 p.m., Detective Gill of the Broward Sheriff's Office contacted Consalvo at the Pompano Jail Annex After advising Consalvo of his rights, Gill notified Consalvo that they wanted to speak to him about Pezza's checks being found on his person at the time of his arrest. Consalvo responded by stating: "[Y]ou are not going to pin the stabbing on me." At this time, Gill did not know that Pezza had been stabbed.

At 2:30 am. the next day, Detective Gill effectively arrested Consalvo by filing an add charge against him for the murder of Lorraine. Pezza. Consalvo had not yet been released on bond for the burglary charge. When a search warrant was executed on Corropolli's apartment, the police found a bloody towel in a dresser in Consalvo's bedroom. Subsequent DNA testing matched the blood on the towel with the victim's blood. In a statement to the police, Consalvo's mother confirmed that, her son had in fact called her from the county jail and had advised her that he might be implicated in a homicide. She further informed police that she had found a towel in her son's room with blood on it.

While incarcerated in the Broward County Jail, Consalvo made inculpatory statements to a fellow inmate named William Palmer. Consalvo told Palmer that he killed Pezza after she caught him burglarizing her apartment and said she would call the police. When' she started to yell for help, Cons&o stabbed her. Lorraine Pezza was stabbed three times with five additional superficial puncture wounds. The fatal wound was to the left side of the chest, According to the testimony of Dr. Ronald Wright, the medical examiner,' this could have occur& only if the victim was lying down at the time. The additional stab wounds were to the right upper chest 'and the right side of the back

1. Pezza's medical and psychological records indicate a history of mental illness.

2. Telephone records indicated that at 7:32 p.m. on October 3. 1991 a collect call was made from the Pompano Jail Annex inmates' phone to Ms. Corropolli's apartment. Consalvo, at this time, was being held at the Pompano Jail Annex.

18

The five superficial puncture wounds were to the back. Dr. Wright classified the manner of death as homicide and estimated that death occurred approximately three to seven days before the body was discovered.

On February 11, 1933, appellant was convicted of armed burglary and the first-degree murder of Lorraine Pezza. The jury recommended the death sentence by a vote of eleven to one. The trial court found two aggravating factors: (1) the capital felony was 'committed while the defendant was engaged in the commission of a burglary, see § 921.141(5)(d), Fla.Stat. (1995); and (2) the capital felony was committed for the purpose of avoiding or preventing a lawful arrest, see *id.* § 921.141(5)(e). The court found no statutory mitigating circumstances. As for nonstatutory mitigating circumstances it accorded the following "very little weight": (1) appellant's employment history; and (2) appellant's abusive childhood. Became the "mitigating factors have been given very little weight and they in no way offset the aggravating factors," the trial court found the death sentence "fully supported by the record."

APPEAL

[1] Consalvo raises twenty claims in this appeal.[3] Claims (3), (5), (6), (7), and (10) were not properly preserved for appellate review and are therefore procedurally barred. Further, assuming arguendo that claims (3), (5), (7) and (10) were preserved for appeal, we have considered them and find them to be without merit. The legal claims raised in issues (11),[4] (13),[5] (17),[6] (18),[7] and

3. The twenty claims are: (1) The trial court abused its discretion in finding the state did not commit a discovery violation when it failed to disclose a laboratory's inability to test cigarette butts found in the victim's toilet and when it failed to disclose a letter requesting laboratory analysis on the same evidence; (2) The trial court abused its discretion in ruling that the state did not commit a discovery violation when, after the defense's opening statement, which asserted a third party hilling theory, the state informed the defense that the fingerprint expert had identified several previously unidentified prints as belonging to the victim's deceased boyfriend; (3) The trial court abused its discretion in admitting evidence relating to the collateral burglary of Walker's residence; (4) The trial court erred in allowing the state, during guilt-phase closing argument, to argue a collateral burglary as similar fact evidence: (5) The trial court abused its discretion by admitting appellant's statement to the police upon arrest for a collateral burglary (i.e., that he had permission to be in the victim's residence): (6) The trial court abused its discretion by admitting certain out-of-court statements relating to a prior incident between appellant and the victim regarding an alleged theft; (7) The trial court abused its discretion in allowing Eva Bell to testify to statements made by appellant in-a telephone conversation with his mother, who then related them to Bell; (8) The trial court erred by allowing the state, during its guilt-phase closing argument, to rebut a suicide defense which the state believed was raised by the defense's case; (9) The trial court erred in instructing the jury that proof of unexplained possession of recently stolen property by means of burglary may justify a conviction for burglary; (10) Constructive amendment of an indictment by instruction and argument on felony murder when the grand jury only charges premeditated murder violates article I, section 15(a) of the Florida Constitution and the Fifth Amendment: (11) Appellant's right to due process was violated and he was denied effective assistance of counsel when the trial court instructed the jury on, and allowed the prosecution to argue, a first-degree felony murder theory when the indictment charged only premeditated first-degree murder; (12) The trial court abused its discretion in admitting the victim-impact testimony of the victim's brother and the prosecutor used victim-impact evidence in an improper manner; (13) The trial court abused its discretion in denying appellant's specially requested penalty-phase jury instructions which specifically defined certain non-statutory mitigating circumstances that appellant believed were applicable in his case; (14) The trial court's sentencing order, which relied on testimony and deposition statements not presented in open court, violated appellant's due process rights; (15) The trial court erred in failing to consider and find certain non-statutory mitigating circumstances and the court applied an improper standard in evaluating the "turbulent family background" mitigating circumstance; (16) The trial court erred in finding the "avoid arrest" aggravating circumstance: (17) Section 921.141(5)(d), Florida Statutes (1995), which delineates the "felony murder" aggravator, is unconstitutional; (18) Section 921.141(7), Florida Statutes (1995), which authorizes the introduction of victim-impact evidence, is unconstitutional; (19) Death by electrocution is cruel and unusual punishment; and (20) The death penalty is not proportionally warranted in this case.

4. *See* *Armstrong v. State*, 642 So.2d 730 (Fla. 1994), *cert. denied*, 514 U.S. 1085, 115 S.Ct. 1799, 131 L.Ed.2d 726 (1995); *Lovette v. State*, 636 So.2d 1304, 1307 (Fla.1994); *Bush v. State*, 461 So.2d 936, 940 (Fla.1984), cert. denied, 475 U.S. 1031, 106 S.Ct. 1237, 89 L.Ed.2d 345 (1986); *O'Callaghan v. State*, 429 So.2d 691, 695

19

(19) [8] have been previously rejected by this Court and do not require additional discussion.

Discovery

[2] Appellant argues that the State committed several discovery violations. First, he asserts the State committed a discovery violation by failing to disclose that a laboratory tried to test cigarette butts found in the victim's toilet but was unable to test them.

Rule 3.220(b)(1)(J), Florida Rules of Criminal Procedure, requires. the prosecutor to disclose to defense counsel "reports or statements of experts made in connection with the particular case, including results of physical or mental examinations and of scientific tests, experiments, or comparisons." In this case, the cigarette butts were sent to a crime lab but the lab could not perform any tests on the butts, and no reports or statements were generated as a result. We find no error in the trial court's determination that no discovery violation occurred under these circumstances and that a *Richardson* [9] hearing was not required. *Matheson v. State*, 500 So.2d 1341, 1342 (Fla.1987).

[3, 4] We also find the State's failure to disclose the letter requesting the lab analysis of the cigarette butts did not constitute a discovery violation. Rule 3.220(b)(1)(K), Florida Rules of Criminal Procedure, requires the prosecutor to disclose to defense counsel "any tangible papers or objects that the prosecuting attorney intends to use in the hearing or trial and that were not obtained from or that did not belong to the accused." Documents simply used to procure or elicit evidence are not subject to disclosure. *State v. Gillespie*, 227 So.2d 650, 556–57 (Fla. 2d DCA 1969); Fla.R.Crim.P. 3.220(g)(1). Furthermore, the State did not use the letter during its examination of Detective Gill.

151 Appellant further maintains the State committed a discovery violation when, after the defense's opening statement which asserted a possible third party killer theory, the State informed the defense that the fingerprint expert had identified several previously unidentified prints as belonging to the victim's deceased boyfriend.

Rule 3.220(j), Florida Rules of Criminal Procedure, provides for a party's continuing duty of disclosure:

> If, subsequent to compliance with the rules, a party discovers additional witnesses or material that the party would have been under a duty to disclose or produce at the time of the previous compliance, the party shall promptly disclose or produce the witnesses or material in the same manner as required under these rules for initial discovery.

Months before trial the State disclosed the fingerprint expert's name (Tom Messick) and his thirteen-page latent fingerprint report to the appellant. There were some forty unidentified latent fingerprints in the victim's apartment. The prosecutor asked Messick the day before trial to determine if any of those prints could match the victim. However, in addition to acting on the State's re-

(Fla.1983). As for appellant's ineffective assistance of counsel claim, it is not reviewable on direct appeal and is more properly raised in a motion for post-conviction relief. *McKinney* v. *State*, 579 So.2d 80, 82 (Fla. 1991).

5. *See, e.g., Finney v. State*, 660 So.2d 674, 684 (Fla.1995), cert. denied, — U.S. —, 116 S.Ct. 823, 133 L.Ed.2d 766 (1996): *Jones v. Stare*, 612 So.2d 1370, 1375 (Fla.1992), cert. *denied*, 510 U.S. 836. 114 S.Ct. 112. 126 L.Ed.2d 78 (1993): *Robinson* v. State, 574 So.2d 108, I I I (Fla.). cert. *denied*, 502 U.S. 841, 112 S.Ct. 131, 116 L.Ed.2d 99 (1991).

6. *See, e.g., Hunter v. State*, 660 So.2d 244, 253 & n. 11 (Fla.1995), cert. *denied*, — U.S. —, 116 S.Ct. 946, 133 L.Ed.2d 871 (1996).

7. We have explicitly upheld the constitutionality of section 921.141(7) in *Maxwell* v. State, 657 So.2d 1157 (Fla. 1995), approving, 647 So.2d 871 (Fla. 4th DCA 1994). *See* also *Payne v. Tennessee*, 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991): *Windom v. State*, 656 So.2d 432 (Fla.), *cert.* denied, — U.S. —, 116 S.Ct. 571, 133 L.Ed.2d 495 (1995).

8. *See*, e.g., Hunter, 660 So.2d at 253; *Cardona* v. Stare, 641 So.2d 361, 365 (Fla.1994), *cert. denied*, 513 U.S. 1160, 115 S.Ct. 1122, 130 L.Ed.2d 1085 (1995): *Fotopoulos v. State*, 608 So.2d 784, 794 n. 7 (Fla.1992), cert. *denied*, SO8 U.S. 924, 113 S.Ct. 2377, 124 L.Ed.2d 282 (1993).

9. See Richardson v. Stare, 246 So.2d 771 (Fla. 1971).

20

quest, Messick ran the unidentified prints through a computer database to check for other possible matches. The computer identified the victim's deceased boyfriend, Scott Merriman, as a potential match. Messick retrieved Merriman's prints from the archives and compared them to the previously unidentified prints. After confirming that Merriman's fingerprints matched eighteen fingerprints found in the victim's apartment, Messick notified the prosecutor, who, in turn, immediately notified defense counsel. Defense counsel deposed Messick two days later and the State sought to present Messick's testimony a week later.

The record reflects that the fingerprint expert was not acting on the State's request or at tbe direction of the State when he independently tried to match the unidentified fingerprints to someone other than the victim. Further, the State immediately disclosed its results to defense counsel once the State was informed of Messick's analysis. Thus, we find that the trial court did not abuse its discretion in finding no discovery violation on the part of the State.

[6] Even if there was a discovery violation, however, we find no error by the trial court in concluding that appellant's defense was 'not prejudiced and that any violation was not willful. In fact, because there still remained a substantial number of unidentified prints, even after Messick's further analysis, the defense's third party theory could still be asserted. Also, Messick's ultimate conclusion was that none of the latent fingerprint5 recovered from the victim's apartment matched appellant's fingerprints, a fact helpful to the defense.

Walker Burglary

[7, 8] *As we noted* above, claim three relating to the admission of evidence of the Walker burglary was not preserved for appeal. Nevertheless, even if it were preserved, it would be without merit. In Florida, evidence of other crimes, wrongs and acts is admissible if it is relevant (i.e., it is probative of a material issue other than the bad character or propensity of an individual). Charles W. Ehrhardt, *Florida Evidence* § 404.9, at 156 (1995 ed.). *See Hartley v. State*, 686 So.2d 1316, 1320 (Fla.1996) (citing *Griffin v. State*, 639 So.2d 966 (Fla.1994)) (both stating that evidence of other crimes which are "inseparable from the crime charged" is admissible under section 90.402).

The Walker burglary was closely connected to the murder of Pezza and was part of the entire context of the crime. When the police caught appellant burglarizing the Walker residence, they found Pezza's checkbook on his person. It was also as a result of the Walker burglary that police placed appellant in custody. Furthermore, appellant was in jail for this burglary when he placed the incriminating call to his mother and stated that the police were going to implicate him in 8 murder.

Appellant also claims that the State improperly argued the collateral burglary as similar fact evidence in closing argument to the jury. Under section 90.107, Florida Statutes (1995), evidence that is admissible for one purpose may be inadmissible for another purpose. *See Parsons v. Motor Homes of America, Inc.*, 466 So.2d 1285, 1290 (Fla. 1st DCA 1985). Consequently, it is error to take tbe position that once material "is received in evidence, it will be received for *any* probative value it may have on any issues before the co,." *Id.*

[9] As discussed above, the trial court properly admitted details of the Walker burglary because it was inextricably intertwined with the instant murder. However, the Walker burglary was never admitted as similar fact evidence during the trial. Nevertheless, during closing argument, the prosecutor pointed out the similarities between the Walker burglary and the Pezza burglary/murder. This argument by the prosecutor was improper. The State's claim that it was simply arguing facts elicited during the trial and drawing legitimate inferences from them is not availing. The State's use of the facts from the Walker burglary exceeded the scope for which they were admitted—i.e., to establish the entire *context* out of which the criminal action occurred.

[10] Nevertheless, we find this error harmless. Throughout the trial, the jury was presented with evidence of both the Pezza

21

burglary and the *Walker* burglary, mostly without objection This evidence was not erroneously admitted.[10] Moreover, the similarities between the two crimes were not made a feature of the trial. Thus, while the prosecutor's comments were error, they were harmless. See *State v. DiGuilio,* 491 So.2d 1129, 1138–39 (Fla.1986).

Prosecutor's Argument

[11] Next, appellant claims that the trial court erred by allowing the State during its closing argument to rebut a suicide defense which the State believed was raised by the defense's case. Relying on *Bayshore v. State,* 4.3'7 So.2d 198 (Fla. 3d DCA 1983), and *Brown v. State, 524* So.2d 730 (Fla. 4th DCA 19881, Consalvo contends that the prosecutor improperly set up a "strawman" defense in order to knock it down.

We find no error and find this case distinguishable from *Bayshore* v. St&, 437 So.2d 198 (Fla. 3d DCA 1983), and *Brown* v. *State,* 524 So.2d 730 (Fla. 4th DCA 1988). In *Bayshore,* the prosecutor himself created the strawman (defense) and then proceeded to knock it down. Specifically, the defendant in *Bayshore* filed no notice of alibi and did not even hint at an alibi defense during the trial. Nevertheless, during the trial, the prosecutor elicited testimony from the arresting officer which supported an alibi defense. 437 So.2d at 199. During closing argument, the prosecutor told the jury to use its common sense and rhetorically asked: "[I]f [Bayshore] was at home with his father as he told [the officer], where's the one person who can corroborate that?" *The Bayshore court* found that the prosecutor's comments required a new trial since the whole issue of alibi was raised by the State and the comments may have led the jury to believe that defendant had the burden of proving his innocence. Id at 19% 200.

Similarly, in *Brown v. State,* 524 So.2d 730 (Fla. 4th DCA 1988), the prosecutor improperly attempted to create an alibi defense for the defendant and then commented on the defendant's failure to call alibi witnesses. *See also Lane v. State, 469* So.2d 1145 (Fla. 3d DCA 1984)(holding where whole issue of alibi was raised by state, prosecutor's repeated improper comments on defendant's failure to call alibi witnesses was prejudicial error). The Fourth District found that "but for the prosecutor's creation of the impression that alibi witnesses existed . . . there would not have been even a hint as to the existence of a possible alibi defense." *Brown, 524* So.2d at 731.

Unlike the prosecutors in *Brown* and *Buys-* the prosecutor in this case did not manufacture the suicide defense out of whole cloth. . In fact, although defense counsel equivocated on the issue of whether a suicide defense was going to be advanced," the testimony he elicited on cross-examination and the evidence he requested pretrial on this issue contradicted his statements.[12] The appellant effectively opened the door to prose-

10. Therefore, the rule announced in Straight *v. State, 397* So.2d 903 (Fla.), *cert.* denied, *454 U.S. 1022. 102* S.Ct. 556, 70 L.Ed.2d 418 (1981)—erroneous admission of irrelevant collateral crimes evidence "is presumed harmful error because of the danger that a jury will take the bad character or propensity to crime thus demons-ted as evidence of guilt of the crime charged"-is inapplicable. *Id.* at 908; *see* also *Castro v. State. 547* So.2d 11 1, I 15 (Fla.1989); *Keen* v. State, 504 So.2d 396, *401 (Pla.1987); Peek v. State, 488* So.2d 52 (Fla. *1986).*

11. At one point, defense counsel stated: "Let me say this, that is not our theory in defense in the sense of it is not our purpose to say that it was a suicide. That doesn't mean that areas that come out in this case about potential suicide won't be presented."

12. Prior to trial, defense counsel obtained the victim's mental health records and had an expert review the victim's psychological background, including the effects of any medication she may have been taking. During trial, defense counsel elicited testimony from Bell that the victim had been hospitalized for a mental illness and that in 1990 she had threatened to kill herself by stabbing herself to death. Defense counsel also elicited testimony from Dr. Wright (1) that there were characteristics of suicide surrounding the victim's death, (2) that the victim's wounds could have been self-inflicted or suicide-assisted, and (3) that suicide was prevalent among people who took Prozac.

At one stage of the trial the trial court allowed defense counsel to cross-examine a witness on certain matters because it was in direct support of a potential defense of suicide. Also, the trial court even believed that a suicide defense was implicitly raised by defense counsel.

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eutorial comment on suicide since the testimony elicited by defense counsel on cross-examination suggested a potential suicide de-. *Cf. Biondo v. State*, 533 So.2d 910 (Fla. 2d DCA 1988)(holding state did not prematurely rebut defendant's entrapment defense where state introduced evidence in anticipation of entrapment defense after defendant had inserted defense into case through opening statement and defense counsel's cross-examination of state witness). Under the circumstances here, a jury could have reasonably believed that an issue of suicide was raised by the defense. Accordingly, the trial court did not err.

Jury Instructions

[12] The last error claimed by the appellant during the guilt phase is that the trial court erred in instructing the jury that proof of unexplained possession of recently stolen property by means of burglary may justify a conviction for burglary. In this case, the trial court read the following instruction to the jury:

> Proof of unexplained possession by an accused of property recently stolen, by means of a burglary may justify a conviction of burglary with intent to steal that property if the circumstances of the burglary and of the possession of the stolen property, when considered in the light of all of the evidence in the case, convince you beyond a reasonable doubt that the defendant committed the burglary.

See Fla.Std.Jury Instr. (Crim.) 136.[13]

[13–15] As with all jury instructions, there must be an appropriate factual basis in the record in order to give this instruction. *See, e.g., Griffin v. State*, 370 So.2d 860, 361 (Fla. 1st DCA 1979) (holding that in prosecution for burglary it was reversible error to give instruction regarding possession of stolen property when evidence did not disclose that defendant was ever in possession of the property). This means two things. First, it must be shown that the defendant, when arrested, either failed to explain or gave an incredible or unbelievable explanation for his possession of the property. *Id.* Second, the instruction applies only where the property is undisputedly stolen and the question is who stole it. See *Jones v. State*, 495 So.2d 856, 857 (Fla. 4th DCA 1986). "[W]here there is conflict in the evidence as to the intent with which property alleged to have been stolen was taken . . . the question should be submitted to the jury without any intimation from the trial court as to the force of presumptions of fact arising from . . . the testimony." *Curington v. State*, 80 Fla. 494, 497, 86 So. 344, 345 (1920). It is improper to give this instruction when its only possible effect is to allow the jury to presume that a defendant is guilty because he was in possession of the property. This goes against the presumption of innocence inherent in our criminal justice system. *Jones* 495 So.2d at 856.

In this case, appellant argues that the instruction could lead the jury to conclude appellant was guilty of burglary by his innocent possession of a canvas bag and checkbook that were not shown to have been stolen from the victim's residence. Appellant was also videotaped using the victim's ATM card and was seen ***driving the victim's car*** several days before the victim's body was found. At trial or upon arrest, appellant failed to explain his possession of the victim's checkbook, canvas bag, ATM card, and car. We find there was sufficient evidence in the record that these items were recently stolen to justify the instruction. given by the court.

We also find *Jones* inapplicable to this case. In *Jones*, there was a clear danger that the instruction would be improperly used. The car in *Jones* was *not* undisputedly stolen; in fact, the only issue at trial was whether the defendant intended to steal or innocently took a car from a car dealer. 496 So.2d at 857. That danger is not present here. All the evidence indicates that the victim's property observed or found in appellant's possession was stolen. As the trial court stated: "There is no evidence to indicate that that property was stolen at some other time than at the time of the burglary—at the time of the burglary of the victim's

13. Jury instructions referring to the inference arising from the unexplained possession of stolen property have been specifically approved by this Court. See, e.g., *Edwards v. State*, 381 So.2d 696 (Fla.1980), and cases cited therein.

23

residence." Consequently, we find that the trial court did not err in giving the "unexplained possession" jury instruction.

[16] Even if it were error for the trial court to have given the instruction, we would 5d it harmless beyond a reasonable doubt. The evidence against appellant was overwhelming, and we find no reasonable possibility that the giving of the instruction affected the outcome. Appellant lived with his mother, who lived next door to the victim. Appellant knew the victim and had been in her apartment on several occasions. Appellant also was aware that the victim's live-in boyfriend had recently died, leaving her alone in her apartment. Prior to the victim's body being found, appellant was observed with various items of the victim's personal property. During that time, appellant was filmed on three different days making withdrawals from the victim's bank account using her ATM card and was also observed driving the victim's car. Appellant's mother saw appellant carrying a beach bag that belonged to the victim. Cards found in the victim's bedroom and bathroom matched playing cards found in the beach bag which was ultimately retrieved from a nearby dumpster. Upon the appellant's arrest for burglary, appellant was found in possession of one of the victim's checkbooks.

"Appellant also made numerous incriminating statements. When appellant called his mother from jail for the unrelated burglary, he told her he was going to be implicated in a murder. When his mother told him that the police were in the victim's apartment, appellant replied, "Oh, shit." When the police asked appellant about his possession of the victim's checkbook, he responded, "[Y]ou are not going to pin that stabbing on me." At that point, the police did not know that the victim had been stabbed. Appellant told another jail inmate that he went to the victim's apartment and broke in to get drugs knowing the victim was home but unconscious. After he entered the victim's apartment, she awoke and started yelling at him to get out and that she was going to call the police. She reached for the telephone so he grabbed her. She screamed and he stabbed her. When she screamed louder, he stabbed her several more times.

Finally, pursuant to a search warrant, the police found a towel in appellant's dresser drawer. Blood on the towel, which had been transferred from a hand onto the towel while the blood was still wet, matched the victim's DNA pattern. Based on this evidence, we feel that there is no reasonable possibility that the verdict would have been different had the instruction not been given. See State v. *DiGuilio*, 491 So.2d 1129 (Fla.1986).

Sufficiency of Evidence

[17] The sufficiency of the evidence has not been directly challenged in this case, However, our review of the evidence as outLined above demonstrates that there was sufficient evidence to support Consalvo's convictions for first-degree murder and armed burglary. Accordingly, finding no reversible error during the guilt phase of the trial, we affirm Consalvo's convictions.

Penalty *Phase*

Appellant claims that the victim-impact testimony of the victim's brother should not have been admitted and that the prosecutor used the victim-impact evidence improperly. We disagree. Section 921.141(7), Florida Statutes (1995), which establishes the permissible bounds of victim-impact evidence, states:

> Such evidence shall be designed to demonstrate the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death., Characterizations and opinions about the crime, the defendant, and the appropriate sentence shall not be permitted as part of victim impact evidence.

After reviewing the testimony of the victim's brother, we conclude that it did not violate the dictates of section 921.141(7).

[18] Appellant also claims that the prosecutor improperly used victim-impact evidence in his opening and closing penalty-phase argument. Since appellant failed to object at the trial, he has failed to preserve this point for appeal. *Sims v. State*, 444 So.2d 922,924 (Fla.1983), *cert. denied*, 467 U.S. 1246, 104

24

S.Ct. 3525, 82 L.Ed.2d 832 (1984); *see also Johnson v. State*, 660 So.2d 637,646 (Fla. 1995) (finding defendant's contention that state made improper closing argument was not preserved for appeal, where counsel did not object until after jury had been given its instructions and retired to deliberate), *cert. denied*, — us. —, 116 S.Ct. 1550, 134 L.Ed.2d 653 (1996). Even if it had been preserved for appeal, however, we would find that appellant's claim fails on the merits.

(19) Next, appellant claims that the trial court's sentencing order relied on testimony and deposition statements not presented in open court and thereby violated his due process rights. In *Porter v. State*, 400 So.2d 5 (Fla.1981), the trial court based a "substantial portion" of its findings as to two aggravators on the testimony of an acquaintance of the appellant. However, even though the acquaintance testified at trial, the trial court's critical findings came from the acquaintance's deposition testimony which differed from that presented at trial. "The trial judge never advised the appellant of his intention to utilize the deposition and never afforded the appellant an opportunity to rebut, contradict, or impeach the deposition testimony." *Id.* at 7.. Extending the holding *in Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), we concluded that when a sentencing judge intends to use any information not presented in open court as a factual basis for a sentence, he must advise the defendant of what it is and afford the defendant an opportunity to rebut it. *Porter*, 400 So.2d at 7. Because the trial judge sentenced Porter to death, relying in part on information not presented in open court and not *proved* at *trial*, we found the trial judge deprived Porter of due process of l a w . *Id.*

In this case, the trial court's sentencing order quotes two statements from depositions which were never presented in open court. The first quote, taken from Officer Hopper's deposition, concerned a statement made by the victim to Officer Hopper. The victim stated to Hopper tbat "she was a little scared of Robert (the appellant]." The second quote was taken from Detective Doethlaff's deposition, where he stated that he told the defendant that, "she was there, you were there. You're going to have to go to court over it and she wants to take action."

[20] The trial court also stated that the "Defendant's girlfriend, Gail Russell, testified that during the period of September 27, 1991 until approximately September 30, 1991 the Defendant drove the victim's vehicle and had the keys to the vehicle in his possession." Gail Russell did not testify during the guilt phase, but she did testify during the penalty phase. Although we find that it was error for the trial court to utilize these out-of-court deposition statements, we find these errors are harmless beyond a reasonable doubt. See *Chapman v. California*, 386 U.S. 18, 22, 87 S.Ct. 824, 827, 17 L.Ed.2d 705 (1967). Unlike the situation in *Porter*, the trial court here made reference to facts which were established at trial by evidence other than that referred to in the sentencing order.

First, as for the victim's statement that she was a little scared of the appellant+ the evidence at trial revealed that the victim identified the appellant as a suspect in the theft of her money and keys. On September 26, 1990, the victim told her brother that she was feeling "down" because appellant had stolen her money and keys. She indicated that she had made arrangements to have her locks changed, that she had called the police, and that she had spoken to appellant's mother about the situation. The following day, a locksmith changed the locks on the victim's apartment door and mailbox. From this testimony, the judge and jury could have easily inferred, without reference to Officer Hopper'+ deposition, that the victim was "a little scared" of appellant. Second, Doethlaff's trial testimony essentially paralleled his deposition quote.'"

14. Detective Doethlaff testified on direct examination what he told the appellant would happen if Pezza filed charges against him:

> I told him, for starters, it was his word against her's because there was not police there at the time of the alleged incident, and it was basically his word against her's. And she evidently wanted to pursue the situation so I was just updating the report. And she stated to me she was intending on filing charges and it would be handled through the courts. She

25

Gail Russell did testify at the penalty phase, although not to all the matters referred to by the trial court, She testified about being in the victim's car with appellant when he went to the ATM, as well as testifying to the fact that appellant was without money until this crime occurred. The substance of her statement was also substantiated by several trial witnesses. Real Favraeau, a motel manager, testified he saw appellant driving a maroon car on September 30, 1990, which was "similar" to Pezza's car. Detective Gill testified that he found the victim's car on October 8, 1990, parked just south of Mr. Favraeau's motel. Detective Gill took Ms. Russell to the site and they located the keys to the car in the backyard of a nearby house. Additionally, James Andrews authenticated photographs taken from videotapes which recorded appellant withdrawing money from the victim's bank account from various ATM machines.

Therefore, although the trial court erred in referring to deposition testimony, the trial court did not actually rely on any information that was not otherwise proven during trial. That was not the case in *Porter*. We find the violation was harmless beyond a reasonable doubt and that the error complained of did not contribute to the sentence of death. See *State v. DiGuilio*, 491 So.2d 1129 (Fla.1986).

Mitigating Circumstances

[21] As his next claim, appellant argues that the trial court erred in assessing certain nonstatutory mitigating circumstances. Specifically, appellant claims that the following nonstatutory mitigating circumstances were uncontroverted and should have been considered and found by the trial court: (1) appellant has a potential for rehabilitation; (2) appellant is amenable to learning and has the ability to learn; (3) appellant has some positive personality traits; and (4) if appellant had been raised in a different environment, his behavior might have been different.

[22, 23] In *Lucas v. State*, 568 So.2d 18 (Fla.1990), we stated: "[T]he defense must share the burden and identify for the court the specific nonstatutory mitigating circumstances it is attempting to establish." *Id.* at 24. Unlike statutory mitigation that has been clearly defined by the legislature, nonstatutory mitigation may consist of any factor that could reasonably bear on the sentence. The parameters of nonstatutory mitigation are largely undefined. This is one of the reasons that we impose some burden on a party to identify the nonstatutory mitigation relied upon. Appellant has not met this burden with respect to mitigating circumstances numbers (1) and (4) above. Appellant neither presented these circumstances to the jury nor to the trial court. Therefore, we find no error by the trial court in not expressly considering or finding these as nonstatutory mitigators,

[24, 25] As to mitigating circumstances numbers (2) and (3), we also fmd no error. A trial court may reject a defendant's claim that a mitigating circumstance has been proven, provided that the record contains competent, substantial evidence to support the trial court's rejection of the mitigating circumstances. *Nibert v. State*, 5'74 So.2d 1059, 1062 (Fla.1990); *see also Cook v. State*, 542 So.2d 964, 971 (Fla.1989) (trial court's discretion will not be disturbed if the record contains "positive evidence" to refute evidence of the mitigating circumstance). In this case, appellant's amenability to learning was specifically considered by the trial court in its sentencing order and not found because of controverting evidence. The same goes for the appellant's assertion that he had some positive personality traits.

[26, 27] Appellant also urges that the trial court used the wrong standard in assessing the mitigating circumstance of his turbulent family history, which it accorded very little weight. The trial court found this mitigating circumstance and accorded it "very little weight." It did not reject this mitigating circumstance as a result of what the appellant claims is an improper standard. It is mere speculation whether the trial court would have accorded the circumstance more weight had it used a different standard. The trial court concluded that: "Although there may have been some abuse by his father

believed he had taken the property, and she wanted it handled through the courts.

26

when he was younger it does not appear to this Court that this murder stems from that abuse or childhood trauma, rather, it appears to have been prompted by purely selfish motives." Mitigating circumstances are defined as "factors that, in fairness or in the totality of the defendant% life or character may be considered as extenuating or reducing the degree of moral culpability for the crimes committed." *Jones v. State, 652* So.2d 346, 351 (Fla.), cert. *denied*, — U.S. —, 116 S.Ct. 202, 138 L.Ed.2d 136 (1995); *see also Brown v. State, 526* So.2d 963, 908 (Fla.) ("Mitigating evidence is not limited to the facts surrounding the crime but can be anything in the life of a defendant which might militate against the appropriateness of the death penalty for that defendant."), *cert. denied*, 488 U.S. 944, 109 S.Ct. 371, 102 L.Ed.2d 361 (1988). The trial court's decision to find this circumstance but accord it very little weight was within its discretion.

AVOID ARREST AGGRAVATOR

[28–31] Section 921.145(5)(e), Florida Statutes, defines the "avoid arrest" aggravator: "The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effectuate an escape from custody." The appellant challenges the finding of this aggravator here. Typically, this aggravator is applied to the murder of law enforcement personnel. However, the above provision has been applied to the murder of a *witness to a crime as well. Riley v. State*, 366 So.2d 19, 22 (Fla.1978). In this instance, "the mere fact of a death is not enough to invoke this factor.. . .Proof of the requisite intent to avoid arrest and detection must be very strong in these cases." Id In other words, the evidence must prove that the sole or dominant motive for the killing was to eliminate a witness. *Geralds* v. *State*, 601 So.2d 1157, 1164 (Fla.1992); *Oats v. State*, 446 So.2d 90, 95 (Fk1984); see, *e.g., Harvey v.* State, 529 So.2d 1683, 1087 (Fla.1988) (holding murders were committed for purpose of avoiding lawful arrest where defendant was known to victims and defendants discussed in victims' presence the need to kill them to avoid being identified), cert. *denied*, 489 U.S. 1040, 109 S.Ct. 1175, 103 L.Ed.2d 237 (1989). Mere speculation on the part of the state that witness elimination was the dominant motive behind a murder cannot support the avoid arrest aggravator. *Scull* v. *State*, 533 So.2d 1137, 1142 (Fla.1988), *cert. denied*, 490 U.S. 1087, 109 S.Ct. 1937, 104 L.Ed.2d 408 (1989). Likewise, the mere fact that the victim knew and could identify defendant, without more, is insufficient to prove this aggravator. *Geralds* v. *State*, 601 So.2d 1157, 1164 (Fla.1992); *Davis v. State, 604* So.2d 794,798 (Fla.1992).

[32–34] Additionally, a motive to eliminate a potential. witness to an antecedent crime can provide the basis for this aggravating circumstance. *Swafford v. State*, 533 So.2d 270, 276 (Fla.1988), *cert. denied*, 489 US. 1100, 109 S.Ct. 1578, 103 L.Ed.2d 944 (1989). And, it is not necessary that an arrest be imminent at the time of the murder. *Id.* Finally, the avoid arrest aggravator can be supported by circumstantial evidence through inference from the facts shown. *Id* at 276 n.6.

In this case, a witness testified regarding a conversation he had with appellant while in jail:

> He went over there one day, and she didn't answer the door, but he knew she was home. He figured she was passed out. So he broke into the house.
>
> While he was in there, she woke up and started yelling she was going to call the cops and get out of her house and this and that. And she reached to grab the phone, and he grabbed her and tried to pull, you know, tried to step her from calling the 'cops; and she started screaming, so he said he stuck her. Then she really started screaming, so he stuck her a couple more times.

We conclude that this testimony, coupled with the fact that appellant and victim knew each other, and the appellant was aware that the victim was pressing charges against him for his prior theft, is sufficient to uphold the trial court's finding of the avoid arrest aggravator.

Appellant cites to *Garron* v. State, 528 So.2d 353 (Fla.1988), to contradict tbe trial court's finding of tbis aggravator. But *Garron* can be distinguished. In *Garron*, the defendant had been drinking and was in a foul mood on the night of the murder. After one of the victims was shot in the chest, the

first victim's daughter ran to a telephone, called the operator, and requested the police. Defendant followed the daughter to the phone, leveled the gun at her, and fired. Id at 354. We rejected the avoid arrest aggravator because there was no proof as to the true motive for the shooting of the second victim, other than that it involved another family member and immediately followed the mother's shooting. In fact, the motive was unclear. We believed that the fact that the second victim was on the phone at the time of the shooting hardly implied any motive on the defendant's part. *Id.* at 360. In the instant case, however, the victim threatened to call the police and reached for the phone while appellant was attacking her.

Appellant's reference to *Cook v. State*, 542 So.2d 964 (Fla.1989), is also inapposite. In that case, we found the defendant's statement that he shot the victim to keep her quiet because she was yelling and screaming was insufficient to support the trial court's finding that the defendant killed the victim to avoid arrest. Rather, the facts indicated that the defendant shot instinctively, not with a calculated plan to eliminate the victim as a witness. IO! at 970. In this case, the victim's screaming was contemporaneous with her threat and actions to call the police.

[35, 36] As an alternative argument, appellant contends that the avoid arrest and felony murder aggravators should be merged. Under the same reasoning in *Provence v. State*, 337 So.2d 783 (Fla.1976), *cert. denied*, 431 U.S. 969, 97 s.ct. 2929, 53 L.Ed.2d 1066 (1977), where we held that in robbery-murders the felony murder and pecuniary gain aggravators should be merged, appellant's claim is without merit, The avoid arrest and felony murder aggravators do not refer to the same aspect of the defendant's crime. See id at 786. Also, one who commits a capital crime in the course of a burglary will not automatically begin with two aggravating circumstances. See *id.* Therefore, the trial court did not err in finding the "avoid arrest" aggravating circumstance.

PROPORTIONALITY

[37] Finally, appellant contends that his death sentence is disproportionate. There are two aggravators in this case-avoid arrest and murder committed during the course of a burglary. There are no statutory mitigating circumstances and, as for nonstatutory mitigating circumstances, the trial court gave the appellant's employment history and appellant's abusive childhood "very little weight" We conclude that the axistence of the two aggravators is sufficient to outweigh the very little weight given to the nonstatutory mitigating circumstances set forth in the sentencing order. We have previously upheld death sentences in cases where there were two aggravators, no statutory mitigators, and weak nonstatutory mitigation.[15] We have also upheld death sentences where there are two aggravators and no mitigation. See, *e.g.*, *King v. State*, 436 So.2d 50 (Fla.1983) (affirming imposition of death penalty where there were two aggravators—prior violent felony and heinous, atrocious and cruel-and no mitigation), *cert. denied*, *466* U.S. 909, 104 S.Ct. 1690, 80 L.Ed.2d 163 (1984). Accordingly, we find that Consalvo's death sentence is not disproportionate to other cases.

We affirm appellant's convictions and the imposition of the sentence of death.

It is so ordered.

KOGAN, C.J., and OVERTON, SHAW, GRIMES, HARDING, WELLS and ANSTEAD, JJ., concur.

15. *See, e.g., Melton v. State*, 638 So.2d 927 (Fla.) (holding death sentence not disproportionate where trial court found two statutory aggravators that felony-murder was committed for pecuniary gain and that defendant had been convicted of prior murder, no statutory mitigating factors, and nonstatutory mitigators of good conduct while awaiting trial and difficult family background which were given little weight), *cert. denied*, 513 U.S. 971, 115 S.Ct. 441, 130 L.Ed.2d 352 (1994); Bowen v. *State*, 588 So.2d 225 (Fla. 1991) (affirming sentence of death where trial court found two aggravators-prior violent felony and heinous, atrocious, or cruel-and the nonstatutory mitigating factor of "terrible childhood and adolescence"), cert. *denied*, 503 U.S. 975, 112 S.Ct. 1596, 118 L.Ed.2d 311 (1992).

28

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished by mail, to AUGUST A. BONAVITA, Assistant Attorney General, 1655 Palm Beach Lakes Blvd., Third Floor, West Palm Beach, Florida 33401, this 1st day of JUNE, 2000.

MARCY K. ALLEN
Assistant Public Defender