IN THE SUPREME COURT OF FLORIDA

ALLEN WARD COX,

Appellant,

v.

Case No. SC00-1751
Lower Tribunal No. 99-249-CF

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIFTH JUDICIAL CIRCUIT,
IN AND FOR LAKE COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

STEPHEN D. AKE
ASSISTANT ATTORNEY GENERAL
Florida Bar No. 14087
Westwood Center
2002 North Lois Avenue, Suite 700
Tampa, Florida 33607
Telephone: (813) 801-0600
Facsimile: (813) 356-1292

COUNSEL FOR APPELLEE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

OTHER AUTHORITIES CITED

STATEMENT OF THE CASE AND FACTS

On February 5, 1999, a grand jury indicted Appellant, Allen Ward Cox, for premeditated first degree murder and battery in a detention facility. (V1, R.1). Appellant initially entered a plea of not guilty to both charges, but subsequently plead guilty to the battery charge. (V1, R.11; V12, T.411-16).

Prior to trial, defense counsel moved to declare Florida Rule of Criminal Procedure 3.202 unconstitutional, both facially and as applied. (V2, R.281-95). After conducting a hearing, the trial judge denied Appellant's motions. (V10, T.129-39). Subsequently, in violation of Rule 3.202, defense counsel failed to timely give notice of Appellant's intent to present expert testimony of mental mitigation. Defense counsel moved to extend the time for providing the information required by the rule. (V4, R.682-83). The State acquiesced to an extension provided that Dr. McMahon, the defense expert, produce a report and provide the State with a copy of her notes and test results prior to her scheduled deposition. (V11, T.250-51). Defense counsel agreed and the trial judge signed an order[1] extending the time for Appellant's filing under Rule 3.202 until February 25, 2000. (V4, R.693; V11, T.251).

On Monday, February 28, 2000, the day before Dr. McMahon's scheduled deposition, the prosecutor informed the court that he had

[1]The hearing was conducted on February 17, 2000, but the court did not sign the order until February 23, 2000.

not received any of the information from Dr. McMahon as required by the court's order of February 23, 2000. (V11, T.326-29). After discussion with counsel, it was agreed that Dr. McMahon would provide her notes and test material to the State's expert witness, Dr. Michael Gutman. (V11, T.329-38, 352-57).

On March 1, 2000, the State informed the court that Dr. McMahon indicated at her deposition that she did not plan on preparing a written report unless ordered by the court. Accordingly, in compliance with the parties' agreement and court order of February 23, 2000, the prosecutor requested that the court order the doctor to prepare a written report. (V11, T.363-65). Defense counsel belatedly objected[2] to the entire procedure, including the taking of Dr. McMahon's deposition and the production of her reports and test material. (V11, T.365-68). The State reminded the court of the prior agreement made between the parties on February 17th, and noted that defense counsel's argument as to Dr. McMahon's deposition was moot because the State had already taken the first portion of her deposition and the State did not question the doctor about any statements Appellant made regarding

[2]At the hearings on February 17th and February 28th, defense counsel did not raise an objection to the doctor's deposition scheduled for February 29, 2000 or to Dr. McMahon providing her notes to the State's expert, Dr. Gutman. Defense counsel did, however, express his "concern" that the prosecutor would obtain a copy of Dr. McMahon's test results prior to the guilt phase. (V11, T.354-55).

the crime.[3] (V11, T.370). The trial judge denied the State's request to order Dr. McMahon to prepare a written report and signed an order prepared by defense counsel noting Appellant's compliance with Florida Rule of Criminal Procedure 3.202. (V4, R.752-53; V11, T.375-87).

Appellant's jury trial began on March 6, 2000, before the Honorable T. Michael Johnson. The State presented evidence from numerous correction officers and inmates from Lake Correctional Institute (LCI) regarding the murder of inmate Thomas Baker. On December 20, 1998, Appellant discovered that someone had broken into the footlocker in his cell and stolen approximately $500. (V18, T.1648; V21, T.2278). Appellant went out onto the balcony of his dorm, E-dorm, and announced in a loud voice that he was offering a $50 reward for information on the identity of the thief.[4] Appellant indicated that he would stab and kill the thief and he did not care about the consequences. (V16, T.1393-97, 1405; V17, T.1432-34, 1530-31). Appellant stated that he would rather do his time on death row because he would have a television in his cell on death row. (V17, T.1434; V18, T.1656; V20, T.2075).

Several inmates were in the dorm at the time and testified to hearing Appellant's threat. (V16, T.1393-95; V17, T.1432-34, 1530-

[3]The prosecutor stated that her second deposition would not take place until after the guilt phase. (V11, T.370).

[4]Appellant subsequently increased the amount to $100. (V16, T.1393-95)

31; V18, T.1647-50; V20, T.2074-78). Prior to any of the inmates' testimony, defense counsel orally moved in limine to preclude the State from introducing into evidence any testimony regarding Appellant's statement that he was already serving two life sentences. (V16, T.1372-84). When making his threat, Appellant stated that he did not care about the consequences because he was already serving two life sentences. (V16, T.1372-77). The trial court granted the motion in limine and had the prosecutor inform all of the State's inmate witnesses about the ruling.

The morning after Appellant's threat, the victim, Thomas Baker,[5] came into E-dorm and got into a fight with inmate Tony Wilson. Thomas Baker was upset that Tony Wilson had told Appellant that he (Baker) was responsible for the theft. (V16, T.1397-98; V17, T.1426; V18, T.1697-99). After the Baker/Wilson fight, Appellant told another inmate, "I don't think the kid done it. I think those people are setting him up for the reward money." (V18, T.1711-12). Before lunch, however, one of Appellant's friends told Appellant that he believed "in his heart that [Baker] did it and I think you should kill the little bastard." (V17, T.1499).

During lunchtime at LCI, inmates gather around the canteen area to pick up their mail and buy snacks. On December 21, 1998, at around 12:45, numerous inmates were standing in the canteen area

[5]Most of the inmates referred to Thomas Baker by the nicknames "Venezuela" or "Little Kid."

near the handball courts and witnessed Appellant stab Thomas Baker to death. Appellant saw Thomas Baker at the handball court and called him over. (V18, T.1652-53). Appellant hit Baker a couple of times with his fists and knocked him down.[6] (V18, T.1653). During the attack, Baker continuously yelled out that he did not do it. (V17, T.1596 -97; V18, T.1630, 1653, 1744). The victim managed to wiggle free and attempted to get up, only to be slammed back down by Appellant. (V17, T.1452-53). After beating the victim with his fists, Appellant stated, "Mother fucker, this ain't good enough," and pulled out a shank shaped like an icepick and stabbed at the victim three or four times.[7] (V17, T.1453-54, 1596; V18, T.1627, 1658, 1745). One inmate testified that there was no question that Appellant fatally stabbed Baker in the back with the icepick shank. (V18, T.1744-46).

After the stabbing, Appellant put the shank under his jacket sleeve and walked away stating, "It ain't over, I've got one more mother-fucker to get." (V17, T.1456, 1597; V18, T.1748; V20, T.2059). Inmate Walter Dorsey testified that he saw Appellant walk behind LCI's pumphouse, and when Appellant returned, Dorsey did not

---

[6]One witness described the victim as a "featherweight," compared to "Big Al," who he described as being six foot, three or four inches tall and weighing about 230-240 pounds. (V17, T.1441). The medical examiner testified that the victim was five foot, ten inches and weighed 144 pounds. (V14, T.990).

[7]The victim suffered three stab wounds. (V14, T.991). One witness described hearing the shank strike the concrete when Appellant stabbed at the victim on one occasion. (V18, T.1658).

see him with the shank. (V18, T.1748-49). Prison officials found an icepick-shaped shank hidden in a pipe of the pumphouse. (V16, T.1244, 1294). Appellant admitted to Department of Corrections Inspector Cornelius Faulk that he placed the icepick in the pipe. (V19, T.1823).

After hiding the shank, Appellant returned to E-dorm and encountered inmate Donny Cox and asked him if he or Lawrence Wood had his money. (V18, T.1781). Appellant told Donny Cox that if he had his money, he would kill him too. (V18, T.1781, 1784). Appellant then proceeded up to his cell in quad three, cell number 3209, and struck his cellmate, Lawrence Wood, in the face with his fist and threatened to kill him. (V17, T.1531-35). Appellant believed that his cellmate was also involved in the theft of his money. (V17, T.1531-34). Appellant told Lawrence Wood, "You know you did it...I got your friend, mother-fucker. You're lucky I put it up or I'd get your ass." (V20, T.2079). After attacking Lawrence Wood, Appellant went into a mop closet and washed up. (V18, T.1782; V20, T.2083).

While Appellant was busy hiding the shank and confronting Lawrence Wood, the victim of the stabbing, Thomas Baker, took it upon himself to seek medical attention. Immediately after being stabbed, the victim got to his feet and ran to correction officers in C-dorm. Officer Susan Parker was the first prison official to come into contact with the victim at about 12:45 p.m. She

testified that Baker had blood coming from his mouth and complained of being stabbed. (V15, T.1118-19). Officer Parker made an emergency medical call and then examined Baker looking for stab wounds. She found a small puncture wound below his left shoulder, but there was no visible blood. (V15, T.1122). Prison officials asked the victim who stabbed him and he responded, "Big Al, Echo dorm, quad three." (V15, T.1051, 1129, 1170-71). Baker complained to officials that his lungs were filling with blood, so instead of waiting for the medical cart to arrive, officers placed the victim on a stretcher and ran him over to the medical center. (V15, T.1051-53, 1163-67). Emergency Medical Service (EMS) technicians were dispatched to LCI at 1:06 and started attending to Thomas Baker at 1:23 p.m. (V15, T.1197-99). When paramedic Martin Bundy first came into contact with Baker, the victim was not breathing and did not have a pulse. (V16, T.1203). EMS transported Baker to a local hospital but he was pronounced dead before arriving at the hospital. (V16, T.1203-06).

Doctor Janet Pillow performed an autopsy on Thomas Baker and discovered three puncture wounds, two of which were to the lower torso and were shallow, non-life-threatening injuries. (V14, T.991). Doctor Pillow found that Baker died as a result of a major puncture wound that entered through the victim's back and went through the chest cavity, between two ribs, and pierced the lungs and aorta. (V14, T.992-96). The wound was only 2 millimeters wide

(2/25th of an inch), but was approximately 17.5 centimeters deep (six and 7/8th of an inch). (V14, T.991-95). The major wound to the lungs and aorta would not immediately render a person unconscious, but blood would seep into the lungs and impair the person's breathing. (V14, T.996-98).

Doctor Pillow testified that the shank found in the pumphouse was consistent with the type of weapon used to cause the victim's injuries. (V15, T.1003-04). She also stated that it is not unusual to have a wound deeper or longer than the length of the blade. (V15, T.1020-22). When force is applied to the body, the tissues, because of the body's elasticity, can give from the pressure and the depth of the wound track can actually be greater than the length of the instrument. (V15, T.1020).

After the State rested its case-in-chief, Appellant moved for a judgment of acquittal which the trial judge denied. (V20, T.2145-69). Defense counsel then called Dr. Ronald Reeves, a forensic pathologist, who opined that the icepick shank found hidden in the pumphouse could not have caused the victim's fatal wound. Dr. Reeves initially testified that the "blade" on the icepick was 3.9 inches[8] and the victim's fatal wound was 6.78 inches according to Dr. Pillow's autopsy report. (V20, T.2186-2200). Dr. Reeves disagreed with Dr. Pillow's opinion regarding

[8]The entire shank measured eight and 5/8 inches long, but there was tape wrapped around the end to form a make-shift handle. (V19, T.1975).

the elasticity of the victim's body. Specifically, Dr. Reeves did not believe it was possible for there to be almost three inches of elasticity (the difference between the wound's reported length and Dr. Reeves' opinion as to the blade's length). (V21, T.2210-15).

Doctor Reeves subsequently testified that the shank blade appeared in a photograph to be 4.6 to 4.7 inches long. (V21, T.2246). The doctor still believed the blade was not long enough to cause the fatal blow, barring a number of mitigating circumstances occurring simultaneously. (V21, T.2253). However, the doctor acknowledged that if the shank found in the pumphouse did not cause the fatal injury, a weapon with very similar characteristics caused the injury. (V21, T.2261).

Doctor Reeves also conceded that the positioning of the victim at the time of the stabbing could affect the indentation or elasticity of his body. The doctor apparently was unaware of the fact that Appellant, weighing 215 pounds, was on top of the victim's chest while the victim was lying in a fetal position on a concrete surface when Appellant struck him with great force.[9] (V21, T.2231-33, 2262-63). Under this factual scenario, the doctor noted there would be more indentation of the body. (V21, T.2233).

---

[9]The doctor testified that his opinions were "in the context of the testimony that I was given, that's assuming that the person is in a standing position or laying position or whatever, and a stab wound is inflicted in that anatomical part of the body, without any other factors affecting the track length or the indentation or excursion of the chest." (V21, T.2263).

Defense counsel called inmate Vincent Maynard as a defense witness. Maynard was housed in the same quad as Appellant and was aware of the theft of Appellant's money. (V21, T.2277-78). The theft of Appellant's money bothered Maynard because Appellant owed Maynard $500. (V21, T.2279-80). Maynard loaned Appellant $500 about six or eight months prior to the theft so Appellant could buy marijuana. (V22, T.2404).

Maynard believed Appellant's roommate, Lawrence Wood, was responsible for the theft. (V21, T.2280). Maynard was aware that Tony Wilson attempted to collect Appellant's reward money by claiming that Thomas Baker broke into his cell. Maynard observed Thomas Baker get into a dispute with Tony Wilson on the morning of December 21, 1998. (V21, T.2281-83). According to Maynard, Tony Wilson later threatened Thomas Baker and told him he better get a knife and watch his back. (V21, T.2283).

Vincent Maynard testified that Appellant was upset that morning because three black inmates were attempting to rob him of the reward money. One of the inmates was Tony Wilson's homosexual partner, Willie Pittman, a.k.a. "Dancing Willie."[10] (V21, T.2286-88). Appellant asked Maynard if he had a shank because he wanted to be prepared if the inmates attempted to rob him. (V21, T.2290).

[10]Willie Pittman testified for the State in rebuttal and stated that he never threatened Appellant about the reward money. Pittman simply informed Appellant that Tony Wilson was entitled to the reward money because he identified the thief. (V23, T.2727-30).

After lunch, Maynard and Appellant ran into Thomas Baker and Appellant asked if he could speak with Baker alone. (V21, T.2296-300). Maynard heard bickering between the two men and then saw them fighting. Maynard claimed he attempted to break up the fight but was unsuccessful. (V21, 2303). According to Maynard, Baker "was going for something in his back, I can't say that he had anything back there, but Allen Cox beat him to the punch, he pulled out a shank." (V21, T.2304). Maynard saw Appellant stab Baker three times. (V21, T.2304).

During Maynard's direct examination, defense counsel asked to proffer evidence of Maynard's prior crimes as reverse Williams rule evidence in an attempt to show that Maynard actually stabbed the victim. (V21, 2317-39). During the proffer, Maynard became upset at defense counsel for attempting to blame him for the murder. (V21, T.2332-33). The court reserved ruling on the admissibility of the reverse Williams rule evidence until after the weekend break. On Monday morning, the court heard further argument on the issue and eventually ruled that the evidence was inadmissible. (V21, T.2345-73).

Immediately after the court's ruling, the prosecutor informed the judge that Maynard had shared information with him over the weekend. Maynard told the prosecutor that on the morning of the murder, Appellant gave him some personal belongings and told Maynard that he did not need them anymore because he was going to

kill someone that day. (V21, T.2374-75). Maynard also told the prosecutor that at some point during the trial, Appellant passed Maynard a note in jail asking him if he would be willing to lie when he testified and say that someone else stabbed Baker. (V21, T.2376). The court brought Maynard out for a proffer and he testified to the conversation he had with Appellant on the morning of the murder. Maynard testified that Appellant gave him his radio and told him he planned to kill someone that day. (V21, T.2388). Maynard also testified that about a month after the murder Appellant wrote him a letter asking Maynard to implicate Lawrence Woods as the person who stabbed Baker.[11] (V21, T.2390-91). Appellant wrote another note to Maynard during the trial asking Maynard to implicate an unknown person as the murderer. (V21, T.2391).

During his direct examination, Vincent Maynard admitted that he testified falsely on Friday in an attempt to save Appellant's life. (V21, T.2394; V22, T.2462-64). During an exchange with defense counsel, the witness stated that Appellant was already serving two life sentences. (V22, T.2464). Appellant moved for a mistrial and argued that the witness had violated the court's

[11]Appellant wrote "the only statement I gave, I beat his ass down, I pulled the knife out, put it to his throat, to make him tell me where the money was, then I turned and gave Woody the knife and he stabbed him right there before he could get up." (V22, T.2508).

instructions not to mention Appellant's sentence.[12] (V22, T.2466). The court denied Appellant's motion for mistrial and gave the jury a curative instruction. (V22, T.2472). The court instructed the jury:

> Ladies and gentlemen, you are instructed that the sentence that Mr. Cox was serving at Lake Correctional Institution is not relevant to this case in any way.
>
> He has never been convicted nor is he serving any sentence for Homicide or any type of Murder.

(V22, T.2476).

On cross-examination, Vincent Maynard testified that during the attack on Thomas Baker, the victim briefly got away from Appellant, but Appellant grabbed him and slammed him back down. (V22, T.2497-98). When Appellant stabbed the victim with the shank, he struck him so hard, the victim's body "scooted over about a foot or better." (V22, T.2498). The State also questioned the witness about the note Appellant passed to him in jail during trial. In the note, Appellant wrote, "I told you my lawyer had some kind of secret plan that he wouldn't tell me about. I swear I didn't know. I hope you won't say anything that will hurt me because of what I did, what he did." (V22, T.2511). Defense counsel argued that this testimony opened the door to the reverse Williams rule evidence of Maynard's prior crimes. The trial court agreed and defense counsel called a number of witnesses to testify

[12]Contrary to defense counsel's assertion, this witness was not instructed in open court to avoid disclosing information about Appellant's prison sentence. (V21, T.2272-75).

to violent crimes committed by Vincent Maynard. (V22, T.2515; 2552-90).

In his defense, Appellant testified that when he discovered his locker had been broken into, he made an announcement offering $50 for the identity of the thief, but he denied ever threatening to kill the person. (V23, T.2621-22). Appellant testified to the fight between Thomas Baker and Tony Wilson and testified that after the fight, Dancing Willie came to his cell with some friends and confronted Appellant. (V23, T.2622-25). The men were upset that Appellant had told Baker that Tony Wilson was blaming Baker for the theft and they thought Appellant should pay more than $50. (V23, T.2625). After the visit, Appellant testified that he sent out for a shank so he would be prepared if Dancing Willie and his friends came back. (V23, T.2625-28).

Appellant testified that Vincent Maynard became very upset with him when he found out Appellant had $500 stolen from his locker. (V23, T.2628-29). After lunch, Appellant saw Maynard and the victim walking near the canteen area. Appellant asked if he could speak to Baker alone. According to Appellant, Baker pulled a knife on him and told him:

> I'm not afraid of you. I've got an equalizer in case you want to jump on me. That money was owed to Pig [Vincent Maynard], you should have paid him in the first place. When I get my half of it, I'm going to give half of my money to Pig. You were wrong in not paying him what you owed him in the first place.

(V23, T.2638). Appellant then realized Baker was in on the theft

and he grabbed the knife and struck the victim in the face with his other hand. (V23, T.2638). Appellant testified that Maynard came running up with a knife to stab Appellant, but Appellant was able to move out of the way resulting in Maynard accidentally stabbing Baker in the back. (V23, T.2640). At this point, an unnamed friend of Appellant's came up and knocked Maynard into the bushes. (V23, T.2641). Meanwhile, Appellant struck the victim with his fists and eventually stabbed the victim twice in the buttocks area because the victim continued to struggle with him. (V23, T.2641-42).

After Appellant testified, the defense rested its case. Appellant renewed his motion for judgment of acquittal which the trial judge denied. (V23, T.2714). The State called Willie Pittman, "Dancing Willie," to testify to the visit he made to Appellant's cell prior to the murder. As previously noted, supra footnote 10, Willie Pittman denied threatening Appellant about the reward money.

The State also called Appellant's cellmate, Lawrence Woods. Woods testified that Appellant told him that when he found out who stole his money, the person would not be around to spend it. (V23, T.2743). Woods also testified that Appellant was not intimidated after Dancing Willie and his friends left Appellant's cell. (V23, T.2744). About ten minutes later, another inmate brought Appellant a shank which Appellant placed in his pants' pocket. (V23, T.2744-

45). The witness speculated that the shank had to puncture Appellant's pocket.[13] (V23, T.2745). Prior to lunch, Woods asked Appellant if he was going to eat, and Appellant responded that he had someone to take care of. (V23, T.2747).

On March 14, 2000, the jury deliberated and found Appellant guilty of the first degree murder of Thomas Baker. (V25, T.3023). The penalty phase of the trial began on March 16, 2000, and at the outset of the hearing, Appellant renewed his offer to stipulate to the aggravating circumstances of previous violent felony convictions and under sentence of imprisonment. (V25, T.3036-38). The trial judge ruled that the State was allowed to present evidence detailing the prior violent felonies despite Appellant's willingness to stipulate. (V25, T.3038-39).

The State called Mary Hamilton, a Kentucky resident who worked at a convenience store in the early 1980s. On May 27, 1980, Appellant entered her convenience store wearing a mask and pointed a rifle or shotgun at her and another employee, Michael Bishop, and took all the money from the cash register.[14] (V25, T.3091-92). On February 24, 1981, Appellant and another individual returned to the store and again robbed Ms. Hamilton at gunpoint. (V25, T.3093-96). Ms. Hamilton was aware that Appellant was convicted for these

---

[13]Inspector Cornelius Faulk testified in rebuttal that Appellant had two holes in his pants' pocket. (V24, T.2817-18).

[14]Michael Bishop briefly testified to the facts surrounding the robberies. (V25, T.3099-103).

robberies and served time in prison.[15] (V25, T.3097).

In November 1989, Appellant broke into Judith and Earl Turner's home while they were asleep in bed. (V25, T.3104-12). Judith Turner woke up when she observed a figure in her bedroom doorway. Appellant came over to her and covered her face with his left hand and reached over and started striking her husband in the head with a 3-hole punch he had removed from their dining room. (V25, T.3106-07). Judith Turner was aware that Appellant was convicted for armed burglary of a dwelling and aggravated battery for the crimes committed against her and her husband. (V25, T.3108, 3133).

Bonnie Primeau testified that she was working at a 7-11 convenience store on October 29, 1989, when Appellant entered the store with a shirt over his head and told her to go into the back room. Appellant eventually forced Ms. Primeau from the store and carried her to the end of a plaza where he pushed her over a brick wall. (V25, T.3114-18). Ms. Primeau hurt herself when she landed and told Appellant that she thought she broke her leg. (V25, T.3119).[16] Appellant removed Ms. Primeau's clothes and asked her to perform oral sex on him. When she refused, Appellant had her

---

[15]The State introduced certified copies of the judgment and sentences for these, and other, felony convictions. (V25, T.3122-32)

[16]Ms. Primeau actually suffered a fractured pelvis. (V25, T.3121). Ms. Primeau landed in an ant bed and was bitten on the legs and arms during the subsequent rape. (V25, T.3121).

get on her knees and he unsuccessfully tried to anally rape her. (V25, T.3119-20). Appellant then placed Ms. Primeau on her back and raped her vaginally. (V25, T.3120). Ms. Primeau testified at Appellant's trial on the charges of kidnapping, sexual battery, attempted sexual battery, and aggravated battery, and she was aware of Appellant's convictions for these offenses. (V25, T.3122, 3133).

Appellant began his penalty phase case-in-chief by presenting the video-taped testimony of his grandmother, Hazel Cox. Ms. Cox testified that Appellant came to live with her when he was ten-years-old and stayed for about five years. (V25, T.3150). Ms. Cox never had any trouble or disciplinary problems with Appellant. (V25, T.3150). She testified that she took Appellant to church and tried to teach him right and wrong. (V25, T.3153, 3172). The only problem incident happened when Appellant was approximately fifteen. Ms. Cox testified that Appellant drank some type of poison and called her and said he had just attempted suicide. (V25, T.3151-52). Hazel Cox called for an ambulance and Appellant was taken to a hospital where his stomach was pumped. (V25, T.3151-52). Ms. Cox also testified to Appellant's family history. (V25, T.3157-59). Her son, Ray Cox, had four children with his cousin/wife, Barbara Edelen. Of the four children, Appellant was the only one

to go to prison.[17] (V25, T.3168).

Appellant's younger sister, Elizabeth Ann Veatch, testified that her mother physically and emotionally abused Appellant. (V25, T.3180-81). Mrs. Veatch testified that her mother would beat Appellant with anything that was handy: switches, fly swatters, belts, and shoes. (V25, T.3181). According to Mrs. Veatch, Appellant got beat more by their mother than the other children because he was the oldest and he was the mirror image of his father. (V25, T.3182). Mrs. Veatch testified that Appellant lived at home with their mother until she kicked him out when he was about ten or eleven. (V25, T.3191-92). Mrs. Veatch testified that her mother drove down the road and "dumped him like a dog" in front of her father's residence. (V25, T.3191-93).

Appellant's father, Ray Cox, testified that he married Barbara Edelen when he was seventeen-years-old. (V27, T.3509). Soon after getting married, Barbara became pregnant and gave birth to Allen. (V27, T.3511). After having two more children, the couple separated and divorced. The couple got back together, remarried and had another child, before getting divorced a second time. (V27, T.3512). During the first ten or eleven years of their marriage, the family went to church. (V27, T.3523). During their tumultuous relationship, Ray never personally observed Barbara

[17]Appellant's sister testified that her younger brother "stays in trouble with the police." (V25, T.3188).

physically discipline Appellant. (V27, T.3530-31). He testified that his daughter Elizabeth Ann Veatch told him about Barbara's mistreatment of their children. (V27, T.3530-31).

Dr. Elizabeth McMahon, a forensic psychologist, testified that she examined Appellant and found that he suffered from mild cortical dysfunction. Appellant has a "low average" IQ of 90,[18] rigid thought processing, and is very depressed. (V26, T.3340-60; V28, T.3677).

In rebuttal, the State called Dr. Michael Gutman, a forensic psychiatrist, who examined Appellant. Like Dr. McMahon, Dr. Gutman also found that Appellant suffered from depression. (V28, T.3668-71). Dr. Gutman, however, viewed Appellant as a totally different person than Dr. McMahon.[19] (V28, T.3712). Dr. Gutman testified that Appellant was skilled, glib, articulate, smooth, and masterful in many ways. (V28, T.3712). Although Dr. Gutman could not understand how two professionals could come to such separate conclusions when examining the same person, Dr. McMahon testified that Appellant probably felt more open and comfortable speaking with a male doctor. (V28, T.3712, 3753).

---

[18]The State's expert, Dr. Gutman, disagreed with the term "low average" to describe Appellant's I.Q. score of 90. Technically, the range for "low average" is 80-89, and "average" is 90-110. (V28, T.3726)

[19]When cross-examining Dr. Gutman, defense counsel went through a list of mitigators prepared by Dr. McMahon and asked the doctor if he agreed with Dr. McMahon's conclusions. (V28, T.3712-41). Dr. Gutman disagreed with a number of her findings.

The State also called Appellant's mother, Barbara Edelen, who testified that she spanked Appellant, often with a switch from a willow tree, when he did something that deserved punishment. (V27, T.3422-23). Ms. Edelen testified that she dropped Appellant off at his father's residence to live because she felt inadequate to deal with a situation that arose when he was about ten-years-old. (V27, T.3423). Ms. Edelen had recently suffered a nervous breakdown and Appellant wanted a large knife which she did not want him to possess. (V27, T.3440, 3444-45).

After hearing closing arguments and instructions from the judge, the jury returned a verdict recommending the death penalty by a vote of 10-2. (V29, T.3886). The court conducted a Spencer hearing and ultimately followed the jury's recommendation and sentenced Appellant to death. The court found four aggravating circumstances: (1) the capital felony was committed by a person previously convicted of a felony and under sentence of imprisonment; (2) the defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence; (3) the capital felony was especially heinous, atrocious or cruel; and (4) the capital felony was a homicide and was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. (V8, R.1513-22). The court did not find any statutory mitigation, but considered numerous nonstatutory mitigating circumstances. (V8, R.1522-60).

SUMMARY OF ARGUMENT

Issue I: The trial court acted within its discretion in denying Appellant's motion for mistrial after an alleged discovery violation. During his direct examination, the lead inspector disclosed a portion of Appellant's oral statement which was not contained in the inspector's written case diary. The witness was questioned further about the oral statement on cross-examination and redirect. Eventually, on recross, defense counsel raised a discovery violation and the court conducted a Richardson hearing. The court properly concluded that there was no discovery violation, and even there was, it was inadvertent. A review of the record establishes beyond a reasonable doubt that the omission of the oral statement from the inspector's case diary did not materially prejudice Appellant's trial preparation. Thus, this Court should find that the trial judge acted within its discretion in denying his motion for mistrial.

Issue II: The trial court acted within its discretion in denying Appellant's motion for mistrial after a defense witness violated a court order prohibiting any testimony regarding Appellant's prison sentence. The day before the murder, Appellant made a threat heard by several inmates. Appellant stated that he would kill and stab the thief who broke into his footlocker and he did not care about the consequences because he was already serving two life sentences. Although the State maintains that this

statement is admissible, the court granted Appellant's motion in limine excluding testimony regarding his prison sentence. Although a defense witness divulged this information in violation of the court order, the error was not so prejudicial as to require a mistrial. The jury was aware that Appellant had already served a number of years in prison and was also aware that he would likely be spending a substantial amount of time in prison in the future. Furthermore, the court gave a curative instruction which cured any error.

Issue III: The trial court's discovery procedure did not violate Florida Rule of Criminal Procedure 3.202. Defense counsel violated the rule by failing to timely file a statement of particulars detailing the mental mitigation evidence he intended to present and the name and address of his mental health expert witness. As an accommodation to the State, defense counsel agreed to provide the State with its expert's notes and test material so the State could prepare for the doctor's scheduled deposition. After the State had taken the doctor's deposition, Appellant complained of the procedure. Appellant cannot invite such error and then seek a new trial based on an alleged constitutional violation. Furthermore, Appellant has failed to establish how he was prejudiced in any manner as a result of the procedure utilized. Rule 3.202 does not expressly prohibit the actions taken in this case. Accordingly, this Court should reject Appellant's argument

that the court's procedure violated Rule 3.202 and his constitutional rights.

Issue IV: The trial judge properly refused to accept Appellant's offer to stipulate to the aggravating circumstances of prior violent felony convictions and under sentence of imprisonment. Under Florida statutory law, the State is entitled to present any evidence relevant to the character of the defendant, including evidence relating to the aggravating factor of prior convictions for violent felonies. This Court has long held that it is appropriate for the State to introduce the details of the prior violent offenses rather than just the bare judgment and sentence in order to assist the jury in evaluating the character of the defendant and the circumstances of the crime. The jury must be informed of these details in order to make an informed recommendation to the trial judge. In this case, the court did not err in admitting evidence from the victims of Appellant's prior violent crimes.

Issue V: The prosecutor's allegedly improper comments during voir dire and his penalty phase closing argument do not constitute fundamental error. Although the prosecutor misstated the applicable law three times during an extensive voir dire process and once during his closing argument, the comments were isolated and not prejudicial in light of the court's instructions to the jury. Additionally, the prosecutor's comments during his closing

argument did not denigrate Appellant's mitigation evidence nor did he make an inappropriate "message to the community" argument.

Issues VI & VII: The trial court properly instructed the jury on the application of the aggravating circumstances of CCP and HAC. Based on the evidence introduced, the judge properly found that the these aggravating factors were established beyond any reasonable doubt.

Issue VIII: The court acted within its discretion is assigning the established nonstatutory mitigation evidence various amounts of weight. Contrary to Appellant's claim, the trial judge did not misapply the law when rejecting some of Appellant's proffered mitigation. The court is entitled to find the existence of mitigation, but afford it no weight based on other relevant factors.

Issue IX: Appellant's death sentence is proportionate when compared to other capital cases. There are four substantial aggravating factors, including two of the most serious, CCP and HAC, and only nonstatutory mitigation. In addition to CCP and HAC, the evidence of Appellant's prior violent felony convictions is appalling. Given that this case is one of the most aggravated and least mitigated, this Court should find Appellant's death sentence proportionate.

Issue X: Appellant's argument that Florida's death penalty statute is unconstitutional based on Apprendi v. New Jersey, 120 S.

Ct. 2348 (2000) is without merit and has previously been rejected by this Court.

ARGUMENT

ISSUE I

THE TRIAL JUDGE ACTED WITHIN ITS DISCRETION IN DENYING APPELLANT'S MOTION FOR MISTRIAL FOLLOWING AN ALLEGED DISCOVERY VIOLATION.

Immediately after the murder on December 21, 1998, Appellant was taken into custody and placed in administrative confinement. (V19, T.1805-09). On December 29, 1998, Appellant got word to Inspector Cornelius Faulk that he wanted to speak with him. (V19, T.1821-22). Appellant came into the interview room and told Inspectors Faulk and Williams that there were a number of innocent inmates locked up in confinement that had nothing to do with the incident and they did not need to be there. (V19, T.1822-23). As Appellant was leaving the room, he asked the inspectors if they had found the weapon. When they did not respond, Appellant stated, "I heard you guys found a weapon." (V19, T.1823-24). Appellant described the icepick type weapon as being gray in color, with tape wrapped around it and a curved handle. Appellant told the officers that he had placed the weapon in the bottom of the gate post at the pumphouse.[20] (V19, T.1823).

On cross-examination, defense counsel questioned Inspector Faulk extensively on Appellant's statements and on Appellant's ability to discover that officers had found the weapon while in

[20]A week earlier, officers recovered a shank matching the description given by Appellant in the exact location recounted by Appellant. (V19, T.1825, 1873).

administrative confinement. (V19, T.1878-83). Defense counsel asked Inspector Faulk: "There's absolutely no evidence that you found during the course of your investigation that would lead you to believe that Allen Cox knew that you had found that knife, is there?" Faulk responded, "No evidence, no." (V19, T.1881).

On redirect, Inspector Faulk again reiterated the testimony that Appellant had told the inspectors, "I heard you guys found the weapon." (V19, T.1912). On recross, defense counsel questioned Inspector Faulk on the notation he made in his case diary surrounding the December 29th meeting with Appellant.[21] (V19, T.1921-23). Defense counsel attempted to question the inspector regarding the omission from his case diary of Appellant's statement, "I heard you guys found the knife. You've got a lot of guys in here that shouldn't be in here." The State objected and defense counsel proffered the testimony. (V19, T.1926-27).

While hearing argument from counsel on the admissibility of the testimony, defense counsel for the first time raised the issue of a discovery violation. (V19, T.1927-31). The trial court conducted a Richardson hearing on the alleged violation. During the hearing, the prosecutor and defense counsel questioned

---

[21]The inspector's case diary reflected the following entry for 5:21 p.m., December 29, 1998:

> Interview with Allen Cox states put shank in gate post next to weight pile. Described it as being gray/silver in color, with tape on handle and handle curved.

(V19, T.1956).

Inspector Faulk as to why he omitted Appellant's oral statement from his case diary. (V19, T.1934-47). Inspector Faulk testified that he did not write down every word Appellant said and he did not think it was significant that Appellant had heard officers found the weapon; rather it was significant to him that Appellant accurately described the weapon and its location. (V19, T.1934-47). When questioning Inspector Faulk, defense counsel noted that the inspector did not indicate at his deposition that there was any "evidence" that Appellant knew the prison officials had found the weapon.[22] (V19, T.1942).

The trial court found that there was no discovery violation, and even if there was, it was inadvertent. (V19, T.1947). Nevertheless, as a "cure [to] any problem," the court allowed defense counsel to cross examine the inspector about what he did not write in his report. (V19, T.1947-48). Defense counsel requested a mistrial and stated that "[o]ur entire case

---

[22]This was the same testimony the witness gave at trial when asked the same question. (V19, T.1881). The prosecutor informed the court that he thought there was simply a semantic difference with the inspector's deposition and trial testimony. (V19, T.1950). At his deposition, and at trial, Inspector Faulk was asked if there was any "evidence" that would lead him to believe that Appellant knew that officials had found the knife. (V19, T.1881, 1942). The prosecutor stated:

> You and I as attorneys, know evidence could be anything from the defendant's mouth. He may very well think that evidence is something physical or testimony from some other individual saying 'I know that the defendant knew about the knife.'

(V19, T.195).

preparation, the thrust of our entire consideration of the State's case, as well as the preparation of our defense, is based upon the lack of knowledge on the part of the defendant." (V19, T.1949). The trial judge denied Appellant's motion for mistrial. (V19, T.1949).

Appellant argues that the trial court abused its discretion in denying his motion for mistrial following an alleged discovery violation.[23] The State submits that the trial judge properly concluded that there was no discovery violation, and even if there was, the violation was inadvertent. (V19, T.1947). Furthermore, the trial judge acted within its sound discretion in denying Appellant's proposed remedy of a mistrial based on the alleged prejudice. (V19, T.1947-49).

A trial court has broad discretion in determining whether a discovery violation occurred, in handling any violation, and in determining the proper remedy. Pender v. State, 700 So. 2d 664, 667 (Fla. 1997) (stating that where a trial court rules that no discovery violation occurred, the reviewing court must first determine whether the trial court abused its discretion). Pursuant to Florida Rule of Criminal Procedure 3.220(b)(1)(C), the State is obligated to disclose "any written or recorded statements **and the**

[23] A trial court's ruling on a motion for mistrial is subject to the abuse of discretion standard of review. Thomas v. State, 748 So. 2d 970, 980 (Fla. 1999) (explaining that a ruling on a motion for mistrial is within the trial court's discretion and should not be reversed absent an abuse of that discretion).

substance of any oral statements made by the defendant, including a copy of any statements contained in police reports or report summaries, together with the name and address of each witness to the statements." Fla. R. Crim. P. 3.220(b)(1)(C) (2000) (emphasis added); see also Brown v. State, 640 So. 2d 106, 107 (Fla. 4th DCA 1994) (finding that it was a discovery violation to inform defense counsel that there were no statements made by the defendant and fact that law enforcement officer gave deposition does not change appellate court's opinion when officer testified that he could *not* remember any statements made by the defendant).

In the instant case, the inspector's case diary recorded the substance of Appellant's oral statement, but was not a verbatim rendition of his comments. As the prosecutor noted, the statement was not tape-recorded and the inspector recorded the significant portion of Appellant's statement, namely, the description of the shank and its location. (V19, T.1932-33). The inspector did not write in his case diary or testify at his deposition that Appellant stated, "I heard you guys found the knife," although he did testify at his deposition about the other inmates being locked up in confinement. In fact, the following exchange with defense counsel took place at the deposition:

> Q. Okay. And tell me about that, when did he give that? I think it was – was that on the 29th? The 29th, I'm looking at page four of the diary, 29th at 5:21 p.m.
>
> A. Yes.

Q. And was that interview with Cox at his request or at your request?

A. To the best of my knowledge, that was at his request to let me know, myself and Inspector Williams know, **that a number of the guys that we had in confinement had nothing to do with this altercation.** Because prior to speaking with Cox on that day, I spoke to Vincent Maynard, who was in confinement at the time.

. . . .

Q. Okay. And in that interview Cox told you about the weapon, described the weapon for you?

A. And where it was placed.

Q. And this was the 29th, right?

A. Correct.

Q. And do you recall when this weapon that we talked about in the photographs before, do you recall when that weapon was found?

. . . .

A. Unfortunately I did not make a note here that I could come up with, but I do believe that it was found prior to Cox describing it to us.

Q. Okay. We do have a note on the 22nd that the dive team arrived at 9:45 a.m., do you know if it was found before or after the dive team started their search?

A. It was after the dive team to the best of my –

Q. After the dive team but before Cox –

A. After the dive team but before Cox gave –

Q. Told you –

A. – gave the description.

Q. Okay. And when Cox gave that description, what kind of weight were you able to put on that given that the shank had already been found? What kind of weight did

you give to that description?

A. Great weight, he described it exactly.

Q. So his description matches.

A. Exactly.

Q. The photographs of which –

A. Down to the curved handle.

Q. Okay. And so it is not uncommon I know in D.O.C. for inmates to say, "Hey, I know where the shank is," to get themselves off the hook.

A. Correct.

Q. By this point though Cox already knew he was under a murder investigation, right?

A. Yes, he did.

Q. This went beyond a D.R.

A. Right.

Q. He wasn't going to give up this shank to fish himself out of the D.R. was he?

A. No, he wasn't.

Q. Do you know why he told you about the shank?

A. No, I don't know.

Q. Okay. But you put great weight on it because it–

A. He described it –

Q. And it was –

A. He described where we found it.

Q. And I mean down at the bottom of this gate post is–

A. Correct.

Q. – a pretty specific place. Did – was there any way that he could have found out about that before hand and then try to trade that information in an effort –

A. Yes.

Q. Basically a fraudulent show of good faith, for lack of a better phrase?

A. He could have found out about it.

Q. How could he have found out about it?

A. Just through inmates talking, inmates going in and out of confinement, notes being passed.

Q. Did any of the inmates know that the shank had been found?

A. Not to my knowledge, no.

Q. Okay.

A. But that doesn't mean that they didn't know.

Q. Okay.

A. And that doesn't mean that –

Q. Okay. Was there any evidence to indicate that Cox knew the shank had been found?

A. No, not that I know of.

Q. I mean, if he knew if it had been found, would he have come to you and said, "You can find the shank at this gate post."

A. If he knew it had been found, would he have come to me and said that? I don't know.

Q. Okay.

A. I don't know what his motive was.

Defense Exhibit I at 30-34 (emphasis added).

At trial, Inspector Faulk testified numerous times without objection that Appellant told him, "I heard you guys found the knife." Eventually, Appellant raised a discovery violation objection and the court conducted a Richardson hearing. During a Richardson hearing, the trial court must inquire as to whether the violation (1) was willful or inadvertent; (2) was substantial or trivial; and (3) had a prejudicial effect on the aggrieved party's trial preparation. Richardson v. State, 246 So. 2d 771, 775 (Fla. 1971). In the instant case, the trial court concluded that the alleged violation was inadvertent and did not affect Appellant's trial preparation so as to require a mistrial. The State submits that the trial court acted within its discretion in denying Appellant's motion for mistrial.

In Reese v. State, 694 So. 2d 678 (Fla. 1997), this Court was presented with a similar factual situation. The defendant made an oral statement to a detective that the murder took place at about 10:00 p.m., but the statement was not disclosed to defense counsel. Id. at 681-82. The prosecutor referenced this time frame in his opening statement, but defense counsel did not make an objection even though he admitted he heard the remark and realized at that time that he was not in possession of any such statement. Id. at 683. This Court found that there was no timely objection and any prejudice could have been cured by recess and deposition. Id.

Likewise, in the instant case, defense counsel did not make a

timely objection to the testimony. Defense counsel cross-examined Inspector Faulk extensively on Appellant's ability to know that the shank had been found and on the inspector's failure to note Appellant's oral statements in his dairy. Eventually, defense counsel raised the Richardson violation. When asked how he was prejudiced, defense counsel claimed that his entire defense was predicated on Appellant's lack of knowledge. After the trial court denied his motion for mistrial, defense counsel was permitted to question Inspector Faulk extensively regarding the omission of Appellant's oral statement from his case diary. (V19, T.1951-57).

Contrary to defense counsel's assertions, this Court can easily conclude beyond a reasonable doubt that Appellant was not procedurally prejudiced in any manner by the omission. In State v. Schopp, 653 So. 2d 1016, 1020 (Fla. 1995), this Court stated:

> In determining whether a Richardson violation is harmless, the appellate court must consider whether there is a reasonable possibility that the discovery violation procedurally prejudiced the defense. As used in this context, the defense is procedurally prejudiced if there is a reasonable possibility that the defendant's trial preparation or strategy would have been materially different had the violation not occurred. Trial preparation or strategy should be considered materially different if it reasonably could have benefitted the defendant. In making this determination every conceivable course of action must be considered. If the reviewing court finds that there is a reasonable possibility that the discovery violation prejudiced the defense or if the record is insufficient to determine that the defense was not materially affected, the error must be considered harmful. In other words, only if the appellate court can say beyond a reasonable doubt that the defense was not procedurally prejudiced by the discovery violation can the error be considered harmless.

In this case, defense counsel was always aware that Appellant sought out inspectors while in administrative confinement and gave them a detailed description of the shank and where it could be found. Whether Appellant had prior knowledge that the officers had found the shank is unimportant and not a critical piece of evidence which could have affected his defense or trial preparation. Appellant argues in his brief that this testimony "enabled the State to argue that Cox heard about the smaller knife and allowed the State to shift away from the theory that the found knife was absolutely the actual murder weapon. This allowed the State an arguably alternative way to suggest that the defendant could be aware of another, actual murder weapon which was never found." Initial Brief of Appellant at 34.

In his rebuttal closing argument, the prosecutor noted that Inspector Faulk had testified that he was personally not sure that the weapon found at the pumphouse was the actual murder weapon. The prosecutor informed the jury that a knife is different than a bullet which can be matched to the barrel of a gun. Here, there was no physical evidence establishing that the weapon found in the pumphouse was actually the murder weapon. The State argued that all of the witnesses, including the medical examiner, testified that the shank found at the pumphouse was similar to the weapon Appellant possessed and it was consistent with the injuries caused to the victim. (V24, T.2967-70). Because the State could have

made this argument without Inspector Faulk's testimony that Appellant stated, "I heard you guys found the weapon," Appellant's argument is without merit.

In addition, Appellant was always aware that several inmates heard him threaten to kill the thief the day before the murder and that a large number of inmates actually witnessed Appellant stab the victim to death in broad daylight. Thus, the State submits that this Court can conclude beyond a reasonable doubt that Inspector's Faulk omission of Appellant's oral statement from his case diary was harmless and did not prejudice Appellant's defense. Accordingly, this Court should find that the trial judge acted within its discretion in denying Appellant's motion for mistrial.

ISSUE II

THE TRIAL JUDGE ACTED WITHIN ITS DISCRETION IN DENYING APPELLANT'S MOTION FOR MISTRIAL AFTER A DEFENSE WITNESS VIOLATED A PRIOR COURT RULING AND TESTIFIED THAT APPELLANT WAS SERVING TWO LIFE SENTENCES.

Prior to the State calling its first inmate witness, Appellant orally moved in limine to exclude any testimony as to Appellant's prison sentence. (V16, T.1372-84). The day before the murder, a number of inmate witnesses heard Appellant threaten to kill the person who broke into his locker. Appellant stated that he did not care about the consequences because he was already serving two life sentences. (V16, T.1372-77). Although the State maintains that this evidence is admissible because it is relevant to Appellant's state of mind, the trial court granted Appellant's motion excluding any testimony of his prison sentence.[24]

During Appellant's case-in-chief, defense counsel called inmate Vincent Maynard as a witness. Maynard became agitated with defense counsel when he learned that Appellant's defense was that Maynard was the person who actually fatally stabbed Thomas Baker. At one point, Maynard unresponsively stated that Appellant was serving two life sentences. (V22, T.2464). Appellant moved for a

[24]The trial judge even subsequently acknowledged that he may have erred in excluding this testimony. In his sentencing order the judge stated, "while the court sustained the defendant's objection to any testimony regarding the life sentences, clearly it is a cogent argument that this was relevant to establish the defendant's state of mind; i.e. that he had nothing to lose, and he intended to commit a homicide." (V8, R.1517).

mistrial which the trial court denied. The court gave a curative instruction and informed the jury:

> Ladies and gentlemen, you are instructed that the sentence that Mr. Cox was serving at Lake Correctional Institution is not relevant to this case in any way.
>
> He has never been convicted nor is he serving any sentence for Homicide or any type of Murder.

(V22, T.2476).

The State submits that the trial judge acted within his sound discretion in denying Appellant's motion for mistrial. The law is well established that a motion for mistrial is addressed to the sound discretion of the trial court and "the power to declare a mistrial and discharge the jury should be exercised with great care and should be done only in cases of absolute necessity." Ferguson v. State, 417 So. 2d 639, 641 (Fla. 1982). Furthermore, this Court has stated that "a mistrial is appropriate only when the error committed was so prejudicial as to vitiate the entire trial." Duest v. State, 462 So. 2d 446, 448 (Fla. 1985).

This Court has stated that the abuse of discretion standard of review is applicable when reviewing a trial court's ruling on a motion for mistrial. Goodwin v. State, 751 So. 2d 537, 546 (Fla. 1999); Thomas v. State, 748 So. 2d 970, 980 (Fla. 1999). Under the abuse of discretion standard of review, the appellate court pays substantial deference to the trial court's ruling. Discretion is abused only when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is

abused only where no reasonable person would take the view adopted by the trial court. Trease v. State, 768 So. 2d 1050, 1053 n.2 (Fla. 2000) (citing Huff v. State, 569 So. 2d 1247, 1249 (Fla. 1990)).

In this case, Appellant has failed to establish that the trial court abused its discretion in denying the motion for mistrial. Although Vincent Maynard violated the court's ruling on the motion in limine by volunteering that Appellant was serving two life sentences, this testimony was not so prejudicial as to warrant a mistrial. The jury was aware that Appellant was serving time in prison at Lake Correctional Institution and had been serving time for a number of years. Defense counsel had earlier elicited testimony from Vincent Maynard that he had served time with Appellant at LCI and, a few years earlier, at another institution. (V21, T.2276). Additionally, when Appellant made his threat to kill the thief, he stated that he did not care about the consequences and that he would rather serve his time on death row. Obviously, the jury could infer from Appellant's statements that he was going to be spending a number of years in prison and would rather spend his time on death row where he had a television in his cell.

Appellant relies on two cases in arguing that this Court should reverse for a new trial. In Thomas v. State, 701 So. 2d 891 (Fla. 1st DCA 1997), the defendant was charged with attempted first

degree murder when he attacked a fellow inmate in the exercise yard with a weapon made from a razor blade and a toothbrush handle. The district court of appeal reversed for a new trial when a prison guard testified over objection that the defendant was housed in a wing of the prison reserved for "more violent inmates." Id. at 891-92. The court concluded that the impact of the testimony implied that the defendant "was prone to resort to violence, and that he probably acted consistently with that propensity with regard to the incident in question, rather than in self-defense." Id. at 892. The court rejected the State's harmless error argument because the testimony could have affected the jury's rejection of Appellant's self-defense defense.

In Bozeman v. State, 698 So. 2d 629 (Fla. 4th DCA 1997), the defendant was charged with battery on a police officer based on an attack that occurred at the Broward County Jail. The victim/officer testified that the defendant was housed in a "special management" unit. The prosecutor attempted to have the officer define the term "special management," and defense counsel objected. Id. at 630. The trial judge sustained the objection but subsequently ruled that defense counsel's cross-examination opened the door to the testimony. Id. On redirect, the officer testified that the special management unit housed the "worse behaved inmates in the Broward County jail system," men who were "maladjusted and violent" and were placed in that unit because "they exhibited the

propensity for violent behavior towards other inmates and staff. They are there for escape risk." Id.

During the defendant's case, evidence was presented that the officer was the aggressor and Bozeman acted in self-defense. Bozeman, 698 So. 2d at 630. During his closing argument, the prosecutor used the description of the type of inmates housed in the special management unit to argue that Bozeman must have been the aggressor. Id. The Bozeman court found that the trial court erred in admitting the description of the special unit because it was evidence of Bozeman's bad character and prior bad acts. The court stated that the case turned on the credibility of the witnesses, and in light of the prosecutor's use of the improper testimony during his closing argument, the court found that the error was not harmless. Id. at 631-32.

Unlike the facts in Bozeman, the prosecutor in the instant case did not elicit the prejudicial testimony and rely on it during closing argument to negate the defendant's defense. Likewise, in Thomas, the prejudicial testimony was crucial considering the defendant's theory of self-defense. In this case, the testimony of Appellant's prison sentence was harmless given the evidence presented and his theory of defense. See State v. DiGuilio, 491 So. 2d 1129, 1135 (Fla. 1986) (stating that error is harmless where there is no reasonable possibility that the error contributed to the conviction). Furthermore, the State asserts that the court's

curative instruction informing the jury that Appellant's sentence is irrelevant to the case and that he had never been convicted of any homicide prevented Maynard's comment from vitiating the entire trial. See Riley v. State, 367 So. 2d 1091 (Fla. 3d DCA 1979) (finding curative instruction cured any error when arresting officer referenced several charges defendant was arrested for, but not charged); Jackson v. State, 702 So. 2d 607 (Fla. 5th DCA 1997) (ruling that prosecutor's comment during argument was improper, but the court's curative instruction cured any potential harm and the error was harmless).

In this case, Appellant testified that he did not inflict the fatal wound. Appellant gave an incredibly unbelievable story that did not match with any of the other evidence introduced.[25] Appellant claimed that the victim pulled a knife on him and Appellant grabbed the knife and struck the victim in the face with his free hand. While Appellant was engaged with the victim, Appellant observed Vincent Maynard come at him in an attempt to stab Appellant. Miraculously, Appellant managed to spin around so that Vincent Maynard accidently inflicted the fatal wound on the victim rather than Appellant. Appellant then managed to fend off Vincent Maynard while continuing to scuffle with the victim. Because the victim continued to kick at him, Appellant grabbed his

[25]The trial judge noted in the sentencing order, "Mr. Cox's version of the events is wholly irreconcilable with the other testimony and evidence." (V8, R.1519).

own knife and stabbed the victim twice in the lower torso.

Appellant's theory of events was diametrically opposed to all of the evidence from the numerous inmates that witnessed the murder and the jury clearly rejected Appellant's theory of defense. None of the eyewitnesses observed the victim with a knife nor did they see Vincent Maynard involved in the attack as described by Appellant. In fact, the witnesses all testified that Appellant mercilessly beat the small victim and stabbed him three times with an icepick shank. Because there is no possibility that the jury's verdict was affected by the knowledge of Appellant's prison sentence, this Court should find that any error was harmless.

ISSUE III

THE TRIAL COURT DID NOT VIOLATE THE DICTATES OF FLORIDA RULE OF CRIMINAL PROCEDURE 3.202 AND BASED ON APPELLANT'S AGREEMENT, THE COURT PROPERLY ORDERED APPELLANT'S MENTAL HEALTH EXPERT TO PROVIDE HER NOTES AND TESTING MATERIALS TO THE STATE'S MENTAL HEALTH EXPERT PRIOR TO TRIAL.

Prior to trial, defense counsel moved to declare Florida Rule of Criminal Procedure 3.202 unconstitutional, both facially and as applied. (V2, R.281-95). After conducting a hearing, the trial judge denied Appellant's motions.[26] (V10, T.129-39). Subsequently, in violation of Rule 3.202(c), defense counsel failed to timely give notice of Appellant's intent to present expert testimony of mental mitigation and a statement of particulars listing the statutory and nonstatutory mental mitigating circumstances that Appellant expected to establish. Defense counsel moved to extend the time for providing the information required by the rule. The State acquiesced to an extension provided that the defense expert, Dr. McMahon, produce a report and provide the State with a copy of her notes and test materials prior to her scheduled February 29th deposition. (V11, T.250-51). Defense counsel agreed and the trial judge signed an order extending the time for Appellant's filing under Rule 3.202(c) until February 25, 2000. (V4, R.693; V11, T.251).

---

[26]This Court has upheld Rule 3.202 as constitutional. See Davis v. State, 698 So. 2d 1182, 1191 (Fla. 1997).

On Monday, February 28, 2000, the day before Dr. McMahon's scheduled deposition, the prosecutor informed the court that he had not received any of the information from Dr. McMahon as required by Rule 3.202 and the court's order of February 23, 2000. (V11, T.326-29). After discussion with counsel, it was agreed that Dr. McMahon would provide her notes and test material to the State's expert witness, Dr. Michael Gutman. (V11, T.329-38, 352-57).

After taking the doctor's deposition, the State informed the court that Dr. McMahon indicated that she did not plan on preparing a written report unless ordered by the court. Based on the prior agreement and court order of February 23, 2000, the prosecutor requested that the court order the doctor to prepare a written report. (V11, T.363-65). For the first time, defense counsel raised a formal objection to the entire procedure, including the taking of Dr. McMahon's deposition and the production of her notes and test material.[27] (V11, T.365-68). The State reminded the court of the prior agreement made between the parties on February 17 and noted that defense counsel's argument as to Dr. McMahon's deposition was moot because the State had already taken the first portion of her deposition and the State did not question the doctor

[27]Two days earlier, defense counsel "questioned" the propriety of the prosecutor having access to Dr. McMahon's notes and test data for fear that it may compromise Appellant's Fifth Amendment right against self-incrimination. Defense counsel was aware at this time that the State's expert would be allowed access to this material and he did not raise an objection to the procedure at that time. (V11, T.354-55).

about any statements Appellant made regarding the crime.[28] (V11, T.370). The trial judge denied the State's request to order Dr. McMahon to prepare a written report and signed an order prepared by defense counsel noting Appellant's compliance with Florida Rule of Criminal Procedure 3.202. (V4, R.752-53; V11, T.375-87).

Appellant now argues on appeal that the court's contravention of Florida Rule of Criminal Procedure 3.202 resulted in a denial of Appellant's constitutional rights under the Fifth, Sixth, and Fourteenth Amendments. Contrary to Appellant's vague assertions, the trial judge's ruling did not contravene the language in Rule 3.202, nor did the procedure utilized violate any of Appellant's constitutional rights. Florida Rule of Criminal Procedure 3.202 states:

> (a) Notice of Intent to Seek Death Penalty. The provisions of this rule apply only in those capital cases in which the state gives written notice of its intent to seek the death penalty within 45 days from the date of arraignment. Failure to give timely written notice under this subdivision does not preclude the state from seeking the death penalty.
>
> (b) Notice of Intent to Present Expert Testimony of Mental Mitigation. When in any capital case, in which the state has given notice of intent to seek the death penalty under subdivision (a) of this rule, it shall be the intention of the defendant to present, during the penalty phase of the trial, expert testimony of a mental health professional, who has tested, evaluated, or examined the defendant, in order to establish statutory or nonstatutory mental mitigating circumstances, the defendant shall give written notice of intent to present

[28]The prosecutor stated that her second deposition would not take place until after the guilt phase. (V11, T.370).

such testimony.

(c) Time for Filing Notice; Contents. The defendant shall give notice of intent to present expert testimony of mental mitigation not less than 20 days before trial. The notice shall contain a statement of particulars listing the statutory and nonstatutory mental mitigating circumstances the defendant expects to establish through expert testimony and the names and addresses of the mental health experts by whom the defendant expects to establish mental mitigation, insofar as is possible.

(d) Appointment of State Expert; Time of Examination. After the filing of such notice and on the motion of the state indicating its desire to seek the death penalty, the court shall order that, within 48 hours after the defendant is convicted of capital murder, the defendant be examined by a mental health expert chosen by the state. Attorneys for the state and defendant may be present at the examination. The examination shall be limited to those mitigating circumstances the defendant expects to establish through expert testimony.

(e) Defendant's Refusal to Cooperate. If the defendant refuses to be examined by or fully cooperate with the state's mental health expert, the court may, in its discretion:

(1) order the defense to allow the state's expert to review all mental health reports, tests, and evaluations by the defendant's mental health expert; or

(2) prohibit defense mental health experts from testifying concerning mental health tests, evaluations, or examinations of the defendant.

Fla. R. Crim. P. 3.202 (emphasis added). Obviously, Appellant cannot claim that the court's ruling violated Rule 3.202 when the rule does not expressly prohibit the action taken in this case.

Subdivision (e) of Rule 3.202 provides as a remedy for an uncooperative defendant that the State may be entitled to the

defense expert's reports and test material after the guilt phase proceedings. This provision, however, does not equate to a constitutional violation if the defense attorney agrees to give the information to the State prior to the guilt phase as an accommodation.

Additionally, Rule 3.202 does not prohibit the taking of the expert's deposition prior to the guilt phase. In this case, Dr. McMahon was initially listed as a guilt phase witness.[29] Prior to the deposition, Appellant never raised an objection to her being deposed. Appellant cannot agree to the procedure utilized and then complain to this Court that he is entitled to a new trial based on an alleged error. See Pope v. State, 441 So. 2d 1073, 1076 (Fla. 1983) (stating that "[a] party may not invite error and then be heard to complain of that error on appeal").

Appellant has failed to allege with any specificity how he was prejudiced by the procedure utilized in this case. Appellant simply argues that the court's ruling allowed the State to "jump the gun" in its preparation for the penalty phase. Initial Brief of Appellant at 47. Appellant inaccurately states that the procedure "gave an unfair advantage to the state who had much more time than they should have to prepare this particular aspect of

[29]Dr. McMahon had been listed as a defense witness since February 10, 2000. (V4, R.593-96, 726-28). It was not until February 28, 2000, a day before her scheduled deposition, that the State first learned that Dr. McMahon would not be a guilt phase witness. (V11, T.299, 329).

their penalty phase rebuttal." Id. Clearly, the State did not receive an unfair advantage by defense counsel's violation of Rule 3.202. In fact, the State was extremely hampered by defense counsel's actions in preparing for its penalty phase. (V11, T.382-83). The State was unaware of the statement of particulars until after the doctor's deposition. On Thursday, March 2, 2000, Appellant finally filed his statement of particulars. (V4, R.760-67). Appellant's trial began on Monday, March 6, 2000. This late filing violated the provisions of Rule 3.202(c), and the court's order extending the time to file the document until February 25, 2000.

Appellant's argument that the State received an unfair advantage in being able to prepare its penalty phase is completely without merit. This entire issue could have easily been avoided had defense counsel timely complied with Rule 3.202(c). When defense counsel failed to comply with this rule, he agreed to provide the State with Doctor McMahon's report, notes, and test material. Now, Appellant seeks a new trial based on an agreement he made with the State. As previously noted, such invited error cannot be the basis of a new trial. See Pope, supra.

More importantly, however, is the fact that Appellant did not suffer any prejudice from the procedure utilized. The State deposed Dr. McMahon a few days before the guilt phase trial but did not question her about any statements Appellant made regarding the

crime. Additionally, the doctor apparently provided her notes to the State, as required by Appellant's agreement, but she omitted any reference to Appellant's statements from her notes. (V11, T.375). Appellant is unable to point to any prejudicial information obtained by the State prior to the guilt phase. Because Appellant has failed to show any constitutional violation or any prejudice as a result of the discovery procedure, this Court should reject Appellant's argument.

ISSUE IV

THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR BY REFUSING TO ACCEPT APPELLANT'S OFFER TO STIPULATE TO THE AGGRAVATING FACTORS OF PRIOR VIOLENT FELONY CONVICTIONS AND UNDER SENTENCE OF IMPRISONMENT.

Prior to trial, Appellant offered to stipulate to the aggravating circumstances of previous violent felony convictions and under sentence of imprisonment. (V4, R.600-02; V11, T.220-29). Appellant renewed his objection at the outset of the penalty phase. (V25, T.3036-38). The trial judge ruled that the State was allowed to present the details of the prior violent felonies despite Appellant's willingness to stipulate. (V25, T.3038-39). Appellant argues that the trial judge reversibly erred in allowing the State to present this evidence.

Appellee submits that the court acted within its discretion in allowing the State to present evidence to establish the existence of the aggravating circumstances. The admissibility of evidence is within the sound discretion of the trial court, and the trial court's ruling will not be reversed unless there has been a clear abuse of that discretion. Ray v. State, 755 So. 2d 604, 610 (Fla. 2000); Zack v. State, 753 So. 2d 9, 25 (Fla.), cert. denied, 121 S. Ct. 143 (2000); Cole v. State, 701 So. 2d 845 (Fla. 1997). This Court has previously held:

> [I]t is appropriate in the penalty phase of a capital trial to introduce testimony concerning the details of any prior felony conviction involving the use or threat of violence to the person rather than the bare admission

> of the conviction. Testimony concerning the events which resulted in the conviction assists the jury in evaluating the character of the defendant and the circumstances of the crime so that the jury can make an informed recommendation as to the appropriate sentence.

Rhodes v. State, 547 So. 2d 1201, 1204 (Fla. 1989).

Appellant's reliance on Old Chief v. United States, 519 U.S. 172 (1997) and Brown v. State, 719 So. 2d 882 (Fla. 1998) is misplaced. These cases both involved a defendant willing to stipulate to a prior conviction in a prosecution for felon in possession of a firearm. In Old Chief, the Court stated that a federal district court abuses its discretion in refusing a defendant's offer to stipulate to a prior felony conviction, and instead "admits the full record of a prior judgment, when the name or nature of the prior offense raises the risk of a verdict tainted by improper considerations, and when the purpose of the evidence is solely to prove the element of prior conviction." Old Chief, 519 U.S. at 174. This Court followed the Old Chief analysis in Brown and concluded that "in view of the limited purpose for which evidence of prior convictions in felon-in-possession cases is offered, trial and appellate courts should be relieved of making discrete and subjective value judgments in dealing with what should be a routine submission of prior felony conviction evidence." Brown, 719 So. 2d at 888.

Appellant argues that this Court should extend the Old Chief rationale to the penalty phase of a capital case. If this Court

were to follow Appellant's argument, a defendant would be allowed to simply stipulate to the existence of certain aggravators, thereby eviscerating the State's ability to present its statutorily-authorized penalty case. Florida Statutes, section 921.141 provides that *any* evidence relevant to the nature of the crime and the character of the defendant, including evidence relating to aggravating circumstances, is admissible in a penalty phase. § 921.141(1), Fla. Stat. (2000). The purpose of a penalty phase proceeding, unlike the purpose of a prosecution for felon-in-possession, is to allow the jury to make an informed recommendation on the appropriate sentence. As such, the jury is entitled to hear evidence in its evaluation of the defendant's character. See Hudson v. State, 708 So. 2d 256, 261 (Fla. 1998) (holding that "it is appropriate during penalty proceedings to introduce details of a prior violent felony conviction rather than the bare admission of the conviction in order to assist the jury in evaluating the character of the defendant and the circumstances of the crime"); Elledge v. State, 706 So. 2d 1340, 1344 (Fla. 1997) (stating that trial court properly refused defendant's offer to stipulate to prior violent felony convictions).

In Rodriguez v. State, 753 So. 2d 29, 44-45 (Fla.), cert. denied, 121 S. Ct. 145 (2000), this Court acknowledged that it is "beneficial to the defendant" to hear the details of a prior violent felony from a neutral law enforcement official rather than

from prior witnesses or victims. Although the State is allowed to present the victims of the prior violent felonies, this Court cautioned the State to ensure that the evidence of the prior crimes does not become a feature of the penalty phase proceedings. Id.; see also Finney v. State, 660 So. 2d 674, 683-84 (Fla. 1995) (cautioning the State from using emotional victims to establish facts surrounding prior violent felony convictions).

In this case, the State utilized the victims of the prior violent felony offenses to establish the aggravating circumstance. Prior to the victims' testimony, the court informed the State that he did not intend for the evidence to become a feature of the proceeding nor did he want the victims to become emotional. (V25, T.3038-41). Defense counsel candidly admitted that he was "more concerned with emotion than the factual content." (V25, T.3044-45). The State followed the court's admonishments and introduced the victims' testimony quickly and without incident or emotional outburst.

Because the evidence in the instant case was probative and not overly prejudicial, the trial court properly refused to accept Appellant's offer to stipulate to the aggravators. Even if this Court finds that the trial judge abused its discretion in admitting this testimony, the State submits that the error was harmless. See Hudson v. State, 708 So. 2d 256, 261 (Fla. 1998) (stating that any confrontation error of officer's testimony regarding prior violent

felony was harmless because the introduction of the certified copy of the judgment reflecting the defendant's guilty plea established beyond a reasonable doubt the aggravating circumstance of prior conviction for a felony involving the use or threat of violence); Mendoza v. State, 700 So. 2d 670, 678 (Fla. 1997) ("We have found that erroneously admitted evidence concerning a defendant's character in a penalty phase is subject to a harmless error review under State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986)."); Henry v. State, 649 So. 2d 1366, 1368-69 (Fla. 1994) (finding harmless error when court erroneously admitted testimony concerning an autopsy report of prior murder to establish the aggravating factor of prior violent felony because there was no reasonable possibility that the outcome would have been different in the absence of this error).

ISSUE V

APPELLANT HAS FAILED TO ESTABLISH FUNDAMENTAL ERROR BASED ON THE PROSECUTOR'S COMMENTS DURING VOIR DIRE AND CLOSING ARGUMENTS.

Appellant argues that the prosecutor committed fundamental error by misstating the law during jury selection and during his penalty phase closing argument. Appellant admits that he failed to raise an objection to the prosecutor's allegedly improper comments. Because there was no contemporaneous objection to the prosecutor's comments, this issue is not cognizable on appeal. See Kilgore v. State, 688 So. 2d 895, 898 (Fla. 1996) (holding that allegedly improper prosecutorial remarks cannot be appealed unless a contemporaneous objection is recorded). Appellee recognizes that the only exception to this blanket procedural bar is where the comments constitute fundamental error, defined as error that "reaches down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." Id. (quoting Brown v. State, 124 So. 2d 481, 484 (Fla. 1960)). In this case, the prosecutor's comments do not constitute fundamental error requiring reversal.

During jury selection, the prosecutor informed the venire that "if the evidence in aggravation outweighs the evidence in mitigation, then under the law the recommendation of the jury **should** be for the death penalty." (V13, T.632). The prosecutor subsequently restated the proposition as: If the evidence of

aggravation outweighs the evidence of mitigation, the law says you **must** recommend death or, the law **requires** that you recommend death. (V13, T.633, 636). When a juror indicated that she did not realize the law required you to recommend death, the prosecutor replied:

> Well, maybe I'm being too simplistic here. What the law says is that you need to weigh the evidence against and weigh it in the other direction, and depending upon which way it balances out, that is supposed to decide your recommendation. You're supposed to make your recommendation based on the weight. It's not worded that way, but that's a short rendition.

(V13, T.641). Although the prosecutor misstated the applicable law on a few occasions during voir dire and his penalty phase closing argument, these isolated comments were not prejudicial to Appellant. (V28, T.3773-34).

In Heynard v. State, 689 So. 2d 239, 249 (Fla. 1996), the prosecutor in that case informed the jury during voir dire that "[i]f the evidence of the aggravators outweighs the mitigators, by law your recommendation must be for death." This court held:

> In this case, we agree with Henyard that the prosecutor's comments that jurors must recommend death when aggravating circumstances outweigh mitigating circumstances were misstatements of law. But, contrary to Henyard's assertions, we do not find that he was prejudiced by this error. Initially, we note the comments occurred on only three occasions during an extensive jury selection process. Moreover, the misstatement was not repeated by the trial court when instructing the jury prior to their penalty phase deliberations. In fact, the jury was advised that the statements of the prosecutor and defense lawyer were not to be treated as the law or the evidence upon which a decision was to be based. Further, Henyard does not contend that the jury was improperly instructed before making an advisory sentence recommendation in the penalty

> phase of his trial. In this context, we find the prosecutor's isolated misstatements during jury selection to be harmless error.

Id. at 250 (footnote and citation omitted).

Likewise, in the instant case, the prosecutor's comments occurred on only three occasions during an extensive voir dire and once during penalty phase closing argument. At one point, the prosecutor even acknowledged that he was being too simplistic in defining the law. The prosecutor's misstatement was not repeated by the trial court when instructing the jury on the applicable law. The jury was clearly aware that the law came from the trial judge and not the attorneys. Because the prosecutor's comments did not prejudice Appellant in any manner, this Court should follow Heynard and affirm Appellant's judgment and sentence.

Appellant also argues that the prosecutor committed fundamental error during his closing argument in the penalty phase. At the outset of his closing argument, the prosecutor stated:

> I stand before you again today on behalf of the decent law abiding people of this community and this state, whom I represent.

(V28, T.3767-68). Appellant equates the instant comment to the prejudicial comments in King v. State, 623 So. 2d 486, 488 (Fla. 1993) (new penalty phase proceeding necessitated by prosecutor's comment admonishing jury that they would be cooperating with evil and would themselves be involved in evil just like the defendant if they recommended life imprisonment), Bertolotti v. State, 476 So.

2d 130, 133 (Fla. 1985) (prosecutor's improper comments exhorting the jury to recommend death as a means of sending a message was an appeal to the emotions and fears of jurors), and Campbell v. State, 679 So. 2d 720, 724-25 (Fla. 1996) (prosecutor's "'cop-killer' rhetoric and 'message to the community' argument played to the jurors' most elemental fears, dragging into the trial the specter of police murders and a lawless community that could imperil the jurors and their families"). The prosecutor's comment in this case is not even comparable to the prejudicial comments made in King, Bertolotti, and Campbell. The prosecutor's innocuous comment was not intended to "send a message to the community" or to play on the jurors' emotions.

Appellant further alleges that the prosecutor erred in denigrating valid mitigating evidence. When discussing Appellant's traumatic childhood, the prosecutor stated, "I only suggest that you put it in its proper context, it happened more than twenty-five years before the defendant decided to kill Thomas Baker." (V28, T.3799). Contrary to Appellant's assertions, this comment was not improper. The prosecutor did not tell the jury to ignore this evidence. In fact, the prosecutor noted that if the jury considered the spankings evidence of "abuse," "you should weigh that in the defendant's favor." (V28, T.3798). The prosecutor continued this line of argument by conceding that the mental abuse was more severe and that Appellant suffered a traumatic childhood.

(V28, T.3798-99). The prosecutor's comment to place the evidence in its proper context is not improper. Even if this Court finds that the comment denigrated the mitigation evidence in any way, the error is not so prejudicial as to constitute fundamental error.

In Bertolotti, this Court noted that prosecutorial error alone does not warrant automatic reversal of a conviction. 476 So. 2d at 133 (citing State v. Murray, 443 So. 2d 955 (Fla. 1984)). Furthermore, in the penalty phase where the jury's recommendation is advisory only, prosecutorial misconduct must be egregious to warrant remand for a new sentencing proceeding. Id. This Court admonished prosecutors to refrain from making improper comments, but noted that individual professional misconduct should not be punished at the citizens' expense, by reversal and mistrial, but at the attorney's expense, by professional
sanction. Id.

In this case, even if this Court agrees with Appellant and finds that the prosecutor's comments were improper, the State submits that the error was harmless. The evidence in this case overwhelmingly established the existence of four serious aggravators, including CCP and HAC. Appellant, an admitted "lifer" with nothing to lose, decided to protect his image in prison and announced to everyone in earshot that he planned to kill the person who broke into his footlocker. Once he found the alleged culprit, he ordered a shank from another inmate. Appellant then located the

victim near the canteen at lunchtime; a place where the inmates congregated to receive their mail and buy snacks. Appellant called the victim over and began beating him in front of a number of inmates. The beating was not "good enough" for the victim, so Appellant reached into his pocket and pulled out the shank and stabbed the victim to death. The victim remained conscious for at least fifteen minutes and was aware of his impending death as he literally drowned in his own blood. This evidence, coupled with the evidence admitted at the penalty phase establishing Appellant's other aggravators of prior violent felonies and under sentence of imprisonment, leaves no doubt that the outcome would be the same regardless of the prosecutor's allegedly improper comments. See State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986).

ISSUE VI

THE TRIAL JUDGE PROPERLY INSTRUCTED THE JURY AND FOUND THAT THE MURDER WAS ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL.

Appellant asserts that the court erred in instructing the jury over his objection regarding the aggravating circumstance that the murder was especially heinous, atrocious, or cruel (HAC). Appellant contends that the evidence does not support the giving of this instruction and that the court erred in finding that this aggravating factor was established beyond any reasonable doubt. Contrary to Appellant's assertions, the evidence clearly supports the court's conclusion that the murder was especially heinous, atrocious, or cruel.

In finding this aggravator, the trial judge stated:

> The evidence established that during the confrontation with Mr. Baker, Mr. Cox knocked him to the ground. Mr. Baker was struck numerous times after being on the ground and was unsuccessful in his repeated efforts to get up, each time being "slammed" back to the ground. Several witnesses testified that after being in total control of Mr. Baker, Mr. Cox drew the weapon from his pants and told Mr. Baker that the beating was not "good enough" and began to stab Mr. Baker. The victim, who according to the witnesses was obviously scared, was kicking and trying to get away, and he repeatedly pleaded that he had not taken Cox's money or broken into the locker. Unfortunately, the victim's plaintive appeal fell on deaf ears and the homicidal attack continued for several minutes, during which Mr. Baker curled up in a fetal position.
>
> After Mr. Cox broke off his attack, and as he was leaving the stabbed Thomas Baker, Mr. Cox was overheard saying, "There's one more I've got to get." He later attacked Leonard [sic] Wood.
>
> The evidence established that after the mortal stabbing, the victim got up, ran a short distance, fell,

got back up, and made his way to C-dorm, a distance of over three hundred (300) feet. At C-dorm, Corrections Officer Parker attempted to help Mr. Baker who, according to her, was hysterical and shouting that he had been stabbed. Although the stab wounds were not immediately noticeable to Officer Parker, Mr. Baker was coughing and had blood in his mouth. While awaiting medical assistance, it was evident to Officer Parker that Mr. Baker's condition was worsening and that Mr. Baker knew it. Sargent McBrayor testified that Mr. Baker stated that he could feel his lungs filing with blood and he was having increasing difficulty breathing. Mr. Baker was described by those who saw him at C-dorm as being in great distress, scared and hysterical. He exclaimed to Officer Parker, "Please don't let me die." He was conscious throughout this ordeal for at least fifteen minutes, during which time he constantly experienced difficulty breathing and expressed great fear and apprehension.

The testimony of Dr. Janet Pillow, the medical examiner, and her report, established that Mr. Baker was stabbed three (3) times: one wound on the back of the left, upper thigh which was approximately 2.0 cm deep; a second puncture wound on the right thigh that was superficial and only penetrated the skin; and the fatal wound on the left side of the victim's back which punctured both of his lungs and his thoracic aorta. Dr. Pillow testified that it was her medical opinion that Mr. Baker would have been conscious for minutes, that he would have spit up blood, and that he would have felt great pain and would have "hungered" for air. All of Dr. Pillow's opinion testimony regarding Mr. Baker's possible symptoms and reactions were borne out by those who saw him before his loss of consciousness and ultimate death.

Mr. Cox argues that there is no evidence that the victim suffered pain and that both the victim and he had been involved in a fist fight, the implication being that this was a mutual combat situation. The evidence belies this assertion, and Mr. Cox's version of the events is wholly irreconcilable with the other testimony and evidence.

Numerous stab wounds will support this aggravator, see *Pittman v. State*, 646 So. 2d 167 (Fla. 1994), as will circumstances where the victim drowned in his own blood and had a substantial period of time to contemplate his demise. . . just like Mr. Baker. See *Cummings-El v. State*, 684 So. 2d 729 (Fla. 1996); *Cole v. State*, 701 So. 2d 845 (Fla. 1997); *Lusk v. State*, 446 So. 2d 1038 (Fla.

1984).

> The State has proven this aggravating circumstance beyond and to the exclusion of every reasonable doubt and it is entitled to great weight.

(V8, R.1517-19) (footnote omitted).

Whether an aggravating circumstance exists is a factual finding reviewed under the competent, substantial evidence test. When reviewing aggravating factors on appeal, this Court in Alston v. State, 723 So. 2d 148 (Fla. 1998) reiterated this standard of review, noting that it "'is not this Court's function to reweigh the evidence to determine whether the State proved each aggravating circumstance beyond a reasonable doubt -- that is the trial court's job. Rather, our task on appeal is to review the record to determine whether the trial court applied the right rule of law for each aggravating circumstance and, if so, whether competent substantial evidence supports its finding.'" Id. at 160 (quoting Willacy v. State, 696 So. 2d 693, 695 (Fla. 1997) (footnotes omitted)).

In Cummings-El v. State, 684 So. 2d 729, 731 (Fla. 1996), this Court rejected the defendant's claim that the murder was not heinous, atrocious, or cruel when the victim "sustained numerous stab wounds, several of which were defensive, and the medical examiner testified that her death was caused by her lungs filling with blood--she drowned in her own blood." Witnesses testified that the victim was conscious for several minutes after the stabbing and asked what was taking the paramedics so long. Id.

This Court concluded that the victim had a substantial period of time in which to contemplate her impending doom. Id.; see also Jimenez v. State, 703 So. 2d 437, 441 (Fla. 1997) (finding that trial court properly found HAC aggravator when victim bled to death as a result of multiple stab wounds and lingered for ten minutes knowing she was going to die), overruled by Delgado v. State, 776 So. 2d 233 (Fla. 2000); Pittman v. State, 646 So. 2d 167, 173 (Fla. 1994) (stating that evidence supported HAC aggravating factor when the victim was stabbed numerous times and bled to death); Davis v. State, 620 So. 2d 152, 152-53 (Fla. 1993) (upholding HAC where victim stabbed multiple times and suffered blows to the face). Like the victim in Cummings-El, Thomas Baker was stabbed multiple times and drowned in his own blood. The victim was conscious for at least fifteen minutes and was acutely aware of his impending death.

Appellant's attempt to trivialize the victim's other two stab wounds by characterizing them as shallow and non-life-threatening is unpersuasive. The evidence clearly shows that Appellant beat the much smaller victim with his fists and slammed him to the ground before deciding that the attack was not good enough for him. Appellant then pulled out a large shank and forcefully stabbed the victim three times as he curled up in a fetal position. The fatal wound resulted in the victim drowning in his own blood. The fact that Appellant was unable to cause more serious injuries with the

shank on the other two occasions is likely a result of the victim's positioning during the attack rather than Appellant's intent. Nonetheless, the result was a murder that was especially heinous, atrocious, or cruel.

In this case, competent, substantial evidence supports the trial court's finding of HAC. However, even if this Court finds that the trial judge erred in finding this aggravator, the State submits that the error is harmless given the existence of the other valid aggravating factors and the established mitigation. See Davis, 620 So. 2d at 153 (stating that even though faulty HAC instruction was utilized, "[w]e are satisfied that under any instruction, on the instant facts the jury would have recommended and the judge would have imposed the same sentence").

ISSUE VII

THE TRIAL JUDGE PROPERLY INSTRUCTED THE JURY AND FOUND THAT THE MURDER WAS COMMITTED IN A COLD, CALCULATED MANNER WITHOUT ANY PRETENSE OF LEGAL OR MORAL JUSTIFICATION.

In order to establish that a murder was cold, calculated, and premeditated (CCP), the State must show that the murder was (1) the product of a careful plan or prearranged design; (2) the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage; (3) the result of heightened premeditation; and (4) committed with no pretense of moral or legal justification. Rodriguez v. State, 753 So. 2d 29 (Fla.), cert. denied, 121 S. Ct. 145 (2000). Appellant argues that the court erred in instructing the jury on this aggravator and in finding that it applied to the instant case. As noted in Issue VI, whether an aggravating circumstance exists is a factual finding reviewed under the competent, substantial evidence test. This Court's function is not to reweigh the evidence, but rather to determine whether the trial court applied the right rule of law for each aggravating circumstance and, if so, whether competent substantial evidence supports its finding. Alston v. State, 723 So. 2d 148, 160 (Fla. 1998).

In finding that the murder was committed in a cold, calculated manner without a pretense of moral or legal justification, the trial court found:

> The day before this homicide, the defendant, Mr.

Cox, announced to everyone listening in the area of E-dorm that he intended to kill the person who broke into his locker and stole his money, and that he did not care what happened to him (Mr. Cox) as a result; i.e. whether he got a life or death sentence. He then methodically went about attempting to determine who had done it by offering a reward and by conducting his own investigation. After Mr. Cox determined that Mr. Baker was a suspect, Mr. Cox obtained a weapon and confronted Mr. Baker near the handball courts. During the physical beating of Mr. Baker, and consistent with his announcement the day before, he exclaimed, "This ain't good enough for you," and he pulled the shank and stabbed Mr. Baker three (3) times. After the stabbing, he left Mr. Baker and was heard saying, "I got one more of you mother f---- to get," whereupon he went to E-dorm and confronted Lawrence Wood. There he told Mr. Wood, "I just got your little buddy, and you're lucky I put it up or I'd get your ass, too."

In *Jackson v. State*, 648 So.2d 85 (Fla. 1994), the Florida Supreme Court found the standard jury instruction on the cold, calculated and premeditated aggravator (CCP) unconstitutional and reiterated that this aggravating circumstance required proof of the following elements: (1) the killing was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic or a fit of rage; (2) that the defendant had a careful plan or prearranged design; (3) that the defendant exhibited heightened premeditation; and (4) the defendant had no pretense or moral or legal justification.

In his sentencing memorandum, Mr. Cox asserts <u>his</u> version of the facts regarding the confrontation of Mr. Baker. As every other eyewitness account differed from Mr. Cox's self-serving explanation of the event, this court reasserts its rejection of Mr. Cox's explanation as being without <u>any</u> corroboration.

The killing was the product of cool and calm reflection, the result of a careful plan or prearranged design, and exhibited heightened premeditation. Hours passed between Mr. Cox's initial announcement of his intent to kill and Mr. Baker's death. During the intervening time period, Mr. Cox went about his efforts to ascertain who broke into his locker and to obtain the murder weapon. The evidence of these aspects of CCP is overwhelming.

Mr. Cox argues that because he was a prison inmate who was the victim of the theft of his drug cash, and

because of the various relationships he alleges existed with certain other inmates, he had a "pretense" of a "moral" justification to kill Mr. Baker. This argument again relies in large measure upon Mr. Cox's version of the facts, which this court has previously found unsupported by other evidence. Nothing about his asserted "pretense" rebuts the otherwise cold and calculating nature of this homicide. See *Banda v. State*, 536 So.2d 221 (Fla. 1988).

In *Hill v. State*, 688 So.2d 901 (Fla. 1997), the Supreme Court rejected the argument that Mr. Hill had a pretense of moral justification for killing an abortion doctor and clinic volunteers to protect unborn children. In affirming the trial court's rejection of this argument, the Court quoted its opinion in *Dougan v. State*, 595 So.2d 1 (Fla. 1992) and stated:

> "While Dougan may have deluded himself into thinking this murder justified, there are certain rules by which every civilized society must live. One of these rules must be that no one may take the life of another indiscriminately, regardless of what that person may perceive as justification."

In *Williamson v. State*, 511 So.2d 289, 293 (Fla. 1987), the Court sustained a trial court's finding that no "pretense" existed where the defendant argued that the victim intended to kill him over a $15.00 debt. The evidence showed that the victim had never been violent or threatening and had been attacked by surprise and repeatedly stabbed.

There is no colorable claim that Mr. Cox was, or ever had been, threatened by Mr. Baker. Mr. Cox was, as he told everyone in E-dorm, angry that his locker had been broken into and was going to get even by taking the life of whoever he determined had done it.

This aggravator was established beyond a reasonable doubt and is entitled to great weight.

(V8, T.1520-22).

As the trial judge properly concluded based on the evidence introduced, the murder was committed in a cold, calculated manner. Contrary to Appellant's claim that the murder was more akin to a

murder committed in the heat of anger, the murder was the result of careful planning. On Sunday, December 20, 1998, Appellant discovered his locker had been broken into and threatened to kill and stab the culprit. Appellant placed a reward and began his search for the culprit. In the numerous hours that passed between the threat to kill and the actual murder on Monday afternoon, Appellant obtained a weapon from another inmate and ascertained that Thomas Baker allegedly was the culprit. This evidence clearly supports a finding of cool and calm reflection and evinced a careful plan or prearranged design to commit the murder.

In Zakrzewski v. State, 717 So. 2d 488, 492 (Fla. 1998), the defendant killed his wife and children because of a pending divorce. The defendant asserted that because he was under extreme emotional distress at the time of the murders, it was impossible for him to commit the murders in a cold, calculated, and premeditated fashion. The defendant also argued that the murders were committed with a pretense of moral justification. Id. This Court disagreed because on the day of the murders, Zakrzewski left work at lunch in order to buy a machete and proceeded to set up the murder scene before his family arrived home. Id.

> We find these actions to be both calculated and premeditated. See Rogers v. State, 511 So. 2d 526, 533 (Fla. 1987) (stating that "'calculation' consists of a careful plan or prearranged design"); Walls v. State, 641 So. 2d 381 (Fla. 1994) (holding that CCP requires heightened premeditation, over and above what is required for premeditated first-degree murder, which can be evidenced by a "degree of deliberate ruthlessness"). In

> addition, Zakrzewski had the entire day for "cool and calm reflection," and the murders were not "prompted by emotional frenzy, panic, or a fit of rage." Jackson v. State, 648 So.2d 85, 89 (Fla.1994). Thus, the murders satisfy the cold element of CCP. See Id.

Zakrzewski, 717 So. 2d at 492.

Similar to the defendant in Zakrzewski, Appellant had the entire day for "cool and calm reflection." Appellant discovered the theft of his money on Sunday afternoon and committed the murder the following afternoon. Contrary to Appellant's assertions, the murder was not prompted by emotional frenzy, panic or a fit of rage. Appellant had ample time to reflect on his decision and to plan the murder. Furthermore, Appellant's explicit threat the day before the murder clearly establishes that Appellant had the requisite premeditation to support the trial court's finding of CCP.

Appellant also asserts that the evidence does not support the trial court's conclusion that Appellant's plan to kill was "calculated." Appellant claims that the fact the killing occurred at "high noon" in plain view of numerous inmates is indicative of the lack of calculated plan. To the contrary, as Dr. Gutman testified, Appellant made a business decision as a drug dealer in prison to protect his reputation by killing the person who had the audacity to steal from him. Appellant, a.k.a. "Big Al," purposefully chose to kill Thomas Baker in a populated place where all the other inmates could observe his handy-work. The State

introduced competent, substantial evidence to support the court's finding that the murder was committed in a cold, calculated manner.

Appellant additionally claims that he had a pretense of moral or legal justification in killing Thomas Baker because Mr. Baker allegedly stole nearly $500 from Appellant's cell. This Court has defined a pretense of legal or moral justification as "any colorable claim based at least partly on uncontroverted and believable factual evidence or testimony that, but for its incompleteness, would constitute an excuse, justification, or defense as to the homicide." Nelson v. State, 748 So. 2d 237, 245 (Fla. 1999), cert. denied, 528 U.S. 1123 (2000). In Nelson, this Court rejected the defendant's argument that he acted with a pretense of legal or moral justification when the victim may have committed a sexual battery on one of the defendant's friends. Id.; see also Zakrzewski v. State, 717 So. 2d 488, 492 (Fla. 1998) (noting that killing one's own family to save them from having to go through a divorce does not constitute a pretense of moral or legal justification); Hill v. State, 688 So. 2d 901, 907 (Fla. 1996) (stating that defendant's feeling that he was justified in killing to prevent abortions is not a pretense of moral justification); Williamson v. State, 511 So. 2d 289, 293 (Fla. 1987) (rejecting defendant's claim that he had a pretense of moral or legal justification for killing fellow prisoner because, if he did not murder inmate, inmate would have killed him for failing to

repay $15 drug debt).

In this case, Appellant did not have a colorable claim based on uncontroverted and believable testimony that constitutes an excuse, justification, or defense to the murder. As the trial judge properly found, "[t]here is no colorable claim that Mr. Cox was, or ever had been, threatened by Mr. Baker." Similar to the facts in Williamson, there was no credible evidence that the victim in this case ever threatened Appellant in any manner. In fact, with the exception of Appellant's own self-serving testimony, all of the eyewitnesses testified that the victim was scared of Appellant and did not pose any threat to him. Because the evidence does not support Appellant's contention, this Court should find that the trial judge properly rejected Appellant's claim that he acted with a pretense of legal or moral justification. Even if this Court finds that the trial court erred in finding this aggravating circumstance, the error is harmless given the other valid aggravators.

ISSUE VIII

THE TRIAL COURT ACTED WITHIN ITS DISCRETION IN ASSIGNING THE NONSTATUTORY MITIGATION VARIOUS AMOUNTS OF WEIGHT.

Appellant claims that the trial court abused its discretion in assigning "some weight," "slight weight," "little weight," and "no weight" to his proffered nonstatutory mitigating factors. This Court in Campbell v. State, 571 So. 2d 415, 419-20 (Fla. 1990), established relevant standards of review for mitigating circumstances: Whether a mitigating circumstance has been established by the evidence in a given case is a question of fact and subject to the competent substantial evidence standard, and the weight assigned to a mitigating circumstance is within the trial court's discretion and subject to the abuse of discretion standard. See also Trease v. State, 768 So. 2d 1050, 1055 (Fla. 2000) (receding in part from Campbell and holding that, although a court must consider all the mitigating circumstances, it may assign "little or no" weight to a mitigator); Kearse v. State, 770 So. 2d 1119, 1134 (Fla. 2000) (observing that whether a particular mitigating circumstance exists and the weight to be given to that mitigator are matters within the discretion of the sentencing court), cert. denied, 121 S. Ct. 1663 (2001).

In this case, the court found no statutory mitigators, but considered numerous nonstatutory mitigators proffered by Appellant. (V8, R.1522-58). Appellant complains that the court did not assign

sufficient weight to the mitigators involving Appellant's childhood.[30] The State submits that Appellant has failed to establish an abuse of the court's discretion in finding these mitigators and giving them "some" and "slight" weight. See Porter v. State, 429 So. 2d 293, 296 (Fla. 1983) (stating that mere disagreement with the weight to be given to mitigating evidence is an insufficient basis for challenging the sentence).

In Trease v. State, 768 So. 2d 1050, 1055 (Fla. 2000), this Court receded from Campbell and held that a trial judge is permitted to find the existence of a mitigating factor and afford it no weight. As an example, this Court noted that being a drug addict may be considered a mitigating circumstance, but the fact that a defendant was a drug addict twenty years before the crime for which he was convicted may be sufficient reason to entitle the factor to no weight. Id.

In this case, the court found that the evidence supported the proffered mitigating factors dealing with Appellant's traumatic

---

[30]Specifically, Appellant complains in his brief that the trial court only gave "slight" weight to the mitigators of: (1) Severe domestic violence in the home; (2) Mother very cruel and unpredictable; (3) Mother was very cruel, especially toward Allen Ward; (4) Father frequently absent from the home, indifferent toward Allen Ward and siblings, and failed to protect Allen Ward from physical abuse by mother; (5) Allen Ward was forced to haul firewood as a small child until he dropped from physical exhaustion; and "some weight" to the mitigator: Parents were divorced when Mr. Cox was eight or nine years old, remarried for a brief period of time, and then divorced again after a stormy period of attempted reconciliation when Mr. Cox was eleven years old. (V8, R.1525-29).

childhood. Unlike the situation in Trease, the trial judge did not assign these mitigators "no weight," but afforded the factors "some" or "slight" weight. The court assigned these mitigators this level of weight based on the fact that Appellant moved in with his grandmother at a young age, ten or eleven, and she provided a loving, stable environment for his development. In addition, Appellant's siblings, who grew up in the same environment with Appellant's parents, did not grow up to lead a life of crime like Appellant. Finally, like the example in Trease, the traumatic childhood events occurred over twenty years before the instant crime. Unlike the situation in Nibert v. State, 574 So. 2d 1059 (Fla. 1990), relied on by Appellant, the trial judge in this case did not refuse to consider the childhood mitigation evidence, but simply gave these mitigators "some" or "slight" weight. Because the circumstances support the trial court's decision, this Court should find that the judge acted within its discretion.

Appellant also argues that the trial judge erred in rejecting mitigation: (1) Appellant came from a diluted gene pool (no weight); (2) Appellant's psychotropic medicine was changed prior to the homicide (not mitigating); (3) Appellant suffers from a high level of anxiety when dealing with others (no weight); (4) Appellant still feels protective toward his mother even though she treated him with cruelty as a child (not mitigating); and (5) Appellant requires specialized treatment for a mental disorder that

is treatable (slight weight).[31] (V8, R.1534-52). The law is well established that 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 rejection. Nibert v. State, 574 So. 2d 1059, 1062 (Fla. 1990).

In this case, the record supports the conclusion that these proffered mitigating factors were entitled to no weight. When rejecting the mitigator that Appellant came from a diluted gene pool, the court noted that Appellant's great grandparents were brother and sister, but there was no evidence introduced that established that this fact had any effect whatsoever on Appellant's ability to function as a normal, law-abiding citizen. The court noted that Appellant's siblings also came from this diluted gene pool and they have not committed any homicides. (V8, R.1552-53). The court also rejected the mitigator involving the changing of Appellant's psychotropic medication prior to the homicide. As the court properly concluded, Appellant was successfully being treated for a chronic depressive disorder, and the change in his medication did not contribute to the events surrounding the homicide. (V8, R.1536-37). Although the defense expert testified that Appellant suffers high anxiety when dealing with others, there was no evidence that this anxiety contributed in any way to the murder of

[31]Contrary to Appellant's assertion, the trial judge did not reject this mitigator, but gave it slight weight.

Thomas Baker. (V8, R.1539-40). The trial court also rejected Appellant's proffered mitigator that he was still protective of his abusive mother because such evidence is irrelevant and not mitigating. (V8, R.1534). The court accepted Appellant's mitigation that he required specialized treatment for a mental disorder, but only assigned it slight weight because there was no nexus between the disorder which was being successfully treated and the murder.

The State submits that there is competent, substantial evidence in the record to support the court's conclusion rejecting these mitigators or in assigning them "no weight" or "slight weight." Contrary to Appellant's assertion, the court did not misapply the law when assigning these mitigators weight or when rejecting them. The court did not require Appellant to prove a nexus for each of the mitigators. Rather, like the drug addict example in Trease, the fact that a mitigating circumstance was established does not automatically mean that the court must entitle the factor any weight. Because the trial court properly applied the law and the evidence supports the court's findings, this Court should affirm the trial court's sentence.

Even if this Court finds that the trial judge erred in rejecting the nonstatutory mitigators or in failing to assign the proper weight to the challenged mitigators, this Court should find the error harmless. As previously noted, there are four

substantial aggravators which clearly outweigh the established mitigation. As the trial judge stated in its sentencing order, "the aggravating circumstances are appalling" and "greatly outweigh the mitigating circumstances found to be present in this case." (V8, R.1559). For these reasons, this Court should affirm Appellant's death sentence.

ISSUE IX

APPELLANT'S DEATH SENTENCE IS PROPORTIONATE WHEN COMPARED TO OTHER CAPITAL CASES.

This Court has previously stated that its proportionality review does not involve a recounting of aggravating factors versus mitigating circumstances but, rather, compares the case to similar defendants, facts and sentences. Tillman v. State, 591 So. 2d 167 (Fla. 1991). In conducting the proportionality review, this Court compares the case under review to others to determine if the crime falls within the category of *both* (1) the most aggravated, and (2) the least mitigated of murders. Almeida v. State, 748 So. 2d 922, 933 (Fla. 1999).

A review of the facts established in the instant case demonstrates the proportionality of the death sentence imposed. See Rose v. State, 26 Fla. L. Weekly S210 (Fla. Apr. 5, 2001) (upholding death sentence where there were four aggravators and a number of nonstatutory mitigators); Mansfield v. State, 758 So. 2d 636 (Fla. 2000) (upholding death sentence where two aggravators, heinous, atrocious, or cruel and crime committed during the commission of a sexual battery, outweighed five nonstatutory mitigators), cert. denied, 121 S. Ct. 1663 (2001); Way v. State, 760 So. 2d 903 (Fla. 2000) (finding death penalty sentence proportionate when court found three aggravating circumstances, two statutory mitigators and seven nonstatutory mitigating factors), cert. denied, 121 S. Ct. 1104 (2001).

In the instant case, there are four substantial aggravating factors: (1) prior violent felonies; (2) under sentence of imprisonment; (3) HAC; and (4) CCP. This Court has previously stated that HAC and CCP are "two of the most serious aggravators set out in the statutory sentencing scheme." Larkins v. State, 739 So. 2d 90, 95 (Fla. 1999). In addition to these two serious aggravators, the evidence of Appellant's prior violent felonies is particularly compelling. Appellant began as a young adult robbing convenience store clerks at gunpoint. Appellant progressed to breaking into innocent people's home and causing serious bodily injury. Appellant also forcibly kidnaped, raped, and battered a young woman. Finally, Appellant continued his criminal history while incarcerated in prison. As a result of dealing drugs, Appellant had managed to save $500, only to have it stolen by an unknown inmate. Appellant, believing that Thomas Baker stole his money, took his revenge by fatally stabbing Baker in front of a number of individuals.

Although the trial judge afforded all of the mitigating factors careful and deliberate consideration, the court properly concluded that the aggravating circumstances greatly outweighed the established mitigation. The circumstances of this murder compels the imposition of the death penalty. Accordingly, this Court should affirm the trial court's sentence.

ISSUE X

FLORIDA'S DEATH PENALTY STATUTE IS CONSTITUTIONAL.

Appellant raises several constitutional challenges to Florida's death penalty statute which should be reviewed pursuant to the *de novo* standard of review. See City of Jacksonville v. Cook, 765 So. 2d 289, 291 (Fla. 1st DCA 2000). Appellant's claims, however, have recently been rejected by this Court. See Mills v. Moore, 786 So. 2d 532 (Fla.), cert. denied, 121 S. Ct. 1752 (2001); Mann v. Moore, 26 Fla. L. Weekly S490 (Fla. July 12, 2001).

Appellant challenges the death penalty statute on the basis of the United States Supreme Court's decision in Apprendi v. New Jersey, 120 S. Ct. 2348 (2000). Relying on Apprendi, Appellant claims that each of his four constitutional challenges to the death penalty, involving notice of aggravating factors, specific written jury findings regarding the existence of particular aggravators, jury unanimity, and the burden and standard of proof argument, must be revisited by this Court. This argument fails for several reasons.

First, the decision in Apprendi is inapplicable to the constitutional challenges raised by Appellant. Apprendi requires that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond reasonable doubt." Apprendi, 120 S. Ct. at 2362-63. Nothing in the Apprendi decision altered the jurisprudence of any

capital sentencing scheme. In fact, the Supreme Court specifically noted the following:

> Finally, this Court has previously considered and rejected the argument that the principles guiding our decision today render invalid state capital sentencing schemes requiring judges, after a jury verdict holding a defendant guilty of a capital crime, to find specific aggravating factors before imposing a sentence of death. For reasons we have explained, the capital cases are not controlling:
>
> > "Neither the cases cited, nor any other case, permits a judge to determine the existence of a factor which makes a crime a capital offense. What the cited cases hold is that, once a jury has found the defendant guilty of all the elements of an offense which carries as its maximum penalty the sentence of death, it may be left to the judge to decide whether that maximum penalty, rather than a lesser one, ought to be imposed.... The person who is charged with actions that expose him to the death penalty has an absolute entitlement to jury trial on all the elements of the charge."

Apprendi, 120 S. Ct. at 2366 (citations omitted).

Under these circumstances, Appellant's attempts to apply the Apprendi decision to his constitutional challenges of Florida's capital sentencing scheme must fail. Each of these challenges has been previously rejected by this Court. Mills, 786 So. 2d at 536-38; Mann, 26 Fla. L. Weekly at 490.

1) Notice.

Appellant argues that the death penalty statute should require notice of the aggravating factors the State intends to prove at the penalty phase. In Vining v. State, 637 So. 2d 921, 927 (Fla.

1994), this Court held that the aggravating factors to be considered in determining the propriety of a death sentence are limited to those set forth in the death penalty statute. Therefore, there is no reason to require the State to notify a defendant of aggravating factors that it intends to prove. Id.; Mann, 26 Fla. L. Weekly at 490 (rejecting defendant's claim that State must provide notice of aggravators).

2) Specific Jury Findings.

Again, Appellant's assertion that the death penalty statute is defective for failing to require the jury to make specific written findings regarding the existence of particular aggravators has previously been decided. The Sixth Amendment does not require juries to make specific findings authorizing the imposition of the death penalty. See Randolph v. State, 562 So. 2d 331, 339 (Fla. 1990) (citing Hildwin v. Florida, 490 U.S. 638 (1989)).

3) Jury Unanimity.

The United States Supreme Court has never held that jury unanimity is a requisite of due process.[32] In Mann, this Court rejected the defendant's argument based on Apprendi that a jury verdict recommending death must be unanimous. Mann, 26 Fla. L. Weekly at 490.

4) Burden and Standard of Proof.

---

[32]See Johnson v. Louisiana, 406 U.S. 356 (1972).

This Court has repeatedly held there is no merit to Appellant's burden shifting claim. See Freeman v. State, 761 So. 2d 1055, 1067 (Fla. 2000); Demps v. Dugger, 714 So. 2d 365 (Fla. 1998); Shellito v. State, 701 So. 2d 837 (Fla. 1997).

CONCLUSION

In conclusion, Appellee respectfully requests that this Honorable Court affirm the trial court's judgment and sentence.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

STEPHEN D. AKE
Assistant Attorney General
Florida Bar No. 14087
Westwood Center
2002 North Lois Avenue, Suite 700
Tampa, Florida 33607-2366
Telephone: (813) 801-0600
Facsimile: (813) 356-1292

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Christopher S. Quarles, Assistant Public Defender, Public Defender's Office, 112 Orange Avenue, Suite A, Daytona Beach, Florida 32114, on this 6th day of August, 2001.

_____
COUNSEL FOR APPELLEE

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

_____
COUNSEL FOR APPELLEE