IN THE SUPREME COURT OF FLORIDA

WILLIE SETH CRAIN, JR.,

Appellant,

vs. **CASE NO. SC00-661**

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF HILLSBOROUGH COUNTY, STATE OF FLORIDA

ANSWER BRIEF OF THE APPELLEE

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PRELIMINARY STATEMENT

CITATIONS: Reference to the record on direct appeal will be referred to as "V" followed by the appropriate volume and page numbers.

STATEMENT OF THE CASE AND FACTS

The State generally accepts the Statement of the case and facts set forth in appellant's brief but adds the following.

A. Guilt Phase

In 1998, Amanda was in the second grade, 3'10 and of slender build, weighing approximately 45 pounds. (V-11, 1543). On September 10th, 1998, Kathryn Hartman met her daughter, Amanda after she got off the bus from school. (V-11, 1565). Shortly after arriving at her trailer with Amanda, appellant, who Kathryn had met the previous evening, knocked on the door. Kathryn invited him in. (V-11, 1566). At that point, Amanda was trying to get out of doing her homework. Kathryn told her she could play once she finished her homework. (V-11, 1566). Amanda started doing her homework on the kitchen table. When appellant entered the trailer, he went to the kitchen table where Amanda was doing her homework. (V-11, 1567). Kathryn noted that appellant smelled of alcohol and that he carried a plastic cup with a yellow liquid in it. (V-11, 1568).

Appellant began talking to Amanda about her homework. (V-

11, 1568). Appellant pulled out some money and told Amanda if she got her homework right, he would give her a dollar. (V-11, 1569). He eventually gave Amanda two dollars. (V-11, 1570). Appellant left early that afternoon but was invited back for dinner.

Appellant arrived shortly after 7:00 and they ate dinner together at the kitchen table. (V-11, 1572). Appellant still smelled of alcohol and carried the same plastic cup with a colored liquid. (V-11, 1573). After dinner, appellant played some games with Amanda, such as tic-tac-toe, using a notepad. (V-11, 1574). She also recalled that they were drawing on the notepad, tracing each others' hands. (V-11, 1574). At trial, the notepad was introduced into evidence and reflected Kathryn's statement, "I love my Amanda" on a page with a tracing of Amanda's hand. (V-11, 1610). Also, on the pad, in unfamiliar writing were the words "I like Willie." Id. This appeared on a page with a tracing of a large hand. Id.

Appellant mentioned to Kathryn and Amanda that he had a large movie collection at his house and invited them over to watch a movie. (V-11, 1574). Amanda asked appellant if he had "Titanic," her favorite movie, and he responded "yes." (V-11, 1575). Amanda then pleaded with Kathryn to allow her to see the movie: "Please, mommy, can we go see the movie?" (V-11,

1575). At first, Kathryn said no because the movie would end too late for a school night. (V-11, 1575). Appellant told Kathryn that she could let Amanda sleep in late. (V-11, 1575). After additional pleading by Amanda, Kathryn agreed, thinking that Amanda has been doing very well in school and that being late one day wouldn't hurt. (V-11, 1575-76).

Appellant drove Kathryn and Amanda to his trailer in his newer model white pickup truck. (V-11, 1552-54, 1576). It was only a three minute drive, maybe a mile, to appellant's trailer. (V-11, 1577). They entered appellant's trailer and began watching the movie in the living room on a big screen TV. (V-11, 1579). The movie was interrupted when the phone rang, appellant said it was his sister and that they didn't get along. At appellant's request, Kathryn agreed to talk to her. (V-11, 1580). The phone was in the kitchen and when she began talking, appellant and Amanda were still in the living room watching the movie. (V-11, 1583). She talked to appellant's sister for twenty to twenty-five minutes. (V-11, 1583). When she ended the conversation, appellant and Amanda were not in the living room. (V-11, 1583). Kathryn began looking for them and found them behind a closed door in the rear of the trailer, the master bedroom. (V-11, 1584). She opened the door without knocking and found Amanda on the bed between appellant's legs. Both of

them were dressed and sitting on the bed. (V-11, 1585). Appellant's arms were around Amanda who was facing away from him. Appellant had a remote control in his hand. (V-11, 1586). Kathryn testified that she was not really concerned about what she observed at the time, but did pick up Amanda and place her by her side. (V-11, 1586-87). They watched a little bit more of the "Titanic", but appellant bragged that he could get any movie on his satellite dish and began changing channels. (V-11, 1588).

At some point, Amanda expressed the desire to use the bathroom. (V-11, 1589). There was only one bathroom in the trailer and Kathryn did not allow Amanda to use the bathroom by herself. (V-11, 1589). She took her into the bathroom and was present while she used it. (V-11, 1590). At no point on that Thursday, September 10th, did Kathryn observe Amanda bleeding from any location on her body. (V-11, 1590). Specifically, Kathryn testified that Amanda did not bleed from any source inside appellant's bathroom. (V-11, 1590). Amanda never used the bathroom alone in appellant's trailer. (V-11, 1593). At seven, Amanda was not old enough to have started her menstrual cycle. (V-11, 1590). Nor did Amanda have any sores or injuries on her body. (V-16, 1590).

Kathryn used the bathroom and noticed that her feet hit some

type of carpet on the floor of appellant's bathroom. (V-16, 1592). Kathryn used the bathroom twice, once after Amanda had used it. (V-16, 1594). Kathryn testified that some type of knicknack or object might have been on the back of the toilet tank, but "it didn't appear to be clothes or a change of clothes." (V-12, 1701).

Kathryn asked appellant if he had anything for pain and appellant said he had Elavil and Valium. Appellant offered her Elavil and said it would knock her out, but Kathryn opted for Valium. Kathryn took five of the five milligram pills provided by the appellant. (V-1, 1618). Kathryn explained that she was addicted to pain pills and had the addiction for about twelve years. (V-11, 1620). Appellant also took Valium at the same time, but she did not see how many he consumed. (V-11, 1620). Appellant also offered Kathryn marijuana, but she declined the offer. (V-11, 1620).

When she observed appellant pull out his wallet for something, Kathryn asked him if she could borrow $30.00 until she got her check on Friday. Appellant handed her a fifty and asked if that was enough, handing her another fifty. Kathryn said she could not repay that amount and he said "don't worry about it, you don't have to pay me back." (V-11, 1621). She took the money. Id.

At some point, Kathryn decided it was time to leave. (V-16, 1595). Amanda asked to borrow the "Titanic" video, and appellant agreed. (V-16, 1596-97). Appellant drove them back to Kathryn's trailer. (V-16, 1595). Appellant entered the trailer and again began drawing with Amanda on the kitchen table. (V-11, 1597). Kathryn told Amanda it was time to get ready for bed and got her into the shower. Amanda washed herself in the shower but, as she routinely does, Kathryn goes in to make sure Amanda gets all the shampoo out of her hair. (V-11, 1597). Kathryn also turns on and off the water so that Amanda does not burn herself. (V-11, 1597). Kathryn turned off the water, dried her and put her pajamas on. (V-11, 1598). She was very close to Amanda during this period and did not observe bleeding, open sores or cuts on Amanda's body. (V-11, 1598).

Earlier that evening, Kathryn recalled having a discussion about one of Amanda's teeth. Amanda did have one loose tooth, but it was not bleeding. Kathryn did not observe any bleeding or swelling around the tooth. (V-16, 1600). Kathryn testified that the tooth was not ready to be pulled out. (V-16, 1600). When appellant and Amanda wiggled the tooth, appellant did not make any comment about it bleeding and Kathryn did not observe any bleeding. (V-12, 1723). However, appellant offered Amanda

five dollars if she would let him pull it out. Amanda declined the offer. (V-11, 1601). When Amanda went to bed the tooth was still in place. (V-12, 1723). Amanda usually waited until the morning to brush her teeth, but Kathryn did not notice any blood after Amanda brushed her teeth on September 9th or 10th. (V-16, 1601).

Kathryn put a blue and white nightgown with white lace on Amanda. She was going to put Amanda to bed immediately after the shower, but appellant insisted that she should not go to bed with wet hair because she could catch a cold. (V-11, 1602). Appellant brushed and used a blow dryer on Amanda's hair. (V-11, 1602). It was appellant's idea to blow dry her hair. Id. Amanda was then put to bed at approximately 2:30 am on Friday, September 11th. (V-11, 1603). Kathryn dressed for bed and allowed Amanda to sleep in her bed even though Amanda had her own bedroom. (V-11, 1603-04).

Appellant appeared to be intoxicated and Kathryn invited him to sleep on the floor or couch to sober up. (V-11, 1612). Kathryn testified: "I didn't invite him to lay down in my bed, no." (V-11, 1613). Shortly after putting Amanda to bed, Kathryn entered her bedroom, closed the door, and laid down next to Amanda. Amanda's eyes were closed and Kathryn could tell from Amanda's breathing that she was asleep. (V-11, 1613).

Appellant was still in the house when they went to bed. (V-11, 1612). Amanda often slept in Kathryn's bed and was a heavy sleeper. (V-11, 1624). In fact, she has on occasion picked Amanda up from her grandmother's house when she was asleep and placed her in the car. Amanda would not wake up from the time they left her grandmother's house to the time she was put in her own bed. (V-11, 1624-25).

Within about five minutes of going to bed, appellant opened the bedroom door and laid down on the bed. (V-11, 1614). Appellant was fully clothed and did not take his shoes off. (V-11, 1616). Appellant did not say anything. Kathryn testified that she usually slept with her arm around Amanda. (V-11, 1616). She fell asleep shortly after appellant entered the bedroom. (V-1, 1617). When she fell asleep, Amanda was next to her and appellant was on the other side of Amanda. (V-11, 1618).

Kathryn awoke at 6:15 the next morning and immediately noticed that Amanda was not there. (V-11, 1621). However, Kathryn did not recall any unusual movement in her bed at any time during the night. (V-11, 1621). She did not recall either Amanda or the appellant leaving the bed. (V-11, 1622). She quickly searched the trailer and the yard, but there was no sign of Amanda. (V-11, 1622-23). Although she looked out on the

porch, she knew that Amanda would not go outside in the yard when it was dark. (V-11, 1623). Kathryn retrieved appellant's phone number and called appellant. (V-11, 1622). When appellant answered, Kathryn stated: "What did you do with my daughter?" Where is she?" (V-11, 1622). Appellant responded that he did not have her daughter and that he had to go hook up his boat to the truck. He said he would get back with her later. (V-11, 1623). He told Kathryn to call his daughter, Cynthia. (V-11, 1623). At some point, that morning, Kathryn called the police. (V-11, 1623). Appellant never called her back that day. (V-11, 1623).

Amanda had never run away before, she had friends in the neighborhood and liked going to school. (V-11, 1625). Amanda was afraid of the dark and would always wake-up Kathryn or her former boyfriend James to take her to the bathroom.[1] (V-11, 1626-27). Amanda never wandered out of the trailer alone at night. (V-11, 1627, 1723). The few times Amanda had wandered out of the trailer to go to friends' houses were during the daylight hours. (V-12, 1724). Kathryn testified that she has not seen her daughter since going to sleep on the early morning of September 11, 1998. (V-11, 1627). Nor has Kathryn found or

[1]Kathryn testified that James was residing in the Orient County Jail on September 9th, 10th and 11th. (V-11, 1626). Records from the jail confirmed Kathryn's testimony. (V-14, 2110-2111).

seen the nightgown which Amanda was wearing when she went to sleep. (V-11, 1627). None of her toys were missing and on one had an insurance policy on Amanda. (V-11, 1627). In fact, nothing of value was missing from the trailer. (V-11, 1628).

Amanda was going to stay with her father Roy Brown that weekend in Daytona Beach. Amanda was looking forward to that weekend as they had a place with a pool on the beach. (V-11, 1628).

That morning, Kathryn gave her consent to the Hillsborogh County Deputies to search her car and residence. (V-11, 1629). Deputy Michael Cherup, Jr., responded to the missing child call. Cherup secured and searched the trailer where Amanda lived. Kathryn was very upset, crying, and somewhat dazed. (V-12, 1745-46). Shortly after securing the trailer, Cherup came into contact with Amanda's father Roy Brown at his place of employment. Mr. Brown appeared distraught. (V-12, 1751).

Albert Darlington, Jr. testified that he had known appellant for about ten years as they shared the same occupation, crab fisherman. Darlington did not know appellant well, but had talked to him on a number of occasions. (V-12, 1757-58). They both had traps in the upper Tampa Bay area, and often put their boats in the water off of the Courtney Campbell Causeway. (V-12, 1760-61). Darlington had observed appellant putting his

boat in on many occasions. (V-12, 1796).

On the morning of September 11th, 1998, Darlington arrived at the Courtney Campbell boat ramp between 6:15 and 6:30 am to put his boat in. (V-12, 1762). He noticed another crab fisherman, John Overton, and went over to talk with him. (V-12, 1762-63). Shortly thereafter, appellant pulled up in his truck with his boat. It was approximately 6:30 am and it was still dark. (V-12, 1763). Crab fisherman did not usually venture out until daybreak because they needed daylight to see the traps. (V-12, 1795).

Appellant pulled up with his boat near the ramp, but then drove off down the road toward the West, Clearwater. (V-12, 1765, 1767). Appellant returned to the Courtney Campbell boat ramp after about ten minutes, it was still dark. (V-12, 1768). When appellant pulled in this time, he backed his boat straight into the water. (V-12, 1768). He did not have the rear boat lights on. (V-12, 1769). Darlington was about twenty feet from the ramp where appellant put his boat in. (V-12, 1770). Darlington had observed appellant put his boat in over the years but had never observed appellant back the boat so far that the front wheel-wells on his truck were in the water. In fact, Darlington testified that he and Mr. Overton were stunned when they saw that because salt water would wreck your brakes.

Overton commented to Darlington: "What in the Sam Hill is that all about?" (V-12, 1770-71).

Also unusual was the fact that appellant threw his anchor off on the concrete edge of the boat ramp. (V-12, 1771). Normally he would place the anchor on the dock, hanging it over the handrails. (V-12, 1771). Simply laying or throwing the anchor down on concrete does not work to hold a boat. (V-12, 1772). In fact, the anchor started moving along the concrete and the boat began to drift. (V-12, 1772). In the meantime, appellant pulled forward in his truck.

As appellant walked to the boat, Darlington noticed that appellant was carrying something rolled up under his arm, possibly clothing, shorts or a sweatshirt. (V-12, 1775-76). Appellant walked past, getting as close as ten feet and Darlington said "Hey Willie." However, appellant did not say anything and kept walking back to his boat. (V-12, 1777).

Normally appellant, as other crab fisherman do, would put on a "slicker" which is similar to rain gear to protect against the "junk that runs on you" like old bait and dirt from the bottom of the bay. (V-12, 1773). Ordinarily, appellant would take his slicker out of the back of his truck and put it on before walking over to his boat. (V-12, 1773). On this morning, when appellant got out of his truck he was wearing

dress clothes, a two-tone kind of maroon top with a collar and dark blue or black dress slacks with dress shoes. (V-12, 1774). Darlington was certain that appellant was wearing dress slacks and not jeans. (V-12, 1775). He had never seen anybody, and certainly not the appellant go crabbing in dress pants. (V-12, 1775). Darlington turned to Overton and remarked: "What bar did he come from this early in the morning dressed like that." (V-12, 1775). When asked by defense counsel if he always noticed the clothing of other crab fishermen, Darlington testified:

> No. But I certainly notice when it's drastically different than normal because dress clothes are so drastically different from T-shirts and cut-off jeans or long jeans, that there might as well have been a flare going off.

(V-12, 1797).

Appellant got in his boat and left the area. It was still dark out. (V-12, 1778). Darlington examined State's Exhibit 30 and was asked if those were the clothes appellant was wearing when he rode off in the boat? Darlington testified: "Oh, not a chance." (V-12, 1779).

Previously, while fishing the waters of Tampa Bay with the appellant, Darlington overheard appellant say that he knew how to dispose of a body "where no one could find it." (V-12, 1792-93). He made one such statement while they were fishing near the bridge on the Courtney Campbell Causeway. A similar

statement was made by appellant when they were fishing near the St. Petersburg Pier. (V-12, 1793).

In September of 1998, Roy Brown, Amanda's father, was in the car painting business, lived in Lakeland and was married to Sylvia Brown. (V-13, 1814). Brown had custody of Amanda every other weekend as well as every Wednesday. (V-13, 1817). On Wednesday, September 9, 1998, Amanda spent the night with him at his Lakeland home. (V-13, 1817). They played Nintendo on Wednesday night and watched TV. (V-13, 1818). Roy took Amanda to school the next day in Brandon. They did not arrive until 9:15 which was a little late. (V-13, 1819). They had plans to go to Daytona that Friday and spend the weekend there. (V-13, 1819-20). Amanda was looking forward to the Daytona trip, however, she did not understand time and "we kinda just told her that she had to go home, go to sleep, get up; go home, go to sleep and it'd be time to go." (V-13, 1820). Brown was going with Sylvia and her daughter from a previous marriage, Meagan. (V-13, 1820). Amanda in particular was looking forward to using the pool and going to the beach. (V-13, 1821). Brown was very upset upon learning of Amanda's disappearance, testifying:

> I was real mad; I was upset real bad. She – I had just seen her the day before and everything was all right, and she was – we was planning on that thing for the weekend, and all of a sudden, she's gone.

(V-13, 1835).

Amanda was not the type to run away and was afraid of the dark. She would not even go out of the house at night unless Brown was by her side. (V-13, 1822). Amanda seemed to like living with her mother, Kathryn. (V-13, 1821). Brown did not take Amanda away from Kathryn's house on September 11th, did not have a life insurance policy on her, and had never abused his daughter. (V-13, 1823-24). Although Brown at one time threatened to take Amanda away where the sun didn't shine, he only said that because he was mad. Brown wanted custody of Amanda, testifying: "I thought she needed to be with me." (V-13, 1833-34). Brown testified that he and Amanda were best friends and did everything together. (V-13, 1821). He has not seen Amanda since dropping her off at school on Thursday, September 10th. (V-13, 1819).

Sylvia Brown, Roy's wife, testified that Amanda stayed with them on Wednesday September 9th. As she usually did, Sylvia helped Amanda take a shower by checking the water temperature and ensuring that all the shampoo was rinsed from her hair. (V-13, 1845). Sylvia did not observe any open sores or abrasions on Amanda. Nor did she observe any injury from which Amanda was bleeding. (V-13, 1845).

Amanda preferred to sleep with them in bed but usually slept on the living room sofa. (V-13, 1849-50). Amanda would not

stay by herself unless they had the TV and a light on. Amanda was afraid of the dark. (V-13, 1849-50). Amanda never wandered off by herself when she was visiting. (V-13, 1850).

Monique Brown, ten years-old at the time of trial, testified that she lived across the street from Amanda and that Amanda was her friend. (V-13, 1840-41). On September 10th she went to Amanda's house during the afternoon. They played together for three hours and Amanda never complained about her tooth and she did not observe it bleeding. (V-13, 1841).

Detective Hurley was assigned to investigate the case of a missing child named Amanda Brown. (V-13, 1864). He was notified at 7:45 the morning of September 11th and went out to a business in Palmetto Beach, Tampa, called the Crab Hut. (V-13, 1865). They were looking for the appellant, Willie Crain. (V-13, 1865). At the Crab Hut he talked to Mark Davis, who claimed to be appellant's son-in-law, and appellant's daughter, Patricia Davis. (V-13, 1865). Mark Davis volunteered to take the detectives to appellant's normal crabbing location. (V-13, 1866). The detectives followed Davis to the boat ramp on the Courtney Campbell Causeway where Davis identified a newer model white Ford Truck which belonged to the appellant. (V-13, 1866). Davis offered to take the detectives out on his boat in an attempt to find the appellant. (V-13, 1867). They accepted his

offer.

Once out on the bay they went out north and came upon a white 17-foot Carolina Skiff with a white male on board. (V-13, 1868). The boat was equipped with a winch that is used to pull the crab traps out of the water. (V-14, 2087). The area where they found the appellant was called the "Double Branch" area. (V-13, 1870). It was about a fifteen minute boat ride from the Courtney Campbell boat ramp. (V-13, 1870). Davis told Hurley that the gentleman in the boat was the appellant. (V-13, 1868). Appellant had left to go crabbing at about 6:30 am and was not found until about 8:45 am. (V-14, 2088-89). At trial, appellant claimed he had only been out in the boat for an hour-and-a-half before the police found him. (V-19, 2850).

Hurley asked the appellant to talk to him about a missing child. (V-13, 1868). Appellant said he knew about the missing child because he had been in contact with the girl's mother on his cell phone. (V-13, 1868). Appellant offered to let Detective Hurley ride back with him to discuss the girl's disappearance. (V-13, 1871).

Appellant was clothed in a slicker, rubberized pants that came up to his chest area, a blue T-Shirt, and a baseball cap. (V-13, 1872). Appellant was wearing a pair of blue jeans underneath the slicker. Hurley noticed that appellant's zipper

was down. (V-13, 1875). Appellant was not wearing a red or maroon two-toned shirt. (V-13, 1873). During the ride back to the boat ramp Hurley observed a scratch on appellant's upper right arm visible underneath the arm or sleeve of his T-Shirt. (V-13, 1873). Appellant was wearing a pair of black loafers that looked muddy, "they didn't seem like the type of shoes you would wear to be out on a boat." (V-13, 1874).

In casual conversation, appellant claimed his daughter had called to tell him that Kathryn had accused him of kidnapping Amanda. (V-13, 1876). Appellant told Hurley that he asked his daughter for Kathryn's number because he did not have it with him. Appellant claimed he called Kathryn from his truck and that Kathryn never accused him of kidnapping her daughter. Appellant told her to look through the trailer and she put the phone down. After waiting for a while, appellant hung the phone up "cause he had to go crabbing." (V-13, 1876). Appellant did volunteer that "[t]his looks real bad for me." (V-13, 1876).

Appellant claimed that he had been crabbing for about 40 years and knew "Tampa Bay real well." (V-13, 1877). He claimed he put in very early that morning because he thought someone was stealing from his traps. (V-13, 1877). Appellant stated that he did not find anyone stealing from his traps that morning. Appellant asserted that crabbing was just "off." (V-13, 18777-

78). He also volunteered that he had initially pulled into the boat ramp but then pulled out again because he was afraid of the other crabbers. (V-13, 1878). He returned and used the boat ramp anyway. (V-13, 1878).

At the "soft" interview room, appellant provided consent to search his trailer, his boat, and his truck. (V-13, 1881). Appellant was read his Miranda Rights and agreed to waive those rights. (V-13, 1884). The search of the truck and boat failed to reveal a pair of full length, dark men's pants or a maroon dress shirt. (V-13, 1887-88).

Photographs of appellant's condition taken immediately after Amanda's disappearance were introduced into evidence. They revealed scratches to his right arm, just below the elbow area, (V-13, 1899), a wound on his left arm around the left tricep (V-13, 1901), and the back of his left hand wrist area, also showing a "wound." (V-13, 1901). Appellant's clothes were taken on September 11th shortly after 12:00 pm, and sealed in paper bags. (V-13, 1904). The clothing recovered consisted of a pair of black shoes, a blue pair of pants, a blue shirt, red cap, watch, and a multicolored pair of boxer shorts. (V-13, 1905-06). The clothes were sent to the Florida Department of Law Enforcement for analysis. (V-13, 1928).

Detective Brackett, Special Operations Division, Homicide

Unit, interviewed appellant. He assisted Hurley in questioning the appellant about Amanda's disappearance. (V-13, 1911). Appellant claimed he knew it did not look good for him and volunteered that he had gone home at 1:30 that morning from visiting with Kathryn Hartman. (V-13, 1912). Appellant volunteered that "he spilled bleach in his bathroom; um, he didn't like the smell of bleach and he cleaned that up." (V-13, 1912). He claimed that he cleaned from probably 1:30 in the morning to 5:30 in the morning and then went crabbing. (V-13, 1913). It was the appellant who volunteered during the initial part of the interview that he had spilled bleach in his bathroom, that he didn't like the smell of bleach, and that he cleaned it up. (V-13, 1924). Later in the interview, when his activities came up again, appellant claimed that he cleaned the bathroom with bleach as he usually does. When Brackett confronted appellant with his contradiction, that he earlier claimed to have spilled the bleach, appellant became upset and accused Brackett of making that information up. (V-13, 1925). In the later statement, he did not assert that he spilled bleach or that he hated the smell of bleach, simply that he cleaned with bleach as he normally does. (V-13, 1925).

Brackett learned information from Kathryn such as the fact that appellant was drawing with Amanda and asked him about it.

Appellant denied drawing with Amanda. (V-13, 1914). Appellant also denied that he either helped Amanda with her homework or that he played games with Amanda at the kitchen table. (V-13, 1920). However, after being confronted with Kathryn's statement that he had given Amanda money, appellant thought about it, and said that he did give Amanda $2.00 for spelling "her words right." (V-13, 1921).

Brackett asked appellant about giving Kathryn Valium and he admitted giving her five to take. (V-13, 1922) Appellant volunteered that he offered Kathryn "Amitriptyline" but said that she declined to take it when she learned it would "knock her out for a couple of days." (V-13, 1922).

In the initial part of the interview, appellant did not mention whether he gave Kathryn any money. (V-13, 1922). When Brackett confronted appellant with Kathryn's statement that he had provided her money, appellant initially said he hadn't given her any money. (V-13, 1923). Appellant then thought about it and admitted that he had given her "a hundred dollars." (V-13, 1923). Appellant claimed he was drinking orange juice and vodka, a "screwdriver" the night prior to Amanda's disappearance. He said that Kathryn and Amanda were drinking Pepsi at his residence.

Brackett noticed injuries to appellant's arms, testifying:

"He had scratches to his, um, arms." (V-13, 1915). When asked about the scratches, appellant initially had no response. After about two minutes, appellant stated that he probably got them from his crab traps. (V-13, 1915). Brackett asked appellant to stand up and show him how he got the injuries. Specifically, Brackett wanted to know how appellant got injuries on the back of his arms by lifting a crab trap. Appellant got irritated at that point, claiming that Brackett was trying to accuse him of doing something to the little girl. (V-13, 1916). Brackett explained that he simply wanted to get an explanation for the scratches on appellant's arms. Id. Appellant, however, was very animated and appeared to get very upset. (V-13, 1917). He did not demonstrate how he got the scratches on his arms.

Brackett participated in the search of appellant's trailer on September 11th. (V-13, 1928). Appellant's trailer was only about a mile from Kathryn's trailer. (V-13, 1929). Upon entering appellant's bathroom, Brackett immediately noticed a strong bleach odor. (V-13, 1931). He observed a bleach bottle in the bathroom. (V-13, 1931). Brackett also observed some common household cleaning agents in the bathroom. (V-13, 1932).

Brackett raised the toilet seat cover and examined the interior of the toilet. On the ring he observed a substance

that appeared to be blood. (V-13, 1933-34). A crime scene detective removed the seat in order to submit it to FDLE for analysis. (V-13, 1934). Brackett also observed some stained tissue that was stuck to the wall of the toilet on the way down to the bowl. (V-13, 1935). The tip of the tissue appeared to be partially in the bowl water. (V-13, 1935). In addition, Brackett observed a piece of tissue in the bowl water along with a cigarette butt. (V-13, 1935). These items were all sent to the FDLE for analysis. (V-13, 1935).

In the dryer of appellant's residence, Brackett found a blue fitted rug that appeared to fit around the base of a toilet. (V-13, 1937). Brackett also found some mats or rugs that looked like they came from the kitchen or bathroom. (V-14, 2124). In addition, a few clothing items and a mechanics type rag were found in the dryer. (V-14, 2126).

Pursuant to a court order, Brackett collected hair, blood and saliva samples from the appellant. (V-13, 1939). While collecting the samples on September 17th, Brackett observed black marks on the area of appellant's neck. Appellant said that "he tried to kill himself earlier but the razor broke." (V-13, 1941). Brackett attempted to find an item in Kathryn's trailer that might contain Amanda's DNA for serological testing. (V-13, 1945). Kathryn gave Brackett a toothbrush that belonged to

Amanda. (V-13, 1945). As of September 7th, 1999, Brackett testified that the body of Amanda Brown had not been recovered despite extensive searches of the areas around her trailer and the waters of Tampa Bay. (V-13, 1948).

Detective Hunt testified that after appellant's trailer was processed and items of potential evidentiary value removed, he performed a Luminol test in appellant's bathroom. (V-14, 2134). Luminol reacts to blood and bleach, even when those substances are not visible to the naked eye. (V-14, 2135). When Detective Hunt sprayed Luminol in appellant's bathroom, "[t]he whole area lit up, like the floor, the bathtub, even the walls lit up." (V-14, 2136).

In his trial testimony, appellant claimed that he observed blood on Amanda's tooth and finger at his trailer. (V-19, 2966). Yet he admitted that he never told anyone about it, either the detectives or the Leeza Gibbons show prior to trial. (V-19, 2966). The prosecutor questioned appellant about his remembering this only after reading the police reports and depositions; that is, after it became apparent that he had left blood from Amanda in his trailer. (V-19, 2967-69). Appellant claimed that he attempted to remember everything at the time he was interviewed, but that he couldn't remember about the blood at the time. (V-19, 2970-71).

On cross-examination, appellant explained that he cleaned his bathroom early on Friday morning after getting back from Kathryn's house. He claimed he used bleach because it kills the germs. (V-19, 2893). He asserted that his early morning clean up was not directed toward cleaning the entire bathroom, primarily just the tub. (V-19, 2893-94). However, he claimed that he spilled a little bleach on the floor and had to clean it up. (V-19, 2894). Appellant did acknowledge that he pulled the rugs off the bathroom floor and put them in the wash. (V-19, 2894). Appellant claimed not to recall whether or not he cleaned the floor. (V-19, 2894). He claimed not to like the smell of bleach, given his breathing problem, yet acknowledged that he used a lot of bleach in that bathroom. (V-19, 2895). He claimed not to recall whether or not he cleaned the sink. (V-19, 2896). Appellant was asked whether he flushed the toilet after doing all this cleaning and appellant claimed not to recall if he did or not. When asked if he was concerned about how clean his toilet was, appellant responded: "Um, didn't dawn on me." (V-19, 2896).

Maryann Lee testified that she lived in a trailer park in Hillsborough County and knew appellant through her friend, Cynthia Gay. (V-14, 2139). Shortly after Amanda disappeared, Maryann testified that she came into contact with appellant at

Cynthia's trailer. (V-14, 2142). Maryann was aware that appellant was a suspect in Amanda's disappearance. (V-14, 2142). The Amanda situation came up and Linda Miller stated that appellant had nothing to worry about, that you "didn't do anything, you didn't hurt that little girl." (V-14, 2152). Appellant responded, "Yes, I did do it" but then appellant tried to correct himself, stating that he didn't hurt her and "didn't do anything." (V-14, 2152-53). When she heard appellant say he did do it, Lee got "chills" through her body. (V-14, 2160).

Linda Miller was also present in Cynthia's trailer with Maryann and the appellant when Amanda Brown was discussed. She too heard appellant state "Yes, you're right; I did do it" in response to a statement that he had nothing to worry about in Amanda's disappearance. (V-14, 2168). He paused for a couple of seconds after making that statement, then continued to state that "No, I didn't do it." (V-14, 2168).

Penny Lynn Probst testified that she lived in the mobile home next to Kathryn Hartman's trailer. (V-15, 2207-08). In September of 1998 Probst testified that she frequently looked after Amanda. Specifically, she saw Amanda on September 9th, 10th and 11th. Amanda had medium length fingernails that protruded above the skin of her fingers. (V-15, 2207-09, 2224). Probst testified that she frequently painted Amanda's fingernails. (V-

15, 2207-09).

Probst testified that on the afternoon and evening of September 10th and 11th, she noticed a newer model white truck parked at Kathryn's residence. (V-15, 2209-10). Probst observed an individual she did not know get out of the truck at 2:00 pm on September 10th. (V-15, 2210-11). Probst identified the appellant as the individual she observed visiting Kathryn and Amanda. (V-15, 2212). When she first observed him, appellant was wearing old jeans and a red T-Shirt. (V-15, 2230). Later that evening, she noticed appellant had changed and was wearing dark dress pants, but she did not recall the color of his shirt. (V-15, 2230). Probst observed Amanda, Kathryn and the appellant leave the trailer at approximately 9:00 pm on September 10th. (V-15, 2214). Probst slept in the living room of her trailer and testified that appellant's truck lights woke her up when they returned. They returned at 12:00 am. Probst observed appellant, Amanda and Kathryn enter the trailer. (V-15, 2215). Appellant's truck was parked directly in back of Kathryn's car. (V-15, 2216). Later, not aware of the time, Probst woke up to use the bathroom and noticed a "car running or some kind of vehicle." (V-15, 2217, 2221). She opened up the curtain in her son's bedroom and looked out to see the appellant's truck with its lights on and engine running.

(V-15, 2217-18). Appellant's truck was parked in a different location than she had observed it in earlier. (V-15, 2218). The truck was on the street side of the fence in between Kathryn's and Probst's mailboxes. (V-15, 2218). She could not tell if the truck was occupied at that time. (V-15, 2219). She sat back down on her couch and lit up a cigarette. (V-15, 2220). The truck remained running for about the time it took for her to finish a cigarette, five minutes, before it left. So, for about four-and-a-half minutes Probst testified that the truck engine was running with the lights on. (V-15, 2220). As the truck left, Probst heard it picking up speed as it went down the road. (V-15, 2220).

Another neighbor, Michelle Rodgers, also observed appellant's truck. At approximately 10:30 pm on September 10th Rodgers left to pick up her fiancé and noticed a light colored truck parked directly in back of Kathryn's car. (V-15, 2235). Rodgers recalled telling police the next day that the truck was light blue in color. (V-15, 2244). Shortly after returning home, Rodgers testified that she had to take her daughter to the emergency room in Brandon. (V-15, 2237). She returned from the hospital around 2:30 in the morning and noticed the truck facing east. (V-15, 2239). She noticed that the lights on the truck were on and also that lights were on in Kathryn's trailer. (V-

15, 2239-40).

Russell Vega, Associate Medical Examiner for Hillsborough County, testified that he examined photographs of appellant's scratches. (V-14, 1998). Dr. Vega observes photographs such as those presented in this case and uses his experience and education to render an opinion on what might have caused those injuries. (V-14, 1999). Based upon his examination, the injuries to appellant's arms reflected in the photographs were inflicted within a few hours up to two days prior to the time [September 11th] the photographs were taken. (V-14, 2000). The most likely interval would be from a few hours to one day from the time the injuries were received. (V-14, 2000). In Dr. Vega's opinion, all of the injuries occurred at the same time. (V-14, 2000-01).

Examining Exhibit 34, Dr. Vega testified that the photograph depicts an "obliquely oriented or angled scratch" that was consistent with having been made by a human fingernail. (V-14, 2001). While you cannot tell with certainty, Exhibit 34 was consistent with a scratch or injury inflicted by the fingernail of a seven year old child. (V-14, 2002). State's Exhibit 32 reflected a scratch on the back of the arm, a similar injury but perhaps more superficial. (V-14, 2003). However, that injury was also consistent with having been inflicted by

the fingernail of a seven year old child. (V-14, 2003). State's Exhibit 33 depicted a scratch to appellant's forearm, a little bit above the watch, a non-descript single scratch, but again, consistent with having been inflicted by a seven year old girl's fingernail. (V-14, 2004). State's Exhibit 35 also reflected scratches that could be consistent with having been inflicted by a child's fingernails:

> We have two nearly intersecting scratch marks here, which form roughly a "V" or a "Y" shape' and then we have this scratch mark a little bit, um, to the side of that, um, which is broader and more distinct.

(V-14, 2005). State's Exhibit 31 (A) reflected yet another scratch type injury which consisted of "two closely spaced parallel scratches." (V-14, 2006). It could have come from a fingernail, but the pattern suggested that it was inflicted by some sort of object or implement. (V-14, 2007).

Exhibit 32(A) depicted an interesting array of scratch marks. The series of parallel scratch marks are similar individually to the other scratch marks, "but the fact that they were broadly spaced, parallel cluster is somewhat more suggestive of the pattern one would see with multiple scratch marks inflicted by fingernails of the same hand." (V-14, 2008). Dr. Vega explained:

> When a hand is used to scratch, if multiple fingers are in contact with the skin at the same time, one sees a drag pattern from the fingernails, which leaves

> roughly parallel lines, more broadly spaced than the ones we saw in those previous injuries where the lines were very tightly clustered.
>
> And it is that pattern which suggests these injuries here to be somewhat more likely to have been caused by fingernails than the previously described individual scratch marks in some of the other exhibits.

(V-14, 2008-09). Further, the spacing of the scratch marks is consistent with "the spacing of the fingers of a seven year old child." (V-14, 2009). Exhibit 31 reflected puncture type wounds, dissimilar from previously described simple dragging scratch marks. It was cluster of punctuate single wounds or small gouges. (V-14, 2009-10). This would be consistent with three fingers and the spacing of fingers from a seven year old child. (V-14, 2011-12). Again, the cause of the injury could not be stated with certainty, but the pattern of injury was consistent with having been inflicted by the grasping hand of a seven year old child. (V-14, 2012-13). Given the spacing of the injury, it was less likely that a random bush or twig caused the type of injury seen in the photograph. (V-14, 2016).

Dr. Vega testified that taking five five milligram tablets of Valium would have a significant sedating effect. That amount of the drug is larger than the normal therapeutic dose. However, some individuals develop a tolerance to depressant drugs over time. (V-14, 2013). Nonetheless, such a drug causes drowsiness and consuming five Valium would make it considerably

easier to fall asleep. (V-14, 2014).

Al Dahma, Assistant Principal of Lopez Elementary, testified that Amanda Brown attended that school in September of 1998 and was in the second grade. (V-15, 2245). Amanda did not show up for school on September 11th, 1998, nor at any time after that date. Her school records have not been requested from any other school district. (V-15, 2246).

Detective Dorothy Flair helped secure Kathryn's residence and execute a consent search of the mobile home on the morning of September 11th. (V-15,2248-51). Flair concluded that Amanda had not slept in the bed the previous night: "My conclusion was that because of the amount of things piled on the bed, the condition of the bed, it did not appear to have been slept in." (V-15, 2253).

Appellant's neighbor, Craig Kirkland, testified that he routinely passed by appellant's residence on his way to work in the mornings between 7:00 and 7:30. (V-15, 2321-22). Usually, appellant's truck and boat were present. Maybe only once during the work week would he notice that they were missing. (V-15, 2322). Kirkland testified: "Early in the morning it was pretty much there." (V-15, 2323).

Frank J. Stemm, Jr., testified that he lived in the Oak Grove mobile home park and knew the appellant through his

daughter, Melissa, who is married to appellant's son. (V-15, 2325-26). He described his relationship with the appellant as that of "friends" and they used to go crabbing together. (V-15, 2327). He would go out on the boat two or three times a week, putting the boat in at the Courtney Campbell Causeway. (V-15, 2328). They had no set time to put the boat in the water, but Stemm testified that every time appellant put the boat in with him it was daylight. (V-15, 2329). They never put the boat in the water before sunrise. (V-15, 2329). In September of 1998, appellant's boat was equipped with a winch to pull the crab traps up.[2] (V-15, 2330).

On one occasion, Stemm was with appellant and put traps in what the appellant called a "secret" location. (V-15, 2331). After Amanda disappeared, Stemm recalled a conversation with appellant that "If I told where the crab traps was, that it could bury him." (V-15, 2332). Specifically, appellant used the word "evidence" stating: "That if I revealed it, I had enough evidence to bury him." (V-15, 2333). Appellant had never used the word "evidence" with him prior to that time.

The defense agreed to stipulate that the blood stain found on the toilet seat of appellant's trailer possessed the same DNA

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[2]Stemm testified that "[s]ometimes" appellant would get scratches from crabbing. (V-15, 2338).

profile as that recovered from two items belonging to Amanda Brown, her toothbrush and panties. (V-15, 2348). Similarly, the blood stain found on appellant's boxer shorts also had Amanda's DNA profile. (V-15, 2349).

FDLE serologist, Theodore Yeshion, found two blood stains on appellant's toilet seat, and a very small blood stain on toilet paper recovered from appellant's toilet. (V-16, 2383-88, 2390-92). In addition, a bloodstain was found on appellant's boxer shorts. (V-16, 2388-90). DNA profiles obtained from Amanda's panties and toothbrush provided the basic standard for Amanda's DNA. This standard matched that of a child of Roy Brown and Kathryn Hartman as tested from known blood samples from those two individuals. (V-16, 2392-96).

The DNA profile from blood found on appellant's boxer shorts matched the DNA profile of Amanda. (V-16, 2408). The DNA from the first toilet seat blood stain, the darker stain, was consistent with Amanda's DNA profile. (V-16, 2408-09). The DNA from the second toilet seat blood stain was consistent with a mixture of appellant's DNA and Amanda's DNA. (V-16, 2409). DNA from the toilet tissue found in the toilet was a mixture, consistent with both Amanda's and appellant's DNA profile. (V-16, 2409-10).

Meghan Clement, a DNA expert, and Associate Director of Lab

Corps North Carolina Forensic Department, examined the DNA profiles developed from the testing conducted in this case. (V-16, 2435-38). The DNA profile from the boxer shorts and the first toilet seat stain originated from a female and were the same. They matched the DNA profile obtained from the toothbrush and panties of Amanda Brown. (V-16, 2441). The possibility of finding a random match between the DNA profile on the shorts and the panties and toothbrush (Amanda's), that is a sample that carries the same genetic markers "is approximately one in 388 million for the Caucasian population."[3] (V-16, 2442). The same one in 388 million standard applied to the Amanda standard and the first toilet stain. (V-16, 2442-43). The second toilet stain was consistent with a mixture of DNA from a male and female and was consistent with Amanda's standard as well as appellant's. (V-16, 2443-44). It was possible to have a third contributor, but that contributor would have to match Amanda's genetic profile (toothbrush, panties). (V-16, 2444-45).

Dr. Martin Tracey, Professor of Biological Sciences at Florida International University, testified that (V-17, 2536-37) the DNA profile from blood on appellant's boxer shorts matched

[3]The possibilities of a random match in the African-American and Hispanic populations were even more remote, "one in five billion five hundred million" and "one in three billion five hundred and thirty million" respectively. (V-16, 2442).

the DNA profile from Amanda (toothbrush, panties). The first toilet seat blood stain also matched Amanda's DNA profile. (V-17, 2577-79).

Using the Caucasian data base, the odds of finding a random match to that genetic profile are one in 388 million. (V-17, 2577-79). Using the upper confidence limit or range, varying the number by ten in either direction, would render one person in 38 million to one in 3.8 billion. (V-17, 2587).

Toilet seat stain two was an apparent mixture, consistent with appellant's and Amanda's genetic profiles. (V-17, 2580). Dr. Tracey testified: "If you add the DNA characteristics for, um, Mr. Crain and Amanda Brown, they add up to what you see on toilet stain two; so it's consistent, yes." (V-17, 2580-81). There was no evidence of any other profile present in toilet stain two. (V-17, 2581). The combination of DNA on the tissue from appellant's toilet was also consistent with a mixture of appellant's and Amanda's DNA. (V-17, 2583). There was no possibility that the blood on the boxer shorts and the first toilet seat stain came from the appellant. (V-17, 2580).

Detective Brackett identified a photograph reflecting the condition of the sink in appellant's bathroom. (V-20, 2992). Brackett testified that he could see obvious signs of grime and dirt around the edges of the bathroom sink. (V-20, 29992).

Brackett also testified that the bleach smell emanating from appellant's bathroom was powerful: "Very strong. The minute I walked in, that's all I could smell." (V-20, 2992).

B. Sentencing

During the sentencing phase, the State submitted certified copies of judgments and sentences for five sexual batteries and one count of aggravated child abuse. (V-22, 3324-26). The State also offered the testimony of three child victims of appellant's previous sexual offenses.

Sherry Browning testified that her mother was the appellant's girlfriend and that she lived in his house for six years. She was eight or nine years old when appellant first began sexually abusing her. Sherry endured the appellant's sexual abuse until she was fourteen. (V-22, 3318-19). Sherry testified that she was abused on a monthly basis from "one time, to twenty, thirty times." (V-22, 3319-20). Sherry was forced to sleep with appellant in his bedroom while her mother had her own room in the house. (V-22, 3320). Appellant forced Sherry to bring over a childhood friend, Elizabeth Raices, so that appellant could sexually abuse her. (V-22, 3321). If Sherry refused any of his sexual demands, appellant would beat her. (V-3319). On one occasion, appellant beat Sherry with a .22 rifle. (V-22, 3322). A gym teacher noticed bruising all over

Elizabeth's legs from the beating and initiated an investigation. Elizabeth talked with a police officer and reported the sexual abuse that she had been enduring over the past several years. (V-22, 3322). It was only then that appellant's abuse of Sherry ended.

Appellant used to threaten Sherry in order to prevent her from notifying anyone of the abuse. Sherry testified:

> He told –- he said if I ever told anybody, that I would either be crab bait or he would kill me and nobody would ever find my body.

(V-22, 3322-23).

Donna Martinez, a childhood friend of Sherry Browning and Elizabeth Raices, was seven or eight when appellant began sexually abusing her. The abuse lasted over a period of several months. (V-22, 3296-97). She was also present when appellant physically abused Sherry Browning and heard appellant threaten her. Appellant told Sherry:

> He – he used to beat her up and like one day they had an argument and he said if anything ever happened to him, she – they– he would do something to her and no one would ever find her.

(V-22, 3299).

Elizabeth Raices met Willie Crain through Sherry Browning, appellant's step-daughter. Appellant began to sexually molest her at the age of nine. (V-22, 3306-07). Appellant sexually molested Elizabeth in his home and on his crab boat. (V-22,

3308). Elizabeth testified that the abuse lasted about two years, and occurred about "two or three times a week maybe." (V-22, 3308). If she refused sex with appellant, Elizabeth testified that she was hit by the appellant, "a couple of times." (V-22, 3314). Elizabeth was aware that Sherry Browning, her friend, slept in the same bed with the appellant while Sherry's mother slept in a different bedroom. (V-22, 3313). Elizabeth was also aware that Sherry would be beaten by the appellant if "she wouldn't have sex with him." (V-22, 3314). Elizabeth testified that appellant would threaten to burn down her house and hurt her mother if she told anyone about the sexual abuse. (V-22, 3315-16). Elizabeth also testified:

> Another time when we were on a boat and we were out crabbing, if I ever told, that I would be in one of the crab traps and put out in the water for the crabs and fish to –- eat so nobody could, um, find my body, I guess.

(V-22, 3316).

The expert testimony provided by the defense and the State during the penalty phase are substantially set forth in appellant's brief and need not be repeated here. Based upon that testimony and the testimony presented during the guilt phase, the trial court did not find the statutory mental mitigators urged by the defense. The trial court extensively analyzed the proposed mitigator that the murder was committed

while the defendant was under the influence of extreme mental or emotional disturbance. The trial court stated, in part:

> The Defendant did not reveal anything to Dr. Berland about his mental status at the time of the victim's disappearance.
>
> There is no other evidence that Mr. Crain was under extreme emotional or mental disturbance at the time of the murder. There is no corroboration in the form of medical records or tests. There has been no diagnosis in any record anywhere, either in his prison records or his other medical records, that he was at any time, let alone at the time of the murder, suffering from psychosis.
>
> Clearly the Defendant has been determined to be a pedophile. Although there is disagreement among mental health experts about how Pedophilia should be dealt with in the legal arena, both Dr. Berland and Dr. Stein agreed that Pedophilia is a mental disorder. Pedophilia, however, even in combination with the Defendant's history of alcohol and drug abuse, does not establish that the Defendant was under extreme mental or emotional disturbance at the time of the murder.
>
> The Court is not reasonably convinced that the Defendant suffered a brain injury. There is only the possibility that this alleged injury occurred. There is no corroboration, no medical exam, and no test which shows any brain damage. The Defendant's behavior and other alleged symptoms are not necessarily attributable to brain damage. Dr. Stein emphatically rejected Dr. Berland's interpretation of the MMPI and the WAIS tests to establish brain damage, and this Court is not persuaded that those tests confirm the Defendant's brain injury.
>
> Most persuasive is Mr. Crain's behavior at the time of the murder as both he and others described it to the jury. His recall of events, although certainly not entirely credible, was precise and detailed, albeit clearly self-serving and evasive at times. He went crabbing the day before Amanda disappeared, drove back and forth between Mrs. Hartman's trailer and his own, and watched a movie. The next day he went crabbing and he spoke to his daughter, Mrs. Hartman, and the police. He appeared to be perfectly rational

> and functional.
>
> In fact, and unfortunately, this Court is convinced that he was functioning all too well. He worked the mother to get to the child. He gave the mother drugs, lent her money, complimented her, and made sexual advances toward her. Then he worked the child. He helped her with her homework, gave her money, and played games with her. Then he took the child. Finally, he murdered the child.

(V-2, 314-15). The trial court did find that the appellant is "obviously a pedophile" and that his mental health was impaired from taking illegal drugs, prescription drugs, and alcohol. Consequently, the trial court found his mental health to constitute a non-statutory mitigator and gave some weight to this factor in sentencing the appellant.

Any additional facts necessary for a disposition of the assigned errors will be discussed in the argument, infra.

SUMMARY OF THE ARGUMENT

ISSUE I--The evidence introduced by the State was sufficient for the jury to conclude that appellant committed the premeditated murder of Amanda Brown. The blood evidence submitted by the State coupled with appellant's statements and conduct lead to only one reasonable conclusion: That appellant kidnapped Amanda, murdered her in his own trailer, and disposed of her body the next morning in the bay.

ISSUE II–-The trial court properly denied appellant's motion for a judgment of acquittal for kidnapping. Amanda was last seen by her mother sleeping in bed with appellant on the other side of her, fully clothed, with his shoes on. When Amanda's mother awoke the next morning, Amanda and appellant were gone. The State's blood evidence as well as appellant's conduct establish that he took Amanda back to his trailer, that he struggled with Amanda in the bathroom where they both shed blood, that he murdered Amanda, and disposed of her body in the bay when he went "crabbing" before daylight the next morning.

ISSUE III–-Appellant voiced no objection to the felony murder instruction provided by the trial court below. The instruction provided by the trial court did not constitute error, let alone the type of error required to be considered "fundamental."

ISSUE IV--The evidence is sufficient to sustain the felony

kidnapping aggravator on appeal.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR A JUDGMENT OF ACQUITTAL BASED UPON THE STATE'S FAILURE TO ESTABLISH PREMEDITATION? (STATED BY APPELLEE).

Appellant asserts that the trial court erred below in failing to grant his motion for a judgment of acquittal because the State failed to present sufficient evidence of premeditation. Accordingly, the appellant argues that his conviction for first degree murder must be reversed and a judgment entered for murder in the second-degree. The State disagrees.

A. Applicable Legal Standards On Denial Of A Motion For Judgment Of Acquittal

While the trial court's decision denying the motion for a judgment of acquittal is reviewed de novo, the State is entitled to an extremely favorable review of the evidence. Jones v. State, 790 So. 2d 1194, 1196 (Fla. 1st DCA 2001). "'A court should not grant a motion for a judgement of acquittal unless there is no view of the evidence which the jury might take favorable to the opposite party.'" Deangelo v. State, 616 So.

2d 440, 442 (Fla. 1993)(quoting Taylor v. State, 583 So. 2d 323, 328 (Fla. 1991), cert. denied, 115 S.Ct. 518, 130 L.Ed.2d 424 (1994). In moving for a judgement of acquittal, appellant admits "the facts in evidence as well as every conclusion favorable to the state that the jury might fairly and reasonably infer from the evidence." Taylor v. State, 583 So. 2d 323, 328 (Fla. 1991). "If there is room for a difference of opinion between reasonable people as to the proof or facts from which an ultimate fact is to be established, or where there is room for such differences on the inferences to be drawn from conceded facts, the court should submit the case to the jury." Id.

In a circumstantial evidence case, “the trial judge must first determine there is competent evidence from which the jury could infer guilt to the exclusion of all other inferences.” Barwick v. State, 660 So. 2d 685, 694 (Fla. 1995). After the judge determines as a matter of law, whether such competent evidence exists, the “question of whether the evidence is inconsistent with any other reasonable inference is a question of fact for the jury.” Long v. State, 689 So. 2d 1055, 1058 (Fla. 1997). In State v. Allen, 335 So. 2d 823, 826 (Fla. 1976), this Court stated:

> We are well aware that varying interpretations of circumstantial evidence are always possible in a case which involves no eye witnesses. Circumstantial evidence, by its very nature, is not free from

> alternate interpretations. The state is not obligated to rebut conclusively every possible variation, however, or to explain every possible construction in a way which is consistent only with the allegations against the defendant. Were those requirements placed on the state for these purposes, circumstantial evidence would always be inadequate to establish a preliminary showing of the necessary elements of a crime.

B. The Evidence Was Sufficient For The Trial Court To Submit The Issue To The Jury And For The Jury To Conclude That Appellant Murdered Amanda With Premeditation

"Premeditation is a fully formed conscious intent to kill that may be formed in a moment and need only exist for such time as will allow the accused to be conscious of the act about to be committed and the probable result of that act." Spencer v. State, 645 So. 2d 377, 381 (Fla. 1994)(string cites omitted). Premeditation is often impossible to prove by direct testimony and must be inferred from the circumstances surrounding the homicide. See Ross v. State, 474 So.2d 1170, 1174 (Fla. 1985). "The grade or degree of a homicide, and the intent with which a homicidal act was committed are questions of fact dependent upon the circumstances of the case, and are typically for resolution by a jury." Larsen v. State, 485 So. 2d 1372 (Fla. 1st DCA 1986), aff'd, 492 So. 2d 1333 (Fla. 1986). Consequently this Court provides deference to the jury: "Whether or not the evidence shows a premeditated design to commit a murder is a question of fact for the jury." Penn v. State, 574 So. 2d 1079,

1081 (Fla. 1991).

In Orme v. State, 677 So. 2d 258, 262 (Fla. 1996), this Court observed that the "sole function of the trial court on motion for directed verdict in a circumstantial evidence case is to determine whether there is a prima facie inconsistency between (a) the evidence, viewed in the light most favorable to the State and (b) the defense theory or theories." The Orme Court found that the state presented sufficient evidence to rebut the defendant's theory that another person entered the hotel room and murdered the victim after he had robbed the victim. This Court observed:

> [N]othing anywhere in the record suggests that another person was present in the motel room. Based on this record, the State's theory of the evidence is the most plausible that Orme was the one who had attacked and killed Redd. Put another way, competent substantial evidence supports the conclusion that the State had presented adequate evidence refuting Orme's theory, creating inconsistency between the State and defense theories. Accordingly, we may not reverse the trial court's determination in this regard.

677 So. 2d at 262. See also Rose v. State, 425 So. 2d 521, 522 (Fla. 1982)("Although circumstantial in nature, the evidence was sufficient for the jury to have found beyond a reasonable doubt that defendant, and no other person, kidnapped and murdered eight-year-old Lisa Berry.").

Sub judice, as in Orme, "nothing anywhere in the record"

suggests that another individual kidnaped Amanda, murdered her, and disposed of her body. Based upon this record, the "State's theory of the evidence is the most plausible," that appellant was responsible for kidnapping and murdering Amanda Brown. Premeditation was established by the State's combination of blood evidence, luminol testing, and, appellant's conduct and statements before and after Amanda's murder. There was no evidence to suggest that Amanda's death was accidental or occurred in a fit of rage. The blood bath that we can infer occurred in appellant's bathroom notwithstanding his hasty attempts to conceal his homicidal conduct, provides substantial, competent evidence of his guilt.

Appellant plied Amanda's mother with money to gain her trust and thereby gain access to Amanda. In their brief time together, appellant expressed an unusual degree of interest in Amanda, drawing with her, helping her with homework, giving her money, showing her favorite movie [Titanic], getting her alone in his room and having her sit between his legs, brushing and blow drying her hair. (V-11, 1570, 1574, 1575, 1585, 1602). The morning of Amanda's disappearance, appellant provided Amanda's mother five valium, making his planned departure and murder of Amanda less likely to be interfered with or detected. (V-11, 1618).

The evidence established that appellant and no one else had the opportunity to take Amanda. After Amanda and Kathryn laid down to sleep for the night, appellant entered the room. Appellant laid down on the bed next to Kathryn and Amanda, fully clothed, keeping his shoes on. (V-11, 1616). Appellant left the bed at some point, started his truck engine, left the engine and lights on, then returned to Kathryn's trailer.[4] A neighbor, Probst, observed the truck engine running and the lights on for about five minutes before she heard it drive off from the trailer park. (V-15, 2220). Appellant had ample time during this period to think about taking Amanda, think about murdering her, and to think about disposing of her body.

Kathryn heard no unusual noises and did not wake up until after 6:00 am the next morning.[5] Amanda Brown was never seen again after appellant laid down in the bed next to her. Her body has not been found despite an exhaustive search of the areas surrounding the residences of Amanda and the appellant and of the waters frequently fished by the appellant. According to

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[4]Similarly, another neighbor, Michelle Rodgers, noticed that the truck engine was running and lights were on at approximately 2:30 in the morning. She did not observe anyone in or around the truck at the time. (V-15, 2239-40).

[5]Amanda was a heavy sleeper and frequently would not wake up when Kathryn picked her up late at night from her grandmother's house. (V-11, 1624-25).

neighbors and relatives, Amanda was afraid of the dark and never left her house alone at night. She never ran away from home or threatened to do so. The child had a good relationship with her mother and was looking forward to spending the next weekend with her father in Daytona Beach. See Myers v. State, 704 So. 2d 1368, 1370 (Fla. 1997)(although the victim's body was never found, corpus delicti established by evidence indicating that the victim had no reason to run away from home, was looking forward to high school, none of the victim's things were missing from her room, and defendant had scratches and another injury which were consistent with having been inflicted by the victim.). See also Sochor v. State, 580 So. 2d 595 (Fla. 1991).

The blood evidence presented by the State tells the next, tragic part of what happened to Amanda. The blood evidence reveals that Amanda was back in appellant's trailer, in appellant's bathroom after laying down to sleep next to her mother. Neither her mother nor her friend who played with Amanda had observed any blood coming from Amanda's tooth or any other part of her body on September 10th. And, specifically, when Amanda was in appellant's trailer, Kathryn did not observe any blood, or bleeding, from a sore or open wound. Highly significant is Kathryn's testimony that Amanda only used the bathroom once in appellant's trailer with Kathryn present in

the bathroom. (V-11, 1590-93). Kathryn did not observe any clothes on the back of the toilet. Kathryn used the bathroom twice, once after Amanda had used it. (V-11, 1594). This testimony establishes that the state's compelling blood evidence was not innocently deposited in appellant's bathroom during Amanda's visit, but was left only after appellant removed Amanda from her own home.

Three blood deposits were found in appellant's bathroom. (V-16, 2383-88, 2390-92). The first blood smear on the toilet seat matched the genetic profile of Amanda Brown. (V-16, 2408-09, 2441). The second blood smear was consistent with a combination of appellant's and Amanda's blood. The genetic profile from DNA matched that expected from a combination of appellant's and Amanda's blood. (V-16, 2409). The third deposit was found in the toilet bowl on tissue paper. This blood was also identified as a combination of Amanda's and appellant's blood through consistent DNA profiles. (V-16, 2409-10).

The blood evidence reveals that Amanda was taken back to appellant's trailer, that she was bleeding in his bathroom, and, that appellant was bleeding at or near the same time. Appellant had scratches to his arms, scratches consistent with injuries that would be inflicted by fingernails from the hands of seven

year old Amanda. Those injuries were inflicted upon the appellant at or near the time of Amanda's disappearance. The co-mingling of appellant's and Amanda's blood and the scratches to appellant's arms indicate that a struggle occurred in appellant's bathroom. Amanda fought for her life, but at seven-years-old and only forty five pounds, she lost that struggle.[6] See Holton v. State, 573 So. 2d 284, 289 (Fla. 1990)(circumstantial evidence of ligature found on murder victim's neck and fresh scratches on defendant's chest from the victim's long fingernails "suggesting a struggle" between the defendant and the victim was sufficient to overcome defendant's claim that the death was accidental).

The Luminol testing on appellant's bathroom also helps tell the story of what happened to Amanda. The Luminol test clearly suggests that the identifiable blood from Amanda found in the bathroom was part of a much larger blood spill. See generally Kramer v. State, 619 So. 2d 274, 276 (Fla. 1993)("The blood spatter and victim injury, however, provide a substantial basis

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[6]When asked by a detective how he got the scratches, appellant initially had no response. When he finally spoke, about two minutes later, he said that he got them from crab traps. (V-13, 1915). When asked to demonstrate how he got those scratches on the back of his arms from crab traps, appellant became animated and irritated. Appellant did not or could not demonstrate how he got those scratches. (V-13, 1917). Further, appellant's boat was equipped with a winch to pull up crab traps. (V-15, 2330).

for the conclusion that premeditation existed). When appellant's bathroom was sprayed with Luminol, "[t]he whole area lit up, like the floor, the bathtub, even the walls lit up." (V-14, 2136). Coincidentally, the rug which was around appellant's toilet was put in the wash that morning by the appellant. Detectives found it in the dryer during the search of appellant's house. The only reasonable explanation for appellant's late night cleaning is that a large amount of blood was spilled in the bathroom and that appellant attempted to clean it up. See generally Loehrke v. State, 722 So. 2d 867, 872 (Fla. 5th DCA 1998)(victim's stab wounds in conjunction with defendant's lack of injuries and conscious acts of concealment and deception, including cleaning blood from the garage and disposing of the victim's body constituted sufficient evidence to establish premeditation to overcome defendant's motion for a judgment of acquittal). Fortunately, appellant missed two blood smears on his toilet and left part of a bloody tissue in the toilet.

In his initial interview with the police, appellant did not claim he cleaned his bathroom but that he simply "spilled" bleach on the floor. Later in the interview, appellant changed his story and claimed that he had been using bleach to clean his bathroom. When confronted with the apparent inconsistency,

appellant became belligerent and accused the officers of a frame up. (V-13, 1925). The jury was entitled to infer from the Luminol test, and appellant's sometimes inconsistent or evasive answers regarding his early morning cleaning spree, that appellant used the bleach to clean up the large amount of Amanda's blood which was shed in his bathroom. The detective who entered the bathroom on September 11th testified that the smell of bleach was still "very strong" hours after appellant's clean up. (V-20, 2992).

The final blood deposit was recovered from the boxer shorts that appellant was wearing on the morning of Amanda's disappearance. Appellant was wearing this underwear when he was found on his boat, 'fishing' for crabs on the morning of Amanda's disappearance. (V-16, 2388-90). The possibility of finding a random match between the DNA profile on the boxer's and Amanda's known DNA profile "is approximately one in 388 million for the Caucasian population."[7] (V-16, 2442). See Peek v. State, 395 So. 2d 492, 495 (Fla. 1980)(although evidence was circumstantial, "when considered in combination" the hair comparison, fingerprints, and blood and semen analysis [blood

[7]The possibilities of a random match in the African-American and Hispanic populations were even more remote, "one in five billion five hundred million" and "one in three billion five hundred and thirty million" respectively. (V-16, 2442).

typing, not DNA] enabled the jury to conclude that appellant's guilt was proven beyond a reasonable doubt.").

While appellant disposed of the clothes he was wearing when he first ventured out in his boat, he neglected to dispose of his boxer shorts, which carried the highly incriminating blood stain from Amanda. **There is no reasonable innocent explanation for how Amanda's blood came to be deposited on appellant's boxer shorts.**

In addition to compelling blood evidence, appellant's conduct and statements, before and after Amanda's abduction and murder, were consistent with his guilt. Appellant had previously bragged to an acquaintance that he knew how to dispose of a body where nobody would ever find it.[8] (V-12, 1792-93). After Amanda's disappearance, appellant told Stemm, his father-in-law, that if Stemm "revealed" a secret crab trap location, "I had enough evidence to bury him." (V-15, 2333). Prior to Amanda's disappearance, appellant had never used the word "evidence" in Stemm's presence. Id. This statement in particular, made shortly after Amanda's disappearance, tends to show appellant's consciousness of guilt.

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[8]Although not admitted during the guilt phase, two of appellant's sexual abuse victims testified that he threatened to kill them and hide their bodies where no one would ever find them if they revealed the sexual abuse. (V-22, 3316, 3322-23).

Shortly after Amanda's disappearance, a statement was made that appellant did not have anything to do with Amanda's disappearance. In response, appellant stated: "Yes, I did do it." This was followed by appellant's attempt to correct his statement, stating that he didn't hurt her and that he didn't do anything. However, the impact of appellant's statement sent "chills" through the listener's body. (V-14, 2152-53).

Appellant's conduct immediately after Amanda's disappearance was even more compelling than his statements. In addition to his peculiar early morning cleaning, appellant did not simply endeavor to go crabbing as he usually did the morning of Amanda's disappearance. Appellant left in his boat while it was still dark, before the time he would normally put in to go crabbing. (V-12, 1795). Stemm, who had been crabbing with appellant on a number of occasions, testified that appellant never put his boat in the water before daylight. (V-15, 2329). His conduct was clearly more consistent with someone attempting to dispose of evidence than someone interested in fishing for crabs.

After arriving at the Courtney Campbell Causeway where he normally put in, appellant drove by the ramp and went down the causeway, only to return and hastily put his boat in the water. Crabbers Darlington and Overton were stunned when they observed

the manner in which appellant put in at the boat ramp, driving his truck so far down the ramp that even his front wheels were covered in water. (V-12, 1770-71). Darlington had never seen appellant put his truck in the water in that manner. (V12, 1770-71). Such deep water placement of the boat is likely to cause damage to a truck. Moreover, appellant's anchor placement was haphazard and ineffective, unlike how appellant and other fishermen normally placed an anchor, by carefully hanging it over the dock. (V-12, 1771-72).

Appellant was dressed inappropriately for crabbing, wearing a maroon two-toned shirt with a collar and black or dark blue dress slacks. (V-12, 12, 1174-75). Darlington had never seen anyone and certainly not the appellant go crabbing in that type of clothing. (V-12, 1775). In fact, Darlington remarked to Overton: "What bar did he come from this early in the morning dressed like that." (V-12, 1775). Appellant normally put his slicker on near his truck and then walked to his boat; however, on this morning he did not.

Darlington testified that as appellant walked about ten feet away from him back to his boat, appellant carried what appeared to be rolled up clothing under his arm. (V-12, 1777). Appellant was not wearing the same clothes when he was later found by the police on the bay. Appellant obviously changed

into more appropriate clothing on the bay, discarding the dress clothes he was earlier observed wearing when he left on his boat. (V-12, 1779).

Wearing dress clothing out in the boat and later changing and discarding it is of course highly unusual conduct for a crab fisherman. However, such conduct is consistent with someone who had just murdered Amanda Brown and wanted to get rid of his own blood stained clothing along with Amanda's body. See Sireci v.State, 399 So. 2d 964, 968 (Fla. 1981), cert. denied, 456 U.S. 984, 72 L.Ed.2d 862 (1982)(evidence of a suspect's desire to evade prosecution or attempt to prevent witness from testifying is admissible as relevant to the consciousness of guilt that may be inferred from such evidence); State v. Spioch, 706 So. 2d 32, 35 (Fla. 5th DCA 1998), rev. denied, 718 So. 2d 171 (Fla. 1998)("These circumstances, which include providing funds for the offense, **conscious acts of concealment and false statements to police**, and Mrs. Spioch's explanation that funding was a philanthropic act were sufficient to meet the [circumstantial evidence] burden imposed by State v. Law, 559 So. 2d 187 (Fla. 1989)(emphasis added). Fortunately, appellant failed to change and discard his boxer shorts which carried the tell-tale stain of Amanda's blood.

In Benson v. State, 526 So. 2d 948 (Fla. 2d DCA), rev.

denied, 536 So. 2d 243 (Fla. 1988), cert. denied, 489 U.S. 1069, 109 S.Ct. 1349 (1989), the defendant claimed that the circumstantial evidence linking him to the car bombing first degree murders of his mother and brother was insufficient to submit the case to the jury. The evidence linking the defendant to the murders consisted primarily of evidence establishing motive[9] and opportunity, along with evidence that the defendant had purchased some materials identical to those used to make the pipe bombs. Palm prints found on two receipts for pipes from a hardware store matched the defendant's. At the funeral for the mother and brother, the defendant stated that he had "made and exploded bombs composed of copper pipe and gunpowder." Benson, 526 So. 2d at 950-51. The defendant argued that if this statement was made it "could have referred only to firecrackers." The defendant "also argued other interpretations of other aspects of the evidence." Benson, 526 So. 2d at 951. However, this Court noted that "on appeal from the convictions we must view the evidence in the light most favorable to the state as it could reasonably been interpreted by the jury." Id. (citations omitted). The defendant argued that "there was no evidence directly showing that the particular pipe materials

[9]"At the time of the crimes the mother's attorney was in town at her request and was looking into defendant's suspected mismanagement of the businesses." Benson, 526 So. 2d at 951.

used in the bombs were the same as those purchased from Hughes Supply and that there was no evidence directly showing that defendant had constructed and detonated the bombs." Benson, 526 So. 2d at 952. However, the Second District noted that "permissible inferences do not require the exclusion of all other possible hypotheses." (citation omitted). The court concluded that certain conduct of the defendant, some of which was not particularly incriminating by itself, as a whole, constituted substantial, competent evidence of guilt.[10] "As to whether there was a reasonable hypothesis of innocence and whether the evidence failed to eliminate such a hypothesis were issues for the jury to decide and were argued to the jury." Benson 526 So. 2d at 952. (string cites omitted).

In Benson, the Second District provided a well reasoned

[10]The Second District stated: "Among the evidence involving inferences bearing upon defendant's guilt in this case were the testimony of the sister as to defendant's activities prior to the bombings; the evidence that the relatively large diameter dimensions of the galvanized steel pipe materials, which, from the palm print evidence, could be concluded to have been purchased by defendant from Hughes Supply shortly before the bombings, were identical to the dimensions of that type of pipe materials used in the bombs; defendant's last purchase of those materials having been on the day the mother was looking closely into his suspected business mismanagement and had asked him to bring the books to her attorney the next day, which was the day of the bombings' the evidence as to why the defendant used the Suburban the morning of the bombings, how long he was gone with the Suburban, and as to why he departed from the Suburban immediately prior to the bombings; and defendant having made pipe bombs in the past." Benson, 526 So. 2d at 952.

analysis of the defendant's pyramiding of inferences argument. Benson, 526 So. 2d at 953-954. This Court observed that the evidence must be looked to as a whole to determine whether or not it is sufficient to establish the defendant as the perpetrator of the crimes:

> "The defendant cautions us against 'piling inference upon inference.' As interpreted by the defendant this means that a conviction could rarely be justified by circumstantial evidence. *See* 1 Wigmore, Evidence, § 41 (3d ed. 1940). The rule is not that an inference, no matter how reasonable, is to be rejected if it, in turn, depends upon another reasonable inference; rather the question is merely whether the total evidence, including reasonable inferences, when put together is sufficient to warrant a jury to conclude that defendant is guilty beyond a reasonable doubt. [citations omitted]. **If enough pieces of a jigsaw puzzle fit together the subject may be identified even though some pieces are lacking.** Reviewing the evidence in this case as a whole, we think the jury was warranted in finding beyond a reasonable doubt the picture of the defendant Dirring." (emphasis added).

Benson, 526 So. 2d at 954 (quoting Dirring v. United States, 328 F.2d 512, 515 (1st Cir. 1964)). Based upon all of the evidence presented, the Second district in Benson found that the evidence was sufficient to conclude that the defendant was the perpetrator of the crimes.

In this case, the State possesses even more pieces of the "jigsaw puzzle" that constitute the charged offenses than the State developed in Benson. While evidence of motive was more

developed in that case, in this case, more scientific evidence links the appellant directly to the charged crimes. There is no reasonable, innocent explanation for the State's blood evidence in this case. When the pieces of the evidence are put together, the picture of appellant as the one responsible for the kidnapping and murder of Amanda Brown is clear.

On appeal, appellant argues that the State failed to set forth sufficient evidence to establish premeditation, and does not argue that Amanda is still alive or that the State failed to establish that he was responsible for her death. Indeed, appellant's brief fails to mention what hypothesis of innocence was presented by the appellant at trial. Appellant appears to argue that given the lack of evidence establishing exactly how Amanda was murdered the State cannot prove premeditation. However, at trial, appellant did not suggest that Amanda's death was an accident and that he simply covered it up once she died. See generally Conner v. State, 106 So. 2d 416, 419 (Fla. 1958)(upholding a finding of premeditation based upon a single gun shot wound, this Court observed "[t]here is nothing in the evidence in this cause to show or suggest that the Sheriff was killed in any manner except by the deliberate intended act of the defendant."); Lowe v. State, 105 So. 2d 829, 831 (Fla. 1925) ("So far as we have been able to find, the courts generally hold

that there must be some sort of premeditation, that the fatal blow must not be the incident of mania or a sudden paroxysm or heat of passion such as suspends the cool normal state of the mind' but as to whether there has been such premeditation is a question for the jury to be determined by them from a consideration of all the facts under the instructions given them by the court.")(string cites omitted). Appellant in this case essentially offered a blanket denial of misconduct, a denial the jury was certainly entitled to reject given the State's evidence to the contrary.

The jury was entitled to reject appellant's assertion at trial that Amanda's blood might have been innocently deposited in the bathroom through a loose tooth. As mentioned above, Amanda's mother and other witnesses who observed Amanda immediately before her disappearance testified that she was not bleeding from her tooth or anywhere else.[11] Henderson v. State, 679 So. 2d 805 (Fla. 3d DCA 1996), aff'd, 698 So. 2d 1205 (Fla. 1997)(the state was only required to rebut a reasonable hypothesis of innocence and the defendant's explanation for his

[11]Appellant testified that he kept his boxer shorts and some clothing on the back of his toilet in an obvious attempt to explain away Amanda's blood on his boxer shorts. However, in his early statements to police and the "Jenny Jones" Show appellant omitted any reference to Amanda's allegedly bleeding tooth.

conduct, *"in light of the evidence,* created a legitimate question for the jury to determine."); Holton v. State, 573 So. 2d 284, 289 (Fla. 1990)("Whether the State's evidence fails to exclude all reasonable hypotheses of innocence is a question of fact for the jury."). Since there is no reasonable hypothesis of innocense in this case, and the only reasonable construction of the evidence is consistent with appellant's guilt for premeditated murder, the evidence is sufficient to sustain his conviction for first degree murder on appeal.

The trial court heard all of the testimony and considered the arguments of counsel before determining that sufficient evidence was presented to the jury. The jury was able to weigh the evidence, observe the witnesses and evaluate their credibility. The jury found the evidence sufficient to establish appellant's guilt beyond a reasonable doubt. Appellant has offered this Court nothing on appeal which compels a different conclusion than that reached by the trial court and jury below. See Coleman v. State, 7 So. 2d 367, 370-371 (Fla. 1890)(while some questions remain unanswered, "the circumstances are so strong--they point so directly to the defendant as the perpetrator of the cowardly assassination--as to preclude every reasonable hypothesis inconsistent with his guilt; and hence we can see no reason for setting aside the verdict as being against

the evidence.").

Assuming, *arguendo*, this Court finds some defect in the State's evidence on premeditation, the evidence supports appellant's conviction for first-degree felony murder with kidnaping as the underlying felony. See San Martin v. State, 717 So. 2d 462 (Fla. 1998), cert. denied, 143 L.Ed.2d 553 (1999)(reversal is not warranted where general verdict could have rested upon theory of liability without adequate evidentiary support when there was an alternative theory of guilt for which evidence was sufficient); Griffin v. United States, 502 U.S. 46, 112 S.Ct. 466, 116 L.Ed.2d 371 (1991)(upholding general verdict even though one of the two possible bases of the conviction failed because of insufficient evidence). The basis for upholding appellant's murder conviction under the felony murder theory is argued under Issue II, below.

II.

WHETHER THE STATE PRESENTED SUFFICIENT EVIDENCE TO OVERCOME APPELLANT'S MOTION FOR A JUDGMENT OF ACQUITTAL FOR KIDNAPPING? (STATED BY APPELLEE).

Appellant next contends that the State presented insufficient evidence to support his conviction for kidnapping with the intent to commit or to facilitate the commission of a homicide. (Appellant's Brief at 62). Appellant argues that since the State presented insufficient evidence to prove premeditated murder, appellant's conviction for first degree murder cannot stand. The State disagrees.

As argued under Issue I, the State did present competent, substantial evidence from which the jury could conclude that the murder of Amanda was premeditated. The same evidence discussed above clearly established that appellant kidnapped Amanda, murdered her, and disposed of her body. On appeal, appellant focuses his argument on the perceived lack of evidence supporting the intent with which he took Amanda. In arguing the motion for a judgment of acquittal below, appellant generally argued the evidence was insufficient to submit the case to the jury on either premeditated murder or felony murder and kidnapping. Now, appellant focuses his argument on the specific allegation that the State failed to prove his intent under the

charged kidnapping. C.f. Stephens v. State, 787 So. 2d 747, 753 (Fla. 2001)(Bare bones motion for a judgment of acquittal is not sufficient to preserve a more specific challenge to the evidence on appeal)(citations omitted).

The kidnapping intent was charged to commit or to facilitate the commission of a homicide. As argued above under Issue I, the evidence, although necessarily limited by appellant's successful disposal of Amanda's body, was certainly sufficient to prove kidnapping with intent to commit or to facilitate the commission of Amanda's murder.

Long ago this Court made the following cogent observations about circumstantial evidence:

> Circumstantial evidence may be said to be the inference of a fact in issue which follows as a natural consequence according to reason and common experience from known collateral facts. It is in the nature of things frequently necessary to resort to it to prove guilt in criminal proceedings. **The criminal always, if possible to do so, selects the occasion most favorable to concealment to indulge his appetite for crime and lust when no eyewitnesses are about to behold him.** Circumstantial evidence alone is therefore sufficient to support a verdict of guilty of the most heinous crime, provided the jury believe beyond a reasonable doubt that the accused is guilty upon the evidence, and this cannot be when the evidence is entirely consistent with innocence.

Lowe v. State, 105 So. 2d 829, 830 (Fla. 1925)(citations omitted)(emphasis added). Although appellant did everything he could to eliminate evidence of his kidnapping and murder of

Amanda Brown, sufficient evidence remained to eliminate any hypothesis except that of appellant's guilt. See Sean v. State, 775 So.2d 343, 344 (Fla. 2d DCA 2000)(recognizing that while little evidence of the defendant's intent (terrorizing) was available, the court noted "[i]t would appear that the question of intent is left to the collective wisdom of the jury[,]" and affirmed the kidnapping conviction where the defendant took a young sleeping child from his own bed in the middle of the night).

Once again, as stated in detail under Issue I, the State is entitled to a favorable review of the evidence on appeal. Viewed in the appropriate light, the evidence submitted can be summarized as follows:

> *Appellant plied Amanda's mother with drugs and money to gain her trust. In their brief time together, appellant expressed an unusual degree of interest in Amanda. [drawing with her, helping her with homework, giving her money, showing her favorite movie, taking her into his bedroom, having her sit between his legs, brushing and blow drying her hair].
>
> *Appellant was last seen with Amanda in bed with Kathryn and Amanda; appellant was fully clothed, his shoes were on. When Kathryn awoke at six o' clock the next morning, appellant and Amanda were missing. Amanda's body has never been recovered.
>
> *Appellant started his truck and left it running with the lights on before departing from Kathryn and Amanda's trailer. This suggests that appellant was preparing to make a rapid exit with Amanda in tow.

*****The blood evidence reveals that Amanda was taken back to appellant's trailer, without her mother's permission, after she had gone to sleep in her own home.

*****Amanda's blood is found in two places on the toilet and on a tissue inside the toilet. A mixture of blood indicates that a struggle between appellant and Amanda occurred, both shedding blood. Amanda's blood is found on the boxer shorts appellant is wearing on the morning of Amanda's disappearance.

*****Amanda had medium length fingernails which protruded above the skin of her fingers. Scratches on appellant's arms and hands were consistent with injuries inflicted by the fingernails of a seven year old girl. The pattern of scratch type injuries were consistent with the grasping type injuries which would be inflicted by the hand and fingers of a seven year old girl. Appellant's wounds were inflicted at or near the time of Amanda's disappearance. When first interviewed, appellant became belligerent and evasive when asked to show the detective how he got the scratches.

*****The Luminol test reveals that the blood residue which carried Amanda's genetic markers were part of a much larger spill of blood, indicating that Amanda was murdered in the bathroom and/or dismembered. Appellant used bleach in the early morning hours to remove the blood from the bathtub and floor of the bathroom. He also removed a rug from the bathroom, placing it in the wash to eliminate or cover up visible blood stains.

*****Appellant left in his boat to go crabbing before he ordinarily would the next morning despite being advised of Amanda's disappearance. He put the boat in a hasty and unusual manner, driving in the water so far that the truck wheel-wells were covered in water. He wore dress clothes out in the boat but carried a change of clothes with him. When found by the police, appellant had changed into more appropriate clothing. The clothes he wore out in the boat were discarded and never recovered. This evidence suggests that appellant disposed of Amanda's body and his own bloody clothes out in the bay. Appellant did not change his boxer shorts on the boat and Amanda's blood is identified on the shorts.

*****Appellant made statements indicating that he knew how to dispose of a body where no one would ever find it. Appellant also made a statement evincing his consciousness of guilt when he said to his father-in-law after Amanda 'disappeared' that if Stemm revealed a secret crab trap location, he had enough "evidence" to "bury him." Appellant had never previously used

the word “evidence” in a conversation with Stemm.

In State v. Atwood, 832 P.2d 593 (Ariz. 1992), the Arizona Supreme Court upheld the defendant’s kidnapping and felony murder convictions despite the lack of evidence establishing why the child victim was taken and why or how she was killed. The defendant was charged with kidnapping with “the intent to inflict death, physical injury or a sexual offense on the victim, or to otherwise aid in commission of a felony” and first-degree felony murder. The girl’s partial skeletal remains were found in the desert and the cause of death could not be ascertained.[12] The State’s theory was that appellant observed

[12]The Atwood court found corpus delicti was established under the circumstances presented:

> A young girl disappears from her neighborhood and later is found dead in the desert. This fact alone suggests the presence of criminal activity, for, given the facts of this case, it is difficult, if not impossible, to imagine the child left a residential area, crossed a freeway, traversed a riverbed, and went voluntarily to a sparsely populated desert location several miles from her home. Although we cannot know from the facts presented at trial exactly what happened to the victim when she was taken to the desert, we do know that (1) defendant, a convicted pedophile, was seen within yards of the girl literally seconds before she vanished; (2) that witnesses identified defendant as the man they saw driving with a young child in his car; (3) defendant was seen later that afternoon with blood on his hands and clothing; and (4) defendant was also seen with cactus needles in his arms and legs. 832 P.2d at 616.

the child driving in his car, that he struck her bicycle with his car, that he took her out to the desert where he molested and murdered her.

The Atwood Court noted the following in affirming the convictions:

> Because no witness saw defendant take Mary, and because experts were unable to determine the cause of her death, the state attempted to prove defendant's guilt through extensive circumstantial evidence. Specifically, the prosecutions case consisted of four discrete areas of evidence (1) sightings of defendant, alone and with a young child, on the afternoon of September 17; (2) scientific evidence linking defendant's automobile with the victim's bicycle' (3) testimony concerning defendant's actions and statements after victim's disappearance; and (4) defendant's prior statements concerning his sexual attraction to children.

832 P.2d 611.

The defendant's statements in Atwood only indirectly implicated him in the crime. The defendant claimed that he had stabbed a man in a drug transaction on the afternoon of September 17th. Two witnesses testified that they observed blood on the defendant's hands. A witness overheard the defendant's statement to his mother to the effect of "even if I did do it, you have to help me." Such evidence, including his sexual interest in children was sufficient to sustain the kidnapping and felony murder convictions despite the lack of evidence showing that the defendant murdered the victim or even

showing how the victim died.

Specifically addressing the kidnapping count, the court noted that the State's evidence established the following: The defendant was in the neighborhood where the victim disappeared; a witness placed his car at the intersection where the victim's bike was found; the state's experts testified that paint from the victim's bike matched the paint from defendant's own car, suggesting the two came into contact; that witnesses observed a young child riding with him in his car; and, that letters revealed his sexual attraction to young children. Given the favorable standard of review before the court, such evidence was deemed sufficient to sustain the kidnapping conviction on appeal.

Although Amanda's body was not recovered in this case, the physical evidence linking appellant to her kidnapping and murder is even more conclusive than that presented in Atwood. In Atwood the evidence linking the defendant to the kidnapping consisted primarily of evidence showing the appellant was in the victim's neighborhood at the time of her disappearance, that a child was observed in his car, and that a paint mark on his vehicle matched the paint on the victim's bicycle. While the victim's body was ultimately recovered in Atwood, there was no way to tell the cause of death in that case.

In this case, appellant was in bed, fully clothed, with his shoes on, lying next to Amanda. Amanda was never seen again. The scientific evidence linking appellant to her murder was much more substantial than that presented by the State in Atwood. While in Atwood only paint transfer evidence linked the victim to the defendant's car and the blood evidence consisted of two witnesses who observed blood on the defendant's hands, here scientific testing links the blood found in appellant's bathroom and on his boxer shorts directly to Amanda.

There is no reasonable innocent explanation for the blood evidence found in appellant's bathroom. The State's evidence established that Amanda was back in appellant's trailer, in his bathroom, after she was put to bed, lying next to the appellant, and last observed peacefully sleeping next to her mother. **There is no reasonable innocent explanation for Amanda's blood being found on the boxer shorts appellant was wearing on the morning of her disappearance.** The one and only reasonable conclusion to be reached by the State's evidence in this case is that appellant took Amanda back to his trailer, that Amanda fought appellant in the bathroom of his trailer where she inflicted several scratch and grasping injuries which caused appellant to bleed. Amanda was murdered by the appellant and appellant disposed of Amanda's body in the bay, where no one would ever

find it.

Obviously, Amanda could not be murdered or otherwise harmed without detection in the bed where she lay sleeping with her mother. Movement from her own home to appellant's facilitated the commission of the homicide, made detection of the homicide more difficult, and, was not simply inherent in the homicide. See Faison v. State, 426 So. 2d 963, 965 (Fla. 1983)(the taking or confinement must have some significance apart from the other crime "in that it makes the other crime easier to commit or makes detection of the other crime substantially more difficult.").

While evidence of intent in this case, as in almost all cases, is necessarily circumstantial, it is nonetheless sufficient to establish that Amanda was taken with the intent to commit or to facilitate the commission of a homicide. Brewer v. State, 413 So. 2d 1217, 1219 (Fla. 5th DCA 1982), rev. denied,426 So. 2d 25 (Fla. 1983)(noting that intent is almost never subject to direct proof and that "[k]eeping in mind the test to be applied to a motion for a judgment of acquittal, a trial court should rarely, if ever, grant a motion for a judgment of acquittal based on the state's failure to prove mental intent."). The State need not prove premeditation to establish felony murder, it is sufficient to show that appellant either

took her with the intent to kill her or that taking her facilitated the commission of her homicide.[13] Appellant's convictions for first-degree murder and kidnapping are supported by substantial, competent evidence, and should be affirmed by this Court.

[13]Appellant appears to suggest that in order to sustain the charged kidnapping the State must show the same premeditated intent to commit murder that it would to support a first-degree murder conviction. However, neither the State, nor apparently the appellant has found case law to support that proposition. Indeed, the fact the State need only show the intent to commit **or** facilitate the commission of the more broadly defined term, homicide, not first-degree murder, suggests that fully formed premeditated intent to kill need not be shown at the moment of the taking.

III.

WHETHER THE FELONY MURDER JURY INSTRUCTION DEFINING KIDNAPPING CONSTITUTED FUNDAMENTAL ERROR UNDER THE FACTS OF THIS CASE? (STATED BY APPELLEE).

Appellant contends that the instruction on felony murder which defined kidnapping with the intent to commit bodily harm as well as kidnapping with the intent to commit or facilitate the commission of a homicide was error. Although matters of law are reviewed de novo, instructions provided by the trial court are presumed correct on appeal. Carpenter v. State, 785 So. 2d 1182, 1199-1200 (Fla. 2001). Further, since appellant made no objection below to the instruction at issue here, his convictions cannot be reversed unless he shows fundamental error. Appellant's argument to the contrary, appellant has not made the requisite showing of error, much less fundamental error in this case. Consequently, appellant is not entitled to relief from this Court.

During the charge conference defense counsel was specifically asked if he had any objection to the felony murder instruction containing the language appellant now takes issue with. Defense counsel claimed he had no objection to the instruction itself and simply renewed his earlier motion for a judgement of acquittal on sufficiency grounds. (V-18, 2776-77). After the instructions were read to the jury, the defense again

posed no objection. (V-21, 3153, 3169). As this issue is not preserved for review, appellant must show not only that an error occurred, but that the error is "fundamental." Overton v. State, 26 Fla. L. Weekly S592 (Fla. September 13, 2001)("Issues pertaining to jury instructions are not preserved for appellate review unless a specific objection has been voiced at trial.")(citing Archer v. State, 673 So. 2d 17, 20 (Fla. 1996) and Armstrong v. State, 642 So. 2d 730 (Fla. 1994); Brooks v. State, 762 So. 2d 879, 898 (Fla. 2000)(claimed error in instructing the jury on both first degree murder and first degree felony murder not preserved for review absent an objection to the jury instruction at trial.)(citations omitted).

This Court has stated that for an error to be so fundamental "that it can be raised for the first time on appeal, the error must be basic to the judicial decision under review and equivalent to a denial of due process." State v. Johnson, 616 So. 2d 1, 3 (Fla. 1993)(citing D'Oleo-Valdez v. State, 531 So. 2d 1347 (Fla. 1988); Ray v. State, 403 So. 2d 956 (Fla. 1981). Addressing the application of fundamental error, this Court has stated the following:

> The Florida cases are extremely wary in permitting the fundamental error rule to be the 'open sesame' for consideration of alleged trial errors not properly preserved. Instances where the rule has been

> permitted by the appellate courts to apply seem to be categorized into three classes of cases: (1) where an involved statute is alleged to be unconstitutional, **(2) where the issue reaches down into the very legality of the trial itself to the extent that the verdict could not have been obtained without the assistance of the error alleged,** and (3) where a serious question exists as to jurisdiction of the trial court.

State v. Smith, 240 So. 2d 807, 810 (Fla. 1970)(quoting Gibson v. State, 194 So.2d 19 (Fla. 2d DCA 1967))(emphasis added). See also State v. Rhoden, 448 So. 2d 1013, 1016 (Fla. 1984)(The [contemporaneous objection rule] prohibits trial counsel from deliberately allowing known errors to go uncorrected as a defense tactic and as a hedge to provide a defendant with a second trial if the first trial decision is adverse to the defendant.").

The State need not even charge the underlying felony to support an instruction on and a conviction for felony murder. See Rivera v. State, 717 So. 2d 477, 487 (Fla. 1998)(The "underlying felony need not actually be charged to support a felony murder conviction...")(citing Sochor v. State, 619 So. 2d 290, 292 (Fla. 1993)). And, in Brumbley v. State, 453 So. 2d 381, 386 (Fla. 1984), this Court stated that where the murder trial proceeds on alternate theories of premeditation and felony murder "there must be an instruction defining the underlying felony with sufficient definiteness to assure the defendant a

fair trial." "It is not necessary, however, to instruct on the elements of the underlying felony with the same particularity as would be required if the defendant were charged with the underlying felony." Id. (string cites omitted). The felony murder statute classifies as first degree murder a homicide committed in the act or furtherance of **"any"** of the listed felonies. Section 782.04, of the Florida Statutes, (1999), provides in part, that the unlawful killing of a human being is first-degree murder "[w]hen committed by a person engaged in the perpetration of, or in the attempt to perpetrate, any: .... kidnapping." The statute does not require it to be a certain type or enumerated kidnapping to qualify as the underlying felony to support a felony murder conviction. See e.g. Gurganus v. State, 451 So. 2d 817, 822 (Fla. 1984)(where this Court noted that to prove first degree felony murder, the State would have to prove the attempted kidnapping was made with at least one of the intents listed under the kidnapping statute [none were charged in the indictment]). Use of the term "any" means that the legislature intended a broad application of felony murder to include any underlying kidnapping, sexual battery, burglary, etc. Consequently, the instruction provided in this case defining felony murder as a homicide based upon kidnapping with the intent to commit bodily harm or with the intent to

commit/facilitate the commission of a homicide was not improper. That is, appellant could properly be convicted of felony murder if his intent was simply to commit bodily harm when he took Amanda and later murdered her. Or, if his intent, as the evidence establishes, was to take Amanda with the intent to murder her or to facilitate the commission of her murder.

It stands to reason that if the State need not even charge the underlying felony to support a felony murder instruction on kidnapping, that instructing the jury on two closely related and valid intents listed under the kidnapping statute does not constitute error, let alone fundamental error. See Justus v. State, 438 So. 2d 358, 367 (Fla. 1983)(disapproving of lower court cases suggesting that the underlying felony the accused intended to commit by the kidnapping [787.01(1)(a)2] must be set forth in the indictment). Indeed, appellant does not claim surprise or prejudice to his defense from provision of the felony murder instruction in this case. Appellant was certainly on notice to defend against kidnapping with the intent to commit bodily harm from the charged kidnapping as well as the intent to commit or facilitate the commission of homicide. See generally, McCreary v. State, 371 So.2d 1024, 1027 (Fla. 1979)(noting that an indictment or information or any count within should not be dismissed for vagueness unless it would

"mislead the accused and embarrass him in the preparation of his defense or expose him after conviction or acquittal to substantial danger of a new prosecution for the same offense.")(quoting Fla.R.Crim.P. 3.140 (O)).

Appellant's reliance upon Mills v. State, 407 So. 2d 218 (Fla. 3d DCA 1981), is misplaced. In Mills, the State charged appellant with kidnapping with the intent to hold for ransom or reward. The jury was only instructed on that theory of kidnapping. The State conceded that insufficient evidence was presented to support the ransom theory of kidnapping at trial. The State argued, nonetheless, that the Third District could affirm the kidnapping conviction under the theory that the kidnapping was committed with the intent to steal the victim's car. Mills, 407 So. 2d at 220-21. The Mills court declined the State's invitation, noting that the defendant was specifically and only charged with kidnapping to hold for ransom. The court nonetheless affirmed the felony murder conviction because the jury could properly find felony murder based upon an underlying robbery as an aider and abettor. On rehearing, the court noted that it could not engage in presumptions about what the jury would find when "under the instructions given the jury, there is simply no basis for us to conclude that the jury could well have found the defendant guilty of a distinct and separate kidnapping

offense." Mills, 407 So. 2d at 223.

In Mills, the court was not addressing a non-preserved jury instruction issue on felony murder as is the question presented in this case. *Sub judice*, unlike Mills, the jury was instructed on the charged kidnapping intent and the evidence is sufficient to support that intent: The intent to commit or to facilitate the commission of homicide. The Mills court did not address any defect in the felony murder instruction, which presumably, was based upon kidnapping with the intent to hold for ransom as well as robbery. Indeed, the court upheld the conviction for felony murder based upon the underlying robbery. The problem in Mills was that there was no evidence to support the fact that the victim was kidnapped for ransom and the jury was not instructed on any other intent under the kidnapping statute.

In this case, the jury was properly and only instructed that they must find the charged intent to find the appellant guilty of the kidnapping charge. (V-21, 3157-58; 3167). However, since the evidence supported it, the judge, without any objection, instructed that in order to render a verdict for felony murder the jury must find that the kidnapping was with the intent to commit/facilitate the commission of a homicide or was with the intent to commit bodily harm. (V-2, 241; V-21, 3152-53). Under either of the two intents, the evidence is

sufficient to find appellant guilty of felony murder with kidnapping as the underlying felony. However, should this Court determine it must speculate as to which intent the jury found, the fact the jury returned a verdict of guilty on the kidnapping count indicates the jury necessarily found that the kidnapping was done with the intent to commit or to facilitate the commission of a homicide; the intent charged in the indictment. See Carter v. Brown & Williamson Tobacco Corp., 778 So. 2d 932, 942 (Fla. 2000)("Absent a finding to the contrary, juries are presumed to follow the instructions given them.")(citing Sutton v. State, 718 So. 2d 215, 216 (Fla. 1st DCA 1998)).

Braggs v. State, 789 So. 2d 1151 (Fla. 3d DCA 2001) is also distinguishable from the instant case. In Braggs, the defendant was charged with kidnapping with the intent to facilitate the commission of any felony. The court found that the evidence was insufficient to support an independent kidnapping conviction where the movement of the victims was slight and inherent in the underlying burglary convictions. Braggs, 789 So. 2d at 1153 (citing Faison, 426 So. 2d at 966.). The court indicated it could not affirm the convictions under the theory that the kidnapping was done with the intent to commit great bodily harm or to terrorize the victims, even though the jury was instructed on this theory where this theory was not charged in the

indictment. A conviction on kidnapping on this uncharged intent would constitute fundamental error. Braggs, 789 So. 2d at 1153-54.

In this case, the jury was only instructed under the kidnapping count that it could find the appellant guilty of kidnapping if his intent was to commit a homicide or to facilitate the commission of a homicide.[14] Thus, unlike Braggs the jury was properly instructed in accordance with the allegations made in the indictment. (V-2, 246; V-21, 3157-58). And, unlike Braggs, the evidence presented by the State was

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[14]However, even if the trial court instructed the jury that it could find appellant guilty of kidnapping if appellant possessed the intent to commit bodily harm, the State would not concede error. Mills involved a charged intent to hold for ransom and the State asked the court to find the defendant guilty of kidnapping with the intent to steal the victim's car (grand theft). The two intents are quite distinct and the defendant would not necessarily be on notice to defend against theft of the car when he was charged with the intent to hold for ransom. Here, the two intents are so interrelated (intent to murder and intent to commit bodily harm), that there is no reasonable possibility of prejudice, i.e., misleading or embarrassing the defendant in the preparation of his defense. Both intents are closely related, part of the single offense of kidnapping, the same statute is involved, and the same penalty is prescribed. Section 787.01 (1)(a)2., 3. This Court has been reluctant to reverse on hyper-technical grounds for variances between pleading and proof without the showing of any prejudice to the defendant. See e.g Lackos v. State, 339 So. 2d 217, 219 (Fla. 1976)(recognizing "[t]he modern trend in both criminal and civil proceedings is to excuse technical defects which have no bearing upon the substantial rights of the parties. When procedural irregularities occur, the emphasis is on determining whether anyone was prejudiced by the departure.")(quotation omitted); Accord Martinez v. State, 368 So. 2d 338, 339 (Fla. 1978).

sufficient to establish the kidnapping as charged in the indictment. Finally, Braggs did not address a felony murder instruction which is at issue in this case.

As noted above, there is no legal impropriety in the felony murder instruction provided by the trial court in this case. The State need not even designate the felony it intends to proceed upon. The evidence introduced at trial supported a felony murder instruction that the kidnapping was done to commit/facilitate the commission of a homicide or to inflict bodily harm. There is no allegation that the defense was misled, confused or embarrassed in its defense of the felony murder charge. Appellant's argument appears to be predicated on the spillover effect of the facially proper and unobjected to felony murder instruction on the kidnapping count.[15] However, the felony murder instruction correctly instructed the jury that it may find appellant guilty of murder if it was committed during the course of a kidnapping. The defense has not provided and the State has not found any case where facially valid instructions on first-degree murder, felony murder, and kidnapping somehow combine to create confusion and error, let

[15]The jury was specifically instructed to consider each count separately and that a "finding of guilty or not guilty as to one crime must not affect" the verdict on the other crime charged. (V-2, 256; V-21, 3167).

alone fundamental error. That is, an error so severe that the verdict could not have been reached without the assistance of the error alleged. As no error has been established in the instructions provided by the trial court, appellant provides no basis for reversal of his convictions.[16]

[16]Alternatively, if error has been established, the error is harmless under the circumstances of this case. The jury was properly instructed on kidnapping with the intent to commit a homicide or to facilitate the commission of a homicide. The jury was not instructed that they could find appellant guilty on the kidnapping count if they found appellant's intent was only to commit bodily harm. As we presume the jury followed the instructions, it necessarily found the charged intent in order to convict appellant on kidnapping. See Van Gotum v. State, 569 So.2d 773, 774-75 (Fla. 2d DCA), rev. denied, 581 So.2d 1311 (Fla. 1990)(although the court incorrectly instructed the jury on the uncharged intent to terrorize the victim, the error was harmless beyond a reasonable doubt where the jury found the defendant guilty of the underlying felony of grand theft and necessarily found the required intent to support the charged kidnapping (in the course of a felony.).

IV.

WHETHER THE STATE'S EVIDENCE WAS SUFFICIENT TO SUSTAIN THE TRIAL COURT'S FINDING THAT THE MURDER WAS COMMITTED DURING THE COURSE OF A KIDNAPPING? (STATED BY APPELLEE).

Appellant next contends that the trial court erred in finding the in the course of a felony (kidnapping) aggravator under the facts of this case. In its sentencing order the trial court recited much of the evidence presented at trial and found that the State proved the kidnapping aggravating circumstance "beyond a reasonable doubt" and gave this factor "great weight." (V-2, 311-12). The appellant has offered nothing on appeal to suggest that evidence supporting this aggravating circumstance is insufficient to sustain the ruling of the trial court below.

In Bowles v. State, 26 Fla. L. Weekly S659 (Fla. 2001) this Court noted that a trial court's finding of an aggravating circumstance is entitled to deference on appeal. "In reviewing the trial court's finding of an aggravating circumstance, it is not this Court's function to reweigh the evidence to determine whether the State proved each aggravating circumstance beyond a reasonable doubt. This is the trial court's job. See Willacy v. State, 696 So. 2d 693, 695-96 (Fla.1997). Rather, this Court reviews the record to determine whether the trial court applied the correct rule of law for each applicable aggravator and, if so, whether such finding is supported by competent, substantial

evidence." Bowles.

The State's evidence establishing that appellant kidnapped and murdered Amanda is set forth in some detail under Issues I and II above. The State will not repeat its recital of that evidence here. The one and only reasonable conclusion to be reached by the State's evidence in this case is that appellant took Amanda from the bed where she was sleeping with her mother, took her back to his own trailer, that Amanda fought appellant in his trailer, inflicting several scratch and grasping injuries, causing appellant to bleed, and that Amanda was murdered by the appellant. Appellant disposed of Amanda's body in the bay early the next morning.

The jury found beyond a reasonable doubt that appellant was guilty of kidnapping Amanda. In a detailed order, the trial court found the evidence introduced during the guilt phase sufficient to support the aggravating circumstance that the murder was committed during the course of a kidnapping. The trial court's finding is supported by competent, substantial evidence and should be affirmed by this Court.

Although not raised as an issue in this appeal, the State notes that appellant's death sentence is proportional. In Bates v. State, 750 So. 2d 6, 12 (Fla. 1999), this Court stated:

> Our function in a proportionality review is not to re-weigh the mitigating factors against the aggravating factors. As we recognized in our first opinion in this case, that is the function of the trial judge. Bates, 465 So.2d at 494. Rather, the purpose of proportionality review is to consider the totality of the circumstances in a case and compare it with other capital cases. Terry v. State, 668 So.2d 954, 965 (Fla. 1996). For purposes of proportionality review, we accept the jury's recommendation and the trial judge's weighing of the aggravating and mitigating evidence.

The purpose of the proportionality review is to compare the case to similar defendants, facts and sentences. Tillman, 591 So. 2d 167, 169 (Fla. 1991).

Appellant took seven-year-old Amanda Brown from her mother's bed, took her back to his own trailer, murdered her, and disposed of her body where no one would ever find her. The trial court found three valid aggravators; prior violent felonies (great weight), the murder was committed during the course of a kidnapping (great weight), and that the victim was under the age of twelve (great weight). Of particularly strong weight in this case are appellant's prior violent felony convictions--five counts of sexual battery and one count of aggravated child abuse. (V-2, 310).

Appellant was a violent chronic abuser of young girls, an "uncured pedophile (V-2, 315)." Three of appellant's child sexual abuse victims' testified that appellant would threaten physical harm if they told anyone about the abuse. Two victims

testified that appellant threatened to kill them and put them in crab traps or otherwise see to it that no one would find their bodies.

Balanced against the strong case in aggravation, the trial court found various non-statutory mitigation relating to his character (good worker, family relationships[17]), abusive childhood, non-statutory mental health mitigation, drug and alcohol abuse, and prison record. (V-2, 315-19). The trial court, following the unanimous jury recommendation for death, found that the "aggravating circumstances in this case far outweigh the mitigating circumstances" and sentenced appellant to death. (V-2, 318-19).

This Court has affirmed death cases in which the aggravating circumstances were less compelling and/or the defendant presented more mitigation than was found in this case. See Lukehart v. State, 776 So. 2d 906, 925 (Fla. 2000)(death sentence proportional for murder committed during perpetration of aggravated child abuse where trial court found three aggravators of victim under the age of twelve, prior violent

[17]That appellant could have a good relationship with his children was a charitable finding as none of his children testified during the penalty phase and the defense filed a motion-in-limine prior to trial to prohibit the State from eliciting testimony concerning appellant's sexual abuse of his own children. (V-2, 260; V-22, 3309-3310).

felony, and commission during a felony were balanced against two statutory mitigators of age, and impaired capacity with non-statutory mitigators, including alcohol/drug abuse as well as an abusive childhood); Mann v. State, 453 So. 2d 784, 786 (Fla. 1984)(murder of child with aggravating circumstances of HAC, during the course of a kidnapping, and prior violent felony (burglary with sexual battery) balanced against mitigator of psychotic rage and depression); See also Pope v. State, 679 So. 2d 710 (Fla.), cert. denied, 136 L.Ed.2d 858 (1996)(death sentence proportional for murder of defendant's former girlfriend with aggravating circumstances of prior violent felony convictions and murder committed for pecuniary gain while mitigation included extreme mental or emotional disturbance and the defendant's capacity to conform conduct to the requirements of the law was substantially impaired); Brown v. State, 565 So. 2d 304 (Fla.), cert. denied, 498 U.S. 992 (1990)(death sentence for murder committed during the course of burglary was proportionate where there were two aggravating factors balanced against the mental mitigators). Appellant's death sentence is appropriate and proportionate.

CONCLUSION

Based on the foregoing arguments and authorities, the State respectfully submits that the verdict of the jury and decision of the trial court below should be affirmed on appeal.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Paul C. Helm, Assistant Public Defender, Polk County Courthouse, P.O. Box 9000 - Drawer PD, Bartow, Florida 33831, on this 4th day of February, 2002.

CERTIFICATE OF TYPE SIZE AND STYLE

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).

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COUNSEL FOR STATE OF FLORIDA