SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. SC00-863

HOWARD S. AULT,

Appellant,

- versus -

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT, IN AND FOR BROWARD COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

MELANIE ANN DALE
Assistant Attorney General
Florida Bar No. 0168556
1515 N. Flagler Drive
Suite 900
West Palm Beach, Fl 33401

Counsel for Appellee

Table Of Contents

Page:

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

STATE STATUTES

Preliminary Statement

Appellant, defendant in the trial court below, will be referred to as "Appellant", "Defendant" or "Ault". Appellee, the State of Florida, will be referred to as the "State". References to the record will be by the symbol "R", to the transcript will be by the symbol "T", to any supplemental record or transcript will be by the symbols "SR" or "ST", and to Aults' brief will be by the symbol "IB", followed by the appropriate page numbers.

Statement Of The Case and Facts

Ault was convicted of two counts of murder, of sisters, Deane Mu'min ("Deane"), eleven years old and Alicia Jones ("Alicia"), seven years old (R. Vol. 3 pp. 485-492, 550-551). Appellant was also convicted of two counts of sexual battery on Deane, two counts of kidnaping, and two counts of aggravated child abuse (R. Vol. 1, p. 1a, R. Vol. 3 pp. 485-492). The jury recommended death on both counts of murder by votes of nine to three and the trial judge imposed two death sentences, finding six aggravators, no statutory mitigation, and four non-statutory mitigators (R. Vol. 4, pp.774-775, R. Vol. 5 pp. 901-927).

In this case, Ault filed a motion to suppress his confession claiming that he could not be interviewed by Detective Rhodes because he had signed a rights invocation form on an unrelated

sexual battery case (R. Vol. 2 pp. 390-394). At the motion to suppress hearing, Detective Rhodes ("Rhodes") testified that on November 4, 1996 he was involved in the investigation into the disappearance of Deane and Alicia (T. Vol. 1 p. 8). After the police went to Ault's home to ask if he had seen the girls, Ault and his wife, Tia, went to the Oakland Park police department and they voluntarily gave statements (T. Vol. 1 pp. 11-12). The interview lasted about fifteen minutes and both Ault and Tia said they had met the girls once at Easterlin Park (T. Vol. 1 p. 12). Ault told Rhodes that the girls had never been in his truck and he had met them only once (T. Vol. 1 p. 17). Within one hour after Ault was interviewed by Rhodes, Deborah Cox arrested him on an unrelated sexual battery charge (T. Vol. 1 p. 17-18).

Rhodes also testified that he became the lead detective on the case and on November 5, he located a gentleman who had seen Ault pick the girls up in his truck and give them a ride to the park (T. Vol. 1 p. 16). This gentleman told Rhodes that he was suspicious because Ault was white and the girls were black (T. Vol. 1 p. 16). Rhodes also interviewed Delois Skeete, who saw the same incident (T. Vol. 1 p. 16). During these interviews Rhodes discovered that a few people had seen the girls in Ault's truck (T. Vol. 1 p. 17).

On November 6th, Rhodes went with Detective Geyer to the Broward County jail to speak to Ault (T. Vol. 1 p. 20). Rhodes told Ault that his investigation of the murders had shown that Ault had lied at the initial interview (T. Vol. 1 p. 22). Ault told Rhodes that he had planned on asking Rhodes to come to the jail (T. Vol. 1 p. 22). Rhodes read Ault his Miranda rights and Ault waived them (T. Vol. 1 p. 22). Ault told Rhodes that the girls were dead within an hour after he took them and then he agreed to show Rhodes where he put the girls' bodies (T. Vol. 1 p. 26-29). Ault lead police to his home and confessed that the girls were in the attic (T. Vol. 1 p. 30). After the police recovered the bodies Ault was taken to the Oakland Park Police Department, where he gave a taped confession (T. Vol. 1 p. 35).

During cross examination, Rhodes testified that he was not at the police station when Cox arrested Ault on the unrelated charge, and he did not know that Cox had been contacted (T. Vol. 1 p. 42). When Rhodes went to see Ault at the County Jail he did not know that Ault had signed a rights invocation with respect to the unrelated sexual battery case (T. Vol. 1 p. 48).

Winnifred Walters, taught at Lloyd Estates Elementary, the school the girls attended. She described what Deane and Alicia,

were wearing on November 4th, the day they disappeared (T. Vol. 8 p. 1511).

Mildred Manning testified that she worked at a convenience store, and she saw the girls everyday. She testified that on November 4th, between two and three-o-clock, the girls walked in front of the convenience store. (T. Vol. 8 p. 1514-1516).

James Marrazzo testified that he saw Ault outside the convenience store on November 4th (T. Vol. 8 p. 1524). Larry Joe Jackson stated that he had seen the girls in Ault's truck on October 30th (T. Vol. 8 p. 1525-1529).

Delois Skeete ("Skeete"), worked at John Easterlin Park and had befriended Donna Jones, the victims' mother, and her family (T. Vol. 8 pp. 1544-1552). Skeete testified that she had seen Deane and Alicia with Ault, in his truck, the Friday before they were killed. She averred that she told the girls never to ride in his car again (T. Vol. 8 pp. 1554).

Donna Jones ("Jones") testified that she met Ault at the park during the day while the girls were at school (T. Vol. 8 p. 1570). That same day, Ault picked her girls up from school and brought them home (T. Vol. 8 p. 1572). Jones had scolded the girls for getting into his truck (T. Vol. 8 p. 1573). On November 4th, Jones took the girls to school and they never came home (T. Vol. 8 p. 1577). She told the police that the last

person she had seen with the girls was Ault (T. Vol. 8 p. 1579). Jones went to Ault's home and he told her he had not seen the girls and told her not to call the police (T. Vol. 8 p. 1581). Jones went to the police and told them what Ault had said because she felt that it was a threat (T. Vol. 8 p. 1582).

Rhodes testified at trial that Ault agreed to show him where the bodies were (T. Vol. 8 p. 1621). Ault admitted to Rhodes that he had planned to kidnap and sexually abuse the girls (T. Vol. 8 p. 1622). Ault took the police to his home where he consented to the search and said the bodies were in the attic (T. Vol. 8 p. 1624-1625).

Appellant's confession was played for the jury. In it, he confessed that he had met Donna Jones and her three children at Easterlin Park, yet he did not even know the girls names. (T. Vol. 9 p. 1685). The first time he picked them up and drove them home he had thoughts about sexual intercourse with them (T. Vol. 9 p. 1689). Ault confessed that on November 4, 1996, he decided to sexually abuse the girls; he met them in front of the convenience store about 2:30 p.m. and offered them a ride (T. Vol. 9 p. 1690). Ault had planned to take them back to his place (T. Vol. 9 p. 1690). To lure the girls into his house he told them he had candy for them (T. Vol. p. 1691). Ault confessed that he sexually assaulted the older girl and she

started to scream and fight and he strangled her until she stopped screaming(T. Vol. 9 p. 1692). He said that she said no and told him it would ruin her life (T. Vol. 9 p. 1693). Ault admitted that he assaulted her with his finger, then he had intercourse with her (T. Vol. 9 p. 1693). He then pulled the younger one onto the floor and strangled her because she was there and she would tell (T. Vol. 9 p. 1695). Ault said that she was scared and crying (T. Vol 9 p. 1695). Ault told the police that he never sexually assaulted the younger girl (T. Vol. 9 p. 1696). Ault redressed the older girl and put both girls up into the attic and left to pick up his wife from work (T. Vol. 9 p. 1699). Donna Jones came to his home at about 9 p.m. looking for her daughters (T. Vol. 9 p. 1699). The police came to his home that night and he gave them permission to look around (T. Vol. 9 p. 1701). Ault said he confessed because he thought he might do this again (T. Vol. 9 p. 1702). Ault said that he killed the girls because he knew that if they told on him, he could go to jail for at least twenty five years (T. Vol. 9 p. 1713).

The medical examiner, Lance Davis (“Davis”) testified that Deane died from strangulation (T. Vol 9, p. 1777). Davis stated that Deane had been dead for two days when they found her (T. Vol. 9, p. 1780). He also testified that there was bruising and

hemorrhaging in Deane's vaginal tissue (T. Vol. 9, p. 1775). Davis also conducted the autopsy of Alicia and determined that she had also died from strangulation (T. Vol. 9, p. 1786). He opined that Alicia died between 12 and 18 hours after Deane (T. Vol. 9, p. 1787).

At the penalty phase, Byron Matthai testified that Ault attacked him with a knife in 1986 (T. Vol. 12 p. 2117). Michelle Lemay testified that Ault sexually assaulted her in 1989 (T. Vol. 12 p. 2127). Officer George Rylander testified that Ault sexually battered Nicole Gainey in 1994 (T. Vol. 12 p. 2143).

Tim Allen, was in the county jail with Ault. Allen testified that Ault confessed to him that when he strangled Deane he would squeeze, then let her breathe, then squeeze again until she was dead (T. Vol. 12 p. 2172-2173). Ault told Allen that he did it for the rush, the feeling of power (T. Vol. 2173).

Barbara Matson ("Matson"), Ault's mother, testified that her son was sexually abused by his brother Chuck (T. Vol. 12 p. 2255). Matson testified that Ault was remorseful about the murders(T. Vol. 13 p. 2290). Dr. Hyman Eisenstein testified that the crime was committed while Ault was under the influence of extreme emotional disturbance, and Ault's capacity to conform

his conduct to the requirements of the law was substantially impaired (T. Vol. 13 p. 2360). Gilbert Raiford, a professor of social work, characterized Ault as extremely emotionally disturbed (T. Vol. 13 p. 2431). Dr. Theodore Shaw testified that Ault is a pedophile (T. Vol. 14 p. 2493). Dr. Shaw also testified that Ault suffers from mental disturbance (T. Vol. 14 p. 2508).

In the case on rebuttal, the State called Lisa Allmand, Ault's sister. Allmand testified that Matson told her that Ault said his brother had been raping him since they were children (T. Vol. 15 p. 2715). Allmand testified that Matson told her that Ault never told her about the sexual abuse until after the murders occurred (T. Vol. 15 p. 1216). The jury recommended death on Counts I and II by votes of nine to three and the trial judge imposed a death sentence on both counts. This appeal follows.

Summary Of The Argument

POINT I: Appellant's motion to suppress was properly denied because the right to counsel is charge specific, therefore, the rights invocation form signed with respect to the unrelated sexual battery did not apply to the instant murders and related charges.

POINT II: The trial court properly granted the state's challenge for cause against potential juror Reynolds because she was equivocal about whether she could impose the death penalty.

POINT III: The trial court properly denied Appellant's motion for penalty phase mistrial because the prosecutor's question regarding Ault's remorse concerning the murders was not prosecutorial misconduct.

POINT IV: The trial court allowed Dr. Raiford to express his opinion of Ault as emotionally disturbed. Moreover, the testimony was cumulative to the testimony of other defense mental health experts.

POINT V: The trial court properly allowed Officer Rylander to testify to the facts surrounding Ault's prior violent felony involving the sexual battery of Nicole Gainey. Likewise, the trial court properly allowed Lisa Allmand, Ault's sister, to testify in rebuttal that Ault did not tell his mother that he was sexually abused by his brother until after he committed the

murders.

POINT VI: The trial court properly denied Appellant's motion to discharge penalty phase counsel because Ault admitted that counsel was competent and that he never asked to represent himself. Ault did not ask for another lawyer.

POINT VII: The felony murder aggravating circumstance is constitutional.

POINT VIII: The death sentence does not violate Apprendi v. New Jersey, 530 U.S. 466 (2000).

POINT IX: This case should be remanded to determine if the sentences on the non-capital crimes could lawfully be imposed under the 1995 sentencing guidelines.

POINT X: The death sentence is proportional.

Argument

POINT I

THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION TO SUPPRESS. (RESTATED)

Appellant claims that the trial court improperly denied his motion to suppress as he was interrogated after signing an invocation of rights form on an unrelated 1995 sexual battery charge. Appellant claims that the denial of the motion to suppress violated his right to remain silent, and his right to counsel pursuant to the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments of the U.S. constitution. The State disagrees.

The trial court properly denied the motion to suppress because the rights invocation form was signed at a magistrate hearing on the unrelated sexual battery charge. The rights invocation form applied only to the sexual battery in the unrelated case, not to the instant murders and related charges. Appellant properly waived his rights when he confessed to Detective Rhodes("Rhodes"), thus the confession was properly admitted.

A trial court's ruling on a motion to suppress comes to the appellate court clothed with a presumption of correctness. A reviewing court must interpret the evidence, and reasonable

inferences and deductions derived therefrom, in a manner most favorable to sustaining the trial court's ruling. San Martin v. State, 717 So. 2d 462 (Fla. 1998). The trial court's ruling on the voluntariness of a confession should not be disturbed unless it is clearly erroneous. Escobar v. State, 699 So. 2d 988, 993-94 (Fla. 1997); Davis v. State, 594 So. 2d 264, 266 (Fla. 1992); Chambers v. State, 742 So. 2d 466, 468 (Fla. 3d DCA 1999) (citing Bonifay v. State, 626 So. 2d 1310 (Fla.1993) and Thompson v. State, 548 So. 2d 198 (Fla.1989)).

The right to counsel is offense-specific. The attachment and invocation of the right on one charge imposes no restrictions on police inquiry concerning other charges against a defendant. McNeil v. Wisconsin, 501 U.S. 171 (1991); Traylor v. State, 596 So.2d 957, 968 (Fla. 1992); Owen v. State, 596 So.2d 985 (Fla. 1992); San Martin v. State, 705 So. 2d 1337, 1345 (Fla. 1997). In Traylor, 596 So. 2d at 968, this Court ruled that once a defendant's Sixth Amendment right to counsel has attached and a lawyer has been requested or retained, the State may not initiate any crucial confrontation with the defendant on that charge in the absence of counsel throughout the period of prosecution. This Court further found that because a prime interest protected by the Sixth Amendment is the defendant's right to exercise self-determination in the face of

specific criminal charges, the right to counsel is charge-specific and the invocation of the right on one offense imposes no restrictions on police inquiry into other charges for which the right has not been invoked. Id.

Appellant claims that because Rhodes questioned him about the murders within hours of him signing the rights waiver form on the unrelated sexual battery, his confession is invalid. The deciding fact in this case is not the imminency of the interrogation, rather it is that the rights invocation form that Ault signed was on a completely different charge. There is no error because the right to counsel extended to the unrelated 1995 sexual battery case only, not the 1996 murders and contemporaneous crimes.

Here, the facts show that at the motion to suppress hearing, Rhodes testified that on November 5, 1996, he met with Ault and his wife Tia (T. Vol. I p. 10). Ault gave a statement denying any involvement in the disappearance of the victims in this case, saying that he had met the girls only once and they had never been in his truck (T. Vol. 1 p. 11). Within one hour after Rhodes interviewed Ault, Detective Cox of the Broward Sheriffs Office arrested him on an unrelated 1995 sexual battery charge (T. Vol. I pp. 17-18).

On the morning of November 6, 1996, Ault attended a

magistrate hearing and signed an invocation of constitutional rights with respect to the unrelated sexual battery case (R. Vol. II p. 394; T. Vol. 1 p. 47-48). Rhodes testified that he went to the county jail to question Ault about the instant murders, and did not know that Ault had signed an invocation of rights pertaining to the unrelated sexual battery case (T. Vol. 1 p. 48). Rhodes' additional questioning at the jail was prompted by evidence showing that Ault had lied in his original statement (T. Vol. 1 p. 16). Rhodes read Ault his Miranda rights and Ault waived those rights (T. Vol. 1 p. 22). Ault told Rhodes that he was going to call and ask him to come down to the jail (T. Vol. 1. p. 22). Ault confessed that the girls were dead within an hour after he took them and agreed to take Rhodes to where he had hidden the bodies (T. Vol. 1 pp. 26-29). Ault accompanied Rhodes and Officer Geyer to his home and told them that the bodies were in the attic (T. Vol. 1 p. 30). After the bodies were discovered, Rhodes took Ault to the Oakland Park Police department where Ault gave his taped confession (T. Vol. 1 p. 34).

Detective Cox testified at the motion to suppress hearing, that she worked in the the Broward Sheriff's Office Sex Crimes Unit in November 1996 (T. Vol. I p. 65). Cox said that on November 5, 1996, her husband, who worked at the Oakland Park

police department, contacted her and told her that Ault was at the station (T. Vol. I p. 67). Cox was investigating Ault on a sexual battery case which was unrelated to the murder investigation (T. Vol. I p. 67). She went to the Oakland Park station, spoke with Ault, and arrested him for the unrelated 1995 sexual battery (T. Vol. I p. 71). Here, the trial court properly denied Ault's motion to suppress because Ault's invocation of his Sixth Amendment right to counsel on the unrelated sexual battery case does not extend to Rhodes' inquiry regarding the crimes committed against Deane and Alicia. See Traylor, 596 So. 2d at 968.

Moreover, Appellant can not anticipatorily invoke his fifth amendment right to counsel. In Sapp v. State, 690 So. 2d 581 (Fla. 1997), this court found that an individual may not invoke his Fifth Amendment Miranda right to counsel before custodial interrogation has begun or is imminent. See Hess v. State, 794 So. 2d 1249 (Fla. 2001) (finding that a capital murder defendant's written invocation of constitutional rights, executed incident to his custody on other charges did not invoke his fifth amendment right to counsel on murder charges). The reason for informing individuals of their rights before questioning is to ensure that statements made during custodial interrogation are given voluntarily; it is not to prevent

individuals from ever making these statements without first consulting counsel. Sapp, 690 So. 2d at 586. This court reasoned that a rule allowing a person to invoke the right to counsel for custodial interrogation before it is even imminent (whether it be through a claim of rights form or by any other means) would provide little additional protection against involuntary confessions but would unnecessarily hinder lawful efforts by police to obtain voluntary confessions. Id. at 586. This court stated that it believes that requiring the invocation to occur either during custodial interrogation or when it is imminent strikes a healthier balance between the protection of the individual from police coercion on the one hand and the State's need to conduct criminal investigations on the other. Id.

Furthermore, in State v. Guthrie, 666 So. 2d 562 (Fla. 2d DCA 1995), Guthrie was arrested for Grand Theft at 12:30 a.m., and at 8 a.m. that same day he signed an invocation of constitutional rights. Seven hours later on the same day, two detectives went to the jail to question Guthrie about an allegation of sexual child abuse. Guthrie waived his Miranda rights and confessed to the sexual abuse. The Second District Court of Appeal suppressed the confession. However, on appeal, this Court quashed the decision based upon Sapp, and remanded

the cause for further proceedings. State v. Guthrie, 692 So. 2d 888 (Fla. 1997).

The circumstances of the instant case are analogous to the circumstances in Sapp and Guthrie. Here, Appellant was arrested on November 5, 1996 on charges unrelated to the murders at issue. On November 6, Ault had his first appearance and signed a claim of rights form with respect to the unrelated sexual battery charge. Later that day, he met with Detective Rhodes and confessed to the murders. The trial court properly denied the motion to suppress as Ault may not anticipatorily invoke his right to counsel with respect to the murder charges. Sapp, 690 So. 2d at 586; Guthrie, 666 So. 2d at 888; Hess, 794 So. 2d at 1249. Hence, the trial court did not abuse its discretion when it denied Appellant's motion to suppress.

Moreover, any error in admitting Ault's confession was harmless. The focus of a harmless error analysis "is on the effect of the error on the trier-of fact." State v. DiGuilio, 491 So. 2d 1129, 1139 (Fla. 1986). "The question is whether there is a reasonable possibility that the error affected the verdict." Id.

> The test must be conscientiously applied and the reasoning of the court set forth for the guidance of all concerned and for the benefit of further appellate review. The test is not sufficiency-of-the-evidence, a correct result, a not clearly wrong, a

> substantial evidence, a more probable than not, a clear and convincing, or even an overwhelming evidence test. Harmless error is not a device for the appellate court to substitute itself for the trier-of-fact by simply weighing the evidence.

In this case, there is no reasonable possibility that the error affected the verdict. The police would have found the bodies even if Ault had not confessed and shown them where the bodies were. The record reflects that Delois Skeete had seen Alicia and Deane ride in Ault's car a few days before they were murdered (T. Vol. 8 p. 1554). Deane and Alicia's mother, Donna Jones testified that she had befriended Ault and his wife. On the day her girls were missing, she went to Ault's home and he told her he had not seen them, but also told her not to call the police because he had problems with them (T. Vol. 8 p. 1580-81). Jones told the police what Ault had said because she felt like it was a threat.

Mildred Manning testified that she worked at a convenience store and on November 4th, the day the girls were reported missing, she saw them walking in front of the store between two and three-o-clock in the afternoon (T. Vol 8 p. 1516). James Marrazzo testified that on November 4th, at about 2:30 p.m. he saw Ault standing in front of the convenience store (T. Vol. 8 p. 1524). Larry Joe Jackson testified that on October 30, he saw the girls with Ault at the convenience store and Ault was

buying them soda and chips (T. Vol. 8 1529). Jackson testified that he wrote down the tag number and followed the car until Ault dropped the girls off at the park (T. Vol. 8 pp. 1529-1530). He was suspicious because Ault was white and the girls were black. Detective Rhodes testified that he went to question Ault at the county jail because Ault's story was inconsistent (T. Vol. 8 p. 1613).

At the first interview with Rhodes, Ault said he had only met the girls once and told Rhodes that they had never been in his truck, yet other witnesses saw Ault with the girls at the park, at the convenience store, and in his truck(T. Vol. 8 p. 1516, 1524, 1529-30, 1554, 1597). While Ault invited the police to look around his home on the day the girls were missing, that search was cursory because they had not gathered evidence showing a clear link between Ault and the girls' disappearance. It is apparent from the instant record that Ault's initial version of events was called into question before Rhodes spoke to him on November 6th at the county jail, thus, a more thorough search of his home would have been conducted even had Ault not confessed.

There is overwhelming evidence that suggests that Ault's home would have been searched thoroughly, including any areas such as the attic where bodies could have been hidden, and the

girls bodies inevitably would have been found without Ault's statements. Maulden v. State, 617 So. 2d 298, 301 (Fla. 1993) citing Nix v. Williams, 467 U.S. 431, 448 (1984)(finding that evidence obtained as a result of unconstitutional police procedure may still be admissible provided the evidence would inevitably have been discovered by legal means); Thorp v. State, 777 So. 2d 385, 396 (Fla. 2000); Jeffries v. State, 797 So. 2d 573, 578 (Fla. 2001).

Here, the police were able to determine that Ault lied about the girls never being in his truck, Ault was seen at the same location where the girls were last seen alive, at about the same time. Ault had threatened Donna Jones when she asked Ault if he had seen her children, and he had a prior criminal history of sexual assault on children. Without question, had Ault not confessed on November, 6, 1996, the record reflects that the police had probable cause to search his home and would have found Deane and Alicia in the attic. There is no reasonable probability that any error affected the verdict. The conviction and sentence must be affirmed.

POINT II

THE TRIAL COURT PROPERLY GRANTED THE STATE'S CHALLENGE FOR CAUSE. (RESTATED).

Appellant claims that the trial court erroneously granted the State's cause challenge against prospective juror Reynolds

based on her views of the death penalty. In this case, the trial court properly granted the State's cause challenge, as prospective juror Reynolds stated that she was opposed to the death penalty and that her experiences with death in her own life would effect her decision with respect to guilt or innocence (T. Vol. II p, 573-574, Vol. V pp. 849-850). Moreover, it was never established that Reynolds could follow the law.

A trial court's decision on whether or not to strike a juror for cause is reviewed for abuse of discretion. Kearse v. State, 770 So. 2d 1119 (Fla. 2000) (noting that a trial court has great discretion when deciding whether to grant or deny a challenge for cause, recognizing that the trial court has a unique vantage point because the trial court is able to see the jurors' voir dire responses and make observations which simply cannot be discerned from an appellate record, and concluding that it is the trial court's duty to determine whether a challenge for cause is proper); Castro v. State, 644 So. 2d 987 (Fla. 1994) (excusing a juror for cause is subject to abuse of discretion review because the trial court has the opportunity to observe and evaluate the prospective juror's demeanor and credibility); United States v. Greer, 223 F.3d 41, 52 (2d Cir. 2000) (observing that a district court's determination regarding

whether actual bias exists to establish a challenge for cause is reviewed for abuse of discretion); United States v. Taylor, 207 F.3d 452, 454 (8th Cir. 2000) (noting that decisions denying challenges for cause are reviewed for abuse of discretion); United States. v. Lowe, 145 F.3d 45, 48 (1st Cir. 1998) (noting that a district court's ruling on for-cause challenges to prospective jurors is reviewed for clear abuse of discretion).

Under the abuse of discretion standard of review, the appellate court pays substantial deference to the trial court's ruling. A trial court's determination will be upheld by the appellate court "unless the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable man would take the view adopted by the trial court." Canakaris v. Canakaris, 382 So. 2d 1197, 1203 (Fla. 1980). The abuse of discretion standard is one of the most difficult for an Appellant to satisfy. Ford v. Ford, 700 So. 2d 191, 195 (Fla. 4th DCA 1997).

The standard for exclusion of jurors was settled in Wainwright v. Witt, 469 U.S. 412 (1985), the question is whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and oath. In Hannon v. State, 638 So. 2d 39 (Fla.

1994), this Court stated that "[t]he inability to be impartial about the death penalty is a valid reason to remove a prospective juror for cause". However, jurors who have expressed strong feelings about death penalty may serve if they indicate an ability to abide by the trial court's instructions. Johnson v. State, 660 So. 2d 637 (Fla. 1995). If there is any reasonable doubt that a prospective juror cannot render a verdict based solely on the evidence submitted and the trial court's instruction of law, he should be excused. King v. State, 622 So. 2d 134 (Fla. 3d DCA 1993). The relevant inquiry is whether a juror can perform his or her duties in accordance with the court's instructions and the juror's oath. Farina v. State, 680 So. 2d 392, 396 (Fla. 1996)

In Johnson, this Court found that on the question of whether or not a juror who is opposed to the death penalty has been rehabilitated, the trial court is in the best position to observe the attitude and demeanor of the juror and gauge the quality of the juror's responses. Johnson, 660 So. 2d at 644. In that case, when asked if she could follow the law, the potential juror stated that she thought and hoped she would, and this court affirmed the trial court's decision to strike the juror for cause, finding that the trial court is in the best position to judge the juror's response and demeanor. Id.

In Fernandez v. State, 730 So. 2d 277 (Fla. 1999), Fernandez argued that the trial court erred in granting the State's challenges for cause against four prospective jurors who stated during voir dire that they were opposed to the death penalty. Fernandez alleged that the four venire persons should not have been excused because, upon examination by defense counsel, they stated that they could follow the law. This court reasoned that the standard for determining whether a prospective juror may be excused for cause because of his or her views of the death penalty is whether the prospective juror's views would prevent or substantially impair the performance of his or her duties as a juror in accordance with the jury's instructions or oath. Id. This Court found that the trial court properly granted the challenges for cause because the four venire persons gave equivocal answers as to whether they could follow the law and set aside their beliefs. See also Foster v. State, 679 So.2d 747 (Fla. 1996).

Recently, in Morrison v. State, 27 Fla. L. Weekly S253, S255(Fla. March 21, 2002), this Court found that a juror was properly removed for cause when he expressed uncertainty about imposing the death penalty. This Court held that a juror who says he is not sure he can impose the death penalty is enough equivocation to support a challenge for cause. Id.

In the instant case, the record reflects that during the State's voir dire, prospective juror Reynolds stated that she was opposed to the death penalty (T. Vol. 2 pp. 573-574). During defense counsel's voir dire questioning, while Ms. Reynolds stated that she could be fair and impartial, she also said she was unsure of how personal experiences with death might effect her in trying to be fair and impartial regarding a finding of guilt, innocence, or the proper penalty. (T. Vol. 5 pp. 849-850, 866, 895). Defense counsel never rehabilitated Reynolds as it was never established that she could follow the law and the judges instructions.

The trial court did not abuse its discretion when it sustained the State's challenge for cause, as Reynolds gave equivocal responses regarding her ability to impose the death penalty. Moreover, defense counsel never established that Reynolds could follow the law. Johnson, 660 So. 2d at 637. Therefore, there has been no determination that Reynolds could perform her duties as a juror.

However, should this court find that the trial court erred in granting the state's challenge for cause, any error was harmless. The focus of a harmless error analysis "is on the effect of the error on the trier-of fact." State v. DiGuilio, 491 So. 2d 1129, 1139 (Fla. 1986). "The question is whether

there is a reasonable possibility that the error affected the verdict." Id.

> The test must be conscientiously applied and the reasoning of the court set forth for the guidance of all concerned and for the benefit of further appellate review. The test is not sufficiency-of-the-evidence, a correct result, a not clearly wrong, a substantial evidence, a more probable than not, a clear and convincing, or even an overwhelming evidence test. Harmless error is not a device for the appellate court to substitute itself for the trier-of-fact by simply weighing the evidence.

Id.

In this case, Appellant has made no showing that the jury was impartial, nor has he established that the State's reason for the strike was improper. The State did not use all 12 peremptory challenges, rather the State had two peremptory challenges left at the end of voir dire. (T. Vol. V p. 992). Had the trial court denied the challenge for cause, the State would have struck Reynolds with a peremptory. See Morrison v. State, 27 Fla. L. Weekly S253, s255 (March 21, 2001)(finding that the State may properly exercise a peremptory challenge to strike prospective jurors who are opposed to the death penalty but not subject to a challenge for cause). In Morrison, this court found that both parties have the right to peremptorily challenge persons who are inclined against their interests. Morrison, 27 Fla. L. Weekly at s255; See also Walls v. State,

641 So. 2d 381, 386 (Fla. 1993)(holding that trial court did not err in sustaining peremptory strike of venire person who expressed discomfort with the death penalty).

The State recognizes this Court's decisions in Chandler v. State, 442 So. 2d 171, 173-175 (Fla. 1983) and Farina v. State, 680 So. 2d 392 (Fla. 1996), where this court has refused to apply a harmless error analysis to the circumstance where the trial court erroneously granted a challenge for cause, yet this court affirmed the conviction and remanded for a new penalty phase. However, in light of this court's recent decision in Morrison, the State asks this court to revisit the issue.

In this case, there is no allegation that the State was seeking to remove Reynolds because of her race, rather the State's challenge was based on a proper reason, namely that she could not follow that law. However, should this court find that the record does not support the State's challenge, then under Morrison, the State could have struck Reynolds with a peremptory challenge simply because she was opposed to the imposition of the death penalty. Hence, any error was harmless. The conviction and sentence should be affirmed.

POINT III

THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION FOR PENALTY PHASE MISTRIAL. (RESTATED)

Appellant argues that the trial court improperly denied Appellant's motion for mistrial as the prosecutor's question regarding Ault's plot to kill a deputy to escape was prosecutorial misconduct and an erroneous introduction of collateral crime evidence. Appellant argues that the trial court should have rebuked the prosecutor in front of the jury and should have granted the motion for mistrial. This claim is wholly without merit. The trial court sustained Appellant's objection to the question and gave the proper curative instruction to the jury. The sentence should be affirmed.

A trial court's ruling on a motion for mistrial is subject to an abuse of discretion standard of review. Goodwin v. State, 751 So. 2d 537, 546 (Fla. 1999); Thomas v. State, 748 So. 2d 970, 980 (Fla. 1999) (explaining that a ruling on a motion for mistrial is within the trial court's discretion and should not be reversed absent an abuse of that discretion); Hamilton v. State, 703 So. 2d 1038, 1041 (Fla. 1997) (noting that a ruling on a motion for mistrial is within the trial court's discretion); United States v. Puentes, 50 F.3d 1567, 1577 (11th Cir. 1995) (stating that a district court's ruling on a motion for a mistrial is reviewed for abuse of discretion); United States. v. Honer, 225 F.3d 549, 555 (5th Cir. 2000) (reviewing the denial of a motion for mistrial for abuse of discretion).

Absent a finding to the contrary, juries are presumed to follow the instructions given them. U.S. v. Olano, 507 U.S. 725, 740 (1993); Valle v. State, 474 So. 2d 796, 805 (Fla. 1985); Carter v. Brown & Williamson Tobacco Corp., 778 So.2d 932 (Fla. 2000) citing Sutton v. State, 718 So. 2d 215, F.N. 1 (Fla. 1st DCA 1998).

A trial court's ruling on whether to give a curative instruction, as opposed to granting a mistrial, is subject to an abuse of discretion standard of review. Franqui v. State, 804 So. 2d 1185, 1194 (Fla. 2001).

Under the abuse of discretion standard of review, the appellate court pays substantial deference to the trial court's ruling. A trial court's determination will be upheld by the appellate court "unless the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable man would take the view adopted by the trial court." Canakaris, 382 So. 2d at 1203. The abuse of discretion standard is one of the most difficult for an Appellant to satisfy. Ford, 700 So. 2d at 195.

This Court has held that prosecutorial misconduct in the penalty phase must be egregious to warrant vacating the sentence and remanding for a new penalty phase proceeding. Bertolotti v.

State, 476 So. 2d 130, 133 (Fla. 1985); Rodriguez v. State, 609 So. 2d 493, 501 (Fla. 1992); Jones v. State, 695 So. 2d 1229, 1234 (Fla. 1997); Knight v. State, 746 So. 2d 423, 433 (Fla. 1998); Franqui, 804 So. 2d at 1194. Furthermore, after defense counsel adduces evidence during the sentencing phase of a capital case about a defendant's remorse for murders, the State can present evidence concerning the lack of remorse. Singleton v. State, 783 So. 2d 970 (Fla. 2001); Derrick v. State, 581 So. 2d 31 (Fla. 1991); Walton v. State, 547 So.2d 622 (Fla. 1989).[1] When the defense puts the defendant's character in issue in the penalty phase, the State is entitled to rebut with other character evidence, including collateral crimes tending to undermine the defense's theory. Johnson v. State, 660 So. 2d 637, 646 (Fla. 1995); Wuornos v. State, 644 So.2d 1000, 1009 & n. 5 (Fla. 1994); Valle v. State, 581 So. 2d 4-, 46 (Fla. 1991).

Appellant misrepresents the tenor of the record in the instant case. After reviewing the record surrounding the question asked by the State it is clear that there was no

[1] In this case, while the trial court sustained Ault's objection that the question was improper, it is still apparent that Ault raised the issue of remorse. Ault's plot to escape from jail rebuts his contention that he was remorseful about the crime.

prosecutorial misconduct. Nonetheless, the trial court cured any error when it instructed the jury to disregard the question. The following occurred on redirect of Barbara Matson:

> Ms. Smith: And has Steve discussed his remorse with you?
>
> Witness: Yes, he has. He has sent me letters and we have talked about it over the phone because as a mother I need to know that he is remorseful. This is just natural to want to know that he is remorseful and feels guilt and shame for what he has done.
>
> Ms. Smith: Are you a hundred percent sure that he is remorseful.
>
> Witness: Yes.
>
> Ms. Smith: Thank you, Your Honor.
>
> Mr. Donnelly: May we approach, your Honor?
>
> The Court: Yes.
>
> Mr. Donnelly: **I think she has opened the door to remorseful. I would like to question the witness about some of the defendant's incidents in jail to see if he has spoken to her and showed a lack of remorse**.
>
> Ms. Smith: Your Honor, if he wants to question her about whether she knows about whether he is remorseful, that is one thing, but if he is doing this just as an attempt to bring in the issue that he has already raised–I mean, she may or may not have knowledge.
>
> The Court: **He is entitled to bring it out**.
>
> Mr. Donnelly: I wouldn't expect him to tell

his mother. That is exactly the point.

The Court: It is going to depend on how the question is worded. I will allow it.

Ms. Smith: What is the answer?

The Court: Well, no, make your objection at the appropriate time.

Ms. Smith: No further questions at this time.

The Court: State?

Mr. Donnelly: Ms. Matson, you indicated that your son has told you that he is remorseful for this crime?

Witness: Yes, sir.

Mr. Donnelly: Do you believe that your son would hide information from you or that he would protect you?

Ms. Smith: Objection, your Honor, speculation. The witness doesn't know?

The Witness: I'm not sure how to answer.

The Court: Overruled. Please state your question again.

Mr. Donnelly: Do you think he is remorseful for killing these two girls? You are his mother, right?

Witness: He is remorseful.

Mr. Donnelly: You wouldn't expect him to tell you that he is remorseful?

Witness: He has shown me other ways through my husband and others.

Mr. Donnelly: Did he tell you about other

incidents after he murdered these two girls when he has been in jail as an example of his remorsefulness?

Witness: We have not talked about it. I have not asked him questions. It has come to light, yes, other things that have happened I am aware of them through other ways.

Mr. Donnelly: So you are aware then that while he is in jail and expressing his remorse to you by killing these two girls that he was making plans to kill a deputy with a razor blade and escape?

Ms. Smith: Objection, your Honor.

The Court: Let me have the attorneys up here.

Ms. Smith: There is no provocation for this outrage and I would ask that it be stricken from the record.

The Court: What has this got to do with the issue?

Mr. Donnelly: **It has everything to do with remorse. If the defendant is remorseful, he is not plotting to do any crimes. That is exactly what it goes toward**.

Ms. Smith: I anticipated in your discussions earlier that it would be discussions that he had with other people in jail which has been testified about.

The Court: No more questions about the attempted escape.

Mr. Donnelly: Okay.

The Court: All right, let’s move on.

(emphasis added)(T. Vol. 13 pp. 2296-2301).

While the trial court sustained the objection to the question, it did not find prosecutorial misconduct. In this case, the trial court sent the jury out and Appellant made a motion for mistrial, claiming that the State was attempting to prejudice the jury (T. Vol. 13 p. 2302). The State argued that the defendant opened the door to the remorse issue (T. Vol. 13 p. 2303). The trial court stated that it would deny the motion for mistrial (T. Vol. 13 p. 2305). Defense counsel asked that the judge instruct the jury to disregard the question regarding the escape and strike it from the record and she asked the judge to tell the jury that the question was prosecutorial misconduct (T. Vol. 13 p. 2306-2308). The trial court stated that it would not tell the jury why to disregard the question (T. Vol. 13 p. 2309). Defense counsel told the judge they just want him to tell the jury to disregard the last question (T. Vol. 13 p. 2311). Defense counsel then renewed her motion for mistrial and stated that the prosecutor committed misconduct (T. Vol. 13 p. 2311). When the jury returned, the trial court instructed them to disregard the last question asked by the Assistant State Attorney (T. Vol. 13 p. 2312).

In this case, it is clear that the trial court properly cured any error. Appellant relies on Geralds v. State, 601 So.

2d 1157 (Fla. 1992), and claims that a mistrial was warranted. However, this reliance is misplaced. Geralds argued that the trial court improperly allowed the State to refer to Geralds' prior criminal convictions to impeach a mitigation witness. Id. at 1161. On direct, the witness testified that he had been Geralds' neighbor for one year, had never had any confrontations with him, and that Geralds had often played with his young children. Id. On cross, the State asked the witness if he were aware of Geralds' prior convictions and if he knew Geralds had eight convictions. Id. Geralds objected and the trial court sustained the objection and prohibited questions about the specific number of convictions, but allowed the State to use the phrase multiple convictions. Id. at 1162. Defense counsel again objected and the State argued that the direct examination of the witness opened the door to rebuttal. Id. This court disagreed and found that the trial court's curative telling the jury to disregard the question, was not enough. Id. However, in Geralds, this Court's analysis hinged on the fact that the defense had not opened the door to rebuttal of the mitigating circumstance of no significant prior criminal history. (emphasis added) Id. Whereas in this case, it is clear from the record that Ault opened the door to remorse when defense counsel asked Appellant's mother if he was remorseful. Hence, it is apparent

that the analysis in Geralds does not apply to this case.

Moreover, upon a complete review of the record it is clear that there was absolutely no egregious misconduct by the prosecutor and the trial court properly cured any error when it instructed the jury to disregard the question. In this case, the prosecutor asked the court's permission to attack the defendant's remorse. The trial court found that Ault had opened the door, however, the trial court told the State that it would depend on the question. While the trial court sustained Ault's objection, it did not find prosecutorial misconduct. It is apparent from the record that the prosecutor was properly attempting to rebut the testimony that Ault was remorseful about the murders. The fact that the trial court found the question to be improper does not mean that the question constituted prosecutorial misconduct. Further, there was no abuse of discretion as the trial court cured any error by instructing the jury to disregard the question.

Moreover, any comment by the State had no effect on the sentence imposed and any error was harmless. The focus of a harmless error analysis "is on the effect of the error on the trier-of fact." State v. DiGuilio, 491 So. 2d 1129, 1139 (Fla. 1986). "The question is whether there is a reasonable possibility that the error affected the verdict." Id.

> The test must be conscientiously applied and the reasoning of the court set forth for the guidance of all concerned and for the benefit of further appellate review. The test is not sufficiency-of-the-evidence, a correct result, a not clearly wrong, a substantial evidence, a more probable than not, a clear and convincing, or even an overwhelming evidence test. Harmless error is not a device for the appellate court to substitute itself for the trier-of-fact by simply weighing the evidence.

Id.

In the instant case, Appellant confessed to the crime and the confession was played for the jury. On November 6, 1996, Detective Rhodes went to see Ault at the county jail (T. Vol. 9 p. 1613). Ault told Rhodes that he was going to call him to come to the jail (T. Vol. 9 p. 1615). Appellant agreed to show Rhodes where the bodies were and then he would give a taped statement (T. Vol. 9 pp. 1621-1622). Ault took law enforcement to his home and told the officers that the bodies were in the attic (T. Vol. 9 p. 1624). Ault admitted that he planned to kidnap and sexually abuse the girls (T. Vol. 9 p. 1622). Upon returning to the police station Ault waived his Miranda rights and confessed to the crime. Ault sexually assaulted the older girl and she started to scream and fight and he strangled her until she stopped (T. Vol. 9 p. 1692). Ault confessed that first he assaulted her with his finger then he had intercourse with her (T. Vol. 9 p. 1693). Ault confessed that he strangled

her until she wasn't breathing (T. Vol. p. 1695). Ault then pulled the younger one onto the floor and strangled her because she was there and she would tell (T. Vol. 9 p. 1695). Ault confessed that she was scared and crying (T. Vol 9 p. 1695). He confessed that he put both girls up into the attic and left to pick his wife up at work (T. Vol. 9 p. 1699). Ault confessed because he thought he might do this again (T. Vol. 9 p. 1702).

Byron Matthai had testified that Ault attacked him with a knife in 1986 (T. Vol. 12 p. 2117). Michelle Lemay testified that Ault sexually assaulted her in 1989 (T. Vol. 12 p. 2127). Officer George Rylander testified that Appellant had sexually assaulted Nicole Gainey in 1994 (T. Vol. 12 p. 2143). Furthermore, the State presented testimony from Tim Allen, who was at the county jail with Ault. Allen testified that Ault confessed that when he strangled the older girl, he would squeeze, let her breathe, then squeeze again until she was dead (T. Vol. 12 pp. 2172-2173). Based on the facts of this case, there is no reasonable possibility that any comments affected the sentence. Hence, the sentence should be affirmed.

POINT IV

THE TRIAL COURT ALLOWED DR. RAIFORD TO EXPRESS HIS OPINION THAT APPELLANT IS EXTREMELY EMOTIONALLY DISTURBED. (RESTATED)

Appellant argues that the trial court erroneously refused to allow Dr. Raiford to express his opinion regarding the applicability of the statutory mitigating circumstance that Appellant was under the influence of extreme mental or emotional disturbance at the time of the offense. Initially, the State would point out that this issue is not properly preserved because below when the State objected to the testimony defense counsel argued that she was presenting Dr. Raiford's testimony to prove **non-statutory mitigation** (emphasis added)(T. Vol. 13 p. 2434). Ault never argued that Dr. Raiford's opinion was being elicited to prove the statutory mitigator that he was under extreme mental or emotional disturbance at the time of the murders.

It is well established that for an issue to be preserved for appeal, it must be presented to the lower court and "the specific legal argument or ground to be argued on appeal must be part of that presentation if it is to be considered preserved." Archer v. State, 613 So. 2d 446 (Fla. 1993), quoting Tillman v. State, 471 So. 2d 32, 35 (Fla. 1985); See also Steinhorst v. State, 412 So. 2d 332, 338 (Fla. 1982). Therefore, because Ault never objected below that Dr. Raiford had been prevented from expressing his opinion about statutory mitigation, this claim is not properly before this court.

Turning to the merits, the trial court has broad discretion in determining the admissibility of evidence and such a determination will not be disturbed absent an abuse of discretion. Heath v. State, 648 So. 2d 660, 664 (Fla. 1994); Hardwick v. State, 521 So. 2d 1071, 1073 (Fla. 1988). Under the abuse of discretion standard of review, the appellate court pays substantial deference to the trial court's ruling. A trial court's determination will be upheld by the appellate court "unless the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable man would take the view adopted by the trial court." Canakaris, 382 So. 2d at 1203 . The abuse of discretion standard is one of the most difficult for an Appellant to satisfy. Ford, 700 So. 2d at 195.

Dr. Raiford was not qualified to testify to the statutory mitigator that Ault was extremely emotionally disturbed at the time of the crime. The determination of a witness's qualifications to express an expert opinion is peculiarly within the discretion of the trial judge whose decision will not be reversed absent a clear showing of error. Ramirez v. State, 542 So. 2d 352, 355 (Fla. 1989). An expert is permitted to express an opinion on matters in which the witness has expertise when the opinion is in response to facts disclosed to the expert at

or before the trial. Fla. Stat. Sec. 90.704. Section 90.702 requires that before an expert may testify in the form of an opinion, two preliminary factual determinations must be made by the court under section 90.105. First, the court must determine whether the subject matter is proper for expert testimony, ***i.e.***, that it will assist the trier of fact in understanding the evidence or in determining a fact in issue. Second, the court must determine whether the witness is adequately qualified to express an opinion on the matter. Charles W. Ehrhardt, Florida Evidence Sec. 702.1 (2001 ed.). A witness may only testify as an expert in the areas of his or her expertise, it is not enough that the witness is qualified in some general way. Id.

In this case, Dr. Raiford was generally qualified as an expert in social work (T. Vol. 13 p. 2416). Ault established that Dr. Raiford is a professor of Social Work and had done a few "psycho-socials" for capital defendants, yet did not elaborate as to what type of testing or evaluations the "psycho-socials" included (T. Vol. 13 p. 2413). Dr. Raiford said that he specializes in human growth and that now he mostly does volunteer work for the homeless (T. Vol. 13 pp. 2415-1418). Ault did not qualify Dr. Raiford as a mental health expert who could testify to the existence of mental health mitigators. Hence, the trial court did not abuse its discretion when it

found that Dr. Raiford was not qualified to testify that Ault was extremely emotionally disturbed.

Moreover, Appellant has misrepresented the record. The record reflects that Dr. Raiford opined that Appellant was extremely emotionally disturbed. The court declared Dr. Raiford an expert in social work, and the State agreed so long as he renders an opinion that is appropriate given his expertise (T. Vol. 13, p. 2417). Dr. Raiford explained the difference between mental illness and emotional disturbance, testifying that when it comes to an emotional disturbance, a person can know what they are doing, they know it is bad, but they still do it (T. Vol. 13 p. 2427). Dr. Raiford testified that Ault is emotionally disturbed (T. Vol. 13 p. 2431). Defense counsel asked the Doctor if he would characterize Ault as "extremely emotionally disturbed", Dr. Raiford said yes, and the State objected that Dr. Raiford was not qualified to make the determination (T. Vol. 13 p. 2431). The trial court sustained the objection (T. Vol. 13 p. 2431).

The State and defense counsel went side bar and the State argued that the witness was not qualified to render an opinion relating Ault's emotional disturbance as some mitigator (T. Vol. 13 pp. 2431-2432). Defense counsel stated that she stopped the Doctor before he elaborated, and the State said okay (T. Vol. 13

p. 2432). The following questioning then took place:

> Ms. Smith: Dr. Raiford, as a hypothetical for you, if a person is sexually abused as a child between the ages of about five and twelve, that he has organic brain damage, fetal alcohol syndrome, post-traumatic stress disorder, at the time of a crime such as we have in this case, would you render an opinion as to whether or not–
>
> Mr. Donnelly: Objection Judge, I know exactly where it is going. It is not admissible.

(T. Vol. 13 p. 2432).

The trial court sent the jury and the witness out and lengthy argument began. The trial court asked defense counsel to complete her question and she stated that she was going to ask Dr. Raiford if in his opinion the person in the hypothetical suffers from an emotional disturbance (T. Vol. 13 p. 2433). The State argued that before Dr. Raiford can relate statutory mitigators to this case, the defense has to establish that Dr. Raiford is familiar with the facts of this case and that has not been done (T. Vol. 13 p. 2433). Defense counsel argued that emotional disturbance is not a statutory mitigator and that non-statutory mitigators are relevant (T. Vol. 13 p. 2434). The trial court subsequently found that defense counsel had not laid a foundation for the witness to give an expert opinion about whether or not this defendant was emotionally disturbed at the time the crime was committed (T. Vol. 13 p. 2437). The trial court told defense counsel that he would not prevent her from

moving forward if she laid the proper predicate (t. Vol. 13 p. 2441).

Dr. Raiford continued to testify. The following took place during direct examination:

> Ms. Smith: **Tell the jury why you believe you are qualified to diagnose Mr. Ault as extremely emotionally disturbed?**
>
> Dr. Raiford: I have been a practitioner as well as a professor. I have worked with mentally ill and emotionally disturbed people. There are certain things we observe with clients who are mentally ill. **One of the things I observe in emotionally disturbed people– one of the things I observed with Mr. Ault immediately was he is what we call flat, inappropriate aftereffect. He did not seem to have the kind of emotional reaction to questions and responses that would have indicated good emotional health.**

(Emphasis added)(T. Vol. 13 p. 2447-2448).

Therefore, it is clear from the record that defense counsel was able to get Dr. Raiford's opinion with respect to the Appellant's emotional disturbance. While defense counsel couched the question as one about Dr. Raiford's qualifications, he clearly stated that Ault was emotionally disturbed and explained why he thought so. Even more compelling is that during cross examination, the State asked Dr. Raiford if at the time of the murders Ault was suffering emotional disturbance and Dr. Raiford testified that, that is his opinion (T. Vol. 13 pp. 2456-2457, 2458). Hence, Appellant's argument is meritless as

it is abundantly clear from the record that Dr. Raiford was able to express his opinion that at the time these offenses occurred Appellant was extremely emotionally disturbed.

Furthermore, if this Court finds that Dr. Raiford was not permitted to testify that Ault was extremely emotionally disturbed, such error is harmless beyond a reasonable doubt. This alleged error is harmless because Dr. Eisenstein testified that Ault was extremely emotionally disturbed (T. Vol. 13 p. 2335). "It is settled that even incorrectly admitted evidence is deemed harmless and may not be grounds for reversal when it is essentially the same as or merely corroborative of other properly considered testimony at trial." Morrison v. State, 27 Fla. L. Weekly S253 (Fla. 2002). As such, the sentencer was informed of this mental health mitigation. Hence, any error was harmless and the sentence should be affirmed.

POINT V

THE TRIAL COURT PROPERLY ALLOWED HEARSAY TESTIMONY DURING THE PENALTY PHASE. (RESTATED)

Appellant argues that the trial court erroneously allowed the State to rely on inadmissible hearsay testimony at the penalty phase. Specifically, Appellant claims that this occurred during the testimony of Officer Rylander with regard to the facts of a prior violent felony conviction and Lisa

Allmand's testimony with respect to the sexual abuse of Ault. A review of the record reveals that the testimony was properly admitted and the sentence should be affirmed.

The admissibility of evidence is within the sound discretion of the trial court, and the ruling will not be reversed unless there has been a clear abuse of that discretion. Ray v. State, 755 So. 2d 604, 610 (Fla. 2000); Zack v. State, 753 So. 2d 9, 25 (Fla. 2000); Cole v. State, 701 So. 2d 845 (Fla. 1997); Jent v. State, 408 So. 2d 1024, 1039 (Fla. 1981); General Elec. Co. v. Joiner, 522 U.S. 136, 118 S.Ct. 512, 517, 139 L.Ed.2d 508 (1997) (stating that all evidentiary rulings are reviewed for "abuse of discretion").

Under the abuse of discretion standard of review, the appellate court pays substantial deference to the trial court's ruling. A trial court's determination will be upheld by the appellate court "unless the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable man would take the view adopted by the trial court." Canakaris, 382 So. 2d at 1203. The abuse of discretion standard is one of the most difficult for an Appellant to satisfy. Ford, 700 So. 2d at 195.

In the instant case, Appellant concedes that Fla. Stat. Sec. 921.141(1), and Rhodes v. State, 547 So. 2d 1201, 1204 (Fla.

1989), allow for this type of hearsay, yet he is asking this court to review the issue and hold the evidence inadmissible as it is violative of the confrontation clause.

Specifically, F.S. 921.141(1), states:

> "... any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements..."

Here, officer Rylander testified that he investigated a sexual battery in 1994 (T. Vol. 12 p. 2135). Rylander interviewed the victim, Nicole Gainey, and she told Rylander that she was staying at a trailer with her mother in a park in Sunrise (T. Vol. 12 p. 2139). The victim said that she had asked Ault to take her to Winn-Dixie so that she could get some coloring pads (T. Vol. 12 p. 2140). Ault drove the victim down a dirt path and told her to take her panties off and when she refused he took them off and put his fingers inside of her (T. Vol. 12 p. 2140). The victim cried because Ault was hurting her (T. Vol. 12 p. 2140). When he was finished, Ault drove the victim back to her trailer where she told her mother what happened (T. Vol. 12 p. 2140). Rylander met with Ault who denied the victim's allegations (T. Vol. 12 p. 2141). Ault eventually plead guilty and was placed on probation (T. Vol. 12 p. 2143).

Contrary to Appellant's claim, with respect to officer

Rylander's testimony, there is no reason to revisit this Court's finding in Rhodes v. State, 547 So. 2d at 1204. In Rhodes, this court found that it is appropriate in the penalty phase of a capital trial to introduce testimony concerning the details of any prior felony conviction involving the use or threat of violence to the person rather than the bare admission of the conviction. See Bowles v. State, 804 So. 2d 1173 (Fla. 2001); Jones v. State, 748 So. 2d 1012 (Fla. 1999); Hudson v. State, 708 So. 2d 256 (Fla. 1998)(finding that it is appropriate during penalty proceedings to introduce details of prior violent felony conviction through hearsay testimony); Tompkins v. State, 502 So. 2d 415 (Fla. 1986); Stano v. State, 473 So. 2d 1282 (Fla. 1985). In Rhodes, this court reasoned that testimony concerning the events which resulted in the prior conviction assist the jury in evaluating the character of the defendant and the circumstances of the crime so that the jury can make an informed recommendation as to the appropriate sentence. Rhodes, 547 So. 2d at 1204. Under the statute regulating admission of evidence during penalty phase of capital murder trial, the linchpin of admissibility is whether the defendant has a fair opportunity to rebut any hearsay statements. Rodriguez v. State, 753 So.2d 29 (Fla. 2000).

Here, as Appellant concedes, the trial court properly

allowed officer Rylander to testify to the facts and circumstances surrounding Ault's 1994 conviction for sexual battery. Moreover, it is apparent that Ault had the opportunity to rebut Rylander's testimony. Ault had the opportunity to cross examine officer Rylander, as well as to present witnesses to rebut officer Rylander's testimony. Ault chose not to do so. In this case, the State was presenting the testimony to prove that Ault had been convicted of a prior violent felony which is proper under Rhodes and its predecessors. See Rodriguez, 753 So.2d at 44-45 (reaffirming the precedent allowing neutral witness to give hearsay testimony as to details of prior violent felony).

Ault also argues that the trial court erroneously allowed inadmissible hearsay during the testimony of Lisa Allmand. However, it is apparent that the testimony was being presented to rebut the testimony of Ault's mother, Barbara Matson. In this case Barbara Matson, Ault's mother, testified that she knew Ault's brother was sexually abusing Ault when Ault was a child (T. Vol. 12 pp. 2258-2263). In its case on rebuttal the State called Lisa Allmand, Ault's sister. Allmand testified that Matson told her that Ault said his brother had been raping him since they were children (T. Vol. 15 p. 2715). Allmand also testified that Ault did not tell Matson that he was sexually

abused until after he had committed the murders (T. Vol. 15 p. 1216).

Here, both Matson and Allmand were subject to cross examination. Moreover, Ault made no attempt to recall Matson to rebut Allmand's testimony. Hence, it is clear that Ault had a fair opportunity to rebut the testimony, yet chose not to do so. See Clark v. State, 613 So. 2d 412, 415 (Fla. 1992)(where an officer testified that Clark had previously been convicted of first degree murder this Court found that Clark had a fair opportunity to rebut the hearsay testimony, and the fact that he did not or could not rebut this testimony does not make it inadmissible). Here, since Ault had the opportunity to rebut Allmand's testimony his conviction and sentence should be affirmed.

POINT VI

THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION TO DISCHARGE PENALTY PHASE COUNSEL.(RESTATED)

In this case, Ault filed a pro se motion to dismiss penalty phase counsel. Ault argues that the trial court erred in two respects: (1) it conducted an inadequate hearing on the motion, and (2) it failed to inform him of his right to proceed pro se when the court denied the motion. The trial court properly denied Ault's motion to discharge penalty phase counsel because,

Ault admitted that Melodee Smith was not incompetent and he never claimed whether he wanted to represent himself nor whether he wanted another lawyer.

Pursuant to Nelson v. State, 274 So. 2d 256 (Fla. 4th DCA 1973), when a defendant complains about his court-appointed counsel, the judge should inquire of both the defendant and his attorney to determine if there is reasonable cause to believe that the attorney is rendering ineffective assistance. If no reasonable basis appears for a finding of ineffectiveness, the trial court should so state on the record and advise the defendant that if he discharges his counsel the State may not thereafter be required to appoint a substitute. Id. However, not all of a defendant's complaints require a full Nelson inquiry.

When a defendant merely expresses generalized grievances about his or her attorney without questioning his attorney's competence, no additional inquiry is required. See Lowe v. State, 650 So. 2d 969 (Fla. 1994)(defendant's general grievances did not warrant additional inquiry where the defendant "could point to no specific acts of counsel's alleged incompetence."); Smith v. State, 641 So. 2d 1319, 1321 (Fla. 1994), cert. denied, 513 U.S. 1163 (1994)(finding that while the defendant expressed dissatisfaction with the level of experience of court appointed

counsel, he did not question the attorney's competence so as to require a Nelson hearing); Jimenez v. State, 703 So. 2d 437, 439 (Fla. 1997)(finding that trial court must conduct Nelson inquiry only if the defendant questions the attorney's competence); Knight v. State, 770 So. 2d 663, 666 (Fla. 2000); Stephens v. State, 787 So. 2d 747, 758 (Fla. 2001).

In deciding whether a trial court conducted an appropriate Nelson inquiry, appellate courts apply the abuse of discretion standard of review. Kearse v. State, 605 So. 2d 534, 536 (Fla. 1st DCA 1992), rev. denied, 613 So. 2d 5 (Fla. 1993). Under the abuse of discretion standard of review, the appellate court pays substantial deference to the trial court's ruling. A trial court's determination will be upheld by the appellate court "unless the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable man would take the view adopted by the trial court." Canakaris, 382 So. 2d at 1203. The abuse of discretion standard is one of the most difficult for an appellant to satisfy. Ford, 700 So. 2d at 195.

In this case, the record reflects that Ault never claimed that counsel was incompetent. In his pro se motion, filed on June 25, 1999, Ault alleged that Melodee Smith did not have time to properly consult with him about his case, she had not

contacted a proper psychologist, and that she suffered from a conflict of interest (R. Vol. 3 pp. 413-415). Ault never explained what the conflict of interest was, nor does he explain it in his initial brief. A hearing on Ault's pro se motion was held on July 2, 1999. At the hearing, the trial court asked Ault if he had any specific complaints and Ault told him that Smith would not be ready on time (SR. Vol 3 p. 458). When asked, Ault told the court that she was not incompetent and he had no evidence that she had knowingly and wilfully failed to make adequate investigations (SR. Vol. 3 p. 458). Ault's only complaint was that she had not yet appointed a psychologist.[2] The trial court found that there was nothing indicating that Smith had been ineffective and incompetent in her representation of Ault (SR. Vol. 3 p. 459).

Similarly, in Jimenez, 703 So. 2d at 439, Jimenez requested that the court replace his attorney because he had a conflict with him, he could not reach him, and he did not know what was going on in his case. When asked by the court, Jimenez declined to explain the claims to the judge. Id. This court found that because Jimenez did not question his attorney's competence, no further inquiry was warranted. Hence, in this

[2] It is notable that counsel called a psychologist who testified that Ault was extremely emotionally disturbed.

case, as it is clear from the record that Ault did not question Smith's competence, his only complaint was that she had not yet appointed a psychologist, no further inquiry was required.

Ault's claim that the trial court failed to instruct him regarding his right to proceed pro se has not been preserved for appellate review. Here, Ault never requested to proceed to the penalty phase pro se in his written motion, nor during the hearing. It is well-established that an appeal may not be taken from a judgment or order of a trial court unless a prejudicial error is alleged and is properly preserved, or if not properly preserved would constitute fundamental error. Archer v. State, 613 So. 2d 446 (Fla. 1993), quoting Tillman v. State, 471 So. 2d 32, 35 (Fla. 1985); See also Steinhorst v. State, 412 So. 2d at 338. An issue is properly preserved if the legal argument or objection to evidence was timely raised before, and ruled on by, the trial court, and was sufficiently precise that it fairly apprised the trial court of the relief sought and the grounds therefor. Florida Statute §924.051(1)(b).

"An appellate court must confine itself to a review of only those questions which were before the trial court and upon which a ruling adverse to the appealing party was made." State v. Barber, 301 So. 2d 7, 9 (Fla. 1974); Larkins v. State, 655 So. 2d 95 (Fla. 1995)(defendant failed to preserve issue on appeal

by failing to make same objection in trial court); Archer v. State, 613 So. 2d 446 (Fla. 1993)(for issue preservation, it must be presented to lower court with specific legal argument or grounds).

Turning to the merits, Nelson and Faretta are related by the fact that Nelson suggests that if the trial court does not find a basis to discharge counsel, it should announce the reasons supporting its finding that counsel is rendering effective assistance, and inform the defendant that it is not required to appoint a new attorney. This means that if despite the trial court's findings, the defendant persists in wanting to discharge his attorney, appellant will have to either hire his own attorney or represent himself. Should he chose to represent himself, then a Faretta inquiry is needed. Faretta v. California, 422 U.S. 806, 835 (1975) provides:

> When an accused manages his own defense, he relinquishes, as a purely factual matter, many of the traditional benefits associated with the right to counsel. For this reason, in order to represent himself, the accused must 'knowingly and intelligently; forgo those relinquished benefits. Although a defendant need not himself have the skill and experience of a lawyer in order competently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open'. Id.

After Nelson, some appellate courts were under the mistaken assumption that if the trial court denied appellant's motion to discharge counsel, under Nelson, it was required to inform appellant he could represent himself, and proceed with a Faretta inquiry. The failure to explain to a defendant that he could represent himself was thought to be reversible error. More recent cases from this Court have dispelled this faulty premise.

First, Nelson includes no such requirement. Rather, it suggests that the trial court ***should*** engage in this procedure, and admittedly it is the better course. However a failure to inform appellant regarding his right to self-representation is not reversible error, and Faretta is not necessary absent an unequivocal request by defendant to represent himself. Capehart v. State, 583 So. 2d 1009 (Fla. 1991), stands for this proposition:

> Without establishing adequate grounds, a criminal defendant does not have a constitutional right to obtain different court-appointed counsel. Capehart at no time asked to represent himself. His letter indicated only a dissatisfaction with his counsel and the guilty verdict, and it clearly is addressed to the replacement of counsel. The court addressed his allegations in open court and found them to be insufficient. While the better course would have been for the trial court to inform Capehart of the option of representing himself, we do not find it erred in denying Capehart's request for new

counsel.

Id. at 1014.

In Watts v. State, 593 So.2d 198 (Fla. 1992) cert. denied, 505 U.S. 1210 (1992), this Court took on the narrow question of whether a defendant must be informed, when his motion to discharge appointed-counsel is denied, whether or not he has the choice to represent himself. This Court found that absent an unequivocal request for self-representation, the trial court is not required to inform the defendant he can represent himself. In State v. Craft, 685 So. 2d 1292 (Fla. 1996), this Court reiterated :

> The question presented here is whether Nelson v. State, 274 So.2d 256 (Fla. 4th DCA 1973), which was cited with approval by this Court in Hardwick v. State, 521 So.2d 1071, 1074-1075 (Fla.) cert. denied, 488 U.S. 871, 109 S.Ct. 185, 102 L.Ed.2d 154 (1988), requires the trial court to inform a defendant of his or her right to self-representation after the court denies the defendant's motion to discharge counsel based on incompetence. Nelson clearly requires an inquiry where the defendant requests new counsel based upon incompetence of counsel. That inquiry was conducted in the instant case and the record supports the trial court's conclusion that there was no reasonable basis for a finding of incompetent representation.
>
> However, Nelson also states that the court should "advise the defendant that if he discharges his original counsel the State may not thereafter be required to appoint a substitute." While it is unclear from

> Nelson or Hardwick whether the judge has an obligation to inform the defendant of his right to self-representation, a recent decision from this Court appears to resolve the question by finding no such obligation. In Watts v. State, 593 So.2d 198 (Fla. 1992) cert. denied, 505 U.S. 1210, 112 S.Ct. 3006, 120 L.Ed.2d 881 (1992), the defendant claimed that the trial court erred in failing to advise him of his right to represent himself and in failing to conduct a Faretta inquiry when he expressed dissatisfaction with his attorneys and requested that another attorney be appointed. This Court concluded that "because there was no unequivocal request for self-representation, Watts was not entitled to an inquiry on the subject of self-representation under Faretta.

Id. at 1295 (some internal citation omitted). See Lopez v. State, 684 So. 2d 342 (Fla. 3rd DCA 1996); Jimenez v. State, 703 So. 2d 437 (Fla. 1997).

The trial court's conclusion that Ms. Smith's representation was not ineffective is supported by the record. Hence, Ault's motion to discharge counsel was properly denied. Further, because Ault did not make an unequivocal request for different counsel nor to proceed pro se, there is no error and the conviction and sentence should be affirmed.

POINT VII

> THE FELONY MURDER AGGRAVATING CIRCUMSTANCE (Florida Statutes 921.141(5)(d)) IS CONSTITUTIONAL. (RESTATED)

Appellant claims that the felony murder aggravating

circumstance is unconstitutional. Both this Court and the federal courts have repeatedly rejected claims that the "felony-murder" aggravator is unconstitutional because it constitutes an "automatic" aggravating factor. See Lowenfeld v. Phelps, 484 U.S. 231 (1988); Blystone v. Pennsylvania, 494 U.S. 299 (1990); Banks v. State, 700 So. 2d 363, 367 (Fla. 1997); Mills v. State, 476 So.2d 172, 178 (1985) (concluding that the legislature's determination that a first-degree murder committed in the course of another dangerous felony was an aggravated capital felony was a reasonable determination); Johnson v. Dugger,932 F.2d 1360 (11th Cir. 1991). Even if Appellant's argument is read as based upon the constitutional guarantees of the Eighth and Fourteenth Amendments, this Court has already rejected those arguments in Clark v. State, 443 So. 2d 973 (Fla. 1983)("felony-murder" aggravator comports fully with the constitutional requirements of equal protection and due process as well as the prohibition against cruel and unusual punishment), cert. denied, 467 U.S. 1210(1983).

POINT VIII

THE DEATH SENTENCE DOES NOT VIOLATE APPRENDI v. NEW JERSEY, 530 U.S. 466, 120 S. CT. 2348 (2000).

Appellant argues that his death sentence violates Apprendi v. New Jersey, 520 U.S. 466 (2000). This claim has been raised

and rejected by this court. In Mills v. Moore, 786 So. 2d 532 (Fla. 2001) this court found that the rule announced by the United States Supreme Court in Apprendi v. New Jersey, 530 U.S. 466 (2000) requiring any fact increasing penalty for a crime beyond the prescribed statutory maximum to be submitted to jury and proved beyond reasonable doubt, does not apply to the state capital sentencing scheme. Furthermore, this court has found that Apprendi does not apply in a capital sentencing scheme because death is the statutory maximum sentence upon conviction for murder. Spencer v. State, SC. No. 00-1051, 2002 WL 534441 (Fla. April 11, 2002), Bottoson v. State, 27 Fla. L. Weekly s119 (Fla. Jan 31, 2002), King v. State, 808 So. 2d 1237 (Fla. 2002), Card v. State, 803 So. 2d 613 (Fla. 2001). Florida's capital sentencing statute was upheld in Proffitt v. Florida, 428 U.S. 242 (1976).

Moreover, the recent decision of the U.S. Supreme Court in Ring v. Arizona, 122 S. Ct. 2445 (2002) does not apply to Florida's death penalty scheme. Ring does not require jury sentencing in capital cases, rather it involves only the requirement that the jury find the defendant death-eligible. Id. at n.4. In Ring, the United States Supreme Court held that the Sixth Amendment right to a jury trial applied to capital cases and requires that the fact-finding necessary to sentence a

defendant to death be done by a jury. The Ring Court reasoned that because aggravating factors operate as the functional equivalent of an element, the Sixth Amendment requires that they be found by a jury. The Ring Court overruled Walton v. Arizona, 497 U.S. 639 (1990) because it was "irreconcilable" with Apprendi. The Ring Court limited its holding to states that allow a judge, "sitting without a jury", to impose death.

Even in the wake of Ring, a jury only has to make a finding of one aggravator and then the judge may make the remaining findings. Ring is limited to the finding of an aggravator, not any additional aggravators, nor mitigation, nor any weighing. Ring, 122 S.Ct. 2445 (Scalia, J., concurring)(explaining that the fact finding necessary for the jury to make in a capital case is limited to "an aggravating factor" and does not extend to mitigation or to the ultimate life-or-death decision which may continue to be made by the judge); Ring, 122 S.Ct. 2445 (Kennedy, J., concurring)(noting that it is the finding of "an aggravating circumstance" that exposes the defendant to a greater punishment than that authorized by the jury's verdict). Constitutionally, to be eligible for the death penalty, all the sentencer must find is one narrower, *i.e.*, one aggravator, at either the guilt or penalty phase. Tuilaepa v. California, 512 U.S. 967, 972 (1994)(observing "[t]o render a defendant eligible

for the death penalty in a homicide case, we have indicated that the trier of fact must convict the defendant of murder and find one 'aggravating circumstance' (or its equivalent) at either the guilt or penalty phase.”). So, once a jury has found one aggravator, the constitution is satisfied, the judge may do the rest. The trial judge may make additional findings in aggravation or mitigation, perform any weighing and may be the ultimate decision maker. Just as a trial judge may perform any weighing and may be the ultimate decision maker, an appellate court may engage in any fact-finding necessary to perform a harmless error analysis without violating the right to a jury trial. A capital defendant does not have a Sixth Amendment right to have a jury weigh aggravation and mitigation, so any reweighing by appellate judges does not violate the Sixth Amendment. Hence, the decisions of Apprendi and Ring do not apply to Florida’s capital sentencing scheme and Ault’s death sentence should be affirmed.

Additionally, the requirements of Apprendi and Ring were met in this case. Apprendi requires a jury rather than a judge make the determination of certain facts and that those facts be proven beyond a reasonable doubt rather than by the preponderance standard. Both requirements were met. The jury recommended a death sentence and the aggravators were proven

beyond a reasonable doubt. Ault cannot present a valid Apprendi challenge to Florida's death penalty statutes. Ault had a jury at sentencing. The jury was present during the penalty phase; heard the evidence of aggravators and mitigators; was instructed on aggravating circumstances and the requirement that they be proven beyond a reasonable doubt. Ault's jury then recommended two death sentences by a 9 to 3 vote. In Florida, only a defendant in a jury override case has any basis to raise an Apprendi challenge to Florida's death penalty statute. A capital defendant who has had a jury recommend death simply cannot claim that his right to a jury trial was violated. There can be no violation of the right to a jury trial under these facts. Thus, the death penalty imposed in this case does not violate Apprendi.

Moreover, not only did Ault have a jury that recommended death but one of the aggravators that the judge relied on was found by the jury in the guilt phase. The felony murder aggravator, *i.e.,* that the homicides occurred during the commission of a felony was found to exist by the jury in the guilt phase. The jury found the defendant guilty of two counts of first degree murder of Deane and Alicia (R. Vol. 3 pp. 485-86). Moreover, the jury found Ault guilty of two counts of sexual battery, kidnaping and aggravated child abuse of Deane

(R. Vol. 3 pp. 487-492). The jury also found Ault guilty of the kidnaping and aggravated child abuse of Alicia (R. Vol. 3 pp. 487-492). The jury found the felony murder aggravator beyond a reasonable doubt prior to the penalty phase. Ring 122 S.Ct. 2445 at n.7 (declining to address Arizona's argument that the implied jury findings render any error harmless). Therefore, because the jury found one aggravator at the guilt phase the constitution is satisfied.

Furthermore, not only did the jury find that the murders were committed during the course of a felony, the judge's finding of the prior violent felony aggravator is exempted from the holding in Apprendi. Apprendi explicitly exempted recidivist factual findings from its holding. Apprendi, 530 U.S. at 490 (holding, other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt).[3] Thus, a trial court may make

[3] The *Apprendi* majority noted that it is arguable that *Almendarez-Torres* was "incorrectly decided and that a logical application of our reasoning today should apply if the recidivist issue were contested." *Apprendi* at 489, 120 S.Ct. 2348. However, contrary to this observation, exempting recidivism from the holding in *Apprendi* is logical. The Sixth Amendment guarantees the right to a jury trial, not two. Any defendant, who is a recidivist, has already had a jury find the underlying facts of conviction at the higher standard of proof. The judge, in a recidivist sentencing situation, is merely taken

factual findings regarding recidivism. Walker v. State, 790 So.2d 1200, 1201 (Fla. 5th DCA 2001)(noting that Florida courts, consistent with Apprendi's language excluding recidivism from its holding, have uniformly held that an habitual offender sentence is not subject to an Apprendi). Here, the trial court found the prior violent felony aggravator. This is a recidivist aggravators. Recidivist aggravators may be found by the judge even in the wake of Ring. Ring, 122 S.Ct. 2445 at n.4 (noting that none of the aggravators at issue related to past convictions and that therefore the holding in Almendarez-Torres v. United States, 523 U.S. 224(1998), which allowed the judge to find the fact of prior conviction even if it increases the sentence beyond the statutory maximum was not being challenged). Therefore, the prior violent felony aggravator may be found by the judge even in the wake of Ring. The death sentences should be affirmed.

POINT IX

THIS CASE SHOULD BE REMANDED TO DETERMINE IF THE SENTENCES IMPOSED ON COUNTS V-VIII COULD HAVE LAWFULLY BEEN IMPOSED UNDER THE 1995 SENTENCING GUIDELINES. (RESTATED)

---

judicial notice of the prior jury's verdict. A defendant is entitled to one jury trial, not two.

Appellant claims that he is entitled to re-sentencing because the imposition of consecutive sentences on counts V-VIII was illegal. He also argues that the sentences imposed violate Heggs v. State, 759 So. 2d 620 (Fla. 2000). Primarily, Appellant argues that his sentences on the non-capital offenses are illegal because the trial judge ordered them to run consecutive to each other. The State agrees that the case should be remanded for re-sentencing because the trial court failed to prepare written reasons for the departure. The consecutive nature of the sentences on the non-capital offenses, which exceeds the guidelines, is illegal. See Donaldson v. State, 722 So. 2d 177 (Fla. 1998), Robertson v. State, 611 So. 2d 1228 (Fla. 1993), Robinson v. State, 520 So. 2d 1 (Fla. 1988).

Appellant also argues that his sentences on Counts V-VIII violate Heggs v. State, 759 So. 2d 620 (Fla. 2000). The State submits that, consistent with Judge Altenbernd's analysis in Smith v. State, 761 So. 2d 419 (Fla. 2d DCA 2000), Appellant's case must be remanded back to the trial court for preparation of the 1994 guidelines scoresheet in light of this Court's decision in Heggs v. State, 759 So. 2d 620 (Fla. 2000):

> if a person's sentence imposed under the 1995 guidelines could have been imposed under the 1994 guidelines (without a departure), then that person shall not be

> entitled to relief under our decision here. (Citations omitted).

Smith, 761 So. 2d at 422.

Upon preparation of the 1994 guidelines score sheet, the trial court needs to determine whether the sentence imposed for the non-capital November 1996 crimes under the 1995 guidelines could lawfully have been imposed under the 1994 guidelines without a departure. If the answer is in the negative, then Appellant must be resentenced in accordance with the valid guidelines in existence at the time he committed his offense. Conversely, if the court determines re-sentencing is unnecessary, an order making this finding shall be entered. See George v. State, 760 So. 2d 293 (Fla. 2d DCA 2000). Therefore, this case should be remanded for reconsideration of the sentences imposed on the non-capital cases.

POINT X

THE DEATH PENALTY IS PROPORTIONAL.

Although Ault has not challenged the proportionality of his sentence, the Court is required to complete such a review. Gore v. State, 784 So. 2d 418, 438 (Fla. 2001) (recognizing even absent challenge, Court "has an independent duty to review the proportionality of [the] death sentence as compared to other cases where the Court has affirmed death sentences."); Jennings v. State, 718 So. 2d 144 (Fla. 1998). Proportionality review is

to consider the totality of the circumstances in a case compared with other capital cases to ensure uniformity. Urbin v. State, 714 So. 2d 411, 416-17 (Fla. 1998); Terry v. State, 668 So. 2d 954 (Fla. 1996). It is not a comparison between the number of aggravators and mitigators, but is a "thoughtful, deliberate proportionality review to consider the totality of the circumstances in a case, and to compare it with other capital cases." Porter v. State, 564 So. 2d 1060, 1064 (Fla. 1990). The Court's function is not to reweigh the aggravators and mitigators, but to accept the jury's recommendation and the judge's weighing of the evidence. Bates v. State, 750 So. 2d 6 (Fla. 1999).

The two death sentences are proportional based on the six (6)aggravating factors: (1) Ault was on community control when he committed the crimes, (2) prior violent felony, (3) committed during commission of a felony (kidnapping and aggravated child abuse), (4) avoid arrest, (5) heinous atrocious or cruel ("HAC"), (6) victims were less than 12 years old. The trial court found no statutory mitigation. The non-statutory mitigators are, family relations and troubled upbringing(little weight), prenatal care (little weight), sexual and physical abuse (some weight), physical injuries (little weight), adult problems (pedophilia) (some weight), remorse (some weight).

The trial court found the following:

> After reviewing this matter thoroughly and having considered everything that has been presented, this court finds that the aggravating factors that were established beyond a reasonable doubt far outweigh the mitigating factors that were established by the evidence.
>
> This court is also required to take into consideration that the law in this State recognizes that "death is a unique punishment" and "the death penalty must be limited to the most aggravated and least mitigated of first degree murders". Larkins v. State, 739 So. 2d (Fla. 1999). The murders of the two little girls in this case, after the abduction of them both, the rape of the older child, considered within the context that it occurred, coupled with the history of the Defendant, are undeniably in the category of the most aggravated, and least mitigated of first degree murders.

(R. Vol. 5 p. 926).

Based upon the circumstances of this crime along with the strong aggravation and weak mitigation, the sentence is proportional as compared to death sentences in other cases. In Wike v. State, 698 So. 2d 817, 818 (Fla. 1997), Wike abducted Sayeh age eight (8), and Sara, age six (6), sisters, from their home. Wike bound Sara's hands behind her back, drove to a remote location, sexually battered Sayeh and slit her throat. Sayeh managed to escape, while Wike was killing Sara. Id. This Court affirmed the sentence finding four aggravators (prior violent felony, avoid arrest, HAC, and CCP) and gave little

weight to the mitigation. Id. See Rose v. State, 787 so. 2d 786 (Fla. 2001)(affirming death sentence for murder of eight (8) year old girl, finding four aggravators, prior violent felony, felony murder (kidnaping), HAC, and felony committed while on probation); Rolling v. State, 695 So.2d 278 (Fla. 1997) (affirming death sentences despite defendant's significant statutory and nonstatutory mental mitigation, including family's history of mental illness and defendant's physically and mentally abusive childhood); Henyard v. State, 689 So.2d 239 (Fla.1996) (affirming two death sentences for defendant who raped and shot one victim, who survived, in close proximity to and in earshot of her young children and who later killed the children while they pled for their mother, despite trial court's finding of both statutory mental mitigators and nonstatutory mitigation involving defendant's stunted emotional level, low intelligence, impoverished upbringing, and dysfunctional family). Furthermore, in Branch v. State, 685 So.2d 1250 (Fla.1996), the female victim was beaten, stomped, sexually assaulted, and strangled by the defendant. The defendant was convicted of first-degree murder and sentenced to death and this Court affirmed the death sentence finding three aggravators (murder was committed in the course of a sexual battery, prior violent felony conviction, and HAC) and several nonstatutory

mitigators. Id. at 1253. See Mendyk v. State, 545 So.2d 846 (Fla.1989) (involving a strangulation with three aggravators (murder was committed during a kidnaping and sexual battery; HAC; and CCP) and one mitigator (age of 21)).

Moreover, this Court has upheld death sentences with less aggravation than shown here. Sliney v. State, 699 So. 2d 662 (Fla. 1997)(affirming sentence with felony murder and avoid arrest aggravators, two statutory mitigators, and several nonstatutory mitigators); Hayes v. State, 581 So. 2d 121 (Fla. 1991) (affirming death penalty with CCP and felony murder aggravators, one statutory and other nonstatutory mitigators). Based upon the above, this Court should affirm Ault's death sentences.

Conclusion

For the foregoing reasons, it is respectfully submitted that the decision of the trial court should be affirmed.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

_____
Melanie Ann Dale
Assistant Attorney General
Florida Bar No. 0168556
1515 N. Flagler Dr. #900
West Palm Beach, FL 33401
(561) 837-5000

Counsel for Appellee

Certificate Of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to, Richard B. Green, Esq., Office of the Public Defender, 421 Third Street, 6th Floor, West Palm Beach, Fl 33401, this ____ day of _____, 2002.

_____
Melanie Ann Dale

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY the size and style of type used in this brief is

12 point Courier New, a font that is not proportionally spaced.

_____

Melanie Ann Dale