IN THE SUPREME COURT OF FLORIDA

FRANKLIN DELANO FLOYD,

Appellant,

v. **CASE NO. SC03-35**

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY, STATE OF FLORIDA

ANSWER BRIEF OF THE APPELLEE

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STATEMENT OF THE CASE AND FACTS

Cheryl Commesso disappeared in early April, 1989 (SV18/1052-53). She was living with her parents and her brother, and left to visit some friends but told her brother that she would be back the following week (SV18/1053; SV19/1241). Her car was impounded from the St. Petersburg/Clearwater airport in May, 1989, and had been parked there since at least April 7 (SV17/911-912, 920; SV18/1053-54).

Shortly before Cheryl's disappearance,[1] a friend and co-worker, Diana Rife, received a phone call from Appellant Franklin Floyd (SV18/1065-66). Floyd wanted Rife to provide Commesso's last name and parents' address; he was very angry and threatened that he would get Commesso because he believed she was responsible for problems his family was having with authorities; Floyd intended to make her regret what she had done (SV18/1066-67). Sometime after the phone conversation, Rife saw Floyd and Commesso in a heated argument outside the Mons Venus bar where Rife, Commesso, and Floyd's daughter Sharon Maxwell all worked (SV18/1067-68). That was the last time Rife had any contact with Commesso (SV18/1074, 1080).

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[1]Rife indicated this was shortly after St. Patrick's Day, which would be three weeks prior to the time Commesso's car was left at the airport.

At that time, Floyd lived in a mobile home with his daughter, Sharon, and her young son Michael (SV18/1028; SV19/1185). In late May, 1989, Floyd asked a neighbor to mow his yard and collect his mail, indicating that he would be back on June 15 (SV19/1198). However, Floyd and Sharon were married under other names in New Orleans on June 15, and the mobile home in Pinellas County burned down on June 16 (SV18/1028-31). Floyd did not to return to Florida and asked the neighbor to burn his mail (SV19/1199).

In March, 1995, Commesso's skeletal remains were discovered in an area off of Interstate 275 in Pinellas County (SV15/623-26, 646-47, 656, 661-62; SV16/898). Her skull contained two bullet wounds and lead fragments consistent with .22 caliber long rifle bullets (SV16/894; SV17/909-910; SV19/1256-59). There was also a fracture to the right cheek area that occurred shortly before death, as it had not yet begun to heal (SV18/1137; SV19/1256, 1260). Located in the same area were two silicone breast implants, several items of clothing, jewelry, artificial fingernails, and a clump of fibers (SV15/626, 630-32, 639, 668-75, 679-83, 686-87, 694-714; SV16/868; SAD/2169). There were roots several years old growing in and around the remains, indicating they could have been there for six or seven years (SuppAddT/2185).

Also in March, 1995, a sealed envelope containing 97 photographs was discovered in a truck which had been stolen by Floyd in Oklahoma on September 12, 1994, and found abandoned in Texas on October 22, 1994 (SV15/724-26, 737, 741, 751, 769; SV17/988-995). Among the photographs were pictures of Floyd's boat, Floyd's daughter-turned-wife Sharon Maxwell and other young girls in Floyd's life, and pictures of Cheryl Commesso laying bound, beaten and bleeding on a sofa identified as one destroyed in a fire at Floyd's trailer in June, 1989 (SV18/1094-95, 1154; SV19/1189, 1193-97). The clothes Commesso is wearing in the pictures appear to be the same articles found near Commesso's remains in 1995 (SV20/1336-44). In addition, expert testimony indicated that Commesso died within a short time of receiving injuries consistent with the injuries depicted in her pictures (SV18/1134, 1137, 1145-45). A thumb consistent with Floyd's thumb can be seen on one of the pictures of the victim (SV20/1347-51).

The primary defense theory below was that either some of the pictures or the entire collection of photographs had been planted in the truck. This defense was presented in pretrial legal challenges to the admissibility of the pictures and as a claim of factual innocence to the jury (SVSV9/5654-60; SV14/435-515, 556-572; SV23/1631-40). Trial was held in September, 2002

(SV11-SV25).

James Davis testified about Floyd's coming into possession of the truck where the pictures were ultimately found (SV17/988-997). He related an incident from September, 1994, where Floyd came into an elementary school where Davis was principal, and demanded that Davis and one of the students, Michael Hughes, leave the school with Floyd in Davis's pickup truck (SV17/988-990). The jury was advised that Floyd had developed a relationship with his stepson, Michael, but the Oklahoma authorities had determined that Floyd was not Michael's natural father, and had terminated Floyd's visitation rights (SV20/1393-95).

Davis was driving and Floyd directed him to a wooded area, where Davis observed a sleeping bag on the ground, covering other items (SV17/990-992). Floyd walked Davis to another area and secured him to a tree (SV17/992). After Davis told Floyd how to open the back of the truck, he heard noises like someone putting things into the back (SV17/993-95). Floyd also asked Davis about changing gears in the truck (SV17/994-95). When Davis was discovered and rescued a few hours later, the truck, sleeping bag, and other items were gone (SV17/995). Davis was not familiar with the package of photographs later found in the truck (SV17/1005). Prior to trial, Floyd had written a

threatening letter to Davis, warning him against coming to testify (SV17/998-1003).

Floyd had also written a threatening letter to Helen Hill Keller prior to trial (SV18/1166-69). Nevertheless, Hill testified that she knew Floyd for about a year in Oklahoma (SV18/1151-52). Floyd lived in her garage for a time (SV18/1152). She identified her daughter among the photographs of young girls found in the collection (SV18/1154). The pictures had been taken at Floyd's apartment (SV18/1154-55). Keller also provided other pictures that Floyd had taken and given her years earlier; the children depicted were wearing the same clothes, and those pictures had also been taken at Floyd's apartment (SV18/1156-65).

Floyd was convicted as charged of first degree murder (V16/2879; SV23/1747).

During the penalty phase, the defense stipulated that Floyd had absconded from federal parole in 1973, and had been a fugitive under a sentence of imprisonment at the time of Cheryl's murder (SV25/1917-18). The State presented the testimony of the victim of one of Floyd's prior violent felony convictions, Carrie Marie Box Howell (SV25/1919-1938). The witness described an attack by Floyd in July, 1994, in Oklahoma City, Oklahoma, resulting in his convictions for burglary and

battery with a dangerous weapon (SV25/1917-33). In addition, James Davis offered additional testimony about the kidnaping incident (SV25/1939-56).

Although other possible defense witnesses were discussed, the only defense penalty phase witness was Floyd himself (SV25/1981-2006). The jury recommended a sentence of death by unanimous vote (V17/3073-74; SV25/2046-47). A special jury verdict form was submitted, and indicated that the jury unanimously found each of the three aggravating factors had been proven beyond a reasonable doubt (V17/3073-74).

The court ordered a PSI, and subsequently conducted a Spencer hearing on October 18, 2002 (SV8/5429-5598). Floyd submitted additional evidence and addressed the court in a statement which exceeded three hours (SV8/5493-5597; V17/3167). Floyd refused to permit defense counsel to present witnesses, and the court conducted an extensive inquiry to insure that Floyd understood he was waiving the right to present mitigation (SV8/5440-61).

Sentencing was imposed on November 22, 2002 (SV9/5722-68). The court followed the jury recommendation and imposed a sentence of death, finding three aggravating factors: prior violent felony convictions, murder while under sentence of imprisonment, and murder during the course of a kidnaping

(SV9/5743-48). The sentencing order reflects that the court acknowledged the proffered mental mitigation which Floyd had refused to permit his attorneys to present (V17/3171). The court correctly described her role in considering the proffered mitigation, as well as the mitigating factors expressly sought by the defense (V17/3171-72). The court found and gave "some weight" to the defendant's chronological age of 46 at the time of the crime (age 59 at sentencing), determining that expert testimony from the pretrial competency proceedings indicated that Floyd suffered from one or more personality disorders, emotional immaturity, and poor impulse control (V17/3172). The court found that the statutory mental mitigators of extreme disturbance and substantial impairment had not been proven, and noted Floyd's less severe mental deficiencies had been weighed in conjunction with the age statutory mitigator as well as nonstatutory mitigation (V17/3173). The court reviewed a number of nonstatutory mitigators, and gave some weight to Floyd's family background and to the abuse he suffered at an orphanage where he was raised; some weight to Floyd's personality disorders and psychological imbalances; very little weight to Floyd's other prison sentences to be served; and very little weight to Floyd's poor health (V17/3173-77).

SUMMARY OF THE ARGUMENT

I. The jury verdict convicting Appellant Floyd of first degree murder is supported by competent, substantial evidence. Floyd was connected by direct and circumstantial evidence to a collection of photographs which included pictures of the victim in this case at Floyd's home during the course of her kidnaping. Floyd had threatened the victim previously. His assertion that the evidence is insufficient because the jurors were required to stack inferences in order to determine guilt is not supported by the record. Floyd fails to accord respect for the reasonable inferences available from the evidence presented. When the evidence is viewed in the proper light, ample support for the jury verdict exists.

II. The trial court did not err in allowing the State to present evidence of Floyd's kidnaping of James Davis and Michael Hughes. This evidence was necessary to connect Floyd with the pictures found in the truck. The testimony was relevant and highly probative. The trial court's rulings to sanitize the details of the prior crime deflected any "unfair" prejudice that might accrue and defeats Floyd's claim of error in the admission of this evidence.

III. The trial court did not err in allowing the State to introduce the photographs found in the truck as evidence

against Floyd. Floyd's claims that these photographs were irrelevant and that the probative value was outweighed by the danger of unfair prejudice are without merit. The photos were relevant and necessary to establish Floyd's connection with the pictures of the victim. The court below reviewed each picture and excluded the most prejudicial photos from the jury's consideration, and no abuse of discretion is shown in this issue.

IV. The trial court did not err in allowing the State to present opinion testimony from FBI examiner Mosheno. The trial court properly found that this testimony would assist the jury. Floyd's claim that the testimony was unduly prejudicial was not offered to the court below and is not supported by the record.

V. The trial judge properly denied Floyd's motion for mistrial during the prosecutor's guilt phase closing argument. The evidence upon which the prosecutor commented had not been stricken, and no error was noted by the judge below. The cautionary instruction provided cured any possible error, and no mistrial was warranted.

VI. Floyd is not entitled to a new penalty phase based on the prosecutor's questioning of him on cross examination. Floyd opened the door to the line of inquiry into his prior felony

convictions. In addition, the jury was already aware of the information elicited, since his prior convictions were in the record to support the aggravating factor.

VII. The trial court properly denied Floyd's motion to declare Florida's capital sentencing statute unconstitutional under Ring v. Arizona, 536 U.S. 584 (2002). This Court has rejected this claim many times. In addition, the judge below submitted special penalty phase verdict forms, which reflect that each aggravating factor was found unanimously by the jury.

VIII. The trial court properly denied Floyd's motion to dismiss the death penalty which asserted that the sentence is unconstitutional because innocent people are allegedly executed. Floyd's appellate argument does not appear to be the same claim presented for relief below. In addition, Floyd has not offered any support for his assertion that evolving standards of decency require a higher burden of proof for conviction of a capital offense.

ARGUMENT

ISSUE I

WHETHER THE JURY VERDICT IS SUPPORTED BY SUBSTANTIAL, COMPETENT EVIDENCE.

Appellant Floyd initially challenges the sufficiency of the evidence supporting his first degree murder conviction. He asserts that the trial judge should have granted his motion for judgment of acquittal (SV22/1574-1614; SV23/1618-20), claiming that the circumstantial evidence required an impermissible stacking of inferences and did not exclude a reasonable hypothesis that someone else committed this crime. However, a review of the record demonstrates clear support for the jury verdict, and conclusively refutes Floyd's claim.

The standard of review for the denial of a judgment of acquittal is de novo. Johnston v. State, 863 So. 2d 271, 283 (Fla. 2003), cert. denied, 124 S. Ct. 1676 (2004); Pagan v. State, 830 So. 2d 792, 803 (Fla. 2002), cert. denied, 539 U.S. 919 (2003). A judgment of conviction carries a presumption of correctness, and an appellate court cannot reverse a conviction that is supported by competent, substantial evidence. Terry v. State, 668 So. 2d 954, 964 (Fla. 1996); Conahan v. State, 844 So. 2d 629, 634-635 (Fla.), cert. denied, 124 S. Ct. 240 (2003). The evidence is sufficient to sustain a conviction if, after viewing the evidence in the light most favorable to the State,

a rational trier of fact could find the existence of the elements of the crime beyond a reasonable doubt. Johnston, 863 So. 2d at 283.

There are special rules that apply in cases relying exclusively on circumstantial evidence. A motion for judgment of acquittal should be granted in a circumstantial evidence case if the State fails to present evidence from which the jury can exclude every reasonable hypothesis except that of guilt. However, the question of whether the evidence fails to exclude all reasonable hypotheses of innocence is for the jury to determine, and where there is substantial, competent evidence to support the jury verdict, an appellate court will not reverse. Darling v. State, 808 So. 2d 145, 155 (Fla.), cert. denied, 537 U.S. 848 (2002); State v. Law, 559 So. 2d 187, 188 (Fla. 1989). In meeting its burden, the State is not required to "rebut conclusively, every possible variation of events" which could be inferred from the evidence, but must introduce competent evidence which is inconsistent with the defendant's theory of events. Once the State meets this threshold burden, it becomes the jury's duty to determine whether the evidence is sufficient to exclude every reasonable hypothesis of innocence beyond a reasonable doubt. Darling, 808 So. 2d at 156; Law, 559 So. 2d at 189.

In ruling on Floyd's motion for acquittal below, the trial judge applied the rules for a circumstantial evidence case, paying particular attention to the her role as described in Darling (SV23/1618-20). However, many of the facts incriminating Floyd in this murder were established by direct rather than circumstantial evidence. This Court has described direct evidence as "that to which the witness testifies of his own knowledge as to the facts at issue." Davis v. State, 90 So. 2d 629, 631 (Fla. 1956). According to Professor Ehrhardt, direct evidence is "evidence which requires only the inference that what the witness said is true to prove a material fact." See Ehrhardt, Florida Evidence § 401.1 (2000 ed.).

Accordingly, the identification of an injured Cheryl Commesso reclining on a couch in Floyd's mobile home was provided by direct evidence. Four witnesses testified, based on their own personal knowledge, that it was Cheryl depicted in the pictures of a battered woman reclining on a couch (SV18/1057, 1071-72, 1090; SV19/1237-38, 1241-42). Michele Sturgis testified, from her own knowledge, that the couch Cheryl was lying on was located inside Floyd's mobile home in Pinellas County (SV19/1193-97). There was also direct evidence that this mobile home burned down on June 16, 1989 (SV18/1029-31). Because Floyd went to the trouble of documenting and preserving

the commission of this crime, the State did not have to rely entirely on circumstantial evidence to prove its case.

In addition, there was direct testimony relating Floyd's threat to make Cheryl pay for hurting his family, as well as describing the fight between Cheryl and Floyd shortly before Cheryl disappeared (SV18/1065-68). There was direct evidence that Floyd sent threatening letters to two State witnesses (SV17/998-1003; SV18/1165-67). Since material facts were proven by direct as well as circumstantial evidence, there is no reason to analyze whether the State's case was inconsistent with any reasonable hypothesis of innocence. Conde v. State, 860 So. 2d 930, 943 (Fla. 2003), cert. denied, 124 S. Ct. 1885 (2004); Pagan, 830 So. 2d at 803 (special rule applies if State's evidence is "wholly" circumstantial); Hertz v. State, 803 So. 2d 629, 646 (Fla. 2001), cert. denied, 536 U.S. 963 (2002); Davis, 90 So. 2d at 631 (special rule applies where case proven "purely" on circumstantial evidence).

At any rate, the State's burden was clearly met in this case, and fully refutes the defense theory that someone else may have committed this murder. Floyd's argument insists that the State's evidence relies too heavily on inferences to be drawn from the evidence, and asserts that improper pyramiding of inferences is required in order to establish Floyd's guilt.

This argument is not compelling. Floyd's analysis is flawed in two critical respects: 1) he disputes the reasonable inferences drawn from the evidence rather than acknowledging that his motion for acquittal conceded such inferences, and 2) he confuses the prohibition against stacking or pyramiding inferences with the entirely proper reasoning of combining parallel inferences. Each of these deficits will be explored in turn.

Floyd's argument clearly fails to accord proper deference to the reasonable inferences to be drawn from the evidence presented. See Darling, 808 So. 2d at 155 (in moving for acquittal, defendant admits the facts in evidence, as well as every conclusion favorable to the State that the jury might fairly and reasonably infer from the evidence); Lynch v. State, 293 So. 2d 44, 45 (Fla. 1974). Floyd notes that he was primarily incriminated by the collection of photographs found in the abandoned Davis pickup truck. He then proceeds to describe these pictures as inferring 1) that the photographs belonged to him; 2) that he took the pictures or was at least present when the pictures were taken; and 3) that the pictures of Commesso were taken immediately before she was shot and killed. However, Floyd does not accept the facts in a light most favorable to the State, because his argument disputes the legitimacy of each of

the inferences he identifies.

For example, Floyd recognizes that the jury could infer that all of the pictures discovered belonged to him; then, he goes on to suggest that the pictures were not his, noting that truck was unsecured, that anyone could have placed this package in the truck, that the pictures were not found during an inventory search conducted by police, and that even if some of the pictures were his, others could have been added later in an attempt to frame him for this murder. His arguments against adoption of the clear inference that these pictures belonged to him demonstrate that he is not assessing the sufficiency of the evidence in a light most favorable to the State, as required.

Floyd's obvious connection to the collection of photographs was well established. Most pointedly, Floyd was tied to the pictures through the content of the photographs themselves. A number of witnesses provided direct testimony identifying people and places from Floyd's past among the pictures (Jennifer McElhannon, SV18/1094-95; Helen Hill Keller, SV1154; Michele Sturgis, SV19/1189, 1193-97). Floyd's boat was there; as were pictures of Floyd's daughter/wife, Sharon Marshall, and pictures of Helen Hill Keller's children. Some of the pictures, including those of Cheryl, had been taken at Floyd's 1989 Pinellas County residence; others were from an apartment Floyd

had in Oklahoma.

The tale of the discovery of the pictures also independently supports the inferential link to Floyd. The pictures were found concealed underneath the bed of a pickup truck that Floyd had stolen and later abandoned, on the run with his kidnapped "stepson," Michael. Although his primary theory of innocence below was that the pictures had been "planted" in the truck, this was not a reasonable hypothesis. The suggestion that the truck had been unsecured for months, having traveled untold miles between Choctaw, Oklahoma; Dallas, Texas; and Mission, Kansas, does not explain the presence of the hidden, taped envelope with 97 cropped, disconcerting pictures. Floyd has never identified anyone else that had access to his personal mementoes and knowledge about the travels of the truck to be able to plant the package of photographs.

Central to understanding ownership of this collection is recognition of the critical importance Floyd placed on its possession. These pictures were truly a collection; they spanned a number of years and many miles in Floyd's life. Although some were pornographic and others sexually suggestive, there were a number of perfectly innocent photos as well. In addition, the pictures were curiously cropped, most no bigger than two inches by two inches; they were described as just "bits

and pieces" of photographs (SV15/751; SV15/768-769).

The testimony of Helen Hill Keller provides conclusive proof that Floyd had taken the pictures in question. In addition to identifying her daughter in some of the pictures found in Floyd's collection, Keller also provided pictures which Floyd had taken and given to her. These pictures were taken at the same time and place (Floyd's apartment) as some of the ones from the collection; the children are wearing the same clothes (SV18/1156-65).

Furthermore, one of the pictures of the victim shows a thumb, which is consistent in every way with Floyd's thumb (SV20/1347-51). This testimony, along with all of the other testimony outlined above, provides substantial, competent evidence to establish Floyd's connection with the collection of photos. Thus, this link was proven by both direct and circumstantial evidence from a number of independent sources.

Floyd also disputes the inference that the collection of photographs included pictures of the victim, Cheryl Commesso, near the time of her death. Once again the evidence supporting this inference is solid. Cheryl was positively identified by four different witnesses, including her brother and her father, as the person depicted in the photos that appears bound and beaten (Diana Rife, SV18/1071-72, 1090; Joseph Commesso,

SV18/1057; Victoria Zucker, SV19/1237-38; John Commesso, SV19/1241-42). Expert testimony established that the injuries depicted in the pictures were recently inflicted and consistent with the unhealed fracture noted on Cheryl's skull[2] (SV18/1134-36).

The fact that the fracture had not healed demonstrated that the injuries occurred near the time of death (SV18/1144-45). In addition, other items discovered with Cheryl's remains are depicted in the photos, including the same clothes, jewelry, and fingernails (SV20/1336-44). Furthermore, testimony relating to the growth rate of Brazilian pepper plants which were found among the remains were consistent with her body having been left in the area about the time of her disappearance in 1989 (SuppAddT/2185, 2191-93). Thus, there was substantial, competent evidence that the photo collection included pictures of Cheryl near the time of her death. In fact, there is no other conclusion that could reasonably be drawn from the evidence presented.

After acknowledging but then disputing the reasonable inferences to be drawn, Floyd complains that the three inferences must be combined in order to reach a conclusive

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[2]The defense stipulated below that the remains found were that of Cheryl Commesso (SV16/898).

judgment of guilt. According to Floyd, this amounts to an impermissible stacking or pyramiding of inferences, as discussed in Brown v. State, 672 So. 2d 648 (Fla. 4th DCA 1996). Once again, Floyd's analysis must fail. The concept of stacking or pyramiding inferences requires a fact-finder to disregard inferences which rely entirely on other inferences in order to provide probative value. In the instant case, reasonable inferences are provided by the evidence and testimony below, and do not require a fact-finder to resort to speculation, as in Brown and similar cases.

Floyd's argument demonstrates a misunderstanding between the prohibition against stacking inference upon inference to establish a probative fact and the perfectly acceptable consideration of multiple, parallel inferences to reach a conclusion. This Court addressed the difference between stacking inferences and parallel inferences in Castillo v. E.I. Du Pont de Nemours & Co., 854 So. 2d 1264, 1279 (Fla. 2003):

> Next, the Castillos' expert testified that he performed in-vitro testing, and considered the results of other testing, to determine the lowest concentration of benomyl that would induce human cell death. This conclusion is independent of any fact or finding that Mrs. Castillo was sprayed with Benlate. In other words, if there is an inference needed to conclude that the exposure level of benomyl was sufficient to cause harm to Mrs. Castillo's fetus, it is a parallel inference, not a stacked inference. *See, e.g., Belden v. Lynch*, 126 So. 2d 578 (Fla. 2d DCA 1961) (concluding that the negligence of a driver

> who struck a parked car was not shown by piling inference upon inference in succession, but rather from what may be described as parallel inferences arising under the circumstances). The conclusion drawn from the expert's testing that a certain concentration level of benomyl causes human cell death is independent of any circumstantial or direct evidence that shows Mrs. Castillo was sprayed with Benlate. **One inference need not be established before the next inference can be considered. Each fact inferred is independent of the other. Therefore, there was no stacking of inferences** required before the jury could reach its verdict.

(Emphasis added.) Floyd has not identified any inference which relied entirely on the existence of other inferences to be proven, and his argument demonstrates that the inferences he disputes are independent and parallel, not stacked.

In Benson v. State, 526 So. 2d 948, 953-954 (Fla. 2d DCA), rev. denied, 536 So. 2d 243 (Fla. 1988), cert. denied, 489 U.S. 1069 (1989), the Second District provides an extensive analysis of the defendant's pyramiding of inferences argument. The court acknowledged the exception to the general rule against pyramiding inferences from Voelker v. Combined Insurance Company of America, 73 So. 2d 403, 407 (Fla. 1954), "when no contrary *reasonable* inference may be indulged, such inference is elevated for the purpose of further inference to the dignity of established fact" (emphasis in original). The court observed that the evidence must be looked to as a whole to determine whether or not it is sufficient to establish the defendant as

the perpetrator of the crimes:

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

(Emphasis added.) Benson, 526 So. 2d at 954 (quoting Dirring v. United States, 328 F.2d 512, 515 (1st Cir. 1964)). Even if Floyd were to identify inferences which required pyramiding in this case, this exception applies because Floyd has not identified any reasonable contrary inferences which can be drawn from the evidence.

Rather than analyzing the sufficiency of the evidence by suggesting alternative inferential interpretations in a light most favorable to the defense, as Floyd has urged, this Court must consider the evidence as a whole. Viewed in this light, the testimony and exhibits presented below were clearly sufficient to support the jury's verdict of guilt.

Consideration of comparable cases clearly demonstrates that

the court below properly denied Floyd's motion for acquittal. See Mansfield v. State, 758 So. 2d 636 (Fla. 2000) (defendant and victim seen together near scene of murder around time of murder), cert. denied, 532 U.S. 998 (2001); Rose v. State, 425 So. 2d 521 (Fla. 1982) (defendant was seen leaving with victim, had motive, made inconsistent and false statements about circumstances, and her blood type was found in his van); Crump v. State, 622 So. 2d 963 (Fla. 1993) (victim's hair and driver's license found in defendant's truck, ligature marks on wrists matched restraining device found in truck, defendant admitted prior similar murder); Peek v. State, 395 So. 2d 492, 495 (Fla. 1980) (although evidence was circumstantial, "when considered in combination" the hair comparison, fingerprints, and blood and semen analysis [blood typing, not DNA] enabled the jury to conclude that appellant's guilt was proven beyond a reasonable doubt); Holton v. State, 573 So. 2d 284, 289 (Fla. 1990)(circumstantial evidence of ligature found on murder victim's neck and fresh scratches on defendant's chest from the victim's long fingernails "suggesting a struggle" between the defendant and the victim was sufficient to overcome defendant's claim that the death was accidental); Sireci v. State, 399 So. 2d 964, 968 (Fla. 1981), cert. denied, 456 U.S. 984 (1982) (evidence of a suspect's desire to evade prosecution or attempt

to prevent witness from testifying is admissible as relevant to the consciousness of guilt that may be inferred from such evidence); Orme v. State, 677 So. 2d 258, 262 (Fla. 1996) (finding evidence sufficient where "the State's theory of the evidence is the most plausible"); Coleman v. State, 7 So. 367, 370-371 (Fla. 1890)(while some questions remain unanswered, "the circumstances are so strong–-they point so directly to the defendant as the perpetrator of the cowardly assassination–-as to preclude every reasonable hypothesis inconsistent with his guilt; and hence we can see no reason for setting aside the verdict as being against the evidence).

The cases cited by Floyd offering insufficient evidence are easily distinguishable. For example, in both Cox v. State, 555 So. 2d 352 (Fla. 1989), and Long v. State, 689 So. 2d 1055 (Fla. 1997), the State offered trace evidence such as hair, blood, and fiber in order to establish that the defendants had been with the victims. The trace evidence was consistent with, but not shown definitively to be (i.e., no fingerprints or DNA), from the defendant (Cox) or the victim (Long). There was no evidence that the defendants and victims knew each other or even had ever been seen together in either case. In the instant case, the picture of Commesso near death on Floyd's couch is obviously much stronger than trace evidence which for which no source

could be positively identified. In fact, the evidence in this case surpasses forensic evidence which positively places a defendant with a victim, because not only the are the parties shown to be together, but they are together in close proximity to the time of death. Commesso was positively identified by direct evidence, bound and beaten in Floyd's home at or near the time of her death.

Of course, there was not only evidence that Commesso and Floyd knew each other, but that Floyd was angry with Commesso around the time of her disappearance and had threatened to "make her pay." (SV18/1065-66). Floyd and Cheryl were seen arguing around this time (SV18/1067-68). Shortly thereafter, Floyd left the State to marry his "daughter," Sharon, changed his name, and did not return to Florida (SV19/1198-99; SuppAddT/2131-33). Once this prosecution came together years later, Floyd wrote threatening letters to State witnesses, urging them not to testify (SV17/998-1003; SV18/1166-69).

Floyd does not suggest Commesso's murder was anything other than a premeditated killing during the course of a kidnaping. His only theory of innocence asked the jurors to believe that he did not have anything to do with Commesso's death, a position which the jury was clearly entitled to reject based on the State's evidence showing Commesso bound, beaten, and near death

on the couch in Floyd's home. There is no reasonable, innocent explanation for the pictures of Commesso found in Floyd's collection of photographs, and the court below properly denied Floyd's plea for acquittal.

This Court has held that a motion for judgment of acquittal should not be granted "unless there is no view of the evidence which the jury might take favorable to the opposite party." DeAngelo v. State, 616 So. 2d 440, 442 (Fla. 1993); Lynch, 293 So. 2d at 45. On the facts of this case, there is only one reasonable conclusion to be drawn: Floyd killed Cheryl Commesso. This Court must affirm his conviction as fully supported by the evidence presented below.

ISSUE II

WHETHER THE TRIAL COURT ERRED IN PERMITTING THE INTRODUCTION OF COLLATERAL CRIME EVIDENCE.

Floyd next asserts that a new trial is warranted due to the admission of prejudicial evidence relating collateral crimes committed by Floyd. Specifically, Floyd contests the admission of testimony relating to the events of September, 1994, resulting in Floyd's convictions for carjacking and kidnaping of James Davis and Michael Hughes. As will be shown, Floyd is not entitled to any relief on this issue.

This is an evidentiary ruling reviewed on appeal for an abuse of discretion. Jorgenson v. State, 714 So. 2d 423 (Fla. 1998). "Discretion is abused only 'when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable [person] would take the view adopted by the trial court.'" Spann v. State, 857 So. 2d 845, 854 (Fla. 2003). The record in this case fails to support Floyd's assertion that the judge below abused her discretion in the admission of this evidence.

The record reflects that the admission of this evidence was carefully considered a number of times before and during the trial. The defense filed a motion in limine to preclude use of

this evidence, and the court entertained argument from the parties at a pretrial hearing (V13/2287-2288; 2dAddT2/4348; SV9/5671-5707; SV10/5810-38; see also SV15/804-811; SV17/967-986 [discussions during trial]). On September 12, 2002, the trial judge issued an extensive Order detailing her ruling as to the admission of this evidence and explaining the court's rationale (V15/2763-2768). The court concluded that the 1994 Oklahoma offenses were relevant and significant to the State's prosecution, and therefore a sanitized version of those crimes could be provided to the jury.

The court's order acknowledges the judge's initial concern that the prejudicial nature of the collateral crimes would outweigh the relevance and probative value, and that the timing of the incident -- occurring years *after* the charged offense was committed -- might render this evidence inadmissible (V15/2763-64). However, upon further consideration, the court determined it could alleviate the prejudicial impact by insuring that the most damaging facts were not presented. The court's order explicitly details the facts to be admitted, and cautions both parties to insure strict compliance with the limits placed on the admission of this testimony (V15/2764).

Consistent with this ruling, James Davis testified at Floyd's trial that on September 12, 1994, Floyd came to the

elementary school where Davis was principal and Davis and Floyd called Floyd's stepson, Michael Hughes, out of class (SV17/988-989). Against Davis's consent, the three of them went out to his pickup truck and Floyd directed Davis to drive to a secluded wooded area (SV17/990). Davis noticed a sleeping bag with bulges under it near the truck, and Floyd directed Davis into the woods and handcuffed him to a tree (SV17/991-92). Floyd went back in the direction of the truck and then returned to Davis, asking Davis how to open the locked camper shell part of the truck; Floyd again went toward the truck and again returned to Davis, this time asking how to shift the truck into gear (SV17/993-94). Floyd returned to the direction of the truck, and Davis heard the back of the camper on the truck opening (SV17/994). Davis then heard noises like something being thrown into the back of the truck, and heard the truck starting and revving up (SV17/995). Davis yelled out and was rescued about four and a half hours later (SV17/995). The truck was gone, and the sleeping bag and other items under the bag were also gone (SV17/995-96). He reported the truck stolen and was reimbursed by his insurance company (SV17/996). A little over a month later, he was notified that the truck had been recovered, and he went to an insurance office in Norman to collect personal items, such as a tool box, that had been found in the truck (SV17/996-

97). Davis knew the package of photographs had been discovered in the truck and testified that he did not recognize the package and did not have the package stowed in his truck (SV17/1005).

James Davis was the only witness to testify about Floyd's Oklahoma offenses, and his testimony on that point comprises less than ten pages of transcript out of the six volumes of trial testimony presented. The judge expressly instructed the jury before, during, and after his testimony that Floyd was not on trial for other crimes and evidence of other crimes could only be considered as it related to Floyd's guilt in the charged offense (SV17/986-87, 998, 1004, 1006). A similar limiting instruction was provided with the court's final instructions prior to deliberations (SV23/1737).

The court's order includes the legal analysis and demonstrates that the court applied the appropriate law and conducted the mandated weighing of probative value against unfair prejudice in ruling this evidence admissible (V15/2766-68). As Floyd notes, the court below properly found that the carjacking and kidnaping were factually dissimilar from the charged crime, and not within the purview of Williams v. State, 110 So. 2d 654 (Fla.), cert. denied, 361 U.S. 847 (1959). The court also ruled that the evidence would not be considered to be inextricably intertwined with the charged offense because the

crimes were about six years apart (V15/2767). However, the court determined that the State's case required use of this evidence "to link the defendant to the photographs, and to shed light on the significance of the photographs to the defendant" (V15/2767-68).

Floyd disputes both the trial court's finding of relevance and the determination that this evidence was not unduly prejudicial. He claims his state of mind regarding the photographs during the kidnaping and carjacking was not relevant to the charged Commesso murder. Floyd also claims that, even if relevant, the tailoring of the facts did little to mitigate the prejudice generated, and therefore admission of the testimony should have been precluded by Section 90.403, Florida Statute. These claims do not demonstrate any error in the admission of this testimony.

As to relevance, Floyd submits that his state of mind at the time of the collateral crime, more than five years after the homicide, cannot be relevant. It bears noting that the court below cited a defendant's state of mind as one example of possible relevance, along with other examples such as providing the entire context in which the crime occurred, providing a motive, and showing the relationship of key players in order to permit an intelligent account of the charged crime (V15/2767-

68). The court discusses these general theories of admissibility developed in the caselaw, but her determination of relevance was not premised solely on the state of mind relevance; the court finds relevance in the essential link the testimony provides between the defendant and the photographs found in the truck that was the subject of the carjacking conviction (V15/2767-68). The State's theory in this case required not just a showing that Floyd had access to this truck, but also that the photographs were of such significance to Floyd that he would secure and maintain them while fleeing in a stolen truck with his kidnaped "stepson." Therefore, his state of mind with regard to the pictures was relevant.

Floyd has cited no authority for the suggestion that a defendant's state of mind several years after a homicide cannot be relevant as a matter of law. If the defendant has not been caught, and his statements and behavior demonstrate consciousness of guilt or preoccupation with the evidence of a prior crime, this relevance does not dissipate simply through the passage of time. Evidence of collateral crimes committed after the charged crime has been properly admitted in a number of cases. See Lamarca v. State, 785 So. 2d 1209, 1213 (Fla. 2001); Henry v. State, 649 So. 2d 1366 (Fla. 1994); Heath v. State, 648 So. 2d 660 (Fla. 1994); Sireci v. State, 399 So. 2d

964 (Fla. 1981), cert. denied, 456 U.S. 984 (1982).

Floyd makes no effort to explain how the jury could have understood the connection between Floyd and the collection of photographs without this evidence. Although he claims that the jury only needed to hear that he was in possession of the truck, as the trial court found and the record confirms, the jury needed to hear more than simply Floyd had access to the truck. Davis not only provided the truck to Floyd, but observed Floyd's personal belongings in the woods and heard Floyd loading his things into the truck before it left (SV17/993-96). Calling Davis to testify that he released the truck to Floyd would not have provided the jury with the complete picture to which they are entitled. No error has been presented with the trial court's finding of relevance.

Floyd's assertion that this evidence should have been excluded under Section 90.403 is similarly unavailing. Clearly, the trial court carefully considered which facts were necessary for the State's presentation and which were unduly prejudicial and needed to be omitted. Although Floyd now complains that the court's sanitizing may have done more harm than good, his attorneys at the time had no objection to the limitations placed on the court's ruling admitting this evidence. Any current objections that the court erred in

excluding facts and in providing the limiting instructions given are not preserved for appellate review, since defense counsel below did not express these concerns to the trial judge. Anderson v. State, 863 So. 2d 169, 181 (Fla. 2003) (only specific claim presented to trial court can be considered on appeal).

In addition, this evidence was not as prejudicial as Floyd suggests. As noted above, the trial court excluded the most inflammatory details, including Floyd's having a gun, making death threats against Davis, and taping Davis's mouth with duct tape. The jury was aware of the domestic nature involved, being told that Floyd had a relationship with Michael which the Oklahoma authorities had severed when they determined Floyd was not Michael's natural father (SV20/1393-95). There was no suggestion that Davis or Michael had been harmed in any real respect. These facts are far less prejudicial than those which have been permitted in a number of other trials.

A review of other cases dispels any notion of impropriety with the admission of this evidence. Even collateral crime evidence which is overwhelmingly prejudicial may be admitted when the requisite relevance is demonstrated. For example, in Sexton v. State, 775 So. 2d 923 (Fla. 2000), this Court held that evidence that the defendant had fathered two of his

daughter's children, was involved in the death of a baby fathered by Sexton's son-in-law, and had engaged in a standoff with Ohio police that resulted in him becoming a fugitive was all admissible to explain defendant's motive for having his son kill his son-in-law. See also Anderson v. State, 841 So. 2d 390, 398-400 (Fla. 2003) (collateral evidence that the defendant was on probation for eleven counts of attempted capital sexual battery on the murder victim was properly admitted in his subsequent murder trial); Lamarca, (evidence of defendant's rape of his daughter hours after killing her husband, and testimony that defendant had done something to cause his stepdaughter to move out, properly admitted); Henry, (evidence that defendant took five year old boy from murder scene to another county, then killed him relevant and admissible in trial on wife's murder; Coolen v. State, 696 So. 2d 738, 742 (Fla. 1997) (no error in failure to redact defendant's statement that he had spent eight years in maximum prisons in Massachusetts when introducing confession). The disputed evidence in this case was far less prejudicial and more probative than the evidence permitted in these cases.

Floyd's reliance on Bryan v. State, 533 So. 2d 744 (Fla. 1988), and Henry v. State, 574 So. 2d 73 (Fla. 1991), is misplaced. In Bryan, this Court determined that evidence of

Bryan's participation in a bank robbery should not have been admitted because the prejudicial impact outweighed the probative value. Central to this conclusion, however, was this Court's finding that a "plethora" of evidence connected Bryan to the sawed off shotgun at issue before, during, and after the unrelated murder. Bryan, 533 So. 2d at 747. The probative value was seriously diminished because the same facts were already well established. In the instant case, it was critical to show the jury that Floyd had placed his photo collection in the truck, and there was no other evidence establishing this connection.

Similarly, in Henry, this Court initially reversed the conviction for a new trial because so much inflammatory testimony about the subsequent murder of the child had been admitted. In the appeal after remand, however, this Court approved the more restricted presentation of the boy's killing. Henry, 649 So. 2d at 1367-68. Because the evidence of Floyd's kidnaping of Davis and Michael was restricted to only that testimony necessary to accomplish the State's purposes, and the court below was diligent about insuring that the limitations on this evidence were honored, this case is more comparable to the Henry trial this Court reviewed and affirmed after the remand. In fact, the judge in this case did exactly what the judges in

the original Henry and Sexton[3] trials should have done – limited the prejudicial impact of relevant collateral evidence to that needed to reasonably present the State's case.

On the facts of this case, no abuse of discretion can be shown in the trial court's Order permitting admission of the evidence of the 1994 Oklahoma carjacking and kidnaping offenses. Any possible error would be harmless beyond any reasonable doubt, given the substantial independent evidence of Floyd's guilt. Bryan, 533 So. 2d at 747. This Court must affirm Floyd's conviction and deny his request for a new trial on this issue.

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[3]See Sexton, 775 So. 2d at 929-30 (approving milder version of collateral crime evidence causing reversal in Sexton v. State, 697 So. 2d 833, 837-838 (Fla. 1997); and Henry, 649 So. 2d at 1367-68, (affirming admission of limited collateral crime evidence held improper in Henry, 574 So. 2d at 75-76.

ISSUE III

WHETHER THE TRIAL COURT ERRED IN PERMITTING THE ADMISSION OF PHOTOGRAPHS.

Floyd also claims that a new trial is necessary due to the admission of certain photographs. This is an evidentiary ruling which is reviewed on appeal for an abuse of discretion. Hertz v. State, 803 So. 2d 629 (Fla. 2001). A review of the record in this case clearly demonstrates that the judge below exercised her discretion reasonably and properly, and no error can be shown with regard to the admission of these pictures.

According to Floyd, the only relevant photographs of the 97 that were found in James Davis's stolen truck were the sixteen pictures of the homicide victim, Cheryl Commesso, and one picture of Floyd's boat. He asserts that the remaining photos were irrelevant, or if relevant, the danger of unfair prejudice outweighed the probative value, and therefore they should not have been admitted. Floyd's argument must be rejected on a number of bases.[4]

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[4]Floyd's brief suggests prosecutorial misconduct in the admission of this evidence by asserting that the prosecutor "was able to elicit" testimony that the photos appeared to be child pornography, then argue to the judge that the jury already knew child pornography was involved (Appellant's Initial Brief, p. 53). The record reflects, however, that defense counsel opened the door to the jury first hearing the pictures characterized as pornographic. One of the factors giving rise to Floyd's repeated assertions of tampering was the fact that a number of different jurisdictions had maintained the photos as they found

First of all, Floyd's claim of error is difficult to explore because he has not identified which exhibits, in particular, denied him a fair trial. For his appellate argument, Floyd has grouped the objectionable pictures into three categories: 1) nude pictures of Sharon Marshall;[5] 2) erotic photos of Britney Keller; and 3) pictures of female genitalia of individuals that cannot be identified due to the way the pictures have been cropped. Although Floyd's brief suggests there were "numerous" nude pictures of Sharon and "numerous" erotic pictures of

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their way from Mission, Kansas, back through the Oklahoma State Bureau of Investigation, to the FBI, and ultimately to the St. Petersburg Police Department. As the pictures progressed from one investigative agency to the next, different agents secured photocopies of some of the pictures in the collection. As a result, there were numerous copies of the pictures, and agencies were not consistent in which pictures they may have copied for their own purposes. In order to support the claim of tampering, defense counsel explored the fact that there were different numbers of different copies of different pictures. During defense counsel's cross examination of Detective Hines, he wanted Hines to explain why different determinations had been made as to which pictures were "deemed to have evidentiary value" (SV15/779-780). On redirect examination, the prosecutor asked Hines what concerns he was alluding to in responding to the defense, and Hines responded that they "appeared to be child pornography" (SV16/781). There was no objection to this question or answer, and no claim during the discussion on admitting the pictures a hundred pages later in the transcript of any prosecutorial misconduct such as inferred in Floyd's brief.

[5]However, he acknowledges that the State was entitled to at least one picture of Sharon (Appellant's Initial Brief, p. 55); and defense counsel below agreed to the use of one nude picture of Sharon (SV16/830).

Britney Keller, the pictures published to the jury during the testimony of Jennifer Elhannon and Helen Hill Keller also included photos which were not pornographic in nature and do not appear to fall within Floyd's objections, which seem to be limited to nude or erotic pictures. Throughout the discussions below on the admissibility of this evidence, the court and attorneys had difficulty in agreeing on how to characterize the pictures -- while some were unmistakably pornographic, others were deemed "suggestive" and others appear to be innocent (SV16/814-31; SV22/1506-1510). Floyd's failure to identify which photos he is currently characterizing as nude and erotic and therefore within the umbrella of his appellate objection precludes meaningful review of this issue.

Although there is not a sufficient claim before this Court to grant relief, the record is adequate to establish that the judge did not abuse her discretion in permitting any of this evidence. Floyd's grouping the collection into three objectionable categories is helpful, but it is essential to keep in mind that the State's case relied on the importance of the collection as a whole. The court below properly determined the entire collection to be relevant, and therefore each picture is admissible unless some specific basis for exclusion is demonstrated. Floyd cites Section 90.403 as that basis, but the

trial judge performed the necessary balancing required by that statute, and no abuse of discretion can be shown. Douglas v. State, 29 Fla. L. Weekly S219, S20-S21 (Fla. May 6, 2004) (trial court's preliminary screening for prejudice is factor weighing in favor of admissibility); Philmore v. State, 820 So. 2d 919, 932 (Fla. 2002).

The record reflects that the complete collection of 97 pictures was admitted into evidence early in trial during the testimony of Detective Gary Hines (SV15/772). The court would later review the pictures admitted and select those photos deemed overly prejudicial, keeping those photos from being submitted to the jury with the other exhibits (SV16/814-31; SV22/1506-22). The judge selected a number which were pornographic in nature and excluded them from the jury's consideration (SV16/814-31; SV22/1506-22). The judge did not consider her definition of pornography to be the guiding factor; she acknowledged that some of the pictures she was allowing to go to the jury would typically be considered pornographic. However, she considered the extent to which the subjects in the pictures were posed in a manner similar to the pictures of Cheryl, an appropriate consideration on relevance. Her comments clearly demonstrate the care she took in reviewing each and every picture admitted:

> Now, one has the child with the clothes on, but her breasts are showing, and this is very similar to one of the photos of the victim. So this group is okay. This group is okay.
>
> Do you want me to keep them in a pile? I plan to let in some things that would otherwise be described as pornography.
>
> You know when you see them, surely these are not healthy pictures of children's or people's bodies; but on the other hand, they clearly show the child's vagina or clearly shows, you know, the possible capital sexual battery.
>
> I'm going one by one. I have to give the State the -- remember now, I spent whatever it was, an hour-and-a-half standing up here looking at all of these photos. I'm not seeing them for the first time this morning. It struck me then and now with some of the pictures, that if the jury sees them all, he doesn't have a chance. Those are the photos I'm keeping out.
>
> But I also think it would be incorrect for me to take all of the photos that in any way, shape, or form reflects something that you and I might call child porn. If the photos appear to be similar in kind to the ones that allegedly involve Cheryl Commesso's death or if they are similar in kind to some of the other photos that are of the people that he was close to, they could I.D. him off this group of photos, either connect them to him or connect them in kind to the death of Cheryl Commesso.
>
> But when you come to the vagina shots, I'm not letting them in about the children because I do not want the jury to be so prejudiced by those that they don't otherwise follow the law.

(SV16/823-824).

Throughout the course of the trial, individual pictures or groups of pictures from the collection were identified and discussed with the appropriate witnesses. As to the pictures identified as objectionable in Floyd's brief, those depicting Sharon Marshall were discussed during the testimony of Jennifer

McElhannon (SV18/1094-95). The record reflects that McElhannon was shown pictures of a girl "in various stages of dress," which she identified as Sharon. Floyd asserts that, because only one picture of Sharon was necessary to tie him to the photos, the additional exhibits were unnecessary, cumulative, and overly prejudicial. Of course, necessity is not the controlling factor. Bryan, 533 So. 2d at 746-47; Ruffin v. State, 397 So. 2d 277, 279-280 (Fla.), cert. denied, 454 U.S. 882 (1981). In addition, this argument fails to appreciate the importance of not only connecting the pictures to Floyd, but demonstrating why the collection of photos was so valuable to Floyd that he would go to the lengths he did to maintain possession, including protecting and concealing them during his time on the run with his kidnaped stepson.

Floyd's objection to the pictures of Britney Keller is also without merit. It is not clear whether Floyd is disputing the admission of the innocent pictures Helen Hill Keller provided to authorities that had been given to her by Floyd. Floyd's recitation of the comments below were taken from the discussion concerning Keller's pictures, yet Floyd's argument addresses only the "erotic" pictures of Britney, and Keller's pictures were not erotic (SV18/1157-63). In any event, both groups of pictures were highly relevant and needed to be considered

together. Because both sets of pictures appear to have been taken at the same time, and Floyd acknowledged having taken the pictures which Keller supplied, this evidence provided effective proof of Floyd's ownership of the more suggestive collection pictures.

Finally, the pictures of unidentified females were also properly submitted to the jury. Floyd's theory seems to be that only the sixteen pictures of Cheryl and the one picture of his boat were truly relevant, so the State must individually justify each and every other picture admitted. Such is not the law. As the court below found, the entire collection of 97 pictures was relevant and admissible, subject to the exclusion of those photos whose unfairly prejudicial impact outweighs its probative value. This is a basis of exclusion against the general rule of admissibility, and the defense should have to establish why each photo should be excluded rather than requiring the State to establish its right to offer relevant evidence. Randolph v. State, 463 So. 2d 186, 189 (Fla. 1984), cert. denied, 473 U.S. 907 (1985) (reiterating controlling importance of relevancy).

In addition to the clear relevance of connecting Floyd to the photo collection, the court below agreed that relevancy was also demonstrated by the State's need to rebut Floyd's defense that the photos had been tampered with or planted. In fact, a

great deal of the defense argument for excluding the pictures below focused on allegations of tampering. A lengthy pretrial hearing extensively explored defense attempts to establish tampering (2dAddT1/4168-83; 2dAddT2/4210-4346). Nearly half of Floyd's initial guilt phase closing argument focused on theories that the pictures could have been placed in the Davis truck by anyone at any time (SV23/1631-39).

This defense required the State to be diligent in convincing the jury that the collection was whole and intact when Luther Masterson retrieved the package from under the truck. The more pictures or categories of pictures excluded from the jury's consideration, after the jury was told that ninety-seven pictures had been found, the more the jury might speculate that the defense theory of tampering might have merit. If, as Floyd suggests, the State had been limited to admitting only the sixteen pictures of Cheryl and the one picture of Floyd's boat, the plausibility of the defense theory that the photos were not his would increase exponentially. In this sense, the State would suffer "unfair prejudice" by being hindered in countering a defense argument, and the defendant would reap an undeserved benefit and be rewarded for his vice.

In most cases regarding the admission of photographs in compliance with Section 90.403, the inflammatory nature of the

pictures arises from the natural emotional reaction evoked by gory images of the victim. In this case, the danger of prejudice flows from the fact that the jury would learn that Floyd created and collected child pornography. Therefore, although Floyd's reliance on case law addressing challenges to gruesome photos is reasonable, this issue may be more appropriately considered under the traditional principles governing the admission of collateral crime evidence. See Gorham v. State, 454 So. 2d 556 (Fla. 1984) (collateral evidence not improper where it provides a circumstantial link between the defendant and the victim).

Considered in that context, these pictures offered little to the jury beyond what they could already reasonably conclude from the evidence. In assessing the danger of unfair prejudice, it is important to keep in mind that the jury knew that Floyd was known for years as Sharon Marshall's father, but in June 1989, he married Sharon in New Orleans (SuppAddT/2131-32). This evidence was properly before the jury without objection from the defense. In light of that uncontested insight into Floyd's character, the added information that Floyd may have had a fetish for suggestive pictures of young girls would not cause the jury much concern.

On these facts, any possible error in the admission of this

evidence would be harmless. As the court below noted, a jury was not going to convict Floyd of murder based on these pictures (SV16/828). Floyd has failed to demonstrate any abuse of discretion in the admission of the pictures. This Court must affirm Floyd's conviction and reject his plea for a new trial on this issue.

ISSUE IV

WHETHER THE TRIAL COURT ERRED IN PERMITTING OPINION TESTIMONY.

Floyd's next issue challenges the admission of testimony from FBI examiner Musheno relating his opinion with regard to some of the photographs permitted into evidence. According to Floyd, the trial court erred in admitting this evidence because the testimony was irrelevant and invaded the province of the jury. This is an evidentiary ruling reviewed on appeal for an abuse of discretion. Ramirez v. State, 810 So. 2d 836 (Fla. 2001). A review of the record demonstrates that the judge below exercised her discretion reasonably in allowing this evidence, and therefore Floyd is not entitled to any relief in this issue.

Floyd correctly cites Glendening v. State, 536 So. 2d 212, 220 (Fla. 1988), cert. denied, 492 U.S. 907 (1989), for the appropriate test for determining the admissibility of expert testimony. Floyd contends that the testimony in the instant case should have been excluded because it failed the test in two respects: it did not assist the jury and that its probative value is outweighed by the danger of unfair prejudice. Floyd's claim that this evidence should have been excluded as too prejudicial, however, has not been preserved for appellate review, as no such argument was presented below. Anderson, 863 So. 2d at 181. Therefore, the issue before this Court turns

solely on the reasonableness of the trial court's conclusion that this testimony would assist the jury (SV20/1314-1315).

The trial judge offered the following remarks in finding this testimony to be admissible:

> First, the Court has to decide whether or not the subject matter is proper for expert testimony, that it will assist the trier of fact in understanding the evidence, and must determine if the witness is adequately qualified to express an opinion on the matter.
>
> It appears that Mr. Musheno is testifying based on his experience and something that he has done repeatedly; that his experience could assist the jurors, perhaps, in finding any details in the pictures that might not be -- that might not readily jump out at them; or similarly that he can assist them in looking at the thumb in the photo and comparing it, I assume, to a known thumb of Mr. Floyd. This is not I.D. or technical in the way of fingerprint applications or a test as we knew it.

(SV20/1314-1315). The court continues by citing to Professor Ehrhardt and to Davis v. Caterpillar, 787 So. 2d 894 (Fla. 3d DCA 2001), concluding that no Frye[6] hearing was necessary (SV20/1315-16). Thus, it is clear the court below gave careful consideration to Floyd's objection to this testimony and applied the correct legal principles.

Floyd's claim that this testimony would not assist the trier of fact is without merit. Surprisingly, Floyd acknowledges the

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[6]Frye v. United States, 293 F. 1013 (D.C. Cir. 1923). The defense below contended that this testimony should be subject to a Frye hearing (SuppAddT/2204).

possibility of such assistance by stating that, if the expert had found *differences* between the photos he compared, the opinion would be "invaluable," but because the expert's opinion was incriminating, Floyd characterizes it as "not so helpful" (Appellant's Initial Brief, p. 63). Clearly, the degree of assistance to the jury is not going to change based on the ultimate conclusion to be reached from the testimony. If the testimony can be helpful to reach an answer on the existence of a disputed fact, then the required element of helping the fact finder has been met.

It is not the final answer, but the thought process in reaching a reliable answer, that is at issue.

A review of the testimony in this case demonstrates that this evidence was properly found to assist the jury. Although, as defense counsel asserts, any reasonable juror may be able to compare two pictures and draw a conclusion as to whether the same objects are depicted, such comparison can be aided by hearing a trained expert explain the importance of contrasting patterns, pattern recognition, class characteristics, and unique identifying or individualized characteristics. Musheno pointed out details and unique characteristics that could be matched up between pictures, telling the jury what to look for in contrasting the photos (SV20/1338-51).

Contrary to the defense claim that Musheno's testimony invaded the province of the jury, Musheno did not offer any opinion of a positive identification, he merely identified details to use in determining whether some items in one picture could be or could not be the same items in another picture. Since Musheno provided specific points to consider for comparison purposes, his expertise was relevant and helpful in assisting the jury to decide whether different photographs portrayed the same particular objects.

Floyd's speculation that the jury would simply adopt Musheno's conclusions without examining the evidence for themselves is unwarranted, and was not offered below as a basis to exclude this evidence. Again, Musheno did not offer a specific opinion on identification, but he explained to the jury how such an analysis should be made. Of course, the jury was properly instructed on considering expert testimony at the conclusion of the case (SV23/1739).

Floyd's claim that this testimony should have been excluded because its probative value was allegedly outweighed by the danger of unfair prejudice is also without merit. As noted previously, this claim was not urged below, and therefore Floyd's current criticism that the judge abused her discretion in permitting this testimony "without weighing the huge danger

of unfair prejudice to Appellant against the slight probative value Musheno's opinion provided" (Appellant's Initial Brief, p. 65), is both unfair and unwarranted. There is no doubt that Judge Ley would have been happy to perform this balancing test if Floyd had requested it or sought to exclude this evidence on that basis. He should not fault the judge for failing to do something which no one asked her to do.

Even if Floyd's claim of unfair prejudice is considered, he has clearly failed to demonstrate any such prejudice from this testimony. Floyd claims the probative value of this evidence was slight, because there was no showing that the jurors would have been unable to make their own comparisons without this testimony. It is true that this evidence was not critical, but it was relevant and therefore valuable to the jury. However, more compelling for this analysis is the complete lack of any potential prejudice. If the only basis for exclusion is that the jury would do exactly the same thing without this testimony, it is difficult to discern any credible possibility of prejudice.

Floyd suggests that the testimony was prejudicial because Musheno would be considered an "authority" and the jury would simply adopt his conclusions rather than examine the evidence for itself. He analogizes the situation to those cases where

judicial or prosecutorial comments have deprived defendants of a fair trial. However, his reliance on the "improper vouching" line of cases is clearly misplaced. To premise a finding of prejudice under this theory would render all expert testimony inadmissible. No improper vouching occurs merely because a witness is qualified as an expert. The jury was instructed with the standard charge on expert witnesses, including the admonishment that they were entitled to believe or disbelieve all or any part of an expert's testimony (SV23/1739).

Floyd has not cited any comparable cases where similar evidence was determined to have been improperly admitted. However, numerous cases have permitted expert testimony comparing crime scene evidence and offering opinions that such evidence may be consistent or inconsistent with other evidence available. See Ramirez v. State, 651 So. 2d 1164, 1168 (Fla. 1995) (wounds consistent with knife); Mitchell v. State, 527 So. 2d 179, 181 (Fla. 1988) (bite marks); Amazon v. State, 487 So. 2d 8, 12 (Fla. 1986) (tool marks); Bundy v. State, 455 So. 2d 330, 349 (Fla. 1984) (bite marks); Bottoson v. State, 443 So. 2d 962, 964 (Fla. 1984) (cloth impression); State v. Richardson, 621 So. 2d 752, 757-58 (Fla. 5th DCA 1993) (bullets); Bradford v. State, 460 So. 2d 926, 929-30 (Fla. 2d DCA 1984) (bite marks). The testimony presented below was in line with these

authorities, and no error has been shown.

Floyd has failed to demonstrate any abuse of discretion in the admission of Musheno's expert testimony. Furthermore, on the facts of this case any impropriety would be harmless beyond any reasonable doubt, since the testimony would not give rise to any undue prejudice. He is not entitled to a new trial on this issue, and this Court must affirm the conviction entered below.

ISSUE V

WHETHER THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION FOR MISTRIAL DURING THE PROSECUTOR'S CLOSING ARGUMENT.

Floyd also seeks a new trial based on the denial of his motion for mistrial during the prosecutor's guilt phase closing argument. According to Floyd, the prosecutor's reference to a comment on cross examination of Diana Rife required the judge to grant a mistrial. However, once again Floyd is not entitled to any relief.

A trial court's ruling on a motion for mistrial is reviewed on appeal for an abuse of discretion. Ford v. State, 802 So. 2d 1121, 1129 (Fla. 2001). The control of prosecutorial comments and conduct in closing argument is also within the trial court's discretion. Esty v. State, 642 So. 2d 1074, 1079 (Fla. 1994). In claims such as this, the vantage point of the trial judge, present in the courtroom, is entitled to due respect. See Justus v. State, 438 So. 2d 358, 366 (Fla. 1983). A motion for a mistrial should only be granted when an error is so prejudicial as to vitiate the entire trial. Snipes v. State, 733 So. 2d 1000 (Fla. 1999); Duest v. State, 462 So. 2d 446 (Fla. 1985). "It has been long established and continuously adhered to that the power to declare a mistrial and discharge the jury should be exercised with great care and caution and

should be done only in cases of absolute necessity." Thomas v. State, 748 So. 2d 970, 980 (Fla. 1999).

To require a new trial, a prosecutor's comments must either deprive the defendant of a fair and impartial trial, materially contribute to the conviction, be so harmful or fundamentally tainted as to require a new trial, or be so inflammatory that they might have influenced the jury to reach a more severe verdict than that it would have otherwise. Anderson, 863 So. 2d at 187; Spencer v. State, 645 So. 2d 377, 383 (Fla. 1994). The record clearly reflects that the legal standard for a mistrial has not been satisfied in this case.

Floyd alleges that he is entitled to a new trial because the prosecutor noted that Diana Rife had described having seen Cheryl with a bruise and mentioning something about Floyd (SV23/1683-85). The prosecutor was recalling Rife's testimony, that she was concerned about Cheryl during the argument outside of the bar because she had seen a bruise on her face, and Cheryl had told her that Floyd – but Rife did not finish her answer, because defense counsel interrupted and objected that Rife was not being responsive to his question (SV18/1088).

Floyd claims the mistrial should have been granted because the prosecutor was discussing facts outside of the evidence. Although the prosecutor may have elaborated on what Rife did not

complete, the gist of it was certainly already before the jury. Because there was testimony about Cheryl's bruise, Floyd's argument that the prosecutor went beyond the evidence is without merit. Hamilton v. State, 703 So. 2d 1038, 1043-44 (Fla. 1997) (prosecutor's statement was fair comment on evidence); Pagan, 830 So. 2d at 813.

Floyd's underlying argument, however, disputes the admissibility of Rife's testimony. No appellate claim can be made with regard to this testimony, because defense counsel did not request the court to rule on his "objection," or request a mistrial, or any other action to preserve the issue for appeal. Perhaps defense counsel did not pursue this because he realized that the prosecutor was correct, that he had opened the door and indeed Rife's comments, while maybe unanticipated, were entirely responsive to his question (SV18/1087-89).

The circumstances were that defense counsel was attempting to impeach Rife by suggesting that she was still angry with Floyd and lying about the encounter outside the bar. Rife had initially exaggerated the parking lot incident to the bar bouncers, and Floyd's attorney used her willingness to embellish at that time as fodder for trial impeachment. Knowing from Rife's deposition that she was concerned about Cheryl because Floyd had "popped" Cheryl earlier, defense counsel tried to get

Rife to admit she was angry rather than concerned, and pushed her to explain why (SV18/1087-89). Rife's answer about having seen Cheryl with a bruise, and Cheryl saying something about Floyd, was entirely responsive to defense counsel and therefore properly before the jury and subject to comment in the prosecutor's closing argument.

The defense did not move to strike Rife's testimony or request any further court action on his objection at that time (SV18/1088-89). The record reflects that defense counsel opened the door to this response; therefore, his objection to Rife's observation of the bruise was not well taken and Rife's testimony was not improper.

On these facts, no error is presented. As this Court has repeatedly recognized, attorneys are permitted wide latitude in their closing arguments. See Thomas v. State, 748 So. 2d 970, 984 (Fla. 1999); Breedlove v. State, 413 So. 2d 1, 8 (Fla.), cert. denied, 459 U.S. 882 (1982). Counsel may advance any legitimate argument. A prosecutor is clearly entitled to offer the jury his view of the evidence presented. Shellito v. State, 701 So. 2d 837, 841 (Fla. 1997) (no error where prosecutor referred to defendant's mother as "either an extremely distraught concerned mother or ... a blatant liar" since statement was fair comment on testimony and permissible as to

prosecutor's view of the evidence), cert. denied, 523 U.S. 1084 (1998).

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

Of course, the jury was reminded just prior to the closing arguments that what the attorneys say in summation arguments is not evidence (SV23/1626). In addition, any possible impropriety in these comments was cured by the trial court's immediate

reminder to the jury to use own recollection (SV23/1685-87). Thomas, 748 So. 2d at 984. Clearly, on the facts of this case, any impropriety could not have affected the ultimate result. Walker v. State, 707 So. 2d 300, 316 (Fla. 1997) (prosecutor's comments impugning defense counsel, referring to expert witnesses as hired guns, and violating Golden Rule were harmless); Bertolotti v. State, 476 So. 2d 130, 133 (Fla. 1985) (prosecutor's impermissible comments on right to silence, Golden Rule violation, and appeal to emotions and fears of jury were harmless). Relief must be denied in this case as well.

ISSUE VI

WHETHER A NEW PENALTY PHASE PROCEEDING IS REQUIRED DUE TO A PROSECUTORIAL QUESTION ON CROSS EXAMINATION OF THE DEFENDANT.

Floyd's first sentencing issue disputes the propriety of the prosecutor's cross examination of Floyd during the penalty phase of the trial. According to Floyd, the court below should have granted a motion for mistrial when the prosecutor revealed the nature of some of Floyd's prior convictions. Floyd asserts that inquiry into the nature of the convictions amounted to improper impeachment, and claims that a new penalty phase proceeding is warranted.

The denial of a motion for mistrial is reviewed on appeal for an abuse of discretion. Ford, 802 So. 2d at 1129. On the facts of this case, no such abuse can be demonstrated.

It must be noted initially that presentation of this issue in Floyd's brief is inaccurate and misleading. The argument presented suggests first that Floyd responded to the prosecutor's question about prior felonies by stating that he thought he had "exactly" nineteen (Appellant's Initial Brief, p. 69). In fact, the record reflects that after Floyd admitted he had no idea how many prior felonies he had, the prosecutor asked if he thought it was 19, and Floyd responded, "Exactly" (SV25/1993). In context, it appears that Floyd was simply being

consistent about maintaining that his admitted number of nineteen convictions was just a guess, and not that he was guessing he had exactly nineteen convictions.

More importantly, Floyd's appellate argument suggests that the prosecutor's use of Floyd's 1962 child molestation conviction violated a prior "ruling" by the judge prohibiting use of this conviction in the penalty phase (Appellant's Initial Brief, pp. 70-71). This clearly did not occur and was not even alleged to the court below. Floyd states "the judge had ruled" that this conviction could not be mentioned in the penalty phase, citing to the penalty phase charge conference. The discussion arose at the charge conference because the State was listing the prior violent felony convictions so that the court could properly instruct the jury on that aggravating factor (SV24/1773-1800). After reviewing several other convictions, the prosecutor indicated they needed to discuss the availability of Floyd's 1962 Georgia conviction for child molestation for consideration under the aggravator. Although the prosecutor noted that Floyd was under 21 at the time of that crime, Floyd had been tried and convicted as an adult and this was not a juvenile adjudication. The defense concern with use of the conviction was not related to Floyd's age, but focused on the issue of whether the conviction was "violent" for purposes of

Section 921.141(5)(b), Florida Statutes. According to defense counsel, the conviction was for an offense in the nature of a non-violent lewd and lascivious charge, and therefore could not be considered in aggravation (SV24/1786). After some discussion about the difficulty obtaining information on the conviction due to its age, the prosecutor elected to withdraw his request for consideration of that conviction for purposes of proving the aggravating factor (SV24/1788).

Unfortunately, discussion of the molestation conviction upset Floyd, who had documentation which he believed demonstrated that the conviction should never have been obtained. Floyd's frustration rendered him unable to control his outbursts and he ultimately had to be removed from the courtroom so that the court could continue to discuss the proposed jury instructions with the attorneys (SV24/1797). However, the judge did not feel comfortable continuing the charge conference in Floyd's absence, and asked his defense attorneys to try to speak with Floyd and calm him down so the charge conference could continue (SV24/1797-99). Upon their return to court, defense counsel advised the judge that Floyd was angry because he had been fighting the validity of this allegedly wrongful conviction for forty years, and that he wanted the opportunity to again put on the record his

explanation of innocence for that conviction (SV24/1800). Defense counsel concluded: "So I just want the record to be complete on behalf of Mr. Floyd, that that is why he had the outburst. And he felt that we were not defending him. So I tried to explain it, again, so it's on the record. Hopefully, we can move forward." The judge responded, "And that incident will not be mentioned to the jury in the penalty phase" (SV24/1800).

The judge's comment was obviously not a "ruling" of any sort. For one thing, there was nothing before the judge on which to rule. The prosecutor had withdrawn any attempt to use the conviction to prove the violent felony conviction aggravator. The judge is merely attempting to reassure Floyd and confirming that the State would not be seeking to use the conviction as an aggravating factor. However, Floyd's brief takes the comment completely out of context and uses it as a basis to argue prosecutorial misconduct, accusing the State of intentional disrespect for the court's ruling.

The attempt to distract this Court with a frivolous claim of "'egregious and inexcusable' prosecutorial misconduct" (Appellant's Initial Brief, p. 72), suggests that Floyd appreciates the lack of merit in a straightforward claim presenting the denial of the motion for mistrial as it actually

arose. In order to adequately consider the denial of the mistrial at issue, it is necessary to explore the totality of the circumstances in context.

The record reflects that the defense moved for a mistrial during prosecutorial questioning of Floyd on cross examination in the penalty phase (SV25/1995-97). Floyd testified on direct examination that he was not going to beg for a life recommendation, because he had not committed this crime and believed it was "wrong to beg for something you didn't do" (SV25/1983). He continued in a narrative fashion to tell the jury about his background, including a history of abuse which started when he was in an orphanage and continuing through his stays in state and federal prison (SV25/1983-89). Floyd stated that he went to prison in the state of Georgia, and then later robbed a bank and got fifteen years in a federal prison (SV25/1987).

Before beginning cross examination, the prosecutor approached the bench and told the judge that he thought Floyd's denial of having committed this crime opened the door to examination on that particular issue, to rebut any claim of lingering doubt as mitigation (SV25/1989-90). The prosecutor also felt that Floyd's testimony about having been in prison opened the door for inquiry as to why he was sent to prison

(SV25/1990). The prosecutor noted that the prison time resulted from the 1963 child molestation case (SV25/1990). The defense advised that the prison time could be based on any number of prior convictions, which defense counsel had intended to ask about on direct (SV25/1990). Defense counsel also stated that they were not seeking mitigation based on lingering doubt, acknowledging that the jury had already convicted Floyd and the defense had no intention of revisiting the conviction under the guise of mitigation (SV25/1991). The judge indicated that she was inclined to find that the door had been opened to these questions, but that she was considering taking a break and calling Judge Susan Schaeffer for advice before ruling that the prosecution could explore these issues (SV25/1992). The prosecutor indicated that he may not approach this line of questioning, and offered to start cross examination and request to approach the bench for a proffer if he felt he was going to get into that area (SV25/1992). Defense counsel asked for the opportunity to ask about Floyd's priors before tendering the witness for cross examination; thereafter, the sidebar conference concluded and Floyd testified in response to his attorney's question that he had nineteen prior felony convictions (SV25/1992-93).

The prosecutor's initial question on cross examination

followed up on his admission to having nineteen prior felony convictions (SV25/1993). When the prosecutor asked how many times Floyd had been convicted of a felony, Floyd responded he didn't really know, but guessed it was nineteen (SV25/1993). He stated that he did not really know the number or what they were; he had some idea, but couldn't remember all of them (SV25/1993).

The prosecutor then asked if Floyd "did all those crimes," and Floyd said no (SV25/1994). Floyd acknowledged that he had made a choice to do the crimes he had done, but he had not done them all (SV25/1994). At that point, the prosecutor began recounting the prior convictions about which the jury had heard evidence - the attack on Ms. Box, which Floyd denied having committed but admitted having been convicted on; the carjacking and kidnaping of Mr. Davis and Michael Hughes, which Floyd admitted; and the bank robbery in 1963, which Floyd admitted (SV25/1994-95). The prosecutor then asked about a child molestation offense in 1963, and Floyd denied having committed that crime (SV25/1995). At that point, the defense objected for the first time, moving for a mistrial (SV25/1995). The judge indicated that the prosecutor was not using the testimony to establish the prior convictions aggravating factor, but only for cross examination on the admitted convictions. The prosecutor

felt entitled to go through the convictions because Floyd had been uncertain and guessing about the number; he confirmed that he was seeking impeachment and not using the convictions for an aggravating factor (SV25/1996). The defense countered that this was improper impeachment (SV25/1996).

The judge indicated at that point that she was wary of the jury hearing anything about a juvenile conviction, and asked the prosecutor how far he intended to go with this line of questioning (SV25/1996). The prosecutor indicated he was stopping at that point; the court then denied the motion for mistrial, and asked the defense if they had any further request of the court; they did not (SV25/1996). The prosecutor then clarified for the record that the 1963 conviction was not a juvenile adjudication; Floyd had been tried as an adult, and received an adult criminal conviction (SV25/1997). The defense did not dispute this assertion, but did request the court provide a curative instruction, asking the jury to disregard the last question and answer (SV25/1997). The court agreed and so advised the jury (SV25/1997).

Following this ruling, Floyd refused to respond to any other questions from the prosecutor, indicating that he had nothing else to say after the way he had been treated (SV25/1998). Floyd refused to answer the questions as instructed by the

court, but at the request of the defense, finding it to be an extraordinary situation, the judge permitted Floyd the opportunity to explain the circumstances behind the molestation conviction. Floyd noted particularly that the child victim was not required to testify under Georgia law, that there was no physical evidence against him, and that it was a case of mistaken identity (SV25/1998-2004). When Floyd finished, the judge reminded that the jury had been instructed to disregard any reference to that offense (SV25/2004). The prosecutor then asked Floyd if Floyd felt that his history at the orphanage explained how he became the man he was today, and Floyd denied that, saying that he had been a criminal for fifty years and that he took full responsibility for his background (SV25/2004-05).

Application of relevant legal principles confirms that the trial court's ruling denying the motion for mistrial was proper. Although it is true that the general rule limits impeachment by prior convictions to the number of convictions and prohibits exploration into the details, this Court has acknowledged that a witness may be subject to further inquiry if there is any attempt to mislead the jury or delude the jury about the criminal history. Fotopoulos v. State, 608 So. 2d 784, 791 (Fla. 1992). A trial judge, as observer, determines the extent

to which testimony may open the door to further questioning and is charged with keeping the parties within reasonable bounds. Lawhorne v. State, 500 So. 2d 519, 523 (Fla. 1986).

The record reveals that the prosecutor's questioning in this case was a proper response to Floyd's comments about his prior convictions. When Floyd indicated that he did not remember how many convictions he had, the prosecutor was entitled to explore the issue. See Burst v. State, 836 So. 2d 1107, 1108-09 (Fla. 3d DCA 2003) (defendant opened door to prosecutor's questions into nature of prior convictions); Mosley v. State, 739 So. 2d 672, 676 (Fla. 4th DCA 1999) (noting exception to general rule against inquiry into nature of prior convictions when witness opens the door to broader inquiry). Moreover, any possible impropriety in asking Floyd whether he had committed the crimes for which he had been convicted was waived; no objection was lodged at that time, and the later objection when the prosecutor specifically mentioned the molestation conviction only challenged mention of that particular conviction. Although that objection asserted improper impeachment, when the mistrial was denied the only further request by the defense was to ask the court to instruct the jury to disregard the last question and answer. From this request, it is clear that defense counsel was not concerned with how the prosecutor had gotten to that point,

only that that point had been reached. Since the defense did not request any action by the court as to the initial line of questioning into the nature of Floyd's prior convictions, any purported error that may now be gleaned from that inquiry has been waived.

Floyd asserts, however, that any failure to adequately preserve this issue for appeal amounts to ineffective assistance of counsel on the face of the record, as in Rodriguez v. State, 761 So. 2d 381 (Fla. 2d DCA 2000). On the facts of this case, reliance on Rodriguez is misplaced. Most notably, defense counsel in the instant case *did* object to the prosecutor's question, and although the court below denied a mistrial, a curative instruction was granted advising the jury to disregard the question and answer regarding Floyd's molestation conviction. In addition, even if counsel below had offered the same claims now asserted, no relief would have been warranted on trial or in this appeal. Any violation of the rules governing impeachment could not have affected the jury recommendation in this case because the information obtained by the prosecutor about the nature of Floyd's prior convictions was already known to the jury. Therefore, no possible prejudice can be discerned and no compelling example of ineffective assistance of counsel is offered on this record.

For the same reason, any possible impropriety revealed in the prosecutor's questioning is clearly harmless beyond any reasonable doubt on the facts of this case. At the beginning of the penalty phase, a stipulation was entered by the parties agreeing that Floyd had been convicted of a number of violent crimes, including a 1963 bank robbery in Oklahoma; the 1995 federal convictions for the carjacking and kidnaping offenses on James Davis and Michael Hughes; the subsequent State of Oklahoma convictions for the Davis/Hughes incident; and a 1994 burglary and battery on Ms. Carrie Box (SV25/1917-18). The parties also stipulated that Floyd had absconded from his 1973 federal parole stemming from the bank robbery conviction and was therefore under a sentence of imprisonment at the time of Cheryl Commesso's murder (SV25/1918).

Thus, although the prosecutor mentioned the nature of several of Floyd's prior convictions, the jury was already well aware of the details of Floyd's convictions for his actions against Carrie Box, James Davis, and Michael Hughes. In addition, the jury had heard penalty phase testimony from Box and Davis describing the facts underlying those particular convictions (SV25/1919-1938, 1939-1958).

Floyd complains primarily about the molestation conviction, which prompted the objection and request for mistrial below.

However, in addition to having the jury instructed to disregard this information, Floyd testified following the denial of the mistrial to his version of events demonstrating his alleged innocence of this crime (SV25/2000-04). Following his explanation, the court repeated her admonition for the jury to disregard any reference to that crime (SV25/2004). On these facts, any possible error in the exchange between Floyd and the prosecutor could not have affected the jury verdict and could only be harmless. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986).

On these facts, no abuse of discretion can be shown in the trial court's denial of the motion for mistrial during the prosecutor's cross examination of Floyd's penalty phase testimony. No new sentencing proceeding is warranted, and this Court must affirm Floyd's sentence.

ISSUE VII

WHETHER THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION CHALLENGING THE CONSTITUTIONALITY OF FLORIDA'S CAPITAL SENTENCING PROCEDURES UNDER RING V. ARIZONA, 536 U.S. 584 (2002).

Floyd next asserts that his death sentence must be vacated because he was allegedly sentenced under a defective statute. It must be noted initially that Floyd's appellate argument does not provide any meaningful argument as to error, it simply refers to a motion to bar sentence premised on Ring v. Arizona, 536 U.S. 584 (2002), which was denied by the court below. The absence of any substantive claim in this issue precludes consideration of the conclusory argument presented in Floyd's brief. The failure to assert any argument with regard to these claims compels a conclusion that any possible error has been waived. Sweet v. State, 810 So. 2d 854 (Fla. 2002) ("because on appeal Sweet simply recites these claims from his postconviction motion in a sentence or two, without elaboration or explanation, we conclude that these instances of alleged ineffectiveness are not preserved for appellate review"); Peede v. State, 748 So. 2d 253, 256 n.5 (Fla. 1999); Shere v. State, 742 So. 2d 215, 217 n. 6 (Fla. 1999); Duest v. Dugger, 555 So. 2d 849, 852 (Fla. 1990) ("The purpose of an appellate brief is to present arguments in support of the points on appeal. Merely making reference to

arguments below without further elucidation does not suffice to preserve issues, and these claims are deemed to have been waived.").

To the extent it may be considered despite the failure to brief this issue, it is a purely legal claim, subject to de novo review. Trotter v. State, 825 So. 2d 362, 365 (Fla. 2002).

This Court has repeatedly rejected Floyd's claim that Ring invalidated Florida's capital sentencing procedures. See Duest v. State, 855 So. 2d 33, 49 (Fla. 2003); Kormondy v. State, 845 So. 2d 41, 54 (Fla. 2003) (Ring does not encompass Florida procedures or require either notice of the aggravating factors that the State will present at sentencing or a special verdict form indicating the aggravating factors found by the jury); Butler v. State, 842 So. 2d 817, 834 (Fla. 2003) (rejecting Ring claim in a single aggravator (HAC) case); Porter v. Crosby, 840 So. 2d 981, 986 (Fla. 2003); Bottoson v. Moore, 833 So. 2d 693 (Fla.), cert. denied, 537 U.S. 1070 (2002); King v. Moore, 831 So. 2d 143 (Fla.), cert. denied, 537 U.S. 1067 (2002).

In addition, it bears noting that the judge below adopted measures specifically designed to prevent or diffuse any possible Sixth Amendment violation. This case was tried after Ring was decided but before this Court issued its opinions in King and Bottoson. In order to assess and document jury

findings should it be deemed necessary in light of Ring, the judge provided a special verdict form which required the jury to indicate the jury vote with regard to each of the three aggravating factors sought by the State. This verdict form reveals that the jury found unanimously that all three aggravating factors applied, and unanimously recommended that a sentence of death be imposed (V17/3073-74). These unmistakable jury findings in the record, along with the application of the prior violent felony conviction and under sentence of imprisonment aggravating factors, establish that no possible Ring error can be discerned. This Court must reject this claim as barred and affirm the death sentence imposed below.

ISSUE VIII

WHETHER THE DEFENDANT'S DEATH SENTENCE VIOLATES DUE PROCESS BECAUSE HIS GUILT WAS NOT ESTABLISHED TO A MORAL CERTAINTY.

Floyd's final claim asserts that his death sentence violates the Eighth Amendment because his conviction allegedly failed to establish his guilt to a virtual certainty. According to Floyd, proof of guilt beyond a reasonably doubt is insufficient, and the heightened reliability required by the Eighth Amendment demands that his death sentence be reversed. Once again, Floyd is not entitled to any relief in this issue.

This is a purely legal claim which is reviewed de novo. Trotter, 825 So. 2d at 365.

The first difficulty with Floyd's argument is that it does not appear to be the same claim presented to the court below. The pro se written motion is not included in the record on appeal. The transcript of the hearing at which the motion was argued reflects that Floyd asked the court to declare Florida's death penalty to be unconstitutional because allegedly innocent people have been executed (SV2/4656-4665). The appellate argument suggests the problem stems from this Court's refusal to acknowledge lingering doubt as a mitigating factor, and claims that the Eighth Amendment elevates lingering doubt to such importance as a mitigator that death cannot be constitutionally

imposed unless guilt is proven to a "virtual certainty," (Appellant's Initial Brief, p. 74). The argument to the court below, however, did not mention using lingering doubt in mitigation or the need to recognize a higher standard of proof. Since Floyd had changed the substance of his argument, his current claim was not preserved for appellate review. Steinhorst v. State, 412 So. 2d 332 (Fla. 1982).

Even if considered, Floyd's argument is clearly without merit. Both the United States Supreme Court and this Court have rejected the claim that lingering doubt must be considered in mitigation. Floyd cites no authority to support his assertions and offers no basis for this Court to find that the Eighth Amendment modifies the reasonable doubt standard which otherwise satisfies due process. Although his brief claims that proof of a "virtual certainty" is required in capital cases, Floyd has not defined that standard or provided any meaningful legal analysis compelling its adoption.

If Floyd is equating virtual certainty with utmost certainty or moral certainty, these standards are already encompassed within the definition of reasonable doubt. See In re Winship, 397 U.S. 358, 364 (1970) (constitution requires government to convince factfinder of guilt with utmost certainty); Victor v. Nebraska, 511 U.S. 1 (1994) (finding burden of proof requiring

moral certainty to be the same as the "ancient and honored" standard of proof beyond a reasonable doubt);[7] United States v. Walton, 207 F.3d 694, 699 (4th Cir. 2000) (noting difficulty of defining standards, suggesting proposed definition of reasonable doubt arguably required virtual certainty) (Wilkinsons, C.J., concurring).

Perhaps due to the lack of legal authority directly supporting his claim, Floyd cites to the evolving standards of decency applied under the Eighth Amendment. However, Floyd has not identified any jurisdictions which have adopted virtual certainty as a burden of proof. Absent some showing of a national consensus or objective factors such as legislation to indicate that contemporary values demand imposition of a higher burden on the State, no relief is warranted. Atkins v. Virginia, 536 U.S. 304, 312 (2002) (evolving standards of decency best exemplified by legislation). Floyd has not suggested that his demand for a higher standard has been embraced by anyone outside of death row.

For all of these reasons, Floyd has not demonstrated any error in the denial of his motion to declare Florida's death

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[7]The defendants in Victor contended that the "moral certainty" language used in their jury instructions amounted to an easier standard than the constitutionally required beyond a reasonable doubt standard. Victor, 511 U.S. at 13.

penalty statute unconstitutional. This Court must affirm his sentence.

Proportionality

Although Floyd has not presented an issue with regard to the proportionality of his death sentence, this Court reviews this issue in every capital case. The facts of this case clearly warranted the death sentence imposed. The trial court properly found three aggravating factors, including the weighty prior violent felony conviction, which in this case was supported by several unrelated violent criminal episodes from Floyd's past. The mitigation considered was minimal and garnered only some weight or very little weight from the court.

The following cases are comparable to establish the proportionality of Floyd's sentence: Douglas v. State, 29 Fla. L. Weekly S219 (Fla. May 6, 2004) (young defendant with no criminal history and numerous nonstatutory mitigating factors committed heinous murder during course of sexual battery); Finney v. State, 660 So. 2d 674 (Fla. 1995) (aggravators include during course of felony, heinous, atrocious or cruel, and prior violent felony conviction); Johnston v. State, 863 So. 2d 271 (Fla. 2003) (heinous murder committed by defendant with prior convictions, mental and nonstatutory mitigation found);

Singleton v. State, 783 So. 2d 970 (Fla. 2001) (prior violent felony conviction and heinous, atrocious or cruel; three statutory and nine nonstatutory mitigators); Spencer v. State, 691 So. 2d 1062, 1065 (Fla. 1996) (prior violent felony and HAC; and two statutory mental mitigators--extreme mental or emotional disturbance and impaired capacity to appreciate the criminality of conduct--as well as a number of nonstatutory mitigating circumstances); Heath v. State, 648 So. 2d 660, 666 (Fla. 1994) (affirming defendant's death sentence based on the presence of two aggravators--prior violent felony and murder committed during the course of a robbery--despite the existence of the statutory mitigator, extreme mental or emotional disturbance); Lemon v. State, 456 So. 2d 885, 888 (Fla. 1984) (upholding imposition of the death penalty where defendant was convicted of stabbing a woman and the trial court found two aggravating factors--HAC and a prior violent felony conviction--and one mitigating factor, emotional disturbance). Clearly, the sentence imposed in this case is proportional to other cases where similar aggravating circumstances have been found.

CONCLUSION

Based on the foregoing facts, arguments and citations of authority, the appellant's conviction and death sentence must be affirmed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Douglas S. Connor, Assistant Public Defender, Polk County Courthouse, P. O. Box 9000 -- Drawer PD, Bartow, Florida 33831, this _____ day of August, 2004.

CERTIFICATE OF FONT COMPLIANCE

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

Respectfully submitted,

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