

IN THE SUPREME COURT OF FLORIDA

RONALD KEITH WILLIAMS,

Appellant,

vs.

Case No. 89,668

STATE OF FLORIDA,

Appellee.

_____ /

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

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant, RONALD KEITH WILLIAMS, was the defendant in the trial court below and will be referred to herein as "Defendant" or "Appellant." Appellee, the State of Florida, was the petitioner in the trial court below and will be referred to herein as "the State." Reference to the pleadings will be by the symbol "R," reference to the transcripts will be by the symbol "T," and reference to the supplemental pleadings and transcripts will be by the symbols "SR[vol.]" or "ST[vol.]" followed by the appropriate page number(s). Reference to Appellant's brief will be as "IB" followed by the appropriate page numbers.

STATEMENT OF THE CASE AND FACTS

Subject to the following additions, corrections, and/or clarifications set forth below and in the argument portion of this brief which are necessary to resolve the legal issue presented upon appeal, the Appellee accepts the Appellant's statement of the case and facts for purposes of this appeal.

SUMMARY OF ARGUMENT

Issue I - No error occurred in substituting an alternate for a juror who had become unable to discharge her duties. Not having been not discharged, the alternate was available for recall.

Issue II - A sufficient inquiry was made of Juror Wallace to determine she was incapable of rendering discharging her duties.

Issue III - The instruction on juror note taking and review was proper. No undue emphasis was placed on the notes.

Issue IV - The judge heard from the appropriate parties and conducted a sufficient inquiry regarding Mr. Raticoff's competency.

Issue V - Having failed to object to Mr. Raticoff's representation, Appellant must establish an actual conflict of interest existed and adversely affected his case. No such showing has been made, thus, this Court should affirm.

Issue VI - Defendant was not unrepresented during the hearing on counsel's Bipolar Disorder and a new attorney was not required.

Issue VII - Evidence of the victim's pregnancy was admitted properly and did not prejudice Appellant's case.

Issue VIII - The trial judge was present physically during the entire trial. His inability to see a particular exhibit did not make him functionally absent.

Issue IX - Sufficient, competent evidence was presented to support sexual battery as the underlying felony for felony murder.

Issue X - Substantial, competent evidence was presented as to Appellant's premeditated intent to kill the victim.

Issue XI - Although unpreserved, the State's closing argument was fair reply to Defendant's closing, the Court should affirm.

Issue XII - The victim's statements to Officer Gillespie qualified as both dying declarations and excited utterances.

Issue XIII - The victim's statements to the 911 operator were excited utterances and the identification of Appellant from the photo line-up was admitted properly as a dying declaration.

Issue XIV - The State was not required to allege felony murder in order to argue it to the jury.

Issue XV - There was no error in permitting the State to argue felony murder because first degree murder had been charged.

Issue XVI - Reliance upon Appellant's conviction for indecent assault upon a child as a prior violent felony was proper.

Issue XVII - The judge conducted the appropriate analysis of the penalty phase evidence before imposing the death penalty.

Issue XVIII - Proportionality review supports the imposition of the death sentence in the instant case.

Issue XIX - Appellant's prior second-degree murder conviction was not a feature of this case; the admission of the facts of that murder did not prejudice Appellant unfairly.

Issue XX - The finding of the heinous, atrocious, or cruel aggravator was appropriate in this homicide.

Issue XXI - The standard jury instruction on mitigation in a first-degree murder penalty phase is constitutional.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN REPLACING JUROR WALLACE WITH ALTERNATE JUROR CARRIL DURING GUILT-PHASE DELIBERATIONS (Restated).

At 9:40 a.m., the jurors were excused to begin deliberations. The court explained to the alternates they may be recalled if a penalty phase were necessary and asked them not to read about or discuss the case with anyone. (T XVII 2164-69). Later, a note was received from the jury which read: "Juror number ten requests that she be allowed to speak to Judge Shapiro. She feels that she's emotionally unable to make a decision, either way." (T XVII 2171). Before talking with the juror, the court discussed substituting an alternate or declaring a mistrial. (T XVII 2171-75).

When the juror, Bessie Wallace ("Wallace"), explained her note, the following occurred:

THE COURT: I don't know what that means. In other words, we have sat here for approximately a month, and both sides -- the State has presented evidence, the defense has cross examined State's witnesses, I have instructed you on the law. Can you apply the law to the evidence and attempt to determine has the State proven the elements, or do you feel you're unable to do that?

MS. WALLACE: I can't do that. I can't bring myself to that.

THE COURT: Why not?

MS. WALLACE: I've been through that before and I couldn't handle it before.

THE COURT: What?

MS. WALLACE: Before my son - with my son. I was with it before with my son.

THE COURT: How come you didn't tell us about that when we were questioning you?

MS. WALLACE: I tell my son, he was actually before three times.

* * * *

MS. WALLACE: Okay. I've been to court with my son three years ago, I'm saying, now, for a crime he didn't commit. I'm saying now, and I can't, I just can't do it. I can't bring myself to do this. I can't do this. You understand what I'm saying?

THE COURT: No, I don't understand a word you're saying. In other words, we went into a great deal of questioning. We spent approximately two weeks questioning jurors and I want to know if you had any feelings or emotions that you didn't bring up?

MS. WALLACE: I had, at that time, no, I did not.

THE COURT: All right, can you listen to the other jurors discussing their views of the evidence and applying the law to it and would that help you?

MS. WALLACE: I cry. I couldn't. We try, but I couldn't go through that. I can't do it. So, I just cannot do it.

(T XVIII 2176-78).

Both parties declined the court's offer to question Wallace.

(T XVIII 2178-79). The defense moved for a mistrial. When the

court proposed substituting an alternate, the State agreed, arguing substitution would be appropriate where a juror became incapable of participating in deliberations. (T XVIII 2179-80). Over a defense objection, the court excused Wallace and substituted an alternate:

In other words, it's not a situation where this woman is voting for the defendant and everyone else wants to vote for the State. It's a situation where she's not capable of rendering any verdict and the Court feels that since she is emotionally incapacitated, that I see no difference than if she got in an automobile accident and was unable to perform her job as a juror. I don't see any difference.

And, basically, we have a situation where I don't think this woman knew the emotions she would be subjected to during this proceeding. And I'm just going to bring in an alternate.

(T XVIII 2180-81).

When the defense renewed its motion, the court explained:

THE COURT: Your motion for mistrial is denied. The Court finds that juror number ten is not, in any way, saying she's mentally ill. What the Court is saying is that because emotionally, again, which involves no mental illness, but involves experiences she's had in life, she's unable to perform the duties of a juror, of weighing the evidence and applying the law to that evidence, and attempting to arrive at a verdict.

... I think the record is clear that she's unable to arrive at any verdict, even if this matter would continue on for days, is that correct, ma'am?

MS. WALLACE: That's right.

THE COURT: And because of that, the Court is going to excuse her and call for the first alternate juror. I see no difference between a juror taking ill and being unable to perform the job of being a juror, as being emotionally unable to perform. I think both are involuntary, both are matters that all humans suffer from, be it physical illness, or with it that the emotions prevent her from performing her duty. That's why we have alternates and what we'll do, then, is call the jury out, have them recess until we can get the alternate in, and then have them recommence their deliberations from the very beginning, noting the defendant's objection.

(T XVIII 2183-84).

Having contacted first alternate, Barbara Carril ("Carril"), the clerk informed the court Carril could return within an hour. The court discussed its instructions and informed the remaining jurors Wallace was excused and Carril would arrive shortly. The jurors were invited to wait in the snack bar with the bailiff, and were instructed not to discuss the case. Significantly, the judge explained deliberations would have to begin anew:

As you probably know, juror number ten has very candidly informed us that she's unable to perform the function of being a juror for emotional reasons. ... What this is going to require is that since the alternate was not present during your deliberation, and does not have the input of the discussion from the eleven other jurors, you're going to have to restart your deliberations when the new juror, or the old alternate, gets here.

(T XVIII 2184-87). The court also stated:

So, we won't have to reread the instructions. We would just like to restart the deliberation, so that the juror is present during the discussion. And her input may change how you feel about certain matters.

In other words, that's the greatness of the jury system is that each person has their individual input that can affect the whole, and vice versa. The whole affects the individual, and the individual affects the whole.

(T XVIII 2188-89).¹ Neither party sought other instructions.

Upon alternate juror Carril's arrival, the court discussed what the instructions would be, and the State presented case law to support the substitution. Neither party objected to or suggested additional language to the proposed instructions nor sought inquiry of the panel or alternate juror. The jurors were instructed:

Let the record reflect that we now have twelve jurors. The alternate, Barbara [Carril], who was the first alternate, is present. I would ask you, at this time, to commence your deliberation.

What I will do is at 5:30 I will ask you whether or not you want to continue your deliberation, or order supper in, or whether or not you wish to retire for the evening. If you wish to continue, you may continue as late as you think is reasonable. It's solely up to you and whatever you decide, you're the boss.

So, at this point, I would ask you to start anew. We'll call you at 5:30 to see

¹ The judge noted it was 2:20 p.m. (T XVIII 2188).

what you want to do. At this time, I would ask you start your deliberations anew.

It's now 10 after 3:00.

(T XVIII 2190-91, 2193-94) (emphasis added).

Sometime later, the jury asked for Officer Gillespie's testimony to be re-read; this was allowed. (T XVIII 2195). Approximately a half hour later, a verdict was returned. It was 5:45 p.m., after the verdict was published, the jury polled, and instructed regarding penalty phase plans. (T XVIII 2196-2201).

Appellant claims the court abused its discretion in denying a mistrial and in substituting an alternate during deliberations. (IB 15-35). He begins the analysis by citing Florida Rule of Criminal Procedure 3.280(a), which provides in pertinent part, "[a]lternate jurors, in the order in which they are impaneled, shall replace jurors who, prior to the time the jury retires to consider its verdict, become unable or disqualified to perform their duties." (IB 16). He alleges this rule precluded the substitution.²

² Appellant did not, however, apprise the court of this rule or otherwise alert the court to the substance of its provisions. Rather, he raised general, conclusory objections to substituting the alternate: "You can't bring in an alternate" (T XVIII 2173); "I'm going to move at this point, however, for a mistrial" (T XVIII 2179); "Judge, see, the problem is that I'm having, at least from my perspective, this is a first. Whatever decision is made, I'm making, at this time a motion for new trial, whether it be right or wrong, subject to 3.850 review, should my client be convicted. And I'm going with it with an abundance of caution. The Court's made some good suggestions. The only conservative and the safest view I see is moving for mistrial, right now" (T XVIII 2179); "Just for the record, and

The State submits Rule 3.280 is not controlling in a capital case. Rule 3.280(a) also provides: "Except as hereinafter provided regarding capital cases, an alternate juror who does not replace a principal juror shall be discharged at the same time the jury retires to consider its verdict." In a non-capital case, once the jury begins deliberations, the alternates are discharged from further service. See McGill v. State, 468 So.2d 356, 357 (Fla. 3d DCA 1985) (finding "[t]he rule makes no provision for the recall of a juror who has been discharged after deliberations have commenced"); James v. State, 453 So.2d 786, 792-93 (Fla. 1984)(reasoning generally, "once a jury is discharged it cannot be re-impaneled to hear matters relating to the same case ... because after discharge the members lose their separate identity as a jury and because they are subject to outside influences").

I'm strenuously objecting to any alternate, I'll make the motion in front of my client" (T XVIII 2180-81); "I'm moving for a mistrial at this point" (T XVIII 2181-82); "Obviously, I strenuously object to any deliberations continuing with an alternate juror who has not been present. I would like the record to reflect any deliberations coming in, in the middle of the deliberations, replaces Mrs. Wallace, who, for the record, is the only, the only black juror" (T XVIII 2182); and "I object to the entire procedure and I renew my motion for mistrial" (T XVIII 2182). These general objections and conclusions were not sufficient to apprise the court of the putative error and were legally insufficient to allow Appellant to rely on a rule he could have, but failed, to cite below. This issue was unpreserved for review. See Tillman v. State, 471 So.2d 32 (Fla. 1985); Steinhorst v. State, 412 So.2d 332 (Fla. 1982); but see Wike v. State, 648 So.2d 683 (Fla. 1994).

Conversely, in capital cases, alternates are not "discharged." Like Carril, they are excused from deliberations, but told to remain in contact with the court for potential penalty phase service and they are told not to discuss or read about the case. Thus, unlike alternate jurors in non-capital cases, those in capital cases are not discharged, and thus, are available for substitution if a juror becomes unable to fulfill his duties.

Appellant contends substitution during deliberations has constitutional consequences, namely, the infringement of the right to a jury of 12. (IB 18-19). Discharging a juror and substituting an alternate does not disturb the ultimate number of jurors who decide the case. Ultimately, only 12 jurors render a verdict. As for the specific 12 that do so, "a defendant has no right to have any particular person serve as a juror but is entitled only to qualified jurors." Street v. State, 592 So.2d 369, 370 (Fla. 4th DCA 1992); Gordon v. State, 704 So.2d 107, 111 (Fla. 1997) (finding no right to a "particular jury composition").

Wallace was no longer qualified to serve. See Issue II. Once she declared she could not render a fair and impartial verdict, the court had three options; first, it could seek Appellant's waiver of 12 jurors and proceed with 11, See Patton v. United States, 281 U.S. 276 (1930)(finding defendant may

waive 12 person jury); cf. Blair v. State, 698 So.2d 1210, 1214 (Fla. 1997)(finding defendant may waive six-person jury); second, it could declare a mistrial; or third, it could substitute an alternate because she had not been discharged. Without specific legal grounds for doing so, Appellant moved for a mistrial. Despite reliance now on numerous out-of-state cases, Appellant has failed to show an abuse of discretion. See Cole v. State, 701 So.2d 845, 853 (Fla. 1997)(finding "ruling on a motion for mistrial is within trial court's sound discretion and should be granted only when necessary to ensure a fair trial").

Even a cursory review of the law in other jurisdictions reveals no general consensus on the issue. Some states have a rule or statute which allows substitution during deliberations as long as procedural safeguards are met. Pendergrass v. State, 702 N.E. 2d 716, 718 n.2 (Ind. 1998)(finding it is within court's discretion to invoke rule which permits substitution of an alternate for an original juror who has become disqualified); People v. Fudge, 7 Cal 4th 1075, 31 Cal Rptr 2d 321, 875 P.2d 36 (Cal 1994)(finding no error in substituting alternate for a discharged juror even though jury had reached guilty verdicts on three of five counts); Perry v. State, 255 Ga 490, 339 S.E. 2d 922 (Ga. 1986)(finding no bar to the replacement of original juror with alternate after deliberations commenced as long as

nothing occurred to affect alternate's qualifications to serve); Green v. Zant, 738 F.2d 1529 (11th Cir. 1984)(affirming no error under Georgia law to substitution of discharged juror with alternate); Henderson v. Lane, 613 F.2d 175 (7th Cir.)(finding Illinois permits substitution of incapacitated juror after deliberations started), cert. denied, 446 U.S. 986 (1980). The states that do not have an applicable rule or statute either strictly forbid substitution after deliberations have begun, or allow substitution conditioned on procedural safeguards. State v. Girts, 121 Ohio App.3d 539, 700 N.E. 2d 395 (8th Dist. Cuyahoga County 1997)(finding general rule that alternates may not be substituted once deliberations commence is not absolute and even though rule is expressed in mandatory terms, violation is not per se reversible error), dismissed, appeal not allowed, 80 Ohio St. 3d 1424, 685 N.E. 2d 237 (1997); State v. Bobo, 814 S.W.2d 353 (Tenn. 1991)(acknowledging right to original 12 jurors could be waived, but if not waived knowingly, failure to follow procedural rules not subject to harmless error analysis); Cork v. State, 433 So.2d 959, 962-63 (Ala App. 1983)(finding no error in permitting substitution because jury had not begun deliberations although it had been instructed); State v. Lehman, 108 Wis.2d 291, 321 NW 2d 212 (1982)(holding it was error to substitute alternate for original juror once deliberations began because there was no authorizing rule and because (1) trial was

not of significant duration; (2) parties did not consent to substitution; (3) alternate was not questioned to see if separation had created prejudice; (4) court did not question jurors to determine if they could deliberate anew while giving consideration to alternate's views; and (5) new jury was not told to begin deliberations anew).

Federal Rule of Criminal Procedure 24(c) is similar to Florida's Rule 3.280 in that it contains language requiring discharge of alternates once deliberations begin. However, the federal rule is not constitutionally grounded. U . S . v . Phillips, 664 F.2d 971, 992 (5th Cir. 1981), cert. denied sub nom., Meinster v. U.S., 457 U.S. 1136 (1982). But see, U.S. Huntress, 956 F.2d 1309, 1314-15 (5th Cir. 1982)(overruling Phillips in the Fifth Circuit Court of Appeals based upon new rule). Shortly after Phillips was issued, Federal Rule of Criminal Procedure 23(b) was created which provided for the use of an 11 person jury, negating the need for substitution. Huntress, 956 F.2d at 1314-15. However, violation of Rule 23(b) is not per se reversible error; a defendant may agree to the substitution. Id. at 1316.

However, in U.S. v. McFarland, 34 F.3d 1508 (9th Cir. 1994), cert denied, 515 U.S. 1107 (1995) after noting Rule 24(c)'s mandate, the court reasoned:

A district court's decision to excuse a juror for just cause pursuant to Rule 23(b)

is reviewed on appeal for abuse of discretion. Once the jury begins deliberations, it is error in the Ninth Circuit to substitute an alternate for a regular member who has to be discharged, unless there has been an express waiver of Rule 24(c) by the defendant. This court must, however, also determine whether the decision to substitute the alternate absent an express waiver either presumptively or actually affected the defendant's substantial rights. If this court finds that his rights were affected, it must then decide whether the error so threatens the fairness, integrity, or public reputation of the court as to require reversal.

McFarland, 34 F. 3d at 1511 (citations omitted). In McFarland, an original juror was excused after deliberations had commenced and an alternate, who had been admonished not to discuss the case, was substituted. Upon recommencement of deliberations, testimony was re-read and additional instructions given. Even though finding error on appeal, the appellate court concluded it was harmless in light of the jury instruction to begin from the beginning, rereading of testimony, and no indication a different verdict would have been reached by an 11 member jury. Id., at 1513-15.

Only two Florida cases have addressed substitution during deliberations. In Sotola v. State, 436 So.2d 1001 (Fla. 5th DCA 1983), motion den., 447 So.2d 888 (Fla. 1984), a 12 member jury retired to deliberate at 8:15 p.m. after a five-day trial and the alternates were discharged. At 1:22 a.m., the foreman told the court one of its members had read the newspaper in

contravention of the court's order, but had not discussed it with the others. During discussions with parties, the court rejected the idea of proceeding with 11 jurors. Instead, the offending juror was replaced with an alternate. Unsure and fatigued, defense counsel requested a recess until the morning, so he could strategize. Absent a formal request for a mistrial, the court told the jurors not to read anything and sent them home. Id. at 1001-06.

The next morning, the judge learned the first alternate had neither read nor heard anything about the case. Addressing the "new" jury, the court informed it that the alternate was ready to deliberate and they should start deliberating the case again. That evening a verdict was reached Id. at 1006-07.

On appeal, the defense argued Rule 3.280 precluded substitution. After noting several non-Florida courts had approved of such substitution during deliberations, the district court found Sotola's motion for mistrial insufficiently specific to apprise the court of his complaint. Sotola, 436 So.2d at 1008. It also noted he failed to raise more specific objections after the recess, which he had requested in order to decide his position. Id. Recognizing the judge had not instructed the jury to begin deliberations anew, an important factor in affirmance in federal cases, but noting post-trial interviews

revealed the jury started from "scratch" in their deliberations, the district court found:

Florida has no statutory or procedural authorization for substitution of an impaneled juror after discharge of the alternates and commencement of deliberations. In the event of timely objection, it should not be done. But there is no constitutional impediment to such substitution, and it is not fundamental error to permit it in the absence of timely and proper objections.

Id. at 1008-09.

In McGill v. State, 468 So.2d 356 (Fla. 3d DCA 1985), the deliberations commenced and the alternate was discharged. Before leaving, the alternate told the judge *ex parte* he would have found the defendant guilty. Forty minutes later, a juror was discharged because he was not fluent in English sufficiently to perform his duties. When the defendant refused to stipulate to a jury of five, the court sat the alternate. About two hours after the jury had retired to deliberate, the alternate returned, and deliberations started anew. However, on appeal, the district court declined to decide whether substitution was *per se* reversible error. Id. at 357. Rather, it determined the alternate, who had expressed an opinion about the defendant's guilt required disqualification, and the judges's *ex parte* conversation with him was so fraught with potential prejudice it could not be considered harmless. Id.

As argued above, Appellant's general, conclusory objection to the substitution, as in Sotola, was insufficiently specific to apprise the judge of the alleged error. Also, there is no proof of prejudice. At the time Carril was released pending recall, she was admonished not to discuss the case. Additionally, just a few hours later, the new jury was informed it should begin deliberation **anew**. The jury spent a period of time deliberating; in fact, it sought a read-back of specific trial testimony. There is no indication the jurors did not follow their instructions. Sutton v. State, 718 So.2d 215, 216 n. 1 (Fla. 1st DCA 1998)(finding law presumes jurors followed judge's instructions in the absence of contrary evidence). See also, U.S. v. Olano, 507 U.S. 725, 740 (1993)(finding there is a presumption, absent contrary evidence, jurors follow court's instructions). Given these facts, this Court should find the trial court took the appropriate steps in addressing the discharge of Wallace and substitution with Carril.

Moreover, from a public policy standpoint, there is no need to declare a mistrial in a capital case merely because a juror becomes incapacitated. Because steps are taken to ensure alternates are not tainted during their separation from the original jurors as guilt phase deliberations are proceeding, and additional precautions could be instituted to ensure a newly constituted jury would begin deliberations anew, there is no

reasonable basis to require a mistrial be declared under these circumstances. Clearly, to sacrifice the overwhelming time invested by all parties concerned (victims, witnesses, defendants and state), and to squander limited judicial resources where there is no constitutionally grounded reason to do so, would be elevating procedural form over substance. Absent proof prejudice did inure to the defendant; this Court should permit substitution of alternate jurors after deliberations have begun in capital cases when an original juror has become incapacitated. For the foregoing reasons, Appellant's conviction should be affirmed³.

³ Alternately, should the Court find Rule 3.280 applies and requires reversal, the State submits a rule amendment is warranted for capital cases where an original juror becomes incapacitated during deliberations. To require a mistrial under these circumstances is unnecessary, especially where alternates are not discharged, and are admonished not to discuss the case. Basic procedural safeguards may be employed to ensure a fair and impartial jury after such substitution. Should the Court promulgate a new rule, it could require inquiry of the alternates and original jurors to ensure there has been no prejudice generated due to the delay in substitution and that the newly created jury would be capable of beginning deliberations anew.

ISSUE II

WHETHER TRIAL COURT MADE ADEQUATE INQUIRY
INTO GROUNDS FOR REMOVING JUROR WALLACE FROM
JURY DURING GUILT-PHASE DELIBERATIONS
(Restated).

As discussed in Issue I, the deliberating jury sent a note which read juror number 10, Wallace, wants to speak to the court because "she's emotionally unable to make a decision, either way." (T XVII 2171). Wallace informed the court she was too emotional to make a decision in the case; she was crying so much and recalling the experience her son had with the criminal justice system that she could not deliberate. (T XVIII 2176-78).

When the court queried if the parties wished to ask the juror questions, both declined. (T XVIII 2178-79). Ultimately, over a defense objection, the trial court excused Wallace, finding she was "not capable of rendering any verdict ... since she [was] emotionally incapacitated." (T XVIII 2180-81). Upon defense counsel's renewed objection and motion for mistrial, the judge explained that "she's unable to perform the duties of a juror." In response to the judge's comment, "I think the record is clear that she's unable to arrive at any verdict, even if this matter would continue on for days," Wallace responded, "That's right." (T XVIII 2183-84).

Appellant claims "Wallace's problem of continuing as a juror is ambiguous ... and appears as if [it were] due to the facts of the case and deliberations over the case," rather than "personal

problems." (IB 35-36). He speculates Wallace "could have been a hold out juror who was being pressured by the other jurors." (IB 36). He concludes "reversal is warranted here where there were not adequate facts on the record to support that Wallace's problems stemmed from exclusively personal problems rather than from the facts of the case." (IB 38). The State disagrees.

To the extent Defendant labels the inquiry insufficient, the State submits he failed to preserve the claim. After the court inquired of the situation, it asked the parties if they wanted to ask questions. Both parties declined; Appellant neither complained about the inquiry nor questioned the alleged ambiguity of Wallace's complaint. (T XVIII 2178-79). Also, Appellant did not object to Wallace's excusal; rather, he objected to the substitution. The failure to object below, waives this issue. See Garland v. State, 634 So.2d 692 (Fla. 5th DCA 1994) (finding waiver where defendant did not object to trial court's dismissal of "disoriented" juror).

Were this Court to consider the claim that Wallace's reason was too ambiguous to justify removal, this Court should note, it has held the decision to dismiss a juror is within the trial court's sound discretion. See Jennings v. State, 512 So.2d 169, 173 (Fla. 1987)(finding trial court has broad discretion in deciding whether a juror may sit); Raleigh v. State, 705 So.2d 1324, 1328 (Fla. 1997); Calloway v. State, 189 So.2d 617 (Fla.

1966); Bullis v. State, 734 So.2d 463, 464 (Fla. 5th DCA 1999); Orosz v. State, 389 So.2d 1199, 1200 (Fla. 1st DCA 1980). See generally United States v. Fajardo, 787 F. 2d 1523, 1525-26 (11th Cir. 1986)(finding removal of a juror is not to be disturbed absent a showing of resulting bias or prejudice).

Here, Appellant has failed to show an abuse of discretion. Wallace's reason for her inability to continue was not ambiguous; as the court found, she was "not capable of rendering any verdict ... since she [was] emotionally incapacitated." (T XVIII 2180-81). From her responses, it was clear she could not sit in judgment. Had she made these statements during voir dire, she would have been subject to a challenge for cause. San Martin v. State, 717 So.2d 462, 467 (Fla. 1998)(finding jurors 'who cannot and will not conscientiously obey the law with respect to one of the issues in a capital case' are subject to a for cause challenge (quoting Lockhart v. McCree, 476 U.S. 162, 176 (1986))); Castro v. State, 644 So.2d 987, 989 (Fla. 1994)(finding for cause removal of juror proper where juror stated he was unsure he could follow the court's instructions). Similarly, Wallace's removal was warranted when she revealed her true feelings during deliberations. Because Appellant was not prejudiced by the removal, this Court should affirm his conviction. See Jennings v. State, 512 So.2d 169, 172-73 (Fla. 1987)(affirming dismissal of juror during trial when juror

stated she had not been candid about her feelings concerning the death penalty); Graham v. State, 470 So.2d 97, 97-98 (Fla. 1st DCA 1985)(finding no error in dismissing juror during trial when he repeatedly expressed discomfort with continued service).

ISSUE III

WHETHER THE TRIAL COURT'S INSTRUCTION TO THE
JURY TO READ THEIR NOTES PRIOR TO
DELIBERATIONS WAS IMPROPER (Restated).

Before jury selection, the court indicated its desire to allow the jurors to take notes. Defense counsel stated he had no objection. (T VI 346). Thereafter, the judge informed the jurors:

I would like to bring up the subject of taking notes.... If you wish, you may take notes.... I wish to give you the following pros and cons....

If you choose to take notes, you should only mark down the highlights of what is happening. If you try to take down every word that every witness is saying, you will be so busy writing, that you will not have the opportunity to pay attention to the testimony that the witness is giving and you will not have the ability to look at the demeanor of the witness on the witness stand. Sometimes the body language of a witness is as important as what the witness is saying.

... You should, during your deliberations, rely solely on your own notes to refresh your recollection. If we have one juror taking notes, and we have eleven other jurors that rely on those notes, then, in effect, we have the recollection of one juror.

(T XI 1178, 1187). Defense raised no objection, nor sought other instructions. (T XI 1181).

Because of the late hour when closing arguments ended, two alternatives were offered. (T XVII 2034-2132).

THE COURT: What I would like to do, I don't know if there is any objection, that's why I'm giving you the opportunity. I'd like to tell the jurors to take their notes home with them to review their notes, because this case has taken about a month.

* * * *

THE COURT: And I think if the jurors go home and read over their notes, they are going to be in a better position to deliberate.

[DEFENSE COUNSEL]: I don't have a problem with that.

(T XVII 2130)(emphasis added). Then, the court addressed the jury:

THE COURT: Ladies and gentlemen, I would like to make a suggestion which is not binding on you. ... What I would suggest is that you take your notes home with you at this time and read those notes over.

In other words, we've been here for, it doesn't seem that long, but it's approximately a month, and there have been a lot of facts that have been brought out in the evidence, and taking notes is fine, but I think it's important that you read over your notes so that during deliberations, you have your hand on the facts as you recall them, not the facts that the attorneys recall.

And what I would suggest is that we recess, now, that you take your notes home with you, you read them over tonight, that you return tomorrow at 8:00 in the morning, and at that time I will instruct you.

* * * *

So, that is plan A.

Plan B, is that you commence your deliberation, now, that you work until 5:30 or so, and then go to a hotel room. And I will leave it up to you what you decide.

... At some point, you have been here a good portion of the day, you're going to get tired and you're also going to have to read over your notes, whether you do it at home or in the back room, and I don't want you to feel that you're under any pressure to hurry up with this matter.

It's very important to both sides that you take the time that it deserves and you take the time to read over your notes.

(T XVII 2131-33). The jury opted to retire. (T XVII 2133-34).

Here, Appellant claims the court "gave undue prominence" to the jurors' notes. While acknowledging he did not object, he claims "this issue is ripe for appellate review because of other objections to matters relating to jury deliberations (Point I)." (IB 40). Appellant cites to Ruiz v. State, 24 Fla. L. Weekly S157 (Fla. Apr. 1, 1999), and Whitton v. State, 649 So.2d 861 (Fla. 1994) for support. Neither case excuses the failure to object.

In Ruiz, the Court considered multiple comments made by the State during closing argument, only some of which drew a defense objection. In finding prosecutorial misconduct, this Court noted the failure to object to all of the comments, but determined there was fundamental error "[w]hen the properly preserved comments [were] combined with additional acts of prosecutorial overreaching ... we find that the integrity of the

judicial process has been compromised and the resulting convictions and sentences irreparably tainted.” 24 Fla. L. Weekly at S139. Similarly, in Whitton, the Court did not consider the individual harm of two testimonial comments to a defendant’s right to remain silent, to which there was no objection. Rather, it considered these comments in determining if a later, objected to, comment was harmful in the context of the entire trial. This Court found the objected to third comment harmless in light of the two previous testimonial comments. Whitton, 649 So.2d at 865.

Appellant’s attempt to bootstrap his claim to some unidentified argument or objection made in relation to Point I is unavailing. The Court has held repeatedly, a defendant must object to the wording of an instruction in order to preserve the claim. E.g. Archer v. State, 673 So.2d 17, 20 (Fla. 1996)(finding instructions subject to contemporaneous objection rule); cf. Parker v. State, 641 So.2d 369, 375 (Fla. 1994)(same). Here, Appellant neither objected to the instruction’s wording nor proposed alternative language. The matter is unpreserved. See Kelley v. State, 486 So.2d 578, 583 (Fla. 1986)(rejecting contention jury was instructed inadequately).

“Whether or not a jury is to be allowed to take notes and use them in the deliberation process is a question within the

sound discretion of the trial court." Kelley, 486 So.2d at 583. As noted above, Appellant consented to the note taking. Moreover, prior to any testimony, the court instructed the jurors, without objection, to the proper use of notes. As for the subsequent instruction to which Appellant now complains, the court did not emphasize the notes unduly. Rather, it merely suggested the jurors who took notes, refer to them to refresh their recollection. It did not instruct the jurors to place greater emphasis on their notes than on their recollection or on the jury's collective memory. This instruction was not improper. But if it were, it did not vitiate the entire trial where the court had instructed previously on the proper use of notes. This Court should affirm.

ISSUE IV

WHETHER AN ADEQUATE INQUIRY WAS MADE INTO
DEFENSE COUNSEL'S COMPETENCY DUE TO HIS
BIPOLAR DISORDER (Restated).

On May 20, 1993, Bruce Raticoff ("Raticoff") was appointed Appellant's counsel. Six days before trial, one of his colleagues appeared and indicated Raticoff was in the hospital. Because of jury panel scheduling, trial was reset. The judge asked to be notified if Raticoff would be unavailable for trial. (T V 317-20). Ten days before trial, Raticoff's psychologist, Dr. Brannen, testified, within a reasonable degree of medical certainty, Raticoff was stabilized on Lithium, prepared to begin trial, and capable of performing his role. Having treated Raticoff for a year for "manic" Bipolar Disorder, he prescribed Lithium recently. Aware of the prior manic episodes, he would have expected one within the past month, but none occurred. He opined therapy would alert them to an episode and, in response to the State's concern Raticoff might stop medicating, Dr. Brannen indicated Raticoff's blood would be checked to monitor the Lithium level. Raticoff confirmed there was no reason trial could not begin. (T V 325-31).

Appellant complains the judge failed to make a sufficient inquiry into the illness. Specifically, he claims the court failed to elicit details of the hospitalization, illness, and

medication effects. He asserts the court should have asked if counsel's trial preparation was effected adversely. (IB 42-47).

Appellant had the right to competent counsel. When Raticoff's illness was disclosed, the court heard testimony about it. There was no more significant witness than the treating psychologist, who had the most knowledge of and could opine, within a reasonable degree of medical certainty, as to Raticoff's ability to proceed. While neither Raticoff nor Dr. Brannen disclosed details of the hospitalization or illness,⁴ the court heard medical testimony Raticoff was stabilized and competent.

Appellant seeks a new trial claiming Raticoff did not prepare adequately. Generally, ineffective assistance claims are not reviewable on direct appeal, but are more properly raised in postconviction relief proceedings. McKinney v. State, 579 So.2d 80 (Fla. 1991). Here, the extent to which Raticoff was prepared is a matter for a postconviction relief motion. Also, Defendant claims Raticoff's illness rendered suspect the representation. The representation was either constitutionally effective or not. If it passes muster, it matters not whether he was having a manic episode; effective assistance will have been rendered. If Raticoff was ineffective, it does not matter why; Appellant will be entitled to a new trial. Cf. White v.

⁴ This was privileged under section 90.503, Florida Statute (1995).

State, 559 So.2d 1097 (Fla. 1990)(affirming denial of claim counsel was under the influence of drugs/alcohol at trial); White v. Singletary, 972 F.2d 1218 (11th Cir. 1992); Kelly v. U.S., 820 F.2d 1173 (11th Cir. 1987). It is the inappropriate time or forum to consider Raticoff's competency; such is for the postconviction process. This Court should affirm.

ISSUE V

WHETHER DEFENSE COUNSEL'S BIPOLAR DISORDER
AND THE TRIAL COURT'S INQUIRY INTO SAME
CREATED A CONFLICT OF INTEREST BETWEEN
APPELLANT AND DEFENSE COUNSEL (Restated).

Seeking a new trial, Appellant maintains a conflict between himself and Raticoff developed, when counsel's illness became an issue. Defendant asserts Raticoff's interest was to be found competent and such was adverse to Defendant's⁵. He faults the judge for not asking whether he understood the potential conflict and wished to waive the right to conflict-free counsel. (IB 48-51).

When Appellant asserts Raticoff had no interest in exposing any incompetency, thus, their interests conflicted directly (IB 48), the claim is premised on a belief Raticoff was incompetent and was less than forthright. There is no evidence to suggest these circumstances existed. As noted in Issue IV, if Raticoff rendered competent assistance, it matters not whether he had a personality disorder. Likewise, if Raticoff were competent, his interests do not diverge from Appellant's. Counsel's performance evaluation is better left for postconviction litigation.

Reliance upon Adams v. State, 380 So.2d 421 (Fla. 1980) and Roberts v. State, 670 So.2d 1042 (Fla. 4th DCA 1996) does not

⁵ This claim suggests Appellant's interest was to have counsel found incompetent. The Court should not succumb to such reasoning.

further Appellant's position. In both cases, challenges to the representation were pending, while here, no such challenge existed. The only evidence was notice of Raticoff's hospitalization and presentation of Dr. Brannen who opined, to a reasonable degree of medical certainty, Raticoff was stable and ready for trial. (T V 325-28). There was no showing a conflict existed or that the hearing was anything more than advising the court of the reason for the recent absence and present availability. At no time did Appellant seek new counsel or question Raticoff's competency.

Without an objection below, this issue is unpreserved. Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982)(holding unless there is fundamental error or the matter was presented below, court will not consider claim on appeal); McCrae v. Wainwright, 439 So.2d 868, 870 (Fla. 1983)(finding claim against appellate counsel must fail where conflict issue was not raised below). Without an objection to Raticoff's representation, this Court should find there was no error in the manner the court conducted the hearing and in finding Raticoff ready to proceed. Valdes v. State, 626 So.2d 1316 (Fla. 1993)(affirming denial of motion to discharge counsel when defendant failed to explain allegations of ineffectiveness). In Valdes, without factual support, defendant moved to discharge his counsel and sought new counsel to represent him at the hearing. This Court found such

motion legally insufficient. Id. 1319-20. See also, Johnston v. State, 497 So.2d 863, 868 (Fla. 1986)(finding court must examine defendant's reasons for withdrawal of counsel, but a general claim of loss of confidence is insufficient).

Here, Appellant did less than the defendants in Valdes and Johnston. The court was not informed a potential conflict existed nor was dissatisfaction with counsel voiced. Also, the judge was not told new counsel was sought or needed⁶. This Court should find an insufficient basis for relief was established.

Turning to the claim the judge was obligated to inquire further into Raticoff's competency and ask Appellant if he understood the potential conflict, the State submits an adequate inquiry was conducted. (IB 51). It is axiomatic; conflict must be alleged, or apparent from the record, before a court needs to inquire. With no objection below, actual conflict must be proven. See Kelly, 820 F.2d at 1175-76.

Under Cuyler v. Sullivan, 446 U.S. 335, 346-48 (1980) the United States Constitution does not impose an affirmative duty upon the court to inquire of the propriety of multiple representations. "[T]he possibility of conflict is insufficient

⁶ While maintaining no conflict existed, it is clear the psychologist established Raticoff was competent. Not only were the Defendant's interests in competent counsel protected, but those of the State and judicial system to have a competent attorney for the defense were advanced as well.

to impugn a criminal conviction." Id. at 350. Likewise, this Court opined:

To prove an ineffectiveness claim premised on an alleged conflict of interest the defendant must "establish that an actual conflict of interest adversely affected his lawyer's performance." Our responsibility is first to determine whether an actual conflict existed, and then to determine whether the conflict adversely affected the lawyer's representation. A lawyer suffers from an actual conflict of interest when he or she "actively represent[s] conflicting interests." To demonstrate an actual conflict, the defendant must identify specific evidence in the record that suggests that his or her interests were impaired or compromised for the benefit of the lawyer or another party. Without this factual showing of inconsistent interests, the conflict is merely possible or speculative, and ... such a conflict is "insufficient to impugn a criminal conviction."

Herring v. State, 730 So.2d 1264, 1267 (Fla. 1998)(emphasis supplied)(citations omitted). See, Wood v. Georgia, 450 U.S. 261, 267 (1981)(remanding case for further findings where conflict apparent on the record); Kelly, 820 F.2d at 1175 (holding defendant must show actual conflict which affected attorney's performance adversely); Buenoano v. Dugger, 559 So.2d 1116, 1120 (Fla. 1990)(requiring actual conflict be established that adversely effected trial). Appellant must establish an actual conflict existed before relief is appropriate. Here, there is no record support for a finding of conflict, nor

indication counsel's representation was deficient. The conviction should be affirmed.

Fully informed of the matter through Dr. Brannen, seeing no conflict on the record, and hearing no objection from Appellant, either at the hearing or later, it cannot be said the judge erred in not inquiring of Appellant in this matter. Appellant would have this Court find conflict where none exists. Even here, there is no allegation counsel's representation was ineffective. On this record, it cannot be said the judge knew or should have known a conflict existed or taken different action. As reasoned in Sullivan, 446 U.S. at 346-48 without evidence of a conflict, the court has no duty to inquire. The conviction should be affirmed.

ISSUE VI

WHETHER APPELLANT WAS UNREPRESENTED DURING
TRIAL COURT'S INQUIRY INTO DEFENSE COUNSEL'S
BIPOLAR DISORDER (Restated).

As discussed in Issues IV and V, Appellant claims conflict existed between himself and Raticoff. Appellant believes his interest in discovering the nature and extent of counsel's illness conflicted directly with Raticoff's interest in maintaining his professional reputation. Appellant claims this conflict, which he did not waive, denied him counsel at a critical trial stage. According to Appellant, because the judge failed to appoint disinterested counsel to represent him during the competency inquiry, he is entitled to a new trial. (IB 51-53).

There are many cases wherein a defendant alleges ineffective assistance of counsel prior to or during trial. By their very nature, these allegations create a conflict of interest between defendant and attorney. Pursuant to Hardwick v. State, 521 So.2d 1071, 1074-75 (Fla. 1988), and Nelson v. State, 274 So.2d 256 (Fla. 4th DCA 1973), the court must inquire into the allegations, elicit counsel's response thereto, and determine whether the allegations are well-founded. In such circumstances, the defendant's interest in recusing his attorney is in direct conflict with counsel's interest in protecting his professional reputation. However, the court does not inquire

into privileged matters, as Appellant faults the court for failing to do. Furthermore, the court does not appoint new counsel simply for the purpose the Nelson hearing, as Appellant now proposes should have been done here. See, Valdes, 626 So.2d at 1320-21 (rejecting claim judge should have appointed disinterested counsel to represent defendant during Nelson inquiry).

Here, as in Nelson inquiries, both the court and State were interested in advancing the truth-seeking function of the hearing. Neither wanted to proceed with defense counsel's competency unresolved or without determining counsel could function as the competent counsel to which Appellant was entitled. That he did not have additional counsel to advance his personal interests did not deprive Appellant of due process of law. As argued in Issue IV, the court made a sufficient inquiry into Raticoff's illness and determined he was competent to proceed. Appellant has failed to prove the inquiry or procedure was constitutionally lacking. This Court should affirm the conviction and death sentence.

ISSUE VII

WHETHER TRIAL COURT PROPERLY ADMITTED, IN
GUILT PHASE, VICTIM'S RECORDED 911
STATEMENTS ABOUT HER PREGNANCY WHEN ATTACKED
(Restated).

After Appellant stabbed the victim, Lisa Dyke ("Dyke"), she called 911 and during her plea for help, told the operator she was seven months, three weeks pregnant. (SR 20). Appellant filed a motion in limine⁷ seeking to prohibit use of Dyke's dying declarations made at the hospital. At the August 11, 1995 hearing, apparently defense counsel objected to the 911 tape, both as it related to Dyke's identification of Appellant and her pregnancy. Because the court reporter's notes for this date were lost, the record had to be reconstructed. In the "Amended Statement of Proceedings" prepared by Appellant's counsel, there is no mention of any discussion regarding the 911 tape related to the pregnancy. The judge's order on the motion is silent on the issue. There is no record of an objection to this evidence or its basis.

The day before trial, the State reminded the judge he had sought case law on whether the fact Dyke was pregnant when stabbed, could be introduced. The judge responded, "Not the pregnancy, what happened after the pregnancy. In other words,

⁷ Although the motion was served upon the State and a response was filed by the State, the Clerk could not locate the document in the court files. (See Clerk's Affidavit dated December 20, 1999, R II 312-18, 381-86).

we have a 911 call ... that I ruled is admissible, and the deceased is saying, among other things, that she was pregnant." (T VI 339). The court wanted to know what, if anything, the parties wanted to reveal about the baby's condition. (T VI 340-41). The State indicated it had no intention of mentioning the child's fate. (T VI 341). Defense counsel agreed Dyke's reference to her pregnancy was relevant, but renewed an argument, apparently made at the August 11 hearing, that the pregnancy was more prejudicial than probative. (T VI 342-43). While maintaining his objection "to the pregnancy coming in," counsel agreed to eliciting testimony the baby had been born alive, but not that the child was brain damaged. (T VI 343-44).

In the State's opening, the prosecutor twice mentioned, without objection, Dyke was pregnant at the time of the attack. (T XI 1253-55). During the defense opening, counsel mentioned the baby was born alive. (T XI 1276). During the discussion of the 911 tape, the judge noted defense counsel had filed a motion in limine to exclude the tape; the State did not object to a continuing defense objection. (T XII 1330-31). Thereafter, the tape was introduced and published. (T XII 1372).

Here, Appellant claims the pregnancy was irrelevant to any material fact, and was admitted improperly. (IB 54-55). Appellant conceded, however, that reference to the pregnancy was relevant.

THE COURT: I think that because it's relevant to the issue of spontaneity, the fact she's hurt and pregnant, I think it's relevant.

MR. RATICOFF: Which I never objected to.

...

MR. RATICOFF: ... The pregnan[cy], itself, obviously was mentioned on the 911 tape. It's obviously relevant evidence.

(T VI 340-42)(emphasis added). Having objected on the sole basis the pregnancy reference was more prejudicial than probative (T VI 342-43), Defendant may not argue now it was irrelevant. Tillman v. State, 471 So.2d 32 (Fla. 1985); Steinhorst, 412 So.2d at 338.

The State disagrees with Appellant's claim that mentioning the pregnancy was more prejudicial than probative. "[A] criminal takes his victim as he finds him and 'can not be excused from guilt and punishment because his victim was weak and could not survive the torture he administered.'" Brate v. State, 469 So.2d 790, 795 (Fla. 2d DCA 1985)(quoting Swan v. State, 322 So.2d 485, 487 (Fla. 1975)); Maynard v. State, 660 So.2d 293, 296 (Fla. 2d DCA 1995). Dyke's pregnancy was an intrinsic fact; it could no more have been, nor should have been, excised from evidence than the fact she was an 18 year old female. These facts, sex and age, are so inherent in the case no one thinks to keep them from the jury. Cf. Allen v. State,

662 So.2d 323, 328 (Fla. 1995)(referencing victim's family proper where defense depicted victim as "nice, old grandmother", a "lady who has a large family"). Unless the fact is used to evoke sympathy, its existence does not render it inadmissible. As opined in Muehleman v. State, 503 So.2d 310, 317 (Fla. 1987), when the State referred to the victim as a "feeble, sickly, 97-year-old man", "[s]uch a statement could indeed tend to excite passion in the jury. We cannot, however, rewrite on the behalf of the defense the horrible facts of what occurred or make the slaying appear to be less reprehensible than it actually was." Similarly, addressing use of gruesome photographs, the Court stated:

Those whose work products are murdered human beings should expect to be confronted by photographs of their accomplishments.... It is not to be presumed that gruesome photographs will so inflame the jury that they will find the accused guilty in the absence of evidence of guilt. Rather, we presume that jurors are guided by logic and thus are aware that pictures of the murdered victims do not alone prove the guilt of the accused.

Henderson v. State, 463 So.2d 196, 200 (Fla.), cert. denied, 473 U.S. 916 (1985).

The same could be said in this case. Appellant picked his victim; while he could have picked a less sympathetic one, he picked Dyke, an 18 years old pregnant female (generally more vulnerable than a man). Just as a defendant should not be

shielded from the prejudice inherent in photographs of the scene, he should not be protected from prejudice inherent in the victim's physical characteristics. Cf. Parker v. State, 641 So.2d 369, 377 (Fla. 1994)(finding mention defendant left victim to bleed to death in the street and children in the car were facts, not nonstatutory aggravators); United States v. Salameh, 152 F.3d 88, 122-23 (2d Cir. 1998)(affirming admission of testimony and photos of victims, including one of pregnant victim, though shocking, evidence was probative of the crime and corroborated expert's conclusions).

Appellant's reliance on Lewek v. State, 702 So.2d 527 (Fla. 4th DCA 1997), and Vaczek v. State, 477 So.2d 1034 (Fla. 5th DCA 1985), is misplaced. In Lewek, the defendant was charged with vehicular homicide in the deaths of "a young pregnant mother and her eighteen-month-old son." 702 So.2d at 530. Pre-trial, the court ruled the fact of the pregnancy could be admitted, but not that she was due to deliver three days after the accident. During trial, there were two references to her pregnancy. However, the victim's mother blurted out the victim had been shopping for baby clothes and the baby had been due three days after the accident. The court denied a mistrial, but instructed the jury the "pregnant condition or the term of her pregnancy have no relevance to this case and are not to be considered by

you in your deliberations." Id. at 533-34. On appeal, the district court reversed:

Contrary to the State's argument, given the unduly inflammatory nature of the testimony of Lisa's mother, no instruction to the jury could cure the prejudice. ... the evidence regarding Lisa's pregnancy is so inflammatory and so prejudicial that only a mistrial could have been the proper remedy.... Not only did the introduction of the term date of Lisa's pregnancy violate a portion of the trial court's own ruling in limine, but such testimony was unduly prejudicial and could only be calculated to play upon the jury's passions and evoke sympathy for the tragic victims of this accident. Consequently, we agree ... the curative instruction was insufficient and that the trial court erred in not declaring a mistrial.

Id. at 534 (citation omitted).

In Lewek, the deciding factor for reversal was the mother's outburst regarding the baby's due date and shopping for clothes coupled with an inadequate curative instruction. Had the mother not blurted out these facts, it is unclear whether the district court would have reversed. While it concluded the pregnancy was irrelevant, its reversal was based on the court's failure to grant a mistrial following the mother's testimony.

Similarly, in Vaczek, the defendant stabbed a pregnant co-worker, who lost her baby. The defendant moved to exclude this evidence; after the State indicated it was not eliciting such facts, the motion was granted. Despite the State's assertion, it elicited this information. The court denied a mistrial, but

gave a curative instruction. In reversing, the district court held,

The prosecutor's questioning was clearly erroneous, and all the more reprehensible in light of the trial court's previous order of exclusion. The loss of the victim's unborn child was such an inflammatory fact that we cannot deem the error harmless nor cured by the judge's instruction. Absent the improper questioning and resultant testimony, it is not clear beyond a reasonable doubt that the jury would have returned a verdict of guilty on attempted first degree murder rather than some lesser crime because the evidence was not overwhelming on that point.

477 So.2d at 1035 (emphasis added; footnote and citation omitted).

As in Lewek, the pregnancy was not, by itself, the basis for reversal. Rather, it was the introduction of more inflammatory information, namely, the child died, which warranted reversal. Here, Dyke's pregnancy was mentioned four times by the State: twice in opening statements as an identifying feature of Dyke, once, on the 911 tape, and once, in closing argument. It was not a feature of the trial nor used to inflame the jury. See Jackson v. State, 545 So.2d 260, 265 (Fla. 1989)(rejecting claim testimony revealing pregnant victim killed was unduly prejudicial because pregnancy revealed in other testimony without objection); Bolden v. State, 404 So.2d 417, 418 (Fla. 1st DCA 1981)(finding pregnancy admitted properly in attempted murder case involving stabbing); cf. Valentine v. State, 688

So.2d 313, 315 (Fla. 1996)(same); Slawson v. State, 619 So.2d 255, 256 (Fla. 1993)(finding evidence admitted without objection that defendant shot eight-month-pregnant victim, slit her open, and left her dead fetus at foot of couch where husband found killed); Keen v. State, 504 So.2d 396 (Fla. 1987); Ruffin v. State, 397 So.2d 277, 278 (Fla. 1981).

Dyke's pregnancy was highly relevant to show lack of consent to the sexual battery, and/or to show use or threat of deadly force, or actual physical force. Though not charged, sexual battery formed the underlying felony for the felony murder theory. The fact Dyke was almost eight months pregnant with another man's baby was relevant evidence she had not consented to having sex with Appellant. See Thomas v. State, 328 S.E.2d 422, 424 (1985)(opining "[w]hile the mere fact of pregnancy of an alleged rape victim may not be relevant to the issue of consent of a victim, when the alleged victim is in her fortieth week of pregnancy, it can be argued by both sides that her physical condition has relevance to the issue of consent"); People v. Cook, 186 A.D.2d 879, 880-81, 588 N.Y.S.2d 919, 920-21 (1992)(finding evidence of non-consent where, among other things, victim was eight months pregnant). Also, the pregnancy was relevant to show use or threat of use of deadly or actual physical force likely to cause serious personal injury. See Thompson v. State, 47 Ala.App. 586, 258 So.2d 926 (1972)(finding

evidence, including victim seven and a half months pregnant, sufficient to support rape conviction); State v. Gray, 556 So.2d 661, 667 (La. Ct. App. 1990)(affirming rape conviction where victim pregnant); People v. Cook, 186 A.D.2d 879, 880-81, 588 N.Y.S.2d 919, 920-21 (1992) (finding evidence of forcible compulsion where, among other things, victim eight months pregnant and feared for her unborn baby); Commonwealth v. Jones, 449 Pa.Super. 58, 63, 672 A.2d 1353, 1355 (1996)(finding evidence of physical force or threat of physical force where victim pregnant).⁸

Even were it not relevant, or more prejudicial than probative, the references to the pregnancy were harmless beyond a reasonable doubt. Both Ruth and Stephanie Lawrence testified Stephanie ended her relationship with Appellant the night before the attack because of a recent disagreement between Appellant and Ruth Lawrence. (T XII 1307-09, 1335-40). The State theorized Appellant went to Ruth Lawrence's apartment to kill her, but instead found, raped, and killed Dyke. (T XI 1250-52).

⁸ Although Appellant does not allege a sentencing error, evidence of the pregnancy was relevant, and not unduly prejudicial, to show the "heinous, atrocious, or cruel" aggravator. Hall v. State, 614 So.2d 473, 482 (Fla. 1993)(finding crime heinous were seven month pregnant woman killed); cf. Muehleman v. State, 503 So.2d 310, 317 (Fla. 1987)(finding portrayal of victim as "feeble, sickly, 97-year-old man" was "highly relevant" in establishing "felony murder," "avoid arrest," HAC, and CCP aggravators).

To support this theory, the State presented the 911 call, wherein Dyke identified her assailant as a black man named "Ronnie" who and gave Stephanie Lawrence's telephone number. (SR I 17, 20). The police contacted Stephanie, who told them "Ronnie" was "Ronnie Williams" and showed them his home. (T XIII 1422). That day, the police found Appellant in mental health unit, where he had admitted himself after the attack. (T XIII 1422). The State presented Dyke's statement to Officer Gillespie, in which she told him "Rodney", Ruth's sister's boyfriend, raped and stabbed her. (T XII 1385-87). Dyke identified Appellant from a photo lineup. (T XIII 1552-53).

Bite marks on Dyke, especially one on her left breast, matched Appellant's dental cast. (T XV 1803). In the expert odontologist's opinion, Appellant's teeth lined up with the bite mark "as good as [he has] ever seen one line up." (T XV 1815). He testified it was unusual to match as many teeth as matched here. (T XV 1845).

The police found Appellant's fingerprint in blood on the inside of the bathroom door. (T XIII 1491-92; XV 1734-35). They found his blood on the sweat pants Dyke used to cover herself and on the shirt Ruth Lawrence's baby was wearing that morning. (T XIII 1464-74; XVI 1909-10, 1945-46). The statistical probability someone other than Appellant left the blood on the clothing was estimated at 1:2.1 billion in the Caucasian

population and 1:120 million in the African American population.
(T XVI 1954).

Based on the quality and quantity of permissible evidence upon which the jury could have relied in finding Appellant guilty, the State's few references to the pregnancy, if error, were harmless beyond a reasonable doubt. Cf. Allen, 662 So.2d at 328 (finding guilt phase testimony regarding victim's family relationships irrelevant, but harmless); Davis v. State, 698 So.2d 1182, 1190 (Fla. 1997) (finding state's closing argument reference to victim's emotional handicap harmless). This Court should affirm the Defendant's conviction for the first-degree murder.

ISSUE VIII

WHETHER TRIAL COURT'S INABILITY TO SEE
STATE'S BITE MARK EXPERT'S DEMONSTRATIVE
EXHIBITS DEPRIVED APPELLANT OF A FAIR TRIAL
(Restated).

Dr. Souviron qualified as an expert forensic odontologist in bite mark analysis. (T XV 1777-80). During direct examination, he testified the cast he made of Appellant's teeth matched bite marks found on Dyke's left breast. He explained, using photographs, transparencies, and the cast, how the movement of Appellant's jaw, Dyke's body, and the elasticity of her skin caused a four millimeter distortion in the bite mark. (T XV 1777-1819). During his explanation, the State asked the doctor to move from the witness stand and publish certain exhibits on an overhead projector. (T XV 1807). Shortly thereafter, the doctor demonstrated his ability to match the cast with the bite mark:

Q [By State] Could you please show us what the - where the distortion relates to when you place the cast on the one-to-one [photograph]?

A [By Witness] And then you'd have to move it this way to get these teeth to line-up. So there's a movement over to the left.

(T XV 1819).

This drew a defense objection that the answer was non-responsive. Indicating he had not been able to see the demonstration because he was sitting behind the screen, the

judge had the court reporter read back the doctor's testimony. The pith of Defendant's objection was that the doctor was explaining the movement of Appellant's jaw during the bite, rather than why the cast did not line up exactly with the mark. The judge ruled the answer was "within the parameters of the questions being asked." (T XV 1819-21).

Appellant claims the court's inability to see the demonstration rendered it functionally absent from the proceedings. This absence, he claims, constitutes fundamental error. (IB 60-63).

There is no question the judge was present physically during the doctor's testimony, and without question, he heard the testimony. The court also made evidentiary rulings during the doctor's testimony prior to the instant exchange. (T XV 1811-18). When defense counsel posed the objection, the court understood it and made an appropriate ruling. Conspicuously, Appellant does not challenge the propriety of that ruling. After all, if the judge had "no idea" what transpired because of the obstruction, Appellant surely would have challenged those other ruling(s); but he has not.

That the judge did not see the doctor's demonstration did not render him "absent" from the proceedings. Having heard the testimony, the court considered and denied appropriately Appellant's objection. Defendant's frivolous claim must fail.

ISSUE IX

WHETHER THERE WAS SUFFICIENT EVIDENCE OF SEXUAL BATTERY TO SUPPORT AN INSTRUCTION ON FELONY MURDER IN THE GUILT PHASE AND TO SUPPORT AN INSTRUCTION ON THE FELONY MURDER AGGRAVATOR IN THE PENALTY PHASE (Restated).

As will be discussed in more detail in Issues XIV and XV, Appellant filed pretrial motions to prohibit argument and/or instructions concerning first degree felony murder, but the record contains no rulings on them. (R I 111-13; II 277-79). At the guilt-phase charge conference, the court presented its tentative jury instructions. In discussing felony murder instructions, the judge indicated he would not instruct on burglary as an underlying felony, because the State had failed to establish the victim withdrew her consent to Appellant's presence. (T XVII 2034-37). As for the instruction on sexual battery as an underlying felony, the judge stated: "I think that the fact that the victim said she'd been raped, the fact that she was found by the officers nude, the fact that she had bites about her breast and vaginal area, is sufficient evidence to submit the rape to the jury." (T XVII 2037).

When asked if there were any objections to the felony murder instruction, defense counsel stated, "Judge, my objection is that the State has not made the necessary showing for rape to be considered as a predicate to the felony murder theory. I understand the Court has just elucidated your reasons for

including it. I would like to raise my objection." (T XVII 2037-38). Thereafter, both parties rested their cases (T XVII 2049-50) and defense counsel motioned for judgment of acquittal stating:

I would advance a motion for judgment of acquittal. My argument is strictly this, the State has failed to make a prima facie case of guilt against the defendant, regarding, especially regarding premeditation, first degree murder, where there has been no, absolutely no evidence that the defendant's acts were premeditated, or as to felony murder.

(T XVII 2053). Such was denied without comment. (T XVII 2053-54).

Here, Appellant claims the court abused its discretion in instructing the jury on felony murder with sexual battery as the underlying felony because the evidence of sexual battery was legally insufficient, especially where the evidence was circumstantial. (IB 63-67). In Davis v. State, 703 So.2d 1055, 1059 (Fla. 1997), this Court stated "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 that can be sustained under the law." Describing the trial judge's task in a circumstantial evidence case, this Court stated:

It is the trial judge's proper task to review the evidence to determine the presence or absence of competent evidence from which the jury could infer guilt to the

exclusion of all other inferences. That view of the evidence must be taken in the light most favorable to the state. The state is not required to "rebut conclusively every possible variation" of events which could be inferred from the evidence, but only to introduce competent evidence which is inconsistent with the defendant's theory of events. Once that threshold burden is met, it becomes the jury's duty to determine whether the evidence is sufficient to exclude every reasonable hypothesis of innocence beyond a reasonable doubt.

State v. Law, 559 So.2d 187, 189 (Fla. 1989)(citations and footnote omitted).

When taken in the light most favorable to the State, the evidence establishes Appellant killed Dyke during the commission of, or the attempt to commit, a sexual battery. Ruth Lawrence testified that shortly before the attack, Dyke was wearing a white T-shirt and shorts. Neither was torn nor stained. (T XII 1310). Both Officers, Gillespie and Costello, testified Dyke was nude when she opened the door for them. (T XII 1381, 1405). While paramedics were administering to Dyke, she told Officer Gillespie Appellant raped her.⁹ (T XII 1387). Detective Cerat

⁹ Besides renewing his challenge to this statement as an excited utterance (Issue XII), Appellant claims the statement's impact was negligible as far as the sufficiency of the evidence. (IB 65). The weight accorded circumstantial evidence is for the jury. Donaldson v. State, 722 So.2d 177, 182 (Fla. 1998)(finding evidence contradictory does not warrant acquittal as the weight and credibility of the evidence and witnesses are jury questions); Woods v. State, 733 So.2d 980, 986 (Fla. 1999). The evidence, and all reasonable inferences therefrom, must be taken in a light most favorable to the State. State Law, 559 So.2d 187, 189 (Fla. 1990).

Appellant also claims Dyke's conclusion she was raped was

testified he found Dyke's shorts tangled in the bed sheets, with the underwear still inside, as if removed simultaneously. (T XIII 1452). He also found on the bathroom floor Dyke's shorts and shirt, with the collar torn, saturated in blood. (T XII 1310; XIII 1471). At the hospital, Detective James photographed bite marks on Dyke's left breast, on her back, on her right arm near her shoulder, and on her inside left arm. (T XIII 1556-62). He noticed bite marks in Dyke's pubic region around her vagina, but the hospital staff would not allow him to photograph them. (T XIII 1585-86). An expert odontologist testified the cast of Defendant's teeth matched the bite marks on Dyke's left breast and back. (T XV 1803, 1825). Dyke was almost eight months pregnant, which is relevant to show lack of consent and threat or use of force. See Thomas v. State, 173 Ga.App. 810, 811, 328 S.E.2d 422, 424 (1985); Cook, 186 A.D.2d at 880-81, 588 N.Y.S.2d at 920-21; Jones, 449 Pa.Super. at 63, 672 A.2d at 1355; Thompson, 47 Ala.App. at 258 So.2d 926.

These facts were sufficient for submission of the felony murder with sexual battery issue to the jury. Davis, 703 So.2d at 1059 (finding circumstantial evidence of sexual battery sufficient to overcome motion for acquittal in felony murder); Barwick v. State, 660 So.2d 685, 695 (Fla 1995)(finding evidence

"opinion testimony" on a legal matter. (IB 65). He did not challenge the statement on this ground below, hence, he cannot challenge it here. Steinhorst v. State, 412 So.2d 332 (Fla. 1982).

victim's bathing suit displaced and semen stain near body sufficient to establish attempted rape); Sochor v. State, 619 So.2d 285, 290 (Fla. 1993)(concluding there was sufficient evidence of attempted sexual battery for felony murder where last time victim seen alive she was being held and kissed by defendant); Dailey v. State, 594 So.2d 254, 258 (Fla. 1991)(reasoning penalty phase evidence that victim was found nude with her clothing scattered about was sufficient to indicate a sexual battery); Smith v. State, 515 So.2d 182, 184 (Fla. 1987); State v. Gray, 556 So.2d 661, 667 (La. Ct. App. 1990)(affirming rape conviction where victim pregnant).

The defense "hypothesis of innocence," asserted below was that Appellant did not commit this murder. Despite the fact Dyke identified him and the police found his fingerprint and blood in the apartment,¹⁰ Appellant claimed he was not there that morning. (T XVI 1875). Dyke's identification of Appellant as her attacker and the physical and circumstantial evidence collected showed he was present in the apartment that morning, and adequately refuted Appellant's "hypothesis." The judge denied properly the motion for judgment of acquittal for felony murder.

¹⁰ Appellant argued this evidence could have been left at another time. However, in the bedroom where the knife was found, Defendant's blood was discovered on the baby's shirt and his bloody fingerprint was collected from inside the bathroom.

Should this Court decide the evidence was legally insufficient to support a felony murder conviction, nevertheless, Appellant's conviction for first-degree murder should be affirmed. As discussed in Issue X, the evidence is legally sufficient to support a conviction for premeditated murder. Hence, any felony murder argument or instruction was harmless beyond a reasonable doubt. Teffeteller v. State, 439 So.2d 840 (Fla. 1983)(finding erroneous instruction on underlying felony for felony murder was harmless where substantial, competent evidence existed to uphold conviction under theory of premeditated murder), cert. denied, 465 U.S. 1074 (1984); Brown v. State, 521 So.2d 110, 111 (Fla. 1988)(finding failure to instruct on underlying felony harmless where evidence supported premeditated murder conviction).

ISSUE X

WHETHER DENIAL OF A JUDGMENT OF ACQUITTAL AS
TO PREMEDITATION WAS PROPER (Restated).

Here, Appellant asserts a judgment of acquittal should have been granted as to premeditation.¹¹ (IB 71) The State disagrees. The force with which the stab wounds were inflicted to Dyke's vital organs (both lungs), coupled with her cries for help, and the fact the attack progressed from the one room to another, establishes Appellant's premeditated intent to kill.

"[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 that can be sustained under the law." Davis, 703 So.2d at 1059. In seeking a judgment of acquittal, Appellant not only admitted the facts in evidence, but admitted every conclusion favorable to the State the jury may reasonably infer therefrom. Where there is room for disagreement between reasonable people regarding the proof of

¹¹ While maintaining premeditation has been established, the State submits that were this Court to decide the evidence was legally insufficient to support a premeditated murder conviction, Appellant's conviction for first-degree murder should be affirmed under the theory of felony murder. San Martin v. State, 717 So. 2d 462, 469 (Fla. 1998)(finding "[w]hile it may have been error to instruct the jury on both premeditated and felony murder, any error in this regard was clearly harmless. The evidence supported conviction for felony murder and the jury properly convicted San Martin of first-degree murder on this theory."); Jenkins v. State, 692 So. 2d 893, 894 (Fla. 1997)(same). As discussed in Issue IX, the evidence was legally sufficient to support a conviction for felony murder with sexual battery as the underlying felony.

facts or inferences, the case should be sent to the jury. Taylor v. State, 583 So.2d 323, 328 (Fla. 1991). The judge's task is "to determine the presence or absence of competent evidence from which the jury could infer guilt." Law, 559 So.2d at 189. It is the jury's province to decide whether the evidence supports a finding of premeditation. Larry v. State, 104 So.2d 352, 354 (Fla. 1958).

As opined in Sireci v. State, 399 So.2d 964, 967 (Fla. 1981):

Premeditation can be shown by circumstantial evidence. Premeditation is a fully-formed conscious purpose to kill, which exists in the mind of the perpetrator for a sufficient length of time to permit reflection, and in pursuance of which an act of killing ensues. Premeditation does not have to be contemplated for any particular period of time before the act, and may occur a moment before the act. Evidence from which premeditation may be inferred includes such matters as the nature of the weapon used, the presence or absence of adequate provocation, previous difficulties between the parties, the manner in which the homicide was committed and the nature and manner of the wounds inflicted. It must exist for such time before the homicide as will enable the accused to be conscious of the nature of the deed he is about to commit and the probable result to flow from it insofar as the life of his victim is concerned.

Id., at 967(citation omitted); See, Jackson v. State, 575 So.2d 181 (Fla. 1991). In Sochor, 619 So.2d at 288, premeditation was shown by evidence the defendant's assault of the victim was

interrupted long enough for him to stop, turn, look, and shout at another person, before resuming his attack. Premeditation may be established through circumstantial evidence. Preston v. State, 444 So.2d 939, 944 (Fla. 1984). Where premeditation is established by circumstantial evidence, the evidence relied upon must be inconsistent with every other reasonable inference. Wilson v. State, 493 So.2d 1019 (Fla. 1986). 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 verdict, it will not be reversed. Spencer v. State, 645 So.2d 377 (Fla. 1994). The circumstantial evidence standard does not require the jury believe the defense version on which conflicting evidence was produced. Peterka v. State, 640 So.2d 59, 68 (Fla. 1994).

Substantial, competent evidence for premeditated murder was presented. Appellant and Dyke were acquainted through her roommate, Ruth Lawrence, whose sister, Stephanie, he was dating. On the Saturday, before the attack, Ruth argued with Appellant. That Monday evening, she told her sister of the disagreement, which in part, caused Stephanie to break up with him that night. (T XII 1302-09, 1335-38).

Between 8:00 and 9:00 a.m. the next morning, Ms. Healy, heard screaming from Dyke's apartment; a girl screamed twice, "Help me." Persons were heard running from room to room and

thumping as though one was being thrown against a wall. (T XII 1350-54). Near 8:30 a.m., the police responded to Dyke's 911 call and found her nude and bleeding. A bloody knife was located in her bedroom; blood was found in the bathroom, blood soaked clothing was collected, and Appellant's bloody fingerprint was discovered on the inside of the bathroom door. Defendant's blood was found on the sweat pants Dyke used to cover herself as well as on the baby's shirt. (T VXII 1360-75; XIII 1453-74, 1591-92; XV 1734-35; XVI 1909-10, 1945-46).

Dr. Wright testified Dyke suffered seven stab wounds. One to her chest was four inches deep, penetrating through the sternum, puncturing the right lung, and entering the ribs of her back; a knife wound like this required great force. The other stab wounds were to Dyke's back; one, was four inches deep puncturing the left lung. Due to the 19 days Dyke lingered before dying, the original wounds may have been deeper. The puncturing and collapse of both lungs caused severe aspiration pneumonia, and the loss of blood pressure caused sepsis. Of the other stab wounds, all stopped upon hitting bone or did not penetrate deeply. There were defensive knife lacerations to her hand and fingers, and she suffered bites to her arm, breast, and leg. Cuts to Appellant's hand were consistent with slippage of the knife as it hit bone. (T XIV 1617, 1639-43, 1651-55 1668-85, 1784-90, 1803-15).

Defendant contends multiple stab wounds suggest a frenzied, not premeditated murder. (IB 71). He cites Kirkland v. State, 684 So.2d 732 (Fla. 1996), but, Kirkland is distinguishable. There, the defendant resided with the victim and was tempted sexually by her. Id. at 735. Here, while Appellant knew Dyke they did not live together and there is no evidence he was tempted by her. Further, it was only after Ruth Lawrence caused Defendant's relationship to end that he raped and stabbed Dyke in the Lawrence apartment. The force needed to inflict the major wounds, and the fact the attack progressed from one room to another established premeditation.

Similarly, Green v. State, 715 So.2d 940 (Fla. 1998) does not further Appellant's position. In Green, the victim was drunk and there was testimony that after the defendant did things to her, she "got crazy", and he stabbed her. Id. 943. The weapon was never located, nor was there testimony the defendant possessed a knife. Id. Here, the weapon was found, and Appellant had cuts to his hand consistent with it sliding down the knife as he stabbed Dyke. She was not drunk and there was no indication she provoked the attack.

Finally, Appellant's attack was not committed in the frenzied manner contemplated in Austin v. United State, 382 F.2d 129 (D.C. Cir. 1967). The Austin court found 26 major stab wounds, with as many superficial cuts, indicated a lack of

deliberation especially where the defendant did not procure the knife with the specific purpose to kill; he always carried it. Id., at 132, 139. Here, there was no indication Appellant usually carried a knife, and while multiple stab wounds were inflicted, only two of the seven were major. Clearly, there was a fully formed intent to kill as evidenced by the two major thrusts to Dyke's torso which penetrated her sternum, ribs, and both lungs. This homicide was premeditated.

Because Appellant challenges the court's decision on the judgment of acquittal, the issue here, is whether sufficient evidence of premeditation existed to submit the case to the jury. Law, 559 So.2d at 189. The facts in Jimenez v. State, 703 So.2d 437 (Fla. 1997) almost mirror those here. In Jimenez, this Court concluded "[t]he deliberate use of a knife to stab a victim multiple times in vital organs is evidence that can support a finding of premeditation." Id., at 440 (citing Preston v. State, 444 So.2d 939 (Fla. 1984)). In that case, the victim was beaten and stabbed eight times; one wound was four inches deep penetrating her heart. This was sufficient to support a finding of premeditation. Also, in Henry v. State, 574 So.2d 73, 74 (Fla. 1991), the evidence of defendant's repeated stabbing of his wife's throat after an argument, was sufficient to prove premeditation. See, Nibert v. State, 508 So.2d 1 (Fla. 1987)(finding defendant's ordering victim to his knees during

stabbing, coupled with excessive number (17) and nature of the stab wounds, provided sufficient evidence to support premeditated murder).

Here, Dyke and Appellant were acquainted. Based upon the timing of Stephanie Lawrence's break-up with Appellant and Dyke's murder, a reasonable inference to be drawn is that Ruth Lawrence caused the break-up and the homicide was a result of Defendant's anger at not finding Ruth home that morning. Also, there was screaming, thumping on walls, and cries for help coming from the apartment before 911 was called. (T XII 1350-54, 1367-75). During the attack, Appellant bit and stabbed Dyke; two of the stab wounds were at least four inches deep entering each lung. One was inflicted with such great force it penetrated through the sternum, into the back ribs. (T XIV 1617, 1639-43, 1682-85). Because of Dyke's cries for help, the wounds to her torso, hitting vital organs (the lungs), and evidence the attack progressed from bedroom to bathroom, this Court should find there was sufficient evidence to have the jury determine whether Appellant contemplated his actions, and formulated a premeditated intent to kill.

ISSUE XI

WHETHER THE STATE'S COMMENTS DURING GUILT-PHASE CLOSING ARGUMENT DEPRIVED APPELLANT OF A FAIR TRIAL (Restated).

Defendant claims the State made improper comments during its closing which denied him due process and a fair trial. (IB 71-74). However, he did not object to any of the comments at trial. Riechmann v. State, 581 So.2d 133, 139 (Fla. 1991)(finding claim of prosecutorial misconduct unpreserved without contemporaneous objection). Moreover, no fundamental error has been shown.

Initially, he complains the State appealed to the passions and sympathy of the jury improperly when it "emphasized" the victim's pregnancy. (IB 72). To avoid redundancy, the State relies upon its arguments in Issue VII wherein the admissibility of evidence and comments relating to Dyke's pregnancy were discussed.

Next, he claims the State "denigrated the defense by referring to it as 'Alice in Wonderland.'" (IB 72-73). When put in context, the State's comments were not improper. Not having presented guilt-phase evidence, Appellant was entitled to first and last closing argument. In his initial argument, defense counsel listed the State's evidence and then discounted it. For example, he alleged the State failed to establish Dyke's veracity; thus, her statements could not be believed.

Addressing Appellant's bloody fingerprint, he alleged it could have been left at another time. The defense argued the serologist failed to explain how she obtained the DNA match and failed to establish no contamination occurred. Similarly, he alleged the odontologist did not account for the distortion in the bite mark to Dyke's breast. Thus, neither the DNA nor bite mark evidence was credible. In effect, defense counsel was turning the State's case upside down.

There was no defense objection to the State's comments:

You know, in listening to the defense counsel's opening, closing argument ... my prior thoughts, actually, became reality. Because as I sat there, during the course of the trial ... a child's story came to my mind. ... that story is Alice in Wonderland. To listen to how he has taken each piece of evidence in this case, you would have thought you were with Alice in Wonderland, okay? Because up is down in her world, in was out in her world, and down was up, and out was in, in Alice's Wonderland story. And you know what, there was a conversation between Humpty Dumpty and Alice in that case, and in that conversation, Humpty Dumpty said, when I use a word, it means exactly what I want it to mean, but Alice said, but the question is, can you make words means so may different things? And Humpty Dumpty responded, and he responded, no. The question is, which one shall be master.

Well, you know what? Humpty Dumpty was a little bit wrong. He was off the mark because in reality, ladies and gentlemen, truth is not what you want it to be at any given time. This fight with - despite what Humpty Dumpty said, truth is the truth is the truth.

(T XVII 2087-88). When put in context, these comments were fair reply. It is well settled, a prosecutor may respond to arguments and suggestions made by the defense and such fall into the category of "invited response". Dufour v. State, 495 So.2d 154 (Fla. 1986); Ferguson v. State, 417 So.2d 639 (Fla. 1982); Pitts v. State, 307 So.2d 473 (Fla. 1st DCA), cert. dismissed, 423 U.S. 918 (1975).

To support his position, Defendant cites State v. Merritt, 247 N.J.Super. 425, 589 A.2d 648 (1991), and People v. Clemons, 166 A.D.2d 363, 561 N.Y.S.2d 425(1990), but neither is availing. In Merritt, wherein the defense was characterized as an "Alice in Wonderland" story, the court found some of the state's summation improper, however, it did not specify what part. More important, it concluded the statements were not so egregious to deprive the defendant a fair trial. In Clemons, the prosecutor did far more than what is alleged here:

The prosecutor told the jury not to listen to defense counsel's "Alice in Wonderland" version of the facts, nor to follow the trail of the red herring. He suggested that counsel would lie to protect his job with Legal Aid and described counsel's cross-examination of the complainant as "two hours of slander ... two hours of character assassination".

Referring to defendant, an admitted transvestite, the prosecutor stated "this poor soul who sits before you dressed as a woman", "a person whose entire life is a fraud", is "totally amoral ... (T)ruth, oath,

lies mean nothing to him.... He is willing to be a receptacle for any man who comes along with a few bucks." He added that "(y)ou cannot embarrass that man.... What more could you possibly do that would make that man ashamed? He has done everything already himself." The prosecutor then stated that although defendant thinks he's the Mayflower Madam, he's actually just a common street prostitute. The prosecutor also referred to the fact that defendant had rosary beads at trial and labeled him "Mother Theresa at the defense table."

Clemons, 166 A.D.2d at 366. No such comments or ad hominem attacks were made here.

Appellant also claims the State improperly "made mention about bringing in another expert". (IB 73). When put in context, the comment was proper. During defense closing, it was argued the knife found was proven to be the murder weapon:

They don't tell you there were no other knives in the house, that Ronnie Williams prints were on the knife. It was a knife found in the house. They don't bring in doctors to tell you the angle of the wound, the depth of the wound was consistent with this knife. They don't tell you that the wound was straight and not serrated, so it wouldn't be the knife that had the little grooves in it. It was a knife found at the scene, period.

(T XVII 2079-80). In rebuttal, the State commented:

... I'm going to discuss further those stab wounds with you, and also defense counsel's comment that that knife was not determined by any experts. If I brought in yet another expert, you would have been hearing that particular evidence thrown down the kitchen sink. However, but defense said it could have been tested for purposes of

determining whether this was the type of knife, whether it was a serrated knife.

... let's not forget that Dr. Wright ... who tells you, in fact, how deep the knife goes in, to the extent that he could see it. Let's not forget that when you make those types of studies, as he did, he had to open Lisa up. He had to do an internal exam.

Lisa survived for nineteen days, almost twenty days. They are not going to do any such testing on Lisa while she's at least attempting to survive these mortal wounds or what ultimately become mortal wounds. Let's not take this out and, excuse me, to the absurdity as to what could have been done in this case.

(T XVII 2086-87). This was fair reply to the defense argument.

Finally, Appellant claims the State "misrepresented to the jury that the DNA on the sweat pants and baby's shirt 'matched up' with Appellant"; he claims DNA evidence does not identify a suspect. (IB 73). However, the serologist was permitted to testify, without objection, "the D.N.A. obtained from the sweat pants matched that of the D.N.A. from Ronnie Williams," and "[t]he D.N.A. obtained off the child's shirt matched that of the D.N.A. from Ronnie Williams." (T XVI 1945-46). The State reiterated merely the expert's testimony. To the extent this was improper, the State stated immediately that "there was only a one in 120 million chance, and one in 2.1 billion chance in the white population, that the DNA came from another source." (T XVII 2089). These comments related the trial evidence properly.

However, should the Court find one or more of these comments improper, they neither, singularly nor cumulatively, constitute fundamental error. The evidence was more than adequate to sustain the verdict. To rebut Appellant's claim he was not the person who attacked Dyke, the State admitted Dyke's identification of Appellant, his bloody fingerprint, and blood on the baby's shirt, which could have been left only at the time of the crime. To the extent the State commented on the evidence, or defense improperly, it did not vitiate the entire trial. This Court should affirm.

ISSUE XII

WHETHER TRIAL COURT ABUSED ITS DISCRETION IN
ADMITTING VICTIM'S STATEMENTS TO OFFICER
GILLESPIE AS A DYING DECLARATION OR EXCITED
UTTERANCE (Restated).

In seeking a reversal, Appellant contends the State did not prove Dyke's statements to Officer Gillespie ("Gillespie") were dying declarations or excited utterances; thus, their admission violated his constitutional rights. (IB 74-79). The State maintains reversal is not warranted as Dyke's statements qualify as both dying declarations and excited utterances.

Appellant asserts Dyke's statements to Gillespie were not dying declarations because the paramedics were treating her, therefore, there was "hope for recovery." (IB 76). The State submits a proper predicate was established. "Before a hearsay statement is admissible as a dying declaration the court must be satisfied that the deceased declarant, at the time of its utterance, knew that his death was imminent and inevitable." Torres-Arboledo v. State, 524 So.2d 403, 407-08 (Fla. 1988); Teffeteller, 439 So.2d at 843; Lester v. State, 37 Fla. 382, 385, 20 So. 232, 233 (1896). "Whether a proper and sufficient predicate has been laid for the admission in evidence of a dying declaration is a mixed question of law and fact and will not be disturbed unless clearly erroneous." Teffeteller, 439 So.2d at 843-44.

Pretrial, the judge found Dyke told Gillespie she was dying and did not want to die. (R II 381). At trial, Gillespie testified he saw Dyke nude, bleeding from stab wounds, and covered in blood. (T XII 1381-83). According to him, "[f]rom the onset Dyke was afraid of dying, she was saying, 'I do not want to die. I do not want to die.'" (T XII 1382). While paramedics were attending her, administering fluids and oxygen, Gillespie tried to engage her in conversation. As he was doing so, she would slip in and out of consciousness causing Gillespie to repeat his questions several times. His queries were propounded subsequent to and during Dyke's expressions of fear she was dying. (T XII 1384-85).

In Teffeteller, this Court addressed the propriety of the admission of a decedent's statements. Although suffering a massive gunshot wound, the victim remained conscious for three hours as he was treated at the scene and hospital. Teffeteller, 439 So.2d at 842-43. Responding to the victim's statement, "Oh God, I'm going", the doctors consoled him and told him not to worry. Id. at 843. In concluding there was sufficient evidence to support a finding the victim believed he was about to die, this Court quoted Lester:

It is not necessary that the evidence...should consist of express utterances of the deceased to the effect that he knew he was going to die, or could not live, or would never recover. It may be gathered from any circumstance or from all the circumstances

of the case, and is sufficient if the evidence...satisfies the judge that the deceased knew and appreciated his condition as being that of an approach to certain and immediate death.

Teffeteller, 439 So. 2d at 843 (quoting Lester, 20 So. at 233).

Similarly, in Henry v. State, 613 So.2d 429 (Fla. 1992), the victim, with burns over 90% of her body, plus a head wound, gave the police a statement upon her arrival at the hospital. Id. at 430. Relying upon Lester and Teffeteller, this Court reasoned:

It is not required that the declarant make "express utterances...that he knew he was going to die, or could not live, or would never recover." Rather, the court should satisfy itself, on the totality of the circumstances, "that the deceased knew and appreciated his condition as being that of an approach to certain and immediate death." The trial court did this. The sufficiency and propriety of the predicate for a dying declaration is a mixed question of law and fact, and a trial court's determination of the issue will not be disturbed unless clearly erroneous.

Henry, 613 So.2d at 431 (citations omitted). See also, Anderson v. State 182 So. 643 (Fla. 1938)(finding predicate for admission of victim's statement defendant "killed me, I am dying" where statement made about 30 minutes after attack and death occurred 14 days later). Clearly, a victim's statement is admissible as a dying declaration even though she may have received encouragement; Teffeteller, 439 So.2d at 843, did not express her belief in her pending death; Id., or made statements after a period of time elapsed; Henry, 613 So.2d at 430, so long as

the totality of the circumstances indicate the victim knew and appreciated her impending death. Lester, 20 So. at 233. Here, Dyke, kept repeating to Gillespie, "I do not want to die", as she was fading in and out of consciousness. (T XII 1381-83). While nude and covered in blood, Dyke told him she was dying. (R II 381). Upon the paramedics' arrival, oxygen and fluids were administered. (T XII 1381-83). Clearly, the totality of the circumstances support a finding Dyke's statements fall under section 90.804(2)(b), Florida Statutes as dying declarations. This Court should affirm.

Appellant claims there is no basis for concluding the statements to Gillespie qualify as excited utterances.¹² (IB 77). He asserts the statements were made approximately 30 minutes after the stabbing, thus, there was time for reflection and Dyke's responses to Gillespie show she was relying upon her memory, not answering spontaneously. (IB 78). The State disagrees.

Notwithstanding section 90.802, Florida Statutes, which prohibits admission of hearsay, certain exceptions to the rule exist; specifically, statements found to be "excited utterances" are admissible. Section 90.803(2), Florida Statutes defines an

¹² There is no record citation where this issue was argued; the thrust of the motion in limine was to have Dyke's statements found not to be dying declarations. Assuming this argument was advanced during the un-transcribed hearing, it will be addressed.

excited utterance as: "A statement or excited utterance relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." The essential elements of an excited utterance are: an event startling enough to cause nervous excitement, a statement made before there was time to contrive or misrepresent and a statement made while under the stress of excitement. Henyard v. State, 689 So.2d 239, 251 (Fla. 1996); Rogers v. State, 660 So.2d 237 (Fla. 1995); State v. Jano, 524 So.2d 660 (Fla. 1988). "While the length of time between the event and the statement is a factor to be considered in determining whether the statement may be admitted under the excited utterance exception ... the immediacy of the statement is not a statutory requirement." Henyard, 689 So.2d at 251 (citation omitted).

In Henyard, the victim's statements were admitted properly as excited utterances. Regaining consciousness two hours after being raped and shot, the victim reached a nearby house for help. Henyard, 689 So.2d at 243. In finding the victim's statement to the police excited utterances, this Court stated:

... When the officer arrived, he found Ms. Lewis, who was hysterical but coherent. At trial, the officer was permitted to recount statements Ms. Lewis made to him on the front porch immediately after his arrival. The police officer testified that Ms. Lewis told him she had been raped and shot, identified her assailants as two young black

males who fit the description of Henyard and Smalls, and said they had taken her children. Given these circumstances, we find that Ms. Lewis was still experiencing the trauma of the events she had just survived when she spoke to the officer and her statements were properly admitted under the excited utterance exception to the hearsay rule.

Id. at 251.

Here, Dyke made her 911 call within 30 minutes of Appellant's attack and the police arrived minutes later. Upon their arrival, they witnessed Dyke covered in blood from the stabbing, and fading in and out of consciousness. When lucid, Dyke answered questions, but cried repeatedly she did not want to die. The medical testimony shows Dyke suffered two deep stab wounds which punctured both lungs making it difficult to breathe. Further, the stab wounds hit ribs and one penetrated through Dyke's sternum; clearly, a very painful, stressful event. Merely because 30 minutes passed before she could call 911 does not establish Dyke was not laboring under the excitement of being raped and stabbed, especially when she was going in and out of consciousness, and having difficulty breathing. Under these circumstances, her statements constitute excited utterances. See Power v. State, 605 So.2d 856, 862 (Fla. 1992)(finding witness' statements to police an excited utterance).

Assuming arguendo, the statements were inadmissible, their admission was harmless. Both Lawrence sisters testified as to Stephanie's recent break-up with Appellant. (T XII 1307-09, 1335-40). Hence, the State theorized Ruth was Appellant's intended target, but he found Dyke instead. (T XI 1250-52). Bite mark evidence, matching Appellant's dental cast, was presented; the match was "as good as" the expert had ever seen. Appellant's bloody fingerprint from the bathroom, his blood on the sweat pants Dyke used, and on the shirt the baby was wearing that morning were admitted. (T XIII 1464-74 1491-92; XV 1734-35 1803, 1815, 1845; XVI 1909-10, 1945-46). Statistically, the chance someone other than Appellant left the blood was 1:2.1 billion in the Caucasian and 1:120 million in the African American population. (T XVI 1954). With this overwhelming evidence, admission of Dyke's statements, if error, was harmless beyond a reasonable doubt. Hamilton v. State, 547 So.2d 630 (Fla. 1989); State v. DeGuilio, 491 So.2d 1129 (Fla. 1986). This Court should affirm Defendant's conviction.

ISSUE XIII

WHETHER THE TRIAL COURT ABUSED ITS
DISCRETION IN ADMITTING THE VICTIM'S 911
CALL AND IDENTIFICATION OF APPELLANT
(Restated).

Appellant claims the judge erred in admitting Dyke's 911 statements as excited utterances. (IB 79). He also complains her identification of him from a photo line-up was not a dying declaration and was admitted improperly. (IB 80).

Pretrial, the judge found the 911 tape admissible as a dying declaration stating, "...based on the totality of the circumstances brought out at the evidentiary hearing in this case, that the statements of the Victim fall within the exception to the hearsay rule relating to statements under belief of impending death set forth in §90.804(2)(b), of the Florida Evidence Code." (R II 385). Even if it were error to admit the tape as an excited utterance, it was harmless; the tape was admitted properly as a dying declaration which has not been challenged on appeal.¹³

¹³ The statements on the 911 tape were dying declarations. Throughout the tape, Dyke asserts she had been stabbed (heart, chest, back), needed immediate help, could not breath, blood was "falling all over the place", she was dying, and could not make it anymore. Dyke explained she had tried to reach the phone and later she said she could not get up; she could not move. Only 20 to 30 minutes passed between the stabbing and Dyke's phone call to 911. (SR I 17-21). A declarant's statement should be admitted, if, from the totality of the circumstances it is clear the declarant knew of her imminent, inevitable death. Teffeteller, 439 So.2d at 840, 842-43 (Fla. 1983). Clearly, Dyke believed she was dying; there is substantial, competent evidence to support this conclusion, thus, the 911 statements

Not only does the tape qualify as a dying declaration, but it qualifies as an excited utterance. The essential elements of an excited utterance are: an event startling enough to cause nervous excitement, made before there was time to contrive or misrepresent, and made while under the stress of excitement. Henyard, 689 So.2d at 251; Rogers, 660 So.2d at 240; Jano, 524 So.2d at 661. "While the length of time between the event and the statement is a factor to be considered in determining whether the statement may be admitted under the excited utterance exception ... the immediacy of the statement is not a statutory requirement." Henyard, 689 So.2d at 251. See, Sliney v. State, 699 So.2d 662, 669 (Fla. 1997)(affirming admission of victim's wife's 911 call as excited utterance); Davis, 698 So.2d at 1190 (same); Turner v. State, 530 So.2d 45, 50 (Fla. 1987)(affirming use of victim's taped conversation with police to show premeditation), cert. denied, 489 U.S. 1040 (1989).

Should this Court find Dyke's statements to Officer Gillespie (Issue XII) were excited utterances, the 911 tape should qualify for the same treatment. The statements were given minutes before the police arrived while Dyke was still experiencing the shock of the attack. Dyke was having difficulty breathing and was anxious for medical help. As is evident from the discourse with the operator and paramedic, Dyke

were admitted properly.

could not recall her address and was more interested in obtaining help than describing her assailant.

911: Hello, mam? Can you tell me what the subject looked like? Can you tell me whether he was a black male or a white male?

L: Yes. Can I give you a number you can find out. Please.

911: Can you just answer my question. Was he black or white?

L: Okay.

911: Mam, help is on the way but we want to try to catch him, okay?

L: Okay. I can't go anywhere....(inaudible) the blood is falling all over the place.

911: Is he black or white?

L: He's black.

911: Black male?

L: Yes!

911: Do you know who he is?

L: Ronnie. I don't know his last name. I can give you his, a number where you can get the information you need.

(SR I 18, 20¹⁴).

The 20 to 30 minute delay before Dyke's 911 call does not preclude admission of the statements as excited utterances. As in Henyard, the delay is excusable due to the incapacitation of the victim for a time before the call was made. Here, Dyke told

¹⁴ The transcript pages are out of order in the record.

the operator, it had been a long time that she "tried to get to the phone" and she could not get up, she could not move. (SR II 17-18). Dyke's first contact with 911 was at the earliest time while still experiencing the pain and excitement of the event. Her statements were admitted properly. This Court should affirm.

Turning to Appellant's attack upon the admission of Dyke's statements made in the hospital, the State submits there was no error. These statements were dying declarations and admitted properly. According to Nurse Chestnut ("Chestnut"), she was present when Detective James showed Dyke the photo line-up after surgery on January 26, 1993. Very anxious with tubes in her throat, Dyke wrote to communicate. From her training and experience, Chestnut opined Dyke feared for her survival; Chestnut observed her crying and upset upon realization of her circumstances. (T V 230, 240-42, 248-49, 256-58; SR II 85). Nurse, Walter attended Dyke near 8:00 p.m. that evening, and noted her anxiety, and trepidation of dying. In fact, numerous times, Dyke wrote, "I am going to die." (T V 261-64, 272).

Appellant's reference to Nurse Grondona's testimony to support his claim the statements to Detective James were not dying declarations is misplaced as Ms. Grondona did not meet Dyke until the day after the photo line-up was run. (IB 81; T V 185, 199, 200). Conversely, both Chestnut and Walter testified

Dyke feared she was dying; Dyke wrote such statements to the nurses between 6:00 and 8:00 p.m.; the time frame when the photo line-up was held. This is evidence Dyke believed her death was imminent and inevitable. Henry, 613 So.2d at 430-31 (finding no need for express declaration of victim's belief in her imminent death to qualify as dying declaration); Teffeteller, 439 So.2d at 843 (finding victim's statement dying declaration in spite of physician's encouragement). From the totality of the circumstances, Dyke believed she was dying when she identified Appellant's photograph. This Court should affirm this conviction.

ISSUES XIV AND XV

WHETHER INDICTMENT WAS AMENDED
CONSTRUCTIVELY BY FELONY MURDER INSTRUCTION
AND ARGUMENT AND WHETHER APPELLANT WAS
DENIED DUE PROCESS AS A RESULT (Restated).

Pretrial, Appellant filed a motion and an amended motion to prohibit argument and/or instructions concerning first degree felony murder, claiming it would violate his Sixth Amendment right to allow the State to argue felony murder and to instruct the jury on felony murder when only premeditated murder had been charged in the indictment. (R I 111-13; II 277-79). A hearing on the motions was held on August 11, 1995, but the court reporter could not locate his notes for that hearing, so no transcripts exist. Although this Court granted Appellant's motion to relinquish jurisdiction to reconstruct the hearing, he failed to reconstruct the proceedings relating to this motion. Moreover, an order issued six days after the August 11 hearing, which contains rulings on 24 other motions, does not, as Appellant alleges, contain a ruling on this motion.¹⁵ (R II 373-77). There is no order disposing of this motion. Most important, Appellant did not move to dismiss the indictment on these grounds.

In Issue XIV, Appellant claims the Grand Jury Clause was violated because the indictment charged only one method

¹⁵ In footnote 22 of the initial brief, he alleges the order (R 375) contains a ruling on his motion. The State disagrees.

(premeditation), "for violation of a particular law, but there was a constructive amendment of the indictment by instructing the jury on a different method (felony-murder in this case) for violation of a particular law." (IB 85). In Issue XV, he claims "lack of notice denied [him] due process of law and the effective assistance of counsel." (IB 87).

As to Issue XIV, Appellant failed to preserve this issue.

An [indictment] that completely fails to charge a crime is fundamentally defective. However, where the charging allegations are merely incomplete or imprecise, the failure to timely file a motion to dismiss under Rule 3.190(c) waives the defense, and it cannot be raised for the first time on appeal.

Carver v. State, 560 So. 2d 258, 260 (Fla. 1st DCA), rev. denied, 574 So. 2d 139 (Fla 1990). See also White v. State, 446 So. 2d 1031, 1035-36 (Fla. 1984); Huene v. State, 570 So. 2d 1031, 1031-32 (Fla. 1st DCA 1990), rev. denied, 581 So. 2d 1308 (Fla. 1991). Here, the pith of Appellant's complaint is that the indictment was incomplete because it did not allege felony murder as an alternative theory of prosecution. Thus, by instructing on felony murder, the trial court improperly amended the indictment.

Although Appellant filed a motion below relating to the absence of felony murder allegations in the indictment, he did not move to dismiss it. Rather, he moved to prohibit the State

from arguing, and the court from instructing on this theory. (R 63-65). Because Appellant never moved to dismiss the indictment, his motion did not preserve this issue for appeal.¹⁶

Even were his allegations preserved, they have no merit. In fact, Appellant fails to acknowledge that both of these claims have been rejected repeatedly. E.g., Knight v. State, 338 So. 2d 201, 204 (Fla. 1976), sentence vacated on other grounds, 863 F.2d 705 (11th Cir. 1988); Kearse v. State, 662 So. 2d 677, 682 (Fla. 1995). In Kearse, this Court reaffirmed the principle “[t]he State need not charge felony murder in an indictment in order to prosecute a defendant under alternative theories of premeditated and felony murder when the indictment charges premeditated murder.” Id. at 682. The element of premeditation is presumed when a homicide is committed in the commission of one of the enumerated felonies. Knight, 338 So. 2d at 204. Because Appellant has failed to establish a valid reason why this Court should recede from its long line of precedent, the claim should be denied.

As for the ineffective assistance of counsel claim raised in Issue XV, this Court has previously held “[c]laims of

¹⁶ The motion to prohibit argument/instruction on felony murder is unpreserved, because he failed to obtain a ruling on it. Armstrong v. State, 642 So. 2d 730, 740 (Fla. 1994)(finding claim procedurally barred where judge heard motion, but never ruled); Richardson v. State, 437 So. 2d 1091, 1094 (Fla. 1983)(same); State v. Kelley, 588 So. 2d 595, 600 (Fla. 1st DCA 1991) (noting failure to obtain ruling effectively waives motion).

ineffective assistance of counsel are generally not reviewable on direct appeal but are more properly raised in a motion for postconviction relief." McKinney, 579 So. 2d at 82. Because the merits of such a claim do not appear on the face of the record, this Court should reject this allegation as inappropriately raised and affirm the conviction.

ISSUE XVI

WHETHER RECORD SUPPORTS TRIAL COURT'S
FINDING OF "PRIOR VIOLENT FELONY" AGGRAVATOR
BASED ON PRIOR INDECENT ASSAULT CONVICTION.
(Restated).

Defendant claims the judge relied solely upon the indecent assault conviction as support for the "prior violent felony" aggravator because the judge did not find, beyond a reasonable doubt, Appellant had been convicted of second degree murder. Further, Appellant asserts it was error to admit evidence and argument on the indecent assault conviction as a prior violent felony. (IB 89). The State disagrees on both points.

During the sentencing hearing, the trial court stated:

... Court finds that the State has proven the following statutory aggravating circumstances beyond a reasonable doubt. The Court finds that the defendant has been convicted twice of a felony involving the use or threat of force against a person, in 1985 the defendant was convicted of indecent assault upon a child, and second degree murder.

(T XVIX 2469-70). The sentencing order reads:

24. The Court ... finds that the State has proven the following aggravating circumstances beyond a reasonable doubt:

...

The Court finds that the State has proven beyond a reasonable doubt, that in 1985, Defendant had been convicted of an indecent assault upon K.C., a child, and that this crime involved the use or threat of violence to the person. The Defendant was also convicted of the second degree murder of

Gaynell Jeffrey, which also involved the use or threat of violence to the person.

...

27. WEIGHING BY THE COURT: The Court after carefully considering and weighing the statutory aggravating circumstances which have been proven by the State beyond a reasonable doubt ... finds ... that the three statutory aggravating circumstances proven by the State beyond a reasonable doubt, outweighed the statutory and non-statutory mitigating evidence.

(R III 538-39, 542). Clearly, it was determined both Appellant's prior violent felonies had been proven beyond a reasonable doubt. Hence, the court did not rely solely upon the indecent assault conviction as an aggravating factor.

Appellant does not challenge his second-degree murder conviction, except to argue the judge did not find it proven beyond reasonable doubt. However, there is record evidence that murder conviction was found proven and established the "prior violent felony" aggravator. As such, there is at least one valid basis for finding the "prior violent felony" aggravator. Thus, should this Court strike the reliance upon the indecent assault, such error is harmless. Mahn v. State, 714 So.2d 391, 399 (Fla. 1998)(finding harmless error where court relied improperly upon robbery as prior violent felony when other factors supported aggravator); Robinson v. State, 610 So.2d 1288, 1292 (Fla. 1992)(same); Holton v. State, 573 So.2d 284, 291 (Fla.1990), cert. denied, 500 U.S. 960 (1991) (same).

With the "prior violent felony" aggravator established, Defendant's sentence should be affirmed.

Turning to Appellant claim it was error to find his "indecent assault" a prior violent felony, the State submits the Court must look to the facts of the prior felony to determine whether it was violent. Appellant's asserts that violence is not an inherent element of indecent assault, nor is indecent assault a life-threatening crime. (IB 89). For support he relies upon Mahn, 714 So.2d at 399; Elam v. State, 636 So.2d 1312 (Fla. 1994); and Lewis v. State, 398 So.2d 432 (Fla. 1981). These cases are unavailing because the elements of the crime are not the deciding factor. Evidence of the facts surrounding a violent or capital felony may be considered when determining if the "prior violent felony" aggravator has been established. See Gore v. State, 706 So.2d 1328 (Fla. 1998); Rhodes v. State, 547 So.2d 1201 (Fla. 1989); Johnson v. State, 465 So.2d 499 (Fla. 1985).

In Lewis, this Court determined that convictions for breaking and entering, escape, grand larceny, and possession of a firearm by a convicted felon did not involve a threat of violence. However, there was no discussion of the facts underlying those convictions. Lewis, 398 So.2d at 438. Similarly, neither Elam, nor Mahn, discussed the facts surrounding the criminal convictions relied upon by the trial

courts in their finding statutory aggravators. Thus, these cases do not assist in the instant analysis.

Conversely, Johnson, 465 So.2d at 505 is instructive and dispositive. In Johnson, this Court opined:

... whether a previous conviction of burglary constitutes a felony involving violence under section 921.141(5)(b), Florida Statutes (1981), depends on the facts of the previous crime. Those facts may be established by documentary evidence, including the charging or conviction documents, or by testimony, or by a combination of both.

Id. at 505. See Gore, 706 So.2d at 1333 (finding armed trespass sufficient to support prior violent felony aggravator); Rhodes, 547 So.2d at 1204-05 (finding facts of prior conviction may be considered in connection with "prior violent felony" aggravator).

Indecent assault, by its very terms is a per se violent felony. The crime may involve a touching of or an assault upon the child in a lewd or lascivious manner. However, should this Court find the indecent assault was not a per se violent felony, there is ample evidence establishing violence was involved in the crime.

As revealed by Deputy Martorella, the victim was nine years old at the time of the assault and an investigation commenced when the father of the victim reported he found blood in his daughter's bathing suit. (T XVIII 2336-37). The victim informed

the deputy Appellant took her to the bedroom, removed her bathing suit, and penetrated her digitally. (T XVIII 23439-40). During the attack, Appellant told her that if she did not cooperate he would hurt her. (T XVIII 2342). A medical examination revealed the victim had vaginal cuts. (T XVIII 2338). When arrested, Appellant had long finger nails and admitted penetrating the victim's vagina with his index finger. (T XVIII 2341, 2345). Clearly, these facts establish the indecent assault was a violent felony. This Court should find no error was committed below and affirm Appellant's conviction.

ISSUE XVII

WHETHER THE TRIAL COURT'S ORDER ARTICULATES SUFFICIENTLY THAT THE COURT FOUND ONE OR MORE AGGRAVATING FACTORS TO SUPPORT THE DEATH PENALTY (Restated).

It is Appellant's position the court's sentencing order did not contain findings requiring a death sentence and thus, the sentence of death must be vacated. (IB 91-92). The State disagrees and submits the requisite findings were made for the aggravating and mitigating factors and that the trial judge completed the appropriate analysis. Appellant's sentence should be affirmed.

As required by Campbell v. State, 571 So.2d 415 (Fla. 1990), each aggravating and mitigating factor was discussed. (R 538-42). After finding the aggravators were proven beyond a reasonable doubt, the judge addressed the mitigating factors; these were discussed and a weight assigned to each¹⁷. (R 540-42).

It was only after this analysis the court balanced the various factors and found the aggravators outweighed the mitigators. (R 542). Upon this conclusion, the death sentence was imposed.

¹⁷ Little weight was given the statutory "mental mitigator" as there was no evidence Appellant had been under the influence of a controlled substance. Appellant's age (30) was found not to be a mitigating circumstance (R 541). Slight weight was given the non-statutory mitigators that Appellant was a "model prisoner", attended religious services, had a deprived childhood, and was a loving person who did not fight with his relatives. This weight was assigned because the judge found these factors did not produce an effect upon Appellant's character or the circumstances of the homicide. (R 541-42).

Having performed the appropriate analysis under Campbell, 571 So.2d at 419-20, the trial court's sentencing order should be affirmed.

ISSUE XVIII

WHETHER APPELLANT'S SENTENCE OF DEATH IS
PROPORTIONATE TO THOSE OF OTHER DEFENDANTS
UNDER SIMILAR CIRCUMSTANCES (Restated).

Claiming his death sentence is disproportional, Appellant focuses upon the mitigation evidence he presented during the penalty phase. (IB 92-93). He asserts that the totality of the evidence reveals that his case is not one of the most aggravated and least mitigated cases. (IB 94). The State disagrees with Appellant's position. Not only were three aggravating circumstances proven beyond a reasonable doubt, the mitigating factors had little bearing on the crime. This Court has upheld the imposition of the death penalty under similar conditions.

Here, three statutory aggravating factors were proven beyond a reasonable doubt. The trial court found Appellant had two prior convictions (second-degree murder and indecent assault) which established the aggravating factor of prior violent felony. Also, the judge concluded the instant homicide was committed during the commission of or attempted commission of a sexual battery. Further, it was determined that the homicide was committed in a heinous, atrocious, or cruel ("HAC") manner. (R 538-40). Balanced against these aggravating factors were one statutory mitigating circumstance and four non-statutory mitigating conditions. These mitigators were given either little or slight weight.

With respect to Appellant's second-degree murder conviction, a review of the circumstances of the crime are eerily similar to those of the instant homicide. In the second-degree murder case, Appellant was spurned by his girlfriend, and a few days later returned to her home where he killed her sister by stabbing her repeatedly. As the Court will recall, in the instant homicide, Appellant was rejected by the sister of the victim's roommate. This break-up was precipitated by an argument between Appellant and Ruth Lawrence. The morning after Stephanie Lawrence rejected Appellant, he returned to Ruth Lawrence's apartment and attacked the remaining occupant, Lisa Dyke, stabbing her multiple times¹⁸. Both murders were committed by stabbing the victims repeatedly. The violence the Defendant exhibits toward relatives and friends of the women who have rejected him, gives insight into Appellant's character and the nature of his criminal actions. Moreover, rehabilitation through incarceration was attempted with this Defendant for the second-degree murder. Such was to no avail as Appellant committed the instant homicide just seven months after his early

¹⁸ As will be discussed in Issue XX, the infliction of multiple stab wounds is a particularly heinous, atrocious, or cruel manner of killing. See, Jimenez v. State, 703 So.2d 437, 441 (Fla. 1997) (affirming HAC aggravator where victim stabbed numerous times as she cried for help); Derrick v. State, 641 So.2d 378, 381 (Fla. 1994)(finding HAC aggravator where victim stabbed multiple times, wounds would have been extremely painful, and defensive wounds indicated victim experienced pre-death apprehension and pain).

release from his seventeen year sentence for the second-degree murder. (SR I 29). See generally, Harvard v. State, 414 So.2d 1032 (Fla. 1982) in which a defendant attempted to kill his first wife because she had "taken him to court" and after his release from prison killed his second wife during the pendency of their marriage separation.

The purpose of proportionality review is to consider the totality of the circumstances in a homicide case and compare it with other capital cases. Urbin v. State, 714 So.2d 411 (Fla.1998); Terry v. State, 668 So.2d 954 (Fla.1996). Given the facts of the instant homicide, the aggravating circumstances established by the State, the inconsequential mitigation presented by the defense, and the fact that Appellant has not challenged the trial court's assignment of weight to the mitigating evidence, the sentence imposed is reasonable. Actually, this is one of the most aggravated and least mitigated murders. Furthermore, a review of other death penalty cases establishes that the sentence here is proportional.

This Court found that the death sentence in Jimenez, 703 So.2d at 438, 442 was proportionate based upon the finding of four aggravating factors (prior felony conviction, capital felony during burglary, homicide committed while defendant on community control, and capital felony HAC), one statutory mitigating factor (defendant's capacity to understand

criminality of his conduct was substantially impaired) and two non-statutory mitigating factors (potential for rehabilitation and life sentence with parole at the age of 81). In Jimenez, the defendant was convicted for the stabbing murder of an elderly woman during the commission of a burglary. Id. at 438, 440. In the instant case, the homicide was committed during the course of another felony (sexual battery), and the trial judge found three aggravating circumstances and five mitigating factors of little weight. In fact, the similarities of the crimes and aggravating/mitigating factors are alike, thus, warranting the same sentence of death. See also, Johnson v. State, 660 So.2d 637 (Fla. 1995)(affirming death sentence for stabbing of elderly woman during a burglary of her home); Watts v. State, 593 So. 2d 198 (Fla. 1992)(affirming death penalty where there were three aggravating factors outweighed two mitigating factors of age and low I.Q.); Floyd v. State, 569 So.2d 1225 (Fla. 1990)(upholding death sentence where defendant stabbed victim 12 times); Freeman v. State, 563 So.2d 73 (Fla. 1990)(finding death penalty proportional where two aggravating circumstances were weighed against mitigating evidence of low intelligence and abused childhood), cert. denied, 501 U.S. 1259 (1991); Haliburton v. State, 561 So.2d 248 (Fla. 1990)(affirming death sentence where defendant broke into victim's home and stabbed him 12 times).

Sentences of death have been upheld where the defendant has reacted violently to his rejection by a girlfriend or spouse. In Occhicone v. State, 570 So.2d 902 (Fla. 1990), cert. denied, 500 U.S. 938 (1991), the death penalty was affirmed for the sentences imposed for the murders of his ex-girlfriend's parents because he blamed them for ending his relationship with their daughter. Similarly, this Court upheld the death sentence rendered upon defendant's conviction for the murder of his girlfriend's child after he broke into her home to confront the victim about "lies" she had been telling. Brown v. State, 565 So. 2d 304, 305 (Fla.), cert denied, 498 U.S. 992 (1990). Likewise, this Court affirmed the death sentence in Hudson v. State, 538 So.2d 829 (Fla.), cert. denied, 493 U.S. 875 (1989) where the defendant had threatened his ex-girlfriend on numerous occasions and then broke into her home two months after they had ended their relationship. After threatening his ex-girlfriend and failing to find his her home, he killed her roommate instead. Id. at 829-30. In Turner, 530 So.2d at 47, 51, this Court upheld the sentences for the stabbing deaths of the defendant's estranged wife and her girlfriend, whom he blamed for taking his wife's affection, after he had broken into the victims' apartment, killing his wife and then chasing the girlfriend outside cornering and stabbing her to death. It is evident that revenge or jealousy motivated the above homicides,

just as it did in the instant murder. The death sentences were found appropriate in those cases; thus, this Court should conclude the death penalty was applied correctly here.

From the foregoing, it is clear Appellant's death sentence is not disproportional. The instant homicide, coupled with the aggravating and mitigating circumstances found here, support the death sentence imposed. This matter is one of the most aggravated and least mitigated of cases. This Court should affirm Appellant's sentence of death.

ISSUE XIX

WHETHER THE PROBATIVE VALUE OF THE EVIDENCE
TO SUPPORT THE "PRIOR VIOLENT FELONY"
AGGRAVATOR OUTWEIGHED ITS PREJUDICIAL EFFECT
(Restated).

In this case, Appellant complains the State's presentation of the facts surrounding his second-degree murder conviction became a feature of the penalty phase and prejudiced him. (IB 94). The State submits the facts of the second-degree murder were not made a feature of the trial and no constitutional violations occurred. This Court should affirm.

At the outset, Appellant contends "[n]one of the State's evidence in the penalty phase dealt with the present case." (IB 94). He also insinuates that the evidence of the prior convictions was lengthier than the testimony on the instant homicide. (IB 95). This is not accurate. First of all, the evidence related to the present homicide encompassed numerous witnesses over approximately three weeks of trial. Further, in its penalty phase opening statement, the State reminded the jury the victim in this case had given a dying declaration that Appellant had raped her, thus establishing a statutory aggravator. Also, the State discussed the HAC aggravator and how the instant stabbing death would qualify as such. (T XVIII 2254-58). During this argument, the State informed the jury it

could consider the guilt phase evidence for the penalty phase deliberations. (T XVIX 2405-06)¹⁹.

Similarly, in its penalty phase closing argument, the State referenced the trial evidence of the instant homicide to support the aggravators that the murder was committed during the course of another felony and was heinous, atrocious and cruel. (T XVIX 2409-14). Before deliberations, the jury was instructed by the judge:

Your advisory sentence should be based upon the evidence that you have heard while trying the guilt or innocence of Ronnie K. Williams, and evidence that has been presented to you in these proceedings

(T XVIX 2426--27). Clearly, the State referenced the trial testimony. Surely, there was no need to recall trial witnesses to re-hash the guilt phase evidence during the penalty phase.

For support of his claim that the prior convictions became a feature of the trial, Appellant directs this Court to Long v. State, 610 So.2d 1276 (Fla. 1993) and Bell v. State, 650 So.2d 1032 (Fla. 5th DCA 1995). Neither case furthers the Defendant's position. In both Long and Bell, the collateral crime evidence was used to establish the defendants' guilt. In finding the collateral crime evidence was admitted improperly, this Court in Long noted that the testimony related to the subject crime lasted four hours while three days was spent on the collateral

¹⁹ The record is identified as volume XVIX, however it should be XIX (19).

crimes. Long, 610 So.2d at 1280. The reasoning on appeal for excluding much of the collateral crime evidence from the penalty phase was due to a plea agreement that had been entered in those cases, whereby the convictions would not be used in subsequent penalty proceedings. Id. at 1281. When reversing the conviction in Bell, the district court found that the collateral crime was not similar to the subject charge, thus, was not admissible as Williams²⁰ rule evidence. Hence, the collateral crime evidence was more prejudicial than probative.

Here, in order to afford the jury insight into Appellant's character so that an informed sentencing recommendation could be made, the State was required to prove the aggravating factor of "prior violent felony" beyond a reasonable doubt. Toward this end, the State merely added evidence upon which the jury could rely in addition to the trial testimony in order to render an advisory sentence. It cannot be said that the discussion of Appellant's two prior violent felonies for the two day penalty phase hearing became a feature of the case in light of the fact nearly three weeks of trial testimony was taken for the instant homicide.

Seeking a new sentencing hearing, Appellant claims that the use of the facts surrounding his second-degree murder conviction equated to the admission of evidence of a crime for which he had

²⁰ Williams v. State, 110 So.2d 654 (Fla.), cert. denied, 361 U.S. 847 (1959).

been acquitted. For support he directs this Court's attention to Burr v. State, 576 So.2d 278 (Fla. 1991). This case does not assist Appellant. In Burr, after overriding the jury's recommendation of life imprisonment, and imposing the death penalty, there was an acquittal of one and a nolle prosequi of another of the "un-convicted" collateral crimes admitted during the defendant's guilt phase and relied upon by the court expressly in finding aggravating factors. Burr, 576 So.2d at 279-80. Thus, after the trial court had imposed the sentence based in part on the collateral crimes, the defendant was acquitted of those matters. As a result, the basis for the sentence was undermined to the point where this Court found the sentence suspect. Id. Here, there was no such acquittal. The trial court was informed there was an existing valid second-degree murder conviction and the facts surrounding that crime. As such, the aggravating factor found below was not based upon erroneous or invalid information. Hence, the sentence should be affirmed.

In Rhodes v. State, 547 So.2d 1201 (Fla. 1989), this Court addressed the propriety of admitting live testimony from a captain regarding convictions the defendant had obtained and the admission of a taped interview the victim gave for one of those crimes. In affirming the admission of the captain's testimony

but finding error in the admission of the taped statement, the Court opined:

This Court has held that it is appropriate in the penalty phase of a capital trial to introduce testimony concerning the details of any prior felony conviction involving the use or threat of violence to the person rather than the bare admission of the convictions.... Testimony concerning the events which resulted in the conviction assists the jury in evaluating the character of the defendant and the jury can make an informed recommendation as to the appropriate sentence.

Rhodes, 547 So.2d at 1204 (citations omitted)(emphasis supplied). However, this Court reasoned that such evidence may be inadmissible if it is not relevant, precludes the defendant from exercising his constitutional right to confront witnesses, or is more prejudicial than probative. Id. at 1205. It is Appellant's position that the testimony regarding his second-degree murder conviction was more prejudicial than probative. The State disagrees.

As noted above, the facts surrounding the second-degree murder merely informed the jury of the character of the Defendant and the violent crime he had committed previously. The testimony on this matter did not re-try the case, but showed the natural progression from the realization the victim was missing, to the discovery of her body, and the evidence establishing the role Appellant had in her death. This was not the focus of the trial, but was introduced during the penalty

phase to prove the statutory aggravating factor and shed light upon Appellant's character. Both of these factors are permissible areas for penalty phase investigation. Rhodes, 547 So.2d at 1204. As such, the sentence of death should be affirmed.

ISSUE XX

WHETHER THE RECORD SUPPORTS THE TRIAL COURT'S FINDING OF THE "HEINOUS, ATROCIOUS, OR CRUEL" AGGRAVATING FACTOR (Restated).

Here, the Defendant attacks the trial court's finding that the instant murder was heinous, atrocious, or cruel. He asserts that the facts of his case do not satisfy the definition of the HAC aggravator. As a result, Appellant seeks to have the aggravator stricken, thus, undermining the trial court's sentencing decision. This Court should reject Appellant's claim, and instead find the HAC aggravator is supported by the evidence and case law.

Consistently, this Court has upheld the HAC aggravator where the victim was stabbed repeatedly. See, Jimenez, 703 So.2d at 441 (affirming HAC aggravator where victim stabbed numerous times in her home as she cried for help); Derrick, 641 So.2d at 381 (affirming HAC aggravator where victim stabbed multiple times, the wounds would have been extremely painful, and the defensive wounds indicated the victim experienced pre-death apprehension and pain); Floyd, 569 So.2d at 1232 (same); Haliburton, 561 So.2d at 252 (upholding HAC aggravator where sleeping or drunk victim was stabbed in his bed while vainly trying to defend himself); Nibert, 508 So.2d at 4 (affirming finding of HAC where victim was stabbed 17 times, some of victim's wounds were defensive wounds, and victim remained

conscious throughout stabbing); Johnston, 497 So.2d at 871 (upholding HAC finding for multiple stabbing homicide). Cf. Hansborough v. State, 509 So.2d 1081, 1086 (Fla. 1987)(finding homicide was heinous, atrocious, or cruel where the victim suffered defensive wounds and did not die instantly).

Here, the evidence reveals the victim suffered defensive wounds, was conscious for at least part of the attack, and feared for her safety and that of her unborn child. Moreover, the stabbing was so painful it was very difficult for the victim to move. (SR II 17-18). The eight stab wounds inflicted to the victim's chest and back, which perforated both her lungs as well as breaking through her sternum and lodging in her back ribs, as she was attempting to defend herself qualifies this homicide for the HAC aggravator. (T XII 1350-54; XIV 1617, 1639-43, 1651-55, 1668-85, 1784-90, 1803-15). Appellant's conviction and sentence should be affirmed.

ISSUE XXI

WHETHER THE TRIAL COURT PROPERLY INSTRUCTED
THE JURY AS TO APPELLANT'S STANDARD OF PROOF
FOR ESTABLISHING MITIGATION (Restated).

Appellant challenges the jury instruction on mitigation, claiming it (a) invades the province of the Legislature; (b) is an incorrect statement of the law; and (c) unconstitutionally limits consideration of mitigating evidence. (IB 98). In spite of the fact Appellant failed to object to the mitigation instruction, he claims his constitutional rights were violated. The State disagrees.

It is well settled that in order to preserve for appellate review a challenge to a jury instruction, an objection must have been asserted below or an alternate instruction must have been offered. San Martin v. State, 705 So.2d 1337, 1350 (Fla. 1997)(finding challenge to jury instruction unpreserved where a no objection was raised below), cert. denied, 119 S.Ct. 277 (1999); Hodges v. State, 619 So.2d 272, 273 (Fla.)(reasoning challenge to jury instruction procedurally barred because of failure to assert objection below), cert denied, 510 U.S. 996 (1993). Moreover, if an issue is not preserved for appellate review, the matter will not be reversed unless fundamental error is established. Steinhorst, 412 So.2d at 338 (holding that "except in cases of fundamental error, an appellate court will not consider an issue unless it was presented to the lower

court"). Similarly, section 924.33, Florida Statute (1993) mandates that a case may not be reversed absent a showing of error with injuriously affected the defendant's substantial rights.

In the instant case, Appellant challenges the standard jury instruction which follows:

A mitigating circumstance need not be proved beyond a reasonable doubt by Ronnie K. Williams. If you are reasonably convinced that a mitigating circumstance exists, you may consider it as established.

(T XVIX 2429). In particular, the Defendant attacks the phrase "reasonably convinced." However, there was no objection to this jury instruction on mitigation nor was an alternate instruction presented to the trial court. As such, the matter is unpreserved and the sentence of death should be affirmed. However, assuming arguendo this Court reaches the merits of Appellant's claim, the State submits the instruction is constitutional.

As his first argument, Appellant claims the use of the phrase "reasonably convinced" in defining the proof necessary to prove a mitigating factor exists is a violation of the separation of powers doctrine. Separation of powers is intended to preserve the system of checks and balances built into the government as a safeguard against the encroachment or aggrandizement of one branch at the expense of the other.

Buckley v. Valeo, 424 U.S. 1, 122 (1976). Surely, the judiciary has the power to promulgate standard jury instructions putting into effect the legislative intent outlined in the statute.

Pursuant to section 921.141(1), Florida Statute, both parties are permitted to put on evidence relevant to the nature of the crime and character of the defendant including evidence related to aggravating and mitigating circumstances. Section 921.141(2), Florida Statutes requires that the jury deliberate and render an advisory sentence based upon:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);

(b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

Thus, in order to give guidance as to whether aggravating and/or mitigating circumstances exist, this Court has determined that the State must prove the aggravator beyond a reasonable doubt, but that the defendant need only reasonably convince the jury of the existence of any mitigators. Robertson v. State, 611 So.2d 1228, 1232 (1993)(holding State must prove beyond reasonable doubt existence of aggravating circumstance); Johnson, 660 So.2d at 647(finding mitigating factors can be established by a preponderance of the evidence); Walls v. State, 641 So.2d 381,

390 (Fla. 1994)(reasoning "reasonably established" and "greater weight of the evidence" are equivalent standards for finding mitigation "because both simply mean 'that which is more probable'"), cert denied, 513 U.S. 1130 (1995). The state's burden is higher than that of the defendant and it is only logical that the jurors must be reasonably convinced of a fact before they may use it as a basis for advising the trial court of the appropriate penalty. The promulgation of this instruction does not violate the separation of powers doctrine, but gives effect to the legislative intent.

Turning to Appellant's challenge that the instruction does not reflect the law accurately, the State submits that the standard jury instructions for mitigation in the penalty phase are proper. Walls, 641 So.2d at 389 (reaffirming the validity of the jury instruction on mitigation in the penalty phase of a capital murder case and finding it "has been repeatedly upheld both in this Court and in the federal courts). In a review of the standard jury instructions given during the penalty phase, this Court found them to describe law in Florida properly. Jackson v. State, 502 So.2d 409, 410 (Fla. 1986)(finding that "review of the record clearly shows that the standard instructions [in penalty phase of trial] given accurately informed the jury of the law), cert denied, 482 U.S. 920 (1987). See also, Bonifay v. State, 680 So.2d 413, 416 (Fla.

1996)(holding that "[t]he decision as to whether a mitigating circumstance has been established is within the trial court's discretion"). The "reasonably convinced" standard meets the requirement the defendant need only prove the mitigating circumstances by a preponderance of the evidence, or that it is more likely than not that the mitigation factor exists. The jury instruction is proper. Walls, 641 So.2d 389-90(finding jury instruction on mitigation valid).

Lastly, Appellant complains the instruction precludes the jury from considering "all" the mitigating evidence. (IB 99). The State disagrees. A review of the instruction requires the jury to look at all the evidence, both aggravating and mitigating, to determine what facts have been established. If the jurors are convinced a mitigating fact exists, they are to assume it has been established. Hence, contrary to what Appellant asserts, the jury is not precluded from considering all mitigation evidence presented. Again, it is only logical that the mitigating facts which have been established should be considered in rendering an advisory opinion and those that do not exist should have no bearing or effect upon the sentence. Without some burden of proof that an asserted mitigating fact exists, the advisory opinion would be rendered meaningless. Because the jury instruction describes the law accurately, this Court should affirm Appellant's sentence of death. Walls, 631

So.2d at 389-90 (finding jury instruction on mitigation valid); Jackson, 502 So.2d at 410 (finding penalty phase instructions accurately informed jury of law).

CONCLUSION

WHEREFORE, based on the foregoing arguments and authorities, the State requests that this Honorable Court affirm Appellant's conviction and sentence of death.

Respectfully submitted,

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CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY that the size and style of type used in this brief is Courier New, 12 point, a font that is not proportionately spaced.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing document was sent by United States mail, postage prepaid, to Jeffrey Anderson, Assistant Public Defender, Criminal Justice Building, 421 Third Street, Sixth Floor, West Palm Beach, FL 33401, this 6th day of January, 2000.

LESLIE T. CAMPBELL
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