

Supreme Court of Florida

No. SC95158

HARRY BUTLER,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

[May 9, 2002]

PER CURIAM.

We have on appeal Harry Butler's conviction for first-degree murder and his sentence of death. We have jurisdiction. See art. V, § 3(b)(1), Fla. Const. For the reasons stated below, we affirm Butler's conviction and his sentence.

FACTUAL AND PROCEDURAL BACKGROUND

On the night of March 13, 1997, or early morning hours of March 14, 1997, Leslie Fleming (Fleming), also known as Bay, was stabbed multiple times and asphyxiated by her former boyfriend, Harry Butler (Butler). Shawna Fleming

(Shawna), Leslie's sister, discovered Fleming's body at about 7:15 a.m. on the morning of March 14 when LaShara Butler (LaShara), the couple's six-year old daughter, opened the apartment door for Shawna. According to LaShara's trial testimony, on the night before the body was discovered, she had been sleeping with her mother when her father entered the bedroom, picked her up, and took her to her own room. LaShara testified that she saw his face during this process. LaShara also stated she heard her mother say, "Stop," saw her father's leg pinning down her mother's leg, and heard her mother screaming as though she were being hurt. Officer Scott Ballard, one of the first officers on the scene, testified that on the way to the police station, LaShara said, "My daddy hurt mommy. I heard him yelling at her."

Lola Young, a long-time neighbor of Fleming's who had also known Butler for some time, testified she saw Butler hiding in the bushes near Fleming's apartment between 3:30 and 4 a.m., around the same time as the murder. She also stated that soon after seeing Butler, she saw a blue car speed through the housing complex, stop abruptly, pick up Butler, and speed off. Latwanda Allen (Allen) testified that she, Butler and Martisha Kelly (Kelly) are cousins. Allen said Kelly told her Butler killed Fleming. At trial, Kelly denied having made the statement.

Detective Steffens testified that Kelly stated she went by Fleming's apartment

the morning of the murder, looked through a window and noticed the apartment was in disarray. Steffens also testified he questioned Butler, and Butler denied any involvement in the murder. During the interview, Steffens noticed superficial cuts on Butler's hands, which Butler explained he received from falling off a bicycle and from a broken bottle. A broken beer bottle was found on the floor of Butler's room.

Detective Green testified Kelly told him the murder weapon could be found in a dumpster near a food store where a pair of blue shorts, a white T-shirt, a pair of underwear, a towel, and a pair of tennis shoes having no laces were eventually found. However, no weapon was recovered from this location. Dr. Jeannie Eberhardt, a forensic scientist specializing in DNA serology, testified she found the presence of blood on the white T-shirt, but she was unable to confirm a DNA profile of the blood. Blood stains found on the denim shorts, towel, and boxer shorts were also tested, with the same result. The blood was either of an inadequate amount or degraded. The dyes of the denim shorts inhibited DNA testing. However, testing of the sneakers revealed a DNA profile consistent with that of the victim.

Shawna testified that Fleming ended her relationship with Butler several months before the murder. On March 9 Butler moved out of the apartment at Fleming's request. He was present, however, in the apartment on March 11 when Shawna visited her sister. Fleming told Shawna to leave and call the police. One of

the officers who arrived on the scene observed red marks on Fleming's back and an injury to her shoulder. Butler was arrested, but bonded out the next evening. Two days after the incident with the police, Butler was again seen at Fleming's apartment. An employee of a cable company, John Doshier, was removing a cable box from the residence. He indicated that Fleming and Butler seemed affectionate with no animosity between them.

Lakisha Miller (Miller), Butler's cousin and Fleming's best friend, who was known as Red, testified she spent the night with Fleming, at Fleming's request, on the night of March 12. She said she last spoke with Fleming at 8 p.m. on the night of March 13. Miller testified that Butler did not like her and that he was upset over the breakup with Fleming. She also said Butler was upset because Fleming was having an affair with Adonis Hartsfield.

Terry Jackson, Butler's coworker and acquaintance for many years, testified that he gave Butler a ride the day before the murder. During that ride, Butler said he was going to kill Bay (Fleming) and Red (Miller).

Dennis Tennell (Tennell) testified that he shared a motel room with Butler on the night of the murder and that he allowed Butler to borrow a pair of his Nike sneakers the next morning because Butler's shoes were wet. Tennell identified the sneakers found in the dumpster as Butler's. Butler testified he and Tennell attended

a party and arrived at their room around 2 a.m. Tennell left for an hour on a “dope run.” At some time during the night, Butler noticed his blue and white Converse sneakers were missing and when he asked Tennell where they were, Tennell responded, “I’m on a mission with them.” Butler then borrowed Tennell’s black Nikes, which Butler was wearing when arrested. As Butler and Tennell left their room, the police confronted them. Tennell ran away and Butler was taken to the police department for questioning. Butler testified he did not know Fleming was dead at this time.

At the penalty phase, several family members, including Butler’s father, Junior Butler, testified concerning Butler’s early life. Prior to the death of his mother, Butler lived with his mother and father, with Junior Butler supporting the family on fifty dollars a week. Junior Butler indicated that he was tried and acquitted of the murder of Butler’s mother when Butler was eight years old. After his mother’s death, Butler went to live with his grandmother. Butler’s sister, Sandra Butler, testified Butler protected her as a child. When their grandmother died, Junior Butler again took custody of Butler and his siblings. When Butler reached age eighteen, he moved out of his father’s house.

On June 28, 1998, the jury recommended Butler be sentenced to death by a vote of eleven to one. The trial court denied Butler’s motion for new trial at a

hearing on August 7, 1998. On November 2, 1998, the trial judge conducted a Spencer¹ hearing during which the defense presented additional mitigating testimony from a psychiatrist, Dr. Michael Maher. Dr. Maher testified that he interviewed Butler concerning his use of drugs and his psychiatric background. Butler informed him that he used a lot of cocaine on the night of murder, but he also said he did not commit the murder. Dr. Maher indicated that one of the effects caused by the use of cocaine was irrational, repetitive actions. He opined that the number of stab wounds in this case suggests this type of behavior. Dr. Maher further opined that a child whose mother dies as a result of violence faces a great risk of participating in violence to resolve conflicts, especially when this factor is coupled with other dysfunctional social activities, such as drug use.

On January 11, 1999, the trial judge concurred with the jury recommendation and sentenced Butler to death. The trial judge found one aggravating circumstance, that the murder was heinous, atrocious, or cruel. The defense requested two statutory mitigating circumstances, that the defendant was acting under the influence of emotional and mental disturbance and that his capacity to appreciate the criminality of his act was impaired. However, the trial judge found no statutory mitigating factors and four nonstatutory mitigating factors including: (1) Butler was

1. Spencer v. State, 615 So. 2d 688 (Fla. 1993).

reared without his natural mother (some weight); (2) Butler is a loving and good son (some weight); (3) Butler is well thought of by neighbors and coworkers (slight weight); and (4) Butler has a long-term substance abuse problem (slight weight).

Butler filed a timely notice of appeal on February 9, 1999.

In this appeal Butler claims the trial court erred by: (1) permitting the State to elicit testimony concerning prior acts of violence allegedly committed by the defendant; (2) permitting an unqualified expert witness to testify concerning DNA evidence; (3) denying the defense motion for a new trial following the discovery of a probation violation report on one witness that was not disclosed by the State; (4) instructing the jury that the only proposed statutory aggravating circumstance had been established by the evidence; (5) failing to consider a statutory mitigating circumstance proposed by the defense during the penalty phase; and (6) imposing a death sentence that is excessive, disproportionate, and cruel and unusual punishment under the United States and Florida Constitutions.

We deny relief on all of Butler's claims and affirm both the finding of guilt and the sentence of death.

ISSUES

Prior Acts Of Violence

Butler first argues the trial court erred in allowing the prosecutor to ask him,

Detective Marvin Green, and Theodore Dallas questions related to prior domestic violence allegations against him. Contending that this evidence was similar fact evidence, Butler argues this evidence should have been excluded because it was used only to show Butler's propensity to commit the crime charged or his bad character and because the probative value of this evidence was outweighed by the prejudice. See §§ 90.403-90.404, Fla. Stat. (1995).

On April 30, 1997, the State filed a notice of intent to use evidence of other crimes, wrongs, or acts committed by Butler. The notice specifically sought to introduce evidence of a March 11, 1997, domestic violence incident in which Butler allegedly sexually battered and assaulted Fleming. On July 14, 1997, Butler filed a motion to strike the State's notice, alleging the March 11 incident bore no similarity to the March 14 murder. He further argued such evidence was irrelevant and could only be used to show bad character and propensity of the defendant to commit violent acts. The defense filed a motion in limine on June 24, 1998, seeking to exclude the following evidence:

1. Any evidence of the Defendant's alleged statement, "gonna kill Bay and Red."
2. Any mention of Leslie Fleming's alleged fear of the Defendant.
3. Any mention that the Defendant allegedly kidnaped Leslie Fleming on or about March 11, 1997.
4. Any mention that Defendant allegedly touched, struck or caused bodily harm to Leslie Fleming on or about March 11, 1997.

5. Any mention that the Defendant allegedly committed a sexual battery upon Leslie Fleming on or about March 11, 1998 [sic].
6. Any mention of prior allegations of abuse, physical or emotional, towards Leslie Fleming by the Defendant.

Defendant again alleged such evidence was irrelevant and that any relevance would be outweighed by the prejudice that would result from its admission.

At the June 23, 1998, pretrial hearing on this motion, defense counsel noted that a prior hearing had been held on the domestic battery charge before a different judge, who found the charge admissible to show motive. At the 1998 hearing, the present trial judge granted the motion to exclude the sexual battery and kidnapping (paragraphs three and five of the motion) to the extent that the State could not raise them in opening statement. Otherwise, the State was directed to approach the bench prior to introducing the evidence. The judge then denied the exclusion requested in paragraph four of the motion in limine to the extent it would be introduced to show motive or any other issue at trial. Defense counsel in fact conceded the domestic battery was relevant to this murder case. Finally, the judge ruled that any evidence presented in relation to statements Fleming may have made concerning previous abuse (paragraphs two and six) would be dealt with contemporaneously. The motion was denied as to any statements made by the defendant (paragraph one).

Generally, any evidence relevant to prove a material fact at issue is

admissible unless precluded by a specific rule of exclusion. See § 90.402, Fla. Stat. (1997); Zack v. State, 753 So. 2d 9 (Fla. 2000). Collateral crime evidence, codified in section 90.404, Florida Statutes (1997), is also relevant and admissible if used to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. However, even relevant evidence will be inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice² or if introduced to prove defendant's bad character or propensity to commit the crime charged.³ See Gore v. State, 719 So. 2d 1197 (Fla. 1998); Williams v. State, 621 So. 2d 413 (Fla. 1993); State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). As we stated in Bryan v. State, 533 So. 2d 744, 746 (Fla. 1988):

The only limitations to the rule of relevancy are that the state should not be permitted to make the evidence of other crimes the feature of the trial or to introduce the evidence solely for the purpose of showing bad character or propensity, in which event it would not be relevant, and such evidence, even if relevant, should not be admitted if its probative value is substantially outweighed by undue prejudice.

We have consistently adhered to this principle in other cases where evidence is being introduced pursuant to Williams v. State, 110 So. 2d 654 (Fla. 1959).

In this case the evidence complained of was elicited during the cross-

2. § 90.403, Fla. Stat. (1997).

3. See § 90.404(2)(a), Fla. Stat.

examination of three defense witnesses (including the defendant). A prosecutor can use cross-examination to delve further into issues raised during the direct examination and to impeach a witness's credibility. See Steinhorst v. State, 412 So. 2d 332, 337 (Fla. 1982); Diaz v. State, 747 So. 2d 1021, 1023 (Fla. 3d DCA 1999). Additionally, we have often said that cross-examination is not limited to the exact details testified to on direct examination but extends to the whole subject and all matters that modify, supplement, contradict, rebut or make clearer the direct testimony. See Chandler v. State, 702 So. 2d 186 (Fla. 1997); Geralds v. State, 674 So. 2d 96 (Fla. 1996). Although evidence of collateral crimes may be raised for these purposes, such evidence should not become a feature of the trial. The other crimes evidence in this case was used during Detective Green's cross-examination to elaborate on why the police believed Butler was a suspect. The evidence was used during Theodore Dallas's cross-examination to test his knowledge of the relationship between the defendant and the decedent. The other crimes evidence was used as impeachment during the cross-examination of Butler. Furthermore, the use of this evidence did not become a feature of the trial; it covered very little of the cross-examination of these witnesses.

During direct examination by defense counsel, Detective Green stated he had been reading e-mail about crimes committed in his patrol area during the same week

as Fleming's murder when he heard a call of a possible homicide over his radio. He asked officers to confirm the address and noticed it matched the same address as shown in the e-mail concerning a domestic violence incident two days earlier involving Butler. Green then testified to seeing Butler and Dennis Tennell near the crime scene and approached them. As he did, Tennell⁴ ran away, but Butler remained, voluntarily complying with Green's request to go down to the police station.

On cross-examination, the prosecutor again asked Green about the e-mail concerning the previous domestic violence incident in the context of how this e-mail, in conjunction with the address where the murder occurred, led the police to suspect Butler. As the prosecutor questioned Green, he began to delve into what was termed "the serious nature" of the allegations against Butler. The defense attorney objected and the trial judge told the prosecutor to stay away from the nature of the allegations.

The prosecutor asked these questions to determine the officer's knowledge about the identity of the possible perpetrator. This is a proper purpose under section 90.404(2)(a). While the prosecutor's characterization of the domestic violence

4. Tennell later explained during direct examination that he ran away when Butler told him to and that he was carrying cocaine with him that morning.

incident as “serious” and “violent” was not necessary to achieve this purpose, no prejudice resulted from these comments since they were brief and immediately met by admonishment from the court. See, e.g., Jones v. State, 748 So. 2d 1012 (Fla. 1999); Oats v. State, 446 So. 2d 90 (Fla. 1984). Therefore, we find any error caused by this characterization to be harmless. See State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986).

Butler also alleges error during cross-examination of his friend Theodore Dallas. On direct examination, Dallas indicated he was aware of the relationship between Butler and Fleming, a relationship which had begun some seven years earlier. Dallas further indicated there was no friction between Butler and Fleming. On cross-examination Dallas continued this theme and indicated Butler was not upset that Fleming was leaving him and seeing another man. He indicated Butler and Fleming never had any problems.

After Dallas acknowledged the March 11 domestic violence incident, the prosecutor asked him about an April 24, 1993, domestic violence incident. During the bench conference after defense counsel’s objection, the prosecutor argued defense counsel had opened the door to this line of questioning by eliciting information from Dallas about the nature of the relationship between Butler and Fleming. The prosecutor further argued he could properly test in his cross-

examination the extent of Dallas's knowledge and what information he had on which to base an opinion. The trial judge overruled the objection and directed the State to limit the scope of questioning to the nature of the act about which the prosecution already had a factual basis.

When the prosecutor asked other questions concerning the 1993 incidents, defense counsel again objected on the basis that the prosecutor was going into the specifics of the incidents. The trial judge ultimately directed the prosecutor to ask Dallas if he was aware of any incident in which Fleming was allegedly touched or struck on the particular date in order to avoid making the prior abuse a feature of the trial. Dallas admitted to hearing rumors of abuse in the relationship, but stated many relationships had those kind of problems.

The purpose of the prosecutor's cross-examination of Theodore Dallas was to test his credibility concerning the relationship between Butler and Fleming. Section 90.608, Florida Statutes (1997), provides:

90.608 Who may impeach.—Any party, including the party calling the witness, may attack the credibility of a witness by:

- (1) Introducing statements of the witness which are inconsistent with the witness's present testimony.
- (2) Showing that the witness is biased.
- (3) Attacking the character of the witness in accordance with the provisions of s. 90.609 or s. 90.610.
- (4) Showing a defect of capacity, ability, or opportunity in the witness to observe, remember, or recount the matters about which the

witness testified.

(5) Proof by other witnesses that material facts are not as testified to by the witness being impeached.

(Emphasis added.) The prosecutor's questions specifically tested the basis for the witness's recount of the matters about which he testified, those matters being the lack of discord between the defendant and the victim. See Bonifay v. State, 626 So. 2d 1310 (Fla. 1993).

This Court has in prior cases found admissible testimony concerning specific acts committed by the defendant to rebut a witness's testimony describing the defendant as benign or to show motive or premeditation where the defendant has committed prior acts of violence against the same victim. See Pittman v. State, 646 So. 2d 167 (Fla. 1994) (found admissible prior threats against the murder victim and her family); Hildwin v. State, 531 So. 2d 124 (Fla. 1988) (finding the State could introduce rebuttal evidence of defendant's prior specific acts of misconduct and violence to rebut expert testimony that defendant would be a good prisoner). Admission of the evidence concerning prior incidents of violence against the victim was not error.

Butler next complains of the other crimes testimony elicited from him during the State's cross-examination. On direct examination by defense counsel, Butler indicated that he loved Fleming and that they had made love on the Tuesday before

the murder. He gave the impression that they had a good relationship and that he was not concerned about what may have been going on between Fleming and Adonis Hartsfield. He admitted to being arrested on March 11, 1997, but he indicated there had been an argument with Fleming, not serious fighting.

On cross-examination Butler again tried to minimize the circumstances of his arrest by indicating the couple had consensual sex on March 11 and by saying the ride in his car on that day was not against her will. He indicated the incident did not involve rape or kidnapping. However, he acknowledged that he was told the case was being referred to the prosecutor's office on felony charges. Additionally, during cross-examination and in response to Butler's assertion that he would never hurt Fleming, the prosecutor asked about a 1993 incident in which Butler choked Fleming.

When a defendant takes the stand, his credibility may be impeached in the same manner as any other witness. See Fotopoulos v. State, 608 So. 2d 784 (Fla. 1992). More specifically, impeachment may be through questioning concerning prior acts of misconduct in a situation where the defendant has testified on direct examination that he has not or would not participate in such misconduct. See Lusk v. State, 531 So. 2d 1377 (Fla. 2d DCA 1988). In this case, Butler took the stand and testified he would never hurt the victim. The evidence concerning the 1993

incident was relevant to this issue; therefore, the trial court properly allowed cross-examination concerning the incident.

Prior to trial, the trial judge ruled that the March 11 domestic violence incident was admissible at trial to show motive. The defendant, however, maintains the prosecutor should not have questioned him about possible felony charges arising out of that incident. This question was relevant impeachment evidence given the fact that Butler was downplaying the seriousness of the events and said it was merely an “argument.” Moreover, the questioning was relevant to the issue of motive based on the seriousness of these possible charges, and it helped put into context the defendant’s statement to Dennis Tennell that he was going to kill Fleming. The trial court did not err in allowing this limited cross-examination because it tended to “modify, supplement, contradict, rebut, or make clearer the facts testified to in chief.” Coco v. State, 62 So. 2d 892 (Fla. 1953).

In sum, the trial court did not err in allowing the cross-examination of three defense witnesses on other crimes evidence because the evidence was admissible to explain and modify direct testimony, was relevant and probative, and its probative value was not outweighed by the prejudicial effect.

Unqualified Expert Witness

Butler next contends DNA expert Dr. Jeannie Eberhardt was not qualified to

testify to the frequency to which DNA profiles occurred in the population because she did not assist in creating the database that she used to determine the frequencies nor was she trained in statistics. We disagree and affirm the trial court's finding that the DNA expert was qualified to give an expert opinion.

DNA testing requires a two-step process, one biochemical and the other statistical. The first step uses principles of molecular biology and chemistry to determine that two DNA samples look alike. The second step uses statistics to estimate the frequency of the profile in the population. Both steps must satisfy the Frye test. See Brim v. State, 695 So. 2d 268 (Fla. 1997). The Frye test requires that the scientific principles or methodologies to which an expert testifies must be generally accepted in the scientific community before they will be considered valid in the courts. See Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923).

Butler relies on Murray v. State, 692 So. 2d 157 (Fla. 1997), in arguing that Dr. Eberhardt lacked the requisite knowledge to testify about her DNA testing and population frequencies. In Murray, the expert who testified had no knowledge about the database on which his population frequency calculations were based, repeatedly evaded questions about the procedures he used in his testing, and misled the court as to the scientific community's acceptance of PCR (Polymerase Chain

Reaction) DNA testing⁵ at that time. This Court ultimately found the expert was not qualified, but further held assembly or creation of the database is not necessary to testify to results. However, “a sufficient knowledge of the database grounded in the study of authoritative sources” is necessary. Murray, 692 So. 2d at 164.

Contrary to Butler’s assertion, Dr. Eberhardt was qualified to testify as to population frequencies of the DNA profile she discovered. Although she did not participate in the creation of the database, she was familiar with samples from which the database was created. Moreover, Dr. Eberhardt stated the Florida Department of Law Enforcement in Tampa conducted validation studies of its own on the database she used. Although these studies were conducted before she began working there, her training consisted of conducting “revalidations” of those databases.

Butler’s argument at trial and in his brief before this Court that a person who was not involved in creating a database and who has no knowledge other than that contained in an article about a database cannot testify to her personal knowledge of the validity of a database misstates the holdings in Brim and Murray. In Brim we

5. In its 1992 publication, the National Research Council (NRC) explicitly withheld endorsement of the PCR method of DNA testing. See Murray, 692 So. 2d at 160 (relying on National Research Council, DNA Technology in Forensic Science 70 (1992)).

held the second step of the DNA analysis process, statistical probabilities, must meet the Frye test, and in Murray we found a particular expert unqualified whose testimony did not adequately give the population frequency of a DNA profile. Butler's argument, however, overlooks the fact that the Murray decision also states creation of the database is not a necessary prerequisite to testifying; a sufficient knowledge of the authorities pertinent to the database is an adequate basis on which to render an opinion. In Murray, the unqualified expert stated Murray's DNA sample matched the one recovered from the crime scene and "91.8 percent of the population would be anticipated to have different DNA types." Murray v. State, 692 So. 2d at 163. This Court properly characterized that testimony as not enlightening since it did not demonstrate to the jury what segment of the population the profile was more likely to match.

Dr. Eberhardt's testimony did for the jurors what the expert's testimony in Murray could not--it explained the significance of the information and data they were given. She testified the DNA profile of the blood on Butler's sneaker matched that of Leslie Fleming. She explained that she then calculated a statistical frequency that could tell her "how common or how rare that type of profile would be found in any given population." She concluded, "[T]he DNA profile found on the sneaker, as well as the DNA profile from Leslie Fleming occurs approximately one in 3,000

in the African American population, approximately one in 112,800 individuals of the Caucasian, and approximately one in 538,000 in the Southeastern Hispanic population.” This testimony quantitatively helped the jury and the trial court understand the importance of a DNA match. See Hayes v. State, 660 So. 2d 257 (Fla. 1995) (first case where this Court took judicial notice that DNA methodology conducted properly would satisfy the Frye test).

Butler also contends Dr. Eberhardt’s use of the product rule to determine population frequencies was error. Several Florida cases, as well as cases from other jurisdictions, have accepted use of the product rule. See Brim v. State, 695 So. 2d at 272 (observing that the NRC adopted the ceiling principle amid speculation that product rule calculations did not account for population substructures, but later disavowed the ceiling principle and renewed its approval of product rule calculations); Clark v. State, 679 So. 2d 321 (Fla. 3d DCA 1996) (“[P]roduct rule calculations are appropriate as a matter of scientific fact and law.”) (citing National Research Council, The Evaluation of Forensic DNA Evidence (prepublication copy 1996)); see also United States v. Bonds, 12 F.3d 540 (6th Cir. 1993); United States v. Jakobetz, 955 F.2d 786 (2d Cir. 1992).⁶ Butler’s contention is inaccurate in light

6. In United States v. Chischilly, 30 F.3d 1144 (9th Cir. 1994), the United States Court of Appeals for the Ninth Circuit provides an understandable explanation of the intricacies of DNA tests and analyses.

of the case law that continues to uphold the validity of the product rule. This argument is without merit. Dr. Eberhardt was qualified to testify as an expert because her testimony was based on proven scientific principles.

Denial Of Motion For New Trial

Butler argues that the prosecution's nondisclosure of Lola Young's probation violation report compromised his right to a fair trial. Moreover, he argues the State had constructive knowledge of this report and is responsible for any adverse

Forensic DNA tests compare allele combinations at loci where the alleles tend to be highly variable across individuals and ethnic groups. If there is no match between the alleles from the evidence DNA and the potential suspect's DNA, the suspect is generally ruled out as the source of the evidence, unless the failure is attributable to inadequate test conditions or contaminated samples. If there is a match, analysts use the frequency of the alleles' appearance in the relevant population to calculate the probability that another person could have the same pattern of allele pairs.

Id. at 1152 n.7 (relying on Georgia Sargeant, DNA Evidence Finding Stricter Scrutiny, New Uses, Trial, Apr. 1993, at 15). In United States v. Bonds, 12 F. 3d 540 (6th Cir. 1993), the United States Court of Appeals for the Sixth Circuit illustrates the product rule:

To estimate the frequency of a suspect's overall DNA pattern, the individual allele frequencies are multiplied together, using a multiplication or product rule, to compute an aggregate estimate of the probability that this combination of alleles in the suspect's DNA sample would be encountered in a particular racial population.

Id. at 550.

consequences flowing from its nondisclosure. The State argues the defense had the same access to the court file containing the probation report, and that even if the report had been disclosed, its use would have been limited, so no prejudice has ensued to the defendant. Thus, the State posits no violation of Brady v. Maryland, 373 U.S. 83 (1963), has been demonstrated.

The State is required to disclose to the defense evidence in its possession or control that is favorable to the accused or that tends to negate the guilt of the accused. See United States v. Bagley, 473 U.S. 667 (1985); Brady v. Maryland, 373 U.S. 83 (1963). The defendant must prove three elements to establish a Brady claim: (1) the evidence at issue is favorable to the accused, either because it is exculpatory, or because it is impeaching; (2) the evidence has been suppressed by the State, either willfully or inadvertently; and (3) prejudice has ensued. See Way v. State, 760 So. 2d 903, 910 (Fla. 2000) (quoting Strickler v. Greene, 527 U.S. 263, 281-82 (1999)).

While Butler has demonstrated this violation report was in the possession of the State and that it contained information that could have been used in impeaching Young, he has failed to demonstrate that this report was material. As this Court explained in Young v. State, 739 So. 2d 553 (Fla. 1999), an item of evidence is material if there is a reasonable probability that the outcome of the proceeding

would have been different if the evidence had been disclosed. Thus, the question is whether in the absence of this evidence the defendant received a fair trial. We must also ask whether the suppressed evidence could reasonably be taken to put the case in such a different light that it undermines our confidence in the verdict. See Kyles v. Whitley, 514 U.S. 419 (1995).

This prong of the Brady standard has not been satisfied because this violation report does not undermine our confidence in this verdict. There is no doubt that the defense had in its possession information concerning the witness's background.

Lola Young was deposed on December 12, 1997, six months before trial. At the time of the deposition she was on probation. In response to questioning, Young indicated she was not only on probation but also in a drug treatment program. She also indicated she had several drug-related convictions.

Thus, the defense was aware of both the witness's prior drug convictions and her present treatment for drug use and, based on this information, could have developed a line of inquiry as it related to her ability to perceive. This is the same line of inquiry Butler now says he could have pursued with the violation report.

Additionally, any error in the prosecutor's failure to disclose this violation report was harmless. When Young's testimony is weighed against the other evidence presented at trial, it does not minimize Butler's guilt. At trial, six-year-old

LaShara testified she saw her father's face when he removed her from her mother's bed, and she said that later the same night she was awakened by her mother's screams and saw her father's leg pinning down her mother. The jury also heard and considered testimony that the tennis sneaker Butler had been wearing and that was found in a dumpster had blood on it matching Fleming's DNA.

Jury Instruction On Statutory Aggravator

Butler argues the jury instruction on the statutory aggravating circumstance of heinous, atrocious, or cruel indicated that the aggravator had been established and deprived the jury of its decision-making on this issue. This issue has not been preserved for review since no objection was made in the trial court. There was no objection made to the jury instructions once each party was apprised by the court of how the instruction would be worded. See Hazen v. State, 700 So. 2d 1207, 1211 (Fla. 1997). The defense's failure to object is illustrated by the following exchange that occurred during the trial regarding where to place the definition of the heinous, atrocious, or cruel aggravator.

THE COURT: Aggravating circumstance that can be considered is limited to the following that are the following. I think I'm going to leave that is the following established by the evidence or that is established by the evidence.

DEFENSE COUNSEL: If you are going to make it singular.

THE COURT: So I will put a comma in there by the following that is established by the evidence the crime for which -- and was conscious. It reads standing alone with an -- insert special instruction at that point.

DEFENSE COUNSEL: Pardon me, Judge?

THE COURT: I inserted it right after that just before if you find the aggravating circumstances.

DEFENSE COUNSEL: That's fine, Judge.

No objection was made by the defense during this discussion. It is clear from this exchange that defense counsel accepted not only the placement of the definition of the HAC aggravator, but also the wording of the instructions related to it.

As the State points out, this issue is also without merit. The defense has proffered an argument based purely on semantics. The instructions given at trial on the heinous, atrocious, or cruel aggravator read as follows, in pertinent part:

The aggravating circumstance that you may consider is limited to the following, that is established by the evidence: The crime for which the defendant is to be sentenced was especially heinous, atrocious or cruel.

(Emphasis added.) The standard jury instructions on aggravators states: "The aggravating circumstances that you may consider are limited to any of the following that are established by the evidence." The only practical difference between the two instructions is that the one given at trial involved one aggravator while the standard jury instruction contemplates a situation where more than one aggravator

has been established by the evidence. Defense counsel showed an awareness of this slight linguistic difference when he stated, “If you are going to make it singular” after the judge stated he would instruct the jury to consider a certain aggravator. Had defense counsel disagreed with these instructions, he should have objected at that moment. His failure to do so indicates his agreement with the court’s version of the jury instructions.

We therefore deny relief on this claim.

Failing To Consider Statutory Mitigators

Butler next argues the trial court erred in failing to consider, as a separate mitigating circumstance, the evidence presented concerning his impaired mental capacity due to cocaine use. Although a jury instruction on this mitigator was given, the State maintains Butler abandoned this as a separate mitigator when it was not discussed in the defense sentencing memorandum to the trial judge. The memorandum included the statutory mental mitigator of extreme mental or emotional disturbance and the seven nonstatutory mitigators requested, including Butler’s long-term substance abuse problem. The record indicates the trial judge considered and weighed all of the mitigating evidence offered by the defense.

Section 921.141(3), Florida Statutes (Supp. 1996), requires specific findings as to both aggravating and mitigating factors. The State may not prevent the

sentencer from considering any relevant mitigators and, likewise, the sentencer may not refuse to consider any mitigating evidence. See Eddings v. Oklahoma, 455 U.S. 104 (1982). In Campbell v. State, 571 So. 2d 415 (Fla. 1990), this Court sought to clarify and make more uniform the application of the law pertaining to mitigators by stating:

When addressing mitigating circumstances, the sentencing court must expressly evaluate in its written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence and whether, in the case of nonstatutory factors, it is truly of a mitigating nature. See Rogers v. State, 511 So. 2d 526 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988). The court must find as a mitigating circumstance each proposed factor that is mitigating in nature and has been reasonably established by the greater weight of the evidence. . . . The court next must weigh the aggravating circumstances against the mitigating and, in order to facilitate appellate review, must expressly consider in its written order each established mitigating circumstance. Although the relative weight given each mitigating factor is within the province of the sentencing court, a mitigating factor once found cannot be dismissed as having no weight. To be sustained, the trial court's final decision in the weighing process must be supported by "sufficient competent evidence in the record." Brown v. Wainwright, 392 So. 2d 1327, 1331 (Fla. 1981).

Id. at 419-420 (footnotes omitted).

The trial court adequately considered the impaired capacity mitigator. Butler's argument to the contrary is belied by the sentencing order itself. The sentencing order explicitly discusses the impaired capacity issue. The judge considered this factor in the discussion of the HAC aggravator. The trial judge

stated the defense offered the impaired capacity evidence in the form of Dr. Maher's testimony "to mitigate the State's position that the crime was torturous." The court then pointed out that the defense failed to present testimony at trial that substantiated the claim that Butler was in fact impaired by his use of cocaine and other substances at the time of the murder.⁷ For these reasons, the court concluded the crime was heinous, atrocious, and cruel. See Brown v. State, 721 So. 2d 274 (Fla. 1998) (finding despite defendant's use of cocaine and alcohol on the night of the murder, no evidence was presented that he was actually intoxicated at the time of the crime or that his capacity to appreciate the criminality of his act was impaired); Cooper v. State, 492 So. 2d 1059 (Fla. 1986) (finding consumption of alcohol and marijuana on the day of the murder without more does not compel a finding of the diminished capacity mitigator). Therefore, the trial judge's conclusion that the weight of the HAC aggravator was not diminished by this proposed mitigator was proper.

Butler's use of cocaine and alcohol was also explored by the trial judge during the discussion of the statutory mitigating circumstances of under the influence of extreme mental or emotional disturbance and as a separate nonstatutory

7. Although Dennis Tennell discussed Butler's use of beer and cocaine on the night of the murder and Antonio Strappy indicated Butler appeared as if he had been using drugs, neither said Butler was in any way incapacitated that night.

mitigating factor of long-term substance abuse. The trial judge followed the Campbell directive in discussing all the mitigating evidence presented.

Proportionality

In deciding whether the death sentence is proportional in a particular case, this Court is required to consider the totality of circumstances surrounding the case and compare it to other capital cases. See Sexton v. State, 775 So. 2d 923 (Fla. 2000) (citing Urbin v. State, 714 So. 2d 411 (Fla. 1998)); Brown v. State, 721 So. 2d 274 (Fla. 1998). Comparing this case to other capital cases with similar aggravating and mitigating circumstances demonstrates that Butler's sentence of death is proportional.

The trial court found one aggravating circumstance, heinous, atrocious or cruel (HAC), and several mitigating circumstances, including under extreme mental or emotional disturbance. Butler argues the death penalty is not proportional because the murder was committed during an emotional, domestic dispute. This argument is not persuasive or dispositive of the issue. As we held in Pooler v. State, 704 So. 2d 1375 (1997), there is no per se "domestic dispute" exception to imposition of the death penalty. Domestic situations are evaluated in the same manner as other cases for determination as to whether a death sentence may be disproportional given the overall circumstances. See, e.g., Spencer v. State, 691 So.

2d 1062 (Fla. 1997) (death penalty affirmed where the defendant killed his wife and the trial court found HAC and prior felony, as well as a number of statutory and nonstatutory mitigators).

Given the overall circumstances of this case, imposition of a sentence of death is not disproportional. We have upheld the death sentence in several cases where the HAC aggravator has been found along with several mitigating factors. See Spencer v. State, 691 So. 2d 1062 (Fla. 1997). Moreover, the death penalty has been held to be proportional in several cases where a domestic relationship existed between victim and defendant. See Pooler, 704 So. 2d at 1380; Spencer; Cummings-El v. State, 684 So. 2d 729 (Fla. 1996); Henry v. State, 649 So. 2d 1366 (Fla. 1994); Porter v. State, 564 So. 2d 1060 (Fla. 1990).

In Ferrell v. State, 680 So. 2d 390 (Fla. 1996), we affirmed a sentence of death where the defendant shot his live-in girlfriend twice in her head. One aggravator, a previous felony conviction for second-degree murder of another woman the defendant had known, was found and given great weight. This Court found the death sentence was proportionate to other cases where death had been imposed on defendants who had prior felony convictions. See Duncan v. State, 619 So. 2d 279 (Fla. 1993) (death sentence affirmed where single aggravating factor of prior second-degree murder of fellow inmate was weighed against numerous

mitigators). Moreover, in Henry v. State, 649 So. 2d 1366, the defendant killed both his wife and her son. He was tried separately for each murder. He was convicted of first-degree murder for his wife's murder and sentenced to death. The trial court found the previous conviction of a felony and HAC aggravators. Defendant's sentence was found to be proportional.

In Cardona v. State, 641 So. 2d 361 (Fla. 1994), the trial court found the HAC aggravator and five mitigators. This Court found the death sentence was proportional particularly in light of the length of time the child had suffered. We found the death sentence proportionately warranted although the trial court found that at the time of the murder, Cardona was under the influence of extreme mental or emotional disturbance due to her diminished standard of living and daily cocaine use, which substantially impaired her ability to conform her conduct to the requirements of the law.

Similarly, in this case, Fleming suffered several instances of prior abuse by the defendant, and there was no evidence of extreme mental or emotional disturbance and little evidence of drug use. Moreover, the evidence presented at trial indicates that she also suffered for a long period of time throughout the attack. As the trial judge pointed out in his order, the stab wounds were so numerous that the medical examiner testified she had run out of new words to describe them. In

fact, several of the wounds were defensive indicating the victim was alive for a substantial portion of the attack. The number of stab wounds inflicted on this victim shows the type of indifference to human life to which this Court alluded in Guzman v. State, 721 So. 2d 1155 (Fla. 1998). Butler was also unfazed by the presence of the victim's children in the apartment at the time. The totality of the circumstances in this case, which includes this indifference combined with the brutality of this murder, supports imposition of the death penalty. See Brown v. State, 721 So. 2d at 277. We find this sentence proportional.

CONCLUSION

For the reasons stated above, we affirm Butler's conviction for first-degree murder and his sentence of death.

It is so ordered.

WELLS, C.J., and SHAW, HARDING, LEWIS, and QUINCE, JJ., concur.
ANSTEAD, J., concurs in result only.
PARIENTE, J., concurs in part and dissents in part with an opinion.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION, AND IF FILED, DETERMINED.

PARIENTE, J., concurring in part and dissenting in part.

I concur in the affirmance of the conviction but would reduce the sentence of death to life. This case involves a single aggravator of HAC. Although this Court

has never recognized a "domestic dispute" exception to imposition of the death penalty, we nevertheless have only one time before approved as proportional a death sentence where a single aggravator of HAC was involved. In that case, Cardona v. State, 641 So. 2d 361, 363 (Fla. 1994), the trial court stated that HAC was "'overwhelming and of enormous weight,' considering the 'long period of time over which this baby was subject to torture, abuse, pain, and suffering.'" In Cardona, the facts underlying HAC revealed an eighteen-month history of severe child abuse that this Court found culminated in the death of the defendant's three-year-old child. Id. at 362-63.

Indeed, a review of factually similar cases establishes that this Court has reversed the death sentence even where HAC was established in combination with other significant aggravators. See Blakely v. State, 561 So. 2d 560 (Fla. 1990) (HAC and CCP); Wilson v. State, 493 So. 2d 1019 (Fla. 1986) (HAC, CCP, and prior violent felony); Irizarry v. State, 496 So. 2d 822 (Fla. 1986) (HAC, CCP, prior violent felony, and committed during commission of a burglary).

In this case, although the trial court found no statutory mitigation, there is evidence that Butler was both drinking alcohol and using cocaine on the night of the murder. Dr. Michael Maher explained that a common effect caused by the use of cocaine is irrational, repetitive actions. He opined that the number of stab wounds

in this case--which the trial court used to support the HAC aggravator--is consistent with this effect. Further, regarding the violent death of Butler's mother when Butler was only eight, Dr. Maher explained that a child whose mother dies as a result of violence faces a greater risk of participating in violence to resolve conflicts, especially when combined with drug use.

I conclude that this case is more factually similar to the other domestic dispute cases in which we have reduced the death sentence to life, see, e.g., Blakely, 561 So. 2d at 561; Wilson, 493 So. 2d at 1024; Irizarry, 496 So. 2d at 826, than it is to the cases cited by the majority in support of its proportionality analysis. Further, in the cases cited by the majority, the trial court found additional aggravators other than HAC. See Pooler v. State, 704 So. 2d 1375, 1377 (Fla. 1997) (HAC, prior violent conviction, committed during burglary); Cummings-El v. State, 684 So. 2d 729, 731 (Fla. 1996) (HAC, CCP, prior violent felony, committed during burglary); Henry v. State, 649 So. 2d 1366, 1367 (Fla. 1994) (HAC and prior violent felony); Porter v. State, 564 So. 2d 1060, 1063 (Fla. 1990) (reversing the finding of HAC but affirming the finding of CCP and stating, "this is not a case involving sudden fit of rage").

Moreover, it appears that the majority opinion relies on impermissible nonstatutory aggravation to support its finding that the death sentence is

proportional. Specifically, the majority states:

Butler was also unfazed by the presence of the victim's children in the apartment at the time. The totality of the circumstances in this case, which includes this indifference combined with the brutality of the murder, supports imposition of the death penalty.

Majority op. at 33 (emphasis supplied). The fact that the murder occurred in the presence of the victim's children does not support any specific statutory aggravator in this case. Thus, to the extent that the majority has improperly considered inadmissible nonstatutory aggravation, its proportionality analysis is flawed.

Finally, on a separate but related point regarding the integrity of the jury's verdict in this case, I am particularly concerned about a potentially misleading jury instruction that was given regarding the HAC aggravator. The standard jury instruction states:

The aggravating circumstances that you may consider are limited to any of the following that are established by the evidence.

The standard instruction means that the jury may consider the aggravators if they are established by the evidence. Because there was only one statutory aggravator in this case on which the jury could be instructed, the standard instruction was modified and given as follows:

The aggravating circumstance that you may consider is limited to the following, that is established by the evidence: The crime for which the defendant is to be sentenced was especially heinous, atrocious or cruel.

The modified instruction may have conveyed to the jury that the jury was required to find HAC as established by the evidence. The instruction should have stated:

The aggravating circumstance that you may consider is limited to the following if it is established by the evidence

Although I recognize that the instruction as given was unobjected to, my concern is that the jury may have believed it was compelled to find the HAC aggravator. Because HAC was the only potential aggravator in this case, this misstatement in the jury instruction could have had an effect on the jury's ultimate advisory recommendation.

An Appeal from the Circuit Court in and for Pinellas County,

Frank Quesada, Judge - Case No. CRC 97-04690 CFANO-A

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