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IN THE SUPREME COURT OF FLORIDA

JAMES PATRICK BONIFAY,

Appellant,

v. CASE NO. 78,724

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT
IN AND FOR ESCAMBIA COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

The appellee accepts the appellant's Statement of the Case and Facts.

SUMMARY OF ARGUMENT

ISSUE I: The trial court's ruling on the motion to suppress is presumed correct. The record shows Bonifay understood his Miranda rights which he freely and voluntarily waived. There was no coercive police activity. A juvenile defendant can make a voluntary waiver.

ISSUE II: The murder was heinous, atrocious and cruel. The victim was shot four times. Between the first two shots and the last two shots the victim lay on the floor for a significant period of time begging for his life. He was told to shut up and to forget his wife and children. Simply because the murder weapon was a gun does not preclude consideration of this aggravating factor. The fear and mental anguish of the victim make this murder heinous, atrocious and cruel. Bonifay was totally indifferent to the victim's suffering.

ISSUE III: The trial court did not err in finding the aggravating circumstance of both pecuniary gain and during a robbery. Each aggravating circumstance was supported by independent facts. There is no question the murder was committed during a robbery. It was committed for pecuniary gain because Archer offered Bonifay a briefcase full of money.

ISSUE IV: The trial court did not err in rejecting this mitigating circumstance which was not uncontroverted.

ISSUE V: This claim has no merit since the trial court did not reject "good attitude while incarcerated" but simply gave it little weight. The trial court did not err in giving little weight to Bonifay's "good attitude" where his conduct was no more than would be expected.

ISSUE VI: The trial court did not abuse its discretion in allowing the state attorney to cross-examine Bonifay's mother regarding his rehabilitation potential. The defense opened the door to this cross-examination by asking whether she believed Bonifay could be rehabilitated.

ISSUE VII: Bonifay's death penalty is proportional.

ARGUMENT

ISSUE I

THE TRIAL COURT DID NOT ERR IN ADMITTING BONIFAY'S TAPE RECORDED STATEMENT.

Bonifay claims the state violated his constitutional rights against self-incrimination and his due process rights. He claims his statement was not voluntary because (1) he was seventeen years old, (2) his parents or an attorney were not present, (3) he was emotionally upset, and (4) the officers promised to do the best they could to protect his family.

Defense counsel filed a motion to suppress Bonifay's February 11, 1991 statement because his parents were not present and he did not understand his Miranda[1] rights. Defense counsel proffered testimony that Bonifay's mother would have advised Bonifay not to make the statement had she been contacted (R 95). After argument, the court denied the motion to suppress (R 99). Before the statement was admitted during the trial the state attorney asked the court to make a finding of voluntariness (R 168). The state presented testimony that after Bonifay was arrested and taken to the Escambia County Sheriff's Office, he was released from his restraints and advised of his Miranda warnings (R 171). Officer O'Neal read the printed Miranda form to Bonifay who appeared to understand what he was being read and who signed the form (R 172). The form was read to Bonifay again before the tape recorder was turned on (R 173). Bonifay had no questions at either reading. Bonifay was not threatened or

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[1] *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

coerced in any way. He had no questions with regard to his right to remain silent and his right to an attorney (R 173). Bonifay did not appear to be intimidated in any way (R 174). Officer O'Neal got him a cup of coffee one time (R 175). Bonifay did not appear to be under the influence of drugs or alcohol. He smoked cigarettes. In the very beginning he cried when he was expressing a fear for his family (R 175). Bonifay did not want his family contacted at that time (R 176). The court found the statement was made freely and voluntarily (R 176).

A trial court's ruling on a motion to suppress is presumptively correct. Savage v. State, 588 So.2d 975, 978 (Fla. 1991); Henry v. State, 586 So.2d 1033, 1035 (Fla. 1991); Medina v. State, 466 So.2d 1046 (Fla. 1985).

Bonifay does not claim he asserted his right to silence or requested an attorney. His sole complaint seems to be that his statement was not freely and voluntarily given due to several factors, including age, emotional state, concern for his mother and girlfriend and his mother not being present. The only allegation that police conduct contributed to the statement was that the officers said they would do their best to protect his family. Coercive police activity is a necessary predicate to finding that a confession is not voluntary. Colorado v. Connelly, 479 U.S. 157, 167, 107 S.Ct. 515, 522, 93 L.Ed.2d 473 (1986). The officers did not prevent Bonifay's mother from being present. In fact, Bonifay did not want his family contacted. There is nothing in the record to demonstrate coercion. The officers advised Bonifay of his Miranda rights two times before

the statement, offered him coffee, removed his restraints and allowed him to smoke cigarettes. Bonifay's waiver was intelligently given and he signed the waiver form.

The voluntariness of a confession need be established only by a preponderance of the evidence. Connelly, supra, 479 U.S. at 169, citing Lego v. Twomey, 404 U.S. 477, 92 S.Ct. 619, 30 L.Ed.2d 618 (1972); Thompson v. State, 548 So.2d 198, 204 (Fla. 1988). The testimony of Officer O'Neal proffered for the purpose of the court ruling on voluntariness established the statement was voluntary.

Although the mental condition of the defendant is a factor in the voluntariness calculation, a defendant's mental state, by itself and apart from its relation to official coercion does not render the confession involuntary. Connelly, supra, 479 U.S. at 164. Bonifay claims he was emotionally upset and in fear for his family at the time of the confession. Most defendants are emotionally upset when arrested for murder. Bonifay has neither alleged nor demonstrated anything more than a normal reaction. Bonifay testified he was afraid Robin Archer would hurt his family, not that he was afraid any police officer would harm them. The officers tried to calm him down by telling him they would do everything they could to make sure the family was all right. This is hardly coercion. Bonifay's statement implicated Archer. If he were so afraid Archer was going to hurt his family, he would have refrained from making the statement, not proceeded to blame Archer for the murder.

There is no evidence of a mental disturbance such as would prevent Bonifay's waiver and confession to be voluntary. Further, even though mental weakness of the accused is a factor in the determination of voluntariness, the fact of mental subnormality alone does not make a confession involuntary. Thompson v. State, 548 So.2d 198, 203-04; Kight v. State, 512 So.2d 922, 920 (Fla. 1981). Bonifay was capable of understanding his rights. He was 17 years old, attended night school, and communicated with no difficulty. He provided an excuse for his actions - Robin Archer. The trial court's findings are supported by sufficient evidence. See, Thompson, supra at 204; Hayes v. State, 581 So.2d 121, 125 (Fla. 1991); Ross v. State, 386 So.2d 1191 (Fla. 1980).

To the extent Bonifay is implying a juvenile defendant cannot make a voluntary waiver without a parent present, this allegation is contradicted by case law. A juvenile defendant can make a voluntary waiver of his Miranda right where the totality of the circumstances shows the waiver is voluntary. See, Fare v. Michael C., 442 U.S. 707, 725, 99 S.Ct. 2560, 61 L.Ed.2d 197 (1979); Ross v. State, 386 So.2d 1191 (Fla. 1980); State v. Francois, 197 So.2d 492 (Fla. 1979). Bonifay was 17 years old, had previous contact with the criminal justice system, had no serious mental problems and understood his Miranda rights. The police protecting his parents and girlfriend was neither a condition precedent for the confession nor a promise. He was simply reassured law enforcement would do the best they could to protect them, as they do every other citizen.

Error, if any, was harmless. See, Arizona v. Fulminante, ___ U.S. ___, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991). Cliff Barth was present at the robbery/murder and testified against Bonifay in detail. Both Jennifer Morris and Kelly Bland testified that Bonifay told them about how he killed the victim.

ISSUE II

THE TRIAL COURT DID NOT ERR IN FINDING THE MURDER WAS HEINOUS, ATROCIOUS AND CRUEL.

Bonifay claims the murder was not heinous, atrocious and cruel because "a very short time elapsed" between the second shot and the two shots to the head. He also claims multiple gunshot wounds do not make a murder heinous, atrocious and cruel.

The security tape which was admitted as State Exhibit #10, the testimony of Cliff Barth and Bonifay's statement establish that it was not a very short time between the second and third shots. Between these two shots, both Barth and Bonifay entered the store, fumbled with the locks, had to climb on counters, and collected money to put in the bag (R 236-37, 258, 274-76). During this entire time the victim lay wounded on the floor begging for his life, speaking of his wife and children, was told "shut the f___ up and f___ your kids", then was mercilessly shot in the head. The victim still was not dead so Bonifay shot him again in the head (R 237).

This case is strikingly similar to Gaskin v. State, 591 So.2d 917 (Fla. 1991). In Gaskin this court found heinous, atrocious and cruel was established where the victim was shot twice after which the defendant entered through a window and shot her in the head at point blank range. The only difference is that Mr. Coker was begging for his life and calling out his children's names and ages when he was shot.

The simple fact that a victim is shot does not erase the mental anguish and terror experienced before the shooting. Coker

was painfully aware of what was happening as he lay on the floor, heard Barth and Bonifay enter the store, and begged them to let him live. In Routly v. State, 440 So.2d 1257, 1265 (Fla. 1983), this court cited six cases to illustrate that even if death is instantaneous, as by a gunshot wound, when victims are subjected to agony over the prospect that death is soon to occur, the murder is heinous, atrocious and cruel. In Huff v. State, 495 So.2d 145 (Fla. 1986), the defendant shot his mother and father from the back seat of a car. The murder was heinous because the evidence showed the father turned in his seat and placed his hands up in a defensive position, and the mother witnessed her husband being shot while knowing she was about to be killed. See also, Douglas v. State, 575 So.2d 165 (Fla. 1991) (victim hit in head with rifle and shot); King v. State, 436 So.2d 50 (Fla. 1983) (victim struck in forehead with blunt instrument then shot in head; Melendez v. State, 498 So.2d 1258 (Fla. 1986) (victim shot in head and shoulders and throat slit); Zeigler v. State, 402 So.2d 465 (Fla. 1981) (victim shot then struck in head with blunt instrument).

This court has found the factor of heinous atrocious or cruel applicable in similar circumstances where even though death resulted from a gunshot wound, the victim suffered mental anguish beforehand. Farinas v. State, 569 So.2d 425 (Fla. 1990) (victim's pleas for mercy ignored, fact that victim jumped from car and ran while screaming indicates victim was in frenzied fear for life, after victim paralyzed from waist down with gunshot wound to spine defendant approached her and fired two shots into

the back of her head after unjamming the gun three times and victim was conscious while he unjammed gun and was aware of her impending death); Harvey v. State, 529 So.2d 1083 (Fla. 1988) (elderly people accosted in home aware of impending deaths because defendants discussed disposing of witnesses and in desperation they ran away but were shot and when not yet dead shot again at point blank range); Douglas, supra, (victim driven around, forced to have sexual acts with another in presence of defendant then hit in head with gun and shot); Mills v. State, 462 So.2d 1075 (Fla. 1985) (victim knew he would be killed after abductors reached destination and fact that he died almost immediately after an "execution style" shotgun blast did not negate mental anguish suffered beforehand); Routly v. State, 440 So.2d 1257 (Fla. 1983) (victim must have known that defendant had one reason for binding, gagging and kidnapping him, and after arriving at isolated area victim forcibly removed from trunk and shot without slightest mercy-terror felt by victim during ride and immediately precedent to his death is beyond description). Likewise, the evidence in the instant case supports the conclusion of horror and contemplation of serious injury or death. See also, Sochor v. State, 580 So.2d 595 (Fla. 1991); Swafford v. State, 533 So.2d 270 (Fla. 1988); Chandler v. State, 534 So.2d 701 (Fla. 1988).

This court has repeatedly recognized mental anguish as supporting a finding of heinousness. Garcia v. State, 492 So.2d 360 (Fla. 1986); Francois v. State, 407 So.2d 885 (Fla. 1981); Adams v. State, 412 So.2d 850 (Fla. 1982); Knight v. State, 338

So.2d 201 (Fla. 1976). Mental anguish alone has been held sufficient to support a finding of heinousness. Scott v. State, 494 So.2d 1134, 1137 (Fla. 1986), citing Preston v. State, 444 So.2d 939 (Fla. 1984), and Routly, supra. Archer's argument that the murder is not heinous because he did not intend for him to suffer, has no merit. Hitchcock v. State, 578 So.2d 685 (Fla. 1990).

This court has never placed a time limit to qualify a murder as heinous. In Hildwin v. State, 531 So.2d 124, 128 (Fla. 1988), the victim took several minutes to lose consciousness and was aware of her death. Harvey v. State, 529 So.2d 1083, 1087 (Fla. 1988), involved a situation where elderly people were accosted in their home, became aware of their impending deaths, tried to run away, and were shot. In Johnson v. State, 497 So.2d 863, 871 (Fla. 1986), it took the helpless victim 3-5 minutes to die during which time she was in terror and experienced considerable pain. In Kokal v. State, 492 So.2d 1317, 1319 (Fla. 1986), this court rejected the argument that the murder was not heinous because death was instantaneous, observing that the appellant overlooked the events preceding the murder.

The cases cited by Bonifay are distinguishable. Shere v. State, 579 So.2d 86 (Fla. 1991) involved a rapid succession of gunshots with no prolonged apprehension of death. Lewis v. State, 377 So.2d 640 (Fla. 1980) also involved one continuous shooting. Likewise, the shots in Amoros v. State, 531 So.2d 1256 (Fla. 1988) were fired within a short time of each other. In McKinney v. State, 579 So.2d 80 (Fla. 1991) there were no

additional facts in the record which would raise the shooting to the "shocking" level. The shots in Rivera v. State, 545 So.2d 864 (Fla. 1989) were all fired within approximately 16 seconds of each other. Id. at 866. The judge in Brown v. State, 526 So.2d 903 (Fla. 1988) based his finding of heinous, atrocious and cruel on the victim's status as a law enforcement officer. The fatal shots to the victim in Brown came "almost immediately" after the initial shot. Id. at 907. The victims arms in Menendez v. State, 368 So.2d 1278 (Fla. 1979) "may have been" in a submissive position. Id. at 1282. This fact was subject to other reasonable interpretations and the victim was shot twice and died.

In this case there was direct testimony the victim was begging while he lay wounded on the floor and there is no other reasonable interpretation. The fatal shots were separated from the initial shots by a substantial period of time. Bonifay stood over the victim and told him to shut the f___ up and f___ his kids. The victim lay on the floor with two gunshot wounds while Bonifay and Barth fumbled with the locks, climbed around on counters and told him to shut the f___ up.

This case did not involve a "quick killing" as in Cheshire v. State, 568 So.2d 908 (Fla. 1990) and Santos v. State, 591 So.2d 160 (Fla. 1991). It involved a prolonged period during which the victim suffered and contemplated impending death. Bonifay showed utter indifference to the victim's pleas and suffering. See, Dougan v. State, 595 So.2d 1 (Fla. 1991).

There were four valid aggravating circumstances. The only statutory mitigating circumstance was age to which little weight was given. The only nonstatutory mitigating circumstances were that Bonifay had an unhappy childhood and behaved well in jail, both of which were given little weight. This could hardly be considered substantially mitigating under the circumstances. See Zeigler v. State, 580 So.2d 127, 130 (Fla. 1991). Archer would have received the death penalty even if the heinous, atrocious and cruel aggravating circumstance were stricken. See, Maharaj v. State, 17 F.L.W. S201 (Fla. March 26, 1992); Robinson v. State, 574 So.2d 108 (Fla. 1991); Porter v. State, 564 So.2d 1060 (Fla. 1990); Rivera v. State, 545 So.2d 864 (Fla. 1989); Hamblen v. State, 527 So.2d (Fla. 1988). See also, Clemons v. Mississippi, ___ U.S. ___, 110 S.Ct. 1441, 108 L.Ed. 725 (1990). Cf., Happ v. State, 17 F.L.W. S68 (Fla. January 23, 1992); Young v. State, 579 So.2d 721 (Fla. 1991); Gore v. State, 17 F.L.W. S247, 249 (Fla. April 16, 1992); Reed v. State, 560 So.2d 203 (Fla. 1990); Rivera v. State, 561 So.2d 536 (Fla. 1990); Hardwick v. State, 521 So.2d 1071 (Fla. 1988); Rogers v. State, 511 So.2d 526 (Fla. 1987).

ISSUE III

THE TRIAL COURT DID NOT ERR IN FINDING BOTH PECUNIARY GAIN AND DURING THE COURSE OF A ROBBERY AS AGGRAVATING CIRCUMSTANCES.

Bonifay claims the trial court erred in finding both pecuniary gain and during the course of a felony as aggravating circumstances. Bonifay does not dispute the fact the murder was committed during a robbery.

The trial court found the murder was committed for financial gain because:

> The evidence is clear that the murder was committed to gain the receipts from Trout Auto Parts that was split among the three on scene participants including the defendant. In addition, by his own admission, defendant committed the murder for a case full of money promised by the instigator of the crime, co-defendant Robin Archer.

(R 622).

This murder would not have occurred if Archer had never offered Bonifay money. The aggravating circumstance of pecuniary gain is established by the fact this was a contract-murder situation and "but for" Archer's offer would not have happened. This episode was separate and distinct from the robbery. Therefore, the aggravating circumstances are not doubled. The fact Bonifay also obtained $700 from the robbery was an ancillary pecuniary gain to the thousands of dollars he thought were in the briefcase. Pecuniary gain is established by the contract murder arrangement independent of the robbery. See, Thompson v. State, 553 So.2d 153, 156 (Fla. 1989).

When there are separate facts to support each aggravating circumstance, it is not per se error to have both aggravating circumstances. Cf., Henry v. State, 586 So.2d 1033 (Fla. 1991) (during robbery/arson and pecuniary gain); Walton v. State, 547 So.2d 622 (Fla. 1989) (during burglary/robbery and pecuniary gain); Bryan v. State, 533 So.2d 744 (Fla. 1988) (during kidnap/robbery and pecuniary gain). Simply because a robbery also occurred does not automatically eliminate consideration of the pecuniary gain aggravating circumstance. In Echols v. State, 484 So.2d 568, 575 (Fla. 1985) this court stated:

> There is no reason why the facts in a given case may not support multiple aggravating factors provided the aggravating factors are themselves separate and distinct and not merely restatements of each other as in a murder committed during a robbery and murder for pecuniary gain, or murder committed to eliminate a witness and murder committed to hinder law enforcement. *Squires v. State*, 450 So.2d 208 (Fla.), *cert. denied*, ___ U.S. ___, 105 S.Ct. 268, 83 L.Ed.2d 204 (1984); *Combs v. State*, 403 So.2d 418 (Fla. 1981), *cert. denied*, 456 U.S. 984, 102 S.Ct. 2258, 72 L.Ed.2d 862 (1982).

The only prohibition is against doubling aggravating circumstance which are based on the same aspect of the crime, Provence v. State, 337 So.2d 783, 786 (Fla. 1976) or arose out of the same episode Green v. State, 583 So.2d 647 (Fla. 1991). Here, the robbery was separate and distinct from the pecuniary gain which motivated the murder. Error, if any, was harmless. See, Clemons v. Mississippi, ___ U.S. ___, 110 S.Ct. 1441, 108 L.Ed. 725 (1990).

ISSUE IV

THE TRIAL COURT DID NOT ERR IN REJECTING THE NONSTATUTORY MITIGATION OFFERED THAT BONIFAY COOPERATED WITH LAW ENFORCEMENT.

Bonifay claims the trial court erred in rejecting the nonstatutory mitigating circumstance that he cooperated with law enforcement officers. The trial court stated:

> The Court rejects the claim that defendant has been cooperative with law enforcement and the State Attorney from the beginning. Clearly his stories have varied, been incomplete, and, at best, self-serving.

(R 625).

Finding or not finding a specific mitigating circumstance is within the trial court's domain, and reversal is not warranted simply because an appellant draws a different conclusion. Cook v. State, 542 So.2d 964, 971 (Fla. 1989); Stano v. State, 460 So.2d 890, 894 (Fla. 1984); Quince v. State, 414 So.2d 185, 187 (Fla. 1982). A trial court has discretion in rejecting mitigating factors. Hudson v. State, 538 So.2d 829 (Fla. 1989); Scull v. State, 533 So.2d 1137 (Fla. 1988); Hargrave v. State, 366 So.2d 1 (Fla. 1979). There is no requirement that a court must find anything in mitigation. Suarez v. State, 481 So.2d 1201 (Fla. 1985); Porter v. State, 429 So.2d 293, 296 (Fla. 1983). So long as all the evidence is considered the trial judge's determination of a lack of mitigation will stand absent a palpable abuse of discretion. Provenzano v. State, 497 So.2d 1177, 1184 (Fla. 1986); Pope v. State, 441 So.2d 1073, 1076 (Fla. 1983). Appellate counsel is faced with a very high hurdle in trying to convince this court that mitigating circumstances were

proven when the judge who presided at trial has declined to find the same from the evidence. Thomas v. Wainwright, 495 So.2d 172, 175 (Fla. 1986).

Additionally, the trial court determines the weight to be given any mitigating circumstance and whether the circumstance was even established. It is not within the reviewing court's province to revisit or reevaluate the evidence presented as to aggravating or mitigating circumstances. Hudson, supra at 831. This finding should not be disturbed where supported by competent substantial evidence. Bryan v. State, 533 So.2d 744 (Fla. 1988). The trial court makes the ultimate determination as to sentence and must himself consider which aggravating and mitigating factors apply, what weight should be accorded to each, and how they balance. Lopez v. State, 536 So.2d 226 (Fla. 1988); Grossman v. State, 525 So.2d 833 (Fla. 1988). Bonifay has failed to demonstrate any error in the trial court's finding or weighing of the aggravating and mitigating circumstances.

Bonifay cites Nibert v. State, 574 So.2d 1059 (Fla. 1990) for the proposition that once a defendant presents uncontroverted evidence the trial court must find that mitigating circumstance. The operative word is "uncontroverted". Here, the trial court specifically found the evidence was contradicted and was justified in rejecting this aggravating circumstance. His findings are supported by competent evidence. See, Nibert, supra at 1062; Shere v. State, 579 So.2d 86 (Fla. 1991); Preston v. State, 17 F.L.W. S252 (Fla. Apr. 16, 1992).

Even if this court finds the trial court should have found this mitigating circumstance it would not change the outcome. Ever since State v. Dixon, 283 So.2d 1 (Fla. 1973), this court has consistently held that "the procedure to be followed by the trial judges and juries is not a mere counting process of X number of aggravating circumstances and Y number of mitigating circumstances, but rather a reasoned judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances present". Id. at 10. Obviously, the trial court gives little credence or weight to Bonifay's claim he cooperated. Bonifay was trying to save himself from the death-penalty, and, as the trial judge observed, his efforts were self-serving. As stated in Campbell v. State, 571 So.2d 415 (Fla. 1991) the trial court must evaluate "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" (emphasis supplied). Id. at 419; See, Dougan v. State, 595 1 (Fla. 1991). Even if this mitigating circumstance were established, it is not truly mitigating. Bonifay's cooperation extended only to blaming others and exonerating himself. His statement was aimed toward diffusing the blame and pointing the finger at Archer and Barth. He claimed he only committed the murder because Archer threatened his family. He held Barth responsible for the gun going off and telling him to kill the victim (R 236-37) and he was happy to involve Fordham and Barth in the entire scheme to take the heat off himself.

ISSUE V

THE TRIAL COURT DID NOT ERR IN GIVING LITTLE WEIGHT TO THE NONSTATUTORY MITIGATING CIRCUMSTANCE THAT BONIFAY DEMONSTRATED GOOD ATTITUDE AND CONDUCT WHILE INCARCERATED.

Bonifay claims the trial court found "unhappy childhood" as the one nonstatutory mitigating factor and rejected "good attitude while incarcerated". To the contrary, the trial court rejected unhappy childhood[2] and the one nonstatutory mitigating factor found was good attidue while incarcerated[3].

Thus, it appears Bonifay's claim that the trial judge did not find "good attitude" has no merit. Even if Bonifay is correct in his assertion the trial judge rejected this factor, it is well-established that finding or not finding a specific

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[2] The trial court stated:

> The defendant has had an unhappy childhood. He claims incestuous sexual abuse and other physical punishment. It is clear from the record that defendant was shuffled from home to home with little family stability, although his mother testified that she had always attempted to provide a good, stable home for him. However, there is no evidence before the Court from a qualified witness attesting to the effect of this unhappy childhood on his ability to conform his behavior to the norms of society.

(R 625).

[3] The trial court stated:

> Defendant claims that he has demonstrated good attitude and conduct while incarcerated awaiting trial. Little weight is given to this short term conversion; it is easy to behave in jail, especially when you are awaiting trial for a first degree murder.

(R 625).

mitigating circumstance is within the trial court's domain, and reversal is not warranted simply because an appellant draws a different conclusion. Cook v. State, 542 So.2d 964, 971 (Fla. 1989); Stano v. State, 460 So.2d 890, 894 (Fla. 1984); Quince v. State, 414 So.2d 185, 187 (Fla. 1982). A trial court has discretion in rejecting mitigating factors. Hudson v. State, 538 So.2d 829 (Fla. 1989); Scull v. State, 533 So.2d 1137 (Fla. 1988); Hargrave v. State, 366 So.2d 1 (Fla. 1979). There is no requirement that a court must find anything in mitigation. Suarez v. State, 481 So.2d 1201 (Fla. 1985); Porter v. State, 429 So.2d 293, 296 (Fla. 1983). So long as all the evidence is considered the trial judge's determination of a lack of mitigation will stand absent a palpable abuse of discretion. Provenzano v. State, 497 So.2d 1177, 1184 (Fla. 1986); Pope v. State, 441 So.2d 1073, 1076 (Fla. 1983). Appellate counsel is faced with a very high hurdle in trying to convince this court that mitigating circumstances were proven when the judge who presided at trial has declined to find the same from the evidence. Thomas v. Wainwright, 495 So.2d 172, 175 (Fla. 1986).

The trial court found "good attitude" was entitled to little weight. The trial court determines the weight to be given any mitigating circumstance and whether the circumstance was even established. It is not within the reviewing court's province to revisit or reevaluate the evidence presented as to aggravating or mitigating circumstances. Hudson, supra at 831. This finding should not be disturbed where supported by competent substantial evidence. Bryan v. State, 533 So.2d 744 (Fla. 1988). The trial

court makes the ultimate determination as to sentence and must himself consider which aggravating and mitigating factors apply, what weight should be accorded to each, and how they balance. Lopez v. State, 536 So.2d 226 (Fla. 1988); Grossman v. State, 525 So.2d 833 (Fla. 1988). Bonifay has failed to demonstrate any error in the trial court's finding or weighing of the aggravating and mitigating circumstances.

Bonifay had only been in jail six months and, as the trial judge observed, Bonifay's actions were no more than would be expected. See, Zeigler v. State, 580 So.2d 127, 130 (Fla. 1991).

ISSUE VI

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING THE STATE TO CROSS-EXAMINE BONIFAY'S MOTHER ABOUT BONIFAY'S REHABILITATION POTENTIAL.

Bonifay requests a new sentencing hearing claiming the State improperly introduced evidence of prior criminal activity. One of the nonstatutory mitigating circumstances offered by the defense was Bonifay's potential for successful rehabilitation (R 406). Defense counsel asked Bonifay's mother whether she felt her son could be rehabilitated and be a productive member of society (R 413). The door was opened for the State Attorney to cross-examine the mother on whether, despite a history of problems, she still believed he could be rehabilitated (R 413). When defense counsel objected to a question regarding the mother's awareness of things Bonifay had done wrong, the State Attorney argued he was entitled to cross-examine her about her opinion and what she knew about his criminal activity or any other activities that lead her to believe he could be rehabilitated (R 414). The trial judge hypothesized that Bonifay's activities went to the validity of the witness' opinion as to rehabilitation (R 415). He cautioned the State Attorney to "approach the issue as gently as possible without any great significant detail at this point" (R 415). The State Attorney did not elicit details of any prior crime, but simply asked whether she was aware of a problem in Mississippi in which someone was injured and other "things" in Pensacola (R 416).

The trial court has broad discretion in the admission of evidence. Welty v. State, 402 So.2d 1159 (Fla. 1981); Muehleman v. State, 503 So.2d 310, 315 (Fla. 1987). The bottom line concern involving the admission of evidence is relevance. Id. at 315. Unless an abuse of discretion can be shown the trial court's ruling will not be disturbed. Hardwick v. State, 521 So.2d 1071 (Fla. 1988). The questions asked were proper cross-examination particularly since the defense opened the door with Ms. Crenshaw's opinion testimony regarding rehabilitation potential. See, Holton v. State, 573 So.2d 284, 288 (Fla. 1991) (cross-examination about homicides in neighborhood); Mills v. State, 462 So.2d 1075, 1079 (Fla. 1985) (cross-examination regarding prior convictions); McCrae v. State, 395 So.2d 1145, 1152 (Fla. 1980) (state entitled to negate delusive innuendos of defense counsel); Hernandez v. State, 569 So.2d 857 (Fla. 2d DCA 1990) (defendant said he had never done drug-related deals); Ashcraft v. State, 465 So.2d 1374, 1375 (Fla. 2d DCA 1985) (defendant mislead jury by implying he never hurt anyone).

In Hildwin v. State, 531 So.2d 124 (Fla. 1988) the state presented rebuttal evidence of a sexual battery five months before the murder. The victim of the sexual battery never reported the crime. The defendant claimed that, since he had never been charged with the sexual battery it was inadmissible. This court stated:

> At the outset, it must be remembered that there is a different standard for judging the admissibility and relevance of evidence in the penalty phase of a capital case, where the focus is substantially directed toward the

defendant's character. *See* § 921.141(1), Fla. Stat. (1987). In *Elledge v. State*, 346 So.2d 998, 1001 (Fla. 1977), we pointed out that

> the purpose of considering aggravating and mitigating circumstances is to engage in a character analysis of the defendant to ascertain whether the ultimate penalty is called for in his or her particular case.

Thus, evidence that would not be admissible during the guilt phase could properly be considered in the penalty phase. *Alvord v. State*, 322 So.2d 533, 538 (Fla. 1975), *cert. denied*, 428 U.S. 923, 96 S.Ct. 3234, 49 L.Ed.2d 1226 (1976).

Section 921.141(1); Florida Statutes (1987), relating to sentencing proceedings, provides that

> evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida.

As noted in *Alvord*, "[t]here should not be a narrow application or interpretation of the rules of evidence in the penalty hearing, whether in regard to relevance or any other matter except illegally seized evidence." 322 So.2d at 539 (citing *State v. Dixon*, 283 So.2d 1 (Fla. 1973), *cert. denied sub nom. Hunter v. Florida*, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974)).

Because no conviction was obtained, evidence such as that introduced in the instant case has been deemed inadmissible to

> prove the aggravating circumstance of committing a previous violent felony. *Provence v. State*, 337 So.2d 783 (Fla. 1976, *cert. denied*, 431 U.S. 969, 97 S.Ct. 2929, 53 L.Ed. 2d 1065 (1977). On the other hand, even where the defendant waived the mitigating circumstance of no prior criminal activity, the state was allowed to bring out the defendant's prior misconduct when the defendant opened the door by introducing evidence of his nonviolent chartacter. *Parker v. State*, 476 So.2d 134 (Fla. 1985). *We hold that, during the penalty phase of a capital case, the state may rebut defense evidence of the defendant's nonviolent nature by means of direct evidence of specific acts of violence committed by the defendant provided, however, that in the absence of a conviction for any such acts, the jury shall not be told of any arrests or criminal charges arising therefrom.*[4] *Cf. Squires v. State*, 450 So.2d 208 (Fla.) (in guilt phase of trial, state was permitted to rebut evidence of nonviolent character by showing that defendant had fired a deadly weapon at persons other than the victim), *cert. denied*, 469 U.S. 892, 105 S.Ct. 268, 83 L.Ed. 2d 204 (1984). The court did not err in permitting the rebuttal evidence of the separate incident of sexual battery. Such evidence was more reliable than the reputation evidence which was condemned in *Dragovich v. State*, 492 So.2d 350 (Fla. 1986) (emphasis added).

Id. at 127-28.

Similarly, in Parker v. State, 476 So.2d 134 (Fla. 1985) the appellant claimed the trial court erred in allowing the state to present evidence of his prior criminal history during cross examination of a mental health expert. The appellant had waived the mitigating circumstance of no significant prior criminal activity. This court found the testimony of the expert that he based his opinion on the appellant's personal history, including criminal history, opened the door for cross-examination by the

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[4] Court footnote #1: We hasten to add that evidence that the defendant had been a devoted family man or a good provider would not place in issue his reputation for nonviolence.

state. This court found it proper for a party to fully inquire into the history utilized by the expert to determine whether the expert's opinion has a proper basis. Id. at 139. In the present case, the State Attorney was entitled to explore Ms. Crenshaw's basis for concluding Bonifay could be rehabilitated. See also, Muehleman v. State, 503 So.2d 310, 315 (Fla. 1987).

Finally, in Smith v. State, 515 So.2d 182 (Fla. 1987) a relative of the defendant testified he would never hurt anyone. This court held it was proper impeachment for the state to ask whether she knew of a juvenile manslaughter conviction where the defendant stabbed a schoolmate to death when the schoolmate refused to surrender small change. Id. at 185.

The cases cited by Bonifay do not require relief. In Odom v. State, 403 So.2d 936 (Fla. 1981) the trial court considered the appellant's prior record, including numerous arrests and charges which did not result in convictions, as nonstatutory aggravation. Odom involved a completely different issue from the one Bonifay presents. In Maggard v. State, 399 So.2d 973 (Fla. 1981) the state presented "extensive evidence of Maggard's prior criminal record of nonviolent offenses to rebut a mitigating factor on which Maggard expressly stated he would not rely". Id. at 977. In the present case the question went to the mother's basis for concluding Bonifay could be rehabilitated. The state did not present extensive evidence of nonviolent crimes to rebut "no significant criminal history". The state simply asked the witness whether, given her knowledge Bonifay had failed to conform his behavior even after her attempts to help him, she

believed he could be rehabilitated. Garron v. State, 528 So.2d 353, 358 (Fla. 1988) is based on Robinson v. State, 487 So.2d 1040 (Fla. 1986). In Robinson, the state tried to impeach two witnesses who testified the defendant was a good-hearted person and good worker with evidence of two uncharged crimes that occurred after the murder at issue. The state also gave lip service to its inability to rely on these crimes to prove the aggravating factor of "prior violent felony". This court found the state "went too far". Id. at 1042. In Hildwin, supra, this court reiterates that prior violent behavior is not relevant to whether a person was a devoted family man or good provider. Id. at 128 n.1. However, Hildwin held the state was allowed to bring out prior misconduct when the defendant introduced evidence of his nonviolent character. Id. at 128. Questioning Mrs. Crenshaw on Bonifay's rehabilitation potential opened the door to the prosecution asking whether, despite defendant's inability to function as a law-abiding citizen her opinion on rehabilitation was unchanged. The trial court did not abuse its discretion in allowing the questions.

The trial judge did not abuse his discretion. Error, if any, was harmless. DiGuilio v. State, 491 So.2d 1129 (Fla. 1987); see, Rogers v. State, 511 So.2d 526, 533 (Fla. 1987).

ISSUE VII

THE SENTENCE OF DEATH IS PROPORTIONAL.

Bonifay claims his sentence is disproportional. Bonifay planned a robbery and murder and executed Billy Coker as he lay wounded on the floor begging for his life. The trial court found four statutory aggravating circumstances: (1) during the commission of a robbery, (2) committed for financial gain, (3) heinous, atrocious and cruel, and (4) cold, calculated and premeditated. The trial court found age as a statutory mitigator but gave it little weight (R 625)[5]. The trial judge found one nonstatutory mitigator--good attitude while incarcerated, but gave it little weight (R 625). The jury recommended the death penalty by a vote of 10-2 which the trial court gave great weight (R 627).

The cases cited by Bonifay are not comparable to this case. Nibert v. State, 574 So.2d 1059 (1990) involved a defendant who was abused as a child, a chronic alcoholic who lacked substantial control over his behavior when he drank, and had been drinking heavily on the day of the murder. There was substantial mitigation, only one aggravating circumstance and the jury

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[5] To accord any significant weight to age as a mitigating circumstance, it must be "linked with some other characteristic of the defendant or the crime such as immaturity or senility". *Echols v. State*, 484 So.2d 568, 575 (Fla. 1985); *Garcia v. State*, 492 So.2d 360, 367 (Fla. 1986). There is no per se rule which pinpoints a particular age as an automatic factor in mitigation. *Peek v. State*, 395 So.2d 492, 498 (Fla. 1980); *Deaton v. State*, 480 So.2d 1279, 1283 (Fla. 1985). The trial judge found Bonifay's age was linked to any other characteristic of the defendant or the crime (R 625). There is no constitutional prohibition against executing a 17-year old. *Stanford v. Kentucky*, 492 U.S. 361, 109 S.Ct. 2969, 106 L.Ed.2d 306 (1989).

recommendation was 7-5. Id. at 1063. Blakley v. State, 561 So.2d 560 (Fla. 1990) was a domestic case and this court found "when the murder is a result of a heated domestic confrontation the death penalty is not proportionally warranted". Id. at 561. Lloyd v. State, 524 So.2d 386 (Fla. 1988) was a case like Nibert in which there was only one aggravating circumstance and the defendant had no significant history of prior criminal activities. Again, Rembert v. State, 445 So.2d 337 (Fla. 1984) was a one-aggravator case in which the defendant presented a considerable amount of statutory mitigating evidence. Caruthers v. State, 465 So.2d 496 (Fla. 1985) was also a one-aggravator case in which the defendant had no significant prior criminal history and there were several nonstatutory mitigating factors. Penn v. State, 574 So.2d 1079 (Fla. 1991) involved a domestic situation where there was one aggravating circumstance weighed against mitigating circumstances of no significant prior criminal history and extreme emotional disturbance.

Bonifay's sentence is proportional to Hayes v. State, 581 So.2d 121 (Fla. 1991) (18-year old defendant robbed and shot a taxi driver, aggravating circumstances of during a robbery, pecuniary gain, and cold, calculated and premeditated; mitigating circumstances of age, developmentally learning disabled and product of deprived environment); LeCroy v. State, 533 So.2d 750 (Fla. 1988) (17-year old defendant shot campers during robbery, aggravating circumstances of prior violent felony, during a robbery and avoid arrest; mitigating circumstances of age, no significant criminal history and various nonstatutory mitigating

factors), Remeta v. State, 522 So.2d 825 (Fla. 1988) (convenience store clerk shot during robbery, aggravating circumstances of prior violent felony, during a robbery, avoid arrest and cold, calculated and premeditated; mitigating circumstances of mental age of 13, deprived childhood and raised in poverty stricken home by alcoholic parents who abused him, low-average to average intelligence, subject to discrimination because of Indian heritage and speech impairment, and long-term substance abuser institutionalized since age 13); Preston v. State, 17 F.L.W. 252 (Fla. April 16, 1991) (19-year old defendant murdered convenience store clerk, aggravating circumstances of during kidnap, heinous, atrocious and cruel, avoid arrest, pecuniary gain; mitigating circumstances of age and minimal nonstatutory mitigators); Scott v. State, 494 So.2d 1134 (Fla. 1986) (18-year old defendant with aggravating circumstances of heinous, atrocious and cruel, cold, calculated and premeditated, prior violent felony, during kidnap and pecuniary gain; mitigating circumstances of age, substantially impaired capacity, mental problems, drug problems, family problems); Deaton v. State, 480 So.2d 1279 (Fla. 1985) (18-year old defendant killed victim during robbery, aggravating circumstances of during robbery, heinous, atrocious and cruel and cold, calculated and premeditated; mitigating circumstances of age, troubled childhood and no significant criminal history rejected; sentence not disparate to co-defendant); Woods v. State, 490 So.2d 24 (Fla. 1986) (18-year old defendant stabbed prison guard, aggravating circumstances of under sentence of imprisonment and avoid arrest; mitigating circumstances of age

found but intelligence and past life rejected); Shere v. State, 579 So.2d 86 (Fla. 1991) (21-year old defendant shot victim, aggravating circumstances of hinder law enforcement, cold, calculated and premeditated; mitigating circumstances of age found but nonstatutory mitigation rejected); Gunsby v. State, 574 So.2d 1085 (Fla. 1991) (grocery store clerk killed because he threatened to hurt defendant's friend; aggravating circumstances of cold, calculated and premeditated, prior violent felony and under sentence of imprisonment; mitigating circumstances of diminished mental capacity). See also, Rogers v. State, 511 So.2d 526 (Fla. 1987); Teffeteller v. State, 495 So.2d 744 (Fla. 1986); Herring v. State, 446 So.2d 1049 (Fla. 1984); Johnson v. State, 442 So.2d 193 (Fla. 1983); Medina v. State, 466 So.2d 1051 (Fla. 1985) (all during robberies).

CONCLUSION

Based on the arguments and authorities presented herein, appellee respectfully requests this court affirm the judgment and sentence of the trial court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Answer Brief of Appellee has been furnished by U.S. Mail to Peter W. Mitchell, 600 South Barracks Street, Suite 107, Pensacola, FL 32501, this 9th day of June, 1992.

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