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IN THE SUPREME COURT OF FLORIDA

RICHARD TONY ROBERTSON, Appellant, vs. STATE OF FLORIDA, Appellee.	CASE NO. 81,324

ON APPEAL FROM THE CIRCUIT COURT
OF THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

The following statement is offered to supplement and/or clarify Robertson's factual statement.

Carmella Fuce, from Ft. Lauderdale, was a student at Florida A&M University. On Wednesday, August 28, 1991, Richard Thelwell, her boyfriend of four and one-half years (T 643),[1] telephoned to say that he would be in Tallahassee for the Labor Day weekend. (T 644). Thelwell arrived at Ms. Fuce's apartment between 10:00 and 10:30 p.m. on Friday, but she did not answer his knock at the door. (T 645). He also received no answer when he called her apartment from a telephone booth. (T 646). Despite repeated attempts to contact her over the weekend, Ms. Fuce answered neither her telephone nor her door. (T 647-51). On Monday, September 2, 1991, Thelwell and his friend Mario Shirley went back to Ms. Fuce's apartment and persuaded the manager to unlock the door. (T 651). The trio entered the apartment, and Mario found Ms. Fuce's nude, badly decomposed body in the bedroom. (T 651).

Rosemary Brown, a crime scene investigator with the Tallahassee Police Department (T 689), described the scene at the apartment for the jury. The body was found on its back, with a pair of pants tied around the head, a brassiere stuffed in the mouth, and a black electrical cord around the neck. (T 691). The hands were under the body and were tied with both a piece of cloth and a white electrical cord. (T 692). The body was in an

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1 "T" refers to the six-volume transcript (pages 1 through 1251), "R" refers to the four-volume record (pages 1 through 380), and "SR" refers to the three-volume supplemental record (pages 1 through 33) in this case.

advanced state of decomposition, and no wounds were visible. (T 704). Brown could not tell if a struggle had occurred; the closet and kitchen were neat, but the bedroom was in disarray (T 709), with an overturned box of scattered items and a pile of clothes on the floor. (T 710).

Thomas Wood, the medical examiner, performed an autopsy on the body on September 3, 1991. (T 718). The victim's hands were tightly tied, and a ligature on the neck meant the black electrical cord had been tighter around the neck than when found. (T 720). The clothing around the head looked like it had slipped up toward the top of the head due to decomposition. (T 721). Hemorrhages inside the neck and the larynx were "something you see oftentimes when people are strangled and they suffocate." (T 721). Dr. Wood opined that Ms. Fuce was the victim of a homicide and that the cause of death was strangulation asphyxia. (T 728).

Robertson, calling himself "Tony Nixon," called the Tallahassee Police Department around 4:15 p.m. on September 4, 1991. (T 497-98). During that call, Robertson told investigator Steve Gauding that he had dated the victim and wanted to talk with the police if someone would come and pick him up. (T 498). Investigator Frank Springer picked Robertson up, drove him to the police station, and, with Karen Brown, interviewed him. (T 508-09). Brown and Springer recorded their interview with Robertson, and the transcript of that interview is included in the record as defendant's exhibit #1. Contrary to Robertson's contentions (initial brief at 12-13), Springer did not do "everything he could" to get Robertson to confess during that interview, as evidenced by Robertson's continued denial of involvement in the

homicide. After Brown and Springer interviewed Robertson, Gauding conducted a separate interview. (T 500 et seq.). Robertson left the station after these interviews, but, after that, wanted to visit the police station almost every day. (T 516).

Late in the evening of September 9, 1991, Robertson called the police and told them that he wanted to commit suicide by shooting himself.[2] A patrol car picked him up and transported him to the emergency room at Tallahassee Memorial Hospital, where he was admitted to the psychiatric unit. Less than forty-eight hours later, Robertson was released into police custody. Springer arrested Robertson at the hospital (T 834) and took him to the police station. Over the next several hours, Robertson made several statements to the police. In his first taped statement to Springer, Robertson, as he had done September 4,

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[2] This information is taken from defendant's exhibit #6, a composite exhibit of numerous diagnostic evaluations, consisting of the following documents: (1) four-page report from Wiregrass Mental Health System, dated December 23, 1985; (2) thirteen pages of documentation from Tallahassee Memorial Hospital (TMH) and its Psychiatric Center, the first page of which is dated September 1991; (3) two-page report from the Apalachee Center for Human Services (ACHS), dated July 24, 1991; (4) two-page report from TMH, dated February 1990; (5) twenty-two pages of documents from Alabama Youth Services, the first page of which is dated April 29, 1986; (6) three-page report from Alabama Youth Services, dated August 24, 1988; (7) two pages from the Florida Department of Health and Rehabilitative Services, dated January 3, 1989; (8) three pages from ACHS, dated September 13, 1991; (9) four pages from ACHS, dated July 15, 1991; (10) three-page report from TMH, dated February 5, 1990; (11) two-page report from TMH, dated February 3, 1990; (12) two pages from ACHS, dated July 15, 1991; and (13) four-page report from Alabama Youth Services, dated April 15, 1986. These records were used at both the suppression hearing (e.g., T 489) and during the penalty phase. (E.g., T 1084). The information in the text is from Dr. Bailey's admission and discharge reports, located in item 2 in the above list.

denied killing the victim.[3] He continued to lie about his involvement in an interview with Cecil Towle that took place between 4:50 and 5:27 p.m.[4] Then, Springer began an hour-long interview, starting at 5:30 p.m., during which Robertson confessed to murdering the victim.[5] Robertson then gave a videotaped confession to Towle.[6]

On October 9, 1991 the grand jury returned a five-count indictment against Robertson. The charges included: (1) first-degree premeditated murder, subsection 782.04(1), Florida Statutes; (2) burglary with an assault, subsection 812.02(2)(a), Florida Statutes; (3) robbery, subsection 812.13(2)(c), Florida Statutes; (4) burglary of a conveyance, subsection 810.02(3), Florida Statutes; and (5) grand theft of a motor vehicle, subsection 812.014(2)(c)(4), Florida Statutes. (R 1-3).

The public defender originally represented Robertson. On April 9, 1992, counsel moved for the appointment of experts "for the purpose of further evaluating the defendant's mental status and determining whether he is competent to proceed and whether he was sane at the time of the offense," pursuant to Florida Rules of Criminal Procedure 3.210 and 3.216. (R 37). The following day, the court appointed Harry McClaren and James Brown and issued a four-page order setting out the scope of their

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3 Defendant's exhibit #2. This taped interview began at 4:06 p.m., September 11, 1991. Defendant's exhibits #2 through 4 are transcripts of the audio and video tapes submitted by the state.

4 Defendant's exhibit #3.

5 Defendant's exhibit #2.

6 Defendant's exhibit #4.

examinations. (R 38-41). Dr. Brown wrote his report on June 17, 1992 and concluded that, although emotionally disturbed, Robertson was competent to stand trial. (R 43-47). Dr. McClaren's report is dated August 20, 1992 and also states that Robertson was competent to stand trial. (SR 18-22). On June 25, 1992 the public defender's office filed a conflict of interest certificate and asked that substitute counsel be appointed. (R 42). The circuit court then appointed James C. Banks to represent Robertson. (R 51).

On September 16, 1992 Banks moved for the appointment of a confidential mental health expert to assist the defense. (R 23). The court appointed Robert Berland, as requested by the defense. (R 21).[7] Robertson later moved for the appointment of a psychiatrist and/or psychologist to examine Robertson for the purpose of developing mitigating evidence. (R 70). The court granted this motion on December 9, 1992 (R 89), and Dr. James Meyer, a psychologist, testified on Robertson's behalf at the penalty phase. (T 1081).

In November Robertson filed a motion to suppress his statements made on September 4 and 11. (R 71). This motion claimed that Robertson "made his incriminating statements only after being subjected to several improper influences, including, but not limited to, psychological coercion, promises of help and threats." (R 72). The trial court heard the motion to suppress on January 20, 1993, immediately before the trial began. (T 479). Robertson waived his presence at and did not testify at

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7 Dr. Berland did not testify at trial, and his report is not in the record.

this hearing. (T 479). The state presented several witnesses and introduced various of the taped interviews that Robertson gave. The defense introduced transcripts of those tapes and Robertson's mental health records. As it was then near the end of the day, the judge announced that he would read everything that had been submitted overnight and that counsel would have the opportunity to argue the next morning. (T 578). After hearing the parties on January 21, the court denied the motion to suppress (T 603) and stated "based upon the totality of all the factors and circumstances that the statements in this case were freely, knowingly, intelligently and voluntarily made." (T 607).

The trial began immediately after the suppression ruling. On January 23, 1993, the jury found Robertson guilty as charged on four of the counts against him, i.e., first-degree murder, burglary with an assault, burglary of a conveyance, and grand theft of a motor vehicle. (T 1030-31; R 195, 197, 201, 202). On the robbery charge, the jury found Robertson guilty of the lesser included offense of theft of property worth $300 or more. (T 1030; R 199). The court then gave the jury its choice of returning on Monday (January 25) or Tuesday (January 26) for the penalty phase. (T 1032). The jury elected Monday. (T 1034).

At the penalty hearing the state relied on the evidence and testimony presented in the guilt phase (T 1071) and presented only two witnesses, the victim's father and sister. (T 1072, 1077). Psychologist James Meyer testified on Robertson's behalf. (T 1081). Apparently, Dr. Meyer did not interview Robertson; he testified only about his review of Robertson's records, but made no diagnosis of mental condition. (T 1084-1106). On cross-

examination, Meyer confirmed that Robertson's first two admissions for suicide attempts were for taking five Advil tablets and for a scratch on his wrist. (T 1110). Two of Robertson's sisters and a cousin testified about his home life. (T 1144-74). Robertson, himself, then testified and asked that he be sentenced to death. (E.g., T 1187). After the defense rested, the state presented psychologist Harry McClaren as a rebuttal witness. (T 1195). Dr. McClaren, who had met with Robertson three times (T 1198), testified that, although Robertson had a personality disorder, he was not schizophrenic (T 1206) and that Robertson did not meet the criteria for the statutory mental mitigators. (T 1207). The jury recommended that Robertson be sentenced to death by a vote of eleven to one. (T 1245; R 209).

The court sentenced Robertson to death on February 23, 1993. (R 337). In support of that sentence the court found that two aggravators had been established; felony murder (burglary) and heinous, atrocious, or cruel. (R 230, 231). The court found that the statutory mitigators of age and impaired capacity had been established, but were entitled to little weight. (R 234). The court also held the nonstatutory mitigators relating to Robertson's childhood and mental health to be entitled to little weight. (R 234-36). Robertson filed his notice of appeal on February 23, 1993. (R 300).

SUMMARY OF ARGUMENT

Issue I: Two experts examined Robertson and found him competent to stand trial. Although Robertson misbehaved during a pretrial hearing, the trial court did not err in not holding a competency hearing on its own motion.

Issue II: Robertson waived his rights to remain silent and to have counsel present when he made statements on September 4 and 11, 1991. He claims that those statements should have been suppressed because they were obtained through psychological coercion, but has shown no error in the trial court's denial of his motion to suppress.

Issue III: The trial court properly denied challenges for cause to several jurors. Robertson failed to object to a specific juror when he requested more peremptories, so this issue has not been preserved.

Issue IV: The evidence was sufficient to support Robertson's convictions of burglary of a conveyance and grand theft of a vehicle and those convictions and their attendant sentence should be affirmed.

Issue V: Robertson has shown no error in the state presentation of victim impact evidence in the penalty phase.

Issue VI: Strangulation murders are almost per se heinous, atrocious, or cruel. The facts of this case demonstrate that the trial court properly found that this aggravator applied in this case.

Issue VII: Robertson has shown no error in the trial court's consideration of the mitigating evidence. The court followed this Court's directions and properly weighed the mitigators.

Issue VIII: When compared with truly similar cases, Robertson's death sentence is both appropriate and proportionate.

ARGUMENT

ISSUE I

WHETHER THE COURT ERRED IN NOT CONDUCTING A COMPETENCY HEARING ON ITS OWN MOTION.

Robertson claims that his pretrial behavior, alleged mental instability, and psychological evaluations raised questions about his competency to stand trial. Thus, he argues that, on its own motion, the court should have held a hearing on his competency. There is no merit to this issue.

It has long been held that one must be mentally competent to stand trial. See Drope v. Missouri, 420 U.S. 162, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975). The test for determining competency to stand trial is whether a defendant "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding - and whether he has a rational as well as factual understanding of the proceedings against him." Dusky v. United States, 362 U.S. 402, 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960); Drope. This Court has adopted the same test for competency. E.g., Hunter v. State, 20 Fla.L.Weekly S251 (Fla. June 1, 1995); Pridgen v. State, 531 So.2d 951 (Fla. 1988); Scott v. State, 420 So.2d 595 (Fla. 1982); Lane v. State, 388 So.2d 1022 (Fla. 1980). Furthermore, as provided by Florida Rule of Criminal Procedure 3.210(b):

> If, at any material stage of a criminal proceeding, the court of its own motion, or on motion of counsel for the defendant or for the state, has reasonable ground to believe that the defendant is not mentally competent to proceed, the court shall immediately enter its order setting a time for a hearing to determine the defendant's mental condition, which shall be held no later than 20 days

> after the filing of the motion, and shall order the defendant to be examined by no more than 3, nor fewer than 2, experts prior to the date of the hearing.

In April 1992 counsel moved for the appointment of two experts to determine Robertson's competence to proceed and his sanity at the time of the offense. (R 37). The court appointed Drs. Brown and McClaren to examine Robertson. (R 38). Dr. Brown visited Robertson four times in April and May 1992 and wrote his report on June 17, 1992. (R 43). Dr. McClaren visited Robertson three times in June and July 1992 and wrote his report on August 20, 1992. (SR 18). Both found that Robertson was at least minimally competent to stand trial (R 46; SR 22), even though McClaren thought that a period of hospitalization might "better elucidate his true mental condition." (SR 22).

On September 25, 1992 the trial court held a hearing on defense counsel's motion for a continuance. (R 92). Robertson refused to cooperate during that hearing and displayed inappropriate behavior by talking almost incessantly and by giving obscenity-laden responses to the court. The court asked if examinations had not been ordered, to which counsel responded that Dr. Brown found Robertson competent to stand trial and that Dr. McClaren did not receive the cooperation he wanted from Robertson and had received "indications that [Robertson] was falsifying his answers." (R 97). As the hearing continued, the court remarked that "the demonstration that Mr. Robertson has placed on the record so far this morning leads me to believe that under the rule, that there is some question concerning his competency, and perhaps an order should be entered." (R 101).

The state responded that neither doctor said that Robertson was incompetent and that Robertson was just mean. (R 101). The prosecutor then stated: "And he shows you that in this courtroom today. This is a big game that he's playing," (R 101-02) and "all he's doing is playing a game. There's nothing wrong with him other than he is mean." (R 102). After noting that Brown found Robertson competent, the court granted the continuance. (R 106).

Defense counsel never asked for a competency hearing. Now, however, Robertson argues that one should have been held on the court's own motion. As the state will show, however, no error occurred.

Robertson argues that his behavior, including his insistence that he be executed, his rejection of counsel, and McClaren's suggestion that Robertson be hospitalized for evaluation should have alerted the court to the need for a competency hearing. (Initial brief at 41-42). None of these items, however, was as much of a red flag as Robertson now contends.

It is true that Dr. McClaren wrote that his evaluation of Robertson might be enhanced if Robertson were hospitalized for observation. This, however, appears to be intellectual or professional curiosity, or an attempt to be as thorough as possible, because McClaren also unequivocally found Robertson competent to stand trial. Also, other comments in McClaren's report cannot be overlooked. For instance, in the evaluation summary McClaren wrote that Robertson had "little insight into his mental condition and was likely exaggerating the degree of his mental and emotional disturbance." (SR 19). McClaren

commented that Robertson "gave the impression of being a non-psychotic individual likely suffering from a Borderline Personality Disorder who is under considerable mental and emotional distress due to his current legal situation." (SR 19-20). McClaren also wrote that in past contacts with mental health professionals the possibility that Robertson engaged in malingering had been mentioned. (SR 20). Tellingly, McClaren made the following observations:

> The veracity of his self-report is extremely questionable due to his variable clinical presentation and his high possible motivation for deception. He said that he planned to be disruptive in court and according to information received from the State Attorney's Office he has recently behaved in a disruptive manner during a court hearing. Also, it is noted that he reportedly advised another jail inmate that it was his intention to deceive mental health professionals and to present himself as more mentally disturbed than he actually is. He termed such behavior to "nut up."

(SR 20-21). McClaren also observed that Robertson "probably has the ability to manifest appropriate courtroom behavior should he choose to do so," that "he definitely has the capacity to be deceptive and might feign symptoms of mental illness during testimony," and that Robertson was "most likely exaggerating the degree of his emotional disturbance for the understandable reason of delaying his trial or attenuating the consequences of his alleged misbehavior." (SR 21). Finally, McClaren noted that Robertson "responded in a manner clearly indicative of efforts to exaggerate psychopathology. Most likely . . . in order to falsely present himself as much more mentally disturbed than is actually the case." (SR 21).

Dr. McClaren's observations echo those previously made about Robertson. For instance, Dr. Bailey's report of September 10, 1991 contains the following observation: "Based on his [Robertson's] past history and current behavior, malingering is strongly suspected with secondary gain being that of avoiding investigation and/or incarceration." (Defendant's exhibit #6, item 2 listed in n.2, supra). An Alabama Youth Services psychological evaluation dated August 24, 1988 (defendant's exhibit #6, item 6 listed in n.2, supra) also supports McClaren's observations. That report states that Robertson "is belligerent toward authority figures, and he absolutely refuses to adhere to set rules and regulations." The report observed that "when limitations are placed on him, he views them as a challenge and he defies all rules and regulations and social standards. Historically, he has displayed little or no respect for authority figures, and he cares little about conforming to minimal social standards."

Granted that Robertson had mental difficulties, but "one need not be mentally healthy to be competent to stand trial." Muhammed v. State, 494 So.2d 969, 973 (Fla. 1986), cert. denied, 479 U.S. 1101, 107 S.Ct. 1332, 94 L.Ed.2d 187 (1987). Rather than demonstrating his lack of competency to stand trial, Robertson's misbehavior at the September 1992 hearing bears out the accuracy of his previous evaluations, with McClaren's report being almost a blueprint of Robertson's conduct. The September hearing shows Robertson as what he truly was, a manipulative defendant who would do anything to disrupt proceedings against him because he had no respect for the judicial system and refused to abide by minimal social standards.

Robertson's failure to communicate with counsel does not demonstrate incompetence because it "was a matter of his own choosing." LaPuma v. State, 456 So.2d 933, 934 (Fla. 3d DCA 1984). Instead, it is further evidence of his attempt to manipulate and subvert the legal process. Also, actively seeking the death penalty does not demonstrate incompetency, but, rather, may be the manifestation of one's last control over one's own life. See Durocher v. State, 623 So.2d 482 (Fla.), cert. dismissed, 114 S.Ct. 23, 125 L.Ed.2d 774 (1993); Hamblen v. State, 527 So.2d 800 (Fla. 1988).

Robertson also claims that his "suicide" attempts and his biting the throat of a cat should have alerted the court to his incompetence. (Initial brief at 42). The cat episode is mentioned in both McClaren's and Brown's reports (SR 20; R 44) as well as five times in Robertson's initial brief (pages 8, 9, 13, 18, and 42), but the record contains no support for the incident. The suicide attempts are also of little note, being for taking five Advil, for a scratch on the wrist, and for threatening to shoot himself with no proof of any ability to do so. The severity of that last attempt is called into question by the short, less than two-day hospitalization it caused and by Dr. Bailey's belief that Robertson might be malingering.

Robertson claims that United States ex rel. McGough v. Hewitt, 528 F.2d 339 (3d Cir. 1975), and Blazak v. Ricketts, 1 F.3d 891 (9th Cir. 1993), cert. denied, 114 S.Ct. 1866, 128 L.Ed.2d 487 (1994), support his claim, but those cases are factually distinguishable. In both cases the federal courts held that the defendants' trial courts erred in not holding pretrial

competency hearings. Both McGough and Blazak, however, had much more serious and lengthy histories of mental problems than Robertson. McGough had been committed to a psychiatric hospital for two years, and Blazak had been declared incompetent in a previous, unrelated trial. Robertson's history cannot compare with Blazak and McGough's.

Pridgen v. State, 531 So.2d 951 (Fla. 1988), is also distinguishable. Pridgen was found competent to stand trial, but then, apparently, his mental health deteriorated. This Court vacated Pridgen's conviction because the trial court should have conducted another competency hearing prior to sentencing. Robertson, on the other hand, never made any more outbursts, stopped using obscenities in court, and generally behaved himself after his disruption of the September hearing failed to gain him anything. His subsequent behavior shows that his behavior at that hearing was intentional and designed to thwart the proceedings against him rather than being an indication of incompetence to proceed.

Robertson acknowledges the possibility that his behavior was an attempt to manipulate the system. (Initial brief at 48). That "possibility," however, was a certainty as recognized by the prosecution and by the court. At first the court had some questions about Robertson's competency, but, as the hearing progressed, those concerns were dispelled. Thus, it is obvious that the court did not need to order a competency determination on its own motion. Cf. Krawczuk v. State, 634 So.2d 1070 (Fla.) (increasing nervousness and depression did not demonstrate necessity of further mental health evaluation), cert. denied, 115

S.Ct. 216, 13 L.Ed.2d 143 (1994); Lopez v. State, 536 So.2d 226 (Fla. 1985) (competency became an issue only when defendant realized he was in trouble and might not get out of it); Trawick v. State, 473 So.2d 1235 (Fla. 1985) (despondency and ambivalence about plea did not raise reasonable questions about the defendant's competency), cert. denied, 476 U.S. 1143, 106 S.Ct. 2254, 90 L.Ed.2d 699 (1986). This issue, therefore, has no merit and should be denied.

ISSUE II

WHETHER THE TRIAL COURT CORRECTLY REFUSED TO SUPPRESS ROBERTSON'S STATEMENTS.

Robertson argues that his statements of September 4 and 11, 1991 should have been suppressed because the police intentionally took advantage of his mental or emotional condition by using psychological coercion to overcome his free will.[8] There is no merit to this issue.

Robertson filed a motion to suppress his statements in November 1992, alleging that he made them "only after being subjected to several improper influences." (T 71-72). The trial court heard that motion on January 20, 1993 after the jury had been chosen. (T 479). Robertson waived his presence at the hearing (T 479-81), but the defense introduced transcripts of his statements as well as a composite of his mental health records as exhibits. (T 484-87). The state presented testimony from five officers[9] about the taking of Robertson's statements. These

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8 Robertson acknowledges that he voluntarily waived his right to remain silent and his right to counsel. (Initial brief at 49, n.19).

9 The following officers testified: Gauding (T 497), Springer (T 507, 561), Gibbs (T 534), Towle (T 541), and Adams (T 556).

witnesses testified that, when interviewed, Robertson responded in a "calm, rational, normal" manner (T 501) and that he was coherent and did not appear to be under the influence of drugs or alcohol. (T 501, 505; 509; 536; 542). After a discussion of pertinent caselaw (T 565-72), the defense began its argument on the motion by going through Robertson's mental health records. Counsel argued that the court should grant the motion but admitted that it was tenuous. (T 580). The judge announced that he would read the exhibits and caselaw overnight and allow the parties to argue the following morning. (T 581).

On January 21, 1993 defense counsel went through numerous quotes from the transcribed statements and argued that they showed that Robertson was not "mentally capable of exercising a free will, or that he fully appreciated the significance of his admission." (T 602). After argument, the court denied the motion to suppress, stating "it does not appear to be the case, based on the consideration of the totality of the circumstances in this case, that any law enforcement officer has overborne the will of the accused in making these statements." (T 603). The court noted that there was no evidence of coercion and that there was "no documented diagnosis of any psychosis of any kind for this individual." (T 603). The court reviewed Robertson's medical records verbally and observed "that perhaps there is some personality disorder, . . . but it does not affirmatively appear that there's ever been any documented finding of any psychosis." (T 605). After noting that the record was unclear as to medication and that most of Robertson's mental health history relied on his self-reporting (T 605), the court concluded that

"it appears that perhaps even though the accused may have some substance abuse problems and some psychological problems, that those are not of a nature that would have rendered any statements that he gave to be unknowing or unintelligent or involuntary." (T 606).

Convictions based on involuntary statements will not be allowed to stand. E.g., Traylor v. State, 596 So.2d 957 (Fla. 1992); Thomas v. State, 456 So.2d 454 (Fla. 1984); Reddish v. State, 167 So.2d 858 (Fla. 1964). However, "coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary.'" Colorado v. Connolly, 479 U.S. 157, 167, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986). Coercion can be psychological as well as physical and, as recognized by this court: "If for any reason a suspect is physically or mentally incapacitated to exercise a free will or to fully appreciate the significance of his admissions, his self-condemning statements should not be used against him." Reddish, 167 So.2d at 863; DeConingh v. State, 433 So.2d 501 (Fla. 1983), cert. denied, 465 U.S. 1005, 104 S.Ct. 995, 79 L.Ed.2d 228 (1984).

Even though coercion can be psychological, the psychological impact of voluntary disclosure of a guilty secret does not qualify as state compulsion. Oregon v. Elstad, 470 U.S. 298, 105 S.Ct. 1285, 84 L.Ed.2d 222 (1985). Thus, the "[p]olice are not required to protect [people] from their own unwarranted assumptions," nor is it "forbidden to appeal to the consciences of individuals." Johnson v. State, 20 Fla.L.Weekly S343, S344 (Fla. July 13, 1995); cf. Bruno v. State, 574 So.2d 76, 80 (Fla.) ("fact that Bruno's confession was motivated in part by concern

over the welfare of his son does not provide a basis for suppressing the confession"), cert. denied, 502 U.S. 834, 112 S.Ct. 112, 116 L.Ed.2d 81 (1991); Cannady v. State, 427 So.2d 723, 728 (Fla. 1983) ("mere fact that appellant regarded Officer McKeithen as his friend is insufficient to show that his confession was improperly induced"); Black v. State, 630 So.2d 609, 617 (Fla. 1st DCA 1993) ("At worst, the police merely acquiesced in appellant's attempt to obtain leniency for his girlfriend, when in fact, the police had no intention of charging her. . . . That appellant thought differently does not furnish a basis for invalidating his otherwise voluntary confession"); Barnason v. State, 371 So.2d 680, 681 (Fla. 3d DCA 1979) (psychologically effective interrogation does not render a confession involuntary), cert. denied, 381 So.2d 764 (Fla. 1980). Furthermore, "mental subnormality or impairment alone does not render a confession involuntary." Thompson v. State, 548 So.2d 198, 203 (Fla. 1989).

Robertson argues that, on September 4, Springer's "tactics were blatantly coercive and deliberately intended to exploit Robertson's obvious mental and emotional impairment." (Initial brief at 51). Thus, he complains that Springer subjected him to a variation of the "Christian burial technique" by playing on his sympathy for the victim's family, on his belief in God and the Bible, his supposed love for the victim, and the possibility that the killing was accidental. A reading of the transcript shows no merit to these claims, especially since Robertson did not confess then.

For instance, when Springer told Robertson that the victim's family needed to know what happened to her, Robertson denied hurting the girl. (Defendant's exhibit #1 at 21-22). This is a far cry from the "Christian burial technique," and Robertson's analogy to that technique fails. Johnson. Moreover, Robertson, not Springer, first brought up God and religion by emphatically stating: "I didn't hurt her as God is my witness." (Defendant's exhibit #1 at 22). Springer's comment that "God needs the truth" (defendant's exhibit #1 at 23) was merely "a simple noncoercive plea for a defendant to be candid." Johnson, 20 Fla.L.Weekly at S344.

Robertson called the police and volunteered to come in and make a statement on September 4. During that statement, he continuously denied harming the victim, but gave enough information that the police later developed him as a suspect. Robertson has shown no improper police conduct in connection with his September 4 statement.

He complains, however, that the first statement set the stage for the interrogations on September 11 during which he confessed. He claims that Springer knew he would be vulnerable because he had just been released from psychiatric care. (Initial brief at 53). He cites nothing to support this claim and its incorrectness is obvious. If Robertson had been in need of further psychiatric care, surely he would not have been released from the hospital's psychiatric unit. The police had an arrest warrant, so it would have been inconsequential if Robertson were arrested on September 11 or some other day. That Robertson was released on the 11th supports the inference that

his mental health had improved to where he no longer needed to be hospitalized, especially as Dr. Bailey saw no need to recommend that he be on any medication when released. (Defendant's exhibit #6, item 2 listed in n.2, supra).

Thus, there is no merit to Robertson's claim that Springer applied such coercive techniques that Robertson broke down, sobbing, and confessed. (Initial brief at 54). Robertson's real confession starts on page 14 of defendant's exhibit #2. Springer's telling him that he thought that telling why he committed the murder would make Robertson feel better (defendant's exhibit #2 at 22) simply is not an impermissible tactic. Reading the transcripts of the September 11 statements discloses no improprieties on the part of the police. Listening to the tapes is also informative because it shows the patience with which the interrogators proceeded and the lack of threats and coercion. Compare Brewer v. State, 386 So.2d 232, 235 (Fla. 1980) ("officers raised the spectre of the electric chair, suggested that they had the power to effect leniency, and suggested to the appellant that he would not be given a fair trial. It was under the influence of these threats and promises that the appellant made an oral confession").

This Court has long held that a voluntary confession requires

> that at the time of the making the confession [sic] the mind of the defendant be free to act uninfluenced by either hope or fear. The confession should be excluded if the attending circumstances, or the declarations of those present at the making of the confession, are calculated to delude the prisoner as to his true position, or to exert improper and undue influence over his mind.

Frazier v. State, 107 So.2d 16, 21 (Fla. 1958); State v. Beck, 390 So.2d 748 (Fla. 3d DCA 1980). Robertson's interrogators did nothing to delude him and exerted no improper or undue influence over him. Instead of being coerced into confessing, it is obvious that on September 4 Robertson made only exculpatory statements. He continued in this vein in his initial statements on September 11. Finally, however, Robertson decided to tell the truth. The state met its burden of showing Robertson's confessions to have been made freely and voluntarily, and the court properly denied the motion to suppress.

"A trial court's ruling on a motion to suppress is presumed correct, and a ruling on voluntariness will not be overturned unless clearly erroneous." Bonifay v. State, 626 So.2d 1310, 1312 (Fla. 1993); Trepal v. State, 621 So.2d 1361 (Fla. 1993), cert. denied, 114 S.Ct. 892, 127 L.Ed.2d 85 (1994). Moreover, an appellate court must interpret the evidence and reasonable inferences and deductions drawn therefrom in the manner most favorable to sustaining the trial court's ruling. Johnson v. State, 608 So.2d 4 (Fla. 1992), cert. denied, 113 S.Ct. 2366, 124 L.Ed.2d 273 (1993). Robertson has failed to show that the trial court erred in denying his motion to suppress. This Court, therefore, should affirm the trial court's ruling.

ISSUE III

WHETHER THE TRIAL COURT PROPERLY DENIED TWO OF ROBERTSON'S CHALLENGES FOR CAUSE.

The trial court denied Robertson's cause challenges to two prospective jurors, Castleton and Blauvelt. Robertson now argues that the trial court's refusal to remove these prospective jurors

denied him a fair trial. Besides having no merit, this issue is procedurally barred.

The United States Supreme Court expressed the test for whether a prospective juror should be removed for cause as "whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." Wainwright v. Witt, 469 U.S. 412, 424, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985). Florida has adopted this test: "The test for determining juror competency is whether the juror can lay aside any bias or prejudice and render a verdict solely upon the evidence presented and the instructions on the law given by the court." Bryant v. State, 20 Fla.L.Weekly S164, S164 (Fla. April 13, 1995), citing Lusk v. State, 446 So.2d 1038 (Fla.), cert. denied, 469 U.S. 873, 105 S.Ct. 229, 83 L.Ed.2d 158 (1994). To implement this rule, this Court has long held that "if there is a basis for any reasonable doubt as to any juror's possessing that state of mind which will enable him to render an impartial verdict based solely on the evidence submitted and the law announced at the trial[,] he should be excused on motion of a party, or by [the] court on its own motion." Singer v. State, 109 So.2d 7, 23-24 (Fla. 1959). The competency of a juror challenged for cause "is a mixed question of law and fact, the resolution of which is within the trial court's discretion." Hall v. State, 614 So.2d 473, 476 (Fla. 1993); Castro v. State, 644 So.2d 987 (Fla. 1994).

It takes more to establish error, however, than simply complaining that a trial court should have granted a challenge for cause. "To show reversible error, a defendant must show that

all peremptor[y challenges] had been exhausted and that an objectionable juror had to be accepted." Pentecost v. State, 545 So.2d 861, 863 n.1 (Fla. 1989). As this Court explained the Pentecost rule:

> Where a defendant seeks reversal based on a claim that he was wrongfully forced to exhaust his peremptory challenges, he initially must identify a specific juror whom he otherwise would have struck peremptorily. This juror must be an individual who actually sat on the jury and whom the defendant either challenged for cause or attempted to challenge peremptorily or otherwise objected to after his peremptory challenges had been exhausted. The defendant cannot stand by silently while an objectionable juror is seated and then, if the verdict is adverse, obtain a new trial.

Trotter v. State, 576 So.2d 691, 693 (Fla. 1990); Pietri v. State, 644 So.2d 1347, 1352 (Fla. 1994) ("a defendant seeking reversal because he claims he was wrongfully forced to exhaust peremptory challenges must identify a specific juror he otherwise would have struck peremptorily") (emphasis in original), cert. denied, 132 L.Ed.2d 836 (1995).

Robertson cannot and has not met this standard. As stated before, the court denied Robertson's challenges for cause to Castleton and Blauvelt. (T 373). When Robertson ran out of peremptory challenges, defense counsel moved for more, stating: "I issued five challenges for cause that were denied. Out of those five, I had to use either three or four peremptories to get rid of some of those people. Two of them are left on the jury." (T 442-43) (emphasis supplied). The court denied that request and stated: "I think the record will reflect that the Court has been extremely liberal in granting your challenges for cause in

this case. And your challenges that have been denied, having been few and far between. The challenges that were denied were based on valid grounds." (T 444).

In his appellate brief Robertson notes that only one juror, McCabe, for whom his challenge for cause had been denied eventually sat on the jury. (Initial brief at 58-59 n.23). At trial, however, he did not, as required, object to a specific juror when the court denied his request for extra peremptories. (T 444). He also did not object when the court announced the jury members and gave them their initial instructions (T 473-78) or when those jurors were sworn. (T 617). Thus, because Robertson failed to identify a specific objectionable juror for the trial court, he has failed to preserve this issue for appellate review. Compare Kearse v. State, 20 Fla.L.Weekly S300, S302 (Fla. June 22, 1995) (Kearse failed to establish claim because, after using an additional peremptory, he did not identify specifically another juror that he would excuse); Pietri, 644 So.2d at 1352 ("Although Pietri had been denied challenges for cause for several jurors, he did not specifically identify those jurors as ones on whom he would have exercised peremptory challenges. Thus, this issue has not been preserved for review); Knowles v. State, 632 So.2d 62, 65 (Fla. 1993) (issue not preserved because "Knowles failed to object to a specific venireperson who ultimately served on his jury"); Padilla v. State, 618 So.2d 165, 169 (Fla. 1993) ("defense counsel did not specifically identify Juror W. or Juror N. as objectionable when he asked the court for additional peremptory challenges"); Hitchcock v. State, 578 So.2d 685, 689 (Fla. 1990)

(Hitchcock "did not point to any juror remaining on the panel that he wished to challenge"), reversed on other grounds, 112 S.Ct. 3020, 120 L.Ed.2d 892 (1992); Trotter, 576 So.2d at 693 ("after exhausting his peremptory challenges, Trotter failed to object to any venireperson who ultimately was seated. He thus has failed to establish this claim"); Penn v. State, 574 So.2d 1079, 1081 (Fla. 1991) (denial of cause challenges was at most harmless error "because Penn has shown no prejudice, i.e., that he had to accept an objectionable juror"); with Watson v. State, 651 So.2d 1159, 1161 (Fla. 1994) (even though Watson identified three specific jurors that he would excuse, any error in refusing additional peremptories was harmless because there was no error in refusing to grant the challenges for cause); Parker v. State, 641 So.2d 369, 373 (Fla. 1994) (issue preserved for review because Parker identified specifically four people that he challenged for cause), cert. denied, 115 S.Ct. 944, 130 L.Ed.2d 888 (1995).

Even if Robertson had preserved this issue for review, he has shown no error in the trial court's denial of his challenges for cause. Robertson bases his argument solely on Castleton and Blauvelt, but the court also did not err in denying the cause challenge to McCabe. McCabe, in individual voir dire, stated that he heard on the radio that a jury would be picked for Robertson's trial and something about "what the defense was going to be using, something about his mother, being abused." (T 295). He did not, however, recall anything specific and specifically stated that he had not formed an opinion about the case. (T 296-99). Robertson challenged McCabe for cause (T 303), but the

court denied the challenge (T 304-05), noting that "there has been no legal ground and there has been no other indication that this juror cannot be a fair and impartial juror." (T 304). "The mere fact that jurors were exposed to pretrial publicity is not enough to raise the presumption of unfairness." Castro, 644 So.2d at 990; Hall v. State, 614 So.2d 473 (Fla. 1993). McCabe exhibited no prejudice toward Robertson due to pretrial publicity, and the record supports the trial court's denial of the challenge for cause to McCabe.

Moreover, the court correctly denied Robertson's cause challenges to Castleton and Blauvelt. During the defense's voir dire, the following exchange occurred:

> We've talked about the death penalty quite a bit and I believe everybody in the box expressed their belief that it's appropriate in certain circumstances. Does anybody believe as Mr. Castleton does that if you kill somebody, you automatically forfeit the right to your life?
>
> MR. CASTLETON: If you willfully kill somebody.
>
> MR. BANKS: If you willfully kill somebody, that you automatically forfeit your life or your right to life? Does anybody else believe that?
>
> MS. BLAUVELT: I believe that way.
>
> MR. BANKS: Does that come our of your religious background?
>
> MS. BLAUVELT: That comes out of the Bible and I teach the Bible.
>
> MR. BANKS: Does anybody else? Now the judge is going to instruct you that while that may be your belief system, or belief of a lot of people, that that's not necessarily the law of the State of Florida. He's going to tell you that you have to weigh these aggravating circumstances and you have to

weigh these mitigating circumstances and give them whatever weight you deem appropriate. And if one outweighs the other, that will dictate the way you should vote. Will both of you be able to follow the judge's instructions?

MS. BLAUVELT: I believe so.

THE COURT: Now you both gave some very hard, fast beliefs. If the mitigating circumstances outweigh the aggravating circumstances, will you be able to go essentially against your own beliefs on the death penalty and return with a recommendation of life?

MS. BLAUVELT: I guess I can't fathom how that can be against what I believe.

MR. BANKS: The only way we get to the death penalty in this case is if you convict him of first degree murder. If you do, then we know it's premeditated. We know he killed the young lady. If and only if you return with that verdict. Now can you think of a case or a set of circumstances that would allow you to vote for life given those parameters?

MS. BLAUVELT: No, I can't.

MR. BANKS: Can you, sir?

MR. CASTLETON: No.

MR. BANKS: So if you as a jury determine that he's guilty of first degree murder, premeditated, intentional killing of a human being, you would automatically vote for death?

MS. BLAUVELT: Yes.

MR. CASTLETON: Yes.

MR. BANKS: Under every circumstance?

MS. BLAUVELT: Yes.

MR. CASTLETON: Yes.

MR. BANKS: Regardless of what the judge tells you?

MR. CASTLETON: Here you are with these difficult questions.

MR. BANKS: Mr. Castleton and Ms. Blauvelt, believe me, the most difficult question is going to come at the end of the trial. I can't begin to tell you how difficult that is.

MS. BLAUVELT: Well when you say regardless of what the judge tells us, that throws me for a loop because I don't know what you mean by that.

MR. BANKS: Well he's going to explain what mitigating circumstances are. He's going to explain what aggravating circumstances are. If you get this far, you will have already determined that this was a premeditated willful killing of a human being. Okay? Given those parameters, willful killing of a human being, and given the judge is going to explain mitigating circumstances and aggravating circumstances, can you follow those, or are you just going to, "I found him guilty of that type of a murder, he's going to the chair?". Is that your automatic decision, or are you willing to consider other options?

MR. CASTLETON: As much as I might disagree with it, I would have to go with the law.

MR. BANKS: How about you, ma'am?

MS. BLAUVELT: Same with me.

MR. BANKS: So you would consider other circumstances?

MR. CASTLETON: Yes.

MS. BLAUVELT: Yes.

(T 365-68).

As can be seen from the above exchanges, both Castleton and Blauvelt, when they received a clearer explanation of a juror's duty, stated that they would follow the instructions and law. This conclusion is reinforced by their answers to subsequent questions posed by the prosecutor.

MR. CUMMINGS: If I could just ask one question, because it must be -- this lady is here for a purpose. Everything that you everyone says is being taken down in this courtroom so it has to be clear for the record exactly what you mean. Would you, Mr. Castleton, follow the Court's instructions on what the law is and follow that law based upon your oath?

MR. CASTLETON: Sure.

MR. CUMMINGS: And that is, it has to be a definite answer one way or the other. And if you can't, we need to know that, too. But your answer is what?

MR. CASTLETON: Even though I might disagree with the law, I would have to go with the law, which means yes, I could do what I was told to do under oath.

MR. CUMMINGS: Yes. You will do that?

MR. CASTLETON: Yes.

MR. CUMMINGS: And Ms. Blauvelt?

MS. BLAUVELT: Absolutely.

MR. CUMMINGS: You will follow your oath and the instructions as given to you by the Court?

MS. BLAUVELT: I may not agree with it, I may try to change it, but I will obey what I am told to do.

(T 370).

As this Court recently stated, even "jurors who have expressed strong feelings about the death penalty nevertheless may serve if they indicate an ability to abide by the trial court's instructions." Johnson v. State, 20 Fla. L. Weekly S343, S345 (Fla. July 13, 1995). It is obvious that, when the role of a juror was explained to them, both Castleton and Blauvelt clearly stated that they would follow the court's instruction. The record supports the trial court's denial of the challenges

for cause against these prospective jurors, and this Court should not revisit the issue. Johnson. Thus, besides the issue being procedurally barred, Robertson has shown no error and no basis for granting relief.

ISSUE IV

WHETHER THE EVIDENCE WAS SUFFICIENT TO SUPPORT ROBERTSON'S CONVICTIONS OF BURGLARY OF A CONVEYANCE AND GRAND THEFT OF A MOTOR VEHICLE.

Robertson argues that the state produced insufficient evidence to support his convictions of burglary of a conveyance and grand theft of a motor vehicle. Thus, he contends that his convictions and sentences for those crimes should be vacated. There is no merit to this claim.

After the state rested its case, Robertson moved for judgment of acquittal on all counts. (T 863-68). On count 4, burglary of a conveyance, Robertson argued that the state had not presented a prima facie case sufficient to go to the jury because it did not prove that Robertson ever entered the victim's car. (T 865). He used the same reason, that he never entered the car, to argue that the state had not produced enough evidence for the jury to decide count 5, grand theft of a motor vehicle. (T 866). Robertson also argued that even if the evidence showed that he committed those crimes, they occurred after, not before, the victim's death. (T 866-67). Therefore, according to Robertson, that property did not belong to the victim, but, rather, to her heirs, and the offenses were wrongly charged. (T 867-68).

The state responded that, by moving for acquittal, a defendant admits the truth of all the facts and evidence. (T

868). The state went through the evidence regarding the car, including that the car was unlocked, with the key in the ignition and the security bar unlocked; the car could not be started unless the shoulder harness and seat belt were fastened; and Robertson's admission that he had tried to start the car, but could not do so. (T 872-73). The prosecutor reminded the court that a burglary is complete when one enters or remains in a conveyance with the intent to commit an offense therein and that endeavoring or attempting to steal the car constituted grand theft auto. (T 873).

Robertson then argued that this case was not a robbery that went bad, ending in murder, but that, rather, there was no intent to burgle and steal the car until after the death. (T 876). The judge recessed court so that he could review the law. (T 876). After returning, the judge stated "that the State has established a prima facie case and the matters are questions for the jury" and denied the motion for judgment of acquittal. (T 877).

As the state pointed out, when a defendant moves for a judgment of acquittal, he or she "admits not only the facts stated in the evidence adduced, but also admits every conclusion favorable to the adverse party that a jury might fairly and reasonably infer from the evidence." Lynch v. State, 293 So.2d 44, 45 (Fla. 1974). The court should "review the evidence to determine the presence or absence of competent evidence from which the jury could infer guilt as to the exclusion of all of the inferences." State v. Law, 559 So.2d 187, 189 (Fla. 1989) (emphasis in original); Barwick v. State, 20 Fla.L.Weekly S405 (Fla. July 20, 1995); Atwater v. State, 626 So.2d 1325 (Fla.

1993), cert. denied, 114 S.Ct. 1578, 128 L.Ed.2d 1038 (1994). The trial court's review of the evidence must be "in the light most favorable to the state," Law, 559 So.2d at 189, and the state does not have to rebut every possible sequence of events - it only has to introduce evidence that is inconsistent with a defendant's version of what happened. Barwick; Atwater; Law. If the state does this, the case should be presented to the jury: "Where there is room for a difference of opinion between reasonable men as to the proof or facts from which an ultimate fact is sought to be established, or where there is room for such differences as to the inference which might be drawn from concealed facts, the Court should submit the case to the jury." Lynch, 293 So.2d at 45; Barwick.

Robertson confessed to killing the victim. He was, therefore, the last person to see her alive. There was no evidence that anyone but Robertson was in the victim's apartment until her body was found several days after her death. Her car, however, was unlocked, with the key in the ignition. There was sufficient evidence from which the jury could conclude that Robertson committed burglary of a conveyance and grand theft of a motor vehicle. That the automobile was still at the apartment complex does not prove Robertson's innocence of these crimes; it only shows the accuracy of his statement that he did not know how to start the car.

This Court has long held that a "judgment of conviction comes to this Court with a presumption of correctness and that a defendant's claim of insufficiency of the evidence cannot prevail where there is substantial competent evidence to support the

judgment and sentence." Spinkellink v. State, 313 So.2d 666, 671 (Fla. 1975), cert. denied, 428 U.S. 911, 96 S.Ct. 3227, 49 L.Ed.2d 1221 (1976). Furthermore, any conflicts in the evidence must be resolved in the state's favor. Holton v. State, 573 So.2d 283 (Fla. 1990), cert. denied, 500 U.S. 960, 111 S.Ct. 2275, 114 L.Ed.2d 726 (1991); Williams v. State, 437 So.2d 133 (Fla. 1983), cert. denied, 466 U.S. 909, 104 S.Ct. 1090, 80 L.Ed.2d 164 (1984). The state presented competent substantial evidence to support Robertson's conviction of counts 4 and 5, and those convictions and their attendant sentences should be affirmed. Even if this Court disagrees, vacating those convictions and sentences will have no effect on the three other convictions or the death sentence.

ISSUE V

WHETHER THE ADMISSION OF VICTIM IMPACT EVIDENCE DEPRIVED ROBERTSON OF DUE PROCESS.

Robertson argues that the court erred by allowing the state to introduce victim impact evidence during the penalty phase. There is no merit to this claim.

In Payne v. Tennessee, 111 S.Ct. 2597, 2609, 115 L.Ed.2d 720 (1991), the United States Supreme Court overruled Booth v. Maryland, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987), and South Carolina v. Gathers, 490 U.S. 805, 109 S.Ct. 2207, 104 L.Ed.2d 876 (1989), and held that

> if the State chooses to permit the admission of victim impact evidence and prosecutorial argument on the subject, the Eighth Amendment erects no per se bar. A State may legitimately conclude that evidence about the victim and about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death

> penalty should be imposed. There is no reason to treat such evidence differently than other such relevant evidence is treated.

After Payne, the Florida Legislature added paragraph (7) to section 921.141, Florida Statutes. Ch. 92-81, § 1, Laws of Fla. That new subsection read as follows:

> (7) VICTIM IMPACT EVIDENCE. - Once the prosecution has provided evidence of the existence of one or more aggravating circumstances as described in subsection (5), the prosecution may introduce, and subsequently argue, victim impact evidence. Such evidence shall be designed to demonstrate the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death. Characterizations and opinions about the crime, the defendant, and the appropriate sentence shall not be permitted as a part of victim impact evidence.

The last sentence of the new statute echoes Payne's admonition "that the admission of a victim's family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence violates the Eight Amendment." 111 S.Ct. at 2611 n.2; Burns v. State, 609 So.2d 600 (Fla. 1992); Hodges v. State, 595 So.2d 929 (Fla.), vacated on other grounds, 113 S.Ct. 33, 121 L.Ed.2d 6 (1992). This Court recently affirmed the constitutionality of subsection 921.141(7). Maxwell v. State, 20 Fla.L.Weekly S427 (Fla. July 20, 1995); Windom v. State, 20 Fla.L.Weekly S200 (Fla. April 27, 1995).

At the beginning of the penalty phase the prosecution stated it would rely on the evidence and testimony presented in the guilt phase. (T 1071). As found by the trial court, that evidence and testimony established two aggravators, committed during a felony (burglary) and heinous, atrocious, or cruel. (R

230-32). The state then presented two witnesses, the victim's father and sister. After establishing that he was related to the victim, the prosecutor asked the father the following question: "Now, you understand and I have discussed this with you earlier today, that you are going to be restricted to testifying only as to the uniqueness of Carmella as an individual?" (T 1073). Mr. Fuce responded affirmatively. (T 1073).

Defense counsel objected to Mr. Fuce and his daughter testifying "as being nothing more than what amounts to a victim impact statement, and the impact that this death may have had on the family and Carmella Fuce and what kind of individual she is." (T 1074). Counsel recognized Payne and stated that he made the objection "for further appellate purposes." (T 1074). The state noted that Payne overruled Booth and that both the Florida Statutes and Florida Constitution allowed victim impact statements. (T 1074-75). The court overruled the objection. (T 1075).

Mr. Fuce then described his daughter's school activities and education. (T 1075-77). The victim's sister then testified. Again, the prosecutor reminded her: "Now, I discussed with you that your testimony is going to be restricted to the uniqueness of your sister as an individual?" (T 1078). The sister described the victim's school activities and her future plans. (T 1078-80). In closing argument (T 1212-23) the state argued nothing about victim impact, and the court's findings of fact make no mention of such. (R 229-36).

Robertson acknowledges Windom, but argues that the father's and sister's testimony was irrelevant and too prejudicial to have

been admitted. In Payne, however, the United States Supreme Court stated that victim impact evidence is relevant. ("There is no reason to treat such evidence differently than other relevant evidence is treated." Payne, 113 S.Ct. at 2609, emphasis supplied.) Here, the state carefully restricted the testimony to evidence about the victim herself and scrupulously avoided the proscribed subjects, i.e., characterizations and opinions about the crime, the defendant, and the appropriate sentence.

In the majority of cases, as in the instant one, victim impact evidence serves entirely legitimate purposes. The scant testimony in this case, less than half a dozen pages, can best be described as brief humanizing remarks. Robertson has demonstrated no error, and this claim should be rejected. If any error occurred regarding the victim impact evidence, it was harmless beyond any reasonable doubt. Stein v. State, 632 So.2d 1361 (Fla.), cert. denied, 115 S.Ct. 111, 130 L.Ed.2d 58 (1994).

ISSUE VI

WHETHER THE TRIAL COURT CORRECTLY FOUND THE MURDER TO HAVE BEEN HEINOUS, ATROCIOUS, OR CRUEL.

Robertson argues that the trial court erred in finding the murder to have been committed in a heinous, atrocious, or cruel (HAC) manner in aggravation. There is no merit to this argument.

The trial court made the following findings of fact in concluding that the state established the HAC aggravator:

> (h) The capital felony was especially heinous, atrocious, or cruel. Evidence was presented on this aggravating circumstance and the Jury was instructed on it. The evidence clearly established that the death of the victim was caused by asphyxiation due to strangulation and that the victim would

> have been conscious during the initial period of strangulation from fifteen seconds up to one minute and alive for a matter of minutes until death ultimately occurred. Furthermore, the evidence reflected a methodical binding, hog-tying and blindfolding of the victim with the stuffing of a complete bra in the victim's mouth with such force as to prevent breathing. The crime herein was conscienceless, pitiless and unnecessarily torturous to the victim. Hitchcock v. State, 578 So.2d 685 (Fla. 1990); Holton v. State, 573 So.2d 284 (Fla. 1990); Tompkins v. State, 502 So.2d 415 (Fla. 1986); State v. Dixon, 283 So.2d 1 (Fla. 1973); Sochor v. Florida, 110 L.Ed.2d 326 (1992).
>
> The Court finds that this aggravating circumstance was proven beyond a reasonable doubt.

(R 231-32). The record supports these findings.

As Robertson acknowledges, this aggravator applies to most strangulation murders. E.g., Sochor v. Florida, 504 U.S. 527, 112 S.Ct. 2114, 119 L.Ed.2d 326 (1992) (acknowledging that the Florida Supreme Court has consistently held that HAC applies to strangulations); Carroll v. State, 636 So.2d 1316 (Fla.) (HAC approved where victim raped and strangled), cert. denied, 115 S.Ct. 447, 130 L.Ed.2d 357 (1994); Happ v. State, 618 So.2d 205 (Fla.) (HAC approved where victim beaten, raped, and strangled), cert. denied, 114 S.Ct. 328, 126 L.Ed.2d 274 (1994); Hildwin v. State, 531 So.2d 124 (Fla. 1988) (HAC approved where victim abducted, raped, and strangled), aff'd, 490 U.S. 638, 109 S.Ct. 2055, 104 L.Ed.2d 728 (1989); Perry v. State, 522 So.2d 817 (Fla. 1988) (same); Tompkins v. State, 502 So.2d 415 (Fla. 1986) (HAC approved where victim abducted and strangled), cert. denied, 483 U.S. 1033, 107 S.Ct. 3277, 97 L.Ed.2d 781 (1987); Adams v. State, 412 So.2d 850 (Fla.) (HAC approved where victim abducted, raped,

and strangled), cert. denied, 459 U.S. 882, 103 S.Ct. 182, 74 L.Ed.2d 148 (1982). Robertson, however, argues that, because the victim was aware of the nature of the attack for only a short period of time, the HAC aggravator does not apply to this killing. As this Court stated previously, however, "it is permissible to infer that strangulation, when perpetrated upon a conscious victim, involves foreknowledge of death, extreme anxiety and fear." Tompkins, 502 So.2d at 421. Moreover, "[f]ear and emotional strain may be considered as contributing to the heinous nature of the murder, even where the victim's death was almost instantaneous." Preston v. State, 607 So.2d 404, 411 (Fla. 1992), cert. denied, 113 S.Ct. 1619, 123 L.Ed.2d 178 (1993); Hitchcock v. State, 578 So.2d 685 (Fla. 1991), reversed on other grounds, 112 S.Ct. 3020, 120 L.Ed.2d 892 (1992); Rivera v. State, 561 So.2d 536 (Fla. 1990); Adams. Here, as the trial court stated, the victim was conscious when Robertson began strangling her, and her death was not instantaneous.

Furthermore, Robertson's argument ignores the events leading to the victim's being strangled. The HAC aggravator pertains to the nature of the killing and the surrounding circumstances and to the victim's perception of the events leading to death. Hitchcock; Stano v. State, 460 So.2d 890 (Fla. 1984), cert. denied, 471 U.S. 1111, 105 S.Ct. 2347, 85 L.Ed.2d 863 (1985); Mason v. State, 438 So.2d 374 (Fla. 1983), cert. denied, 465 U.S. 1051, 104 S.Ct. 1330, 79 L.Ed.2d 725 (1984). In two of his confessions, Robertson said that he was just playing with the victim. (Defendant's exhibit #2 at 23; defendant's exhibit #5 at 3-5). The facts, however, do not support Robertson's claim.

A veritable stranger, whom the victim had told to leave her alone and not to touch her (T 778-79), somehow gained access to the victim's apartment. While there, he bound her, forcibly gagged her, and blindfolded her. After all this, he strangled her. It is impossible to believe that the victim thought Robertson was engaging in just "fun and games." Instead, Robertson killed the victim only after torturing and terrorizing her. This victim's suffering went far beyond that of a victim in cases where the HAC aggravator is not present.

The record more than adequately supports the trial court's finding HAC in aggravation. This Court, therefore, should affirm that finding.

ISSUE VII

WHETHER THE TRIAL COURT PROPERLY WEIGHED THE MITIGATORS.

In this issue, Robertson argues that the trial court erred in its consideration of the mitigators. According to Robertson, the court failed to support its findings with specific facts, made ambiguous findings, and failed to give the mitigators their "full weight," among other things. The trial court, however, fully complied with the dictates of Campbell v. State, 571 So.2d 415 (Fla. 1990), and Robertson has demonstrated no error.

As this Court stated in Campbell, a trial court "must expressly evaluate" each proposed mitigator and "must find as a mitigating circumstance each proposed factor that is mitigating in nature and has reasonably been established by the greater weight of the evidence." Id. at 419 (footnotes omitted). The trial judge did precisely what Campbell demands. He evaluated

the mitigating evidence presented by Robertson and found that, while the extreme mental or emotional disturbance mitigator had not been established, several others had, i.e., substantially impaired capacity, age, abused/deprived childhood, and mental illness/borderline functional intelligence. (R 232-36).

The trial court made the following findings on the first statutory mental mitigator:

> (b) The capital felony was committed while the Defendant was under the influence of extreme mental or emotional disturbance. The defendant contended that this mitigating circumstance was applicable and it was presented to the Jury. The defendant's institutional record and the testimony of the mental health professionals established that the defendant has a mental disorder although there is some disagreement as to the nature of the disorder. There was sufficient evidence upon which the Jury could have been reasonably convinced that this mitigating circumstance was established. The Court has reviewed the evidence independently and is not reasonably convinced that the defendant was under the influence of extreme mental or emotional disturbance at the time of the commission of the capital felony, and therefore rejects this as a mitigating circumstance.

(R 232-33). Robertson complains that the court did not support its conclusion with specific facts and that the record does not support the court's conclusion. Although sparse as to the specific facts relied on, the findings specifically mention Robertson's institutional records and testimony from mental health professionals. These are sufficient for this Court to perform a meaningful review of the court's order. Rhodes v. State, 547 So.2d 1201 (Fla. 1989).[10]

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10 This Court restated the requirements of Campbell and Rhodes in Larkins v. State, 655 So.2d 95 (Fla. 1995), and Ferrell

Any deficiency in the findings is harmless, however, because, contrary to Robertson's argument, the court's rejection of this statutory mitigator is supported by the record.[11] Robertson attacks the conclusion of the state's rebuttal expert, Harry McClaren, that Robertson did not meet the requirements for establishing this mitigator. McClaren is a widely experienced psychologist (T 1196-98) who saw Robertson on three occasions. (T 1198). After interviewing and testing Robertson and reviewing depositions and psychiatric records provided by Robertson's counsel (T 1200-05), McClaren concluded that Robertson suffered from two personality disorders, borderline personality disorder and antisocial personality disorder. (T 1203-04). McClaren did not believe Robertson to be schizophrenic because "my psychological testing did not support that idea at all." (T 1206). McClaren concluded that, because of his behavior on the day of the murder, Robertson was not under the influence of great mental or emotional disturbance that day. (T 1207). Because Robertson did not have a major mental illness and because of his actions at the crime scene, McClaren also thought that Robertson had the capacity to conform his behavior to the requirements of the law. (T 1207-08).

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v. State, 653 So.2d 367 (Fla. 1995). Larkins and Ferrell however, should not be applied retroactively. E.g., Gilliam v. State, 582 So.2d 610 (Fla. 1991) (Campbell is not to be applied retroactively). In any event the instant sentencing order does not suffer from the same deficiencies as the orders in Larkins and Ferrell.

11 The court considered Robertson's mental problems in its analysis of the nonstatutory mitigators as discussed infra.

Contrary to being "untenable," as Robertson characterizes them, McClaren's conclusions are well supported by his interviews and testing of Robertson and his study of Robertson's mental health records. This is in sharp contrast to Dr. Meyer's conclusion that Robertson was schizophrenic. (T 1103). Meyer, never interviewed or tested Robertson; he only reviewed Robertson's records. (T 1084). The only report that diagnoses Robertson as schizophrenic is that of Dr. Patel of Apalachee Center for Human Services, item 3 of defendant's exhibit #6. N.2 supra. That report is notable, however, for its shortness and for being based on Robertson's self-reporting even though Dr. Patel considered Robertson to be "a poor historian and either unable or unwilling to give a good account of his problems in his past." Significantly, Meyer did not testify that Robertson met the requirements for the statutory mental mitigators.

In Rogers v. State, 511 So.2d 526 (Fla. 1987), cert. denied, 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988), this Court set out the manner in which trial courts should address proposed mitigating evidence. Under the Rogers procedure a trial court must "consider whether the facts alleged in mitigation are supported by the evidence[,] . . . must determine whether the established facts are of a kind capable of mitigating the defendant's punishment[, and] . . . must determine whether they are of sufficient weight to counterbalance the aggravating factors." Id. at 534. Whether the greater weight of the evidence establishes a proposed mitigator "is a question of fact." Campbell, 571 So.2d at 419 n.5; Lucas v. State, 613 So.2d 408 (Fla. 1992), cert. denied, 114 S.Ct. 136, 126 L.Ed.2d 99

(1993). Moreover, the decision on whether the facts establish a particular mitigator lies with the trial court and will not be reversed merely because an appellant, or this Court, reaches a different conclusion. Wyatt v. State, 641 So.2d 355 (Fla. 1994), cert. denied, 115 S.Ct. 1372, 131 L.Ed.2d 227 (1995); Preston; Sireci v. State, 587 So.2d 450 (Fla. 1991), cert. denied, 112 S.Ct. 1500, 117 L.Ed.2d 639 (1992). A trial court's finding that a proposed mitigator is not supported by the facts "will be presumed correct and upheld on review if supported by 'sufficient competent evidence in the record.'" Campbell, 571 So.2d at 416 n.5, quoting Brown v. Wainwright, 392 So.2d 1327, 1331 (Fla. 1991); Lucas; Johnson v. State, 608 So.2d 4 (Fla. 1992), cert. denied, 113 S.Ct. 2366, 124 L.Ed.2d 273 (1993); Ponticelli v. State, 593 So.2d 483 (Fla. 1991), aff'd on remand, 618 So.2d 154 (Fla.), cert. denied, 114 S.Ct. 352 (1993). Also, resolving conflicts in the evidence is the trial court's duty, and its resolution is final if supported by competent substantial evidence. Parker v. State, 641 So.2d 369 (Fla. 1994), cert. denied, 115 S.Ct. 944, 130 L.Ed.2d 888 (1995); Lucas; Johnson; Sireci; Gunsby v. State, 574 So.2d 1085 (Fla.), cert. denied, 112 S.Ct. 136, 116 L.Ed.2d 103 (1991). The trial judge did as Rogers and Campbell direct, and his conclusion that Robertson was not suffering from substantial mental or emotional disturbance is supported by competent substantial evidence.

On the other statutory mental mitigator, the trial court found as follows:

> (f) The capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of

> law was substantially impaired. Evidence was presented with regard to this statutory mitigating circumstance, the Jury was instructed on it, and there was sufficient evidence upon which the Jury could have been reasonably convinced that this mitigating circumstance was established. The defendant's confession included statements that he had consumed alcohol and various illegal drugs the day of the murder.
>
> While this mitigating circumstance, whether viewed as a statutory or non-statutory mitigating circumstance, is entitled to some weight, it is not entitled to great weight considering the self serving nature of the defendant's statements and the accuracy of his memory of the crime and the crime scene.

(R 234). Robertson argues that this finding is ambiguous because the court did not decide if the statutory mitigator had been established and because the evidence does not support giving the mitigator little weight. There is no merit to these contentions.

The trial court obviously found Robertson's impairment in mitigation. Just as obviously, the court decided that further explanation of whether this was statutory or nonstatutory was unnecessary because, whichever it might be, the mitigator was entitled to little weight. As this Court has held repeatedly, "the weight to be given a mitigator is left to the trial judge's discretion." Mann v. State, 603 So.2d 1141, 1144 (Fla. 1992); Jones v. State, 648 So.2d 669 (Fla. 1994), cert. denied, 132 L.Ed.2d 836 (1995); Ellis v. State, 622 So.2d 991 (Fla. 1993); Campbell; Swafford v. State, 533 So.2d 270 (Fla. 1988), cert. denied, 489 U.S. 1100, 109 S.Ct. 1578, 103 L.Ed.2d 944 (1989).

The court mentioned Robertson's saying he consumed alcohol and drugs on the day of the murder, but gave the mitigator little weight because of the self-serving nature of the statements and

because his memory of the crime and crime scene were so accurate. Robertson's complaint that the record does not support the judge's reasoning is incorrect. David Wilson, a neighbor of the victim who drank beer with Robertson on the day of the murder, described Robertson as acting "happy-go-lucky," not drunk. (T 770). Additionally, Investigator Springer testified that he did not furnish details of the crime and crime scene to Robertson but that Robertson correctly related those details to Springer, including how the victim was bound, gagged, and blindfolded. (T 843-44). Purposeful conduct can negate a claim of intoxication, Johnson, 608 So.2d at 13, and a trial court does not have to accept self-serving statements as true. Pardo v. State, 563 So.2d 77 (Fla. 1990), cert. denied, 500 U.S. 928, 111 S.Ct. 2043, 114 L.Ed.2d 127 (1991). The court's conclusion that this mitigator is entitled to little weight should be affirmed.

Robertson is correct in arguing that he was nineteen years old at the time of the crime rather than twenty as stated by the trial court. He is incorrect, however, in claiming that the court should have awarded his age more weight as a mitigator. Robertson had been living on his own and was an adult. This argument is nothing more than a difference of opinion about the weight of this mitigator, and the court's finding should be upheld. See Ellis. Any error in the court's consideration is harmless because Robertson's age is not sufficient to overcome the aggravators in the weighing process.

The trial court found that two nonstatutory mitigators had been established. As to the first, the court made the following findings:

> (a) The Defendant suffered an abused and deprived childhood. Substantial emphasis was placed on this factor in the penalty phase and there is substantial evidence that the defendant endured an abused and deprived childhood. While this non-statutory mitigating circumstance is entitled to some weight, when its remoteness in time and the fact that his similarly situated siblings also endured similar abuse and deprivation without being so affected that they could not lead productive law abiding lives is considered this circumstance simply does not weigh heavily as a mitigating circumstance. Kight v. State, 512 So.2d 922 (Fla. 1987); Remeta v. State, 522 So.2d 825 (Fla. 1988); Gunsby v. State, 574 So.2d 1085 (Fla. 1991).

(R 234-35). Again, Robertson complains about the weight the court assigned to this mitigator. Both of Robertson's sisters who testified at the penalty phase said that all of the children, not just Robertson, were abused by their parents. (T 1153-54, 1165-66). As the trial court stated, Robertson's similarly situated siblings went on to lead productive lives. Robertson has demonstrated no error in the court's consideration of this mitigator and the weight given to it.

The court made the following findings as to the second nonstatutory mitigator:

> (b) The Defendant suffers from a mental illness and borderline functional intelligence. Substantial emphasis was also placed on this factor in the penalty phase. The defendant's institutional history and the testimony of the psychologists presented clearly established that the defendant has a mental disorder of some type although there is disagreement as to its precise nature. Defendant's I.Q. was also established to be 77. The Court is reasonably convinced that the defendant suffers from some mental disorder as all must who commit acts of this violent nature and that the defendant is in a low range of intelligence. Although it is difficult to allocate the evidence as to this mitigating circumstance from its

> applicability to the mitigating circumstance in Section 921.141(6)(f), the Court is not convinced that the capacity of the defendant to conform his conduct to the requirements of the law and to appreciate the criminality of his conduct was substantially impaired. Accordingly, while entitled to some weight, it is not entitled to great weight in light of the facts established in this case and they simply do not outweigh the proven aggravating circumstances.

(R 235-36). Robertson complains that the trial court did not accord this mitigator enough weight, but has shown no abuse of discretion. The court included sufficient facts in its analysis, and its ruling should be affirmed.

Robertson ignores the trial court's compliance with Rogers and Campbell. That the trial court did everything that this Court has said it should do, however, cannot be overlooked. The trial court's findings of fact and conclusion that Robertson should be sentenced to death are supported by the record and should be affirmed.

ISSUE VIII

WHETHER ROBERTSON'S DEATH SENTENCE IS PROPORTIONATE.

Robertson argues that his death sentence is disproportionate. As the state will demonstrate, however, there is no merit to this claim.

Robertson incorrectly assumes that the HAC aggravator was improperly found and that, therefore, his death sentence is supported by only a single aggravator. As demonstrated in issue VI, supra, the trial court correctly found HAC to have been established, and, thus, Robertson's sentence is supported by two aggravators. His reliance on Clark v. State, 609 So.2d 513 (Fla.

1992); McKinney v. State, 579 So.2d 80 (Fla. 1991); Nibert v. State, 574 So.2d 1059 (Fla. 1990); and Smalley v. State, 546 So.2d 720 (Fla. 1989), is misplaced because only a single aggravator existed in each of those cases. The instant case is also distinguishable from cases with substantial to overwhelming mitigation, such as Smalley and Nibert, due to the lack of weight of Robertson's mitigators. Miller v. State, 373 So.2d 882 (Fla. 1979); Huckaby v. State, 343 So.2d 29 (Fla.), cert. denied, 434 U.S. 920, 98 S.Ct. 393, 54 L.Ed.2d 276 (1977); Holsworth v. State, 522 So.2d 348 (Fla. 1988); and Ross v. State, 474 So.2d 1170 (Fla. 1985), are also distinguishable because Robertson did not demonstrate that his mental impairment or drug and/or alcohol use caused him to kill the victim or substantially mitigated the homicide. Livingston v. State, 565 So.2d 1288 (Fla. 1988), is not on point, with its minor-age defendant whose mitigation was quantifiably greater than Robertson's. Similarly, Fitzpatrick v. State, 527 So.2d 809 (Fla. 1988), is distinguished by the quality of Fitzpatrick's mitigating evidence and the conspicuous absence of HAC in aggravation.

There are many double-aggravator cases, many with more in mitigation than Robertson has, where the death penalty has been found to be appropriate. E.g., Davis v. State, 648 So.2d 107 (Fla. 1994) (felony murder/burglary and HAC aggravators not outweighed by six nonstatutory mitigators); Smith v. State, 641 So.2d 1319 (Fla. 1994) (two aggravators not outweighed by one statutory and several nonstatutory mitigators), cert. denied, 115 S.Ct. 1129, 130 L.Ed.2d 1091 (1995). This murder is comparable to other murders committed during a burglary, many with stronger

mitigation than is present in this case. E.g., Johnson v. State, 20 Fla.L.Weekly S343 (Fla. July 13, 1995) (fifteen mitigators); Griffin v. State, 639 So.2d 966 (Fla. 1994) (four mitigators), cert. denied, 115 S.Ct. 1317, 131 L.Ed.2d 198 (1995); Fotopoulos v. State, 608 So.2d 784 (Fla. 1992) (five mitigators), cert. denied, 113 S.Ct. 2377, 124 L.Ed.2d 282 (1993); Hudson v. State, 538 So.2d 829 (Fla.) (age plus both statutory mental mitigators), cert. denied, 493 U.S. 875, 110 S.Ct. 212, 107 L.Ed.2d 165 (1989). Death has also been held to be the appropriate penalty for strangulation murders, even when considerable mitigators had been found, e.g., Adams, and for the execution "of a helpless woman who had already been bound and gagged." Walls v. State, 641 So.2d 381, 391 (Fla. 1994), cert. denied, 115 S.Ct. 943, 130 L.Ed.2d 887 (1995).

Here, Robertson overpowered and terrorized his victim, toyed with her, and finally ended her life by strangling her. As found by the trial court, the mitigation is worth little on the facts of this case and did not outweigh the aggravators. Contrary to Robertson's contentions, this is not one of the least aggravated and most mitigated murders. The manner of this killing was truly heinous, atrocious, or cruel and more than adequately supports the jury's recommendation and the trial court's conclusion that Robertson should be sentenced to death. When set beside truly comparable cases, it is obvious that Robertson's death sentence is both appropriate and proportionate and that it should be affirmed.

CONCLUSION

Based on the foregoing, Robertson's convictions and sentences should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Ms. Nada Carey, Assistant Public Defender, Leon County Courthouse, 301 South Monroe Street, Tallahassee, Florida, 32301, this 14th day of September, 1995.

Barbara J. Yates

BARBARA J. YATES
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