IN THE SUPREME COURT OF FLORIDA

JASON JAMES MAHN,

Appellant/Cross-Appellee,

v. Case No. 83,423

STATE OF FLORIDA,

Appellee/Cross-Appellant.

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

ANSWER BRIEF OF APPELLEE/INITIAL BRIEF OF CROSS-APPELLANT

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STATEMENT OF THE CASE AND FACTS

The following summary is offered to supplement and clarify Mahn's factual statement.

Michael Mahn returned home before 1:00 a.m. on April 2, 1993 to find his girlfriend Debbie Shanko had been stabbed to death and her fourteen-year-old son Anthony dying of stab wounds. (T 703).[1] Debbie's car and bank bag containing $400 were gone (T 702, 710), as was Mahn's twenty-year-old son, Jason Mahn, the defendant. Mahn was arrested in Oklahoma several days later following a high-speed chase and his futile attempt to escape capture by hopping on a coal train. (T 880-900; 908-11). Mahn was arrested on April 9, 1993 (R 7), and the state indicted him for two counts of first-degree murder on April 27, 1993. (R 1). Also in April counsel filed a motion for appointment of a confidential expert, alleging that Mahn may have been insane at the time of the crimes and might be currently incompetent to proceed. (R 8). At Mahn's request the trial court appointed John Bingham, a licensed mental health counselor, as the confidential mental health expert on May 18, 1993. (R 19).

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[1] "T" refers to the transcript (nine volumes, pages 1 through 1711); "R" refers to the record (two volumes, pages 1 through 323); and "CH" refers to the competency hearing (three volumes, pages 1 through 531).

At the end of June counsel moved for the appointment of experts to determine Mahn's competency to proceed, alleging that he was having delusions and was not in touch with reality and that Bingham thought Mahn was not competent to proceed. (R 19). The court appointed James Larson, a clinical psychologist, and Charles Thomas, a forensic psychologist, to examine Mahn and held a three-day competency hearing, beginning on July 13, 1993. At that hearing Larson testified that he had concluded that Mahn was "grossly exaggerating psychological symptoms" (CH 9) and malingering "or completely feigning symptoms of a major mental disorder." (CH 9-10). Larson reviewed Mahn's jail records, conducted a three-hour mental status examination, and interviewed numerous people who knew Mahn. (CH 10-11). Mahn was "not candid" when Larson interviewed him (CH 11) and the tests administered to Mahn supported Larson's conclusion that Mahn was "grossly exaggerating his symptomatology." (CH 13). Larson found Mahn's demeanor very different from what he exhibited in his videotaped statements. (CH 20). Larson also compared Mahn's behavior when interviewed with letters that Mahn had written to friends while in jail. While Mahn's "presentation to me was that of a very confused person who was so grossly psychotic he really didn't know what was going on" (CH 24), Mahn's letters were 'essentially logical,

coherent and relevant" and were "inconsistent with the gross disorganization" that Mahn presented to Larson and to the jail infirmary evaluators, (CR 26). Friends of Mahn that visited him in jail did not find his demeanor unusual or different from before he committed these murders. (CH 28). Larson concluded that Mahn was most probably malingering, rather than suffering from a bona fide mental illness (CH 38) and that he was competent to stand trial. (CH 41).

On cross-examination Larson testified that he originally thought that Mahn was incompetent. (CH 60). He also suspected that Mahn might be malingering (CH 61) and that more testing, interviews with third parties, and his review of Mahn's records and letters (CH 62, 65) led him to conclude that Mahn had a personality disorder, not a major mental disorder. (CH 66). Larson also testified that, in making their reports, the jail evaluators relied only on Mahn's self-reporting. (CH 68).

Mahn's father testified that Mahn made sense when talked with, that he never talked about demons, and that he was manipulative. (CH 86, 88). Mahn lived with his father, Debbie, and Anthony for four to five of the thirteen months that he spent in Pensacola. (CH 90). In answer to the court's question, his father responded that Mahn understood what was going on and reiterated that Mahn was

manipulative. (CH 96). Mahn's father also testified that Mahn did not want to work and that he "wanted to get everything the easy way." (CH 98).

Tracy Collins, a friend of Mahn's, testified that she had talked with Mahn twice since he had been jailed (CH 114) and that she thought Mahn understood the seriousness of the offenses he committed and the consequences that could flow from them. (CH 134). John Peaden, an investigator with the State Attorney's Office who escorted Mahn back from Oklahoma, testified that, when he met him, Mahn asked if Anthony were dead and if Florida electrocuted people (CH 164) and that Mahn acknowledged that Debbie was dead. (CH 165).

Charles Thomas testified that, after interviewing Mahn on July 8, he thought Mahn was not competent. (CH 176). That opinion, however, was based on Mahn's self-reporting (CH 178), the infirmary records (CH 179), and Bingham's conclusions (CH 220). A Bender-Gestalt test gave no indication of a mental disorder (CH 179), and Mahn's demeanor in his videotaped statements was different from his behavior on July 8. (CH 182). Thomas stated that he would need more time to determine if Mahn had a mental disorder (CH 229) and acknowledged that Larson had more experience with this type of

situation than he. (CH 243). Thomas reinterviewed Mahn and testified again on July 15. (CH 491).

On July 14 Jeffery Jay, the supervisor of medical services at the Escambia County jail, testified that, while taking the psychological tests assigned by Larson, Mahn asked other inmates how he should answer the questions (CH 289-90), but that Mahn did not appear to be confused. (CH 293). Jay stated that Mahn had no problem understanding the test questions when he asked for answers. (CH 294). Jay also testified that Mahn appeared to be normal when not being observed by the professional staff (CH 295-96) and that he acted differently when he knew the staff was observing him. (CH 300-01).

John Bingham, the defense's confidential expert, thought that Mahn understood the charges against him, but that he would not be able to give helpful information to his attorneys. (CH 311). Bingham admitted that he had not given Mahn any psychological tests (CH 318) and that he did not examine Mahn for malingering (CH 331). In response to the court's question Bingham admitted that Mahn fit the secondary gain category of high risk for lying. (CH 338).

On July 15 Charles Thomas testified that over the two prior days he saw Mahn two more times, spoke with several people who knew Mahn, read Mahn's letters, and gave Mahn two psychological tests.

(CH 491). After doing all that, Thomas concluded that Mahn was competent and that he was "malingering to a great extent." (CH 492). The trial court found Mahn competent to stand trial.

In late August 1993, the state filed a demand for particulars regarding Mahn's insanity defense. (R 26). The following month the court appointed doctors Larson and Thomas to examine Mahn as to his sanity. (R 29). Larson wrote his report on October 10, 1993, setting out his updated review of the infirmary records (R 40),[2] his interview with Mahn (R 40-41), and the results of the tests he administered. (R 41-44). Larson noted that Mahn claimed not to recall the murders but gave clear details of events both preceding and following the crimes and that Mahn "specifically disclaims that he was using alcohol or drugs during the time frame of the alleged incidents." (R 44). Larson also discussed collateral information, Mahn's videotaped statements, reports from family and friends, and Mahn's testimony at his robbery trial, that was not consistent with Mahn being impaired at the time of the murders. (R 45). This section of Larson's report also includes a paragraph of information from a cellmate of Mahn's who told Larson that Mahn said he would

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[2] Larson noted that a corrections officer overheard Mahn on the telephone "making comments about how he fooled all the doctors." (R 40).

"throw Dr. Larson off" and that Mahn's statements revealed he had a clear recall of the murders. (R 45). The cellmate also stated that "Mahn told him he was afraid of the death penalty" and "expressed his motive to go to Chattahoochee or a mental institution." (R 46). Larson acknowledged that it was possible that Mahn was insane when he committed the murders. (R 46). However, Mahn clearly had "been malingering or grossly exaggerating symptoms of a psychotic disorder." (R 46). Larson concluded that Mahn did not meet the criteria for insanity at the time of the offense. (R 48).

Doctor Thomas' report is similar to Doctor Larson's. Thomas opined that Mahn has an anti-social personality (R 55) and did "not find credible evidence to support a psychotic condition in this individual." (R 56). Based on his evaluation, Thomas also concluded that Mahn was sane at the time of the murders. (R 56).

On November 8, 1993, the state filed an amended information charging Mahn with armed robbery, among other things. (R 5). The trial took place November 8 through 16, and the jury found Mahn guilty as charged of two counts of first-degree murder and one count of armed robbery. (R 119; T 1265). Numerous witnesses testified on Mahn's behalf on November 17 during the penalty phase.

Maxine Laue, Mahn's step-grandmother, testified that she had not seen Mahn on a regular basis since 1988. (T 1339). Laue admitted that, in deposition, she described Mahn as spoiled and stated that he would get upset when things did not go his way. (T 1343-34). She agreed that Mahn's life experiences were no excuse for killing two people (T 1348) and admitted that she refused to allow Mahn to come to her home after he beat up his boss in Chicago. (T 1353).

Doctor Thomas testified that Mahn told him he was unhappy with his father's rules (T 1387) and that he was jealous of the victims. (T 1388). Thomas could not say that Mahn's background caused the murders. (T 1390). Thomas also testified that Mahn was not psychotic or controlled by demons, voices, or delusions and that he knew what he was doing. (T 1395). According to Thomas, any symptoms that Mahn exhibited did not affect his ability to do what was right or conform his conduct to the requirements of the law. (T 1398). Moreover, Mahn consciously decided not to abide by the law (T 1399), had no paranoia (T 1399), and was not schizophrenic. (T 1400).

John Bingham testified that he thought Mahn's personality and behavior were consistent with someone who uses LSD (T 1515), but did not apply his opinion specifically to Mahn. Bingham also

stated that Mahn's self-reporting played a "great part" in the formation of his opinion (T 1516), and admitted that, if what Mahn told him was not correct, that would affect the reliability of his opinion. (T 1517). Bingham could not say that the murders were caused by any drug use or mental problems (T 1518) or how various drugs would affect Mahn. (T 1523-24).

In rebuttal Doctor Larson testified that Mahn denied using alcohol or drugs on the day of the murders and also denied having delusions or hallucinations during the murders. (T 1628). Larson found no mental disease, infirmity, or defect and found that Mahn was antisocial, a type of "personality disorder that is used - designed for criminal behavior." (T 1631).

By a vote of eight to four, the jury recommended that Mahn be sentenced to death for killing Anthony; it recommended a sentence of life imprisonment for Debbie's murder. (R 128; T 1701). The trial court conducted a sentencing hearing on January 25, 1994. (R 131). Mahn's father testified that Mahn had gotten a GED diploma after moving to Pensacola (R 137) and that Mahn was streetwise and bragged that he could make more money by panhandling than by working. (R 138). The prosecutor argued that the prior violent felony; heinous, atrocious, or cruel (HAC); and cold, calculated, and premeditated (CCP) aggravators applied to both murders and that

the avoid arrest and pecuniary gain/felony murder (robbery) aggravators applied to Debbie Shanko's murder. (R 154-72). At sentencing on February 23, 1994 the court imposed two death sentences, finding that the prior violent felony, HAC, and CCP aggravators applied to both murders and that those aggravators outweighed the mitigators. (R 239-63). The state filed a cross-appeal, challenging the trial court's: instructing the jury on voluntary intoxication; allowing the defense to exceed the scope of direct examination when cross-examining a state witness instead of requiring Mahn to call that witness as his own; failure to find felony murder (robbery) as an aggravator for Debbie Shanko's murder; and failure to find the avoid arrest aggravator for Debbie Shanko's murder. (R 310-11).

SUMMARY OF THE ARGUMENT

Issue I: Mahn's misbehavior caused him to be restrained during the trial and to be absent from part of the voir dire. The trial court used the least restrictive means possible to insure the orderly progress of the trial, and Mahn has failed to demonstrate a violation of his rights.

Issue II: The evidence was sufficient to submit the armed robbery charge to the jury and to support Mahn's conviction of that charge.

Issue III: Contrary to Mahn's argument, the trial court correctly found prior conviction of violent felony, HAC, and CCP applicable to each murder.

Issue IV: The trial court properly considered the proposed mitigating evidence.

Issue V: Because there is no difference in the aggravators and mitigators applicable to each murder, the trial court correctly overrode the jury's recommendation and sentenced Mahn to death for Debbie Shanko's murder.

Issue VI: Mahn's death sentences are proportionate to those imposed in other cases and should be affirmed,

Issue VII: Even if an insufficient CCP instruction was given, the issue was not preserved for appeal. Moreover, the facts of this **case** show any error to be harmless.

Issue VIII: The trial court properly instructed the jury on the HAC aggravator.

Cross-appeal Issue I: During the guilt phase, the trial court erred in instructing the jury on voluntary intoxication because the facts did not support giving that instruction.

Cross-appeal Issue 11: The trial court erred in forcing the stated to expand direct examination of one of its witnesses so that Mahn could question the witness about a gratuitous statement that Mahn made.

Cross-appeal Issue III: The trial court erred in not finding the felony murder (robbery) aggravator applicable to Debbie Shanko's murder.

Cross-ameal Issue IV: The trial court erred in not finding in aggravation that Debbie Shanko **was** killed to avoid or prevent a lawful arrest.

ARGUMENT

ISSUE I

WHETHER USING AN ELECTRONIC BELT TO RESTRAIN MAHN VIOLATED HIS CONSTITUTIONAL RIGHTS.

During the early portion of the trial, Mahn wore an electronic stun belt to restrain him. He now argues that using the stun belt was excessive (initial brief at 45); the belt caused him mental distress and the trial court should have explored his competency to continue (initial brief at 46); the belt deprived him of his right to be present during jury selection (initial brief at 46); and the belt adversely affected his ability to communicate with counsel. (Initial brief at 47). Mahn did not object or raise these claims at trial and, thus, did not preserve them for appeal. Mahn's refusal to behave caused the need for him to be restrained, and, as the state will demonstrate, there is also no merit to this issue.

Mahn was convicted of robbery before Judge Frank L. Bell prior to the instant trial. (See e.g., T 1363). This trial began on November 8, 1993, also before Judge Bell, who, immediately prior to voir dire, reminded Mahn that his unruly behavior during the first trial's voir dire would not be tolerated in the current proceedings. (T 18-19). Specifically, the court stated:

> Now we're getting ready to start another trial and the same rules apply. You have got a lawyer. Anything you want to say you need to say to your lawyer, and if it's something that is relevant to the case, if it's something that needs to be said to me, your lawyer will make sure that your position is heard.
>
> . . .
>
> But you are not going to be allowed during the course of the trial to become disruptive and in any way interfere with an orderly procedure of this trial. If you do, Mr. Mahn, you will be removed, we will proceed in your absence. And the truth of it is, sir, I don't want to do that.

(T 20). After Mahn stated that he understood, the court continued:

> I want you to be present and I want you to have the ability to be there with your lawyer and to converse with your lawyer and to participate fully in the trial. But your conduct is not going to interfere with the orderly procession of this trial.

(T 20-21). Mahn began questioning his right to freedom of speech (T 21), and the court heard defense counsel's motions after telling Mahn to be quiet. (T 22).

Mahn remained quiet for a while (T 22-51), but, during voir dire, raised a hand-lettered sign reading: "I'm innocent, please

help." (T 51-52).[3] At a bench conference, the court reminded Mahn that his freedom of speech did not extend to disrupting the trial. (T 52-53). The court gave Mahn a last warning: 'If you sit over there and behave yourself. . . you're **welcome** to be in here. If you pull any more stunts like that, I'm not giving you another chance, you will be taken from the courtroom and you will be tried in a absentia." (T 53). Voir dire then continued.

Following **a** break, defense counsel informed the court: "During the break there **was** an incident between the defendant that involved one of the security guards, and they had to use electronic means to restrain him." (T 112). The incident was not explained further, but defense counsel said that Mahn would like to have the belt removed, although Mahn did not know if he would behave. (T 112). Mahn did not want to proceed, but counsel told him he would have to remain in court or go back to jail. (T 113). When Mahn could not make up his mind, the court suggested a closed-circuit television setup electronically linked to defense counsel so "if he has any **questions or he wants** to offer any information to you, it will be available." (T 116). The court then stated: "At any time he wants to come back into the courtroom and not just watch the trial on the

[3] The sign is included in the record at R 94.

monitor and be in radio contact with his lawyers, he's welcomed to come back in there on the condition that he behaves himself." (T 116). Thereafter, the court continued the recess until the television connection was set up. When court reconvened, the judge stated: "Now that everyone is connected up electronically, we can start." (T **124**). When defense counsel began questioning the prospective jurors, he mentioned the headset he was wearing so that he and Mahn could communicate with each other. (T **212**).

The following morning defense counsel told the court that Mahn wanted to return to the courtroom and stated: 'He's promised to be a good boy and wants to be in the courtroom to participate in the proceedings today." (T **325**). The court stated: "Now, if he wants to come back in here and participate, that's fine with me. I would rather him be in the courtroom. But if he acts out again like we have told him, and I have told him that if he acts out and becomes disruptive he will be removed." (T **328**). Mahn was brought into the courtroom, and the court questioned him about staying. (T **332**). During that exchange, the court said: "You're kind of slurring your speech this morning. Yesterday when I left here you were talking to your lawyers, you were talking just fine. Why is it - you were talking just great yesterday as we were leaving. Why is it you're having a problem now?" (T 332). Mahn denied having

any problems and denied having taken any medications. (T 332-33). The court then told Mahn that he did not have the right to disrupt or interfere with the trial and that he would be removed if he did not behave. (T 333). Mahn said he understood those rules and would abide by them. (T 334).

During an afternoon recess, defense counsel asked that the stun belt be removed because the guards were teasing Mahn. (T 504). The court reminded counsel that Mahn was being restrained because he misbehaved at his robbery trial (T 504-05) and that he misbehaved at the beginning of the instant trial. (T 506). Counsel agreed that Mahn was unpredictable, and the court stated that his unpredictability 'is the reason why he's going to stay in the situation that he's in." (T 506). The following exchange then occurred:

> MR. RATCHFORD: So you're saying no?
>
> THE COURT; I'm saying no because he's too unpredictable. As long as he behaves himself here he's got nothing to worry about.
>
> MR. RATCHFORD: Well, I understand, Judge, and once again, I haven't been back there but according to him somebody is playing mind games with him with that stun belt and saying we're going to push the button just to see if you're still alive. And they are calling him rude names and treating him without dignity.

THE COURT: I can correct that.

MR. RATCHFORD: I would appreciate that.

THE COURT: And the security people that are back there, the officer over there and the officer back there, they should not even -- they should not even have any conversations with him. They are guarding him. To tease him or whatever is not part of the job, and they should not do that if they've done it. I'm not going to get into a conversation about whether or not they've done it.

MR. RATCHFORD: I understand that.

THE COURT: Mr. Mahn also has a propensity to say things. So I'm not going to get into -- start taking a bunch of testimony about whether or not it was said or wasn't said.

MR. RATCHFORD: No, sir. I don't want to do that.

THE COURT: I'll just tell security -- not security, but the people that are here guarding him that have control of that, if they have done it, don't do it again. If they haven't done it then it's a moot question.

(T 506-08).

Before trial started the following morning, however, the court readdressed the subject:

THE COURT: I need to see the State and the Defense up here a minute, please.

Let me tell you something that's come up and it really doesn't have anything to do with the merits of this case, but it's something that's going to have to be addressed. It

deals with this stun belt and the fact that the other day one of these guys activated it. We did not go into it, we did not find out what caused it. No one asked for a hearing. I don't want to have a hearing in the middle of this trial because it doesn't have anything to do with what we're doing, but it's not forgotten. He made a complaint yesterday that they were teasing him and taunting him. We didn't have a hearing on that either, okay, because that really doesn't have anything to do with the merits of this case either.

After I got out of court yesterday, someone that is in my opinion unimpeachable and has no reason to exaggerate or otherwise, heard a comment, had nothing to do with what Mr. Mahn said, but another comment that makes me question whether or not someone should have their hand on a button with someone else on the other end of an electronic device. Again, I don't want to get into a hearing on it because it doesn't make any difference in this case. It doesn't go to the merits of this case, but it certainly makes me question the finger on the button, whether or not someone has psychologically in enough good and -- enough good judgment to have their finger on the button, and I'm very concerned about it.

By the same token, all of that aside, it does not improve Mr. Mahn's stock, his stock doesn't rise in relation to whether or not he's unstable, whether or not he's unpredictable and all those things and the reason why he's got it on to begin with. What I'm concerned about is the criteria and the fact that it is very, very subjective as to who's got their finger on the button and when it's going to be activated, and that bothers me a lot.

MS. NEEL: Can I ask you a question? There is two things we can do.

THE COURT: Well, I'll get to the solution.

MS. NEEL: Never mind then.

THE COURT: I don't want him in here unrestrained.

MR. BERRIGAN: I understand that, Judge.

THE COURT: And I'm basically going to give him an option. If he wants to get the anklets on, he can sit down over there and what we can do -- what we can do, we need to put a box over there, one of these evidence boxes around what we did in the other trial, we can stick a box on there and --

MR. RATCHFORD: We can improvise that without any difficulty.

THE COURT: And the anklet irons. I want to put a waist chain on him where he cannot grab anybody, strike anybody. That's more confining than -- that's more confining as far as his arms are concerned that he's got right now, but he does not have the possibility of somebody using bad judgment or accidentally dropping that thing and activating it, and that's all taken away. You know, we will move him into the courtroom and move him out of the courtroom where the jury wouldn't see it or anything like that. It will be his choice.

MR. RATCHFORD: If I may, Judge, I appreciate the Court providing us with those options. He is writing notes to me. He is not going to write notes to the jury anymore, and if he has on handcuffs of some kind, then I think the point is do you not feel like the

leg restraints would be enough? Because the only people that he could strike is me or Mr. Fisher, and he's never exhibited any aggressiveness towards us anymore. And if he becomes aggressive, he's not going any further than these security.

MS. NEEL: That way he couldn't go at someone like that if we only had one chained. But he still could write the notes that he wanted to write to them.

MR. RATCHFORD: I would ask that we try it without his hands restrained at all, because once again the way we have him sitting at counsel table, I'm sitting at counsel table, I'm sitting at one end and Mr. Fisher is sitting at the other and the defendant is in the middle.

THE COURT: He can't go anywhere. There's a wall behind him and there's an officer within about six feet of him.

MR. RATCHFORD: He would have to crawl over the table, and with leg braces on it would be very difficult to crawl over the table to get to anybody besides me and Mr. Fisher. We're not afraid of him.

THE COURT: Sam, come here a minute.

MR. RATCHFORD: Let me talk to the defendant just a moment.

THE COURT: Do you have any of the anklets put on him.

SECURITY OFFICER: Leg irons?

THE COURT: Leg irons.

SECURITY OFFICER: I know we have leg irons.

THE COURT: What we might do, and we'll know in just a minute, is put some leg irons on him so he can't basically get from where he is, and we're going to take -- maybe take that electronic thing off of him. I feel real confident that leg irons is going to keep him controlled and he can't get from where he is to anybody. Mr. Ratchford and Mr. Fisher indicate they are not concerned about him because they are sitting next to him, that -- do you feel the same way, Mr. Fisher?

MR. FISHER: I feel the same way, Judge.

THE COURT: I think that will secure him for the courtroom and it will take the possibility of anybody using bad judgment on that electronic device. And when this thing is all over with, that independently is going to be taken up, not necessarily by me. I don't know that's my job, but certainly it is my job to bring it to the attention and make sure that it is looked at and not covered up.

MS. NEEL: I understand.

SECURITY OFFICER: Let me check on the leg irons.

MR. RATCHFORD: Judge, Mr. Mahn says he would really appreciate having the opportunity not to wear that belt.

THE COURT: Sam is going to check and --

MR. RATCHFORD: He promises to be a good boy. Of course, I also want to tell you --

THE COURT: Of course, I've heard the before.

MR. RATCHFORD: He said it yesterday and he minded yesterday. I think we've gotten his attention.

THE COURT: This trial is not over with.

(T 574-79).

Thereafter, the transcript does not reflect any misbehavior by Mahn until the penalty phase. During his cousin's testimony, Mahn became disruptive. (T 1404). The court sent the jury to the jury room and again reminded Mahn of his earlier misbehavior. (T 1404). The court then went through Mahn's numerous transgressions up to that point. (T 1406-11). The judge made his exasperation with Mahn's conduct clear:

> I will be perfectly candid with you Mr. Mahn, it is my second trial with you and I have seen enough of your antics. You do have the ability to sit in here and behave. You choose not to. You choose not to. And I have seen your antics not only in this trial on two occasions, but in the robbery trial during the voir dire examination when you stood up and made some obsecenties and things of that nature in front of all those people.
>
> I don't know how many times you think you can act up and something not be done about it. I just don't know. I guess you don't believe me when I tell you that if you do that, then you will be excluded from the courtroom.

(T 1411-12).

After a colloquy with Mahn (T 1412-13), the court decided that the closed-circuit television setup would be reinstalled and that Mahn would be removed from the courtroom. (T 1414). Defense counsel pleaded for Mahn's being allowed to remain and conceded that 'if there are any further outbursts, I would certainly acquiesce and agree to have him removed from the courtroom." (T 1414-15). Reluctantly, the court agreed to Mahn's remaining, but warned "that if I hear one peep out of him that can be described as being outrageous, boisterous or disruptive, that he will be taken at that point out of the courtroom." (T 1417). Trial counsel agreed (T 1417), and the court questioned Mahn as to whether he wished to stay. (T 1417-18). Mahn at first said he wanted to remain (T 1418), but then acknowledged that he might not behave. (T 1419). Mahn was removed from the courtroom and the jury brought back. (T 1419). The court told the jury that proceedings would be recessed for lunch, during which time the television equipment would be set up and that Mahn would be absent. (T 1421-22).

When court reconvened, the judge confirmed that both Mahn and defense counsel had headsets and were in communication with each other. (T 1423). Counsel checked with Mahn and stated that Mahn could hear the proceedings. (T 1423-24). The court again stated his concerns both with Mahn being absent and with his being

disruptive. (T 1424-25). Counsel then spoke with Mahn through the headphones:

> All right. Here is what Judge Bell wants me to tell you, that if you will promise that you will be good and behave yourself, he wants you in the courtroom. But the last time that we talked about that, what you told me that you want to try and behave yourself, but you are not sure that you can now, is that correct? I'm sorry, say it again. Okay. The fact is the Judge is saying if you promise to be a good boy, you can come back in the courtroom. Are you - do you think you can do that or would you rather keep things they way they are and you stay there and look at the TV set for the way that you are? You want to come in?

(T 1425-26). The court then again stated that if Mahn behaved, he could return. (T 1426-27). Counsel conveyed that message to Mahn (T 1427), and Mahn was returned to the courtroom. (T 1428). Defense counsel asked that Mahn's handcuffs be removed, and, when the court questioned that, the prosecutor stated: "He was throwing things last time, that was part of the problem. He threw something over that way." (T 1428). The court decided to keep the handcuffs on (T 1428-29), and the penalty phase continued. (T 1429).

In considering the problem of disruptive defendants the United States Supreme Court held:

> It is essential to the proper administration of criminal justice that dignity, order, and decorum be the hallmarks of all court proceedings in our country. The flagrant disregard in the courtroom of elementary standards of proper conduct should not and cannot be tolerated. We believe trial judges confronted with disruptive, contumacious, stubbornly defiant defendants must be given sufficient discretion to meet the circumstances of each case.

Illinois v. Allen, 397 U.S. 337, 343, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970). This Court has adopted the Allen standard: "The court's obligation to maintain safety and security in the courtroom outweighs, under proper circumstances, the risk that the security measures may impair the defendant's presumption of innocence." Diaz v. State, 513 So. 2d 1045, 1047 (Fla. 1987), cert. denied, 484 U.S. 1079, 108 S. Ct. 1061, 98 L. Ed. 2d 1022 (1988); Derrick v. State, 581 So. 2d 31 (Fla. 1991); Correll v. State, 558 So. 2d 422 (Fla. 1990); Stewart v. State, 549 So. 2d 171 (Fla. 1989), cert. denied, 497 U.S. 1032, 110 S. Ct. 3294, 111 L. Ed. 2d 802 (1990); Jones v. State, 449 So. 2d 253 (Fla. 1984), cert. denied, 469 U. S. 893, 105 S. Ct. 269, 83 L. Ed. 2d 205 (1984); Czubak v. State, 644 So. 2d 93 (Fla. 2d DCA 1994); Joseph v. State, 625 So. 2d 109 (Fla. 3d DCA 1993); Blanco v. State, 603 So. 2d 132 (Fla. 3d DCA 1992).

Mahn started this trial wearing an electronic stun belt because of his disruptive behavior at a prior trial. As the court noted, the belt was a less obvious means of restraint that the shackles and handcuffs that replaced it. On the first day of trial counsel told the court that the guards had had to activate the belt to restrain Mahn. Mahn did not, however, ask for any investigation at that time. On the second day of trial counsel informed the court that Mahn said the guards were teasing him. The court responded that, if that were so, he would tell the guards to stop doing so. Again, however, Mahn sought no further inquiry. On the third day of trial, the court on its own initiative ordered shackles and handcuffs to replace the belt.

It is obvious that Mahn was the instigator of his own problems. His actions illustrated the various descriptions of him as being manipulative. (R 53, 85). Contrary to his current complaint, the trial court used the least restrictive means to insure that this trial proceeded in the most orderly manner possible with the greatest regard possible for Mahn's rights. Whenever a problem arose, the court moved quickly to solve it, despite Mahn's truculence and obstruction. Mahn has demonstrated no abuse of discretion in the manner the trial court treated him or in the methods used to restrain him.

The trial court committed no error in not making a formal determination that Mahn was competent to continue with the proceedings. The trial court held a three-day competency hearing four months before this trial. The psychologists who examined Mahn determined that he was "grossly exaggerating his psychological symptoms (CH 9), was malingering (CH 9, 492), and was competent to stand trial. (CH 491). A month before trial these same psychologists reported to the court that Mahn did not meet the criteria for insanity at the time of the crime (R 48, 56), that Mahn was malingering (R 47), and that he had an anti-social personality (R 55) rather than a mental illness. During trial, the court was well aware of Mahn's state, as evidenced by the concern with Mahn's slurred speech on the second day of trial.

One need not be mentally healthy to be competent. Muhammad v. State, 494 So. 2d 969 (Fla. 1986), cert. denied, 479 U.S. 1101, 107 S. Ct. 1332, 94 L. Ed. 2d 183 (1987). Any distress that Mahn exhibited was due to his failed attempts to disrupt and thwart the proceedings against him rather than to the belt or his incompetency. Mahn's counsel did not request a further competency determination, and Mahn has shown no error in the trial court's failure to conduct a hearing on its own motion.

Besides not being preserved for appeal, there is also no merit to Mahn's claim that the belt caused him to be absent from voir dire. The United States Supreme Court has stated that

> a defendant can lose his right to be present at trial if, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom.

Illinois v. Allen, 397 U.S. 337, 343, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970) (footnote omitted). This Court has recognized that, by their misbehavior, defendants can waive their right to be present. Valdes v. State, 626 So. 2d 1316 (Fla. 1993), cert. denied, 114 S. Ct. 2725, 129 L. Ed. 2d 849 (1994); Peede v. State, 474 So. 2d 808 (Fla. 1985), cert. denied, 477 U.S. 909, 106 S. Ct. 3286, 91 L. Ed. 2d 575 (1986).

The trial court gave Mahn every opportunity to remain in the courtroom. Mahn's refusal to temper his conduct, not the belt, caused his removal, Even then, the court insured that Mahn would be able to view the proceedings and communicate with counsel. Mahn's later misbehavior and removal only reinforces the conclusion

that the belt had little or nothing to do with his absence. Instead, Mahn's recalcitrance caused his absence.

Mahn also claims that the belt impaired his communication with counsel, but the record does not support this contention. During voir dire counsel commented on his headset through which he could communicate with Mahn. Counsel voiced no complaint that Mahn could not or would not communicate with him. When Mahn was removed from the courtroom later, it was obvious that he could and did talk with counsel through the headset. This totally unsupported argument has not been preserved and has no merit.

Trial counsel zealously pled Mahn's case. If the situation had been as bad as appellate counsel claims, trial counsel surely would have objected. Mahn has demonstrated no error, and his complaints presented in this issue should be rejected. Even if this Court were to find error regarding this claim, it would be harmless. Mahn misbehaved and disrupted the proceedings several times, as he had done in an earlier trial. Judge Bell did everything he could to insure both the orderly progress of the trial and that Mahn's rights were protected. If any error occurred, Mahn caused it and he should not be allowed to profit from his misbehavior.

ISSUE II

WHETHER THE EVIDENCE WAS SUFFICIENT TO SUBMIT THE ROBBERY CHARGE TO THE JURY.

Mahn claims that there is 'no evidence that the murders were motivated by a desire to take property" (initial brief at 49) and that the trial court should not have submitted the robbery charge to the jury. There is no merit to this claim, and Mahn's robbery conviction should be affirmed.

On April 27, 1993, the state indicted Mahn on two counts of first-degree murder, case no. 93,1738. (R 1). In case no. 93-2193 the state filed an amended information in November 1993 charging Mahn with armed robbery for taking "United States money or currency and/or jewelry and/or other property of a value of $300 or more or an automobile."* (R 5). The trial court granted the state's motion to consolidate case nos. 93-1738 and 92-2193. (T 17). The jury convicted Mahn of armed robbery as charged. (R 119; T 1265).

Subsection 812.13(1), Florida Statutes (1995), defines robbery as

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[4] The amended information also charged Mahn with cruelty to an animal and malicious property damage. (R 5). The trial court granted Mahn's motion for judgment of acquittal on those charges. (T 1099).

> the taking of money or other property which may be the subject of larceny from the person or custody of another, . . . when in the course of the taking there is the use of force, violence, assault, or putting in fear.

Furthermore, an act is considered to be "'in the course of the taking' if it occurs either prior to, contemporaneously with, or subsequent to the taking of the property and if it and the act of taking constitute a continuous series of acts of events." § 812.13(3)(b), Fla. Stat. (1995). As this Court has interpreted subsection 812.13, "the violence or intimidation may occur prior to, contemporaneous with, or subsequent to the taking of the property so long as both the act of violence or intimidation and the taking constitute a continuous series of acts or events." Jones v. State, 652 So. 2d 346, 349 (Fla. 1995).

Mahn argues that his taking Debbie Shanko's car and money was only an afterthought, Contrary to this argument, however, the state produced evidence that, to effect his motive of getting revenge on his father, Mahn planned to kill the victims and steal his father's Corvette. During both his second videotaped interview and his penalty-phase testimony, Mahn admitted that he intended to steal the Corvette. (T 1064; T 1592). That he could not do so because he could not find the keys did not lessen his intent. Instead, he had to content himself with stealing Debbie's car.

Besides the car, Mahn also stole a money bag containing around $400 from the master bedroom. Although Mahn testified that he found the money by accident (T 1066-67), his father testified that Debbie always carried her money in a money bag and that it was on the dresser in plain view. (T 710). Moreover, during closing argument, the defense admitted that Mahn knew that Debbie kept money in the bedroom. (T 1179). With the evidence presented, the jury could decide that, along with a car, Mahn intended to steal the money all along, thus rejecting Mahn's self-serving statement. At any rate, the murders and Mahn's stealing the car and money were clearly part of a continuous series of events under section 812.13, and the evidence shows a robbery with the requisite force and violence rather than a simple theft.

If the state introduces competent, substantial evidence that is inconsistent with a defendant's theory of events, "the question of whether the evidence is sufficient to exclude all reasonable hypotheses of innocence is for the jury to determine." Atwater v. State, 626 So. 2d 1325, 1328 (Fla. 1993), cert. denied, 114 S. Ct. 1578, 128 L. Ed. 2d 221 (1994). The state's evidence was more than sufficient for the robbery charge to be submitted to the jury. Moreover, a jury need not believe a defendant's version of events

where the state has produced conflicting evidence. Cochran v. State, 547 So. 2d 928 (Fla. 1989).

On appeal a reviewing court's concern "must be whether, after all conflicts in the evidence and all reasonable inferences therefrom have been resolved in favor of the verdict on appeal, there is substantial, competent evidence to support the verdict and judgment." Tibbs v. State, 397 So. 2d 1120, 1123 (Fla. 1981), aff'd 457 U.S. 31, 102 S. Ct. 2211, 72 L. Ed. 2d 652 (1982) (footnote omitted); Spinkellink v. State, 313 So. 2d 666 (Fla. 1975), cert. denied, 428 U.S. 911, 96 S. Ct. 3227, 49 L. Ed. 2d 1221 (1976). Moreover, judgments of conviction come to reviewing courts with a presumption of correctness, Spinkellink, and 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. 1690, 80 L. Ed. 2d 164 (1984); Tibbs. The state presented substantial, competent evidence supporting the jury's convicting Mahn of armed robbery. Finney v. State, 660 So. 2d 674 (Fla. 1995); Larkins v. State, 655 So. 2d 95 (Fla. 1995); Jones; Atwater,

Mahn's reliance on Knowles v. State, 632 So. 2d 62 (Fla. 1993), Clark v. State, 609 So. 2d 513 (Fla. 1992), and Parker v. State, 458 So. 2d 750 (Fla. 1984), cert. denied, 470 U.S. 1088, 105 S. Ct. 1855, 85 L. Ed. 2d 152 (1985), is misplaced. In those cases this Court held that the thefts that occurred were true after-thoughts and that, therefore, the felony murder (robbery) aggravator had not been established. In this case, the state proved that Mahn intended to commit a robbery.[5]

There is no merit to this issue, and Mahn's robbery conviction should be affirmed. If the Court were to find otherwise, vacating the robbery conviction would not affect the first-degree murder convictions because they were based on premeditated murder. (T 1270).

ISSUE III

WHETHER THE TRIAL COURT PROPERLY FOUND THREE AGGRAVATORS TO HAVE BEEN PROVEN BEYOND A REASONABLE DOUBT.

The trial court found three aggravators (CCP, HAC, and previous convictions of a violent felony) applicable to each of these murders. Mahn now argues that the court erred in its

[5] As discussed in cross-appeal issue III, the court should have found felony murder (robbery) in aggravation for Debbie Shanko's murder.

consideration of these aggravators. There is no merit to this issue.

A. CCP

As his first attack on the aggravators, Mahn argues that the trial court erred in finding CCP applicable to each of the murders. The trial court made the following findings on the CCP aggravator for Debbie Shanko's killing:

> The Defendant told several witnesses that he was jealous of the time his father gave to Debbie and Anthony Shanko. Debbie Shanko was in her own home, in her own bed, when the Defendant went to the kitchen and took two large kitchen knives. The Defendant by his own admission started to stab Anthony Shanko when Anthony was asleep and stabbed him up to eight times with one of the large kitchen knives. The Defendant by his own admission waited until his father left the house that night before he committed the murder of Anthony Shanko. The Defendant by his own admission says Anthony Shanko did not deserve this, but he was mad that his father had sold his automobile the day of the murder because the Defendant had defaulted upon his agreement to make the automobile payments. The evidence has established that the Defendant's father had a great deal of love for Anthony Shanko. The Defendant felt that his father was not there for him as a child when he was growing up with his mother. The Defendant by his own admission stated that he had thought about killing Anthony and Debbie Shanko, because he thought that they would die immediately rather than fight and cry and scream. The evidence does not support nor does the Defendant claim that he had any moral or legal justification.

The aggravating circumstance was proved beyond a reasonable doubt.

(R 288). The findings for Anthony's murder are the same except for the second sentence which refers to Anthony rather than Debbie. (R 300). Mahn claims that CCP applies to neither killing because he killed Anthony 'in a jealous rage while suffering depression and hopelessness" (initial brief at 54) and that it "was an impulsive killing committed in an emotionally charged state." (Initial brief at 56). According to Mahn, Debbie's death was also "an impulsive, domestic homicide committed in anger, fueled by frustration and jealousy." (Initial brief at 58). On the other hand, Mahn also argues that Debbie might not have been an intended victim and that her death might have been a panic killing resulting from her confronting and then struggling with Mahn. The record, however, supports the trial court's findings that each of these murders was cold, calculated, and fully premeditated with no pretense of moral or legal justification.

Michael Mahn, the defendant's father, testified that Mahn had been living with him, Debbie, and Anthony off and on for about a year. (T 695). When Mahn was working, he lived with his friends, but, when out of work, he lived at his father's house, and, on the day of the murders, had been back for several days. (T 696).

Michael Mahn purchased a car for the defendant with the understanding that he would pay back his father for that car. (T 696-97). About a week before the murders Mahn told his father that he could not afford to repair the car or make payments on it and, the day of the murders, the car was cleaned up and taken to a woman who said she would buy the car from Michael. (T 696-99).

Cynthia Hurley, the sister of Mahn's girlfriend, testified that Mahn told her he was mad because his father would not give him the money he needed for the car and that he blamed Debbie for this. (T 734). Mahn told her that "maybe if he got rid of her, his dad would go back to the way he used to be." (T 734). Cynthia described Mahn as "full of hatred." (T 734). On cross-examination she reiterated that Mahn said things might be better "if he got rid of her [Debbie]" (T 735) and stated **that** Mahn sounded serious. (T 736).

Michelle Quimette, Mahn's girlfriend, testified that Mahn was jealous of Debbie and that he said he would get more attention from his father if Debbie were not around. (T 728-29). Mahn scared her when he said these things. (T 729). On cross-examination she stated that Mahn made such statements about Debbie **numerous times.** (T 731).

That Mahn was actually contemplating murder is demonstrated by Bernard Suko's testimony. Suko was at a party at a friend's house when Mahn and a friend showed up. (T 740). While talking and joking about things they could get away with (T 741), "out of the blue" Mahn said that murder would be the easiest crime. (T 742).

Before going to Florida, Mahn told **a** friend, David Butler, that his father **was** strict (T 1506) and that he did not want to follow his father's rules. (T 1505). After being arrested, Mahn told Frank Everett, an Oklahoma Highway Patrolman, that he was mad at his father and killed the victims to get even with his father. (T 944). When he testified during the penalty phase, Mahn stated that he liked Debbie "more than I liked my dad," that his father "was meaner to me than he was to Anthony" (T 1577), and that he planned to steal his father's Corvette. (T 1592-93). In his first videotaped interview Mahn called his father a 'jerk" and stated: "I don't like him." (T 1042). He also blamed his father for taking away his car and stated: "I was mad at my dad because I don't think that he cares about me." (T 1053).

On the night of the murders, Mahn's father left the house between 9:30 and 9:45 p.m. (T 699) . Mahn waited until the victims were asleep and then put into effect his plan to get back at his father. He took two knives from the kitchen (T 1584) and entered

Anthony's bedroom around 11:00 p.m. (T 1060). When Debbie came into her son's room, Mahn attacked her too. (T 1061). There was blood all over the telephones in the living room and the master bedroom. (T 512-13). The telephones in the house had been hit by lightning or a power surge (T 705), and the only dependable telephone was in Mahn's bedroom. (T 713). The receiver from that telephone, however, was down in the mattress of Mahn's sofa bed (T 513-14), thus rendering it inoperable.

Four elements must be proved to establish the CCP aggravator: the murder must be 'cold," it must be the product of a careful plan or prearranged design, there must be heightened premeditation, and there must be no pretense of moral or legal justification. Fennie v. State, 648 So. 2d 95 (Fla. 1994), cert. denied, 115 S. Ct. 1120, 130 L. Ed. 2d 1083 (1995); Jackson v. State, 648 So. 2d 85 (Fla. 1994); Wuornos v. State, 644 So. 2d 1000 (Fla. 1994), cert. denied, 115 S. Ct. 1705, 131 L. Ed. 2d 566 (1995); Walls v. State, 641 So. 2d 381 (Fla. 1994), cert. denied, 115 S. Ct. 943, 130 L. Ed. 2d 887 (1995). Mahn makes no claim that his acts met the fourth condition, and the facts of this case, as set out above and as found by the trial court, establish the other elements of CCP.

Mahn coldly and calmly planned these murders in order to get revenge on his father as evidenced by the complaints he voiced to

numerous people. Mahn claims that he was in an emotional frenzy, but the judge and jury were entitled to, and obviously did, reject his self-serving statements as contrary to the facts. Wuornos; walls. His careful plan or prearranged design is also supported by the facts and show that these murders did not occur on the spur of the moment. Mahn waited until the only other adult male left the house, leaving behind a woman and child, and waited further until they were asleep. He procured weapons with which to effect the murders and disabled the only working telephone, which he controlled. See Occhicone v. State, 570 So. 2d 902 (Fla. 1990), cert. denied, 500 U.S. 938, 111 S. Ct. 2067, 114 L. Ed. 2d 471 (1991); Correll v. State, 523 So. 2d 562 (Fla.), cert. denied, 488 U.S. 871, 109 S. Ct. 183, 102 L. Ed. 2d 152 (1988); Lightbourne v. State, 438 So. 2d 380 (Fla. 1983), cert. denied, 465 U.S. 1051, 104 S. Ct. 1330, 79 L. Ed. 2d 725 (1984). Mahn's actions also exhibited the deliberate ruthlessness needed to show heightened premeditation. Mahn stabbed the victims numerous times, completely disabling them. He had ample time to reflect on his actions and their consequences. The victims' reactions may have surprised Mahn, as shown by his statement that "I didn't think they were going to cry and scream." (T 1048). However, Mahn fully intended to kill them, as evidenced by his follow-up statement : 'I thought

they would just die real quick." (T 1048). The state proved the elements of CCP beyond a reasonable doubt.

Mahn's reliance on cases such as Maulden v. State, 617 So. 2d 298 (Fla. 1993), Santos v. State, 591 So. 2d 160 (Fla. 1991), Douglas v. State, 575 SO. 2d 165 (Fla. 1991), Garron v. State, 528 So. 2d 353 (Fla. 1988), and Wilson v. State, 493 So. 2d 1019 (Fla. 1986), is misplaced. In those cases, the defendants killed family members, usually wives or girlfriends, with whom they had ongoing domestic disputes. Those cases are characterized by their facts and/or by the presence of the statutory mental mitigators or extensive drug or alcohol use that negated the defendants' formation of the requisite intent for CCP. As shown by the facts of this case, Mahn's desire to punish his father, not any kind of passionate obsession, motivated him to commit these murders, and he fully intended to commit the murders.

Contrary to Mahn's contentions, he did not kill the victims in a fit of rage or because he panicked. Although fueled by jealousy, Mahn coldly, calculatedly, and premeditatedly effected his plan to gain revenge on his father by killing Debbie and Anthony and stealing his father's Corvette. See Arbelaez v. State, 626 So. 2d 169 (Fla. 1993), cert. denied, 114 S. Ct. 2123, 128 L. Ed. 2d 678 (1994); DeAngelo v. State, 616 So. 2d 440 (Fla. 1993); Klokoc v.

State, 589 So. 2d 219 (Fla. 1991); Occhicone. That events did not happen as he planned (i.e., the victims did not die quietly and quickly, he could not steal the Corvette, and he was apprehended and prosecuted rather than escaping) does not negate the CCP aggravator. Asay v. State, 580 So. 2d 610 (Fla.), cert. denied, 502 U.S. 895, 112 S. Ct. 265, 116 L. Ed. 2d 218 (1991); see also Wickham v. State, 593 So. 2d 191 (Fla. 1991), cert. denied, 112 S. Ct. 3003, 120 L. Ed. 2d 878 (1992). Instead, Mahn's actions showed the coldness, planning, and heightened premeditation needed to support finding CCP. When there is a legal basis for finding an aggravator, this Court will not substitute its judgment for that of the trial court. Occhicone. Therefore, this Court should affirm the trial court's finding CCP in aggravation.

B. HAC

Mahn also claims that the trial court erred in finding that HAC had been established for both murders. The court made the following findings as to Debbie Shanko's murder:

> The victim, Debbie Shanko, was approximately 36 years old at the time she was murdered. The Defendant waited until his father left the house to sell the Defendant's car, and then took two large knives out of the kitchen to perfect this murder. As he was in the process of murdering Anthony Shanko with Anthony Shanko fighting, crying and screaming, the mother of Anthony Shanko walked into Anthony's

> bedroom to find the Defendant murdering her son. The Defendant turned on the mother and cut and stabbed her up to 40 times. She suffered more than one fatal blow from the Defendant's knife. Debbie Shanko, from the evidence, put up a fight for her life with her blood covered over most of the house. She had cuts and stab marks over most of her body. She died in the hallway after trying to use the telephones. Her blood was on the telephone sets, but the telephones were inoperable. The telephone in the Defendant's room was off the hook and did not have any blood on the telephone. One could conclude that the Defendant took his telephone off the hook to prevent anyone from calling for help.

(R 289). In finding HAC applicable to Anthony Shanko's murder the court made the following findings:

> The victim, Anthony Shanko, was 14 years old at the time he was murdered. The Defendant took the two largest knives out of the kitchen to perfect this murder. The knife used on Anthony Shanko was a serrated knife. The Defendant cut a 2 ½ - 4 ½ inch hole in the chest of Anthony Shanko. Anthony's lung was damaged causing a sucking sound where he was taking air from the outside instead of down his mouth. The evidence established that he lived for one to two hours after the stabbing. The evidence established that he suffered great pain prior to dying. Anthony Shanko tried to call for help, but was unable to because the phone failed to work properly. Anthony was trying to defend himself because some of the wounds were defensive wounds. When the Defendant's father, Michael Mahn, returned home, Anthony told him that he was in pain and he was suffering. Anthony was begging the EMS personnel for help and telling them that it hurt to talk. He told EMS that

> he did not think he was going to make it. In addition to all the pain and suffering Anthony had to endure, he also had to watch the Defendant murder his mother, Debbie Shanko. The pain and suffering of watching and knowing the Defendant is stabbing his mother up to 40 times. Prior to Anthony Shanko dying, the evidence is clear that he knew his mother was dead, because Anthony told the Defendant's father (Michael Mahn) when he returned home that 'She's dead. Jason did it. Call 911." He knew what happened to his mother but was helpless to offer her help because of his wounds. This aggravating circumstance **was** proved beyond **a** reasonable doubt.

(R 301). The evidence supports these findings.

According to his second videotaped interview, Mahn entered Anthony's room around 11:00 p.m. and began stabbing the sleeping boy. (T 1060). Anthony's cries woke his mother, and she came to Anthony's room, where Mahn began stabbing her too. (T 1061). Carolyn Stephens, a senior crime scene investigator with the Pensacola Police Department, described her examination of the crime scene (T 509-65) and then narrated a videotape of the scene (T 582-92), describing a house literally awash in the victims' blood from the living/dining room and kitchen area through the hallway and into Anthony's bedroom and the master bedroom. John Lazarchick, the medical examiner, visited the scene the morning after the murders and prior to performing autopsies on the bodies 'to get a [sic] more understanding of what had transpired." (T 810). His

"most striking finding was just the amount of blood which was present throughout the house." (T 811).

The autopsy of Debbie Shanko revealed that she was five feet four inches tall and weighed between 120 and 130 pounds. (T 817). She had an extensive area of hemorrhaging on the right side of her skull (T 816), probably caused by blunt trauma (T 817), and had been stabbed close to forty times. (T 817). Some of the stab wounds were superficial, some were defensive (T 814-49), with at least four being fatal or potentially fatal. (T 822, 828-33, 848-49). As a cause of death, the medical examiner determined that she bled to death. (T 849).

Anthony Shanko had been five feet six inches tall and weighed from 110 to 120 pounds. (T 859). He had been stabbed six times (T 849) and sustained several defensive wounds. (T 855-56). The fatal wound was a four-inch wound to his right chest where the knife went completely through his liver and tore a major blood vessel. (T 854-54, 859). Anthony was still alive when Michael Mahn returned home (T 703-04), but died at the hospital before surgery could be performed on him. (T 495-97).

This Court has found HAC applicable to virtually all stabbing deaths. Merck v. State, 664 So. 2d 939 (Fla. 1995); Allen v. State, 662 So. 2d 323 (Fla. 1995); Barwick v. State, 660 So. 2d 685

(Fla. 1995); Finney v. State, 660 So. 2d 674 (Fla. 1995); Johnson v. State, 660 So. 2d 637 (Fla. 1995); Henry v. State, 649 So. 2d 1366 (Fla. 1994); Whitton v. State, 649 So. 2d 861 (Fla. 1994); Pittman v. State, 646 So. 2d 167 (Fla. 1994), cert. denied, 115 S. Ct. 1982, 131 L. Ed. 2d 870 (1995); Garcia v. State, 644 So. 2d 59 (Fla. 1994), cert. denied, 115 S. Ct. 1799, 131 L. Ed. 2d 726 (1995); Derrick v. State, 641 So. 2d 378 (Fla. 1994), cert. denied, 115 S. Ct. 943, 130 L. Ed. 2d 887 (1995); Atwater v. State, 626 So. 2d 1325 (Fla. 1993), cert. denied, 114 S. Ct. 1578, 128 L. Ed. 2d 221 (1994). Mahn argues, however, that his "panicked mental state at the time of the killing" of Debbie Shanko mitigated the aggravating quality of her wounds. (Initial brief at 61). The cases he cites to support this contention are distinguishable from the instant case. In Amazon v. State, 487 So. 2d 8 (Fla. 1986), Miller v. State, 373 So. 2d 882 (Fla. 1979); Burch v. State, 343 so. 2d 831 (Fla. 1977), and Jones v. State, 332 So. 2d 615 (Fla. 1976), the defendants presented much more evidence showing their mental impairment than Mahn did. For example, Miller and Burch established both mental mitigators, and Jones established that he had a paranoid psychosis. As demonstrated in issue IV, infra, the trial court correctly found that the statutory mental mitigators had not been proved and that Mahn's mental problems were worth

little weight as nonstatutory mitigation. The other cases that Mahn relies on are also factually distinguishable. In Cheshire v. State, 568 So. 2d 908 (Fla. 1990), Porter v. State, 564 So. 2d 1060 (Fla. 1990), cert. denied, 498 U.S. 1110, 111 S. Ct. 1024, 112 L. Ed. 2d 1106 (1991), and Santos v. State, 591 So. 2d 160 (Fla. 1991), this Court found HAC inapplicable to those domestic disputes because the defendants killed their victims quickly in the heat of passion. The instant murders, on the other hand, did not arise from a domestic dispute, were prolonged, and were cold-blooded and fully premeditated. Shere v. State, 579 So. 2d 97 (Fla. 1991), is also distinguishable because this Court found HAC not applicable where Shere's victim died quickly with no evidence that the victim experienced pain or prolonged suffering. The facts of Shere are vastly different from those in this case.

Mahn also argues that the trial court improperly found HAC for both murders because he did not intend for his victims to suffer. (Initial brief at 62, 63). That Mahn might not have intended that his victims suffer does not mean that these murders were not unnecessarily torturous and, thus, not HAC. Hitchcock v. State, 578 So. 2d 685 (Fla. 1990), reversed on other grounds, 112 S. Ct. 3020, 120 L. Ed. 2d 892 (1992). Mahn's argument ignores the fact that the HAC aggravator 'pertains more to the victim's perception

of the circumstances than to the perpetrator's," id. at 692, and applies to the nature of the killing and the surrounding circumstances. Gorby v. State, 630 So. 2d 544 (Fla. 1993), cert. denied, 115 S. Ct. 99 (1994); 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). AS this Court has recognized: 'In determining whether the circumstance of heinous, atrocious or cruel applies, the mind set or mental anguish of the victim is an important factor." Rarvev v. State, 529 So. 2d 1083, 1087 (Fla. 1988), cert. denied, 489 U.S. 1040, 109 S. Ct. 1175, 103 L. Ed. 2d 237 (1989); Phillips v. State, 476 So. 2d 194 (Fla. 1985). Thus, fear and emotional strain preceding a victim's death contribute to the heinous nature of that death. See Wuornos v. State, 644 So. 2d 1000 (Fla. 1994), Cert. denied, 115 S. Ct. 1708, 131 L. Ed. 2d 568 (1995); Sochor v. State, 619 So. 2d 285 (Fla.), cert. denied, 114 S. Ct. 538, 126 L. Ed. 2d 596 (1993); Preston v. State, 607 So. 2d 404 (Fla. 1992), cert. denied, 113 S. Ct. 1619, 123 L. Ed. 2d 178 (1993); Hitchcock; Rivera v. State, 561 So. 2d 536 (Fla. 1990); Chandler v. State, 534 So. 2d 701 (Fla. 1988), cert. denied, 490 U.S. 1075, 109 s. ct. 2089, 104 L. Ed. 2d 652 (1989); Cooper v. State, 492 So, 2d 1059

(Fla. 1986), cert. denied, 479 U.S. 1101, 107 s. ct. 1030, 94 L. Ed. 2d 181 (1987); Garcia v. State, 492 So. 2d 360 (Fla.), Cert. denied, 479 U.S. 1022, 107 S. Ct. 680, 93 L. Ed. 2d 730 (1986); Adams v. State, 412 So. 2d 850 (Fla.), cert. denied, 459 U.S. 882, 103 S. Ct. 182, 74 L. Ed. 2d 148 (1982).

The facts of this case prove that these murders were, indeed, heinous, atrocious, or cruel. Debbie Shanko saw her son attacked by a man who had been welcomed into her home and who then turned and attacked her, chasing her around her home and stabbing her multiple times. Anthony, after being brutally attacked in his bed, had to watch and listen to the attack on his mother. The victims could not save themselves, let alone one another. The victims were conscious throughout Mahn's attack on them. Their deaths were not swift, merciful, or relatively painless. Instead, Mahn's brutal attack caused prolonged suffering and a lengthy contemplation and anticipation by the victims of their impending deaths. The record fully supports the trial court's finding the HAC aggravator applicable to each murder, and the trial court's findings should be affirmed.

C. PRIOR VIOLENT FELONY

As his third attack on the aggravators, Mahn argues that the trial court erred in its findings regarding prior conviction of a

violent felony. The court made the following findings on this aggravator as to Debbie Shanko's murder:

> The Defendant **was** convicted of Robbery that occurred in 1992. The Defendant was on bond for the Robbery at the time of this double First Degree Murder. The Defendant was convicted of the murder of Anthony Shanko. Roth of these felonies involve the use or threat of violence to another person. This aggravating circumstance was proven beyond **a** reasonable doubt.

(R 287-88). The court made the same findings for Anthony's murder, with his mother's murder substituted for his. (R 299-300). Mahn argues that the court erred in relying on his robbery conviction because that robbery "did not involve his coming in contact with the victim or his commission of a violent act on another." (Initial brief at 66). There is no merit to this contention.

At the penalty phase the state introduced a certified copy of Mahn's judgment of conviction of robbery. (T 1317-18). John Allbritton, Mahn's attorney for the robbery charge, testified about the circumstances of that crime: "Mahn's involvement was that of the driver of the automobile. A nurse at Sacred Heart Hospital's purse was taken. And a friend of Jason's left the automobile, took the purse from the lady and ran. It appears the lady was knocked to the ground." (T 1363). On cross-examination Allbritton admitted that Mahn testified that he was not involved in the

robbery, but that the jury disregarded that testimony and convicted Mahn. (T 1364-65). Allbritton **also** testified that, when Mahn was arrested in Mississippi, he stated that he and his friend planned the robbery (T 1365-66), that they planned 'to knock somebody in the head and take all of their money" (T 1366, 1371), and that their sole purpose in going to the hospital was to rob someone. (T 1367).

"Robbery" is defined as

> the taking of money or other property which may be the subject of larceny from the person or custody of another, with intent to either permanently or temporarily deprive the person or the owner of the money or other property, when in the course of the taking there is the use of force, violence, assault, or putting in fear.

§ 812.13(1), Fla.Stat. (1995). The pertinent aggravator is: "The defendant **was** previously convicted of another capital felony or of a felony involving the **use** or threat of violence to the person." § 921.141(5) (b), Fla.Stat. (1995). As this Court has stated, "robbery is as a matter of law a felony involving the use or threat of violence." Simmons v. State, 419 So. 2d 316, 319 (Fla. 1982). Robbery, therefore, can be used to aggravate a murder.

The trial court properly relied on Mahn's prior robbery conviction in aggravation. Even though Mahn might not have knocked

the victim down, he participated fully in the robbery. He helped his friend plan the robbery, drove him to where the robbery could be accomplished, and knew that violence would be used to accomplish the robbery. Thus, Mahn intended that a violent crime be committed, and there is no merit to this claim.

Even if there were error in the court's reliance on the robbery conviction, no relief is warranted. Contemporaneous crimes committed against separate victims can be used to prove the prior violent felony aggravator. Windom v. State, 656 So. 2d 432 (Fla. 1995); Zeigler v. State, 580 So. 2d 127 (Fla.), cert. denied, 502 U.S. 946, 112 S. Ct. 390, 116 L. Ed. 2d 340 (1991); Correll v. State, 523 So. 2d 562 (Fla.), cert. denied, 488 U.S. 871, 109 S. Ct. 183, 102 L. Ed. 2d 152 (1988). As the trial court found, each of these murders aggravated the other. Any error in relying on the robbery conviction, therefore, was harmless because the separate murders support finding the prior violent felony aggravator. The court's findings should be affirmed, and this issue should be denied.

ISSUE IV

WHETHER THE TRIAL COURT PROPERLY CONSIDERED THE MITIGATING EVIDENCE.

Mahn argues that the trial court improperly refused to find several mitigators and failed to give sufficient weight to the mitigators it did find. There is no merit to this claim.

Mahn presented numerous witnesses at the penalty phase and argued that numerous mitigators applied to his committing these murders. (T 1679-87). His sentencing memorandum listed five statutory mitigators (no significant criminal history, both mental mitigators, extreme duress, and age) and seven nonstatutory mitigators (family background, remorse, potential for rehabilitation, alcohol\drug use, mental problems, abuse, and voluntary confession) that would be argued for the judge's consideration. (R 235) . The trial court considered each of the proposed mitigators in the sentencing orders (R 290-94; 302-05) and, based on the evidence presented in the case, found that none of the statutory mitigators existed. (R 290-92; 302-03). As to the proposed nonstatutory mitigators, the court held that Mahn's alcohol and drug use did not constitute a mitigator because there was no evidence Mahn was under the influence of alcohol and/or drugs when he committed these murders. (R 293; 305). The court

found that the other proposed nonstatutory mitigators had been established and ♑♋❖♏ "substantial" weight to Mahn's family background and abuse and "little" weight to the others. (R 292-94; 304-05).

Now, Mahn complains about the trial court's treatment of the statutory mental mitigators and Mahn's age, his mental problems as nonstatutory mitigation, and his alcohol and drug use. Contrary to the current contentions, the trial court properly considered all of the evidence, and Mahn has demonstrated no reversible error.

This Court set out the manner in which trial courts should address proposed mitigating evidence in Roaers v. State, 511 So. 2d 526 (Fla. 1987), cert. denied, 484 U.S. 1020, 108 S. Ct. 733, 98 L. Ed. 2d 681 (1988). According to Rogers, 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 v. State, 571 So. 2d 415, 419 n.5 (Fla. 1990); Lucas v. State, 613 So. 2d 408 (Fla. 1992), cert. denied, 114 S. Ct. 136, 126 L. Ed. 2d 99 (1993). A trial court has

broad discretion in determining whether mitigators apply, and the decision on whether the facts establish any particular mitigator lies with the trial court and will not be reversed because this Court or an appellant reaches a contrary conclusion. Foster v. State, 654 So. 2d 111 (Fla. 1995); Pietri v. State, 644 So. 2d 1347 (Fla. 1994), cert. denied, 132 L. Ed. 2d 836 (1995); Wvatt v. State, 641 So. 2d 355 (Fla. 1994), cert. denied, 115 S. Ct. 1372, 131 L. Ed. 2d 227 (1995); Arbelaez v. State, 626 So. 2d 169 (Fla. 1993), cert. denied, 114 S. Ct. 2123, 128 L. Ed. 2d 678 (1994); Preston v. State, 607 So. 2d 604 (Fla. 1992), cert. denied, 113 S. Ct. 1619, 123 L. Ed. 2d 178 (1993); 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 the facts do not establish a mitigator "will be presumed correct and upheld on review if supported by 'sufficient competent evidence in the record."' Campbell, 571 So. 2d at 419 n.5 (quoting Brown v. Wainwright, 392 so. 2d 1327, 1331 (Fla. 1991)); Duncan v. State, 619 So. 2d 279 (Fla.), cert. denied, 114 S. Ct. 453, 126 L. Ed. 2d 385 (1993); 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). Resolving conflicts in the

evidence is the trial court's duty, and its decision 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; Pireci; Gunsby v. State, 574 So. 2d 1085 (Fla.), cert. denied, 112 S. Ct. 136, 116 L. Ed. 2d 103 (1991). Moreover, "the relative weight given each mitigating factor is within the province of the sentencing court." Campbell, 571 so. 2d at 420; Windom v. State, 656 So. 2d 432 (Fla. 1995); Foster; 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); Mann v. State, 603 So. 2d 1141 (Fla. 1992); 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).

Applying these standards to the instant case, it is obvious that the trial court considered the mitigating evidence in a proper manner. The trial court made identical findings on the mitigators for each of the victims. As to the first mental mitigator, committed while under the influence of extreme mental or emotional disturbance, the court found:

> All the doctors that testified in this case found no psychosis in this Defendant. Dr. Thomas testified that the Defendant was faking. Dr. Bingham testified that he was exaggerating. Dr. Larson testified that the

> Defendant was faking and malingering. All doctors that examined the Defendant said he was exaggerating the symptoms. This mitigating circumstance does not exist.

(R 291; 302). The court made the following findings regarding the second mental mitigator (whether the capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired):

> The doctors that testified in this case indicated that the Defendant had the ability to appreciate the criminality of his conduct and conform his conduct to the requirement of law, but he **was** unwilling to do so. This mitigating circumstance does not exist.

(R 291-92; 303). Contrary to Mahn's current contention, the trial court's findings regarding, and rejection of, the mental mitigators **are** consistent with the experts' testimony and are supported by the record.

Mahn called two mental health professionals at the penalty phase. Charles Thomas, a clinical psychologist who was appointed to examine Mahn as to his competency to stand trial (T 1375; R 29), testified that Mahn "knew what he was doing at the time of the offense and that he knew it was wrong." (T 1376). Based on Mahn's long history of behavioral problems, i.e., stealing, assaults, fighting, Thomas diagnosed him as having an antisocial personality. (T 1376-77). When asked (T 1381-82), Thomas could not **say** what

impact Mahn's antisocial personality had on his ability to conform his conduct to the requirements of the law (T 1383), but reiterated that Mahn knew what criminal behavior was. (T 1382). On cross-examination Thomas testified that he could not say that Mahn's background was a contributing factor to his murdering the victims. (T 1390). Thomas also testified that Mahn was malingering and "grossly exaggerating his psychological symptoms." (T 1391). When asked about Mahn's ability to conform his conduct to the requirements of the law, Thomas responded 'He does not do it," even though Mahn knew his conduct was wrong. (T 1393). Thomas testified that Mahn's lack of a psychotic state, his motives for the killings, and his detailed descriptions of his actions the night of the murders convinced him that Mahn knew what he was doing and that he knew right from wrong. (T 1395-96). On redirect examination Thomas stated that Mahn had some symptoms of a mental disorder even though he was "grossly exaggerating" those symptoms. (T 1397). Thomas agreed with the prosecutor that Mahn's not abiding by the law was a conscious act that he knew was wrong, yet he still did it. (T 1399). Finally, Thomas testified that Mahn had no symptoms of paranoia (T 1399) or schizophrenia. (T 1400).

John Bingham, a licensed mental health counselor, also testified on Mahn's behalf. The court allowed Bingham to testify,

but refused to accept him as an expert in substance abuse. (T 1511). Bingham testified that Mahn's "personality and behavior is consistent with an individual that has abused multiple drugs" (T 1515), but he offered no testimony that Mahn had used drugs the night of the murders or that drug use caused these murders. On cross-examination Bingham testified that Mahn exaggerated his symptoms (T 1516) and, specifically, that he could not say that the murders were due to drug use or any mental problems. (T 1518). Furthermore, nothing led Bingham to believe that Mahn was under the influence of alcohol or drugs when he killed the victims (T 1523), and he could not say how LSD, cocaine, or marijuana would affect Mahn. (T 1523-24).

The state presented James Larson, a clinical psychologist, as a rebuttal witness. Larson examined Mahn prior to trial in reference to Mahn's competency to stand trial and his notice of insanity. (T 1623-24) . Larson found no formal thought disorder (T 1625), found that Mahn was in contact with reality (T 1625-26), and that he was malingering (T 1627), which "has to do with an individual who is trying to either greatly exaggerate his symptoms or completely make up a mental disorder." (T 1626). Larson testified that Mahn denied using drugs or alcohol the day of the murders and also denied being under the influence of hallucinations

or delusions during the murders. (T 1628). Larson found that Mahn could answer questions in a relevant and appropriate manner when he chose to do so (T 1630) and that he had no mental disease, infirmity, or defect. (T 1631). In Larson's opinion Mahn engaged in antisocial behavior, "a personality disorder that is used - designed for criminal behavior." (T 1631).

Contrary to Mahn's contention, the record supports the trial court's findings. The experts did not testify that the statutory mental mitigators applied, and Mahn has shown no error in the trial court's refusal to find those mitigators. Jones v. State, 652 So. 2d 346 (Fla. 1995); Foster; Pittman v. State, 646 So. 2d 167 (Fla. 1994), cert. denied, 115 S. Ct. 1982, 131 L. Ed. 2d 870 (1995); Duncan v. State, 619 So. 2d 279 (Fla.), cert. denied, 114 S. Ct. 453, 126 L. Ed. 2d 385 (1993); Preston; Bruno v. State, 574 So. 2d 76 (Fla.), cert. denied, 502 U.S. 834, 112 S. Ct. 112, 116 L. Ed. 2d 81 (1991).

The trial court considered Mahn's mental problems as non-statutory mitigation and made the following findings:

> #5. The Defendant has mental problems as testified by the doctors. They say he has a personality defect. All agree that he understands the difference between right and wrong and will not conform to society's rules. The doctors say he has the ability to conform, but not the desire or the willingness to do

> so. The court finds that this mitigating circumstance was proven, but gives it little weight in the weighing process.

(R 293; 305). Contrary to Mahn's argument, the trial court did not rely "on a misstatement of the testimony and conclusions of the experts." (Initial brief at 72). Instead, as set out above, the record supports the trial court's findings, Mahn's real complaint is that the court should have given more weight to this nonstatutory mitigation. As set out earlier, however, the weight to be given a mitigator is left to the trial court's discretion. Mahn has demonstrated no abuse of discretion, and no relief is warranted on this issue.

In rejecting Mahn's age as a statutory mitigator, the court found:

> The double murder took place on the Defendant's 20th birthday. None of the doctors that testified said that the Defendant was retarded. The Defendant had recently received his GED. The Defendant knew the difference between right and wrong. The Defendant's age at the time of the crime is not a mitigating factor.

(R 292; 303). Mahn acknowledges that he was not a minor when he committed these murders and that 'the trial court was not legally bound to find this circumstance." (Initial brief at 73). He argues, however, that the court should have found his age to be a

mitigator due to his lack of maturity.[6] There is no merit to this argument.

"Mitigating circumstances must, in some way, ameliorate the enormity of the defendant's quilt." Eutzy v. State, 458 So. 2d 755, 759 (Fla.), cert. denied, 471 U.S. 1045, 105 S. Ct. 2062, 85 L. Ed. 2d 366 (1985). As this Court has recognized, "age is simply a fact, every murderer has one." Echols v. State, 484 So. 2d 568, 575 (Fla. 1985), cert. denied, 479 U.S. 871, 107 S. Ct.241, 93 L. Ed. 2d 166 (1986); Mungin v. State, 21 Fla. L. Weekly S66 (Fla. Feb. 8, 1996). One's age standing alone, however, does not constitute a mitigator unless one is a minor. See Ellis v. State, 622 So. 2d 991 (Fla. 1993). Instead, if one is not a minor, "[t]here is no per se rule which pinpoints a particular age as an automatic factor in mitigation. The propriety of a finding with respect to this circumstance depends upon the evidence adduced at trial and at the sentencing hearing." Peek v. State, 395 So. 2d 492, 498 (Fla. 1980), cert. denied, 451 U.S. 964, 101 S. Ct. 2036, 68 L. Ed. 2d 342 (1981). The record supports the trial court's rejection of Mahn's age as a statutory mitigator because the proof adduced at trial did not link his age to anything else that would

[6] Mahn did not ask the court to consider his age as a nonstatutory mitigator. Lucas v. State, 568 So. 2d 18 (Fla. 1990).

mitigate these crimes. Merck v. State, 664 So. 2d 939, 942 (Fla. 1995) ('the trial court may find or decline to find age as a mitigating factor in respect to a defendant who is 19"); Cooper v. State, 492 So. 2d 1059 (Fla. 1986) (trial court did not err in refusing to find defendant's age of eighteen years to be a mitigator), cert. denied, 479 U.S. 1101, 107 S. Ct. 1330, 94 L. Ed. 2d 181 (1987); Garcia v. State, 492 So. 2d 360, 367 (Fla.) ('The fact that a murderer is twenty years of age, without more, is not significant, and the trial court did not err in not finding it as mitigating"), cert. denied, 479 U.S. 1022, 107 S. Ct. 680, 93 L. Ed. 2d 730 (1986); Peek, 395 So, 2d at 498 (record supported trial court's rejection of defendant's age, nineteen years, as a mitigator). Mahn has demonstrated no error in the trial court's findings, and this claim should be rejected.

As his final complaint about the trial court's treatment of the mitigating evidence, Mahn argues that the court should have found his alcohol and drug use to be a nonstatutory mitigator. The court rejected this proposed mitigator, finding as follows:

> #4. The Defendant began drinking alcohol at a very young age and would get drunk and fight and cause trouble most of his life. The Defendant has used all sorts of illegal drugs in the past, but the evidence in this case is clear that the Defendant was not under the influence of drugs or alcohol when he

> committed this double First Degree Murder. He said he wasn't and there is no evidence to suggest such. The Court gives this no weight in the weighing process.

(R 291; 305). The record supports this finding.

When arrested, Mahn made a gratuitous statement to an Oklahoma police officer that he had taken LSD and shot up cocaine prior to the murders. (T 1002-03). Mahn also told another police officer that the last time he used any drugs was three days before the murders, (T 1086). Mahn did not mention any drug or alcohol use in his videotaped interviews (T 1040-82) and specifically denied using drugs or alcohol on the day of the murders when interviewed by Dr. Larson. (T 1628). Even John Bingham, Mahn's expert, could not say that the murders were caused by any drug use. (T 1518). Stephen Cone and David Butler, friends of Mahn from Texas, testified that Mahn used drugs while in Texas (T 1459; 1492-93), but Mahn told each of them that he stopped using drugs before going to Florida (T 1472; 1501). Eddie Peterson, a friend of Mahn's in Florida, testified that he saw Mahn drink alcohol, but that he never saw Mahn use drugs. (T 1481).

When it contributes to a crime, a defendant's alcohol and drug abuse **may** constitute mitigation. See Johnson; Ross, 474 So. 2d 1170 (Fla. 1985). The evidence, however, must show that the

alcohol and/or drug use influenced or caused the defendant to commit murder. Mungin; Duncan; Johnson. As this Court has held: "A trial court does not err in rejecting this mitigating circumstance [alcohol and drug use] when it is inconsistent with testimony presented and in light of the fact that the defendant was able to give a detailed account of the crime." Cooser, 492 So. 2d at 1062, Based on the evidence, the trial court properly rejected Mahn's drug and alcohol use as a nonstatutory mitigator. Because it is supported by the record, the trial court's finding must be upheld. Mahn complains that the court gave this item "no weight," but recognizes that such "is a finding that the mitigating factor does not exist." (Initial brief at 76).

Mahn has shown no error in the trial court's consideration of the proposed mitigators, and that court's findings should be affirmed. Even if this Court were to find some error in the trial court's findings, such error would be harmless. Given the strength and number of the aggravators and the circumstances of the terrible crimes Mahn committed, the mitigation is negligible, and there is no likelihood of a different sentence. Barwick v. State, 660 So. 2d 685 (Fla. 1995); Pietri v. State, 644 So. 2d 1347 (Fla. 1994), cert. denied, 132 L.E.2d 836 (1995); Wuornos v. State, 644 So. 2d 1000 (Fla. 1994), cert. denied, 115 S. Ct. 1705, 131 L. Ed. 2d 566

(1995); Armstrong v. State, 642 So. 2d 730 (Fla. 1994), cert. denied, 115 S. Ct. 1799, 131 L. Ed. 2d 726 (1995); Peterka v. State, 640 So. 2d 59 (Fla. 1994), cert. denied, 115 s. ct. 940, 130 L. Ed. 2d 884 (1995).

ISSUE V

WHETHER THE TRIAL COURT PROPERLY OVERRODE THE JURY'S RECOMMENDED LIFE SENTENCE FOR THE MURDER OF DEBBIE SHANKO.

Mahn argues that the trial court should not have overruled the jury's recommendation and sentenced him to death for Debbie Shanko's homicide. There is no merit to this argument.

The jury recommended that Mahn be sentenced to death for killing Anthony, but recommended life imprisonment for Debbie's murder. (R 128; T 1701). The trial court, however, overrode the jury's recommendation and sentenced Mahn to death on both counts of first-degree murder. The court's findings contain the following statement regarding the override:

> The Court has very carefully considered and weighed the Aggravating and Mitigating circumstances found to exist in this case, being ever mindful that human life is at stake in the balance. The Court finds that the jury's recommendation of a life sentence could have been based only on minor, non-statutory mitigating circumstances or sympathy and was wholly without reason. In this case the

> evidence of mitigation is minuscule in comparison with the enormity of the crime committed.
>
> In this case the sentence of death is so clear and convincing that virtually no reasonable person could differ, and a jury override in light of the standard pronounced in Tedder v. State, 322 So.2nd, 908 (Fla. 1975) would be warranted. Bolender v. State 422 So.2nd, 833, 837 (Fla. 1982). See also Zeigler v. State, 16 FLW, S, 257, 258 (April 19, 1991) .

(R 294).

Mahn sets out all of the proposed mitigating evidence that he presented to the jury and judge and concludes that the jury's recommendation of life imprisonment could reasonably have been based on the mitigating circumstances present in this case. (Initial brief at 79). As demonstrated in issue IV, supra, the trial court did not err in its consideration of this evidence. Just as the mitigating evidence did not outweigh the aggravators regarding Anthony's death, that same evidence did not outweigh the same aggravators as to Debbie's death.'

Mahn's argument ignores the fact that an "override is not improper simply because a defendant can point to some evidence

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[7] The propriety of the override is only emphasized by cross-appeal issues III and IV, infra, which show that the court should have found two more aggravators in regard to Debbie Shanko's murder.

established in mitigation." Zeigler v. State, 580 So. 2d 127, 131 (Fla.), cert. denied, 502 U.S. 946, 112 S. Ct. 390, 116 L. Ed. 2d 340 (1991). He also ignores the fact that this Court has affirmed overrides in numerous cases where the defendants killed more than one person. Garcia v. State, 644 So. 2d 59 (Fla. 1994); Williams v. State, 622 So. 2d 456 (Fla.), cert. denied, 114 S. Ct. 570, 126 L. Ed. 2d 570 (1993); Robinson v. State, 610 So. 2d 1288 (Fla. 1992), cert. denied, 114 S. Ct. 1205, 127 L. Ed. 2d 553 (1994); Coleman v. State, 610 So. 2d 1283 (Fla. 1992), cert. denied, 114 S. Ct. 321, 126 L. Ed. 2d 267 (1993); Zeigler; Porter v. State, 429 So. 2d 293 (Fla.), cert. denied, 464 U.S. 865, 104 S. Ct. 202, 78 L. Ed. 2d 176 (1983). Garcia, in fact, is directly on point with this case. Garcia broke into the home of two elderly sisters and killed both of them. The jury recommended death on one count and life imprisonment on the other. Finding the same aggravators applicable to each murder, the trial court overrode the life recommendation and imposed two death sentences. This Court held that the trial court properly considered the mitigating evidence and correctly found that the aggravators were supported by the record. The Court affirmed both death sentences because there were no differences between the murders that justified the jury's differentiating between them, finding "that under the circumstances

of this case no reasonable person could differ as to the appropriateness of the death penalty for the murder of" the second sister. 644 So. 2d at 64.

The same result should be reached in this case. The trial judge found that three aggravators (prior conviction of violent felony, HAC, and CCP) had been established for each murder. The court also made the same findings for each murder as to which proposed mitigators did and did not apply. As shown in issues III and IV, supra, the trial court's findings were proper and supported by the evidence. The trial court correctly applied the test from Tedder v. State, 322 So. 2d 908 (Fla. 1975), and did not err in concluding that reasonable people could not differ regarding the propriety of the death sentence for Debbie's murder. Mahn has presented nothing showing that the facts of this case are so clear and convincing that no reasonable person could differ as to the appropriateness of the override.

The cases that Mahn cites to support his argument are factually distinguishable. In Amazon v. State, 487 So. 2d 8 (Fla. 1986), this Court found that the mitigating evidence Amazon presented supported the jury's recommendation of life imprisonment. Amazon's evidence, however, exceeds Mahn's both in quantity and quality. Moreover, contrary to Mahn's contention, and as discussed

in issue III, supra, these were not "domestic" murders. Therefore, cases such as Douglas v. State, 575 So. 2d 165 (Fla. 1991), Fead v. State, 515 So. 2d 176 (Fla. 1987), Irizzary v. State, 496 So. 2d 822 (Fla. 1986), Herzog v. State, 439 So. 2d 1372 (Fla. 1983), Phippen v. State, 389 So. 2d 991 (Fla. 1979), Halliwell v. State, 323 So. 2d 557 (Fla. 1976), and Tedder are inapposite and do not support Mahn's argument.

Numerous aggravators apply to these murders, and, in comparison with the enormity of these crimes, the mitigators are inconsequential, No reasonable basis exists for the jury's recommendation of life imprisonment, and the override should be affirmed.

ISSUE VI

WHETHER MAHN'S DEATH SENTENCES ARE PROPORTIONATE.

Mahn argues that his death sentences are disproportionate. There is no merit to this issue.

Mahn adopts the arguments he presented in issue V that the trial court should not have overridden the jury's recommendation of life imprisonment for the murder of Debbie Shanko. As the state

demonstrated, however, that recommendation was unreasonable, and the trial court correctly imposed two death sentences.

In its proportionality review this Court must 'consider the totality of circumstances in a case" and 'compare it with other capital cases." Porter v. State, 564 So. 2d 1060, 1064 (Fla. 1990), cert. denied, 498 U.S. 1110, 111 S. Ct. 1024, 112 L. Ed. 2d 1106 (1991). To perform this review, the Court is "required to weigh the nature and quality" of the aggravators and mitigators in comparison with other cases. Kramer v. State, 619 So. 2d 274, 277 (Fla. 1993). With these precepts in mind it is obvious that the cases Mahn relies on do not support his argument that his death sentences are disproportionate.

Yet again, Mahn claims that these murders were "domestic." Domestic murders, however, uniformly involve longstanding, heated, ongoing intra-family disputes where defendants kill their wives, girlfriends, children, or other family members. Here, on the other hand, Mahn had not known the victims for much more than a year and shared his father's home with them only sporadically. Mahn had no ongoing or longstanding dispute with the victims. Instead, he killed them to get revenge on his father, the real object of his hatred.

Thus, the cases Mahn relies on, all of them domestic, are readily distinguishable from this case on their basic facts. The quality and quantity of the aggravators and mitigators in the cited cases also distinguish them. For instance, Farinas v. State, 569 So. 2d 425 (Fla. 1990), state, 561 So. 2d 560 (Fla. 1990), and Wilson v. State, 493 So. 2d 1019 (Fla. 1986), all had two aggravators. This Court, however, found the death sentences disproportionate because the murders resulted from heated domestic confrontations. In contrast the instant case has numerous aggravators and little in mitigation, and the murders resulted from Mahn's cold, calculated, and fully premeditated plan of revenge.

The other cases Mahn cites are all single-aggravator cases, i.e., Chakv v, State, 651 So. 2d 1169 (Fla. 1995); White v. State, 616 so. 2d 21 (Fla. 1993); Klokoc v. State, 589 So. 2d 219 (Fla. 1991); Penn v. Stat& 574 So. 2d 1079 (Fla. 1991); Ross v. State, 474 so. 2d 1170 (Fla. 1985); Blair v. State, 406 So. 2d 1103 (Fla. 1981). Besides having little in aggravation, these cases contain considerable mitigation, especially mental mitigation. E.g., mite; Klokoc; Penn. Here, on the other hand, the mitigation is inconsequential. Moreover, the aggravators are substantial and include both HAC and CCP, two of the strongest aggravators. See Fitzgerald v. State, 527 So. 2d 809 (Fla. 1988).

Instead of the cases Mahn relies on, other cases provide more appropriate comparisons to the instant case. Both Garcia v. State, 644 So. 2d 59 (Fla. 1994), and Porter v. State, 429 So. 2d 293 (Fla.), cert. denied, 464 U.S. 865, 104 S. Ct. 202, 78 L. Ed. 2d 176 (1983), are double murder cases where this Court affirmed jury overrides. The aggravators and mitigators in these cases are comparable to the aggravators and mitigators in this case and demonstrate that the death sentences here are appropriate. In addition to Garcia and Porter there are numerous other multiple-murder cases containing aggravators comparable to those in this case and similar mitigation (some with much more mitigation than Mahn) where this Court found that the trial courts correctly considered the mitigating evidence and then properly weighed the aggravators and mitigators: Windom v. State, 656 So. 2d 432 (Fla. 1995); Jones v. State, 652 So. 2d 346 (Fla. 1995); Pittman v. State, 646 So. 2d 167 (Fla. 1994), cert. denied, 115 S. Ct. 1982, 131 L. Ed. 2d 870 (1995); Stein v. State, 632 So. 2d 1361 (Fla.), cert. denied, 115 S. Ct. 111, 130 L. Ed. 2d 58 (1994); Asay v. State, 580 So. 2d 610 (Fla.), cert. denied, 502 U.S. 895, 112 S. ct. 265, 116 L. Ed. 2d 218 (1991); Chandler v. State, 534 So. 2d 701 (Fla. 1988), cert. denied, 490 U.S. 1075, 109 S. Ct. 2089, 104 L. Ed. 2d 652 (1989); Correll v. State, 523 So. 2d 562 (Fla.),

cert. denied, 458 U.S. 871, 109 S. Ct. 183, 102 L. Ed. 2d 152 (1988); Huff v. State, 495 So. 2d 145 (Fla. 1986); Hooper v. State, 476 So. 2d 1253 (Fla. 1985), cert. denied, 475 U.S. 1098, 106 S. ct. 1501, 89 L. Ed. 2d 901 (1986); Rutledge v. State, 374 So. 2d 975 (Fla. 1979), cert. denied, 446 U.S. 913, 100 S. Ct. 1844, 64 L. Ed. 2d 267 (1980).

When the instant case is set beside truly comparable cases, it is obvious that these murders are among the most aggravated and least mitigated. Mahn's death sentences are proportionate and should be affirmed. Even if this Court decides that the trial court should not have overridden the jury's recommendation and sentenced Mahn to death for Debbie's murder, the death sentence for Anthony's murder should be affirmed. Walls v. State, 641 So. 2d 381 (Fla. 1994), cert. denied, 115 S. Ct. 943, 130 L. Ed. 2d 887 (1995); Occhicone v. State, 570 So. 2d 902 (Fla. 1990), cert. denied, 500 U.S. 938, 111 S. Ct. 2067, 114 L. Ed. 2d 471 (1991); Turner v. State, 530 So. 2d 45 (Fla. 1987), cert. denied, 489 U.S. 1040, 109 s. ct. 1175, 103 L. Ed. 2d 237 (1989).

ISSUE VII

WHETHER THE TRIAL COURT ERRED IN GIVING THE STANDARD JURY INSTRUCTION ON THE CCP AGGRAVATOR.

Mahn argues that the trial court erred in giving the then-standard instruction on the CCP aggravator. This issue has not been preserved for appeal, and no reversible error has been demonstrated.

Mahn filed a pretrial motion attacking, in shotgun fashion, the constitutionality of Florida's death penalty statute. (R 83-91). One of those boilerplate claims argued that the CCP aggravator is unconstitutional. (R 88-89). At the penalty-phase charge conference defense counsel objected to instructing on that aggravator because the facts did not support it. (T 1296-97). Mahn also did not propose an alternative CCP instruction.

To preserve this claim, a specific objection to the wording of the CCP instruction must be made at trial. Gamble v. State, 659 So. 2d 242 (Fla. 1995); Thompson v. State, 648 So. 2d 692 (Fla. 19941, cert. denied, 132 L. Ed. 2d 286 (1995); Jackson v. State, 648 so. 2d 85 (Fla. 1994); Walls v. State, 641 So. 2d 381 (Fla. 1994), cert. denied, 115 S. Ct. 943, 130 L. Ed. 2d 887 (1995). Mahn's failure to make a sufficient objection to the CCP

instruction precludes appellate review because this issue has not been preserved.

Even if this issue were cognizable now, no relief would be warranted. As demonstrated in issue III, supra, these murders were cold, calculated, and premeditated with no pretense of moral or legal justification under any definition of those terms. Any instructional error regarding the CCP aggravator was harmless, and this issue should be denied.

ISSUE VIII

WHETHER THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON THE HAC AGGRAVATOR.

Mahn argues that the trial court erred in giving the standard jury instruction on the HAC aggravator. Besides not being preserved for appellate review, this issue has no merit.

Prior to trial, Mahn filed a motion, containing numerous boilerplate claims, complaining that Florida's death penalty statute is unconstitutional. (R 83-91). Included in this shotgun challenge is the allegation that the CCP and HAC aggravators 'are unconstitutional because they do not narrow the **class** of death eligible persons, or channel the discretion of the sentencer." (R 88). Contrary to Mahn's assertion (initial brief at 93), this

motion does not constitute an objection to the standard jury instruction and a request for a substitute instruction.

At the penalty-phase charge conference, defense counsel stated: "I object to heinous, atrocious and cruel. It's vague and ambiguous." (T 1295). Counsel also argued that the facts did not support finding the HAC aggravator. (T 1295). Given that the pretrial motion complained only about the constitutionality of the aggravator itself, this objection is insufficient to constitute an objection to the wording of the instruction on the HAC aggravator. Besides failing to make a sufficient, specific objection, Mahn also failed to propose an alternative instruction. This issue, therefore, has not been preserved for appellate review. Walls v. State, 641 So. 2d 381 (Fla. 1994), cert. denied, 115 S. Ct. 943, 130 L. Ed. 2d 887 (1995).

As Mahn admits (initial brief at 93), there is also no merit to this issue. This Court approved the instruction given in this case in Hall v. State, 614 So. 2d 473 (Fla.), cert. denied, 114 S. ct. 109, 126 L. Ed. 2d 74 (1993). Hall has been followed consistently. E.g., Merck v. State, 664 So. 2d 939 (Fla. 1995); Finney v. State, 660 So. 2d 674 (Fla. 1995); Johnson, 660 So. 2d 637 (Fla. 1995); Fennie v. State, 648 So. 2d 95 (Fla. 1994), cert. denied, 115 S. Ct. 1120, 130 L. Ed. 2d 1083 (1995); Wall.;

Taylor v. State, 630 So. 2d 1038 (Fla. 1993), cert. denied, 115 S. ct. 518, 130 L. Ed. 2d 424 (1994). Mahn has shown no reason why this Court should reconsider this issue, and it should be denied.

Furthermore, even if an erroneous instruction had been given, no relief would be warranted. As demonstrated in issue III, supra, these murders were heinous, atrocious, or cruel under any definition of those terms.

CROSS-APPEAL ISSUE I

WHETHER THE TRIAL COURT ERRED IN GIVING A JURY INSTRUCTION DURING THE GUILT PHASE.

During the guilt-phase charge conference, defense counsel asked that the jury be instructed on voluntary intoxication. (T 1113). After reading the instruction, the court asked: "What evidence is there that alcohol and drugs was involved in this other than his statement that he indicated that he has used drugs in the past?" (T 1114). The court noted that there had been no testimony that drugs had any influence on the case and questioned if the evidence were sufficient to support instructing on voluntary intoxication. (T 1115-16). Defense counsel responded: "Well, Judge, we intend to support the statement that was made to Officer Heim that the defendant took cocaine and LSD prior to the incident with the witnesses that we'll be calling tomorrow.'/ (T 1116).

When the court asked if counsel were saying that the evidence was sufficient or insufficient, counsel responded that there was "a conflict in the testimony that has been presented so far." (T 1116). The court asked for an explanation of the conflict (T 1116-17), and, after further discussion, counsel stated: "It may be at this time, Judge, that it's premature since our evidence has not been presented. If we could readdress this at a later time." (T 1119). The court agreed to wait and see what the defense's evidence was. (T 1119).

When the proceedings resumed the following morning, the defense announced that it would not present any witnesses. (T 1129-30). In discussing the jury package instruction the court said the voluntary intoxication instruction would not be included, and defense counsel asked to argue that. (T 1131). Thereafter, counsel argued that Mahn's statement to Officer Heim[8] that he used cocaine and LSD prior to the murders and another witness' statement that Mahn said he took drugs three days before the murders presented enough evidence for the jury to decide the issue of voluntary intoxication. (T 1133-35). The prosecutor argued that the defendant had to show his actions were affected by the use of

[8] Heim's testimony is the subject of cross-appeal issue II.

an intoxicant before an instruction on voluntary intoxication should be given. (T 1138-39). The court agreed with the prosecutor's assessment and noted that "the only evidence in this case is his gratuitous statement at the time that he got arrested that he had taken some cocaine and LSD." (T 1140-41). The judge reminded counsel of the previous day's discussion and decided to think further about the issue. (T 1142-43).

The court had the jury brought into the courtroom, and the defense rested. (T 1147). After informing the jury of the upcoming schedule, the court recessed the proceedings so that counsel could prepare for closing argument. (T 1148-49). With the jury out of the courtroom the judge again brought up the issue of voluntary intoxication and what an appellate court might do if the instruction were not given. (T 1149). The judge stated his belief that no reversible error had been committed in the case (T 1149), but voiced his concern with having an appellate court decide otherwise. (T 1150). The court then stated:

> I would like to be double safe, maybe give it, even though I think legally it doesn't have to be given which is the - i.e., guess the safe way out where error cannot even be claimed on the record that, you know, the jury instruction that would have given this guy an escape clause - escape on this charge was not given.

> Now, I still say for the purpose of the appellate court I think the record is absolutely clear that no evidence has been produced that drugs played a part of this. And I don't think just because you mention the word drugs that it now becomes an issue. I don't think that is the law and I feel - I bet my life on it. But by the same token I don't want to try to speculate on what some appellate court is going to do somewhere down the line. If I feel that this has been an error or at least reversible error free trial up to this point to have this one thing hanging out there that might be a problem legally that is, and that's, you know, I mean I would feel very very confident not giving it. If the jury convicted him of first degree murder I would feel very very confident it would not be reversed. But I would feel more confident if it was given and they found him guilty that it would not be reversed. That's kind of where we are.

(T 1151-52). The state objected to instructing the jury on voluntary intoxication (T 1152), but the court decided to give the instruction. (T 1155).

As stated by this Court:

> Voluntary intoxication has been recognized as a defense in this state for the last century. Linehan v. State 476 So. 2d 1262 (Fla. 1985). A defendant is entitled to an instruction on the theory of defense if the evidence supports giving such an instruction. Robinson v. State, 574 So. 2d 108 (Fla. 1991). However, "where the evidence shows the use of intoxicants but does not show intoxication, the [voluntary intoxication] instruction is not required." Linehan, 476 So. 2d at 1264.

Savage v. State, 588 So. 2d 975, 978 (Fla. 1991); Lamb-ix v. State, 534 so. 2d 1151 (Fla. 1988); Hardwick v. State, 521 So. 2d 1071 (Fla. 1988). Moreover, a self-serving statement given during a confession that is not supported by independent evidence or testimony is not sufficient to warrant giving a voluntary intoxication instruction. Bertolotti v. State, 534 So. 2d 386 (Fla. 1988); Savage.

It is obvious that the trial court was correct in stating that the evidence did not support giving an instruction on voluntary intoxication. The only "evidence" that Mahn used drugs prior to committing these murders was his gratuitous statement to Officer Heim. This is insufficient to warrant such an instruction, and the trial court should have sustained the prosecutor's objection.

The state sympathizes with the court's dilemma - give an unsupported instruction or risk appellate reversal for not giving it. The fear of such reversal, however, should not control judicial proceedings. Instead, trial judges should make their rulings on the evidence before them and should be confident of the deference that appellate courts will pay to their decisions.

The state is not asking for reversal on this point, but for direction that will assure the trial courts that their rulings will not be lightly disregarded. Moreover, if this case were to be

reversed for a new trial, the state would **ask** this Court to declare that a voluntary intoxication instruction should not be given unless the defense demonstrates a direct connection between these murders and Mahn's use of drugs or **alcohol.**

CROSS-APPEAL ISSUE II

WHETHER THE TRIAL COURT ERRED BY ALLOWING THE DEFENSE TO CROSS-EXAMINE A STATE WITNESS ABOUT AN GRATUITOUS COMMENT MADE BY MAHN.

The state called Roy Heim, a detective in the investigation unit attached to the Tulsa Police Department homicide squad (T 954), to introduce photographs of the car and its contents into evidence. (T 956-72). After cross-examination, defense counsel stated: "I need this witness retained." (T 975). Heim then asked if there were any way he could be released because he was to be the primary witness in a federal trial the following Tuesday and had missed three trials while waiting in Pensacola to testify in Mahn's trial. (T 976). When the court **asked** why Heim was needed, defense counsel responded that Heim had some discussions with Mahn. (T 977). Heim confirmed that, and defense counsel stated: "Of course, the State [has] very **carefully** steered around any statements the defendant made in the course of direct examination because that was not opened up. I want these statements testified to." (T 977).

The court then stated: "What we could do is call the jury back in and we can go ahead and let you make him your witness as if you would be doing that next" week. (T 978). Defense counsel agreed to the court's suggestion. (T 978). The prosecutor then stated her concern that Mahn's statement to Heim would be inadmissible hearsay and suggested a proffer. (T 979) . After hearing the proffer and the parties' argument, the court held that Mahn's statement that he used cocaine and LSD prior to the murders was not a declaration against interest or a spontaneous statement. (T 992). The court then expressed its concern with appellate review and finally stated:

> Well, first of all, let's get to the ruling. The ruling is it's going to come in. I'm very concerned about this case, of having to redo this case all over again about two years from now when all the witnesses are scattered across the United States and have to bring all these people back and all this business two years from now over this one thing. And as far as I'm concerned so far in this trial no reversible error has been made.

(T 996) .

When court reconvened, instead of having the defense take Heim out of turn as its witness, the court had the state recall Heim and examine him. (T 1001). During this examination, Heim testified that Mahn said he used drugs prior to the murders. (T 1002).

Then, defense counsel cross-examined the witness about that statement. (T 1009).

In Steinhorst v. State, 412 So. 2d 332, 337 (Fla. 1982), this court held

> that questions on cross-examination must either relate to credibility or be germane to the matters brought out on cross-examination. If the defendant seeks to elicit testimony from an adverse witness which goes beyond the scope encompassed by the testimony of the witness on direct examination, other than matters going to credibility, he must make the witness his own. Stated more succinctly, this rule posits that the defendant may not use cross-examination as a vehicle for presenting defensive evidence.

(Citations omitted, emphasis supplied); Penn v. State, 574 So. 2d 1079 (Fla. 1991); Lambrix v. State, 494 So. 2d 1143 (Fla. 1986); Echols v. State, 484 So. 2d 568 (Fla. 1985), cert. denied, 479 U.S. 871, 107 S. Ct. 241, 93 L. Ed.2d 166 (1986).

As defense counsel acknowledged, cross-examination of Heim about Mahn's statement was impermissible the first time Heim testified because such questions would have exceeded the scope of direct examination. (T 977). The court correctly held that Mahn would have to call Heim as a defense witness to bring out this statement, but, inexplicably, did not require the defense to make

Heim its witness, Instead, the court had the prosecutor expand her direct examination so that the defense could ask its questions on cross-examination.

Again, as in cross-appeal issue I, the state is not asking for reversal, but for direction to the trial courts that the state should not be forced to prove an affirmative defense. Instead, as the trial court initially realized, the defense bears the burden of presenting evidence on an affirmative defense it wants to rely on, but cannot do so through cross-examination that exceeds the scope of direct examination. In the event that this Court holds that this case must be retried, the state asks this Court to direct the trial court to have the defense make Heim its witness if the instant set of events happens again.

CROSS-APPEAL ISSUE III

WHETHER THE TRIAL COURT ERRED IN REFUSING TO FIND THE FELONY MURDER (ROBBERY) AGGRAVATOR APPLICABLE TO DEBBIE SHANKO'S MURDER.

In the penalty-phase charge conference the trial court agreed to give the state's proposed instruction combining the felony murder and pecuniary gain aggravators. (T 1288). Thereafter, the court instructed the jury as follows:

> aggravating circumstance No. 2, the crime for which the defendant is to be sentenced was committed while he **was** engaged in the commission of or in attempt to commit or flight after committing or attempting to commit the crime of robbery, or the crime for which the defendant is to be sentenced was committed for financial gain.

(T 1689). In its findings of fact regarding Debbie Shanko's murder, the trial court refused to find that this aggravator applied, stating as follows:

> It is true that the jury convicted the Defendant of Robbery with a Deadly Weapon. It is also true that the taking of the property ($400.00 and an automobile) is only incidental to the killing and not a motive for it. The evidence seems to indicate that he took the victim's property as an afterthought after he kill[ed] the victim.

(R 289-90).

When the state produces sufficient evidence to support conviction of a felony, that evidence also supports the felony murder aggravator. Jones v. State, 652 So. 2d 346 (Fla. 1995); see also Finnev v. State, 660 So. 2d 674 (Fla. 1995); Sochor v. State, 619 So. 2d 285 (Fla.), cert. denied, 114 S. Ct. 638, 126 L. Ed. 2d 596 (1993); Lightbourne v. State, 438 So. 2d 380 (Fla. 1983), cert. denied, 465 U.S. 1051, 104 S. Ct. 1330, 79 L. Ed. 2d 725 (1984).

As demonstrated in direct appeal issue II, supra, the state produced substantial competent evidence to support Mahn's conviction of armed robbery. Contrary to the trial court's assumption, Mahn's taking the car and money was not an afterthought. Instead, Mahn fully intended to steal a car and the money, both to punish his father and to complete his revenge by escaping. That he could not steal his father's Corvette and had to settle for Debbie Shanko's car in no way lessened his intent to commit robbery. Mahn's admitting that he needed to steal Debbie's money to finance his flight supports finding a pecuniary gain motive for the murder. See Allen v. State, 662 So. 2d 323 (Fla. 1995). Both parts of the combined felony murder (robbery)/ pecuniary gain aggravator were established,[9] and the court erred in not finding the aggravator applicable to Debbie Shanko's murder. This Court should correct the error.

[9] Either felony murder (robbery) or pecuniary gain is sufficient to support finding this combined aggravator.

CROSS-APPEAL ISSUE IV

WHETHER THE TRIAL COURT ERRED IN NOT FINDING IN AGGRAVATION THAT DEBBIE SHANK0 WAS KILLED TO AVOID OR PREVENT A LAWFUL ARREST.

During closing argument the prosecutor argued that the avoid arrest aggravator applied to Debbie Shanko's murder because, according to Mahn's Oklahoma statement, she came into the room where Mahn was killing her son and he did not want her to be able to tell anyone that he killed Anthony Shanko. (T 1642). The trial court, however, decided that this aggravator did not apply. (R 290). The court erred in so finding.

Finding this aggravator is proper when witness elimination is one of the dominant motives for the killing. Fotopoulos v. State, 608 so. 2d 784 (Fla. 1992), cert. denied, 113 S. Ct. 2377, 124 L. Ed. 2d 282 (1993). As the trial court admitted, the state certainly has an argument that this aggravator applies. (R 290). Mahn's primary motive for these crimes **was** revenge on his father, which he planned to accomplish by killing Debbie and Anthony, stealing his father's Corvette, and then escaping. Mahn told Bobby Girten of the Oklahoma Highway Patrol that he killed Debbie because she interrupted his attack on Anthony. (T 952). When her son's cries caused Debbie to come to his aid, Mahn realized that he had

to kill her before she could summon help. Thus, eliminating her as a witness became a dominant motive for her murder. This Court, therefore, should hold that the avoid arrest aggravator is applicable to Debbie Shanko's murder.

CONCLUSION

Based on the foregoing, the State of Florida asks this Court to affirm Mahn's convictions and sentences.

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 Mr. William McClain, Assistant Public Defender, Leon County Courthouse, Fourth Floor North, 301 South Monroe St., Tallahasee, FL 32301, this 12th day of April, 1996.

Barbara J. Yates

/BARBARA J. YATES
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