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

REPLY BRIEF OF APPELLANT

AND

ANSWER BRIEF OF CROSS-APPELLEE

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TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS

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PRELIMINARY STATEMENT

The Appellant/Cross-Appellee, Jason James Mahn, relies on his Initial Brief in reply to the State's Answer Brief except for the following additions concerning Issues II, III, IV, V, VI, VII and VIII. Mahn answers the State's cross-appeal issues following the reply argument.

REPLY BRIEF ARGUMENT

ISSUE II:

ARGUMENT IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT THE TRIAL COURT ERRED IN PERMITTING THE CHARGE OF ROBBERY TO BE SUBMITTED TO THE JURY SINCE THE EVIDENCE WAS INSUFFICIENT TO PROVE MORE THAN A THEFT.

The State's argument concerning this issue is that Jason intended to take his father's Corvette and steal Debbie Shanko's money before the violence began. Answer Brief at 32-33. However, the facts simply do not support this position.

First, the State relies on statements Jason made in his confession and his penalty phase testimony to assert that he intended to steal his father's Corvette. (Tr 1064, 1592) Answer Brief at 32. This assertion is made implying that these statements prove an intent to steal the car before the homicides. Answer Brief at 32. However, a review of the record shows the opposite. (Tr 1064, 1592) Jason formulated an intent to take a car in order to flee after the violence occurred.

In his taped confession, Jason responded to questioning about what happened after the stabbings. (Tr 1062-1067) Jason said, "I started running around trying to find the keys to the car to get out of there because I realized what I just did and just wanted to get away." (Tr 1062) After questioning Jason about where Debbie and Anthony were inside the house, the detective asked about the car. (Tr 1062) Jason responded that he could not find the keys to the Corvette. (Tr 1063) He then took the keys to the Thunderbird after efforts to find the Corvette keys failed. (Tr 1063-1064) Jason did state, 'I wanted to take the

corvette" as he explained his actions taken in an effort to flee after the homicides.(Tr 1064) However, this statement does not support the State's position that he intended to take the Corvette before the violence occurred.

The State also relies on a statement Jason made in his penalty phase testimony. (Tr 1592) Answer Brief at 32. Of course, this testimony has no relevance to the question of whether the State presented sufficient evidence of a robbery during the guilt phase. Nevertheless, this testimony mirrored Jason's confession to the police on this point. (Tr 1592) Although Jason again said he wanted to take the Corvette, there is no indication he formed this intent before the homicides. In fact, Jason specifically denied that the homicides occurred because he wanted the Corvette:

> Q. You wanted to take your dad's red Corvette, didn't you?
>
> A. Yes.
>
> Q. That was one of the reasons that this happened?
>
> A. No.

(Tr 1592).

Second, the State asserts that the evidence contradicts the defense position that Jason took the money as an afterthought. Jason testified that he found the money bag in a dresser drawer while looking for car keys in order to flee. (Tr 1066) The State points only to the testimony of Jason's father that Debbie's money bag was on the dresser when he left the house to contradict the defense. (Tr 710) Answer Brief at 33. This testimony does

not contradict Jason's testimony that the money bag was inside a dresser drawer since hours had elapsed since Michael Mahn saw the money bag and Debbie could have put it away in the drawer in the interim. Furthermore, the exact location of the money bag has no relevance to the issue of whether Jason committed these homicides to steal money. Whether on the dresser or inside the drawer, the money bag's location does not refute Jason's testimony that he came upon the money looking for car keys when trying to flee.

The State also points to the defense lawyer's closing argument in which he stated that Jason knew Debbie had money in her room. (Tr 1179) Answer Brief at 33. It is axiomatic that argument of counsel is not evidence. Therefore, statements counsel made are of no consequence to the issue of sufficiency of the evidence of robbery. Counsel either did not accurately remember the testimony or **was** arguing that knowledge of the money made no difference. However, even if there was evidence that Jason knew Debbie had money in her room, this would not contradict his testimony that the money was taken as an afterthought following the homicides.

Unless the State can point to evidence which contradicts and is inconsistent with the defense's reasonable hypothesis of innocence, Jason is entitled to a discharge on the robbery count. E.g., State v. Law, 559 So.2d 187 (Fla. 1989); McArthur v. State, 351 So.2d 972 (Fla. 1977). None was presented at the trial of this case. The State's Answer Brief arguments are not well founded. Jason Mahn urges this Court to reverse his robbery conviction with directions that he be discharged.

ISSUE III:

ARGUMENT IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT THE TRIAL COURT IMPROPERLY FOUND THREE AGGRAVATING CIRCUMSTANCES TO HAVE BEEN PROVEN BEYOND A REASONABLE DOUBT.

A. Homicides Were Not CCP

The State argues that Jason coldly planned to kill before the night of the homicides, To support this theory, the State relies on comments Jason made to three witnesses, Michelle Ouimette, Cynthia Hurley and Bernard Suko. Answer Brief at 38-39. These statements demonstrate that Jason was angry and jealous of the time his father spent with Debbie, however, they do not show the cold, calculated, preplanning of a murder.

Michelle Ouimette met Jason several weeks before the homicides. They dated twice, but they saw each other almost daily during that time since Jason also dated and visited Michelle's friend and neighbor. (Tr 728, 729-730) She said Jason expressed his feelings about Debbie and told her that he was jealous of Debbie because she got more attention from his dad than he. (Tr 728) Jason also told Michelle that if Debbie were not around, he would get more attention from his father. (Tr 729) This last statement occurred in the presence of Michelle's older sister, Cynthia Hurley. (Tr 729) Michelle said on this occasion, Jason was quite intense emotionally and it scared her. (Tr 729)

Cynthia also testified about the statement Jason made in her presence. (Tr 734-736) She testified that Jason was angry at his father because he would not give him money for his car and he blamed Debbie. (Tr 734) Jason said that if he got rid of Debbie,

maybe his father would change back to the way he used to be. (Tr 734) Cynthia said Jason was angry and his emotions were intense and seemed filled with hate. (Tr 734)

The third witness barely knew Jason. (Tr 740, 743) Bernard Suko had a party at his house where Jason came with a friend. (Tr 740) Suko saw Jason the following day at another friend's house where several people were visiting and drinking beer. (Tr 740-741) Suko said the group was about out of beer and started to joke around about stealing some from a convenience store. (Tr 741) The joking continued to a discussion about other crimes which would be easy to commit. (Tr 741-742) Jason joined in the discussion and simply said that murder would be the easiest crime. (Tr 742) Jason never mentioned his father, mother, step-brother or stepmother. (Tr 744-745)

Contrary to the State's assertion, these three witnesses do not show that Jason was coldly, calculating and preplanning a murder. In fact, the witnesses corroborate the fact that Jason was a mentally troubled young man who was intensely angry and irrationally jealous. Intense anger and jealousy is exactly the opposite of the calm, cold state of mind necessary to establish the CCP factor. As this Court has recognized, an intra-family murder fueled by such emotions does not qualify for the CCP aggravating circumstance. Santos v. State, 591 So.2d 160, 162-163 (Fla. 1991); Douglas v. State, 575 So.2d 165 (Fla. 1991). See, Initial Brief at 54-57.

Finally, the State points to two additional facts which it asserts supports a finding of a coldly preplanned murder. Answer

Brief at 41. First, the State asserts that **Jason's** procuring knives from the kitchen shows sufficient preplanning. Ibid. Instead, the use of knives from the kitchen is more consistent with an impulsive act and the procurement of weapons which happened to be available. Geralds v. State, 601 So.2d 1157, 1164 (Fla. 1992) (knife from the victim's kitchen as a weapon of opportunity weighed against a finding of CCP) Second, the State claims that Jason disabled the only working telephone in the house prior to the murder. Answer Brief at 41. This claim is completely speculative. Michael **Mahn** testified that there were problems with some of the telephones in the house because of a lightening strike. (Tr 705, 712-713) The telephone in the room where Jason stayed happened to be one which worked. (Tr 713) When the crime scene investigator looked at that room, she found that the telephone receiver was off the hook. (Tr 513) There was no testimony that the telephone was disabled. Furthermore, there was no testimony about how the receiver came to be off the hook.

B. Homicides Were Not HAC

Appellant relies on the Initial Brief to respond the State's arguments on this point.

C. Robbery In 1992 Not A Violent Felony

Appellant relies on the Initial Brief to respond the State's arguments on this point.

ISSUE IV:

ARGUMENT IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT THE TRIAL COURT ERRED IN FAILING TO FIND, CONSIDER AND PROPERLY WEIGH SEVERAL STATUTORY AND NONSTATUTORY MITIGATING CIRCUMSTANCES.

Appellant relies on his initial brief to reply to the State's arguments with the following additional comments.

First, on page 59 of the Answer Brief, the State summarized the testimony of a mental health expert, Charles Thomas, as "...Thomas testified that he could not say that Mahn's background was a contributing factor to his murdering the victim." The State provided a reference to Thomas' testimony on cross-examination -- TR 1390. This summary of testimony is inaccurate and is affirmatively misleading because Thomas' testimony was that, indeed, Jason's background **was** a contributing factor in the crimes. (Tr 1379)

On direct examination, Thomas testified that Jason suffered from a 'very dysfunctional family background" which was a contributing factor in the commission of the crimes. (Tr 1379-1381)

> Q. What do you believe were the contributing factors to his behavior on the night of April 1st and 2nd?
>
> A. Well, I appreciate you using the word contributing. I think certainly the fact that he had a very dysfunctional family background was a contributing factor.

(Tr 1379) . Later, on cross-examination, the prosecutor acknowledged Thomas' testimony that Jason's background was a contributing factor in the homicides. (Tr 1390) He then followed with a question asking if Jason's background caused the murders. (Tr

1390) Thomas then responded that he could not say that Jason's background caused the murders. (Tr 1390)

> Q. And you say that his background was a contributing factor or could be a contributing factor to the activities of the night of the murders, is that correct?
>
> A. Yes.
>
> Q. That is not the cause of these murders, is it?
>
> A. I cannot say that it was.

(Tr 1390) The State's assertion in the Answer Brief that "...Thomas testified that he could not say that Mahn's background was a contributing factor to his murdering the victim" is simply inaccurate and directly at odds with the testimony.

On page 60 of the Answer Brief, the State says that the court did not accept Dr. Bingham as an expert in substance abuse. Although the court made that statement, when viewed in context, the court merely limited Bingham's expertise to exclude matters properly the field of a chemist or toxicologist:

> THE COURT: Well, not necessarily in the field of substance abuse. In the field on -- he's an expert based upon his education and training in the area what he previously stated, but not substance abuse. I mean, he's not -- he's not a chemist, toxicologist. And if you want to ask him questions about that, that's not -- that's not about substance abuse --

(Tr 1511) Bingham was fully qualified to testify about the evaluation and treatment of individuals who abuse drugs. (Tr 1507-1511) The court did not limit any of his testimony or opinions. (Tr 1512-1526).

ISSUE V:

ARGUMENT IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT THE TRIAL COURT ERRED IN OVERRIDING THE JURY'S RECOMMENDATION OF A LIFE SENTENCE FOR THE HOMICIDE OF DEBBIE SHANKO.

On page 69-70 of the Answer Brief, the State argues that this Court's decision in Garcia v. State, 644 So.2d 59 (Fla. 1994) should control. Mahn disagrees because Garcia is distinguishable.

Garcia differs from this case on the type of crime, the degree aggravation and amount of mitigation. Garcia was convicted for the stabbing deaths of two elderly women, whom he did not know, the armed burglary of their home and the sexual battery of one of them. In contrast, Mahn's crimes involved homicides of family members which were fueled by misdirected anger and jealousy. The aggravating circumstances in Garcia included the fact that he was under sentence of imprisonment, had four prior convictions for violent felonies, that the homicides occurred during a sexual battery and were HAC. The trial court in Mahn's case found three aggravating circumstances -- a prior violent felony which was based on Mahn's participation in purse snatching, a finding of HAC and CCP. And, as pointed out in Issue III, the evidentiary support for these aggravators is insufficient. In Garcia, the defense presented nothing in mitigation and the trial court found no mitigating circumstances. Mahn's defense counsel presented substantial mitigating evidence during the penalty phase, and the trial court found mitigating circumstances

existed and should have found the existence of others as well. See, Initial Brief, Issue IV. Garcia is not a comparable case.

The State, on page 70 of the Answer Brief, discounts the comparability of Amazon v. State, 487 So.2d 8 (Fla. 1986) to the present one. As the sole basis for distinguishing the case, the State asserts, 'Amazon's [mitigating] evidence, however, exceeds Mahn's both in quantity and quality." Answer Brief at 70. There is no support for this assertion and the State offers none in the Answer Brief. As noted in the Initial Brief (pages 83–86), Mahn's background and mental condition is perhaps more mitigated than Amazon's and his crime less aggravated. Just as in Amazon, a death sentence is not the appropriate and proportionate punishment.

ISSUE VI:

ARGUMENT IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT THE DEATH SENTENCES IMPOSED FOR THE MURDERS OF DEBRA AND ANTHONY SHANKO ARE DISPROPORTIONATE.

Initially, the State's argument on this point suggests that a proportionality review involves a quantitative evaluation of the aggravating and mitigating circumstances. More than a counting of aggravating and mitigating circumstances is involved. This Court recently reaffirmed the standard to be applied when conducting a proportionality review and emphasized that the process is not a mere counting of aggravating and mitigating circumstances:

> Our proportionality review requires us to "consider the totality of circumstances in a case, and to compare it with other capital cases. It is not a comparison between the number of aggravating and mitigating circumstances." 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). In reaching this decision, we are also mindful that "[d]eath is a unique punishment in its finality and in its total rejection of the possibility of rehabilitation." State v. Dixon, 283 So.2d 1, 7 (Fla.1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974). Consequently, its application is reserved only for those cases where the most aggravating and least mitigating circumstances exist. Id.; Kramer v. State, 619 So.2d 274, 278 (Fla.1993) .
>
> * * * *
>
> Our proportionality review requires a discrete analysis of the facts. Porter, 564 So.2d at 1064. As stated by a federal appellate court: "The Florida sentencing scheme is not founded on 'mere tabulation' of the aggravating and mitigating factors, but relies instead on the weight of the

> underlying facts." Francis v. Dugger, 908 F.2d 696, 705 (11th Cir.1990), cert. denied, 500 U.S. 910, 111 S.Ct. 1696, 114 L.Ed.2d 90 (1991).

Terry v. State, 21 Fla. Law Weekly S9 (Fla. Jan. 4, 1996).

Contrary to the State's assertion, this case is not one of the most aggravated and least mitigated, The cases the State suggests as comparable and support the position that a death sentence is proportionate are, in fact, not similar. They differ either in the degree of aggravation or the presence or absence of mitigation. Three of the cases involved the murder of elderly strangers, in their home, during some other crime and no mitigating circumstances. In both Porter v. State, 429 So.2d 298 (Fla. 1983) and Garcia v. State, 644 So.2d 59 (Fla. 1994), this Court approved overrides of life recommendations. The defendants in these two cases killed elderly strangers in their own homes during a burglary or robbery and in Garcia, a sexual battery. In both cases, no mitigating circumstances were present. A death sentence was approved for another similar crime in Chandler v. State, 534 So.2d 701 (Fla. 1989). Again, several aggravating circumstances were involved and there were no mitigating circumstances. A fourth case the State cited also involved the robbery/murder of a couple in their business by an employee during a robbery. Jones v. State, 652 So.2d 346 (Fla. 1995). This case, likewise, had no mitigating circumstances present. Ibid. Additional cases the State cites involved some minimal mitigation, much less than is present in the instant case. Furthermore, each of the four were much more aggravated crimes than

the instant case. In Windom v. State, 656 So.2d 346 (Fla. 1995), the defendant methodically shot four people in four different locations, three died. In Pittman v. State, 646 So.2d 167 (Fla. 1994), the defendant planned and carefully carried out a plan to kill the parents and sister of his estranged wife. He attempted a sexual battery on the sister, who was threatening to report him for a prior sexual assault on her. He set fire to the house and car after the three murders. In Stein v. State, 632 So.2d 1361 (Fla. 1994), the defendant and his codefendant planned a robbery to include killing witnesses. Two victims were executed with a firearm the defendant carried to the scene. Finally, in Asay v. State, 580 So.2d 610 (Fla. 1991), the defendant killed two individuals in separate incidents on the same night and this Court concluded the murders were racially motivated.

The cases the State offerers as comparable are distinguishable and fail to support death sentences imposed as proportionate punishment. As presented in the Initial Brief, Jason Mahn's crime is not one warranting the ultimate sanction of death. He urges this Court to reduce his death sentence to life imprisonment.

ISSUE VII:

ARGUMENT IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT THE TRIAL COURT ERRED IN GIVING THE STANDAR D JURY INSTRUCTION TO DEFINE THE COLD, CALCULATED AND PREMEDITATED AGGRAVATING CIRCUMSTANCE.

The State claims this issue is not preserved for appeal because the issue was not presented to the trial court. Answer Brief at 76-77. However, the State has overlooked the portion of the defense motion which specifically attacked the instruction on constitutional vagueness grounds. The motions reads:

> The jury plays a crucial role in capital sentencing. Its penalty verdict is to be overridden only where no reasonable person could agree with it. Nevertheless, the jury instructions are such as to assure arbitrariness and to maximize discretion in reaching the penalty verdict;
>
> Pope v State, 441 So.2d 1073 (Fla. 1984) forbids jury instructions limiting and defining the meaning of the "heinous, atrocious or cruel" aggravating factor under State v. Dixon, 283 So.2d 1 (Fla. 1973). This assures arbitrary application of this aggravating circumstance in violation of the dictates of and Maynard v. Cartwright, 108 S.Ct. 1853 (1988). The standard instruction regarding the "cold, calculated and premeditated" aggravating circumstance is similarly infirm. It simply tracks the vague terms of the statute. The vagueness of the statute, and the susceptibility to uneven application, is shown by the act[sic] that a supreme court has been unable to apply and construe it consistently, as shown below.

(R 83). The trial court considered the motion and denied it, and the issue has been preserved for this Court's review.

ISSUE VIII:

ARGUMENT IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT THE TRIAL COURT ERRED IN GIVING THE STANDARD JURY INSTRUCTION TO DEFINE THE HEINOUS, ATROCIOUS OR CRUEL AGGRAVATING CIRCUMSTANCE.

The State argues that the defense failed to preserve this issue for review. Answer Brief at 77-78. Specifically, the State claims that the defense pretrial motion did not object to the constitutionality of the instruction and that counsel's objection at the charge conference that the instruction was vague and ambiguous was not enough. Again, as noted in Issue VII, supra., the State has overlooked the critical portion of the defense motion where the jury instruction on the HAC circumstance was attacked. (R 83) The motion reads:

> The jury plays a crucial role in capital sentencing. Its penalty verdict is to be overridden only where no reasonable person could agree with it. Nevertheless, the jury instructions are such as to assure arbitrariness and to maximize discretion in reaching the penalty verdict;
>
> Pope v State, 441 So.2d 1073 (Fla. 1984) forbids jury instructions limiting and defining the- meaning of the "heinous; atrocious or cruel" aggravating factor under State v. Dixon, 283 So.2d 1 (Fla. 1973). This assures arbitrary application of this aggravating circumstance in violation of the dictates of and Maynard v. Cartwright, 108 S.Ct. 1853 (1988). The standard instruction regarding the "cold, calculated and premeditated" aggravating circumstance is similarly infirm. It simply tracks the vague terms of the statute. The vagueness of the statute, and the susceptibility to uneven application, is shown by the act[sic] that a supreme court has been unable to apply and construe it consistently, as shown below.

(R 83). The State's assertion that the defense did nothing more than complain about the constitutionality of the aggravator is not correct. Answer Brief at 78. Moreover, the objection to the instruction at the charge conference on the grounds of vagueness is sufficient to preserve this issue. (Tr 1295-1296)

ANSWER TO CROSS-APPEAL

CROSS-APPEAL ISSUE I:

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

The State challenges the correctness of the trial court's decision to give an instruction on the defense of voluntary intoxication. Initially, the State relies on case authority examining the issue of whether a court commits error in **refusing** to give a voluntary intoxication instruction. State's Brief at 82-**83**. Those cases are not controlling here. Even if the evidence in this case was insufficient to require a voluntary intoxication instruction, the evidence was sufficient for the trial judge, in his discretion, to give the instruction. The judge could rule either way and still not commit error.

Contrary to the State's position, there **was** sufficient evidence to justify the trial court's discretionary ruling to give an instruction on the intoxication defense. This Court held that a defendant is entitled to a theory of defense instruction if there is any evidence to support it. Gardner v. State, 480 So.2d 91 (Fla. 1985); Bryant v. State, 412 So.2d 347 (Fla. 1982); Robinson v. State, **574** So.2d 108 (Fla. 1991). The merits of the defense or its likelihood of success is not a criteria for deciding whether an instruction is appropriately given. Ibid. In this case, there was evidence that Jason was a chronic drug abuser and that he had used drugs near the time of the homicides. In Jason's confession to Detective Heim, Jason said he had used cocaine and LSD prior to the murders. (Tr **1002,** 1085-1090)

The trial court noted this evidence of drug use, viewed it in the light most favorable to the defense position, which the law requires, and decided to give the instruction. Even though the evidence may not have mandated the giving of the instruction, the judge was legally permitted to do so. Gardner. The trial judge properly exercised his discretion on this point. The State's argument that the trial judge did not is without merit.

CROSS-APPEAL ISSUE II:

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

The State has misread the record concerning the testimony of Roy Heim, the trial court's ruling regarding the admissibility of Heim's testimony, the prosecutor's actions in the trial court and the defense counsel's cross-examination. There was no improper cross-examination conducted of Roy Heim. A few of the major facts which the State ignores are:

1. The prosecutor never objected to any of the cross-examination defense counsel conducted of Roy Heim. (Tr 972-974, 1008-1010)

2. The trial court's ruling on the admissibility of certain testimony the defense wanted to elicit from Heim was based on the rule of completeness when a defendant's statement is introduced. (Tr 991-996) See, Christopher v. State, 583 So.2d 642, 645-646 (Fla. 1991).

3. After the court ruled that the defense could present the testimony under the rule of completeness, the prosecutor **volunteered** to recall the witness to elicit the subject testimony so she could control the context. (Tr 997)

Roy Heim was one of the Oklahoma detectives involved in the apprehension and questioning of Mahn. He testified for the State and was cross-examined on this testimony by the defense. (Tr 954-972, 972-975) The prosecutor did not object to any of defense counsel's cross-examination. (Tr 972-975)

At the conclusion of Heim's testimony, defense counsel asked that Heim be retained as a witness. (Tr 975) Heim explained to the court that he had to testify in a federal trial in Oklahoma and remaining would be a hardship. (Tr 975-977) The trial judge then asked defense counsel why Heim was needed. (Tr 977) Counsel said that Mahn had made statements to Heim that counsel wanted presented to the jury. (Tr 977) Counsel noted that the prosecutor's direct examination had not touched this subject and defense counsel recognized that he could not bring the matter up in his cross-examination. (Tr 977) Defense counsel agreed to call Heim as his witness out of time in order to present the evidence. (Tr 978) At this point, the prosecutor raised an issue about the admissibility of the statements. (Tr 979) The court allowed a proffer of the testimony. (Tr 980-988) The prosecutor argued the statement was hearsay. (Tr 988) After considering and rejecting some possible exceptions to hearsay as a basis for admission, the court finally ruled the statement admissible under the rule of completeness. (Tr 988-996)

Immediately after the court ruled the testimony admissible, the prosecutor asked to be able to recall the witness to elicit the subject testimony in order to bring out other matters to place the testimony in context. (Tr 997) The prosecutor said:

> MS. NEEL: If we could, if I know that it's coming in, then at this point in time I ask that I would be allowed -- he said it among other things that, but he said a bunch of incriminating statements, too.
>
> THE COURT: Like what?

MS. NEEL: That he did the murders and all this kind of stuff. He told him the whole thing. If I could just ask more questions that ask during the course of time you were in contact with the defendant, did he give a statement -- can I go into it first?

THE COURT: Of course you can.

MS. NEEL: Okay. I will do that.

(Tr 997).

The prosecutor, as she had requested to do, recalled Heim as a witness and elicited the statements on direct examination. (Tr 1001-1008) Defense counsel cross-examined the witness. (Tr 1008-1010) No objections to defense counsel's cross-examination were made. (Tr 1008-1010)

Based on the record in this case, the State's cross-appeal issue has no factual foundation. The State's argument is without merit.

CROSS-APPEAL ISSUE III:

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

The question of the sufficiency of the evidence to support the robbery conviction in this case has been briefed in Issue II of the initial brief. Appellant adopts those arguments presented in the initial and reply briefs to answer this cross-appeal issue.

CROSS-APPEAL ISSUE IV:

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

The aggravating circumstance of the homicide being committed to avoid arrest can apply to the homicide of someone other than a law enforcement officer only when the sole or dominant motive for the killing is to eliminate the victim as a witness and it is proved by "strong evidence." E.g., Riley v. State, 366 So.2d 19 (Fla. 1978). Under the State's theory of the case, the dominant motive for the homicide of Debbie Shanko was to seek revenge. The State has conceded that this does not qualify for the avoiding arrest aggravating circumstance. See, State's Brief at 90. Consequently, the State's argument on this point is grounded on a second theory of the case -- Jason killed Debbie when she confronted him during the homicide of Anthony. State's Brief at 90-91. Although this Court has approved the avoiding arrest factor where this was only one of two or more motives for a homicide, Fotopulos v. State, 608 So.2d 784 (Fla. 1992), the evidence of a motive to avoid arrest is simply insufficient under the second theory in this case. The trial judge correctly found the evidence lacking and did not err in rejecting the avoiding arrest aggravating circumstance.

The manner in which the homicide occurred was consistent with a panic killing during a confrontation. Evidence at trial indicates that Jason became involved in a struggle and a frenzied knife attack when Debra entered Anthony's room. E.g., Amazon v. State, 487 So.2d 8 (Fla. 1986) (multiple wounds from a knife

attack consistent with killing in a panicked frenzy). In Perry v. State, 522 So.2d 817, 820 (Fla. 1988), this Court held that a killing in a panicked state during the commission of another felony is not sufficient to support the avoiding arrest aggravating circumstance. Additionally, the fact the victim knew Jason is of no import and can not lead to the valid conclusion that the murder was to eliminate a witness. Geralds v. State, 601 So.2d 1157, 1164 (Fla. 1992); Caruthers v. State, 465 So.2d 496 (Fla. 1985). Furthermore, the inference that the victim could have summoned for help if left alive does not lead to sufficient proof of this aggravating circumstance. See, Garron v. State, 528 So.2d 353 (Fla. 1980) (fact that victim was calling for help at time of killing did not establish avoiding arrest factor); Cook v. State, 542 So.2d 964, 970 (Fla. 1989)(victim killed to stop her from screaming did not prove avoid arrest factor).

The evidence was insufficient to prove the avoiding arrest aggravating circumstance beyond a reasonable doubt. No error occurred in the court's decision to reject this aggravating circumstance.

CONCLUSION

For the reasons presented the Initial Brief and this Reply Brief, Jason Mahn asks this Court to reverse his convictions for a new trial, or alternatively, to reverse his death sentence and remand for imposition of a life sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by delivery to Barbara J. Yates, Assistant Attorney General, Criminal Appeals Division, The Capitol, Plaza Level, Tallahassee, Florida, 32301; and a copy has been mailed to appellant, Mr. Jason Mahn, on this 17th day of May, 1996.

W.C. McLAIN