IN THE SUPREME COURT OF FLORIDA

JOSHUA D. NELSON,

Appellant,

vs. **CASE NO. 89,540**

STATE OF FLORIDA,

Appellee.

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ANSWER BRIEF OF THE APPELLEE

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SUMMARY OF THE ARGUMENT

Appellant's first claim is that DNA evidence identifying blood found on Nelson's clothing as belonging to the victim Tommy Owens was improperly admitted. It is the state's position that the evidence was properly admitted, the admission was harmless and many of the claims presented on appeal concerning the admission of this evidence are procedurally barred as these arguments were not presented to the court below.

Appellant next objects to the introduction of out of court statements made by Keith Brennan in the presence of Joshua Nelson and Misty and Tina Porth. These statements were introduced through the testimony of the Porth girls. Both girls testified that both Brennan and Nelson were present when they were told by Brennan and Nelson about the facts surrounding the death of Tommy Owens. It is the state's position that the admission of these statements was within the trial court's discretion and appellant has failed to show an abuse of that discretion. Furthermore, in light of appellant's confession and the physical evidence, appellant has failed to show prejudicial error.

As his third claim of error, Nelson claims that the trial court abused his discretion in failing to consider and find his history of alcohol and drug abuse as a mitigating factor. It is the state's position that the factor now being urged as mitigating was not presented to the court below. Therefore, this claim is

procedurally barred. Furthermore, a review of the order shows that the trial court sufficiently complied with the procedures set forth by this Court in Campbell v. State, 571 So.2d 415 (Fla. 1990), and Rogers v. State, 511 So.2d 526 (Fla.), cert. denied, 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988).

Appellant next contends that the trial court erred in finding the murder was cold, calculated, and premeditated because he had a pretense of justification and there was no careful plan. It is the state's position that the evidence supports finding the murder to have been committed in a cold, calculated, and premeditated manner with no pretense of moral or legal justification.

Appellant asserts that the trial court erred in finding heinous, atrocious or cruel aggravating factor and, therefore, weighed an invalid factor in violation of the Eighth Amendment to the United States Constitution. It is the state's position that the finding is well supported by the evidence and within the trial court's discretion.

Appellant's challenge to the heinous, atrocious or cruel jury instruction is without merit. The jury was given the full instruction on heinous, atrocious or cruel now contained in Florida Standard Jury Instructions in criminal cases. This Court has consistently rejected claims that the statute or the new jury instructions are unconstitutionally vague.

A review of the facts established in the instant case clearly demonstrates the proportionality of the death sentence imposed. Tommy Owens' murder was the result a totally unprovoked attack by Joshua Nelson, for no better reason than Nelson wanted his friend Tommy Owens' car. This murder was the result of a cold, calculated plan carried out in a heinous manner. Accordingly, the state urges this Honorable Court to find that the sentence imposed in the instant case was properly imposed.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT FAILED TO PROPERLY DETERMINE THE ADMISSIBILITY OF TESTIMONY BY STATE'S DNA EXPERT.

At trial the state presented FDLE crime laboratory analyst Darrien Esposito as an expert in serology and DNA analysis. After a proffer and qualification by the court as an expert, Esposito testified that the DNA from a blood stain found on Nelson's sneakers, his underwear and a box knife all matched the victim Tommy Owens' DNA.

Appellant now contends that the evidence was improperly admitted for the following reasons: 1) the state's proffer addressed only the third step in process mandated by this Court in Hayes v. State, 660 So.2d 257 (Fla. 1995), and Ramirez v. State, 651 So.2d 1164 (Fla. 1995); 2) the state failed to establish Esposito's qualifications to report population frequency statistics because Esposito did not demonstrate sufficient knowledge of the database upon which his calculations were based; 3) the court failed to determine that the testimony would assist the jury in determining a fact in issue or that the testimony was based on scientific principles that were sufficiently established to have gained general acceptance in the field; and 4) the court failed to determine whether both the DNA test conducted by Esposito and his

calculation of the statistical probability of a match satisfied the Frye test.

Initially, the state asserts that section 924.051, Florida Statutes (Supp. 1996), which was created by the Criminal Appeal Reform Act of 1996 (ch. 96-248, § 4, at 954, Laws of Fla.) applies. Section 924.051 became effective on July 1, 1996. Appellant was not tried until September 16-19, 1996 and was not sentenced until November 27, 1996. (XIV/ T 1,7; XII/ R 1070) The statute provides that the *party challenging the judgment or order of the trial court has the burden of demonstrating that a prejudicial error occurred in the trial court and precludes review unless a prejudicial error is alleged and is properly preserved or, if not properly preserved, would constitute fundamental error.* Amendments to the Florida Rules of Appellate Procedure, 685 So.2d 773 (Fla. 1996) (on reh'g). "Prejudicial error" is defined in the statute as an error in the trial court that harmfully affected the judgment or sentence. It is the state's position that Nelson is not entitled to relief as he has failed to demonstrate that a prejudicial error occurred in the trial court and that the claim was properly preserved or, if not properly preserved, would constitute fundamental error.

Furthermore, it is the state's contention that under any harmless error standard, a review of the evidence clearly shows that any possible error resulting from the admission of the DNA

evidence in the instant case was harmless. The evidence presented at trial included Nelson on videotape at the scene of the crime confessing to the murder. Nelson walked the detectives through the crime scene and demonstrated how he committed the murder.[1] In his confession Nelson showed the officers how he repeatedly beat Tommy Owens with a baseball bat and how Keith Brennan hacked at Owens' body with the box cutting knife. Nelson admitted chasing Owens, tying him up and rejecting Owens' pleas to take the car and spare his life. (XVII\ T 723, 725-26, 732, 734-36) Nelson also took the officers to the empty lot on a canal where he and Brennan disposed of the bat. (XVII/ T 748) He told them that he and Brennan had gone to a car wash where they took off their pants and put them in the trash can. (XVII/ T 751) He also explained that they had lost the bloodied underwear and the box cutting knife between the car wash and the lot. (XVII/ 751-752)

Further, even defense counsel conceded that the DNA evidence was cumulative to matters presented in the confession. (III/R 98) Additionally, the state presented the testimony of Misty and Tina Porth who testified that Nelson and Brennan admitted beating Owens with a baseball bat, tying his hands and slitting his throat.

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[1]This tape was played for the jury and is transcribed on the record. (XVII/ T 705, State's Exhibit 18) An audiotape was also made of this confession and was introduced to supplement the audio on the videotape. (XVII/ T 704, State's Exhibit 21)

(XVI/ T 471) They also testified that Nelson and Brennan told them to clean the blood off their shoes in the sink. (XVI/ T 471)

The evidence is further rendered harmless by Nelson's defense at trial. At trial, Nelson admitted that he and Keith Brennan committed the murder but claimed that it was second degree not first degree murder. (XV/ T 332) Consistent with this defense, Nelson testified at trial that he repeatedly beat Owens with the baseball bat. (XVIII/ T 811) *Since his own defense was consistent with him having the victim's blood on him, there is no reasonable probability that the admission of the DNA evidence adversely effected the outcome of the trial*.

In support of his claim of harmful error, appellant argues that the "fact that the prosecutor chose to present the DNA evidence indicates he thought that the evidence would enhance the probability of conviction and thereby affect the jury's verdict." (Initial Brief of Appellant, pg. 49) Nelson also contends that the evidence was harmful because it provided a scientific link to Owens' murder and corroborated Nelson's confessions. First, if the mere presentation of evidence was the test for harmful error then no evidentiary error could ever be harmless. Obviously, this is not the state of the law. This argument is likewise undermined by Nelson's defense at trial. Further, as previously noted, Nelson's confession was corroborated by the condition and location of Owens'

body, the testimony of the Porth girls and Nelson's possession of Owens' car.

As for the harmfulness of Esposito's testimony that he consulted a geneticist to supplement the generally accepted database, Esposito explained that in applying the test results to the generally accepted statistical database, one of the genes was given a factor of .000. (XVI/ T 566) As the use of .000 was too individualizing, he consulted a geneticist who advised him to use .03 instead of 0. (XVI/ T 566) In other words, instead of saying there were zero odds of finding anyone else with this particular gene and, therefore, it could only be Owens' blood, the geneticist added Owens' gene into the pool and doubled the pool. This method allowed for a finding that the odds were 1 in 300 of finding someone with the particular gene. (XVI/ T 566) Thus, rather than resulting in harm to Nelson, the change in the database factor worked to Nelson's benefit.

Furthermore, even though the trial court agreed that defense counsel could challenge this finding on cross-examination, defense counsel declined to explore this area in front of the jury.[2] If trial counsel truly believed that the evidence was not the result of the proper use of statistics or that Esposito was not qualified

[2] Despite the court's approving the expense for the defense to hire their own DNA expert, said expert was not presented at trial. (III/ R 99)

to testify as an expert in the field, then the statistical basis and/or his qualifications could have been attacked on cross-examination.

Further, the state submits that this claim was not properly preserved for appeal. Prior to trial Nelson filed a Motion in Limine seeking to prohibit the state from using the research generated by Mr. Esposito. In the pretrial motion Nelson claimed it was too prejudicial and that the opinion did not satisfy generally accepted scientific standards. (II/ R 73) Subsequently, at a pretrial hearing, Nelson was given the funds to hire a DNA expert. (III/ R 99-102) Based on the appointment of an expert, defense counsel asked the court to continue the motion in limine hearing on the DNA until he could offer his own expert to rebut the state's expert. The court denied the motion in limine without prejudice to refile prior to trial. (IV/ R 388-90) Although defense counsel "renewed all pretrial motions" at trial, he does not allege, and the record does not show, that the motion in limine was ever refiled. (XIV/ T 12; XV/ T 309) In fact, the record shows that the proffer of Mr. Esposito's qualifications as a DNA expert was the result of an offer by the state. Upon the state's offer of a proffer, defense counsel stated that "we would like to challenge his credentials." (XVI/ T 484) He did not assert, as he has here, that the court should conduct a Frye hearing. The state

submits that the failure to reassert the request for Frye determination after the court denied the motion in limine without prejudice to refile after consulting with the defense DNA expert constitutes a waiver and precludes review. Objections must be specific and contemporaneous and must sufficiently apprise the trial court of the basis of the objection. The generalized objection made in the instant case was not sufficient to preserve the claim now being presented.

In support of its contention that the objection was not sufficient, the state directs this Court's attention to the following colloquy:

> BY MR. STEVENS: (Cont'g)
> Q And the data base which you used, do you know if it's been generally recognized and accepted in the scientific community?
> A To my knowledge, it has.
> Q But you didn't actually use it; you made a change in it?
> A I used the data base, however, one of the figures which the data base reports is reported as .000. And in that instance, if I used .000, that would give me a frequency of 0.
>
> In other words, the odds of a random person matching that type, if I use that figure, would be 0, and that would be a little bit too individualizing.
>
> So to be more conservative, I consulted my supervisor, who then consulted a population geneticist who determined that a value of .03 or 3 percent instead of 0 for that particular frequency would be sufficient.
> MR. STEVENS: That's the problem we have, Judge. He didn't use the data base.
> MS. LABODA: Your Honor, if I can ask a couple questions.

> THE COURT: Just wait a second. It's not a big deal. It goes to credibility. His qualifications are sufficient. Are you objecting to his qualifications?
> MR. STEVENS: We're objecting to the data base that he didn't use.
> THE COURT: Okay.
> MR. STEVENS: In other words, the whole thing depends on --
> THE COURT: ***And you're asking me to do what?***
> MR. STEVENS: To not allow him to testify because he didn't follow the data base which has achieved general acceptance in the scientific community.

(XVI/ T 566-567) (emphasis added)

In Jordan v. State, 694 So.2d 708 (Fla. 1997), this Court found a similar claim waived in the absence of a specific and contemporaneous objection:

> We note that this profile evidence should have been tested for general acceptance within the relevant scientific community. See Frye v. United States, 293 F. 1013 (D.C.Cir.1923). It is this type of new or novel scientific profile evidence for which the safeguards of a Frye test are needed in order to guarantee reliability. The defense did not, however, specifically object on Frye grounds, leaving this issue unpreserved. See Hadden v. State, 690 So.2d 573 (Fla.1997).

Id. at 708, 717

Similarly, in Hadden v. State, 690 So.2d 573 (Fla. 1997), this Court held that "it is only upon proper objection that the novel scientific evidence offered is unreliable that a trial court must make this determination. Unless the party against whom the evidence is being offered makes this specific objection, the trial

court will not have committed error in admitting the evidence." This Court further noted that in Glendening v. State, 536 So.2d 212 (Fla.), cert. denied, 492 U.S. 907, 109 S.Ct. 3219, 106 L.Ed.2d 569 (1989), where the defendant objected to an expert witness testifying as to her opinion about whether the alleged victim had been sexually abused on the basis that the question called for an opinion on the ultimate issue in the case and that the witness was not competent to make this conclusion and not on the basis that the testimony was scientifically unreliable, that the claim was waived. This Court stated, "As the defendant did not make a Frye objection, the only basis upon which the trial court could rule on this evidence was the relevancy standard for expert testimony as outlined in the evidence code. Accordingly, this was the only basis for the appellate court to rule on the evidence." Hadden at 690 So.2d 580.

Except for the challenge to Esposito's credentials and his failure to rely solely on the accepted database for one of the six factors, there was no request for a Frye hearing or a challenge to the PCR method and its general scientific acceptance. Accordingly, this claim is not only harmless, but it is also barred as Nelson has not sufficiently preserved the claim for appeal.

Even if this claim was properly before this Court, the state maintains that the trial court's review of Esposito's credentials as well as the scientific principles used in reaching his

conclusion was in accordance with the standards set forth in Ramirez v. State, 651 So.2d 1164 (Fla. 1995), and Hayes v. State, 660 So.2d 257 (Fla. 1995).

In the instant case, Esposito testified that he had been with the Florida Department of Law Enforcement for four years, that he had completed over a year's training in DNA analysis and serology and attended several workshops in serology and DNA analysis, specifically with regard to polymerase chain reaction (PCR) methods and DQA-1 testing. (XVI/ T 562) He testified that he used the PCR method in the instant case, that he had performed the PCR test approximately 1000 times, and that he had previously been qualified as an expert in serology and DNA analysis. (XVI/ T 563-64) Esposito testified that the PCR method was accepted in the scientific community as being valid. (XVI/ T 572) Esposito explained that the PCR test was developed in the early to mid - eighties, so it has been around for 10 to 15 years. (XVI/ T 576) He also gave an explanation of how the results were formulated in the instant case. He explained how he separated out six genes to test and what quality control methods were used to prevent contamination of those genes. (XVI/ T 574-5) Those six genes are them compared to genes taken from the known source to determine a match. If any of the genes were different it would result in an exclusion of that particular individual. (XVI/ T 575) He further explained:

Q I have what's marked here as State's Exhibit Number 27 for identification. Could you please explain what that is and how it was used in this case.

A This is just a general breakdown of the PCR method which I utilize to analyze DNA. And the specific tests which I utilize the PCR method are called the poly marker plus CPA-1 test. This happens to be the old number. But again, the tests which I run are called poly marker and DQA-1, and that's utilizing the PCR method.

This PCR method can be split into three main segments. The first segment is the DNA extraction, and that's where I actually have to take a cutting of the stain and place it into small tubes, and then I need to extract the DNA or separate the DNA from the rest of the components of the stain.

Once I've done that, I carry it into the second phase of the PCR process, which is the DNA amplification. And all that simple is is making copy upon copy of those six specific areas of DNA which I'm interested in typing.

That's done in an instrument called thermoflector (Phonetic). And again, it just makes copy after copy. And as it's making those copies, it tags it with a substance which allows me to identify exactly what type of DNA I made all those copies of, and that's shown in the third segment. PCR process, which is the DNA typing segments.

Q Do you have another overhead that would assist you in regard to the specific tests that you used beyond the PCR?

A Yes, I do.

Q I'm now showing you what's been marked as State's Exhibit 28 for identification.

A Okay. This is a representation of the final end result or the end product of the poly marker test. These are nylon strips which are split up into the five areas of DNA which are associated with these poly marker strips.

And before any of my sample DNA is added, they're blank, with the exception of the writing to designate the five different

genes and the different types which can occur within each of those five genes.

So this is what it would look like before the addition of my sample. And then after the addition of my sample and I run it through the typing phase of the process, you get these dots to appear. And where these dots appear correspond to specific types within each of these five genes.

For example, in this first one, this gene is LDLR, and if you -- I don't know if you can see it. It's kind of fuzzy, but there's an A and a B here. And those are the two different -- they're called alios (Phonetic), but they're two different forms which that gene can take.

In this instance, you see that the B dot is lit up but the A dot is not. And there are two portions to each person's type with each of these five genes. One portion comes from an individual's mother, the DNA from the mother, the other portion comes from the DNA of that individual's father. So in this case, we've only got the B dot lit up, therefore, that individual received a B alio or B portion from its mother and a B portion from its father, and it's typed would therefore be a BB.

This second one, however, has both the A and the B dot lit up and, therefore, that individual received an A from either its mother or father and B from the other parent. And its type would therefore be an AB. Going through the rest of these, then this would be a type AA, a type AB, and a type BB.

Q Did you also perform another test, an HLA DQA-1?

A Yes. These five are already the poly marker test, these five genes. A sixth gene is called a DQA-1 test.

Q I'm now showing you what's been marked for State's Exhibit 29 for identification. Would that assist you with the DQA-1?

A Yes. Okay. The DQA-1 strips are similar to the poly marker strips, however, again, we're only looking at one gene here as opposed to the five on the others. And

> instead of using letters to designate the types, DQA-1 uses numbers. And the numbers go from 1 to 4 for the major types, and then a further breakdown or a subtyping of the 1 and the 4 alios.
>
> So for example, this is before the addition of any of my sample DNA, and this would be after the addition of the sample DNA as well as carrying through the PCR process through the typing phase. And again, we've got dots lighting up. And depending on where the dots light up on the strips that corresponds to specific DQA-1 types.
>
> For example, this, again, it's 1, 2, 3 and 4. We've got the 1 dot lit up, and then we've got the 4 dot lit up. So the major components are a 1 and a 4, and then to split up the 1 alio, we've got this dot here, which is a 1.1, so we know the 1.1 is present, and then further breakdown of the 4, we've got the 4.1 dot lit up here.
>
> So again, similar to the poly marker, each person's going to have 2 segments to the types, one from the mother, one from the father. In this instance the type would be a 1.1, 4.1.
>
> Q Thank you. Mr. Esposito. I'm now showing you what has been marked as State's exhibit 25, FDLE Exhibit Number 8. Do you recognize it?
>
> A Yes, I do.

(XVI/ T 577-580)

Accordingly, the state maintains that the trial court's review of Esposito's credentials as well as the scientific principles used in reaching his conclusion was in accordance with the standards set forth in Ramirez v. State, 651 So.2d 1164 (Fla. 1995), and Hayes v. State, 660 So.2d 257 (Fla. 1995).

However, even if the lower court's review was insufficient, this Court has made it clear that the standard of review in cases

such as this should be *de novo*. Brim v. State, 695 So.2d 268 (Fla. 1997); Vargas v. State, 640 So.2d 1139, 1144 (Fla. 1994). This means that the trial judge's ruling will be reviewed as a matter of law rather than by an abuse-of-discretion standard. Accordingly, an appellate court may consider any scientific material that was not part of the trial record in its determination of whether there was general acceptance within the relevant scientific community. For example, in Brim, this Court considered the effect the 1996 NRC report would have on the admissibility of the State's population frequency statistics presented in that case and noted, "[d]uring the course of Brim's appeal, the state of science has significantly changed." Brim at 270. With regard to the PCR method, the 1996 NRC report at 119 concludes that PCR-based systems are ready to be used and should be used. The report also notes that the method is a generally accepted scientific method that has been accepted by courts as satisfying the Frye standard. 1996 Report, *supra*, at 178

The state submits that in light of the foregoing, this claim should be denied.

ISSUE II

WHETHER THE TRIAL COURT VIOLATED APPELLANT'S RIGHT TO CONFRONTATION BY ADMITTING EVIDENCE OF HIS NONTESTIFYING CODEFENDANT'S OUT OF COURT STATEMENTS MADE IN APPELLANT'S PRESENCE.

Appellant next objects to the introduction of out of court statements made by Keith Brennan in the presence of Joshua Nelson and Misty and Tina Porth. These statements were introduced through the testimony of the Porth girls. Both girls testified that both Brennan and Nelson were present when they were told by Brennan and Nelson about the facts surrounding the death of Tommy Owens. The girls further testified that Nelson was doing most of the talking. It is the state's position that the admission of these statements was within the trial court's discretion and appellant has failed to show an abuse of that discretion. Furthermore, in light of appellant's confession and the physical evidence, appellant has failed to show prejudicial error.

In general, a person's silence can constitutes admissible evidence of an admission where the circumstances and nature of the statement made by another in the defendant's presence are such that it would be expected that the person would protest the statement even if untrue. Farina v. State, 679 So.2d 1151 (Fla. 1996); Privett v. State, 417 So.2d 805 (Fla. 5th DCA 1982); Tresvant v. State, 396 So.2d 793, 738 (Fla. 1981). In Privett, *supra*, at 806, the Court set out several factors that should be present to show

that acquiescence did in fact occur. These factors include the following:

> "1. The statement must have been heard by the party claimed to have acquiesced; (2) the statement must have been understood by him; (3) the subject matter of the statement is within the knowledge of the person; (4) there were no physical or emotional impediments to the person responding; (5) the personal makeup of the speaker or his relationship to the party or event are not such as to make it unreasonable to expect a denial; (6) the statement itself must be such as would, if untrue, call for a denial under the circumstances."

Id. at 806

After considering the foregoing, the court in Privett, held that:

> "In this case the testimony was clear that the defendant Privett was present and heard extensive discussions of bank robberies and his participation in them. No claim of physical impediment is raised, and the statements implicating Privett in bank robberies certainly seem to be ones, if untrue, that would call for a denial. Clearly, an admission by acquiescence can be seen by these repeated statements made in Privett's presence, without any objection by him, and, indeed, the statements of his own tending to show the truth of the conversations. Here, the statements were admissible against Privett via 90.803(18)(b), and were properly allowed in by the trial court."

Id. at 807

Similarly, in Farina, this Court held:

> [E]ven if such statements are properly admitted under the statement against interest

hearsay exception, they are likely to run afoul of the Confrontation Clause. However, this does not mean that such statements are never admissible. The Supreme Court also explained in Lee that the presumption of unreliability that attaches to a codefendant's confession may be rebutted where there is a " 'showing of particularized guarantees of trustworthiness.' " 476 U.S. at 543, 106 S.Ct. at 2063 (quoting Ohio v. Roberts, 448 U.S. 56, 66, 100 S.Ct. 2531, 2539, 65 L.Ed.2d 597 (1980)).

In Lee, the State of Illinois argued that the circumstances surrounding a codefendant's confession and the interlocking nature of the codefendants' confessions rebutted the presumption of unreliability. 476 U.S. at 544-46, 106 S.Ct. at 2063-65. While recognizing that the presumption could be rebutted if the codefendant's statement had sufficient "indicia of reliability," the Supreme Court went on to find that neither of the grounds asserted by the state met that standard. Id. at 546, 106 S.Ct. at 2064-65. First, the circumstances surrounding the confession reflected the reality of the criminal process, namely that partners lose any identity of interest and quickly become antagonists after the "jig is up." Id. at 544-45, 106 S.Ct. at 2063-64. Second, while the codefendants' statements did interlock on some of the facts, they diverged on the very issues in dispute: the roles played by the two defendants in one killing and the question of premeditation as to the other killing. Id. at 546, 106 S.Ct. at 2064-65. Thus, the Supreme Court concluded that the admission of the codefendant's confession inculpating the accused violated the constitutional right of confrontation. Id. However, the Supreme Court did not foreclose the possibility that the error was harmless when assessed in the context of the entire case against the accused. Id. at 547, 106 S.Ct. at 2065.

Based upon the cases discussed above, we find that the circumstances surrounding

Jeffery's taped conversations had sufficient "indicia of reliability" to rebut the presumption of unreliability that normally attaches to such hearsay evidence. Thus, the conversations were properly admitted. First, neither brother had an incentive to shift blame during these conversations as these were not statements or confessions to the police. These were discussions between two brothers sitting in the back seat of a police car; neither was aware that the conversations were being recorded. Second, Anthony was present and confronting Jeffery face-to-face throughout the conversations. Anthony could have taken issue with Jeffery's statements at any point, but instead either tacitly agreed with Jeffery's statements or actively discussed details of the crime. Thus, the court did not err in admitting the taped conversations between Jeffery and Anthony Farina, and no Bruton violation occurred in this case.

However, even if we determined that the conversations should not have been admitted because they did not meet the Confrontation Clause reliability standards, we would find the error harmless. As the Supreme Court explained in Cruz, the defendant's own confession may be considered on appeal in assessing whether any Confrontation Clause violation was harmless. 481 U.S. at 193-94, 107 S.Ct. at 1719-20.

In this case, Anthony Farina's own incriminating statements were admissible as admissions by a party-opponent. See § 90.803(18)(a), Fla.Stat. (1991). In these statements, Anthony recounted the crime in minute detail, including which victim died and the specific wounds inflicted upon specific victims. While most of Anthony's comments focused on Jeffery's actions, Anthony did admit that he tied up the victims. He also expressed regret that "[i]nstead of stabbing [the victims] in the back [I] should have sliced their fucking throats and then put something in front of the freezer door so they

> couldn't open them ... [and] cut the phone lines." In light of Anthony's inculpatory statements, even if the court had erred in admitting Jeffery Farina's incriminating statements, it would be harmless. Cruz. 679 So.2d 1156-57

More recently, this Court in Franqui v. State, 699 So.2d 1312 (Fla. 1997), while receding from Farina in part, reaffirmed that this type of statement is a classic "example of when a codefendant's statements, although implicating the defendant, had a particularized guarantee of trustworthiness so as to be introduced against him based solely upon the circumstances under which the statements were made." Id. at 1320

Applying the six-prong test set forth in Privett it is clear that the admission of the statements was not an abuse of discretion. **(1) The statement must have been heard by the party claimed to have acquiesced**: each witness testified that Nelson was present when the statements were made and, for the most part, led the conversations; **(2) the statement must have been understood by him:** Nelson's participation in the crime and the conversations about the crime is evidence that he understood the content of same; **(3) the subject matter of the statement is within the knowledge of the person:** again, even Nelson's confession shows that he had knowledge of the subject matter of the statements; **(4) there were no physical or emotional impediments to the person responding:** Nelson claims no such impediments; **(5) the personal makeup of the speaker or his relationship to the party or event are not such as**

to make it unreasonable to expect a denial: Nelson was the oldest in the group and there is nothing to suggest that he was afraid to speak up; **(6) the statement itself must be such as would, if untrue, call for a denial under the circumstances:** as most of the statements concerned Nelson's plans and actions with regard to the murder, it would be expected that he would deny blame when it was being assessed. Under these circumstances, the statements do not constitute hearsay and were admissible against Nelson.

Assuming, arguendo, it was error for the trial court to admit the testimony, error, if any, was harmless in light of the extensive confession made to law enforcement by Nelson.

ISSUE III

WHETHER THE TRIAL COURT VIOLATED THE EIGHTH AMENDMENT BY FAILING TO WEIGH APPELLANT'S HISTORY OF ALCOHOL AND DRUG ABUSE AS A MITIGATING FACTOR.

As his third claim of error, Nelson claims that the trial court abused his discretion in failing to consider and find his history of alcohol and drug abuse as a mitigating factor. It is the state's position that the factor now being urged as mitigating was not presented to the court below. Therefore, this claim is procedurally barred. Furthermore, a review of the order shows that the trial court sufficiently complied with the procedures set forth by this Court t in Campbell v. State, 571 So.2d 415 (Fla. 1990), and Rogers v. State, 511 So.2d 526 (Fla.), cert. denied, 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988).

In Campbell and Rogers this Court set forth the procedures to be employed with regard to the consideration of mitigating evidence. The trial court must first consider whether factors alleged in mitigation are supported by evidence and then determine whether the established facts are of a kind capable of mitigating the defendant's punishment. If such factors exist in record at time of sentencing, the sentencer must determine the weight to be accorded a given factor and, finally, the court must determine whether they are of sufficient weight to counterbalance any aggravating factors.

First, however, "because nonstatutory mitigating evidence is so individualized, the defense must share the burden and identify for the court the specific nonstatutory mitigating circumstances it is attempting to establish." Lucas v. State, 568 So.2d 18 (Fla. 1990).

As Appellant concedes defense counsel did not ask the court to find as a nonstatutory mitigating factor that appellant had a history of alcohol and drug abuse. The only argument concerning substance abuse was stated in his sentencing memorandum as follows:

> 6. Outside influences and pressures saddled the Defendant with emotional handicaps. ***Clearly, this Defendant was a product of not only substance abuse*** but also parental sexual abuse and parental abandonment which left him without the proper development which was necessary to teach him how to chart a course down the highway of life.
>
> * * *
>
> 8. The Defendant was suffering emotional turmoil before and at the time of the homicide. In addition to his own family troubles, it must be remembered that the Defendant had been told by the Porth girl about the abuse visited upon her by the decedent. ***It is very hard to imagine the combined impact of the various things that were affecting the Defendant such as alcohol abuse, parental abandonments, step parent's sexual abuse, confrontation, the humiliation of being abandoned by him mom, and having a friend who had forced his sexual advances upon the sister of a girlfriend.*** It is obvious from the 34-minute deliberation that the jury did not address this issue. It must be addressed, and it should be found to outweigh the aggravating factors in this case.

(XII/ R 1010-1011)

While acknowledging that counsel has a duty to argue those mitigating factors it wishes the court to find, appellant contends that this Court in Farr v. State, 621 So.2d 1368 (Fla. 1993), imposes a duty on trial court to consider evidence contained anywhere in the record. The Farr line of cases concern the duties placed on a trial court when a death eligible defendant refuses to offer any evidence in mitigation and asks for the imposition of death. Contra, Lawrence v. State, 691 So.2d 1068 (Fla.), cert. denied, 510 U.S. 833, 114 S.Ct. 107, 126 L.Ed.2d 73,(1993), Nelson vigorously pursued a life sentence and presented evidence and argument in support thereof. This is not a case where the court has to act on behalf of a death seeking defendant in order to preclude state from administering the death penalty by default. Hamblen v. State, 527 So.2d 800 (Fla. 1988)

Furthermore, this Court has repeatedly held that "a trial court need not expressly address each nonstatutory mitigating factor in rejecting them, 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), and '[t]hat the court's findings of fact did not specifically address appellant's evidence and arguments does not mean they were not considered.' Brown v. State, 473 So. 2d 1267, 1268 (Fla.), cert. denied, 474 U.S. 1038, 106 S.Ct. 607, 88 L.Ed.2d 585 (1985)." Lucas v. State, 568 So.2d 18, 24 (Fla. 1993). More

recently, in Bonifay v. State, 680 So.2d 413 (Fla. 1996), this Court rejected a similar argument stating:

> We find no error with the trial court's findings as set forth in the sentencing order regarding this mitigator. While the trial court did not specifically mention the term "organic brain damage," the court's discussion about Bonifay's attention deficit disorder refers to Bonifay's organic brain damage. The trial court expressly evaluated the evidence presented on this mitigator, thus complying with the requirements of Rogers and Campbell. The trial court's determination regarding the establishment and weight afforded to this mitigator is supported by competent, substantial evidence; consequently, the sentencing order is sufficient.

Bonifay at 417

The record in the instant case shows that the trial court, relying on Nelson's sentencing memorandum, considered, among other things, the following evidence in mitigation:

> 3. The Defendant acted under extreme duress or under the substantial domination of another person.
>
> *Dr. Merrin testified as to the Defendant's dysfunctional family and its history of mental illness and alcohol and drug abuse. The Defendant himself related a personal history of alcohol, drug as well as sex abuse by his step-father.* There was no evidence that the Defendant was under extreme duress or under the substantial domination of another person at the time of this offense. This statutory mitigating circumstance does not exist.
>
> * * *
>
> (4,5,6,7,8,9,10 & 12) These eight factors are all related and will be considered together.

> All of the defenses' witnesses have given unrebutted testimony that the Defendant's natural father is an alcoholic and has been one for many years. The testimony also shows the Defendant's early childhood involved abuse by his natural parents. There is no doubt that the Defendant's parents neglected his needs for clothing and other necessaries. There is also testimony as to the sexual abuse the Defendant suffered at the hands of his step-father. There was testimony that the Defendant's family suffered a history of mental illness which led Dr. Merrin to believe that the Defendant may have retained some latent genes of a mental disturbance that was available from his father's side of the family. The non-statutory factors in paragraphs 4, 5, 6, 7, 8, 9, 10 and 12 exist and the Court has given them moderate weight in the weighing process.

(XII/ R 1093-1094)

Thus, it is apparent that the court was aware of and considered the evidence concerning Nelson's claim of substance abuse history. The decision as to whether a particular mitigating circumstance has been established is within the trial court's discretion. Bonifay, at 416, citing, Preston v. State, 607 So.2d 404 (Fla.), cert. denied, 507 U.S. 999, 113 S.Ct. 1619, 123 L.Ed.2d 178 (1993); Lucas v. State, 568 So.2d 18 (Fla.1990). A review of the complete sentencing order shows the court sufficiently considered and weighed each of the applicable aggravating circumstances and each of the statutory and non-statutory mitigating circumstances as required by this Court's decision in Campbell v. State, 571 So.2d 415 (Fla. 1990).

Even assuming the trial judge failed to consider this mitigating factor, the error was harmless because the mitigator would not have offset the three aggravators (during the commission of a robbery, HAC, CCP) that were properly found. Lawrence v. State, 691 So.2d 1068 (Fla.), cert. denied, 510 U.S. 833, 114 S.Ct. 107, 126 L.Ed.2d 73,(1993); Wickham v. State,593 So.2d 191, 194 (Fla.), cert. denied, 505 U.S. 1209, 112 S.Ct. 3003, 120 L.Ed.2d 878 (1992); Rogers v. State, *supra*.

ISSUE IV

WHETHER THE TRIAL COURT ERRED IN FINDING THE MURDER WAS COLD, CALCULATED, AND PREMEDITATED WHERE APPELLANT ARGUED A PRETENSE OF JUSTIFICATION AND NO CAREFUL PLAN.

Appellant next contends that the trial court erred in finding the murder was cold, calculated, and premeditated because he had a pretense of justification and there was no careful plan. It is the state's position that the evidence supports finding the murder to have been committed in a cold, calculated, and premeditated manner with no pretense of moral or legal justification.

This Court has held that in order to prove the existence of the CCP aggravator, the State must show a heightened level of premeditation establishing that the defendant had a careful plan or prearranged design to kill. Rogers v. State, 511 So.2d 526, 533 (Fla.), cert. denied, 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988); Swafford v. State, 533 So.2d 270 (Fla.), cert. denied, 489 U.S. 1100, 109 S.Ct. 1578, 103 L.Ed.2d 944 (1989).

With regard to this aggravating factor the court specifically found:

> 3. The crime for which the Defendant is to be sentenced was committed in a cold and calculated and premeditated manner and without any pretense of moral or legal justification.
>
> The Defendant in this case made a plan in advance and lured the victim to the scene of his murder. The Defendant testified live and by video taped confession that he calmly discussed with his Co-Defendant methods by

> which they might entice the victim out of his car so they could kill him.
>
> The Defendant hit the victim, then chased him down and continued the beating. The Defendant then stopped and discussed with the Co-Defendant the victim's offer to give them what they wanted and make up a story in return for his life. Both decided the victim must die. The victim was cut at the throat with a box cutter, bound, and dragged into the brush where he was beaten some more and finally left to die.
>
> These actions were the product of calm and cool reflection and were not prompted by emotional frenzy, panic or a fit of rage.
>
> The death of Thomas Owens was the result of a careful plan made well in advance of the commission of the offense thus indicating a heightened state of premeditation.
>
> Since these facts were all admitted by the Defendant and the evidence fully supports his admission, the aggravating factor that the capital felony for which the Defendant is to be sentenced was committed in a cold and calculated and premeditated manner without any pretense of moral or legal justification has been proved beyond a reasonable doubt.
>
> None of the other aggravating factors enumerated by statute is applicable to this case and none other was considered by this Court.
>
> Nothing except as previously indicated (in paragraphs 1 - 3) above was considered in aggravation.

(XII/ R 1088-1090)

This finding was within the trial court's discretion and supports the conclusion that the aggravating factor was correctly found. Gudinas v. State, 693 So.2d 953 (Fla. 1997) Nevertheless,

Nelson contends that a pretense of moral justification existed “due to his emotional suffering, sexual abuse by his stepfather, abandonment by his mother and the rape of the Porth girl.” Neither the facts nor the law supports this conclusion.

In Cannady v. State, 427 So.2d 723 (Fla. 1983), this Court addressed the issue of what constitutes a "pretense" of moral or legal justification. This Court found that Cannady had such a pretense because Cannady had shot the victim only after the victim jumped at him. Similarly, in Banda v. State, 536 So.2d 221 (Fla.), cert. denied, 489 U.S. 1087, 109 S.Ct. 1548, 103 L.Ed.2d 852 (1989), this Court concluded that a "pretense" of moral or legal justification could consist of any "colorable claim ... that [the] murder was motivated out of self-defense, albeit in a form clearly insufficient to reduce the degree of the crime." Id. at 225.

On the other hand, this Court has rejected the proposition that by killing persons in order to prevent them from performing legal abortions, the defendant acted under a pretense of moral justification, Hill v. State, 688 So.2d 901 (Fla.), cert. denied, 118 S.Ct. 265 (1997) or that a pretense of moral justification existed where the murder had been committed in order "to focus attention on a chronic and pervasive illness of racial discrimination and of hurt, sorrow, and rejection," in Dougan v. State, 595 So.2d 1 (Fla.), cert. denied, 506 U.S. 942, 113 S.Ct. 383, 121 L.Ed.2d 293 (1992). This Court stated:

> "While Dougan may have deluded himself into thinking this murder justified, there are certain rules by which every civilized society must live. One of these rules must be that no one may take the life of another indiscriminately, regardless of what that person may perceive as a justification."

Id. at 6

Most recently, in Jackson v. State, 22 Florida Law Weekly S690 (Fla. Nov. 7, 1997), this Court rejected Jackson's claim that a pretense of moral or legal justification existed. Similar to Nelson's claim at trial that Owens' death was a result of Nelson's sexual abuse at the hands of his stepfather, Percival, and that Owens "became" Percival during the murder, Jackson argued that as a result of being raped as a child she perceived the officer's attempt to arrest her as an attempted rape. In rejecting this claim, this Court stated:

> As to a pretense of moral or legal justification, Jackson alleges this element was not proven because she perceived Officer Bevel's attempt to arrest her as an attempted rape. In support of her claim, Jackson relies on several cases in which this Court found factual evidence or testimony supported a colorable claim of self-defense. *See Christian v. State*, 550 So. 2d 450 (Fla. 1989), *cert. denied*, 494 U.S. 1028 (1990); *Banda, v. State*, 536 So. 2d 221 (Fla. 1988), *cert. denied*, 489 U.S. 1087 (1989); *Cannady, v. State*, 427 So. 2d 723 (Fla. 1983). In each of these cases, though, the victim had threatened violence to the defendant and caused the defendant to fear for his life. The same is not true in the instant case where Officer Bevel had not threatened or harmed Jackson. *Cf. Arbelaez v. State*, 626 So. 2d 169, 177 (Fla. 1993), *cert. denied*, 511 U.S.

> 1115 (1994). Moreover, we note that Jackson's belief that she was about to be raped was purely subjective. We have repeatedly rejected claims that the purely subjective beliefs of the defendant, without more, could establish a pretense of moral or legal justification. *Walls*, 641 So. 2d at 388. Consequently, we find that, unlike the murders that occurred in *Christian*, *Banda*, and *Cannady*, no pretense of legal or moral justification for this murder exists.
>
> Based on the foregoing, we conclude that the trial judge correctly found that the murder was cold, calculated, and premeditated. The trial court did not abuse its discretion in rejecting the expert testimony to the contrary, as that testimony was inconsistent with the facts of this case.

Id. at S692

Nelson's other claim of justification, based on the Tina Porth incident, is in nature of the rejected claim of justification in the Hill and Dougan line of cases, i.e., the victim is a bad person and deserves to die. As none of Nelson's claims of justification fall into the "self-defense" types of claims which have been upheld by this Court, it cannot be said that the trial court abused its discretion in rejecting his claim of justification.

Furthermore, Nelson's claim of justification could have been, should have been and, apparently, was rejected as it was simply not credible. First, Nelson told the officers that the his motive for killing Owens was "to have the car and the money and leave." (XVII/ T 743) He never claimed or even suggested it was because of what Owens had allegedly done to Tina Owens or because Owens, like Nelson's stepfather, watched pornography and used people.

Furthermore, Misty Porth testified that after she told Nelson that Owens had forced Tina to engage in oral sex, she heard Nelson and Owens arguing about it. Nelson told her that Owens had denied it and they continued to do things together like normal friends. When she asked Nelson if the murder had anything to do with Tina, he said probably or maybe. (XVII/ T 480-81) As such it was within the court's discretion to reject the contention as contrary to the evidence.

Appellant also claims the evidence did not show "cool and calm reflection" but an act prompted by emotional frenzy. To the contrary, Nelson's own statement shows that not only had he and Brennan devised the plan to murder Owens the day before they lured Owens to the remote location, but, also, after he and Brennan tied Owens up, they discussed Owens' plea that they leave him and just take the car. After rejecting the offer, they went back to beating and cutting Owens until he finally died. Then they hid the body and took the car. (XVII/ T 707, 727-733) The trial court's finding that "these actions were the product of calm and cool reflection and were not prompted by emotional frenzy, panic or a fit of rage" was within its discretion and appellant has failed to show an abuse of that discretion.

Assuming, arguendo, that it was error to find the factor, the error was harmless in light of the remaining valid factors.

ISSUE V

WHETHER THE TRIAL COURT ERRED IN FINDING THE HEINOUS, ATROCIOUS OR CRUEL AGGRAVATING FACTOR.

Appellant asserts that the trial court erred in finding heinous, atrocious or cruel aggravating factor and, therefore, weighed an invalid factor in violation of the Eighth Amendment to the United States Constitution. It is the state's position that the finding is well supported by the evidence and within the trial court's discretion.

With regard to this aggravating factor the trial court found the following:

> 2. The crime for which the Defendant is to be sentenced was especially heinous, atrocious or cruel.
>
> The victim in this case was lured under false pretenses to a remote section of Cape Coral, Lee County, Florida, ostensibly for the purpose of meeting a friend. The facts show that the Defendant and Co-Defendant knew that the victim kept a baseball bat in his car. They formulated a plan to get the victim out of the car by informing him that there was a cut in the rear bumper. When the victim got out to look, the Defendant hit the victim with the metal baseball bat. The facts show that the Defendant hit the victim twice before the victim tried to run away. The Defendant then chased the victim down and struck him again. While on the ground the victim asked the Defendant not to hit him any more and told him to take the car and anything else he wanted. The Defendant repeatedly told the victim to "shut up." The victim then offered to make up a story and let the Defendant and the Co-Defendant take everything in return for his life. The Defendant then beat the victim

> again to knock him unconscious so that the Co-Defendant could slit the victim's throat. As the Co-Defendant began to cut the victim's throat, the victim cried out that he was not out yet whereupon the Defendant hit the victim again with the bat. After the victim's throat was cut, the evidence shows that he was still alive and the Defendant then hit the victim at least four more times. This ordeal lasted over an undetermined period of time where the victim suffered multiple blows to the head. The evidence shows he was conscious and was aware of his impending doom when he asked to be knocked out before his throat was to be cut. This murder was a conscienceless, pitiless crime which was unnecessarily torturous to the victim. Since these facts were admitted by the Defendant and the facts fully support his admission, the aggravating factor that this murder was especially heinous, atrocious, or cruel has been proved beyond a reasonable doubt.
>
> (XII/ T 1090-1091)

In Reed v. State, 560 So.2d 203 (Fla.), cert. denied, 498 U.S. 882, 111 S.Ct. 230, 112 L.Ed.2d 184 (1990), this Court considered similar facts and held:

> On the other hand, the evidence supports the finding that the killing was especially heinous, atrocious, and cruel. Upon first encountering Mrs. Oermann, Reed slapped her and tied her up. He then severely beat her, leaving numerous bruises on her body. Following this, he choked the victim and then raped her. Finally, he slashed her throat more than a dozen times. The medical examiner testified that because the stab wounds were made with a serrated-edge knife, they would have taken more time and effort to inflict. Likewise, Reed told his cellmate, Nigel Hackshaw, that he cut the victim's throat "to keep her from talking," thus proving the aggravating circumstance of committing the killing to avoid lawful arrest.

> The elimination of the two aggravating circumstances would not have affected Reed's sentence. Rogers; Jackson v. Wainwright, 421 So.2d 1385 (Fla.1982), cert. denied, 463 U.S. 1229, 103 S.Ct. 3572, 77 L.Ed.2d 1412 (1983). There remain four aggravating circumstances balanced against a total absence of mitigating circumstances. We affirm the judgment and sentence.

Id. at 207

Similarly, in Hannon v. State, 638 So.2d 39 (Fla.), cert. denied, 513 U.S. 1158, 115 S.Ct. 1118, 130 L.Ed.2d 1081 (1995), this Court agreed that the beating and stabbing of a screaming victim supported the heinous, atrocious or cruel aggravating factor. This Court further noted in Hannon that it has consistently upheld findings of heinous, atrocious, or cruel under similar circumstances. Trotter v. State, 576 So.2d 691, 694 (Fla. 1990); Campbell v. State, 571 So.2d 415, 418 (Fla. 1990). See, also, Jackson v. Dugger, 633 So.2d 1051, 1055 (Fla.), cert. denied, 488 U.S. 1050, 109 S.Ct. 882, 102 L.Ed.2d 1005 (1989) (victim bound as he begged for mercy, beaten, stabbed and choked); Taylor v. State, 630 So.2d 1038 (Fla.), cert. denied, 513 U.S. 832, 115 S.Ct. 107, 130 L.Ed.2d 54 (1993) (victim was alive while she was stabbed, beaten, and finally strangled); Atwater v. State, 626 So.2d 1325, 1329 (Fla.), cert. denied, 511 U.S. 1046, 114 S.Ct. 1578, 128 L.Ed.2d 221 (1994) (victim beaten prior to or during the stabbing); Randolph v. State, 562 So.2d 331, 338 (Fla. 1990) (victim repeatedly hit, kicked, strangled, and knifed); Perry v. State, 522

So.2d 817 (Fla. 1988) (victim was choked and repeatedly stabbed and was severely beaten while warding off blows); Wilson v. State, 493 So.2d 1019 (Fla. 1986) (victim was brutally beaten while attempting to fend off blows before being fatally shot). Where, as here the evidence shows that the victim was beaten with a metal baseball bat, managed to escape, beaten again and again, then bound as he begged Nelson and Brennan to take his car but let him live and finally begs them to knock him out before they slice his throat, the trial court did not err in finding the HAC factor.

Nevertheless, appellant argues that this Court's opinions in Kearse v. State, 662 So.2d 677 (Fla. 1995); Stein v. State, 632 So.2d 1361, 1367 (Fla.), cert. denied, 115 S.Ct. 111, 130 L.Ed.2d 58 (1994); and Bonifay v. State, 626 So.2d 1310, 1313 (Fla.), appeal after remand, 680 So.2d 413 (Fla. 1996), appear to overrule prior cases by holding that HAC is not appropriate where the facts do not indicate that there was any intent to cause the victim unnecessary and prolonged suffering. Subsequent cases, however, have routinely acknowledged that HAC is consistently applied in cases where the victim is repeatedly bludgeoned, without any specific discussion as to the defendant's mental condition. This is because where facts demonstrate that a victim suffered a great deal, the reasonable inference is that the defendant either intended or was indifferent to such suffering. For example, in Bogle v. State,655 So.2d 1103 (Fla.), cert. denied, ___ U.S. ___,

116 S.Ct. 483, 133 L.Ed.2d 410 (1995), Bogle claimed that the factor could not be upheld because nothing in the case established that he intended to cause the victim unnecessary suffering. Upon rejecting this claim, this Court stated:

> "In his last claim regarding the aggravating circumstances, Bogle asserts that the murder in this case was not HAC. According to Bogle, nothing in this case established that Bogle intended to cause the victim unnecessary suffering. Additionally, he asserts that the evidence establishes that the victim was highly intoxicated and that the first blow to the victim's head could have killed her. As noted by the trial judge, Bogle struck [the victim] a total of seven times with such force that her head was so far impressed into a hollow in the ground that the initial impression of the officers at the scene was that the head had been flattened to a considerable degree. The medical examiner testified that the victim was alive at the time of the infliction of most of the wounds but could not testify as to how long she survived, "four breaths, several seconds, or a few minutes." In his opinion, the last blows were those inflicted to the side of her head--the blows which caused her death. The murder was extremely wicked and vile and inflicted a high degree of pain and suffering on the victim, Margaret Torres. The defendant acted with complete indifference to the victim's suffering.
>
> We have found other similar murders to be HAC and likewise find this factor to be supported here. Penn v. State, 574 So.2d 1079 (Fla.1991) (beating victim to death with hammer was HAC); Chandler v. State, 534 So.2d 701 (Fla.1988) (repeatedly beating victims with baseball bat was HAC), cert. denied, 490 U.S. 1075, 109 S.Ct. 2089, 104 L.Ed.2d 652 (1989); Lamb v. State, 532 So.2d 1051 (Fla.1988) (beating victim to death by

> striking victim on head with hammer six times was HAC)."
>
> Bogle v. State, 655 So.2d at 1109

Accordingly, the state maintains that the defendant's state of mind is not a dispositive fact that must be determined and weighed *every time* that HAC is considered. Rather, the relevant facts are typically those showing the manner in which the homicide occurred. Nevertheless, the facts in the instant case clearly show an utter indifference to the suffering of the victim. As Nelson related to the officers during the videotaped crime scene walk through, Owens' pleas to his friends for mercy were met with cold rejection and an order from Nelson to just "shut-up." (XVII/ T 726, 731) Owens was then bound and beaten some more. Owens was also forced to listen to Nelson's demands that Brennan go ahead and cut Owens' throat with the box knife as he had previously agreed. (XVII/ T 732-34) Owens then begged them to knock him out first because he was still conscious. (XVII/ T 732) Clearly, this evidence demonstrates "the defendant acted with complete indifference to the victim's suffering." Bogle, 655 So.2d at 1109.

Based on the foregoing, the state maintains that the trial court properly found the HAC aggravating circumstance.

ISSUE VI

WHETHER THE TRIAL COURT ERRED IN DENYING THE DEFENSE MOTION TO DECLARE THE HEINOUS, ATROCIOUS OR CRUEL JURY INSTRUCTION UNCONSTITUTIONAL AND DECLINING TO INSTRUCT THE JURY ON THE FACTOR.

Appellant's challenge to the heinous, atrocious or cruel jury instruction is without merit. The jury was given the full instruction on heinous, atrocious, or cruel now contained in Florida Standard Jury Instructions in criminal cases. This Court has consistently rejected claims that the statute or the new jury instructions are unconstitutionally vague.

> ". . . Because of this court's narrowing construction, the United States Supreme Court upheld the aggravating circumstance of heinous, atrocious, or cruel against the vagueness challenge in Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (Fla. 1976). Unlike the jury instruction found wanting in Espinosa v. Florida, ___ U.S. ___, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992), the full instruction on heinous, atrocious and cruel now contained in the Florida Standard Jury Instruction in Criminal Cases, which is consistent with Proffitt was given in Preston's case."

Preston v. State, 607 So.2d 404, 411 (Fla. 1992) Accord, Stein v. State, 632 So.2d 1361 (Fla.), cert. denied, 115 S.Ct. 111, 130 L.Ed.2d 58 (1994); Hall v. State, 614 So.2d 473 (Fla.), cert. denied, ___ U.S. ___, 114 S.Ct. 109, 126 L.Ed.2d 74 (1993).

To paraphrase this Court's holding in Whitton v. State, 649 So.2d 861, 867 (Fla.), cert. denied, 116 S.Ct. 106, 133 L.Ed.2d 59

1995) this instruction was approved in Hall v. State, 614 So.2d 473 (Fla.), cert. denied, ___ U.S. ___, 114 S.Ct. 109, 126 L.Ed.2d 74 (1993), and [Nelson] has not presented an adequate reason to recede from that decision.

Further, in light of the particular facts of this case, error, if any, is harmless.

ISSUE VII

WHETHER THE SENTENCE IMPOSED IN THIS CASE IS PROPORTIONATE.

Appellant's next claim is that the death penalty is disproportionate in the instant case in light of the totality of circumstances. He contends that two of the three aggravating circumstances were improperly found and, therefore, only one aggravating circumstance remains. Obviously, the state does not agree that the trial court improperly found CCP and HAC. Furthermore, proportionality is not a recounting of aggravating versus mitigating but, rather, compares the case to similar defendants, facts and sentences. Tillman v. State, 591 So.2d 167 (Fla. 1991). A review of similar cases compared to the facts of the instant case shows that the sentence in the instant case was proportionate.

The court below found three aggravating circumstances; 1) cold, calculated, and premeditated; 2) during the commission of a robbery; and 3) heinous, atrocious or cruel. In mitigation the court found Nelson's age as mitigating. The Court also found nonstatutory mitigating circumstances based on Nelson's family history including sexual and substance abuse, his cooperation with law enforcement, the absence of violence in his extensive prior criminal record, offer to plea to life, and Nelson's potential for rehabilitation. The jury recommended death by a vote of 12-0. (XII/ R 1088)

In Sliney v. State, 22 Florida Law Weekly S476a (Fla. 1997), upon affirming the death sentence imposed on the nineteen year old defendant who beat and stabbed a pawnshop owner to death during the course of a robbery, this Court stated:

> We next address Sliney's issue eight: whether the death penalty is proportionate. In reviewing the proportionality of a death sentence, we must consider the totality of the circumstances in a case and compare it with other capital cases. Terry v. State, 668 So.2d 954, 965 (Fla.1996). Although the trial court did not find the aggravating circumstance that the murder was especially heinous, atrocious, or cruel, this was a particularly brutal murder. The victim was beaten with a hammer to the face and was found with a pair of scissors stuck in his neck, with fractured ribs, and with a fractured backbone. The trial court did find two aggravating circumstances. Moreover, the trial court did not find any statutory mental mitigation. Comparing this to other cases in which the death penalty was imposed, we do not find that the mitigating circumstances which were found to exist in this case make the death sentence disproportionate. See Smith v. State, 641 So.2d 1319 (Fla.1994); see generally Geralds v. State, 674 So.2d 96 (Fla.), cert. denied, --- U.S. ----, 117 S.Ct. 230, 136 L.Ed.2d 161 (1996); Finney v. State, 660 So.2d 674 (Fla.1995), cert. denied, --- U.S. ----, 116 S.Ct. 823, 133 L.Ed.2d 766 (1996). Furthermore, we agree with the trial court that the codefendant's life sentence does not require a different result because Sliney was more culpable than his codefendant. See Heath v. State, 648 So.2d 660 (Fla.), cert. denied, --- U.S. ----, 115 S.Ct. 2618, 132 L.Ed.2d 860 (1995).
>
> Id. at 477

Similarly, this Honorable Court has upheld the imposition of the death penalty in numerous other cases where the evidence shows

that a victim was brutally beaten and stabbed. See, e.g., Atwater v. State, 626 So.2d 1325 (Fla.), cert. denied, 511 U.S. 1046, 114 S.Ct. 1578, 128 L.Ed.2d 221 (1994) (sentence upheld where defendant entered victim's apartment and repeatedly stabbed victim); Bowden v. State, 588 So.2d 225 (Fla.), cert. denied, 503 U.S. 975, 112 S.Ct. 1596, 118 L.Ed.2d 311 (1992)(sentence affirmed where the evidence shows that the victim was brutally beaten to death with a rebar and the trial court imposed death after finding HAC and prior violent felony balanced against Bowden's abused childhood); Hayes v. State, 581 So.2d 121 (Fla.), cert. denied, 502 U.S. 972, 112 S.Ct. 450, 116 L.Ed.2d 468 (1991) (two aggravating factors weighed against minor mitigating factors of age, low intelligence, learning disabled, a product of deprived environment); Freeman v. State, 563 So.2d 73 (Fla.), cert. denied, ___ U.S. ___, 111 S.Ct. 2910, 115 L.Ed.2d 1073 (1991)(death penalty not disproportionate where two aggravating factors weighed against mitigating evidence of low intelligence and abused childhood); Kight v. State, 512 So.2d 922 (Fla.), cert. denied, 485 U.S. 929, 108 S.Ct. 1100, 99 L.Ed.2d 262 (1988), disapproved on other grounds, Owen v. State, 596 So.2d 985 (Fla. 1992)(death penalty proportionally imposed with two aggravating factors despite evidence of mental retardation and deprived childhood); Watts v. State, 593 So.2d 198 (Fla.), cert. denied, 505 U.S. 1210, 112 S.Ct. 3006, 120 L.Ed.2d 881 (1992)(prior

convictions, during the course of sexual battery, and pecuniary gain outweighed mitigation of defendant's age and low IQ).

A review of the facts established in the instant case clearly demonstrates the proportionality of the death sentence imposed. The circumstances of this murder compels the imposition of the death penalty. Tommy Owens' murder was the result a totally unprovoked attack by Joshua Nelson, for no better reason than Nelson wanted his friend Tommy Owens' car. This murder was the result of a cold, calculated plan carried out in a heinous manner.

Accordingly, the state urges this Honorable Court to find that the sentence imposed in the instant was properly imposed.

CONCLUSION

Based on the foregoing arguments and authorities, the judgment and sentence should be affirmed.

Respectfully submitted,

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COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Paul C. Helm, Assistant Public Defender, Public Defender's Office, Post Office Box 9000, Drawer PD, Bartow, Florida 33831, this _____ day of December, 1997.

COUNSEL FOR APPELLEE