IN THE SUPREME COURT OF FLORIDA

LYNFORD BLACKWOOD,

Appellant,

vs. Case No. 90,859

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTEENTH JUDICIAL CIRCUIT,
IN AND FOR BROWARD COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

MARRETT W. HANNA
ASSISTANT ATTORNEY GENERAL
FLA. BAR NO. 0016039
1655 PALM BEACH LAKES BLVD.
SUITE 300
WEST PALM BEACH, FL. 33409
(561) 688-7759
ATTORNEY FOR APPELLEE

TABLE OF CONTENTS

TABLE OF CITATIONS

STATUTES PAGES

IN THE SUPREME COURT OF FLORIDA

LYNFORD BLACKWOOD,

Appellant,

vs. Case No. 90,859

STATE OF FLORIDA,

Appellee.
_____/

PRELIMINARY STATEMENT

Appellant, LYNFORD BLACKWOOD, was the defendant in the trial court below and will be referred to herein as "Appellant." Appellee, the State of Florida, was the petitioner in the trial court below and will be referred to herein as "the State." Reference to the pleadings will be by the symbol "R," reference to the transcripts will be by the symbol "T," and reference to the supplemental pleadings and transcripts will be by the symbols "SR[vol.]" or “ST[vol.]” followed by the appropriate page number(s).

STATEMENT OF THE CASE AND FACTS

The state accepts Appellant's statement of the case and facts as reasonably accurate, but provides the following additions or corrections as they relate to both the guilt and sentencing phases:

1. Anthony Thomas went to Carolyn's house to check on her because she did not show up for work. (TIV 406-407). He discovered Carolyn's body in her bedroom, naked on her bed and not moving. (TIV 414). Although he placed a pillow over her lower private parts, he did not touch any place around her head. (TIV 415). He also said it was unusual for her to have stuff strewn about her bedroom because she normally kept it neat. (TIV. 417).

2. Katrina Tynes knew Appellant as "the guy that used to date my mom." (TIV 393). Her mother instructed her not to accept anything from Appellant. (TIV 396). Katrina also said Appellant was selfish: "He always wanted [her mother] to hisself." (TIV 396).

3. Officer Joseph Bollinger observed one of the EMS personnel with foam on his glove. When he pointed this out to the paramedic, "he wiped it on the pillow her head was on." (TIV 445). He also observed speaker wire knotted at both ends on the floor next to the bed where Carolyn's body was discovered. (TIV 467).

4. When asked by defense counsel if Appellant indicated "he choked [the victim] to kill her," Donovan Robinson, Appellant's cousin, said, "No, he didn't. He didn't tell me that. He said he choked her, not to kill her, he didn't tell me that." (TV 500). He said Appellant did not tell him what his intentions were. (TIV 501).

5. St. Petersburg Police Officer Alan Seymour received Appellant's description and possible location. (TV 570). While patrolling, he observed a suspect matching Appellant's description. (TV 571). He approached the individual and asked for his name. (TV 571). Appellant said, "Earl Simmey." (TV 571). Then after asking Appellant to stand up and turn around, Appellant stood up, refused to turn around and took off running. (TV 571). Officer Seymour captured him, and Donovan Robinson identified this individual as Appellant. (TV 572).

6. Assistant Medical Examiner Dr. Eroston Ann Price concluded that the cause of death was asphyxia:

> In this particular case, [the victim] had pretty much every method of asphyxia except the bag over the head. Technically she had evidence of a ligature around her neck, and you saw the actual abrasion from the ligature. She has significant trauma in the muscles of the neck that can be created from a ligature, but is more common from actual hands around the neck. She had the soap and the towel in her mouth that would block her ability to

> breathe through her mouth. There was foam on the pillow that took the shape of her nostrils. There is foam in her nostrils such as the pillow being placed over her face. Quite a few methods and it takes a while to inflict those injuries.

(TVI 723-724). She also concluded that the grooves in the wire found by Carolyn's bed were consistent with the marks around the entire circumference of Carolyn's neck. (TVI 708). And that it took several minutes for Carolyn's healthy heart to fail. (TVI 713).

8. Carter Powell admitted on cross-examination that before coming to testify he did not review Appellant's contact card to see if Appellant received any DR's, although he was supposed to review it. (TX 989). After looking at the card, Powell indicated that Appellant was involved in a fight in December 1995 and got 8 days in lock down. (TX 994-995). Appellant also refused to come to court on a number of occasions and had to be ordered by Judge Cohn to comply. (TX 990). Mr. Powell admitted that he violated BSO policy because he failed to notify his supervisor and the prosecutor when he received his subpoena. (TX 993).

9. The jury recommended that Appellant be sentenced to death by a majority vote of nine to three. (TX 1138).

SUMMARY OF ARGUMENT

Issue I - Appellant's sentence is proportionate to those in other cases under similar facts. Appellant had one weighty aggravator based on the heinous, atrocious and cruel murder of Carolyn Thomas-Tynes. In contrast, Appellant's mitigation paled by comparison.

Issue II - The trial court properly denied Appellant's motion for judgment of acquittal on the element of premeditation. The state presented ample evidence demonstrating Appellant's consciousness of the nature of his act as he utilized four different methods to kill Carolyn and that Carolyn's death was the probable result of Appellant's actions.

Issue III - The trial court correctly found the HAC aggravator where the evidence revealed that the victim suffered four different methods of strangulation, endured a continuing attack and was aware of her impending death, as was evidenced by signs of struggle.

Issue IV - Appellant failed to preserve this issue for review because he failed to proffer his mental health expert's reports for the record. These reports were cumulative evidence in light of the expert's testimony from her reports and the trial court did not abuse its discretion when it did not admit them into evidence. The trial court considered the expert's testimony, which was based on

the expert's reports. And any error in excluding these reports was therefore harmless.

Issue V - The trial court did not abuse its discretion when it allowed Serina Thomas and Hazel Scott to testify about statements Appellant made to them. The defense only objected to portions of these statements on the basis of "double hearsay," but these statements were not offered to prove the truth of the matter asserted. The testimony as a whole clearly related Appellant's state of mind around the time of the murder.

Issue VI - The record supports the trial court's rejection of the extreme mental or emotional disturbance mitigating circumstance and the trial court did not abuse its discretion. This is particularly evident because the trial court found that Appellant suffered from an emotional disturbance and considered this as a non-statutory mitigating factor.

Issue VII - When read in its entirety, the trial court's written sentencing order establishes that the trial court did not apply a presumption of death upon finding the existence of a single aggravating factor. The order reveals that the court performed its statutory duty by making the requisite findings.

Issue VIII - Appellant failed to propose age as a mitigating factor and he failed to present evidence in support of this factor.

The trial court does not have to speculate about mitigation not apparent from the record, particularly where Appellant's age was not linked with some other characteristic demonstrating immaturity.

Issue IX - The trial court did not abuse its discretion when it did not admit hearsay testimony, which was not capable of being rebutted, and amounted to self-serving statements.

ARGUMENT

ISSUE I

WHETHER THE DEATH SENTENCE AT BAR IS PROPORTIONATE (Restated).

In performing proportionality review, this Court's function is to "view each case in light of others to make sure the ultimate punishment is appropriate." Songer v. State, 544 So. 2d 1010, 1011 (Fla. 1989). It should not reweigh the facts or the aggravating and mitigating circumstances. Gunsby v. State, 574 So. 2d 1085, 1090 (Fla. 1991), cert. denied, 116 L. Ed. 2d 102 (1992); Hudson v. State, 538 So. 2d 829, 831 (Fla. 1989), cert. denied, 493 U.S. 875 (1990). In fact, this Court must accept, absent demonstrable legal error, the aggravating and mitigating factors found by the trial court, and the relative weight accorded them. See State v. Henry, 456 So. 2d 466 (Fla. 1984). It is upon that basis that this Court determines whether the defendant's sentence is too harsh in light of other decisions based on similar circumstances. Alvord v. State, 322 So. 2d 533 (Fla. 1975), cert. denied, 428 U.S. 923 (1976).

As the trial court recognized, the weighing process is not a numbers game. Rather, when determining whether a death sentence is appropriate, careful consideration should be given to the totality of the circumstances and to the weight given the aggravating and

mitigating circumstances. Floyd v. State, 569 So. 2d 1225, 1233 (Fla. 1990), cert. denied, 501 U.S. 1259 (1991). While it is true that this Court has required there to be little or no mitigation for a case to withstand proportionality review with a single aggravator,[1] this Court has also stressed that it is the weight of the aggravators and mitigators that is of critical importance. See e.g., Windom v. State, 656 So. 2d 432, 440 (Fla. 1995) (finding in a single aggravator case that the number of aggravating and mitigating circumstances is not critical but rather the weight given them).

Here, although the trial court found only HAC in aggravation, it obviously assigned significant weight to it. This conclusion is implicit in the trial court's sentencing order:

> Without question, the undisputed facts established beyond a reasonable doubt that this murder was unnecessarily torturous to the victim and was especially heinous, atrocious, or cruel.

(RXIV 1583). Moreover, this Court has previously observed that "[b]y any standards, the factors of heinous, atrocious, or cruel,

[1] See, e.g., Songer, 544 So. 2d at 1011 ("We have in the past affirmed death sentences that were supported by only one aggravating factor, but those cases involved either nothing or very little in mitigation." (citation omitted)

and cold, calculated premeditation are of the most serious order." Maxwell v. State, 603 So.2d 490, 494 n.4 (Fla. 1992).

The record in this case certainly supports the extremely serious nature of the HAC aggravator. Appellant admitted that he strangled Carolyn, but he attempted to minimize his culpability in his confession. (TV 633-637). The cause of death was mechanical asphyxia associated with ligature strangulation and smothering. (TVI 722). Carolyn was subjected to a series of torturous "hands-on" methods before she ultimately succumbed. Dr. Price, the medical examiner, testified that Carolyn was manually strangled, as she had extensive deep muscle bruising in her neck. She was also strangled by a wire, evidenced by the ligature marks around the entire circumference of her neck. Dr. Price removed a folded normal-sized hand towel and a bar of soap from the very back of her throat. A lathery foam emanated from her mouth and nose and was also present in her lungs. Finally, she was smothered with a pillow as there were nostril imprints discovered on the pillowcase. She also had bruising on her head and body and some of her hair was ripped from her scalp. Extensive petechial hemorrhaging in the whites of Carolyn's eyes and eyelids, as well as the amount of fluid in her lungs, indicated that a lengthy struggle occurred, during which time Appellant applied and reapplied pressure to her

neck. (TVI708-723). There is no question that it took Appellant some time to bring about Carolyn's death and that she was conscious of her impending death.

In this case, the state argued for both the CCP and the HAC aggravators factors, But the trial court found only one aggravating factor:

> Without question, the undisputed facts established beyond a reasonable doubt that this murder was unnecessarily torturous to the victim and was especially heinous, atrocious, or cruel.

(R. 1583). In mitigation, the trial court only found one statutory mitigating factor--that Appellant had no significant history of prior criminal conduct and accorded this factor "significant weight." (RXIV 1584). The court did not find that evidence of extreme mental or emotional disturbance existed, but considered this as a non-statutory mitigator because the mental health expert found that the defendant was under the influence of an emotional disturbance. (RXIV 1584).

As far as other non-statutory mitigating factors, the trial court found seven factors:

1. Defendant's capacity for rehabilitation. The trial court specifically indicated that its only reason for finding this mitigator was because the mental health expert, Dr. Block-Garfield,

testified that the defendant had the capacity for rehabilitation. On cross-examination, however, Appellant's expert admitted that she was not confident any murderer could be rehabilitated and that there is no protocol for rehabilitating a murderer. (TXI 1233, 1235). Thus, although the court found that the Appellant's capacity for rehabilitation existed, it gave this mitigator "very little weight." (R XIV 1584).Moreover, in considering and rejecting Defendant's good conduct in jail, the trial court went through a litany of Appellant's bad acts while in jail:

> In fact, jail records revealed the defendant was involved in a fight and received eight days in lockdown as punishment. The defendant refused to come to court on two occasions, and refused to be evaluated by a psychologist for a court ordered competency evaluation. The defendant had contraband in his cell and wrote on the jail walls. He showed an inability to get along with other inmates. In short, the evidence demonstrated a pattern of not obeying rules and orders.

(RXIV 1585).

2. Defendant's cooperation with police. The trial court gave this mitigator "only moderate weight," but this label should not be taken too literally. It is apparent from the court's sentencing order that it did not believe that Appellant actually cooperated with the police, other than confessing to the crime. In fact, the court pointed out that Appellant did everything but cooperate until

he was in custody. "The defendant fled the scene of the murder traveling across the state to Pinellas County where he was later arrested." (RXIV 1585). Initially, Appellant gave Officer Seymour a false name before attempting to flee from the officer. (TV 571). Once at the police station, Appellant gave Officer James Jones another false name and false date of birth. (TV 575). Then while speaking with Detective Desaro, Appellant said his name was Errol Smith but had difficulty spelling it. (TV 587). He gave the detective an "incident description" in which he stated that he hitch hiked from Tampa to St. Petersburg. A man named Donovan Robinson gave him a ride to the St. Petersburg area and left him. Appellant said he spent the night in a Tampa motel and was trying to get back to Tampa when he was picked up. (TV 587). Eventually, the detective told Appellant that he was going to be booked into the county jail under the name Lynford Blackwood with an alias of Errol Smith. (TV 588).

When Appellant was being prepared for transport to the jail, he brought his injuries to Officer Jones' attention. (TV 576). As a result, Officer Jones took Appellant to Bayfront Medical Center. (TV 576-577). While at the hospital, Appellant indicated that he wished to speak to Detective Desaro again. (TV 589). En route to the jail, Appellant told Officer Jones that he had never been to

jail and asked what happens there. (TV 582). During this trip, Appellant also alluded to the fact that he might have some disease. (TV 583). The officer then explained the administrative details about booking procedures and fingerprinting.

These facts reveal that Appellant was not cooperative with the police and only agreed to talk when faced with being sent to the jail. Even his statement, however, revealed a lack of intent to cooperate. As the trial court observed, "the defendant gave a statement to police indicating his involvement, but describing his actions in vague, imprecise terms, attempting to minimize his culpability." (RXIV 1585). In light of the above discussion, it is apparent that the trial court truly deemed Appellant's "cooperation" inconsequential and therefore accorded it "only moderate weight." (RXIV 1585).

3. Murder was the result of lover's quarrel. The trial court considered this non-statutory mitigating factor at defense counsel's request; however, its order assigns no specific weight to this factor. (RXIV 1585-1586). The evidence presented at trial revealed that Appellant's relationship with Carolyn ended during the Fall of 1994. (TVI 757). She had a new boyfriend and was six weeks pregnant with her new boyfriend's baby. (TVI 719). Clearly,

these facts do not support a finding that this murder occurred as the result of a lover's quarrel.

4. Defendant's remorse. The trial court strained to find some basis for this mitigator, as is evident from its order:

> It is difficult for the court to determine whether this non-statutory mitigator exists. The defendant did tell police that he was sorry for what happened. He also told the defense mental health expert that he regretted what happened.

(RXIV 1586). Initially, the record reveals that Appellant showed no remorse about murdering Carolyn. In fact, it only shows that he was busy trying to get away with murder. He fled to St. Petersburg and tried to make arrangements to go to New York. He gave a false name and birth date in an effort to evade capture and demonstrated no remorse until he was caught. Only at that point did Appellant indicate that he was sorry for what happened. Moreover, during Appellant's interview with Dr. Block-Garfied, he never accepted responsibility for murdering Carolyn. Instead, he stated, "they say I killed someone. They say I killed a woman." (TXI 1179). Appellant also told the doctor, "[t]hey say I was fighting her and I killed her." (TXI 1179). And he stated that he did not think she was dead. (TXI 1179, 1180). As a result, it becomes apparent that the only remorse Appellant experienced is remorse that he got caught and regret for his predicament. Furthermore, the doctor

conceded on cross-examination that Appellant did not express remorse until she inquired for that specific purpose. (TXI 1258, 1266).

5. Defendant is a good parent. Here again, the trial court strained to find support for this mitigator. In affording only "some weight" to this mitigator, the court observed that Appellant and his son were "best friends" and that Appellant visited his son several times a week. (RXIV 1586). In spite of these frequent visits, however, Appellant could not tell Dr. Block-Garfield how old his son was. (TXI 1248). Furthermore, Appellant did not talk about his son during any of the two prior interviews with Dr. Block-Garfied. (TXI 1248). In fact, he did not mention his son until the doctor asked about his son, particularly to gain information for this mitigator. (TXI 1249-1251). Moreover, nowhere in Appellant's statements to the police did Appellant express concern for what his son would endure as a result of this. It is clear that Appellant was concerned only about himself and what he wanted. In addition, Appellant certainly cannot be deemed a good parent for setting a horrible example of how to treat a woman you supposedly love and cherish. Claudette Bernard, Appellant's former girlfriend and mother of his child summed it up:

> I feel he should put his child first and be there for him, not choosing somebody that

> would tell him when to see his child or if he has to hide to see his child, stuff like that. That's the way it was.

(TXI 1062). Apparently, Appellant did not put his child first before he murdered Carolyn and clearly was not being a good parent when he murdered Carolyn. Thus, this mitigator was entitled to "some," but not much, weight.

6. Defendant's employment record. The evidence established that Appellant built cabinets by trade. (TX 1018). His friends characterized him as a hard worker. At the same time, however, Appellant's own witness, Joe Petty, testified that Appellant was fired from his job. (TX 1007). And the mother of Appellant's son, Claudette Bernard, testified that Appellant had not been working for a while. (TX 1061). Appellant's own brother testified that Appellant left his job at Wico Mico a year and a half before this murder. (TX 1018). Accordingly, this mitigator was given only "some weight." (RXIV 1587).

7. Defendant's intelligence level. As the trial court observed, Appellant's mental health expert testified that Appellant scored 70 on the Weschler Adult Intelligence Scale. But the expert also opined, "I did not feel that his performance reflected his true intellectual capability, but rather it was underestimated because of the depression and that he may perhaps function in the

low average range." (TXI 1205). Joe Petty, a former co-tenant in a warehouse with Appellant, knew Appellant anywhere from three to five years or more. (TX 1005-1006). Mr. Petty characterized Appellant as hard working, with above average intelligence. (TX 1008). Mr. Petty summed it up nicely when he stated:

> Depends what you're doing. If you are putting in cabinets, making them, I would say [Appellant's] a leader. He knows that. That's his profession. Any other capacity, he was a home owner. At his job 15 years. You don't stay on a job 15 years without having respect for other leaders and being able to follow directions.

(TX 1008). Appellant's sister, however, testified that "[o]ut of all seven of us, [Appellant] would be on the lower level." (TX 1072). She said that he was not able to communicate as well as others. (TX 1072). Based on this testimony and in light of the gravity of the death sentence, the trial court reluctantly accorded this factor "some weight." (RXIV 1587).

Both the jury and the trial court considered Appellant's mitigation and weighed it against the fact that Appellant murdered Carolyn in a horrific manner. Neither was persuaded that Appellant deserved a life sentence. When deciding whether Appellant's sentence is proportionate to those of other defendant's under similar circumstances, this Court should compare Appellant's case

to those where the court found a single weighty or serious aggravating circumstance and some mitigation.

This Court has affirmed cases where the sole aggravator was especially weighty, in spite of mitigation. In Ferrell v. State, 680 So.2d 390 (Fla. 1996), the defendant killed his live-in girlfriend and was previously convicted of a second-degree murder. This Court found Ferrell's lone aggravator "weighty." In mitigation, the trial court found that Ferrell "was impaired, was disturbed, was under the influence of alcohol, was a good worker, was a good prisoner, and was remorseful." Id. at 392, n.2. In considering the evidence of mitigation, this Court observed that the trial court assigned little weight to each of these factors. Id. at 391. Ultimately, this Court found the defendant's sentence proportionate, citing to Duncan v. State, 619 So.2d 279 (Fla.), cert. denied, 510 U.S. 969 (1993), King v. State, 436 So.2d 50 (Fla. 1983), cert. denied, 466 U.S. 909 (1984), Lemon v. State, 456 So.2d 885 (Fla. 1984), cert. denied, 469 U.S. 1230 (1985), and Harvard v. State, 414 So.2d 1032 (Fla. 1982), cert. denied, 459 U.S. 1128 (1983).

Likewise, in Cardona v. State, 641 So.2d 361 (1994), this Court upheld Cardona's death sentence where the trial court found as a single aggravator that the murder was especially heinous, atrocious

or cruel. In mitigation, the trial court found that Cardona was under the influence of extreme mental or emotional disturbance and that her ability to conform her conduct to the requirements of the law may have been substantially impaired. Although the extent of abuse in the instant case was not as protracted as that endured by the victim in Cardona, the degree of abuse is comparable, and the amount of mitigation in Cardona was greater than or equal to the mitigation here. Thus, in light of the extended period of time that Carolyn suffered horrific abuse, which culminated in her death, and the comparatively little mitigation, Appellant's death sentence is warranted.

In Arango v. State, 411 So.2d 172 (Fla. 1982), rev'd on other grounds, 497 So.2d 1161 (Fla. 1986), the trial court found only the HAC aggravator based on facts similar to the instant case. Arango utilized several different methods to kill his victim, including wrapping a wire around the victim's neck to choke him and stuffing a large towel down the victim's throat to prevent him from breathing. In mitigation, Arango established a lack of prior criminal history, as did Appellant. Finding death proportionate, this Court reflected:

> The death penalty statute does not contemplate a mere tabulation of aggravating versus mitigating circumstances to arrive at a net sum. Instead, it places upon the trial judge

> the task of weighing all these factors. We believe that the trial court properly performed this function.

Id. at 175. Likewise, in the instant case, the trial court found some mitigation, but when viewed in the totality of the circumstances, the trial court appropriately weighed all of these factors and properly performed this function.

Finally, in Pope v. State, 679 So.2d 710 (Fla. 1996), the defendant beat, stabbed and kicked the victim in the head repeatedly with cowboy boots, took her car and fled. The trial court found two aggravating circumstances, two statutory mitigating circumstances and three nonstatutory mitigating circumstances. On appeal, he argued that his sentence was disproportionate because this murder arose from a lovers' quarrel. This Court disagreed, however, because the evidence demonstrated that this was a premeditated murder for pecuniary gain, not a heat of passion killing. Id. at 716. Similarly, the evidence in the instant case does not support Appellant's claim that Carolyn's murder resulted from a lovers' quarrel. Rather, the evidence reveals that this was a premeditated murder of the most heinous fashion. Moreover, in Pope the trial court found significant mitigation. By comparison, here looking at the entire record, the trial court found relatively inadequate mitigation in light of the "unquestionably cruel" manner

of death. (RXIV 1588). Accordingly, in comparison with other death cases, Appellant's sentence is proportionate. See also, Pooler v. State, 704 So.2d 1375 (Fla. 1997); Cummings-El v. State, 684 So.2d 729 (Fla. 1996); Spencer v. State, 691 So.2d 1062 (Fla. 1996).

Appellant asks this Court to impose a life sentence because there was only a single aggravator and what he characterizes as strong mitigation. He cites to numerous cases remanded by this Court for a life sentence where there were one or two aggravators. But significantly, either the aggravators were weakened by certain facts, an aggravator was stricken, the murder occurred as the result of a long-standing heated domestic conflict, or the mitigators were incredibly weighty. For example, in Penn v. State, 547 So.2d 1079 (Fla. 1991), this Court struck the CCP aggravator and imposed life because of Penn's heavy drug use and duress from his domestic situation. In Besaraba v. State, 656 So.2d 441 (Fla. 1995), this Court struck the CCP aggravator, leaving only the commission of another capital offense, which was outweighed by "vast mitigation." In Blakely v. State, 561 So.2d 560 (Fla. 1990), this Court found death disproportionate because the murder resulted from a long-standing domestic dispute over money and children. In Maulden v. State, 617 So.2d 298 (Fla. 1993), this Court struck all of the aggravating factors. In Smalley v. State, 546 So.2d 720

(Fla. 1989), this Court found it unlikely that Smalley intended to kill the victim, and except for felony murder, Smalley probably could not have been convicted of a crime greater than second-degree murder. In Santos v. State, 591 So.2d 160 (Fla. 1991), the trial court failed to find mental mitigation and erred in its findings on the aggravating factors as well. Consequently, this Court remanded for resentencing. In Wright v. State, 688 So.2d 298 (Fla. 1996), this Court found that the record was devoid of aggravation, but rife with mitigation. Finally, in Sinclair v. State, 657 So.2d 1138 (Fla. 1995), this Court found death disproportionate where the sole aggravator was that the murder was committed in the course of a robbery when weighed against mitigators given some weight by the trial court. Sinclair is unlike the instant case because the aggravator is not considered as "weighty" or serious as the HAC aggravator in the instant case.

In addition, Appellant repeatedly characterizes this murder as a heated domestic confrontation. There is no evidence, however, to substantiate such a conclusion. Appellant and Carolyn never lived together and Carolyn ended the relationship several months before this murder. There is no evidence that they were together, much less had an ongoing dispute.

In Zakrzewski v. State, 717 So.2d 488 (Fla. 1998), this Court reiterated the holding in Spencer v. State, 691 So.2d 1062, 1065 (Fla. 1996), cert. denied,---U.S.---, 118 S.Ct. 213, 139 L.Ed.2d 148 (1997), that there is no *per se* "domestic dispute" exception:

> [T]his Court has never approved a "domestic dispute" exception to imposition of the death penalty. See [Santos v. State, 629 So.2d 838 (Fla. 1994)] (finding death sentence disproportionate because four mitigating circumstances of extreme emotional disturbance, substantial inability to conform conduct to requirements of law, no prior history of criminal conduct, and abusive childhood outweighed single aggravating circumstance of prior violent felonies based upon crimes that occurred during the murders). In some murders that result from domestic disputes, we have determined that CCP was erroneously found because the heated passions involved were antithetical to "cold" deliberation. Santos v. State, 591 So.2d 160, 162 (Fla. 1991); Douglas v. State, 575 So.2d 165, 167 (Fla. 1991). However, we have only reversed the death penalty if the striking of the CCP aggravator results in the death sentence being disproportionate.

Id. Moreover, the "domestic" cases cited by Appellant focus on lengthy ongoing family struggles, which involved financial difficulties and child custody disputes. Appellant's prior relationship with Carolyn does not fall into any of these categories, particularly because they did not live together and did not face everyday struggles involving children or financial burdens. Accordingly, based on Ferrell, Cardona, Arango and Pope,

and the cases cited therein, this Court must affirm Appellant's sentence of death.

ISSUE II

WHETHER THE RECORD SUPPORTS THE TRIAL COURT'S DENIAL OF APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL WITH RESPECT TO THE ELEMENT OF PREMEDITATION (Restated).

Appellant argues that the state failed in its initial burden to refute his version of the facts. As a result, he contends that the trial court should have granted a judgment of acquittal to the charge of first degree murder. Under Florida law, premeditation can be formed in a moment and need only exist "for such time as will allow the accused to be conscious of the nature of the act he is about to commit and the probable result of that act." Asay v. State, 580 So.2d 610, 612 (Fla.), cert. denied, ---U.S.---, 112 S.Ct. 265, 116 L.Ed. 218 (1991). The jury must determine whether a premeditated design to kill was formed before the killing. Id. This determination may be established by circumstantial evidence. Id. Although a motion for judgment of acquittal should be granted in a circumstantial case if the state fails to present evidence from which the jury can exclude every reasonable hypothesis except that of guilt, a jury is not required to believe a defendant's story where the state produces evidence that conflicts with his version of events. DeAngelo v. State, 616 So.2d 440 (Fla. 1993), (citing Holton v. State, 573 So.2d 284 (Fla. 1991)). In the

instant case, this is exactly what occurred. The state presented evidence that conflicted with Appellant's version of the events.

Appellant's argument focuses upon his own claims that he choked Carolyn during an argument but did not intend to kill her, in spite of evidence indicating "purposeful actions" (Appellant's Brief p. 35). This contention, however, is contradicted by Assistant Medical Examiner Dr. Eroston Ann Price's testimony, which indicated that there were four different methods of asphyxiation used to kill Carolyn Thomas-Tynes. (TVI 722).

1. **Ligature**: There was evidence that Appellant used a ligature that was consistent with speaker wire found next to Carolyn's bed on the floor. (TVI 707-708). Small linear scratches appeared on Carolyn's neck, which indicated that she tried to remove the ligature. In addition, Carolyn's face was much darker than the rest of her body. (TVI 710). According to Dr. Price, this discoloration indicated that Carolyn had something tight around her head or had a buildup of blood in her head, which would have been caused by a ligature. (TVI 710).

2. **Manual Strangulation**: Dr. Price explained that the autopsy revealed muscular hemorrhaging in Carolyn's neck. (TVI 720). She also had hemorrhaging in the ligaments of her hyoid cartilage, indicating a significant amount of pressure around her throat.

(TVI 721). In other words, Carolyn had injuries consistent with hands being applied to her neck. (TVI 722).

3. Suffocation: Soap and a folded normal-sized hand towel had been shoved all the way to the back of her mouth, occluding her pharynx. (TVI 715). Dr. Price observed lathery foam coming from Carolyn's mouth and nose. Therefore, Dr. Price concluded that Carolyn was alive when the soap was placed in her mouth. (TVI 717). In addition, Dr. Price explained, "the foam in her mouth and nose indicated that Carolyn was alive for some time for that to be produced." (TVI 717).

4. Smothering: Carolyn was smothered with a pillow. Dr. Price explained that when she examined the pillow discovered on Carolyn's thighs, she observed the outline of two human nostrils on the pillowcase. Further examination revealed the presence of the white foamy substance that had been found in Carolyn's nose. (TVI 717). Dr. Price explained that these markings were consistent with the pillow being placed over Carolyn's face as she tried to breath. And she was alive for some time to produce the edema deposited on the pillow. (TVI 717-718). In addition, Carolyn's brother, Anthony Thomas, testified that when he discovered her body he placed the pillow over her lower private parts, but he never moved this pillow up near her face. (TIV 413, 414).

In sum, the autopsy revealed that Carolyn was alive for some time and struggled for some time before dying. (TVI 711). She had petechial hemorrhages in the whites and pink of her eyes, which is indicative of a long struggle. (TVI 712). Dr. Price testified that Carolyn suffered "pretty much every method of asphyxia except the bag over the head," and any of these methods alone could have brought about Carolyn's death. (TVI 723). Dr. Price also testified that based upon her training and experience, these findings were inconsistent with an unintentional killing. (TVI 723). Carolyn also had other injuries indicative of a struggle. Her left temple muscle had significant hemorrhages in it, which is consistent with hair being torn from that area of her head. (TVI 718). In fact, Detective Hill found hair next to Carolyn's body on the bed. (TVI 718). And she had an abrasion to her left upper arm and a bruise on her left pinky finger. (TVI 719).

In DeAngelo v. State, 616 So.2d 440 (Fla. 1993), the appellant claimed that he killed the victim in a blind rage during an argument. But at the trial, the state presented evidence contradicting the appellant's story. The medical examiner testified that the appellant had to have choked the victim for five to ten minutes to kill her. In addition, evidence revealed that the victim was strangled manually and choked with a ligature. In

light of these factors, this Court upheld the appellant's conviction for first-degree premeditated murder, finding substantial competent evidence to support the jury's verdict. Likewise, the Appellant's conviction in the instant case must be upheld. See also, Thomas v. State, 456 So.2d 454 (Fla. 1984) (upholding conviction in beating case where jury could presume defendant intended death although defendant left victim alive in alley); Holton v. State, 573 So.2d (Fla. 1990) (finding jury properly inferred premeditation where defendant admitted strangling victim, intended to flee and victim had injuries suggesting struggle); Czubak v. State, 570 So.2d 925 (Fla. 1990) (finding jury properly found premeditation where victim manually strangled and defendant made comments inferring victim dead); Sochor v. State, 619 So.2d 285, (Fla. 1993) (finding premeditation supported where defendant reflected during attack but chose to continue).

In support of his argument, Appellant relies on several cases that focus primarily upon the lack of witnesses to the events immediately preceding the homicide and a lack of evidence demonstrating prior calculation or design. These cases, however, are distinguishable. In general, they do not take into account the lengthy torturous period of time endured by the victim while the

Appellant made a conscious decision to change his method of murdering his victim no less than four times.

For example, in Green v. State, 715 So.2d 940 (Fla. 1998), the victim died as a result of being stabbed three times, when she "got crazy." There was also undisputed evidence that the appellant's intelligence level was exceedingly low. Here, although Dr. Price testified that Appellant had an IQ of 70, which is in the border-line retarded range, she did not believe that Appellant functioned in the retarded range. Moreover, Appellant's landlord of several years believed Appellant had above average intelligence. Finally, Appellant was a cabinet maker by trade with his own business, a hard worker and owned a home. Thus, unlike Green, the evidence disputed defense claims that Appellant's intelligence level was exceedingly low. In Kirkland v. State, 684 So.2d 732 (Fla. 1996), the victim suffocated as a result of receiving slash wounds to the neck and the appellant's IQ was in the low 60's. Again, Appellant has no comparable intellectual state.

In Mungin v. State, 689 So.2d 1026 (Fla. 1995), the victim died from one gunshot wound to the head. And this Court specifically pointed out that there was "no continuing attack that would have suggested premeditation." Id. at 1029. By contrast in the case *sub judice*, the evidence reveals that Carolyn suffered a

lengthy "continuing attack" at Appellant's hands, during which time the Appellant changed his method of strangulation until he accomplished his goal: Carolyn's death.

Finally, Hoefert v. State, 617 So.2d 1046 (Fla. 1993), is distinguishable because of the sheer lack of evidence. In Hoefert, the state was not able to prove the manner in which the homicide occurred or even the nature and manner of the wounds inflicted because the victim's body had decomposed. The medical examiner was only able to say that the cause of death was "probably asphyxiation based upon the lack of finding anything else." Id. at 1048. Moreover, there was no medical evidence or physical trauma to the victim's neck, no evidence of sexual activity and no evidence of genital injuries. As a result, this Court could not find sufficient evidence to prove premeditation.

The opposite is true in the instant case. Here, the state not only proved the manner in which Carolyn's homicide occurred, but also the nature and manner of the wounds inflicted. There was no decomposition thwarting the medical examiner's ability to definitively state the cause of death. In fact, the medical examiner unequivocally stated that the manner of death was homicide and the cause of death was asphyxiation by ligature, manual strangulation and smothering. (TVI 723, 740). What is more, there

was ample medical evidence of physical trauma to Carolyn's neck. The medical examiner testified at length regarding the trauma to Carolyn's neck and hemorrhaging in the left temple area as a result of hair being ripped out of Carolyn's scalp, petechial hemorrhaging in Carolyn's eyes, heart failure and pulmonary edema and congestion in Carolyn's head pointing to ligature strangulation. (TVI 708-724). Dr. Price also explained to the jury that she removed a bar of soap and a normal-sized hand towel from the very back of Carolyn's mouth. (TVI 715). She found evidence that Carolyn was smothered by a pillow. (TVI 717). Inasmuch as Carolyn was a healthy woman, it took several minutes before she went into heart failure. (TVI 713). Based upon the manner of death in which this particular homicide occurred, the nature of Carolyn's wounds and the length of time Carolyn suffered before succumbing, there is no question that sufficient evidence existed to prove premeditation.

While Appellant's argument stresses the fact that no evidence was presented to show that he contemplated killing Carolyn and that there were no witnesses to the events immediately preceding the homicide, the importance of these factors is utterly diminished in light of the severity and length of the continuing attack. Appellant's claimed lack of premeditation defies logic in light of the numerous methods of asphyxiation. At some point during the

attack, Appellant reflected and decided that the ligature was not doing the job, so he squeezed Carolyn's throat with his hands and when this did not produce the desired result he shoved a bar of soap and a towel down her throat and when she was still able to breathe through her nose he put a pillow over her face to smother her. Clearly, this is not a case where "blind and unreasoning passion" momentarily occluded Appellant's ability to form a premeditated design to kill. He obviously had the opportunity to reflect for at least a moment during this lengthy struggle.

In addition to the medical evidence, the state also presented evidence that Appellant had a motive to kill Carolyn. In Appellant's taped confession, he admitted that he told Carolyn's sister that Carolyn might be pregnant. (TV 622). Carolyn's sister, Hazel Thomas, corroborated this statement. She testified that Appellant was upset because Carolyn was pregnant from someone else and had a boyfriend. (TVI 770-771). She recalled that Appellant told her the Thursday before Christmas that Carolyn was pregnant. (TVI 771). Appellant also told Hazel that Carolyn did not want him to follow her family around, "because they are not going to get them back together. And he gave her a look. And she asked him why he was looking at her like that, like he wanted to kill her." (TVI 772).

Carolyn's daughter also testified that Appellant told her that her mother was pregnant from someone else. (TVI 760, 764). According to Carolyn's family, she stopped seeing Appellant in October 1994. (TVI 769). She rebuffed his advances and refused to accept gifts from him. (TIV 396). Thus, this evidence cannot be overlooked and is particularly important where the evidence is largely circumstantial. Daniels v. State, 108 So.2d 755, 759 (Fla. 1959). Accordingly, this Court must uphold the trial court's judgment and affirm Appellant's conviction.

ISSUE III

WHETHER THE TRIAL COURT ERRED IN FINDING THAT THE MURDER WAS ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL.

Appellant argues that the trial court erred when it found that Carolyn's murder was especially heinous, atrocious or cruel. Specifically, he claims that the court based its decision on a combination of fact and speculation and therefore the HAC aggravator was not proven beyond a reasonable doubt.

Under Florida law, a court may infer that a conscious victim, suffering strangulation, is filled with foreknowledge of death, extreme anxiety and fear. Thus, the HAC aggravator is applicable. Tompkins v. State, 502 So.2d 415, 421 (Fla. 1986); see also Robertson v. State, 699 So.2d 1343, 1347 (Fla. 1997), cert. denied, ---U.S. ---, 118 S.Ct. 1097, 140 L.Ed.2d 152 (1998). In addition, this Court has repeatedly held that the fear and emotional strain preceding the victim's death warrants consideration as contributing to the heinousness of a capital felony. Adams v. State, 412 So.2d 850, 857 (Fla. 1982). Without question,

> murder by strangulation has consistently been found to be heinous, atrocious and cruel because of the nature of the suffering imposed and the victim's awareness of impending death.

Id.

In its sentencing order, the trial court explained in detail

the basis for its decision:

> The defendant had an on again, off again intimate relationship with the victim over a period of seven to ten years. This relationship was ended by the victim in October, 1994. The defendant knew the victim had begun seeing other men. On January 1, 1995, the defendant advised the victim's sister that he knew the victim was pregnant by another man.
>
> On the morning of January 6, 1995, the defendant went to the victim's home. The defendant contends through a post-arrest statement given to detectives, that he had consensual sexual intercourse with the victim, and subsequently an argument ensued.
>
> The defendant said that he, quote, "Must have strangled her." "Next thing I know she was, like, unconscious." The victim's nude body was found on her bed by her brother in the late afternoon of January 6th.
>
> The victim's body was examined on the scene by associate medical examiner, Eroston Price, who later conducted the autopsy. Dr. Price's findings include:
>
> 1. ligature marks around the entire circumference of victim's neck.
>
> 2. deep muscle bruising to the victim's neck.
>
> 3. extensive petechia in the whites of victim's eyes and in eyelids.
>
> 4. imprint of victim's nostrils found on pillow next to her on bed.

> 5. hair and woven hair ripped from victim's scalp.
>
> 6. bruises on victim's head, neck and, body.
>
> 7. bar of soap and wash cloth folded and lodged in rear of victim's throat.
>
> Based on the above findings, Dr. Price concluded that the cause of death was mechanical asphyxia with ligature strangulation and smothering. The amount of fluid found in the victim's lungs indicate that the victim was alive for some time as the defendant applied then reapplied pressure to her neck.
>
> There were signs that the victim struggled for her life. Ultimately, a bar of soap and wash cloth were forced down the victim's throat leaving only her nasal passages as a potential source of oxygen. This was subsequently extinguished by the placement of a pillow over the victim's face.
>
> During this entire ordeal, the victim was conscious and aware of her impending death. Without question, the undisputed facts established beyond a reasonable doubt that this murder was unnecessarily torturous to the victim and was especially heinous, atrocious, or cruel.

(RXIV 1582-1583).

As discussed earlier, Dr. Price testified at length regarding the several different methods of strangulation Appellant used to kill Carolyn. Throughout this ordeal Carolyn was conscious. (TVI 708). Dr. Price also explained that Carolyn had several small linear scratches on her neck, indicating that she tried to remove

the ligature from her neck. The muscular hemorrhaging indicated that a significant amount of pressure squeezed her throat. (TVI 720). In addition, Appellant forced a bar of soap and folded towel all the way to the back of Carolyn's mouth, occluding her pharynx. (TVI 715). Upon closer examination, Dr. Price discovered lathery foam coming from Carolyn's mouth and nose. This indicated that Carolyn was alive when the soap was shoved into her mouth and struggled for some time in order to produce the lather. (TVI 717). Also supporting Dr. Price's conclusions were the petechial hemorrhages in the whites and pinks of Carolyn's eyes. (TVI 712). It is plain that Carolyn suffered tremendously at Appellant's hands and was aware of her impending death.

Appellant attempts to soften the horrendous nature of Carolyn's death by arguing that she quickly became unconscious. Under his rationale, she would not have suffered the fear and anxiety sufficient to support the trial court's HAC finding. His own argument, however, belies this fact. In his brief, Appellant infers that Dr. Price testified that Carolyn lost consciousness after a few seconds. (Initial brief, p. 42). But according to the transcript, Dr. Price actually explained that, upon strangulation, it only takes a few seconds for a victim to begin to struggle due to oxygen deprivation. (TX 922).

Appellant also seeks solace in the fact that "it is very hard to keep a continuous pressure around someone's neck who is really fighting." (Initial brief, p. 42). In reality, however, this very important and undisputed factor only serves to highlight the atrocity Carolyn endured. Obviously, struggle indicates fear of imminent death and a fight for survival.

Appellant characterizes his relationship with Carolyn as "domestic." (Initial Brief, p. 44). Accordingly, he contends that Carolyn's murder occurred in the context of a domestic quarrel as in Santos v. State, 591 So.2d 160 (Fla. 1991). There, this Court determined that appellant's reloading of the shotgun was consistent with a rage killing and therefore he lacked the intent to inflict a high degree of pain. At this juncture it is important to point out that the relationship between the victim and Appellant never constituted a domestic relationship. Testimony at trial revealed that Carolyn and Appellant never lived together, were no longer dating and never had a child together. Furthermore, the state presented evidence that the relationship ended in October 1994 and that Carolyn was carrying her new boyfriend's baby. Carolyn and Appellant were not related in any way, nor were they going through a child custody or support dispute as in Santos. It appears that

the relationship here is more akin to a stalker and his victim, deserving no special pitying excuses for Appellant's actions.

Moreover, nothing in the record supports Appellant's theory that he and Carolyn were involved in a "heated quarrel without evidence of any torturous intent." (Initial brief, p. 44). To the contrary, there was ample evidence of torturous intent as demonstrated by the prolonged and agonizing death Carolyn suffered at Appellant's hands. The medical examiner's testimony sums up Appellant's conscienceless and unnecessarily torturous actions:

> In this particular case, [Carolyn] had pretty much every method of asphyxia except the bag over the head. Technically, she had evidence of a ligature around her neck, and you saw the actual abrasion from the ligature. She has significant trauma in the muscles of the neck that can be created from a ligature, but is more common from actual hands around the neck. She had the soap and the towel in her mouth that would block her ability to breathe through her mouth. There was foam on the pillow that took the shape of her nostrils. There is foam in her nostrils such as the pillow being placed over her face. Quite a few methods. And it takes a while to inflict those injuries.

(TVI 724).

In other less egregious strangulation cases, this Court has upheld the trial court's finding of the HAC aggravator. For example, in James v. State, 695 So.2d 1229 (Fla. 1997), James manually strangled his eight-year-old victim to death. James

admitted that he picked his victim up from the couch by her neck. Their eyes met and he squeezed her neck until her eyes and tongue bulged out. The medical examiner testified that the victim died from asphyxiation due to strangulation and the state did not dispute that the victim died quickly. This Court held that

> it is clear [the victim] was conscious of both her attacker and her impending death in the moments preceding her actual death. Consequently, we find that the HAC aggravator was proven beyond a reasonable doubt in this case and the trial court's finding that it applied to the murder of [the victim] was not improper.

Id.; see also Doyle v. State, 460 So.2d 353 (Fla. 1984) (finding HAC supported by record where evidence showed victim died of strangulation over five minutes and before losing consciousness victim was aware of nature of attack and had time to anticipate her death); Hildwin v. State, 23 Fla. L. Weekly S447 (Fla. 1998) (finding HAC supported where evidence established that victim was conscious while being strangled with her own tee shirt). Finally, in Tompkins v. State, 502 So.2d (Fla. 1986), this Court pointed out that "there is sufficient competent evidence in the record to support a finding that the victim was not only conscious but struggling and fighting to get away when appellant strangled her. Death under these circumstances is heinous, atrocious, and cruel." Id.

As discussed above, this case involved several methods of strangulation. In addition, the state presented evidence that Carolyn struggled to free herself from Appellant's grip. It is also apparent from the record that Carolyn was awake when Appellant entered her apartment. Nothing suggests that she did not see Appellant coming. In other words, she had foreknowledge of death and suffered extreme anxiety throughout this lengthy ordeal. Clearly, death under these circumstances is heinous, atrocious and cruel. Therefore, the trial court properly found this aggravating factor and this Court must affirm Appellant's sentence of death.

ISSUE IV

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DID NOT ADMIT CUMULATIVE EVIDENCE (Restated).

As his first witness at the Spencer hearing, Appellant called Dr. Block-Garfield. She testified extensively about her evaluations of Appellant. After her testimony, Appellant sought to admit Dr. Block-Garfield's three reports into evidence. The state objected on hearsay grounds and that these reports were cumulative. Ultimately, the trial court sustained the objection. (TXI 1305-1309).

Appellant now claims that by refusing to admit the reports, the trial court refused to consider valid mitigation, attempting to couch the trial court's refusal as a Hitchcock error. Appellant, however, failed to proffer the contents of Dr. Block-Garfield's reports to the trial court or otherwise submit them for inclusion in the appellate record. As a result, this Court cannot determine whether the trial court failed to consider evidence in mitigation. Moreover, Appellant's argument on appeal fails to shed any light on the reports' contents. A proffer is necessary to preserve a claim such as this because an appellate court will not otherwise speculate about the admissibility of such evidence. See Lucas v.

State, 568 So.2d 18, 22 (Fla. 1990). Therefore, Appellant failed to preserve this claim for review.

Regardless, Appellant's claim is without merit. Generally, a trial court's ruling regarding the admissibility of evidence will not be disturbed absent an abuse of discretion. Blanco v. State, 452 So.2d 520, 523 (Fla.1984), cert. denied, 469 U.S. 1181 (1985). Here, Dr. Block-Garfield's reports would have been cumulative to her testimony. Under Section 90.403, "[r]elevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence."

Dr. Block-Garfield generated three reports. (TXI 1166). She specifically stated that she refreshed her memory and was familiar with their contents. (TXI 1168). During her testimony, Dr. Block-Garfield repeatedly referred to her reports. For example, she testified on direct examination from her May 2, 1995, report that she worked up Appellant's behavioral and psychosocial history, which essentially detailed Appellant's background from childhood on. (TXI 1168-1181). The doctor even quoted from this report, relaying her discussions with Appellant as well as her conclusions based on her interview. Defense counsel went through the second report dated December 1995 with the doctor as well. (TXI 1183-

1205). The doctor extensively discussed the tests she administered and her conclusions regarding Appellant's depression and level of functioning. Dr. Block-Garfield testified that she generated the third report dated March 12, 1995, to determine the existence of potential mitigators. (TXI 1207-1213). Finally, the state cross-examined the doctor using each of these reports. (TXI 1216-1273). Given Dr. Block-Garfield's extensive testimony, Appellant has failed to demonstrate that the trial court abused its discretion by precluding the admission of the doctor's reports. Muehleman v. State, 503 So.2d 310 (Fla.) (holding that it is within the trial court's discretion to exclude cumulative evidence), cert. denied, 484 U.S. 882 (1987); cf. Coronado v. State, 654 So.2d 1267 (Fla. 2d DCA 1995) (finding no abuse of discretion in precluding admission of emergency medical service run report to show how minor victim's injuries were where "all material facts contained in the report had already been testified to by the two paramedics"); Mendoza v. State, 700 So.2d 670 (Fla. 1997) (finding no abuse of discretion in precluding admission of application for political asylum to corroborate mother's testimony about defendant's childhood where state had no opportunity to rebut report and it was cumulative to mother's testimony); Griffin v. State, 639 So.2d 966, 970 (Fla.

1994) (finding newspaper article on defendant properly excluded when author of article testified to contents of article).

All of the cases cited by Appellant are clearly distinguishable from the instant case. For example, in Maxwell v. State, 603 So.2d 490 (Fla. 1992), this Court discussed mitigation appearing in a presentence investigation report in order to perform a harmless error analysis under Hitchcock. In Lawrence v. State, 691 So.2d 1068, 1076 (Fla. 1997), the defendant had waived the presentation of mitigation and challenged on appeal the trial court's failure to consider mitigation discussed in the state's sentencing memorandum. Similarly, in Straight v. Wainwright, 422 So.2d 827 (Fla. 1982), the defendant had waived presentation of mitigation and challenged on appeal the trial court's failure to consider mitigation apparent in a presentence investigation report. In the instant case, Appellant neither waived mitigation, requiring the trial court to cull information from the record, nor was the trial court restricted to statutory mitigators, requiring an analysis of all of the available nonstatutory mitigators from any source.

Finally, the trial court specifically stated in its sentencing order that it had reviewed all of the evidence presented: "This court having heard the evidence presented in the guilt phase,

penalty phase, and subsequent sentencing hearing, having the benefit of legal memoranda and argument both in favor of and in opposition of the death penalty, finds as follows: . . .” (R. XIV 1581-1582). It also specifically noted that Appellant presented evidence through a mental health expert (R. XIV, 1581), and repeatedly referred to the expert’s testimony throughout its order (R XIV 1584, 1586, 1587). The trial court clearly considered all of the evidence the defense presented in mitigation, including evidence from these reports admitted in the form of Dr. Block-Garfield’s testimony. As far as is discernible from the record, the reports did not offer any further factual elaboration or support. Accordingly, Appellant’s argument is without merit and this Court must affirm his sentence of death.

ISSUE V

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT ALLOWED SERINA THOMAS AND HAZEL SCOTT TO TESTIFY ABOUT STATEMENTS APPELLANT MADE TO THEM BEFORE CAROLYN'S MURDER (Restated).

Appellant argues that the trial court abused its discretion when it allowed Serina Thomas (Carolyn's daughter) and Hazel Scott (Carolyn's sister)to testify about statements Appellant made to them before Carolyn's murder.

1. Testimony of Serina Thomas

On direct examination, Serina testified that

> [Appellant] was telling me that my mother didn't want to be with him anymore and that she told him that she didn't want him around. And he offered to, uhm -- to share her with the other guy that she was with. And she told him that she didn't want him at all.

(TVI 758). At that point, defense counsel requested a sidebar conference, objecting to the admission of some of these statements as double hearsay. He did not take issue with Appellant's admissions. (TVI 758). The state argued that these were Appellant's statements, which demonstrated his state of mind and motive for killing Carolyn and made the following proffer:

Q. Did Mr. Blackwood make any comments to you regarding whether or not your mother was pregnant?

A. Yes.

Q. And this is, again, in that two-week time period

right before your mother died?

A. It was the Wednesday before.

Q. You will have to speak up.

A. It was the Wednesday before.

Q. So if your mother died on a Friday, it was two days before?

A. Yes.

Q. What did he tell you about that?

A. He told me that he shouldn't be telling me this, but my mother had some abortion from him, and now she is telling him that she is pregnant from someone else.

Q. The last thing is did Mr. Blackwood indicate to you that he had any travel plans right around that time frame?

A. Yes. He told me that he was leaving to go to Jamaica after his son's birthday.

Q. When would that have been?

A. January the 19th.

(TVI 761). After hearing the proffer, defense counsel reiterated his objection to the double hearsay and argued that the Jamaica statements were prejudicial. (TVI 762). The state pointed out that these statements were demonstrative of Appellant's state of mind, and the trial court overruled defense counsel's objection, stating that this was not even a "close call." (TVI 763).

Defense counsel did not object to any statements Appellant made to the witness that were based on his own personal knowledge. In other words, he did not object to any "admissions" of the Appellant. But he did object to the statements made by the victim to Appellant that Appellant related to the victim's daughter. Those statements, however, were admissible because they were non-hearsay. Regardless of what Carolyn told Appellant, her statements to him were not offered for the truth of the matter asserted, nor were they offered to establish Carolyn's state of mind:

> If an out-of-court statement is offered in court to prove the truth of the facts contained in the statement, it is hearsay. If an out-of-court statement is not offered to prove the facts contained in the statement it is not hearsay.

Charles W. Ehrhardt, *Florida Evidence*, section 801.2 at 556-57 (1996 ed.)

The issue at trial was not whether Carolyn no longer wanted anything to do with Appellant, but rather whether Appellant formed a premeditated design to murder her. The fact at issue was Appellant's intent, and what Carolyn may have said to him was relevant to that issue. In Taylor v. State, 601 So.2d 1304 (Fla. 4th DCA 1992), the trial court refused to allow Taylor's statements about the victim's father's statements to Taylor because they were hearsay. On appeal, the Fourth District determined that the trial

court erred in excluding this testimony because it was not hearsay and was relevant to prove Taylor's state of mind. Id. at 1304.

In this case it is clear that the Appellant was upset over losing Carolyn and attempted to use Carolyn's family in an effort to get back into her life. Serina's testimony only serves to underline this point and provides a keen example of Appellant's state of mind around the time of the homicide. Serina's testimony also relates the effect these statements had on Appellant. See Breedlove v. State, 413 So.2d 1, 7 (1982).

In support of his argument that the trial court erred in admitting this testimony, Appellant relies Hodges v. State, 595 So.2d 929 (Fla. 1992), sentence vacated on other grounds, 112 S.Ct. 2926 (1993). But his reliance is misplaced. In Hodges, the state argued that the victim's statements were admissible to prove the defendant's state of mind-that he had a motive to kill the victim. This Court concluded, however, that the statements of a victim cannot be used to prove the defendant's motive or state of mind because §90.803(3) did not apply to this type of situation.

The instant case is distinguishable from Hodges. Here, the statements at issue are not the victim's statements offered to show Appellant's state of mind. Rather, they are Appellant's own declarations offered to show the effect Carolyn's statements had on

Appellant. See United States v. Rubin, 591 F.2d 278 (5th Cir.), cert. denied, 444 U.S. 864 (1979) (defendant's testimony that he had been told by present and past union presidents that union's constitutional procedures for obtaining salary increases did not have to be scrupulously followed was admissible to establish defense to charge of taking unauthorized salary increases); see also Escobar v. State, 699 So.2d 988 (Fla. 1997) (finding witness' testimony that defendant told him he carried gun and would kill police officer before going to jail admissible under exception to hearsay rule because relevant to defendant's motive for murder of police officer and established defendant's then existing state of mind); Monlyn v. State, 705 So.2d 1 (Fla. 1997).

In addition, with respect to the "Jamaica statements," the state argued that they demonstrated Appellant's state of mind prior to Carolyn's murder. Serina's testimony after the proffer underscores this fact. She explained that "[Appellant] was getting ready to go to Jamaica because he couldn't handle it anymore, and he was leaving after his son's birthday." (TVI 765). It is well established that the admissibility of evidence is a matter within the broad discretion of the trial court. Absent an abuse of discretion, the trial court's ruling will not be overturned. Blanco v. State, 452 So.2d 520, 523 (Fla. 1984), cert. denied, 469

U.S. 1181 (1985). Appellant has failed to demonstrate that the trial court abused its discretion by allowing Serina's testimony. Accordingly, this argument is without merit.

2. Testimony of Hazel Scott:

First, it should be noted that Appellant failed to object to any portion of Hazel's testimony. Therefore, this issue is not preserved for review. In general, an appellate court may review only those questions properly presented to the trial court. Proper presentation requires a contemporaneous objection. Castor v. State, 365 So.2d 701 (Fla.1978). Under the test established in Castor, an objection must be specific enough "to apprise the trial judge of the putative error and to preserve the issue for intelligent review on appeal." Id. at 703.

Appellant contends, however, that "the lack of objection did not waive this issue" because the trial court made its ruling clear on the matter, presumably at the time it ruled on the admissibility of Serina Thomas' testimony. Appellant's rationale does not stand up to scrutiny. In his initial objection, defense counsel explained

> Mr. Ullman: I don't know where Tony is going with this, but, you know, admissions, I have no problem with. They're not qualified as hearsays. But if we get double hearsay from the mother who is telling this person something, I mean, you asked her pointblank

> what did Lynford tell you? Now, she is telling you something that Lynford supposedly-
>
> Mr. Loe: But that's his statement. That goes to his state of mind. That goes to his motive for what he did.
>
> Mr. Ullman: Yeah, but I don't have a problem with that. But my point is you're bringing in through her stuff that the mother said.
>
> Mr. Loe: I'm not offering it for the truth of the matter. I'm offering it for what the defendant said right around the time, which is extremely relevant to why the homicide was committed.
>
> COURT: Yeah, but how does what she says that the mother said go to the truth of the matter asserted therein? Doesn't that just to show the defendant's mental state or mental condition at the time he had the conversation with the witness?

(TV 761). It is apparent from this exchange that defense counsel objected to double hearsay or hearsay within hearsay. But a review of Hazel Scott's testimony reveals that there is no hearsay within hearsay:

> Uhm, we had two conversations on New Year's Day. One was at her father's wash--laundrymat. And after I left the laundrymat, and by the time I got to my mother's house, he beat me over there. And then when I was walking up in the yard, he -- you know, told me, said, yeah, your sister's pregnant, you know, like that right there.

(TVI 770). Hazel also testified that Appellant talked about Carolyn's other boyfriend:

> He said, you know that -- that's why she left me because she got another man. And that was the Thursday before Christmas because he had cooked some food to my house. So he was talking about the other boyfriend.

(T. 771).

Nowhere within these statements is there any double hearsay. Rather, Appellant directly made them to Hazel. Therefore, Appellant's earlier objections to Serina Thomas' testimony are not applicable to Hazel Scott's testimony. And contrary to Appellant's theory of preservation, this issues is waived. For that matter, the trial court made its ruling clear solely with respect to Appellant's objection to Serina Thomas' testimony, but no issue was brought to the trial court's attention with respect to a new witness and new testimony.

Second, should this Court agree with Appellant's preservation argument, however, the trial court did not abuse its discretion in admitting Hazel Thomas' testimony for the same reasons addressed in the first portion of this argument. Finally, even if the trial court incorrectly admitted portions of both Serina Thomas' and Hazel Scott's testimony, any error was harmless, particularly in light of Appellant's confession that he strangled Carolyn and the medical examiner's testimony regarding the manner of death and the nature of Carolyn's injuries. There is no reasonable possibility

that the error contributed to Appellant's conviction. See State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). Therefore, this Court must affirm Appellant's conviction.

ISSUE VI

WHETHER THE RECORD SUPPORTS THE TRIAL COURT'S REJECTION OF THE EXTREME MENTAL OR EMOTIONAL DISTURBANCE MITIGATING CIRCUMSTANCE (Restated).

First, it is important to point out that Appellant complains about the substance of his own witness' testimony. Specifically, he argues that Dr. Block-Garfield improperly defined "extreme mental or emotional disturbance." And as a result of this improper definition, he presumes that the trial court applied the wrong standard in rejecting this statutory mitigator. But Appellant cannot take issue with his own witness' testimony, whose sole purpose in testifying was to present evidence of mental mitigation in light of Appellant's earlier requested instruction for the extreme mental or emotional disturbance mitigator. (TXI 1207).

Second, it is well established that a trial court's findings in mitigation will not be disturbed absent an abuse of discretion:

> The decision as to whether a mitigating circumstance has been established is within the trial court's discretion. Preston v. State, 607 So.2d 404 (Fla. 1992), cert. denied, 507 U.S. 999, 113 S.Ct. 1619, 123 L.Ed.2d 518 (1987). Even uncontroverted opinion testimony can be rejected, especially when it is hard to reconcile with the other evidence presented in the case. See Wuornos v. State, 644 So.2d 1000, 1010 (Fla. 1994), cert. denied, ---U.S.---, 115 S.Ct. 1705, 131 L.Ed.2d 566 (1995). As long as the court considered all of the evidence, the trial

> judge's determination of lack of mitigation will stand absent a palpable abuse of discretion.

Provenzano v. State, 497 So.2d 1177, 1184 (Fla. 1986).

Here, a reading of the trial court's sentencing order reveals that it searched the record for other evidence to support this mitigator, but ultimately observed that "[t]here were no other witnesses presented to substantiate this statutory mitigator." (TXII 1336). And Appellant's expert denied that he was under the influence of extreme mental or emotional disturbance at the time he committed this crime. (TXI1220). She did, however, testify that she believed Appellant was under the influence of a mental or emotional disturbance. (TXI 1280). As a result, the trial court considered this as a non-statutory mitigator and gave it moderate weight. (TXII 1336). Similarly, in Foster v. State, 679 So.2d 747 (Fla. 1996), the trial court rejected the extreme mental or emotional disturbance mitigator, except there, the defense expert testified that Foster was under the influence of extreme mental or emotional disturbance at the time of the crime. On appeal, Foster argued that since his expert's testimony was uncontroverted, the trial court should have found this mitigator. But this Court refused to find that the trial court abused its discretion in

failing to find that Foster was under the influence of extreme mental or emotional disturbance. In particular, this Court stated

> It is clear from the sentencing order that the trial court gave some weight to nonstatutory mitigation; however, the trial court did not find that it rose to the level of this statutory mitigator. Accordingly, we find that the trial court did not abuse its discretion in finding that this mitigator was not established.

Id. at 756. Likewise, in the instant case, the trial court gave this mitigator "moderate weight," but did not find that it rose to the level of a statutory mitigator. Thus, Appellant has failed to demonstrate that the trial court abused its discretion in rejecting this mitigator.

For the sake of argument, however, even if Appellant's own expert improperly defined extreme mental or emotional disturbance, the Appellant's expert's alleged error cannot be imputed to the trial court, particularly where the trial court can reject an expert's opinion. See Provenzano v. State, 497 So.2d 1177 (Fla. 1986), cert. denied, 481 U.S. 1024 (1987); Wuornos v. State, 644 So.2d 1000, 1010 (Fla. 1994), cert. denied, 514 U.S. 1069 (1995).

Finally, Appellant complains about the definition of extreme mental or emotional disturbance his expert utilized. He claims that Dr. Block-Garfield applied the wrong standard and that the "correct standard for the extreme emotional disturbance circumstance is

whether the defendant was extraordinarily overwrought or had more than the emotions of an average man, however inflamed--not whether he was psychotic." (Initial Brief, p. 53). Despite this claim, Appellant offers no authority in support of his limited definition. And the state submits that Dr. Block-Garfield's testimony falls within the broad parameters set out by this Court. In State v. Dixon, 283 So.2d 1 (Fla. 1973), this Court explained that

> extreme mental or emotional disturbance is a second mitigating consideration pursuant to Section 921.141(7)(b) which is easily interpreted as less than insanity but more than the emotions of an average man, however inflamed.

Id. at 10.

In mitigation, Dr. Block-Garfield explained that Appellant told her, "I didn't feel good" regarding Carolyn seeing somebody else. (TXI 1187). She also indicated that Appellant was depressed, but generally cooperative. (TXI 1170, 1183). He denied using drugs, he occasionally drank beer, he graduated from high school, he did not suffer from any neurological impairment, nor had he ever had any type of mental health intervention or treatment. (TXI 1183, 1202, 1176). The doctor also explained that Appellant did not have genuine hallucinations, but rather "thought processes" when he said that he heard voices in his head. (TXI 1177-1178). And although Appellant had at one time expressed "suicide

idealizations," he had had none recently. (TXI 1185). On cross-examination, Dr. Block-Garfield explained that, although Appellant was distressed, he was not suffering from an "extreme mental or emotional disturbance." (TX 1120). On redirect examination, the doctor again explained that, in her opinion, to qualify for this mitigator a person does not have to be insane, but he would present psychotic disturbances or psychotic processes. (TXI 1279).

Notably, even under Appellant's standard, without conceding its correctness, nothing in the record tends to show that Appellant was "extraordinarily overwrought." In fact, as discussed above, nothing shows that he exhibited the emotions of more than the average man or exhibited any behavior indicative of these mitigators. Appellant's own words underline this point when he said simply, "I didn't feel good," about her seeing someone else. (TXI 1187).

Moreover, in each case Appellant cites, there were additional factors present in the record supporting extreme mental or emotional disturbance mitigator. For example, in Wright v. State, 688 So.2d 298 (Fla. 1996), this Court observed that "the record shows he was extraordinarily overwrought at the thought of losing his children." Id. at 301. Apparently, after several years of marriage Wright and his wife separated. She moved in with her

parents and her family refused to let Wright visit the children. After shooting his wife, Wright approached a police officer and confessed, "**I want to turn myself in because I just shot my wife for trying to take my kids.**" Id. at 299. (Emphasis added.). By contrast, in the case *sub judice*, there was no ongoing custody dispute or for that matter even a marriage. Here, Appellant simply did not like the fact that his former girlfriend had been seeing another man. Even if this caused the Appellant to become distraught, however, it does not rise to the level of extreme mental or emotional disturbance, particularly in light of the fact that the defense presented no other evidence tending to show extreme mental distress. In fact, the record reveals that Appellant was a good father and well-liked by those around him. He was perceived as a hard worker and was never known to have suffered any type of mental disorder or disturbance before.

Likewise, Stewart v. State, 558 So.2d 416 (Fla. 1990), is also distinguishable from the instant case, for two reasons. First, as Appellant points out, the jury in Stewart was never instructed on the impaired capacity aggravator, despite defense counsel's request. As a result, this Court refused to speculate whether the failure to give this instruction had no effect on the jury's decision, particularly where testimony was adduced to support a

standard instruction on impaired capacity. Id. at 420-421. In the instant case, the converse is true. The defense offered no evidence to support the extreme disturbance mitigator, yet the court still instructed the jury on this mitigator. (TX 1129). Second, unlike the instant case, the defense in Stewart presented evidence that the defendant was drunk most of the time and used drugs from adolescence. The expert testified that the defendant was drunk at the time of the shooting. Therefore, his control over his behavior was reduced by the alcohol in his system. Whereas, in the instant case, Appellant did not use drugs or abuse alcohol, nor was he drunk at the time of the killing, nor was he suffering from any mental or emotional impairment of an extreme nature. As noted previously, there was simply no evidence presented to support a finding of extreme mental disturbance, as there was in Stewart to warrant an impaired capacity instruction. Therefore, the trial court properly rejected this mitigator since the Appellant failed to establish it by any evidence in the record. As a result, this Court must uphold the trial court's determination and affirm Appellant's sentence of death.

ISSUE VII

WHETHER THE TRIAL COURT'S SENTENCING ORDER ADEQUATELY SETS FORTH ITS FINDINGS THAT SUFFICIENT AGGRAVATING CIRCUMSTANCES EXISTED TO JUSTIFY THE DEATH SENTENCE (Restated).

The Appellant complains that the trial court failed to make the requisite finding that sufficient aggravating circumstances exist to justify the death sentence. This is not true. In the order, the trial court determined whether the single aggravating factor upon which the state relied existed and concluded that, "[w]ithout question, the undisputed facts established beyond a reasonable doubt that this murder was unnecessarily torturous to the victim and was especially heinous, atrocious, or cruel." (RXIV 1582-1583). Moreover, after analyzing all of the mitigation, the court analyzed whether the HAC aggravator alone was sufficient to justify the death penalty in this case:

> The defendant's most compelling argument for imposition of a life sentence is based on proportionality. The defendant contends that this was a domestic killing brought about by the defendant's rejection and jealousy.
>
> This Court reviewed domestic and prior relationship killing cases decided by the Florida Supreme Court to determine if death is a proportionate sentence in this case.
>
> Based on its proportionality analysis, the Court concluded:

> 1. Florida has not adopted a domestic killing exception to the imposition of the death penalty. Spencer v. State, 21 Fla.L.Weekly S366 (Fla. Sept. 12, 1996).
>
> 2. In both domestic and prior relationship killings, this Court found no case upholding the death penalty where the sole aggravator was heinous, atrocious, or cruel.
>
> 3. In the prior relationship killing where the death penalty was upheld, the aggravating circumstance of prior violent felony was present in almost all cases and, if not, at least two other aggravators were found.
>
> In this case, whether the killing is characterized as domestic or prior relationship, the only aggravating factor found was heinous, atrocious, or cruel.
>
> The above conclusions beg the following question. Does Florida prohibit the death penalty in all--and I emphasis [sic.] "all"--cases involving a domestic or prior relationship killing where the only aggravator found is heinous, atrocious, or cruel? Since this question has not been specifically addressed in any case decided in Florida, this Court found no such prohibition to exist.
>
> Mr. Blackwood and the victim never lived together, were never married, and the relationship ended over two months prior to the killing. The manner of death was unquestionably cruel. The Supreme Court has upheld many death sentences where only a single aggravator existed. Without a specific exception carved out to ban this type of killing based on the single aggravator, heinous, atrocious, or cruel, this Court does not find death disproportionate.

(RXIV 1587-1589).

It is clear from this order that the trial court understood its statutory duty and performed that duty accordingly. It not only found that sufficient aggravation existed to justify death, but it also found that Appellant's mitigation did not outweigh that aggravating factor. (RXIV 1589). In substance that is what the statute requires. Neither it, nor this Court, requires the use of magic words. Therefore, this Court should reject Appellant's claim and affirm his death sentence for the murder of Carolyn Thomas-Tynes.

ISSUE VIII

WHETHER THE TRIAL COURT ERRED IN FAILING TO CONSIDER APPELLANT'S AGE IN MITIGATION.

Appellant argues that the trial court should have considered his age as a mitigating circumstance and that its failure to do so constitutes error. Appellant did not request an instruction on age as a statutory mitigator and did not argue this mitigator to the jury or to the trial court. In Campbell v. State, 571 So.2d 415 (Fla. 1990), this Court held that, "[w]hen addressing mitigating circumstances, the sentencing court must expressly evaluate in its written order each mitigating circumstance proposed by the defendant." See also Ellis v. State, 622 So.2d 991 (Fla. 1993).(instructing court on remand to "expressly find, consider and weigh in its written sentencing order all mitigating evidence urged by Ellis, both statutory and nonstatutory. . . ."). Having failed to propose the age mitigator, Appellant cannot fault the trial court for failing to consider age in mitigation. Cf. Muhammad v. State, 494 So.2d 969, 976 (Fla.1986).(finding that trial court has no obligation to infer mitigating circumstance that was not urged at trial and for which no evidence was presented), cert. denied, 479 U.S. 1101 (1987); Lucas v. State, 568 So.2d 18 (Fla. 1990).("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. This is not too much to ask if the court is to perform the meaningful analysis required in considering all the applicable aggravating and mitigating circumstances.").

Regardless, there is no per se rule that pinpoints a particular age as an automatic factor in mitigation. The propriety of a finding with respect to this circumstance depends upon the evidence adduced at trial and at sentencing. Moreover, this Court has held that chronological age alone generally does not warrant a special instruction. "If age is to be accorded any significant weight, it must be linked with some other characteristic of the defendant or the crime, such as immaturity or senility." Mahn v. State, 714 So.2d 391, 400, (Fla. 1998), (citing Echols v. State, 484 So.2d 568, 575 (Fla. 1985)). In addition, this Court has held that trial courts may reject age as a mitigating factor where the defendants were twenty to twenty-five years old at the time the defendants committed their offenses and there was no showing of immaturity or a comparatively low emotional age. E.g., Scull v. State, 533 So.2d 1137 (Fla. 1988).

In the instant case, Appellant failed to establish any evidence that he suffered from a low emotional age compared to his chronological age. In fact, the evidence supports the conclusion

that Appellant was a mature responsible adult who was a good father to his son. Appellant was not a drug user, graduated from high school, ran his own business and was known by his friends as a hard worker. (TXI 1183, 1169, 1008). Nothing points to a lifelong mental or emotional instability, and there was no evidence that Appellant suffered physical or mental abuse during his childhood. The record reveals that Appellant was raised by his grandmother and, although there was occasionally insufficient food, there was no evidence of deprivation that would have provided an essential link between Appellant's age and maturity, warranting consideration in mitigation.

In support of his position, Appellant relies on Burns v. State, 699 So.2d 646, 649 n.4 (Fla. 1997). Specifically, he states, "In [Burns], the mitigating factor of age was applied to a 42-year-old." For whatever reason, the trial court in Burns essentially considered the defendant's lack of prior criminal conduct twice in mitigation. In its sentencing order, the court found the defendant's age of 42 as a statutory mitigator to the extent that the defendant led a law-abiding life for 42 years. It also found the defendant's lack of a significant prior criminal history as a statutory mitigator. But it afforded each factor minimal weight. This Court upheld the defendant's death sentence

because there was negligible mitigation outweighed by a single merged aggravator. In short, the minimal weight afforded to the defendant's age in Burns did not mandate a life sentence.

Appellant also cites Maxwell v. State, 603 So.2d 490 (Fla. 1992), for the proposition that every mitigator apparent in the record must be considered and weighed in the sentencing process. The analysis in Maxwell, however, centered on the trial court's refusal to instruct on and consider nonstatutory mitigators in violation of Hitchcock v. State, 578 So.2d 685 (Fla. 1990). Such an analysis does not apply here. Thus, Maxwell is inapposite.

Here, Appellant did not propose this mitigator, and the trial court did not have to speculate about mitigation that was not apparent from the record. Therefore, Appellant's argument is without merit and this Court must affirm his sentence of death.

ISSUE IX

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DID NOT PERMIT HEARSAY DURING THE PENALTY PHASE (Restated.)

Appellant argues that Lana Blackwood Salmon should have been able to testify about the content of her conversation with the deceased victim, Carolyn Thomas, that occurred two days before she was murdered. In his brief, Appellant declares that "the court granted the state's hearsay objection to testimony that appellant was at Carolyn's house at the time of the conversation and that appellant and Carolyn would occasionally spend the night together." (Initial Brief p. 60). But Appellant fails to point out where in the record the content of her alleged conversation was presented for the trial court's consideration. In fact, a review of the record reveals no such proffer.

The trial court sustained the state's hearsay objection when defense counsel asked Ms. Blackwood Salmon if she and Carolyn spoke about the Appellant. (TX 1066). But before the state objected, Ms. Blackwood Salmon stated that Appellant was with Carolyn at nine o'clock in the morning when she called Carolyn. (TXI 1066). Thereafter, Ms. Blackwood Salmon made no other statements regarding the status of her brother's relationship with Carolyn.

Appellant contends that this evidence would have rebutted the state's assertion that Carolyn ended the relationship well before the murder. (Appellant's Brief p. 60). First, defense counsel failed to proffer what the witness would have said if allowed to answer the question. "A proffer is necessary to preserve a claim such as this because an appellate court will not otherwise speculate about the admissibility of such evidence." Lucas v. State, 568 So.2d 19 (Fla. 1990). Therefore, Appellant has failed to preserve this issue for appellate review.

Second, this Court has recognized that hearsay evidence may be admissible in a penalty-phase proceeding if there is an opportunity to rebut it. Lawrence v. State, 691 So.2d 1068 (Fla. 1997), cert. denied, ---U.S.---, 118 S.Ct. 205, ---L.Ed.2d---(1997); see also section 921.141(1), Fla. Stat. (1991). But admission of evidence under this provision is not unlimited. Hitchock v. State, 578 So.2d 685, 690 (Fla. 1991). "While the rules of evidence have been relaxed somewhat for penalty proceedings, they have not been rescinded." Id. This is especially true in the instant case where the state cannot rebut the statements of a deceased victim and there is no way to test the reliability of the alleged statements.

In Hitchcock v. State, 578 So.2d 685 (Fla. 1990), the Defendant sought to introduce, among other things, "hearsay statements of three now-deceased people who had known Hitchcock in Arkansas." This Court upheld the trial court's restriction of such evidence.

Similarly in Mendoza v. State, 700 So.2d 670 (Fla. 1997), the appellant claimed error in the trial court's exclusion of his application for political asylum in the penalty phase. Defense counsel attempted to introduce this application through the appellant's mother. This Court refused to find error in the trial court's decision and held that the application was not admissible because there was no opportunity to rebut it. The individual who prepared the application was not identified and no official action had been commenced on the application. Thus, this Court determined that the application amounted to nothing more than a self-serving statement filed in the public records. By way of analogy, in the instant case, Appellant's sister's testimony amounts to nothing more than self-serving statements. But these statements have a much less official air than the statements in Mendoza. In addition, Appellant's presence at Carolyn's house proves nothing. He may have shown up uninvited and Carolyn may have been demanding that he leave. Thus, this testimony does not show that the

relationship was still ongoing. Therefore, it was not error for the trial court to refuse to allow the content of an alleged conversation into evidence.

Moreover, even if the court erred in refusing to allow hearsay testimony in the penalty-phase proceeding, any error is harmless for another reason. Assuming, without conceding that Appellant's brief accurately speculates on the substance of the conversation, any statements would have been at most cumulative to Appellant's statements in his confession about the status of his relationship with Carolyn and to statements Appellant made to Dr. Block-Garfield. (TV 599, XI 1222). Id. Thus, the trial court's refusal to admit cumulative evidence is not tantamount to an abuse of discretion requiring reversal. Muehlman v. State, 503 So.2d 310 (Fla.), cert. denied, 484 U.S. 882 (1987).

Finally, even if this Court determines that these statements should have been admitted, any error is harmless because the trial court considered, as a non-statutory mitigator, that "the killing was borne out of a prior relationship, and thus fueled by passion." (RXIV 1586). Therefore, this Court should affirm Appellant's death sentence.

CONCLUSION

WHEREFORE, based on the foregoing arguments and authorities, the State requests that this Honorable Court affirm Appellant's conviction and sentence of death.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General

_____
MARRETT W. HANNA
Assistant Attorney General
Bar No. 0016039
1655 Palm Beach Lakes Blvd.
Suite 300
West Palm Beach, FL 33401-2299
(561) 688-7759

CERTIFICATE OF FONT

I HEREBY CERTIFY that the size and style of type used in this brief is Courier New, 12 point, a font that is not proportionately spaced.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing document was sent by United States mail, postage prepaid, to Gary Caldwell, Assistant Public Defender, Criminal Justice Building, 421 Third Street, Sixth Floor, West Palm Beach, FL 33401, this date: December 22, 2000.

_____

MARRETT W. HANNA
Assistant Attorney General