IN THE SUPREME COURT OF FLORIDA

ARTHUR BARNHILL, III,

Appellant,

v.

Case No. SC00-547
Lower Tribunal No. 95-2932-CFA

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE EIGHTEENTH JUDICIAL CIRCUIT,
IN AND FOR SEMINOLE COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

On November 6, 1995, the grand jury indicted Appellant for the offenses of first degree murder, burglary of a dwelling while armed, armed robbery, and grand theft of a motor vehicle. (V1, R.17-19).

Prior to his trial on the charges, Appellant filed a motion to suppress his statements to police and any evidence seized from him during his arrest. (V1, R.157-60). Two days after the murder, Appellant was arrested in New York City at his girlfriend's mother's apartment. Detective Wallace Zeins of the New York City Police Department (NYPD) testified that the victim's stolen vehicle was stopped by officers in the early morning hours of August 8, 1995. (V6, T.679-82). The occupants of the vehicle informed NYPD officers that the car belonged to Appellant and they directed the officers to Appellant's current location at his girlfriend's apartment. Officers had a bench warrant for Appellant's arrest and they executed the warrant and arrested Appellant that morning.

At the suppression hearing, Appellant was required to testify in order to establish that he had standing to contest the alleged unlawful entry into his girlfriend's mother's apartment. Appellant testified that he arrived at his girlfriend's apartment at 11:00 p.m. on August 7, 1995. (V6,

T.718, 721). Appellant stated that he spoke with his girlfriend's mother on the telephone about an hour after he arrived and she gave him permission to stay there. Appellant testified that at the time he was arrested the following morning, he was "living" at the apartment. (V6, T.719). On cross-examination, Appellant admitted that he had never met his girlfriend's mother or step-father and did not even know their names. Appellant did not know the address to the apartment, he did not have a key to the apartment, he had never paid any rent, and he had no personal belongings at the apartment. (V6, T.721-25).

When ruling on Appellant's motion to suppress, the trial court stated:

> There may be reason for a lawsuit where you can sue [the police] under a 1983 action, there may be grounds for a lawsuit or a motion to suppress for the homeowner who lives there, okay, and I'm not finding by any stretch of the imagination that your client lives there. In fact, I find him [sic] to be a totally unbelievable explanation as to what happened. It about borders on perjury, in fact, when you say that somebody's going to be living at a house, they can't tell you who it is that says they live there, either the mother-in-law or, I use the word mother-in-law, the girlfriend's mother and stepfather, can't give me their names, arrives there eleven o'clock at night, says there's a phone call at midnight that says, yes, you can live there. He hasn't been there for quite sometime. Additionally, it's a two bedroom apartment. The way I counted it, there's his girlfriend and three sisters, a baby, a mother and a stepfather, and he says he's gonna live in one of the bedrooms. That's not believable under any stretch of

the imagination.

(V6, T.733-34). The trial judge denied the motion to suppress. (V1, T.738).

After denying the motion to suppress, the State was about to begin opening statements in the trial when Appellant changed his plea on all charges to no contest. (V6, T.746-77). Once he changed his plea, Appellant became very depressed and defense counsel argued that Appellant was incompetent to stand trial for the penalty phase. (V6, T.786-99). The original jury panel was discharged and the penalty phase was continued. (V7, T.801-53).

On October 23, 1998, Appellant filed a motion to disqualify the trial judge pursuant to Florida Rule of Judicial Administration 2.160. (V2, R.232-35). Appellant alleged that he had a well-grounded fear that he would not receive a fair and impartial penalty phase and sentencing based on the trial judge's comments made at the suppression hearing regarding the credibility of Appellant's testimony. (V2, R.232-35). Because there were issues regarding Appellant's competency to sign the oath on the motion based on his alleged incompetency, the trial judge deferred ruling on the motion until Appellant was deemed competent. (V10, T.1280-98). On December 7, 1998, after Appellant had been declared competent to proceed, the trial judge denied the motion to disqualify. (V10, T.1301-02).

Prior to the penalty phase proceeding, Appellant moved for a continuance to secure the live testimony of an expert medical witness, Dr. Feegel. (V10, T.1317-38). Appellant planned on calling Dr. Feegel at the penalty phase proceeding, but the doctor had surgery scheduled and would not be able to attend. Defense counsel informed the court that Dr. Feegel would offer testimony to contradict the medical examiner's opinion regarding the time it took the victim to lose consciousness when strangled. (V10, T.1318-26). The State objected to a continuance and argued that Appellant could retain a number of medical examiners who would testify to the same opinion as Dr. Feegel regarding the time it takes a victim to lose consciousness and Appellant would be able to cross-examine the medical examiner, Dr. Gore, regarding his opinion. (V10, T.1326-27). According to defense counsel, Dr. Gore's opinion on the time it took someone to lose consciousness when strangled was a minority view in contradiction to established authority within the field of forensic science. (V10, T.1331). The court denied the motion to continue and allowed Appellant to perpetuate Dr. Feegel's testimony via videotape. (V10, T.1333-37).

During the voir dire examination at the penalty phase proceeding, the court had to interrupt both the prosecuting

attorney and defense counsel on a number of occasions in order to clarify an issue or a juror's response. (V12, T.1575-76, 1584-86; 1596-97; 1618-24; 1631; 1674). The trial judge was forced to take an active role in policing defense counsel's voir dire examination based on counsel's inability to ask clear and concise questions. The court lectured defense counsel outside the hearing of the venire about his questioning, which the court characterized as misleading, rambling, disjointed and nonsensical. (V12, T.1618-28; 1676).

When exercising juror challenges, Appellant requested that the court strike two prospective jurors for cause based on their answers during voir dire. Appellant asserted that Mr. Cotto and Mrs. Robinson should be struck for cause because of their personal beliefs favoring the death penalty. (V12, T.1687-89). The trial judge denied Appellant's challenges for cause and he exercised peremptory challenges against the two jurors. Appellant exhausted all of his peremptory challenges, requested additional challenges, and identified the jurors he would strike had the court granted his request for additional peremptory challenges. (V12, T.1695-99).

The evidence at the penalty phase proceeding established that the victim, Earl Gallipeau, was murdered on August 6, 1995, at some time prior to 6:00 p.m. Robert Hudson, a neighbor of

Earl Gallipeau, found the victim's wallet in the street around 6:00 p.m. (V13, T.1824-28). Mr. Hudson looked in the wallet and saw the name of a person to contact in the event of an emergency, Holly Lohr. (V13, T.1826). Eventually, as a result of Mr. Hudson calling Ms. Lohr, the police were called to the victim's residence. (V13, T.1913-18).

On August 6, 1995, at approximately 10:30 p.m., James Culver, an officer with the Winter Springs Police Department, entered Earl Gallipeau's residence and discovered the victim's body inside a back bedroom. (V13, T.1788-92). It appeared that the victim had been dragged into the back bedroom because his socks and shorts were rolled down and there were drag marks on the carpet. (V13, T.1792-93).

The medical examiner, Dr. Shashi Gore, testified that Mr. Gallipeau, an eighty-four year old man, died as a result of strangulation. (V13, T.1838-56). Mr. Gallipeau had been struck in the head with approximately three or four blows prior to his death. (V13, 1843-47; 1902). The victim had two ligatures around his neck, a towel and a belt. (V13, T.1847-48). The belt had been wrapped around his neck four times and had been pulled so tightly that it broke the hiatal bone in the victim's neck. (V13, T.1847-51). The victim also had some minute petechiae hemorrhages in his eyes. (V13, T.1852). According to

Dr. Gore, petechiae hemorrhages result more frequently in cases when someone squeezes the throat and completely shuts off the blood supply, releases the pressure allowing blood to flow, and then shuts off the blood supply again. (V13, T.1903).

Dr. Gore testified that the victim would have likely lost consciousness "within a minute, two minutes, max," and would have died within one to seven minutes. (V13, T.1856-60). Dr. Gore also opined that the victim may have lost control of his bladder during the attack as a result of fear. (V13, T.1862). On cross-examination, Dr. Gore testified that he was familiar with a textbook, Forensic Pathology, written by the leading authority in the field of pathology, Vincent DeMayo. Dr. Gore disagreed with DeMayo's personal opinion that a victim loses consciousness within thirty seconds if the blood vessels in the neck are completely closed off. (V13, T.1894).

In the early morning hours of August 8, 1995, NYPD officers located the victim's stolen 1994 Ford Taurus near Central Park. (V13, T.1932). Germaine Montgomery was driving the vehicle and Jelani Jackson was sitting in the back seat.[1] Officers were informed that the vehicle was involved in a Florida homicide case so they took the occupants of the car into custody. (V13,

[1]Mr. Montgomery testified that Appellant told him the vehicle belonged to his girlfriend from Florida. (V16, T.2525).

T.1932-34). The occupants informed NYPD officers that the car belonged to Appellant and they directed the officers to Appellant's whereabouts. When arrested on an outstanding warrant that morning at approximately 5:45 a.m., Appellant was wearing the same Charlotte Hornets basketball jersey he wore at the time of the murder. (V6, T.689; V13, T.1920-27). A blood stain on Appellant's jersey tested positive for the victim's DNA. (V17, T.2634-36).[2]

Detective Kenneth Gannon of the NYPD took a post-Miranda statement from Appellant. (V14, T.1968-69). Appellant told the detective that on August 6, 1995, he went to church with Michael Jackson. (V14, T.1972). After church, Appellant met Michael Jackson's brother, Jelani Jackson, at Sean Scipio's house. (V14, T.1972-73). According to Appellant, it was Jelani Jackson's idea to get a car. In his statement to Detective Gannon, Appellant claimed he and Jelani left Sean Scipio's house at approximately 5:00 p.m. and went to the victim's house. (V14, T.1973).

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[2]Contrary to Appellant's assertion in his brief that it was speculated that the blood came from sores on the victim's head caused by recent surgery, Initial Brief of Appellant at 17, the evidence established that the victim's scars had healed completely. (V13, T.1918-19). In fact, defense counsel conceded in his closing argument that the blood stain probably resulted from blood in the victim's ear, not from any previous scars. (V20, T.3335).

Once at the victim's residence, they entered through a door in the garage and stayed inside the victim's kitchen for two hours watching the victim as he sat in the living room. (V14, T.1973-74). At approximately 9:00 p.m., the victim turned off the television and came toward the kitchen at which point Appellant claimed Jelani Jackson attacked the victim and began strangling him. (V14, T.1974). Jelani Jackson told Appellant to grab the victim's arms because Mr. Gallipeau was scratching Jelani's arms. Appellant asserted that this is how he got blood on his jersey. (V14, T.1974). Appellant eventually sat down on a coffee table and watched as Jelani Jackson wrapped a towel around the victim's neck. Appellant heard Mr. Gallipeau gasping for air, so Jelani Jackson removed the victim's belt and wrapped it around his neck until the victim died. (V14, T.1975). Jelani Jackson took money from the victim's wallet in the kitchen and went into the garage and started the car. (V14, T.1975-76). Appellant told Detective Gannon that he assisted in dragging the victim into the back room.

According to his statement, Appellant dropped Jelani Jackson off about four blocks from Jelani's house and then drove to the house and asked Jelani's mother if she knew where Jelani was. Appellant told Jelani's mother that the car he was driving belonged to Susan. (V14, T.1976-77). Appellant picked Jelani

back up and they drove to a few friends' houses and ultimately left for New York City at approximately 1:30 a.m. on August 7, 1995. (V14, T.1977-78). Appellant and Jelani Jackson drove straight to Appellant's mother's house in New York City. Appellant stated that he arrived at his mother's at 6:00 p.m. on August 7th. (V14, T.1979).

Jelani Jackson testified that Appellant was living at his house prior to the murder. On August 6, 1995, Jelani Jackson went to church with his mother and brother, Michael Jackson. Appellant, wearing a clean, unbloodied Charlotte Hornets jersey, accompanied the Jackson family to church. (V14, T.2007-12). Prior to going to church, Appellant stated that he was going to get a car from Susan. (V14, T.2012).

Once at the church, everyone went inside except for Jelani Jackson. Jelani skipped the services and went to his friend's house, Sean Scipio. (V14, T.2012-13). Jelani stayed at Sean's house playing video games until Appellant arrived that afternoon between 2:00 and 4:00 p.m. driving a Ford Taurus.[3] (V14, T.2013-

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[3]Sean Scipio confirmed Jelani's alibi testimony and testified that Jelani Jackson arrived at his house on the morning of August 6, 1995, and they played video games until Appellant came over later that afternoon driving a Ford Taurus. (V15, T.2279-86).

Jelani Jackson's mother testified that Appellant drove up to her house in the Taurus looking for Jelani and Michael Jackson at approximately 4:00 p.m. (V16, T.2450-51).

16). Appellant, Jelani Jackson, Sean Scipio, and Rachard Bernard went in the car and drove around visiting friends. (V14, T.2015-20). Although Appellant only had four dollars on him prior to church, he had a large amount of money after he arrived with the car. (V14, T.2012, 2017; V16, T.2525). Jelani also noticed that Appellant had blood on his jersey when he arrived. (V14, T.2022). After visiting with their friends and dropping off the other passengers, Appellant and Jelani Jackson drove nineteen hours to New York. (V14, T.2021). Once in New York, Appellant let a friend of his drive Jelani around so he could see the sights. (V14, T.2022). The car was stopped by NYPD and Jelani learned for the first time that the car had been stolen and was involved in a homicide. (V14, T.2023).

Jelani Jackson testified that he had scratches on his arm from working with his uncle's tree-cutting business on Saturday, August 5, 1995. (V14, T.2024-25). Jelani's uncle, Michael Oliver, confirmed that Jelani worked with him that day and obtained a number of scratches on his arms and face from dealing with the limbs and branches. (V16, T.2466-68).

Michael Jackson testified that when the Jacksons and Appellant went to church on August 6, 1995, his brother Jelani left Sunday School early and Michael and Appellant stayed behind for the church services. (V18, T.2757-62). After the church

services, Michael and Appellant assisted Charles Cauthen in cleaning up the church. (V16, T.2415-21; V18, T.2763-64).[4] Thereafter, Mr. Cauthen gave Appellant and Michael a ride to the Sunrise subdivision. Appellant had told Michael Jackson that he needed to pick up a car at Susan's house. (V18, T.2763-65). Appellant told Mr. Cauthen to drop them off at the Sunrise subdivision and they walked the 2.6 miles to the victim's residence, which Michael thought was Susan's house. (V18, T.2765-67; 2894-95).

When Appellant and Michael Jackson arrived at the victim's residence, the garage door was open and a Ford Taurus was parked in the garage. Michael testified that he thought the vehicle belonged to Appellant. (V18, T.2768). Michael followed Appellant as he entered the residence through an unlocked door in the garage. (V18, T.2768-69). Once inside, Michael observed a wallet and car keys sitting on the kitchen counter. Michael stayed in the kitchen as Appellant peaked into the living room and observed the victim watching television. (V18, T.2769-71). Appellant came back and told Michael that "there's an old guy on the couch, I'm going to kill him." (V18, T.2771-73). Michael told Appellant to just leave, but Appellant wanted to stay.

[4]Mr. Cauthen did not see Jelani Jackson at church that day. (V16, T.2419).

Appellant went back and looked into the living room and returned to Michael and said, "we going to do it?" (V18, T.2771-74). Michael said no and left the residence. Appellant told Michael he would pick him up later. (V18, T.2771). Michael left the victim's residence and walked home alone, arriving at his house at approximately 6:00 p.m. (V16, T.2455; V18, T.2775).[5]

Earl Gallipeau's neighbor, Ramelle Hudson, testified that she lived across the street from the victim and she believed she saw his car back out of the garage on the day of the murder. However, Ms. Hudson was unsure whether it was actually the day of the murder. (V19, T.2956-62). Ms. Hudson believed that there was a small person in the passenger seat of the car, but she was not sure that it was a person. (V19, T.2958-62). Additionally, Ms. Hudson did not see a person driving the vehicle. (V19, T.2960).

In presenting his mitigation evidence, Appellant utilized Drs. Eisenstein and Gutman. Dr. Eisenstein testified that

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[5]Jeslyn Whitlock, a high school student who knew Michael Jackson, testified that she saw him walking alone in a direction away from the victim's residence. (V16, T.2429-34). Jeslyn's parents were unable to identify Michael Jackson, but when showed separate photopacks containing pictures of Michael and Jelani Jackson, the Whitlocks stated that Michael Jackson looked most like the person they saw walking. (V20, T.3183-85).

Eric Vaughn saw two people walking towards the victim's house and saw one person walking away. Mr. Vaughn knew Jelani Jackson and stated that he was definitely not the person he saw walking. (V20, T.3183-88).

Appellant was taking psychotropic medications at the time of his trial. (V14, T.2124-30). Dr. Eisenstein diagnosed Appellant as having a reading disability, attention deficit disorder, and frontal lobe impairment, but admitted there was a large degree of leeway in determining Appellant's level of impairment. (V14-15, T.2131-55). Dr. Eisenstein conceded that Appellant was not intellectually deficient[6] and could be faking given his test scores on the Minnesota Multiphasic Personality Inventory (MMPI). (V14, T.2137; V15, T.2169-79).

Dr. Gutman diagnosed Appellant has having a low grade depression, a condition affecting over 20 million Americans. (V17, T.2587). Dr. Gutman also testified that Appellant had a dependant personality, a condition which affects over 50 million Americans. (V17, T.2589-90). Unlike Dr. Eisenstein, Dr. Gutman did not diagnose Appellant as having frontal lobe impairment. (V17, T.2587-93).

Appellant's family members testified to his difficult upbringing at the hands of his mother. Appellant's mother attempted suicide while pregnant and when she eventually delivered Appellant, her husband was in the same hospital as a patient with a gunshot wound he received while committing a

[6]Appellant has a slightly below average IQ of 87. (V14, T.2137)

robbery. Appellant's father was incarcerated for the majority of Appellant's life. (V18, T.2901). When he was four years old, Appellant was struck in the eye with a rock and lost vision in his left eye. (V18, T.2902). A number of family members had custody of Appellant during his youth because his mother neglected and abused him. (V18, T.2905-15; V18, T.2934-50). Despite his difficult childhood, Appellant had a number of friends and role models within his family. Appellant spent a large amount of time with his aunt (Angela Brown), uncle (James Horne), and his grandparents (Arthur and Deloris Barnhill and Dorothy Wilkinson). (V16, T.2496-2500; V18, T.2899-2956; V20, T.3155-69).

After hearing all of the evidence and being instructed on the applicable law, the jury recommended by a vote of 9-3 that Appellant be sentenced to death. At the Spencer hearing, Appellant apologized to the victim's family and to his grandmother. (V21, T.3411). Appellant also submitted an affidavit from Dr. Feegel to rebut the medical examiner's opinion that the victim may have lost control of his bladder during the attack as a fear reaction. (V21, T.3418-26).

In following the jury's recommended sentence, the trial judge found five statutory aggravating factors: (1) Appellant was previously convicted of a felony and under sentence of

imprisonment or placed on community control or on felony probation;[7] (2) the capital felony was committed while Appellant was engaged in the commission of a robbery or burglary; (3) the capital felony was committed for pecuniary gain; (4) the capital felony was a homicide and was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification; and (5) the capital felony was especially heinous, atrocious or cruel. (V2, R.346-53). The trial judge found one statutory mitigator, the defendant's age at the time (20 years old), and gave it "little weight." (V3, R.353). The court also assigned "little weight" to all of the nonstatutory mitigators: (1) the defendant suffers from a learning disability; (2) the defendant has frontal lobe impairment; (3) the defendant had a difficult childhood; (4) the defendant entered a plea in this case, eliminating the need for a guilt phase portion of his trial; (5) the defendant manifested appropriate courtroom behavior throughout the pendency of the penalty phase; (6) the defendant suffers from psychiatric disorders; (7) the defendant feels remorse for the homicide; and (8) any aspect of the defendant's character or background. (V3, R.358-64). The court stated that the "aggravating circumstances

[7]Appellant was on community control for a felony at the time of the murder. (V16, T.2517-22).

in this case far outweigh the mitigating circumstances. Each of the aggravating factors in this case, standing alone, would be sufficient to outweigh the minimal amount of mitigation that exists in this case." (V3, R.364-65).

SUMMARY OF ARGUMENT

Issue I: The trial court properly denied Appellant's motion to disqualify the judge. Appellant alleged that he had a well-grounded fear that he would not receive a fair and impartial penalty phase from the judge based on comments the judge made at a suppression hearing when issuing an adverse ruling. After Appellant testified at the suppression hearing, the court commented that he found Appellant's testimony unbelievable and it almost bordered on perjury. The State submits that the court's comments on Appellant's credibility were necessary to the court's ruling and a trial court's adverse ruling does not constitute a legally sufficient justification for disqualification of the judge. Thus, this Court should affirm the trial judge's denial of the motion for disqualification.

Issue II: The court acted within its discretion in denying Appellant's motion to strike two prospective jurors for cause. Both jurors indicated that they favored the death penalty, but they also indicated that they would follow the law and weigh the aggravating and mitigating circumstances and recommend the appropriate sentence. Based on their responses, there is no question that the jurors' views on the death penalty would not prevent or impair their ability to be impartial.

Issue III: The trial court did not improperly limit or

restrict Appellant's voir dire examination in any manner. On a few occasions, the court was forced to interrupt defense counsel's voir dire because counsel was asking misleading and confusing questions. The court, however, always informed defense counsel that he was not limiting the scope of his questioning. Furthermore, contrary to Appellant's assertions, the court never chastised defense counsel in front of the jury. Because the trial court's actions did not improperly taint the venire, this Court should reject Appellant's argument that he did not receive a fair and impartial penalty phase proceeding.

Issue IV: The trial judge acted within his sound discretion in denying Appellant's motion to continue the penalty phase proceeding in order to secure the live testimony of an expert medical witness. The court denied the motion for continuance and allowed Dr. Feegel's testimony to be perpetuated via videotape. Appellant presented the testimony at the penalty phase, but Appellant argues that this was insufficient because the doctor's recorded testimony was unable to rebut the medical examiner's "surprise" testimony that the victim may have urinated on himself during the murder as a reaction to his fright. Even if Dr. Feegel had testified before the jury that the discoloration of the victim's shorts did not mean he experienced fright at the time of the attack, the State would

have still been able to make the same argument in closing based on the medical examiner's contrary opinion. Furthermore, although this point was unrebutted to the jury, Appellant presented an affidavit from Dr. Feegel at the Spencer hearing which presented his expert opinion regarding this matter. Thus, any error in denying the motion for continuance was harmless.

Issue V: Appellant's double jeopardy rights were not violated by his separate convictions and sentences for robbery with a deadly weapon and grand theft of an automobile. Each of these offenses requires proof of an element that the other does not. Accordingly, this Court should affirm Appellant's convictions and sentences for these two offenses.

Issue VI: The trial court acted within its discretion in denying Appellant's request to omit the modifying terms "extreme" and "substantial" from the standard jury instructions on the statutory mental mitigating factors. This Court has never required a modification of the standard instructions in cases such as this where evidence is presented as to mental impairment. Here, the court instructed the jury on numerous nonstatutory mental mitigators that did not utilize the modifying terms. Thus, neither the judge nor the jury were limited to considering only the statutory mental mitigators. Because the court did not abuse its discretion in omitting the

modifying terms from the standard jury instructions, this Court should affirm the trial judge's ruling.

Issue VII: The trial court properly imposed the death penalty in this case. The court found that the evidence established five aggravating factors beyond all reasonable doubt. Any of these aggravating circumstances, standing alone, were sufficient to outweigh the slight mitigation found by the court. The court found one statutory mitigating circumstance and a number of nonstatutory mitigators and assigned all of them "little weight."

Contrary to Appellant's assertions, the trial court properly found the aggravating circumstances of HAC and CCP and the court did not improperly double the aggravators of commission during the course of a burglary or robbery and commission for pecuniary gain. Additionally, the court acted within its discretion in assigning the mitigating circumstances little weight. Even if this Court finds that the trial judge erred in finding any of the aggravators or in assigning little weight to the mitigators, the State submits that the error is harmless. This case is one of the most aggravated and least mitigated cases before this Court. Thus, this Court should affirm Appellant's death sentence.

ARGUMENT

ISSUE I

THE TRIAL COURT ACTED WITHIN ITS DISCRETION IN DENYING APPELLANT'S MOTION TO DISQUALIFY BASED ON COMMENTS THE JUDGE MADE DURING AN ADVERSE RULING.

Appellant filed a motion to suppress his statements to law enforcement officers and all physical evidence seized from him after his arrest in a New York City apartment. (V1, R.157-60). At the hearing on the motion to suppress conducted on October 14, 1998, Appellant testified to the limited issue of his standing to contest the arrest made at his girlfriend's mother's apartment.[8] Appellant testified that he arrived at his girlfriend's apartment at 11:00 p.m. on August 7, 1995. (V6, T.718, 721). Appellant claimed that he spoke with his girlfriend's mother on the telephone about an hour after he arrived and she gave him permission to stay there. Appellant testified that at the time he was arrested the following morning, he was "living" at the apartment. (V6, T.719). Numerous other people lived in the two-bedroom apartment: Appellant's sixteen-year-old girlfriend and their baby, his girlfriend's two younger sisters, her mother and her step-

[8]New York City Police Department officers had a bench warrant for Appellant's arrest and entered the apartment when Appellant's girlfriend opened the door and allowed the officers to enter. Appellant was arrested while sitting on the sofa.

father. (V6, T.719). On cross-examination, Appellant admitted that he had never met his girlfriend's mother or step-father and did not even know their names. Appellant did not know the address to the apartment, he did not have a key to the apartment, he had never paid any rent, and he had no personal belongings at the apartment. (V6, T.721-25). Appellant also acknowledged that his mother lived only six blocks away. (V6, T.725).

When ruling on Appellant's motion to suppress, the trial court stated:

> There may be reason for a lawsuit where you can sue [the police] under a 1983 action, there may be grounds for a lawsuit or a motion to suppress for the homeowner who lives there, okay, and I'm not finding by any stretch of the imagination that your client lives there. In fact, I find him [sic] to be a totally unbelievable explanation as to what happened. It about borders on perjury, in fact, when you say that somebody's going to be living at a house, they can't tell you who it is that says they live there, either the mother-in-law or, I use the word mother-in-law, the girlfriend's mother and stepfather, can't give me their names, arrives there eleven o'clock at night, says there's a phone call at midnight that says, yes, you can live there. He hasn't been there for quite sometime. Additionally, it's a two bedroom apartment. The way I counted it, there's his girlfriend and three sisters, a baby, a mother and a stepfather, and he says he's gonna live in one of the bedrooms. That's not believable under any stretch of the imagination.

(V6, T.733-34).

On October 23, 1998, less than ten days later, Appellant

filed a motion to disqualify the trial judge pursuant to Florida Rule of Judicial Administration 2.160. (V2, R.232-35). Appellant alleged that he had a well-grounded fear that he would not receive a fair and impartial penalty phase and sentencing based on the trial judge's comments made at the suppression hearing. (V2, R.232-35). Because there were issues regarding Appellant's competency to sign the oath on the motion,[9] the trial judge deferred ruling on the motion until Appellant was deemed competent. (V10, T.1280-98). On December 7, 1998, the trial judge denied the motion to disqualify. (V10, T.1301-02). Prior to the commencement of the penalty phase proceedings, Appellant again renewed his motion to disqualify which was denied. (V11, T.1352-53).

An order denying a motion for disqualification is reviewable by the de novo standard of review. MacKenzie v. Super Kids Bargain Store, 565 So. 2d 1332, 1335 (Fla. 1990) (stating that the legal sufficiency of a motion to disqualify is purely a question of law); Sume v. State, 773 So. 2d 600, 602 (Fla. 1st

[9]Immediately after the suppression hearing, Appellant entered a plea of no contest to the charged offenses. (V6, T.754-77). On October 15, 1998, the following morning, defense counsel raised the issue of Appellant's competency to proceed to the penalty phase and the trial court continued the proceedings until Appellant could be evaluated. Prior to Appellant being declared competent, defense counsel filed his motion to disqualify.

DCA 2000) ("Although the matter has apparently not been addressed in the Florida case law, we conclude that an order denying a motion for disqualification is reviewable by the de novo standard of review."); but see Arbelaez v. State, 775 So. 2d 909, 916 (Fla. 2000) (applying the abuse of discretion standard to a motion to disqualify and finding that the trial judge had not "abused her discretion in denying Arbelaez's motion to disqualify"). Federal courts review a judge's decision not to recuse himself for abuse of discretion. United States v. Bailey, 175 F.3d 966, 968 (11th Cir. 1999); United States v. Bremers, 195 F.3d 221, 226 (5th Cir. 1999).

Even if this Court applies the de novo standard of review to the instant case, a review of the record indicates that Appellant's motion to disqualify was legally insufficient. Appellant asserted that he feared he would not receive a fair and impartial sentencing proceeding based on the trial judge's comments made at the suppression hearing. Florida Rule of Judicial Administration 2.160(f) states:

> The judge against whom an initial motion to disqualify under subdivision (d)(1) is directed shall determine only the legal sufficiency of the motion and shall not pass on the truth of the facts alleged. If the motion is legally sufficient, the judge shall immediately enter an order granting disqualification and proceed no further in the action. If any motion is legally insufficient, an order denying the motion shall immediately be entered. No other reason for denial shall be stated, and an order of denial shall not take

issue with the motion.

Fla. R. Jud. Admin. 2.160(f). The trial judge abided by this rule and denied the motion without taking issue with the factual allegations. The trial court did not dispute any assertions contained in the motion and did not become involved in a swearing match with Appellant. See Young v. State, 671 So. 2d 277, 277 (Fla. 2d DCA 1996) (“After defense counsel moved for recusal, the trial court properly denied the motion as legally insufficient, stated no other reason for the denial, and did not take issue with the motion.”).

In order to decide whether a motion for disqualification is legally sufficient, "[a] determination must be made as to whether the facts alleged would place a reasonably prudent person in fear of not receiving a fair and impartial trial." Livingston v. State, 441 So. 2d 1083, 1087 (Fla. 1983). The asserted facts must be "reasonably sufficient" to create a "well-founded fear" in the mind of a party that he will not receive a fair trial. Fischer v. Knuck, 497 So. 2d 240, 242 (Fla. 1986). It is well settled that subjective fears of bias or prejudice are not legally sufficient to justify disqualification when they are based simply on prior adverse rulings. Id.; see also Barwick v. State, 660 So. 2d 685, 692 (Fla. 1995); Jackson v. State, 599 So. 2d 103, 107 (Fla. 1992).

Appellant's allegations of bias or prejudice based on the trial judge's comments are subjective fears on the part of Appellant and based on an adverse ruling by the trial judge.[10] The court denied Appellant's motion to suppress and found Appellant's testimony unbelievable. The court's comments on Appellant's credibility were entirely warranted given Appellant's incredulous testimony that he lived at the apartment where the arrest was made. As noted during his cross-examination, Appellant did not know the address to the apartment, did not have a key, did not know the names of his girlfriend's parents who leased the apartment (and had never even met them), and had only arrived at the apartment a few hours before his arrest with no personal belongings. The trial court was in a position to observe Appellant's demeanor when testifying and could obviously tell that Appellant was being

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[10]Appellant also argues that the trial judge somehow had "lingering animosity" towards defense counsel because of Appellant's testimony, as evidenced by the court's alleged admonishments and rebukes of defense counsel during the penalty phase proceeding. The State will address this issue in more detail in Issue III, infra, but would note that this argument is entirely without merit. The court's comments to defense counsel were justified given counsel's conduct at trial and the court did not depart from its role of impartial and neutral arbiter. See Williams v. State, 689 So. 2d 393 (Fla. 3rd DCA 1997) (stating that trial judge did not err in denying motion for recusal based on adverse ruling and court did not depart from its position of impartiality when judge interjected herself into defense counsel's voir dire examination).

untruthful in an attempt to obtain a favorable ruling. Accordingly, when ruling on Appellant's motion, the trial court properly noted that Appellant's testimony was unbelievable and bordered on perjury. See Brown v. St. George Island, Ltd., 561 So. 2d 253, 257 n.7 (Fla. 1990) (finding that judge is not subject to disqualification "simply because of making an earlier ruling in the course of a proceeding which had the effect of rejecting the testimony of a moving party"); Deauville Realty Co. v. Tobin, 120 So. 2d 198, 201 (Fla. 3rd DCA 1960) (stating that when a judge observes a witness testify and reaches a conclusion that the witness is unworthy of belief, there is no reason why the judge should not say so, provided that it is out of the presence of the jury).

The instant facts are distinguishable from the cases relied on by Appellant suggesting that a court's comment regarding a party's credibility is generally regarded as indicating bias against the party. See Campbell Soup Co. v. Roberts, 676 So. 2d 435, 435-36 (Fla. 2nd DCA 1995) (when judge denied trial counsel's motion to withdraw after having been discharged by his corporate client, court remarked that it was siding with the attorney in the matter and that it did not find the corporate party reliable); Deauville Realty Co., 120 So. 2d at 199-202 (trial judge's belief that a party lied during his testimony and

judge's subsequently developed prejudice against the party did not affect the case); Morales v. Four Star Poultry & Provision Co., 523 So. 2d 1183, 1185 n.3 (Fla. 3rd DCA 1988) (appellate court noted in a footnote that "[t]he predecessor judge had recused himself due to his belief that Morales was patently untruthful"); St. George Island, Ltd., 561 So. 2d at 257 (holding that trial judge should be disqualified when he received an affidavit from defendant Stocks and, without hearing any testimony from Mr. Stocks, stated "if Mr. Stocks were here I wouldn't believe him anyway"); Owens-Corning Fiberglass Corp. v. Parsons, 644 So. 2d 340 (Fla. 1st DCA 1994) (finding that trial judge erred in denying motion for disqualification when judge made comment, based on his previous experience with company, that "their credibility with me is about as thin as a balloon"); Crosby v. State, 97 So. 2d 181 (Fla. 1957) (stating that trial judge should have granted motion to disqualify based on his comments that defendant was a "liar from the word 'go'").

In each of the above cases, the trial judge made a gratuitous comment about a party's veracity which was unnecessary and unrelated to any court ruling. In the instant case, however, it was necessary for the court to weigh Appellant's credibility when making his ruling on the motion to suppress. Thus, the State submits that Appellant's motion to

disqualify was legally insufficient as it was based on the court's comments when making an adverse ruling and merely expressed a subjective fear on Appellant's part. The comments upon which Appellant's motion was founded do not suggest the trial judge harbored any bias or prejudice against the defendant. See Barwick v. State, 660 So. 2d 685, 692 (Fla. 1995) (the fact that the trial judge makes an adverse ruling is not a sufficient basis for establishing prejudice); Dragovich v. State, 492 So. 2d 350 (Fla. 1986) (finding that without a showing of some actual bias or prejudice so as to create a reasonable fear that a fair trial cannot be had, affidavits supporting a motion to disqualify are legally insufficient). There has been no showing that Appellant would not receive a fair and impartial penalty phase before this judge. It must be presumed that the judge would comply with the applicable law in determining the appropriateness of the sentence and in making evidentiary objections during the proceedings. Dragovich, 492 So. 2d at 353. Because Appellant's subjective fears are insufficient to require the disqualification of a trial judge, this Court should affirm the trial court's denial of Appellant's motion to disqualify.

ISSUE II

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING APPELLANT'S MOTION TO STRIKE TWO PROSPECTIVE JURORS FOR CAUSE.

Defense counsel attempted to strike two prospective jurors for cause based on their answers during voir dire. During questioning of Mr. Cotto, the following exchange took place:

> [Prosecutor]: Mr. Cotto, what do you feel about the death penalty?
>
> Mr. Cotto: I strongly agree with the death penalty. I think if you kill you should be executed.
>
> [Prosecutor]: Okay. Well, Florida law doesn't quite agree with you on that, it weighs out circumstances when it should and when it should not and things to consider and weigh out that way in making your decision, it's not all the time. Can you set aside your opinions and follow what the law says?
>
> Mr. Cotto: Yes, I could.
>
> [Prosecutor]: Even if it lead you to saying no death penalty in this case?
>
> Mr. Cotto: Yes, I could.

(V12, T.1582). When defense counsel was questioning Mr. Cotto, he agreed with other prospective jurors that inmates spend too long on death row prior to execution. (V12, T.1641).

The other challenged juror, Mrs. Robinson, stated that she strongly believed in the death penalty and thought it should be imposed "according to the circumstances." (V12, T.1587-88). She further elaborated that "I do tend to favor the death

penalty in murder cases. But I'm more than willing to listen and I'm not head strong enough that I wouldn't listen to what is being said and consider the life imprisonment." (V12, T.1624). Mrs. Robinson also indicated that not everyone convicted of first degree murder should be sentenced to death. (V12, T.1639). Like Mr. Cotto, Mrs. Robinson stated that she believed defendants spend too much time on death row prior to their execution. (V12, T.1638-39).

Defense counsel asserts in his brief that the court prevented him from further questioning Mrs. Robinson regarding her beliefs in favoring the death penalty. During his voir dire, defense counsel asked Mrs. Robinson, "so you would be inclined to give greater weight, you think, to aggravating circumstances because you favor the death penalty than you would be to give to mitigating circumstances, generally speaking?" (V12, T.1624). Mrs. Robinson stated "Yes," but the court interjected and had counsel approach the bench so he could admonish defense counsel for asking misleading questions. (V12, T.1624-25). Because the jurors had not been instructed on the concepts of aggravating and mitigating circumstances, the court clarified the question and asked the venire if they would follow the law. The judge told defense counsel he could question the jurors in this regard, but had to inform them of *all the law*,

not just the pieces of the choice, favorable parts of the law. (V12, T.1625). Thus, contrary to Appellant's assertions, the court did not preclude Appellant from asking Mrs. Robinson "more probing" questions. See also Issue III, infra.

Appellant moved to strike both Cotto and Robinson for cause based on their responses. (V12, T.1687-89). The trial court denied Appellant's challenges for cause and Appellant exercised peremptory challenges and struck the two jurors. Appellant requested additional peremptory challenges and identified jurors he wanted to strike, but the trial judge denied his request. (V12, T.1695-99).

"The standard for determining whether a prospective juror may be excused for cause because of his or her views of the death penalty is whether the juror's views would prevent or substantially impair the performance of his or her duties as a juror in accordance with the juror's instructions and oath." Foster v. State, 679 So. 2d 747, 752 (Fla. 1996). It is within the trial court's discretion to determine whether a challenge for cause is proper and the court's decision denying a cause challenge will not be overturned absent manifest error. Id.

Although the two prospective jurors indicated that they favored the death penalty, both jurors clearly indicated that they would follow the applicable law. This Court has

consistently found that jurors who have expressed strong beliefs about the death penalty may nevertheless serve on the jury if they indicate an ability to abide by the trial court's instructions. See Johnson v. State, 660 So. 2d 637, 644 (Fla. 1995); Bryant v. State, 656 So. 2d 426, 428 (Fla. 1995); Penn v. State, 574 So. 2d 1079, 1080-81 (Fla. 1991). In Penn, this Court found that the trial judge properly refused to excuse two prospective jurors for cause because they ultimately demonstrated their competency by stating that they would base their decisions on the evidence and instructions. Id.

Likewise, in the instant case, both Cotto and Robinson indicated that they would follow the law and weigh the aggravating and mitigating factors to determine whether death was the appropriate sentence. Because the trial judge was in the best position to observe the attitude and demeanor of the two prospective jurors, this Court should defer to the trial judge's ruling denying Appellant's challenges for cause. See Johnson, 660 So. 2d at 644 (stating that trial judge is in best position to gauge jurors' responses and as long as there is competent record support for the trial court's ruling, this Court will not reverse on a cold record).

ISSUE III

THE TRIAL JUDGE DID NOT COMMIT REVERSIBLE ERROR BY LIMITING OR INTERRUPTING DEFENSE COUNSEL'S VOIR DIRE EXAMINATION OR BY ALLEGEDLY CHASTISING DEFENSE COUNSEL.

Appellant argues that the trial court committed reversible error by interrupting and restricting his voir dire examination and by chastising defense counsel in front of the jury. Although the trial judge took an active role in both the State's and defense counsel's voir dire, the judge's actions and comments were not prejudicial and did not taint the jury in any manner.

It is well established that the scope of voir dire questioning rests within the sound discretion of the trial judge and will not be interfered with unless the judge's discretion is clearly abused. Vining v. State, 637 So. 2d 921, 926 (Fla. 1994). Furthermore, whether a trial judge should have allowed interrogation on specific subjects is also reviewed under an abuse of discretion standard. Farina v. State, 679 So. 2d 1151, 1154 (Fla. 1996). Appellant has failed to demonstrate a clear abuse of the court's discretion in handling the voir dire examination.

Appellant argues that the trial judge improperly interrupted defense counsel's voir dire examination without an objection

from the State. First, it should be noted that the trial judge frequently interrupted *both* the State and defense counsel during voir dire, without objection, in order to clarify an issue. (V12, T.1575-76; 1584-86; 1596-97; 1618-24; 1631; 1674). Admittedly, the court interrupted defense counsel's voir dire more frequently, but this was simply a result of defense counsel's questioning which the court properly characterized as bifurcated, rambling, disjointed, and nonsensical.[11] (V12, T.1676). The court had to interrupt defense counsel and explain to counsel that his questions were confusing the jury. Once counsel began asking clear and concise questions which were not misleading, counsel had a lengthy examination without unsolicited interruptions from the court. (V12, T.1635-69).

Appellant also claims that the court erred by precluding defense counsel from individually questioning potential jurors regarding their attitude on mitigating circumstances (V12, T.1669) and from questioning certain jurors who expressed their favor of the death penalty for those convicted of murder. (V12, T.1624-25). See Initial Brief of Appellant at 53-54. Contrary to Appellant's assertions, the trial judge did not preclude

[11]For example, defense counsel's initial "question" to the venire took up approximately five full transcript pages, covered a number of topics, and resulted in admitted confusion to the venire. (V12, T.1602-07).

defense counsel from questioning the venire regarding their feelings toward mitigation evidence of a troubled childhood. The State objected to defense counsel's question, and the trial judge ruled that counsel could ask the question provided he placed the question in context. (V12, T.1669-74). Similarly, the trial court did not prevent Appellant from questioning the venire regarding their inclination to favor the death penalty. As discussed in Issue II, supra, the court expressed displeasure with defense counsel's attempt to articulate a straight-forward question and, as a result, the court asked the venire a few questions and then turned the examination over to defense counsel for further inquiry. (V12, T.1624-30). Thereafter, defense counsel continued along the lines of his previous questions.

Appellant's argument that the court improperly limited or restricted his voir dire by "reigning him in" and prejudiced him by chastising defense counsel in front of the jury is without merit. As the trial judge properly noted, counsel's voir dire examination was misleading to the venire and "in order to preserve some sanctity of the process, I think it was necessary to reign you in." (V12, T.1677-79). Clearly, the court did not abuse its discretion in preventing defense counsel from confusing the jury with improper questions. Additionally, the

court was oftentimes polite to defense counsel in attempting to get him to ask clear and concise questions,[12] and the court never chastised defense counsel in front of the jury. See Williams v. State, 689 So. 2d 393 (Fla. 3rd DCA 1997) (finding that trial court properly exercised its authority over voir dire by interjecting itself, without objection, into defense counsel's voir dire without harshness).

In Brown v. State, 678 So. 2d 910, 913 (Fla. 4th DCA 1996), the court reversed for a new trial when the trial judge castigated defense counsel in front of the jury and made counsel apologize to the jury. In addressing the defendant's claim that the trial judge impaired the fairness of the trial, the appellate court noted:

> It is clear that the trial judge interjected himself into the defense counsel's voir dire examination of jurors and final argument without any objection from the prosecutor. While it is certainly true that a trial judge has the power to take such action even in the absence of an objection from the opposing lawyer, it should be exceedingly rare to do so. Repeated interjections without objection can recast the judicial role from impartial adjudicator to an apparent advocate for the party foreswearing objection. The occasion authorizing such judicial action should thus be both singular and intolerably offensive.

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[12]On one occasion, the court stated "I'm not following it, I don't mean to be rude. You're asking bifurcated questions. . . . I'm all for educating jurors, it's not helping people, it's confusing them at this stage. Ask succinct questions, if at all possible." (V12, T.1622-23).

Id. at 913.

In the instant case, unlike the facts in Brown, the trial judge's interjections into the voir dire process and the court's comments to defense counsel in front of the jury[13] did not recast the judge's role in the eyes of the venire. Obviously, the court did not preclude Appellant from questioning the jury on any area of the law, but merely imposed proper limits on the manner in which defense counsel asked the questions. Accordingly, this Court should find that the trial judge acted within its discretion in controlling the voir dire process.

[13]The allegedly improper comments the judge made in front of the jury were: "We're going to stop it right now. Counsel approach the bench," and on one occasion, the court declined defense counsel's request to approach the bench. (V12, T.1623-24). Clearly, these comments cannot be characterized as "castigating" or raising a stigma around defense counsel.

ISSUE IV

THE TRIAL COURT ACTED WITHIN ITS DISCRETION IN DENYING APPELLANT'S MOTION FOR A CONTINUANCE TO SECURE THE LIVE TESTIMONY OF A DEFENSE EXPERT WITNESS.

Prior to the commencement of the penalty phase, Appellant moved for a continuance based on the unavailability of an expert witness. (V2, R.253-54). Appellant planned on calling Dr. Feegel at the penalty phase proceeding, but the doctor had surgery scheduled and would not be able to attend. At the hearing on the motion, defense counsel informed the court that Dr. Feegel would offer testimony to contradict the medical examiner's opinion regarding the time it took the victim to lose consciousness when strangled. (V10, T.1318-26). The State objected to the motion and noted that the case had been continued by defense counsel many times and the State had scheduling problems with a number of out-of-state witnesses. Furthermore, the State argued that Appellant could retain plenty of medical examiners who would testify to the same opinion as Dr. Feegel regarding the time it takes a victim to lose consciousness and Appellant would be able to cross-examine the medical examiner, Dr. Gore, regarding his opinion.[14] (V10,

[14]Appellant asserted that Dr. Gore's opinion on the time it took someone to lose consciousness when strangled was a minority, "pro-State" view in contradiction to established

T.1326-27).

The court denied the motion to continue and allowed Appellant to perpetuate Dr. Feegel's testimony via videotape. (V10, T.1333-37). The State submits that the trial court acted within its sound discretion in denying the motion for continuance and in allowing Appellant to perpetuate and present Dr. Feegel's testimony via videotape.

A trial court's ruling on a motion for continuance is reviewed under the abuse of discretion standard. Kearse v. State, 770 So. 2d 1119 (Fla. 2000). In Kearse, the Florida Supreme Court stated that the trial court's ruling on a motion for continuance will only be reversed when an abuse of discretion is shown and the court further noted:

> An abuse of discretion is generally not found unless the court's ruling on the continuance results in undue prejudice to defendant. See Fennie v. State, 648 So. 2d 95, 97 (Fla.1994). This general rule is true even in death penalty cases. 'While death penalty cases command [this Court's] closest scrutiny, it is still the obligation of an appellate court to review with caution the exercise of experienced discretion by a trial judge in matters such as a motion for a continuance.'

Kearse, 770 So. 2d at 1127 (quoting Cooper v. State, 336 So. 2d 1133, 1138 (Fla. 1976)).

In the instant case, Appellant has failed to establish an

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authority. (V10, T.1331).

abuse of the trial court's discretion or undue prejudice resulting from the court's ruling. Dr. Gore testified that the victim in this case would have likely lost consciousness "within a minute, two minutes, max." (V13, T.1860). Dr. Gore also opined that the victim may have lost control of his bladder during the attack as a result of fear. (V13, T.1862). On cross-examination, Dr. Gore admitted that an elderly victim with arterial sclerotic condition would likely lose consciousness quicker than a younger person without the condition. (V13, T.1885). Dr. Gore testified that he was familiar with a textbook, Forensic Pathology, written by the leading authority in the field of pathology, Vincent DeMayo. Dr. Gore disagreed with DeMayo's personal opinion that a victim loses consciousness within thirty seconds if the blood vessels in the neck are completely closed off. (V13, T.1894).

After the State rested, defense counsel presented the videotaped testimony of Dr. Feegel. (V20, T.3198-3228). Dr. Feegel testified that he generally agreed with Dr. Gore's deposition testimony regarding the amount of time the victim would have remained conscious, but indicated that if the victim's blood supply was completely cut off, he would have lost consciousness in less than a minute, probably under thirty seconds. (V20, T.3205-07).

Appellant argues on appeal that he was prejudiced by the trial court's denial of his motion to continue because Dr. Feegel's videotaped testimony did not address Dr. Gore's "surprise" testimony that the victim may have urinated in his shorts out of fear. Even if Dr. Feegel had testified that the discoloration in the victim's shorts did not mean he urinated on himself out of fear while conscious, the prosecutor would have been allowed to make the same argument he made during closing. Contrary to Appellant's assertion in his brief that this testimony was "featured prominently" in the State's closing argument, the prosecutor merely stated that it was Dr. Gore's opinion that the victim urinated out of fear. (V20, T.3277). Admittedly, Appellant could not counter this argument to the jury by presenting Dr. Feegel's rebuttal testimony, but Appellant was able to submit an affidavit from Dr. Feegel to the court at the Spencer hearing detailing the doctor's position on the victim's discoloration of his shorts. (V21, T.3418-26). The State did not object to the admission of the affidavit and argued that Dr. Gore's opinion regarding the discoloration of the victim's underwear was cumulative evidence of the victim's suffering and fear. As the prosecutor noted, Appellant described in his statement to law enforcement officers the victim's fear during the attack, including his struggling,

pushing away, and attempting to yell. (V21, T.3426).

In finding the aggravating circumstance of heinous, atrocious or cruel, the trial judge did not rely on the fact that the victim had discolored clothing. The court found that the murder was especially heinous, atrocious or cruel based on the evidence of strangulation and the fact that the murder was not one continuous action. (V3, R.351-53). Appellant attacked an eighty-four year old man and strangled him manually. When this did not result in his death, Appellant obtained a towel and used it as a ligature. When the towel did not suffice, Appellant removed the victim's belt from his pants and wrapped it around the victim's neck four times and strangled him to death. Appellant's statement to law enforcement officers indicated that the victim struggled during the attack and Appellant claimed the attack took six to seven minutes. Based on this evidence, the trial court found that the murder was especially heinous, atrocious or cruel. The fact that Dr. Gore may have believed the victim urinated out of fear prior to losing consciousness was not a factor in the trial judge's decision to find HAC. Thus, any error in denying the motion for continuance was harmless and did not create any undue prejudice. See State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986).

ISSUE V

APPELLANT'S DOUBLE JEOPARDY RIGHTS WERE NOT VIOLATED BY HIS CONVICTIONS FOR THE STATUTORILY SEPARATE AND DISTINCT OFFENSES OF ROBBERY WITH A DEADLY WEAPON AND GRAND THEFT OF A MOTOR VEHICLE.

Appellant argues that double jeopardy bars his convictions for the offenses of robbery with a deadly weapon and grand theft of a motor vehicle. Assuming arguendo that Appellant may raise this issue based on his no contest plea,[15] the State submits that separate convictions and sentences for these two offenses are permissible under Florida Statutes, section 775.021(4)(a) because each of the offenses requires proof of an element that the other does not. Section 775.021(4)(a), which codified the applicable test set forth in Blockburger v. United States, 284 U.S. 299 (1932), provides as follows:

> Whoever, in the course of one criminal transaction or episode, commits an act or acts which constitute one or more separate criminal offenses, upon conviction and adjudication of guilt, shall be sentenced separately for each criminal offense; and the sentencing judge may order the sentences to be served concurrently or consecutively. For purposes of this

[15]See Henderson v. State, 26 Fla. L. Weekly D512 (Fla. 1st DCA Feb. 14, 2001) (state acknowledges that defendant may raise for the first time on appeal a double jeopardy claim regarding his convictions for robbery and grand theft); Hayes v. State, 748 So. 2d 1042, 1044 n.1 (Fla. 3d DCA 1999) (finding that double jeopardy violation is fundamental error which can be raised on appeal even without objection in the trial court), review granted, 761 So. 2d 329 (Fla. 2000).

> subsection, **offenses are separate if each offense requires proof of an element that the other does not, without regard to the accusatory pleading or the proof adduced at trial.**

§ 775.021(4)(a), Fla. Stat. (2000) (emphasis added).

In applying the foregoing rule to the offenses involved here, it is clear that robbery requires proof of the element that Appellant took the victim's property through "force, violence, assault, or putting in fear." See § 812.13, Fla. Stat. (2000). On the other hand, unlike the offense of robbery, the offense of grand theft requires proof that the property taken was of a *specific* value or type, e.g., a motor vehicle. See § 812.014, Fla. Stat. (2000). Again, section 775.021(4)(a), Florida Statutes, provides in pertinent part that "offenses are separate if each offense requires proof of an element that the other does not, without regard to the accusatory pleading or the proof adduced at trial." Accordingly, separate convictions and sentences for robbery with a deadly weapon and grand theft of an automobile are permissible. See Henderson v. State, 26 Fla. L. Weekly D512 (Fla. 1st DCA Feb. 14, 2001); Hayes v. State, 748 So. 2d 1042 (Fla. 3d DCA 1999) (upholding convictions for armed robbery and grand theft of a vehicle under identical facts), review granted, 761 So. 2d 329 (Fla. 2000); Wilson v. State, 608 So. 2d 842, 843 (Fla. 3d DCA 1992) (upholding defendant's

convictions for both grand theft and armed robbery on double jeopardy grounds since the theft of the victims' car from *outside* the hotel was a separate, independent criminal act apart from the armed robbery which occurred *inside* the victims' hotel room) (emphasis added).

Appellant relies on two cases from the Fifth District Court of Appeal, Castleberry v. State, 402 So. 2d 1231 (Fla. 5th DCA 1981) and J.M. v. State, 709 So. 2d 157 (Fla. 5th DCA 1998), for the proposition that double jeopardy bars his convictions for both robbery and grand theft of a vehicle. In Hayes and Henderson, supra, the First and Third District Courts of Appeal certified conflict with Castleberry and J.M. The court in Henderson even noted that "the Fifth District appears to be less than united on the issue." Henderson, 26 Fla. L. Weekly at 513 (citing Taylor v. State, 751 So. 2d 659 (Fla. 5th DCA 1999), review denied, 770 So. 2d 161 (Fla. 2000)). The State would urge this Court to affirm Appellant's convictions for robbery with a deadly weapon and grand theft of a vehicle because both offenses require proof of different elements and the subsequent theft of the vehicle from the victim's garage took place at a different time and place than the robbery inside the house.

ISSUE VI

THE TRIAL JUDGE PROPERLY INSTRUCTED THE JURY ON THE APPLICABLE LAW.

Appellant argues that the trial judge erred in instructing the jury on the statutory mental mitigators that: (1) he acted "under *extreme* duress or the *substantial* domination of another person," and (2) that his capacity to conform to the requirements of the law was "*substantially* impaired." (V19, T.3091-93). Appellant objected to the modifying terms in each instruction and asked that the first instruction not be given and requested that the court delete the term "substantially" in the second instruction. The court overruled Appellant's objections to the standard instructions and found that the instructions were warranted based on the evidence presented by Appellant's medical experts.

The State submits that the trial court properly determined that the standard jury instructions were warranted based on the evidence introduced by Appellant. This Court has stated that a trial court has wide discretion in instructing the jury, and the court's decision regarding the charge to the jury is reviewed with a presumption of correctness on appeal. See James v. State, 695 So. 2d 1229, 1236 (Fla. 1997). Appellant has failed to establish an abuse of the court's discretion in the instant

case.

Appellant's reliance on Maggard v. State, 399 So. 2d 973 (Fla. 1981) is misplaced. In Maggard, this Court stated that the State should not be allowed to present damaging evidence against a defendant to rebut a mitigating circumstance that the defendant concedes does not exist. Id. at 978. The facts of the instant case are clearly distinguishable in that the State did not introduce damaging evidence to rebut a mitigating circumstance that Appellant waived. Here, Appellant was not waiving mental mitigation, but simply wanted the court to delete the modifying terms "extreme" and "substantial" from the standard jury instructions. This Court has never required such a modification. See Jones v. State, 652 So. 2d 346 (Fla. 1995); Stewart v. State, 558 So. 2d 416 (Fla. 1990).

In Stewart, the defendant also sought to delete the modifying terms "extreme" and "substantially" from the standard jury instructions on mental mitigators. Stewart, 558 So. 2d at 420. In addressing the defendant's claim regarding the level of his impairment, this Court stated

> [A]n instruction is required on all mitigating circumstances 'for which evidence has been presented' and a request is made. Once a reasonable quantum of evidence is presented showing impaired capacity, it is for the jury to decide whether it shows 'substantial' impairment. To allow an expert to decide what constitutes 'substantial' is to invade the province of the jury. Nor may a trial judge inject into the

> jury's deliberations his views relative to the degree of impairment by wrongfully denying a requested instruction.

Id.

In Jones v. State, 652 So. 2d 346 (Fla. 1995), this Court found that the trial judge did not err in denying the defendant's request to omit the word "extreme" from the standard jury instruction dealing with a statutory mental mitigator. This Court found that neither the jury nor the sentencing judge were restricted to consideration of only "extreme mental or emotional disturbance." Id. at 351. The jury was also given the standard jury instruction on nonstatutory mitigating circumstances which explained that the jury could consider any other aspect of the defendant's character, record or background, and any other circumstance of the offense. Id.

In Johnson v. State, 660 So. 2d 637, 647 (Fla. 1995), this Court found that the defendant's argument that the trial judge erred in declining to modify the standard jury instructions on mental mitigators by omitting the terms "extreme" and "substantially" was based on "a fundamental misconception of Florida law." This Court stated that the defendant's attempt to have the trial judge rewrite the statutory description of mental mitigators would constitute a violation of the separation of powers doctrine. Id.

In the instant case, neither the jury nor the judge were restricted to considering only the statutory mental mitigators. The court also instructed the jury on numerous other mental mitigators, including, (1) the defendant suffers from a learning disability; (2) the defendant has frontal lobe impairment; (3) the defendant suffers from psychiatric disorders; and (4) any other aspect of the defendant's character, record or background, and any other circumstance of the offense.[16] These instructions were sufficient to inform the jury that it could also consider nonstatutory mental mitigation. See Jones, 652 So. 2d at 351; Johnson, 660 So. 2d at 647. Because the trial judge did not abuse its discretion in denying Appellant's request to omit the modifying terms from the standard instructions, this Court should affirm Appellant's sentence.

[16]The jury was not aware of the distinction between "statutory" and "nonstatutory" mitigating factors. The jury was instructed to consider *any* mitigating circumstance established by the evidence. (V21, T.3382-84). Thus, Appellant's argument that reference to'nonstatutory' mitigating factors has the effect of communicating to the jury that these mitigating factors are inferior to the statutory mitigating factors is without merit because there is no such distinction as far the jury is concerned.

ISSUE VII

THE TRIAL JUDGE PROPERLY SENTENCED APPELLANT TO DEATH BASED ON THE SUBSTANTIAL AGGRAVATING CIRCUMSTANCES AND THE LIMITED MITIGATING FACTORS.

Appellant asserts that the trial court erred in considering inappropriate aggravating factors, failed to consider mitigating circumstances, and improperly found that the aggravating circumstances outweighed the presence of the mitigating factors. The State submits that the trial judge properly found that the five aggravating circumstances greatly outweighed the limited amount of mitigation. The trial court found that the following five aggravators were established beyond all reasonable doubt: (1) Appellant was previously convicted of a felony and under sentence of imprisonment or placed on community control or on felony probation; (2) the capital felony was committed while Appellant was engaged in the commission of a robbery or burglary; (3) the capital felony was committed for pecuniary gain; (4) the capital felony was a homicide and was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification; and (5) the capital felony was especially heinous, atrocious or cruel.

Appellant argues that the trial judge erred in finding two of the aggravators: heinous, atrocious, or cruel (HAC), and cold,

calculated and premeditated (CCP), and engaged in improper doubling of aggravators regarding the pecuniary gain and in the course of a robbery or burglary aggravators. The State submits that the trial judge properly found each of the aggravators. Whether an aggravating circumstance exists is a factual finding reviewed under the competent, substantial evidence test. When reviewing aggravating factors on appeal, this Court in Alston v. State, 723 So. 2d 148 (Fla. 1998), reiterated the standard of review, noting that it "'is not this Court's function to reweigh the evidence to determine whether the State proved each aggravating circumstance beyond a reasonable doubt -- that is the trial court's job. Rather, our task on appeal is to review the record to determine whether the trial court applied the right rule of law for each aggravating circumstance and, if so, whether competent substantial evidence supports its finding.'" Id. at 160 (quoting Willacy v. State, 696 So. 2d 693, 695 (Fla. 1997) (footnotes omitted)).

HAC

Appellant argues on appeal that the State's evidence did not support the court's finding that this aggravating circumstance was established beyond a reasonable doubt. In finding that the State proved this aggravator beyond all reasonable doubt, the trial judge stated:

a. The murder of Earl Gallipeau was a consciousness [sic] crime, a pitiless crime and unnecessarily tortuous to the eighty-four year old victim. Mr. Gallipeau was stalked in his own residence by the Defendant. The Defendant struck the victim about the head and drove him to the ground and began strangling him.

b. The murder of Earl Gallipeau by strangulation did not take place in one continuous action. First the Defendant manually choked Mr. Gallipeau. The older victim was forced to view the face of his killer and know that this was a person to whom he had only shown kindness and generosity.

c. When manual strangulation did not kill the victim, the Defendant was forced to obtain a towel and use this as a ligature to choke the victim.

d. Realizing that the towel by itself was not sufficient to strangle Mr. Gallipeau, the Defendant then removed Mr. Gallipeau's belt from his pants and used that as a ligature to murder the victim.

e. It is not difficult to imagine that the strangulation of Earl Gallipeau involved extreme anxiety, fear and the foreknowledge of death. Socher v. Florida, 580 So. 2d 595, 603 (Fla. 1991), rev'd on other grounds, Socher v. State, 112 S. Ct. 2114 (1992).

f. Even though the evidence showed that there was a possibility that Mr. Gallipeau could have regained consciousness during the time period when the Defendant quit manually strangling the victim and searched for the towel ligature, the Court is taking the posture that the Defendant [sic] never regained consciousness from the initial bout of manual strangulation.

g. While the Defendant claimed not to have directly strangled the victim, his confession was that he participated in the murder of Mr. Gallipeau by holding the victim's arms. The Defendant described the length of time necessary to strangle Mr. Gallipeau as consisting of either six or seven minutes. According

> to the Defendant, Mr. Gallipeau struggled and fought his attacker off all the while trying to yell for help. The Defendant's own chilling rendition of the events of Mr. Gallipeau's demise appear to be accurate when measured against the evidence presented by both counsel for the State and counsel for the Defense, but for the identity of the perpetrator.
>
> h. This aggravating factor has been proved beyond all reasonable doubt.

(V2, R.351-53).

In Sochor v. State, 580 So. 2d 595, 603 (Fla. 1991), rev'd on other grounds, 504 U.S. 527 (1992), both the Florida Supreme Court and the United States Supreme Court agree that the "strangulation of a conscious victim involves foreknowledge of death, extreme anxiety, and fear, and that this method of killing is one to which the factor of heinousness is applicable." Additionally in Orme v. State, 677 So. 2d 258, 263 (Fla. 1996), this Court stated that "strangulations creates a prima facie case for this aggravating factor."

This Court noted in Tompkins v. State, 502 So. 2d 415, 421 (Fla. 1986), that "it is permissible to infer that strangulation, when perpetrated upon a conscious victim, involves foreknowledge of death, extreme anxiety and fear, and that this method of killing is one to which the factor of heinousness is applicable." In Tompkins, this Court upheld the trial judge's finding of HAC where the medical examiner testified that death was not

instantaneous and there was evidence that the victim struggled while Appellant strangled her. Id.; see also Hildwin v. State, 531 So. 2d 124, 128-29 (Fla. 1988) (upholding HAC aggravator where victim took several minutes to lose consciousness when strangled and was aware of her pending doom); Capehart v. State, 583 So. 2d 1009, 1015 (Fla. 1991) (stating that trial court did not err in finding HAC when defendant strangled sixty-two year old victim and medical examiner testified that victim would have remained conscious for up to two minutes).

In this case, the medical examiner testified that the victim could have lost consciousness within one to two minutes after being manually strangled by Appellant and would have died after one to seven minutes of constant pressure. (V13, T.1856-60). However, the evidence established that Appellant not only manually strangled the victim, but also used a towel, and then a belt as a ligature. Thus, according to the medical examiner, there was a possibility that Appellant released the pressure around the victim's neck and subsequently reapplied pressure with the ligatures, resulting in prolonged consciousness. (V13, T.1860). The presence of petechiae hemorrhages also supports a finding that Appellant prolonged the victim's death by releasing the pressure around his neck and then reapplying pressure. The trial judge, however, interpreted the evidence in Appellant's

favor and stated that his sentence was based on a finding that the victim never regained consciousness after the initial bout of manual strangulation. (V3, R.352).

In Appellant's statement to police, he claimed that he assisted another individual by holding the victim's arms during the strangulation which lasted six to seven minutes. Although the trial court did not find the totality of Appellant's statement credible, the judge did find that his account of the murder was accurate and consistent with the other evidence, with the exception of the identity of the perpetrator. (V3, T.353); see Hildwin v. State, 531 So. 2d 124, 128 n.2 (Fla. 1988) (stating that a defendant's act of giving several statements which are somewhat conflicting, does not prevent a court from considering those parts of the statement that bear an indicia of reliability). Because there is substantial, competent evidence in the record to support the court's finding of HAC, this Court should reject Appellant's argument that the court abused its discretion in finding this aggravator.

CCP

In order to establish that a murder was cold, calculated, and premeditated, the State must show that the murder was (1) the product of a careful plan or prearranged design; (2) the product of cool and calm reflection and not an act prompted by emotional

frenzy, panic, or a fit of rage; (3) the result of heightened premeditation; and (4) committed with no pretense of moral or legal justification. Rodriguez v. State, 753 So. 2d 29 (Fla.), cert. denied, 121 S. Ct. 145 (2000).

Appellant argues that the court erred in finding CCP. In support of this aggravator, the trial judge stated:

> a. On August 6, 1995, the Defendant made the decision to steal the victim's vehicle. The testimony elicited during the penalty phase showed that the Defendant had devoted an exceptional amount of time and effort in traveling to the victim's residence in order to steal the vehicle.
>
> b. After entering the victim's residence, the Defendant concealed himself in such a fashion that he was able to observe the victim and plot his prospective course of action. As the Defendant remained within the confines of the victim's residence prior to the murder for a lengthy period of time, he had the opportunity to reflect on his decision of whether he wanted to steal the victim's vehicle without murdering him or to murder the victim and then steal his vehicle.
>
> c. Rather than take the victim's keys then steal the car, the Defendant made the monumental decision to kill the victim.
>
> d. The killing was not simple. The murder began with the Defendant manually choking the victim. The victim when confronted with his attacker surely must have been shocked and confounded by his attacker. The testimony from the Defendant's grandfather was that the Defendant knew the victim and had performed yard work for the victim while in the employ of the Grandfather. The Grandfather testified that he considered Mr. Gallipeau to be a good man and that he was always kind to the Defendant and himself whenever they worked for the victim. As the Defendant attacked the elderly victim, forced him to the ground and began the strangulation of Mr. Gallipeau, the victim was forced

to look into the face of a man to whom he had only shown kindness and generosity. The Defendant at that time had an option to renounce his homicidal labor, but instead chose to continue choking the victim with his hands. Mr. Gallipeau did not die easy or quick. After the Defendant determined that he could not kill Mr. Gallipeau by merely strangling him with his hands, he ceased strangling Mr. Gallipeau, stood up and retrieved a towel. At that moment, the Defendant had an opportunity to still reflect on his course of action and withdraw. Instead, he continued his criminal course of action. He then took the towel and used it as a ligature by placing it around Mr. Gallipeau's neck and twisting it tight. Still not obtaining the desired result, the Defendant removed Mr. Gallipeau's belt from around his pants and wrapped the belt around Mr. Gallipeau's neck four times. The Defendant then pulled the belt so tight that a small bone in the neck was broken.

e. The Defendant had an extraordinary amount of time to calmly and coolly reflect upon the course of action in which he was about to engage. The murder was not a spur of the moment decision, but was the result of an extended period of time spent in the kitchen hiding and deciding whether to steal the car or murder the victim, then steal the car.

f. The crime was calculated in that the Defendant had the opportunity to perfect his plan while hiding in the victim's kitchen prior to the murder. When considering the evidence in a light most favorable to the Defendant, the amount of time he spent in the kitchen perfecting his plan was extraordinary under any definition. This extensive period of time that the Defendant used to consider his actions goes beyond ordinary premeditation and demonstrates a heightened level of premeditation.

g. Michael Jackson, while in the victim's house with the Defendant, knew what the Defendant was planning and chose to withdraw from the criminal activity, which had been planned by the Defendant. This demonstrates another opportunity that the Defendant had to reflect upon his own behavior when confronted with a Co-Defendant who chose to renounce

> the course of action envisioned by the Defendant. Instead of withdrawing from his plan, the Defendant moved forward with his plan to murder Mr. Gallipeau. According to the Defendant's time estimates, he spent approximately two hours in the victim's house determining whether or not he was going to steal the car and leave, or to kill Mr. Gallipeau. The elapsed time demonstrates that it was the Defendant's prearranged design to kill Mr. Gallipeau and then steal the car. It has not been demonstrated in any form or fashion that the killing simply took place during the theft of the victim's vehicle. Jackson v. State, 648 So. 2d 85 (Fla. 1994).
>
> h. The State of Florida has proved beyond a reasonable doubt that this killing was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.

(V3, R.349-51). The State submits that the trial court's finding of CCP is supported by substantial, competent evidence.

Appellant argues in his brief that the evidence failed to support a finding that the murder was "the product of cool and calm reflection and not an act prompted by emotional frenzy, panic or a fit of rage." Initial Brief at 74-75 (citing to Jackson v. State, 648 So. 2d 85, 89 (Fla. 1994)). Clearly, this argument is without merit. The evidence demonstrated that Appellant made a lengthy journey to the victim's house in order to obtain a car. Michael Jackson, a friend who accompanied Appellant on the long walk to the victim's house,[17] thought that

[17]Officers determined that it was 2.6 miles from the victim's house to the point where Appellant and Michael Jackson were dropped off by Mr. Cauthen. (V18, T.2894-95). Mr. Cauthen testified that he saw Michael Jackson at church that morning and

Appellant was heading to a girlfriend's house to obtain Appellant's own car. (V18, T.2764-70). When Appellant and Michael Jackson arrived at the victim's house, Michael Jackson followed Appellant as he entered the residence through a doorway off the open garage. The two men entered the victim's kitchen and observed the victim's wallet and car keys on the counter. (V18, T.2768-69). Appellant looked into the living room and came back and told Michael Jackson that there was "an old guy on the couch, I'm going to kill him." (V18, T.2773). At this point, Michael told Appellant that he was leaving and he left the house and walked home.[18] Appellant stayed inside the kitchen for an unknown period of time before actually murdering Mr. Gallipeau.

Clearly, there were discrepancies between the time frames testified by several witnesses. Mr. Cauthen testified that he did not drop Appellant and Michael Jackson off until about 2:15 p.m. The two men then had to walk 2.6 miles to the victim's house. Jeslyn Whitlock testified she saw Michael Jackson walking

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Michael helped him clean up the church after the service. (V16, T.2419-20). According to Mr. Cauthen, he gave Appellant and Michael a ride to the Sunrise subdivision entrance and dropped them off at approximately 2:15 p.m. (V16, T.2421-22).

[18]Jeslyn Whitlock, a high school student who knew Michael Jackson, testified that she saw him walking alone headed away from the victim's house at approximately 12:30 - 1:00 p.m. (V16, T.2429-34).

away from the victim's house, presumably after Appellant told him he planned on murdering Mr. Gallipeau, at 12:30 - 1:00 p.m. In his statement to police, Appellant claimed that he did not even arrive at the victim's house until 7:00 p.m. and did not commit the crime until 9:00 or 10:00 p.m. (V14, 1973). Other witnesses testified that Appellant showed up at Sean Scipio's house driving the victim's car in the afternoon, possibly between 2:00 and 4:00 p.m. (V14, T.2014; V15, T.2284-85). As the trial judge found, no matter what time line is considered accurate, the evidence clearly showed that Appellant stayed inside the victim's kitchen for an inordinate amount of time plotting the murder. These facts support the trial court's finding that the murder was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic or a fit of rage.

The evidence also supports a finding that the murder was calculated and evinced "heightened" premeditation. Prior to the murder, Appellant spoke of obtaining a car so he could drive to New York. On the day of the murder, Appellant arranged to be given a ride towards the victim's subdivision. After being dropped off, Appellant had to walk 2.6 miles to the victim's house. Once inside the victim's house, Appellant announced his plan to kill the victim to his friend. Michael Jackson then left the house and Appellant stayed behind and concealed himself and

watched the victim through a reflection in a picture. This time allowed Appellant the opportunity to reflect on the consequences of his decision. Rather then simply taking the car keys from the kitchen counter and stealing the car, Appellant chose to stealthily wait and murder the elderly victim by strangulation.

As the trial court found, even when Appellant attempted to strangle the victim, the death did not come about easily or quickly. Appellant first manually strangled the victim. When this did not result in his immediate death, Appellant obtained a towel and wrapped it around the victim's neck. After this, Appellant took the victim's belt and wrapped it around his neck four times and exerted so much pressure that a small bone in the victim's neck broke. Appellee submits that this evidence is more than sufficient to support the trial court's finding that the murder was calculated and demonstrated heightened premeditation. See Reese v. State, 694 So. 2d 678 (Fla. 1997) (upholding a finding of CCP when the defendant hid in the victim's house for hours before raping and killing her by strangulation).

Appellant next argues that the trial judge improperly doubled the separate aggravators of pecuniary gain and during the course of a robbery or burglary. "Improper doubling occurs when aggravating factors refer to the same aspect of the crime." Foster v. State, 679 So. 2d 747, 754 (Fla. 1996). In Foster,

this Court addressed the defendant's claim that the trial court erred in finding the aggravators of pecuniary gain and during the course of a felony (kidnapping). Id. In upholding these two aggravators, this Court noted that the evidence supported both aggravators; the purpose of the kidnapping was not to rob the victims. Id. at 754-55. The defendant could have taken the victims' automobile without kidnapping them, but the victims were ordered back into their vehicle and driven away. "Thus, it could be concluded beyond a reasonable doubt from the evidence that the kidnapping had a broader purpose than just to provide the opportunity to rob." Id. at 755.

Likewise, in the instant case, the evidence supports a finding that Appellant had a broader purpose in mind than simply stealing the victim's money and car. The victim's wallet and car keys were sitting on the kitchen counter in plain sight. Appellant had the opportunity to steal the money and take the car while the victim watched television in the living room. Instead, Appellant waited in the kitchen planning the murder. After beating and strangling Mr. Gallipeau, Appellant stole his car and money and drove away, tossing the victim's wallet in the street. Because the evidence supports the two separate aggravators, this Court should affirm the trial court's sentence. See also Monlyn v. State, 705 So. 2d 1, 6 (Fla. 1997) (stating that court did not

improperly double aggravators of commission during the course of or attempt to commit robbery or kidnapping and commission for financial gain because evidence supported finding that defendant committed murder while engaged in both robbery and kidnapping); Brown v. State, 473 So. 2d 1260, 1267 (Fla. 1985) (upholding separate aggravators of during the commission of a burglary and for pecuniary gain where evidence established that defendant had a broader purpose in mind for burglary other than mere opportunity for theft); but see Davis v. State, 604 So. 2d 794, 798 (Fla. 1992) (finding that court improperly doubled aggravators of murder committed during the course of a burglary and for pecuniary gain where purpose of burglary was for pecuniary gain); Campbell v. State, 571 So. 2d 415, 418 (Fla. 1990) ("Commission of a capital felony in the course of an armed robbery and burglary, and for pecuniary gain should have been counted as one, not two, factors, where the offense underlying the burglary was robbery.").

Even if this Court finds that one of the above aggravators were improperly considered or doubled by the trial judge, the State submits that the error was harmless and did not contribute to the trial court's imposition of the death penalty. Geralds v. State, 674 So. 2d 96 (Fla. 1996); State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). In Geralds, this Court found that the trial

court erred in finding that the cold, calculated, and premeditated aggravator was proven beyond a reasonable doubt, but upheld the death sentence because there was no reasonable likelihood of a life sentence being imposed under the facts of that case. Geralds, 674 So. 2d at 104-05. Specifically, the court found two substantial aggravators and mitigation evidence that the trial judge gave "little weight." Id. In the case at bar, the court found five aggravators and assigned "little weight" to all of the mitigating factors. The court found that the aggravating circumstances far outweighed the mitigating factors and stated that "[e]ach one of the aggravating factors in this case, standing alone, would be sufficient to outweigh the minimal amount of mitigation that exists in this case." (V3, R.364-65). Accordingly, even if this Court strikes any of the challenged aggravators, the trial judge would have nevertheless imposed the death penalty.

Appellant next argues that trial court abused its discretion in assigning "little weight" to the statutory and nonstatutory mitigating factors. This Court in Campbell v. State, 571 So. 2d 415 (Fla. 1990), established relevant standards of review for mitigating circumstances: Whether a mitigating circumstance has been established by the evidence in a given case is a question of fact and subject to the competent substantial evidence standard,

and the weight assigned to a mitigating circumstance is within the trial court's discretion and subject to the abuse of discretion standard. See also Trease v. State, 768 So. 2d 1050, 1055 (Fla. 2000) (receding in part from Campbell and holding that, though a court must consider all the mitigating circumstances, it may assign "little or no" weight to a mitigator); Kearse v. State, 770 So. 2d 1119, 1134 (Fla. 2000) (observing that whether a particular mitigating circumstance exists and the weight to be given to that mitigator are matters within the discretion of the sentencing court).

In this case, the court found one statutory mitigator: the age of Appellant at the time of the crime. (V3, T.353). The court stated that Appellant was twenty years old at the time of the murder and was emotionally immature. However, the court found that there was evidence in the record that showed Appellant's ability to work and socially interact in an appropriate manner with other members of the community. Appellant has failed to establish an abuse of the court's discretion in finding this mitigator and giving it little weight. See Porter v. State, 429 So. 2d 293, 296 (Fla. 1983) (stating that mere disagreement with the weight to be given to mitigating evidence is an insufficient basis for challenging the sentence).

Although Drs. Eisenstein and Gutman testified that Appellant

was emotionally immature, other evidence supports the trial judge's conclusion that Appellant interacted with others in an appropriate manner. There was evidence presented that Appellant worked with his grandfather in his lawn business. In fact, Appellant had worked at the victim's house on many occasions. (V16, T.2499-50). Appellant also had numerous friends in his age group with whom he maintained a social relationship.

This Court has previously explained that "age is simply a fact, every murderer has one." Echols v. State, 484 So. 2d 568, 575 (Fla. 1985). Furthermore, in Garcia v. State, 492 So. 2d 360, 367 (Fla. 1986), this Court noted that the defendant's age of twenty, without more, was not significant mitigation. It is only when the murder is committed by a minor, that the mitigating factor of age must be found and given "full weight." Ellis v. State, 622 So. 2d 991, 1001 n.7 (Fla. 1993); see also Ramirez v. State, 739 So. 2d 568 (Fla. 1999) (stating that trial court erred in not giving "full weight" to age mitigator when defendant was only seventeen at time of murder and evidence was unrebutted that he was emotionally, intellectually and behaviorally immature), cert. denied, 120 S. Ct. 970 (2000). In this case, the trial judge was not required to give "full weight" to this mitigator based on Appellant's age of twenty. The State submits that the court did not abuse its discretion in finding this mitigator and

affording it little weight based on other evidence demonstrating some level of age-appropriate maturity.

Appellant next argues that the court abused its discretion in rejecting the statutory mental mitigators of extreme mental or emotional disturbance and the capacity of Appellant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. As a corollary, Appellant argues that the court erred in finding the nonstatutory mental mitigators and giving them little weight. The State submits that the judge acted within its discretion in finding the nonstatutory mental mitigators and assigning them little weight and in rejecting the statutory mitigators based on the modifying terms. See generally Johnson v. State, 660 So. 2d 637, 646-47 (Fla. 1995) (affirming death sentence where trial court found and weighed *nonstatutory* mental mitigation and expressly concluded that the evidence presented did not rise to the level of *statutory* mitigation).

In rejecting the statutory mental mitigator that Appellant was under the influence of extreme mental or emotional disturbance, the trial judge stated that "[a]lthough some evidence was presented that showed the presence of mental and emotional disturbance, it did not rise to the level necessary to convince the Court that the Defendant's mental or emotional

disturbance was extreme." (V3, R.354). Likewise, in rejecting the statutory mental mitigating factor that Appellant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired, the court found that Appellant may have "some slight mental or emotional difficulties," but these difficulties do not rise to the level of substantial impairment. (V3, R.357-58).

In Cheshire v. State, 568 So. 2d 908, 912 (Fla. 1990), this Court stated that Florida's capital sentencing statute requires that emotional disturbance be "extreme." However, it clearly would be unconstitutional for the state to restrict the trial court's consideration solely to "extreme" emotional disturbances. Id. Under the case law, *any* emotional disturbance relevant to the crime must be considered and weighed by the sentencer. Id.; see also Jones v. State, 652 So. 2d 346 (Fla. 1995) (finding that neither the judge nor the jury were restricted to considering only "extreme" mental or emotional disturbance).

In this case, both the judge and jury considered the statutory mental mitigators using the modifying terms and the nonstatutory mental mitigators. Based on the evidence introduced, the court properly found that Appellant's mental condition did not rise to the level to support a finding of the statutory mitigators. This finding is supported by competent

substantial evidence. A trial court may reject a defendant's claim that a mitigating circumstance has been proven provided that the record contains competent substantial evidence to support the rejection. Nibert v. State, 574 So. 2d 1059, 1062 (Fla. 1990).

Appellant presented evidence that showed the presence of some mental and emotional disturbance, but it did not rise to the level of "extreme" or "substantial." Dr. Eisenstein testified that Appellant suffered from a reading disability, attention deficit disorder, and frontal lobe impairment, but admitted there was a large degree of leeway in determining Appellant's level of impairment. (V14-15, T.2131-55). Doctor Eisenstein also conceded that Appellant was not intellectually deficient and could be faking given his test scores on the Minnesota Multiphasic Personality Inventory (MMPI). (V14, T.2137; V15, T.2169-79). Dr. Gutman diagnosed Appellant has having a low grade depression and dependant personality, but did not diagnose Appellant as having frontal lobe impairment. (V17, T.2587-93). Based on the entirety of the evidence presented, this Court must affirm the trial court's decision rejecting the statutory mental mitigators.

Similarly, this Court should affirm the court's discretionary decision to assign several nonstatutory mental

mitigators "little weight." Specifically, the court found that Appellant suffers from a learning disability, has frontal lobe impairment, and suffers from psychiatric disorders. The court concluded that these conditions existed on some level, but did not exist in such a fashion or manner so as to impact Appellant's behavior or thinking. Because Appellant has failed to establish that the trial court abused its sound discretion in affording the nonstatutory mental mitigators little weight, this Court should affirm Appellant's sentence.

Appellant also makes a brief argument that the court erred in giving little weight to the following mitigators: (1) the defendant's cooperation with the police;[19] (2) Appellant was remorseful; and Appellant had an abusive and deprived childhood, wherein his mother abandoned and neglected him. Appellant has failed to show an abuse of the court's discretion in assigning these mitigators little weight.

Even if this Court finds that the trial judge erred in rejecting the statutory mental mitigators or in failing to assign

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[19]Contrary to Appellant's assertions, this mitigator was not "firmly established" and was not given little weight. In fact, the trial judge specifically rejected this mitigator based on the evidence that Appellant gave deceptive statements to law enforcement. As the court properly concluded, a false confession cannot be considered as cooperation with law enforcement. (V3, R.359-60). The rejection of this mitigator is clearly supported by competent, substantial evidence.

the proper weight to the challenged mitigators, this Court should find the error harmless. As previously noted, there are five substantial aggravators present and only slight mitigation. As the trial judge stated in its sentencing order, each one of the aggravating circumstances, standing alone, would be sufficient to outweigh the minimal amount of mitigation present in this case.

Furthermore, when compared with other capital cases, it is clear that Appellant's case is one of the most aggravated and least mitigated cases. This Court has previously stated that its proportionality review does not involve a recounting of aggravating factors versus mitigating circumstances but, rather, compares the case to similar defendants, facts and sentences. Tillman v. State, 591 So. 2d 167 (Fla. 1991). In conducting the proportionality review, this Court compares the case under review to others to determine if the crime falls within the category of *both* (1) the most aggravated, and (2) the least mitigated of murders. Almeida v. State, 748 So. 2d 922, 933 (Fla. 1999).

A review of the facts established in the instant case demonstrates the proportionality of the death sentence imposed. See Rose v. State, 26 Fla. L. Weekly S210 (Fla. Apr. 5, 2001) (upholding death sentence where there were four aggravators and a number of nonstatutory mitigators); Mansfield v. State, 758 So.

2d 636 (Fla. 2000) (upholding death sentence where two aggravators, heinous, atrocious, or cruel and crime committed during the commission of a sexual battery, outweighed five nonstatutory mitigators); Way v. State, 760 So. 2d 903 (Fla. 2000) (finding death penalty sentence proportionate when court found three aggravating circumstances, two statutory mitigators and seven nonstatutory mitigating factors), cert. denied, 148 L. Ed. 2d 975 (2001). The circumstances of this murder compels the imposition of the death penalty. Accordingly, this Court should affirm the trial court's sentence.

CONCLUSION

In conclusion, Appellee respectfully requests that this Honorable Court affirm the trial court's sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to James R. Wulchak, Assistant Public Defender, Chief of Appellate Division, Public Defender's Office, 112 Orange Avenue, Suite A, Daytona Beach, Florida 32790-8200, on this _____ day of May, 2001.

_____
COUNSEL FOR APPELLEE

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

_____
COUNSEL FOR APPELLEE