IN THE SUPREME COURT OF FLORIDA

ERIC SIMMONS,

Appellant,

v.

Case No. SC04-19

STATE OF FLORIDA,

Appellee.

____________________________/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIFTH JUDICIAL CIRCUIT,
IN AND FOR LAKE COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

CHARLES J.

CRIST, JR.

ATTORNEY

GENERAL

STEPHEN D. AKE
ASSISTANT

ATTORNEY GENERAL

Florida Bar

No. 14087

Concourse

Center 4

3507 E.

Frontage Road, Suite 200

Tampa, Florida

33607

Telephone:

(813) 287-7910

Facsimile:

(813) 281-5501

COUNSEL FOR

APPELLEE

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STATEMENT OF THE CASE

On December 28, 2001, a grand jury indicted Appellant for the first degree murder and sexual battery of Deborah Tressler. (V1, R:5).[1] The indictment was amended on January 13, 2003, and a charge of kidnapping was added to the murder and sexual battery counts. (V4, R:644).

All proceedings in the instant case were presided over by the Honorable T. Michael Johnson. Numerous pretrial motions were filed by defense counsel, and to the extent the motions are relevant to the issues raised in the instant appeal, Appellee will discuss these motions in further detail *infra*.

A jury trial was conducted on September 8-19, 2003. The jury found Appellant guilty of each of the three charged counts. (V32, T:4432-33). At the penalty phase proceeding, the State briefly presented victim impact evidence from two witnesses. (V32, T:4564-82). Defense counsel introduced evidence surrounding Appellant's prior conviction for aggravated assault with a deadly weapon against a law enforcement officer, and called a

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[1]Citations to the record on appeal will be by volume number, record page number (V_, R:_), and citations to the transcript of the trial will be by volume number and page number (V_, T:_).

corrections officer from the Lake County Jail to testify regarding Appellant's behavior in jail during his incarceration. (V32, T:4590-4600). Defense counsel also presented evidence from Appellant's sister regarding his character. (V33, T:4625-31).

After hearing all of the evidence and argument from counsel, the jury returned an advisory verdict recommending that Appellant be sentenced to death. The jury's special interrogatory verdict form indicated that the jury found, by a unanimous 12-0 vote, that the State had proved each of the three aggravating factors beyond a reasonable doubt. The jury found: (1) the defendant had been previously convicted of a felony involving the threat of violence; (2) the crime for which the defendant is to be sentenced was committed while he was engaged in the commission of, or an attempt to commit sexual battery, or kidnapping or both; and (3) the crime for which the defendant is to be sentenced was especially heinous, atrocious or cruel. (V7, R:1211).

On November 13, 2003, the court conducted a hearing pursuant to Spencer v. State, 615 So. 2d 688 (Fla. 1993), and heard testimony from the defense's mental health expert, Dr. Elizabeth McMahon. Dr. McMahon testified that Appellant had a moderate to severe learning

disability and did not have a significant history of violent behavior. (V33, T:4718-28).

The court issued a lengthy sentencing order finding that the State had established the three aggravating factors beyond a reasonable doubt. In regards to each aggravating factor, the court found that the defendant had been previously convicted of a felony involving the threat of violence to a law enforcement officer, but gave this aggravator moderate weight "due to the circumstances of the assault."[2] The court gave great weight to the other two aggravating factors; the murder was committed while Appellant was engaged in the commission of sexual battery and kidnapping; and the crime was especially heinous, atrocious or cruel (HAC). (V9, R:1413-32).

The court rejected the proposed statutory mitigating circumstance of Appellant's age (27) because there was no evidence that "he functioned (except in reading) at a level below his stated age of twenty-seven." (V9, R:1424-25). The court did, however, find the following non-statutory mitigating factors: (1) the defendant

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[2]The defense introduced the probable cause affidavit at the penalty phase hearing detailing the facts surrounding the assault. According to the affidavit, Appellant was fleeing from law enforcement officers in his vehicle when he deliberately veered toward an officer, causing the officer to take evasive measures to avoid a head-on collision.

manifested appropriate courtroom behavior (some weight); (2) Appellant was kind to the victim (some weight); (3) Appellant loves and cares for animals (minimal weight); (4) Appellant was active in his church and a mentor to the little boys who belonged to the church's Royal Rangers (some weight); (5) Appellant has a good family background and came from a close knit, caring family (some weight); (6) Appellant was employed (some weight); (7) Appellant has a learning disability (some weight); and (8) Appellant is immature. (V9, R:1424-30).

STATEMENT OF THE FACTS

On December 3, 2001, at approximately 11:30 a.m., Lake County Sheriff's Office (LCSO) Deputy John Conley discovered the body of an unknown female while he was on routine patrol in a large wooded area often utilized for illegal dumping. (V19, T:1924-26). The victim was located approximately 270 feet from the main road, down a two-track dirt road. (V19, T:1942). Crime scene technician Theodore Cushing noted that it appeared a car had done a three point turn within close proximity to the victim's body. (V19, T:1944). Numerous tire tracks were located in the sand and the technicians took plaster cast impressions of the three best tracks.[3] There were some all-terrain vehicle tire tracks closer to the victim, but these tracks were deteriorated probably by either weather or time. (V19, T:1945-46). Numerous items of debris were also found in the vicinity of the victim due to the illegal dumping in the area.[4] (V23, T:2736-37).

After the medical examiner, Dr. Sam Gulino, arrived

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[3]Mr. Cushing testified that he observed and photographed five tracks, but only took plaster casts of three tracks because, based on his experience, these were the tracks with the most detail which would assist in making comparisons. (V19, T:1945).

[4]Despite checking a number of debris items for fingerprints, no prints of comparable value were found at the scene. (V19, T:1992-94).

at the scene and observed the victim and surroundings, her body was transported to the medical examiner's office at 3:30 p.m. (V20, T:2075). The medical examiner performed a preliminary examination and collected a sexual assault kit which took approximately one hour. (V20, T:2161-62). Dr. Gulino observed crime scene technicians collect the victim's fingerprints and fingernail scrapings. (V20, T:2161-62). Afterwards, the victim's body was placed into a cooler which is kept in the range of 35 to 40 degrees Fahrenheit. (V20, T:2164).

The following day, crime scene technician Robert Bedgood attended the autopsy and collected evidence from the victim. Mr. Bedgood collected a vial of the victim's blood, her clothing, some hairs from her hand, the sexual assault kit, and some insect larvae. (V20, T:2027-28). Mr. Bedgood collected the larvae prior to the autopsy and placed some of the larvae in a dry container and also placed some into a container with alcohol.[5] Bedgood left the medical examiner's office at around 4:30 p.m. and returned to the LCSO and placed the insect larvae in the

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[5]At the time he collected the larvae, the technician had never been trained on collecting insects and he testified that he attempted to do the best he could do to preserve the specimens. (V20, T:2033).

evidence room’s refrigerator around 5:30 p.m. (V20, T:2039).

The State called Dr. Jerry Hogsette as an expert entomologist in the life cycle of flies. Defense counsel objected to the witness testifying as an expert in forensic entomology, but the trial judge informed the jury that the witness was qualified as an

expert in entomology and in the life cycle of flies. (V20, T:2079-95).[6] Dr. Hogsette explained to the jury the life cycle of a specific screwworm fly, *cochliomyia macellaria*, and the three larval instar stages. (V20, T:2095-2100). The expert examined the specimens collected by Technician Bedgood and determined that the insects were in the second instar stage, and some were younger in the first instar stage. (V20, T:2103). The expert testified that once the victim was placed in the refrigerator at the medical examiner's office, the larvae would have stopped developing, and once the larvae was placed within the jars by Mr. Bedgood, they would have died within an hour. (V20, T:2104-06). Based on the temperature in the area[7] where the victim was found and the development of the larvae taken from the victim's body, the expert opined that the victim had been killed between midnight on Saturday, December 1, 2001, and early Sunday morning, December 2, 2001. (V20, T:2106-15).

Dr. Sam Gulino, the medical examiner, testified that

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[6]Prior to trial, Appellant filed a motion in limine seeking to exclude testimony from Dr. Hogsette. (V5, R:881-83). After hearing his proffered testimony, the trial judge denied the motion. (V15, T:1067-71; 1088-1145).

[7]The State presented detailed evidence from the coordinator of the Florida Automated Weather Network describing the temperature and weather in the area during the weekend of the victim's murder. (V20, T:2051-73).

when he observed the victim's body at the scene on December 3, 2001, at approximately 2:00 p.m., he observed the victim lying on her left side with her right arm over her face. (V20, T:2158-59). According to the doctor, rigor mortis had set in and, although there is a tremendous amount of variability, he opined that such a condition lasts for 24-38 hours before it dissipates. (V20, T:2160). After examining the body and the scene, the doctor concluded that the time of death was 24-48 hours before the body was discovered.

The autopsy revealed that the victim suffered a variety of different injuries from multiple types of weapons. The victim had a number of stab wounds from a sharp object, including a five-and-a-quarter inch stab wound to the abdomen,[8] multiple stab wounds to the head and neck, a major slice cut across the neck, and numerous defense wounds to the hands and arms.[9] (V20, T:2165-79). In addition to these injuries, the victim suffered

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[8]The victim's pants were uncut and the pants were over the cut.

[9]The doctor noted an unusual pattern injury on the victim's right index finger which consisted of several multiple little parallel lines. Although any object could have made the pattern, the doctor noted that the injury reminded him of threads on a pipe. (V20, T:2177, 2190-91). The doctor also noted a T-shaped laceration to the victim's scalp. (V20, T:2191).

In addition to the stab wounds and blunt force lacerations, the doctor also noted extensive recent bruising on the victim, including restraint-type bruises to the upper arm. (V20, T:2193-94).

multiple lacerations to the head caused by a blunt object.[10] There was a significant, fatal injury to the right side of her head that resulted in her skull fracturing into numerous pieces. (V20, T:2165-67). The doctor opined that this injury to the brain caused the victim to go into neurogenic shock, causing the victim's heart rate and blood pressure to decrease greatly. The doctor felt that the neurogenic shock accounted for the lack of bleeding at the site of the victim's injuries. (V20, T:2168-72; 2184-86). The victim also had a significant injury to her anus with a resulting laceration to the rectum which was inconsistent with consensual anal intercourse. (V20, T:2172-73). Due to the extensive hemorrhaging around the injury to her anus, the doctor testified that this injury occurred prior to the fatal head injury. (V20, T:2185).

The medical examiner testified that he did not believe that the attack occurred at the exact spot where the victim was found because there was not much blood there and the area around her body did not appear to be disrupted. (V21, T:2226, 2233-34). Dr. Gulino acknowledged that neurogenic shock may explain the lack

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[10]The medical examiner testified that the victim had likely suffered 10-11 blows to the head. (V20, T:2187-88).

of blood. (V21, T:2230). The doctor also testified that the position of the victim's body was consistent with the attack occurring a few feet away. (V21, T:2230-34).

The day after discovering her body, law enforcement officers were able to ascertain the victim's identity, Deborah Tressler, based on her fingerprints. (V24, T:2942). Crime scene technicians went to her residence and place of employment, a laundromat in the small town of Sorrento, and conducted Luminol testing, but did not discover any evidence of violence inside her trailer or the laundromat. (V21, T:2261-63). The technicians found the victim's purse inside the laundromat and located a birthday list with names on it, including "Eric" and his mother, father, and sister. (V21, T:2273-77).

During the investigation of the murder, law enforcement officers handed out fliers at road blocks in an attempt to locate the victim's boyfriend. Officers also reviewed all the 911 calls/reports from the weekend in an attempt to see if anyone had reported an incident which may have been connected with the murder. This led detectives to an incident that occurred on Saturday, December 1, 2001, at approximately midnight.

Andrew Montz testified that late on the evening of Saturday, December 1st, he took his pregnant wife to the Circle K convenience store located at

the intersection of State Road 44 and County Road 437, in Lake County. (V24, T:2872-76). While his wife was inside purchasing a snack, Mr. Montz waited outside and checked the tire pressure on his car. After he finished, he saw a white four-door car heading north on 437 pulling up to the traffic light very slowly. As the car approached the red light, a lady opened the passenger door and screamed out, "Somebody help me. Somebody please help me." (V24, T:2876-77). The driver of the car pulled the lady back into the car and ran the red light at a high rate of speed. Mr. Montz got a "decent look" at the lady, but not enough to positively identify her. He stated that she was wearing a white T-shirt or pajama type top.[11] (V24, T:2879-80). He did not get a good look at the driver. (V24, T:2880).

Mr. Montz noted that the white car had a dent on the passenger side, black and silver "deco" trim on the door panel, and a flag hanging from the window. (V24, T:2880; 2885). He described the car as a Chevy Corsica/Ford Taurus type of car. (V24, T:2883). After the car ran the red light, Mr. Montz noticed a brown van chase after the vehicle. (V24, T:2882). Mr. Montz subsequently viewed a videotape of Appellant's 1991 white, four-door Ford Taurus and identified it as the car he saw that night. (V24, T:2884-85). Mr. Montz initially told lead Detective Stewart Perdue that the car had spoked rims, but after viewing spoked rims at an auto parts store, the witness concluded that the rims were not spoked. (V24, T:2894-95; 2902-03).

Sherri Renfro testified that on Saturday evening at approximately 11:30 - 11:40 p.m., she was at the Circle K at the intersection of 44 and 437 with her sister-in-law's boyfriend, Shane Lolito. Ms. Renfro used the pay phone to call her sister-in-law and after speaking with her, Mr. Lolito got on the phone with her. (V26, T:3252-54). Ms. Renfro saw a car slowly approach the red light and the passenger door open and a woman yell for help. (V26, T:3255). The woman looked directly at Ms. Renfro and asked her for help. Ms. Renfro stated that she saw the fear in the lady's eyes.[12] After Ms. Renfro yelled at the driver to stop, she got into her van and chased after the car. Despite traveling in excess of the speed limit, Ms. Renfro never got very close to the car and eventually lost track of the car's tail lights. (V26, T:3259-61; 3273-74).

At the time of the incident, Ms. Renfro thought the car might be a Chevy Corsica, but she admitted that she did not know car models very well. (V26, T:3261). Ms. Renfro observed the car's interior and recalled that the car had a patriotic bumper sticker in the rear window and a flag hanging in the back passenger window. (V26, T:3265-66). When subsequently shown Appellant's car, Ms. Renfro positively identified Appellant's car as the one she saw at the intersection. She was confident of her identification because she recognized the interior, the bumper sticker, and the flag. (V26, T:3265-66). Ms. Renfro was also shown a photograph of the victim, and she identified Deborah Tressler as the woman in the car screaming for help. (V24, T:2945-47; V26, T:3262-63).

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[11]The victim was found wearing a light grey sweatshirt. (V28, T:3784).

[12]Like Mr. Montz, Ms. Renfro testified that the victim was wearing what appeared to be a white T-shirt. (V26, T:3258). Unlike Mr. Montz, Ms. Renfro stated that she observed the victim's foot leave the car in a "quick motion" when she was attempting to flee from the car. (V24, T:2890; V26, T:3272-73).

Jose Rodriguez testified that he was friends with the victim because he "was always" hanging out at the laundromat where she worked. (V23, T:2779). Mr. Rodriguez first met Appellant the day before Thanksgiving when he borrowed a dollar from Appellant. (V23, T:2780-81). Appellant and the victim were always together and were drinking when he saw them. Mr. Rodriguez knew Appellant owned a four-door white car and often drove around with a dog in his car. (V23, T:2782-83). Appellant's car had a flag sticking out of the rear passenger side window. (V23, T:2783-84).

The last time Mr. Rodriguez saw Appellant and the victim was on Saturday evening, December 1, 2001, at the laundromat. (V23, T:2785). Mr. Rodriguez went up to the laundromat at approximately 10:30 - 10:45 p.m. so he could receive a call from his girlfriend on the pay phones outside the laundromat. (V23, T:2785-86). When he arrived, he knocked on the front glass window to get Appellant's attention and asked him to come outside. While Appellant was exiting from the side of the building, Mr. Rodriguez got Ms. Tressler's attention and asked her if she was okay, and she said yeah. (V23, T:2789-90). Appellant came outside and spoke with Mr. Rodriguez for a few minutes. (V23, T:2788-89). Mr. Rodriguez then went and talked on the phone with his girlfriend. After he got off of the phone, he noticed that Appellant and the victim were still inside the closed laundromat. (V23, T:2787; 2790).

The following day, Mr. Rodriguez was arrested and locked up in the county jail. When law enforcement officers came and spoke with him on December 5, 2001, they showed him a photopack with about 35 pictures in it. (V24, T:2847-48). Mr. Rodriguez did not identify any of the photos as Ms. Tressler's boyfriend, but picked one and stated that it looked most like the Appellant, but it was not him. Mr. Rodriguez asked if he could add items to the photograph to make it look more like Appellant, and he was allowed to draw on a photocopy of the photo. (V23, T:2797-99; V24, T:2847-50). Subsequently, on December 7, 2001, when shown a single photograph of Appellant, Mr. Rodriguez positively identified him as the victim's boyfriend. (V23, T:2799; V24, T:2855-57).

Once detectives had positively identified Appellant as Deborah Tressler's boyfriend, they discovered that he owned a 1991 Ford Taurus. (V24, T:2954-55). Detective Perdue went to Appellant's parents' home, located on State Road 44 a few miles from the 44/437 intersection. (V24, T:2956-57). Appellant was not at the residence at the time, but he eventually rode up to the house on a four-wheel all terrain vehicle. Detective Perdue and Detective Kenneth Adams approached Appellant and asked him to walk over to a group of trees so they could talk.[13] The detectives told Appellant what they were there for and asked Appellant if he knew Deborah Tressler was dead, and he responded that he knew. (V24, T:2960). Detectives asked Appellant if he would accompany them to the Sheriff's Office to talk, and Appellant consented to the interview. (V24, T:2960-61).

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[13]At the time, there were approximately 15 other members of the LCSO on the property. (V24, T:2957). The detective testified that the command center included a number of detectives, deputies, and other ranking officers. This "thundering herd" that descended on the Simmons' property also included a helicopter. (V25, T:3159)

Once at the Sheriff's Office, Detectives Perdue and Adams interviewed Appellant in a room equipped with audio and video capabilities. The taped interview began at 4:48 p.m., but unbeknownst to the two detectives, the people placed in charge of monitoring the videotape left the room and allowed to the videotape to run out after two hours.[14] As a result, approximately two hours of the interview was not recorded. (V24, T:2963-71). After waiving his Miranda rights, Appellant stated that he was friends with "that lady"[15] and had tried to help her because she needed things to improve her living conditions.[16] Appellant stated that he had engaged in consensual sex with the victim on one occasion approximately two weeks before the December 7, 2001 interview.[17] (V24, T:2980-81). Appellant stated that when he woke up after having sex with her, he was disgusted. (V24, T:2981). Despite the detectives' various interrogation tactics in interviewing Appellant, he continually denied killing Ms. Tressler until the very end of the interview when, after detectives had discovered that blood was found in his car and confronted Appellant with this fact, he stated, "Well, I guess if you found blood in my car, I must have did it." (V24, T:2983; 2992).

During his statement to detectives, Appellant claimed that on Saturday, December 1, 2001, he and the victim were watching the University of Florida versus University of Tennessee football game at his apartment in Mt. Dora. (V24, T:2985). Because the television reception was poor, the victim asked that Appellant take her back to the laundromat or her trailer[18] so she could watch the game. According to Appellant, he took her back to the laundry between the first and second quarter of the football game and dropped her off and then "high-tailed it" home because he and the victim were supposed to go to work together early the next morning with Appellant's father's landscaping business.[19] (V24, T:2989). He drove back to his apartment, took a shower, fed his dog, and

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[14]The audio portion of the tape was of very poor quality, and despite having the tape worked on by NASA, there were still numerous inaudible portions of the taped statement that was played to the jury. (V24, T:2971-73).

[15]Detective Perdue testified that Appellant repeatedly referred to the victim as either "that lady" or "that old lady," and only referred to her by name on one occasion. (V24, T:2984).

[16]The victim lived in a trailer that had no working plumbing and had to wash herself with a garden hose outside.

[17]Appellant's semen was discovered in the vaginal washings from the victim at her autopsy on December 4, 2001. (V23, T:2698). Appellant's semen would only be viable for three to six days in a living person. (V23, T:2704).

[18]The victim's travel trailer was located behind the Oasis Bar which was across the street from the laundromat. (V24, T:2943).

[19]The State called a witness in charge of televising the UF/Tennessee game and he testified that it started at 4:46 p.m., the first quarter ended at 5:21, the second quarter ended at 6:14, the third quarter ended at 7:07, and the game ended at 7:56 p.m. (V21, T:2236-38).

went to bed. (V24, T:2985-87). Appellant denied seeing Mr. Rodriguez at the laundromat that evening and stated that he was not there at 11:30 in the evening. (V24, T:2988-89). Appellant also denied that he had been in his car with the victim at the intersection of 44 and 437, and claimed that his car was at his house all evening after he dropped off Ms. Tressler. (V24, T:2988).

During the course of Appellant's interview, the detectives took turns leaving the room and checking on the status of Appellant's car. After the detectives had left the elder Simmons' property, Appellant's car was towed to the LCSO and a search warrant was secured. At about 8:30 p.m., Detective Perdue went downstairs and observed technicians do a presumptive test on a suspected blood stain found inside the car. The test indicated that the stain contained blood. (V21, T:2294-99; V23, T:2990-91). Detective Perdue then returned to the interview room and, as previously noted, confronted Appellant with the discovery of blood at which time Appellant admitted, "Well, I guess if you found blood in my car, I must have did it." (V24, T:2992). Detective Perdue considered Appellant's statement a confession. (V25, T:3178).

After detectives obtained a search warrant for Appellant's white Ford Taurus, crime scene technicians took possession of the tires from the car. Terrell Kingery, a crime lab analyst with the Florida Department of Law Enforcement, examined the plaster tire casts made at the scene and compared them to the tires obtained from Appellant's car. (V21, T:2387-99). The two rear tires from Appellant's car, which were each different brand tires, had tire tread designs which were consistent with the three plaster casts taken from the scene.[20] (V22,

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The State also presented phone records to establish that Appellant used his father's cell phone on Saturday evening at 6:05 p.m., to call his friend Steve Ellis. The phone call lasted until 6:32 p.m. (V23, T:2757-60). Mr. Ellis testified he the thought Appellant was at his apartment in Mt. Dora and Mr. Ellis could hear a female in the background. (V23, T:2759-60). Appellant told him it was "Debbie," a lady he met at the laundromat. Mr. Ellis testified that it sounded like Appellant had been drinking. (V23, T:2755-60).

Mr. Ellis also testified that due to his job with Lake County Fire Rescue, he was able to monitor a police scanner. Mr. Ellis testified to the numerous calls made by Appellant immediately after the victim's body was found seeking information about the activities of law enforcement. (V23, T:2762-73). Mr. Ellis missed about seven calls from Appellant and finally spoke with him for 23 minutes on the evening of December 6, 2001. Mr. Ellis advised Appellant to call the Sheriff's Office because he knew the victim had worked at the coin laundry and was aware that Appellant's friend from the laundry was missing. (V23, T:2771-73). When Mr. Ellis jokingly asked Appellant if he had killed her, Appellant responded that he had not and became sad.

[20]One of the rear tires was a YKS brand and two other companies had similar tread designs (Woosung and Nexen). (V22, T:2455). The other rear tire was a Sigma

T:2501). On two of the three casts, the dimension and general condition were also consistent. (V22, T:2501-02).

In addition to the tire track evidence, the State also presented substantial scientific evidence concerning blood stains found inside Appellant's car. Crime scene technician Ronald Shirley testified that he obtained a positive result from a presumptive test for blood on a stain located on the passenger door. He photographed and swabbed numerous stains that appeared to be blood from the doorjamb/post between the front and back seat on the passenger side. (V21, T:2306-07). He also performed Luminol testing and noted that the area glowed around the passenger seat cushion and on the carpet below the passenger seat, in both the front and back. (V21, T:2328-29). The largest glow came from the area where you sit on the seat. (V21, T:2330). The technicians cut the fabric off the seat cover and noted what appeared to be a large stain on the cushion itself. (V21, T:2331). Technicians removed the seat and sent samples of the cushion out for DNA testing. Technicians also removed a portion of the interior trim from the passenger side that contained suspected blood stains. (V21, T:2331-36).

Brian Sloan, a mitochondrial DNA (mtDNA) sequencing expert from Orchid Cellmark Forensics, testified that mtDNA is better than traditional STR DNA testing when examining degraded samples. He examined a sample from the passenger seat cushion and compared the mtDNA obtained from the seat to that of Lee Daubanschmide, the

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Tempest tire made by the Cooper Tire Company.

The front passenger tire that Mr. Kingery examined could not have left any of the tire tracks that were cast. (V21, T:2445). The witness was also informed by LCSO that the other front tire had been eliminated as a possible contributor to the casts. (V21, T:2475-76; 2531).

victim's mother.[21] When comparing the two samples, the witness noted that each sequence had an anomaly in the same place. (V22, T:2554-58). He ultimately concluded that the mtDNA sequence obtained from the bloodstain card from the victim's mother was consistent with the mtDNA obtained from the seat cushion. (V22, T:2561). Once he noted this consistency, he entered the information into the FBI database and checked for any matches. The profile he entered had never been seen in the group of 4,839 people in the FBI database. (V22, T:2562).

Shawn Johnson, a DNA analyst employed by the Florida Department of Law Enforcement, testified that he performed a presumptive test for blood on the large stain on the passenger seat cushion and it came back positive.[22] (V23, T:2635). The witness cut three different pieces from the stain and tested them together, but was unable to get a DNA profile. He opined that the stain had to be degraded because he should have been able to get a profile given the size of the stain. (V23, T:2636). Degradation could occur due to chemicals or exposure to the sun. (V23, T:2636). Mr. Johnson actually did a second presumptive test on the stain and again obtained a positive indication for blood. (V23, T:2636-37).

On two blood swabs from the front passenger door jamb, Mr. Johnson was able to obtain a DNA profile from each of the stains that matched Deborah Tressler. (V23, T:2638). The statistical probability of getting that type of DNA female profile from the population would be 1 in 12 quadrillion Caucasians, 1 in 173 quadrillion blacks, and 1 in 10 quadrillion Hispanics. (V23, T:2639). Mr. Johnson also noted blood stains on a piece of the car trim from the passenger side. Of the 11 stains on the trim piece, 5 of them gave chemical reactions for blood. (V23, T:2644-45; 2721). Mr. Johnson was unable to get a DNA profile from one of the five stains, but found the victim's DNA profile on four of the blood stains. The female DNA profile matched the victim at all 13 loci and had the same statistical numbers as to blood stain on the passenger door jamb. (V23, T:2645-46). On one of the four stains containing the victim's DNA, the witness found a mixture containing non-human DNA, most likely canine DNA. (V23, T:2699-702; 2709; 2721). The witness agreed that if a dog had drooled on the trim, and then human blood got on there, it could explain the mixture. (V23, T:2702).

After the State rested their case in chief, defense counsel called Stuart James, an expert in blood stain pattern analysis. Mr. James observed blood spatter on photographs of Appellant's vehicle's passenger

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[21]Because mtDNA is inherited maternally, it is a valid scientifically approved analysis to utilize a known maternal sample. (V22, T:2554). In this case, the blood drawn from the victim at the autopsy appeared to be degraded, so the experts utilized the mother's blood when examining mtDNA and used saliva samples from the victim when using STR DNA comparisons. (V22, T:2600-26; V23, T:2724).

[22]LCSO crime scene technician Theodore Cushing also testified that he conducted an "ABA" presumptive test for blood on the seat cushion and it came back positive. (V23, T:2741-42). Appellant's own expert, Stuart James, testified that an ABA test used to detect blood is more definitive than a presumptive test. (V26, T:3374).

doorjamb. (V26, T:3390). He also examined a piece of the car's trim, but could not determine whether there was blood spatter on this piece because the circled area that had contained the stain had been swabbed and were no longer visible in the photograph. (V26, T:3390-91). With regard to the spatter on the doorjamb, the witness testified that it was consistent with the size range found in beatings and stabbings, and sometimes even gunshots, but it was a fairly limited amount of staining and, without more supportive evidence and more areas of blood, he could not conclude that such events took place in close proximity to the area. (V26, T:3392-93). Basically, as the witness candidly admitted, he could not come to any conclusions about the spatter evidence because he did not have enough information or evidence. (V27, T:3443).

Defense counsel also called Dr. Neal Haskell, a forensic entomologist, to testify regarding the proper procedures utilized in collecting physical evidence from victims at a crime scene. Dr. Haskell examined the insect specimens collected by LCSO and found the *cochliomyia macellaria*, second instar larvae consistent with the greenbottle fly group, and a hairy maggot larvae. (V27, T:3517). Based on the limited information that this witness possessed, he could not determine the victim's time of death. (V27, T:3520-21).

On cross-examination, Dr. Haskell was alerted to numerous facts that he did not possess, but were relied upon by the State's entomology expert Dr. Jerry Hogsette. (V27, T:3528-43). After being informed of this information, Dr. Haskell concluded that Dr. Hogsette's written report was faulty for not including the information in his report. Based on the lack of information he possessed, Dr. Haskell could not determine whether Dr. Hogsette's opinion was incorrect or correct. (V27, T:3538; 3562). He did opine, however, that the State's expert was not qualified to render an opinion on the time of death. (V27, T:3545-56).

The defense presented testimony from a local veterinarian who observed a white, four-door car with stickers[23] on it driving very slowly at the intersection of 44 and Seminole Springs Road on the morning of Sunday, December 2, 2001. (V28, T:3633-36). The car pulled off the road a short ways into a lightly wooded area and came to a stop. There were three entrances into this area and the car pulled about 75 yards into the northern most entrance. (V28, T:3643-45). The driver of the vehicle appeared to be an older white male with gray hair. (V28, T:3637). After reading in the newspaper about a body being found in that general location, the witness reported the incident to police after being stopped by a roadblock. (V28, T:3637-38; 3644).

Defense counsel recalled numerous state witnesses, including law enforcement officials to testify regarding their actions in investigating the homicide. Crime scene technician Ronald Shirley testified that two photographs of Appellant's car depicted fingerprint powder on the car. (V28, T:3720-21). When asked if

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[23]The car had multiple stickers and the witness believed that one of them was a flag. (V28, T:3640). He also thought the car had a Florida license plate with an orange on it, and did not notice a Florida State University speciality tag on the car. (V28, T:3640).

Appellant's car was clean or dirty, he responded that it was medium.[24] (V28, T:3721). He also testified that two other photographs of the passenger side of Appellant's car were taken in different lighting conditions[25] and accurately showed the exterior of the car, with the exception of the replacement wheels.[26] (V28, T:3722). Mr. Shirley noted that there were packages of partially-consumed cleaning materials in Appellant's car: a box of Clorox, a bottle of liquid Clorox, and a box of detergent softener. (V28, T:3972-73).

Crime scene technician Theodore Cushing testified that he unsuccessfully searched the victim's trailer for signs of a struggle. (V29, T:3920-23). Mr. Cushing took photographs of the victim's trailer and did not test a red stain on her carpet that appeared to be fingernail polish. (V29, T:3924).

The defense called Dr. Terry Melton, an expert in mtDNA analysis, to "correct the record." (V30, T:4055). Dr. Melton testified that she reviewed the data obtained from Orchid Cellmark and determined that Orchid Cellmark had run the information through the FBI database incorrectly. According to Dr. Melton, although Orchid Cellmark had properly found a match with the mtDNA, their statistical analysis that it had never been seen in the FBI database of 4839 was incorrect. (V30, T:4055-58). Dr. Melton stated that when she ran the data in the database, she found that it was a common type of sequence that was found in 105 of the 4839 people in the database. (V30, T:4058).

Dr. Melton testified that when her lab examines mtDNA samples, she runs a larger sample of 783 base pairs through the FBI database. Orchid Cellmark and the FBI only look at 610 base pairs. (V30, T:4069-73). Orchid Cellmark did not examine two zones of the samples, zones 55 and 57, that Dr. Melton examined. Dr. Melton found that both samples had "C" markers in zone 55 and 57 and Dr. Melton had never seen these before in her experience. Although she testified that 105 of the 4839 people in the FBI database had this sequence, she could not determine if any of the 105 had the rare "C" marker at zones 55 and 57. (V30, T:4073-77).

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[24]Contrary to the assertion in Appellant's brief, Mr. Shirley did not testify that the seats in the vehicle were dirty. See Initial Brief of Appellant at 25. When shown a photograph of the steering wheel and front seat cushion, Mr. Shirley stated that the area needed to be cleaned out and the carpet appeared dirty. (V29, T:3971).

[25]Mr. Shirley took photographs of the car on a number of different days during his investigation and processing of evidence. (V28, T:3962).

[26]The tires on Appellant's car were seized and replacement tires were placed on the car. (V28, T:3961).

SUMMARY OF ARGUMENT

The State presented substantial, competent evidence to support the jury's verdict finding Appellant guilty of first degree murder, kidnapping, and sexual battery. The evidence contradicted Appellant's story that he had dropped the victim off at the laundromat early on Saturday evening. Rather, witnesses observed Appellant and the victim together at the laundromat late on Saturday evening near midnight, and shortly thereafter, observed the victim screaming for help and attempting to jump out of Appellant's moving vehicle only a few miles away. After the victim was found dead in a wooded field, law enforcement officers located tire impressions near the body that were consistent with the two rear tires from Appellant's vehicle. Furthermore, the victim's blood was found in a large stain on the passenger seat cushion of Appellant's car and her blood spatter was found on the passenger door jamb and trim. Finally, when confronted by detectives with the fact that blood had been found in his car, Appellant stated that "he must have done it."

Appellant's argument that the trial court lacked *jurisdiction* in the instant case is without merit. Clearly, the trial court had jurisdiction over a felony criminal case. Appellant confuses the issue of subject matter jurisdiction with venue and her argument on appeal is actually addressed to the issue of venue. As the lower court noted, unlike the essential elements of a crime, venue need not be proved beyond a reasonable doubt. In this case, the State introduced substantial, competent evidence that the crimes occurred in Lake County, Florida.

The lower court properly denied Appellant's motion to suppress his statements to law enforcement officers and motion to suppress the evidence seized from his vehicle. As the trial court properly found, Appellant voluntarily accompanied law enforcement to the Sheriff's Office where he freely and voluntarily gave a post-Miranda statement. Furthermore, as the lower court properly noted, even if Appellant had not voluntarily accompanied the detectives, probable cause existed for his arrest. The court also properly denied the motion to suppress the physical evidence seized from Appellant's car. Contrary to Appellant's argument, the affidavit in support of the search warrant was sufficient to establish probable cause for a search. Additionally, the court ruled in the alternative that the Carroll doctrine permitted the search of the automobile when probable cause existed that the vehicle contained contraband or the fruits of a crime.

The trial court properly allowed the State's expert on mtDNA to testify regarding his analysis and statistical conclusions. Appellant's argument that the expert's report was erroneous is not justification to bar the admissibility of this evidence, but was a matter properly subjected to cross-examination. Additionally, the State made proper arguments based on the mtDNA evidence introduced.

The trial judge acted within his discretion in excluding the testimony from a defense expert regarding factors that affect the reliability of eyewitnesses' identifications. This Court has previously ruled in McMullen v. State, 714 So. 2d 368 (Fla. 1998), that the trial court did not abuse its discretion in excluding the same expert's testimony. The jury in the instant case was fully capable of assessing the witnesses' ability to perceive and remember events without the aid of the expert witness' admittedly speculative testimony.

The court properly denied Appellant's motion to suppress the out-of-court identifications of the

eyewitnesses. Although law enforcement officers only showed the witnesses one photograph or one vehicle, the totality of the circumstances did not give rise to the substantial likelihood of misidentification.

Appellant has failed to preserve any issue regarding alleged prosecutorial misconduct. Counsel's vague argument on appeal is insufficient to preserve any issue. Furthermore, the few examples cited by Appellant clearly do not support a finding of misconduct.

Finally, this Court has previously rejected the argument that Florida's death penalty statute is unconstitutional pursuant to Ring v. Arizona, 536 U.S. 584 (2002). The trial court correctly found the existence of all three of the aggravators and substantial, competent evidence supports the court's findings. Additionally, Appellant's death sentence is proportionate.

ARGUMENT

ISSUE I

THE JURY’S GUILTY VERDICTS ON THE CHARGES OF FIRST DEGREE MURDER, KIDNAPPING, AND SEXUAL BATTERY ARE CLEARLY SUPPORTED BY THE EVIDENCE.

Appellant argues in his first issue on appeal that the evidence is insufficient as a matter of law to support the jury's verdicts.[27] The majority of counsel's argument is addressed to the charge of first degree murder and counsel briefly alludes to the other two charges in a footnote. Appellant's counsel makes numerous factual misstatements and ignores the substantial and overwhelming evidence presented by the State which clearly supports the jury's verdicts. Counsel's argument on appeal is simply a four-page summary of her closing argument. This Court should find that Appellant's argument is lacking and without merit.

As this Court recently noted in Crain v. State, No. SC00-661, 2004 Fla. Lexis 1875, at 29 (Fla. Oct. 28, 2004) (citations omitted):

> A judgment of conviction comes to this Court with a presumption of correctness and a defendant's claim of insufficiency of the evidence cannot prevail where there is substantial competent evidence to support the verdict and judgment. The fact that the evidence is contradictory does not warrant a judgment of acquittal since the weight of the evidence and the witnesses' credibility are questions solely for the jury. It is not this Court's function to retry a case or reweigh conflicting evidence submitted to the trier of fact.

This Court further stated in Tibbs v. State, 397 So. 2d 1120, 1123 (Fla. 1981):

> An appellate court should not retry a case or reweigh conflicting evidence submitted to a jury or other trier of fact. Rather, the concern on appeal must be whether, after all conflicts in the evidence and all reasonable inferences therefrom have been resolved in favor of the verdict on appeal, there is substantial, competent evidence to support the verdict and judgment. Legal sufficiency alone, as opposed to evidentiary weight, is the appropriate concern of an appellate tribunal.

As this Court recognized in Orme v. State, 677 So. 2d 258, 261 (Fla. 1996), the first question in a sufficiency case is to determine whether the evidence was "wholly circumstantial." Here, in addition to overwhelming circumstantial evidence, Appellant confessed to detectives that he killed Deborah Tressler. This Court has recognized that a confession constitutes direct evidence of guilt. Floyd v. State, 850 So. 2d 383, 406 (Fla. 2002); Philmore v. State, 820 So. 2d 919, 935 (Fla.), cert. denied, 537 U.S. 895 (2002); Hardwick v. State, 521

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[27] Appellant preserved the instant issue by arguing that the evidence was insufficient when he moved for a judgment of acquittal after the State presented its case in chief and again at the close of the evidence. (V27, T:3467-85; V31, T:4397-4400). Counsel also moved for a new trial and asserted, among other arguments, that the evidence was insufficient to support the jury's verdict. (V8, R:1212-51; V33, T:4704-12). All of these motions were denied.

So. 2d 1071, 1075 (Fla. 1988). After detectives confronted Appellant with the fact that they had discovered blood in his car, Appellant stated, "Well, I guess if you found blood in my car, I must have did it." Detective Perdue testified that Appellant had not been flippant or sarcastic during the interrogation and Detective Perdue considered his statement to be a confession. Because the State's evidence included Appellant's confession, this case is not entirely circumstantial.

In Hardwick v. State, 521 So.2d 1071, 1075 (Fla. 1988) (citations omitted), this Court rejected the defendant's contention that the State's evidence against him was purely circumstantial:

> We disagree that the case was circumstantial, since Hyzer and others testified that Hardwick had confessed to the murder or told others of his plans in advance of the killing. A confession of committing a crime is direct, not circumstantial, evidence of that crime.

See also Pagan v. State, 830 So. 2d 792 (Fla. 2002) (rejecting defendant's claim that evidence was "wholly circumstantial" because the State introduced direct evidence of the defendant's confession), cert. denied, 539 U.S. 919 (2003); Meyers v. State, 704 So. 2d 1368, 1370 (Fla. 1997) (rejecting a contention that the State's case was entirely circumstantial where the state's evidence included the defendant's confessions to his former cellmates); Orme, 677 So. 2d at 261 (evidence not wholly circumstantial where direct testimonial evidence placed defendant at the scene of the crime along with defendant's statement to the police establishing both presence and an altercation of some type with the victim).

This Court applies a different standard if the State's evidence is entirely circumstantial. In State v. Law, 559 So. 2d 187, 188 (Fla. 1989), this Court noted that where the only proof of guilt is circumstantial, no matter how strongly the evidence may suggest guilt, a conviction cannot be sustained unless the evidence is inconsistent with any reasonable hypothesis of innocence. The question of whether the evidence fails to exclude all reasonable hypotheses of innocence is for the jury to determine, and where there is substantial, competent evidence to support the jury verdict, this Court will not reverse. Heiney v. State, 447 So. 2d 210 (Fla. 1984). Even if this Court ignores the direct evidence presented by the State, Appellee submits that there is substantial, competent circumstantial evidence to support the jury's verdicts.

Appellant contends in his brief that law enforcement improperly characterized him as the victim's "boyfriend" when he was simply acting as a Good Samaritan to the "essentially homeless" victim. Appellant claims that law enforcement did not investigate his "true relationship" with the victim, but rather assumed he must have murdered her because he was the last person seen with the her. This argument, which was presented to the jury, was properly rejected by the trier of fact. Counsel's version of the evidence is inconsistent with the evidence presented by the State which clearly establishes Appellant's guilt.

The evidence introduced by the State established that even if Appellant did not consider Deborah Tressler his "girlfriend," the two had an intimate relationship. Appellant called his friend, Steve Ellis, and

told him about "Debbie," the girl he met at the laundromat and Appellant wanted to bring her over to introduce her to his friend. Other witnesses observed Appellant and the victim together. By his own admission, Appellant engaged in consensual sexual relations with the victim.

Regardless of the level of their relationship, the fact remains that Appellant was the last person seen with the victim at the laundromat very late on Saturday evening, December 1, 2001. Mr. Rodriguez testified that he observed Appellant and the victim at the laundromat when he arrived there around 10:30 - 10:45 p.m. on Saturday evening. Mr. Rodriguez subsequently talked on the phone with his girlfriend for a period of time. When he left to walk home, he noticed that Appellant was still with the victim. Not long thereafter, eyewitnesses saw the victim in Appellant's car at the well-lit intersection of State Road 44 and County Road 437 screaming for help. The victim was so scared that she was attempting to jump out of a moving car, but was prevented from doing so when the driver yanked her back into the car and sped away at a high rate of speed.[28]

Appellant attacks this incident because, according to counsel, "both witnesses identified the car as being a Chevrolet Corsica, not a Ford Taurus, [and] both witnesses identified the 'victim' as wearing white when Debbie Tressler had on black pants and a gray sweatshirt." Initial Brief of Appellant at 27. Contrary to these assertions, the two witnesses never conclusively stated that the white, four-door car they observed was a Chevy Corsica. Andrew Montz testified that the car was comparable to a Chevy Corsica or a Ford Taurus. After he reported the kidnapping to Crime Line, he looked at car styles to help identify the car and told detectives that the car he saw resembled a Corsica, but it could have been a Taurus. (V24, T:2883; 2892-94; 2904). Likewise, Ms. Renfro testified that she was not very familiar with car styles, but the size and body shape "resembled" a Chevy Corsica.[29] (V26, T:3278). Nevertheless, both witnesses viewed Appellant's car and positively identified it as the car they observed at the intersection of 44 and 437. They specifically recalled the car's trim, the patriotic flag hanging from the rear window, and the patriotic sticker on the car. Counsel further attacks the witnesses' description of the victim on the ground that they described her as wearing a white shirt. The State introduced numerous photographs of the light gray sweatshirt the victim was wearing and the jury could easily determine what credibility to place on the witnesses' description based on these photographs.

Appellant attacks the substantial blood evidence introduced by the State clearly establishing that the victim's blood was present in large amounts in Appellant's vehicle. Appellate counsel contends that the victim's

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[28]The evidence presented by the State clearly supports the jury's finding as to the kidnapping charge. See generally Chavez v. State, 832 So. 2d 730 (Fla. 2002) (abduction at gunpoint to remote trailer where blood stains found sufficient to allow jury to find kidnapping), cert. denied, 539 U.S. 947 (2003); Rancourt v. State, 766 So. 2d 1071 (Fla. 2d DCA 2000); Nino v. State, 744 So. 2d 528 (Fla. 3d DCA 1999).

[29]The State introduced photographs of a 1991 Chevy Corsica, a 1991 Ford Tempo, and Appellant's 1991 Ford Taurus. (V25, T:3096-97).

blood spatter in his car was a result of the victim helping him move tree limbs, or possibly as a result of Appellant's dog biting or scratching her. Counsel also asserts that the "so-called" blood was "so old" that no nuclear DNA could be obtained from the seat cushion by FDLE.[30] The evidence introduced by the State, however, simply contradicts appellate counsel's fanciful view of the evidence.

The State introduced photographs depicting the blood spatter evidence found in Appellant's car. The location of this spatter was consistent with the State's theory that the passenger door was open when an attack occurred nearby, causing the blood to spatter in that area of the car. As the State argued in closing argument, the attack may have taken place near the car with the door open and at some point, Appellant placed the victim's head on the passenger seat while he committed the sexual battery. (V31, T:4349-51). There simply was no evidence that supported Appellant's hypothesis that the victim had been bleeding as a result of injuring herself while working with tree limbs or having been bitten by Appellant's dog. There was a large blood stain on the seat cushion that could not be observed until the seat upholstery had been cut open to expose the cushion. By the defense expert's own admission, there was a substantial amount of blood there at some point in time.[31] Unfortunately for the State, the blood stain was degraded. The experts testified that degradation can occur when blood is exposed to cleaning chemicals such as bleach, or to heat and moisture. Obviously, given the circumstantial evidence in this case, the jury could have concluded that Appellant cleaned the upholstery of the passenger seat cushion and was able to degrade the underlying blood stain, but was not able to destroy the mtDNA evidence showing that it was the victim's blood.[32]

In addition to the significant blood stain on the seat cushion and the victim's blood spatter on the passenger side of Appellant's car, the State also introduced evidence which was inconsistent with Appellant's defense theory. Appellant claimed to detectives that he dropped the victim off at the laundromat on Saturday,

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[30]Counsel notes that the defense expert, Edward Blake, obtained nuclear DNA from two male contributors from the seat. Dr. Blake obtained weak results from the degraded blood stain on the seat cushion, but admitted that the male DNA probably did not come from the large blood stain on the seat cushion. (V30, T:4096; 4105). Even the defense expert, Dr. Blake, admitted that the "so-called" blood was blood. He even acknowledged that there was "at one point in time . . . a substantial amount of blood there. I mean you can see it with your naked eye." (V30, T:4117).

[31]None of the experts testified that the blood stain was "so old" that it prevented them from obtaining DNA results. The State's expert from FDLE, Shawn Johnson, testified that when he examined the stain three months after the murder, it appeared darker than a typical bloodstain, but there was no way to age blood and the stain was consistent with being three months old. (V23, T:2714-15; 2726-27).

[32]Recall that Appellant had partially opened containers of chemical cleaners in his car.

December 1, 2001, before halftime of the Florida/Tennessee football game.[33] Appellant then "high-tailed" it home to get some sleep. Although Appellant admitted to detectives that he had engaged in sexual intercourse with the victim, he claimed that it took place two weeks prior to the interview.

The State's evidence clearly contradicts Appellant's story. Jose Rodriguez observed Appellant and the victim at the laundromat only a short time before midnight. As previously discussed, Sherri Renfro and Andrew Montz observed the victim trying to flee from Appellant's car at the intersection of 44 and 437, a short distance from the laundromat, at almost midnight. Thus, contrary to his statement to detectives, the State introduced evidence showing that Appellant and the victim were together late in the evening on December 1, 2001. Appellant's semen was found in the vaginal washings of the victim indicating recent sexual activity, contrary to his claim of engaging in consensual sexual intercourse more than a week before her murder.

Tire track cast impressions taken from the area near the victim's body were consistent with the two rear tires on Appellant's car – two tires made by different manufacturers. The State introduced evidence that established that the victim was murdered sometime between midnight Saturday and the early morning hours of Sunday morning. The totality of the circumstantial evidence presented in this case, coupled with the direct evidence of Appellant's confession to law enforcement officers, clearly constitutes substantial, competent evidence to support the jury's verdicts. See generally Crain v. State, No. SC00-661, 2004 Fla. Lexis 1875 (Fla. Oct. 28, 2004) (affirming felony murder conviction based on kidnapping with intent to inflict bodily harm when based, among other things, on evidence of an abduction, drops of the victim's blood in the defendant's bathroom, and DNA evidence which allowed the jury to infer, to the exclusion of any reasonable hypothesis of innocence, that the defendant abducted and intentionally harmed the victim before her death); Riechmann v. State, 581 So. 2d 133 (Fla. 1991) (upholding defendant's murder conviction where bullets were recovered from defendant's motel room which matched the type used to kill the victim, defendant possessed weapons similar to those used to kill the victim, and evidence of blood splatter and stains on the car, blanket, and clothes was consistent with the state's theory of what transpired and inconsistent with the defendant's theory of defense); Heiney v. State, 447 So. 2d 210 (Fla. 1984) (upholding murder conviction when the victim was with Heiney just before he was murdered, the victim's blood was found in the defendant's car, and the victim's valuables were found in the defendant's possession). As this Court stated in Riechmann, where there are conflicts in testimony and theories of the case, the jury has the prerogative to resolve those conflicts in favor of the state. Riechmann, 581 So. 2d at 141. Here, the jury was able to weigh the evidence, observe the witnesses and evaluate their credibility. The jury found Appellant guilty of first degree murder, kidnapping and sexual battery. A determination by the trier of fact when supported by substantial evidence, will not be reversed on appeal by this Court. State v. Law, 559 So. 2d 187 (Fla. 1989). Accordingly, this Court should affirm Appellant's convictions.

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[33]The State introduced evidence that the second quarter of the football game concluded at 6:14 p.m. (V21, T:2238).

ISSUE II

THE TRIAL COURT HAD JURISDICTION TO HEAR THE INSTANT CASE AND VENUE WAS PROPER IN LAKE COUNTY.

Appellant asserts that the trial court lacked jurisdiction to hear the instant case. Prior to trial, counsel filed a motion to dismiss for lack of jurisdiction. In the motion, counsel alleged that the State was unable to state in its Statement of Particulars where the charged crimes of murder and sexual battery occurred.[34] (V3, R:549-50). After the court conducted a hearing on the matter, the court denied the motion. (V11, R:347-52). Thereafter, the State amended the indictment and added a charge of kidnapping. (V4, R:644). Appellant filed another motion to dismiss for lack of jurisdiction and/or venue.[35] (V4, R:666-67). On March 4, 2003, the trial court entered a written order denying Appellant's second motion to dismiss. (V5, R:865-66).

In considering a motion to dismiss, "the State is entitled to the most favorable construction of the evidence, and all inferences should be resolved against the defendant." State v. Pasko, 815 So. 2d 680, 681 (Fla. 2d DCA 2002). The standard of review for a trial court order regarding a motion to dismiss is de novo. Id.

Appellant's argument that the lower court erred in denying his motion to dismiss for lack of *jurisdiction* is without merit. As the trial judge properly found when he denied the motion, subject matter jurisdiction is distinct from venue and a circuit court judge in Florida has subject matter jurisdiction to adjudicate a first degree murder case. (V5, R:865; V11, R:351); see § 26.012, Fla. Stat. (2002); Art. V, § 5(b), Fla. Const.

Appellant's current argument on appeal is more appropriately addressed to the issue of venue. Appellant asserts that because the State is unable to establish where the murder and sexual battery occurred, venue is improper.[36] The State alleged in the amended indictment that Appellant kidnapped the victim in Lake County,

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[34]Counsel argued in this motion, as well as in her Initial Brief to this Court, that the Florida Constitution requires that a person be tried in the county where the crime is committed. See Art. I, § 16, Fla. Const.

[35]In this argument, as well as in numerous other places in her brief, Appellant's counsel attempts to adopt the arguments made in her written motions filed below. Initial Brief of Appellant at 30, 33, 34, 51, 56. Such a practice does not preserve an issue for appellate review. See Duest v. Dugger, 555 So. 2d 849, 851-52 (Fla. 1990) (stating that "[t]he purpose of an appellate brief is to present arguments in support of the points on appeal. Merely making reference to arguments below without further elucidation does not suffice to preserve issues, and these claims are deemed to have been waived.").

[36]Appellant states in his Initial Brief that lower court believed that the State's act of amending the indictment to include the kidnapping charge "cured the problem that the lower court lacked jurisdiction." Initial Brief at 30-31. Contrary to this statement, the court never found any "problem" with jurisdiction that needed to be cured. Furthermore, the court correctly noted that the issue of venue was a matter of proof that was more appropriately addressed during the trial after the State

Florida. As the lower court found when it denied this portion of Appellant's motion without prejudice to raise the issue at the appropriate time,[37] venue "is a matter of proof at trial, and unlike the essential elements of the crime, venue need not be proved beyond a reasonable doubt. State v. Crider, 625 So. 2d 957, 959 (Fla. 5th DCA 1993)." (V5, T:866). Venue is sufficiently proved if the jury can reasonably infer from the evidence that the offense was committed in the county where the case was brought. Id.

In this case, the State presented evidence that the kidnapping occurred in Lake County at the intersection of State Road 44 and County Road 437. Eyewitnesses observed the victim yelling for help and attempting to jump out of Appellant's moving car. The witnesses observed the driver of the vehicle pull the victim back inside the car and run through a red light at a high rate of speed. Within a relatively short period of time after the kidnapping, the victim was sexually battered and murdered. The victim's body was discovered in Lake County. Clearly, given this evidence, the jury could reasonably infer that the crimes occurred in Lake County. See § 910.05, Fla. Stat. (2002) ("If the acts constituting one offense are committed in two or more counties, the offender may be tried in any county in which any of the acts occurred."); Copeland v. State, 457 So. 2d 1012, 1016 (Fla. 1984) (stating that venue was proper in county where robbery and kidnapping occurred *or* in county where rape, continued kidnapping, and murder occurred); Crittendon v. State, 338 So. 2d 1088 (Fla. 1st DCA 1976) (affirming murder conviction because venue was properly found in the county where the defendants elaborately planned and set a murder into motion even though the murder was eventually committed in a different county). Accordingly, this Court should affirm the trial court's denial of Appellant's motion to dismiss.

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presented its evidence. (V5, T:866).

[37]Appellant unsuccessfully renewed this argument during trial when moving for a judgment of acquittal. (V27, T:3467-85).

ISSUE III

THE TRIAL JUDGE PROPERLY DENIED APPELLANT’S MOTION TO SUPPRESS HIS STATEMENT TO LAW ENFORCEMENT OFFICERS AND HIS MOTION TO SUPPRESS THE EVIDENCE OBTAINED FROM THE SEARCH OF HIS VEHICLE.

Appellant argues in his third issue that he was unlawfully detained by law enforcement officers and he did not voluntarily accompany the officers to the Lake County Sheriff's Office for an interview. Appellant also claims in this issue that there was no probable cause for the issuance of a search warrant on Appellant's vehicle and the court erred in denying his motion to suppress the evidence obtained from the car. Finally, Appellant asserts that his arrest and conviction were the result of police misconduct and "embellished" evidence. The State submits that the trial court properly denied Appellant's motion to suppress on each of these issues.

1. <u>The trial court acted within its discretion in denying Appellant's motion to suppress his statements made to detectives after he voluntarily accompanied them to the Sheriff's Office.</u>

This Court recently discussed the standard of review for orders on motions to suppress:

> [A]ppellate courts should continue to accord a presumption of correctness to the trial court's rulings on motions to suppress with regard to the trial court's determination of historical facts, but appellate courts must independently review mixed questions of law and fact that ultimately determine constitutional issues arising in the context of the Fourth and Fifth Amendment and, by extension, article I, section 9 of the Florida Constitution.

<u>Globe v. State</u>, 877 So. 2d 663, 668-69 (Fla. 2004) (citations omitted).

As the lower court properly noted in denying Appellant's motion to suppress, the thrust of Appellant's motion is "that the circumstances surrounding the Lake County Sheriff's Office's detectives' request for Mr. Simmons to accompany them to the Sheriff's Office for a consensual interview were so intimidating that the interview was not voluntary on Mr. Simmons part." (V6, R:907). The State urges this Court to review the lower court's order which contains detailed factual findings that are fundamental to the trial judge's conclusions that Appellant voluntarily accompanied the LCSO detectives to the Sheriff's Office, and that there was probable cause for Appellant's arrest when detectives first encountered Appellant at his parents' home. (V6, R:907-21).

In addressing the issue of whether Appellant voluntarily accompanied law enforcement officers to the Sheriff's Office for an interview, the court noted that a large number of law enforcement personnel were present at Appellant's parents' house, including a helicopter flying overhead, but found that these personnel were not involved in any way with the conversation between Appellant and Detectives Perdue and Adams. (V6, R:911-12). Detectives Perdue and Adams were unarmed and dressed in plain clothes when they encountered Appellant. They walked to some nearby trees and sat down to talk. Detective Perdue showed Appellant a photograph of Deborah Tressler and asked Appellant if he knew that she had been murdered. Detective Perdue's uncontradicted testimony was that he asked Appellant to come down to the Sheriff's Office to talk and Appellant stated that he would. Appellant was not threatened or coerced and was specifically told that he was not under arrest. (V6, R:912-13). Although Appellant was handcuffed for officer safety purposes when being transported to the Sheriff's Office, he was immediately uncuffed once they arrived. Appellant was informed on two occasions that if he needed a ride

home, one would be provided for him.

Appellant asserts that the instant facts are similar to those in Hayes v. Florida, 470 U.S. 811 (1985), wherein the United States Supreme Court held that the police violated the defendant's Fourth Amendment rights when they, without probable cause or a warrant, removed the defendant from his home without his consent, and transported him to the station where he was briefly detained for the purposes of obtaining fingerprints. The lower court properly distinguished the instant case from Hayes. As the court noted, the testimony was unrebutted that Appellant never expressed any reluctance or reservations about accompanying the detectives to the station.[38] (V6, R:916).

Additionally, contrary to Appellant's argument, he did not simply acquiesce to the authority of the detectives. In United States v. Mendenhall, 446 U.S. 544, 554 (1980) (citations and footnote omitted), the Court stated that "a person has been 'seized' within the meaning of the Fourth Amendment only, if in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." In this case, although there was a large number of officers on the scene, only two unarmed, plainclothes detectives were closely involved with Appellant and the circumstances clearly establish that he was free to refuse to accompany them to the station. As the lower court noted, the detectives did not use threatening or commanding language and the other officers were not encircling Appellant or drawing their guns or behaving in any intimidating manner. (V6, R:916-17).

Finally, as the trial court properly ruled, the law enforcement officers had probable cause to arrest Appellant at the scene of his parents' home. See Chavez v. State, 832 So. 2d 730, 747-48 (Fla. 2002) (stating that probable cause for arrest exists where an officer has reasonable grounds to believe that the suspect has committed a felony), cert. denied, 539 U.S. 947 (2003). The lower court compared the instant case to the situation in Chavez and noted that when law enforcement officers were able to accumulate the collective information they possessed, probable cause existed for Appellant's arrest. (V6, R:917-21). The officers knew that Appellant was the victim's boyfriend, that he had recently beaten up the victim, that he also had recently been arrested for abusing a former spouse or girlfriend, that he drove a white, four door Ford Taurus and was the last person seen with the victim while she was alive, and the officers were aware of the incident at the

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[38]As the court noted, Appellant never testified and there was no evidence introduced indicating that Appellant did not voluntarily consent. See generally Jorgenson v. State, 714 So. 2d 423, 426 (Fla. 1998) (stating that the burden of showing that a defendant's statement was voluntarily made is on the State and the State must establish voluntariness by a preponderance of the evidence). Clearly, the unrebutted testimony in this case meets this standard.

intersection of 44 and 437 where witnesses identified the victim as attempting to flee from a vehicle that matched Appellant's white Ford Taurus. Based on the totality of these circumstances, the officers had probable cause to arrest Appellant prior to his consensual statement to detectives.

Appellant has failed to show any error in the lower court's ruling denying Appellant's motion to suppress. The unrebutted testimony establishes that Appellant voluntarily consented to accompany the detectives to the police station. Once there, Appellant waived his Miranda rights and freely and voluntarily gave a statement to detectives. Although the interview was consensual, the court also found that probable cause existed for Appellant's arrest prior to his interview. Because the trial court properly ruled on his motion to suppress, this Court should affirm the lower court's order.

2. The lower court properly denied Appellant's motion to suppress the evidence seized from Appellant's vehicle.

Appellant filed a motion to suppress the evidence seized from his vehicle on the grounds that the probable cause affidavit in support of the search warrant issued authorizing the search was insufficient. (V3, R:562-67). The trial court conducted hearings on the motion for four days and denied the motion by order dated April 15, 2003. (V6, R:899-906). On appeal, Appellant argues that the trial judge ignored or altered the facts in order to reach his conclusion. The State strongly disagrees.

As previously noted, a lower court's factual findings on a motion to suppress comes to this Court cloaked with a presumption of correctness. Globe v. State, 877 So. 2d 663, 668-69 (Fla. 2004). Appellant has failed to show that the trial court's factual findings are erroneous. Because the lower court's facts and legal analysis was correct, this Court should affirm the trial court's denial of the motion to suppress.

Appellant first asserts that the affiant, Detective Mark Brewer, did not truthfully set forth his qualifications and experience in the affidavit. Appellant argues that Detective Brewer was the legal advisor for the LCSO and was not a certified law enforcement officer for a 20-year gap between approximately 1981-2001. Detective Brewer testified at the suppression hearing that his law enforcement career began in 1979 as a city police officer in Sarasota, Florida. Detective Brewer then worked as a deputy sheriff in New York for about a year. In addition to his civilian service, Brewer served as a military police officer from 1979 to 1981, was a battalion commander training officer from 1983 to 1985, and was involved in Operation Desert Shield and Desert Storm as a Judge Advocate General. Throughout this service, he was involved with numerous homicide cases and documented atrocities committed by Iraqis, including the deaths of over 600 Kuwait civilians. (V11, R:230-34). Unlike his Florida certification, Detective Brewer's certification as a military police officer never lapsed. (V11, R:230). When Detective Brewer was hired by the LCSO as their legal advisor, his certification was reinstated. He testified that at the time he prepared the instant warrant for detectives, he was a sworn law enforcement officer assigned as a detective. (V11, R:234). Based on these facts, the trial court properly concluded that Detective Brewer had the training and experience as set forth in the affidavit.

Appellant next challenges Detective Brewer's statement in the affidavit that he observed a sheet in Appellant's car that had two stains on it which appeared to be consistent with blood. In a related claim,

Appellant argues that Detective Brewer could not have even observed the sheet in question because of a controversy regarding the time the vehicle arrived at the Sheriff's Office and the time Detective Brewer obtained a signed warrant from Judge Briggs. In addressing these claims, the lower court stated:

> Detective Brewer testified that he prepared the affidavit and warrant for the search of Defendant's car on behalf of the detectives working on the case. He had begun working on the affidavit and warrant earlier in the day, before the vehicle was towed to the sheriff's office, on December 7, 2001. Once the vehicle arrived, the probable cause affidavit was nearly completed and ready for Detective Perdue's signature. Detective Brewer testified he walked down to the vehicle inspection bay (sallie port) where the vehicle had been towed from the Defendant's parents residence. A preliminary exterior inspection of the car was being conducted and Detective Brewer asked if the search warrant had been obtained. The technician conducting the exterior search indicted the warrant had not been obtained, and at that time Lieutenant Garret or Lieutenant Morrison authorized Detective Brewer to obtain the warrant. It was at this time, in the sallie port, that Detective Brewer personally observed the sheet in the back seat that had, what appeared to him, to be stains consistent with blood stains on it. Detective Brewer returned to his office, changed the biographical data and signature line on the affidavit to his own, and inserted a final paragraph describing the sheet in open view. On the basis of this affidavit a search warrant was signed by the Honorable Judge Briggs, Lake County Circuit Judge.
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> As the days of hearings progressed, an issue, not raised in the defendant's motion, emerged, i.e., a controversy about the time the Defendant's vehicle arrived at the sallie port and was viewed by Detective Brewer who then concluded his affidavit, versus when the warrant and the affidavit were presented to the Honorable Don Briggs, the reviewing magistrate. The Defendant's inference being that Detective Brewer apparently lied about seeing the sheet in the back of the car, or altered the affidavit after the fact. While there does remain some

question as to when the affidavit and warrant were presented to the magistrate,*[39] the court does not find the discrepancy in time as any indication of untoward action on behalf of the Lake County Sheriff's Department.

Detective Brewer testified at the hearing on January 10, 2003 that when he looked through the windows of the vehicle at the sallie port, he observed what appeared to be blood stains on a blue cloth sheet in the back seat. He said they appeared to be blood stains because of their brown-in-color nature. One stain was approximately a thumb-sized oval, and one was smaller. Later in the hearing, after Detective Brewer had left the witness stand, the sheet in question was brought to the courtroom and inspected by the undersigned. While no stains were readily apparent to the undersigned, there is no evidence to contradict that Detective Brewer observed what appeared to him to be blood stains on the sheet on December 7, 2001. Accordingly, the Court finds the Defendant has failed to show the last sentence of the paragraph of probable cause describing Detective Brewer's observation of the sheet was less than accurate.*[40]

(V6, R:900-02).

While the trial court acknowledged that there was some discrepancy regarding the timing of events,[41] there was no evidence of improper conduct by the LCSO. Furthermore, although the court did not observe the stains

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[39]* [footnote 1 in trial court's order] Judge Briggs did not recollect when he read and signed the warrant. See, deposition transcript of Judge Don F. Briggs taken March 4, 2003.

[40]*[footnote 2 in trial court's order] The observation of the blood-stained sheet may be superfluous under Chambers v. Maroney, 399 U.S. 42, 90 S. Ct. 1975, 26 L. Ed. 2d 419 (1970). "For constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment." Id. at 52. Thus, the initial Fourth Amendment intrusion was the seizure of the vehicle, and a proper analysis would be to review the facts as they existed at that time. See, State v. Chivers, 400 So. 2d 1247 (Fla. 5th DCA 1981).

[41]Detective Brewer testified that he knew the warrant was signed after hours and thought it was between 6:00 - 9:00 p.m. (V13, R:701). The prosecuting attorney indicated that the warrant was signed after hours, but he could not recall the specific time. He believed it was between 6:00 and 7:00 p.m. (V13, R:642).

on the blue sheet reported by the detective,[42] this does not, as alleged by Appellant, equate to a finding that the detective purposefully put this in the affidavit so the magistrate would believe there was evidence seen which warranted a search. In fact, as Detective Brewer indicated, he was able to look through the window with a crime scene technician and observe what appeared to be tiny dots on the car's interior consistent with blood stains, but he did not put this information in the affidavit because he was unsure if they were blood stains (even though he subsequently learned that they were in fact blood stains). (V11, R:237, 248-49).

Appellant next argues that the affidavit misstated the information received from Sherri Renfro. The affidavit states that on the evening of December 1, 2001, a "citizen called in to the Lake County Sheriff's Office that a white/female that matched the description of the victim was seen screaming and attempting to exit a white car further described as resembling a Chevrolet Corsica type car." (V6, R:902). Appellant argues that this statement is inaccurate. To the contrary, Ms. Renfro described the victim as being "an older woman around mid 50's with short brown hair and a white T-shirt." (V4, R:621). When shown a photograph of the victim, Ms. Renfro positively identified her as the woman she saw attempting to exit the car. See also discussion of this identification in Issue VII, infra. Although the victim apparently had long hair, she often wore it pulled back. The victim was 48 years old and Detective Perdue testified that she appeared older than in her picture. The victim was found wearing a light gray shirt as opposed to a white shirt. Appellant's car was a white Ford Taurus, which has a very similar body style as a Chevy Corsica. (V11, R:289-90; V14, R:946-47). Thus, as the trial court properly found, the "facts presented to the magistrate in the affidavit of probable cause accurately reflect information provided to the officers of the Lake County Sheriff's Office." (V6, R:902).

As has been demonstrated, Appellant's arguments regarding false statements in the affidavit are simply without merit. None of the alleged misstatements were inaccurate. The lower court's factual findings are correct and the court applied the proper law in denying Appellant's motion. The court noted that "[t]he task of the magistrate when reviewing an application for a search warrant is to make a practical, common sense decision whether, given all the circumstances before him, there is a fair probability that contraband or evidence of a crime will be found in a particular place." (V6, R:904). In the instant case, the magistrate was presented with an affidavit from a detective with substantial experience stating that the body of a female had been found on December 3, 2001 and she had died as a result of being beaten to death. The affidavit also detailed Sherri Renfro's report of seeing a woman scream for help and attempt to jump out of a white car on Saturday night, December 1, 2001, and the woman matched the description of the victim. The affidavit noted that witnesses had identified Appellant as the victim's boyfriend and noted that he had a white Ford Taurus. Finally, the affiant stated that he had observed a sheet in Appellant's car that appeared to have blood stains on it. As the lower

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[42]In argument on the motion, the prosecuting attorney noted that he could see the stains on the sheet (one thumb sized and one smaller), but they were faint now. (V11, R:329-30). He further noted that Detective Brewer was never asked if the sheet looked the same as when he observed it a year earlier at the Sheriff's Office.

court found, based on the totality of this information, probable cause existed for the search of Appellant's vehicle, even without consideration of the sheet.

In the alternative, the trial court also noted that the Carroll doctrine applied in this case and that no warrant was necessary for the seizure and subsequent search of the car. In Carroll v. United States, 267 U.S. 132 (1925), the Court held that automobiles or other vehicles may be searched without a warrant where a law enforcement officer has probable cause for believing that the vehicle is carrying contraband. See also § 933.19, Fla. Stat. (2001) (codifying the Carroll doctrine as the law of this state). The trial judge, noting that detectives had probable cause to arrest Appellant when they approached him at his parents' home, ruled that this probable cause would also support searching his vehicle at his parents' home. Based on the exigent circumstances associated with a vehicle, a warrantless search would have been justified at that time. The fact that the vehicle was subsequently towed to the Sheriff's Office does not render the Carroll exception inapplicable. See Chambers v. Maroney, 399 U.S. 42 (1970) (finding Carroll doctrine applicable even after police towed the car to the police station); Adoue v. State, 408 So. 2d 567 (Fla. 1982) (holding that warrantless seizure of airplane was proper under Carroll doctrine even though plane was secured by police); Hendrix v. State, 456 So. 2d 494 (Fla. 2d DCA 1984) (even though automobile was not "movable" because it was in garage being repaired, exigent circumstances still applied for warrantless search).

As the lower court properly found, the affidavit for the search warrant of Appellant's vehicle was sufficient to establish probable cause for the search. Contrary to Appellant's assertions, the factual statements in the affidavit were a correct and accurate statement of the circumstances. Furthermore, even in the absence of a valid warrant, the officers could have properly searched Appellant's vehicle under the Carroll doctrine given the existence of probable cause and exigent circumstances inherent in a motor vehicle.

3. Appellant's claim that his arrest and ultimate conviction was the result of police misconduct is without merit.

This sub-issue in Appellant's brief is nothing more than trial/appellate counsel's diatribe regarding her view of the evidence. Counsel's premise in this claim is that the LCSO were on a manhunt to find the victim's boyfriend and convict him of murder, even if they needed to falsify evidence in order to accomplish their goal. Clearly, counsel's view is not supported by the evidence.

In denying Appellant's motion to suppress, the trial judge set forth the information possessed by law enforcement officers establishing probable cause to arrest Appellant. Briefly, this evidence was that Appellant was the victim's boyfriend and was the last person seen alive with her. He had previously beaten her a few days earlier and had also been arrested for abusing another female. Witnesses observed Appellant and the victim together at the laundromat where she worked on Saturday evening close to midnight. Appellant was driving his white, four door Ford Taurus at that time. Shortly thereafter, witnesses observed the victim screaming for help and attempting to jump out of a car matching Appellant's at an intersection only a few miles away from the laundromat. Law enforcement officers possessed this information prior to actually speaking with Appellant and obtaining a search warrant for his car.

Once officers located Appellant and his vehicle, the eyewitnesses identified Appellant’s vehicle as the one involved in the kidnapping at the intersection on Saturday evening. After law enforcement officers located blood stains in Appellant’s car, he confessed. The State tested the blood found in Appellant’s car and determined that it was the victim’s blood spatter on the passenger side interior of the car. Additionally, after law enforcement officers cut the upholstery on the passenger seat, they discovered a large blood stain containing the victim’s blood. Obviously, given the totality of the evidence presented in this case, this Court cannot have any questions regarding the propriety of law enforcement’s focus on Appellant as the perpetrator of Deborah Tressler’s brutal murder.

ISSUE IV

THE TRIAL JUDGE PROPERLY ALLOWED THE STATE'S EXPERT ON MITOCHONDRIAL DNA TO TESTIFY BEFORE THE JURY AND THE PROSECUTING ATTORNEY MADE PROPER ARGUMENTS CONCERNING THIS EVIDENCE.

Appellant presents two separate arguments on this issue in his initial brief. First, he claims that the trial judge erred in allowing the State's mitochondrial DNA (mtDNA) expert, Brian Sloan, to testify regarding his qualitative analysis of the mtDNA evidence obtained from the blood stain on the passenger seat cushion in Appellant's vehicle. Second, Appellant argues that the State made improper arguments to the jury regarding this evidence. As will be shown, each of Appellant's claims are completely lacking in legal authority or factual accuracy.

4. The trial court properly allowed Brian Sloan to testify regarding his mtDNA analysis.

In Magaletti v. State, 847 So. 2d 523 (Fla. 2d DCA), review denied, 858 So. 2d 331 (Fla. 2003), the Second District Court of Appeal addressed an issue of first impression involving the use of mtDNA evidence for identification purposes. As the Magaletti court noted, Florida courts require that new or novel scientific evidence adhere to the test set forth in Frye v. United States, 293 F. 1013 (D.C. Cir. 1923). Under Frye, the admission of expert testimony concerning a new or novel scientific principle involves a four-step inquiry which requires the trial court to determine whether:

> (1) [the] expert testimony will assist the jury in understanding the evidence or in determining a fact in issue; (2) the expert's testimony is based on a scientific principle or discovery that is "sufficiently established to have gained acceptance in the particular field in which it belongs" under the Frye test; and (3) the particular expert witness is qualified to present opinion evidence on the subject in issue. If the answer to the first three questions is in the affirmative, the trial judge may proceed to step four and allow the expert to present an opinion to the jury.

Magaletti, 847 So. 2d at 525 (quoting Hayes v. State, 660 So. 2d 257, 262 (Fla. 1995)). In the context of DNA cases, this Court has observed that Frye determinations require two levels of analysis. The first involves principles of molecular biology and chemistry and results in a qualitative determination which "simply indicate[s] that two DNA samples look the same." Murray v. State, 692 So. 2d 157, 162 (Fla. 1997); Brim v. State, 695 So. 2d 268 (Fla. 1997). However, as to this initial inquiry, this Court has concluded that "to say that two patterns match, without providing any scientifically valid estimate . . . of the frequency with which such matches might occur by chance, is meaningless." Brim, 695 So. 2d at 270. Accordingly, on the second level of analysis, experts

are required to provide quantitative, rather than qualitative, estimates of the frequency of an incriminating profile occurring in one or more races. Id. This quantitative estimate assists the trier of fact in understanding the probative value or significance of a match, and Florida law requires a separate Frye analysis. Id. Based on this framework, the Magaletti court considered whether the statistical calculations used during the mtDNA analysis satisfied the Frye test.

In Magaletti, the court heard testimony about the process of mtDNA analysis. The preliminary steps of mtDNA are essentially identical to those of nuclear DNA testing: extraction, replication, and sequencing. These methodologies have been scientifically validated since the 1970s and this Court declared this type of analysis admissible in nuclear DNA cases in Hayes v. State, 660 So. 2d 257 (Fla. 1995). Magaletti, 847 So. 2d at 527. Once the preliminary steps have been completed, a technician can compare the unknown sample to the known sample to determine whether there is a match. If there is a match, the matching sequence is then compared to profiles in the FBI's mtDNA database, and a simple "counting method" is used to indicate the number of times the sequence appears in the database. Id. These reliability results can be increased by going beyond the "counting method" and applying a ninety-five percent confidence interval based on the number of times a sequence occurs in the database. Id. at 527-28. The Magaletti court noted that the "counting method" is the *only* method of reporting used by analysts in the United States and such a standard satisfied the State's burden of proving general scientific acceptance by a preponderance of evidence. Accordingly, the court upheld the trial court's admissibility of mtDNA evidence. Id. at 528.

In the instant case, defense counsel moved to exclude evidence regarding the mtDNA analysis obtained from the large blood stain on the seat cushion. On the eve of trial, counsel argued for the first time that the expert's report did "not include any kind of statistical analysis here, which is required for the admission of any kind of DNA testing." (V16, T:1268-78). Because Appellant had consistently maintained that he was not challenging the mtDNA on the grounds of Frye v. United States, 293 F. 1013 (D.C. Cir. 1923), the State was not prepared to address this aspect of Appellant's claim at the hearing. The trial court subsequently conducted a hearing on this motion after voir dire and heard evidence from Dr. Richard Staub, the Director of Operations at Orchid Cellmark in Dallas, Texas. (V18-19, T:1799-1850).

At the hearing,[43] the prosecuting attorney questioned Dr. Staub about the process of obtaining mtDNA and questioned the witness regarding the quantitative analysis. Dr. Staub's testimony mirrored the testimony presented in the Frye hearing that was discussed by the Magaletti court. Namely, after extracting and sequencing mtDNA from the large red stain in the seat cushion and determining that it was a match to the known sample, the

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[43]Despite repeatedly claiming that she was not raising an objection to the admissibility of the mtDNA evidence based on Frye, this is exactly what defense counsel argued below when challenging the statistical analysis. The purpose of the hearing where Dr. Staub testified was to rebut Appellant's argument that the mtDNA analysis did not include any kind of statistical analysis.

next step was to search the FBI's database to determine whether the sequence had ever been seen before. (V19, T:1833-37). The only difference between what was done in this case and that of Magaletti was that the FBI had expanded their database to 4839 sequences. At the time of the Frye hearing in Magaletti, the FBI database contained 4142 sequences. Magaletti, 847 So. 2d at 527.

In this case, after a match had been found, the sequence was run through the FBI database and no other sequences were the same as the one Brian Sloan found. (V19, T:1836-37). Dr. Staub reviewed Mr. Sloan's report and signed off on of it. Once it was determined that there were no other sequences within the FBI database, the experts then utilized the "counting method," a conservative means of determining the likelihood of finding this particular profile in a random population. (V19, T:1838). Dr. Staub testified that his lab, which is certified by numerous agencies, utilized the same procedures and same database that other private and state labs use when examining mtDNA. (V19, T:1839). After the prosecutor became aware that Appellant was challenging the statistical analysis contained in the report, he requested that the expert go beyond the written report and perform the ninety-five percent confidence interval discussed in Magaletti. (V19, T:1840). Dr. Staub testified that performing this ninety-five percent confidence interval, he came up with the conservative number of 1 in 1600 as the chances of finding this DNA sequence in the random population. (V19, T:1839-42).

Surprisingly, on cross-examination, defense counsel did not question the witness at all regarding Orchid Cellmark's statistical analysis.[44] (V19, T:1843-50). Rather, counsel simply asserted that their "statistics are wrong, but in this case that's really kind of neither here nor there because the issue here is whether or not the seat cushion has anything – this testing has anything to do with – the stain in that seat cushion has anything to do with this case." (V19, T:1852). After hearing the testimony of Dr. Staub, the trial court found that Magaletti was directly on point and the evidence would be admissible. (V19, T:1857). The trial court reserved ruling on the other issue raised by defense counsel regarding the mtDNA; the question of whether the mtDNA profile was attributable to the bloodstain on the seat cushion. (V19, T:1857-58; V22, T:2514).

Prior to the proffer of Brian Sloan's testimony, the State indicated that they had requested that Mr. Sloan re-search the FBI database in light of the report generated by the defense expert, Dr. Terry Melton. (V22, T:2459-60). As will be discussed in more detail, infra, Dr. Melton's opinion was that the mtDNA sequence found in the seat cushion was quite common; 147 matches within the FBI database. As the prosecuting attorney informed the judge, the Orchid Cellmark experts found an anomaly in the sample obtained from the seat cushion in a section of the 610 base pairs and found the same anomaly in the victim's mother's sample. Apparently, Dr. Melton ignored the anomaly and compared the remaining base pairs to the sequences in the FBI database and found 147 matches. (V22, T:2461).

The State proffered the testimony of Mr. Sloan and he testified that he took a small sample from the

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[44]Both the State and the court expressed surprise in the argument presented by defense counsel given the earlier representations as to the purpose of the hearing. (V19, T:1852-58).

seat cushion in an area which appeared to be a large blood stain. He was able to obtain a human mtDNA sample that did not contain any mixtures. Based on his professional opinion, the mtDNA came from a human bloodstain. (V22, T:2517-21). Appellant argued that because he could not conclusively state that the mtDNA came from a human bloodstain, and given the fact that the defense DNA expert found STR DNA evidence from two males, Mr. Sloan's testimony should be excluded. The trial court found Mr. Sloan's testimony was admissible and defense counsel's issues could adequately be addressed on cross examination. (V22, T:2528-29).

Brian Sloan testified before the jury that Orchid Cellmark performs the same standardized procedure for mtDNA sequencing as the FBI and the Armed Forces DNA Identification Lab. (V22, T:2543-45). Mr. Sloan explained that the mitochondrial genome is approximately 16,500 base pairs long, but only a region of about 610 base pairs varies between individuals, thus, this is the area that is sequenced and used to differentiate between individuals. (V22, T:2547-48). Mr. Sloan also noted that unlike nuclear DNA testing, mtDNA testing was much more conclusive to finding a sequence in a degraded sample. Degradation occurs due to environmental factors such as moisture, bacteria, harsh chemicals, ultraviolet rays, fungi, and age. (V22, T:2550-51). These factors can fragment or destroy chromosomal DNA to the point that it cannot be used in STR testing. (V22, T:2550).

In this case, Mr. Sloan extracted mtDNA from the stain on the seat cushion and sequenced it for comparison purposes. (V22, T:2552-53). He compared the result to the known sample from the victim's mother who had the same mtDNA profile as her daughter and determined that there was a match. (V22, T:2253-55). Mr. Sloan noted that on both samples, there was an anomaly at base pairs 303 through 315 that contained several C's (or Cytosines) in a row. (V22, T:2556-58). This anomaly resulted in him declaring this section of the sequence inconclusive from base pairs 303 through 340. At base pair 341, the sequence began a different region. (V22, T:2556-58). Nevertheless, both samples contained this anomaly and Mr. Sloan found that the unknown sample was the same as the known sample from the victim's mother. (V22, T:2589).

When Mr. Sloan ran the profile through the FBI database, he found no matches in the 4839 sequences. (V22, T:2561-62). Mr. Sloan was aware that Dr. Melton from Mitotyping had run the profile and came up with a different result. (V22, T:2564-65). He opined that this could result from a difference in interpretation on how to use the database. (V22, T:2565). On cross-examination, Mr. Sloan indicated that he did not perform the ninety-five percent confidence interval calculations, but he was aware that Dr. Staub had performed these calculations. (V22, T:2578-80). When defense counsel questioned Mr. Sloan on re-running the data through the FBI database at the request of the prosecuting attorney, Mr. Sloan testified that Dr. Staub reviewed his results and agreed that it was the same data that they had originally found. (V22, T:2583-84).

On appeal to this Court, Appellant argues that given the fact that Orchid Cellmark's "qualitative analysis changed three times in three days raises grave doubt as to their qualifications as experts in the field." Initial Brief of Appellant at 45. Counsel argues that Mr. Sloan opined that the mtDNA came from a blood stain on the seat even though he did not perform a presumptive test for blood. Counsel further claims that Mr. Sloan should not have even been qualified as an expert given his qualifications. These arguments, some of which were not even raised below, are without merit or legal authority and should be rejected by this Court.

The law is well settled that the admissibility of evidence is within the sound discretion of the trial court, and the trial court's ruling will not be reversed unless there has been a clear abuse of that discretion. Ray v. State, 755 So. 2d 604, 610 (Fla. 2000); Zack v. State, 753 So. 2d 9, 25 (Fla. 2000); General Elec. Co. v. Joiner, 522 U.S. 136 (1997) (stating that all evidentiary rulings are reviewed for "abuse of discretion"). Likewise, the trial judge's finding that a witness is qualified to render an expert opinion is a factual matter within the sound discretion of the trial judge. See Ramirez v. State, 542 So. 2d 352, 355 (Fla. 1989) ("The determination of a witness's qualifications to express an expert opinion is peculiarly within the discretion of the trial judge, whose decision will not be reversed absent a clear showing of error.").

In this case, the trial judge clearly acted within its discretion in allowing Mr. Sloan to testify as an expert in forensic DNA typing. In fact, after conducting voir dire on the expert's qualifications, defense counsel did not object to him testifying as an expert in this field. (V22, T:2541-42). Defense counsel raised no objection despite being made aware that Orchid Cellmark had allegedly changed their opinion as to the number of matches.[45] Thus, as to Appellant's argument that Mr. Sloan was not qualified to testify as an expert, this issue is waived based on a lack of objection to his qualifications.[46] See Anderson v. State, 863 So. 2d 169, 180-81 (Fla. 2003) (finding defendant's argument was not preserved for appeal when he presented a different argument to the trial court), cert. denied, 124 S. Ct. 1662 (2004); Occhicone v. State, 570 So. 2d 902, 905-06 (Fla. 1990) (stating that claim was not preserved for review where defense failed to object on specific grounds advanced on appeal). Even if not waived, there is no question that Mr. Sloan's qualifications are sufficient to allow him to testify regarding mtDNA analysis. Mr. Sloan had a biology degree, significant on-the-job training, and had

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[45] Appellant claims that Orchid Cellmark changed their analysis "three times in three days." The evidence in the record does not support this conclusion. Although the prosecutor noted at one point that unknown individuals at Orchid had re-run the profile through the FBI database and found 140-some-odd matches like the defense expert, Dr. Melton (V21, T:2255-59), there was never any evidence to support this representation. In fact, to the contrary, Mr. Sloan testified that he and Dr. Staub had re-run the information and came to the same conclusion as they had before and were sticking to their conclusion. (V22, T:2583-84). Admittedly, based on the prosecuting attorney's representations to the court, defense counsel may have been under the impression that Orchid had changed their opinion once.

[46] Appellant states that Mr. Sloan was "not qualified" to do the statistics. Initial Brief of Appellant at 45. Once again, the evidence does not support counsel's assertion. Mr. Sloan testified that he ran the information through the FBI database, but he did not conduct the additional step of performing the ninety-five percent confidence interval. Mr. Sloan testified that he was aware that Dr. Staub had performed these calculations, but he never testified that he was not "qualified" to perform these calculations. (V22, T:2578-80).

completed an 80-hour workshop at the Armed Forces DNA Identification Laboratory. (V22, T:2540).

In addition to challenging Mr. Sloan's qualifications based on the alleged change in Orchid Cellmark's opinion, Appellant also challenges Mr. Sloan's ability to testify that in his professional opinion, the stain he observed was blood and that the mtDNA he obtained came from the stain. Mr. Sloan examined a silver dollar-sized piece of the foam rubber from the seat cushion and testified that in his professional opinion, the stain was blood and the mtDNA was obtained from the stain. Defense counsel cross-examined the witness and elicited testimony that he did not perform any presumptive test to determine whether the stain was blood, and he did not know for certain that the mtDNA came from blood. (V22, T:2569-88).

The State submits that the trial court did not abuse his discretion in allowing Mr. Sloan to testify regarding his professional opinion regarding the nature of the stain and the source of the mtDNA. This testimony was clearly an area within the witness' expertise based on his knowledge, skill, experience, training, or education. See § 90.702, Fla. Stat. (2002). Even if the court erred in allowing this testimony, the error was harmless given the cross-examination of the witness and other evidence introduced at trial. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). Defense counsel elicited testimony from Mr. Sloan that the mtDNA could have come from any human biological fluid or material containing cellular material, such as saliva, semen, diarrhea, and menstruation. (V22, T:2574). Certainly, there was no prejudicial error in allowing Mr. Sloan to opine that the stain was blood. The State introduced evidence from other sources that the stain had tested positive for blood, and Appellant's own expert witness testified that there was no question that the stain was a large blood stain that was visible with the naked eye. (V30, T:4117).

In sum, Appellant has failed to show any reversible error in allowing Mr. Sloan to testify regarding his mtDNA analysis of the sample he obtained from the blood stain on the car seat cushion. Appellant's arguments are more properly addressed to the weight of the evidence, not the admissibility. Defense counsel succeeded in eliciting information on cross-examination regarding her concerns with the evidence. Appellant has failed to cite any legal authority supporting his position that the trial court erred in allowing Mr. Sloan's testimony. Accordingly, this Court should deny Appellant's claim that the trial court committed reversible error in allowing Mr. Sloan to testify.

5. The prosecuting attorney did not make improper arguments regarding the mtDNA evidence.

Appellant argues that the prosecuting attorney improperly argued that the degradation of the DNA in the seat cushion was caused by Appellant using cleaning fluids to clean the seat. Counsel argues that this argument was especially prejudicial because the seat cushion was the crux of the State's case. Appellant fails to note any specific argument by the prosecuting attorney and once again fails to cite any applicable caselaw governing this issue.

Presumably, Appellant is asserting that the prosecutor made improper arguments during either his opening or closing arguments regarding the mtDNA. Because Appellant has failed to specifically assert the grounds that he is relying on for this argument and simply vaguely asserts error, this Court should deny the instant claim. Neither counsel for Appellee nor this Court is required to comb the record in search of this alleged error, which

is waived for failure to be adequately briefed. See generally Coolen v. State, 696 So. 2d 738, 744 n.2 (Fla. 1997) (defendant's failure to fully brief and argue these points constitutes a waiver of these claims); Whitfield v. State, 168 So. 2d 685 (Fla. 1st DCA 1964) (stating that the appellate court need not examine each word on each page of the appellate record with the hope of finding something to substantiate the argument contained in a party's brief).

Furthermore, although defense counsel made objections during the State's opening and closing argument, none of these objections related to argument concerning mtDNA evidence or to the State's argument that the degradation of the stain was caused by Appellant utilizing cleaning fluids.[47] Because counsel failed to object to the allegedly improper comments, the error is waived unless the comments were fundamental error. See Brooks v. State, 762 So. 2d 879, 898-99 (Fla. 2000) (stating that failing to raise a contemporaneous objection when improper closing argument comments are made waives any claim concerning such comments for appellate review, with the sole exception of unobjected-to comments which rise to the level of fundamental error). Clearly, the State's brief argument that Appellant cleaned up the blood stain in the upholstery is a permissible comment given the evidence introduced below. (V31, T:4365-66). Even if Appellant had objected to this argument, the objection would have been overruled as a fair comment on the evidence. Thus, because the prosecutor's argument was a proper argument based on the evidence introduced, the alleged error cannot be deemed fundamental. See Urbin v. State, 714 So. 2d 411, 418 n.8 (Fla. 1988) (defining fundamental error as error that "reaches down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error"). Accordingly, this Court should deny the instant claim as set forth by Appellant.

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[47]In fact, defense counsel was the first person to mention this theory in her closing when she stated, "the State was also alluding to the fact and, I would venture to guess, will argue that the reason the seat cushion was degraded was because it was cleaned." (V31, T:4273).

ISSUE V

THE LOWER COURT PROPERLY EXCLUDED THE TESTIMONY OF A DEFENSE EXPERT IN EYEWITNESS IDENTIFICATION.

Defense counsel proffered the testimony of Dr. John Brigham, an expert in factors affecting the reliability of eyewitness identification. (V28, T:3647-80). Dr. Brigham testified to numerous factors affecting the accuracy of eyewitness identifications. Specifically, he noted that (1) a witness' confidence or certainty in an identification is unrelated to the accuracy of their identification; (2) a show-up identification where only one photograph is shown is more suggestive than a line-up or photopack containing multiple individuals; (3) time lapses affect a witness' memory; and (4) stress affects a person's memory. (V28, T:3651-61). When the State questioned Dr. Brigham, he testified that he essentially would be testifying to the same factors discussed by this Court in the case of McMullen v. State, 714 So. 2d 368 (Fla. 1998).[48] After hearing the proffer, the trial judge ruled that the expert's testimony was inadmissible.

The law is well established regarding this issue that the trial court's decision to deny or allow this type of expert testimony is a matter left to the trial judge's sound discretion. McMullen, 714 So. 2d at 372-73 (stating that the trial court was in a far superior position to that of an appellate court to consider whether the testimony would have aided the jury in reaching its decision); Johnson v. State, 438 So. 2d 774 (Fla. 1983) (stating that a trial court has wide discretion concerning the admissibility of evidence and the range of subjects about which an expert can testify).

The instant issue is very similar to the situation presented to this Court in McMullen.[49] In that case, this Court followed its earlier decision in Johnson, and found that the lower court did not abuse its discretion in finding Dr. Brigham's expert testimony inadmissible. In the instant case, the trial judge was well aware of this Court's McMullen decision and considered it when making his ruling. The lower court also was aware of

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[48]As will be discussed in more detail infra, this Court in McMullen upheld the trial court's denial of Dr. Brigham's testimony in a case solely involving eyewitness testimony.

[49]The significant difference between McMullen and the instant case is McMullen was based entirely on eyewitness testimony whereas in this case, there was far more evidence linking Appellant to the crime including DNA evidence, tire track impressions, false statements to law enforcement officers, and a confession.

Justice Anstead's concerns expressed in his concurring in part and dissenting in part opinion in McMullen. Justice Anstead expressed concern that lower courts would read Johnson and McMullen as a per se rule prohibiting this type of expert testimony and urged lower court's to consider Florida Statutes, section 90.702 "helpfulness" standard. See McMullen, 714 So. 2d at 380-81 (Anstead, J., concurring in part and dissenting in part) ("In considering a proffer of such evidence the trial court should be aware that it has the discretion to admit the evidence. It should be careful in assessing the qualifications of the expert presented as well as in making an evaluation of the helpfulness of the proffered testimony compared to the risk that it may cause juror confusion.").

Contrary to Appellant's assertions in his brief, the eyewitnesses in this case did not change their testimony drastically. In fact, the eyewitnesses' statements immediately after the event were entirely consistent with their trial testimony. Although Dr. Brigham could have offered general observations regarding factors affecting some eyewitnesses' identifications, his testimony would not have assisted the jury in the instant case because he could not give specifics about the witnesses involved in this case. As this Court held in McMullen, 660 So. 2d at 341, "a jury is fully capable of assessing a witness' ability to perceive and remember, given the assistance of cross-examination and cautionary instructions, without the aid of expert testimony." Because the trial judge acted within his sound discretion in denying Dr. Brigham's testimony, this Court should affirm his ruling.

ISSUE VI

THE TRIAL JUDGE PROPERLY ALLOWED THE STATE’S ENTOMOLOGY EXPERT TO TESTIFY AS AN EXPERT IN THE LIFE CYCLES OF FLIES.

Appellant argues that the lower court erred in allowing Dr. Jerry Hogsette to testify as an expert entomologist in the life cycle of flies. Defense counsel objected to the witness testifying as an expert in forensic entomology, but the trial judge informed the jury that the witness was qualified as an expert in entomology and in the life cycle of flies. (V20, T:2079-95). Based on his examination of larvae found on the victim and factoring in other circumstances regarding the temperature of the surroundings, Dr. Hogsette opined that the victim had been killed between midnight on Saturday, December 1, 2001, and early Sunday morning, December 2, 2001. (V20, T:2106-15).

Florida Statutes, section 90.702 defines an expert as a person who is qualified in a subject matter "by knowledge, skill, experience, training, or education." § 90.702, Fla. Stat. (2002). This Court has stated that the determination of a witness's qualifications to express an expert opinion is peculiarly within the discretion of the trial judge, whose decision will not be reversed absent a clear showing of error. Ramirez v. State, 542 So. 2d 352, 355 (Fla. 1989). Appellant has failed to show an abuse of the court's discretion in allowing Dr. Hogsette to testify regarding his opinion.

Appellant argues in his brief that Dr. Hogsette had "never worked in forensic entomology," and was "wholly unfamiliar with the matters concerning a murder victim which must be taken into account in the collection and analysis of insect evidence." Initial Brief of Appellant at 50. This is clearly an inaccurate statement of the witness' qualifications and experience as it relates to the issue in the case at bar. Dr. Hogsette testified regarding his vast experience in entomology and the study of the life cycles of flies. (V20, T:2079-95). Although the expert had never testified as a "forensic entomologist," he had testified in court before as an expert in entomology and in the life cycles of flies, and had been involved in murder cases. Furthermore, as Dr. Hogsette noted, for the purposes of his testimony regarding the life cycle of flies, it was really not important whether the flies were feeding on a deceased human or some other medium. Based on his qualifications, the trial judge found that he was "qualified as an expert in entomology and in the life cycle of flies." (V20, T:2095). Appellant has shown no abuse of discretion in this regard.

Appellant also asserts that "Dr. Hogsette was questioned about the decomposition of the body, an area which he had absolutely no training or experience." Initial Brief of Appellant at 50. Although the doctor was not trained in the decomposition of the human body, he clearly had experience in this area regarding livestock and other animals. When questioned by the State about the lag time it takes for flies to become attracted to a body, the witness began to answer the question by stating that the body starts to decompose, but was interrupted by an objection from defense counsel. (V20, T:2099-100). The trial court overruled the objection and the State

rephrased its question to the generic term of "medium," as opposed to "body."

The State submits that the court did not err in overruling the objection. A trial court has broad discretion in determining the range of subjects on which an expert witness can testify, and, absent a clear showing of error, the court's ruling on such matters will be upheld. Burns v. State, 609 So. 2d 600, 603 (Fla. 1992). Although initially discussing a body, the witness changed his testimony to reference a "medium." Given his significant experience in studying the life cycle of flies feeding on dead animals, his testimony was not beyond the scope of his expertise. Even if this Court were to find that the lower court erred in allowing Dr. Hogsette to testify as an expert in entomology and the life cycle of flies, the error was harmless. See State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). Dr. Hogsette's testimony provided a framework for the approximate time of the victim's death. The State introduced other evidence which would have allowed the jury to find that the victim was murdered during this time period. Witnesses last saw the victim alive shortly before midnight on Saturday evening, and her body was found on Monday morning. The medical examiner's testimony also provided an estimate which was consistent with Dr. Hogsette's opinion that Deborah Tressler was murdered between the window of midnight Saturday and early Sunday morning. Thus, any error in allowing Dr. Hogsette to provide his expert opinion on the time of death based on the development of fly larvae was harmless given the other evidence consistent with this opinion.

ISSUE VII

THE TRIAL JUDGE ACTED WITHIN ITS DISCRETION IN DENYING APPELLANT'S MOTION TO SUPPRESS AND/OR PRECLUDE IN-COURT IDENTIFICATION OF APPELLANT'S VEHICLE.

Prior to trial, Appellant filed a motion to suppress and/or preclude in-court identifications. (V5, R:884-93). Although Appellant couches the current issue as solely challenging the identification of Appellant's vehicle, the argument section also addresses Sherri Renfro's identification of the victim, and briefly mentions Jose Rodriguez's identification of Appellant. In lieu of making a detailed argument, Appellant's counsel states in a footnote that she is adopting the arguments made below in her motions and accompanying memorandums. See Initial Brief of Appellant at 51. As previously noted, such a practice does not preserve an issue for appellate review. See Duest v. Dugger, 555 So. 2d 849, 851-52 (Fla. 1990).

After conducting an evidentiary hearing on Appellant's motion and hearing argument from counsel, the trial judge entered a detailed order denying Appellant's motion. (V6, R:933-42). The State submits that the trial court properly denied the motion. A trial court's ruling on a motion to suppress comes to the appellate court clothed with a presumption of correctness. Henry v. State, 613 So. 2d 429 (Fla. 1992). The appellate court will interpret evidence and the reasonable inferences derived therefrom in the manner most favorable to the trial court. Freeman v. State, 559 So. 2d 295 (Fla. 1st DCA 1990). Additionally, a trial judge's finding that a show-up identification was not impermissibly suggestive is a factual resolution encompassed within the presumption of correctness. State v. Houston, 616 So. 2d 595, 596 (Fla. 4th DCA 1993).

Florida courts apply a two-pronged test to determine whether suppression of an out-of-court identification is warranted: "(1) did the police use an unnecessarily suggestive procedure to obtain the out-of-court identification; (2) and if so, considering all the circumstances, did the suggestive procedure give rise to a substantial likelihood of irreparable misidentification." Thomas v. State, 748 So. 2d 970, 981 (Fla. 1999). In Neil v. Biggers, 409 U.S. 188, 199 (1972), the United States Supreme Court identified five factors for determining the reliability of an identification: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the length of time between the crime and the confrontation. Although the Neil case involved the identification of the defendant, this Court has extended the same analysis to a witness' identification of physical evidence. Dennis v. State, 817 So. 2d 741 (Fla.), cert. denied, 537 U.S. 1051 (2002). Additionally, in denying Appellant's motion, the lower court utilized the same analysis when dealing with Sherri Renfro's identification of the victim.

As previously discussed in this brief, two witnesses, Sherri Renfro and Andrew Montz observed a woman trying to escape a white, four-door vehicle at the intersection of State Road 44 and County Road 437. Sherri

Renfro subsequently identified both the victim and Appellant's vehicle from photographs provided by LCSO. Appellant challenges Ms. Renfro's identification of the victim and Appellant's vehicle as unnecessarily suggestive. The State submits that the lower court properly denied these arguments.

Sherri Renfro and her "brother-in-law," Shane Lolito, went to the Circle K convenience store around midnight on Saturday evening, December 1, 2001, to use the pay phone. (V14, R:899-900). While Mr. Lolito was on the phone, Ms. Renfro observed the white car approach the red light and slow down, and the passenger door opened and a woman started to climb out and screamed "Help me, help me." (V14, R:901-02). Ms. Renfro began walking towards the car and the woman looked at her and screamed louder. Ms. Renfro looked mostly at the woman's face and eyes. (V14, R:902-04). As she approached, the driver hit the gas and pulled the woman back inside and ran the red light. Ms. Renfro returned to her van and gave chase, but never caught up to the car despite traveling at ninety to ninety-five miles per hour. (V14, R:904).

On December 4, 2001, Ms. Renfro spoke with Detective McDonald and wrote out a statement of her observations. That evening, she met with Detective Perdue and their taped interview was introduced into evidence.[50] At the time of her interview, Ms. Renfro did not recall any bumper sticker and could not describe the license plate. She described the victim as an older woman, around mid-fifty, with short brown hair and a white T-shirt.[51] (V6, R:938). At the conclusion of this interview, Detective Perdue showed her a single picture of the victim, and Ms. Renfro identified her as the woman in the car. She stated there was no doubt in her mind that was the woman she saw and further stated that she would never forget the woman's expression for the rest of her life. (V14, R:926). Almost a week later, Detective Perdue had Ms. Renfro come to the Sheriff's Office to view a single vehicle in the sallie port. Ms. Renfro identified Appellant's car as the vehicle she saw on December 1, 2001. She was certain of her identification because the car had the same interior color, and had a flag on the back window and a patriotic "flag" bumper sticker that she recognized.[52] (V14, T:906-08, 913-14).

As the lower court noted, it is undisputed that Ms. Renfro was shown only one photograph and only one

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[50]In addition to the taped transcript, the State introduced Ms. Renfro's two-page written statement to Detective McDonald and another written statement given to Detective Perdue after identifying Appellant's car. (V14, R:937).

[51]The victim was actually 48 years old, and Detective Perdue described her as looking older than she appeared in photographs. (V14, R:934). She was found wearing a light gray sweatshirt and witnesses described her as routinely wearing her hair tied in a ponytail behind her head. (V14, R:934).

[52]Appellant's counsel questioned the witness on when she observed the bumper sticker and she testified she saw it when the car drove past her. Despite Ms. Renfro's uncontradicted testimony concerning her observations, Appellant's counsel asserts on appeal that "she could not have possibly have seen" the sticker from her perspective. Initial Brief of Appellant at 53.

vehicle. The trial judge noted that Florida courts have held that "a show-up is inherently suggestive because a witness is presented with only one suspect for identification, but the procedure is not invalid if it did not give rise to a substantial likelihood of irreparable misidentification under the totality of the circumstances." (V6, R:938-39). In denying Appellant's motion, the court stated:

> The Court finds the events herein the process [sic] was valid and does not give rise to a substantial likelihood of irreparable misidentification under the totality of the circumstances. Ms. Renfro testified that she got a good look at the victim at the intersection. She said there was enough light to see plainly the victim's face and the testimony was that she approached within twenty or twenty-five feet of the victim. She gave a detailed description of both the car and the victim. Any discrepancies in the actual appearance of the victim or the car compared to Ms. Renfro's statements are the proper subject of cross-examination, but are not sufficient to amount to a bar to admissibility. See, Dennis v. State, 817 So. 2d 741, 761 (Fla. 2002). Ms. Renfro was confident and did not hesitate in her identification of either the victim or the car. In identifying the picture of the victim, only three days had passed since the incident, and the car was identified approximately eight days after that. Thus, an evaluation of the Neil factors lead to the conclusion that the identification process, even though a show-up, does not give rise to the likelihood of misidentification in this instance.

(V6, R:939). Appellant has failed to show any error in the court's analysis.

Appellant also challenges Andrew Montz's identification of Appellant's vehicle. Mr. Montz, like Ms. Renfro, was at the Circle K convenience store on December 1, 2001, checking the tire pressure on his car when he observed the same incident as Ms. Renfro. After reading in the paper that a body had been found in the vicinity, Mr. Montz called Crime Line and reported the incident. (V14, R:875-80). On December 10, 2001, Detective Perdue met with Montz and took his statement. Detective Perdue testified that Mr. Montz was very fearful and reluctant to be involved in the case. (V14, R:940). Approximately one year later, Detective Perdue again asked Mr. Montz if he was willing to become involved and if he was capable of identifying the car, and Mr. Montz indicated that he could. Detective Perdue showed Mr. Montz a portion of the videotape depicting Appellant's car and Mr. Montz identified it as the car involved in the kidnapping, stating that there was no doubt in his mind. (V14, T:881, 940-41). Mr. Montz recognized the car because of the dents on the passenger side, the rims, the cleanliness of the car, and the flag hanging in the window.[53] (V14, R:881, 894). When initially interviewed by Detective Perdue,

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[53]Appellant incorrectly states in his initial brief that "Mr. Montz said [the] vehicle he was shown looked the same as he had seen the previous year except for the dents, the dirt, the wheels, and the trim." Initial Brief of Appellant at 53. This is exactly opposite of what the witness stated. He stated that he recognized the car because of these factors, not because they were not present. However, the witness never

Mr. Montz indicated that the car had the body type of a Chevy Corsica.[54] (V14, T:882-83, 892).

In denying this claim, the trial court recognized that the lapse of time could weigh in favor of finding that there is a substantial likelihood of misidentification, but ruled that the totality of the circumstances did not give rise to the substantial likelihood of misidentification. (V6, R:941). The court noted that the witness was confident of his identification and was very specific in his description, including the dents on the passenger side of the car. As the court noted, "[t]he time between the identification and the incident is the subject for rigorous cross-examination, but does not rise, in this instance, as a bar to admissibility." (V6, R:941). Clearly, even though the witness did not identify the car for over a year after the incident, he cannot be said that he had lost or abandoned his mental image of the car. See Baxter v. State, 355 So. 2d 1234, 1238 (Fla. 2d DCA 1978) (stating that in order to warrant exclusion of evidence of identification, the procedure must be so suggestive, and the witness' unassisted ability to make the identification so weak, that it may reasonably be said that the witness has lost or abandoned his or her mental image and has adopted the identity suggested). Because the lower court did not err in denying this motion, this Court should affirm the trial court's ruling.

This Court must also reject Appellant's argument that there is a *per se* exclusionary rule for identifications made after Appellant had exercised his Sixth Amendment right to counsel. Relying on United States v. Wade, 388 U.S. 218 (1967) and Gilbert v. California, 388 U.S. 263 (1967), Appellant asserts that the right to counsel applies to the identification of his vehicle. As the prosecutor and the lower court properly noted below, these cases involve the post-indictment line-up of a defendant, as opposed to an eyewitness' identification of an inanimate object. (V6, R:941; V14, R:975-76). Appellee, like the court and the prosecutor below, is unaware of any case standing for the proposition that identification of physical evidence requires the presence of defense counsel. Certainly, Appellant has failed to cite to any such decision. Thus, this Court should reject this argument.

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mentioned the car's trim in his pre-trial testimony.

[54] At the hearing, the State introduced photographs of a 1991 Ford Tempo and a 1991 Chevy Corsica. (V14, R:947-48).

ISSUE VIII

APPELLANT'S ARGUMENT CONCERNING PROSECUTORIAL MISCONDUCT IS WITHOUT MERIT.

Appellant argues that the prosecutor engaged in misconduct throughout the proceedings below, from pretrial motions until the verdict. Counsel's vague argument does not rise to an appellate issue capable of meaningful response. As noted previously, neither counsel for Appellee nor this Court is required to comb the record in search of alleged error, and Appellant's failure to adequately brief this issue results in waiver of the issue. See Coolen v. State, 696 So. 2d 738, 744 n.2 (Fla. 1997) (stating that defendant's failure to fully brief and argue issue constitutes a waiver of claim); Duest v. Dugger, 555 So. 2d 849, 852 (Fla. 1990) ("The purpose of an appellate brief is to present arguments in support of the points on appeal. Merely making reference to arguments below without further elucidation does not suffice to preserve issues, and these claims are deemed to have been waived.").

The only concrete examples of alleged prosecutorial misconduct contained in Appellant's brief on this issue relate to the prosecutor's comments as an officer of the court attempting to recall his involvement with reviewing a search warrant. Counsel asserts that even the prosecutor's statements "were found to be erroneous by documented time sheets." Initial Brief of Appellant at 55. Appellant's allegation is misleading and inappropriate. At the motion to suppress hearing, the prosecutor, at the request of defense counsel, informed the court as an officer of the court, that his recollection was that he waited after hours "for a long time" in Judge Briggs' chambers for the detective to arrive with the search warrant. (V13, R:641-42). The prosecutor stated that he did not recall the specific time, but thought the time frame was somewhere around six or seven in the evening. (V13, R:642). The State is unaware of any time sheets which conclusively establishes that the prosecutor's equivocal statements were "erroneous." Appellant's only other specific reference to prosecutorial misconduct relates to the prosecutor's argument on the mtDNA evidence. Because this issue was addressed in Issue IV, supra, the State will not reargue its position. In sum, Appellant's vague rantings do not justify review by this Court of the entire record for instances of alleged prosecutorial misconduct.

ISSUE IX

FLORIDA'S DEATH PENALTY STATUTE IS CONSTITUTIONAL AND THE LOWER COURT PROPERLY IMPOSED A DEATH SENTENCE IN THE INSTANT CASE.

Appellant first asserts that Florida's death penalty statute is unconstitutional based on Ring v. Arizona, 536 U.S. 584 (2002). This Court has consistently upheld Florida's death penalty statute in response to constitutional challenges under Ring. See, e.g., King v. Moore, 831 So. 2d 143 (Fla. 2002); Bottoson v. Moore, 833 So. 2d 693 (Fla.), cert. denied, 537 U.S. 1070 (2002). Since Florida's death penalty statute does not suffer from the same constitutional infirmities that resulted in the remand to the Arizona Supreme Court in Ring, Appellant is not entitled to relief.

The State would also note that in the instant case, the prosecutor agreed to allow the jury to return a special interrogatory jury verdict indicating the aggravating circumstances they unanimously found. After hearing all of the evidence at the penalty phase, the jury returned a special interrogatory verdict form indicating that the jury found, by a unanimous 12-0 vote, that the State had proved each of the three aggravating factors beyond a reasonable doubt. The jury found: (1) the defendant has been previously convicted of a felony involving the threat of violence to some person; (2) the crime for which the defendant is to be sentenced was committed while he was engaged in the commission of, or an attempt to commit sexual battery, or kidnapping or both; and (3) the crime for which the defendant is to be sentenced was especially heinous, atrocious or cruel. (V7, R.1211).

Furthermore, Appellant's Ring claim is without merit in the instant case given his prior felony conviction. Since the defect alleged to invalidate the statute - lack of jury findings as to an aggravating circumstance - is not even implicated in this case due to the interrogatory verdict form and the existence of a prior felony conviction, Appellant has no standing to challenge any potential error in the application of the statute. Accordingly, this Court should deny Appellant's claim.

Appellant next asserts that the court erred in finding the three aggravating factors. Appellant briefly challenges his prior conviction for aggravated assault on a law enforcement officer. As the trial judge properly found below:

> The jury found by a vote of 12 to 0 that the State proved the aggravating circumstance that the Defendant had been convicted of a felony involving the use or threat of violence to the person. The defense concedes the existence of the aggravator, but argues that the Defendant pled nolo contendere to the charges, and no violence was involved. As to the argument the Defendant pled nolo contendere, this argument would have a legal effect if the adjudication of guilt had also been withheld. See, Garron v. State, 528 So. 2d 353, 360 (Fla. 1988) (plea of no contest to aggravated assault with an adjudication withhold does not qualify as a conviction pursuant to 921.141(5)(b)). Herein, the offense qualifies under the statute as the Defendant was adjudged guilty of the aggravated assault on August 26, 1996. See, Capehart

> v. State, 583 So. 2d 1009, 1014 (Fla. 1991) (a defendant's conviction for aggravated assault supports statutory aggravator of prior violent felony).
>
> As to the defense's argument that no violence was involved, the statute specifically provides for the threat of violence. Indeed, it is a threat of violence that allows an assault to be considered as a qualifying crime under Section 921.141(5)(b). According to the uncontradicted recitation in the probable cause affidavit, the Defendant's vehicle appeared to deliberately veer toward the officer, causing him to take evasive measures to avoid a head on collision.

(V9, R:1415-16).

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)).

As the trial court properly noted, the crime of aggravated assault on a law enforcement officer supports the statutory aggravating circumstance of a prior violent felony. Capehart v. State, 583 So. 2d 1009, 1014 (Fla. 1991), cert. den., 502 U.S. 1065 (1992). Although Appellant refers to this crime as "a drunk driving incident in which the officer involved *thought* that the Appellant was swerving toward him," these are not the facts as introduced at the penalty phase.[55] Initial Brief of Appellant at 57. Defense counsel read the probable cause affidavit to the jury and the officer that wrote the affidavit stated that Appellant was fleeing from three police cars at a high rate of speed, approximately 80 miles per hour, when Appellant appeared to "deliberately veer into" the officer's lane causing him to completely drive off the roadway to avoid a head on collision. (V32, T:4590-92). As the lower court correctly noted, it was uncontradicted that Appellant deliberately veered toward the officer in a speeding car forcing him to take evasive action to avoid a potentially fatal head on collision.

Appellant next argues that the evidence does not support a finding that the murder occurred during the commission of a kidnapping or sexual battery. The State submits that the trial court properly rejected

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[55]The probable cause affidavit states that Appellant was administered a breath test, but the record does not indicate the result.

Appellant's argument and found this aggravating circumstance. In his sentencing order, the trial judge stated:

> Contrary to defense counsel's assertion in her sentencing memorandum that "[t]he kidnapping charge against this Defendant was not supported by any facts," the Court notes there was more than sufficient evidence for the jury to conclude beyond a reasonable doubt that the Defendant did indeed commit all three crimes with which he was charged. Although this case is largely circumstantial, some of the evidence that supports the kidnapping conviction is in the form of eyewitness testimony positively identifying the victim trying to escape the Defendant's car and pleading for help.

(V9, R:1416-17). Clearly, as the trial court found, there was substantial, competent evidence introduced establishing that Appellant kidnapped the victim and murdered her.[56]

Counsel argues that "[t]here was absolutely no evidence presented on when or where the sexual battery occurred." Initial Brief of Appellant at 57. Actually, the medical examiner testified that based on the injuries he observed to the victim's anus and rectum, he opined that the sexual battery occurred prior to the fatal injuries she suffered to her head. (V20, T:2172-73, 2185). Based on the evidence presented by the State, this Court should find that substantial, competent evidence supports the trial court's finding that the sexual battery during the commission of the murder.

Finally, Appellant challenges the imposition of the HAC aggravator and, while conceding that the victim was badly beaten, asserts that it was possible that the first blow rendered her unconscious. Appellant apparently overlooks the bulk of the medical examiner's uncontradicted testimony establishing that the victim had twenty-five defensive wounds and numerous, non-fatal stab wounds and blunt trauma injuries that were inflicted prior to the fatal blows to the head. In addition, as noted above, the brutal sexual battery occurred prior to her murder. Obviously, prior to this vicious murder, the victim was aware of her situation as she attempted to escape from Appellant's moving vehicle with a look of fear in her eyes that Sherri Renfro stated she would never forget. See Gudinas v. State, 693 So. 2d 953 (Fla. 1997) (where evidence supports the theory that the victim's multiple injuries were inflicted before the fatal blow, and the evidence can be construed to show that the victim

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[56]Appellant's argument that the victim had to go home and change clothes after having been seen trying to jump out of Appellant's moving car is inaccurate. According to Detective Perdue, a non-testifying witness had described the victim as wearing yellow jogging pants on Saturday, December 1st, but this was before Jose Rodriguez saw her at the laundromat late that evening. (V28, T:3784; V29, T:3850; V31, T:4340).

was conscious during a sexual battery and other assaults, the court does not abuse its discretion in finding the murder to be HAC); Banks v. State, 700 So. 2d 363 (Fla. 1997) (upholding HAC when victim was brutally raped for twenty minutes before the defendant shot her); Cave v. State, 727 So. 2d 227 (Fla. 1998) (where victim was taken at gunpoint from store, pled for her life during the fifteen minute ride to an isolated area, urinated in her pants, and was then stabbed and shot, murder was HAC).

In finding that the HAC aggravator was applicable to the facts of this case, the trial judge stated:

> . . . [B]efore that brain-crushing blow was landed, Deborah Tressler endured the extreme pain and degradation of being sexually assaulted with some foreign object that was used with enough brute force to perforate the skin of her anus and rectum, by a man she considered her boyfriend. She was conscious quite long enough to have incurred twenty-five distinct defensive wounds on her hands. These wounds, as with the stab wound in her abdomen and the cut along her throat were caused by a sharp object such as a knife, an instrument wholly different from the blunt object that inflicted the head wounds, indicating that the Defendant had time to choose a second weapon during the attack before inflicting the fatal wound.

(V9, R:1421-22). The trial judge's finding of this aggravator is supported by substantial, competent evidence and this Court should affirm the finding of this aggravator.

Additionally, although not raised by Appellant, the State would note that Appellant's sentence is proportionate when compared with other capital 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 its 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).

Clearly, Appellant's death sentence is proportionate when compared to other cases. A review of the facts established in the instant case demonstrates the proportionality of the death sentence imposed. See Crain v. State, No. SC00-661, 2004 Fla. Lexis 1875 (Fla. Oct. 28, 2004) (upholding death sentence where there were three aggravating factors and "far from compelling" nonstatutory mitigation); 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); White v. State, 817 So. 2d 799 (Fla.) (finding death sentence proportionate when defendant stabbed victim fourteen times and slit her throat), cert. denied, 537 U.S. 1091 (2002); Singleton v. State, 783 So. 2d 970 (Fla. 2001) (stating that defendant's death sentence was proportionate in stabbing murder where the two aggravating factors of HAC and prior violent felony conviction outweighed statutory mitigators of extreme mental disturbance, inability to appreciate the criminality of conduct, the defendant's age and nine nonstatutory mitigators).

In the instant case, there are three substantial aggravating factors: (1) prior felony conviction involving the use or threat of violence; (2) crime committed during the commission of kidnapping and sexual

battery; and (3) the murder was especially heinous, atrocious or cruel (HAC). This Court has previously stated that HAC is one "of the most serious aggravators set out in the statutory sentencing scheme." Larkins v. State, 739 So. 2d 90, 95 (Fla. 1999). The aggravating factors far outweigh the insubstantial nonstatutory mitigation found in this case: (1) Appellant maintained appropriate courtroom behavior; (2) Appellant was kind to the victim;[57] (3) Appellant loves and cares for animals; (4) Appellant was active in his church and a mentor to the little boys who belonged to the church's Royal Rangers; (5) Appellant has a good family background and came from a close knit, caring family; (6) Appellant was employed; (7) Appellant has a learning disability; and (8) Appellant is immature. Accordingly, when this Court conducts its proportionality review, it should affirm Appellant's death sentence based on a finding that the instant case is one of the most aggravated and least mitigated of first degree murders.

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[57]The trial judge properly found that this factor was "certainly undermined by the treatment he ultimately afforded Miss Tressler." (V9, R:1427). Obviously, the trial judge's charitable finding of this mitigating factor should not be entitled to much weight given Appellant's subsequent act of brutally murdering the victim.

CONCLUSION

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

Respectfully submitted,

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

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STEPHEN D. AKE
Assistant Attorney General
Florida Bar No. 14087
Concourse Center 4
3507 E.
Frontage Road, Suite 200
Tampa, Florida 33607
Telephone: (813) 287-7910

Facsimile: (813) 281-5501

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Janice C. Orr, 141 Waterman Avenue, Mt. Dora, Florida 32757, on this 8th day of November, 2004.

____

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).

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COUNSEL FOR APPELLEE