IN THE SUPREME COURT OF FLORIDA

CASE NO. SC05-587

ROY LEE MCDUFFIE

Appellant,

v.

STATE OF FLORIDA

Appellee.

CORRECTED ANSWER BRIEF OF APPELLEE

ON APPEAL FROM THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR VOLUSIA COUNTY, FLORIDA

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STATEMENT OF THE CASE

Roy Lee McDuffie was arrested on December 17, 2002, for the October 25, 2002, murders of Dawniell Beauregard ("Dawn") and Janice Schneider ("Janice") at the Dollar General store in Deltona. The grand jury returned a four-count indictment charging McDuffie with:

Count I: Premeditated murder and/or felony murder during a Robbery, of Dawniell Beauregard;

Count II: Premeditated murder and/or felony murder during a Robbery, of Janice Schneider;

Count III: Robbery with a firearm; and

Count IV: False imprisonment while armed.

(V1, R15-17).

The following defense motions were **granted**:

Motion for Appointment of Co-counsel (V1, R76-79, 81);

Motion for Confidential Fingerprint Expert (V1, R104-05, 109);

Motion for Confidential Locksmith Expert (V1, R127-129, 133);

Motion for Confidential Mental Health Expert (V1, R176-79, 180-81);

Motion to Appoint New York Private Investigator (V2, R212-214, 215);

Motion to House Separately (V2, R249, 251);

Motion to Allow Out of State Defense Witness to Testify by Live Video (V4, R707-08; V10, R1781);

Motion in Limine re McDuffie's Job Applications (V4, R757-

59; V5, R951-52; V10, R1867).

The following defense motions were **denied**:

Motion to Suppress Admissions to Jeffrey Arnold (V1, R185-187);

Motion to Obtain New York Arrest and Records of Carlos Ruiz (V3, R587-611; V4, R642);

Motion to Declare Death Penalty Unconstitutional (reliability) (V2, R292-310; V5, R948-49, V11, R1899);

Motion to Declare Death Penalty Unconstitutional (Art. I, §4; First and Fourteenth Amendments) (V2, R311-319; V5, R948-49; V11, R1899);

Motion to Declare Death Penalty Unconstitutional (appellate review) (V2, R326-351; V5, R948-49; V11, R1899);

Motion to Declare Death Penalty Unconstitutional (as applied) (V2, R352-382; Vol.3, R397-405, 409-432; V5, R948-49; V11, R1899);

Motion to Declare Death Penalty Unconstitutional (burden shifting) (V2, R383-396, V5, R948-49; V11, R1899);

Motion to Declare Death Penalty Unconstitutional (*Ring v. Arizona)* (V3, R450-465; V5, R948-49; V11, R1899);

Objection to "Reasonable Doubt" Standard of Proof (V3, R466-475, V5, R948-49; V11, R1899);

Objection to Standard Jury Instructions (V3, R476-534; V5, R948-49; V11, R1899);

Motion to Exclude State Hearsay Testimony from Penalty Phase (V4, R639-640);

Motion for Statement of Particulars and Phase II Interrogatory Verdict (V2, R 279-291, V5, R948-49);

Motion to Dismiss based on Jailhouse Confession of Michael Fitzgerald (State's Motion to Strike this motion was granted). (V2, R217-225, V8, R1490);

Motion in Limine re McDuffie's Financial History (V4, R737-38; V5 R951-52; V10, R1867);

Motion in Limine re Olivia Sousa's Observation of Black Male Inside Dollar General (V4, R739-40; V5, R950; V10, R1752-77)[1];

Motion to Suppress Alex Matias Identification (V4, R741-40; V5, R955-56; V10, R1692-1752)[2];

Motion to Dismiss or for Sanctions for State's Negligent Destruction of Fingerprint on Duct Tape (V4, R760-64; V5, R953-54; V10, R1787-1851)[3];

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1 At this hearing, Olivia Sousa testified that she owns a bar in the same plaza as Dollar General. Around 9:20-9:30 p.m. on the night of the murder, she walked past the Dollar General and saw the lights still lit. (V10, R1757-58). She purchased a card at Winn-Dixie. When she walked back past the Dollar store, she saw a black male inside. (V10, R1759). She had seen the black male earlier in the week at the store and noticed him because Dollar General had never had a black employee. (V10, R1760).

2 At this hearing, Alex Matias testified that he was in the parking lot of Dollar General the night of the murder and saw a black male exit then re-enter the store around 9:25 p.m. (V10, R1709-12). This happened two times, and the man locked the store each time he left. (V10, R1712). The next day he learned of the murders and called the police. (V10, R1714). The trial judge made oral factual findings and entered a written order. (V10, R1750-51).

3 At the hearing on this motion, FDLE analyst Perry used a laser to illustrate a palm print, Q3B, and alleged fingerprint, Q3E, on duct tape. (V10, R1797-1800). The laser presents different wave lengths which illuminate the print. When the laser reaches the most clarity, a photograph is taken. (V10, R1800). James Hamilton, defense investigator, testified that he saw a chemically-developed latent fingerprint, Q3E, when he was examining evidence at the sheriff's evidence facility in December 2003. (V10, R1811-12, 1820). He told Deputy Lewis and Inv. Willis the print needed to be photographed before the chemicals caused it to fade and disappear. (V10, R1813-14). The sheriff's deputies advised that since it was FDLE's evidence, only they could photograph the duct tape. (V10, R1818). In Hamilton's opinion, the print was placed on the tape after FDLE analyst Perry developed the palm print. (V10, R1826). Hamilton

Motion to Require State to Identify Aggravating Factors (V5, R856-57; V10, R1785-86);

Motion to Dismiss Capital Indictment in Phase II Penalty Trial (V5, R858-59; V10, R1779-81);

The State Motion in Limine on Reverse *Williams* Rule witnesses was granted. (V6, R969-71; 1152-57). The parties stipulated to predicates and admissibility of many documents. (V11, R1903-1916). On some of the documents, defense counsel stipulated to authenticity, but reserved the right to challenge relevance. (V10, R1923-1926).

McDuffie filed a *pro se* motion to discharge counsel, and the trial judge held a *Nelson* hearing on July 16, 2004. (V3, R544-45; V9, R1590-1616). McDuffie complained that defense counsel would not attack Inv. Willis or the palm print on the duct tape, and he failed to call James Hamilton at a bond hearing. After response by defense counsel, the trial judge found there was no reasonable cause to believe counsel was rendering ineffective assistance of counsel. (V8, R1614). The trial judge advised McDuffie he would not remove counsel, but he could fire him and represent himself. McDuffie asked to participate as co-counsel. The request was denied. (V8, R1616).

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saw no evidence of tampering and had no idea who the print belonged to. (V10, R1829).

Jury selection began January 10, 2005. (V12, TT1).[4] A jury was selected, and trial began on January 24, 2005. On February 15, 2005, the jury returned a verdict finding McDuffie guilty of all charges. (V7, R1164-67). The verdict form on Counts I and II stated that McDuffie was guilty of both premeditated and felony murder.

Richardson Hearing. During the defense case on February 7, two weeks after the trial began, the State asked for a *Richardson* hearing because defense counsel handed him a Western Union receipt during the testimony of Regina Prater. (V43, TT3796-97). Apparently, Anthony Wiggins, who was listed only as a penalty phase witness, had sent money to McDuffie. (V43, TT3797-98). During the *Richardson* hearing, it became evident that there were two money orders. (V43, TT3798). The State had not been made aware of the second money order. (V43, TT3799). After discussion, the trial judge found a *Richardson* violation and excluded the witness and receipt. (V43, TT3799). Defense counsel proffered Wiggins' testimony that he sent McDuffie two money orders: one for $300 and a second for $40. (V43, TT3801). The receipt was for the $40 transaction. (V43, TT3796).

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[4] Page numbering for both the pleadings and the trial begin with "1." Cites to the pleadings will be by volume, "V," followed by "R." Cites to the trial and penalty phase transcripts will be by volume followed by "TT."

Penalty Phase. The penalty phase proceedings began on February 22, 2005, and concluded on February 24, 2005. (V51-52, TT4481-4732). The trial Court allowed evidence and argument to be presented on four aggravating factors: (1) prior violent felony; (2) committed during a robbery; (3) heinous, atrocious and cruel; and (4) cold, calculated or premeditated.[5]

The jury returned an advisory verdict recommending the death penalty by a vote of twelve (12) to zero (0) for each murder. (V7, R1306, 1307). McDuffie filed a Motion and Amended Motion for New Trial. (V7, R1187-1202, 1245-1260).

A *Spencer* hearing was held March 2, 2005. (V11, R1933-62). During that hearing, defense counsel indicated he had "newly discovered evidence" that he just learned (V11, R1956-57). The trial judge asked defense counsel to add the claim to the motion for new trial (V11, R1957).

The Motion for New Trial was heard March 11, 2005. (V11, R1963-2030). McDuffie presented the testimony of five witnesses: Stefan Armstrong, Johnny Bullock, Wesley Wilkins, Jose Vidana, and Curtis Williams. (V11, R1965-2003). Armstrong testified that Curtis Williams lied about McDuffie being a

[5] The State argued for the cold, calculated aggravating circumstance. (V50, TT4528, 4534). Although the trial court instructed the jury on this aggravating circumstance, he did not find this aggravator present. (V7, R1308-1318, 1319-1329).

racist. (V11, R1967-68). Williams lied because he wanted "to protect his partner, Fitzgerald." "Partner" in jail terms means homosexual lover. (V11, R1968). Williams allegedly said he hated McDuffie and wanted him to die. Also, someone from the State gave Williams a "paper" telling him what to say when he testified. (V11, R1968-69). Williams was happy when McDuffie was convicted. (V11, R1969). Williams also said "he was gonna get his time cut or something." (V11, R1970). Armstrong had been convicted of five or six felonies. He arrived at the branch jail on February 2, 2005, in the middle of the McDuffie trial (V11, R1971). He was on the same cell block as Bullock, Wilkins and Vidana. (V11, R1972). In Armstrong's deposition the day before the hearing on the motion for new trial, he testified that Williams told him before he went to court that he was going to testify that McDuffie was a racist and had been told by the State what to say. (V11, R1973). At the hearing, Armstrong said he did not talk to Williams until after he testified at trial. (V11, R1973).

Bullock wrote a letter to McDuffie. (V11, R1977, Defense #1). After the verdict in the McDuffie case, Williams boasted that he lied. (V11, R1977). Williams said "I helped got that n---r the death penalty." (V11, R1979). Williams said someone from the State gave him statements to say. (V11, R1977).

Bullock saw the notes Williams had. Some were written on white paper, and some on yellow paper. (V11, R1980). Bullock confirmed that Williams and Fitzgerald were homosexual "partners," even though he had never personally witnesses anything. (V11, R1978, 1984). Bullock was currently prosecuted by the State and facing the death penalty (V11, R1980-1981). The court took judicial notice of a pleading filed in Bullock's case claiming he is mentally retarded (V11, R2006, State #1).

Wilkins also testified Williams told him he lied when he said McDuffie was a racist and had threatened him. (V11, R1985-86). Williams had notes he claimed were from the State Attorney "guiding him in his testimony." (V11, R1986-87). Wilkins saw the notes. (V11, R1987). The State Attorney also told Williams to deliberately make mistakes (V11, R1988). Williams said he was "taking advantage of his opportunity" and was going home soon. He saved the notes in case the prosecutor welched on the deal. (V11, R1988). Williams believed his testimony was the deciding factor and he should get a deal. (V11, R1989). The night of the verdict, Williams was called out to the control section of the jail because "the guy had come to congratulate him on his testimony." (V11, R1990). Wilkins was being prosecuted for attempted murder. (V11, R1991).

Vidana testified that Wiliams said he "snitched because he

couldn't take his time" and because "he hated McDuffie." (V11, R1994). Vidana was being prosecuted for attempted murder with a firearm and arrived at the branch jail on February 8, 2004, (during the trial). (V11, R1995).

Curtis Williams testified that he did not lie in the McDuffie trial. (V11, R1995). The State Attorney did not visit him, and they only time he met Ms. Taylor was at depositions. (V11, R1996). The only person in law enforcement he ever met with was Inv. Willis in 2004. (V11, R1997). Williams had some notes he wrote for his deposition. He had the notes with him at trial. (V11, R1998). Williams denied telling other inmates that the state attorney wrote notes for him or asked him to "play dumb." (V11, R1999). McDuffie is a racist, and Williams never told inmates he lied about that fact. (V11, R2001). Williams and Fitzgerald were "partners," but not in the homosexual way (V11, R2002). On cross-examination, Williams' testimony was clarified: the prosecutor was with Inv. Willis when he first met with Williams in 2004, but had not seen Williams since then (V11, R2003). No one from the State came to the jail after the verdict to congratulate Williams on his testimony (V11, R2003). The prosecutor had never given Williams a handwritten note or told him what to say. (V11, R2004). Williams did not want to be involved in McDuffie's case and was very upset he was dragged

into it (V11, R2004). Williams got a copy of his deposition from his attorney (V11, R2005).

The motion for new trial was denied. (V11, R 2028).

Sentencing. The sentencing hearing was March 15, 2005. (V11, R2031-57). The trial judge followed the jury recommendation and imposed a sentence of death for each of the two murders. He filed detailed written fact findings in support of the death penalty for each murder. (V7, R1308-1318, 1319-1329). In rejecting the cold, calculated, and premeditated aggravating circumstance, the judge stated:

> As to the cold, calculating, premeditated aggravator, the State argued that this aggravator had been established beyond a reasonable doubt on the basis of the following: Defendant is a smart man; Defendant knew he was not going back to Dollar General; Defendant knew the store closing procedures; Defendant knew there was money at Dollar General that evening; Defendant had a handgun with quiet bullets; Defendant had been in the military; Defendant had been to prison; Defendant had to kill witnesses because they knew him. The State's theory may well be accurate as to heightened planning and premeditation. However, while the State demonstrated planning insofar as the robbery was concerned, the Court remains uncertain as to whether the evidence showed that the killing was planned from the beginning, or whether it was necessitated by what happened during the course of the robbery. For example, the evidence showed indications of a struggle that may have prompted the killings. Absent a statement or other evidence that would demonstrate that the killing itself was planned from the beginning, the Court cannot find beyond a reasonable doubt that the killing was committed with the heightened premeditation necessary for C.C.P.

(V11, R2038-39). The arguments the court refers to are included

in the State's Sentencing Memorandum. (V7, R1227-1232).

STATEMENT OF THE FACTS

Janice Schneider was Theodore Teixiera's common law wife. (V28, TT2157-58). She and Teixiera had a fourteen-year-old son, Thomas. Janice had a daughter, Jessica. (V28, TT2159). Teixiera drove a truck for a frozen food business, and Janice worked at the Dollar General store located in Deltona, Florida. (V28, TT2159-60, 2162).

On Friday, October 25, 2002, Teixiera worked as scheduled. During the day, Thomas called his father and asked if he could attend a high school football game that evening. Since Teixiera would still be working at 9:00 that night, Janice was supposed to pick up Thomas. (V28, TT2161-62). Later that evening, Teixiera called Janice to remind her to pick up Thomas. Teixiera also spoke with Janice shortly after 8:00 p.m. when the store closed. They agreed that if she could not pick up Thomas, she was to call Teixiera. (V28, TT2164).

At 10:00 p.m., Teixiera spoke with Jessica, who informed him that Janice had not come home. (V28, TT2165). Jessica had driven by the store at 9:45 p.m. and saw her mother's car in the parking lot. Teixiera assumed Jessica was mistaken and that it was 8:45 p.m. when she saw her mother's car. (V28, TT2166). At 10:36 p.m., Thomas called his father and left a voice mail

message that Janice never came to pick him up at the school. Teixiera picked up Thomas and called 911, "Because if my wife hadn't picked him up by then, something was wrong." (V28, TT2167-69). Janice routinely called Teixiera when she left work. (V28, TT2169). The 911 operator told Teixiera to call the Sheriff department's non-emergency number to report his concerns regarding his wife. (V28 TT2170). He proceeded directly to the Dollar General store where he could see his wife's car in the parking lot and the lights on inside. The front door was locked.[6] (V28 TT2171). Teixiera called the security company's phone number located on the door and requested that the store manager, Daniel Vodhanel, be called. After a few more phone calls, Teixiera was informed the store manager was on his way. (V28 TT2172-73; V29, TT2188-89).

At 11:05 p.m., the store's security company called Vodhanel at home and informed him that something might be wrong at the store. (V29, TT2193). Vodhanel called Dawn's husband and asked if she was home. When told that Dawn had not arrived home, Vodhanel went to the store. (V29, TT2194). Upon arriving, Vodhanel saw Janice's family waiting and the female employees' cars in the parking lot. Vodhanel opened the locked door to the

[6] On previous occasions, Teixiera had gone to the store after it had closed for the evening. Schneider always followed procedure and did not allow anyone in the store. (V29, TT2185-86).

store and he and Teixiera entered. (V29, TT2195). After entering, Vodhanel locked the door from the inside. It takes two different keys to lock the front door whether inside going out or outside coming in. On this particular day, Vodhanel, his assistant Linda Torres, and Janice had keys to the door. (V29, TT2196). Dollar General utilizes a system called "InstaKey Lock" where the locks could be changed if one of the employees loses their keys. No keys had been lost on this day.[7] (V29, TT2198).

When Mr. Vodhanel arrived, he and Teixiera went inside. (V278, R2174). They made a path to the back of the store. Vodhanel did not notice anything out of the ordinary except that the lights and radio were still on. (V29, TT2200). The bathrooms were locked during store hours. (V29, TT2203). Vodhanel walked toward the office while Teixiera walked toward the bathrooms. (V29, TT2206). Teixiera pointed out the employees' purses located by the office door, which were typically kept in a locked cabinet in the front of the store. (V29, TT2206-07). Vodhanel continued walking toward his office. He looked in and saw:

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[7] Vodhanel had been a store manager for Dollar General for 10 years. (V29, TT2188). On October 25, 2002, four employees were scheduled to work: Janice Schneider, Dawniell Beauregard, Carol Hopkins, and Roy McDuffie, a manager-in-training. (V29, TT2191). McDuffie had just started work on Monday and was scheduled to close the store with Schneider, Beauregard and Hopkins. (V29, TT2192, 2193).

> [b]lood on the wall and I saw legs, basically, and it looked like a couple of sets on top of one another, and I turned around, and by then Tex was approaching me, and I told him not to look, but he came past me and he went into the office. And he went all the way in and started screaming, so he came out and we both walked out.

(V29, TT2207). Teixiera and Vodhanel proceeded to the front of the store where Vodhanel called 911.[8] (V29, TT2208).

Documentation for Janice's register for October 25, 2002, indicated she closed her register at approximately 7:30 p.m. Hopkins worked until 8:30 p.m. (V29, TT2223). At the end of the evening, the store's computer printout showed a sales total of $6,413.93.[9] (V29, TT2228). $1,000.00 was kept in the safe for petty cash. In addition, each of four drawers would have $100.00 to start the day, with an extra $600.00 available for change. (V29, TT2238). The deposit report for October 25, 2002, initially indicated the amount of $6,459.18. (V29, TT2240). However, this amount was crossed off and replaced with the amount of $6,414.18. Any discrepancy in the deposit amount would have to be resolved in order to make the deposit and seal the deposit bag. (V29, TT2241). The sales receipts for October 25,

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[8] Inv. Thomas Frazier, Volusia County Sheriff's Office, was the on-call Inv. on October 25, 2002. (V32, R2534, 2535). He responded to a call at the Dollar General store at 12:30 a.m., October 26, 2002. (V32, R2536).

[9] There was $4,946.17 in cash, and $1,467.76 in checks. (V29, R2228).

2002, did not indicate that duct tape was sold. (V29, TT2248). Duct tape is sold at the store but is not an item regularly used by employees. (V29, TT2271, 2273). Scissors and screwdrivers are also sold in the store. (V29, TT2272). Mr. Vodhanel routinely kept scissors, a screwdriver and a box cutter on his desk. (V29, TT2277-78). The store did not sell handguns or ammunition. (V29, TT2278).

After the store is closed for the evening, employees verify that no one is left inside, including the bathrooms and stockroom. The door leading into the stockroom from the sales floor would be locked. Items are replaced on the shelves and the store is cleaned up. (V29, TT2243). Typically, by 9:00 p.m., all employees are finished for the evening. (V29, TT2244). Store policy dictates that all employees leave the store together after closing. (V29, TT2265). It was store policy for the manager to accompany a customer to the restroom, unlock the doors, and wait for the customer. (V29, TT2264). It was possible that a person could hide in between clothing racks, in the store's bathrooms, or in the store's boxes located in the stockroom. (V29, TT2266-67). Vodhanel had never caught anyone hiding in the bathrooms after closing time. (V29, TT2275, 2281). During business hours, the door to the stockroom was always locked. (V29, TT2275). On occasion, customers were told the

bathrooms were not available. (V29, TT2276).

Only three managers at the store had the combination to the safe. Janice had the combination; McDuffie did not. (V29, TT2245, 2246). McDuffie did not have keys to the store nor the security code for the alarm system. (V29, TT2246).

McDuffie was scheduled to start another job the following Monday. Had Vodhanel known this, he would not have allowed McDuffie to help close the store that evening. (V29, TT2246-47). McDuffie's direct supervisor wanted McDuffie to close the store that evening, after McDuffie had attended a Dollar General manager's meeting in Apopka, Florida. (V29, TT2247).

Carol Hopkins, a cashier at Dollar General in October 2002, did not have keys to the store. (V30, TT2300-01). On the day of the murders, she was scheduled to work the closing shift with Dawn and Janice. (V30, TT2306). McDuffie asked Hopkins earlier in the week if the store had any silent alarms, cameras, or panic buttons. (V30, TT2305, 2335). Hopkins informed the store's assistant manager, Linda Torres, about McDuffie's inquiry. (V30, TT2305). The store did not have any security, only an alarm that was activated after the store's closing. (V30, TT2306). Hopkins expressed her concern over the lack of security to store manager Mr. Vodhanel several times. Vodhanel told her "it was up to corporate to do something about it." (V30, TT2371).

During her evening break on October 25, Hopkins saw McDuffie looking at the time sheets. He told her he wanted to make sure he knew how to close the store. (V30, TT2308). At 7:30 p.m., Janice and McDuffie pulled her register and counted the money in the back room. (V30, TT2311). Just prior to the store's 8:00 p.m. closing, a few other customers wandered in. (V30, TT2313, 2314, 2315, 2316). After all the customers left, the store was locked, leaving McDuffie, Janice, Dawn and Hopkins inside. (V30, R22316). The four employees did a "walk through" to ensure no one was left inside. (V30, TT2316). Nobody was in the store, and the stockroom was locked. (V30, TT2317). After the walk through, McDuffie pulled Hopkins' register, the last remaining open register. McDuffie and Hopkins went to the back room and counted the money. (V30, TT2318, 2319). Hopkins did not have access to the safe. She did not know whether McDuffie did, but "He said he didn't." (V30, TT2320).

While Hopkins and Janice replaced items on the shelves, Dawn remained with McDuffie. (V30, TT2320-21). Janice and Hopkins continually walked from one end of the store to the other, and side to side. There were no other individuals in the store other than the employees. (V30, TT2321, 2322).

The money was locked in the safe, the employees left the office, and the door was locked. (V30, TT2324). The four

employees proceeded to the front of the store for a "final reading," then Hopkins clocked out. (V30, TT2324-25). She was not aware of any discrepancy in the money count when she left the store. (V30, TT2369).

Janice unlocked the door, let Hopkins out, and relocked the door. (V30, TT2326, 2327). The two male customers that had bought the sodas just prior to the store's closing were sitting on a bench outside the store. None of the employees would ever let anyone inside the store, not even family members, after it had closed. (V30, TT2328-29).

Hopkins was awakened by police in the early morning hours and informed that something had happened at the store. (V30, TT2329). Upon arriving, Janice's husband informed her, "they were all dead." At that point, she believed Janice, Dawn and McDuffie were all deceased. (V30, TT2330). Hopkins proceeded to the police station where she spoke with Inv. Willis. (V30, TT2330). Later that evening, Hopkins learned that McDuffie was alive and asked her husband to call police. (V30, TT2331). Janice would never have let McDuffie leave the store ahead of them; "three together, we leave together. No one ever goes home if there's three ... no matter what." (V30, TT2332). However, when there are four employees, it would not be contrary to store procedure for one to leave early. (V30, 2332, 2368).

Hopkins never used duct tape at the store nor did she see other employees use the tape. (V30, TT2333). After closing, Hopkins saw Janice move their purses (Janice's and Dawn's) near the store bags on register one, near the front of the store. (V30, TT2327, 2333). Hopkins did not notice blood in the storeroom, on the floor, or on the door handle to the bathroom when she left. (V28, TT2372). On the day of the murders, Dawn was the only employee with keys to the store. (V30, TT2373). The bathrooms were always locked although a key was hanging in close proximity. (V30, TT2372). Hopkins did not recall whether bathrooms were checked during the walk through at closing time that night. (V30, TT2373).

In the weeks prior to the murders, Hopkins had seen "suspicious black males" hanging around the store. (V30, TT2373-74). When Hopkins exited the store October 25, she told Janice and Dawn to call 911 if there was any trouble. (V30, TT2374).

Harry Southwell and Angel Garcia are good friends. They often hang out at Garcia's home directly across the street from the Dollar General store. (V31, TT2395, 2397). Southwell and Garcia, who were together on the evening of October 25, 2002, bought sandwiches at a Subway shop, rented a video, and went to the liquor store. (V31, TT2397). They also bought some sodas at the Dollar General store right around closing time. (V31,

TT2398). Although Southwell could not identify McDuffie as the gentleman who let Southwell and Garcia into the store, he said the gentleman was an African-American employee. (V31, TT2398). Southwell did not see any other customers in the store during the time he was there. (V31, TT2400). Angel Garcia confirmed that he and Southwell went to the store on October 25, 2002, to buy sodas at closing time. (V31, TT2404-05). He recognized McDuffie as the person who let them into the store. (V31, TT2406-07). Garcia spoke with law enforcement after learning about the murders. (V31, TT2409). Both Southwell and Garcia said they did not sit outside the store after making their purchase. They bought the sodas and left the premises. (V31, TT 2403, 2410).

After a proffer, attorney David Pedersen, testified that his parents rented a condominium to Roy McDuffie in 2002. (V31, TT2439-40). Due to non-payment of rent, Pedersen initiated an eviction action against McDuffie on his parents' behalf. (V31, TT2440-41). McDuffie was served with a three-day eviction notice on October 11, 2002. (V31, TT2442). On October 16, 2002, Pedersen filed a complaint with the clerk's office regarding the eviction proceedings. (V31, TT2443-44). Shortly after the complaint was filed, Pedersen received a voice mail message at his work, "an extremely hard, hardcore message, just a real

nasty message" in which McDuffie told Pedersen "he hoped myself and my father would go to Baltimore, Maryland, and get our asses shot off. At that time, the sniper was there." (V31, TT2445-46). McDuffie owed Pedersen's parents $1800.00. (V31, TT2446). Pedersen contacted the police about the phone message. The police came to the office but did nothing. (V31, TT2447). A few weeks later, Pedersen deleted the message. (V31, TT2448).

Linda Phillips worked with Janice and Dawn at the Dollar General store in 2002. Roy McDuffie was the manager-in-training. (V31, TT2453-54). Phillips worked with McDuffie three times during the week of the murders but never closed the store with him. Phillips did not have a key to the store. She was a cashier. (V31, TT2454). Phillips worked the morning shift on October 25, 2002, and left around 2:00 p.m. (V31, TT2454-55). Nothing unusual happened that day. She did not use duct tape for any purpose nor did she see any of the other employees use it. (V31, TT2455).

Linda Torres, an assistant manager at the Dollar General store until October 25, 2002,[10] had keys to the store. (V31, TT2456-57). Torres had switched shifts with Janice that day so she could to pick up her husband at the airport. (V31, TT2457). She left the store at 2:00 p.m. when Janice arrived. Torres had

[10] Torres resigned after the murders. (V31, R2461).

her set of store keys with her when she left the store. (V31, TT2458). Torres worked with McDuffie during the days prior to October 25, 2002, and had closed the store with him. (V31, TT2460). McDuffie was pleasant and Torres felt safe around him. (V31, TT2460-61). Although duct tape was sold in the store, it was not used as part of employment. (V31, TT2461). Torres was not aware that McDuffie had accepted employment with Coca-Cola until Janice told her on the afternoon of October 25th. Torres left the store at 2:00 p.m. on October 25, 2002, prior to the start of McDuffie's shift. (V31, TT2462).

Alex Matias went to the Winn Dixie store located in the Dollar General store plaza at 9:25 p.m. on October 25, 2002. (Vol32, TT2467, 2468). While he stood by his car, he noticed the lights on inside the Dollar General store, which was unusual for that time of night. (V32, TT2470-71). Matias knew this was unusual because he had previously worked at the Dollar General and was very familiar with the store's closing procedures. (V32, TT2471). At approximately 9:26 p.m.,[11] Matias noticed a black male exit the store, lock the store's door, walk over to a car parked in front of Matias' car, go back to the store, unlock the door, and re-enter the store. (V32, TT2472). Matias could not see what the black male was doing at the car. (V32, TT2473). The

[11] Matias received a cell phone call during this time (V32, TT2475).

same black male exited the store for a second time, using the same procedures of unlocking the door, exiting, re-locking the store's door behind him. (V31, TT2474). The black male was wearing slacks with a collared shirt, but Matias could not identify the color. Matias did not see this person again. (V32, TT2475).

The following morning, Matias learned there had been two murders committed at the Dollar General store. He called the Tips Crime Line and gave information regarding the male he saw exiting and re-entering the store the previous evening. Subsequent to that phone call, he spoke with police. (V32, TT2476). Matias helped prepare a composite drawing of the person he saw the night of October 25, 2002. (V32, TT2478). After McDuffie was arrested, Matias saw him on television and recognized him as the black male he saw exiting the store on October 25, 2002. (V32, TT2480, 2481).

Matias and Crystal Beauregard, Dawn's sister, were good friends in middle school. (V32, TT2484). When Matias first spoke with police, he did not recognize McDuffie from any photographs he was shown. (V32, TT24900). He recognized McDuffie five months later when he saw McDuffie's picture on television. (V32, TT2492, 2494). Matias wrote a letter dated April 23, 2003, requesting a reward. (V39, R3361). He received the reward from

Dollar General on July 15, 2003. (V32, 2497; V39, TT3360). If Matias did not identify McDuffie in court, he stood to lose the $10,000.00 reward. (V32, TT2497). However, he did not testify at trial just to keep the money. (V32, TT2503).

Olivia Sousa was working at Pecos Grill in the same plaza as Dollar General on October 25, 2002. (V32, TT2505). At approximately 9:30 p.m. that evening, Sousa and her family went to the Winn Dixie store located next to the Dollar store. (V32, TT2507). When they walked past the Dollar General store, she noticed the lights on in the store, which was very unusual since Dollar General closed at 8:00 p.m. (V25, TT2507). The family proceeded to Winn Dixie, made a purchase, and walked back to the restaurant right by the Dollar General store. (V32, TT2509). She noticed, "a black gentleman inside the store walking towards the back of the store halfway ... I was very curious then what he was doing in there." (V32, TT2509-10). The man was wearing a black shirt. (V32, TT2514, 2517). Ms. Sousa had been in the Dollar General store earlier that week and noticed a black male employee standing close to the store manager, Dan Vodhanel.[12] On a different day during the same week, Sousa saw the same black male helping someone out the door of the store. (V32, TT2510). She had never seen a black person employed at that Dollar

[12] Mr. Vodhanel testified that McDuffie was the only African-American male that worked at that Dollar General. (V41, TT3439).

General store. (V32, R 2511). She could not tell if the employee she saw earlier in the week was the same person she saw in the store the night of October 25, 2002. However, the build and physical characteristics were the same. She spoke with police the Monday following the murders. (V32 TT2512).

At 3:30 a.m. on October 26, 2002, Inv. Frazier went to McDuffies' home to see if Roy McDuffie was there. By then, police knew additional employees had been working at the store the previous night and were checking to see if McDuffie was dead or alive. (V31, TT2540-41, 2542). Inv. Frazier did not suspect McDuffie had been involved in the murders and did not treat him as a suspect. (V32, TT2541). Inv. Frazier and Inv. Moore spoke with McDuffie and tape-recorded their conversation. Prior to the recorded statement, Inv. Frazier did not tell McDuffie that the two femal store employees had been murdered. McDuffie was cooperative and gave Inv. Frazier a statement.[13] (V32, TT2541-42).

During the taped statement, McDuffie told Inv. Frazier he was in training at the Deltona Dollar General store. At the end of the shift on October 25, 2002, merchandise displayed outside the store was brought in and Carol Hopkins made a "last call" for customers to make their purchases. Dawn, in training to be

[13] McDuffie's statement was published to the jury. (V32, TT2545-2569).

the "third key," and McDuffie completed the paperwork for the evening. (V31, TT2546-47). Each register was closed, reports were run, and McDuffie counted the checks while Dawn counted the cash. McDuffie's accounting for the checks "did not come out right." Janice and Carol Hopkins were straightening up the front of the store. (V32, TT2547). Due to the discrepancy in the money count, reports were re-run but Carol Hopkins was told she could go home. (V32, TT2548). McDuffie said, "I was bitchin' about going to the Edgewater and Evans game. So once we did that and I said well, we need to hurry up because I got my wife sitting in the car - - " At this time it was 8:45 p.m. (V32, TT2548). McDuffie recalled Janice telling the employees to hurry up because she had to pick up her son at a high school football game. (V32, TT2550). Since the money count still did not balance properly, McDuffie said, "basically they let me go because my wife was sitting in the parking lot by herself. So Dawn stayed in the back, Janice walked me up front, opened the door, and I was out." (V32, TT2548). Janice locked the door behind him because he heard the "click" of the lock. (V32, TT2550). He did not notice anything unusual.

McDuffie was at the Dollar General store for only 2 hours that night, not the entire evening shift. (V32, TT2551). During this time, Janice told McDuffie there was a customer in the

store “a black kid” who had made her nervous on a previous occasion and had stolen T-shirts. She asked McDuffie to come out onto the sales floor. When the customer saw McDuffie, he got in line and paid for his items and left. (V32, TT2551). Two Hispanic men came in at approximately 8:10 p.m., bought sodas, and left. (V32, TT2553). McDuffie left a few minutes after Carol Hopkins clocked out for the evening. (V32, TT2558).

Initially, McDuffie said, “I can’t believe they got robbed.” (V32, TT2550). When Inv. Frazier told McDuffie that Janice and Dawn had been murdered, McDuffie said, “Somebody killed them f---ing people over that little bit of money?” (V32, TT2559). McDuffie described the last few customers to Inv. Frazier. (V32, TT2562-63, 2565).

McDuffie did not appear nervous during the interview and answered all of Inv. Frazier’s questions. (V33, TT2577). Inv. Frazier did not notice any injuries or blood on McDuffie. He did not ask to look at the clothing McDuffie was wearing the previous night nor did he look for any weapons or money in the home. Inv. Frazier did not look at McDuffie’s vehicle or ask him to submit to a gunshot residue test. (V33, TT2579). McDuffie’s wife, Troy, joined McDuffie during the interview with Inv. Frazier and corroborated what McDuffie told him. (V33, TT2580).

McDuffie gave a second taped statement on October 29, 2002.

(V33, R2586-2704). McDuffie had dropped off his wife, Troy, at work at 7:00 a.m. He went to a training meeting in Apopka, Florida, at 12:00 p.m. The meeting lasted until 5:00 p.m. McDuffie picked his wife up from her workplace at 5:30 p.m. and they proceeded to the Dollar General store, arriving at 6:20 p.m. (V33, TT2603-04). Troy used the store's phone to call Aaron's rental. She told the manager that a monthly payment due on a leased television would be put in the drop box that evening. (V33, TT2614-15, 2616). Dawn and McDuffie took Janice's register to the back office to count the money. (V33, TT2620).

Dawn opened the safe to put in the "pulls" (money pulled from the register during the day) while McDuffie counted out $100 starting capital for the next day. (V333, TT2627). While McDuffie was doing this, Janice "ran back" and told McDuffie about a customer that she was afraid of. (V33, TT2629). McDuffie and Dawn stopped what they were doing, put all the money in the safe, and left the office. (V33, TT2630). They each went down a different aisle. (V33, TT2631).

After the customer left, Dawn and McDuffie returned to the office to finish closing out the register drawer. (V33, TT2635). They closed out Dawn's register. (V33, TT2639). At approximately 7:55 P.M., Troy said she was going to the Winn Dixie next door to purchase a money order. Janice yelled out that the store was

closing in 5 minutes. (V33, TT2644). Two male Hispanics entered to buy sodas. (V33, TT2648-49). Carol Hopkins checked them out through her register. Troy was sitting in the car. (V33, TT2657).

McDuffie and Dawn removed Carol Hopkins' register and walked it back to the office. (V33, TT2658). Dawn counted the money while McDuffie prepared the $100 for the start of the next day. (V33, TT2659). Eventually all the money was put in the deposit bags and returned to the safe. McDuffie said the door to the room which contained the safe was not closed or locked. (V33, TT2663). McDuffie and Dawn walked to the front of the store to prepare final reports. Hopkins was let out of the store to go home. (V33, TT2664). McDuffie and Dawn returned to the back room to add up the checks and cash. The count was off by approximately $50.00. (V33, TT2669). McDuffie told Janice and Dawn he wanted to leave and to get to a high school football game in Orlando. Janice said she had to leave to pick up her son at a local high school game. (V33, TT2673).

At 8:45 P.M., Janice told McDuffie he could leave. She walked him to the front of the store and let him out. (V33, TT2675). McDuffie did not leave the store and then go back. He noticed a male standing by a white pickup truck parked near his own vehicle. (V33, TT2598099, 2678). After McDuffie got into his

car, he and his wife went to Aaron's Rental to drop off a payment, arriving at 9:35 P.M. (V33, TT2682, 2685). They proceed to McDonald's which is 15 minutes from his house, arriving at 9:45 P.M. (V33, TT2686, 2687). After eating inside, the McDuffies left and arrived home at 10:20 P.M. (V33, TT2687). McDuffie called Ted Rivers at 10:45 P.M. to see how the football game turned out. McDuffie said Rivers had not gone to the game. (V33, TT2688). McDuffie and his wife went to bed. (V33, TT2689).

McDuffie did not have keys to the store nor did he have the safe or alarm combinations. (V33, TT2608). McDuffie was trained on various store procedures throughout the week. (V33, TT2609-2613).

McDuffie only worked at the Dollar General for one week. He was hired by Coca-Cola on the Tuesday the week of the murders. (V33, TT2697). McDuffie enjoyed working at Dollar General but his wife did not like it. (V33, TT2701). He said that Torres knew he had accepted a job at Coca-Cola. (V33, TT2703).

Christopher Gullion, manager at Aaron's Sales and Lease, identified the McDuffies as customers. (V34, TT2710-11). On October 25, 2002, Troy made a $289.79 payment on a 43-inch television. This included late fees. (V34, TT2711, 2712). When Gullion checked the payment drop box at 9:25 P.M., there were no payments inside. (V34, TT2714). After reviewing a video

surveillance tape of the Aaron store's parking lot, Gullion said cars entered the lot at 10:30 and 11:00 P.M. (V33, TT2720).

Inv. David Dewees, Volusia County Sheriff's Office, works in the crime scene unit which is responsible for collection, documentation, and preservation of physical evidence from crime scenes. (V34, TT2725, 2726). On October 25, 2002, Dewees lead the team that processed the Dollar General store. (V34, TT2726, 2727). After a briefing, the team was responsible for videotaping and photographing the scene. (V34, TT2727). With Dewees narrating, the videotape was published to the jury. (V34, TT2729-2732).

When Dewees entered the Dollar store, he saw the victims on the floor. Dawn's mouth was duct-taped. (V34, TT2798, State Exhibits 99, 162). There was a gunshot wound to the back of her head and her throat was slit (State Exhibit 162). Her hands were taped behind her back, and her legs were duct-taped. (V35, TT2805, 2809; State Exhibits 102,162-165). From the way Dawn's hands were taped, it appeared she had been compliant. (V35, TT2927). There was blood spatter on the wall above her and the file cabinets. (V35, TT2813). What appeared to be impressions of hair dragging in blood were on the wall. (V35, TT2804). Dawn had urinated on herself, probably when she was upright because the stain ran all the way down her leg. (V35, TT2946). There was

no blood on the top of her shoes, so she was not standing when cut and shot. (V35, TT2947).

Janice had a gunshot wound to her right temple and right abdomen. (V35, TT2815; State Exhibit 163). There were lacerations on her face and neck. (V35, TT2928,State Exhibit 163). Scissors were on the floor between her legs and right below her hands. (V35, TT2818, State Exhibit 120, 122). There was no blood on the bottom of her left shoe, but a small amount of blood on her right shoe. (V35, TT280, 2822, State Exhibit 123, 126). Dewees could see a gunshot wound to Janice's abdomen. (V34, TT2731). Janice had cuts on her face and neck. (V35, TT2928). She had probably been holding the scissors that were near her hand on the floor. (V35, TT2934).

Scissors and a screwdriver, both with blood on them, were on the desk. (V34, TT2331; V35, TT2841; State Exhibits 92, 154). There were no prints of value on the screwdriver. (V35, TT2841, 2863).

The back door was secured with a lockbar and chain, and there were no signs of tampering. (V34, TT2732, State Exhibit 57). Neither were there pry marks on the front door nor signs of tampering with the lock. (V34, TT2737). There was blood on a box near the storeroom door. A Chex cola can, a Diet Pepsi

bottle[14], and box cutter were also on the box. (V34, TT2760, 2778, V35, TT2909; State Exhibit 78). The door handle to the south bathroom had a small area of blood. There was a blood drop on the floor inside the bathroom. Both blood samples came from an unknown female. (V34, TT2765; V35, TT2866-67; State Exhibits 56).

A Dollar store duct tape wrapper was in a trash can near the door to the storeroom. There were no prints on the wrapper. (V34, TT2775-76; V35, TT2838; State Exhibits 72-75, 149). Two purses were on a box near the entrance to the office. One purse contained wadded paper towels with blood on them. (V34, TT2778; V35, TT2840; State Exhibit 77). One paper towel held a box cutter blade and clump of hair. (V34, R2781; V35, R2873). Blood on the cardboard box contained the DNA of Janice. (V40, TT3433). Janice's DNA was also on the knife blades in the paper towels, on the paper towels, on the screwdriver on the desk, and in "area 19" and "area 31" on the floor of the office. (V40, TT3431-3435). Dawniell's DNA was in blood found on the utility knife blade, the scissors on the floor, and in "area 8" and "area 13." (V40, TT3431, 3433, 3435).

Inv. Dewees did not see any signs of struggle on the desk in the office where the victims were located. (V34, TT2727, 2793). However, there was blood all over the office cabinet and floor

[14] McDuffie's DNA was on the Diet Pepsi bottle. (V40, TT3439).

where the victims were laying. (V34, TT2797, State Exhibit 98). Dewees collected duct tape, scissors, and a screwdriver set from the Dollar store to compare to the items used in the homicides. (V35, TT2831). The only duct tape used in the store was by a construction company. There was no other duct tape used in the store. (V35, TT2844).

The calculator on the desk showed $6,414.18. There was no blood on the calculator. (V35, TT2825, State Exhibit 131). There were receipts and logs on the desk. (V35, TT2826, State Exhibit 132). The safe was unlocked but closed. (V35, TT2833).

Inv. Dewees attended the autopsies of both victims and collected evidence. (V35, TT2827). The duct tape from Dawn's hands, feet and mouth was sent to FDLE. (V35, TT2828-2830, State Exhibits 135-137). The exhibits were designated as follows:

Q1 – duct tape on Dawn's mouth
Q2 – duct tape on Dawn's feet
Q3 – duct tape on Dawn's hands

(V40, TT3406). McDuffie's partial palm print was on Q3. (V40, TT3399, 3481). Q3 was cut from Dawn's hands by the medical examiner, but the FDLE crime lab analyst made "fracture matches" and pieced the sections back together. (V40, TT3476-3497). Q3 consisted of 15 pieces, 12 of which could be "fracture matched" back together to form a piece 79 inches long. (V40, TT3482, 3496; State Exhibit 193). The closest portion of the palm print

was 30 inches from one end of the Q3 duct tape and 41¾ inches from the other. (V40, TT3497). The roll of tape was 17 inches in circumference. (V40, TT3467, 3498). Therefore, McDuffie's palm print was not on the outside of a roll of tape. The print was approximately two layers of tape inside the 30 inch section, and 2½ layers inside the 41¾ inch section. (V40, TT3500). None of the pieces had manufacturer ends, but even using best-case scenario for McDuffie and using the 17-inch circumference, the print was placed on the tape after the roll was unwound. (V40, TT3498-3500).[15] The duct tape used to tape Dawn's hands, feet, and wrists was consistent with the tape sold at Dollar General. (V40, TT3470).

One bullet was collected from Janice's head and another from her abdomen. One bullet was collected from Dawn's head. (V35, TT2834, 2837; State Exhibits 144, 147, 148). FDLE analyst Omar Felix examined the three bullets and testified they were all .22 long rifle bullets which only one manufacturer, Aquila, makes. (V40, TT3417, 3419). The bullets are named .22-SSS for "sniper subsonic." (V40, TT3419). The bullet travels slower than the speed of sound and is quieter than other bullets because it does not "crack." (V40, TT3420).

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[15] FDLE analyzed the different sections of tape: Q1, Q2, and Q3; however, the most significant testimony was that regarding Q3 which contained McDuffie's palm print. (V40, TT3470-77; State Exhibit 193).

Troy McDuffie was interviewed on October 29, 2002, December 17, 2002, and April 28, 2003. She gave a deposition on December 29, 2004. (V35, TT3099). At trial, she testified that on October 25, 2002, she worked from 7:00 a.m. until 3:00 p.m. She had to wait for McDuffie to pick her up because they only had one vehicle. (V37, TT3138). Their other car was repossessed. (V37, TT3139). Troy and Roy arrived at the Dollar store after 5:00 p.m. McDuffie said it was his last day at Dollar and he had to close the store. (V37, TT3142).

Troy called Aaron's Rental about paying for an entertainment center and asked whether they had a drop box. (V37, TT3146). She then went next door to Winn Dixie to purchase a money order for $289.79. (V37, TT3149). She moved the car closer to the Dollar store, reclined the passenger seat, and relaxed while waiting for McDuffie. (V37, TT3150; V38, TT3230). She was parked next to a brown van. (V38, TT3231). The parking lot was full and people were walking around. (V37, TT3151). Troy told the investigator on October 29 that she waited in the car "for awhile."(V37, TT3152). At trial, Troy said it didn't seem to be very long. She had to wait 2½ hours for McDuffie to pick her up from work, so she was tired. (V37, TT3153). McDuffie came out of the Dollar store to check on her, then went back in. (V37, TT3154). He was wearing a black shirt and khaki pants. (V38,

TT3234). Troy testified she did not see blood on him, he did not appear disheveled, and he was not carrying anything. (V38, TT3234). McDuffie has a foot condition that causes the top of his foot to swell if he undertakes strenuous physical exercise (V38, TT3243). It does not bother him to coach football. (V38, TT3275).

McDuffie and Troy left the Dollar store and went to Aaron's Rental, then to McDonald's. Troy did not know what time it was. (V37, TT3157). McDuffie had missed a football game and was going to call Ted Rivers. (V38, TT3236). When they got home, Troy went to bed. The police woke them in the middle of the night. She and McDuffie both gave statements to the police. (V38, TT3245).

The day after the murders, Saturday, the McDuffies went to Bradenton after Troy had her hair done and Roy coached a midget football game. (V37, TT3159; V38, TT3248). Troy testified she did not buy any money orders or wire any money. (V37, TT3160). After the prosecutor confronted her with a Western Union receipt, Troy remembered she sent $50.00 to her son. (V37, TT3161, State Exhibit 172). They returned to Orlando Sunday, and McDuffie began working for the Coca Cola Company on Monday. (V37, TT3163; V38, TT3257). On Tuesday, October 29, Troy and Roy went to the sheriff's station and gave statements. (V38,

TT3261). The search warrant was served November 5, and McDuffie was arrested on December 17, 2002. (V38, TT3260-61).

Three polo shorts were seized at the McDuffie residence pursuant to the search warrant: a dark blue striped one, a royal blue one, and a bright blue one. (V38, TT3293, State Exhibits 176-178). None of the shirts in the house matched the shirt McDuffie was wearing in the McDonald's video the night of the murders. (V38, TT3295). There was no clothing in McDuffie's car when it was searched (V38, TT3300).

Inv. Willis provided a list of phone calls from the McDuffie house. Although McDuffie said in his statement that he called Ted Rivers at 10:50 p.m. on October 25, there was no call on his phone records. (V39, TT3339). There was a call checking voice mail at the McDuffie residence at 10:56 p.m. (V39, TT3346). There was a phone call from the McDuffie house to Rivers at 1:19 a.m. on October 26. (V39, TT3341, State Exhibit 180). Phone records showed a call to David Pederson on October 22 at 7:40 a.m. (V39, TT3341). There was a phone call on October 26 to Chuck Fowler, Dollar General supervisor, at 1:15 p.m. (V39, TT3344). A call from the McDuffie house at 1:22 p.m. was to Scott Sturgis, landlord. (V39, TT3345).

A timeline for October 25 prepared by Inv. Willis showed:

8:09 p.m. Carol Hopkins closes register
8:38 p.m. End of day report
10:30 p.m. Vehicle arrives at Aaron's Rental

10:36 p.m. McDuffie at McDonald's (shown on videotape)
10:56 p.m. McDuffie checks voice mail

(V39, TT3348). McDuffie said he left Dollar General at 8:50 p.m., arrived at Aaron's Rental at 9:30-9:45 p.m., arrived at McDonald's at 9:50-10:05 p.m., and was home by 10:15-10:20 p.m. (V39, TT3351-52).[16] It takes 41 minutes to travel by car from the Dollar General to Aaron's rental. (V39, TT3354).

FDLE fingerprint examiner David Perry examined the duct tape recovered from Dawn's body. There were no prints of value on Q-1, the tape around Dawn's feet. (V39, TT3379-80; State Exhibit 137). Likewise, there were no prints of value on Q-2, the tape over Dawn's mouth. (V39, TT3381, State Exhibit 136). Perry found one palm print on Q-3, the tape around Dawn's hands. (V39, TT3382, State Exhibit 135). The palm print matched McDuffie. (V39, TT3391).

Financial motivation. McDuffie filled out a rental application on October 2, 2002, for a home on Mardell Court in Orlando. (V36, TT2971). The application represented that McDuffie had lived at 4698 Sussex Terrace and worked at Lockheed Martin for two years. (V36, TT2974-75, State Exhibit 159). The

[16] McDuffie's timeline would make him absent from the Dollar General when Alex Matias and Mrs. Sousa saw him there at appx. 9:30 p.m.

application listed Helen Hubbard[17] as his landlord. (V36, TT2992). McDuffie said he was in a rush to move into the house because he was taking care of two children who had been orphaned and needed to get them in a good school district. (V36, TT2993). The rent for the Mardell Court house was $1350 per month, but the landlord, Scott Sturgis, agreed to pro-rate the rent to $600 for October. (V36, TT2993). McDuffie paid Sturgis $500 cash on October 14. The security deposit of $1350 plus the additional $100 for the pro-rated rent was due on October 22. (V36, TT2994). On October 23, McDuffie told Sturgis he did not have the security deposit and rent. (V36, TT2995). Sturgis picked up three money orders in the amount of $1450 on October 27. (V36, TT2996, State Exhibits 156-58).

Troy McDuffie worked as a nurse at Adventist Care Center and was paid bi-weekly. (V37, TT3128; V38, TT3216). She was paid $706.24 on October 10, 2002, and $675.27 on October 24, 2002.[18] (V37, TT3127). The paycheck following October 24 would have been November 1. (V37, TT3129).

Troy did not know they were evicted from the Sussex Road house. Peter Pedersen was the landlord at the Sussex house, and

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[17] It was subsequently revealed that Helen Hubbard is his mother-in-law.

[18] Troy earned $28,164 on 2002, and McDuffie earned $26,733 (V37, TT3190).

David Pederson was Peter's son. (V37, TT3136). Troy did not know the amount of rent at the Mardell Court house. McDuffie told her it was $700.00. (V37, TT3132). The phone number at that residence was 407-290-9929. (V37, TT3133). There had been no tragedy after which they took in two children. (V37, TT3135).

McDuffie only worked for Dollar General from Monday, October 21, to Friday, October 25. Before that, he had been unemployed for over a month. (V37, TT3166). During 2002, McDuffie had six or seven different employers. (V37, TT3167).

McDuffie was responsible for the rent, and both he and Troy made car payments. (V37, TT3167, 3169). Troy paid the utilities phone and Aaron's Rental. They both paid for food. McDuffie paid for his credit card. (V37, TT3169). They kept their money separate and did not know what each other was paid. (V37, TT3170). The only car they had on October 25 was a 2002 Chevy Cavalier. (V37, TT3170-71). They paid $433.57 per month on the loan. (V37, TT3171). Orlando Utilities Commission ("OUC") was paid $162.00 for water in October, 2002. (V37, TT3174). McDuffie wrote a $320.00 check for the cable bill on October 12, but the check bounced because the checking account was closed. (V37, TT3177-78, State Exhibit 173). The McDuffies did not have a checking account. (V37, TT3176). They were receiving phone calls from creditors. (V37, TT3184-85). McDuffie was not paying

child support, which caused his driver's license to be suspended. Troy gave him $160.00 so he could reinstate his license. (V37, TT3185).

Troy was aware McDuffie had the rent money for the Mardell Court house on October 26 because he called the landlord to pick it up. Troy testified at trial she thought the money came from family and friends who were sending money; however, in her December 17 deposition, she said she did not know where the money came from. (V37, TT3187). They borrowed $2,000 from Troy's father on October 17, 2002, and $500 from a friend. (V37, TT3201). They borrowed $500 from one of McDuffie's brothers, and $250 from another. (V37, TT3202). McDuffie's stepfather gave them $500 in October. The total amount of the loans was $3,750. (V37, TT3203). Troy had no personal knowledge of any of the loans except the one from her father. However, McDuffie told her about the loaned monies. (V38, TT3262). In Troy's December 17 statement, she told Inv. Willis that she and Roy did not borrow money because they did not need it. (V38, TT3271).

Inv. Willis summarized the sequence of money orders purchased by McDuffie shortly after the murders. A videotape showed McDuffie purchasing $1450 worth of money orders at a Texaco in Orlando at 8:02 a.m. on October 26, the day after the murders. He paid cash. (V39, TT3321; State Exhibit 159). The

money orders were recovered from Scott Sturgis. (V39, TT3320). McDuffie purchased a $350 money order at 1:00 p.m. on November 6 at a Circle K on Silver Star Road. (V39, TT3330-31; State Exhibit 157). He later purchased a $500 money order at a 7-11 store on Conway Road at 4:07 p.m.[19] (V39, TT3322; State Exhibits 158, 179). At 4:19 p.m. he purchased a second $500 money order from a different 7-11 store a mile away. (V39, TT3328; State Exhibit 156).[20]

Inv. Willis detailed McDuffie's debts. McDuffie was unemployed between September 16 and October 21, 2002, when he started with Dollar General. (V39, TT3332). There was a child support judgment against him for $11,573.00. The $453.57 car payment for the Chevy Cavalier was due October 22, as was the utilities payment to OUC. McDuffie was $547.10 in arrears with OUC. (V39, TT3333). He owed Time Warner $1343.37 for the Sussex Road home and $126.73 for the Mardell Court home. A rent payment of $1450.00 was due October 26. The next rent payment of $1350.00 was due November 6. There was a Ford Motor Company judgment against him for $8,351.86. He still owed $1,849.00 for the Sussex Drive rent. (V39, TT3334). The $289.79 Aaron's Rental

[19] There is a time discrepancy of five minutes between the videotape timer and the money order timer. (V39, TT3326).

[20] The total of the November 6 money orders is $1350.00, the amount of rent due for the Mardell Court home.

bill was due October 25. McDuffie had a credit card with a $250.00 limit, but his balance was $573.62 on October 25. (V39, TT3335-36). He had not been making payments on the credit card, and the collection agency for the card, Applied Card Systems, had been calling him. (V39, TT3336, 3338-39, State Exhibit 180).

Troy had closed her bank account in January 2002. (V39, TT3373). Roy had $6.62 in his bank account. (V39, TT3374).

Medical Examiner testimony. Dr. Beaver, chief medical examiner for Volusia County, conducted the autopsies on Dawn and Janice.[21] He was qualified as an expert in forensic pathology. (V36, TT3000). He removed duct tape from Dawn's hands, mouth and ankles. (V36, TT3005). He was very careful removing the tape because he knows that duct tape is "good for getting fingerprints." (V36, TT3010, 3011). The duct tape around Dawn's ankles had already been cut when they reached the medical examiner. This was unusual because the body is not supposed to be touched by anyone until it reaches the medical examiner. (V36, TT3036).

Dawn's hands were taped behind her back with the "left hand clenching the right wrist." ((V36, TT3011). Before the duct tape was removed, marks were made so it could be reconstructed

[21] Dawn, 27, was 5'7" tall and weighed 124 pounds (V36, TT3032, 3035). Janice, 39, was 5'9" tall and weighed 201 pounds (V36, TT3031).

exactly where the duct tape was. Photographs document every stage of the tape removal. (V36, TT3011-13). There was no blood on the palms of Dawn's hands where they were clenched. (V36, TT3013).

Dawn sustained numerous sharp force injuries. (V36, TT3049). There was a series of incised wounds through the skin of the neck which caused hemorrhaging. (V36, TT3015). There was one superficial incised wound along the neck "then a series of incised wounds" which formed "together kind of a large, gaping wound." There were actually distinct wounds with individual starting and ending points which created one large wound. (V36, TT3017). Dawn would not be dead after the slashes to the neck. It would take "perhaps hours to days" to die from the neck wounds. (V36, TT3049). When a major neurovascular structure is cut, death results "pretty quickly." (V36, TT3018). However, in Dawn's case the wound went through the muscle but not the jugular vein or carotid artery. The wounds bled "quite profusely" but were not fatal. (V36, TT3017, 3020). The instrument used would have been sharp because it cut through the skin rather than bluntly tearing the skin. (V36, TT3021). A box cutter could have caused the wounds. (V36, TT3022). There were also three superficial wounds, either abrasions or incised wounds, on the lower part of the neck and chest. (V36, TT3019).

There was one gunshot wound to Dawn's head which would be immediately fatal. Dawn would have lost consciousness immediately and blood pressure would have fallen to zero in a short period of time. When blood pressure falls to zero, there is no hemorrhage. Therefore, the stab wounds had to have been made before the shooting. (V36, TT3021). There was "active hemorrhage" involved in Dawn's neck wounds. (V36, TT3023).

Dawn was shot in the head at close range. The gunpowder residue around the wound indicated the gun barrel was "either in contact with the skin or very close to it." (V36, TT3026). Dr. Beaver removed two bullet fragments from Dawn's head. (V36, TT3028-29, State Exhibit 148). Given the plane of the bullet wound, Dawn was shot from behind. (V36, TT3031).

Janice sustained numerous sharp force injuries on the left side of her neck. The stab wounds were not fatal. (V36, TT3060). Janice was alive when the sharp force injuries were inflicted. (V36, TT3065). There was hemorrhaging under the skin. (V36, TT3064). This shows there was blood flowing inside the skin, resulting in discoloration. Blow flow indicates blood pressure. (V36, TT3077). The sharp force injuries could be from the same instrument that was used on Dawn, although Janice's injuries were more ragged. (V36, TT3078). A screwdriver would

not have made Janice's stab wounds, but a box cutter or scissors may have. (V36, TT3079).

There were two gunshot wounds: one to the right "flank" or abdomen, and a second to the head. The shot to the right flank was at close range. (V36, TT3060). The direction was from right to left and slightly front to back. The shot angled slightly upward. The abdominal wound could be fatal, but it would take 20 to 30 minutes. Janice would go into shock after 15 to 20 seconds. (V36, TT3085). The direction of the gunshot wound above Janice's right ear was from right to left. (V36, TT3083). Since the gun was small, the wounds could be contact wounds. (V36, TT3070).

The wounds to Janice's neck occurred before the gunshot wounds. In Dr. Beaver's opinion, the gunshot to the abdomen occurred before the shot to the head. There would be no reason to shoot Janice in the abdomen after she was shot in the head. (V36, TT3080). Janice would be unconscious immediately upon being shot in the head. (V36, TT3081). Further, there had to be an interval between the neck wounds and the fatal head wound because the neck wounds showed hemorrhaging. (V36, TT3081). Dr. Beaver believed Dawn was on the floor first and Janice second. (V36, TT3089). Janice was moving after she started bleeding because there was drip, spatter and swipe patterns as well as

blood spatter on her forearms. (V36, TT3090). It was possible the shooter could have "blowback" blood on himself, but Dr. Beaver didn't "know that I would expect it." (V36, TT3093).

Defense Witnesses. The defense presented numerous witnesses: James Hamilton and Jake Ross, private investigators; Reginald Jones, McDuffie's barber; Kimbra Zayonc, FDLE supervisor; Krista Vivero-Sepp, a customer of Dollar General; Lori Provancher, a shopper next door who heard a possible gunshot; Regina Prater, McDuffie's mother; Don and Tyrving Perkins, McDuffie's brothers; Tammy Ryan and Krystal Beauregard, Dawn's sisters; Kim Williams, McDuffie's ex-wife; Inv. Seymour and Deputy Thoman, Volusia County Sheriff's Office; inmates Michael Fitzgerald and Kevin Ingram; James Engman, co-worker of Michael Fitzgerald; Woodrow Moran, the alleged murderer of Dawn and Janice; Christine Sanders, defense counsel's wife; and McDuffie himself.

James Hamilton specialized in crime scene investigations and fingerprint analysis. He was qualified as an expert in those areas. (V42, TT3563, 3569). He discussed the female blood in the public bathroom, shoe prints, and fingerprints. (V42, TT3583). He believed that the presence of feces in the toilet could indicate someone had been hiding in the bathroom and did not want to flush the toilet. (V42, TT3535). He re-enacted the

murders in an attempt to illustrate two perpetrators would have to be involved. (V42, TT3589). He explained how he would have processed the crime scene. (V42, TT3596-3604). He criticized the fracture analysis of FDLE analyst Strawser. (V42, TT3608).

Reginald Jones testified that McDuffie always cut his hair in an Afro and that he had his hair cut on October 25, 2002. (V42, TT3671-73).

Kimbra Zayonc, a supervisor at FDLE, sent trace evidence to the FBI because FDLE does not conduct that type of analysis. (V42, TT3674). The FBI report was admitted as Defense Exhibit 55.

Krista Vivero-Sepp shops at Dollar General and considers Janice Schnieder a friend. (V43, TT3706-07). "Something told her to go to the Dollar General" even though she didn't need anything. (V43, TT3708). She was there near closing time the night Janice and Dawn were murdered. (V43, TT3708). When she greeted Janice, she felt Janice was acting strange. It gave Sepp the "heeby-jeebies." (V43, TT3710). Sepp walked up and down every aisle and did not see anyone hiding. (V43, TT3714, 3725). There was a Black or Hispanic male walking quickly down the center aisle as if he was trying to shop before the store closed (V43, TT3719). She was in the Dollar store three to five days a week, and the employees did not use duct tape. (V43, TT3725).

Lori Provancher was at Winn Dixie from 8:15 to 9:30 p.m. on October 25, 2002. (V43, TT3728). She heard a popping noise which sounded like a champagne bottle. (V43, TT3728-29). It could have been a gunshot. (V43, TT3730). At trial she testified she heard the noise between 9:10 and 9:15 p.m. (V43, TT3731). At her deposition, she said it was between 9:05 and 9:10 p.m. (V43, TT3732).

Regina Prater has one daughter and five sons, including McDuffie. She also has 21 grandchildren. (V43, TT3736). One grandchild had a birthday on October 26, and the entire family was in Bradenton to celebrate. (V43, TT3737-39). McDuffie and Troy arrived in Bradenton around 11:00 a.m. to noon. (V43, TT3744-45). They all went to some football games, then Roy and Troy spent the night at Prater's house. (V43, TT3742, 3750). The McDuffies left Sunday afternoon. (V43, TT3753). Prater gave McDuffie $350 that weekend and $50 the week before. (V43, TT3755). Additionally, her husband, Johnny Prater, gave McDuffie $300. (V43, TT3756). Prater also made a car payment for Troy after McDuffie was arrested.(V43, TT3774).

Don and Tyrving Perkins remembered McDuffie being at the family home the last two weekends in October. (V43, TT3779, 3790). Don gave McDuffie $200, and Tyrving gave him $500 on one of the two weekends.(V43, TT3781, 3789).

Kim Williams, McDuffie's ex-wife was on AFDC (federal assistance), and the government filed against McDuffie for child support. (V44, TT3813). There was a judgment against McDuffie for $11,391.63. (V44, TT3815). There was a settlement on September 25, 2002, providing McDuffie would pay $25 per week on the judgment. (V44, TT3815).

Inmate Testimony. The State filed a motion in limine regarding testimony from Kevin Ingram that Michael Fitzgerald said he killed Janice and Dawniell (V6, R969-1106). The trial judge granted the motion (V6, R1162-1157). The defense then asked to call Fitzgerald as a witness and, if he denied saying he killed the victims, calling Ingram as an impeachment witnesses. (V42, TT3684). After discussion, the judge asked for a proffer of all inmate witnesses. (V42, TT3685). The next morning, defense counsel advised the trial judge that McDuffie personally waived any negative effect of calling Fitzgerald as a defense witness. Defense counsel also explained the effect of testimony that McDuffie confessed to Fitzgerald. (V43, TT3702). McDuffie personally waived any issue. (V43, TT3703). The trial judge then withdrew the ruling that a proffer was required, and held that Fitzgerald could be called as a defense witness. (V43, TT3702). The State objected. (V43, TT3702-03).

Fitzgerald[22] was housed in the same jail block as McDuffie and Kevin Ingram. (V44, TT3846). They spent a lot of time together. (V44, TT3847). There were a lot of "snitches" in the jail and Ingram was a "big snitch." (V44, TT3848). Fitzgerald heard that someone was going to try to pin a murder on him. (V44, TT3853). Fitzgerald denied telling Kevin Ingram he murdered Dawn Beauregard and Janice Schneider. (V44, TT3844). However, he did hear McDuffie confess to the murders. McDuffie said there were three women in the store. He and Dawn were counting the money in the back of the store after he told Dawn there was something wrong with the numbers and got her to come to the back. McDuffie tied up Dawn while Janice was letting the third woman out of the store. McDuffie then told Janice the register was short. When she came back to the office, she tried to help Dawn. They struggled and McDuffie shot her. (V44, 3854).

Fitzgerald had two children with Tammy Ryan, Dawniell's sister. (V44, TT3819). In October 2002, he lived in Deltona and worked framing sheds for Superior Sheds. (V44, TT3819-20). He was in jail for armed robbery with a deadly weapon and had three prior felony convictions. (V44, TT3821, 3857).

When questioned about his whereabouts the night of the

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[22] Fitzgerald was represented by an attorney and waived his Fifth Amendment privilege before testifying. (V44, TT3809,

murder, Fitzgerald testified that he was in Spring Hill smoking crack. (V44, TT3823). He smoked crack and would spend up to $300 in one night buying drugs. (V44, TT3822). He allowed his drug dealer, Charles, to drive his truck in exchange for crack. (V44, TT3827). Charles came back to Fitzgerald's location in the woods and told him the police had his truck. (V44, TT3829). Fitzgerald went to the club where his truck was parked and showed the police his license. (V44, TT3831). The police told him to take his truck and leave the area. (V44, TT3834).[23] Inv. Seymour, Volusia County Sheriff's office, verified that Fitzgerald's truck was in Spring Hill pursuant to a CAD (computer aid dispatch). (V44, TT3903). The CAD showed that Fitzgerald's truck was in Spring Hill and was going to be towed, but Fitzgerald showed up and it was not towed. (V44, TT3904). On October 27 and 29, Seymour spoke to Fitzgerald about the murders. (V44, TT3900, 3904). Fitzgerald told Seymour it was Woodrow Moran that had his truck. (V44, TT3904). Deputy Thoman stated that it "appeared" from his call history that he had contact with Woodrow Moran at 11:30 p.m. in Spring Hill at the Vibe club. (V44, TT3909).

James Engman testified that he works with Michael Fitzgerald, an inmate who testified against McDuffie, and

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3811, 3858).

[23] Spring Hill is a predominantly Black community and

Fitzgerald wears a “fade,” a type of haircut short on the top and sides. (V45, TT3918). Fitzgerald drives a white Dodge pick up truck. (V45, TT3920).

Woodrow Moran testified he does not know Fitzgerald, that he has never been to the Dollar General store, and that when his sister called to tell him he was a suspect in the murders, he went to the police station to cooperate and give a DNA sample. (V45, TT3933-36). Moran was, however, in the white truck at the Vibe club on October 25. (V45, TT3923). He walked down to the club and was cold, so a Black male outside the club told him it was all right to sit in the white truck and play the radio. (V45, TT3927-28). The Black male gave Moran the keys. When Moran turned the key, the radio came on real loud, which attracted the police. (V45, TT3929). The police handcuffed Moran, but after he explained what he was doing in the truck, they let him go. (V45, TT3930).

Jake Ross, private investigator, measured the distance from club Vibe to the Dollar General store. It is 11.94 miles and takes 21 minutes to drive per MapQuest. (V45, TT3943). Moran lived two to four minutes from the club. (V45, TT3944).

Kevin Ingram testified that Fitzgerald came to talk to him about Ray Warren, the attorney for both inmates. (V44, TT3873). During the conversation, Fitzgerald told him that he, his

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Fitzgerald is white (V44, TT3834-36).

girlfriend, and Woodrow Moran committed the robbery of the Dollar General. (V44, TT3873). Fitzgerald was doing a lot of crack and needed money. (V44, TT3874). Supposedly, Fitzgerald and Ashley met Woodrow at the store at closing. Woodrow hid in the store and tied up the employees. Then he opened the door for Fitzgerald and Ashley. Woodrow was supposed to blindfold the employees, but he didn't. Dawn saw Fitzgerald and things "went bad." (V44, TT3875). Fitzgerald and Ashley left for Spring Hill. When Woodrow arrived, he said he "took care of the situation." (V44, TT3876). Woodrow is a Black male. Ingram also said Fitzgerald told him they like to dress up like the employees. (V44, TT3876).

On cross-examination, Ingram admitted he is a convicted murderer. (V44, TT3877). He had snitched for the State before by obtaining a written confession from Derrick Willis, another murderer. (V44, TT3878). Willis was dying of cancer (V44, TT3878). When the State found out Ingram was giving Willis' family $15,000 to $20,000 for the confession, they increased Ingram's charges from second-degree murder to first-degree. (V44, TT3879-80). The prosecutor in the McDuffie case was the prosecutor in Ingram's case and refused to make any deals with Ingram. (V44, TT3881). Ingram conceded he reads the newspaper in jail. (V44, TT3888).

Derek Willis testified in the State rebuttal case that when he was in jail with Kevin Ingram, they entered into an agreement whereby Willis would write out a confession for Ingram to provide law enforcement and Ingram would pay Willis $15,000. (V47, TT4162). Willis knew he was "going away for a long time," since he was charged with first-degree murder. (V47, TT4162). He wanted to leave money for his son. (V47, TT4162). Willis was suffering from terminal cancer. (V47, TT4163).

Curtis Williams knew McDuffie, Ingram, and Willis in jail. (V47, TT4166-67). Williams was also a good friend of Fitzgerald. McDuffie asked Williams to try to get Fitzgerald moved into their cell block. (V47, TT4167). McDuffie knew Fitzgerald had been questioned about his involvement in the Dollar store murders, and wanted to meet him. (V47, TT4168). McDuffie set up meetings with Fitzgerald. Williams thought McDuffie was trying to get information from Fitzgerald to set up Woodrow Moran and Fitzgerald's girlfriend, Ashley. (V47, TT4168). However, Williams testified that the plan changed:

> Q At some point, did you find out from the defendant that his plan was actually to try to point the finger at Michael Fitzgerald himself?
>
> A Yes, I did.
>
> Q And did you talk with the defendant about that change in plans?
>
> A Yes, I did, because I was very upset by it, because initially he told us that his plan was to try

> to create a reasonable doubt in the jury's mind to try to get a hung jury or acquittal by saying that Woodrow and Ashley had committed the crime. He said that he didn't have to beat it; all he had to do was create reasonable doubt in the jury's mind, and he could get an acquittal or a hung jury.

(V47, TT4169). When Williams protested, McDuffie said to "F—k that cracker." McDuffie had a low opinion of whites. (V47, TT4170).

McDuffie tried to get Kevin Ingram, "Mohammed," Cory Greer and William Postima to testify against Fitzgerald. (V47, TT4168). He even showed case material to Ingram so he would be believable. (V47, TT4171). McDuffie knew Fitzgerald did not kill Janice and Dawn. (V47, TT4170). Williams had been threatened in jail not only by McDuffie but also by other Blacks because he was testifying for a white person and testifying against a Black man. (V47, TT4173).[24]

McDuffie Testimony. Before the defendant testified, the trial

Judge questioned him about his awareness of the consequences, including being impeached with his false job applications and

[24] During re-direct, Williams said McDuffie had received a "DR," or disciplinary report, for "extortion." (V47, TT4189). Defense counsel requested a mistrial; however, after discussing the issue with McDuffie the motion was withdrawn (V47, TT4190-95). The trial court instructed the jury to disregard the word "extortion," and Williams testified McDuffie received a DR for running a commissary in jail, which is not a crime. (V47, TT4196).

his prior convictions. (V45, TT3958, 3961, 3967).

McDuffie, 41, was in the Army five to six months. He was discharged with a 10% disability after he sustained a right leg injury. (V45, TT3969). He had been convicted of eight felonies and one misdemeanor involving dishonesty or false statement. The felonies included worthless checks, dealing in stolen property, grand theft, license fraud, and escape. (V45, TT3973-74).

McDuffie does not own a gun and had no money problems on October 25, 2002. (V45, TT3977, 3983). During 2002, he was out of work for one month, but he borrowed money from his family. (V45, TT3986). He borrowed $2,000 from Jay Hubbard, $390 from Anthony Wiggins, $450 from his mother, $300 from his stepfather, $200 from his brother Don, and $500 from his brother Tyrving. (V45, TT3987). According to McDuffie, the eviction notices for the Sussex house were filed by Mr. Pedersen's son after they left the house. (V45, TT3990). McDuffie had an agreement with the father to forfeit the security deposit. (V45, TT3989).

At the time he was arrested, McDuffie worked for Coke as a delivery man. (V45, TT3999). He had told Linda Torres, his supervisor at Dollar General, that he was going to work for Coke. Linda told him to stay the full week so he could get paid. (V45, TT4000). On October 25, 2002, McDuffie had a haircut, a

Philly fade, at 7:15 a.m. He went to a meeting at Coke at 8:00 a.m. (V45, TT4009). He left Coke and arrived in Apopka for a Dollar store meeting at 12:30 p.m. (V45, TT4012). He left that meeting around 5:00 p.m. and picked up Troy. (V45, TT4013). He was wearing his Dollar uniform: tan pants and blue shirt. (V45, TT4015). Roy and Troy arrived at the Dollar store between 6:15 and 6:30 p.m. (V45, TT4015). Janice told McDuffie she was concerned about a white male in the store with a pony tail. (V45, TT4017). After McDuffie watched the white male, he helped another customer tape some boxes. (V45, TT4019). He used duct tape she had purchased, and hung the leftover part of the roll on the neck of a bleach bottle near the office. (V45, TT4019, 4024). He helped cash out the registers and do the accounting. Janice came in and said someone was in the store. McDuffie went out, and the Black male paid for his items and left in a blue Chevy with big rims. (V45, TT4029-30). The car was parked in front of the store with the engine running. The Black male got in the passenger side. (V45, TT4030). McDuffie provided information for a composite drawing of the Black male. (V46, TT4037). He identified the car pictured in a defense exhibit as similar to the blue Chevy. (V46, TT4038, Defense Exhibit 72). The photo of the car was from an ATM machine at a bank in the same plaza as the Dollar store. (V46, TT4039).

McDuffie testified that the two men who testified at trial were the two men who came in for sodas. (V46, TT4042). When they left, the door was locked behind them. (V46, TT4043). Carol Hopkins left between 8:25 and 8:35 p.m. (V46, TT4045). McDuffie walked back and forth in the store because there was a discrepancy in the accounting he and Dawn were doing. (V46, TT4044, 4047). At one point, Janice let McDuffie out and he checked on Troy in the car. He did not open the car door.[25] (V46, TT4048).

When it was discovered the money was still not matching receipts, McDuffie asked to leave. Janice and Dawn let him out around 9:00 p.m. and locked the door behind him. (V46, TT4051). He and Troy then went to Aaron's Rental and left the money order. (V46, TT4052). They went to McDonald's, then home. (V46, TT4053, 4055). McDuffie called Ted Rivers when they got home. (V46, TT4055). He and Troy went to bed, and around 3:30 a.m., sheriff's officers were knocking on their door. (V46, TT4056). The officers did not ask for McDuffie's shoes or clothing. (V46, TT4057).

On October 26, McDuffie dropped off his wife at the hair salon, purchased money orders to pay the rent, and went to coach a football game. (V46, TT4061). He called Chuck Fowler to tell

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[25] McDuffie previously told Inv. Willis he did not leave the store. (V46, TT4127).

him he was going to work for Coke. (V46, TT4065). McDuffie and Troy then drove to Bradenton, arriving around 3:00 p.m. (V46, TT4065). They stayed at his mother's house Saturday, then went to see Troy's mother in Sarasota on Sunday. (V46, TT4066-68). They left Sunday evening to return to Orlando. (V46, TT4068). They also visited Bradenton the following weekend. When they got back to Orlando, the sheriff's office has served a search warrant on the house and broken down the door. (V46, TT4072). They took McDuffie's shoes, some of which were worth $600. (V46, TT4072). Officers seized his car a few days later. (V46, TT4074). McDuffie was arrested December 17, 2002. [26] (V46, TT4075).

On cross-examination, McDuffie admitted that he actually was released from the Army for "fraudulent enlistment." (V46, TT4093). The resume attached to his application to Dollar General stated the following, none of which was true:

> Graduated from the University of Tennessee with a B.A. in Business (V46, TT4096);
>
> Graduated from Southeast High School (V46, TT4097);

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[26] Before cross-examination, the State requested permission to introduce certain documents which the court previously ruled inadmissible. The State argued McDuffie opened the door to this impeachment. (V46, TT4078). After discussion, the trial court ruled that the State could impeach McDuffie with the employment applications but not the rental applications. (V46, TT4088-91). Also, since McDuffie talked about the substance of his prior convictions, that door was open (V46, TT4082).

Was a certified X-Ray technician in Georgia and Florida (V46, TT4098);

Had never been convicted of a crime (V46, TT4102);

Only had two different jobs in 2002 (he actually had six)(V46, TT4103);

Had lived at the Mardell Court residence a year (V46, TT4105).

In addition to the first three falsehoods, McDuffie's stated in his Coke application that he lived at the Sussex Drive address for eight years. (V46, TT4111).

McDuffie wrote a check for $320 on an account he knew had been closed for nine months. (V46, TT4115). He testified that he bought money orders on November 6 at separate locations because he did not want to wait; however, when shown the videotape, McDuffie admitted the 7-11 transaction was short. (V46, TT4118).

Penalty Phase. The State called several witnesses who made brief victim impact statements: Carol Hopkins, co-worker of Janice and Dawn; Kelli Lee, Janice's sister; Jessica Pierce, Janice's daughter; Thomas Texiera, Janice's son; Tammy Ryan, Dawn's sister; Debbie Oliveri, Dawn's mother; and James Courtney, the father of two children with Dawn. (V50, TT4496-4505, 4512-4518).

Dr. Beaver, medical examiner, testified that both Janice and

Dawn sustained both stabbing and slicing neck wounds. (V50, TT4510). In his opinion, the neck wounds occurred prior to the gunshot wounds, and there was an interval of time between the slicing/stabbing wounds and the fatal gunshots. (V50, TT4510). The neck wounds would be painful. Dawn's movements were restrained and limited to squirming and wiggling. Her hands were securely fastened behind her and she had duct tape over her mouth. (V50, TT4511). She would not be able to scream, but could produce noise from her nose. (V50, TT4511-12). The defense presented family and friends who testified regarding McDuffie's achievements: Regina Prater, mother; Joshua Smith, football player that McDuffie coached; Don and Tyrving Perkins, brothers; Marquis White, nephew; Tavaris Williams, son; Roy McDuffie, Sr., father; Vontina Papay, stepdaughter; Dawn Perkins, sister; Rev. Ronald Fortune, friend and pastor; and Anthony Wiggins, friend. (V51, TT4552-46). Because the trial court entered a detailed order outlining this testimony, it will not be repeated here. (V7, R1310-1315; 1321-1326). The trial court order is attached for this Court's convenience. (Appendix A)

SUMMARY OF ARGUMENT

Point I. Two weeks into the trial, defense counsel gave the prosecutor a Western Union receipt after the State had rested and a defense witness was on the stand. When questioned about the receipt, it was revealed the defense did not list the witness, there were actually two Western Union receipts, and the witness had been gathering the receipts before the trial started. The trial judge conducted a *Richardson* hearing and determined the State was procedurally prejudiced. The trial judge did not abuse his discretion in excluding the witness and receipt. Error, if any, is harmless. The testimony was cumulative to other witnesses and was on an issue which was not exculpatory.

Point II. The trial court did not abuse its discretion in admitting the testimony of Alex Matias who called the police shortly after the murders and helped prepare a composite drawing. The fact that Matias recognized McDuffie on TV when the latter was arrested and received a $10,000 reward goes to the weight, not the admissibility of the testimony. The trial court did not abuse its discretion by precluding the defense from showing Carol Hopkins and Matias the photos of persons unrelated to the murders.

Point III. The trial court did not abuse its discretion by

precluding “reverse *Williams* Rule testimony.” The testimony McDuffie wanted to present is not similar. This case is distinguishable from *Holmes*. McDuffie was allowed wide latitude in presenting his defense.

Point IV. The trial court did not abuse its discretion in admitting the testimony of David Pederson. The testimony was relevant to McDuffie’s state of mind and sense of desperation regarding his finances. Error, if any, was harmless. McDuffie explained the circumstances which lead to the volatile conversation.

Point V. The trial court did not abuse its discretion in admitting financial testimony which was relevant to motive. This is not *Williams* rule evidence. Even if it were, the State did not make a feature of this evidence. McDuffie actually presented more evidence about his finances than the State. Error, if any, was harmless.

Point VI. There is competent substantial evidence to sustain the convictions. This case does not involve solely circumstantial evidence, and McDuffie personally waived this fact when he pursued the testimony of Michael Fitzgerald. Not only was there direct evidence of McDuffie’s admission to the murders, but also there was an eyewitness identification. In addition to the direct evidence, the State presented evidence

of: McDuffie's palm print on the duct tape, financial motive, possession of large amounts of cash after the robberies, being the last person with the victims, and inconsistent statements and timelines.

Point VII. The State proved the aggravating circumstance of heinous, atrocious, and cruel beyond a reasonable doubt. Dawniell was rendered helpless by duct tape over her mouth, and around her hands and feet. He throat was slit in a way which was very painful but which would not produce death for an extended period. She was then shot in the head. Janice discovered Dawn on the floor and tried to help her, only to be stabbed and sliced in the face and neck. She was then shot in the abdomen and head. Both Dawn and Janice sustained mental anguish: Dawn by being tethered and having her neck sliced open, Janice by discovering Dawn in this condition and being attacked while trying to help her.

Point VIII. Florida's standard instruction does not unconstitutionally shift the burden to the defendant. This claim has no merit and has been repeatedly rejected by this Court.

Point IX. The trial judge did not abuse his discretion by instructing the jury on the cold, calculated or premeditated aggravating circumstance. The State presented evidence on this

aggravator, and the jury was free to accept or reject it.

Point X. This Court has repeatedly denied *Ring* claims. Further, this case involves the aggravating circumstances of prior violent felony (contemporaneous murders) and during-a-robbery, both of which the jury found beyond a reasonable doubt.

ARGUMENT

POINT I

THE TRIAL COURT CONDUCTED AN ADEQUATE *RICHARDSON* HEARING AND IMPOSED AN APPROPRIATE REMEDY FOR THE DEFENSE DISCOVERY VIOLATION; ERROR, IF ANY, WAS HARMLESS

McDuffie argues that when the trial court conducted an inadequate *Richardson* hearing when Anthony Wiggins was disclosed as a witness during the trial. McDuffie also claims the trial court abused its discretion in excluding the witness.

During the defense case on February 7, two weeks after the trial began, the State asked for a *Richardson*[27] hearing because defense counsel handed him a Western Union receipt during the testimony of Regina Prater. (V43, TT3796-97). Apparently, Anthony Wiggins, who was listed only as a penalty phase witness, had sent money to McDuffie. (V43, TT3797-98). During the *Richardson* hearing, it became evident that there were two money orders. (V43, TT3798). The State had never been made aware of the second money order. (V43, TT3799). After discussion, the trial judge found a *Richardson* violation and excluded the witness and receipt. (V43, TT3799).

[27] *Richardson v. State*, 246 So. 2d 771 (Fla. 1971). The inquiry should ascertain at the least whether the discovery violation was inadvertent or willful, whether the violation was trivial or substantial, and most importantly, what effect, if any, it had upon the aggrieved party's ability to prepare for trial. *Id. at* 775.

The State expressed prejudice as follows:

> No opportunity to explore the validity of the $40 Western Union receipt;
>
> No knowledge of the witness or what he was going to say;
>
> Receipt handed to prosecutor during testimony of Ms. Prater, no notice of witness;
>
> During *Richardson* hearing being advised of not just one money order, but two.

(V43 3797). Furthermore:

> But the problem is it is a surprise. It is sprung upon the State. And today we've had a number of rulings that have caused us to change the way we were prepared for today, and this thrown into the mix is just -- How many more are we going to get before the end of the trial?

(V43, 3798-99). Wiggins' testimony was then proffered. He said he sent McDuffie a $40 money order on October 18, 2002, and that he tried to obtain a receipt for the $300 money order, but Western Union could not assure Wiggins he would have it by January 24 when McDuffie's trial started. (V43, TT3802). The trial judge ruled there was a *Richardson* violation and the State was prejudiced. He also noted that the witness was not listed and the receipt was handed to the State in the middle of trial. (V43, TT3799, 3803).

Exclusion of the witness is justified, particularly since the witness had obviously been talking to defense counsel quite

some time before trial, as exemplified by his testimony that Western Union could not guarantee verification before January 24. Therefore, Wiggins knew some time before January 24 that the defense wanted to use his testimony. Notwithstanding, defense counsel never disclosed the witness nor the existence of Western Union receipt(s) until February 7. Although defense counsel may have stated the violation was "inadvertent," this statement is contradicted by the record.

Florida Rule of Criminal Procedure 3.220(n) provides in pertinent part:

> (1) If, at any time during the course of the proceedings, it is brought to the attention of the court that a party has failed to comply with an applicable discovery rule or with an order issued pursuant to an applicable discovery rule, the court may order the party to comply with the discovery or inspection of materials not previously disclosed or produced, grant a continuance, grant a mistrial, prohibit the party from calling a witness not disclosed or introducing in evidence the material not disclosed, or enter such other order as it deems just under the circumstances.

Although available case law hinges on the State's failure to provide discovery and this case presents a bit of a brain teaser since it was the defense that committed the discovery violation, this Court's recent decision in *Scipio v. State,* 31 Fla. L. Weekly S114 (Fla. Feb. 16, 2006) lends clarification. This Court made clear that the discovery rules apply to both State

and defense:

> Importantly, this Court has consistently held that "Florida's criminal discovery rules are designed to prevent surprise by either the prosecution or the defense. Their purpose is to facilitate a truthful fact-finding process." *Kilpatrick v. State*, 376 So. 2d 386, 388 (Fla. 1979). In *Kilpatrick* we explained:
>
> > Florida's criminal discovery rules are designed to prevent surprise by either the prosecution or the defense. Their purpose is to facilitate a truthful fact-finding process. Discovery under Florida Rule of Criminal Procedure 3.220 is commenced by service of a demand for discovery by the defense on the State. The rule imposes a continuing mandatory duty on the prosecution to disclose certain specifics, including the names of prospective witnesses. Once having invoked this procedure, the defense must also affirmatively respond by disclosing certain information to the prosecution including the names of prospective witnesses. Both sides are entitled to rely on full and fair compliance with the rule in preparing their cases for trial.

Id.; Scipio, 31 Fla. L. Weekly at 116. This Court also held that the purpose of a *Richardson* hearing is to determine whether a party is prejudiced by the discovery violation, and that "prejudice" refers to procedural prejudice, not substantive prejudice. *Scipio*, 31 Fla. L. Weekly at 117. Further,

> An analysis of procedural prejudice does not ask how the undisclosed piece of evidence affected the case as it was actually presented to the jury. Rather, it considers how the [party] might have responded had it known about the undisclosed piece of evidence and contemplates the possibility that the [party] could have acted to counter the harmful effects of the discovery violation. *Evans,* 721 So. 2d at 1210.

Scipio, 31 Fla. L. Weekly at 117.

The trial court did not abuse its discretion by excluding the witness. Wiggins knew far enough before the start of trial on January 24 to try to obtain the second receipt by January 24. The defense knew of Wiggins because they listed him as a penalty phase witness. (V3, R583). Yet they totally blindsided the State in the middle of the testimony of a witness, two weeks after trial started, by handing the prosecutor a $40 receipt that appeared out of thin air. There was no explanation of the significance of the receipt or who was going to testify about the receipt. McDuffie seems to fault the prosecutor for not stopping the trial right in the middle of witness testimony and delaying a total of 13 pages before he brought the issue to the court's attention (Initial Brief at 36, fn. 41). The question to be determined in the *Richardson* hearing is the procedural prejudice caused by the discovery violation. The prosecutor quite succinctly outlined the procedural prejudice, and the trial court rulings are supported by the record and this Court's case law. A trial judge's ruling on evidentiary issues will not be disturbed absent an abuse of discretion. *Fitzpatrick v. State*, 900 So. 2d 495, 514-15 (Fla. 2005).

Even if the trial judge erred in excluding the witness, the error was harmless. *State v. DiGuilio*, 491 So. 2d 1129 (Fla.

1986). Both Troy and Roy testified they borrowed money from family and friends. Troy testified they borrowed $2,000 from her father on October 17, 2002, and $500 from a friend. (V37, TT3201). They borrowed $500 from one of McDuffie's brothers, and $250 from another. (V37, R3202). McDuffie's stepfather gave them $500 in October. The total amount of the loans was $3,750. (V37, TT3203).

McDuffie testified that during 2002, he was out of work for one month, but he borrowed money from his family. (V45, TT3986). He borrowed $2,000 from Jay Hubbard, $390 from Anthony Wiggins, $450 from his mother, $300 from his stepfather, $200 from his brother Don, and $500 from his brother Tyrving. (V45, TT3987). Regina Prater, Don Perkins and Tyrving Perkins all testified about the money the family gave McDuffie. (V43, TT3755, 3779, 3781, 3789). The testimony of Wiggins was cumulative to that of other witnesses.

Furthermore, the fact McDuffie was borrowing money from family and friends is inconsistent with the defense theory that McDuffie did not rob the Dollar General. This entire line of defense questioning was designed to show McDuffie did not need money because he was being supported by his family. The truth is, this line of questioning only showed how desperate McDuffie was because he was borrowing not only from family, but also from

friends as far away as Jacksonville. McDuffie, a 41-year old man whose mother has 21 grandchildren and two disabled sons and worked a 12-hour shift in a factory to make ends meet, was desperate enough to take money from his mother. This testimony showed McDuffie hit rock bottom and had to borrow not just from family but also from friends so he could live in a three-bedroom house and wear $600 shoes. Although McDuffie couches Wiggins' testimony as "critical," that testimony only added depth to the extent of McDuffie's desperation which ultimately led him to rob the Dollar General.

POINT II

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING THE TESTIMONY OF ALEX MATIAS IDENTIFYING McDUFFIE OR IN LIMITING CROSS-EXAMINATION REGARDING OTHER SUSPECTS

Identification. McDuffie claims the trial court abused its discretion in denying the motion to suppress the identification made by Alex Matias. McDuffie argues the identification is unreliable because Matias received a reward, made the identification after seeing McDuffie on television, and knew the victim. He acknowledges that Matias contacted police the morning after the murders, gave a description, and did a composite drawing with Inv. Willis (Initial Brief at 60). McDuffie also acknowledges that Matias was extensively impeached

at trial with the information McDuffie now claims makes the identification unreliable (Initial Brief at 60-61).

McDuffie filed a Motion to Suppress Alex Matias’ Identification (V4, R741-40; V5, R955-56; V10, R1692-1752). At the hearing on the motion, Matias testified that he was in the parking lot of Dollar General the night of the murder and saw a black male exit, then re-enter, the store around 9:25 p.m. (V10, R1709-12). This happened two times, and the man locked the store each time he left. (V10, R1712). The next day Matias learned of the murders and called the police. (V10, R1714).

The trial judge made oral factual findings and entered a written order. (V10, R1750-51). The trial judge found Matias had a sufficient opportunity to observe McDuffie, that the description and composite Matias gave the police the next day bore sufficient similarity to indicate the subsequent identification was reliable. A suppression ruling comes to the reviewing court clad in a presumption of correctness as to all fact-based issues. *State v. Glatzmayer*, 789 So. 2d 297, 301 (Fla. 2001).

The two-prong test for suppression of an out-of-court identification which requires a determination of:

> (1) whether the police used an unnecessarily suggestive procedure to obtain the out-of-court identification;
> and

> (2) if so, considering all of the circumstances, whether the suggestive procedure gave rise to a substantial likelihood of irreparable misidentification.

Rimmer v. State, 825 So. 2d 304, 316 (Fla. 2002)). Pursuant to *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972), the following factors should be considered:

> (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 of the criminal,
>
> (4) the level of certainty demonstrated by the witness at the confrontation, and
>
> (5) the length of time between the crime and the confrontation.

The trial court properly considered the factors articulated in *Neil* and concluded that there was not a substantial likelihood that Matias' identification of the defendant was incorrect. The findings are supported by the record. Matias saw McDuffie at close range not once, but twice. Matias went to the police station and directed the drawing of a composite that looked like McDuffie. The fact Matias' identification was subject to impeachment goes to the weight, not the admissibility, of the testimony. *See Penalver v. State*, 926 So. 2d 1118 (Fla. 2006); *Ziegler v.* State, 402 So. 2d 365, 374

(Fla. 1981). The jury was aware of all the impeaching factors Matias now argues: the reward, that he saw McDuffie on TV, and that he knew Crystal Beauregard. The jury was free to accept or reject Matias' testimony, as well as decide the weight to be given the testimony. Because he has failed to show an abuse of discretion, McDuffie is not entitled to relief on this issue. A trial judge's ruling on evidentiary issues will not be disturbed absent an abuse of discretion. *Fitzpatrick v. State*, 900 So. 2d 495, 514-15 (Fla. 2005).

Even if the trial judge erred in excluding the witness, the error was harmless. *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986). Olivia Sousa identified a Black male dressed just like McDuffie in the Dollar General at 9:25 p.m. His palm print was on the duct tape around Dawn's hands. He had financial motive and cash right after the robbery. He was the last person with the victims and lied about his whereabouts the night of the murders.

Limits on Cross-Examination. During the testimony of both Alex Matias and Carol Hopkins, defense counsel wanted to show the witness a photo of Steve Absalon. The trial judge ruled the testimony was inadmissible. (V32, R2501; V30, 2343-46). The trial judge had previously ruled that evidence regarding Absalon was inadmissible. (V32, 2500). Additionally, the defense wanted

to show Carol Hopkins a photo of Michael Fitzgerald which the trial judge disallowed. (V30, R2363). McDuffie claims his right to cross-examination was restricted to the extent it denied his constitutional right to confrontation. McDuffie relies on *Delaware v. Van Arsdall*, 475 U.S. 673, 680. (1986).

Cross-examination of a witness is limited to the subject matter of the direct examination and matters affecting the credibility of the witness. §90.612(2), Fla. Stat. (2001). The United States Supreme Court has stated that "trial judges retain wide latitude . . . to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986); *see also State v. Ford*, 626 So. 2d 1338, 1347 (Fla. 1993). Limitation of cross-examination is subject to an abuse of discretion standard. *See, Geralds v. State*, 674 So. 2d 96, 100 (Fla. 1996); *Jones v. State*, 580 So. 2d 143, 145 (Fla. 1991). Here, the judge clearly spelled out his reasons for limiting the cross-examination: in each instance the questions were irrelevant and presented toconfuse the issues. There was no abuse of discretion. *See Moore v. State*, 701 So. 2d 545, 549 (Fla. 1997); *Jones v. State*, 580 So. 2d 143, 145 (Fla. 1991). In

Penn v. State, 574 So. 2d 1079 (Fla. 1991), this Court held that questions on cross examination must either relate to credibility or be germane to the matters brought out on direct examination. If the defendant seeks to elicit testimony from an adverse witness which goes beyond the scope encompassed by the testimony of the witness on direct examination, other than matters going to credibility, he must make the witness his own. Stated more succinctly, this rule posits that the defendant may not use cross-examination as a vehicle for presenting defensive evidence. *Id.* at 1082 (quoting *Steinhorst v. State*, 412 So. 2d 332, 337 (Fla. 1982).

POINT III

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN LIMITING PRESENTATION OF CRIMINAL ACTS OF OTHER PERSONS

The State filed a Motion in Limine requesting the defense proffer reverse *Williams* rule evidence. (V6, TT969-1006). The defense responded (V6, TT1008-10). The trial judge granted the State's motion (V6, TT1152-57). McDuffie argues that the trial court improperly excluded acts of misconduct of other persons, alleging this evidence was reverse *Williams* rule evidence. McDuffie wanted to introduce evidence that:

> (1) Fitzgerald robbed a business with a firearm to obtain money to support his crack habit and that his girlfriend, Ashley Emanual was his accomplice;

(2) Carlos Ruiz committed armed robbery of an individual at the Banco Popular, located in the same plaza as the Dollar General; and

(3) Steve Absalon committed armed robbery at the same Banco Popular as in #2 above.

(Initial Brief at 69). McDuffie acknowledges that the trial court liberally allowed defense evidence of a "straw" man and that the trial court made detailed findings in excluding the evidence of other criminal acts of Fitzgerald, Ruiz and Absalon. (Brief at 69, fn. 55, 56). McDuffie relies on the recent case of *Holmes v. South Carolina,* __U.S.__, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006), and urges this Court to recede from *State v. Savino*, 567 So. 2d 892 (Fla. 1990) and *Rivera v. State*, 561 So. 2d 536 (Fla. 1990).

In *Rivera*[28] this Court stated that evidence which established a reasonable doubt of defendant's guilt is admissible; however, the "admissibility of this evidence must be gauged by the same principle of relevancy as any other evidence offered by the defendant." *Id.* at 540. This Court then held that the dissimilarities in the proffered evidence were "sufficient to preclude its admissibility as relevant evidence." *Id.*

[28] In *Rivera* a defendant, standing trial for murder, attempted to raise reasonable doubt in jurors' minds by introducing evidence that a murder of a similar nature had been committed by someone other than the defendant and that the murder occurred while the defendant was in police custody.

Although there were some similarities between the crimes in *Rivera,* the dissimilarities included: age and body type of the victims, one body was found clothed and the other nude, one body was weighted down in a canal and the other was in a vacant field, there was evidence of anal sex in one case and not the other, and that the victims were abducted in different counties.

Six months after *Rivera* was issued, this Court expanded on the principles guiding reverse *Williams* rule evidence in *Savino:*

> When the purported relevancy of past crimes is to identify the perpetrator of the crime being tried, we have required a close similarity of facts, a unique or "fingerprint" type of information, for the evidence to be relevant. *Drake v. State*, 400 So. 2d 1217 (Fla. 1981); *State v. Maisto*, 427 So. 2d 1120 (Fla. 3d DCA 1983); *Sias v. State*, 416 So. 2d 1213 (Fla. 3d DCA), *review denied*, 424 So. 2d 763 (Fla. 1982). If a defendant's purpose is to shift suspicion from himself to another person, evidence of past criminal conduct of that other person should be of such nature that it would be admissible if that person were on trial for the present offense. Evidence of bad character or propensity to commit a crime by another would not be admitted; such evidence should benefit a criminal defendant no more than it should benefit the state. Relevance and weighing the probative value of the evidence against the possible prejudicial effect are the determinative factors governing the admissibility of similar-fact evidence of other crimes when offered by the state. These same factors should apply when the defendant offers such evidence.

Savino, 567 So.2d at 894. This Court also rejected the argument that the standard of similarity should be less strict when similar-fact evidence is offered by the defendant. *Id.* Later, in

Crump v. State, 622 So. 2d 963 (Fla. 1993), this Court affirmed a trial court's exclusion of defense questions to a detective witness regarding whether he had been given information that another suspect had committed similar crimes. Relying upon the principle stated in *Savino* that evidence of past criminal conduct of another person should be of such a nature that it would be admissible if that person were on trial for the present offense, this Court concluded that evidence concerning the detective's interviews was inadmissible hearsay that would not have been admissible had the other suspect been on trial for the crime with which Crump was charged.

In *Huggins v. State*, 889 So. 2d 743, 761-764 (Fla. 2004), the defendant wanted to present evidence that a man named Rewis was a violent felon with a penchant for stealing cars. Rewis had been in Orlando the day the victim disappeared. He failed to show up for work after her disappearance and had a Centex-Rooney (victim’s employer) money clip in his possession when arrested. Rewis even admitted responsibility for several homicides after which he dumped the victims' bodies on the ground unburied. This Court held, in pertinent part, that Rewis's criminal record was not admissible without a showing of similarity between his prior vehicle thefts and the carjacking in the present case. Further, the evidence Huggins wanted to

admit was mostly inadmissible hearsay, similar to the information derived through the detective's interviews in *Crump*. Additionally, the murder Rewis committed and the murder Huggins was on trial for were dissimilar.

In the present case, none of the alleged incidents of Fitzgerald, Ruiz or Absalon involved a double homicide. There was no showing of similarity between the robberies and the Dollar General robbery/murder. The other robberies involved either a bank or individual, and there were no murders. Reverse *Williams* rule evidence does not mean the defense is allowed to present evidence of any other robbery in the area, with or without an accomplice. It means the defense must find a crime in which a lone male gains access to a Dollar General store after hours while the money is being counted, duct tapes one female employee and cuts her throat then lures the other female employee to the back of the store and subdues her, shoots them both in the head, locks the store and leaves. *See also Gore v. State*, 784 So. 2d 418, 432 (Fla. 2001) (trial court did not abuse its discretion where defendant failed to show relevance and requisite similarities to admit evidence of collateral crime as reverse *Williams* rule evidence); *Crump v. State*, 622 So. 2d 963, 969 (Fla. 1993) (trial court properly excluded evidence regarding substance of a detective's interviews of other

suspects because such evidence did not constitute reverse *Williams* rule evidence); *Jones v. State*, 580 So. 2d 143, 145 (Fla. 1991) (evidence regarding witnesses' convictions involving drug-related offenses and violence against police did not meet test for reverse *Williams* rule evidence); *White v. State*, 817 So. 2d 799, 806-804 (Fla. 2002).

The standard of review is abuse of discretion. *Huggins*, 889 So. 2d at 761; *Jones v. State*, 580 So. 2d 143 (Fla. 1991). The trial judge did not abuse his discretion in excluding this evidence. As the trial court found in his detailed order:

> (1) Fitzgerald robbed convenience stores which were open, did not restrain any victim, made a purchase, took the cash from the register, immediately exited, did not injure anyone;
>
> (2) Ruiz attempted to rob an ATM in 2001. A victim ran to her car and escaped. Ruiz left his fingerprints on the victim's vehicle, did not injury anyone;
>
> (3) Absalon and an accomplice, wearing masks, robbed a bank in the morning while the bank was open for business. They fled on foot and dropped the cash outside the bank, did not injure anyone.

(V6, R1156).

As the trial judge observed, the Dollar General robbery and murders were completely different from the crimes of Fitzgerald, Ruiz and Absalon. The robbery/murder occurred after the store closed, the clerks were in the back office, money was stolen from the safe, one victim was restrained with duct tape, both

clerks were slashed multiple times and then were shot in the head. (V6, R1157).

Holmes does not require this court to overrule sixteen years of precedent. In *Holmes*, the defendant sought to introduce proof that another man had attacked the victim. Several witnesses put the other suspect in the area. Other witnesses heard the man confess. *Holmes*, 126 S. Ct. at 1730-31. The lower court applied a rule of law that if there is strong evidence against the defendant, evidence of a third party's alleged guilt should be excluded. Therefore, rather than focus on the probative value or relevance of the defense evidence, the focus is on the strength of the State's case. The Supreme Court held that the rule, as applied, barred defense evidence based on the perception of the strength of the State's case before it was even challenged by the defense. The rule precluded a defendant from presenting a defense. *Holmes*, 126 S.Ct. at 1735.

Holmes is completely distinguishable from the case at bar. In the present case, McDuffie was allowed great latitude in presenting the defense that Fitzgerald was the true perpetrator. What was precluded was collateral evidence about Fitzgerald or Ruiz or Absalon that had no relevance. The trial judge did not preclude McDuffie's defense. What he did was preclude evidence which was not relevant and was offered merely to confuse the

issues and mislead the jury.

POINT IV

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING THE TESTIMOMY OF DAVID PEDERSON

McDuffie claims the trial court erred in admitting the testimony of David Pederson, attorney and son of the man from whom McDuffie rented the Sussex Drive house. McDuffie seems to take issue only with the portion of Pederson's testimony during which McDuffie cursed at him, claiming it is more prejudicial than probative. §90.403, Fla.Stat.[29]

One of the issues at trial was McDuffie's motivation for robbing the Dollar General. The defense presented five witnesses to testify that McDuffie did not need money and had no reason to steal from Dollar. McDuffie himself testified extensively about his financial situation. Yet three days before the robbery/murder, McDuffie was cursing at the attorney who filed eviction proceedings against him. McDuffie tried to explain his anger as justified because the costs included inflated attorney fees.

The State proffered the testimony of Pederson, after which the trial judge entertained discussion. (V11, TT2415-2522, 2422-2430). The trial judge then ruled, in pertinent part:

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[29] Although defense counsel objected on several grounds, the only ground raised on appeal is the Section 90.403 issue. All other objections have been abandoned and will not be addressed by the

> First, let me set the surroundings first, and that basically is pretrial I did find that the defendant's financial condition was admissible, and as long as it was tied to, I thought -- I think I said something like a year before. And I did reserve ruling on any threat, because I didn't understand what the threat was, I wasn't exposed to that information, and I said just let me hear it, and so I just heard it. But as far as ruling the financial condition admissible or motive, I already said yes, I was going to allow information as to that. So I'm about to rule now ultimately on the issue as far as the weighing test, prejudice, admissibility, and things like that.
> . . .
> I think that evidence of state of mind, especially relating -- of the defendant in or about the time of the offense, and especially regarding financial motives, I think that this is very probative of it. It's basically, in essence, categorizing it, it's desperate, and I'm going to allow it in.

(V31, TT2437-38).

A trial judge's ruling on evidentiary issues will not be disturbed absent an abuse of discretion. *Fitzpatrick v. State*, 900 So. 2d 495, 514-15 (Fla. 2005). The trial judge considered the testimony and arguments and ruled appropriately. McDuffie had an opportunity to rebut Pederson's testimony and explain why he was upset. (V45, TT3989-90). Evidence of McDuffie's financial condition and his distress over that quandry was the reason he robbed the Dollar store. Both Troy and Roy testified they borrowed money from family and friends and did not need money from anyone else. The family made a point of saying McDuffie was welcome to anything they had and did not need money. The

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State.

defense presented evidence of the tax returns for 2002 to show the McDuffies were well-heeled. Yet McDuffie became so upset about an eviction notice he cursed the attorney.

As this Court observed in *Wuornos v. State*, 644 So. 2d 1000, 1007 (Fla. 1994), all evidence prejudices the defendant. The question is whether the prejudice is "so unfair that it should be deemed unlawful." It is the defendant's burden to show the prejudice "substantially outweighed" by the danger of unfair prejudice. §90.403, Fla. Stat. The trial judge is in the best position to make the determination because he is present and best able to have a complete overview of the case. *See Sims v. Brown*, 574 So. 2d 131, 133 (Fla. 1991).

Evidence of a threat is admissible to establish state of mind. *Brooks v. State*, 918 So. 2d 181, 203 (Fla. 2005)(defendant threatened police officer who stopped his car; car contained murder weapon). Evidence of defendant's conduct which raises an inference of consciousness of guilt is admissible. *See Huggins v. State*, 889 So. 2d 743 (Fla. 2004)(shaved so hair samples could not be collected); *Looney v. State*, 803 So. 2d 656, 667 (Fla. 2001)(defendant tried to run down police officer with truck). The trial court did not abuse its discretion in admitting the evidence McDuffie was so desperate over his financial condition that he cursed at the

attorney trying to collect a debt.

Error, if any, was harmless. *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986). An eyewitness saw McDuffie enter and leave the Dollar store, locking the door each time. Olivia Sousa identified a Black male dressed just like McDuffie in the Dollar General at 9:25 p.m. McDuffie's palm print was on the duct tape around Dawn's hands. He had financial motive and cash right after the robbery. He was the last person with the victims and lied about his whereabouts the night of the murders. Further, McDuffie explained that the reason he was so upset was that the attorney was overcharging for his own fees and McDuffie already had an agreement with the attorney's father.

POINT V

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING EVIDENCE OF McDUFFIE'S DESPERATE FINANCIAL CONDITION WHICH WAS THE MOTIVE FOR THE ROBBERY

McDuffie claims the State introduced evidence of collateral bad acts, but does not adequately brief the alleged bad acts. *See Dufour v. State*, 905 So. 2d 42, 75 (Fla. 2005); *Duest v. Dugger*, 555 So. 2d 849, 852 (Fla. 1990). Although McDuffie complains of the State presenting his financial condition, it is hardly a "bad act" to have debt. In fact, the trial judge excluded the false statements on job and Army applications which were admitted in the State's rebuttal only after McDuffie opened

the door to this testimony. McDuffie admits that he contributed to the dearth of testimony regarding his finances, saying he was "forced" to present this testimony and, thus, it became a feature of the trial. A defendant can hardly invite error then hope to profit from the error. *See Mansfield v. State*, 758 So. 2d 636, 643 (Fla. 2000)(The defense, having invited the error, is precluded from complaining of it on appeal).

As previously stated, the State is left to guess what testimony of the named State witnesses was so egregious. It seems McDuffie complains that the financial evidence was *Williams* rule evidence which became a feature of the trial. First, the State questions whether the financial condition of a defendant in a robbery case is even *Williams* rule evidence. Financial motive is relevant to robbery because it tends to prove a material fact, i.e., that McDuffie needed money and had a motive to rob. *See Randolph v. State*, 463 So. 2d 186, 190 (Fla. 1984) (evidence of how much money defendant had before and after robbery is relevant to "distinct probability" he robbed victim). Evidence of McDuffie's financial circumstances both before and after the robbery is relevant evidence. *Williams* rule evidence is similar fact evidence of other crimes, wrongs, or acts which is admissible when relevant to prove a material fact in issue, including, but not limited to, proof of motive,

opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. §90.404(2), Fla. Stat. Evidence of financial status does not fit the definition of *Williams* rule evidence.

Second, even if a person's financial condition could be characterized as a bad act, this evidence was admissible under a *Williams* rule analysis to prove motive. *See Foster v.* State, 679 So. 2d 747, 753 (Fla. 1996)(robberies committed in an attempt to recoup co-defendant's gambling losses); *Lugo v. State*, 845 So. 2d 74, 103 (Fla. 2003)(federal conviction and probation relevant to show defendant had motive to gain access to money to bring probation to an end); *Heiney v. State*, 447 So. 2d 210, 213-14 (Fla. 1984)(evidence defendant shot a person relevant to show motivation for robbery to obtain money and flee); *State v. Shaw,* 730 So. 2d 312, 313(Fla. 4th DCA 1999)(evidence of attempted robbery shortly before robbery/murder showed defendant needed money); *Randolph*, *supra.*

POINT VI

THERE IS SUFFICIENT COMPETENT EVIDENCE TO SUSTAIN McDUFFIE'S CONVICTIONS

Generally, an appellate court will not reverse a conviction that is supported by competent, substantial evidence. *Donaldson v. State*, 722 So. 2d 177 (Fla. 1998); *Terry v. State*, 668 So. 2d

954, 964 (Fla. 1996). If, after viewing the evidence in the light most favorable to the State, a rational trier of fact could find the existence of the elements of the crime beyond a reasonable doubt, sufficient evidence exists to sustain a conviction. *See id.* (citing *Banks v. State*, 732 So. 2d 1065 (Fla. 1999)).

McDuffie contends that the evidence against him is circumstantial. (Brief at 80). McDuffie personally waived this argument when he persevered in calling inmates to testify. (V43, TT3703). The trial judge was careful to warn McDuffie that if Fitzgerald testified that McDuffie made an admission about the murder, it made the case a direct-evidence case. Not only did Fitzgerald testify about McDuffie's admission, but also there was an eyewitness identification by Alex Matias.

McDuffie's convictions are supported by the sufficiency of the evidence. *See Fitzpatrick v. State*, 900 So. 2d 495, 507-508 (Fla. 2005)(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 and competent evidence to support the verdict and judgment). It is not this Court's function to retry a case or reweigh conflicting evidence submitted to the trier of fact. *Fitzpatrick,* 900 So. 2d at 508.

The State presented evidence that McDuffie only started working for Dollar five days before the robbery/murder. He did not have keys to the store, which had two different keys for the front door: one inside and the other outside. Alex Matias saw McDuffie leave the store two times and lock the door behind him. The second time was 9:25 p.m. The door was locked when Mr. Texiera came to check on his wife. Ms. Sousa saw a black male dressed in khaki pants and black shirt in the store at 9:30 p.m. She had seen this black male in the store earlier that week and noticed him because Dollar had never hired a black employee before. The clothing described by Ms. Sousa is the same clothing McDuffie was wearing in the McDonald's video at 10:36 p.m. Oddly, the polo shirt in the video was not found at McDuffie's residence or in his car when the search warrants were served.

McDuffie's palm print was on the duct tape on Dawn's wrists. The print was 30 inches from one end and 40.75 inches from the other. The circumference of the tape roll was 17 inches. Therefore, the prints could only have been placed there after McDuffie unrolled the tape. Dawn was in the back counting money, and the receipt showed McDuffie was there with her because he signed off on the paperwork. According to the medical examiner, Dawn was secured with tape and her throat cut. At some point Janice came in and tried to cut the tape securing

Dawn. Her throat was then cut before she was shot. Dawn and Janice were both shot execution-style in the head. Janice was also shot in the abdomen. McDuffie used quiet bullets. His DNA was on a Diet Pepsi bottle right next to where Janice's blood was found on a cardboard box. During the five days McDuffie worked for Dollar, he inquired whether there were cameras, silent alarms or panic buttons. He was starting employment with Coke on Monday, yet he went to the Dollar store Friday evening to close the store and count the money.

McDuffie made a series of incriminating statements. When officers first told him about the murders, McDuffie noted that the robber couldn't cash the checks. He said he was at Aaron's Rental at 9:30 p.m. and McDonald's shortly thereafter, but the videotape at Aaron's showed a car arriving at 10:30 p.m. and the McDonald's video showed McDuffie there at 10:36 p.m. McDuffie tried to make the timing an hour earlier because Matias and Sousa saw him at Dollar at 9:25-9:30 p.m. McDuffie said he left the Dollar store at 8:55 – 9:00 p.m. The lady at Winn Dixie heard shots some time between 9:05 and 9:15 p.m. McDuffie originally told police officers he did not exit the Dollar store the evening of the murders, then changed his story at trial.

Although McDuffie had serious financial problems: a car repossessed, evicted from Sussex Drive house, credit card debt,

utilities not paid, insufficient funds check, over $11,000 in back child support, late car and utility payments, he had cash enough to purchase money orders in the amount of $1350 the day after the murders. He additionally used $1450 cash to purchase money orders on November 6, two weeks after the murder. Rather than display the cash at one store, McDuffie used three different stores to purchase money orders on November 6.

Fitzgerald testified that McDuffie said:

> [t]here was three women in the store and that one of them was just closing the register and that the other -- he and the other one, [Dawn], were counting money in the back. She came back --The one who just closed the register, he said, came back to tell them that they were doing the money wrong or something for the bank, I'm not quite exactly sure. And then he said she left and the other woman that was in the store was going to let her out, and at that time that that was happening he tied [Dawn] up. And then he –
> . . .
> And then I heard him say after she was let out he -- he went out to the store and told her, the one that let the other woman out, the other cashier, he told her that the lady's draw -- register was short and had her come back, but he let her go first, she went in and he said that she started to help [Dawn] and he had a struggle with her and he shot her.

(V44, TT3854-55).

The State presented evidence of motive. McDuffie’s car was repossessed a month before the murder. He had been unemployed for a month before the Dollar job. He was evicted from the Sussex Drive house and there was a judgment against him for $1800. Credit card companies were calling him, the utilities

were not paid to the tune of thousands of dollars, he was over $11,000 behind in child support, he wrote a check on an account when had been closed for nine months, and he missed the October car payment on the one car he and his wife drove. The rent on the Mardell Drive house was due, and he did not have the money to pay but told the landlord he would have the money by October 26, the day after he robbed and killed Dawn and Janice. He did, in fact, have a large amount of cash on October 26, and purchased money orders to pay the rent. On November 6, when the rent was again due, McDuffie scurried from pillar to post obtaining $1350-worth of money orders so he would not display a large amount of cash at any one location.

McDuffie's convictions are supported by the sufficiency of the evidence.

POINT VII

THE TRIAL COURT DID NOT ERR IN FINDING THE HEINOUS, ATROCIOUS OR CRUEL AGGRAVATING CIRCUMSTANCE

McDuffie claims the trial court erred in finding the heinous, atrocious, or cruel aggravating circumstance as to both Dawn and Janice. The trial court findings are supported by competent substantial evidence. The factual findings were:

> During the course of the armed robbery, Dawniell J, Beauregard was bound, her throat was cut, and then she was shot in the head at point blank or close range. Her mouth was taped in such a manner that she was unable to make more than a muffled sound (see State 99

> and 162). She was alive when her throat was cut. The top neck wound was superficial, but the bottom wound cut through muscle (see State 99 and 100). The wounds were not immediately fatal and were extremely painful. Suffering from the taping and cutting, she would have known that her death was imminent. She would have experienced extreme pain, terror, and mental anguish prior to the fatal gunshot wound.
>
> The details of this crime, including the duct taping, throat slicing, and execution of both victims at close range, constituted more than a shooting during a robbery. Dawniell J. Beauregard was slaughtered (see State 96 and 97). The crime was heinous, atrocious, and cruel. Further, it was conscienceless, pitiless, and unnecessarily torturous.

(V7, TT1309). The factual findings as to Janice were:

> During the course of the armed robbery, Janice Schneider had her throat and face sliced multiple times (see State 166). She was shot in the right flank (see State 116). She was shot in the head at point blank or close range. She was alive during the time her face and throat were sliced and would have felt extreme pain. The gunshot to her side was not immediately fatal but, having passed through her aorta and liver, would have killed her in a period of fifteen to twenty minutes. The medical examiner found that the slicing occurred first, followed by the shot to the flank, and finally the gunshot to the head. The latter probably brought immediate loss of consciousness and death within minutes. Janice must have seen Dawniell Beauregard bound up with duct tape. She must have experienced extreme pain and terrible mental anguish knowing she and Dawniell were going to die.
>
> The details of this crime constituted more than just a shooting during a robbery. The evidence showed a terrible slicing of the face and neck with a sharp object, the gunshot wound to the body, and the final close range shot to the head. Janice Schneider and Dawniell Beauregard were slaughtered (see State 96 and

> 97). The crime was heinous, atrocious, and cruel. Further, it was conscienceless, pitiless, and unnecessarily torturous.

(V7, TT1320).

McDuffie first argues that the findings are not supported by the record. Dr. Beaver, chief medical examiner for Volusia County, testified that Dawn sustained numerous sharp force injuries. (V36, TT3049). There was a series of incised wounds through the skin of the neck which caused hemorrhaging. (V36, TT3015). There was one superficial incised wound along the neck "then a series of incised wounds" which formed "together kind of a large, gaping wound." There were actually distinct wounds with individual starting and ending points which created one large wound. (V36, TT3017). Dawn would not be dead after the slashes to the neck. It would take "perhaps hours to days" to die from the neck wounds. (V36, TT3049). When a major neurovascular structure is cut, death results "pretty quickly." (V36, TT3018). However, in Dawn's case the wound went through the muscle but not the jugular vein or carotid artery. The wounds bled "quite profusely" but were not fatal. (V36, TT3017, 3020). The instrument used would have been sharp because it cut through the skin rather than bluntly tearing the skin. (V36, TT3021). A box cutter could have caused the wounds. (V36, TT3022). There were also three superficial wounds, either

abrasions or incised wounds, on the lower part of the neck and chest. (V36, TT3019).

There was one gunshot wound to Dawn's head which would be immediately fatal. Dawn would have lost consciousness immediately and blood pressure would have fallen to zero in a short period of time. When blood pressure falls to zero, there is no hemorrhage. Therefore, the stab wounds had to have been made before the shooting. (V36, TT3021). There was "active hemorrhage" involved in Dawn's neck wounds. (V36, TT3023).

Dawn was shot in the head at close range. The gunpowder residue around the wound indicated the gun barrel was "either in contact with the skin or very close to it." (V36, TT3026). Dr. Beaver removed two bullet fragments from Dawn's head. (V36, TT3028-29, State Exhibit 148). Given the plane of the bullet wound, Dawn was shot from behind. (V36, TT3031).

Janice sustained numerous sharp force injuries on the left side of her neck. The stab wounds were not fatal. (V36, TT3060). Janice was alive when the sharp force injuries were inflicted. (V36, TT3065). There was hemorrhaging under the skin. (V36, TT3064). This shows there was blood flowing inside the skin, resulting in discoloration. Blow flow indicates blood pressure. (V36, TT3077). The sharp force injuries could be from the same instrument that was used on Dawn, although Janice's

injuries were more ragged. (V36, TT3078). A screwdriver would not have made Janice's stab wounds, but a box cutter or scissors may have. (V36, TT3079).

There were two gunshot wounds: one to the right "flank" or abdomen, and a second to the head. The shot to the right flank was at close range. (V36, TT3060). The direction was from right to left and slightly front to back. The shot angled slightly upward. The abdominal wound could be fatal, but it would take 20 to 30 minutes. Janice would go into shock after 15 to 20 seconds. (V36, TT3085). The direction of the gunshot wound above Janice's right ear was from right to left. (V36, TT3083). Since the gun was small, the wounds could be contact wounds. (V36, TT3070).

The wounds to Janice's neck occurred before the gunshot wounds. In Dr. Beaver's opinion, the gunshot to the abdomen occurred before the shot to the head. There would be no reason to shoot Janice in the abdomen after she was shot in the head. (V36, TT3080). Janice would be unconscious immediately upon being shot in the head. (V36, TT3081). Further, there had to be an interval between the neck wounds and the fatal head wound because the neck wounds showed hemorrhaging. (V36, TT3081). Dr. Beaver believed Dawn was on the floor first and Janice second. (V36, TT3089). Janice was moving after she started bleeding

because there was drip, spatter and swipe patterns as well as blood spatter on her forearms. (V36, TT3090). It was possible the shooter could have “blowback” blood on himself, but Dr. Beaver didn’t “know that I would expect it.” (V36, TT3093).

At the penalty phase, Dr. Beaver testified that both Janice and Dawn sustained both stabbing and slicing neck wounds. (V50, TT4510). In his opinion, the neck wounds occurred prior to the gunshot wounds, and there was an interval of time between the slicing/stabbing wounds and the fatal gunshots. (V50, TT4510). The neck wounds would be painful. Dawn’s movements were restrained and limited to squirming and wiggling. Her hands were securely fastened behind her and she had duct tape over her mouth. (V50, TT4511). She would not be able to scream, but could produce noise from her nose. (V50, TT4511-12).

This Court has repeatedly upheld the HAC aggravating circumstance in cases where a victim was stabbed numerous times. See *Reynolds v. State*, 31 Fla. L. Weekly S318 (Fla. May 18, 2006) and cases cited therein. In *Francis v. State*, 808 So. 2d 110 (Fla. 2001), this Court upheld the application of HAC even when the "medical examiner determined that the victim was conscious for merely seconds." *Id.* at 135. In *Rolling*, this Court upheld the application of the HAC aggravating circumstance even when the medical examiner testified that the "victim would

have remained alive for a period of thirty to sixty seconds." *Rolling*, 695 So. 2d at 296. Moreover, in *Peavy* the Court determined that the application of HAC was not improper when the medical examiner testified the victim would have lost consciousness within seconds. *See Peavy,* 442 So. 2d 200 (Fla. 1983). Additionally "fear, emotional strain and terror of the victim during the events leading up to the murder may make an otherwise quick death especially heinous, atrocious, or cruel." *James v. State*, 695 So. 2d 1229, 1235 (Fla. 1997). "The victim's mental state may be evaluated for purposes of such determination in accordance with the common-sense inference from the circumstances." *Swafford v. State*, 533 So. 2d 270, 277 (Fla. 1998). *See also Francis, supra* at 135 (victim who was attacked second must have experienced extreme anguish at witnessing the other being brutally stabbed and in contemplating and attempting to escape her inevitable fate).

In another double murder case in which the victims were subjected to substantial mental anguish before being shot to death, this Court stated that"[f]ear and emotional strain may be considered as contributing to the heinous nature of the murder, even where the victim's death was almost instantaneous." *Henyard v. State*, 689 So. 2d 239, 254(Fla. 1996), citing *Preston v. State,* 607 So. 2d 404, 410 (Fla.1992).

Dawn was gagged and restrained by duct tape and her throat slit. The medical examiner testified this would cause pain but not death because no major artery or vein was cut. The neck wound preceded the gunshot wound because there was hemorrhaging. She sat there, unable to move, with her neck cut until McDuffie shot her in the head. Her fear started as soon as McDuffie started taping her. As defense counsel demonstrated in the courtroom, this took some time. The tape around Dawn's wrists was approximately 70 inches long and made multiple circles around the wrists. Then her feet were bound.

Janice's neck was cut in a series of wounds on her neck and face. The medical examiner testified these cuts occurred before death because there was hemorrhaging. According to McDuffie's admission and the forensic evidence, Janice came in to find Dawn bound and gagged on the floor. She tried to free Dawn with the scissors she dropped on the floor after she was attacked. In addition to the cut wounds, she was shot in the abdomen.

Ultimately, both women were shot, execution style, in the head and fell onto each other. As the trial judge found, there was competent substantial evidence of HAC.

POINT VIII

THE BURDEN-SHIFTING CLAIM HAS NO MERIT AND HAS BEEN REPEATEDLY DENIED BY THIS COURT

This claim was most recently rejected in *Reynolds v.* State, 31 Fla. L. Weekly S318 (Fla. May 18, 2006). *See also Asay v. Moore*, 828 So. 2d 985 (Fla. 2002); *Carroll v. State*, 815 So. 2d 601 (Fla. 2002); *Rutherford v. Moore*, 774 So. 2d at 637 (Fla. 2000); *San Martin v. State*, 705 So. 2d 1337 (Fla. 1997); *Shellito v. State*, 701 So. 2d 837 (Fla. 1997); *Arango v. State*, 411 So. 2d 172 (Fla. 1982). The recent United States Supreme Court decision of *Kansas v. Marsh,* 19 Fla. L. Weekly Fed. S343 (June 26, 2006*),* further supports the State's position this claim has no merit.

POINT IX

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY INSTRUCTING THE JURY ON THE COLD, CALCULATED, AND PREMEDITATED AGGRAVATING CIRCUMSTANCE; EVIDENCE SUPPORTS THIS AGGRAVATOR

McDuffie claims the trial court abused its discretion by instructing the jury on the cold, calculated (CCP) aggravating circumstance because, ultimately, the judge did not find the aggravator was established. There was evidence presented to support the cold, calculated, and premeditated aggravator; therefore, it was not error for the trial court to have instructed the jury. *Hunter v. State*, 660 So. 2d 244, 252 (Fla. 1995). *See also Floyd v. State*, 850 So. 2d 383, 405 (Fla.

2002)(instructed jury on HAC, not found in sentencing order); *Raleigh v. State*, 706 So. 2d 1324, 1327-28 (Fla. 1997)(pecuniary gain). In *Bowden v. State*, 588 So. 2d 225, 231 (Fla. 1991) this court stated:

> The fact that the state did not prove this aggravating factor to the trial court's satisfaction does not require a conclusion that there was insufficient evidence of a robbery to allow the jury to consider the factor. Where, as here, evidence of a mitigating or aggravating factor has been presented to the jury, an instruction on the factor is required.

McDuffie carried a gun with subsonic (quiet) bullets to the crime scene. *See Looney V. State*, 803 So.2d 656, 678 (Fla. 2001; *Rodriguez v. State*, 753 So.2d 29, 48 (Fla. 2000)(advance procurement of weapon as indicative of CCP). McDuffie waited until the store was closed and he was alone with the two women. He bound and gagged Dawn then lured Janice to her side. He shot both victims in the head, execution style.

This Court set forth a thorough discussion of CCP in *Lynch v. State*, 841 So. 2d 362 (Fla. 2003), defining each element of CCP. The murders in the instant case meet the cold element of CCP, as set forth in *Lynch*, because they were execution-style killings. *See also Ibar v. State,* 31 Fla. L. Weekly S149 (Fla. March 9, 2006); *Walls v. State*, 641 So. 2d 381, 388 (Fla. 1994). McDuffie had ample opportunity to reflect on his actions and abort any intent to kill. But instead he shot each victim in the

head. As to the “calculated” element of CCP, this Court has held that where a defendant arms himself in advance, kills execution-style, and has time to coldly and calmly decide to kill, the element of calculated is supported. *Lynch*, 841 So. 2d at 372. This element has been found when a defendant has the opportunity to leave the crime scene and not commit the murder but, instead, commits the murder anyway. *See Alston v. State*, 723 So. 2d 148, 162 (Fla. 1998).

The final element of CCP is a lack of legal or moral justification. "A pretense of legal or moral justification is 'any colorable claim based at least partly on uncontroverted and believable factual evidence or testimony that, but for its incompleteness, would constitute an excuse, justification, or defense as to the homicide.'" *Nelson v. State*, 748 So. 2d 237, 245 (Fla. 1999) (quoting *Walls v. State*, 641 So. 2d 381, 388 (Fla. 1994)). In this case, there is no legal or moral justification posited for these killings. Thus, the jury was properly instructed on the CCP aggravator.

POINT X

McDUFFIE’S DEATH SENTENCE DOES NOT VIOLATE *RING v. ARIZONA*

McDuffie last asserts that Florida's capital sentencing scheme violates his Sixth Amendment right and his right to due

process under the holding of *Ring v. Arizona*, 536 U.S. 584 (2002). This Court has previously addressed this claim. *Bottoson v. Moore*, 833 So. 2d 693 (Fla. 2002), and *King v. Moore*, 831 So. 2d 143 (Fla. 2002), and denied relief. *See also Jones v. State*, 845 So. 2d 55, 74 (Fla. 2003). McDuffie is likewise not entitled to relief on this claim. Furthermore, two of the aggravating circumstances found by the trial court were prior conviction of a violent felony (the contemporaneous murder), and that the murders were committed during a robbery. *See Doorbal v. State*, 837 So. 2d 940, 963 (Fla. 2003) (rejecting *Ring* claim where aggravating circumstances found by the trial judge were defendant's prior conviction for a violent felony and robbery).

CONCLUSION

Based on the foregoing authority and argument, Appellee respectfully requests this Honorable Court affirm the convictions and sentences.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was furnished by U.S. mail to Todd G. Scher, 5600 Collins Ave., #15-B, Miami, Florida 33140, this _____ day of September, 2006.

____
BARBARA C. DAVIS
Assistant Attorney General

CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing Answer Brief of the Appellee was generated in a Courier New, 12 point font, pursuant to Florida Rule of Appellate Procedure 9.210.

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